

18 October 2023

**DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
MINES AND GEOSCIENCES BUREAU**
Visayas Avenue, Diliman
Quezon City, Philippines

**DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
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For: **Atty. Danilo U. Uykieng**
OIC Director, Mines & Geosciences Bureau (MGB)

Felizardo A. Gacad, Jr., CESO II
Regional Director for MGB - MIMAROPA Region

Re: **Urgent Demand for the Issuance of a Cease-and-Desist Order Against the Mining Operations of Ipilan Nickel Corporation in Brooke's Point and the Suspension of its Mineral Production Sharing Agreement No. 017-93-IV**

Gentlemen:

We, the undersigned Indigenous Peoples ("IPs") of Brooke's Point, Palawan, on behalf of our respective Indigenous Cultural Communities ("ICCs"), **urgently demand that this Honorable Office:**

1. **ISSUE a Cease-and-Desist Order ("CDO")** against the mining operations of Ipilan Nickel Corporation ("INC") being conducted in Brooke's Point, Palawan; and
2. **SUSPEND Mineral Production Sharing Agreement ("MPSA") No. 017-93-IV** issued in favor of INC.

As provided in Section 7(e) of the Revised Implementing Rules and Regulations of the Philippine Mining Act (the "**Philippine Mining Act IRR**") and as will be discussed further below, this Honorable Office has the clear and unmistakable duty to cancel, or recommend the cancellation of, after due process, mining rights, mining applications, and mining claims for noncompliance with pertinent laws, rules, and regulations.

In a Resolution dated 11 August 2023 (the "**Resolution**"), the National Commission on Indigenous Peoples ("**NCIP**") MIMAROPA gave INC five (5) days to wind up its operations

because INC allegedly failed to secure the necessary Certification Precondition ("CP") and Free, Prior, and Informed Consent ("FPIC") required to operate in Barangay Maasin, Brooke's Point, Palawan.¹

Notably, INC did not obtain a CP from the NCIP and insists that it is not subject to this legal requirement. INC relies on a letter dated 31 March 2006 allegedly issued by then-Ancestral Domains Office ("ADO") Director Myrna Caoagas (the "Caoagas Letter"). In the Caoagas Letter, Director Caoagas opined that, since MPSA No. 017-93-IV was issued in 1993 or before the enactment of Republic Act No. 8371, or the Indigenous Peoples' Rights Act of 1997 ("IPRA"), then INC is not required to secure the necessary CP from the NCIP as Section 59 of the IPRA applies only to MPSAs executed after the IPRA was enacted. Section 59 of the IPRA provides that a production-sharing agreement, such as an MPSA, may not be issued by any department or government agency without a CP from the NCIP.

The reliance of INC on the Caoagas Letter is misplaced. Contrary to the claims of INC, INC is not exempt from the requirement of obtaining a CP from the NCIP in accordance with Section 59 of the IPRA.

Despite its enactment on 29 October 1997 and after the grant of the MPSA No. 017-93-IV on 05 August 1993, the IPRA effectively modified the terms and conditions of the said MPSA, such that its holder, INC, is required to comply with the provisions of the law. Through the enactment of the IPRA, the State required even existing MPSA holders to comply with the CP requirement. Notably, there is no provision in the IPRA exempting existing MPSA holders from said requirement.

As a mere privilege, an MPSA does not grant any permanent or irrevocable rights in favor of its holder. The State has the plenary and all-encompassing power to enact laws that modify or amend the terms of privileges, licenses, or permits granted by the State in order to protect the general welfare. Necessarily, as elucidated by the Supreme Court in *Tan v. Director of Forestry*,² since the granting of a license does not create irrevocable rights, it cannot defeat the proper exercise of police power by the State.

Moreover, the NCIP itself has expressly overturned the Caoagas Letter in a Memorandum dated 24 May 2022 issued by ADO Director Atty. Caesar Ortega and addressed to Dr. Mary Grace T. Pascua, Director of NCIP MIMAROPA, wherein he expressly stated that the Caoagas Letter "cannot be given effect".

From the foregoing, this Honorable Office has the legal obligation to suspend the mining operations of INC and to suspend its MPSA due to the failure of INC to obtain the required CP from the NCIP pursuant to Section 59 of the IPRA.

In recognition of the State's police power, the Supreme Court, in *Republic v. Rosemoor Mining & Development Corp.*,³ ruled that a mining license that contravenes a mandatory provision of the law under which it is granted is void and must be revoked.

¹ Badilla, E. (2023), NCIP issues 'cease and desist' order to Ipilan Nickel Corporation, <https://palawan-news.com/ncip-issues-cease-and-desist-order-to-ipilan-nickel-corporation/>

² *Tan v. Director of Forestry*, G.R. No. L-24548, 27 October 1983.

³ *Republic v. Rosemoor Mining & Development Corp.*, G.R. No. 149927, 30 March 2004.

Under Section 9 of Republic Act No. 7942, this Honorable Office has direct charge in the administration and disposition of mineral lands and mineral resources and shall undertake geological, mining, metallurgical, chemical, and other research as well as geological and mineral exploration surveys.

Specifically, Section 7(e) of the Philippine Mining Act IRR grants the MGB the authority to cancel, or recommend the cancellation of, after due process, mining rights, mining applications, and mining claims for noncompliance with pertinent laws, rules, and regulations.

Section 16 of the Philippine Mining Act IRR provides that in no case shall mineral agreements be granted in areas verified as actually occupied by ICCs under a claim of time immemorial possession, except with their prior consent.

