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**NUCLEAR REGULATORY COMMISSION**

Title: Homestake Mining Company of California

Docket Number: 40-8903-LA

ASLBP Number: 23-980-03-LA-BD01

Location: North Bethesda, Maryland

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

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In the Matter of: :

HOMESTAKE MINING COMPANY : Docket No.

OF CALIFORNIA : 40-8903-LA

:

(Denial of License : ASLBP No.

Amendment Request) : 23-980-03-LA-BD01

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Wednesday, September 20, 2023

One White Flint North

North Bethesda, Maryland

BEFORE:

MICHAEL M. GIBSON, Chair

G. PAUL BOLLWERK, III, Administrative Judge

SUE H. ABREU, Administrative Judge

1 APPEARANCES :

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P-R-O-C-E-E-D-I-N-G-S

3:00 P.M.

JUDGE GIBSON: I'm Michael Gibson with the Atomic Safety and Licensing Board Panel. We are here today for a status conference on Homestake Mining Company of California, Docket No. 40-8903-LA.

Sitting with me on this Board to my right are Judge Bollwerk and to my left, Judge Sue Abreu.

This status conference is being transcribed and the transcript will be available on the NRC website in a few days. We've also made a listen-only telephone line available to the public.

Now in addition to our court reporter, our supporting cast here includes our law clerk, Emily Newman; Twana Ellis, our administrative assistant; and our IT assistant, Andy Wilkie.

At this point, I would like to have the announcements of counsel beginning first with Homestake.

MR. WALSH: Thank you, Your Honor. My name is Tim Walsh. I'm with the law firm Pillsbury Winthrop Shaw Pittman here in Washington, D.C. and I am outside counsel for Homestake Mining Company of California.

With me is my colleague, Ashley Meredith,

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1 and I believe on the phone listening to this is Ellie  
2 Rudolf who is the Assistant General Counsel for  
3 Barrick Gold which is the company that owns Homestake  
4 Mining Company.

5 JUDGE GIBSON: Could you spell the owner,  
6 if you will?

7 MR. WALSH: Yes, Barrick Gold. It's two  
8 words. B-A-R-R-I-C-K and G-O-L-D.

9 JUDGE GIBSON: Okay. Thank you so much.

10 MR. WALSH: You're welcome.

11 JUDGE GIBSON: How about the NRC staff?

12 MR. ROACH: Yes, good afternoon, Your  
13 Honors. My name is Kevin Roach. I'm counsel for the  
14 NRC staff. To my left here is Jane Marshall. She's  
15 the Director of the Division of Decommissioning,  
16 Uranium Recycling, and Waste Programs. And to my  
17 right is my co-counsel. I'll let him introduce  
18 himself.

19 MR. BERNSTEIN: My name is Kevin Berstein.  
20 I'm a counsel for the NRC staff.

21 JUDGE GIBSON: Thank you. Okay. I think  
22 the first order of business today would be for the NRC  
23 staff to let us know whether or not it has any  
24 objection to the Licensing Board granting Homestake's  
25 hearing demand?

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1 MR. ROACH: No. We have no objection to  
2 the Board granting the hearing demand.

3 JUDGE GIBSON: Okay, very well. Thank you.  
4 As the NRC staff has no objection to the hearing  
5 demand, the next order of business, I think, would be  
6 to address the notice that was provided in this  
7 proceeding. And I believe, Judge Bollwerk, you have  
8 some questions in that regard to the staff. Is that  
9 right?

10 JUDGE BOLLWERK: That's correct. Thank  
11 you, Judge Gibson.

12 First of all, I just want to say that I'm  
13 really glad to hear that the staff is not arguing  
14 about the Section 2.309(f)(1) contention admissibility  
15 standards having any applicability in this license  
16 amendment application in our proceeding. This seems  
17 to be a staff acknowledgment that in light of the  
18 Charlissa Smith case, LBP 13-3 and 77 NRC 82 and  
19 subsequent proceedings such as the recent Cammenga  
20 case that for Section 2.103(b)(2) hearing demand  
21 regarding a license application or a license amendment  
22 application denial, the applicant need not submit a  
23 reasonable contention for a hearing demand to be  
24 granted.

