



By the order of the court, Judge David A Wiseman

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IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JG SABLAN ROCK QUARRY, INC.,) **Civil Action No. 06-0424**
)
Petitioner,)
)
vs.) **DECISION AND ORDER AFFIRMING**
) **REVOCATION OF MINING PERMIT**
)
DEPARTMENT OF PUBLIC LANDS)
)
Respondents.)
)

I. INTRODUCTION

THIS MATTER came for decision solely on the written submissions of the parties, upon verbal stipulation by the parties. Counsel Michael W. Dotts and Counsel Vincent Torres represented Petitioner JG Sablan Rock Quarry, Inc. (hereinafter “JGS”). Deputy Attorney General Gregory Baka and Assistant Attorney General Howard P. Willens represented Respondent Department of Public Lands (hereinafter “DPL”). The above-captioned action concerns JGS’s appeal of a decision rendered by DPL to revoke a mining permit issued to them which permitted JGS to mine pozzolan and basalt on the northern island of Pagan for 20 years.

1 Having reviewed the parties' submissions, the written findings of the Department of Public
2 Lands, and the applicable law pertaining to review of agency actions, this Court renders its decision.

3 **II. SYNOPSIS**

4 On October 3, 2007, this court issued an Order granting, in part, DPL's motion for summary
5 judgment.¹ This Court unequivocally determined that DPL afforded JGS sufficient due process before
6 revoking JGS's mining permit because the mining permit terms provided sufficient process for
7 revocation and were exclusive of those provided under the APA. In June, 2008, this Court issued a
8 second order denying DPL's second motion for summary judgment. This Court held that JGS did not
9 violate Article 14 of the Permit and the alleged violation could not form the basis for the revocation of
10 their mining permit. This Court declined to decide the issue of whether or not the doctrine of estoppel
11 applied until a complete record was before the court.

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15 ¹On two separate occasions in this matter, this Court considered motions for summary judgments. As previously
16 stated in the issued Orders regarding the summary judgment motions, and worthy of repeating herein, judicial review of
17 agency action does not involve any fact-finder other than the court presiding over the review. Hence, summary judgment in
18 judicial reviews of agency action would ordinarily be superfluous because the APA provides various standards for the
19 reviewing court to apply when considering the lawfulness of the agency action taken at the administrative level below. Thus,
20 in the Court's opinion, the procedure of administrative appeals should not involve heavy motions filing, discovery of facts
21 beyond "the record" as defined in 1 CMC § 9109(j), or countless hearings which occupy the court's and parties' time but
22 resolve little. Instead, administrative review dictates that the parties should assemble a record and present it to the court along
23 with citation to supporting authority in memoranda of points and authorities. To pursue adjudication of an administrative
24 appeal via motions practice, as both parties have done here, is inefficient, costly, and wasteful of Commonwealth resources.
25

1 In so finding, this Court then issued an Order Setting Procedural Guidelines for Judicial Review
2 on July 17, 2008. The Procedural Order clearly defined the parameters of the remaining issues. As
3 such, the issues before the court are²:

- 4 1. Whether JGS by its inaction or action breached the terms of the Permit?
- 5 2. Whether the DPL should be estopped from terminating JGS's Mining Permit because of
6 the acts or omissions of its agency predecessors in interest?

7 In addition to these two issues, the Court will address the sub-issue of whether the statute of
8 limitations prevents DPL from revoking the permit.³

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12 ²JGS included a 'third issue' in their petition regarding the adequacy and fairness of the review hearing which they
13 argue the court should review. This Court has clearly and unequivocally defined the parameters of the remaining issues. *See*
14 *Order Settling Procedural Guidelines For Judicial Review, July 17, 2008*. Further, in its previous Order, this Court cautioned
15 the parties against further attempts to circumvent the court's orders stating: "the Court shall not entertain any other filing in
16 this matter not in conformity with the proposed procedural guidelines set forth by the Court at the inception of this case unless
17 so modified by the Court. . . the parties before this Court (acting through counsel) refuse to cooperate in the slightest to
18 resolve this case. Perhaps the Court has not sufficiently demanded compliance with its scheduling order. Following this order,
19 all scheduled events shall be followed without deviation. And the Court shall now rigidly enforce its deadlines and orders,
20 using the harshest measures available to insure compliance." *Order Denying Respondent's Second Motion For Partial*
21 *Summary Judgment, July 2, 2008*. Therefore, JGS's 'briefly addressed' third issue will not be recognized.

22 ³ JGS again argues that DPL carries the burden in this procedure to show that the decision of the Secretary was
23 reasonable. This has already been addressed by this Court as well as the applicable standard of review in *Orders Denying*
24 *Summary Judgment*. This Court will only briefly restate those conclusions here but will not readdress all of JGS's arguments
25 on these matters.

1 **III. STATEMENT OF UNDISPUTED FACTS**

2 ¶1 On September 8, 1995, the Division of Public Lands in the Department of Lands and Natural
3 Lands and Resources issued a permit to JGS for a term of 20 years to mine pozzolan and basalt
4 on the northern island of Pagan.

5
6 ¶2 As amended on February 15, 1996, the 1995 Permit authorizes termination for “a violation of
7 any of the terms or conditions of [the] permit” after the Commonwealth gives 60-days notice to
8 the permittee, within which period the permittee may request “a hearing on the alleged
9 violations.” *See* Petition for Judicial Review, Exhibit I.

10
11 ¶3 On February 22, 2006, Governor Benigno R. Fitial signed into law Public Law No. 15-2
12 abolishing the Marianas Public Lands Authority (MPLA) and creating the Department of Public
13 Lands (DPL) within the executive branch.

14
15 ¶4 In a letter drafted on May 3, 2006, the Secretary of the DPL, John Del Rosario, issued a notice to
16 permit-holder JGS that its permit was being terminated. The letter was entitled “Notice of
17 Termination: Declaration that Permit is void. *See* Petition for Judicial Review, Exhibit B.