Thus, subject to this Honorable Office's adoption of the NCIP's findings or its own independent investigation and verification of the facts, this Honorable Office should either hold that:

- (1) The twenty (25)-year term of the original MPSA of INC, issued in 1993, had already expired in 2018 pursuant to Article XII, Section 2, of the 1987 Constitution; or
- (2) The amended MPSA of INC issued in 2000, is still in force but is subject to the provisions of the IPRA.

In either case, it is the duty of this Honorable Office and the Department of Environment and Natural Resources to uphold the Constitution and the law, and to issue a CDO against INC on the ground of an expired MPSA, or for INC's continuing failure, for at least twenty-three (23) years and counting, to comply with the requirements of law for an MPSA holder, particularly, to secure a CP from the NCIP.

In further support of our position, we respectfully attach to this letter as **Annex "A"** a copy of our Position Paper, explaining in detail the factual and legal bases of our lawful demand.

In conclusion, to allow INC to continuously violate Section 16 of the Philippine Mining Act IRR, as well as Section 59 of the IPRA despite the abundance of evidence available on such violation, would constitute gross neglect of duty as defined in the Civil Service Law and relevant jurisprudence.

Gross neglect of duty is defined as the failure to give proper attention to a required task or to discharge a duty, characterized by want of even the slightest care, or by conscious indifference to the consequences insofar as other persons may be affected, or by flagrant and palpable breach of duty.⁴

To consciously allow an MPSA holder to continue to operate without the required FPIC of the concerned ICCs/IPs would constitute a flagrant and palpable breach of the duties of this Honorable Office under the Philippine Mining Act. Notably, under Section 50 of the 2017 Rules on Administrative Cases in the Civil Service, gross neglect of duty is punishable by dismissal from the service.

⁴ *Civil Service Commission v. Catacutan*, G.R. No. 224651, 03 July 2019.

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POSITION PAPER

I. FACTUAL ANTECEDENTS

Issuance of MPSA No. 017-93-IV in favor of Celestial Nickel Mining Exploration Corporation.

On 05 August 1993,⁵ the Department of Environment and Natural Resources ("DENR") Secretary issued MPSA No. 017-93-IV to Celestial Nickel Mining Exploration Corporation ("CNMEC") covering an area of 2,835.06 hectares, situated in Barangay Ipilan and Maasin.⁶ Thereafter, on 18 September 1993⁷ MPSA No. 017-93-IV was approved by the Office of the President, and consequently, exploration activities were commenced in Maasin, Brooke's Point, Palawan by CNMEC.

Notably, as early as October 1999, residents of Barangays Calaseguen, Maasim, Mambalot, and Ipilan, Brooke's Point Palawan, signed a petition "expressing their concerns on the potential irreversible environmental damages that the mining activities and future refinery plant of CNMEC would cause to the health, livelihood, and environment of the surrounding barangays."⁸

Subsequently, on 10 April 2000, the DENR amended MPSA No. 017-93-IV "to accord with the Mining Act." In 2004, several residents of Brgy. Maasin continued to raise complaints about illegal exploration activities carried out by CNMEC. The truthfulness of such complaints was verified on 12 May 2004 by the DENR-Community Environment and Natural Resources Office ("CENRO"), which conducted its own investigation and found out that the exploration/drilling activities undertaken by CNMEC violated Republic Act ("RA") No. 7942, as well as the terms and conditions stipulated in the approved MPSA.⁹

In July 2005, CNMEC entered into an operating agreement with INC. Thereafter, in 2006, CNMEC voluntarily applied for a Certification Precondition ("CP") from the National Commission on Indigenous Peoples ("NCIP"). At that time, the Ancestral Domain Office ("ADO") director was Myrna Caoagas ("Director Caoagas").

⁵ COMPLETE LIST OF EXISTING MINERAL PRODUCTION SHARING AGREEMENT (MPSA) as of 30 June 2015 (2015). Available at: <https://s3.amazonaws.com/rgi-documents/ed8d986ad27b76af41e8ff3a9b6703af3beaa3e1.pdf> (Accessed: 3 October 2023).

⁶ Sangkula, D.A. and Tamsi, M. (2007) "The Mining Controversy and Dynamics of Conflict in Brooke's Point Palawan." Environmental Legal Assistance Center. Available at <https://www.slideshare.net/no2mininginpalawan/the-mining-controversy-and-dynamics-of-conflict-in-brookes-point-palawan> (Accessed: 30 April 2023)

⁷ COMPLETE LIST OF EXISTING MINERAL PRODUCTION SHARING AGREEMENT (MPSA) as of 30 June 2015 (2015). Available at: <https://s3.amazonaws.com/rgi-documents/ed8d986ad27b76af41e8ff3a9b6703af3beaa3e1.pdf> (Accessed: 3 October 2023).

⁸ Sangkula, D.A. and Tamsi, M. (2007) "The Mining Controversy and Dynamics of Conflict in Brooke's Point Palawan." Environmental Legal Assistance Center. Available at <https://www.slideshare.net/no2mininginpalawan/the-mining-controversy-and-dynamics-of-conflict-in-brookes-point-palawan> (Accessed: 3 October 2023); Also see Section 3 par. (g) of IPRA.

⁹ Sangkula, D.A. and Tamsi, M. (2007) "The Mining Controversy and Dynamics of Conflict in Brooke's Point Palawan." Environmental Legal Assistance Center. Available at <https://www.slideshare.net/no2mininginpalawan/the-mining-controversy-and-dynamics-of-conflict-in-brookes-point-palawan> (Accessed: 3 October 2023); Also see Section 3 par. (g) of IPRA.

