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NEW MEXICO STATUTE ELIMINATES PREVIOUS MINING LAW DISCOVERY WORK REQUIREMENTS

MINING LAW-DISCOVERY WORK: The New Mexico legislature amends the state mining law to eliminate discovery work and to substitute validation requirements for the location of mining claims in New Mexico. N.M. STAT. ANN. §§69-3-1 to -21 (Supp. 1981).

INTRODUCTION

Although New Mexico is among the poorer states in per capita income, it is a state rich in mineral resources. Oil, coal, gas, and uranium are among the minerals found in New Mexico in varying degrees of abundance. Since those who find the mineral share in the future profits, the search for minerals is highly competitive. Rules to govern mineral exploration and development were formulated early in the history of western expansion.

The regulations adopted in California to govern miners following the Gold Rush of 1849 have been the source of mining laws for most western states, including New Mexico. Congress extensively debated proposals in 1850 to adopt a federal mining law, but could not agree on a national uniform mineral policy. After it became apparent that Congress was deadlocked, President Fillmore reluctantly recommended in 1851 that the gold fields be left unregulated by federal law. The current federal mining law was not enacted until 1872. The California miners, however, soon found it necessary to adopt rules to protect their diggings and to maintain

2. In 1977, New Mexico ranked eighth among the states in mineral production. Id. at 197.
3. Id.
4. In 1876, the Territorial Legislature of New Mexico enacted the recently amended Section 69-3-1. 1876 N.M. Laws, ch. 38, § 1; N.M. STAT. ANN. § 69-3-1 (Mitchie 1973). This section sets the requirements for locating a mining claim in New Mexico, including a provision requiring recordation of the posted notice of location with the appropriate county clerk. Section 69-3-2, enacted at the same time, placed a duty on the clerk to keep the required records and to collect the filing fee. 1876 N.M. Laws, ch. 38, § 2; N.M. STAT. ANN. § 69-3-2 (Mitchie 1978).
6. L. MALL, supra note 5, at 6-19.
7. Id.
Throughout the California goldfields, the miners established mining camps and formulated mining district rules to protect their claims. These regulations, based on established rules of equity and property, provided the framework for subsequent state legislative enactments of mining laws throughout the West.

DISCOVERY REQUIREMENTS IN GENERAL

Discovery is the necessary condition precedent to the location of a valid mining claim and the foundation of all rights in the claim. The word "discovery" has a technical meaning in the mining area. Discovery means knowledge of the presence of a valuable mineral within the claim site, that is, more than a mere indication that the mineral may exist within the claim. A discovery is necessary before the location can be held by valid title. In 1904, Mr. Justice Brewer of the United States Supreme Court called discovery "the great consideration for granting mines to individuals." Both the mining district rules formulated in the gold fields of California and later statutory enactments throughout the West required that discovery work be completed before the miner could acquire permanent rights to his claim against other miners.

The terms "discovery" and "discovery work" are not synonymous. The federal Mining Law of 1872 required that a mineral be discovered before public land could be appropriated for mining. The mining district rules and state or territorial statutes required that some type of work be completed to evidence a mineral discovery. The mining districts established this requirement to give notice to other possible claimants that a particular mineral deposit had been appropriated. A hole with a depth of 10 feet (required by some states) showed prospectors that another person had explored for minerals in that area and may have already appropriated the claim. The discovery work also evidenced a good faith intent on the part of the claimant to extract the minerals. Gold mining was hard and tedious labor in the nineteenth century and perhaps both miners and legislators felt the discovery work requirements insured that the claimant intended to mine the land, and not hold it for non-mining

9. L. MALL, supra note 5.
10. Id.
11. Id. at 6–19, 6–20.
17. L. MALL, supra note 5, at 6–128.
18. Id.
or speculative purposes. These rules also helped to assure the state and territorial governments that any public land taken by private individuals actually contained valuable minerals and was suitable for mining. The western states and territories hoped to avoid situations where land more suitable for farming or grazing could be appropriated for mineral use.