18
19 ¶5 Pursuant to a timely request by Counsel Dotts, DPL scheduled a review hearing for July 14,
20 2006. The purpose of the review hearing was to afford JGS an opportunity to present evidence
21 which contradicted the findings of the Secretary, thereby showing why their Mining Permit was
22 erroneously revoked.

23
24 ¶6 The Notice of Termination dated May 3, 2006, listed seven bases for terminating the Permit. One
25 of the alleged violations, the assignment of rights in violation of Article 14, has already been

1 determined by this court to have not occurred.

2
3 ¶7 Aside from the erroneous allegation that JGS violated Article 14 of the Mining Permit, the Court
4 has defined four additional bases set forth in the Notice of Termination related to violations of
5 specific Permit provisions as follows:

6 a) The Notice charged that JGS failed to produce any revenues for the Commonwealth
7 from its activities on Pagan for two consecutive years after the Permit was granted in
8 1995 and that Article 3 provided for automatic termination under those circumstances;

9 b) The Notice charged that JGS violated Article 10 of the Permit by failing to provide the
10 Government within 180 days after issuance of the Permit, and receiving approval of, a
11 detailed proposal indicating how the Company intended to develop the pozzolan and
12 basalt recovery operation on the premises;

13 c) The Notice charged that JGS violated Article 1 of the Permit by conducting, or seeking
14 to conduct, mining and related activities in areas of Pagan not covered by the Permit; and

15 d) The Notice charged that JGS had failed to pay the royalties and other payments under
16 its earlier permit in 1993 to conduct mining activities on Pagan and that the unpaid
17 amounts totaled \$345,914.17.

18
19 ¶8 The hearing on July 14, 2006, provided JGS with the opportunity to prove that the Company did
20 not in fact violate the Permit in the specific respects summarized above. JGS and its counsel did
21 not present such evidence. Instead, in their written submissions (before and after the hearing) and
22 in their oral testimony, JGS and counsel contended that its failures to comply with these Permit
23 provisions were known to DPL and its predecessor agencies and that these various officials had
24 excused or condoned these violations and had encouraged the Company to continue its efforts to
25 mine pozzolan and basalt on Pagan. In essence, JGS contended that these officials had, by action

1 and inaction, waived the Government's right to terminate the Permit on these grounds and that
2 the DPL therefore was barred (or estopped) from doing so in 2006.

3
4 ¶9 At the hearing, counsel for JGS submitted two documents for the record and called only one
5 witness. The first document was a motion seeking to recuse Secretary Del Rosario from the
6 hearing. The second document was a Memorandum in Support of the Motion to Recuse and
7 Reversal of the Administrative Decision Terminating the Mining Permit. Attached to the
8 Memorandum was: 1) a Table of Contents of a report titled JG Sablan Rock Quarry, Inc.
9 Paganite Project; 2) the Mining Permit with the map of Pagan that was prepared in 1994; 3) a
10 letter from the chairman of Bridgecreek; and 4) an affidavit from the former vice-chairman of
11 MPLA, Manuel Villagomez. The only witness JGS called was President of JGS, Mr. John T.
12 Sablan. *See* Petition for Judicial Review, Exhibit G and Decision of Secretary, Exhibit L.

13
14 ¶10 After the hearing, counsel for JGS submitted the affidavit of Ana Demapan-Castro. *See* Petition
15 for Judicial Review, Exhibit F.

16
17 ¶11 Before addressing this issue of waiver or estoppel in his Decision of August 1, 2006, the
18 Secretary reviewed some of the undisputed facts regarding JGS's performance under the 1995
19 Permit and the CNMI Government's record of enforcement with respect to the JGS permit and
20 other Pagan mining permits that were issued during the same period.

21
22 ¶12 On September 10, 1992, the same day that JGS received its one-year commercial mining permit,
23 Pacific Ventures, Ltd. ("Pacific Ventures") also received a virtually identical permit. Each of
24 these two permits recognized a non-exclusive right to mine pozzolan on Pagan; each permit
25 allowed the permittee to mine in a limited area; and each permit referenced an "Appendix A" for

1 the geographic description of the area covered by the permit.

2
3 ¶13 In an Environmental Overview document submitted by JGS to the Commonwealth in May 1993,
4 the Company (at page 3) stated that it “has secured a permit to collect ash from the entire part of
5 Pagan north of the volcano, to both the eastern and western shores.”

6
7 ¶14 Representatives from JGS and Pacific Ventures appeared at a public hearing in Garapan, held on
8 June 30, 1993, to respond to questions from the public with respect to their activities and plans
9 for Pagan. A drawing roughly outlining their respective areas of operation on Pagan was made
10 available at the meeting.

11
12 ¶15 On August 1, 1993, MPLA issued a second Pagan mining permit to JGS for an additional five
13 year period. JGS’s 1993 permit was virtually identical to the 1992 permit and did not modify the
14 geographic scope or the non-exclusive nature of the permit. The 1993 permit, like the first one,
15 refers to an attached “Appendix A” for a detailed description of the mining area. However,
16 neither DPL nor JGS could find a copy of the “Appendix A” that may have been attached to this
17 permit.

18
19 ¶16 In May 1994 a survey of Pagan was conducted by the firm of Ben Songsong & Sons, Inc. with
20 the participation of JGS representatives. This survey covered the entire area on Pagan where the
21 mining of pozzolan might be economically feasible.

22
23 ¶17 The minutes of the Marianas Public Land Corporation (“MPLC”) Board of Directors from May
24 1994 through August 1994, when the MPLC was abolished by Governor Froilan C. Tenorio,
25 contain no reference to the geographic scope of the JGS 1993 Permit or to the May 1994 survey

1 of Pagan.