In a letter dated 31 March 2006 (the "Caoagas Letter"), Director Caoagas opined that, since MPSA No. 017-93-IV was issued in 1993 or before the enactment of the IPRA, then INC is not required to secure the necessary CP from the NCIP as Section 59 of RA No. 8371, or the Indigenous Peoples' Rights Act of 1997 ("IPRA") applies only to MPSAs executed after the IPRA was enacted.

However, the Caoagas Letter was expressly overturned by the NCIP itself, as well as the MGB.

MGB issuances expressly providing that INC is not exempt from obtaining a CP from the NCIP in accordance with Section 59 of the IPRA.

In a Memorandum dated 07 January 2022, MGB Director Atty. Wilfredo G. Moncano ("Director Moncano") held in abeyance the implementation of the approved Three-Year Development / Utilization Work Program ("3YD/UWP") for Calendar Years ("CYs") 2021-2023 **"pending the compliance of Celestial/Ipilan with Section 59 of the IPRA."** INC was given a period of ninety (90) days to obtain the required CP from the NCIP.

Thereafter, in a letter dated 03 February 2022 addressed to MGB, Atty. Dante Bravo, the President of INC, requested for reconsideration of the suspension due to the absence of the CP from the NCIP.

In a subsequent letter dated 11 February 2022 to the MGB, INC alleged that while it had already secured a Free, Prior, and Informed Consent ("FPIC") Certificate and a Memorandum of Agreement both dated 18 December 2008 with the concerned ICCs/IPs, INC admitted that it had not yet been issued a CP by the NCIP. Afterwards, in a third letter dated 16 March 2022 to the MGB, INC requested for the extension of the period to secure the CP from the NCIP from ninety (90) days to three (3) years.

In response to INC's request for extension, Director Moncano, in a Memorandum dated 17 February 2022 addressed to the MGB-MIMAROPA Regional Director (the **"MGB Director February 2022 Memorandum"**), expressly required CNMEC/INC to secure the CP within the aforementioned ninety (90)-day period, stating thus:

While it is true that the MPSAs which are executed prior to IPRA law is not required to secure CP prior to the commencement of mining operations, it is worthy to note that the Department of Environment and Natural Resources (DENR) issued an Order dated December 21, 2000 clarifying that the effective date of MPSA No. 017-93-IV as Amended-2000 shall be reckoned from the date of the execution of the amended contract, which was on April 10, 2000. Thus, the **applicability of securing the pertinent CP for the said mining tenement shall be observed and complied with by Celestial/INC.**

In view of the foregoing, Celestial/Ipilan can implement the approved 3YD/UWP for CYs 2021-2023 under MPSA No. 017-93-IV as Amended-2000 subject to the following conditions:

1. **Celestial/Ipilan shall secure the pertinent CP from the NCIP within ninety (90) days upon the commencement of the**

development/construction and mining activities in the contract area of the MPSA and shall notify the Mines and Geosciences Bureau (MGB) MIMAROPA Region on the target date of the said commencement;

Celestial/Ipilan shall secure the approval of the NCIP in the establishment of an escrow or trust fund for the royalty due to the identified Indigenous Cultural Communities/IPs in the contract area of the MPSA pending the issuance of the CP; and xxx (Emphasis supplied.)

After the lapse of the ninety (90)-day period for INC to obtain the required CP, the MGB Director, in a letter dated 21 April 2022, rejected INC's request for the three (3)-year extension of the period to secure the CP from the NCIP. However, in the same letter, MGB gave INC one (1) year from the date of the actual commencement of the development/construction and mining activities in the contract area of the MPSA to obtain the required CP from the NCIP.

However, notwithstanding all the aforementioned extensions, accommodations, and acts of leniency extended by MGB in favor of INC, INC still failed to secure the required CP from the NCIP.

NCIP issuances expressly provide that INC is not exempt from obtaining a CP from the NCIP, in accordance with Section 59 of the IPRA.

Aside from the abovementioned MGB issuances, the NCIP itself has expressly overturned the Caoagas Letter in a Memorandum dated 24 May 2022 (the "ADO Memorandum") issued by ADO Director Atty. Caesar Ortega and addressed to Dr. Mary Grace T. Pascua, Director of NCIP MIMAROPA, wherein he expressly stated that the Caoagas Letter "cannot be given effect". The ADO Memorandum explained, thus:

1. Former ADO Director Myrna Caoagas, in a letter dated that 31 March 2006 declared that INC (formerly CNMEC) is exempted from securing a CP because an MPSA was already awarded to CNMEC on 5 August 1993 or prior to the effectivity of IPRA. This declaration cannot be given effect.
2. While it is true that the MPSA was issued before IPRA (November 1997), it is equally true that the same was amended on 10 April 2000 after the enactment of the IPRA, and issued in the name of a new corporation, i.e., INC. The term of the MPSA was also extended from 2018 to 10 April 2025.
3. Moreover, on 10 October 2007, DENR-MGB endorsed again the CP application of CNMEC to NCIP Region IV. Thereafter, the FPIC process was conducted and a MOA between the Palawan ICCs, CNMEC, and NCIP was signed on 10 February 2009. The FPIC report was endorsed by NCIP Region IV to Central Office on 30 March 2009. It was noted that the CP application was not endorsed to the Commission En Banc ("CEB") for deliberation, thus no CP was issued to CNMEC. On 17 July 2017, INC filed its CP application with NCIP Region IV. Thereafter the field-based investigation was conducted but the FPIC activities stopped.

4. Clearly, even CNMEC had already accepted the fact that it had to undergo the FPIC process. Its act of filing a CP application and going through the FPIC process (although not completed) is an admission of the necessity of FPIC. It is now estopped from claiming otherwise.
5. Thus, granting for the sake of argument, that the declaration of the late Director Caoagas was correct at that time, the same does not hold true at present.

