

**APEX MINING CO., INC., PETITIONER, VS. SOUTHEAST MINDANAO
GOLD MINING CORP., THE MINES ADJUDICATION BOARD,
PROVINCIAL MINING REGULATORY BOARD (PMRB-DAVAO),
MONKAYO INTEGRATED SM...**

G.R. Nos. 152613 & 152628. November 20, 2009

Ponente: CHICO-NAZARIO, J.

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CHICO-NAZARIO, J.:

This resolves the motion for reconsideration dated 12 July 2006, filed by Southeast Mindanao Gold Mining Corporation (SEM), of this Court's Decision dated 23 June 2006 (Assailed Decision). The Assailed Decision held that the assignment of Exploration Permit (EP) 133 in favor of SEM violated one of the conditions stipulated in the permit, i.e., that the same shall be for the exclusive use and benefit of Marcopper Mining Corporation (MMC) or its duly authorized agents. Since SEM did not claim or submit evidence that it was a designated agent of MMC, the latter cannot be considered as an agent of the former that can use EP 133 and benefit from it. It also ruled that the transfer of EP 133 violated Presidential Decree No. 463, which requires that the assignment of a mining right be made with the prior approval of the Secretary of the Department of Environment and Natural Resources (DENR). Moreover, the Assailed Decision pointed out that EP 133 expired by non-renewal since it was not renewed before or after its expiration.

The Assailed Decision likewise upheld the validity of Proclamation No. 297 absent any question against its validity. In view of this, and considering that under Section 5 of Republic Act No. 7942, otherwise known as the "Mining Act of 1995," mining operations in mineral reservations may be undertaken directly by the State or through a contractor, the Court deemed the issue of ownership of priority right over the contested Diwalwal Gold Rush Area as having been overtaken by the said proclamation. Thus, it was held in the Assailed Decision that it is now within the prerogative of the Executive Department to undertake directly the mining operations of the disputed area or to award the operations to private entities including petitioners Apex and Balite, subject to applicable laws, rules and regulations, and provided that these private entities are qualified.

SEM also filed a Motion for Referral of Case to the Court En Banc and for Oral Arguments dated 22 August 2006.

Apex, for its part, filed a Motion for Clarification of the Assailed Decision, praying that the Court elucidate on the Decision's pronouncement that "mining operations, are now, therefore within the full control of the State through the executive branch." Moreover, Apex asks this Court to order the Mines and Geosciences Board (MGB) to accept its application for an exploration permit.

In its Manifestation and Motion dated 28 July 2006, Balite echoes the same concern as that of Apex on the actual takeover by the State of the mining industry in the disputed area to the exclusion of the private sector. In addition, Balite prays for this Court to direct MGB to accept its application for an exploration permit.

Camilo Banad, et al., likewise filed a motion for reconsideration and prayed that the disputed area be awarded to them.

In the Resolution dated 15 April 2008, the Court En Banc resolved to accept the instant cases. The Court, in a resolution dated 29 April 2008, resolved to set the cases for Oral Argument on 1 July 2008.

During the Oral Argument, the Court identified the following principal issues to be discussed by the parties:

1. Whether the transfer or assignment of Exploration Permit (EP) 133 by MMC to SEM was validly made without violating any of the terms and conditions set forth in Presidential Decree No. 463 and EP 133 itself.
2. Whether Southeast Mindanao Mining Corp. acquired a vested right over the disputed area, which constitutes a property right protected by the Constitution.
3. Whether the assailed Decision dated 23 June 2006 of the Third Division in this case is contrary to and overturns the earlier Decision of this Court in *Apex v. Garcia* (G.R. No. 92605, 16 July 1991, 199 SCRA 278).
4. Whether the issuance of Proclamation No. 297 declaring the disputed area as mineral reservation outweighs the claims of SEM, Apex Mining Co. Inc. and Balite Communal Portal Mining Cooperative over the Diwalwal Gold Rush Area.
5. Whether the issue of the legality/constitutionality of Proclamation No. 297 was belatedly raised.
6. Assuming that the legality/constitutionality of Proclamation No. 297 was timely raised, whether said proclamation violates any of the following:
 - a. Article XII, Section 4 of the Constitution;
 - b. Section 1 of Republic Act No. 3092;
 - c. Section 14 of the Administrative Code of 1987;
 - d. Section 5(a) of Republic Act No. 7586;
 - e. Section 4(a) of Republic Act No. 6657; and
 - f. Section 2, Subsection 2.1.2 of Executive Order No. 318 dated 9 June 2004.

After hearing the arguments of the parties, the Court required them to submit their respective memoranda. Memoranda were accordingly filed by SEM, Apex, Balite and Mines Adjudication Board (MAB).

We shall resolve the second issue before dwelling on the first, third and the rest of the issues.

MMC or SEM Did Not Have Vested
Rights Over the Diwalwal Gold Rush
Area

Petitioner SEM vigorously argues that *Apex Mining Co., Inc. v. Garcia*[1] vested in MMC mining rights over the disputed area. It claims that the mining rights that MMC acquired under the said case were the ones assigned to SEM, and not the right to explore under MMC's EP 133. It insists that mining rights, once obtained, continue to subsist regardless of the validity of the exploration permit; thus, mining rights are independent of the exploration permit and therefore do not expire with the permit. SEM insists that a mining right is a vested property right that not even the government can take away. To support this thesis, SEM cites this Court's ruling in *McDaniel v. Apacible and Cuisia*[2] and in *Gold Creek Mining Corporation v. Rodriguez*,[3] which were decided in 1922 and 1938, respectively.

McDaniel and *Gold Creek Mining Corporation* are not in point.

In 1916, *McDaniel*, petitioner therein, located minerals, i.e., petroleum, on an unoccupied public land and

registered his mineral claims with the office of the mining recorder pursuant to the Philippine Bill of 1902, where a mining claim locator, soon after locating the mine, enjoyed possessory rights with respect to such mining claim with or without a patent therefor. In that case, the Agriculture Secretary, by virtue of Act No. 2932, approved in 1920, which provides that "all public lands may be leased by the then Secretary of Agriculture and Natural Resources," was about to grant the application for lease of therein respondent, overlapping the mining claims of the subject petitioner. Petitioner argued that, being a valid locator, he had vested right over the public land where his mining claims were located. There, the Court ruled that the mining claim perfected under the Philippine Bill of 1902, is "property in the highest sense of that term, which may be sold and conveyed, and will pass by descent, and is not therefore subject to the disposal of the Government." The Court then declared that since petitioner had already perfected his mining claim under the Philippine Bill of 1902, a subsequent statute, i.e., Act No. 2932, could not operate to deprive him of his already perfected mining claim, without violating his property right.

Gold Creek Mining reiterated the ruling in *McDaniel* that a perfected mining claim under the Philippine Bill of 1902 no longer formed part of the public domain; hence, such mining claim does not come within the prohibition against the alienation of natural resources under Section 1, Article XII of the 1935 Constitution.

Gleaned from the ruling on the foregoing cases is that for this law to apply, it must be established that the mining claim must have been perfected when the Philippine Bill of 1902 was still in force and effect. This is so because, unlike the subsequent laws that prohibit the alienation of mining lands, the Philippine Bill of 1902 sanctioned the alienation of mining lands to private individuals. The Philippine Bill of 1902 contained provisions for, among many other things, the open and free exploration, occupation and purchase of mineral deposits and the land where they may be found. It declared "all valuable mineral deposits in public lands in the Philippine Islands, both surveyed and unsurveyed x x x to be free and open to exploration, occupation, and purchase, and the land in which they are found to occupation and purchase, by citizens of the United States, or of said Islands x x x." [4] Pursuant to this law, the holder of the mineral claim is entitled to all the minerals that may lie within his claim, provided he does three acts: First, he enters the mining land and locates a plot of ground measuring, where possible, but not exceeding, one thousand feet in length by one thousand feet in breadth, in as nearly a rectangular form as possible. [5] Second, the mining locator has to record the mineral claim in the mining recorder within thirty (30) days after the location thereof. [6] Lastly, he must comply with the annual actual work requirement. [7] Complete mining rights, namely, the rights to explore, develop and utilize, are acquired by a mining locator by simply following the foregoing requirements.

With the effectivity of the 1935 Constitution, where the regalian doctrine was adopted, it was declared that all natural resources of the Philippines, including mineral lands and minerals, were property belonging to the State. [8] Excluded, however, from the property of public domain were the mineral lands and minerals that were located and perfected by virtue of the Philippine Bill of 1902, since they were already considered private properties of the locators. [9]

Commonwealth Act No. 137 or the Mining Act of 1936, which expressly adopted the regalian doctrine following the provision of the 1935 Constitution, also proscribed the alienation of mining lands and granted only lease rights to mining claimants, who were prohibited from purchasing the mining claim itself.

When Presidential Decree No. 463, which revised Commonwealth Act No. 137, was in force in 1974, it likewise recognized the regalian doctrine embodied in the 1973 Constitution. It declared that all mineral deposits and public and private lands belonged to the state while, nonetheless, recognizing mineral rights that had already been existing under the Philippine Bill of 1902 as being beyond the purview of the regalian doctrine. [10] The possessory rights of mining claim holders under the Philippine Bill of 1902 remained intact and effective, and such rights were recognized as property rights that the holders could convey or pass by descent. [11]

In the instant cases, SEM does not aver or prove that its mining rights had been perfected and completed when the Philippine Bill of 1902 was still the operative law. Surely, it is impossible for SEM to successfully assert that it acquired mining rights over the disputed area in accordance with the same bill, since it was only in 1984 that MMC, SEM's predecessor-in-interest, filed its declaration of locations and its prospecting permit application in compliance with Presidential Decree No. 463. It was on 1 July 1985 and 10 March 1986 that a Prospecting Permit and EP 133, respectively, were issued to MMC. Considering these facts, there is no possibility that MMC or SEM could have acquired a perfected mining claim under the auspices of the Philippine Bill of 1902. Whatever mining rights MMC had that it invalidly transferred to SEM cannot, by any stretch of imagination, be considered "mining rights" as contemplated under the Philippine Bill of 1902 and immortalized in *McDaniel and Gold Creek Mining*.

SEM likens EP 133 with a building permit. SEM likewise equates its supposed rights attached to the exploration permit with the rights that a private property land owner has to said landholding. This analogy has no basis in law. As earlier discussed, under the 1935, 1973 and 1987 Constitutions, national wealth, such as mineral resources, are owned by the State and not by their discoverer. The discoverer or locator can only develop and utilize said minerals for his own benefit if he has complied with all the requirements set forth by applicable laws and if the State has conferred on him such right through permits, concessions or agreements. In other words, without the imprimatur of the State, any mining aspirant does not have any definitive right over the mineral land because, unlike a private landholding, mineral land is owned by the State, and the same cannot be alienated to any private person as explicitly stated in Section 2, Article XIV of the 1987 Constitution:

All lands of public domain, waters, minerals x x x and all other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. (Emphases supplied.)

Further, a closer scrutiny of the deed of assignment in favor of SEM reveals that MMC assigned to the former the rights and interests it had in EP 133, thus:

1. That for ONE PESO (P1.00) and other valuable consideration received by the ASSIGNOR from the ASSIGNEE, the ASSIGNOR hereby ASSIGNS, TRANSFERS and CONVEYS unto the ASSIGNEE whatever rights or interest the ASSIGNOR may have in the area situated in Monkayo, Davao del Norte and Cateel, Davao Oriental, identified as Exploration Permit No. 133 and Application for a Permit to Prospect in Bunawan, Agusan del Sur respectively. (Emphasis supplied.)

