

February 3, 2012

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By Electronic Transmittal

Mr. John Walker
Executive Secretary
State Environmental Commission
901 South Stewart Street, Suite 4001
Carson City, Nevada 89701
jwalker@ndep.nv.gov

Re: Comstock Mining, Inc.'s Response Supporting and Joining NDEP's Motion to Dismiss
CRA's Appeal of Dayton Consolidated Exploration Project Reclamation Permit #0315,

Dear Mr. Walker:

Enclosed please find the response of Comstock Mining, Inc. (Comstock) to the Motion to Dismiss Appeal filed by the Nevada Division of Environmental Protection (NDEP). Comstock joins in NDEP's Motion and respectfully requests that the State Environmental Commission dismiss the appeal without necessity of a hearing. I have transmitted a true and correct copy of Comstock's Joinder to each of the parties, either electronically or by first class mail, postage pre-paid, as indicated in the Certificate of Service.

If you have any questions, please call me at (303) 894-6127 or contact me via email at cmcintosh@pattonboggs.com.

Sincerely,



Carolyn L. McIntosh

cc: Bruce Holmgren, Nevada Division of Environmental Protection, by electronic transmittal
Carolyn Tanner, Office of the Nevada Attorney General, by electronic transmittal
Cassandra Joseph, DAG, by electronic transmittal
Gayle Sherman, Comstock Residents Association, by first class U.S. mail
Cindi Byrns, Comstock Mining, Inc., by electronic transmittal
Doug McQuide, Comstock Mining, Inc., by electronic transmittal

BEFORE THE STATE ENVIRONMENTAL COMMISSION

STATE OF NEVADA

In Re:)
)
Appeal of the Reclamation Permit for the)
Dayton Consolidated Exploration Project,)
Permit No. 0315, issued to Comstock)
Mining, Inc., by the Comstock Residents)
Association)
)
)
_____)

**Comstock Mining Inc.’s
Response Supporting and Joining
Motion to Dismiss Appeal**

Comstock Mining, Inc. (“Comstock”), by and through its counsel, Carolyn L. McIntosh, hereby files its Response Supporting and Joining the Motion to Dismiss Appeal of the Nevada Division of Environmental Protection, Bureau of Mining Regulation and Reclamation (“NDEP”), states the following further grounds for dismissal, and requests an expedited determination of the motions to dismiss.

I. INTRODUCTION

Comstock properly applied for and was issued Reclamation Permit, No. 0315 (“Permit”) for required reclamation of an exploration project on its Dayton Consolidated mineral leases (the “Project”). After a public hearing and public comment period, NDEP issued the Permit on December 20, 2011. The Comstock Residents Association (“CRA”) filed a Form #3 Request for an Appeal Hearing (“Form #3”) with the State Environmental Commission (“SEC”) on December 30, 2011.

In its Form #3, CRA fails to state a single basis for its appeal. Rather, CRA requests that the SEC impose requirements on Comstock that: 1) Comstock is already undertaking in full compliance with Nevada laws not at issue to the Permit; or 2) have no legal basis. Comstock therefore joins NDEP’s Motion to Dismiss Appeal (“NDEP’s Motion”), incorporates NDEP’s arguments by this reference, and requests that the SEC dismiss CRA’s appeal (“Appeal”) without necessity of a hearing.

II. ARGUMENT

A. CRA Has Failed To Identify A Single Valid Basis for its Appeal

Any person aggrieved by the issuance of a permit may appeal to the SEC. NAC 519A.415 (1). The appellant must be aggrieved, legally, not merely unhappy. See *Webb, ex rel. Webb v. Clark County School Dist.*, 218 P.3d 1239, 1244 (Nev. 2009) (“*Webb*”) (a party is “aggrieved” if either a personal right or a right of property is adversely and substantially affected).

