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December 10, 2023

VIA E-MAIL

Nevada County Board of Supervisors
Nevada County
950 Maidu Avenue
Nevada City, 95959

Re: Board Agenda Memo for Idaho Maryland Mine Vested Rights Petition

Dear Supervisors:

I represent Rise Grass Valley, LLC ("Rise"), regarding its vested rights petition ("Petition") for the Idaho-Maryland Mine ("Mine" or "Subject Property") located in Nevada County ("County"), California. As you know, the County Staff released a certain "Board Agenda Memorandum" dated November 28, 2023 (the "Memorandum"), which recommended that the Nevada County Board of Supervisors (the "Board") reject Rise's Petition based on a conclusion that the vested right, *if it ever existed*, was abandoned in the late 1950s and potentially at many points thereafter. As discussed herein, County Staff has reached this conclusion based on misapplication and in some cases complete reversal of the applicable legal standards and selective use and misstatements or misunderstandings of fact and law. In order to assist the Board in its analysis of the Board Agenda Memorandum, we have attached, as Exhibit A, Rise's Response to County Response to Facts and Evidence, which provides a point by point refutation of factually inaccurate claims in the Memorandum. This letter responds to some of the larger misapplications of law and mischaracterization of facts in the Memorandum.

We respectfully request that the Board carefully consider the extensive evidence provided in the Petition, find that a vested mining right exists as to the subject Property, and that this right has not been abandoned.

I. The Memorandum Fails to Acknowledge that the Petition Clearly Established the Existence of a Vested Right on the Vesting Date in 1954.

A vested right to mine is established and protected under the U.S. and California Constitutions when a mining operation is lawfully conducted before a local zoning ordinance first required a permit to conduct mining activity and said mining operation continues until the permit requirement becomes effective.[1] Unlike other land uses that may establish vested rights, vested mining rights include the right to expand onto other parcels or areas of a property that were owned at the time of vesting, gradually expand operations and throughput in response to market forces, and modernize equipment and processes over time. (*See* Petition at pp. 52-54). Rise bears the burden of demonstrating that a preponderance of the evidence established the

[1] *Hansen Bros. Enterprises v. Nevada County* (1996) 12 Cal.4th 533, 552 [*Hansen Brothers*].

existence of the vested right. If it does so, the Board is required to recognize the existence of the right as of the vesting date. (*See* Petition at pp. 51). Rise clearly carries this burden in its Petition, and has, by law, established a vested right that the County must recognize, unless such right has subsequently been abandoned, as discussed below.

Both Rise and County Staff agree that the first step in a vested rights analysis is for the petitioning party to establish the lawful and continuing existence of a use at the time of the enactment of the ordinance. As County Staff concedes, the relevant vesting date for determining vested rights on the mining property is October 10, 1954 – the date that the County enacted Ordinance No. 196 regulating certain uses within the County. In the Petition, Rise presents irrefutable evidence of active mining, crushing, processing, trucking and transporting, and other ancillary mining activities at the Property beginning in with location of the Union Hill Claim in 1851 and extending until after October 10, 1954. This use was within the scope of Ordinance No. 196, which required a permit for commercial excavation within 1,000 feet of a public street. The Petition establishes the geographic, operational, and volumetric scope of these activities, both historically and in 1954. (Petition at pp. 55-66).

The Memorandum does not directly dispute the scope of operations that Rise demonstrates in its Petition. Instead, the Memorandum claims that “the specifics of what was occurring in 1954 are unknown” (Memorandum at p. 13); and on this basis concludes that “the evidence provided by the Petitioner does not confirm that the activities regulated by Ordinance No. 196 actually occurring at the time the ordinance was passed, or if they occurred within (1000) feet of a public road.” (Memorandum at p. 13.)

