

MINUTE ITEM

37

10/26/89
PRC 3964
Martinez
Frey
Kaufman

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

Chairman McCarthy asked for the Chief Counsel, Robert Hight, to make a statement relative to pulling Item 37.

Mr. Hight said we are asking to pull Item 37, which is consideration of a lease with Monterey Sand Company, at their request. They believe that they did not receive adequate notice, pursuant to the ten-day notice requirement.

Mr. Hight said our records indicate that the notice was sent within the required time period. Apparently, because of the earthquake problems, they did not receive it.

As we agreed in the executive session, the lease will be continued until December 15.

Attachment: Calendar Item 37.

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10/26/89
PRC 3964
Martinez
Frey
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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 EXISTING 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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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 its 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 or condition such 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 it was staff's determination that an environmental impact report would be required prior to consideration of the request for renewal.

(ADDED 10/25/89)

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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 invokes the provisions of P.R.C. Sections 21083 and 21084, which require, respectively, that guidelines for the implementation of CEQA be prepared and adopted by the Resources Agency and such guidelines 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's authority is limited only to a reasonable increase in the royalty rate.

Staff's interpretation of the lease, specifically Paragraph 18, is: 1) that Lessee's request to renew requires the issuance of a new lease; 2) that any subsequent lease or any terms and conditions of that lease is subject to the Commission's discretionary action; and 3) 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 language only stays the requirement on the State to lease such materials through competitive bidding.

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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 new knowledge of potential adverse environmental impacts through the application of the CEQA process.

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 relevant Commission 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).

Staff does not believe this project is categorically exempt from CEQA, as the Lessee contends. In point of fact, 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 exceptions contained in Section 15300.2(b) and (c) of the guidelines apply to the instant application.

The Commission has also 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: 1) the fact that the Applicant's operation is the only surfzone sandmining in California; 2) the significant new information developed since 1970 regarding the impacts of sandmining; and 3) 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 the Commission.

(ADDED 10/25/89)

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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.

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, extended several times, expires on October 31, 1989.

Monterey Sand also needs a permit from the U.S. Army Corps of Engineers. Their prior permit has expired. Because the Corps has found that Monterey Sand's operation may have a significant impact on the quality of the human environment, it has ordered Monterey Sand to prepare an Environmental Impact Statement (EIS). The Corps, however, has not stopped Monterey Sand from continuing to mine sand while the EIS is being prepared. Under the National Environmental Policy Act (NEPA), any decision to renew a permit, whose impact may have a significant impact on the quality of the human environment, must be preceded by the preparation of an EIS. Staff contends the Corps has violated the requirements of NEPA by permitting Monterey Sand to continue mining sand during the preparation of the EIS, which the Corps itself has found necessary.

The Corps has been contacted and is undecided on whether to bar Monterey Sand from continuing to mine sand until after the EIS has been completed and reviewed.

The parties appear to be at an impasse and unable to resolve, in a mutually satisfactory manner, the need for an EIR and the amount of royalty increase and other terms and conditions of the new lease. Similarly, the Corps and the Commission are at an impasse over the need to prohibit mining given the absence of a permit issued after consideration of a final EIS.

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CALENDAR ITEM NO. 37 (CONT'D)

Accordingly, the Commission staff and the staff of the Attorney General recommend that negotiations be terminated with Monterey Sand and authorization be granted to (1) oppose Monterey Sand's lawsuit and take other appropriate legal action to oppose Monterey Sand; (2) adopt the attached lease in the event of a final judicial decision that an EIR is not required for the renewal of Monterey Sand's lease; and (3) file suit in federal district court against the Corps and Monterey Sand to bar the company from operating until the Corps issues a permit after consideration of a valid final EIS if the Corps and the Commission cannot come to an agreement on this issue.

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 this activity is exempt from the requirements of the CEQA as a statutorily exempt project. The project is exempt because CEQA does not apply to projects which a public agency rejects or disapproves.

Authority: P.R.C. 21080(b)(5) and 14 Cal. Code Regs. 15270.

EXHIBITS:

- A. Land Description.
- B. Location Map.
- C. Lease Document.

IT IS RECOMMENDED THAT THE COMMISSION:

1. FIND THAT THE ACTIVITY IS EXEMPT FROM THE REQUIREMENTS OF THE CEQA PURSUANT TO 14 CAL. CODE REGS. 15061 AS A STATUTORILY EXEMPT PROJECT PURSUANT TO P.R.C. 21080(b)(5) AND 14 CAL. CODE REGS. 15270, PROJECTS WHICH A PUBLIC AGENCY REJECTS OR DISAPPROVES.
2. DIRECT 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 OTHER REASONABLE TERMS AND CONDITIONS FOR LEASE ISSUANCE.