2
3 ¶18 The Division of Public Lands in the Department of Lands and Natural Resources (“Division”)
4 assumed all public land management responsibilities previously assigned to MPLC. Shortly after
5 this transfer of duties took place, the Division received an inquiry from Omega International,
6 Inc. (“Omega”) regarding a mining permit for Pagan.

7
8 ¶19 In an effort to accommodate Omega and the two existing permittees, the Division defined three
9 separate areas on Pagan that would be available for commercial mining. Using the 1994 survey
10 map as a guide, the Division created a Parcel “A” of about 970 hectares, which included the
11 largest pozzolan deposits on Pagan and embraced most of the area currently assigned on a
12 nonexclusive basis to JGS and some of the area assigned on a similar basis to Pacific Ventures.
13 The remaining area available for permitting was subdivided into two 510 hectare parcels, labeled
14 “B” and “C”, which together included most of the area previously assigned to Pacific Ventures.

15
16 ¶20 By letter dated August 11, 1995, the Division advised Omega that it was willing to lease
17 “approximately 510 hectares of unsurveyed public land on Pagan Island” if Omega was willing
18 to agree to the proposed changes in the lease set forth in the letter.

19
20 ¶21 A proposed permit for Omega transmitted to Governor Tenorio on September 5, 1995, was
21 subsequently revised to reflect changes requested by the Governor to make it consistent with the
22 permit granted to JGS for Parcel “A” on September 8, 1995.

23
24 ¶22 In April 1996 Pacific Ventures was advised by the Division that the area originally assigned to it
25 had been subdivided into two portions and that the company was now limited to Parcel “B.”

1 ¶23 On December 22, 1996, the Division granted a mining permit for Parcel “C” to Fareast Mining,
2 Inc. (“Fareast”). This was the area that had been previously reserved for Omega, which informed
3 the Division earlier in 1996 that it was unable at that time to pursue its interest in a mining
4 venture on Pagan.
5

6 ¶24 By letter dated February, 18 1997, Governor Tenorio terminated the permit held by Pacific
7 Ventures for Parcel “B.” His letter cited an outstanding debt of \$1,560.90 and the failure to pay a
8 royalty fee following issuance of the permit. Governor Tenorio concluded that as a result of the
9 company’s lack of progress and initiative with respect to the mining of pozzolan, “the
10 Government finds there is no economic benefit to the CNMI” in continuing the permit.
11

12 ¶25 In anticipation of the Governor’s action regarding Pacific Ventures, a mining permit was granted
13 for Parcel “B” to CNMI Mining, Inc. (“CNMI Mining”) on January 30, 1997.
14

15 ¶26 During the period from February 1997 until early 2001, three companies had mining permits to
16 conduct operations on Pagan: JGS, Fareast, and CNMI Mining. Not one of these permit holders
17 produced any revenue for the Commonwealth from mining operations on Pagan at any time.
18

19 ¶27 After an inspection of Pagan in October 2000, personnel from DPL submitted a trip report dated
20 November 9, 2000, to the Director. The report stated that “[t]he quarry premises lacked any
21 evidence that would indicate that the permittee has been actively using the public land for the
22 purposes stated in the permit.” It also reported that the permittee had constructed structures on
23 public land that is outside the permitted premises and that those structures were “in dire need of
24 repairs.” The report cited other violations of the permit, including the nonpayment of
25 \$330,837.35, the failure to submit required financial statements, and the failure to submit proof

1 of liability insurance and property damage insurance.

2
3 ¶28 In response to an inquiry from the CNMI Legislature about these permits, Manuel P.
4 Villagomez, Chairman of the recently created Board of Public Lands at the Department of Land
5 and Natural Resources, wrote a letter dated November 27, 2000, to Senator Maratita. Chairman
6 Villagomez summarized the status of the three permits, the area of Pagan covered by each
7 permit, the various defaults of each company, and the balance of royalty payments due to his
8 agency. He advised Senator Maratita that the Board would be considering the matter of
9 enforcing these three permits at the next Board meeting.

10
11 ¶29 At the direction of the Board of Public Lands, a letter of termination dated March 26, 2001, was
12 sent to Fareast Mining. The letter cited the company's various failures with respect to payments,
13 the submission of detailed plans, and the submission of financial documents. It requested that the
14 company pay the outstanding balance of \$83,156.58 to the agency.

15
16 ¶30 At the direction of the Board of Public Lands, a letter of termination dated March 26, 2001, was
17 sent to CNMI Mining. The letter specified the same deficiencies as in the letter to Fareast
18 Mining and requested that CNMI Mining pay its outstanding debt to the agency of \$81,120.68.

19
20 ¶31 At the Board of Public Lands meeting of October 26, 2001, the Administrator (formerly the
21 Director) informed the Board that JGS owed \$3.726 million to Public Lands pursuant to its
22 various permits, including the 1995 Permit for mining on Pagan. She recommended termination
23 of the Pagan permit. Action was deferred.

24
25 ¶32 On December 23, 2002, the Comptroller of the newly created MPLA submitted a memorandum

1 to the Commissioner of the agency in response to JGS's request for several agency actions in his
2 favor. With respect to the Pagan permit, the Comptroller recommended that MPLA deny JGS's
3 request for a waiver of the minimum royalty payments to the CNMI and his request for a
4 retroactive waiver of the \$20,000 annual permit fee. The Comptroller also recommended
5 termination of the 1995 Permit under its provision authorizing automatic termination of the
6 permit if the permittee fails to generate or report any revenue for two consecutive years.
7

8 ¶33 The MPLA Board of Directors did not act on the Comptroller's recommendation that the 1995
9 Permit be terminated, but denied JGS's request for waiver of the minimum annual royalty
10 payments and retroactive forgiveness of unpaid annual fees.
11

