

**TONOPAH TOWN BOARD
PUBLIC WORKSHOP MINUTES
JUNE 19, 2020
10:00 A.M.**

Tonopah Town Board Vice Chairman Jerry Elliston brought the meeting to order on June 19, 2020 at 10:00 a.m.

Vice Chairman Jerry Elliston led in the Pledge of Allegiance.

Present:

Chairman Don Kaminski
Member Duane Downing
Member Mike Sain

Absent:

Clerk Marc Grigory

5 others were in attendance

1. Public Comment

None.

2. For discussion only: Discussion regarding a request to access Town property by Viva Gold Corp for drilling, exploration and development

Ms. Mulkerns presented to the Town Board Members and members of the audience. She stated there was a letter received in April from Viva Gold.

Susan Dudley with Shaw Engineering gave a history of Midway, the company prior to Viva Gold, that requested rights to drill on the Town's property.

She explained this project could interfere with the Town's water supply.

The company is drilling to possibly mine which could be a problem for the water supply.

She suggested it may be best to let Viva Gold seek a permit from the Bureau of Land Management and not have the Town assume that responsibility.

Vice Chairman Elliston inquired: What does the Homestead Act permit them?

The Town is the surface owner.

Viva Gold owns the mineral rights.

If the Town doesn't grant permission, they can seek permission from Bureau of Land Management.

Viva is requesting permission from the Town and offering money to do so.

Ms. Mulkerns suggested the Town deny the request, keeping in mind that Viva Gold can seek permitting through Bureau of Land Management.

Revisit the previous hydrogeology report; evaluate, per Ms. Dudley.
Press release from Viva Gold stated this will be an open pit heap leach.

Tonopah resident Ed Tomany:

A gold mine in the vicinity of the Town water table; possible contamination.

Suggested denying permission. Put the liability back on Bureau of Land Management.

Request a copy of contract between viva and midway.

Viva Gold will replace wells, suggesting there are better sources of water, per Vice Chairman Elliston.

Would need assurances of that before possibly proceeding.

This will be on the 6.24.20 agenda; allow or deny the proposal.

Contained within these minutes; a letter written by Steven Gross with Porter Simon Law Offices, attorney for the Town of Tonopah.

Louis A. Basile
Kelley R. Carroll*†
Steven C. Gross*
Brian C. Hanley*
James L. Porter, Jr.*
James E. Simon
Rayn R. Whittington*



David W. Wolfe*
Ethan J. Birnberg*
Sara D. Davidson

Peter H. Cuttitta, Of Counsel

† Certified Specialist in Estate
Planning, Trust & Probate Law
(California Board of Legal
Specialization)

* Also licensed in Nevada
◊ Also licensed in Colorado and
Wyoming

June 18, 2020

Town Board
Chris Mulkerns, Administrative Manager
Town of Tonopah
140 S. Main Street
P.O. Box 151
Tonopah, NV 89049

Re: 0862130 Corp (Viva Gold)
Surface Use Agreement – Section 32

Town Board and Ms. Mulkerns:

I am writing to express some of my concerns pertaining to the draft Surface Use Agreement (“SUA”) proposed by 0862130 Corp, Viva Gold’s Nevada subsidiary (“Viva”). My primary concerns with the SUA are that it: (1) would provide broad rights to Viva; (2) would result in the Town losing significant protections afforded it under the law; and (3) is extremely unbalanced and does not provide sufficient rights or protections to the Town.

I. Background

Viva controls unpatented mineral rights in Section 32 and the Town owns most of the surface rights in Section 32 as a “split estate” under the Stock Raising Homestead Act (“SRHA”) of 1916. The Town’s wells are in Section 32 and are the Town’s only source of potable water. Viva has engaged with the Town, seeking permission to use the surface of Section 32 relative to its mineral rights.

By letter dated April 15, 2020, Viva expressed an interest in a multi-year access agreement to conduct geophysical and exploration drilling operations subject to conditions of a Nevada state permit it holds and a Bureau of Land Management (“BLM”) Plan of Operation file. Through telephonic and email communications, the Town Administrative Manager sought Viva’s commitment to reimburse the Town for numerous and likely significant expenses the Town would incur in evaluating Viva’s request, as had been the case when Viva’s predecessor-in-interest, Midway, sought to explore, develop and exploit those mineral rights.

II. SUA Would Provide Broad Rights to Viva

On June 3, 2020, in response to the Town’s request, Viva sent the SUA. The SUA would give Viva consent to use the surface of the property and grant Viva the following rights:

{00891636.DOC1}

TRUCKEE 40200 Truckee Airport Road, Truckee, California 96161 phone (530) 587-2002 fax (530) 587-1316

TAHOE CITY • RENO

“... to explore for and develop all ores and minerals of every kind in, on, or under the Property including without limitation the right to perform drilling, construction of drill pads and roads, excavation, reclamation, the removal of ore and minerals for testing purposes, and all other associated exploration activities at such times and places and in such manner as Claim Holder in its sole discretion deems desirable.”

Although Viva had previously expressed a desire to use the property only for geophysical and exploration drilling, the SUA would provide Viva the rights to not only explore for ores and minerals, but also the rights to develop all ores and minerals. The language of the SUA cited above might suggest that Viva seeks permission to use the property for exploration and testing purposes only, especially when read together with its April 15, 2020 letter. However, the references to exploration and testing in the SUA are provided as examples of the types of activities Viva could conduct on the property and not as a limitation on the types of activities that could be conducted.

The operative phrase in the SUA is “to explore for and develop all ores and minerals of every kind in, on, or under the Property including without limitation.” Granting permission to explore for and develop is somewhat ambiguous and likely extremely broad. The ambiguity arises from the word “develop.”

