

MINUTE ITEM

43

08/30/89
PRC 3964
Martinez
Frey
Barbieri

CONSIDERATION OF SAND EXTRACTION LEASE
IN MONTEREY BAY TO MONTEREY SAND COMPANY

Calendar Item 43, attached, was pulled from the agenda prior to the meeting.

Attachment: Calendar Item 43.

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CONSIDERATION OF SAND EXTRACTION LEASE IN
MONTEREY BAY TO MONTEREY SAND COMPANY

APPLICANT: Monterey Sand Company
625 Elder Street
Sand City, California 93955

AREA, TYPE LAND AND LOCATION:
6.24 acres of tide and submerged lands in
Monterey Bay, Monterey County.

LAND USE: Extraction of sand for processing and
commercial sale.

TERMS OF LEASE: Initial period: Twenty years beginning
July 1, 1968.

Renewal options: Two successive periods of
ten years each.

CONSIDERATION: Rental: \$6 per annum.
Royalty: \$15,000 for sand extracted prior to
issuance of the lease. \$0.06 per
cubic yard for all sand extracted
during the term of the lease. \$0.30
per cubic yard pursuant to agreement
beginning April 1, 1989.

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CALENDAR ITEM NO. 43 (CONT'D)

BASIS FOR CONSIDERATION:

Pursuant to 2 Cal. Code Regs. 2003.

STATUTORY AND OTHER REFERENCES:

A. P.R.C.: Div. 6, Parts 1 and 2; Div. 13.

B. Cal. Code Regs.: Title 2, Div. 3; Title 14, Div. 6.

AB 884: N/A at this time (application has been deemed incomplete).

BACKGROUND:

On March 23, 1988, Lessee formally notified the staff of the State Lands Commission of the intent to renew Mineral Extraction Lease PRC 3964, which would expire on June 30, 1988. It is the Lessee's position that the lease was granted in settlement of litigation and that the option to renew for two successive ten-year periods, which is addressed in Paragraph 18 of the lease, was a material term specifically bargained for. Lessee believes that the option to renew the lease was granted specifically to them. Therefore, they are now proposing to exercise the option to renew for the first ten-year period, commencing July 1, 1988, and believe that the Commission does not have any discretion to deny renewal of the lease.

On April 22, 1988, the Lessee was notified that its submitted Notice of Intent to Renew the lease was considered by staff to be an application to renew, and that it was deemed incomplete, pursuant to the requirements of the Permit Streamlining Act, pending the submittal of specific items required for further processing. At that time, Lessee was also notified that preliminary studies by staff and comments from the California Coastal Commission, Sierra Club, and the Native Plant Society indicate that the project authorized by the lease may have the potential for causing a significant impact on the environment and that an environmental impact report would be required prior to consideration of the request for renewal.

With respect to environmental review, Lessee contends the lease renewal is not subject to CEQA, and that there is no obligation to submit materials related to an environmental determination. It is Lessee's belief that Commission actions authorizing the continued operation of existing facilities are categorically exempt from the requirements of CEQA. Lessee believes that, pursuant to P.R.C. Sections 21083 and 21084, which requires

that guidelines for the implementation of CEQA be prepared and adopted by the Resources Agency, such guideline include a list of classes of projects which have been determined not to have a significant effect on the environment and which, therefore, shall be exempt from CEQA. The CEQA guidelines adopted by the Resources Agency list as Class No. 1 of exempt projects the continued operation of existing facilities, 14 Cal. Code Regs. 2905(a)(2) and such is repeated in the regulations of the State Lands Commission, 2 Cal. Code Regs. 2905(a). Lessee contends that it has conducted the same operations from the same facilities as will be conducted after the renewal of the lease. Thus, Lessee concludes that no environmental impact report or other environmental review is required or called for in connection with the renewal of the lease.

Lessee's concluding position is that the Commission must acknowledge renewal of the lease subject only to a reasonable increase in the royalty rate.

Staff's interpretation of the lease, specifically Paragraph 18, is that Lessee's request to renew requires the issuance of a new lease, that any subsequent lease or any terms and conditions of a subsequent lease is subject to the Commission's discretionary action and that, prior to such action, an environmental review must be conducted in order to satisfactorily comply with the requirements of CEQA.

