

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of the Application of Scappoose Sand) Amended
and Gravel Co. For a Limited Exemption Mining) Final Order No. 102-2007
Certificate to Mine 10 Acres)

WHEREAS, on January 8, 2007, Scott Parker filed an application on behalf of Scappoose Sand and Gravel Co. (hereinafter referred to as the "Applicant") to modify the geographic boundaries of an existing Limited Exemption Certificate (#05-0015) to mine a 10 acre portion of a 63.9 acre parcel zoned Heavy Industrial (M-1), located on E. Crown Zellerbach Road, Scappoose, Oregon, having tax account number 3201-040-00602; and

WHEREAS, on January 23, 2007, the Applicant appeared before the Board of County Commissioners and requested that the Board reconsider a 1993 decision establishing the boundaries of the Limited Exemption Certificate at 103 acres more or less; and

WHEREAS, on January 24, 2007, the Board of County Commissioners denied the request, and staff advised the Applicant that there is no process under the Surface Mining Ordinance to modify an existing Limited Exemption Certificate, as requested; and

WHEREAS, after the Board of Commissioners denied the request to reconsider the 1993 decision, rather than apply for an Operating Permit, the Applicant effectively amended the Application to request a new limited exemption certificate for the 10 acre portion, on the basis that they had established a vested right as of 1972 to mine the 10 acre portion; and

WHEREAS, the Applicant supplemented the Application with materials and testimony presented to the Surface Mining Advisory Committee on January 31, 2007, and provided to the Land Development Services Department on March 6, 2007; and

WHEREAS, the new amended application was not complete until at least some information necessary to determine whether the Applicant has a vested right to mine 10 acres was submitted on January 31, 2007; and

WHEREAS, the Board scheduled a hearing in the matter for March 14, 2007; and

WHEREAS, the Applicant requested that the matter be carried over for a period of one week;
and

WHEREAS, on March 14, 2007, the Board carried the matter over to March 28, 2007; and

WHEREAS, the Board of County Commissioners held a hearing in the matter on March 28, 2007, and carried the matter over for deliberations to April 11, 2007; and

WHEREAS, on April 11, 2007, having heard testimony and received evidence, the Board voted to deny the application;

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

- A. The Board of County Commissioners adopts the Findings of Fact and Conclusions of law in the Staff Report to the Board of County Commissioners, dated March 7, 2007, which is attached hereto as Attachment 1, and is incorporated herein by this reference.
- B. The Board of County Commissioners adopts the Supplemental Findings of Fact and Conclusions of Law which are attached hereto as Attachment 2, and are incorporated herein by this reference.
- C. The Application for a Limited Exemption Certificate is Denied.

Dated this 16th day of May, 2007.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

By: 

Rita Bernhard, Chair

By: 

Anthony Hyde, Commissioner

By: 

Joe Corsiglia, Commissioner

Approved as to form

By: 

Office of the County Counsel

ATTACHMENT 1

Columbia County
BOARD OF COMMISSIONERS STAFF REPORT
March 7, 2007

Application for a Limited Exemption Certificate #05-0015

DATE: March 7, 2007
FILE NUMBER: #05-0015-Amendment
SITE NAME: Scappoose Sand and Gravel
APPLICANT/OWNER: Scott Parker
P.O. Box AF
Scappoose, Oregon 97056
SITE LOCATION: 33485 E. Crown Zellerbach Road, Scappoose, OR
TAX ACCOUNT NUMBER: 3201-040-00602
ZONING: M-1(Heavy Industrial)
SIZE: 10 Acre Portion of 63.9 Acre Parcel
REQUEST: Limited Exemption Certificate for 10 acres of the Scappoose Sand and Gravel Mine
APPLICATION COMPLETE: January 8, 2007

COLUMBIA COUNTY
MAR 14 2007
COUNTY COUNSEL

BASIC FACTS:

The applicant, Scott Parker is requesting a Limited Exemption Certificate to mine a 10 acre portion of the 113 acre Scappoose Sand and Gravel mine in Scappoose . The subject 10 acres is located in the northwest corner of the mine. The entire area mined, or to be mined, is 113 acres. However, 103 acres was already approved under a Limited Exemption Certificate in 1993. All but approximately 2 to 3 acres of the subject 10 acres was mined prior to 1990. The portion of the requested area yet to be mined is on property over which an access easement ran. The property is 60 foot wide and runs along the site's northeast boundary and a strip of land a long West Lane Road south to the existing haul road. The Applicant recently acquired the easement area and indicates that mining will now be possible on such area.

The following is a list of items included in the application:

1. **Original Application** submitted by Scott Parker on January 8, 2007 including cover letter, application form, narrative statement, "voluntary" Reclamation Plan with attached accounts receivable statement from December 2006 and Exhibits A thru F (**Attachment 2**):

- A. Exhibit A: 1972 Application Form
 - B. Exhibit B: 1972 Mining Permit
 - C. Exhibit C: Affidavit by Dale Heimuller, Mining Operations Mgr
 - D. Exhibit D: BOC Minutes of September 15, 1993(103 Acre LE Site)
 - E. Exhibit E: Letter from Bruce Hugo, BOC Member in 1993
 - F. Exhibit F: Letter from Masogs from whom applicant acquired easement.
2. **Supplement To Application #1/Testimony Before SMAC** submitted to the Surface Mining Advisory Committee by Scott Parker et al at their meeting on January 31, 2007 including (Attachment 3) :
- A. 1970 Aerial Map of the Mining Site
 - B. 1990 Aerial of the Mining Site
 - C. 2005 Aerial of the Mining Site
 - D. Copy of 1970 Lease of Mining Site from Charles Parker to SS&G.
 - E. Transcript of oral testimony presented to SMAC.
3. **Supplement To Application #2** submitted to Land Development Services on March 6, 2007 by Larry Derr including (Attachment 4):
- A. Memo from Larry Derr dated March 6, 2007
 - B. Photo A depicting portions of mine site owned since 1942, acquired in 1965 and unmined in 1972 and the subject of this application.
 - C. Photo B: Depicting approximately 2-3 acre area yet to be mined within 10 acres which is subject of this application.

