



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT



ARNOLD
SCHWARZENEGGER
GOVERNOR

For Meeting Date: May 8, 2008

Agenda Item No. 4: Consideration of Administrative Procedure for Conduct of a Vested Rights Determination by the State Mining and Geology Board when Serving as a Lead Agency under SMARA for Big Cut Mine (CA Mine ID #91-09-00XX), Scott Morris (Agent), Rick Churches (Operator), El Dorado County.

INTRODUCTION: The State Mining and Geology Board (SMGB) serves as a Lead Agency in the implementation of the Surface Mining and Reclamation Act of 1975 (SMARA) in El Dorado County. At its Regular Business Meeting held on February 14, 2008, the State Mining and Geology Board (SMGB) adopted regulations pertaining to the administrative procedures for conduct of a vested rights determination when serving as a lead agency pursuant to the SMARA. In correspondence dated May 25, 2007, Mr. Scott Morris, attorney with the law firm of Kronick, Moskovitz, Tiedemann & Girard and legal counsel for the operator of the Big Cut Mine (formerly Donovan Ranch Mine) located in El Dorado County, forwarded to the SMGB a request for confirmation of their vested rights. Although the adopted regulations have not yet been enacted into law, certain elements of the procedures can be further considered at this time by the SMGB as they pertain to the petition for determination by the operator of the Big Cut Mine.

BACKGROUND:

Site Description: The site is located off Big Cut Road, approximately 1.5 miles south of the town of Placerville in El Dorado County. The site encompasses about 31 acres, and is characterized by gently to steeply sloping hillside terrain with elevations ranging from about 1,800 to 2,300 feet above mean sea level (AMSL) with about 500 feet of relief. About 15 out of 31 acres have been previously disturbed; whereas, a total of 18 additional acres are planned to eventually be disturbed by proposed surface mining activities.

Superior Court Ruling: In a recent court ruling (Superior Court Ruling, 2005; William Calvert, et al., v. County of Yuba et al.), the California Court of Appeal, Third Appellate District, held that a proper notice and hearing was required for any vested rights determination, and suggested that when the SMGB is acting as the SMARA Lead Agency, the SMGB has the responsibility to conduct the public hearing and make a vested rights determination. At its February 8, 2007 Regular Business Meeting, the SMGB recognized its authority to conduct



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vested rights determinations (Resolution 2007-04), when serving as a Lead Agency under SMARA.

SMGB Actions: In order to determine the range, diversity, and purpose of administrative procedures and funding mechanisms available to the SMGB as a lead agency, the SMGB conducted several public hearings between March 8, 2007, and September 14, 2007, to hear preliminary concerns and comments from various stakeholders. These preliminary concerns and comments were reviewed by the SMGB and have been publicly available since March 8, 2007. The preliminary concerns and comments considered in this proposed regulation were publicly discussed at the SMGB's Policy and Legislation Committee meetings held on March 8, April 12, May 10, June 14 and September 7, 2007, and by the whole SMGB during its regular business meeting held on September 13, 2007. On February 14, 2008, the SMGB adopted its regulations for conduct of a vested rights determination upon request by a claimant when serving as a lead agency pursuant to SMARA.

Notice of Intent to Seek Confirmation of Vested Rights: In correspondence from Mr. Morris on behalf of the operator dated May 25, 2007, it was requested that "*the SMGB begin the process to confirm the vested rights to mine on the Donovan Ranch Mine*". This request was reiterated in correspondence from Mr. Morris dated July 6, 2007.

CONSIDERATION OF ALTERNATIVES:

In anticipation of the SMGB conducting a vested rights determination in the matter of Big Cut Mine in El Dorado County, the SMGB has several administrative procedural options before it to consider in regards to 1) who will administer its proposed hearing procedure, and 2) who will review the administrative record upon receipt, and compile findings of fact for subsequent consideration by the SMGB.

Consideration No. 1 – Consideration of Hearing Administrator: Pursuant to Section 3506.11 of the SMGB's proposed regulations, several options are available to the SMGB as it considers how it wishes to conduct and administer the hearing for a vested rights determination:

- **Option No. 1 – A Delegated Committee of the SMGB:** A delegated Committee of the SMGB would have, among its members, qualified and experienced individuals that could administer the hearing. Only the SMGB can make the final determination and the Committee, upon completing the hearing, would still have to inform the SMGB as to its determination and the rationale behind its decision. Thus, such action by the Committee would entail a significant amount of time and effort, and would not be an efficient use of the Committee's time considering the other board and committee responsibilities and obligations.



- Option No. 2 - The SMGB: The SMGB has, among its members, qualified and experienced individuals that could administer the hearing. Although administering the hearing would entail a significant amount of time and effort, such action would be an efficient use of the individual board members since none of the board members would require briefing of a complicated record prior to considering a determination.
- Option No. 3 - Administrative Hearing Officer: A hearing officer would serve as a pro tempore part-time, administrative law judge before the SMGB for the sole purpose of serving as the administrative hearing officer for the SMGB. Use of an outside administrative law judge may result in lack of control over who it will be, and the individual will likely not have any mining background or expertise. Additionally, the hearing process will be much more time consuming.
- Option No. 4 - Special Master: A “Special Master” is an attorney who is an active member of the California State Bar who, in accordance with the requirements of these Rules and Regulations, is qualified to conduct the searches and accompany peace officers in conducting searches for documentary evidence under the control of attorneys, physicians, psychotherapists and clergy members as described in Penal Code Section 1524. Use of a Special Master may result in lack of control over who it will be, and the individual will likely not have any mining background or expertise. Additionally, the hearing process will be much more time consuming.

