



Land Use and Environmental Law

Department

June 2, 2009

WHITE PAPER

THE IDLE MINE ISSUE

By Mark D. Harrison, Esq. and Bradley B. Johnson, Esq.

INTRODUCTION

The Surface Mining and Reclamation Act of 1975 (Pub. Resources Code, § 2710 et seq. ["SMARA"]) includes provisions applicable to "idle" mines. These provisions, never a centerpiece of SMARA practice or compliance, have gained new attention from local lead agencies and operators as some mines scale back activity in response to current economic pressures. This recent scrutiny has brought to light inconsistencies in SMARA's idle mine provisions and created confusion as to when a mine is "idle," and whether failure to obtain a nondiscretionary approval known as an "Interim Management Plan" ("IMP") can lead to the loss of the underlying vested mining right itself.¹

In the pages below, we interpret and analyze those provisions in light of relevant facts and law. We also recommend a simple amendment to SMARA's implementing regulations which, if adopted by the State Mining and Geology Board ("SMGB"), would help

^{1/} The term "vested mining right" includes both a right established by use (i.e., nonconforming use), as well as a right established by permit. (See *Trans-Oceanic Oil Corporation v. Santa Barbara* (1948) 85 Cal.App.2d 776; *Avco Community Developers, Inc. v. South Coast Regional Comm'n.* (1976) 17 Cal.3d 785, 790 [a permit becomes a vested property right where the permittee has incurred substantial liabilities and performed substantial work in reliance on the permit]; *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519; *Hansen Bros. Enterprises v. Board of Supervisors of Nevada County* (1996) 12 Cal.4th 533 ("*Hansen*").)

clarify the existing intent of SMARA's idle mine provisions, now partially obscured through inconsistencies in statutory drafting.

EXECUTIVE SUMMARY

In 1991, the Legislature significantly amended SMARA. These amendments, in part, established reporting requirements and created a new category of surface mines, referred to as "idle mines." (See SMARA, §§ 2727.1, 2770(h).)

An "idle mine" is one that "curtail[s] for a period of one year or more **surface mining operations** by more than **90 percent** of the operation's **previous maximum annual mineral production**, with the intent to resume those surface mining operations at a future date." (SMARA, § 2727.1 [emphasis added].)

"Surface mining operations" are broadly defined under SMARA and its implementing regulations. Many activities that do not result in an actual sale of product in any given year fall into this definition, including, for example, the maintenance of stockpiles. On the other hand, the phrase: "previous maximum annual mineral production" is not defined in SMARA as a measure of mine activity independent from overall "surface mining operations." Nor does the statute expressly state how the "90 percent" threshold is to be measured when product sales are not the relevant standard. SMARA is similarly silent on the question of the time period over which the "90 percent" threshold is to be judged. Is it from commencement of the mine? From the original adoption of SMARA in 1975? From the effective date of the 1991 SMARA revisions? SMARA provides no express answers to these questions.

SMARA goes on to state that, once a mine becomes "idle," the mine operator must submit an IMP to the lead agency within a specified time. (SMARA, § 2770(h)(1).) An IMP is a nondiscretionary, ministerial reclamation plan amendment that describes steps the operator will take to secure a mine site during an idle period. SMARA states that an operator's failure to timely submit an IMP to the lead agency results in the mine being considered "abandoned" and subject to immediate reclamation. (SMARA, § 2770(h)(6).)

Just as SMARA fails to define "mineral production," SMARA also does not define the term "abandoned" as used in the idle mine provisions. Consequently, without looking deeper into the statutory language and its original intent, and without considering the constitutional cases governing "abandonment" that have been decided after adoption of SMARA's idle mine provisions, operators and lead agencies are often left to question how to apply the law.

In answering these questions, we note that the legislative history of the section and certain guidelines issued by the SMGB make clear that the fundamental intent of SMARA's idle mine provisions was to allow mining sites to forego reclamation for a finite period of time while the sites are inactive, as measured by the presence or absence of "surface mining operations." The quantity of sold product, while providing some measure of activity, is too narrow to align with the broader definition of "surface mining operations" at

the heart of SMARA's regulatory scheme. If SMARA were not interpreted as we suggest, then a mine that continues to extract material, maintains stockpiles and equipment, remains current with regulatory compliance and files all annual reports could be deemed "idle" simply because its sales have fallen far below its historical highs. This would make no sense.