REVIEW CRITERIA/FINDINGS:

ORS 197.763 Conduct of Quasi-Judicial Hearings

The decision concerning an application for a Limited Exemption Certificate is made by the Board of Commissioners after a land use hearing. The notice of hearing was mailed to property owners within 1000 feet of the subject site and to interested agencies at least 20 days prior to the public hearing.

Surface Mining Ordinance(SMO)

The following Sections of Articles IV and V of the Surface Mining Ordinance are pertinent to this application.:

Article V Section 5.2 - Each new limited exemption certificate must be accompanied by an application fee.

Finding 1: The applicant submitted the required completed Columbia County Limited Exemption application and fee of \$970.

Article IV Section 4.1 -Exempt Lands

Except as otherwise provided in this ordinance, nothing in this ordinance requires the reclamation of lands within the surfaces and contours of surface mines in existence on July 1, 1972, or to vertical extensions of those surfaces and contours. The surfaces and contours of such exempt surface mines shall not include those areas over which the landowner or operator merely leveled terrain or cleared vegetative cover. The surfaces and contours of such exempt surface mines shall not include those areas for which there may have been an intent, a goal or proposal to surface mine on July 1, 1972, but on which no actual surface mining had taken place on that date, unless it is established as provided in Section 4.3 below that the landowner or operator had made such an investment in time, money and/or labor as to establish a vested right to surface mine such property

Finding 2:

The subject 10 acre portion of the 113 acre mine was not mined prior to 1972. The Applicant indicates that he intended to mine the 10 acre portion in 1972. However, according to Section 4.1, a mere intent, goal or proposal to surface mine is not sufficient to allow the issuance of a Limited Exemption Certificate. Rather, the Applicant must show that he, or the operator in 1972, established a vested right to mine based on a sufficient investment in time, money and/or labor on that portion of the property in 1972. Whether the Applicant has established a vested right to mine the property depends on his ability to show with substantial evidence in the record that there was a sufficient investment in time, money and/or labor in that portion of the property in 1972 to allow the proposed use under a limited exemption certificate. Vested Rights is a land use principle that has been interpreted over the years in case law. In the context of the Surface Mining Ordinance, the doctrine protects mining uses under a Limited Exemption Certificate. In determining whether the Applicant has invested enough money to make a finding of vested rights, staff finds that the Ratio Test is the primary test to use. The Ratio Test looks at the ratio of the expenses incurred in 1972 to the total cost of the completed project. Other factors that may be considered are the good faith of the landowner, whether or not he had notice of the 1972 changes before starting improvements, the type of expenditures, ie. Whether the expenditures have any relation to the completed project or could apply to various other uses of the land, the kind of project, the location, and ultimate cost. Furthermore, the acts of the landowner should rise beyond mere contemplated use or preparation such as leveling of land, or boring test holes. Staff also finds that case law suggests that in figuring the number for the expenditures side of the ratio, the purchase price of land is not counted, at least absent a showing that a premium was paid attributable to the specific planned use. Furthermore, expenditures that are equally consistent with uses of the property other than those planned by the owner are not taken into account. Finally, LUBA has found that ratios of 1/14 are good enough to establish a vested right, and ratios of 1/47 to 1/50 are insufficient.

As indicated below, staff finds that the Applicant has not demonstrated with substantial evidence in the record that there was a sufficient investment in time, money and/or labor in 1972 to create a present vested right to mine.

The following is a summary of evidence submitted in support of a finding of “vested right to mine” with related Staff findings:

Original Application(Attachment 2):

1. Exhibit A/B-1972 Application and Approved Permit for 113 Acre Site

Finding 3:

These documents confirm that the County approved a 113 acre mining site under the 1972 ordinance which included the subject 10 acre area. However, there is no evidence of the amount of time, money and/or labor spent in 1972 that would justify a vested right to mine under a Limited Exemption Certificate at this point. Furthermore, there is no indication that the equipment expenditure isn't equally consistent with the mining uses of the adjacent mine.

2. Exhibit C-Heimuller Affidavit. Submitted with application for LEC Status(1990 Ordinance)

Finding 4:

Dale Heimuller was the mining manager for SS&G and included statements that he thought the entire 113 acre site including the subject 10 acres had a vested right to mine. As evidence he referred to the lease entered into by the operator in 1970(Attachment 2, Exhibit C) and equipment purchased by SS&G which they would not have purchased if they had not intended to mine the entire property. He did not indicate the nature and amount of investment in the equipment. He also indicated that the 113 acre site permitted under the 1972 ordinance included a farmhouse which he occupied as Operations Manager of the site. Staff finds that without evidence of the amount of the expenditure for the equipment, one cannot determine the ratio of pre-1972 expenditures to the ultimate cost to mine the property, or whether the expenditures are equally consistent with other uses. Additionally, the presence of the farmhouse and barn on the subject 10 acres in 1972 does not support a finding of investment in time, money and/or labor. Staff analyses the impact of the lease, below.

2. Exhibit D-BOC Minutes-1993 Decision to Approve 103 of 113 Acre LEC site.

Exhibit E-Letter from Bruce Hugo Re: His Understanding of 1993 BOC LEC decision.