It is evident that what MMC had over the disputed area during the assignment was an exploration permit. Clearly, the right that SEM acquired was limited to exploration, only because MMC was a mere holder of an exploration permit. As previously explained, SEM did not acquire the rights inherent in the permit, as the assignment by MMC to SEM was done in violation of the condition stipulated in the permit, and the assignment was effected without the approval of the proper authority in contravention of the provision of the mining law governing at that time. In addition, the permit expired on 6 July 1994. It is, therefore, quite clear that SEM has no right over the area.

Even assuming *arguendo* that SEM obtained the rights attached in EP 133, said rights cannot be considered as property rights protected under the fundamental law.

An exploration permit does not automatically ripen into a right to extract and utilize the minerals; much less does it develop into a vested right. The holder of an exploration permit only has the right to conduct exploration works on the area awarded. Presidential Decree No. 463 defined exploration as "the examination and investigation of lands supposed to contain valuable minerals, by drilling, trenching, shaft sinking, tunneling, test pitting and other means, for the purpose of probing the presence of mineral deposits and the extent thereof." Exploration does not include development and exploitation of the minerals found. Development is defined by the same statute as the

steps necessarily taken to reach an ore body or mineral deposit so that it can be mined, whereas exploitation is defined as "the extraction and utilization of mineral deposits." An exploration permit is nothing more than a mere right accorded to its holder to be given priority in the government's consideration in the granting of the right to develop and utilize the minerals over the area. An exploration permit is merely inchoate, in that the holder still has to comply with the terms and conditions embodied in the permit. This is manifest in the language of Presidential Decree No. 463, thus:

Sec. 8. x x x The right to exploit therein shall be awarded by the President under such terms and conditions as recommended by the Director and approved by the Secretary Provided, That the persons or corporations who undertook prospecting and exploration of said area shall be given priority.

In *La Bugal-B'laan Tribal Association, Inc. v. Ramos*,^[12] this Court emphasized:

Pursuant to Section 20 of RA 7942, an exploration permit merely grants to a qualified person the right to conduct exploration for all minerals in specified areas. Such a permit does not amount to an authorization to extract and carry off the mineral resources that may be discovered. x x x.

Pursuant to Section 24 of RA 7942, an exploration permit grantee who determines the commercial viability of a mining area may, within the term of the permit, file with the MGB a declaration of mining project feasibility accompanied by a work program for development. The approval of the mining project feasibility and compliance with other requirements of RA 7942 vests in the grantee the exclusive right to an MPSA or any other mineral agreement, or to an FTAA. (Underscoring ours.)

The non-acquisition by MMC or SEM of any vested right over the disputed area is supported by this Court's ruling in *Southeast Mindanao Gold Mining Corporation v. Balite Portal Mining Cooperative*^[13]:

Clearly then, the Apex Mining case did not invest petitioner with any definite right to the Diwalwal mines which it could now set up against respondent BCMC and other mining groups.

Incidentally, it must likewise be pointed out that under no circumstances may petitioner's rights under EP No. 133 be regarded as total and absolute. As correctly held by the Court of Appeals in its challenged decision, EP No. 133 merely evidences a privilege granted by the State, which may be amended, modified or rescinded when the national interest so requires. x x x. (Underscoring supplied.)

Unfortunately, SEM cannot be given priority to develop and exploit the area covered by EP 133 because, as discussed in the assailed Decision, EP 133 expired by non-renewal on 6 July 1994. Also, as already mentioned, the transfer of the said permit to SEM was without legal effect because it was done in contravention of Presidential Decree No. 463 which requires prior approval from the proper authority. Simply told, SEM holds nothing for it to be entitled to conduct mining activities in the disputed mineral land.

SEM wants to impress on this Court that its alleged mining rights, by virtue of its being a transferee of EP 133, is similar to a Financial and Technical Assistance Agreement (FTAA) of a foreign contractor, which merits protection by the due process clause of the Constitution. SEM cites *La Bugal-B'laan Tribal Association, Inc. v. Ramos*,^[14] as follows:

To say that an FTAA is just like a mere timber license or permit and does not involve contract or property rights which merit protection by the due process clause of the Constitution, and may therefore be revoked or cancelled in the blink of an eye, is to adopt a well-nigh confiscatory stance; at the very least, it is downright dismissive of the property rights of businesspersons and corporate entities that have investments in the mining industry, whose investments, operations and expenditures do contribute to the general welfare of the people, the coffers of government, and the strength of the economy. x x x.

Again, this argument is not meritorious. SEM did not acquire the rights attached to EP 133, since their transfer

was without legal effect. Granting for the sake of argument that SEM was a valid transferee of the permit, its right is not that of a mining contractor. An exploration permit grantee is vested with the right to conduct exploration only, while an FTAA or MPSA contractor is authorized to extract and carry off the mineral resources that may be discovered in the area.[15] An exploration permit holder still has to comply with the mining project feasibility and other requirements under the mining law. It has to obtain approval of such accomplished requirements from the appropriate government agencies. Upon obtaining this approval, the exploration permit holder has to file an application for an FTAA or an MPSA and have it approved also. Until the MPSA application of SEM is approved, it cannot lawfully claim that it possesses the rights of an MPSA or FTAA holder, thus:

x x x prior to the issuance of such FTAA or mineral agreement, the exploration permit grantee (or prospective contractor) cannot yet be deemed to have entered into any contract or agreement with the State x x x.[16]

But again, SEM is not qualified to apply for an FTAA or any mineral agreement, considering that it is not a holder of a valid exploration permit, since EP 133 expired by non-renewal and the transfer to it of the same permit has no legal value.

More importantly, assuming *arguendo* that SEM has a valid exploration permit, it cannot assert any mining right over the disputed area, since the State has taken over the mining operations therein, pursuant to Proclamation No. 297 issued by the President on 25 November 2002. The Court has consistently ruled that the nature of a natural resource exploration permit is analogous to that of a license. In *Republic v. Rosemoor Mining and Development Corporation*, this Court articulated:

Like timber permits, mining exploration permits do not vest in the grantee any permanent or irrevocable right within the purview of the non-impairment of contract and due process clauses of the Constitution, since the State, under its all-encompassing police power, may alter, modify or amend the same, in accordance with the demands of the general welfare.[17] (Emphasis supplied.)

As a mere license or privilege, an exploration permit can be validly amended by the President of the Republic when national interests suitably necessitate. The Court instructed thus:

Timber licenses, permits and license agreements are the principal instruments by which the State regulates the utilization and disposition of forest resources to the end that the public welfare is promoted. x x x They may be validly amended, modified, replaced or rescinded by the Chief Executive when national interests so require.[18]

Recognizing the importance of the country's natural resources, not only for national economic development, but also for its security and national defense, Section 5 of Republic Act No. 7942 empowers the President, when the national interest so requires, to establish mineral reservations where mining operations shall be undertaken directly by the State or through a contractor, viz:

SEC 5. Mineral Reservations. - When the national interest so requires, such as when there is a need to preserve strategic raw materials for industries critical to national development, or certain minerals for scientific, cultural or ecological value, the President may establish mineral reservations upon the recommendation of the Director through the Secretary. Mining operations in existing mineral reservations and such other reservations as may thereafter be established, shall be undertaken by the Department or through a contractor x x x. (Emphasis supplied.)

Due to the pressing concerns in the Diwalwal Gold Rush Area brought about by unregulated small to medium-scale mining operations causing ecological, health and peace and order problems, the President, on 25 November 2002, issued Proclamation No. 297, which declared the area as a mineral reservation and as an environmentally critical area. This executive fiat was aimed at preventing the further dissipation of the natural

environment and rationalizing the mining operations in the area in order to attain an orderly balance between socio-economic growth and environmental protection. The area being a mineral reservation, the Executive Department has full control over it pursuant to Section 5 of Republic Act No. 7942. It can either directly undertake the exploration, development and utilization of the minerals found therein, or it can enter into agreements with qualified entities. Since the Executive Department now has control over the exploration, development and utilization of the resources in the disputed area, SEM's exploration permit, assuming that it is still valid, has been effectively withdrawn. The exercise of such power through Proclamation No. 297 is in accord with jura regalia, where the State exercises its sovereign power as owner of lands of the public domain and the mineral deposits found within. Thus, Article XII, Section 2 of the 1987 Constitution emphasizes:

SEC. 2. All lands of the public domain, water, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or product-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. (Emphasis supplied.)

Furthermore, said proclamation cannot be denounced as offensive to the fundamental law because the State is sanctioned to do so in the exercise of its police power.[19] The issues on health and peace and order, as well the decadence of the forest resources brought about by unregulated mining in the area, are matters of national interest. The declaration of the Chief Executive making the area a mineral reservation, therefore, is sanctioned by Section 5 of Republic Act No. 7942.

The Assignment of EP No. 133 by MMC
in Favor of SEM Violated Section 97 of
Presidential Decree No. 463 and the
Terms and Conditions Set Forth in the
Permit

SEM claims that the approval requirement under Section 97 of Presidential Decree No. 463 is not applicable to this case, because MMC neither applied for nor was granted a mining lease contract. The said provision states:

SEC. 97. Assignment of Mining Rights. - A mining lease contract or any interest therein shall not be transferred, assigned, or subleased without the prior approval of the Secretary: Provided, that such transfer, assignment or sublease may be made only to a qualified person possessing the resources and capability to continue the mining operations of the lessee and that the assignor has complied with all the obligations of the lease: Provided, further, That such transfer or assignment shall be duly registered with the office of the mining recorder concerned. (Emphasis supplied.)

Exploration Permit 133 was issued in favor of MMC on 10 March 1986, when Presidential Decree No. 463 was still the governing law. Presidential Decree No. 463 pertains to the old system of exploration, development and utilization of natural resources through "license, concession or lease." [20]

Pursuant to this law, a mining lease contract confers on the lessee or his successors the right to extract, to remove, process and utilize the mineral deposits found on or underneath the surface of his mining claims covered by the lease. The lessee may also enter into a service contract for the exploration, development and exploitation of the minerals from the lands covered by his lease, to wit:

SEC. 44. A mining lease contract shall grant to the lessee, his heirs, successors, and assigns the right to extract all mineral deposits found on or underneath the surface of his mining claims covered by the lease, continued

vertically downward; to remove, process, and otherwise utilize the mineral deposits for his own benefit; and to use the lands covered by the lease for the purpose or purposes specified therein x x x That a lessee may on his own or through the Government, enter into a service contract... for the exploration, development and exploitation of his claims and the processing and marketing of the product thereof, subject to the rules and regulations that shall be promulgated by the Director, with the approval of the Secretary x x x. (Emphases supplied.)

In other words, the lessee's interests are not only limited to the extraction or utilization of the minerals in the contract area, but also to include the right to explore and develop the same. This right to explore the mining claim or the contract area is derived from the exploration permit duly issued by the proper authority. An exploration permit is, thus, covered by the term "any other interest therein." Section 97 is entitled, "Assignment of Mining Rights." This alone gives a hint that before mining rights -- namely, the rights to explore, develop and utilize -- are transferred or assigned, prior approval must be obtained from the DENR Secretary. An exploration permit, thus, cannot be assigned without the imprimatur of the Secretary of the DENR.

It is instructive to note that under Section 13 of Presidential Decree No. 463, the prospecting and exploration of minerals in government reservations, such as forest reservations, are prohibited, except with the permission of the government agency concerned. It is the government agency concerned that has the prerogative to conduct prospecting, exploration and exploitation of such reserved lands.[21] It is only in instances wherein said government agency, in this case the Bureau of Mines, cannot undertake said mining operations that qualified persons may be allowed by the government to undertake such operations. *PNOC-EDC v. Veneracion, Jr.*[22] outlines the five requirements for acquiring mining rights in reserved lands under Presidential Decree No. 463: (1) a prospecting permit from the agency that has jurisdiction over the land; (2) an exploration permit from the Bureau of Mines and Geo-Sciences (BMGS); (3) if the exploration reveals the presence of commercial deposit, application to BMGS by the permit holder for the exclusion of the area from the reservation; (4) a grant by the President of the application to exclude the area from the reservation; and (5) a mining agreement (lease, license or concession) approved by the DENR Secretary.