**DISCOVERY REQUIREMENTS UNDER THE FORMER NEW MEXICO LAW**

In 1889, 23 years before New Mexico statehood, the territorial legislature passed the first law specifying discovery work requirements. The 1889 statute required anyone locating a mining claim in New Mexico to sink a discovery shaft at least 10 feet deep below the surface within 90 days of when the mineral was located. The statute also permitted a "tunnel, adit or open cut," also at least 10 feet deep. Whichever type of discovery work was used, it had to expose the mineral located.

In 1957, another statute was enacted which, while retaining discovery work requirements, provided alternatives to sinking discovery shafts. The 1957 Act changed the discovery work requirement to allow a 10 feet deep and 10 feet long open cut on the mineral vein 10 feet below the surface, or a one and one-half inch wide drill hole also at least 10 feet deep. The 1957 Act also provided that those who wished to use the drill hole alternative had to give notice to others by marking the hole with a "substantial post or other permanent marker, placed within five feet of the hole." In addition, locators using the discovery hole alternative were required to file an affidavit with the county clerk within 90 days of the location. The affidavit had to list the type of mineral discovered, the date of drilling the discovery hole, drilling and its location within the claim.

Both the 1889 statute and the 1957 changes lost their utility as mining practices changed and mining technology advanced. The prospector of

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20. Id.
21. See fact pattern in United States v. Coleman, 390 U.S. 599 (1968). In that case, the claimant attempted to patent a mining claim for quartzite. The United States Supreme Court affirmed the denial of the patent by the Ninth Circuit Court of Appeals, finding it significant that the site, upon which Coleman had built a house, consisted of 720 acres of scenic National Forest within two hours of Los Angeles.
22. 1889 N.M. Laws, ch. 25, § 1; N.M. STAT. ANN. § 69-3-1 (Mitchie 1978).
23. Id.
24. Id.
25. 1957 N.M. Laws, ch. 61, § 1; N.M. STAT. ANN. § 69-3-4 (Mitchie 1978).
27. Id.
28. Id.
29. Id.
the old West traveled with his burro and searched for physical evidence of the mineral on the surface of the ground. He relied on no sophisticated equipment, but rather on physical characteristics of the area being searched and on the experiences of other prospectors in that area. He was unlikely to discover any mineral that was not exposed at or near the surface, so in many instances, the discovery work actually became the first step in the mineral extraction process.

Today, mineral exploration and development make use of all available technology. Preliminary exploration may be performed by aerial survey and geologic map analysis. The prospector may never physically explore the area until these initial steps show a high probability or a certainty that the area contains valuable minerals. The consensus of geologists today is that the easily found ore bodies, those susceptible of discovery at or near the surface, have been found. The mineral wealth remaining is largely subterranean. The initial finding of the mineral may not have been done by on-site exploration, but rather by more modern techniques such as aerial surveying or surface electronic sensing. The former law further required that the discovery work "expose" the mineral in place. A 10 feet deep hole or cut was obviously insufficient to expose deep deposits. Claimants either had to drill holes to the depth of the mineral deposit or simply dig a 10 feet deep hole, ignoring the requirement that it expose the mineral. Both sections of the New Mexico law requiring discovery work were repealed in 1981.

THE 1981 AMENDMENTS

The 1981 changes to the New Mexico mining law which eliminated discovery work requirements represent a realistic approach to the now antiquated discovery rules of the 1889 law. Mining technology has changed greatly since 1889. Today's miners are searching for minerals such as uranium that were virtually unknown to the prospectors of the old West. Not only are shallow discovery cuts and shafts virtually useless methods of discovering deep deposits, but are also hazards to the safety of man, wildlife, and livestock. Discovery shafts and cuts no more than 10 feet deep have lost their original value because current exploration targets are often hundreds and thousands of feet deep.