12 ¶34 On February 19, 2004, the Commissioner of MPLA issued a Notice of Violation to JGS citing
13 numerous violations of the 1995 Permit. These included: 1) failing to pay the required permit
14 fees for three years; 2) an unpaid balance of \$125,433.27 for rentals from September 8, 1995 to
15 January 31, 2004, including accrued interest; 3) an unpaid balance of \$358,294.29 for rental and
16 royalty obligations from previous permits; 4) the failure to submit to MPLA the required
17 monthly detail reports; 5) the erecting of structures on the permitted premises without first
18 obtaining MPLA's prior written approval; 6) the failure to submit the detailed development plan
19 required by Article 10 of the 1995 Permit; and 7) the failure to provide proof of public liability
20 insurance as required by Article 12 of the 1995 Permit. The Notice of Violation provided JGS
21 with sixty days to cure these violations (a privilege not afforded by the terms of the Permit) and
22 stated that a failure to do so "will place the Permittee in default pursuant to Article 9 (as
23 amended), and will result in the Permit being terminated."
24

25 ¶35 After issuance of the Notice of Violation, discussions took place between counsel and officials

1 of MPLA and counsel for JGS. During the course of these discussions JGS asserted for the first
2 time that it had exclusive rights not only for Parcel “A” but also for Parcels “B” and “C”.

3
4 ¶36 By memorandum to the MPLA Board of Directors dated August 10, 2004, the Acting
5 Commissioner made three recommendations relating to the mining of pozzolan on Pagan. First,
6 he recommended that MPLA discontinue negotiations with Azmar International (Marianas), Inc.,
7 which had submitted a proposal to the agency for a mining permit on Pagan. Second, the Acting
8 Commissioner recommended that the Board terminate JGS’s 1995 Permit due to “years of
9 inactivity and non-payment of fees.” Third, he recommended that MPLA prepare a Request for
10 Proposals regarding the mining of pozzolan on Pagan for consideration by companies interested
11 in such a project.

12
13 ¶37 On August 17, 2004, Mr. John T. Sablan wrote to Mr. Nekai, a member of the MPLA Board of
14 Directors, regarding his situation. He advised Mr. Nekai that JGS had recently provided MPLA
15 with a check in the amount of \$125,433.27 to cover its “rental permit from 1995 to January 31,
16 2004.” He asked for Mr. Nekai’s assistance in retaining his mining permit.

17
18 ¶38 By letter dated April 28, 2005, MPLA Commissioner Guerrero advised Mr. Sablan that his
19 permit “has not been terminated;” that JGS has “made payments for the Permit fee up to
20 December 31, 2005;” and that “You have been making regular, good faith payments.”

21
22 ¶39 The MPLA Board of Directors did not terminate the JGS 1995 Permit before the agency was
23 abolished on February 22, 2006.

24
25 ¶40 Based on these agency reports, memoranda, and recommendations concerning the JGS 1995

1 Permit, Secretary John S. Del Rosario, Jr. concluded that the Board of Public Lands and the
2 MPLA Board of Directors had not acted to waive its right to terminate the 1995 Permit. And,
3 based on violations of specific provisions of the Permit, he was free to exercise his own
4 discretion in deciding whether termination of the 1995 Permit was justified on the facts, the
5 applicable law, and in the public interest. On May 3, 2006, the Secretary issued a Notice of
6 Termination to JGS.

7
8 ¶41 On May 3, 2006, Governor Fitial appointed the Governor’s Pagan Mining Task Force. His
9 announcements stated: “For more than 20 years the Commonwealth Government has failed to
10 develop the unique resources on Pagan in a rational and productive manner. It is time to embark
11 on an open and competitive process to address this urgent need.” He directed that the Task Force
12 “prepare a Request for Proposal (RFP) to solicit applicants for a permit to mine and extract
13 pozzolan from Pagan. The Task Force shall conduct such studies and consult with such experts
14 as they deem necessary to prepare an appropriate RFP.”

15
16 ¶42 On June 7, 2006, the Chair of the Governor’s Pagan Mining Task Force submitted an Interim
17 Report to the Governor. The Task Force submitted a Working Draft of a Request for Proposals
18 relating to the mining of pozzolan on Pagan and recommended that the draft be widely circulated
19 within the Commonwealth and the Legislature. The Task Force’s Interim Report acknowledged
20 the existence of legal issues arising from the differences regarding the scope of the JGS 1995
21 Permit and the validity of the Secretary’s action in issuing a Notice of Termination on May 3,
22 2006, with respect to that Permit. The Interim Report reflected the Task Force’s recommendation
23 that only a single company should be authorized to extract pozzolan from Pagan and that the
24 RFP should not be circulated “in final form to solicit applicants for such a permit until the legal
25 issues with respect to any area on Pagan are resolved.” *See* Respondents Exhibit 27.

1
2 **IV. DISCUSSION**

3 **A. Standard of Review**

4 1 CMC § 9112(f) prescribes the standard of review the Superior Court must apply when
5 reviewing agency actions within the Administrative Procedure Act. *Camacho v. Northern Marianas*
6 *Retirement Fund*, 1 N.M.I. 362 (1990). Section 9112(f)(2), mandates that a court set aside agency
7 action if it finds the action is found to be “(i) arbitrary, capricious, an abuse of discretion, or otherwise
8 not in accordance with law, (ii) contrary to constitutional right, power, privilege, or immunity..., (iv)
9 without observance of procedure required by law or (vi) unwarranted by the facts to the extent that the
10 facts are subject to trial de novo by the reviewing court.” 1 CMC § 9112(f)(2)(i), (v), (vi).