Here, MMC met the first and second requirements and obtained an exploration permit over the disputed forest reserved land. Although MMC still has to prove to the government that it is qualified to develop and utilize the subject mineral land, as it has yet to go through the remaining process before it can secure a lease agreement, nonetheless, it is bound to follow Section 97 of Presidential Decree No. 463. The logic is not hard to discern. If a lease holder, who has already demonstrated to the government his capacity and qualifications to further develop and utilize the minerals within the contract area, is prohibited from transferring his mining rights (rights to explore, develop and utilize), with more reason will this proscription apply with extra force to a mere exploration permit holder who is yet to exhibit his qualifications in conducting mining operations. The rationale for the approval requirement under Section 97 of Presidential Decree No. 463 is not hard to see. Exploration permits are strictly granted to entities or individuals possessing the resources and capability to undertake mining operations. Mining industry is a major support of the national economy and the continuous and intensified exploration, development and wise utilization of mining resources is vital for national development. For this reason, Presidential Decree No. 463 makes it imperative that in awarding mining operations, only persons possessing the financial resources and technical skill for modern exploratory and development techniques are encouraged to undertake the exploration, development and utilization of the country's natural resources. The preamble of Presidential Decree No. 463 provides thus:

WHEREAS, effective and continuous mining operations require considerable outlays of capital and resources, and make it imperative that persons possessing the financial resources and technical skills for modern exploratory and development techniques be encouraged to undertake the exploration, development and

exploitation of our mineral resources;

The Court has said that a "preamble" is the key to understanding the statute, written to open the minds of the makers to the mischiefs that are to be remedied, and the purposes that are to be accomplished, by the provisions of the statute.[23] As such, when the statute itself is ambiguous and difficult to interpret, the preamble may be resorted to as a key to understanding the statute.

Indubitably, without the scrutiny by the government agency as to the qualifications of the would-be transferee of an exploration permit, the same may fall into the hands of non-qualified entities, which would be counter-productive to the development of the mining industry. It cannot be overemphasized that the exploration, development and utilization of the country's natural resources are matters vital to the public interest and the general welfare; hence, their regulation must be of utmost concern to the government, since these natural resources are not only critical to the nation's security, but they also ensure the country's survival as a viable and sovereign republic.[24]

The approval requirement of the Secretary of the DENR for the assignment of exploration permits is bolstered by Section 25 of Republic Act No. 7942 (otherwise known as the Philippine Mining Act of 1995), which provides that:

Sec. 25. Transfer or Assignment. - An exploration permit may be transferred or assigned to a qualified person subject to the approval of the Secretary upon the recommendation of the Director.

SEM further posits that Section 97 of Presidential Decree No. 463, which requires the prior approval of the DENR when there is a transfer of mining rights, cannot be applied to the assignment of EP 133 executed by MMC in favor of SEM because during the execution of the Deed of Assignment on 16 February 1994, Executive Order No. 279[25] became the governing statute, inasmuch as the latter abrogated the old mining system -- i.e., license, concession or lease -- which was espoused by the former.

This contention is not well taken. While Presidential Decree No. 463 has already been repealed by Executive Order No. 279, the administrative aspect of the former law nonetheless remains applicable. Hence, the transfer or assignment of exploration permits still needs the prior approval of the Secretary of the DENR. As ruled in *Miners Association of the Philippines, Inc. v. Factoran, Jr.*[26]:

Presidential Decree No. 463, as amended, pertains to the old system of exploration, development and utilization of natural resources through "license, concession or lease" which, however, has been disallowed by Article XII, Section 2 of the 1987 Constitution. By virtue of the said constitutional mandate and its implementing law, Executive Order No. 279, which superseded Executive Order No. 211, the provisions dealing on "license, concession, or lease" of mineral resources under Presidential Decree No. 463, as amended, and other existing mining laws are deemed repealed and, therefore, ceased to operate as the governing law. In other words, in all other areas of administration and management of mineral lands, the provisions of Presidential Decree No. 463, as amended, and other existing mining laws, still govern. (Emphasis supplied.)

Not only did the assignment of EP 133 to SEM violate Section 97 of Presidential Decree No. 463, it likewise transgressed one of the conditions stipulated in the grant of the said permit. The following terms and conditions attached to EP 133 are as follows:[27]

1. That the permittee shall abide by the work program submitted with the application or statements made later in support thereof, and which shall be considered as conditions and essential parts of this permit;
2. That permittee shall maintain a complete record of all activities and accounting of all expenditures incurred therein subject to periodic inspection and verification at reasonable intervals by the Bureau of Mines at the expense of the applicant;

3. That the permittee shall submit to the Director of Mines within 15 days after the end of each calendar quarter a report under oath of a full and complete statement of the work done in the area covered by the permit;
4. That the term of this permit shall be for two (2) years to be effective from this date, renewable for the same period at the discretion of the Director of Mines and upon request of the applicant;
5. That the Director of Mines may at any time cancel this permit for violation of its provision or in case of trouble or breach of peace arising in the area subject hereof by reason of conflicting interests without any responsibility on the part of the government as to expenditures for exploration that might have been incurred, or as to other damages that might have been suffered by the permittee;
6. That this permit shall be for the exclusive use and benefit of the permittee or his duly authorized agents and shall be used for mineral exploration purposes only and for no other purpose.

It must be noted that under Section 90[28] of Presidential Decree No. 463, which was the applicable statute during the issuance of EP 133, the DENR Secretary, through the Director of the Bureau of Mines and Geosciences, was charged with carrying out the said law. Also, under Commonwealth Act No. 136, also known as "An Act Creating the Bureau of Mines," which was approved on 7 November 1936, the Director of Mines had the direct charge of the administration of the mineral lands and minerals; and of the survey, classification, lease or any other form of concession or disposition thereof under the Mining Act.[29] This power of administration included the power to prescribe terms and conditions in granting exploration permits to qualified entities.

Thus, in the grant of EP 133 in favor of the MMC, the Director of the BMG acted within his power in laying down the terms and conditions attendant thereto. MMC and SEM did not dispute the reasonableness of said conditions.

Quite conspicuous is the fact that neither MMC nor SEM denied that they were unaware of the terms and conditions attached to EP 133. MMC and SEM did not present any evidence that they objected to these conditions. Indubitably, MMC wholeheartedly accepted these terms and conditions, which formed part of the grant of the permit. MMC agreed to abide by these conditions. It must be accentuated that a party to a contract cannot deny its validity, without outrage to one's sense of justice and fairness, after enjoying its benefits.[30] Where parties have entered into a well-defined contractual relationship, it is imperative that they should honor and adhere to their rights and obligations as stated in their contracts, because obligations arising from these have the force of law between the contracting parties and should be complied with in good faith.[31] Condition Number 6 categorically states that the permit shall be for the exclusive use and benefit of MMC or its duly authorized agents. While it may be true that SEM, the assignee of EP 133, is a 100% subsidiary corporation of MMC, records are bereft of any evidence showing that the former is the duly authorized agent of the latter. This Court cannot condone such utter disregard on the part of MMC to honor its obligations under the permit. Undoubtedly, having violated this condition, the assignment of EP 133 to SEM is void and has no legal effect.

To boot, SEM squandered whatever rights it assumed it had under EP 133. On 6 July 1993, EP 133 was extended for twelve more months or until 6 July 1994. MMC or SEM, however, never renewed EP 133 either prior to or after its expiration. Thus, EP 133 expired by non-renewal on 6 July 1994. With the expiration of EP 133 on 6 July 1994, MMC lost any right to the Diwalwal Gold Rush Area.

The Assailed Decision Resolved Facts and
Issues That Transpired after the Promulgation
of *Apex Mining Co., Inc. v. Garcia*

SEM asserts that the 23 June 2006 Decision reversed the 16 July 1991 Decision of the Court en banc entitled, "*Apex Mining Co., Inc. v. Garcia*." [32]

The assailed Decision DID NOT overturn the 16 July 1991 Decision in *Apex Mining Co., Inc. v. Garcia*.

It must be pointed out that what *Apex Mining Co., Inc. v. Garcia* resolved was the issue of which, between Apex and MMC, availed itself of the proper procedure in acquiring the right to prospect and to explore in the Agusan-Davao-Surigao Forest Reserve. Apex registered its Declarations of Location (DOL) with the then BMGS, while MMC was granted a permit to prospect by the Bureau of Forest Development (BFD) and was subsequently granted an exploration permit by the BMGS. Taking into consideration Presidential Decree No. 463, which provides that "mining rights within forest reservation can be acquired by initially applying for a permit to prospect with the BFD and subsequently for a permit to explore with the BMGS," the Court therein ruled that MMC availed itself of the proper procedure to validly operate within the forest reserve or reservation.

While it is true that *Apex Mining Co., Inc. v. Garcia* settled the issue of which between Apex and MMC was legally entitled to explore in the disputed area, such rights, though, were extinguished by subsequent events that transpired after the decision was promulgated. These subsequent events, which were not attendant in *Apex Mining Co., Inc. v. Garcia*[33] dated 16 July 1991, are the following:

- (1) the expiration of EP 133 by non-renewal on 6 July 1994;
- (2) the transfer/assignment of EP 133 to SEM on 16 February 1994 which was done in violation to the condition of EP 133 proscribing its transfer;
- (3) the transfer/assignment of EP 133 to SEM is without legal effect for violating PD 463 which mandates that the assignment of mining rights must be with the prior approval of the Secretary of the DENR.

Moreover, in *Southeast Mindanao Gold Mining Corporation v. Balite Portal Mining Cooperative*,[34] the Court, through Associate Justice Consuelo Ynares-Santiago (now retired), declared that *Apex Mining Co., Inc. v. Garcia* did not deal with the issues of the expiration of EP 133 and the validity of the transfer of EP 133 to SEM, viz:

Neither can the *Apex Mining* case foreclose any question pertaining to the continuing validity of EP No. 133 on grounds which arose after the judgment in said case was promulgated. While it is true that the *Apex Mining* case settled the issue of who between Apex and Marcopper validly acquired mining rights over the disputed area by availing of the proper procedural requisites mandated by law, it certainly did not deal with the question raised by the oppositors in the Consolidated Mines cases, i.e., whether EP No. 133 had already expired and remained valid subsequent to its transfer by Marcopper to petitioner. (Emphasis supplied.)

What is more revealing is that in the Resolution dated 26 November 1992, resolving the motion for reconsideration of *Apex Mining Co., Inc. v. Garcia*, the Court clarified that the ruling on the said decision was binding only between Apex and MMC and with respect the particular issue raised therein. Facts and issues not attendant to the said decision, as in these cases, are not settled by the same. A portion of the disposition of the *Apex Mining Co., Inc. v. Garcia* Resolution dated 26 November 1992 decrees:

x x x The decision rendered in this case is conclusive only between the parties with respect to the particular issue herein raised and under the set of circumstances herein prevailing. In no case should the decision be considered as a precedent to resolve or settle claims of persons/entities not parties hereto. Neither is it intended to unsettle rights of persons/entities which have been acquired or which may have accrued upon reliance on laws passed by the appropriate agencies. (Emphasis supplied.)

The Issue of the Constitutionality of Proclamation Is Raised Belatedly

In its last-ditch effort to salvage its case, SEM contends that Proclamation No. 297, issued by President Gloria Macapagal-Arroyo and declaring the Diwalwal Gold Rush Area as a mineral reservation, is invalid on the ground

that it lacks the concurrence of Congress as mandated by Section 4, Article XII of the Constitution; Section 1 of Republic Act No. 3092; Section 14 of Executive Order No. 292, otherwise known as the Administrative Code of 1987; Section 5(a) of Republic Act No. 7586, and Section 4(a) of Republic Act No. 6657.

