

# **Blue Lead Decision Postponed until May by Nevada County Planning Commission**

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NEVADA CITY -- Planning Commissioners postponed a decision on granting a vested right to mine to Blue Lead Mine LLC during their Thursday meeting. After over four hours of staff reports, public testimony, refutations and allegations by the applicant's attorney and discussion among themselves, commissioners were unable to reach a decision.

## **Brief History**

The item came before the commission after the owners of the property were cited by Nevada County for code violations and not taking out required permits. BLM and the Regional Water Quality Control Board also issued separate notices of violations. After returning an incomplete use permit application to Nevada County, the company then claimed to be exempt by virtue of having a "vested right to mine."

During a meeting in March, planning commissioners chose to ignore the recommendation of planning staff and legal counsel, voting on a motion of intent to grant Blue Lead the vested right to mine.

The public was largely unaware of the March hearing, but requests to reopen the public hearing were sent to the commission from neighbors, public interest groups and neighborhood associations, after the commission's decision was made public.

## **Presentation by Staff**

Blair Will, on behalf of County Counsel's office, gave the commissioners a brief recap of the issue. The first slide of the PowerPoint presentation summed up the question before the commission:

Was there a surface mining operation at the time of enactment of the ordinance which made the mining use nonconforming? If so,

- What is the geographic scope?
- What is the operational scope (i.e., production level)?

The scope of vested rights is contingent upon either ongoing operation or the objective manifestation of intent, defined by the Supreme Court in the Hansen case as follows: "The mere intention or hope on the part of the landowner to extend the use over the entire tract is insufficient; the intent must be objectively manifested by the past operations."

Staff concluded their presentation by recommending the public hearing be reopened and "The vested right, if granted, be limited in geographic and operational scope consistent with historic scale of mining on the property, as supported by the evidence provided by miner, plus a 'natural and gradual increase.'"

## **Public Hearing Reopened**

For this hearing, unlike the previous one, public interest was great and the chamber was filled to capacity. Braiden Chadwick, the applicant's attorney, recycled his March PowerPoint presentation for a repeat performance, after which commissioners voted unanimously to reopen the public hearing.

First to speak was local author and historian Dave Comstock. He has written extensively about mining operations in the area and sent comments to the Planning Commission prior to Thursday's hearing, including photos of area mining, Red Dog-You Bet Maps and a history of the property. Nothing can be done secretly in the area, Comstock said. Stating that the former owner was an honorable man who did things lawfully, Comstock concluded his remarks to the Planning Commission by saying he was neither in favor or opposed to mining, but "for doing things right."

Tom Brown, the mine's immediate neighbor, now lives in Virginia. His property had been directly impacted when a road was bulldozed through his land -- without his consent -- by Blue Lead Mine LLC. In his stead, Reinette Senum read his letter into the record. Brown stated his intention to appeal the decision if the commission was to grant vested rights to Blue Lead LLC.

CLAIM-GV, Citizens Looking At Impacts of Mining, had submitted a memo by the law firm Shute, Mihaly & Weinberger which concluded that staff was correct in their assessment by recommending the commission deny the vested rights. The memo also raises the question if Blue Lead LLC owns the mineral rights on the property. Following a quiet title action in 1966.

Here, the property descriptions to the quiet title action specifically exclude "any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits within the land above described which may have been discovered or known to exist" prior to the time that the mining patents for the various parcels were issued.

Finally, the memo lays out the reasons why the project cannot be exempt from the California Environmental Quality Act (CEQA). "The California Supreme Court recently affirmed that the existence of a vested right cannot insulate a project from environmental review under CEQA."

Several speakers referred to this memo as well as numerous letters submitted ahead of the hearing. Not one of the dozen speakers urged the commission to grant the vested rights.

### **OMG: OMR Warns of \$34,675,000 in Possible Fines**

Mike Luksic of the Office of Mine Reclamation (OMR) read the following statement:

I'm Mike Luksic, a Professional Geologist with the Department of Conservation, Office of Mine Reclamation, Compliance Unit. Thank you for permission to address the Commission regarding the Surface Mining and Reclamation Act of 1975 (SMARA) and implications of the County's decision on vested rights for the Blue Lead-Nevada County mine. I'm adding Nevada County to the name Blue Lead mine, because there is already a mine named Blue Lead in Butte County, with a State mine ID # (91-04-0020). The Blue Lead Nevada County mine has never been in compliance with SMARA and cannot be assigned a specific State ID # until it is.

The Department notes that under SMARA, the legislature provided owners of pre-1976 mines with a choice: they were either 1) surface mining operations, subject to all the requirements of SMARA, responsible for submitting an adequate reclamation plan and financial assurances among other things or 2) they were no longer mining operations, not subject to any requirements, and not entitled to the privileges of vesting. The (Blue Lead Mine-Nevada County) appears to want to be a mine for the purposes of vesting, avoiding permits and avoiding CEQA, but not be considered a mine for the purposes of complying with the Surface Mining and Reclamation Act. Unfortunately, a mining operation cannot have it both ways.

The Department of Conservation has reviewed the items submitted in support of a vested rights determination for the Blue Lead Mine, and Nevada County's materials prepared for the Planning Commission hearing on vested rights. Under SMARA, it is the responsibility of the lead agency, in this case Nevada County, to

determine if mining was occurring in 1976, and has occurred without break since, thus ensuring a vested right. As this is a local decision, the Department will not comment on the determination. However, based upon Blue Lead's assertion that they have been a mining operation since at least 1983, the Department provides the following to Nevada County, to use in their proceedings as appropriate.