11 Although each of these grounds appears to call for a different type of review, only one standard
12 is required for this Court’s analysis: whether the Board’s determination was supported by “substantial
13 evidence.” Under CNMI case authority an agency action is deemed arbitrary and capricious “if the
14 agency has . . . entirely failed to consider an important aspect of the problem.” *In re Hafadai Beach*
15 *Hotel Extension*, 4 N.M.I. 37 (1993). However, the arbitrary and capricious standard is inappropriate
16 when the agency has held a formal hearing where the parties were represented by counsel , and where
17 evidence and witnesses were allowed, and cross-examination was permitted. *Dept. of Pub. Safety v.*
18 *Office of the Civil Service Commission (Chong)*, No. 01-521E (N.M.I. Super. Ct. Sept. 12, 2002) (Order
19 Setting Aside Oct. 4, 2001 Civil Service Comm. Decision and Order), *aff’d*, 2005 MP 6.

20 Therefore, this Court will review the decision to revoke JGS’s Permit under the “substantial
21 evidence” standard. Before reaching the merits of JGS’s appeal, further explanation of the “substantial
22 evidence” standard is required to determine the degree of deference accorded to the agency body whose
23 actions are subject to review.

24 In judicial review of review of agency action, the substantial evidence standard for a finding
25 of fact means that the decision must be reasonable after consideration of the facts in the
record opposing the agency position as well as supporting it and the reviewing court is to

1 uphold the agency finding *even if supported by something less than the weight of evidence....*

2 In judicial review of agency action, questions of law under the substantial evidence or
3 “reasonableness” standard are examined to determine if the agency’s conclusions are
4 reasonable based on the information package used by the agency in making the decision.
5 *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37 (1993) (*emphasis added*).

6 Stated simply, this Court must examine the record to determine whether the result reached by the
7 Secretary is reasonable in light of the available facts and applicable law. Further, as previously
8 determined by this Court, JGS carries the burden of either establishing that each of the reasons DPL
9 provided as justification for terminating the Mining Permit are unreasonable, or establishing that the
10 Government should be estopped from asserting the provisions of the Mining Permit against JGS to
11 justify termination of the Mining Permit. *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37 (1993) (the
12 burden of proof is squarely on the party seeking review of an administrative action).

13 **B. Statute of Limitations**

14 In addition to denying that they violated the provisions of the permit, JGS also contends that the
15 statute of limitations bars DPL from relying on many of the alleged violations as grounds for revocation
16 of the permit. DPL argues that the statute of limitations has no relevance to agency proceedings
17 initiated by the Department under the Permit. JGS has not directed this court to any authority which has
18 instituted the principles of the statute of limitation in agency proceedings to limit the time period in
19 which the aggrieved party may terminate a contract or revoke a permit.

20 Statutes of limitations merely restrict the length of time in which a court may properly have
21 jurisdiction over a matter after a cause of action arises. Statutes of limitations do not prevent a party to a
22 contract from exercising their right to terminate the contract. While DPL’s time may have expired to
23 bring a claim for damages against JGS, DPL’s time to revoke the Permit does not expire. In further
24 support of this basic conclusion, DPL highlights the language contained within the Permit. Specifically,
25 Article 9 provides that the government may terminate the permit “when, in the opinion of the

1 Government, there has been a violation of any of the terms or conditions.” There is nothing which
2 limits the termination of the Permit to a designated period of time after the infracting conduct.⁴
3

4 **C. The Enumerated Violations**

5 In addition to denying that they violated the terms of the Permit, JGS argues that DPL should be
6 estopped from asserting that JGS violated the permit because it was waived by DPL’s predecessors in
7 interest. This argument will be addressed following the discussions of the enumerated violations.
8

9 *1. Alleged Violation of Article 3: Failure to Generate Revenue for Two Consecutive Years*

10 The review hearing afforded JGS the opportunity to refute the allegation that they had violated
11 their mining permit by failing to generate revenue for two consecutive years. As with the majority of
12 the other violations alleged by DPL at the hearing, JGS did not argue that the violation did not occur,
13 rather, they argued that the Commonwealth officials waived their rights to terminate the Permit by
14 taking no action during the preceding eight years, by continuing to support JGS, and by continuing to
15 accept annual permit fees.

16 Now, JGS concedes that for “various periods of time since 1995, no revenue was generated.”
17 However, JGS also states that the requirement in the Permit was to generate *and/or report* income and
18 therefore, it is not actually necessary to generate income as long as they report that no income is being
19 generated. JGS goes on to argue that the specific two year period in which JGS failed to report revenues
20 was never identified. Additionally, JGS argues that nonetheless, JGS kept in constant contact with the
21 various governing agencies and that therefore, the forfeiture of the permit is not equitable. *See*
22

23 ⁴ In their Reply Brief, JGS argues for the first time that the doctrine of Laches should apply. The argument is not
24 made in response to any argument espoused by DPL. The Court disagrees for the same reasons discussed regarding estoppel.
25 Further, the argument cannot be raised for the *first* time in a reply brief, denying DPL an opportunity to respond.

1 Petitioner’s Opening Brief at 7-8. However, JGS presents no evidence to show that they did, in fact,
2 generate revenue. Rather, JGS argues that the royalties and fees constitute revenue.

3 DPL argues that JGS did not produce any revenues for more than ten years and that Mr. Sablan
4 conceded as much during the hearing. The Court agrees. In the Secretary’s decision, he recognizes Mr.
5 Sablan’s admissions and JGS cannot dispute that they failed to generate revenue for more than two
6 consecutive years. Further, as the law provides, JGS had an opportunity to present contrary evidence at
7 the hearing which would show that the Secretary’s decision was not reasonable. JGS presented no such
8 evidence.

9 As to JGS’s argument that the permit merely required a “report” of revenue or the absence of
10 revenues, this argument is not effectual. The entire purpose underlying issuance of permits by the
11 Commonwealth is the generation of incomes. Further, that interpretation makes no sense in light of the
12 fact that there is no violation under the permit until the permit holder fails to report revenue for two
13 consecutive years. If the permit merely required a recitation of revenue (or an absence of revenue), why
14 would a permit holder be excused from doing so for two consecutive years? Additionally, JGS’s
15 interactions with MPLA and DPL, before and during the hearing, clearly indicates that all parties
16 interpreted the requirement the same.