It is well-settled that when questions of constitutionality are raised, the court can exercise its power of judicial review only if the following requisites are present: (1) an actual and appropriate case exists; (2) there is a personal and substantial interest of the party raising the constitutional question; (3) the exercise of judicial review is pleaded at the earliest opportunity; and (4) the constitutional question is the *lis mota* of the case.

Taking into consideration the foregoing requisites of judicial review, it is readily clear that the third requisite is absent. The general rule is that the question of constitutionality must be raised at the earliest opportunity, so that if it is not raised in the pleadings, ordinarily it may not be raised at the trial; and if not raised in the trial court, it will not be considered on appeal.[35]

In the instant case, it must be pointed out that in the Reply to Respondent SEM's Consolidated Comment filed on 20 May 2003, MAB mentioned Proclamation No. 297, which was issued on 25 November 2002. This proclamation, according to the MAB, has rendered SEM's claim over the contested area moot, as the President has already declared the same as a mineral reservation and as an environmentally critical area. SEM did not put to issue the validity of said proclamation in any of its pleadings despite numerous opportunities to question the same. It was only after the assailed Decision was promulgated -- i.e., in SEM's Motion for Reconsideration of the questioned Decision filed on 13 July 2006 and its Motion for Referral of the Case to the Court En Banc and for Oral Arguments filed on 22 August 2006 -- that it assailed the validity of said proclamation.

Certainly, posing the question on the constitutionality of Proclamation No. 297 for the first time in its Motion for Reconsideration is, indeed, too late.[36]

In fact, this Court, when it rendered the Decision it merely recognized that the questioned proclamation came from a co-equal branch of government, which entitled it to a strong presumption of constitutionality.[37] The presumption of its constitutionality stands inasmuch as the parties in the instant cases did not question its validity, much less present any evidence to prove that the same is unconstitutional. This is in line with the precept that administrative issuances have the force and effect of law and that they benefit from the same presumption of validity and constitutionality enjoyed by statutes.[38]

Proclamation No. 297 Is in Harmony with
Article XII, Section 4, of the Constitution

At any rate, even if this Court were to consider the arguments belatedly raised by SEM, said arguments are not meritorious.

SEM asserts that Article XII, Section 4 of the Constitution, bars the President from excluding forest reserves/reservations and proclaiming the same as mineral reservations, since the power to de-classify them resides in Congress.

Section 4, Article XII of the Constitution reads:

The Congress shall as soon as possible, determine by law the specific limits of forest lands and national parks, marking clearly their boundaries on the ground. Thereafter, such forest lands and national parks shall be conserved and may not be increased nor diminished, except by law. The Congress shall provide, for such periods as it may determine, measures to prohibit logging in endangered forests and in watershed areas.

The above-quoted provision says that the area covered by forest lands and national parks may not be expanded or

reduced, unless pursuant to a law enacted by Congress. Clear in the language of the constitutional provision is its prospective tenor, since it speaks in this manner: "Congress shall as soon as possible." It is only after the specific limits of the forest lands shall have been determined by the legislature will this constitutional restriction apply. SEM does not allege nor present any evidence that Congress had already enacted a statute determining with specific limits forest lands and national parks. Considering the absence of such law, Proclamation No. 297 could not have violated Section 4, Article XII of the 1987 Constitution. In *PICOP Resources, Inc. v. Base Metals Mineral Resources Corporation*,^[39] the Court had the occasion to similarly rule in this fashion:

x x x Sec. 4, Art. XII of the 1987 Constitution, on the other hand, provides that Congress shall determine the specific limits of forest lands and national parks, marking clearly their boundaries on the ground. Once this is done, the area thus covered by said forest lands and national parks may not be expanded or reduced except also by congressional legislation. Since Congress has yet to enact a law determining the specific limits of the forest lands covered by Proclamation No. 369 and marking clearly its boundaries on the ground, there can be no occasion that could give rise to a violation of the constitutional provision.

Section 4, Article XII of the Constitution, addresses the concern of the drafters of the 1987 Constitution about forests and the preservation of national parks. This was brought about by the drafters' awareness and fear of the continuing destruction of this country's forests.^[40] In view of this concern, Congress is tasked to fix by law the specific limits of forest lands and national parks, after which the trees in these areas are to be taken care of.^[41] Hence, these forest lands and national parks that Congress is to delimit through a law could be changed only by Congress.

In addition, there is nothing in the constitutional provision that prohibits the President from declaring a forest land as an environmentally critical area and from regulating the mining operations therein by declaring it as a mineral reservation in order to prevent the further degradation of the forest environment and to resolve the health and peace and order problems that beset the area.

A closer examination of Section 4, Article XII of the Constitution and Proclamation No. 297 reveals that there is nothing contradictory between the two. Proclamation No. 297, a measure to attain and maintain a rational and orderly balance between socio-economic growth and environmental protection, jibes with the constitutional policy of preserving and protecting the forest lands from being further devastated by denudation. In other words, the proclamation in question is in line with Section 4, Article XII of the Constitution, as the former fosters the preservation of the forest environment of the Diwalwal area and is aimed at preventing the further degradation of the same. These objectives are the very same reasons why the subject constitutional provision is in place.

What is more, jurisprudence has recognized the policy of multiple land use in our laws towards the end that the country's precious natural resources may be rationally explored, developed, utilized and conserved.^[42] It has been held that forest reserves or reservations can at the same time be open to mining operations, provided a prior written clearance by the government agency having jurisdiction over such reservation is obtained. In other words mineral lands can exist within forest reservations. These two terms are not anti-thetical. This is made manifest if we read Section 47 of Presidential Decree No. 705 or the Revised Forestry Code of the Philippines, which provides:

Mining operations in forest lands shall be regulated and conducted with due regard to protection, development and utilization of other surface resources. Location, prospecting, exploration, utilization or exploitation of mineral resources in forest reservations shall be governed by mining laws, rules and regulations. (Emphasis supplied.)

Also, Section 6 of Republic Act No. 7942 or the Mining Act of 1995, states that mining operations in reserved lands other than mineral reservations, such as forest reserves/reservations, are allowed, viz:

Mining operations in reserved lands other than mineral reservations may be undertaken by the Department, subject to limitations as herein provided. In the event that the Department cannot undertake such activities, they may be undertaken by a qualified person in accordance with the rules and regulations promulgated by the Secretary. (Emphasis supplied.)

Since forest reservations can be made mineral lands where mining operations are conducted, then there is no argument that the disputed land, which lies within a forest reservation, can be declared as a mineral reservation as well.

Republic Act No. 7942 Otherwise Known
as the "Philippine Mining Act of 1995,"
is the Applicable Law

Determined to rivet its crumbling cause, SEM then argues that Proclamation No. 297 is invalid, as it transgressed the statutes governing the exclusion of areas already declared as forest reserves, such as Section 1 of Republic Act No. 3092,[43] Section 14 of the Administrative Code of 1987, Section 5(a) of Republic Act No. 7586,[44] and Section 4(a) of Republic Act No. 6657.[45]

Citing Section 1 of Republic Act No. 3092, which provides as follows:

Upon the recommendation of the Director of Forestry, with the approval of the Department Head, the President of the Philippines shall set apart forest reserves which shall include denuded forest lands from the public lands and he shall by proclamation declare the establishment of such forest reserves and the boundaries thereof, and thereafter such forest reserves shall not be entered, or otherwise disposed of, but shall remain indefinitely as such for forest uses.

The President of the Philippines may, in like manner upon the recommendation of the Director of Forestry, with the approval of the Department head, by proclamation, modify the boundaries of any such forest reserve to conform with subsequent precise survey but not to exclude any portion thereof except with the concurrence of Congress. (Underscoring supplied.)

SEM submits that the foregoing provision is the governing statute on the exclusion of areas already declared as forest reserves. Thus, areas already set aside by law as forest reserves are no longer within the proclamation powers of the President to modify or set aside for any other purposes such as mineral reservation.

To bolster its contention that the President cannot disestablish forest reserves into mineral reservations, SEM makes reference to Section 14, Chapter 4, Title I, Book III of the Administrative Code of 1987, which partly recites:

The President shall have the power to reserve for settlement or public use, and for specific public purposes, any of the lands of the public domain, the use of which is not otherwise directed by law. The reserved land shall thereafter remain subject to the specific public purpose indicated until otherwise provided by law or proclamation. (Emphases supplied.)

SEM further contends that Section 7 of Republic Act No. 7586,[46] which declares that the disestablishment of a protected area shall be done by Congress, and Section 4(a) of Republic Act No. 6657,[47] which in turn requires a law passed by Congress before any forest reserve can be reclassified, militate against the validity of Proclamation No. 297.

Proclamation No. 297, declaring a certain portion of land located in Monkayo, Compostela Valley, with an area of 8,100 hectares, more or less, as a mineral reservation, was issued by the President pursuant to Section 5 of Republic Act No. 7942, also known as the "Philippine Mining Act of 1995."

Proclamation No. 297 did not modify the boundaries of the Agusan-Davao-Surigao Forest Reserve since, as earlier discussed, mineral reservations can exist within forest reserves because of the multiple land use policy. The metes and bounds of a forest reservation remain intact even if, within the said area, a mineral land is located and thereafter declared as a mineral reservation.

More to the point, a perusal of Republic Act No. 3092, "An Act to Amend Certain Sections of the Revised Administrative Code of 1917," which was approved on 17 August 1961, and the Administrative Code of 1987, shows that only those public lands declared by the President as reserved pursuant to these two statutes are to remain subject to the specific purpose. The tenor of the cited provisions, namely: "the President of the Philippines shall set apart forest reserves" and "the reserved land shall thereafter remain," speaks of future public reservations to be declared, pursuant to these two statutes. These provisions do not apply to forest reservations earlier declared as such, as in this case, which was proclaimed way back on 27 February 1931, by Governor General Dwight F. Davis under Proclamation No. 369.

Over and above that, Section 5 of Republic Act No. 7942 authorizes the President to establish mineral reservations, to wit:

Sec. 5. Mineral Reservations. - When the national interest so requires, such as when there is a need to preserve strategic raw materials for industries critical to national development, or certain minerals for scientific, cultural or ecological value, the President may establish mineral reservations upon the recommendation of the Director through the Secretary. Mining operations in existing mineral reservations and such other reservations as may thereafter be established, shall be undertaken by the Department or through a contractor x x x. (Emphasis supplied.)

It is a rudimentary principle in legal hermeneutics that where there are two acts or provisions, one of which is special and particular and certainly involves the matter in question, the other general, which, if standing alone, would include the matter and thus conflict with the special act or provision, the special act must as intended be taken as constituting an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the Legislature is not to be presumed to have intended a conflict.

Hence, it has become an established rule of statutory construction that where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter shall prevail regardless of whether it was passed prior to the general statute. Or where two statutes are of contrary tenor or of different dates but are of equal theoretical application to a particular case, the one specially designed therefor should prevail over the other.

It must be observed that Republic Act No. 3092, "An Act to Amend Certain Sections of the Revised Administrative Code of 1917," and the Administrative Code of 1987, are general laws. Section 1 of Republic Act No. 3092 and Section 14 of the Administrative Code of 1987 require the concurrence of Congress before any portion of a forest reserve can be validly excluded therefrom. These provisions are broad since they deal with all kinds of exclusion or reclassification relative to forest reserves, i.e., forest reserve areas can be transformed into all kinds of public purposes, not only the establishment of a mineral reservation. Section 5 of Republic Act No. 7942 is a special provision, as it specifically treats of the establishment of mineral reservations only. Said provision grants the President the power to proclaim a mineral land as a mineral reservation, regardless of whether such land is also an existing forest reservation.