Finding 5:

The 1993 minutes give some details on testimony received and deliberations of the Board in granting 103 acres of the 113 acre LEC request by SS&G. The testimony focused primarily on water well issues and not whether or not to include the “10 acre homestead site” or whether the 10 acre site was actually vested. Well water issues were not related to any criteria regarding vested rights. Bruce Hugo, who made the motion approving the 103 acre portion of the 113 acre 1972 mining site, stated in an August 17, 2006 letter to Scott Parker (Attachment 2, Exhibit E) that the 10 acres was excluded from the LEC site at that time due to Scott's testimony that he did not intend to immediately mine the homestead site but wanted to reserve the right to do so in the future and Board concerns over the need to resolve water issues related to the mining of that portion of the site. The minutes indicate that Hugo told Parker after the Board's decision “if and when Mr. Parker wished to mine the 10 acre

homestead site, he would need to reapply for that area". Hugo clarifies in his letter that he was suggesting that SS&G "would have to submit another Limited Exemption Certificate application"(Attachment 2, Exhibit E, page 2). Staff finds that neither the 1993 BOC minutes nor Mr. Hugo's letter provide specific documentation as to whether or not "the landowner or operator had made such an investment in time, money and/or labor as to establish a vested right to surface mine.." per Section 4.1 of the SMO. Rather the documents indicate that both Mr. Hugo and the applicant understood that a future application for LEC could be submitted and reviewed under applicable SMO criteria.

3. Exhibit F-Letter from Masogs, from whom SS&G acquired easement rights to an unmined portion of the subject 10 acre area.

Finding 6:

This letter is from the parties who recently agreed to extinguish the access easement across an unmined portion of the subject 10 acre area indicating the need to follow through with terms of the agreement including relocation of a well and alternative access to the Masogs property. Staff finds that although recent acquisition of the access easement would be necessary to mine out the remainder of the 10 acre area should an LEC be granted, no additional evidence is provided documenting the vested right to mine this area in 1972. Historically, with the easement on the property the area under the easement could not have been mined. The 1970 lease reserves all easements, including the Masogs easement and the two utility easements on this portion of the proposed mine property. Therefore, staff finds that the lease demonstrates the intent to use this property for non-mine purposes in 1972, and is not supportive of vested rights to mine this area under a Limited Exemption Certificate.

4. Supplement To Application #1 /Testimony and Evidence To SMAC on 1/31/07

1970 Aerial Map of the Mining Site (Attachment 3):

Finding 7:

The Applicant used the photo to illustrate the location of the old farm house site on the subject 10 acre area. This area was occupied by the on-site Mining Manager, Dale Heimuller. As indicated above, staff finds that the existence of the old farm house and barn on the subject property does not demonstrate that there was a sufficient investment of time, money and/or labor to establish a present vested right to mine under a Limited Exemption Certificate. Rather, it establishes the intent to use the property for an unknown period for residential purposes. There is no evidence submitted indicating that the Applicant or operator invested in any mining uses of this property by 1972. The house and barn were not removed for mining purposes until after that date.

1990 Aerial of the Mining Site (Attachment 3):

Finding 8:

The Applicant used this photo to indicate that most of the 10 acre area had been mined by 1990.

Staff finds that the fact that the Applicant mined most of this acreage without a permit by 1990 is not evidence that he invested sufficient time, money and/or labor in 1972 to establish a vested right to mine the property at this point.

2005 Aerial of the Mining Site (Attachment 3):

Finding 9:

The Applicant used this photo to indicate that area of the site that had been reclaimed by 2005. Staff finds that the fact that the Applicant reclaimed much of the 10 acre area by 2005 is not evidence that he invested sufficient time, money and/or labor in 1972 to establish a vested right to mine the property at this point.

Copy of 1970 Lease of Mining Site from Charles Parker to SS&G (Attachment 3):

Finding 10:

This lease was for the 113 acre mine site acquired by SS&G of which 10 acres is the subject of this request. Under the terms of the lease SS&G was to pay a per yard royalty to the lessor with a minimum of \$15,000 each year. The lease was for five years with options to renew for an additional 45 years for a total of 50 years or to 2020. The lease was subject to all the easements that existed on the property, including a utility easement in favor of BPA, and an easement in favor of Crown Zellerbach. The lease was also subject to the access easement referenced in the letter from the Masogs. The easements were all on the subject 10 acres. The lease was for an existing mined area as well as for the residence and barn which have now been removed from the 10 acre area. Staff finds that the lease fails to demonstrate that the Applicant's lease price was based on the ultimate use of the 10 acres for mining. To the contrary, because the area the Applicant is seeking to currently mine, was subject to 3 easements and held a residential use, the lease indicates that the Applicant was aware that mining of this area may be impermissible at the time of the lease agreement. Therefore, staff finds that the lease does not demonstrate sufficient investment in time, money and/or labor in 1972 to establish a vested right to mine the property under a Limited Exemption Certificate.

Transcript SMAC Minutes-10-25/06-Testimony of behalf of Applicant(Attachment 6)

Finding 11:

During the October 25, 2006 SMAC meeting Scott Parker reviewed the above documents. He noted that a 1972 permit to mine for the entire 113 acre site included the subject 10 acres. He also indicated that the 10 acres excluded from the 113 acre site in the 1993 Board decision to grant a Limited Exempt Certificate for the SS&G mine site was not specifically described but generally included the old farm house site and was all mined except the 2 to 3 acres that SS&G wants to mine now, by 2005. Scott Parker, Attorney Larry Derr, Dale Heimuller and Bruce Hugo presented evidence previously submitted to the County in the Original Application. Scott Parker indicated that substantial investment in equipment and employees was made since 1977 when he took over with the intent to mine the entire 113 acre site. Staff finds that testimony offered in the SMAC meeting generally elaborated evidence submitted in the Original Application(see Staff findings regarding the

Original Application above). The 1971, 1990 and 2005 aerals submitted to SMAC demonstrated the progress of mining and reclamation after 1972, but do not contribute to the documentation necessary to determine 1972 vesting to mine the area. In addition the investment of money in equipment and employees in 1977 is irrelevant to a determination of whether the Applicant established a vested right in 1972.