1. Since 1991, every mine in the state, whether active or idle, has been required to send an Annual Mine Report to the Department and to the County, documenting their status and mineral production. The Blue Lead Mine has never provided this statutorily required annual report, either under the Brady Family Trust ownership or the current ownership. If Blue Lead is indeed a mining operation, they have been in violation of this statute for nineteen years, and cannot provide the production and intent to mine that those reports were designed to provide.

2. Since 1976, and reaffirmed by the legislature in 1988, every mine in the state, vested or not, was required to have a reclamation plan approved by the lead agency (Public Resources Code Â§2776 and 2770(b)). If the Blue Lead Mine is indeed a mining operation, it has continued to violate this statute for 34 years. Any mine violating this provision is prohibited by statute from operating.

3. Since 1991, every mine in the State of California has been required to maintain a financial assurance to guarantee reclamation. If the Blue Lead Mine is indeed a mining operation, it has violated this section of statute for nineteen years.

4. Violation of any of the above provisions is subject to a fine of up to \$5,000 per day from the first date of violation. If the Blue Lead Mine was indeed a mining operation which violated those statutes, it would be subject to those fines.  $19 \text{ years} \times 365 \text{ days} \times \$5,000 = \$34,675,000$ .

5. Since 1991, all mining operations were required to pay an Annual Reporting Fee to the DOC and submit annual reports including production to the State and lead agencies. Failure to pay this fee and submit reports is subject to fines, penalties and interest. If the Blue Lead Mine was indeed a mining operation since 1983, fees, penalties and interest since 1991 are now due and payable, both from the current operators and the Brady Family Trust. Approximately \$250,000 would be owed to the State.

6. As of 1991, any mine in the state which had no production, but which had intent to mine in the future, was classified as "Idle", and was required to obtain an IMP approval from the lead agency. The documents submitted by Blue Lead assert that they have been a mining operation since at least 1983, and had intent to mine in the future. **Just because a mine existed at some point in somebody's mind does not mean it meets statutory requirements.** Failure to obtain an Interim Management Plan within one year and 90 days of becoming idle results, under statute, in the mine being deemed "Abandoned", and required to immediately reclaim. **If the Blue Lead Mining operation was indeed a surface mine since 1983, with zero production and an intent to mine, it was classified by statute as "Idle", and as no IMP was approved, is now deemed by statute as "abandoned", and required to cease mining and immediately reclaim.**

7. If the Blue Lead Mine is found by Nevada County to have a vested right, and to have been a surface mining operation since 1991, the County is responsible for taking measures necessary to enforce all the above SMARA requirements. Failure to take those enforcement measures would result in OMR performing enforcement duties and referring to the State Mining and Geology Board Nevada County's SMARA mine regulatory program for ALL mines in the County. Thus, if the County finds that Blue Lead has indeed been a surface mining operation, it must order the operator to immediately cease mining and reclaim the site, or face loss of its countywide SMARA authority. Also, the Department will take all enforcement and legal actions necessary to collect fees, penalties and interest owed to the State, and if necessary, to enforce SMARA itself.

8. The right of the County lead agency to issue permits and perform annual inspections, and charge fees is the preferred way to fund the local lead agency SMARA program. Fees for permit processing, plan review, annual report, inspections and program enforcement are necessary to support a viable lead agency. Without these sources of funds, Nevada County risks losing their lead agency status. If Nevada County loses its "lead agency" status to take over by the SMGB, fees for annual inspections will increase to approximately \$5,000 a year for all mine operations in the county. All mine operations should comply with SMARA in order to compete on a level playing field. Illegal, clandestine gold mines provide no support for the SMARA program, yet one illegal mine operator can consume the majority of man-hours the lead agency staff have available, necessitating the increase of associated fees paid by LEGAL mine operations. The DOC supports legal mining operations, not illegal, clandestine mining.

This prompted a surly question by Commissioner Doneski who inquired if OMR was 'threatening' the county. Luksic responded OMR was merely supporting the county's lead authority. Luksic and his colleague left the hearing chamber shortly thereafter, to sustained applause from the public.

### **New Information?**

The commissioners appeared uncomfortable when Chadwick proceeded to ridicule the testimonies of local residents, attorneys and the state. He dismissed Comstock's eyewitness testimony and suggested he visit the Searls Library where Blue Lead LLC had obtained their "evidence." He conceded he was advocating on behalf of his client, whereas planning staff and county counsel were bound by rules that require them to be objective.

The commissioners focused on the abandonment question, trying to determine if there was at least a continuous "intent" to mine. No Interim Management Plan or Reclamation Plan was ever filed, leaving no trace of any "intent" or "idea" to mine in the future in either county or state records.

Commissioners said several times that new information had been brought to them, even though the initial staff report contained all the information. Blair Will, on behalf of county counsel, was pressed by Commissioner Duncan to "tell us what to do." Since staff is not the decision-making body, Will was unable to tell Duncan how to vote and instead he referred to the evidence presented.

Commissioners voted unanimously to direct County Counsel to work with Blue Lead LLC's attorney to exchange legal briefs before the hearing. County Counsel will also provide a relevant definition of "abandonment" for the next hearing, which is set for May 27.