Staff believes that both Paragraph 18 of the lease and P.R.C. Section 6898 give a lessee the right to renew a lease. However, in context of the statutes governing the leasing of minerals other than oil and gas, it is believed this right is limited to the benefit of not having to obtain the lease through competitive bidding.

Staff further believes that the Legislature did not intend that a lessee have an automatic right to a term of more than 20 years on identical terms as its original lease or that a lessee would be exempt from other applicable statutes. Both the statute and the subject lease make it clear that any right to renewal is subject to such reasonable terms and conditions as the Commission chooses to impose. It is believed that "reasonable terms and conditions" indicate the Commission has the discretion to alter, amend, or modify the lease to respond to the adverse environmental impacts of the project and that this discretion makes the application of the CEQA mandatory.

The existing lease also makes it clear the Lessee must comply with "such rules and regulations as may hereafter be promulgated by any agency of the State of California having jurisdiction therein." The Commission's regulation, promulgated after the issuance of the lease to the Applicant in 1968, specifically requires compliance with CEQA. (See 2 Cal. Code Regs Section 2954).

Nor is this project categorically exempt from CEQA, as the Lessee contends. Because the lease expired in 1988 and the Commission had discretion in considering the lease renewal, the Applicant's renewal request cannot be considered an existing operation. In any event, the categorical exemption for existing operations contained in Class 1 of CEQA guidelines (14 Code Reg. Section 15301) would be inapplicable in this situation because the present application is covered by the exceptions contained in Section 15300.2(b) and (c) of the guidelines.

The Commission has been advised that the cumulative impact of the sandmining at these sites over time is significant. (See *Id.*, Section 15300.2[b].) Further, there is a reasonable possibility that the activity will have a significant effect on the environment due to "unusual circumstances". (*Id.*, Section 15300.2[c]) The unusual circumstances here include the fact that the Applicant's operation is the only surfzone sandmining in California, the significant new information since 1970 regarding the impacts of sandmining, and the existence of lease provisions allowing the Commission to impose reasonable terms and conditions upon renewal and requiring the Applicant to comply with new rules and regulations of a state agency.

A letter to Lessee on May 24, 1988 confirmed the staff's positions that renewal of the lease is a discretionary action and that preparation of an environmental impact report would be required prior to further consideration of renewal of the lease. At that time, staff requested that Lessee cease operations at the end of the lease term, but indicated it would be permissible to leave in place any fixed equipment until resolution of the lease renewal issue.

It is staff's intent that the requested lease renewal will not continue to be processed until the items requested from the Lessee, including environmental-review-related information, are received.

The lease expired on June 30, 1988. Monterey Sand filed a lawsuit against the Commission in the nature of a Petition for Relief in the Nature of Mandamus and Complaint of Declaratory Relief, Specific Performance and Injunctive Relief, on the same day. Finally, also on that same day, Monterey Sand and the Commission entered into an Agreement whereby the parties could preserve their respective legal positions and negotiate a settlement. This Agreement has been extended several times and expires on August 31, 1989.

The parties appear to be at an impasse and unable to resolve in a mutually satisfactory manner, the need for an EIR or the amount of royalty increase and other terms and conditions of the new lease. Therefore, the Commission staff recommends that negotiations be terminated and authorization be granted to oppose Monterey's lawsuit and take other appropriate legal action to oppose Monterey.

OTHER PERTINENT INFORMATION:

1. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines (14 Cal. Code Regs. 15061), the staff has determined that the denial of the lease renewal is exempt from the requirements of the CEQA because such a denial is not a "project" as defined by CEQA and the State CEQA Guidelines.

Authority: P.R.C. 21065 and 14 Cal. Code Regs. 15270, 15378.

EXHIBITS: A. Land Description.
B. Location Map.

IT IS RECOMMENDED THAT THE COMMISSION:

1. FIND THAT DENIAL OF THE RENEWAL OF THE LEASE IS EXEMPT FROM THE REQUIREMENTS OF THE CEQA PURSUANT TO 14 CAL. CODE REGS. 15061 BECAUSE SUCH A DENIAL IS NOT A PROJECT AS DEFINED BY P.R.C. 21065 AND 14 CAL. CODE REGS. 15270, 15378.
2. AUTHORIZE STAFF TO TERMINATE NEGOTIATIONS WITH MONTEREY SAND OVER THE RENEWAL OF A REQUESTED SAND EXTRACTION LEASE.
3. RECOGNIZE THE TERMINATION OF PRC 3964 ISSUED JULY 1, 1968 FOR TERM OF TWENTY YEARS AND DENY THE REQUEST FOR A RENEWAL BECAUSE OF FAILURE OF THE APPLICANT TO COMPLY WITH THE CEQA AND TO AGREE TO REASONABLE TERMS AND CONDITIONS FOR RENEWAL.

