



MEMORANDUM

Date: February 6, 2008

To: The Honorable Chairman and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator

A handwritten signature in black ink, appearing to be "CHH", is written over the printed name "C.H. Huckelberry".

Re: Update on Challenge to Portland Cement Mineral Leases in Davidson Canyon

Background

Since January 2005, the County has been actively opposing the renewal of California Portland Cement mineral leases to mine calcium carbonate (limestone) on certain parcels of State Trust lands located along Davidson Canyon within the Cienega Creek watershed. More recently the County has been pursuing a challenge in Maricopa County Superior Court against the State Land Commissioner's decision to issue the leases. This memorandum provides the history of this effort and an update and recommendation on the court case.

History of County Opposition to Leases Prior to Decision to Grant Leases

In December 2004, the State Land Department requested comments from the County on the renewal of California Portland Cement mineral leases in Davidson Canyon. The County submitted comments opposing the renewal of the leases due to the impact mining could have on significant public investments in conservation properties downstream of the proposed mine and impacts on surrounding landowners, among other key points. The County continued to oppose the renewal of these leases through letters to the Land Department and the Governor, Board adopted resolutions, and meetings with State Land Department officials. In June 2006, the County, in response to a request from the State Land Commissioner, provided the Land Department with several conditions to include in the renewal of the mineral leases, while at the same time reiterating the County's outright opposition to issuing the leases. On November 22, 2006, in response to a court order stating that the State Land Commissioner must make a decision on whether to issue the leases or not, the Land Commissioner issued a Decision and Order, No. 134-2006/2007, granting California Portland Cement the mineral leases. The Order did include conditions proposed by the County.

History of County Opposition After Decision to Grant Leases

On December 21, 2006, the County initiated an administrative appeal of the State Land Commissioner's November 22, 2006, Decision and Order by filing a Notice of Appeal with the Land Department. By letter dated January 16, 2007, the State Land Commissioner rejected the County's administrative appeal. Thereafter, on February 16, 2007, the County

filed a complaint in Maricopa County Superior Court to challenge the Commissioner's decision to issue the leases. The State Land Department and California Portland Cement are both defendants. In response, the State Land Department filed a motion to dismiss, arguing that the County lacked standing to appeal the decision to issue the leases, and that the court lacked jurisdiction to hear the appeal. After subsequent briefing and a hearing held on August 3, 2007, the court ruled in the County's favor, concluding that the County's appeal was authorized by statute.

At a status conference held on November 19, 2007, the County requested the court to set an evidentiary hearing and to authorize our expert witnesses to access the property to collect evidence. The State Land Department indicated their opposition to the request. The court therefore ordered the County to make the request in writing. On December 12, 2007, the County filed a request for a hearing and motion to authorize our expert witnesses to access the property to collect evidence. After additional briefing, at the hearing held on January 25, 2008, the court denied the County's request. This means that although the court has agreed that the County has a right to appeal the Commissioner's decision, the court will not permit the collection of evidence and a hearing to produce such evidence.

In addition to the above, on November 19, 2007, the State Land Department filed a motion for summary judgment, asking the court to reconsider its decision of August 3, 2007, that Pima County was entitled to file an appeal with the court. That motion is still pending.

From the beginning, the County was fighting an uphill battle in pursuing this appeal. As a general matter, decisions of the Commissioner on matters falling within his statutory authority, such as the decision to grant a mineral lease on State Trust land in the present case, are subject to review by the court for abuse of discretion only. This is the most deferential standard of review, requiring the party challenging a decision of the Commissioner to show that the decision was reached without consideration of the evidence or that it is contrary to the applicable law. This alone made it unlikely that the appeal would result in an outcome favorable to the County.

Moreover, the County's appeal hinged on the claim that the leases are not in the best interests of the State Trust because the value of the alternative future uses of the property is higher than the value to be gained from mining, and because mining would result in injury to watercourses and plants and wildlife protected under state and federal law. As a result, in order to proceed with the appeal, the County needed to develop sufficient evidence to substantiate its claim. To that end, from the initiation of this case, the County has sought expert opinions on the relevant issues. Unfortunately, the experts the County consulted were not able to find sufficient evidence to support the County's claims based on the present state of events. Without the sufficient evidence, the County is not in a position to proceed with the case, and is required to dismiss it.