The Memorandum’s conclusion is non-committal and contrary to the evidence presented in the Petition. Ordinance No. 196 required a use permit for any "commercial excavation[2] of natural materials within a distance of 1,000 feet from any public street, road or highway."[3] (Memorandum at p. 11). Rise's Petition is replete with evidence of expansive commercial excavation of natural materials throughout 1954, including active operations within 1,000 feet of a public road. The evidence demonstrates that underground mining was occurring on the vesting date in seventeen headings, nine of which are indicated to be “ore” where the operator annotated the “Grade of ore” as either “poor” or “fair”.[4] The description of these heading confirms the mining of this gold mineralization in “Remarks:” using words such as “Drifting on vein” and “approximately 14 inches of vein formation, well mineralized” and “drifting on stringers”[5]. All the ore produced underground in 1954 was hoisted to the surface through the New Brunswick Shaft, and the ore was then milled in the New Brunswick Mill.[6] The location of the New Brunswick Shaft is not in doubt, it is annotated on an official USGS topographical map

[2] Excavation is not defined in Ordinance No. 196 or the current County Land Use and Development Code (the “LUDC”). As per the rules of interpretation of the LUDC, undefined words shall be defined by Webster’s dictionary (Sec. L-II 1.4[2]). Therefore, the County must apply the dictionary definition of “excavating,” which is defined as "to dig out and remove." (https://www.merriam-webster.com/dictionary/excavating). Excavation meant “mining” in a very broad sense, including even crushing and processing of rock – See footnote 10.
[3] *See* Exhibit 185 to the Petition.
[4] See Exhibit 179 to the Petition.
[5] “Stringers” means a narrow vein of irregular filament of mineral traversing a rock mass of different materials. – See Appendix C to the Petition (*Clark* at p. xix). The full glossary from this book is included as New Exhibit 2019 to this letter.
[6] See Appendix C to the Petition (*Clark* at p. 242).

from 1951.[7] The New Brunswick mineral process plant, also known as the New Brunswick Mill, was located immediately adjacent to the New Brunswick Shaft.[8] The USGS topographical map demonstrates that the New Brunswick Shaft and the New Brunswick Mill were located approximately 330 feet from Union Hill Road and 660 ft from Brunswick Road. A 1955 Nevada County Road Map and contemporaneous news articles confirms that both Union Hill Road and Brunswick Road were public roads.[9] This is indisputable evidence of commercial excavation of minerals occurring at the Property within 1,000 feet of a public road on the vesting date.[10]

Evidence also clearly demonstrates that gold excavation activities continue after October 10, 1954. In January of 1955 preparations were underway to sink a winze on the 3280-foot level, where sample sacks of high-grade gold had been gathered while driving the No. 25 drift.[11] The Annual Reports issued by the public mining company, included in the Petition, demonstrate production of gold on the Property in both 1954 and 1955, and demonstrate that mining and milling of gold continued uninterrupted until at least December 27, 1955.[12] The Memorandum admits as much – even its own characterization of the "permit history" of both the Brunswick and Centennial sites note that mining on the sites did not "cease" until "October 1957." (Memorandum at pp.6-8).

In light of this evidence, the Memorandum's conclusion that “the evidence provided by the Petitioner does not confirm that the activities regulated by Ordinance No. 196 actually occurring at the time the ordinance was passed" is wholly unsupported. The Memorandum’s failure to concede such a clear point – that mining was occurring on the vesting date and were regulated by Ordinance No. 196 – demonstrates that either County Staff was confused about the applicable legal standards and burden of proof or that it was unclear on its role to be an objective assessor of the merits of the evidence.

It is important to note that the establishment of a vested right on the Property encompasses the right to conduct activities beyond those specific activities and occurring in October of 1954 that give rise to the establishment of the legal non-conforming use on the Property. The *Hansen Brothers* case clearly established the diminishing assets doctrine, which allows for the vested mining operation to expand across and below a tract of land even if it was not entirely disturbed or fully explored by mining operations on the vesting date if there were “objective manifestations” of the operator’s intent to devote the entire tract to the mining use as of the vesting date**.**[13] The Petition includes a lengthy discussion of the evidence establishing the geographic scope of the area that was intended to be mined. (Petition at pp. 57-61). Again, the Memorandum does not dispute any of this evidence or discussion. However, any suggestion that Rise's claim of vested rights is impermissibly more "expansive" than the specific mining