5. Supplement To Application #2 Submitted to LDS on 3/6/07(Attachment 4)

Finding 12:

The Applicant's attorney, Larry Derr, submitted a supplemental memorandum dated March 6, 2007, summarizing evidence and arguments previously submitted to LDS and to SMAC in favor of granting a LEC to the subject 10 area. Two aerial photos were submitted which were intended to clear up confusion in the application and testimony before SMAC as to exactly where the subject 10 acre area was located. A photo(Photo A) depicts portions of mine site owned since 1942, acquired in 1965 and an area which was unmined in 1972(the subject 10 acre area). A photo(Photo B) depicts an approximately 2-3 acre area yet to be mined within the 10 acres which is subject of this application. Mr. Derr sums up the applicant's arguments in favor of a vested right to mine the subject 10 acre area, as follows:

1. Vested rights analysis under the 1990 Surface Mining Ordinance(Section 4.1)-Facts in existence in 1972. Mr. Derr notes that most of the subject site had been mined by 1990 when the first application for Limited Exempt status was filed. He stated that analysis previously submitted with the application and to SMAC proves a vested right and that the Board concurred in the 1993 decision and did not include the area in the Limited Exempt site for other reasons related to water issues.

2. Vested Rights/Estoppel Argument After 1972.

He noted that the Surface Mining Administrator(DOGAMI) recommended approval of the Limited Exemption in part because the County had permitted the area to be mined up until 1990 establishing a precedent that should not be set aside. He observed that testimony before SMAC concerning the investment of substantial resources in the mining of the 10 acre area since 1972 with knowledge and consent of the County confers a right to complete the mining of the area under the legal principle of estoppel.

Staff finds that Mr. Derr's supplement to the application referenced previously submitted information, but offered no new evidence as to a vested right in 1972 to mine the subject 10 acre area under a Limited Exemption Certificate. Staff finds that there is no evidence that the Board concurred that the 10 acres was vested in 1993. To the contrary, the Board denied Limited Exemption Status for the 10 acres in 1993. Regardless, the vested rights analysis must be made anew under the current Application. The Applicant is required to prove with substantial evidence in the record that he has a vested right that was established in 1972. Mr. Derr also offers a new estoppel argument based on County approvals and investments made in mining the area between 1972 and 1990 in reliance on the 1972 permit. Staff finds that in 1993, the Board of County Commissioners was very clear that in order to legally mine in the 10 acre portion of the property, the Applicant would have to re-apply

for a new Limited Exemption Certificate. Staff finds that at no time has the County condoned mining of property that is not subject to a valid permit. Furthermore, even if the Applicant established that the County permitted the mining to occur on the areas already mined, the County has clearly not allowed mining in the areas that are yet to be mined.

Section 4.3. Certificate Required.

Those surface mines which qualify according to the provisions of Section 4.1, which have not been abandoned, and for which a Limited Exemption Certificate is obtained from the Board will be granted limited exempt status. Such limited exempt status shall also extend to the entire surface mining site, as it existed on July 1, 1972, associated with any such exempt surface mines. Surface mining is prohibited at such surface mining sites unless the landowner or operator has a valid, current Limited Exemption Certificate.....

Finding 13:

Staff finds that the applicant has Limited Exempt status on 103 acres and must demonstrate that the requested 10 acre area meets the requirements for limited exempt status in Section 4.1. Bruce Hugo offered an argument at the January 31, 2007 SMAC meeting based on language in Section 4.3 of the SMO that Limited Exempt status shall extend to the entire surface mining site associated with any exempt surface mine. He interpreted that as meaning that the entire 113 acre SS&G surface mining site permitted under the 1972 ordinance should be granted Limited Exempt status. Staff finds that this interpretation is in error since in order for a mining site to obtain Limited Exempt status it must meet the requirements of Section 4.1; namely have been mined or be able to demonstrate vested right to mine as of July 1, 1972. For purpose of Section 4.3, the surface mining site in this case was the 103 acres granted Limited Exempt status in 1993, not the 113 acres permitted under the 1972 ordinance. Section 4.3 goes on to say that surface mining isn't allowed outside the limited exempt surface mine unless an operating permit is obtained. Staff finds that Section 4.3 does not allow the Board to grant a Limited Exemption Certificate for the remaining 10 acres if the Applicant has not established that he has a vested right to mine.

Section 4.4 Application and Review.

An application for a Limited Exemption Certificate shall be made to the Administrator using the established form...The landowner or operator must demonstrate that the site, or any portion of the site, qualifies for limited exempt status. The Administrator shall review each such application and make a recommendation to the Board based on the evidence and documentation provided, and on-site inspection if necessary. In reviewing such applications, the Administrator shall consider the advice and recommendations of the Committee. If the Administrator refuses to recommend approval of the application for a Limited Exemption Certificate he or she shall notify the landowner or operator in writing, specify the reasons for the refusal and give the landowner or operator an opportunity to supply additional documentation to support the application. If the landowner or operator cannot provide the required documentation, the Administrator shall recommend that the Board deny the application for a Limited Exemption Certificate. If the Board denies the application for a Limited Exemption Certificate, the landowner or operator must obtain an operating permit

before commencing or continuing surface mining. If the application for a Limited Exemption Certificate is denied by the Board, the landowner or operator may also request an appeal hearing before the Board pursuant to Section 2.4 of this ordinance.

Finding 14:

The Applicant has filed the necessary application form. Bob Brinkmann(DOGAMI) prepared preliminary findings and recommendations for approval of the application(See Attachment 5) which were presented to the the Surface Mining Advisory Committee. Since this application depends on a thorough legal review of evidence related to the vesting criterion in the SMO, DOGAMI's preliminary findings and recommendations were substantially revised following the SMAC meeting taking into consideration testimony at the meeting and all of the supplements to the original application submitted by the applicant .

Section 4.6 Expansion.

Expansion of surface mining under limited exempt status into previously unmined land which exceeds 2,500 cubic yards of material excavated, disturbed or sold or which affects more than one acre in any fiscal year is prohibited unless the landowner or operator applies for and receives an operating permit. An operating permit must be obtained before the expansion occurs. Expansion of a site before the operating permit is issued constitutes surface mining without a permit and is prohibited by Section 5.1 of this ordinance.