32. Id.
33. N.M. STAT. ANN. § 69-3-3 (Mitchie 1978).
35. L. MALL, supra note 5.
36. Id.
The new law addresses the problem of giving notice to others of a miner's intent to locate a claim in two different ways. Physical "on-site" notice requirements, such as posting, are now more stringent.\(^{37}\) In addition, claimants must file a location notice with the county clerk in the county where the claim is located.\(^{38}\) These filing requirements, often termed "validation work,"\(^{39}\) are essentially the same as those required under the Federal Land Policy and Management Act (FLPMA) for locators on the federal lands.\(^{40}\) Although most western state mining laws did require discovery work, the federal government has never had such a requirement.\(^{41}\)

Before filing any affidavit of mineral discovery under the new New Mexico law, the miner must first post the proper notices on the claim site.\(^{42}\) The 1981 amendment to N.M. Stat. Ann. § 69-3-1(A) requires that the location be marked "on the ground by four substantial posts or monuments, one at each corner of the claim."\(^{43}\) The notice must identify the person making the claim, state his or her intent to locate a mining claim, and also give a description of the claim "by reference to some natural object or permanent monument as will identify the claim."\(^{44}\) This notice must be posted in "some conspicuous place on the site."\(^{45}\)

NOTICE AND FILING REQUIREMENTS FOR LODE AND PLACER CLAIMS

Two types of mining claims exist—lode and placer. In general, lode mineral deposit is contained in a vein in place in the surrounding rock with "fairly well-defined boundaries" separating the vein and the rock.\(^{46}\) Placer material occurs when the mineral appears in a less defined pattern, not traceable in a vein, not separated from the surrounding rock.\(^{47}\) Each placer claim may be as great as 20 acres under federal law.\(^{48}\) Each lode claim is limited by law to a maximum of 1500 feet by 600 feet.\(^{49}\) New


\(^{38}\) N.M. STAT. ANN. § 69-3-1(C) (Mitchie Supp. 1981).

\(^{39}\) L. MALL, supra note 5.

\(^{40}\) 43 C.F.R. § 3833 (1980).

\(^{41}\) L. MALL, supra note 5.


\(^{43}\) Id. at (A).

\(^{44}\) Id.

\(^{45}\) Id.

\(^{46}\) Titanium Actynite Industries v. McLennan, 272 F.2d 667 (10th Cir. 1959); Globe Mining Co. v. Anderson, 318 P.2d 373 (Wyo. 1957).

\(^{47}\) Titanium Actynite Industries v. McLennan, 272 F.2d 667 (10th Cir. 1959).


\(^{49}\) 30 U.S.C. § 23 (1976). Another important difference is that a single discovery will serve as the basis for only one lode claim, but one discovery may, under certain circumstances, serve as the basis for eight associated placer claims. In the latter situation, the placer claimant must prove all the land is primarily of mineral character and suitable for placer extraction.
Mexico follows the federal law controlling the size of placer claims. This section of the New Mexico Mining Law was not affected by the 1981 changes.

Under the former New Mexico law, materials such as gypsum, clay, oil, and alluvial deposits of gold were placer materials, along with all other minerals designated as such by the laws of the United States. New Subsection (B) of Section 69-3-1 applies only to the placer claims and is virtually the same as former Section 69-3-20, which was repealed. The distinction was important under the former law because discovery work was not required for placer claims. The distinction remains important in the 1981 changes because the notice required to be posted on the claim is different for lode and placer discoveries.

N.M. Stat. Ann. §69-3-1 (B), added in 1981, states that the miner must place a notice of location at a “designated corner” of the placer claim. The corner notice required by Subsection (B) for placer claims gives more detailed notice of the location to others than does the Subsection (A) notice, which applies to lode claims only. The placer notice must identify the locator, state the name of the claim, and identify the mineral for which the claim is located. If the claim is on surveyed land, the corner notice must describe the claim by its legal subdivision. If on unsurveyed land, the claim must be described by metes and bounds, “with reference to some known object or monument.” Each corner must be a securely set post at least four feet high or a substantial stone monument.