The SEC can also properly look to the federal Administrative Procedures Act, 5. U.S.C. § 702,¹ and the standing requirement there, as interpreted by the United States Supreme Court. In *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990). Responding to a challenge of a federal land use planning decision, the Supreme Court articulated two separate requirements to show standing:

“First, the person claiming a right to sue must identify some ‘agency action’ that affects him...under the general review provisions of the APA, the ‘agency action’ in question must be ‘final agency action.’ Second, the party seeking review ... must show that he has ‘suffered legal wrong’ ...or is ‘adversely affected or aggrieved’ by that action... [for which the Supreme Court requires] the plaintiff must establish that the injury he complains of ...falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.”²

CRA does not meet this critical prerequisite for an appeal. As NDEP has already pointed out, CRA does not identify any state law or regulation that NDEP has purportedly violated in issuing the Permit. CRA alleges no improper permit conditions. CRA fails to assert that NDEP abused its discretion in issuing the Permit. In short, CRA has not shown that it has suffered an illegal obligation or burden, as articulated by *Webb*, 218 P.3d at 1244, or that it has suffered a legal wrong, under the Supreme Court’s test. Nor does CRA show how the issues it has identified “fall[] within the ‘zone of interests’ sought to be protected by” *Lujan v. NWF*, 497 U.S. at 882-83, here, the Permit or Nevada’s reclamation laws. Consequently, CRA does not have standing to bring the Appeal. *Webb*, 218 P.3d at 1244; *Esmeralda County v. Wildes*, 137 P. 400, 402 (Nev. 1913) (noting that the term “aggrieved” means substantial grievance which includes the imposition of some injustice,

¹ See SEC rules of practice, Form #3, and NAC 445.891(2) reflecting Nevada’s Administrative Procedure Act, NRS 233B.121.

² *Lujan v. NWF*, 497 U.S. at 882-83. Procedurally, the Supreme Court was called upon to review the adequacy of two affidavits to establish NWF’s standing. The district court granted summary judgment for Lujan, holding that NWF lacked standing because the first two affidavits were insufficient and the four supplemental affidavits untimely. The D.C. Court of Appeals reversed both decisions. On review, the Supreme Court upheld the district court’s decision.

or illegal obligation or burden, or the denial of some equitable or legal right.) CRA's failure to identify how it is aggrieved or any legal shortcoming of the Permit is fatal to its Appeal. The Appeal must be dismissed.

CRA identifies a number of concerns in Form #3, however, none of these are relevant to the Permit. The Permit is a reclamation permit for an exploration project that will disturb less than 20 acres of private land on patented lode claims. CRA purports to put at issue the reclamation provisions in NAC 519A.010 to 519A.370, but does not discuss any of these matters in its narrative response to the question #5 "Nature of the appeal and grounds thereof." Rather, as best Comstock can determine, CRA complains about the following issues:

1. Additional requirements should be imposed because reclamation will be conducted "within the Carson River Mercury Superfund Site" ("CRMS"), *see* Form #3, question #5, first line;
2. Exploration and reclamation will cause the area to be "twice disturbed", *id.*, line 6;
3. NDEP should determine the extent of the hazard and require a mitigation plan before issuing a permit, *id.*, lines 7 and 8;
4. The Sampling and Analysis Plan ("SAP") incorporated by reference in the Permit is somehow insufficient, *id.*, lines 8 - 16; and
5. CRA asserts that the material to be reclaimed is a hazardous waste, *id.*, lines 18 - 19.

Comstock responds briefly to each of these contentions, but emphasizes that none of these issues are relevant to a reclamation permit, the Permit's contents, the scope of authority of the NDEP, or whether the NDEP properly exercised its authority. In short, none of these matters provide a basis for appeal of the Permit.

1. The Project has not been determined to be in the CRMS. The United States Environmental Protection Agency ("USEPA") included old mill sites and related tailings within the CRMS but has not defined site boundaries. *See, EPA Superfund Record of Decision for the CRMS*, dated March 30, 1995 ("ROD"), Section 1.1, p. 6. As the lead agency managing the mill site and tailings portion of the CRMS, NDEP has identified risk area boundaries—not CRMS site boundaries. Portions of the Project are completely outside of the risk boundaries, most of the remainder is within the moderate risk area, and only those portions that are directly adjacent to the Gold Canyon ephemeral drainage are in the high risk area. Even these locations have not been shown to have levels of mercury, arsenic or lead above risk concentrations.