17 JGS’s failure to generate revenue for more than two consecutive years (in fact, they generated no
18 revenue for more than ten years) is a blatant violation of the terms of the mining permit. The Permit
19 clearly requires that JGS generate revenues. JGS was unable to do so for more than two consecutive
20 years. If JGS presented evidence that they did, *in fact*, generate revenue - the reasonableness of the
21 Secretary’s decision would warrant close scrutiny. However, no such evidence was presented.
22 Moreover, this particular violation is egregious, defeats the purpose of the permit, and is harmful to the
23 interests of the Public. This Court is convinced that on the basis of this violation alone, which there is
24 substantial evidence of, the Secretary’s decision was reasonable. Nonetheless, the remaining alleged
25 violations will be briefly addressed.

1
2 2. Alleged Violation of Article 10: JGS Did Not Provide a Development Plan to DPL

3 JGS argues the presented evidence showed that a Development Plan was submitted in 1995. At
4 the hearing, JGS submitted a Table of Contents (TOC) which purported to be the table of contents from
5 a development plan. JGS argues that there was a Development Plan submitted in 1995, but by 2006, all
6 that remained of the plan was the TOC. However, DPL maintains that they were never given the
7 document from which the TOC supposedly came from. Unfortunately, other than the TOC, there is no
8 evidence of a Development Plan ever being submitted.

9 Contrary to JGS's contention, the evidence at the hearing did not show that a plan had been
10 submitted. Other than the purported TOC from the Development Plan and the self serving testimony of
11 Mr. Sablan, there was nothing more which indicated a Plan was submitted. In this particular instance,
12 the *lack of evidence* tends to show that no development plan ever existed. It is unclear why the TOC has
13 been preserved but the actual development plan which, arguably, should have formed the ongoing
14 business model of JGS's mining operation on Pagan is missing. Further, in the 2004 Notice of
15 Violation, the failure of JGS to submit the Plan in accordance with Article 10 was enumerated as one of
16 the many violations justifying termination. In the correspondence which followed the Notice of
17 Violation between JGS attorneys and MPLA attorneys, JGS *never* mentioned the TOC nor did they
18 dispute that a plan had not been submitted. In 2004, if JGS *had* submitted a Plan, it is only logical that
19 their attorney's would have notified MPLA attorneys of such.

20 Therefore, the failure of JGS to submit a Development Plan was a violation of the Mining
21 Permit. However, whether or not this violation, standing alone, would reasonably justify the termination
22 of the Permit is an unnecessary determination in light of the other violations.

23 //

24 //

25

1 3. Alleged Violation of Article 1: JGS Strayed Outside of Parcel A

2 The Mining Permit stated that the area included in JGS's permit as follows: "The government
3 hereby gives to the Permittee a permit to use those certain real properties, situated at Pagan Island in the
4 Northern marianas Islands as show and delineated on the attached Appendix 'A'." Unfortunately, the
5 contents of Appendix A are unknown and neither party was able to produce Appendix "A".

6 In determining that JGS mined outside the parameters of their permit, the Secretary relied on the
7 history of mining permits issued by the Commonwealth, the scope of the area permitted to JGS in 1992-
8 93, the 1994 survey map, and the 1995 decision of DPL to delineate three separate mining areas on
9 Pagan in order to accommodate three permittees. Based on this, the secretary concluded that JGS's
10 permit granted them exclusive mining rights only on Parcel A.

11 JGS argues that Appendix A was not a reference to Parcel A, rather, Appendix A depicted the
12 entire northern region of Pagan and did not divide Pagan into three mining parcels (Parcels A, B, and
13 C). According to JGS, Pagan was divided into smaller lots (Parcels A, B, and C) only after their Permit
14 was issued so that additional permits could be issued to other mining companies. According to the
15 testimony of Mr. Sablan, it was not until 2004 that JGS discovered that Pagan had been divided into
16 three parcels. According to Mr. Sablan, upon discovering that JGS did not have rights to the entirety of
17 Pagan, JGS agreed to waive any claims to Parcel B and C because Parcel A contained the best pozzolan
18 deposits on the condition that JGS could have access across Parcel B and Parcel C.

19 JGS argues that although the alleged letter to Omega may be dated a month prior to the
20 execution of the 1995 Permit, there is no evidence that the 1995 Permit was prepared after the Omega
21 letter. JGS alleges that the notary blocks on the permit do not depict the actual dates of the signatures
22 and the permit was "very likely prepared" well before the letter written to Omega. The argument is
23 unconvincing. JGS's argument is completely void of any factual, evidentiary basis and therefore, this
24 Court cannot accept them as true. JGS had an opportunity at the hearing to confront the Secretary with
25 these allegations and to submit evidence but did neither. Their failure to allege these charges before this

1 filing lends to the unreliability of the allegations.

2 However, this Court is inclined to agree with JGS that if JGS wandered off its designated area in
3 its mining operations, forfeiture of the permit may not be the proper remedy. According to JGS, which
4 DPL does not deny, the other two mining companies which held permits never lodged any complaints
5 about JGS being in their mining territory. Nonetheless, the evidence strongly supports the Secretary's
6 finding that JGS did conduct mining outside of the perimeter of Parcel A. Therefore, substantial
7 evidence existed which showed that JGS did breach the permit in this respect and the Secretary's
8 conclusion that JGS strayed outside of Parcel A was reasonable.

9
10 4. Alleged Unpaid Royalties

11 At the hearing, JGS contended that due to the Asian Economic Crisis, it was unable to make
12 royalty payments and further, JGS and MPLA had reached an agreement for a suitable repayment
13 schedule. Now, JGS argues that the parties agreed to "review exactly what was owed and to work out a
14 payment plan [and] in the interim, JGS was required to make minimum payments." See Petitioners
15 Opening Brief at 17. JGS argues that this agreement between them and MPLA constituted a deferment
16 by the government and because JGS has made their scheduled payments, JGS has not breached the
17 Permit.