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[7] See Exhibit 319 to the Petition (The icon with a hatched square indicates the location of the New Brunswick Mine Shaft).
[8] See Exhibit 373 to the Petition.
[9] See Exhibits 318, 42, 51, and 119 to the Petition; *see also* New Exhibit 2017 attached to this letter.
[10] The County's understanding that activities at the Property were occurring within 1,000 feet of a public road and within the meaning of Ordinance No. 196 are further confirmed by the Nevada County Planning Commission's 1959 approval of Use Permit U59-12. (New Exhibit 2008 attached to this letter). Use Permit U59-12 authorizes a Portable Hot Mix Plant (consisting of a crusher and road-mix plant that supplied road-mix for the surfacing of Brunswick Road) located at the New Brunswick Mine. The County processed this Use Permit under Ordinance No. 196, demonstrating an understanding that crushing and processing of rock near the New Brunswick Mine were within the meaning of “Excavation of Natural Materials” regulated by Ordinance No. 196.
[11] See Appendix C to the Petition (*Clark* at p. 242).
[12] See Exhibit 196 to the Petition.
[13] *Hansen Brothers*, *supra*, 12 Cal.4th at 555-556.

activities occurring in October of 1954 is contrary to the doctrine of vested rights set forth in *Hansen Brothers*.

II. The Memorandum Does Not Establish that the Vested Right to Mine the Property was Abandoned.

As the Petition establishes the existence of a lawful mining operation in occurrence as of October 1954, it establishes a constitutional right to operate. Once this constitutional right is established, waiver of the right is disfavored in the law and requires a knowing and intentional relinquishment on the part of the right-holder.[14] Rise has *no burden* to prove that mining operations have continued at all after the vesting date in order to maintain its vested right. (Petition at p. 50). Instead, the presumption is that such vested rights remain unless the party claiming abandonment can demonstrate that there is clear and convincing evidence of abandonment.[15] Any doubtful cases will be decided in favor of vested rights and against abandonment.[16] The Memorandum does not dispute that the burden of proof to establish abandonment of the vested right lies with the County. (Memorandum at pp. 24-25).

As outlined below, the Memorandum fails to establish any clear and convincing evidence of abandonment of the vested right to mine the Property. Instead, the Memorandum applies an incorrect legal standard by requiring Rise to provide evidence of a continuous intent to maintain mining uses on the Property after the vesting date and further relies on several misstatements of law and facts to manufacture a showing of intent to abandon vested rights. The Memorandum's incorrect rule is the inverse of the abandonment rule from *Hansen Brothers*. Rather than applying the *Hansen Brother's* test of requiring the County to prove abandonment by (1) an intent to abandon, and (2) an overt action or omission evidencing an intent to abandon the vested right as required under California law, the Memorandum claims that Rise has the burden of proving an intent to mine (which equates to an intent not to abandon) continuously after the vesting date. This erroneous rule attempts to completely flip the legal standard for abandonment from *Hansen Brothers* upside-down and push the burden to disprove abandonment onto Rise by requiring continuous proof of intent to mine. Once the correct legal standard is applied and additional factual and legal errors are corrected, the Memorandum provides only speculative doubts and opinions about the Petition's evidence. As the County has the burden of proof for abandonment, the Memorandum's speculation about Rise's provided evidence does not, and cannot, rise to the level of clear and convincing evidence of abandonment of the vested right to mine the property.

A. The Memorandum Applies an Incorrect Legal Standard for Abandonment.

At various points in its analysis, the Memorandum's discussion fundamentally misapplies the law regarding abandonment.

As discussed in detail in Rise's Petition, the California Supreme Court has set forth a clear test to evaluate any claim that a vested mining right has been abandoned. A finding of abandonment

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[14] *Calvert v. Cnty. of Yuba* (2006) 145 Cal. App. 4th 613, 628; *see also Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1320.
[15] *See Hansen Brothers*, *supra*, 12 Cal.4th at 565; *see also Group Property, Inc. v. Bruce* (1952) 113 Cal.App.2d 549, 559; *see also Pickens v. Johnson* (1951) 107 Cal. App. 2d 778, 787 (Holding that abandonment requires a "clear and unmistakable affirmative act").
[16] *City of Ukiah v. County of Mendocino* (1987) 196 Cal.App.3d 47, 56.

requires evidence of two distinct occurrences: first, there must be clear and convincing evidence of a property owner's actual intent to abandon a vested mining right; second there must be clear and convincing evidence of an overt act, or failure to act, that affirmatively demonstrates this intention.[17] A cessation or pause in mining activity – even if prolonged – or failure to extract or sell mined materials is not sufficient to establish abandonment.[18] (Petition at p. 54).