Nor would it make sense for the mine operator to have its underlying mining right deemed "abandoned" or lost for failure to timely submit an IMP to the lead agency. SMARA contains no language that states or suggests that the word "abandoned" as used in the idle mine provisions in any way implicates underlying rights. Further, following passage of the relevant SMARA amendments in 1991, the California Supreme Court has made clear that the abandonment of vested mining rights is wholly controlled by constitutional law. Under this judicial precedent, so long as an operator continues some aspects of a vested surface mining operation, even if at a significantly reduced level, its underlying vested rights remain intact.

We now proceed to discuss the relevant provisions in detail.

SMARA IDLE MINE PROVISIONS

As enacted in 1975, SMARA did not define an "idle" mine or contain any requirements applicable to such mines. In 1991, the Legislature amended SMARA to include the current idle mine provisions, as well as provisions requiring mine operators, for the first time, to submit annual reports to the Director of the Department of Conservation ("DOC"). These reports, intended to help the State gather a database on mine activity in California, asked operators to characterize a mine as "Active," "No longer in operation with no intent to resume," or "Idle."

SMARA defines an "idle" mine as one that:

[C]urtail[s] for a period of one year or more surface mining operations by more than 90 percent of the operation's previous maximum annual mineral production, with the intent to resume those surface mining operations at a future date.

(SMARA, § 2727.1.)

This definition is tethered to two terms: "surface mining operations" and "mineral production." While both SMARA and SMGB regulations define "surface mining operations," neither provide any definition of "mineral production" nor define the relevant timeframes for review. Without such definitions, section 2727.1 leaves open the question of whether a mine's idle status is dependent on "surface mining operations," or some quantitative measure such as sales or tons of material recovered related to the undefined term "mineral production." Consequently, section 2727.1, when read by itself, provides incomplete guidance on when or how a mine becomes idle.

SMARA goes on to provide that once “idle,” a mine becomes subject to certain requirements, as outlined in SMARA section 2770(h). That section provides, in relevant part:

(h)(1). Within 90 days of a surface mining operation becoming idle, as defined in Section 2727.1, the operator shall submit to the lead agency for review and approval, an interim management plan. The review and approval of an interim management plan shall not be considered a project for purposes of Division 13 (commencing with Section 21000). The approved interim management plan shall be considered an amendment to the surface mining operation’s approved reclamation plan, for purposes of this chapter. The interim management plan shall provide measures the operator will implement to maintain the site in compliance with this chapter, including, but not limited to, all permit conditions.

(h)(2). The interim management plan may remain in effect for a period not to exceed five years, at which time the lead agency shall do one of the following:

(A) Renew the interim management plan for another period not to exceed five years, if the lead agency finds that the surface mining operator has complied fully with the interim management plan.

(B) Require the surface mining operator to commence reclamation in accordance with its approved reclamation plan.

(h)(3). The financial assurances . . . shall remain in effect during the period that the surface mining operation is idle. If the surface mining operation is still idle after the expiration of its interim management plan, the surface mining operation shall commence reclamation in accordance with its approved reclamation plan.

(h)(4). Within 60 days of the receipt of the interim management plan, or a longer period mutually agreed upon by the lead agency and the operator, the lead agency shall review and approve the plan in accordance with its ordinance adopted pursuant to subdivision (a) of Section 2774, so long as the plan satisfies the requirements of this subdivision, and so notify the operator in writing. . . .

(h)(5). The lead agency shall approve or deny approval of the revised interim management plan within 60 days of receipt. If the lead agency denies approval of the revised interim management plan, the operator may appeal that action to the lead agency’s governing body, which shall schedule a public hearing within 45 days of the

filing of the appeal, or any longer period mutually agreed upon by the operator and the governing body.

(h)(6). Unless review of an interim management plan is pending before the lead agency, or an appeal is pending before the lead agency's governing body, a surface mining operation which remains idle for over one year after becoming idle as defined in Section 2727.1 without obtaining approval of an interim management plan shall be considered abandoned and the operator shall commence and complete reclamation in accordance with the approved reclamation plan.