Despite the ADO Memorandum, INC continues to rely on the Caoagas Letter. Consequently, in a Resolution dated 11 August 2023 (the "**Resolution**"), the NCIP MIMAROPA gave INC five (5) days to wind up its operations because INC allegedly failed to secure the necessary CP and FPIC required to operate in Barangay Maasin, Brooke's Point, Palawan.¹⁰

Notably, the Resolution provides that INC is not exempt from submitting the required documentation necessary for the CP and FPIC, including the payment of royalties because the effectivity of the current amended MPSA of INC is counted from the year 2000, when it was amended to conform with law, putting said MPSA under the purview of RA No. 7942 or the Philippine Mining Act of 1995 ("**Philippine Mining Act**"), and the IPRA.¹¹

Further, the NCIP MIMAROPA emphasized that their office has validated the complaints filed by the ICCs and IPs of Brooke's Point, which include, among others, INC's lack of respect for the ICC and IP communities, material misrepresentation during the FPIC process, and bribery of IP leaders and members:¹²

As part of the process, the complaints of the ICCs/IPs [were] validated by a validation team on June 10, 2023. The result of the validation activities clearly shows the true sentiments of the ICCs/IPs against the operation of CNMEC/INC within their ancestral domain and their dissent to the earlier MOAs that were executed.

Notably, in a letter dated 22 August 2023, the concerned IPs of Brooke's Point informed the Office of the President of its formal withdrawal of its FPIC to CNMEC/INC under its MPSA No. 017-93-IV.

II. DISCUSSION

INC is not exempt from the requirement of obtaining a CP from the NCIP in accordance with Section 59 of the IPRA.

Section 59 of the IPRA provides that a production-sharing agreement, such as an MPSA, may not be issued by any department or government agency without a CP from the NCIP:

¹⁰ Badilla, E. (2023), NCIP issues 'cease and desist' order to Ipilan Nickel Corporation, <https://palawan-news.com/ncip-issues-cease-and-desist-order-to-ipilan-nickel-corporation/>

¹¹ Badilla, E. (2023), NCIP issues 'cease and desist' order to Ipilan Nickel Corporation, <https://palawan-news.com/ncip-issues-cease-and-desist-order-to-ipilan-nickel-corporation/>

¹² Badilla, E. (2023), NCIP issues 'cease and desist' order to Ipilan Nickel Corporation, <https://palawan-news.com/ncip-issues-cease-and-desist-order-to-ipilan-nickel-corporation/>

Section 59. Certification Precondition. — All departments and other governmental agencies shall henceforth be strictly enjoined from issuing, renewing, or granting any concession, license or lease, or entering into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain. Such certification shall only be issued after a field-based investigation is conducted by the Ancestral Domains Office of the area concerned: **Provided, That no certification shall be issued by the NCIP without the free and prior informed and written consent of ICCs/IPs concerned:** Provided, further, That xxx
(Emphasis and underscoring supplied.)

A CP refers to the certificate issued by the NCIP, signed by the Chairperson, attesting to the grant of FPIC by the concerned ICCs/IPs after appropriate compliance with the requirements provided for in NCIP Administrative Order No. 03-12.¹³

Notably, INC did not obtain a CP from the NCIP and insists that it is not subject to this legal requirement. INC relies on a letter dated 31 March 2006 allegedly issued by then-ADO Director Caoagas. According to INC, the Caoagas Letter opined that, since MPSA No. 017-93-IV was issued in 1993 or before the enactment of the IPRA, then INC is not required to secure the necessary CP as Section 59 applies only to MPSAs executed after the IPRA was enacted.

The reliance of INC on the Caoagas Letter is misplaced. The State has the plenary and all-encompassing power to enact laws that modify or amend the terms of privileges, licenses, or permits granted by the State in order to protect the general welfare.

Despite its enactment on 29 October 1997 and after the grant of the MPSA No. 017-93-IV on 05 August 1993, the IPRA effectively modified the terms and conditions of the said MPSA, such that its holder, INC, is required to comply with the provisions of the law. Through the enactment of the IPRA, the State required even existing MPSA holders to comply with the CP requirement. Notably, there is no provision in the IPRA exempting existing MPSA holders from said requirement.

Under Section 26(a) of the **Philippine Mining Act**, an MPSA is an agreement where the Government grants to the contractor the exclusive right to conduct mining operations within a contract area and shares in the gross output.

In *Lone Congressional District of Benguet Province v. Lepanto Consolidated Mining Co.*,¹⁴ the Supreme Court unequivocally declared that an MPSA partakes of a mere privilege, license, or permit granted by the State:

Further, respondents do not have vested right for the renewal of MPSA 001-90 under the same terms and conditions thereof. It bears underscoring that **the mining agreement partakes of a mere privilege, license or permit**

¹³ NCIP Administrative Order No. 03-12, *The Revised Guidelines on the Exercise of Free and Prior Informed Consent (FPIC) and Related Processes*, 13 April 2012.

¹⁴ *Lone Congressional District of Benguet Province v. Lepanto Consolidated Mining Co.*, G.R. Nos. 244063 & G.R. No. 244216, 21 June 2022.

granted by the State to respondents for the conduct of mining operations on a vast tract of land in the Municipality of Mankayan. (Emphasis supplied.)