Sec. 5(a) of Republic Act No. 7586 provides:

Sec. 5. Establishment and Extent of the System. -- The establishment and operationalization of the System shall involve the following:

(a) All areas or islands in the Philippines proclaimed, designated or set aside, pursuant to a law, presidential decree, presidential proclamation or executive order as national park, game refuge, bird and wildlife sanctuary, wilderness area, strict nature reserve, watershed, mangrove reserve, fish sanctuary, natural and historical landmark, protected and managed landscape/seascape as well as identified virgin forests before the effectivity of this Act are hereby designated as initial components of the System. The initial components of the System shall be governed by existing laws, rules and regulations, not inconsistent with this Act.

Glaring in the foregoing enumeration of areas comprising the initial component of the NIPAS System under Republic Act No. 7586 is the absence of forest reserves. Only protected areas enumerated under said provision cannot be modified. Since the subject matter of Proclamation No. 297 is a forest reservation proclaimed as a mineral reserve, Republic Act No. 7586 cannot possibly be made applicable. Neither can Proclamation No. 297 possibly violate said law.

Similarly, Section 4(a) of Republic Act No. 6657 cannot be made applicable to the instant case.

Section 4(a) of Republic Act No. 6657 reads:

All alienable and disposable lands of the public domain devoted to or suitable for agriculture. No reclassification of forest or mineral lands to agricultural lands shall be undertaken after the approval of this Act until Congress, taking into account ecological, developmental and equity considerations, shall have determined by law, the specific limits of the public domain. (Underscoring supplied.)

Section 4(a) of Republic Act No. 6657 prohibits the reclassification of forest or mineral lands into agricultural lands until Congress shall have determined by law the specific limits of the public domain. A cursory reading of this provision will readily show that the same is not relevant to the instant controversy, as there has been no reclassification of a forest or mineral land into an agricultural land.

Furthermore, the settled rule of statutory construction is that if two or more laws of different dates and of contrary tenors are of equal theoretical application to a particular case, the statute of later date must prevail being a later expression of legislative will.[48]

In the case at bar, there is no question that Republic Act No. 7942 was signed into law later than Republic Act No. 3092, the Administrative Code of 1987,[49] Republic Act No. 7586 and Republic Act No. 6657. Applying the cited principle, the provisions of Republic Act No. 3092, the Administrative Code of 1987, Republic Act No. 7586 and Republic Act No. 6657 cited by SEM must yield to Section 5 of Republic Act No. 7942.

Camilo Banad, et al., Cannot Seek Relief
from This Court

Camilo Banad and his group admit that they are members of the Balite Cooperative. They, however, claim that they are distinct from Balite and move that this Court recognize them as prior mining locators.

Unfortunately for them, this Court cannot grant any relief they seek. Records reveal that although they were parties to the instant cases before the Court of Appeals, they did not file a petition for review before this Court to contest the decision of the appellate court. The only petitioners in the instant cases are the MAB, SEM, Balite and Apex. Consequently, having no personality in the instant cases, they cannot seek any relief from this Court.

Apex's Motion for Clarification and
Balite's Manifestation and Motion

In its Motion for Clarification, Apex desires that the Court elucidate the assailed Decision's pronouncement that "mining operations, are now, therefore within the full control of the State through the executive branch" and place

the said pronouncement in the proper perspective as the declaration in *La Bugal-B'Laan*, which states that -

The concept of control adopted in Section 2 of Article XII must be taken to mean less than dictatorial, all-encompassing control; but nevertheless sufficient to give the State the power to direct, restrain, regulate and govern the affairs of the extractive enterprise.[50]

Apex states that the subject portion of the assailed Decision could send a chilling effect to potential investors in the mining industry, who may be of the impression that the State has taken over the mining industry, not as regulator but as an operator. It is of the opinion that the State cannot directly undertake mining operations.

Moreover, Apex is apprehensive of the following portion in the questioned Decision- "The State can also opt to award mining operations in the mineral reservation to private entities including petitioner Apex and Balite, if it wishes." It avers that the phrase "if it wishes" may whimsically be interpreted to mean a blanket authority of the administrative authority to reject the former's application for an exploration permit even though it complies with the prescribed policies, rules and regulations.

Apex likewise asks this Court to order the MGB to accept its application for an exploration permit.

Balite echoes the same concern as that of Apex on the actual take-over by the State of the mining industry in the disputed area to the exclusion of the private sector. In addition, Balite prays that this Court direct MGB to accept Balite's application for an exploration permit.

Contrary to the contention of Apex and Balite, the fourth paragraph of Section 2, Article XII of the Constitution and Section 5 of Republic Act No. 7942 sanctions the State, through the executive department, to undertake mining operations directly, as an operator and not as a mere regulator of mineral undertakings. This is made clearer by the fourth paragraph of Section 2, Article XII of the 1987 Constitution, which provides in part:

SEC. 2. x x x The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. x x x. (Emphasis supplied.)

Also, Section 5 of Republic Act No. 7942 states that the mining operations in mineral reservations shall be undertaken by the Department of Environment and Natural Resources or a contractor, to wit:

SEC. 5. Mineral Reservations. - When the national interest so requires, such as when there is a need to preserve strategic raw materials for industries critical to national development, or certain minerals for scientific, cultural or ecological value, the President may establish mineral reservations upon the recommendation of the Director through the Secretary. Mining operations in existing mineral reservations and such other reservations as may thereafter be established, shall be undertaken by the Department or through a contractor x x x. (Emphasis supplied.)

Undoubtedly, the Constitution, as well as Republic Act No. 7942, allows the executive department to undertake mining operations. Besides, *La Bugal-B'Laan*, cited by Apex, did not refer to the fourth sentence of Section 2, Article XII of the Constitution, but to the third sentence of the said provision, which states:

SEC. 2. x x x The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. x x x.

Pursuant to Section 5 of Republic Act No. 7942, the executive department has the option to undertake directly the mining operations in the Diwalwal Gold Rush Area or to award mining operations therein to private entities. The phrase "if it wishes" must be understood within the context of this provision. Hence, the Court cannot dictate this co-equal branch to choose which of the two options to select. It is the sole prerogative of the executive department

to undertake directly or to award the mining operations of the contested area.

Even assuming that the proper authority may decide to award the mining operations of the disputed area, this Court cannot arrogate unto itself the task of determining who, among the applicants, is qualified. It is the duty of the appropriate administrative body to determine the qualifications of the applicants. It is only when this administrative body whimsically denies the applications of qualified applicants that the Court may interfere. But until then, the Court has no power to direct said administrative body to accept the application of any qualified applicant.

In view of this, the Court cannot grant the prayer of Apex and Balite asking the Court to direct the MGB to accept their applications pending before the MGB.

SEM's Manifestation and Motion dated 25 January 2007

SEM wants to emphasize that its predecessor-in-interest, Marcopper or MMC, complied with the mandatory exploration work program, required under EP 133, by attaching therewith quarterly reports on exploration work from 20 June 1986 to March 1994.

It must be observed that this is the very first time at this very late stage that SEM has presented the quarterly exploration reports. From the early phase of this controversy, SEM did not disprove the arguments of the other parties that Marcopper violated the terms under EP 133, among other violations, by not complying with the mandatory exploration work program. Neither did it present evidence for the appreciation of the lower tribunals. Hence, the non-compliance with the mandatory exploration work program was not made an issue in any stage of the proceedings. The rule is that an issue that was not raised in the lower court or tribunal cannot be raised for the first time on appeal, as this would violate the basic rules of fair play, justice and due process.^[51] Thus, this Court cannot take cognizance of the issue of whether or not MMC complied with the mandatory work program.

In sum, this Court finds:

- The assailed Decision did not overturn the 16 July 1991 Decision in *Apex Mining Co., Inc. v. Garcia*. The former was decided on facts and issues that were not attendant in the latter, such as the expiration of EP 133, the violation of the condition embodied in EP 133 prohibiting its assignment, and the unauthorized and invalid assignment of EP 133 by MMC to SEM, since this assignment was effected without the approval of the Secretary of DENR;
- SEM did not acquire vested right over the disputed area because its supposed right was extinguished by the expiration of its exploration permit and by its violation of the condition prohibiting the assignment of EP 133 by MMC to SEM. In addition, even assuming that SEM has a valid exploration permit, such is a mere license that can be withdrawn by the State. In fact, the same has been withdrawn by the issuance of Proclamation No. 297, which places the disputed area under the full control of the State through the Executive Department;
- The approval requirement under Section 97 of Presidential Decree No. 463 applies to the assignment of EP 133 by MMC to SEM, since the exploration permit is an interest in a mining lease contract;
- The issue of the constitutionality and the legality of Proclamation No. 297 was raised belatedly, as SEM questions the same for the first time in its Motion for Reconsideration. Even if the issue were to be entertained, the said proclamation is found to be in harmony with the Constitution and other existing statutes;
- The motion for reconsideration of Camilo Banad, et al. cannot be passed upon because they are not parties to the instant cases;
- The prayers of Apex and Balite asking the Court to direct the MGB to accept their applications for exploration

permits cannot be granted, since it is the Executive Department that has the prerogative to accept such applications, if ever it decides to award the mining operations in the disputed area to a private entity;

- The Court cannot pass upon the issue of whether or not MMC complied with the mandatory exploration work program, as such was a non-issue and was not raised before the Court of Appeals and the lower tribunals.

WHEREFORE, premises considered, the Court holds:

- The Motions for Reconsideration filed by Camilo Banad, et al. and Southeast Mindanao Gold Mining Corporation are DENIED for lack of merit;

- The Motion for Clarification of Apex Mining Co., Inc. and the Manifestation and Motion of the Balite Communal Portal Mining Cooperative, insofar as these motions/manifestation ask the Court to direct the Mines and Geo-Sciences Bureau to accept their respective applications for exploration permits, are DENIED;

- The Manifestation and Urgent Motion dated 25 January 2007 of Southeast Mindanao Gold Mining Corporation is DENIED.

- The State, through the Executive Department, should it so desire, may now award mining operations in the disputed area to any qualified entities it may determine. The Mines and Geosciences Bureau may process exploration permits pending before it, taking into consideration the applicable mining laws, rules and regulations relative thereto.

SO ORDERED.

Puno, C.J., Carpio, Carpio Morales, Leonardo-De Castro, Brion, Del Castillo, Abad, and Villarama, JJ., concur.

Corona, Velasco, Jr., and Peralta, JJ., concur.

Nachura, J., no part.

Bersamin, J., with separate opinion.

[1] G.R. No. 92605, 16 July 1991, 199 SCRA 278.

[2] 42 Phil. 749 (1922).

[3] 66 Phil. 259 (1938).

[4] Atok Big-Wedge Mining Co. v. Intermediate Appellate Court, 330 Phil. 244, 262 (1996).

[5] Id. at 262.

[6] Id.

[7] Id. at 263.

[8] Id.

[9] Id. at 264.

[10] Id.

[11] Id. at 267-268.

[12] 486 Phil. 754, 828-829 (2004).

[13] 429 Phil. 668, 682 (2002).

[14] Supra note 12 at 895.

[15] Southeast Mindanao Gold Mining Corporation v. Balite Portal Mining Cooperative, supra note 13 at 682-683.

[16] Id.

[17] G.R. No. 149927, 30 March 2004, 426 SCRA 517, 530.

[18] Id.

[19] Id at 531.

[20] Miners Association of the Philippines, Inc. v. Factoran, Jr., 310 Phil. 113, 130 (1995).

[21] PNOC-Energy Development Corporation (PNOC-EDC) v. Veneracion, Jr., G.R. No. 129820, 30 November 2006, 509 SCRA 93, 106.

[22] Id. at 107-110.

[23] Estrada v. Escritor, 455 Phil. 411, 569 (2003).

[24] Miners Association of the Philippines, Inc. v. Factoran, Jr., 310 Phil. 113, 130-131 (1995).

[25] Promulgated on 25 July 1987.