Consideration No. 2 – Consideration of Administrative Record Review and Analysis:

Pursuant to Section 3506.11 of the SMGB’s proposed regulations, an extensive review and analysis of the administrative record, and a compilation of the finding of fact will need to be completed and summarized for each parcel in question. The Administrative Record is not anticipated to be voluminous, but will require someone with adequate experience in geology, mining, SMARA, permitting, land use, and familiarity with El Dorado County. The SMGB has several options to consider:

- Option No. 1 - SMGB Staff (i.e., Executive Officer): The SMGB has a technical staff of two Certified Engineering Geologists: one who serves as its mine inspector, and the other who serves as its Executive Officer. Both individuals are qualified and have the necessary experience to review the Administrative Record and compile the findings of fact, and the time (i.e., costs) incurred in reviewing and compiling the findings of fact would be passed on to the claimant. A significant amount of time is not anticipated to perform this task, and it is unlikely that other SMGB responsibilities and obligations will be negatively affected.
- Option No. 2 - Individual within the Department of Conservation California Geological Survey (CGS): The SMGB was successful in getting authorization to acquire two



individuals to assist in its efforts to perform a vested rights determination: one certified engineering geologist and an office technician. Costs incurred for these individuals would essentially be passed on to the claimant. CGS has among its staff qualified and experienced personnel who could provide this service to the SMGB. Use of CGS personnel would not present a conflict-of-interest since CGS does not participate in any enforcement or compliance related activities for surface mining operations within the State of California. However, due to previous litigation between the operator and the SMGB while the State Geologist was serving as Executive Officer of the SMGB, this option may not be favorably received by the operator.

- Option No. 3 - External Consultant: The SMGB could consider contracting with a consultant. SMGB staff would be required to adhere to state law, policy and guidelines for contracting with an individual or firm. This approach would be time intensive. In addition, this would be the most costly of options, and whether a qualified consultant would be available and in a position to be responsive and dedicate itself to the task is uncertain.
- Option No. 4 - The SMGB: Although the SMGB has, among its members, qualified and experienced individuals that could review the Administrative Record and determine the findings of fact, such action by the SMGB would entail a dedicated amount of time and effort, and likely would not be efficient use of the individual board members time.
- Option No. 5 - A Delegated Committee of the SMGB: A delegated Committee of the SMGB would have, among its members, qualified and experienced individuals that could review the Administrative Record and determine the findings of fact. Such action by the Committee would entail a dedicated amount of time and effort, and would not be an efficient use of the Committee's time. However, formation of a de facto committee composed of a minimum of three SMGB members, would assure that certain SMGB members would be intimately familiar with the administrative record.

EXECUTIVE OFFICER'S RECOMMENDATIONS:

Assignment of conducting and administering the hearing for a vested rights determination:
In regards to assignment of conducting and administering the hearing for a vested rights determination for the Big Cut Mine, the Executive Officer recommends Option No. 2. It is the opinion of the Executive Officer, that Option No. 2 would provide a group of well qualified and experienced individuals to serve all stakeholders in a fair and unbiased manner during conduct of the hearing, and provide the most efficient and effective use of the SMGB's time.

Assignment of the task of reviewing the Administrative Record: The administrative record for the Big Cut Mine is not anticipated to be voluminous. Thus, the Executive Officer



recommends Option No. 1. SMGB staff is very familiar with this site, and it is the opinion of the Executive Officer that Option No. 1, use of SMGB staff, would provide well qualified and experienced technical support to the SMGB in reviewing the Administrative Record and compiling unbiased finding of facts for the SMGB's consideration during conduct of the vested rights determination hearing.

It is also recommended that the SMGB form a de facto committee of three SMGB members who would work with SMGB staff in review of the administrative record, and ultimately present its findings to the SMGB as a whole.

SUGGESTED MOTION LANGUAGE: The Executive Officer offers the following motion language for the SMGB's consideration:

Motion for the SMGB to serve as administrator of the vested rights hearing:

Mr. Chairman, in light of the information before the SMGB today, I move that the Board serve as administrator, and direct the Executive Officer to coordinate with the Board in future scheduling of administrative hearings for the conduct of a vested rights determination, in the matter of Big Cut Mine's surface mining operation, located in El Dorado County.

and,

Motion for SMGB staff and de facto committee to review administrative record:

Mr. Chairman, in light of the information before the SMGB today, I move that the Board direct the Executive Officer to coordinate with a de facto committee of the Board for the purpose of providing technical support and assistance to the whole Board in the review and analysis of the Administrative Record, in the matter of the Board's vested rights determination of Big Cut Mine's surface mining operation located in El Dorado County.



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Respectfully submitted:

Stephen M. Testa
Executive Officer