18 DPL argues that the repayment schedule agreed to by the parties was in no way a deferment by
19 the government to bring an action against JGS for their failure to pay. Further, DPL argues that JGS has
20 presented no evidence which shows that the government agreed to waive any payment of royalties and
21 at the time of the revocation, JGS owed \$345,914.17 in royalties.

22 The record clearly shows that the government actually denied JGS's requests to waive the
23 payments owed. In 2002, staff recommended that payment of royalties not be waived in light of the fact
24 that even when the economy was strong, JGS did not fulfill their responsibilities to MPLA. The MPLA
25 Board of Directors accepted this recommendation and rejected JGS's request for a waiver of these

1 payments.

2 Further, just because a payment plan was agreed to by the parties for money that JGS already
3 owed, this is not a waiver of any monies that continue to accrue and continue to be due to MPLA or
4 DPL. There is no question that JGS owed more than \$300,000 in unpaid royalties. Additionally, there is
5 no evidence that an agreement was reached which actually deferred payments or precluded further
6 consideration of terminating the permit based on JGS's failure to pay royalties. JGS argues that they
7 should have been given notice and the opportunity to pay the amount owed before the permit was
8 terminated by DPL, however, this 'notice and opportunity' to pay was certainly not required by the
9 terms of their Permit. In fact, the terms of the Permit themselves, were JGS's 'notice' to pay. Clearly,
10 the Permit required them to make timely, routine royalty payments. That JGS was permitted to not pay
11 royalties for years and then make a lump sum payment followed by monthly payments does not
12 distinguish the written terms of the Permit.

13 Therefore, the Secretary had before him substantial evidence that JGS failed to pay royalties and
14 other fees in accordance with the Permit. Thus, revocation of the permit on this ground was reasonable.

15
16 **D. DPL Is Not Estopped from Terminating the Permit Because of the Acts of Their**
17 **Predecessors⁵**

18 "The general rule is that estoppel is rarely applied against the government. However, estoppel
19 may be invoked against the government in certain circumstances, such as where necessary to prevent
20 manifest injustice." *Benavente v. Marianas Pub. Land Corp.*, 2000 MP 13. The CNMI Supreme
21 Court's reluctance to find estoppel against the government reflects the United States Supreme Court's
22

23 ⁵The rules governing estoppel as applied to the government were first defined in this Court's Order which denied
24 Respondent's Partial Motion for Summary Judgment on July, 2, 2008. Those findings will be reproduced in their entirety
25 herein.

1 similar policy:

2 When the Government is unable to enforce the law because the conduct of its agents has
3 given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of
4 law is undermined. It is for this reason that it is well settled that the Government may not be
5 estopped on the same terms as any other litigant.

6 *Heckler v. Community Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984).

7 To determine whether the facts and circumstances warrant estopping the government, the CNMI

8 Supreme Court adopted a two-element test:

9 Estoppel is available when the actions of the government or its representative rise to a level
10 of “affirmative misconduct,” and the doctrine will not be invoked where it would defeat
11 operation of policy adopted to protect the public.

12
13 Before the Government will be estopped two additional elements must be satisfied beyond
14 those required for traditional estoppel. (Internal cite omitted). A “party seeking to raise
15 estoppel against the government must establish ‘affirmative misconduct going beyond mere
16 negligence’; even then estoppel will only apply where the government’s wrongful act will
17 cause a serious injustice, and the public’s interest will not suffer undue damage by
18 imposition of the liability.”

19 *Benavente* at ¶¶ 9-11, citing *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989) (Internal citation
20 omitted).

21 Thus, to succeed in estopping the government from terminating its Mining Permit on the basis
22 of its alleged breach of the Mining Permit terms, JGS must not only demonstrate the elements of
23 traditional estoppel⁶, but it also must show that its reasonable reliance on the government to his
24 detriment resulted from the government’s affirmative misconduct, and that estopping the government
25 would not so “defeat the operation of policy adopted to protect the public” such that the public’s interest
would suffer undue harm. *Id.*

21 ⁶Under CNMI law a party asserting estoppel against a private party must prove the following: (1) that the party to be
22 estopped was apprised of the facts; (2) that the party to be estopped intended that his conduct would be acted upon, or acted
23 such that the party asserting the estoppel had a right to believe it was so intended; (3) that the party seeking estoppel was
24 ignorant of the true state of facts; and (4) that the party seeking estoppel relied upon the conduct to his injury. *See In re*
25 *Blankenship*, 3 N.M.I. 209, 214 (1992).

1 Affirmative misconduct is the only element that DPL contested in their briefings regarding
2 whether or not estoppel should apply. Assuming arguendo, that the other elements are satisfied, JGS
3 cannot begin to show that MPLA or the Secretary engaged in affirmative misconduct; therefore,
4 estoppel does not apply.

5 DPL admits that the agencies preceding DPL in interest failed to act on JGS's alleged violations
6 of the Mining Permit. However, DPL insists that nowhere in the record is there evidence that the
7 Government, by and through DPL's predecessors in interest, committed such affirmative misconduct
8 that it should be estopped from asserting the provisions of the Mining Permit against JGS which justify
9 termination of the Mining Permit.

10 JGS argues that the government and Secretary Del Rosario committed affirmative misconduct.
11 JGS submits that the Secretary, in his own language, admits that MPLA committed affirmative
12 misconduct. However, this Court will not rely on an excerpt from the Secretary's decision to determine
13 that affirmative conduct, *as defined by the law of estoppel*, actually existed. This is not, as JGS
14 suggests, an "admission" by DPL.