Continued Opposition to Mining in Davidson Canyon

Independent of the County's challenge of the State Land Commissioner's decision to grant the leases to California Portland Cement in Davidson Canyon, the County and the public have two other avenues for affecting this project, as well as avenues for preventing the issuance of mining leases on State Land in other unsuitable areas of the County. First, California Portland Cement needs a Section 404 permit from the United States Army Corps of Engineers. As of yesterday, the Corps of Engineers had withdrawn California Portland Cement's application for a 404 permit because they had failed to provide several pieces of information requested in order to process the application. This 404 permitting process will require a public comment period. The County will actively follow this process, provide comments, and will notify interested members of the public of the public comment period. It is our understanding that this mining project cannot move forward without a Section 404 permit.

Another avenue to affect California Portland Cement, and other interested mining companies, from mining in and around Davidson Canyon, is to have Davidson Canyon declared an Outstanding Water of the State of Arizona. This designation would prevent the State from issuing water quality permits that would degrade this waterway. The County, working with the Pima Association of Governments, nominated Davidson Canyon for this status in February 2005. The Arizona Department of Environmental Quality (ADEQ) is currently processing the nomination within a larger water quality rule making process. Our understanding is that ADEQ is supportive of the nomination, but that it takes time to process the larger rule-making package. Assuming the package is approved by ADEQ, and then approved by the Governor's Regulatory Review Council this calendar year, that package will then be sent to the Environmental Protection Agency for review and approval, and then, if approved, will become law. This process is moving too slowly, and the County and the public should request that this process move faster. Letters can be addressed to Joan Card, Division Director of the Water Quality Division, ADEQ, 1110 West Washington Street, Phoenix, Arizona 85007.

In addition to these steps that could specifically impact the California Portland Cement leases in Davidson Canyon, the County and the public should pursue a change in State law, and changes in State Land Department policy administratively:

- A.R.S. § 37-231 prevents the sale of State Trust Land that contains valuable minerals such as calcium carbonate. This statute has prevented the County from attempting to purchase the State Trust land in and around the California Portland Cement lease area, and in other areas where such minerals are located, but which due to the area's unique natural characteristics, should be conserved. Even if the County were to take the risk of requesting a public auction for such lands in order to attempt to purchase the lands as directed by voters in the 2004 County bond election, this statute prevents the State from being able to place these lands and other similar lands up for auction.

- Some of the 9 million acres of State Trust land in Arizona would provide more value to the Trust beneficiaries if used as mitigation land. Several Federal, State, and local agencies, including the County, require important natural areas to be set aside for conservation to mitigate the development of other important natural areas. The State Land Department is beginning to explore this alternative revenue-generating tool, but the County and the public should continue to remind them that this tool exists and can work under current State law.
- Administratively, the Land Department should insert a public scoping session into the public comment process, such as BLM has for federal mineral leases. The Land Department should also revise other aspects of the public comment process to include responding to public comments and providing on-line status of applications.
- Administratively, the Land Department should also improve its environmental assessment procedures by working closer with ADEQ to study water quality impacts that continue to be under-estimated and therefore under-mitigated.

However, the most comprehensive way of dealing with the friction between mining, urban development, and conservation in this State would be to develop an inventory of areas most suitable for mining, most suitable for urban development, and most suitable for conservation. The creation of something akin to the County's Conservation Lands System, but including areas most suitable for mining, and on a statewide scale, will go much further in addressing this problem than other stopgap measures.

Summary

The County has and will continue to actively oppose the renewal of California Portland Cement mineral leases on State Trust land located along Davidson Canyon. This opposition has most recently included a court challenge against the State Land Commissioner's issuing of the leases. Due to a recent unfavorable court ruling, and without the ability to put forth evidence necessary to support the County's claims, it is necessary to reassess our ability to prevail in this case. This will be discussed with the Board in executive session on February 12, 2008. The County will continue to pursue various avenues to prevent this mine and others from occurring in areas unsuitable from a conservation and urban development standpoint.

CHH/jj

c: Christopher Straub, Chief Civil Deputy County Attorney