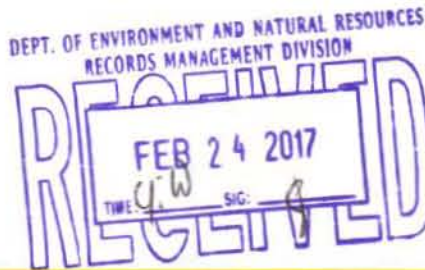




Silangan Mindanao Mining Co., Inc.



24 February 2017

DENR-MINES AND GEOSCIENCES BUREAU
Records Management Section

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

DENR Compound, Visayas Avenue
Diliman, Quezon City



Attention: **Regina Paz. L. Lopez**
DENR Secretary

Subject: Mineral Production Sharing Agreement ("MPSA") No. 149-99-XIII,
of Silangan Mindanao Mining Co., Inc. ("SMMCI")

Dear Sirs:

We refer to your letter to SMMCI dated 13 February 2017 ("**Letter**"), directing SMMCI to show cause why MPSA No. 149-99-XIII "*should not be cancelled pursuant to [the DENR's] mandate and specific provisions of the Mining Act and other existing applicable laws, and rules and regulations that protect watersheds and their ecological services.*"¹ In the Letter, you claim that the contract area of MPSA No. 149-99-XIII is "*within a watershed such that in case mining operation will be pursued therein, said operation, given its extractive, and disruptive nature, will cause impairment of the ecological functions of that watershed.*"

We now state, in response to your Letter, that MPSA No. 149-99-XIII should not be cancelled because:

1. There is no legal basis for its cancellation.

The DENR may not cancel or terminate MPSA No. 149-99-XIII without any clear factual and legal bases. In the same way that private entities engaged in the exploration, development, and utilization of natural resources like SMMCI are required to strictly comply with all pertinent legal and regulatory requirements, so should the DENR discharge its mandate to enforce all mining and environmental rules and policies within the bounds of 1987 Philippine Constitution and applicable laws. The fact that the Revised Forestry Code (*Presidential Decree No. 705*) directs that "*all measures shall be taken to protect the forest resources from destruction, impairment and depletion*" and the Mining Act (*Republic Act No. 7942*) requires the State to "*enhance growth in a way that effectively safeguards the environment and protect the rights of affected communities*" does not give the DENR Secretary the unilateral discretion and authority to declare certain areas closed to mining operations, especially after mining tenements or contracts have been duly issued or executed and

¹ The Letter was served on SMMCI at the close of business hours on 17 February 2017.

implemented by the contracting parties, *i.e.*, the Republic of the Philippines and the private contractor, in respect of such areas following all relevant Constitutional, statutory and regulatory requirements and procedures.

As you must be aware, Philippine law prohibits mining only in watersheds that have been proclaimed, designated or set aside pursuant to law or presidential decrees, presidential proclamations or executive orders as *watershed forest reserves* (*i.e.*, *proclaimed watershed forest reserves*) or as *critical watersheds*. On the other hand, your Letter purports to cancel MPSA No. 149-99-XIII notwithstanding that it is situated outside proclaimed watershed forest reserves and critical watersheds.

As you should also be aware, before MPSAs are issued or executed, the location maps/sketch plans supporting mineral agreement applications are plotted by the Mines and Geosciences Bureau ("**MGB**") against the DENR's control maps to confirm whether the proposed contract areas are free or open to mining applications and then transmitted by the MGB to the relevant regional DENR sectors including the Land Management Services, Forest Management Services and Protected Area Wildlife Coastal Zone and Management Services, local government units (barangay, municipal and provincial levels), and governmental agencies affected by such mineral agreement applications for review and appropriate action. A mineral agreement application will not be processed, let alone be approved, unless and until the relevant DENR sectors, local government units, and governmental agencies issue the requisite area status/consent/clearance. It is only after the proposed contract area has been confirmed to be free or open to mining applications will the applicant be notified and required to pay the corresponding clearance fee.