As a mere privilege, an MPSA does not grant any permanent or irrevocable rights in favor of its holder. Necessarily, as elucidated by the Supreme Court in *Tan v. Director of Forestry*,¹⁵ since the granting of a license does not create irrevocable rights, it cannot defeat the proper exercise of police power by the State:

A license is merely a permit or privilege to do what otherwise would be unlawful, and is not a contract between the authority, federal, state, or municipal, granting it and the person to whom it is granted; neither is it property or a property right, nor does it create a vested right; nor is it taxation" (37 C.J. 168). Thus, this Court held that **the granting of license does not create irrevocable rights, neither is it property or property rights** (People vs. Ong Tin, 54 O.G. 7576). In the case of Pedro vs. Provincial Board of Rizal (56 Phil. 123), it was held that:

"A license authorizing the operation and exploitation of a cockpit is not property of which the holder may not be deprived without due process of law, but a mere privilege which may be revoked when public interests so require."

The welfare of the people is the supreme law. Thus, **no franchise or right can be availed of to defeat the proper exercise of police power** (Surigao Electric Co., Inc. vs. Municipality of Surigao, 24 SCRA 898, Aug. 30, 1968). The State has inherent power enabling it to prohibit all things hurtful to comfort, safety, and welfare of society (Edu vs. Erieta, 35 SCRA 481, Oct. 24, 1970) (Emphasis supplied.)

Further, in *Lone Congressional District of Benguet Province v. Lepanto Consolidated Mining Co.*,¹⁶ citing *Southeast Mindanao Gold Mining Corp. v. Balite Portal Mining Coop.*,¹⁷ the Supreme Court held that any privilege granted to the holder of an MPSA may be altered, modified or amended by the State under its all-encompassing police power, in accordance with the demands of the general welfare:

In *Southeast Mindanao Gold Mining Corp. v. Balite Portal Mining Coop.*, the Court ruled on the nature of a "natural resource exploration permit" **similar to respondent's Mineral Production Sharing Agreement; thus:**

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.** This is necessarily so since the *exploration, development and utilization of the country's natural mineral resources are matters impressed with great public interest.* Like timber permits, **mining exploration permits do not vest in the grantee any permanent or irrevocable right** within the purview of the non-

¹⁵ *Tan v. Director of Forestry*, G.R. No. L-24548, 27 October 1983.

¹⁶ *Lone Congressional District of Benguet Province v. Lepanto Consolidated Mining Co.*, G.R. Nos. 244063 & G.R. No. 244216, 21 June 2022.

¹⁷ *Southeast Mindanao Gold Mining Corp. v. Balite Portal Mining Cooperative*, G.R. No. 135190, 03 April 2002.

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. (Emphasis and underscoring supplied.)

From the foregoing, it is evident that by exempting INC from the CP requirement, the Caoagas Letter runs contrary to the IPRA. The IPRA was enacted in recognition of the State's duty to protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social, and cultural well-being. It shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.¹⁸

Indeed, the Caoagas Letter cannot take precedence over Section 59 of the IPRA. The ADO is an office under the NCIP, created by the IPRA, responsible for the management of ancestral lands/domains in accordance with a master plan as well as the implementation of the ancestral domain rights of the ICCs/IPs as provided in Chapter III of the IPRA.¹⁹ Obviously, the ADO cannot make any pronouncement or ruling, which violates the very law which created it. As the legal maxim goes, the spring cannot rise higher than the source.

Moreover, as discussed above, the NCIP itself has overturned the Caoagas Letter in the ADO Memorandum. Both the NCIP and the MGB have both categorically stated that INC is required to obtain a CP from the NCIP pursuant to Section 59 of the IPRA. Therefore, the argument of INC that it is exempt from such requirement is bereft of legal basis and runs contrary to the provisions of the IPRA. Evidently, INC's continued reliance on the Caoagas Letter is misplaced.

Following the premise of INC that it is exempt from Section 59 of the IPRA due to the issuance of its MPSA in 1993 prior to its enactment, MPSA No. 017-93-IV had already expired.

Assuming without admitting that the Caoagas Letter is correct and the issuance of MPSA No. 017-93-IV on 05 August 1993 prior to the enactment of the IPRA exempts INC from the IPRA's provisions, this premise would lead to the conclusion that MPSA No. 017-93-IV already expired on 05 August 2018, which is the end of the twenty-five (25) year term limit imposed by the 1987 Constitution.

In relying upon the Caoagas Letter, INC is effectively contradicting its own position on the effectivity of its MPSA. INC alleges that its current MPSA did not expire on 5 August 2018 because it was amended on 10 April 2000 to conform to the Philippine Mining Act.

However, by taking the position that their current amended MPSA has not yet expired because its twenty-five (25)-year term began only in the year 2000, then it follows that its current amended MPSA is within the ambit and coverage not only of the Philippine Mining Act, but also of the IPRA, being executed when both laws were already in force.

Similarly, if INC argues that the year 2000 amendment of its current MPSA is a renewal of its original 1993 MPSA, then more so that such year 2000 renewal of the MPSA should

¹⁸ Section 2(b), IPRA.

¹⁹ Section 46(a), IPRA.

already be within the ambit and coverage of both the Philippine Mining Act and the IPRA. Section 59 of the IPRA is clear that "(a)ll departments and other governmental agencies shall henceforth be strictly enjoined from issuing, renewing, or granting any concession, license or lease, or entering into any production-sharing agreement, without prior certification from the NCIP."

The MGB has the legal obligation to suspend the mining operations of INC and to suspend its MPSA due to the failure of INC to obtain the required CP from the NCIP pursuant to Section 59 of the IPRA.