2. CRA's concern about areas being twice disturbed—by exploration and reclamation—does not raise a cognizable legal issue. "Affected" areas, as defined by NRS 519A.040, whether disturbed once, twice or multiple times, must be reclaimed and the Permit so requires.
3. NDEP has no obligation to identify the extent of hazard prior to issuing the Permit and no legal authority to require Comstock to develop a mitigation plan as a pre-condition to the Permit.
4. NDEP approved Comstock's SAP on January 17, 2012. Consistent with the SAP, Comstock will sample the Project area before it initiates exploration. However, the SAP is independently enforceable by NDEP and is not the subject of the Permit, nor is it appealable.
5. None of the material to be reclaimed is hazardous waste, as defined by NRS 459.430. USEPA has determined that the mining related wastes addressed by the CRMS are "mining wastes that are exempt from the definition of hazardous waste under RCRA Section 3001(b)(3)(A)(ii), 42 U.S.C. § 6921(b)(3)(A)(ii), and 40 C.F.R. Section 261.4(b)(7) (also known as the "Bevill amendment"). ROD, Section 9.2.2., p. 33.

In short, all of the specific issues raised in the Form #3 are either already being addressed by NDEP under other permits and approvals, or cannot be legally required. None serves as a valid basis to appeal the Permit.

B. CRA's Form #3 Does Not Provide Fair Notice Of Its Claims

A valid appeal requires that the aggrieved person file a Form #3 and provide the information required on the Form #3. NAC 519A.415(2). Form #3 requires a description of the "nature of the appeal and the grounds thereof" (question #5), as well as the sections of state law or regulation involved in the appeal (question #6). These questions are designed to provide fair and appropriate notice to NDEP and the permittee in order to have a fair hearing. *Federal Trade Com'n v. National Lead Co.*, 352 U.S. 419, 77 S. Ct. 502 (1957).

Contrary to this requirement, it seems that CRA would like to reserve the opportunity to raise every conceivable complaint it may have about Comstock at the appeal hearing. CRA includes in its description of the nature of the appeal the following statement: "all other objections identified in the written and oral comments presented to the NDEP prior to and at the Public Hearing on the draft permit." Form #3, question #5, last two lines. There were hours of hearing and pages of writing comments, raising a multitude of issues that the NDEP has already reviewed and considered in issuing the Permit. Similarly, CRA's identification of sections of law involved in the appeal states:

“At a minimum, NAC 519A.010 to 519A.370. NRS 445B.100, NRS 445.210, NAC. 444” *emphasis added*.

These responses do not meet the requirements for fair notice. CRA’s appeal is improper in this regard, as well, and must be dismissed. In the alternative, CRA’s Form #3 should be disallowed or CRA should be limited to the very specific issues and regulatory provisions identified in the Form #3. The hearing should not be yet another opportunity for CRA simply to vent about Comstock.

C. A Reclamation Permit is Required; The Permit Cannot Be Denied or Revoked by the Appeal

The Nevada state legislature has found that:

Proper reclamation of mined land, areas of exploration and former areas of mining or exploration is necessary to prevent undesirable land and surface water conditions detrimental to the ecology and to the general health, welfare, safety and property rights of the residents of this state....

NRS 519A.010 (1)(b). “A person who desires to engage in an exploration project must...[a]gree in writing to assume responsibility for the reclamation of any surface area damaged as a result of the exploration project.”³ NRS 519A.190(3). Failure to comply with reclamation requirements, including violation of a plan for reclamation, any condition in such plan, or any reclamation regulation may be a violation of NRS §§ 519A.230 and 519A.270, subject to injunction, fines, and/or penalties under NRS §§ 519A.160, 519A.280 and NAC 519A.405.