Finding 15:

Staff finds that if the Board does not grant the Applicant a Limited Exempt Certificate for the proposed 10 acres, the Applicant must apply and receive an Operating Permit for the subject 10 acres.

ATTACHMENTS:

1. (Unassigned)
2. Application; Original Application(1/8/07) with Exhibits A-F.
3. Supplement #1(1/31/07)
4. Supplement #2(3/6/07)
5. Surface Mining Administrators Report(1/24/07)
6. Transcript of SMAC meeting(1/31/07)

SURFACE MINING ADMINISTRATOR'S RECOMMENDATION:

Bob Brinkmann of DOGAMI prepared preliminary findings and recommendations to the SMAC for approval of the application(Attachment 5). He found that evidence was adequate to support vesting but did not specify what evidence he was relying on for this conclusion. He also found that vesting is supported by the fact that the applicant had mined the area between 1972 up to and beyond 1990 when the current Surface Mining Ordinance was adopted. LDS staff and County Counsel's Office reviewed the report in light of all the evidence submitted and the testimony presented at the SMAC meeting on 1/31/07 and prepared revised findings and recommendations in this report.

SURFACE MINING ADVISORY COMMITTEE(S MAC) RECOMENDATION

SMAC recommended approval of the Limited Exemption Certificate request at their meeting on January 31, 2007 with the findings and recommendations contained in DOGAMI's report with an added finding "that the applicant has shown substantial evidence that the parcel, 10.2 acres plus or

minus, in question has both been considered as vested from the 1972 ordinance on and that the applicant has shown that there has been sufficient or substantial time, effort and money invested in this parcel which was based on the entire site of 113 acres that were limited exempt"(See meeting transcript in Attachment 6)

STAFF RECOMMENDATION

Based on the above findings, Staff recommends denial of the application for Limited Exemption Certificate for the subject 10 acre area adjacent to the SS&G Mine.

Attachment 2
Supplemental Findings

1. The Applicant filed an application for a Surface Mining Limited Exemption Certificate to modify the geographic boundaries of Limited Exemption Certificate #05-0015, on January 8, 2008. However, the Applicant was told, and acknowledged that there is no process under the County's Surface Mining Ordinance to expand an existing limited exemption certificate without seeking an Operating Permit. On that basis, the Applicant requested that the Board reconsider the 1993 Limited Exemption Permit approval, which excluded the subject 10 acres. The Board denied that request on January 24, 2007. A copy of the minutes of the January 23, 2007, and January 24, 2007, Board Meetings are attached hereto as Exhibits 1 and 2, and are incorporated herein by this reference. Thereafter, the Applicant has, along with staff, treated the application as having been amended to request a new limited exemption certification for the 10 acres, as opposed to a request to amend the existing Certificate. On January 31, 2007, the Applicant amended the application with supplemental materials provided to the Columbia County Surface Mining Advisory Committee providing materials relevant to the vesting criteria in SMO Section 4.1. Therefore, the Board finds that the Application for a new Surface Mining Limited Exemption Certificate was not complete until January 31, 2007, when the Applicant submitted the missing information.

2. The Applicant relies heavily on the evidence he provided to the Board of County Commissioners in 1993, and what the Board "should" have done at that time. The Board finds that the Applicant failed to appeal that 1993 decision. If the Applicant felt that the Board in 1993 failed to apply the criteria, the Applicant should have appealed the decision. The Board further finds that the fact that past Commissioners submitted testimony that they got the decision wrong in 1993, is not relevant to this Board's decision. The Board finds that the Applicant has the burden to demonstrate with substantial evidence in the record to this Board that he had made such an investment in time, money and/or labor as of 1972 as to establish a vested right to surface mine the remaining 10 acres under a Limited Exemption Certificate. The Board finds that the Applicant has not met his burden, as set forth in the staff report, and below.

3. The Applicant argues that despite the 60 foot wide easement, the Applicant has always been entitled to mine the easement area. The Board finds this argument to be inconsistent with past statements of the Applicant. As shown in the minutes of the Surface Mining Advisory Committee's meeting on January 31, 2007, page 15, the Applicant's attorney stated that the 60 foot stip was not mined between 1972 and 1990 because it was subject to an access easement to benefit the adjoining land owner who had his house in the back. The Board further notes that the actual area used for the driveway is immediately adjacent to the subject property. Therefore, if the Applicant were to mine the remainder of the easement, as he indicated he could, he would have to jump over the driveway and cause an island effect for the driveway. The Board very much doubts that the Applicant could do so in a way that would not undermine the safety of the access. The Board presumes that is why the Applicant

did not mine the area before 1990, and why the Applicant has waited to seek approval to mine the area until he got agreement from the neighbor to extinguish the easement. The Board finds the Applicant has not submitted sufficient evidence of his right and ability to mine that area to overcome the obvious presumption that the access easement was inconsistent with mining in 1972. The Board finds that the fact that the easement has not yet been officially extinguished is yet more information tending to point towards the fact that the Applicant had not expended a sufficient investment in time, money and/or labor as of 1972 as to establish a vested right to mine the remaining 10 acres under a new limited exemption certificate.