25 That being said, what I'd like to explore

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1 for a second with staff counsel for the circumstances  
2 associated with footnote 16 to the September 5th, 2023  
3 Homestake hearing demand. That footnote indicates  
4 that notwithstanding the language of Section  
5 2.103(b)(2) and Section 4.11.2 of NUREG 1556, Volume  
6 20, Revision 1, both of which indicate that a license  
7 application denial letter should provide the applicant  
8 with notice of its right to demand a hearing on an  
9 application denial within at least 20 days of the  
10 denial letter, the NRC staff's September -- I'm sorry,  
11 October -- wrong month -- August 15th, 2023 denial  
12 letter provided no such notice.

13 Additionally, NUREG 1556 issued in  
14 November of 2020 entitled Consolidated Guidance About  
15 Materials Licenses, indicates at page 4-37 that before  
16 being signed, an application denial letter should be  
17 reviewed by legal counsel from either the Office of  
18 the General Counsel for letters coming from the  
19 headquarters office or by regional counsel for letters  
20 coming from an NRC regional office.

21 In this instance, no such notice was  
22 provided in the August 15, 2023 denial letter provided  
23 to Homestake. Homestake, which is represented by  
24 counsel, did file a hearing demand within 20 days of  
25 the staff's denial letter. Accordingly, there's no

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1 issue about the time limits of this hearing demand.  
2 Nonetheless, the denial letter raises a couple of  
3 questions for me.

4 First, although the August 15th, 2023  
5 denial letter has no concurrence box for either OGC or  
6 regional counsel, wasn't that denial letter reviewed  
7 by an agency attorney before being signed and issued  
8 by the Office of Nuclear Materials Safety and  
9 Safeguards Division Director?

10 MR. ROACH: Your Honor, yes, it was. I  
11 think it was an oversight to not include the written  
12 notice in the letter. It's my understanding that the  
13 information about the opportunity for hearing was  
14 conveyed via telephone, but the omission of written  
15 notice was an oversight.

16 JUDGE BOLLWERK: And just as an associated  
17 matter, normally the letters that I've seen over the  
18 years generally have a box for legal concurrence. Was  
19 that the normal thing not to have that sort of box on  
20 this letter?

21 MR. ROACH: I can't speak to why the  
22 concurrence box was not included. I'm not sure why  
23 that is.

24 JUDGE BOLLWERK: Okay. So then I take it  
25 that OGC doesn't have any concerns -- well, doesn't

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1 have any issues, rather, with the denial letter's  
2 legal sufficiency. You had to review it and it was  
3 issued with your legal concurrence.

4 MR. ROACH: Yes, the -- OGC -- we reviewed  
5 the letter and the omission of that text was an  
6 oversight.

7 JUDGE BOLLWERK: Okay. One thing just as  
8 sort of a side note or a historical note, there's been  
9 questions about the way that the NRC gives notice in  
10 materials in licensing cases going back to the middle  
11 '80s. When I was in the General Counsel's Office, the  
12 Acting Assistant General Counsel, the Acting General  
13 Counsel, Marty Moss, sent a paper to the Commission,  
14 a SECY paper, saying the Commission is acting  
15 illegally with the materials licensing notices because  
16 it didn't issue any in most cases. That's still the  
17 case which is why we've got Section 2.309(b)(4) which  
18 allows a timely intervention for an unnoticed  
19 licensing action, if a hearing request is filed in 60  
20 days and the licensing action being completed.

21 So I understand in this case you did the  
22 best you could to cure this, but lack of notice is a  
23 really important thing and I hope that OGC is going to  
24 be looking in the future to avoid this and  
25 particularly in light of what's going on. We now

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1 heard that, for instance, in fusion plants, there are  
2 going to be byproduct materials licensing which is a  
3 type of materials license. We're expecting a lot of  
4 microreactor applications to be coming in, as well as  
5 small modular reactors applications. I don't know how  
6 that's going to be handled. There's been a lot of  
7 talk about the need to review all of this timely on  
8 the technical side, but nothing that's been said about  
9 the procedural side.