These provisions require that an area “affected” (NRS 519A.040) by an “exploration project” (NRS 519A.070) undergo “reclamation” (NRS 519A.100), consistent with the approved plan for reclamation (NRS 519A.230). Further, the NDEP must “[e]nter into agreements relating to reclamation” (NRS 519A.150) and suspend or revoke a permit upon a noticed hearing and a finding by the NDEP that the holder of the permit has violated any provision of NRS 519A.010 to 519A.280 (NRS 519A.150(3) and (9)).

It is unclear what CRA is seeking through its Appeal. However, Comstock has shown in Section II.A., above, that none of the Permit modifications CRA might be seeking are legal or proper. Further, the SEC cannot deny or revoke the Permit without putting NDEP and Comstock

³ Comstock’s exploration permit is not at issue here.

in an untenable position by causing both to violate at least the above-cited reclamation laws. No “relief” can properly be granted in response to the Appeal; the Appeal must be dismissed.

D. On Its Face the Appeal Lacks Merit and Should Be Dismissed Without Necessity of Hearing

Neither the SEC nor NDEP should incur the administrative costs of holding a hearing on the Appeal. It is evident from the Form #3 that CRA representatives participated in the public hearing on the Permit application. CRA representatives also submitted multiple letters, comprising pages and pages of written comments, raising all of the same points made in their Form #3—and more. CRA has had ample opportunity to bring its concerns to the attention of the NDEP. An SEC hearing will simply provide one more venue for CRA to vent its objections about Comstock’s legal and proper use of its own private property pursuant to properly issued permits. In CRA’s own words, it wants to raise the non-relevant, specific issues noted in its Form #3 and “all other objections identified in the written and oral comments presented to the NDEP prior to and at the Public Hearing on the draft permit.” Form #3, question #5, last two lines.

The SEC should not be used as merely an additional venue to re-raise arguments that have been raised, and considered and rejected by the NDEP, in prior proceedings. To merit an SEC hearing, a Form #3 must identify one or more legally meritorious issues that the NDEP improperly failed to consider. CRA’s Form #3 does not do so; it does not even identify a potentially legally meritorious issue that the SEC could redress. If the SEC does not dismiss the Appeal, the NDEP, the SEC, the SEC’s staff, and Comstock will all suffer significant expense and time burdens to prepare for and participate in the hearing. When the legislature of the State of Nevada has directed that “reclamation activities must be economically and technologically practicable...” (NRS 519A.230 (4)), it seems particularly inappropriate to expend the State’s taxpayer funds, and the SEC and NDEP’s time, to hold a hearing on an Appeal that does not meet the minimum requirements NAC 519A.415.

III. CONCLUSION

Comstock supports, joins in, and incorporates by reference NDEP’s Motion to Dismiss Appeal. In light of the foregoing, Comstock respectfully requests that the SEC dismiss the Appeal by CRA of Reclamation Permit, No. 0315, without necessity of a hearing. Should the SEC convene

an evidentiary hearing, Comstock joins in NDEP's request that CRA's appeal be limited to the specific allegations set forth in its Form #3, as discussed above.

Respectfully Submitted, this 3rd day of February, 2012.

By:



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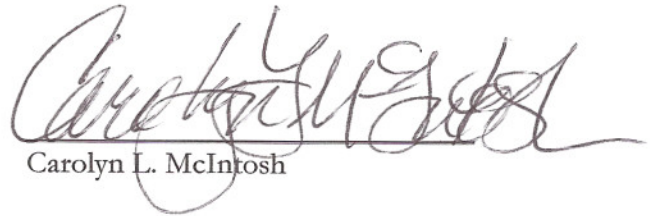
CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2012, I electronically served the foregoing **Comstock Mining, Inc.'s Response Supporting and Joining Motion to Dismiss Appeal** upon the following by email:

Carolyn E. Tanner
Senior Deputy Attorney General
Cassandra P. Joseph
Deputy Attorney General
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
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And upon the following by mailing a true and correct copy, postage prepaid, to:

The Comstock Residents Association
P.O. Box 29
Silver City, Nevada 89428



Carolyn L. McIntosh