4. The Applicant argues that the Surface Mining Ordinance does not require that the investment in time, money or labor be on the portion of the property for which the vested right is sought. The Board disagrees. The Surface Mining Ordinance is designed such that a mine owner or operator is entitled to a limited exemption certificate on the portion of property that was either actually being mined in 1972 or, on which the owner/operator can establish is subject to a vested right to mine based on a sufficient investment in time, money and/or labor as of 1972. The Board interprets its code to require the investment of time, money and/or labor on the specific portion of property argued to be vested. In this case, the Applicant has shown very little in the way of any investment specifically related to the 10 acres purported to be vested. The Applicant argues that most of that property was mined by 1993. The Board does not dispute that there are only 2-3 acres remaining unmined within the 10 acres subject to this request. However, the 7-8 acres was indisputably unmined in 1972 and was therefore not entitled to exemption under a Limited Exemption Certificate.
5. The Applicant argues that he was operating a surface mining site under the 1972 Ordinance and is therefore entitled to mine the entire 113 acre surface mining site. The Board disagrees. The 1972 Ordinance established some mines as being grandfathered. The Ordinance also required yearly renewals. The Applicant infers that the fact that 113 acres was approved meant that he had the right to mine 113 acres forever. Rather, the Ordinance issued approval to mine for one year periods. Regardless, the Board finds that even if the Applicant had established a non-conforming use based on the surface mining use as of 1972, he does not have the right to expand the non-conforming use. Nor, does he have the right to create health and safety issues by failing to comply with reclamation and setback requirements. The Board interprets its code to require an Operating Permit in order to expand a Limited Exempt mine.
6. The Board finds that the Applicant has not demonstrated he has met the ratio test. The Applicant has yet to extinguish the easement constituting the majority of the un-mined area, and failed to provide any evidence that he expended funds that would allow him to mine that area by 1972. The Applicant did not demonstrate that he paid a premium to be able to mine this land. As for stripping costs, the applicant did not provide any evidence that he actually stripped the 10 acre portion by 1972. To the contrary, there is evidence in the record, that the 10 acres was not stripped as of 1972. Furthermore, the easement area includes a private

road and has clearly not been stripped of overburden. With respect to the equipment, Dale Heimuller testified that the equipment purchased by 1972 was not purchased specifically for use on the subject 10 acres. The Board finds that it is unlikely that the Applicant bought sufficient equipment prior to 1972 for the then current mining operation, which clearly did not include the 10 acre portion. The Board also finds that any equipment purchased prior to 1972 is likely depreciated in value. Finally, in 1972, there was a dwelling/farmhouse on the subject 10 acres. By 1972, the Applicant had taken no steps to remove the farmhouse. Removal of the farmhouse would have been essential in order to mine the property. There is no evidence in the record that he had expended any time money or labor to remove the farmhouse, or that he had any intent to do so.

7. The Applicant argues that the County is estopped from denying him a Limited Exemption Certificate for the 10 acre portion because it granted a permit for 113 acres under the 1972 Ordinance. As indicated above, the 1972 Ordinance required annual renewals. Therefore, the Applicant misrepresents his entitlement to mine forever under the permit. The County did not need to "revoke" the permit and did not do so. The 1990 Ordinance instituted a new procedure which exempted existing mines from certain of the surface mining regulations, and allowed mining on un-mined portions of existing mines to continue under an Operating Permit. The question here is whether the 10 acres qualifies for the exemption or whether the Applicant should obtain an Operating Permit for the 10 acres. The Board has found that the Applicant has not established a vested right to mine the 10 acres under a Limited Exemption Certificate, and therefore must obtain an Operating Permit. The fact that the Applicant once had a yearly permit to mine up to 113 acres, does not change the fact that he neither mined the subject property by 1972, nor expended such an investment in time, money or labor to establish a vested right to do so.
8. The Board finds that even if the Applicant had established a vested right to mine in 1972, the Applicant has abandoned that right. Testimony in the record establishes that no mining has occurred on the site since 1993 at the latest. The Applicant waived roughly 14 years to exercise any right he might have had to mine the 2-3 acre portion under his vesting theory.

EXHIBIT 1

BEFORE THE BOARD OF COMMISSIONERS FOR COLUMBIA COUNTY, OREGON

WORK SESSION

January 23, 2007

The Columbia County Board of Commissioners met in scheduled session with Commissioner Rita Bernhard, Commissioner Anthony Hyde and Commissioner Joe Corsiglia, together with Sarah Hanson, Assistant County Counsel and Jan Greenhalgh, Board Secretary.

Commissioner Bernhard called the meeting to order.

FISHHAWK ROAD ACCESS:

Dave Hill, Public Works Director, and Lonny Welter, Transportation Planner, came before the Board to discuss a situation with a steep driveway on Fishhawk Road. This was discussed with the Board a couple of weeks ago and believes there is a solution to the problem. By way of some history, the property requested an access permit. The location was safe so he was granted an access permit. The Mist-Birkenfeld Fire Department went out to inspect the driveway, but did not take into consideration how steep the grade was and was issued a temporary permit. With those two permits and septic approval, they were granted a building permit. Lonny was called out to do the final inspection. The driveway was paved but is at a 30% grade. In good conscience, Lonny could not sign off on the final. He noted that the fire department is not signing off on this either. Basically, the owner has a \$100,000 home sitting on a \$100,000 worth of property and is wanting to move in. Lonny feels the County cannot prevent him from moving in, but under what conditions. Lonny would recommend some type of hold harmless to the county. This is a small lot, no turn around at the top, and is over 170' long. Lonny explained the procedure now being incorporated from this point forward to eliminate this problem in the future. Again, Lonny would recommend a hold harmless agreement between the county and the owner before signing off on this. After discussion, the Board directed Lonny to work with Sarah to draft a Hold Harmless agreement and bring it back before the Board for action.

OLD PORTLAND ROAD/GABLE ROAD PEDESTRIAN BRIDGE:

Just to inform the Board, Dave Hill would recommend that the grant agreement for the pedestrian bridge on Gable Road be transferred to the City of St. Helens to administer since they now have jurisdiction of the road. The Board agreed.

RARE PROGRAM AND PARKS MASTER PLAN:

Dave Hill introduced Lorraine Churchill, Assistant Parks Director and Erika Owen, RARE student. Erika presented the Board with information explaining what she is doing to update the Parks Master Plan and the projects she is working on. She is in the process of gathering information to update the plan and will start connecting with public groups soon. She has prepared a survey that she would like to send out to help gather information from the public regarding the county parks. Commissioner Hyde suggested adding a place for comments on the Linear Trail. Roger Kadell also suggested looking into grants for a Dog Park. Erika will add both items. Dave would like the

Board to take some time to review this information and let Erika know if there are additional items they would like added.