To summarize the above provisions, an operator of an idle mine must submit an IMP to the lead agency within 90 days after becoming idle. (SMARA, § 2770(h)(1).) An IMP is a nondiscretionary, ministerial document that describes steps an operator will take to "button up" a temporarily inactive site. (SMARA, § 2770(h)(1).) Specifically, "[t]he [IMP] shall provide measures the operator will implement to maintain the site in compliance with [SMARA], including, but not limited to, permit conditions." (*Ibid.*) If the operator of an idle mine fails to submit an IMP within one year after the mine becomes idle, the mine will be "considered abandoned" and the operator must commence reclamation.

ANALYSIS

When read in light of the definition of "surface mining operations," SMGB guidelines, and legislative history, SMARA's definition of "idle" seems clearly intended to capture, and require prompt reclamation of, inactive mines, not mines that have merely reduced activity in response to market fluctuations.

SMARA's definition of an "idle" mine requires, in part, a reduction in "surface mining operations." Under SMARA, "surface mining operations" include:

[A]ll, or any part of, the process involved in the mining of minerals on mined lands by removing overburden and mining directly from the mineral deposits, open-pit mining of minerals naturally exposed, mining by the auger method, dredging and quarrying, or surface work incident to an underground mine. Surface mining operations shall include, but are not limited to:

- (a) Inplace distillation or retorting or leaching.
- (b) The production and disposal of mining waste.
- (c) Prospecting and exploratory activities.

(SMARA, § 2735 [emphasis added].)

SMGB regulations expand the definition of "surface mining operations" to include "**borrow pitting, streambed skimming, segregation and stockpiling of mined**

materials (and recovery of same)." (Cal. Code Regs., tit. 14, § 3501 [emphasis added].) According to the SMGB, "[s]urface mining operations are 'active' if engaged in any of these activities on a continuous or intermittent basis, so long as interruptions in mining activities do not exceed one year." (*Principles for Addressing Idle Mining Operations Under the Surface Mining & Reclamation Act ("Idle Mine Principles")*, revised March 1996, § 1, p. 1 [emphasis added].) The SMGB illustrates this point in a hypothetical scenario:

SCENARIO No. 3

A mining operator spends one calendar year mining and compiling a large stockpile. Calendar years two through five, the operator does not extract new material, but sells materials from the stockpile. Year six, the mining operator begins the cycle over by mining new material during one calendar year to rebuild the stockpile. What are the annual reporting requirements for calendar years one through six?

If the stockpile is located on the SAME site minerals are extracted, the mining operator would report as an "active mine" for each calendar year. California Code of Regulations Section 3501 defines the segregation and stockpiling of mined materials, and the recovery of the same, as a surface mining operation. Therefore, if a mine operator continues to remove mined materials from a stockpile on a year-round basis, the mine is considered active for annual reporting purposes.

(*Idle Mine Principles*, Scenario 3, p. 5.) While not entirely consistent in this regard, the SMGB hypotheticals indicate that continuity of "surface mining operations," not sales, tons of material recovered, or other quantitative measure, is critical to determining whether a mine is active or idle. This conclusion reflects the fact that a mine can be engaged in any number of activities within the definition of "surface mining operations", but realize no sales nor recover salable material. Thus, SMARA's "idle" mine definition seems best understood to refer to mines that are objectively "inactive" when judged against those activities that qualify as "surface mining operations" under the statute and applicable regulations.

The idle mine provisions' legislative history supports this conclusion. In the course of a comprehensive review of SMARA, the Legislature identified non-reclamation of inactive mines as posing a serious risk to public health and the environment. (See Assembly Committee on Natural Resources and Wildlife analysis, June 26, 1990; Senate Rules Committee analysis, August 21, 1990.) For example, the Assembly Ways and Means Committee endorsed the idle mine provisions specifically to address its finding that "far too many of the **inactive** mines had undergone little or no reclamation". (Republican Analysis, May 8, 1990 [emphasis added].) Clearly, the Legislature intended to address mines no longer in operation whose operators failed to commence and complete reclamation. This legislative history in no way suggests that the Legislature also intended to impose IMP obligations upon operators that, while maintaining continuous surface mining operations,

have involuntarily reduced sales or recovery of salable material in response to market conditions.