- AUTHORIZE THE ATTORNEY GENERAL AND STAFF TO TAKE WHATEVER ACTION IS NECESSARY TO RESPOND TO LITIGATION FILED AGAINST THE STATE ON JUNE 30, 1988 BY MONTEREY SAND, INCLUDING FILING LITIGATION OF ITS OWN.

EXHIBIT "A"

PRC 3964.1

1.4222 PRC
OWT 2969

LAND DESCRIPTION

Parcel One - Sand City Site

A strip of tide and submerged lands 200 feet in uniform width lying between the ordinary high-water mark of the Pacific Ocean, Monterey Bay and a line drawn parallel therewith and 200 feet seaward therefrom; said strip of land being bounded on the northeast by a line drawn perpendicular to the ordinary high-water mark and extending northwesterly from the point of intersection of the ordinary high-water mark with the northerly line of Lot 1 of the Abrego Subdivision of the Rancho Noche Buena as surveyed and subdivided for the heirs of Don Jose Abrego in July of 1878 according to the map thereof on file in the Office of the County Surveyor of Monterey County, file reference D-18; and bounded on the southwest by the northwesterly projection of that certain course numbered (10) in the deed description of that certain 45.125 acre parcel of land granted by Laura W. Metz, et al to Monterey Sand Co., a partnership, by deed dated October 20, 1958 and recorded November 14, 1958 in Volume 1909 of Official Records of Monterey County at page 490, said projection being extended from the point at which said course numbered (10) intersects the ordinary high-water mark of Monterey Bay.

Said Strip of land being more particularly described as follows:

BEGINNING at the point of intersection of the ordinary high water mark of Monterey Bay with the westerly projection of the southerly boundary of that certain 1.31 acre parcel of land conveyed to Granite Construction Company by Deed and Agreement dated May 23, 1946 and recorded June 10, 1946 in the Office of the County Recorder of Monterey, California under Recorder's Series No. 16405, said 1.31 acre parcel being described as Parcel II in said Deed and Agreement, said southerly boundary being the northerly line of Lot 1 of Abrego Subdivision of the Rancho Noche Buena; thence, along said ordinary high-water mark with the meanders thereof:

1. In a southwesterly direction, 840 feet, more or less, to the point of intersection of said line of ordinary high-water with the said Course numbered (10) in said deed (or the northwesterly projection thereof) granting said 45.125 acre parcel of land to Monterey Sand Company said course numbered (10) being stated in said deed as "N 51° 15' W, 972.6 feet; thence, leaving said line of ordinary high-water and along said course numbered (10) and/or the northwesterly projection thereof:

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2. N 61° 15' W, 200 feet more or less to an intersection with a line that is parallel with and 200 feet seaward of said ordinary high-water mark; thence;
3. Northeasterly and parallel with said line of ordinary high-water and 200 feet seaward (northwesterly) therefrom, 840 feet, more or less, to an intersection with the said line drawn perpendicular with the shoreline of Monterey Bay and extending northwesterly from the point of intersection of said line of ordinary high-water with the westerly projection of the southerly boundary of said 1.31 acre parcel of land; thence, following said line perpendicular to the ordinary high-water mark of Monterey Bay;
4. In a southeasterly direction, perpendicular to the ordinary high-water mark of Monterey Bay, 200 feet to the place of beginning, containing 3.86 acres, more or less.

Parcel Two - Marina Site

A strip of tide and submerged land 200 feet in uniform width lying between the ordinary high-water mark of the Pacific Ocean, Monterey Bay, and a line drawn parallel therewith and 200 feet seaward therefrom;

Said strip of land being bounded on the North by the northerly line of Lot 92 and/or the westerly prolongation of said northerly line, or as may be subsequently determined by agreement of adjoiningers; and bounded on the south by the southerly line of Lot 95 and/or the westerly prolongation of said southerly line or as may be subsequently determined by agreement of adjoiningers; as said Lots 92 and 95 are shown and delineated on that certain map entitled "Loche Paddon's Company's Bayside Subdivision of Monterey City Lands" filed for record February 8, 1916 in Volume 2 of Maps and Grants (outside lands), Official Records of Monterey County, at page 15, containing 2.38 acres, more or less, of tide and submerged lands of Monterey Bay.