Mine “development” is commonly referred to as the process of constructing a mining facility and the infrastructure to support the facility. Mine development may involve many activities such as the construction of head frames, administration buildings, mechanical shops, power lines and other mining facilities. However, “development” in the mining industry is not a term of art; it does not have a precise, specialized meaning. In some areas and contexts, it may refer to mining and production.

The ambiguity of the rights sought through the SUA is fueled by omitting any reference to the Nevada state permit or the BLM Plan of Operation file Viva referenced in its April 15, 2020 letter. By not expressly limiting its rights or activities to those set forth in the permit or Plan of Operation, the SUA could be fairly read and interpreted to grant broader rights.

III. SUA Would Result in Loss of Valuable Protections

Granting surface use rights to the holder of mineral rights on a split estate created under the SRHA should be done with great care and extreme caution. It should not be done casually or loosely. The legal effect of providing such rights has significant consequences. Once the holder of mineral rights has been given written consent from the surface owner to use the surface for “mineral activities” it may engage in those activities.

If the owner of the mineral rights has not received written consent from the owner of the surface rights, then the owner of the mineral rights may only engage in mineral activities, including exploration activities that include more than a minor disturbance of the land, if it has secured permission from the BLM. In order to obtain that permission, it must provide the BLM

{00891686.DOC 1 }

with a plan of operation and a bond sufficient to protect the owner of the surface rights from and against damages that are caused by the mineral activities. Generally, the process employed by BLM is rigorous and includes a 45-day period during which the owner of the surface rights may comment on and request modifications to the plan of operation. If the Town enters into the SUA, it would lose the protections of the law and the BLM's oversight and regulatory authority.

IV. SUA is Unbalanced and Does not Provide Sufficient Rights or Protections to the Town

The SUA's terms are unbalanced and one-sided. They heavily favor Viva and provide little, if any, real rights or protection to or for the Town. Below are a few of the most significant issues.

A. Conduct of Operation

Paragraph 3, Conduct of Operations, would allow Viva to conduct its operations whenever and however it wants, in its sole discretion, subject only to applicable law and the terms of the agreement. There are no other provisions in the agreement that would limit when and how it conducts its operations. There is no requirement to provide, submit or have the Town approve a plan of operation or to provide notice of when and where it conducts its activities. The Town would have no say as to how far away from the Town's wells Viva would have to conduct its operations or what measures it would take to protect the Town's water supply. There are no requirements for Viva to monitor the water supply and whether its activities are causing any harm to it. There are no provisions requiring Viva to stop its activities if it was causing harm to the water supply. There would be no limitation on Viva's right to explore for and develop minerals and ore. There would be no limit on the number or location of roads, buildings, temporary housing or other facilities, such as poles and wires for electric power and communications. The SUA provides Viva with all of the rights with respect to what occurs on the surface of the land and provides the Town with virtually no rights.

B. Indemnification

Paragraph 6, Indemnification, requires Viva to indemnify and hold the Town harmless from actions, claims and liability arising from its activities. This is a very weak indemnity because it doesn't require Viva to defend the Town against such actions, claims or liabilities. Legal fees can be greater than the liability itself. The Town would have to pay for its own defense costs up front and then seek indemnity from Viva. This could be a huge financial burden to the Town. A better indemnity provision would require Viva to defend the Town.

C. No Requirement for a Bond or Insurance

The indemnification provision is the only provision of the SUA that provides protection to the Town against claims and liabilities and potential damage to the

Town's property, including its water supply. The \$10,000.00 payment per approved Work Plan (paragraph 6, Payments to Surface Owner) is the only payment to the Town that arguably is intended as consideration for the rights granted in the SUA, including the option to purchase the land, and for any damage caused to the land, including the water supply.

The SUA does not require Viva to post a bond or other form of security to protect the Town in the event of such damage. The SUA does not require Viva to procure and maintain insurance for its activities. Such insurance would typically be required to name the Town as an additional insured. Viva has not provided any information to demonstrate whether it has sufficient assets or resources to make good on its indemnity obligation without financial security or insurance. Furthermore, under paragraph 9, Post Termination or Expiration, Viva has no further liability or obligation except what it has already accrued as of the date of termination or expiration of the SUA. There simply is not enough protection for the Town under the SUA.

The SUA presented to the Town is woefully inadequate in terms of providing the Town with any meaningful rights or protections. Moreover, entering into the agreement and providing written consent to Viva to conduct unlimited exploration and development rights will allow Viva to avoid the BLM's scrutiny and rigorous review. I recommend that the Town *not* approve or enter into the SUA.

Very truly yours,

PORTER SIMON
Professional Corporation

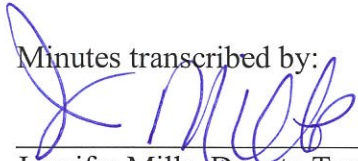


STEVEN C. GROSS
gross@portersimon.com

3. Public Comment
None.

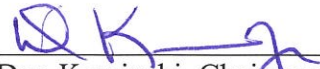
4. Adjourn
Meeting adjourned at 10:51 a.m.

Minutes transcribed by:

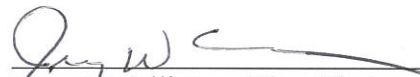


Jennifer Mills, Deputy Town Clerk

Approved:



Don Kaminski, Chairman



Jerry W. Elliston, Vice-Chairman

Marc Grigory, Clerk



Duane Downing, Member



Michael Sain, Member

June 19, 2020 Tonopah Town Board Workshop Minutes
Approved July 22, 2020