SMMCI followed this legal process to the letter before MPSA 149-99-XIII was issued in its favor. In fact, it took SMMCI more than four (4) years to have its mining application approved. This is clear proof that SMMCI went through the rigorous process prescribed by law, which included confirming that the contract area covered by MPSA 149-99-XIII is the proper subject of an MPSA, before it obtained its MPSA. A copy of the Area Status/Clearance for Mining Right Application dated 20 December 1999, and issued in SMMCI's favor as assignee of Philex Gold Philippines, Inc., in respect of MPSA No. 149-99-XIII is attached as **Annex "A"**.² Also, a location map showing the location of the 2,879-hectare contract area of MPSA No. 149-99-XIII in Mainit and Placer, Surigao del Norte is attached as **Annex "A-1"**. A map showing the nearest proclaimed watershed forest reserve in the area³, is attached as **Annex "B"** and, using that government-published map of the government, SMMCI prepared the map attached as **Annex "B-1"** which shows the proclaimed watershed forest reserve in the area vis-à-vis the contract area of MPSA No. 149-99-XIII. Also, the published list of the

² As indicated in the annexed Area Status and Clearance for APSA 40 (*i.e.*, the original application for MPSA 149), the DENR required the exclusion of 900 hectares from Parcel I of APSA 40 because said area overlapped with the Surigao Watershed Reservation. The eventual reduction in the final contract area of MPSA 149 and the maps attached as Annexes A-1 and B-1 evidence PGPI's (as SMMCI's predecessor-in-interest in respect of MPSA 149) compliance with such directive.

³ www.geoportal.gov.ph/viewer, last accessed on February 23, 2017.

proclaimed watersheds⁴ is attached as **Annex "B-2"**. These documents, copies of all of which are with the DENR, foreclose any misimpression that the contract area of MPSA No. 149-99-XIII is within proclaimed watershed forest reserves and critical watersheds.

The subject contract area may not now be deemed to be within proclaimed watershed forest reserves or critical watersheds by your unilateral declaration. First, the DENR has no authority to declare certain areas as watershed forest reserves or critical watersheds; that authority is lodged with the President of the Republic of the Philippines pursuant to Section 18 of the Revised Forestry Code (*Presidential Decree No. 389, as amended by Presidential Decree No. 705*). In fact, the DENR Secretary may not arrogate that authority to herself by invoking the doctrine of qualified political agency because the same Section 18 unequivocally limits the power of the DENR Secretary to reserving or establishing "*any portion of public forests or forest reserve as site or experimental forest for use of the Forest Research Institute.*" Second, and more importantly, declaring that contract area now closed to mining operations (after MPSA No. 149-99-XIII was duly issued or executed and after SMMCI invested billions of pesos in exploration activities) will unconstitutionally impair MPSA No. 149-99-XIII and violate SMMCI's constitutionally vested rights with respect to such MPSA.

Furthermore, even if the MPSA No. 149-99-XIII contract area had been inside a watershed that has not been proclaimed or designated by the President of the Republic of the Philippines as a *forest reserve* or *critical watershed*, the assertion that the mining operations to be undertaken under MPSA No. 149-99-XIII will necessarily "*cause impairment of the ecological functions of that watershed*" is baseless or, at best, speculative. Please note that, before mining contractors may transition to the commercial phase of their respective MPSAs and undertake actual mining operations, they will have to secure environmental clearance certificates ("**ECCs**") from the Environmental Management Bureau ("**EMB**") of the DENR. As you should know, the EMB will issue an ECC only after it is satisfied that the proposed project or undertaking will not cause significant negative environmental impact. After a thorough assessment by EMB and after following the prescribed consultation with stakeholder communities, the ECC will (i) certify that the project proponent is committed to implementing the Environmental Management Plan which it had submitted to the EMB for approval and (ii) set out specific measures that the project proponent has to undertake before and during the operation of a project, and in some cases during the project's abandonment phase, to mitigate any identified environmental impacts. Thus, your claim that future mining operations under MPSA No. 149-99-XIII, which by then should be covered by the requisite ECC/s, will "*impair ecological functions*" is wholly misguided.

Finally, we stress that an MPSA may only be terminated or cancelled on grounds provided in the MPSA itself or under applicable laws or regulations. Under MPSA No. 149-99-XIII, the DENR may terminate on the following grounds:

⁴ www.forestry.denr.gov.ph, last accessed on February 23, 2017.