[26] Supra note 24 at 130.

[27] Records, Vol. 2, pp. 84-85.

[28] Executive Officer. - The Secretary, through the Director, shall be the Executive Officer charged with carrying out the provisions of this Decree. x x x.

[29] Section 3, Commonwealth Act No. 136.

[30] Premiere Development Bank v. Court of Appeals, 471 Phil. 704, 716 (2004).

[31] Id.

[32] Supra note 1 at 284.

[33] Supra note 1 at 283-284.

[34] Supra note 13 at 681.

[35] Matibag v. Benipayo, 429 Phil. 554, 578-579 (2002).

[36] Umali v. Exececutive Secretary Guingona, Jr., 365 Phil. 77, 87 (1999).

[37] Senate of the Philippines v. Ermita, G.R. No. 169777, 20 April 2006, 488 SCRA 1, 66.

[38] Mirasol v. Department of Public Works and Highways, G.R. No. 158793, 8 June 2006, 490 SCRA 318, 347-348.

[39] G.R. No. 163509, 6 December 2006, 510 SCRA 400, 416.

[40] Records of the Constitutional Commission, Vol. III, pp. 592-593.

[41] Id.

[42] PICOP Resources, Inc. v. Base Metals Mineral Resources Corporation, *supra* note 39 at 419.

[43] Approved on 17 August 1961.

[44] Approved on 1 June 1992, this statute is known as the "National Integrated Protected Areas System Act of 1992."

[45] This Act is known as the "Comprehensive Agrarian Reform Law of 1998." It took effect on 15 June 1988.

[46] Disestablishment as Protected Area. - When in the opinion of the DENR a certain protected area should be withdrawn or disestablished, or its boundaries modified as warranted by a study and sanctioned by the majority of the members of the respective boards for the protected area as herein established in Section 11, it shall, in turn, advise Congress. Disestablishment of a protected area under the System or modification of its boundary shall take effect pursuant to an act of Congress.

[47] All alienable and disposable lands of the public domain devoted to or suitable for agriculture. No reclassification of forest or mineral lands to agricultural lands shall be undertaken after the approval of this Act until Congress, taking into account ecological, developmental and equity considerations, shall have determined by law, the specific limits of the public domain.

[48] Philippine National Bank v. Cruz, G.R. No. 80593, 18 December 1989, 180 SCRA 206, 213.

[49] This law is dated 25 July 1987.

[50] *Supra* note 12 at 1093.

[51] Multi-Realty Development Corporation v. Makati Tuscany Condominium Corporation, G.R. No. 146726, 16 June 2006, 491 SCRA 9, 23.

SEPARATE OPINION

BERSAMIN, J.:

I concur with Honorable Minita V. Chico-Nazario's disposition of the challenges posed by the motion for reconsideration and manifestation and urgent motion dated January 25, 2007 filed by Southeast Mindanao Gold Mining Corporation (SEM); the motion for clarification dated July 18, 2006 filed by Apex Mining (Apex); and the manifestation and motion dated July 28, 2006 filed by Balite Communal Portal Mining Cooperative (Balite).

Yet, I feel compelled to write in order to suggest that we should look at and determine which between Apex and Balite has any priority right to explore, develop and mine the Diwalwal Gold Rush Area in the event that the State, represented by the Executive Department, decides either to develop and mine the area directly, or to outsource the task to a service contractor. I am sure that doing so will preclude further litigations from arising. I feel that such an approach can only further the intent and letter of

Section 1,[1] Rule 36, of the Rules of Court to determine the merits of the case, not leaving anything undetermined.

Antecedents

The relevant antecedents excellently recounted in the decision are adopted herein for purposes of giving this separate opinion the requisite backdrop, viz:

On 27 February 1931, Governor General Dwight F. Davis issued Proclamation No. 369, establishing the

Agusan-Davao-Surigao Forest Reserve consisting of approximately 1,927,400 hectares.

The disputed area, a rich tract of mineral land, is inside the forest reserve located at Monkayo, Davao del Norte, and Cateel, Davao Oriental, consisting of 4,941.6759 hectares. This mineral land is encompassed by Mt. Diwata, which is situated in the municipalities of Monkayo and Cateel. It later became known as the "Diwalwal Gold Rush Area." It has since the early 1980's been stormed by conflicts brought about by the numerous mining claimants scrambling for gold that lies beneath its bosom.

On 21 November 1983, Camilo Banad and his group, who claimed to have first discovered traces of gold in Mount Diwata, filed a Declaration of Location (DOL) for six mining claims in the area.

Camilo Banad and some other natives pooled their skills and resources and organized the Balite Communal Portal Mining Cooperative (Balite).

On 12 December 1983, Apex Mining Corporation (Apex) entered into operating agreements with Banad and his group.

From November 1983 to February 1984, several individual applications for mining locations over mineral land covering certain parts of the Diwalwal gold rush area were filed with the Bureau of Mines and Geo-Sciences (BMG).

On 2 February 1984, Marcopper Mining Corporation (MMC) filed 16 DOLs or mining claims for areas adjacent to the area covered by the DOL of Banad and his group. After realizing that the area encompassed by its mining claims is a forest reserve within the coverage of Proclamation No. 369 issued by Governor General Davis, MMC abandoned the same and instead applied for a prospecting permit with the Bureau of Forest Development (BFD).

On 1 July 1985, BFD issued a Prospecting Permit to MMC covering an area of 4,941.6759 hectares traversing the municipalities of Monkayo and Cateel, an area within the forest reserve under Proclamation No. 369. The permit embraced the areas claimed by Apex and the other individual mining claimants.

On 11 November 1985, MMC filed Exploration Permit Application No. 84-40 with the BMG. On 10 March 1986, the BMG issued to MCC Exploration Permit No. 133 (EP 133).

Discovering the existence of several mining claims and the proliferation of small-scale miners in the area covered by EP 133, MMC thus filed on 11 April 1986 before the BMG a Petition for the Cancellation of the Mining Claims of Apex and Small Scale Mining Permit Nos. (x-1)-04 and (x-1)-05 which was docketed as MAC No. 1061. MMC alleged that the areas covered by its EP 133 and the mining claims of Apex were within an established and existing forest reservation (Agusan-Davao-Surigao Forest Reserve) under Proclamation No. 369 and that pursuant to Presidential Decree No. 463, acquisition of mining rights within a forest reserve is through the application for a permit to prospect with the BFD and not through registration of a DOL with the BMG.

On 23 September 1986, Apex filed a motion to dismiss MMC's petition alleging that its mining claims are not within any established or proclaimed forest reserve, and as such, the acquisition of mining rights thereto must be undertaken via registration of DOL with the BMG and not through the filing of application for permit to prospect with the BFD.

On 9 December 1986, BMG dismissed MMC's petition on the ground that the area covered by the Apex mining claims and MMC's permit to explore was not a forest reservation. It further declared null and void MMC's EP 133 and sustained the validity of Apex mining claims over the disputed area.

MMC appealed the adverse order of BMG to the Department of Environment and Natural Resources (DENR).

On 15 April 1987, after due hearing, the DENR reversed the 9 December 1996 order of BMG and declared

MMC's EP 133 valid and subsisting.

Apex filed a Motion for Reconsideration with the DENR which was subsequently denied. Apex then filed an appeal before the Office of the President. On 27 July 1989, the Office of the President, through Assistant Executive Secretary for Legal Affairs, Cancio C. Garcia, dismissed Apex's appeal and affirmed the DENR ruling.

Apex filed a Petition for Certiorari before this Court. The Petition was docketed as G.R. No. 92605 entitled, "Apex Mining Co., Inc. v. Garcia." On 16 July 1991, this Court rendered a Decision against Apex holding that the disputed area is a forest reserve; hence, the proper procedure in acquiring mining rights therein is by initially applying for a permit to prospect with the BFD and not through a registration of DOL with the BMG.

On 27 December 1991, then DENR Secretary Fulgencio Factoran, Jr. issued Department Administrative Order No. 66 (DAO No. 66) declaring 729 hectares of the areas covered by the Agusan-Davao-Surigao Forest Reserve as non-forest lands and open to small-scale mining purposes.

As DAO No. 66 declared a portion of the contested area open to small scale miners, several mining entities filed applications for Mineral Production Sharing Agreement (MPSA).

On 25 August 1993, Monkayo Integrated Small Scale Miners Association (MISSMA) filed an MPSA application which was denied by the BMG on the grounds that the area applied for is within the area covered by MMC EP 133 and that the MISSMA was not qualified to apply for an MPSA under DAO No. 82, Series of 1990.

On 5 January 1994, Rosendo Villaflor and his group filed before the BMG a Petition for Cancellation of EP 133 and for the admission of their MPSA Application. The Petition was docketed as RED Mines Case No. 8-8-94. Davao United Miners Cooperative (DUMC) and Balite intervened and likewise sought the cancellation of EP 133.

On 16 February 1994, MMC assigned EP 133 to Southeast Mindanao Gold Mining Corporation (SEM), a domestic corporation which is alleged to be a 100% -owned subsidiary of MMC.

On 14 June 1994, Balite filed with the BMG an MPSA application within the contested area that was later on rejected.

On 23 June 1994, SEM filed an MPSA application for the entire 4,941.6759 hectares under EP 133, which was also denied by reason of the pendency of RED Mines Case No. 8-8-94. On 1 September 1995, SEM filed another MPSA application.

On 20 October 1995, BMG accepted and registered SEM's MPSA application and the Deed of Assignment over EP 133 executed in its favor by MMC. SEM's application was designated MPSA Application No. 128 (MPSAA 128). After publication of SEM's application, the following filed before the BMG their adverse claims or oppositions:

- a) MAC Case No. 004 (XI) - JB Management Mining Corporation;
- b) MAC Case No. 005(XI) - Davao United Miners Cooperative;
- c) MAC Case No. 006(XI) - Balite Integrated Small Scale Miner's Cooperative;
- d) MAC Case No. 007(XI) - Monkayo Integrated Small Scale Miner's Association, Inc. (MISSMA);
- e) MAC Case No. 008(XI) - Paper Industries Corporation of the Philippines;
- f) MAC Case No. 009(XI) - Rosendo Villafor, et al.;
- g) MAC Case No. 010(XI) - Antonio Dacudao;
- h) MAC Case No. 011(XI) - Atty. Jose T. Amacio;
- i) MAC Case No. 012(XI) - Puting-Bato Gold Miners Cooperative;
- j) MAC Case No. 016(XI) - Balite Communal Portal Mining Cooperative;

k) MAC Case No. 97-01(XI) - Romeo Altamera, et al.

To address the matter, the DENR constituted a Panel of Arbitrators (PA) to resolve the following:

- (a) The adverse claims on MPSAA No. 128; and
- (b) The Petition to Cancel EP 133 filed by Rosendo Villaflor docketed as RED Case No. 8-8-94.

On 13 June 1997, the PA rendered a resolution in RED Mines Case No. 8-8-94. As to the Petition for Cancellation of EP 133 issued to MMC, the PA relied on the ruling in *Apex Mining Co., Inc. v. Garcia* and opined that EP 133 was valid and subsisting. It also declared that the BMG Director, under Section 99 of the Consolidated Mines Administrative Order implementing Presidential Decree No. 463, was authorized to issue exploration permits and to renew the same without limit.