County Staff correctly note that under California Supreme Court precedent, cessation of a non-conforming mining use is insufficient to constitute abandonment of that use. (Memorandum at p. 21). However, County Staff's Memorandum attempts to erode this clear legal mandate by adding in an extra prong for abandonment – that "in order to avoid a finding of abandonment, the property owner must be able to identify evidence of their objective manifestations of intent to resume the nonconforming use throughout the period the nonconforming use was discontinued." (Memorandum at p. 22). This claimed requirement is not found in nor can be deduced from *Hansen Brothers* nor any other California mining cases discussing abandonment of vested rights. In fact, a survey of vested mining rights cases in California revealed there is not a single reported case in which a vested mining right has been abandoned solely due to lack of onsite activity. In the sole recent California case that found an abandonment of vested mining rights, the court's finding was premised on an official document explicitly certifying to the government "that all mining had ceased, with no intent to resume, which was uniquely persuasive evidence of abandonment."[19]

The County justifies its additional requirement by citing sources which have no relevance to these proceedings.

The County Staff Memorandum includes a passing citation to Derek P. Cole's legal "treatise" on *California Surface Mining Law* and its citation of two cases from outside California (Kentucky and Oregon), in which "nonuse for periods of seven and ten years, coupled with the absence of other preservative activity" were found to evidence an intent to abandon a non-conforming use. First, these cases are from outside of California and cannot be relied on to ignore the clear mandate from the California Supreme Court in *Hansen Brothers*. Second, the preface to Cole's "treatise" specifically states "the book is not a treatise" and also contains the following text:

> One final note—from the title, readers will understand that this book only covers regulation of surface mining. ***Underground gold mines*** were once commonplace in California, but few active underground operations are left today. Because such mines do not involve surface mining—the removal of materials from openings in the earth's surface—and are not regulated by SMARA, they ***are not discussed in this book***.[20]

The majority of the impetus for County Staff's inclusion of this wholly new prong is *Stokes v. Bd. Of Permit Appeals* (1997) 52 Cal.App.4th 1348 – a California Court of Appeal case discussing a non-conforming use in regard to a bathhouse. In *Stokes*, the court determined that the automatic 3-year extinguishment provision for non-conforming uses of the San Francisco planning code applied to bathhouses and concluded as a matter of law that the use of the

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[17] *Hansen Brothers*, *supra*, 12 Cal.4th at 564, 569; *Pickens v. Johnson* (1951) 107 Cal.App.2d 778, 787; *Clarke v. Mallory* (1937) 22 Cal.App.2d 55, 64.
[18] *Hansen Brothers*, *supra*, 12 Cal.4th at 570, fn. 28.
[19] *Hardesty v. State Mining & Geology Bd.* (2017) 11 Cal.App.5th 790, 814 (Ordered Not Published).
[20] "Preface," Derek P. Cole, *California Surface Mining Law* (2007), available at: https://solano.com/products/california-surface-mining-law.

property was discontinued for more than three years. As stated by the court in Stokes; “Hansen is inapposite, in Hansen, plaintiffs owned and operated an aggregate mining and production business.” The Memorandum provides no justification why a Court of Appeal case ruling that there is no vested right to operate a non-conforming *bathhouse* use should have any bearing on the California Supreme Court's test for abandonment of a vested right to operate a non-conforming *mining* use, especially given the Supreme Court's observation in *Hansen Brothers* that mining operations are inherently unlike legal non-conforming uses in other industries.[21]

Accordingly, County Staff's analysis is tainted by both: (1) its unfounded and unlawful assertion that the cessation of gold mining uses on the property due to economic conditions can be used to satisfy the County's burden to demonstrate an actual intent to abandon; and (2) its manufactured requirement that Rise's Petition must provide "objective manifestations of intent to resume the nonconforming use throughout the period the nonconforming use was discontinued." This erroneous rule is not the law and inverts the abandonment burden by requiring Rise to *disprove* abandonment (i.e., continuous proof of intent to mine) rather than requiring the County to meet its burden under *Hansen Brothers.* The law under *Hansen Brothers* is clear: after Rise has established historical evidence of its legal operations of the mine in October of 1954, its vested right to continue operating the mine can only be extinguished upon a showing of *clear and convincing* evidence of both (1) an actual intention to abandon a vested mining operation; and (2) overt actions evidencing said intention to abandon the mining operation. As discussed further below, the County Board Agenda Memorandum fails to establish either.