(ADDED 10/25/89)

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4. AUTHORIZE THE COMMISSION (A) TO OPPOSE MONTEREY SAND'S LAWSUIT AND TAKE OTHER APPROPRIATE LEGAL ACTION TO OPPOSE MONTEREY SAND; (B) ADOPT THE ATTACHED LEASE IN THE EVENT OF A FINAL JUDICIAL DECISION THAT AN EIR IS NOT REQUIRED FOR THE RENEWAL OF MONTEREY SAND'S LEASE; AND (C) FILE SUIT IN FEDERAL COURT AGAINST THE CORPS OF ENGINEERS AND MONTEREY SAND TO BAR MONTEREY SAND FROM OPERATING UNTIL THE CORPS ISSUES A PERMIT AFTER CONSIDERATION OF A VALID FINAL EIS.

(ADDED 10/25/89)

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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 61° 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:

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 adjoining; 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 adjoining; 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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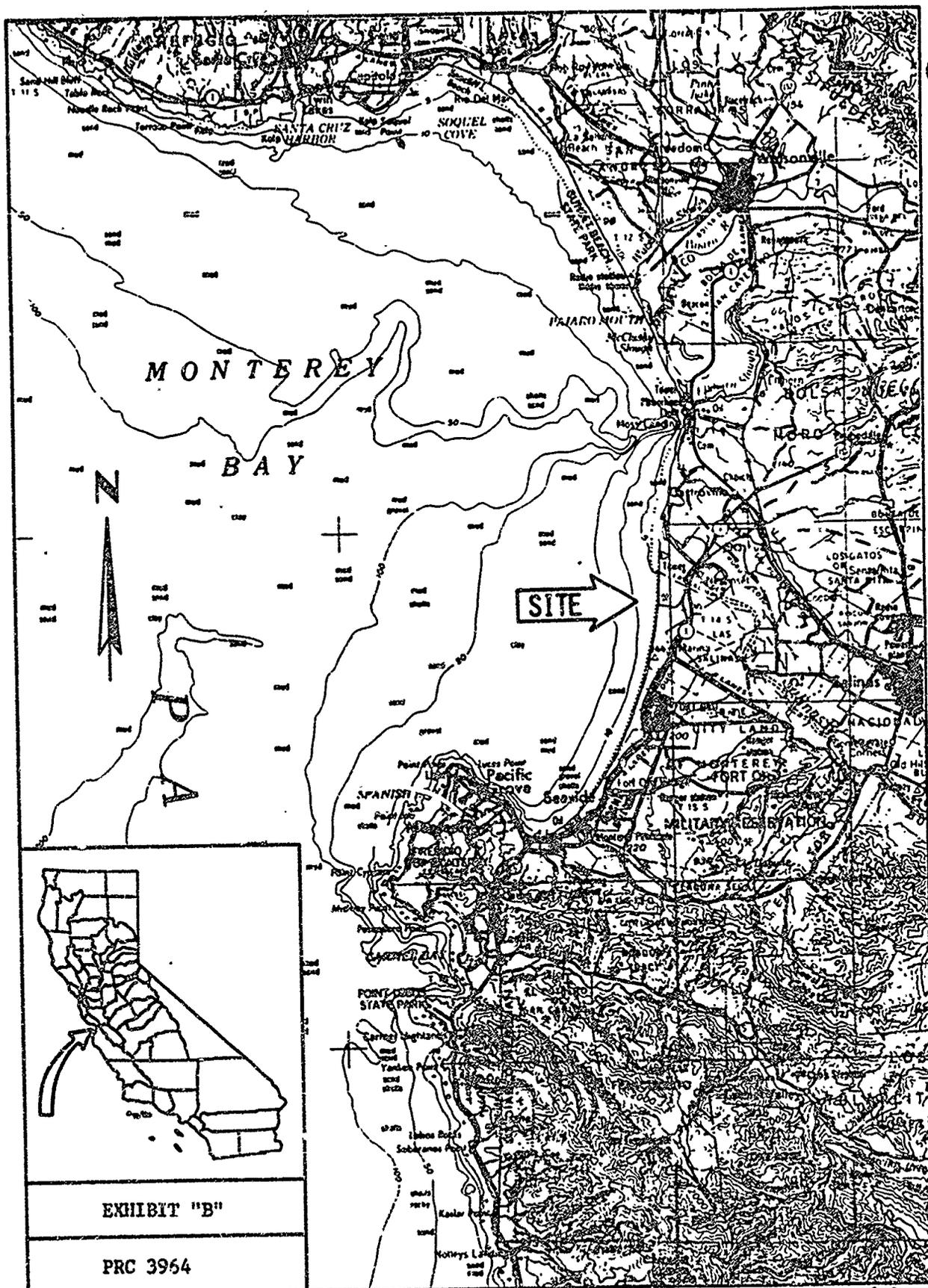