With respect to the adverse claims on SEM's MPSAA No. 128, the PA ruled that adverse claimants' petitions were not filed in accordance with the existing rules and regulations governing adverse claims because the adverse claimants failed to submit the sketch plan containing the technical description of their respective claims, which was a mandatory requirement for an adverse claim that would allow the PA to determine if indeed there is an overlapping of the area occupied by them and the area applied for by SEM. It added that the adverse claimants were not claim owners but mere occupants conducting illegal mining activities at the contested area since only MMC or its assignee SEM had valid mining claims over the area as enunciated in *Apex Mining Co., Inc. v. Garcia*. Also, it maintained that the adverse claimants were not qualified as small-scale miners under DENR Department Administrative Order No. 34 (DAO No. 34), or the Implementing Rules and Regulation of Republic Act No. 7076 (otherwise known as the "People's Small-Scale Mining Act of 1991"), as they were not duly licensed by the DENR to engage in the extraction or removal of minerals from the ground, and that they were large-scale miners. The decretal portion of the PA resolution pronounces:

VIEWED IN THE LIGHT OF THE FOREGOING, the validity of Exploration Permit No. 133 is hereby reiterated and all the adverse claims against MPSAA No. 128 are DISMISSED.

Undaunted by the PA ruling, the adverse claimants appealed to the Mines Adjudication Board (MAB). In a Decision dated 6 January 1998, the MAB considered erroneous the dismissal by the PA of the adverse claims filed against MMC and SEM over a mere technicality of failure to submit a sketch plan. It argued that the rules of procedure are not meant to defeat substantial justice as the former are merely secondary in importance to the latter. Dealing with the question on EP 133's validity, the MAB opined that said issue was not crucial and was irrelevant in adjudicating the appealed case because EP 133 has long expired due to its non-renewal and that the holder of the same, MMC, was no longer a claimant of the Agusan-Davao-Surigao Forest Reserve having relinquished its right to SEM. After it brushed aside the issue of the validity of EP 133 for being irrelevant, the MAB proceeded to treat SEM's MPSA application over the disputed area as an entirely new and distinct application. It approved the MPSA application, excluding the area segregated by DAO No. 66, which declared 729 hectares within the Diwalwal area as non-forest lands open for small-scale mining. The MAB resolved:

WHEREFORE, PREMISES CONSIDERED, the decision of the Panel of Arbitrators dated 13 June 1997 is hereby VACATED and a new one entered in the records of the case as follows:

1. SEM's MPSA application is hereby given due course subject to the full and strict compliance of the provisions of the Mining Act and its Implementing Rules and Regulations;
2. The area covered by DAO 66, series of 1991, actually occupied and actively mined by the small-scale miners on or before August 1, 1987 as determined by the Provincial Mining Regulatory Board (PMRB), is hereby excluded from the area applied for by SEM;

3. A moratorium on all mining and mining-related activities, is hereby imposed until such time that all necessary procedures, licenses, permits, and other requisites as provided for by RA 7076, the Mining Act and its Implementing Rules and Regulations and all other pertinent laws, rules and regulations are complied with, and the appropriate environmental protection measures and safeguards have been effectively put in place;

4. Consistent with the spirit of RA 7076, the Board encourages SEM and all small-scale miners to continue to negotiate in good faith and arrive at an agreement beneficial to all. In the event of SEM's strict and full compliance with all the requirements of the Mining Act and its Implementing Rules and Regulations, and the concurrence of the small-scale miners actually occupying and actively mining the area, SEM may apply for the inclusion of portions of the areas segregated under paragraph 2 hereof, to its MPSA application. In this light, subject to the preceding paragraph, the contract between JB [JB Management Mining Corporation] and SEM is hereby recognized.

Dissatisfied, the Villaflor group and Balite appealed the decision to this Court. SEM, aggrieved by the exclusion of 729 hectares from its MPSA application, likewise appealed. Apex filed a Motion for Leave to Admit Petition for Intervention predicated on its right to stake its claim over the Diwalwal gold rush which was granted by the Court. These cases, however, were remanded to the Court of Appeals for proper disposition pursuant to Rule 43 of the 1997 Rules of Civil Procedure. The Court of Appeals consolidated the remanded cases as CA-G.R. SP No. 61215 and No. 61216.

In the assailed Decision dated 13 March 2002, the Court of Appeals affirmed in toto the decision of the PA and declared null and void the MAB decision.

The Court of Appeals, banking on the premise that the SEM is the agent of MMC by virtue of its assignment of EP 133 in favor of SEM and the purported fact that SEM is a 100% subsidiary of MMC, ruled that the transfer of EP 133 was valid. It argued that since SEM is an agent of MMC, the assignment of EP 133 did not violate the condition therein prohibiting its transfer except to MMC's duly designated agent. Thus, despite the non-renewal of EP 133 on 6 July 1994, the Court of Appeals deemed it relevant to declare EP 133 as valid since MMC's mining rights were validly transferred to SEM prior to its expiration.

The Court of Appeals also ruled that MMC's right to explore under EP 133 is a property right which the 1987 Constitution protects and which cannot be divested without the holder's consent. It stressed that MMC's failure to proceed with the extraction and utilization of minerals did not diminish its vested right to explore because its failure was not attributable to it.

Reading Proclamation No. 369, Section 11 of Commonwealth Act 137, and Sections 6, 7, and 8 of Presidential Decree No. 463, the Court of Appeals concluded that the issuance of DAO No. 66 was done by the DENR Secretary beyond his power for it is the President who has the sole power to withdraw from the forest reserve established under Proclamation No. 369 as non-forest land for mining purposes. Accordingly, the segregation of 729 hectares of mining areas from the coverage of EP 133 by the MAB was unfounded.

The Court of Appeals also faulted the DENR Secretary in implementing DAO No. 66 when he awarded the 729 hectares segregated from the coverage area of EP 133 to other corporations who were not qualified as small-scale miners under Republic Act No. 7076.

As to the petitions of Villaflor and company, the Court of Appeals argued that their failure to submit the sketch plan to the PA, which is a jurisdictional requirement, was fatal to their appeal. It likewise stated the Villaflor and company's mining claims, which were based on their alleged rights under DAO No. 66, cannot stand as DAO No. 66 was null and void. The dispositive portion of the Decision decreed:

WHEREFORE, premises considered, the Petition of Southeast Mindanao Gold Mining Corporation is

GRANTED while the Petition of Rosendo Villafior, et al., is DENIED for lack of merit. The Decision of the Panel of Arbitrators dated 13 June 1997 is AFFIRMED in toto and the assailed MAB Decision is hereby SET ASIDE and declared as NULL and VOID.

Hence, the instant Petitions for Review on Certiorari under Rule 45 of the Rules of Court filed by Apex, Balite and MAB.

During the pendency of these Petitions, President Gloria Macapagal-Arroyo issued Proclamation No. 297 dated 25 November 2002. This proclamation excluded an area of 8,100 hectares located in Monkayo, Compostela Valley, and proclaimed the same as mineral reservation and as environmentally critical area. Subsequently, DENR Administrative Order No. 2002-18 was issued declaring an emergency situation in the Diwalwal gold rush area and ordering the stoppage of all mining operations therein. Thereafter, Executive Order No. 217 dated 17 June 2003 was issued by the President creating the National Task Force Diwalwal which is tasked to address the situation in the Diwalwal Gold Rush Area.

In G.R. No. 152613 and No. 152628, Apex raises the following issues:

I

WHETHER OR NOT SOUTHEAST MINDANAO GOLD MINING'S [SEM] E.P. 133 IS NULL AND VOID DUE TO THE FAILURE OF MARCOPPER TO COMPLY WITH THE TERMS AND CONDITIONS PRESCRIBED IN EP 133.

II

WHETHER OR NOT APEX HAS A SUPERIOR AND PREFERENTIAL RIGHT TO STAKE ITS CLAIM OVER THE ENTIRE 4,941 HECTARES AGAINST SEM AND THE OTHER CLAIMANTS PURSUANT TO THE TIME-HONORED PRINCIPLE IN MINING LAW THAT "PRIORITY IN TIME IS PRIORITY IN RIGHT."

In G.R. No. 152619-20, Balite anchors its petition on the following grounds:

I

WHETHER OR NOT THE MPSA OF SEM WHICH WAS FILED NINE (9) DAYS LATE (JUNE 23, 1994) FROM THE FILING OF THE MPSA OF BALITE WHICH WAS FILED ON JUNE 14, 1994 HAS A PREFERENTIAL RIGHT OVER THAT OF BALITE.

II

WHETHER OR NOT THE DISMISSAL BY THE PANEL OF ARBITRATORS OF THE ADVERSE CLAIM OF BALITE ON THE GROUND THAT BALITE FAILED TO SUBMIT THE REQUIRED SKETCH PLAN DESPITE THE FACT THAT BALITE, HAD IN FACT SUBMITTED ON TIME WAS A VALID DISMISSAL OF BALITE'S ADVERSE CLAIM.

III

WHETHER OR NOT THE ACTUAL OCCUPATION AND SMALL-MINING OPERATIONS OF BALITE PURSUANT TO DAO 66 IN THE 729 HECTARES WHICH WAS PART OF THE 4,941.6759 HECTARES COVERED BY ITS MPSA WHICH WAS REJECTED BY THE BUREAU OF MINES AND GEOSCIENCES WAS ILLEGAL.

In G.R. No. 152870-71, the MAB submits two issues, to wit:

I

WHETHER OR NOT EP NO. 133 IS STILL VALID AND SUBSISTING.

II

WHETHER OR NOT THE SUBSEQUENT ACTS OF THE GOVERNMENT SUCH AS THE ISSUANCE OF DAO NO. 66, PROCLAMATION NO. 297, AND EXECUTIVE ORDER 217 CAN OUTWEIGH EP NO. 133 AS WELL AS OTHER ADVERSE CLAIMS OVER THE DIWALWAL GOLD RUSH AREA.

The common issues raised by petitioners may be summarized as follows:

- I. Whether or not the Court of Appeals erred in upholding the validity and continuous existence of EP 133 as well as its transfer to SEM;
- II. Whether or not the Court of Appeals erred in declaring that the DENR Secretary has no authority to issue DAO No. 66; and
- III. Whether or not the subsequent acts of the executive department such as the issuance of Proclamation No. 297, and DAO No. 2002-18 can outweigh Apex and Balite's claims over the Diwalwal Gold Rush Area.

On the first issue, Apex takes exception to the Court of Appeals' ruling upholding the validity of MMC's EP 133 and its subsequent transfer to SEM asserting that MMC failed to comply with the terms and conditions in its exploration permit, thus, MMC and its successor-in-interest SEM lost their rights in the Diwalwal Gold Rush Area. Apex pointed out that MMC violated four conditions in its permit. First, MMC failed to comply with the mandatory work program, to complete exploration work, and to declare a mining feasibility. Second, it reneged on its duty to submit an Environmental Compliance Certificate. Third, it failed to comply with the reportorial requirements. Fourth, it violated the terms of EP 133 when it assigned said permit to SEM despite the explicit proscription against its transfer.

Apex likewise emphasizes that MMC failed to file its MPSA application required under DAO No. 82 which caused its exploration permit to lapse because DAO No. 82 mandates holders of exploration permits to file a Letter of Intent and a MPSA application not later than 17 July 1991. It said that because EP 133 expired prior to its assignment to SEM, SEM's MPSA application should have been evaluated on its own merit.

As regards the Court of Appeals recognition of SEM's vested right over the disputed area, Apex bewails the same to be lacking in statutory bases. According to Apex, Presidential Decree No. 463 and Republic Act No. 7942 impose upon the claimant the obligation of actually undertaking exploration work within the reserved lands in order to acquire priority right over the area. MMC, Apex claims, failed to conduct the necessary exploration work, thus, MMC and its successor-in-interest SEM lost any right over the area.

In its Memorandum, Balite maintains that EP 133 of MMC, predecessor-in-interest of SEM, is an expired and void permit which cannot be made the basis of SEM's MPSA application.