Erika gave the Board another survey which is specifically for the Board which is to get their feedback on the county parks and the Master Plan. She asked that the Board review it and she will schedule time with each Board member individually to go over their comments. So far, she has been working on a marketing plan and grant research, Camp Wilkerson, and update the Master Plan.

SCOTT PARKER REQUEST TO RECONSIDER SURFACE MINING ACTION:

Todd Dugdale, LDS Director: As the Board is aware, Scappoose Sand & Gravel (SS&G) began mining back in the 1940's. The County adopted their first Surface Mining Ordinance (SMO) in 1972 and it provided for a Limited Exempt status for mines that pre-existed 1972 under certain criteria. In 1993, SS&G came before the Board and was granted a Limited Exemption for the mining site as shown on the 2005 aerial map, with the exception of the cross hatched acreage in the northeast corner, which is about 10 acres. Scott has indicated that he would like to finish mining that 10 acres. A good share of the mine has already been mined - between 1972 and 1990. Scott is requesting the opportunity to make a case for the 10 acres through the Limited Exempt application process. Under the SMO, an expansion of the Limited Exempt area is not allowed. The request is to have the Board reconsider the 1993 Board decision excluding the 10 acres. They have gathered documentation to support, on reconsideration, adding the 10 acres. A motion by the Board would be necessary to begin the land use process.

Commissioner Bernhard asked about a reclamation plan. Todd believes that Scott has a reclamation plan filed and is very actively involved in reclamation of the site for industrial site. A portion of the site has already been reclaimed and in the process of partitioning the reclaimed portion for industrial use.

Scott Parker, SS&G, 33485 Crown Zellerbach Road, Scappoose & Larry Derr, 425 NW 10th Avenue, Portland, OR 97209: The 1972 SMO was fairly basic, with not a lot of detail, but it clearly exempted existing mines. At that time, application was made and that Exempt status was recognized by the Board. Unfortunately, there is no information remaining, either by SS&G or the County, detailing that. What is clear is that an application was made for the entire 113 acre site and a Limited Exempt Certificate was issued for the entire site. Back in 1972, the land fell into 3 categories: 1) the area that was actively mined which was determined by aerial maps; 2) on almost all of the remainder of the site, the overburden had been stripped and sold; then what was left was the issue of the vested rights argument - a commitment to property that wasn't already mine; and 3) the last was a roughly 10 acre area in the north part of the site. The map shows that 10 acres running down West Lane Road. Larry thinks what was probably being referred to at that time was the 10 acres that ran along the north property line. Scott stated that there was never a metes and bounds legal description for that 10 acres. Between 1972 and 1990, the house was taken out and mining occurred. However, the mining did not include the strip along the north property line because there was an easement for a driveway to serve the adjacent property so that was not available for mining. Within the last year, Scott has made arrangements with the adjacent property owner to relocate the driveway and the easement will be moved to another piece of property that he owns. So that has

been addressed. When the 1990 SMO was adopted, it said that anyone with an exempt status had to come back before the Board to get a Limited Exemption Certificate. Scott came in to do that and Larry submitted minutes of that hearing before the Board. At that time, Dale Heimuller was a Commissioner and submitted an extensive affidavit about the history of the site going back to 1972. Larry also has a letter from past Commissioner Bruce Hugo outlining his memory of that hearing. Both of these statements show that there was really no issue at the 1993 hearing about whether the 10 acres was in one area or another. At that hearing, the Board asked Scott what could be done with the easement. Scott had stated he had no immediate intention to mine the 10 acres but wanted to preserve the ability to do it. The only testimony that was heard had to do with some people in the surrounding area that had been having problems with their wells. They had concerns that work in the pit was effecting their wells. Scott hired some professionals in the field to work with those people on their wells issues. The fact that there was no present intention to mine that area and the fact that there was the potential of these people's problems reoccurring, it caused the Board to hold out the 10 acres and let Scott come back in the future when he is ready to mine the 10 acres. Therefore, it is their belief that the 10 acres was not withheld because it didn't qualify as exempt, rather for the reasons just mentioned.

Scott stated that he is very aggressively reclaiming towards West Lane Road up to the 100 year flood plain to allow building with having to deal with flood issues.

Commissioner Hyde asked what the difference is between a reconsideration as opposed to just applying for an operating permit. Todd stated that the process would be the same, either a reconsideration or an application to mine this area. Larry stated that the SMO doesn't contemplate coming back to revisit a Limited Exempt grant, so there is no process for expansion. The only thing that speaks to expansion is that you establish, once and for all, where the site is exempt and if you want to extend that area, it takes an operating permit. John hasn't looked at the ordinance lately, however Todd has stated that the County is not able to expand a Limited Exempt area without an operating permit. However, John believes that the Board inherent authority to reconsider this. He would suggest this be discussed further in Executive Session to determine the options before making a decision.

When asked about the time frame, Larry stated that there is someone that has already committed to use this property but that can't happen until the property is mined and reclaimed, so time is of the essence. Scott reviewed the arrangement with the adjoining neighbor. He explained that the Surface Mining Committee originally approved the entire site, but because of some concerns with some wells at a later date, Commissioner Hugo took out the 10 acres. Scott stated that, years ago, he submitted a reclamation plan, but that has been lost by the county and himself. He has submitted a new reclamation plan to ensure the County that this entire area will be reclaimed. He went into detail on the easement and why that area wasn't mined. He stated again that when the Limited Exempt status was approved for the site, the Surface Mining Committee approved the entire site. It was past Commissioner Hugo who was holding out because of the well problems that occurred in one area to he put the hammer on the 10 acres and that is why he didn't include the 10 acres.

After discussion, the Board felt the need to meet with staff in Executive Session to discuss the options prior to taking any action.