In recognition of the State's police power, the Court, in *Republic v. Rosemoor Mining & Development Corp.*,²⁰ ruled that a mining license that contravenes a mandatory provision of the law under which it is granted is void and must be revoked:

A mining license that contravenes a mandatory provision of the law under which it is granted is void. Being a mere privilege, a license does not vest absolute rights in the holder. Thus, without offending the due process and the non-impairment clauses of the Constitution, it can be revoked by the State in the public interest.

x x x

Moreover, granting that respondents' license is valid, it can still be validly revoked by the State in the exercise of police power. The exercise of such power through Proclamation No. 84 is clearly in accord with *jura regalia*, which reserves to the State ownership of all natural resources. This Regalian doctrine is an exercise of its sovereign power as owner of lands of the public domain and of the patrimony of the nation, the mineral deposits of which are a valuable asset.

Proclamation No. 84 cannot be stigmatized as a violation of the non-impairment clause. **As pointed out earlier, respondents' license is not a contract** to which the protection accorded by the non-impairment clause may extend. **Even if the license were**, it is settled that **provisions of existing laws and a reservation of police power are deemed read into it, because it concerns a subject impressed with public welfare.** As it is, the non-impairment clause must yield to the police power of the state. (Emphasis supplied.)

Under Section 9 of RA No. 7942, the MGB has direct charge in the administration and disposition of mineral lands and mineral resources and shall undertake geological, mining, metallurgical, chemical, and other research as well as geological and mineral exploration surveys.

Specifically, Section 7(e) of the Philippine Mining Act IRR grants the MGB the authority to cancel, or recommend the cancellation of, after due process, mining rights, mining applications, and mining claims for noncompliance with pertinent laws, rules, and regulations.

²⁰ *Republic v. Rosemoor Mining & Development Corp.*, G.R. No. 149927, 30 March 2004.

Section 16 of the Philippine Mining Act IRR provides that in no case shall mineral agreements be granted in areas verified as actually occupied by ICCs under a claim of time immemorial possession, except with their prior consent:

Section 16. Ancestral Lands In no case shall Mineral Agreements, FTAA's or mining permits be granted in areas subject of Certificates of Ancestral Domains/Ancestral Land Claims (CADC/CALC) or in areas verified by the Department Regional Office and/or other office or agency of the Government authorized by law for such purpose as actually occupied by ICCs under a claim of time immemorial possession except with their prior consent.

Prior consent refers to prior informed consent obtained, as far as practicable, in accordance with the customary laws of the ICC concerned. Prior informed consent should meet the minimum requirements of public notice through various media such as, but not limited to, newspaper, radio or television advertisements, fully disclosing the activity to be undertaken and/or sector consultation wherein the Contractor/Permit Holder/Permittee should arrange for a community assembly, notice of which should be announced or posted in a conspicuous place in the area for at least a month before the assembly: Provided, That the process of arriving at an informed consent should be free from fraud, external influence and manipulations.

x x x

The implementation of this Section shall be in accordance with Republic Act No. 8371, otherwise known as "The Indigenous Peoples Rights Act of 1997" and other pertinent laws. (Emphasis supplied.)

Based on Section 16 of the Philippine Mining Act IRR in relation to Section 9 of the Philippine Mining Act, the MGB has the legal obligation to ensure that the prior consent of the concerned IPs/ICCs has been secured prior to the granting of mineral agreements.

Thus, subject to the MGB's adoption of the NCIP's findings or its own independent investigation and verification of the facts, the MGB can either hold that:

- (3) The twenty (25)-year term of the original MPSA of INC, issued in 1993, had already expired in 2018 pursuant to Article XII, Section 2, of the 1987 Constitution; or
- (4) The amended MPSA of INC issued in 2000, is still in force but is subject to the provisions of the IPRA.

In either case, it is the DENR and MGB's duty to uphold the Constitution and the law, and to issue a CDO against INC on the ground of an expired MPSA, or for INC's continuing failure, for at least twenty-three (23) years and counting, to comply with the requirements of law for an MPSA holder, particularly, to secure a CP from the NCIP.

Lastly, we note that the issuance of a CDO by the NCIP does not prevent the DENR from issuing its own CDO against the MPSA holder after making its own determination of the concerned entity's failure to comply with the law and the terms and conditions of its MPSA. These terms and conditions cover the obligation of the MPSA applicant or holder to obtain

and comply with the relevant government approvals and permits, including the requirements to secure a CP from the NCIP and the FPIC of the concerned ICC/IP.

The motion for reconsideration filed by INC will not stay the CDO issued by NCIP.

Currently, INC is appealing for the “swift withdrawal” of the CDO issued by the NCIP, which halted its mining operations in Palawan.²¹ In particular, subsequent to receiving the CDO, INC filed a motion for reconsideration with the NCIP on 18 August 2023. The motion emphasized the company’s request for the NCIP to reconsider its decision and reject a resolution from specific indigenous groups in Brooke’s Point.

We were informed that INC is of the position that the mere filing of its motion for reconsideration before the NCIP will stay the execution of the CDO issued by the same office.

To support its position, INC relied on Section 21, Chapter 4, Book VII of the Revised Administrative Code, which provides that appeals shall stay the decision appealed from. However, it appears that INC has conveniently overlooked the *proviso* contained in Section 21, “unless otherwise provided by law”:

Section 21. Effect of Appeal.—The appeal shall stay the decision appealed from **unless otherwise provided by law**, or the appellate agency directs execution pending appeal, as it may deem just, considering the nature and circumstances of the case. (Emphasis supplied.)

At the outset, the CDO itself provides that the order shall only be lifted upon compliance by INC with the FPIC process and the subsequent issuance of the Certification Precondition in its favor. Thus, the mere filing of a motion for reconsideration or an appeal with the NCIP will not stay the implementation of the CDO. As long as INC has not complied with the FPIC process and a Certification Precondition has not been issued in its favor, the CDO remains effective.