10 So I hope that OGC is going to be paying  
11 close attention to how people, interested members of  
12 the public, as well as applicants get notice of these  
13 different licensing actions coming up. Potentially,  
14 there could be a lot of them and it's really important  
15 that everybody know what's going on. I just provide  
16 that thought to you. Okay.

17 MR. ROACH: Thank you, Your Honor.

18 JUDGE GIBSON: Did you want to say  
19 anything more, sir?

20 MR. ROACH: I appreciate the perspective,  
21 Judge Bollwerk, and that certainly is good food for  
22 thought.

23 JUDGE BOLLWERK: Thank you, appreciate it.

24 JUDGE GIBSON: Okay, Judge Abreu, do you  
25 have anything else in this regard?

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1 JUDGE ABREU: I do not.

2 JUDGE GIBSON: As the staff does not have  
3 any objection to your hearing demand, I think the next  
4 order of business for us is to address the issues that  
5 we're going to be facing here. And I would like you  
6 to explain those two, as you see it, and whether what  
7 we're concerned here with are purely legal issues or  
8 if there are some factual issues that are going to  
9 require our attention?

10 MR. WALSH: Thank you, Your Honor. I  
11 would be happy to answer those questions, but first I  
12 want to apprise the Board that the NRC staff counsel  
13 and myself, as Homestake counsel, have had some  
14 discussions over the past couple of weeks and we have  
15 mutually agreed to enter into settlement discussions  
16 to see if we can work out our issues outside of the  
17 hearing, within the hearing process, but in  
18 settlement. And we're open to how to proceed on that,  
19 but we would like to jointly move the Board to hold  
20 the proceeding in abeyance and allow us a period of  
21 time to have those settlement discussions.

22 JUDGE GIBSON: That was actually going to  
23 be one of the questions that we were going to address  
24 with you guys later. We're obviously not aware of  
25 that and happy to hear that you all are talking to

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1 each other.

2 I guess I would like to get your  
3 perspective in this regard. If we were to just hold  
4 this proceeding in abeyance at this point, we would  
5 have no scheduling order in place. I wonder if you  
6 have any idea about whether you think having a  
7 scheduling order in place would be helpful to ensure  
8 that the settlement discussions proceed apace or do  
9 you think it would be better if no scheduling order  
10 were issued at all?

11 MR. WALSH: At this time, my perspective  
12 is that no scheduling order in place would be helpful.  
13 We have already discussed with the staff, working  
14 hopefully over the course of the next 45 days or so  
15 roughly to engage in settlement discussions. And then  
16 report back to the Board then what the status is, you  
17 know, if we are making progress and where we see this  
18 going or if we're not making any progress at all or if  
19 we've settled the whole thing. And maybe at that  
20 point in time, once we provided a first report back to  
21 the Board, that we could then address that issue if  
22 the Board, of course, is okay with that and I believe  
23 the staff would be okay with that, too.

24 JUDGE GIBSON: Staff, yes, I'd like to get  
25 your input here.

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1 MR. ROACH: Yes, I agree with Mr. Walsh.

2 JUDGE GIBSON: Okay. Next question, are  
3 you satisfied that you all would be well served by  
4 doing this on your own or do you think it would be  
5 important to have a settlement judge involved in this  
6 matter?

7 MR. ROACH: I think from -- as we've  
8 discussed the first cut at it, we believe we're in a  
9 place where we can do that just between ourselves  
10 without a settlement judge. We have contemplated the  
11 possibility that if we -- if during our discussions we  
12 come to believe that a settlement judge would help  
13 move us over the goal line, as it were, that we could  
14 notify the Board and request that one be appointed.

15 JUDGE GIBSON: Sure.

16 MR. WALSH: I agree.

17 JUDGE GIBSON: Okay. All right. Well,  
18 what I would like to do, if you all wouldn't mind, is  
19 since we hadn't expected this, if you all could give  
20 us, the Board, about five minutes for us to go to  
21 chambers for just a minute and we'll come right back.  
22 Okay?