Similarly, the MAB underscores that SEM did not acquire any right from MMC by virtue of the transfer of EP 133 because the transfer directly violates the express condition of the exploration permit stating that "it shall be for the exclusive use and benefit of the permittee or his duly authorized agents." It added that while MMC is the permittee, SEM cannot be considered as MMC's duly designated agent as there is no proof on record authorizing SEM to represent MMC in its business dealings or undertakings, and neither did SEM pursue its interest in the permit as an agent of MMC. According to the MAB, the assignment by MMC of EP 133 in favor of SEM did not make the latter the duly authorized agent of MMC since the concept of an agent under EP 133 is not equivalent to the concept of assignee. It finds fault in the assignment of EP 133 which lacked the approval of the DENR Secretary in contravention of Section 25 of Republic Act No. 7942 requiring his approval for a valid assignment or transfer of exploration permit to be valid.

SEM, on the other hand, counters that the errors raised by petitioners Apex, Balite and the MAB relate to factual and evidentiary matters which this Court cannot inquire into in an appeal by certiorari.

Effects of the Decision

The decision affirms the application in this jurisdiction of the Regalian Doctrine, which means that the State has dominion over all agricultural, timber and mineral lands. It also affirms that Proclamation 297 dated November 25, 2002 was a constitutionally-sanctioned act.

Proclamation 297 has excluded 8,100 hectares of mineral land in Monkayo, Compostela Valley, and has declared that:

xxx. Mining operations in the area may be undertaken either by the DENR directly, subject to payment of just compensation that may be due to legitimate and existing claimants, or thru a qualified contractor, subject to existing rights, if any.

It is clear that under the Proclamation 297 regime of exploration, development and utilization of mineral resources within the Diwalwal Gold Rush Area, the State is bound to either pay lawful claimants just compensation (should it elect to operate the mine directly), or to honor existing rights (should it choose to outsource mining operations to a service contractor). The priority right of an interested party is only deemed superseded by Proclamation 297 and DENR Administrative Order (DAO) 2002-18 if the State elects to directly undertake mining operations in the Diwalwal Gold Rush Area (but nonetheless requires the State to pay just compensation that may be due to legitimate and existing claimants). If the State chooses to outsource mining operations to a service contractor, Proclamation 297 mandates that the existing rights should still be recognized and honored.

Yet, the decision states that:

The issue on who has priority right over the disputed area is deemed overtaken by the above subsequent developments particularly with the issuance of Proclamation 297 and DAO No. 2002-18, both being constitutionally-sanctioned acts of the Executive Branch. Mining operations in the Diwalwal Mineral Reservation are now, therefore, within the full control of the State through the executive branch. Pursuant to Section 5 of Republic Act No. 7942, the State can either directly undertake the exploration, development and utilization of the area or it can enter into agreements with qualified entities, viz:

SEC 5. Mineral Reservations. - When the national interest so requires, such as when there is a need to preserve strategic raw materials for industries critical to national development, or certain minerals for scientific, cultural or ecological value, the President may establish mineral reservations upon the recommendation of the Director through the Secretary. Mining operations in existing mineral reservations and such other reservations as may thereafter be established, shall be undertaken by the Department or through a contractor x x x .

It is now up to the Executive Department whether to take the first option, i.e., to undertake directly the mining operations of the Diwalwal Gold Rush Area. As already ruled, the State may not be precluded from considering a direct takeover of the mines, if it is the only plausible remedy in sight to the gnawing complexities generated by the gold rush. The State need be guided only by the demands of public interest in settling on this option, as well as its material and logistic feasibility. The State can also opt to award mining operations in the mineral reservation to private entities including petitioners Apex and Balite, if it wishes. The exercise of this prerogative lies with the Executive Department over which courts will not interfere.

That the aforequoted passage of the decision, particularly the highlighted portion, has generated interpretation by the parties causes me to pause in order to ask whether the issuance of Proclamation 297 declaring the disputed area as a mineral reservation outweighs the claims of Apex and Balite over the Diwalwal Gold Rush Area; and which between Apex and Balite will have priority once the Government opts to award mining operations in the

mineral reservation to private entities, including Apex and Balite, if it so wishes.

I humbly submit that the answers to these questions should be given by the Court now, not later, if we are to prevent another round of litigation that will surely undermine the efforts of the Government to establish a new order of peace, development and prosperity in the Diwalwal Gold Rush Area.

I also submit that these questions are entirely justiciable in the present case. We have already eliminated the claim of SEM and its parent company, Marcopper Mining Corporation (MMC), due to the latter's numerous violations of the terms of Exploration Permit (EP) 133, which meanwhile expired without being renewed. The issuance of Proclamation 297, and the declaration by this Court of the nullity of DAO No. 66 (declaring 729 hectares within the Agusan-Davao-Surigao Forest Reserve as non-forest land open to small-scale mining operations) necessitate a final and definitive determination of the existing right of the remaining claimants in this dispute, who can replace SEM and fill the void created by the expiration of EP 133.

I have no difficulty in understanding from the decision that the remaining claimants are Apex and Balite.

Submissions

The right of a legitimate and existing claimant envisioned in Proclamation 297 (i.e., "Mining operations in the area may be undertaken either by the DENR directly, subject to payment of just compensation that may be due to legitimate and existing claimants, or thru a qualified contractor, subject to existing rights, if any") is a real right acquired over time by a person who discovered mineral deposits, and was first to stake his claim through location and registration with the mining recorder.

Under Philippine mining laws, which are essentially patterned after Anglo-American models, the location and registration of a mining claim must be followed by actual exploration and extraction of mineral deposits. The person who is first to locate and register his mining claim and who subsequently explores the area and extracts mineral deposits has a valid and existing right regardless of technical defect in the registration.

Which between Apex and Balite has priority?

On the one hand, Apex rests its claim to priority on the precept of first-in-time, first-in-right, a principle that is explicitly recognized by Section 1 of Presidential Decree (P.D.) No. 99-A, which amended Commonwealth Act (C.A.) No. 137 (Mining Act), which provides:

Whenever there is a conflict between claim owners over a mining claim, whether mineral or non-mineral, the locator of the claim who first registered his claim with the proper mining registrar, notwithstanding any defect in form or technicality, shall have the exclusive right to possess, exploit, explore, develop and operate such mining claim.

Apex argues that Proclamation 297 does not extinguish its existing right over Diwalwal Gold Rush Area, because: (1) it conducted exploration work in the area from 1983 to 1991; (2) it spent a total of P15 million on exploration and development work alone; and (3) its petition for intervention was admitted by the Court in this case, which was indicative of its existing right over the disputed area.

On the other hand, Balite states that it filed on June 14, 1994 its application for a Mineral Production Sharing Agreement (MPSA) ahead of SEM; and that it had an existing right over the disputed area by virtue of its native title right under R.A. No. 8371 (IPRA),^[2] because its members are indigenous peoples (IPs) belonging to the four tribes of Mangguangan, Manobo, Mandaya and Dibabawon.

During the oral arguments, Balite's counsel described Balite as a "cooperative for everybody," for its members were comprised of nomads, lowlanders, and IPs belonging to the four tribes thus mentioned. Balite further asserts

that it is a small-scale mining cooperative, as defined under R.A. No. 7076, and is thus entitled to apply for 25% percent of the Diwalwal mineral reservation.

Under the circumstances, it should be Apex who should be recognized as the claimant with priority, with or without Proclamation 297.

Firstly: Being a cooperative whose principal purpose is to engage in the business of mining, and not in the protection of the rights and interest of cultural minorities, Balite is not entitled to preference by virtue of IPRA. I must point out that IPRA speaks of rights of IPs, and of those belonging to the Indigenous Cultural Communities (ICCs), but does not include a cooperative like Balite. Under Sec. 7(b) of IPRA, only IPs and ICCs have the right to "manage and conserve natural resources within the territories and uphold the responsibilities for future generations; to benefit and share the profits from the allocation and utilization of natural resources." IPs and ICCs have also the "right to negotiate the terms and conditions for the exploration of natural resources."

I hasten to clarify, however, that in order to protect the rights of its IP members over certain portions of the Diwalwal mineral reservation, Balite may represent its IP members in negotiating the terms and conditions for the sharing of profit and other benefits arising from the utilization of the mineral deposits that lay beneath their ancestral land with the service contractor chosen by the State, but it cannot directly undertake exploration, development and mining in the Diwalwal mineral reservation.

Secondly: Upon learning of MMC's assignment of its EP 133 to SEM, Balite filed with the Regional Executive Director of the Department of Environment and Natural Resources (DENR) a petition seeking the cancellation of EP 133, and the admission of its MPSA (entitled Rosendo Villaflores, et al. v. Marcopper Mining Corporation and docketed as RED MINES Case No. 8-8-94). The petition was referred to the Panel of Arbitrator (PA) pursuant to R.A. No. 7942.

Yet, Balite's application for an MPSA, although filed prior to SEM's application, did not qualify Balite as a first locator and registrant of a mining claim, because Apex had registered its claims with the Bureau of Mines and Geo-Sciences (BMG) in 1982, much earlier than either Balite, or any other claimant.

Thirdly: While discovery and prior registration of a mining claim with the mining recorder pave the way for a claimant to acquire a priority right over mineral land, it is also important that the claimant must follow his discovery and registration with actual exploration and mining. The final stage of exploration, development and utilization is crucial to bestow upon the discoverer or first registrant an existing right that he can invoke against the whole world, even against the government.

Apex met the requirements of discovery, registration, actual exploration and mining. In 1982, it explored and developed the area covered by its claims located within the Diwalwal mineral reservation. It constructed mining tunnels, access roads and bridges in and around its mine site to facilitate the extraction and processing of gold ores. It sold tons of gold bullions to the Philippine government from 1982 to 1992, and remitted millions of pesos in tax revenues to the national coffers. It operated a modern gold processing plant, as contrasted from gold panners who used crude mining techniques to extract gold ores.

Fourthly: The primordial consideration for granting or recognizing the existence of real rights over mineral lands is discovery. The State rewards the discoverer of mineral deposits for his labor and perseverance, and encourages other persons to search for more minerals and sources of renewable energy to propel the Nation's economic growth and development. For this reason, the Philippines adheres to the first-in-time, first-in-right postulate not only in resolving disputes involving conflicting claims, but also in determining existing rights of claimants.

In view of the foregoing, Apex has an existing priority right in the Diwalwal mineral reservation by virtue of

first-in-time, first-in-right, for having performed the requisite acts of location and registration, followed by actual exploration and mining. Although it did not follow the procedure for registering its mining claim laid down in the *Apex Mining Co., Inc. v. Garcia* (G.R. No. 92605, July 16, 1991, 199 SCRA 278), Apex is not barred from acquiring a superior right over the area to the exclusion of other claimants, because the registration of its claims pre-dated that of the other claimants, including MMC, and because by express provision of law (i.e., Sec. 1 of P.D. No. 99-A, which amended C.A. No. 137, Mining Act, *supra*) no defect in form or technicality should bar the priority.

Fifthly: That the Court in *Apex Mining Co., Inc. v. Garcia* affirmed the decision of the OP and the DENR nullifying and rendering inoperative Apex's mining claims or declarations of location (DOLs) is of no moment. The priority right of Apex that this Court ought to recognize herein, which the State must honor, does not emanate from the DOLs, but is predicated on the principle of first-in-time, first-in-right. The right of Apex to be recognized herein is distinct from its right as a registered owner and operator of the DOLs, considering that the former arises from a vacuum resulting from the extinction and nullification of MMC's EP 133.

Conclusion

I vote to grant the motion for clarification of Apex Mining Co., Inc., and to modify the decision by declaring that Apex Mining Co., Inc. has an existing priority right to explore, develop and utilize the mineral deposits in the Diwalwal Gold Rush Area pursuant to Proclamation 297, subject only to the superior right of the State to directly explore, develop and utilize.

[1] Section 1. Rendition of judgments and final orders. -- A judgment or final order determining the merits of the case shall be in writing personally and directly prepared by the judge, stating clearly and distinctly the facts and the law on which it is based, signed by him, and filed with the clerk of the court. (1a)

[2] Indigenous People Rights Act of 1997.

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