We note that the CDO issued by the NCIP is a provisional order issued to stop or suspend projects that have not satisfied the FPIC process. This is clear in the final *proviso* of Section 59 of the IPRA:

Section 59. Certification Precondition. — All departments and other governmental agencies shall henceforth be strictly enjoined from issuing, renewing, or granting any concession, license or lease, or entering into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain. Such certification shall only be issued after a field-based investigation is conducted by the Ancestral Domains Office of the area concerned: Provided, That no certification shall be issued by the NCIP without the free and prior informed and written consent of ICCs/IPs concerned: Provided, further, That no department, government agency or government-owned or -controlled

²¹Jordeene B. Lagare, *Ipilan Nickel seeks to resume Palawan mining operations*, <https://business.inquirer.net/416047/ipilan-nickel-seeks-to-resume-palawan-mining-operations>

corporation may issue new concession, license, lease, or production sharing agreement while there is a pending application for a CADT: **Provided, finally, That the ICCs/IPs shall have the right to stop or suspend, in accordance with this Act, any project that has not satisfied the requirement of this consultation process.** (Emphasis and underscoring supplied.)

This final *proviso* in Section 59 of the IPRA is clear that “the ICCs/IPs shall have the right to stop or suspend” “any project that has not satisfied the requirement” of the FPIC process. Of course, the law cannot be construed to mean that the ICCs/IPs have the right to take the law into their own hands. After all, Section 39 of the IPRA granted the NCIP the legal mandate “to protect and promote the interest and well-being of the ICCs/IPs.”

In order to protect and promote the legal right of the ICCs/IPs under the final *proviso* of Section 59 of the IPRA, the NCIP has the right to stop or suspend any project on behalf of the concerned ICC/IP if it finds that such project has not satisfied the FPIC process.

The FPIC process is intended to protect the rights of ICCs/IPs in the introduction and implementation of plans, programs, projects, activities and other undertakings that will affect them and their ancestral domains to ensure their economic, social and cultural well-being.²²

Necessarily, a CDO suspending a project that has not satisfied the FPIC process cannot be lifted by the mere filing of an appeal by the project’s developer, as this would run contrary to the policy of the IPRA requiring compliance with the FPIC process, as enshrined in Section 3 of NCIP Administrative Order No. 3 Series of 2012:

Section 3. Declaration of Policy. –

- (a) The FPIC actualizes and strengthens the exercise by ICCs/IPs of their rights to Ancestral Domains, Social Justice and Human Rights, Self-Governance and Empowerment, and Cultural Integrity;
- (b) The right of ICCs/IPs to the management, development, use and utilization of their land and resources within their own ancestral domains shall be given utmost regard;
- (c) No concession, license, permit or lease, production-sharing agreement, or other undertakings affecting ancestral domains shall be granted or renewed without going through the process laid down by law and this Guidelines.

Further, assuming without admitting that the CDO is a final order that completely disposes of INC’s case, Section 50 of NCIP Administrative Order No. 1 Series of 2018 provides that the filing of an appeal to the Court of Appeals will not stay the execution of judgment or decision:

Section 50. Execution of Judgment, Basic Rule. – Only judgments, decisions, or final orders in these appealed cases that completely disposes of the case

²² NCIP Administrative Order No. 3 Series of 2012, Section 2(b).

shall be subject of execution as a matter of right. The filing of an appeal to the CA will not stay the execution of judgment or decision. (Emphasis supplied.)

If judgments, decisions, or final orders of the NCIP are not stayed by the filing of an appeal, then all the more should provisional orders of the NCIP not be stayed by the filing of the same.

Notably, the rules of similarly situated agencies, such as the DENR and the Bureau of Fisheries, expressly provide that the CDOs issued by their respective offices are not stayed by the filing of an appeal:

Rules of Procedure for the Adjudication of Fisheries Law Cases

Section 42. *Effect of the Issuance of CDO.* – The CDO shall be immediately executory upon its issuance. **A Motion to Lift or Appeal shall not stay the execution of the CDO.** (Emphasis supplied.)

DENR Administrative Order No. 2003-30

Section 16. *Fines, Penalties And Sanctions.* x x x The EMB Director or the EMB-RD may issue a Cease and Desist Order (CDO) based on violations under the Philippine EIS System to prevent grave or irreparable damage to the environment. **Such CDO shall be effective immediately. An appeal or any motion seeking to lift the CDO shall not stay its effectivity.** However, the DENR shall act on such appeal or motion within ten (10) working days from filing. (Emphasis supplied.)

Moreover, we understand the NCIP is currently in the process of drafting guidelines that will govern the issuance and effectivity of CDOs issued by their office. In the meantime, however, the NCIP advised affected stakeholders to refer to the CDO itself, as well as NCIP's official statement on the same, in order to determine the duration of its effectivity.

To recall, the CDO itself provides that the order shall only be lifted upon compliance by INC with the FPIC process and the subsequent issuance of the Certification Precondition in its favor. As of date, INC has not complied with the FPIC process and a CP has not been issued in its favor.

Therefore, the implementation of the CDO shall not be stayed by the mere filing of a motion for reconsideration or an appeal with the NCIP. To hold otherwise would be to countenance the irreparable and irreversible harm and injury sought to be avoided by the issuance of an CDO.

