802.2(c)
7ACCX4)

[redacted]

[redacted]

March 23, 2004

HAND DELIVERY

Mr. Michael Verne
Compliance Specialist
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Washington, DC 20580

Re: HSR Exemptions for Unproductive Real Property & Sublease of Land Owned by State Agency

Dear Mr. Verne:

This is to confirm our telephone conversation with you on March 8 and 23, 2004, in which you agreed that unproductive property and the sublease of land owned by a State agency are exempt from the Hart-Scott-Rodino reporting requirements.

FACTS

Company A intends to lease three parcels of land to Company B.

Tract 1 is presently lying fallow: there are no mining or any other commercial activities presently being performed on it nor have there been during the past three years. Thus, no revenue has been or is being derived from Tract 1. Tract 1 is not adjacent to or used in conjunction with either Tract 2 or Tract 3.

Company A owns Tract 2 and a portion of Tract 3 which are adjacent to each other. Company A conducts mining operations on Tract 2; however, it does not conduct any operations on the portion of Tract 3 which it owns and which is adjacent to Tract 3. Company A leases a portion of Tract 3 from a trust fund owned and controlled by a State agency, who leases it to the trust fund. Company A also owns an asphalt plant facility on a portion of Tract 2 which will be retained and will not be leased to Company B.

Company A intends to grant to Company B an exclusive lease or sublease to extract natural resources from all three Tracts for a period of twenty-five years or until the minerals are excavated, which ever comes first. The lease can be extended for a total of ten additional years. The parties intend that all of the mineral reserves located on the Tracts will be mined during the initial lease or during the extended lease period. Company A will also sell to Company B

[redacted]

existing inventories located at Tracts 2 and 3 and Company A will perform extracting and other production services for a one year period as a subcontractor of Company B.

Even though the proposed lease is an exclusive, life-of-the mine lease, Company A, who retains legal title, at any time can sell Tract 1 or Tract 2 at anytime during the term of the lease, subject to Company B's right of first refusal. Company B has the right to purchase Tract 1 and Tract 2 for a stated purchase price at the end of the mine's useful life and any reclamation work to be performed by Company B.

Company B will guarantee Company A a minimum dollar amount for the lease of all three Tracts; however the actual payment may exceed the minimum dollar amount depending on the quantity of minerals extracted and their market price.

ANALYSIS AND CONCLUSIONS

Since there are three separate Tracts it is possible that an exemption from HSR reporting requirements may attach to any one Tract and therefore, each Tract may be analyzed separately to determine if an HSR exemption applies to a Tract of a portion thereof.

TRACT 1. Section 802.2(c) of the HSR rules and regulations excludes from the HSR reporting requirements "Unproductive real property", which is defined, in part, to include real property, including natural resources, that have not generated total revenues in excess of $5 million during the thirty-six month period preceding its acquisition. Unproductive real property does not include any real property that is either "adjacent to" or "used in conjunction" with real property that is not unproductive real property and is included in an acquisition. 16 C.F.R. §802.2(c)(2)(iii). Example 3 to section 802.2 notes that an acquisition of a tract of raw land with copper and timber reserves that generated minimal revenues is exempt from HSR reporting requirements because of the limited revenues generated and because the "reserves are by definition unproductive real property and, thus, are not separately subject to the notification requirements."

Assuming arguendo that the proposed lease constitutes an asset acquisition under HSR, the proposed lease of Tract 1 from Company A meets the requirements of section 802.2(c) because it has not generated revenues in excess of $5 million during the past thirty-six months prior to the proposed lease and is not adjacent to or used in conjunction with any other assets. Based on this exemption, the value of Tract 1 would not be aggregated with any other assets acquired by Company B pursuant to section 801.15(a) of the HSR rules.

Tract 2. As noted above, Company A conducts mining operations on Tract 2 and thus, if the lease to this realty constitutes an acquisition, it would not be exempt under section 802.2 of the HSR rules since it is an on-going operation and would not meet the requirements of this section or any other exemption section of the HSR rules. Thus, the acquisition price or fair market value of Tract 2 would need to be aggregated with any other non-exempt assets to

determine whether the price or fair market value of the assets to be conveyed exceeds $50 million in value.

Tract 3. Tract 3 is owned in part by Company A and in part by a State, which leases it to Company A. The portion which Company A owns lies fallow and no operations are being conducting on this portion; however, this portion of Tract 3 is adjacent to Tract 2 which is owned and being mined by Company A. Therefore, this portion of Tract 3 is not exempt under the HSR rules and its value must be aggregated with the value of Tract 2 in determining the total value of the proposed transaction.

In regard to the portion of Tract 3 which is owned by the State and leased to Company A, the lease of this portion is not subject to HSR reporting requirements because the land is owned by an agency of the State which leases it to a trust fund also owned and controlled by the same agency. An acquisition from a State or an agency thereof, other than a corporation engaged in commerce, is exempt from the HSR reporting requirements pursuant to section 7(c)(4) of the HSR Act and section 801.1(a)(2) of the HSR rules. Entering into a sublease is not regarded as an asset acquisition and is considered to be the creation of an asset (the "leasehold interest") similar to entering into the original lease. PNPM, opinion 104 (2003 edition). Because the parties are entering into a sublease, there is no asset acquisition and therefore, no value from the sublease need be aggregated with non-exempt assets.

Based on the above, it may be fairly stated that Tract 2, which Company A owns and conducts mining operations thereon, and the portion of Tract 3 which it owns and is adjacent to Tract 2, along with any existing inventory must be aggregated to determine the value of the proposed transaction.

The HSR Act, 15 U.S.C.§ 18a provides that an HSR filing only need be made for transactions which exceed $50 million in value. The value of assets for HSR purposes is the stated purchase price or the fair market value, whichever is the greater. 16 C.F.R. § 801.10(b). Whether there is a stated purchase price depends on whether the acquiring party has a reasonable basis for determining the contingent portion of the acquisition price. PNPM, opinion 101 (2003 edition). If the board of directors of Company B (or its delegate) concludes that it cannot fairly estimate the value of the contingency than the acquisition price is not determinable and the fair market value, made in good faith, must be relied upon to determine if the value of the proposed transaction exceeds $50 million. If the fair market value does not exceed $50 million, an HSR premerger notification cannot be made since the transaction is exempt due to failure to meet the size-of-transaction test under the HSR Act.

If you wish to discuss the matter further, please telephone [redacted] and [redacted]. Thank you for your time and consideration in this matter.

Sincerely,

[redacted]

Sincerely,

[redacted]

AGREE -
B. Buchholz
3/24/04