



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT



For Meeting Date: November 12, 2009

Agenda Item No. 7: Public Hearing: Request for Determination for Vested Rights, Big Cut Mine (CA Mine ID #91-09-00XX), Diane Anderson (Agent), Rick Churches (Operator and Claimant), El Dorado County.

BACKGROUND: 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. On March 13, 2009, the SMGB received a Request for Determination for vested rights for the proposed Big Cut Mine, located in El Dorado County. At its May 14, 2009, regular business meeting, the SMGB moved to serve as the hearing officer during conduct of a public hearing for a vested right determination. The SMGB held a pre-conference hearing on September 11, 2009, to schedule the public hearing. The SMGB is commencing the public hearing, and considering the hearing be continued to allow for sufficient time for public comment on the administrative record.

REGULATORY AUTHORITY AND CONSIDERATIONS: SMARA requires all individuals and operators to acquire a permit from the local lead agency, and to obtain a SMARA lead agency approved reclamation plan and financial assurances for reclamation, prior to the commencement of surface mining operations (Public Resources Code (PRC) Section 2770(a)). However, any person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall not be required to secure a permit pursuant to this chapter as long as the vested right continues and as long as no substantial changes are made in the operation except in accordance with this chapter (PRC Section 2770(b)).

PRC Section 2776 further states:

“No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter as long as the vested right continues and as long as no substantial changes are made in the operation except in accordance with this chapter. A person shall be deemed to have vested rights if, prior to January 1, 1976, he or she has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary therefor. Expenses incurred in obtaining the enactment of an ordinance in relation to a particular operation or the issuance of a permit shall not be deemed liabilities for work or materials.”



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SMGB regulations define a vested right and provides criteria for which a vested right is determined. California Code of Regulations (CCR) Section 3951 defines a vested right as follows:

“A vested right is the right to conduct a legal nonconforming use of real property if that right existed lawfully before a zoning or other land use restriction became effective and the use is not in conformity with that restriction when it continues thereafter. A vested mining right, in the surface mining context, may include but shall not be limited to: the area of mine operations, the depth of mine operations, the nature of mining activity, the nature of material extracted, and the quantity of material available for extraction.

A person shall be deemed to have a vested right or rights to conduct surface mining operations if, prior to January 1, 1976, the person has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations. Expenses incurred in obtaining the enactment of an ordinance in relation to a particular operation or the issuance of a permit shall not be deemed liabilities for work or materials. Expansion of surface mining operations after January 1, 1976 may be recognized as a vested nonconforming use under the doctrine of ‘diminishing assets’ as set forth in Hansen Brothers Enterprises, Inc. v. Board of Supervisors (1996) 12 Cal.4th 533.”

The relevant criteria or evidence for determination of a claim of vested rights is discussed in CCR Section 3963, which states:

“Relevant evidence in a proceeding for determination of a claim of vested rights shall be written or oral evidentiary statements or material demonstrating or delimiting the existence, nature and scope of the claimed vested right[s]. Such evidence shall include, but is not limited to, evidence of any permit or authorization to conduct mining operation on the property in question prior to January 1, 1976, evidence of mining activity commenced or pursued pursuant to such permit or authorization, and evidence of any zoning or land use restrictions applicable to the property in question prior to January 1, 1976.



As to any land for which Claimant asserts a vested right for expansion of operations, Claimant shall produce evidence demonstrating that the Claimant clearly intended to expand into such areas. Such evidence shall be measured by objective manifestations, and not subjective intent at the time of passage of the law, or laws, affecting Claimant's right to continue surface mining operations without a permit."

In other words, the four criteria or relevant evidence, are:

1. Evidence of any permit or authorization to conduct mining operations on the property in question prior to January 1, 1976;
2. Evidence of mining activity commenced or pursued pursuant to such permit or authorization;
3. Evidence of any zoning or land use restrictions applicable to the property in question prior to January 1, 1976; and
4. For any land for which Claimant asserts a vested right for expansion of operations, Claimant shall produce evidence demonstrating that the Claimant clearly intended to expand into such areas. Such evidence shall be measured by objective manifestations, and not subjective intent at the time of passage of the law, or laws, affecting Claimant's right to continue surface mining operations without a permit.

CCR Section 3964 provides the burden of proof to be considered in making a determination of vested rights and states:

"Following the public hearing, the Board, if the Board conducted the hearing, or its committee, administrative hearing officer, or special master shall determine whether the Claimant, by a preponderance of the evidence, has demonstrated a claim for vested rights pursuant to Public Resources Code Section 2776."

BACKGROUND: Ms. Diane Anderson, on behalf of the claimant for the Big Cut Mine, filed a vested rights Request for Determination on May 13, 2009. A chronology of pertinent administrative procedural actions taken to date is summarized below:



**Chronology of Pertinent Administrative Procedural Actions
and Schedule
Big Cut Mine
Request for Vested Rights Determination**

Administrative Action	Date Exercised
Receipt of Request for Determination with Administrative Record	March 13, 2009
Determination of Jurisdiction	April 3, 2009
Mailing of Notice of Pending Vested Rights Determination	May 15, 2009.
Determination of Hearing Officer	May 14, 2009
Estimated Cost for Determination of Findings Provided to Claimant	August 11, 2009
Determination of Schedule	September 11, 2009
Further Public Notice	90 calendar days prior to scheduled public hearing; November 13, 2009.
Notice/Submission of Written Materials	60 calendar days prior to scheduled public hearing; December 13, 2009.
Submission of Responsive Written Materials	45 calendar days prior to scheduled public hearing; December 28, 2009.
Commencement of Public Hearing	Between September 22, 2009, and December 11, 2009; to be continued no earlier than February 11, 2010.



The Request for Determination received on March 13, 2009, is comprised of one volume which included 28 Exhibits. The Administrative Record is accessible for review at:

El Dorado County Government Center
2850 Fairlane Court
Placerville 95667

And,

State Mining and Geology Board
801 K Street, Suite 2015
Sacramento, CA 95814

A determination of findings based on review by SMGB staff of the Administrative Record is in progress.

CONSIDERATION BEFORE THE SMGB: The SMGB's regulations Article 15 CCR Section 3959, further public notice shall be given at least 90 days prior to a vested rights public hearing, and such notice shall include certain information including place and time of the hearing, and allow for comments from the public to be received no less than 60 calendar days before the hearing and in no case allow the receipt of responsive materials from the claimant 45 calendar days prior to the hearing. The commencement of the public hearing was previously scheduled for November 12, 2009, pursuant to Article 15 CCR Section 3958. However, such date did not allow for sufficient time for further public notice and submittal of public comment. Thus, the SMGB is considering continuing this matter until February 11, 2010, or later.

EXECUTIVE OFFICER'S RECOMMENDATION: The Executive Officer recommends that the public hearing for a vested rights determination for the Big Cut Mine, El Dorado County, be continued to no earlier than February 11, 2010, and no later than March 11, 2010.



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

Motion for the SMGB to continue the public hearing:

Mr. Chairman, in light of the information before the SMGB today, I move that the Board continue the public hearing for a vested rights determination for the proposed Big Cut Mine surface mining operation located in El Dorado County, for February 11, 2010.

Respectfully submitted:

Stephen M. Testa
Executive Officer