END OF DESCRIPTION

REVIEWED AUGUST 21, 1989 BY BIU 1.

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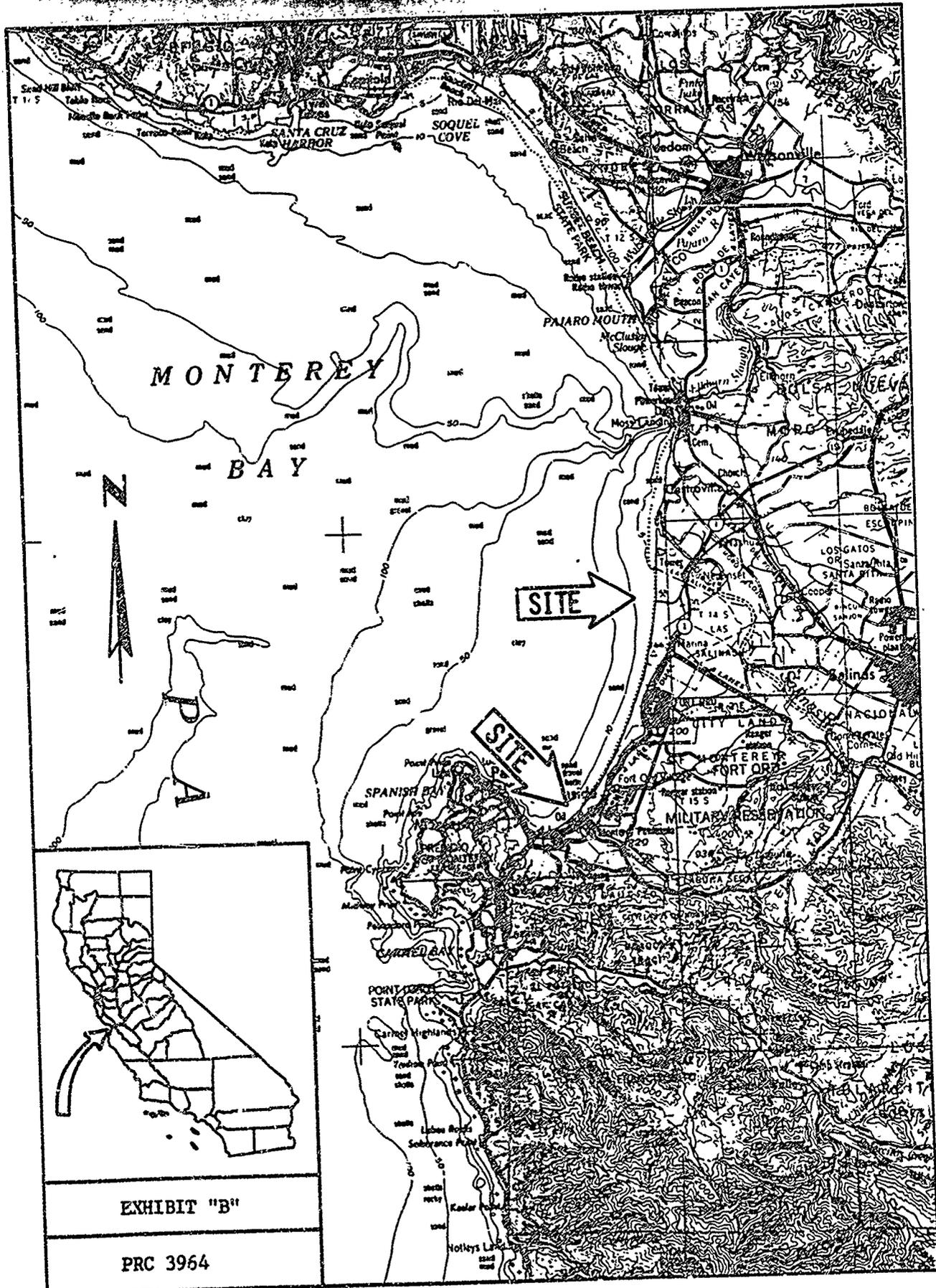


EXHIBIT "B"

PRC 3964