EXHIBIT "B"

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EXHIBIT "C"

STATE LANDS COMMISSION
STATE OF CALIFORNIA

LEASE RENEWAL FOR EXTRACTION OF MINERAL RESOURCES

Section 1

THIS INDENTURE OF LEASE, made and entered into pursuant to Division 6 of the Public Resources Code, Statutes of California, by and between the State of California, acting by and through the STATE LANDS COMMISSION, sometimes hereinafter called the State, as Lessor, and MONTEREY SAND CO., a California co-partnership, hereinafter called the Lessee, whose mailing address is: 625 Elder Street, Sand City, CA 93955.

WITNESSETH

That the Lessor, in consideration of the royalties provided hereunder, as well as the covenants, conditions and agreements herein contained, does hereby lease to the Lessee the State of California's mineral rights in that certain parcel of land, hereinafter designated as the "Leased Lands," situate in the County of Monterey, State of California as described in Exhibit A attached hereto and by reference made a part hereof as though set forth in full.

1. The effective date of this lease shall be July 1, 1988. This lease shall continue for ten years, unless sooner terminated as provided below. The terms and conditions of this lease shall remain in force for the duration of the lease, unless modified by the Commission in the manner set forthin Section 3 of paragraph 4(b). Lessee shall have a preferential right to renew this lease for one successive period of ten years upon such reasonable terms and conditions as may be prescribed by Lessor,

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including but not limited to, modification of the royalty, preparation of an appropriate environmental impact document as required in the discretion of the lessor, or any other provisions in a manner which, in the opinion of Lessor, will adequately protect the interests of Lessor. Any request for renewal by lessee shall be submitted by July 1, 1997.

2. The Lessee shall have the exclusive right to remove a maximum of 100,000 cubic yards of sand deposits from the Leased Lands each year. Lessee shall have no right to prospect for, extract, mine or remove any other mineral, including but not limited to, oil, gas, other hydrocarbons and geothermal resources.

3. The bond required pursuant to paragraph 18 of Section 3 is to be in the amount of \$10,000.

4. This lease consists of three sections and exhibits all attached hereto and by reference made a part of the whole agreement.

Section 2

ROYALTY AND RENT

1. Lessee shall pay to the State a royalty of ten percent (10%) of the gross value of any and all minerals produced, extracted, shipped, used or sold under this lease, less any transportation and processing charges of the State's royalty share of production but not less than \$.30 per cubic yard. The gross value upon which said royalty rate is based shall not be less than the reasonable fair market value, as fixed by the State, of any mineral resources extracted from the leased lands. If Lessee sells its products by tonnage or fraction of tonnage, Lessee agrees to provide Lessor with the formula(s) it uses to convert those figures to cubic yards for royalty determination purposes.

2. Since this lease is being executed in arrears of its effective date, Lessee agrees to pay within 15 calendar days of the execution date all royalties due on minerals produced,

extracted and sold during the period of July 1, 1988 to date of execution of this lease. Royalties shall be calculated in accordance with paragraph 1, section 2 hereof. Lessee shall receive credit for royalties previously paid on minerals produced, extracted and sold during this period.

3. Lessee shall pay to the State an annual land rent of \$10.00 per acre with an increase of \$1.00 per acre per year on the lease anniversary.

Section 3

STANDARD COVENANTS - STATE LANDS COMMISSION LEASE

1. PURPOSE:

(a) Lessee shall have the right to remove only those mineral resource deposits from the Leased Lands as are specified in paragraph 2 of Section 1 hereof.

(b) No additional structural improvements shall be placed on the Lease lands at any time without prior written approval of Lessor.

(c) Lessor shall have the right to go upon the Leased Lands for the purposes of conducting surveys, tests or experiments using any geological, geochemical, geophysical or other method, including core drilling, for determining the presence on or in the Leased Lands of any natural resources, including but not limited to, oil, hydrocarbon, gas, other hydrocarbons and geothermal resources, as well as other mineral deposits listed in Public Resources Code Section 6407, (hereinafter collectively "mineral resources") provided that such surveys, tests, or experiments do not unreasonably interfere with or endanger Lessee's operations pursuant to this Lease.