23 (Whereupon, the above-entitled matter went  
24 off the record at 3:13 p.m. and resumed at 3:20 p.m.)

25 JUDGE GIBSON: Okay, see how if this --

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1 run this up the flagpole and see if this meets with  
2 your approval. We will issue an order granting the  
3 notice. I'm sorry, your hearing request. And at that  
4 point, we will hold things in abeyance for what did  
5 you say, 45 days? Is that what you all were thinking?

6 MR. WALSH: Yes, roughly, Your Honor. I  
7 think more specifically the week of November 6th. I  
8 didn't have a particular day in mind.

9 JUDGE GIBSON: November 6th, okay.

10 MR. WALSH: But we would report back to  
11 you.

12 JUDGE GIBSON: Yes, because we may be out  
13 of commission in October, so that probably makes some  
14 sense, the way things are looking for our funding for  
15 next year.

16 So that's -- November 6th is a Monday, so  
17 yes. And we'll just in the notice granting the  
18 hearing, we'll -- order granting the hearing, we'll  
19 basically make note of the fact that you all are  
20 having discussions and so we're going to get a status  
21 report from you guys on -- no later than November 6th.  
22 Is that okay, on how your settlement discussions are  
23 going? And we won't be appointing a settlement judge.  
24 We won't be issuing a scheduling order and we will  
25 merely proceed on that basis and look forward to get

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1 your status conference on November 6th.

2 Does that make sense? Is there anything  
3 I'm missing? Anything else you think we need to do?

4 MR. ROACH: So would I assume correctly  
5 that holding the hearing in abeyance would encompass  
6 discovery?

7 JUDGE GIBSON: Oh, yes. Oh, yes, yes.  
8 There would be nothing -- essentially the case would  
9 be basically on hold because we won't have a  
10 scheduling order. Well, you might be doing discovery  
11 without a scheduling order. Most of the time a  
12 scheduling order is what's going to trigger your  
13 discovery obligations. That is something that I guess  
14 will -- after we get your status report, no later than  
15 November 6th, we will then reconvene, assuming we have  
16 funding and we can at that point issue a scheduling  
17 order referred to a settlement judge or approve your  
18 settlement. I mean I think there's probably three  
19 things that can happen at that point.

20 Now does all that make sense to you all?  
21 Is there anything that you all are seeing that we're  
22 not on this end?

23 MR. WALSH: That all makes sense to me,  
24 Your Honor. I'm not thinking of anything else that we  
25 need to address at this time.

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1 JUDGE GIBSON: Judge Bollwerk, can you  
2 think of anything else?

3 JUDGE BOLLWERK: You've talked to the NRC  
4 staff about this. If the Agency, if and when the  
5 Agency does go down because of the lack of funding,  
6 that means everything stops. We, whether it's us or  
7 them, cannot do any work.

8 JUDGE GIBSON: Right.

9 JUDGE BOLLWERK: So that means you can't  
10 obviously negotiate with them. Also, frankly, the e-  
11 filing system will shut down so that you will not be  
12 able to file anything as well. So you need to just  
13 kind of bear that in mind in whatever you're doing and  
14 anticipate -- I think I'm speaking out of turn, we  
15 heard today from the Executive Director for Operations  
16 that the Agency may have enough money to go through  
17 the entire month of October because of the carryover.  
18 So that should give you a considerable period of time,  
19 but when CFO says there's no money left, they're going  
20 to tell us probably on pretty short notice and SECY  
21 will issue an order in this case and the others that  
22 are saying basically on this date we're going to shut  
23 down the e-filing system and just like everybody else,  
24 they're going to go home and literally we are  
25 prohibited, we cannot log into the agency network. We

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1 can't come into the building. We're just out of  
2 business. So hopefully, that's going to be sometime  
3 late in October, if at all, but just to make you aware  
4 that you need to put that each party's planning.