The next question we examine is whether a mine operator risks losing its vested rights by failing to timely submit an IMP to the lead agency after becoming idle.

Under any reading of SMARA, and putting aside for the moment questions concerning the definition of the word “idle” under the statute, failure to timely submit an IMP leads only to an acceleration of reclamation requirements, not the loss of vested mining rights.

First, SMARA section 2770(h) at no point mentions vested rights or the loss of vested rights. Instead, the statutory language focuses on maintenance of inactive sites (through the IMP) and on reclamation of such sites after the expiration of an IMP or in the event an IMP is not submitted. The idle mine provisions contain no language that states or suggests the failure to timely submit an IMP results in the loss of vested mining rights. Rather, section 2770(h) mandates simple measures to ensure that inactive mines (i.e., mines at which no activity is occurring) are secured, and that an operator cannot take advantage of a mine’s inactive status to indefinitely postpone reclamation. This is accomplished, in the main, through the requirement for an IMP. Upon expiration of an IMP, the operator must: (1) resume operations; (2) renew the IMP [if the mine is still idle]; or (3) “commence reclamation in accordance with its approved reclamation plan.” (SMARA, § 2770, subd. (h)(2).) As mentioned, SMARA provides no definition of “abandoned”. The term, however, in this context causes no confusion when understood in light of the fundamental thrust of section 2770(h) – to ensure that operators do not indefinitely avoid reclamation duties at inactive mines. Thus, an “abandoned” mine merely describes an inactive mine for which reclamation is appropriate. This reading is both consistent with the purpose of the idle mine provisions, as well as with other usages of the term “abandoned” in SMARA – namely, to describe unreclaimed, inactive mines whose operators are nonresponsive. (See SMARA, §§ 2773.1(b), 2796.5.)

Second, SMARA’s legislative history confirms that the idle mine provisions’ purpose was to ensure reclamation of inactive mines, not to affect underlying vested property rights. As discussed above, the Legislature’s deliberations regarding the idle mine provisions plainly demonstrate intent to ensure the reclamation of inactive mines to protect public health, safety and the environment. (See Assembly Ways and Means Committee, Republican Analysis, May 8, 1990; Assembly Committee on Natural Resources and Wildlife analysis, June 26, 1990; Senate Rules Committee analysis, August 21, 1990.) By contrast, the idle mine provisions’ legislative history contains no indication that the Legislature also intended to implicate vested mining rights.

Finally, the rules governing when a vested mining right might be considered relinquished or abandoned are not set forth in SMARA at all. These rules arise under constitutional doctrines protecting property interests and have been specifically articulated by the California Supreme Court in *Hansen*. The *Hansen* Court held that vested mining rights can be considered abandoned only on the occurrence of two factors: (1)

actual operator intent to abandon the mine; and (2) an overt act, or failure to act, which implies that the operator no longer claims an interest in the vested right. (*Hansen*, p. 569.) Moreover, under *Hansen*, an operator must intend to discontinue, and actually discontinue, the entire mining enterprise (not merely one component) to abandon vested rights. (*Hansen*, p. 566.) Consequently, so long as an operator continues some aspects of a vested surface mining operation, even if at a significantly reduced level, its underlying vested rights will remain intact. Failure to timely submit an IMP, therefore, cannot alone result in the loss of vested mining rights.

SUGGESTED REGULATORY AMENDMENTS

Our discussion above highlighted and resolved certain ambiguities in SMARA's idle mine provisions. Nevertheless, certain minor changes to SMARA's implementing regulations would help clarify the Legislature's original statutory intent in this regard. Accordingly, we would propose that the SMGB adopt the following regulation:

Section 3501. "Previous maximum annual mineral production" for the purposes of determining whether a mine is "idle" under Section 2727.1 of the Act shall be understood to include overall surface mining operations at the site and not merely reduction in product sales resulting from market fluctuations.

END