15 Additionally, JGS enumerates the following as constituting affirmative misconduct by the
16 government:

- 17 1) On June 4, 2004, JGS paid to MPLA \$125,433.27 to pay for all the required Permit fee
18 from September 8, 1995 to January 31, 2004.
- 19 2) On January 2005, JGS paid to MPLA \$20,000 to pay for JGS Mining Permit fee to cover
20 from January 2005 - December 2005.
- 21 3) On April 28, 2005, the Commission of MPLA. . .represented to JGS via letter that the
22 JGS Mining Permit has not been terminated, its permit fee is current up to December
23 2005 and that MPLA is looking forward to a continued business relationship with JGS.
- 24 4) On December 9, 2005, the parties met at the MPLA's office. . . . In this meeting JGS
25 informed MPLA that JGS and Bridgecreek entered into a Joint Venture and JGS' plans in

1 commencing with the pozzolan project.

2 5) At the end of this December 9, 2008 meeting, the Commissioner congratulated JGS with
3 the Joint Venture, and thereafter, JGS handed \$20,000 to MPLA Commissioner Edward
4 Deleon Guerrero to pay for JGS' Mining Permit from January 2006 - December 2006.
5 MPLA accepted the payment.

6 6) On January 20, 2006, JGS provided MPLA with a copy of an insurance Policy
7 Declaration proving that JGS secured a \$100,000 insurance as required by Article 12 of
8 the JGS Permit

9 7) On May 3, 2005, DPL terminated the Permit and did not return to JGS any of the money
10 that JGS had paid to MPLA since June 24, 2004, even though DPL was declaring a
11 breach largely for matters that occurred before June, 2004.

12 *See* Petitioner's Opening Brief at 29-30.

13 JGS also states that "MPLA's acceptance of such payment gave rise to its affirmative
14 representation that JGS' payment satisfied the Notice of Violation and that its permit is valid up until
15 December 2004." *Id.* at 31. This argument is essentially repeated in connection with MPLA's
16 acceptance of payment again in December of 2005. JGS argues that if MPLA knew of any violations at
17 the meeting in December 2005, then that would have been the appropriate time to inform JGS of those
18 violations. JGS argues that this inaction (the failure to make JGS aware of the violations and the failure
19 to revoke the permit) and acceptance of the payment amounts to affirmative misconduct.

20 However, JGS does not contend that MPLA had any intention to revoke the permit at the time
21 they accepted payment and therefore, acted deceitfully. Rather, JGS acknowledges that MPLA had no
22 intention to revoke the permit. However, when DPL was faced with the decision of whether or not to
23 revoke JGS's permit, DPL chose not to overlook JGS's violations the way that MPLA had done for
24 many years. However, nothing in the list of 7 alleged affirmative misrepresentations that JGS
25 enumerates nor MPLA's acceptance of payments equates to acts of negligence or affirmative

1 misrepresentations. Affirmative conduct, as anticipated by the law of estoppel, means that the preceding
2 agency acted with *more than* mere negligence. Here, this Court cannot point to actions by the preceding
3 agency which would even constitute negligence, let alone affirmative misconduct. MPLA’s decision
4 not to terminate the permit was not an act of negligence, nor is MPLA’s acceptance of the fees from
5 JGS. At that time, JGS concedes that MPLA had no intention of revoking the permit. Therefore, there
6 is no allegation that MPLA acts were fraudulent or deceptive.

7 Further, MPLA did not ignore their own procedures or fail to uphold their obligations under the
8 permit in a negligent manner. Rather, MPLA afforded JGS additional opportunities to actually uphold
9 *JGS’s obligations* under the permit. Providing JGS with additional ‘chances’ is not affirmative
10 misconduct. MPLA’s successor, DPL, determined that the failures of JGS had been overlooked by
11 MPLA too many times and to the detriment of the CNMI. Simply stated, the government agency in
12 charge of the Permit decided to enforce the terms of the Permit. This is not a showing of affirmative
13 misconduct.

14 Courts are hesitant to apply the principles of estoppel to government agencies. In light of the
15 difficult burden JGS bears to show estoppel is appropriate and in light of the complete absence of a
16 showing of affirmative misconduct, estoppel is not appropriate.⁷

18 ⁷ JGS also argues that “what happened in April, 2006, is misconduct of the worst kind.” JGS asserts that a public
19 official “essentially tried to coerce JGS into relinquishing its Permit and violate a joint venture agreement so that public
20 official could select a different joint venture partner for JGS.” JGS goes on to argue that “[i]mplicit in this action was that the
21 Secretary would benefit directly from the new joint venture partner . . . [w]hen JGS refused to participate in this activity, the
22 Secretary used his position to terminate the Permit.” However, JGS cannot simply make broad accusations and expect the
23 court to heed the accusation. The only pittance of evidence in this regard was when counsel for JGS asked Mr. Sablan, “Was
24 it suggested that you should let your permit go so the RFP can go forward?” Mr. Sablan responded, “I don’t know if I should
25 go into that.” Those two statements do not equate with evidence of misconduct. As there is a complete lack of evidence in

1 **IV. CONCLUSION**

2 The decision to revoke the mining permit was reasonable. There were multiple, legitimate
3 reasons to revoke the permit and the decision was based on substantial evidence. Further, JGS was put
4 on notice well before the permit was actually terminated that they were in violation of the permit and
5 facing possibly revocation. In fact, two other company's permits were terminated for similar reasons
6 but after less egregious violations. JGS cannot now assert that their permit was unreasonably revoked.
7 For the foregoing reasons, this Court AFFIRMS the decision of DPL to revoke the JGS Mining Permit.

8
9 **So ORDERED** this 31st day of December, 2008.

10
11 /s/
12 _____
13 David A. Wiseman, Associate Judge

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25 relation to this matter, it will not be addressed by this Court. *See* Petitioner's Opening Brief at 5.