5 MR. WALSH: That is something the staff  
6 and Homestake have discussed and we're aware of the  
7 issues and I think it's best to say let's hope they  
8 don't happen, but if they do, we may need an extension  
9 of time on the back end of that rough 45-day period,  
10 but we can certainly report back to you with that  
11 information when you're able to actually read what we  
12 might be able to file.

13 JUDGE GIBSON: Okay. Yes, we won't be  
14 able to read anything. I'm having cataracts, the  
15 second part of my cataract surgery next week, so I was  
16 really looking forward to reading it, but it sounds  
17 like it may not happen.

18 Judge Abreu, anything else?

19 JUDGE ABREU: Nothing.

20 JUDGE GIBSON: Judge Bollwerk? Yes, as  
21 far the notice of hearing, we'll be granting the  
22 hearing.

23 Do you all have strong feelings one way or  
24 another if we make any reference to the fact that you  
25 all are discussing settlement in this case? I mean if

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1 you do, I guess we can just issue the notice and  
2 postpone issuing the scheduling order until after we  
3 get your status report. Can merely mention that the  
4 parties will be providing a status report to the Board  
5 no later than November 6th.

6 JUDGE BOLLWERK: So I think I'm confusing  
7 the situation. What I'm referring -- there's a  
8 provision rule, Section 2.33(i) which says that if a  
9 notice of hearing is issued, then you need to come  
10 back to us for settlement. The Board is inclined to  
11 issue such a notice of hearing.

12 Is there any reason you can tell us why we  
13 shouldn't?

14 MR. WALSH: I can't think of one off the  
15 top of my head, Your Honor.

16 MR. ROACH: Neither can I.

17 JUDGE BOLLWERK: All right, that's fine.  
18 I'm sorry, I just wanted to --

19 JUDGE GIBSON: No, no, I'm glad you  
20 mentioned that because Judge Bollwerk is absolutely  
21 correct, of course, and that is that we can't get an  
22 order -- in order to approve your settlement. We have  
23 to have the notice issued.

24 MR. WALSH: Right.

25 JUDGE GIBSON: And so we need to get that

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1 done. We can -- we'll try to finesse this language  
2 and what I think we'll do under the circumstances is  
3 we probably have Emily and Noel, our law clerks, I did  
4 not get to mention Noel by the way, but she's been  
5 working on this case as well. So our law clerks will  
6 be getting you something, a draft of what we're  
7 proposing to issue and if you all have any strong --  
8 if you have any objections to it, be sure and let us  
9 know, but we want to be sure we issue this so that it  
10 facilitates your discussions, but also ensures that  
11 this doesn't drag on until the end of time, so, okay.  
12 So we'll be looking forward to your status conference  
13 report no later than November 6th.

14 JUDGE BOLLWERK: It may be obvious, but if  
15 you find yourselves at loggerheads and you need a  
16 settlement judge before the 45 days are up, just come  
17 to us and we'll then talk with the Chief  
18 Administrative Judge and he will work to appoint  
19 somebody, provided we have funding. Provided we're  
20 working, right.

21 JUDGE GIBSON: Wow. This may be the  
22 shortest proceeding that I've ever been involved in  
23 since I've been here, but I'm certainly glad you all  
24 are talking. That's wonderful.

25 Anything else that you all can think of

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1 that you need from us?

2 MR. WALSH: Not that I can think of.

3 JUDGE GIBSON: Judge Bollwerk?

4 JUDGE BOLLWERK: Nothing.

5 JUDGE GIBSON: And Judge Abreu?

6 JUDGE ABREU: Nothing.

7 JUDGE GIBSON: Okay, well, with that, I  
8 believe that we are going to stand adjourned and we  
9 look forward to getting your status report. And you  
10 can look forward to receiving a draft notice from  
11 Emily shortly.

12 MR. WALSH: Thank you, Your Honor.

13 MR. ROACH: Thank you.

14 JUDGE GIBSON: Have a pleasant day.

15 (Whereupon, the above-entitled matter went  
16 off the record at 3:28 p.m.)

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