New Subsection (C) of Section 69-3-1 tells both lode and placer claimants what information must be contained within the notice of location. This notice must be filed with the county clerk of the county in which the claim is located within 90 days of the date of location. The date of posting the notice on the claim site is deemed to be the date of location. The notice filed with the county clerk must include:

1. the name of the claim;
2. the name and address of the owner of the claim;

50. N.M. STAT. ANN. §69-3-22 (Mitchie 1978).
51. N.M. STAT. ANN. §69-3-19 (Mitchie 1978).
52. N.M. STAT. ANN. §69-3-20 (Mitchie 1978).
54. Id.
55. Id.
56. Id.
57. Id. Metes and bounds are used to describe the boundary lines of land. This method of description lists the compass directions and distances of the boundaries.
58. Id.
60. Id.
61. Id.
62. Id. at (C)(1).
63. Id. at (C)(2).
(3) the type of claim (lode or placer);64
(4) the date of location (when the notices were posted on the claim site);65
(5) a description of the location of the claim by section and quarter section "to the extent possible," and finally;66
(6) a United States Geological Survey topographic map with the claim marked on it or a "narrative or sketch" describing the location of the claim.67

Whichever method is used, it must describe the claim accurately enough to locate the claim on the ground.68 The narrative description, map, or sketch may be no larger than eight and one-half inches by 14 inches.69 Subsection (D) notes that the above requirement does not require the claimant to hire a professional engineer or surveyor.70 The former New Mexico law simply required the claimant to file a copy off the notice posted on the claim.71

Since 1976, federal law has required filing with the local Bureau of Land Management (BLM) to perfect a mining claim on the public lands.72 Like New Mexico’s statutory requirement, the federal law requires filing within 90 days of location.73 State law determines the date of location.74 Under the 1981 New Mexico law, the date of location is the date on which all acts that must be performed on the ground are completed, such as the posting of notices on the claim.75

FLPMA requires that the miner file a copy of the state statutorily required notice or affidavit with the local BLM office.76 If state law does not require filing, the claimant still must file a certificate of location with the BLM.77 The federal certificate of location must contain the same information New Mexico now requires in new Subsection (C) of 69-3-1.78 The BLM will accept an approved mineral survey in lieu of the topographic map, sketch, or narrative description required in New Mexico, however.79

64. Id. at (C)(3).
65. Id. at (C)(4).
66. Id. at (C)(5).
67. Id. at (C)(6).
68. Id.
69. Id.
70. Id. at (D).
71. N.M. STAT. ANN. §69-3-1 (Mitchie 1978); N.M. STAT. ANN. §69-3-21 (Mitchie 1978).
73. 43 C.F.R. § 3833 1-2(b) (1980).
74. 43 C.F.R. § 3833.0-5(h) (1980).
75. N.M. STAT. ANN. §69-3-1(c) (Mitchie Supp. 1981).
76. 43 C.F.R. § 3833.1-2(c) (1980).
77. Id.
78. Id.
79. Id. The BLM also requires a filing fee of five dollars.
CONCLUSION

The elimination of discovery work in New Mexico and the substitution of validation or filing requirements represents a realistic approach to the changes in modern mining law. The 1981 amendments eliminated the requirement of 10 feet holes and cuts on mining claims, which are often of no actual discovery value and present a safety hazard. The legislature has recognized that this work often serves no useful purpose in ascertaining the presence and extent of mineral deposits. Later prospectors need no longer search for discovery holes or cuts for notice that a particular claim has been appropriated. Prospectors in the field need only search for the required corner post with proper notice affixed upon it. Miners already interested in a particular site may begin by checking records to determine if the claim is still available for location. If no claim is recorded, the interested party may then go to the site to see whether location notices are posted, but not yet filed for record. The federal and New Mexico filing requirements now compliment each other, eliminating needless duplication of effort by claimants.

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