ANIMAL CONTROL LICENSING DATES:

Roger Kadell and Betty Huser came before the Board. Roger had changed dog license renewal date to January 31st. Betty asked him to review that and consider changing that date to March 1st. Roger feels that, to do everything that he needs to do to keep the program running smoothly, March 1st is a more practical date. This date is the same date as the City of St. Helens, so it will cause less confusion for the public. Roger stated that this will be advertised in the local papers to inform the public of the change in the date. The Board was in agreement and directed staff to prepare an order for final approval.

While present Betty wanted to make the Board aware that the Scappoose Parks & Recreation District owes the County approximately \$21,000 for past elections and will have 3 positions coming up for election which will add an additional \$1,600. Commissioner Bernhard will contact them to set up a meeting to discuss this billing.

PROPOSAL FOR TRAINING FACILITY AT TROJAN:

Fred Butcher previously submitted a proposal and asked to review it with the Board at this work session. However, Mr. Butcher was not present and the matter was canceled until Mr. Butcher rescheduled with the Board.

US BANK BUILDING:

Elliott Michael, 13236 NW McNamee Road, Portland: He is one of the owners of the US Bank building in Old Towne. Mr. Michael gave some personal background on himself. He likes this community and it's where he wants to live with his family. He has been working with the Downtown group to enhance the area. He is very community minded and has given a lot to this community. He explained some of the plans he has for the building and, because his is very family oriented, he will be very conscience about what can and cannot go in there. His purpose here today is to request an easement from the county for a rear stairwell out of the back of the building. He is not asking for any parking spaces from the county. He spoke with Bill Potter on this and Bill had asked about an opening on the side of the building. Mr. Michael explained the process involved with doing that and determined that it would be cost prohibitive. Commissioner Bernhard feels that, because this is a private company, there should be some fee involved so the County is not just giving away the easement. Commissioner Corsiglia suggested a discount for county employees for the rock gym. Commissioner Hyde feels that would benefit the employees and the county both because of the risk management effect. Commissioner Corsiglia also feels it would be a great community service for the kids. Commissioner Bernhard just wants to be able to justify the reason for giving away an easement. Elliott made a suggestion that he pay the county a monthly fee of \$50 for the easement, and he would landscape and maintain the area. Commissioner Bernhard would be comfortable with that, as long as there is some monetary benefit to the county. After discussion on some different options for payment to the county, John stated that he would draft an easement and review it with the Board prior to any action.

EXECUTIVE SESSION UNDER ORS 192.660(2)(h):

The Board recessed the regular session to go into Executive Session as allowed under ORS 192.660(2)(h). Upon coming out of Executive Session, no action was taken by the Board.

EMERGENCY MANAGEMENT POSITION:

Commissioner Hyde brought up the issue of the new proposed Emergency Management position. He reviewed his discussions with the stakeholders involved in the funding of this position. Basically, we are two units short of funding the position but feels the commitment is there. Commissioner Bernhard is concerned with losing a very qualified candidate and feels there will be adequate participation to fund the position. Commissioner Corsiglia still has some concerns with the agreements and funding being finalized, however agrees the position is needed and his concerns have been minimized. After discussion, approval was added to the consent agenda. Commissioner Corsiglia would like a process set up where the Board can see when the funding comes in.

With nothing further coming before the Board, the meeting was adjourned.

Dated at St. Helens, Oregon this 23rd day of January, 2007.

NOTE: A tape of this meeting is available for purchase by the public or interested parties.

**BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON**

By: _____
Rita Bernhard, Chair

By: _____
Anthony Hyde, Commissioner

Board Secretary:

By: _____
Joe Corsiglia, Commissioner

By: _____
Jan Greenhalgh

EXHIBIT 2

COLUMBIA COUNTY BOARD OF COMMISSIONERS
BOARD MEETING

STAFF MEETING MINUTES

January 24, 2007

The Columbia County Board of Commissioners met in scheduled session with Commissioner Rita Bernhard, Commissioner Joe Corsiglia, together with John Knight, County Counsel, Sarah Hanson, Assistant County Counsel, and Janet Wright. Also present was Jean Ripa, Human Resources Director and Todd Dugdale, LDS Director.

Commissioner Bernhard called the meeting to order.

PERS BILL:

Jean Ripa provided information to the Board on a bill from PERS for Stan Mendenhall.

CLASSIFICATION STUDY:

Jean discussed Bill Potters report on the Classification and Compensation study. The Board suggested this be put on a work session for further discussion.

SCOTT PARKER REQUEST FOR RECONSIDERATION:

Commissioner Corsiglia moved and Commissioner Bernhard seconded to deny the request from Scott Parker for reconsideration and encourage him to apply for an operating permit. The motion carried unanimously.

The Board would urge the Surface Mining Committee to include high wall fencing around the project site and/or along West Lane Road. They also need to have a controlled access to their site.

TERRY DEATON MODIFICATION:

After some discussion, Commissioner Corsiglia moved and Commissioner Bernhard seconded to approve Final Order No. 13-2007, "In the Matter of the Applications of Terry Deaton for a Modification of a Condition of Preliminary Partition Approval and Modification of Columbia County Road Standards". The motion carried unanimously.

Commissioner Corsiglia moved and Commissioner Bernhard seconded to authorize Todd Dugdale to sign the agreement between Terry Deaton and Columbia County. The motion carried unanimously.

EXECUTIVE SESSION UNDER ORS 192.660(2)(h)(d):

The Board recessed the regular session to go into Executive Session as allowed under ORS 192.660(2)(h)(d). Upon coming out of Executive Session, Commissioner Corsiglia moved and

Commissioner Bernhard seconded to authorize retaining Bullard-Smith to handle the Road Department arbitration. The motion carried unanimously.

With nothing further coming before the Board, the meeting was adjourned.

Dated at St. Helens, Oregon this 24th day of January, 2007.

NOTE: A tape of this meeting is available for purchase by the public or interested parties.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

By: _____
Rita Bernhard, Chair

By: _____
Anthony Hyde, Commissioner

Recording Secretary:

By: _____
Jan Greenhalgh

By: _____
Joe Corsiglia, Commissioner