(d) Lessor shall have the right to issue additional nonexclusive rights to conduct surveys, tests or experiments using any geological, geochemical, geophysical or other method, including core drilling, for determining the presence on or in the Leased Lands of any mineral resource

except those listed in paragraph 2 of Section 1; provided that operations conducted pursuant to such rights do not unreasonably interfere with or endanger Lessee's operations pursuant to this Lease. Further, Lessee agrees to allow all persons authorized by such rights to enter upon the Leased Lands in order to conduct such surveys, tests of experiments.

(e) This lease is entered into with the agreement that its purposes are and its administration shall be consistent with the principle of multiple use of public lands and resources; this lease shall allow coexistence of other permits or lease of the same lands for deposits of mineral resources other than sand under applicable laws, and the existence of this lease shall not preclude other uses of this area covered hereby. However, operations under such other permits or leases or other such uses shall not unreasonably interfere with or endanger operations under this lease, nor shall operations under this lease unreasonably interfere with or endanger operations under any permit, lease, or other entitlement for use issued pursuant to the provisions of any other act. Nor shall this lease be construed as superseding the authority which the head of any state department or agency has with respect to the management, protection, and utilization of the Leased Lands and resources under its jurisdiction. Lessor may prescribe in its rules and regulations those conditions it deems to be necessary for the protection of other mineral resources.

(f) This lease does not confer upon the Lessee any other privilege or right not expressly given hereto.

2. CONSIDERATION:

Lessee agrees to pay to Lessor the following royalties without deduction, delay or offset and as further provided for herein:

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(a) Royalties for the mineral resources produced or extracted based on the formula, rate, or in the amount specified in Section 2 hereof, which shall be due and payable on the 25th day of the month following the month of extraction or production.

(b) Lessee shall keep accurate books and records of his operations hereunder, including all minerals extracted from the Leased Lands, combined with the adjoining lands of Lessee, together with the cost of extraction of same and of mining, quarrying and shipping thereof and shall file with Lessor copies of all sales contracts for the disposition of any and all minerals extracted from the Leased Lands, combined with the adjoining lands of Lessee.

(c) On or before the 25th day of each month, the Lessee shall deliver to Lessor statements in the form prescribed showing the work performed upon the Leased Lands and at the request of Lessor upon any other land necessary to make the determination and the amount, quality and value of all mineral resources extracted, produced, shipped or sold or whether any work was performed on the Leased Lands.

(d) Land rent shall be due on each anniversary date of this lease.

3. INTEREST AND PENALTIES:

(a) It is agreed by Lessee hereto that any royalties or other monetary considerations, arising under the provisions of the lease and not paid when due as provided in this lease, shall bear interest from the day following the day upon which such monetary consideration was due at the rate of one and one-half (1-1/2) percent per month until the date of payment.

(b) It is agreed by Lessee hereto that any royalties or other monetary considerations arising under the provisions of this lease, and not paid when due as provided in this lease, shall be subject to a five (5) percent penalty on the

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amount of any such royalties, rentals, or other monetary considerations arising under the provisions of this lease.

(c) It is agreed by Lessee hereto that, for the purposes of this Section, "royalties or other monetary considerations, arising under the provisions of this lease, and not paid when due" includes but is not limited to any amounts determined by Lessor to have been due to Lessor if, in the judgment of Lessor, an audit by Lessor of the accounting statement and records required by paragraphs 2(b) and 2(c) of Section 3 hereof, shows that inaccurate, unreasonable or inapplicable information contained or utilized in the statement resulted in the computation and payment to the State of less royalties or rentals than actually were due to the State.

4. ENVIRONMENTAL IMPACT:

(a) Within ten days of Lessee's execution of the Lease, Lessee shall pay to Lessor \$15,000 for the preparation of a study of the impacts of sandmining on coastal erosion in Monterey Bay. The study shall be designed and supervised by Lessor. Upon its completion, the study shall be made available to the public and Monterey Sand.

(b) Within twelve months from the completion of the study, the Lessor may impose a new set of reasonable terms and conditions to this Lease, including an increase or decrease in the rate of extraction. Any changes to the terms and conditions of this Lease that are imposed pursuant to this paragraph shall be effective for the remainder of the ten-year term of this Lease.

5. WASTE OF RESOURCES, DAMAGE, LOSS AND LIABILITY:

Lessee shall use all reasonable precautions to prevent waste of, damage to, or loss of mineral resources and wildlife on or in the Leased Lands and shall be liable to Lessor for any such waste, damage or loss to the extent that such waste, damage, or