From all the foregoing, it absolutely behooves the DENR and MGB to issue its own CDO against CNMEC/INC, apart from, or in support of the NCIP:

(1) In accordance with primacy of the rule of law and the prior express official pronouncements of the MGB to INC cited above, to wit:

- i. Then-MGB Director Moncano's Memorandum dated 07 January 2022, holding in abeyance the implementation of the approved 3YD/UWP for CYs

2021-2023 “pending the compliance of Celestial/Ipilan with Section 59 of the IPRA”;

- ii. MGB Director February 2022 Memorandum addressed to the MGB MIMAROPA Regional Director stating that the applicability of securing the pertinent CP for the said mining tenement shall be observed and complied with by CNMEC / INC and giving it ninety (90) days to secure the CP from the NCIP; and
 - iii. Then-MGB Director Moncano’s Letter dated April 21, 2022, rejecting INC’s request for the three (3)-year extension and instead giving it one (1) year from the date of the actual commencement of the development/construction and mining activities in the contract area of the MPSA to secure the CP from the NCIP, as a condition for INC’s continued operations;
- (2) INC failed to secure the CP from the NCIP after the lapse of all the extensions granted by the MGB in its favor, as evidenced by the Resolution; and
- (3) The concerned IPs’ FPIC to CNMEC/INC under its MPSA No. 017-93-IV has been formally withdrawn in the letter dated 22 August 2023 addressed to the Office of the President.

Evidently, the issuance of the said CDO by DENR and MGB is imperative to immediately stop all of INC’s mining operations in Brooke’s Point, Palawan, and is done in the lawful exercise of its mandate and duties to fully enforce the law under the Philippine Mining Act and its IRR, without fear or favor.

III. CONCLUSION

Article II, Section 22 of the 1987 Constitution, the fundamental law of the land, expressly provides that the State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.²³

Pursuant to this express recognition and promotion of the rights of ICCs, the IPRA was enacted. Section 2(b) of the IPRA embodies the commitment of the State to protect the rights of ICCs/IPs to their ancestral domains, and to ensure their economic, social, and cultural well-being.

These express declarations of the State’s recognition of the rights of ICCs/IPs are meaningless and hollow if this Honorable Office allows a mining company like INC to continue to extract minerals from the ancestral lands/domains of ICCs/IPs without first obtaining their FPIC. It is precisely the recognition of the ICCs/IPs distinct rights of ownership over their ancestral domains and lands that breathes life into the Constitutional mandate enshrined in Article II, Section 22.²⁴

The FPIC process is intended to protect the rights of ICCs/IPs in the introduction and implementation of plans, programs, projects, activities and other undertakings that will

²³ 1987 Constitution, Article II, Section 22.

²⁴ *Cruz v. DENR Secretary*, G.R. No. 135385, 6 December 2000, Separate Opinion (J. Puno).

affect them and their ancestral lands / domains to ensure their economic, social, and cultural well-being.²⁵

Underscoring the undeniable importance of the FPIC process in the recognition of the rights of ICCs/IPs, Section 16 of the Philippine Mining Act IRR provides that in no case shall mineral agreements be granted in areas verified as actually occupied by ICCs under a claim of time immemorial possession, except with their prior consent.

Therefore, pursuant to its authority under Section 7 of the Philippine Mining Act IRR, the MGB has the express and categorical duty to cancel or to recommend the cancellation of MPSAs in violation of Section 16 of the Philippine Mining Act IRR.

In the present case, in light of INC's continuing violation of Section 16 of the Philippine Mining Act IRR as well as Section 59 of the IPRA, it is MGB's legal obligation to cancel or to recommend the cancellation of MPSA No. 017-93-IV.

Consequently, in order to protect the rights of the undersigned IPs/ICCs over their ancestral lands/domains pending the investigation of this Honorable Office on whether MPSA No. 017-93-IV should be cancelled, **the undersigned DEMAND that this Honorable Office:**

1. **ISSUE a CDO** against the mining operations of INC conducted in Brooke's Point, Palawan; and
2. **SUSPEND MPSA No. 017-93-IV** issued in favor of INC.

To allow INC to continuously violate Section 16 of the Philippine Mining Act IRR, as well as Section 59 of the IPRA despite the abundance of evidence available on such violation, would constitute gross neglect of duty as defined in the Civil Service Law and relevant jurisprudence.

Gross neglect of duty is defined as the failure to give proper attention to a required task or to discharge a duty, characterized by want of even the slightest care, or by conscious indifference to the consequences insofar as other persons may be affected, or by flagrant and palpable breach of duty.²⁶

To consciously allow an MPSA holder to continue to operate without the required FPIC of the concerned ICCs/IPs would constitute a flagrant and palpable breach of the duties of this Honorable Office under the Philippine Mining Act. Notably, under Section 50 of the 2017 Rules on Administrative Cases in the Civil Service, gross neglect of duty is punishable by dismissal from the service.

Aside from gross neglect of duty, should this Honorable Office fail to issue its own CDO or suspend INC's MPSA in order to enjoin INC from operating without the required FPIC, it would be guilty of knowingly approving or granting a license in favor of any person not qualified for or not legally entitled to such license. Notably, under Section 3(j) of Republic Act No. 3019 or the Anti-Graft and Corrupt Practices Act, "knowingly approving or granting any license, permit, privilege or benefit in favor of any person not qualified for or

²⁵ NCIP Administrative Order No. 3 Series of 2012, Section 2(b).

²⁶ *Civil Service Commission v. Catacutan*, G.R. No. 224651, 03 July 2019.

not legally entitled to such license, permit, privilege or advantage" shall constitute a corrupt practice of a public officer and is declared to be unlawful.

Indeed, should this Honorable Office fail to stop INC's mining operations in Brooke's Point through the issuance of a CDO and the suspension of MPSA No. 017-93-IV despite the abundance of evidence on INC's violations, this Honorable Office would be complicit with the colonial regimes that inflicted the historical injustices suffered by multiple generations of ICCs/IPs, which the enactment of the IPRA sought to rectify.