- (a) expiration of the term of MPSA No. 149-99-XIII;
- (b) withdrawal from the MPSA by SMMCI;
- (c) violation of the terms and conditions of MPSA No. 149-99-XIII by SMMCI;
- (d) failure of SMMCI to pay taxes, fees/charges or financial obligations for two consecutive years;
- (e) false statement or omission of facts by SMMCI;
- (f) any other grounds provided under the Mining Act and its implementing regulations (*DENR Administrative Order No. 21-10*) or other applicable laws;
- (g) failure of SMMCI without valid reason to commence commercial production within the prescribed period; and
- (h) failure of SMMCI to conduct its activities in accordance with approved Work Programs.

The implementing regulations of the Mining Act provide for the following additional grounds:

- (a) any material misrepresentation or false statement made to the Mines and Geosciences Bureau at any time before or after the approval or conclusion of MPSA No. 149-99-XIII; and
- (b) the project under MPSA No. 149-99-XIII ceases to be viable and its continued operation would require additional costs to the economy.

Your Letter fails to cite any of the abovementioned grounds as basis for your action. Thus, it appears that you have no legitimate and lawful cause to terminate MPSA No. 149-99-XIII.

2. You have not observed due process.

Even if you had cited or invoked any of the abovementioned grounds, you still have no basis for unilaterally and immediately terminating or cancelling, or publicly threatening to terminate or cancel⁵, MPSA No. 149-99-XIII. MPSA No. 149-99-XIII, as you must also realize, is a contract drafted by the Republic which provides, in case of any dispute or disagreement arising out of or relating to its *validity*, interpretation, enforceability or performance, that SMMCI and the Philippine Government (acting through the DENR) must first try and settle the matter amicably within a one-year curing period, a procedure that you have unilaterally chosen to disregard and violate. In fact, failing an amicable resolution, the parties must arbitrate and resolve their disagreement in good faith under Republic Act No. 876. In other words, the one-year curing period and mandatory arbitration under MPSA No. 149-99-XIII preclude you from taking any precipitate unilateral and immediate action against SMMCI.

3. You have plainly acted in bad faith.

⁵ Prior to the personal service of the Letter to SMMCI on the close of business hours of 17 February 2017, or on 14 February 2017, the DENR Secretary held a press conference announcing the cancellation of 75 MPSAs. One of the MPSAs mentioned was MPSA No. 149-99-XIII.

As the foregoing shows:

a) MPSA No. 149-99-XIII was issued following all relevant legal requirements and procedures;

b) there is no valid and lawful basis to question, cancel or terminate MPSA No. 149-99-XIII;

c) the facts establishing items (a) and (b) are known to the DENR and reflected in documents on record, while the laws relevant to those same items should be known to you as regulator of the mining and environment sectors, who has sworn to uphold the Constitution and the laws; and

d) MPSA No. 149-99-XIII contains dispute resolution mechanisms binding the parties to the manner of resolving of any disagreement between them including those pertaining to the validity of MPSA No. 149-99-XIII and these mechanisms preclude the taking of unilateral prejudicial and injurious actions.

Your actions have been taken with a complete and wanton disregard of all these basic considerations and for the fair treatment of a party whom the Republic has asked to act, and with whom it has contracted, as its partner in the mining industry for the development of the country, which have resulted not just in actual losses in billions of pesos but in significant damage to the reputation of the company and the erosion of investor confidence.

We trust that this clarifies matters and addresses your concerns. In case it has not, we invoke our rights both to the one-year curing period and the arbitration process imposed by the Republic in MPSA No. 149-99-XIII for the resolution of whatever remaining concerns you may have, before you take any more precipitate and highly prejudicial and injurious actions against us.

In the meantime, we likewise reserve our other rights and remedies to take all appropriate action in the premises including suits for personal and criminal liability as well as actions for enforcement and compensation (which will include full reparation for and loss of earnings from our investments) under the relevant investment treaties signed by the Republic.

Very truly yours,

JEROME JOVELLANA
Chief Finance Officer

Copy furnished:

Mario Luis J. Jacinto

Director (and concurrent Undersecretary for Mining)

Mines and Geosciences Bureau

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