B. Despite the County's Suggestion to the Contrary, A Temporary Cessation of Gold Mining at the Site is not Sufficient to Demonstrate Abandonment under the Law.

In essence, the County's overarching piece of evidence for abandonment is its insistence that underground mining did not occur between 1956 and the present. The County Staff's claim that this pause in excavating operations constitutes clear and convincing evidence of both required prongs of an abandonment finding is both a misunderstanding of the realities of the gold mining industry, a mischaracterization of the facts, and misapplication of California law.

As discussed above, cessation of a mining use alone is not clear and convincing evidence of abandonment of a vested right to mine.[22] The mining industry, and the gold mining industry in particular, is inherently episodic and very responsive to an ever-fluctuating market with regards to both costs and revenue. As stated in *Hansen Brothers*, “[m]ere cessation of use does not of itself amount to abandonment although the duration of nonuse may be a factor in determining whether the nonconforming use has been abandoned.”[23] The County does not analyze the duration of cessation as a factor, but instead provides a conclusory statement with no analysis: “[h]ere, the nearly seventy (70)-year cessation of mining activities on the Subject Property demonstrates abandonment.”[24] In doing so, the Memorandum mischaracterizes the length of cessation and the level of activity onsite by ignoring the numerous events showing a lack of intent to abandon and mining-related activities taking place on the property since 1954, including rock-crushing, exploration drilling, leases to mining companies, and other activities during that period.

[21] *Hansen Brothers*, *supra*, 12 Cal.4th at 553.
[22] *Hansen Brothers*, *supra*, 12 Cal.4th at 569 ("Cessation of use alone does not constitute abandonment").
[23] Id.
[24] Memorandum, at p. 33.

Moreover, the Memorandum fails to follow the mandate of *Hansen Brothers* to analyze the length of cessation as a "factor" in assessing abandonment and instead uses the length of cessation as a determinative factor that by itself proves to abandonment. In *Hansen* Brothers, the California Supreme Court considered all the factors unique to surface mining, such as seasonality, fluctuating markets, and varying demand for different products when considering what overt actions actually manifest an intention to abandon a vested mining right in the aggregate surface mining context. Likewise, the County must consider the actual type of the use (an underground gold mine) when determining how the duration of cessation may or may not be a factor *among other factors* in assessing whether abandonment has occurred. The County fails to do this in the Memorandum and treats the Mine as if it were no different than a bathhouse or surface quarry and as if duration of cessation was the only factor the County needs to consider.

Other factors that the Memorandum failed to consider but should have when assessing length of cessation as a factor in abandonment include but are not limited to: (1) government economic policies fixed the price of gold, making gold mining unprofitable until that policy was lifted in 1971; (2) all property owners since underground gold mining ceased have consistently preserved the core properties necessary to mine, including the severed mineral rights, the surface rights for key shaft access properties, and the records and maps of the mine necessary to re-open the mine; (3) the property was allowed to flood and reopened numerous times over its history during economic cycles, and often equipment was sold and the operation was re-capitalized and re-equipped before starting again; (4) rock crushing was occurring in the middle of the period of underground mining cessation, and other exploration activities (drilling and sampling), which are regulated aspects of "mining" under local, state and federal definitions, were occurring at various times after 1957; (5) millions of dollars have been invested into the property after 1957 to re-open the gold mine; (6) the 2,560 acres of mineral rights are mostly severed, and the only possible use of severed mineral rights is to mine; (7) the mineral resources at this site have unique character and high value given that the Mine was the largest gold producing mine in the U.S. and/or California at several points in time.

The Memorandum's approach to the cessation of gold mining on the site is inconsistent with California court holdings and other California counties' determination of vested rights. California courts have recognized that extractive industries, such as gold mining, often exist "at the mercy of market forces" and are granted the discretion to determine in their "business judgment that a temporary – even if prolonged – hiatus should be made" without such a hiatus being deemed an abandonment of a vested right.[25] In short, mine operators should not be forced to continue operations a loss "in order to await market recovery at some unknowable future point."[26] Three recent determinations of vested rights for mines with periods of cessation over 50 years confirm this legal principle – the County of Merced recognized a vested right for the Kelsey Ranch Mine after a 58-year cessation of mining activity,[27] while the County of San Bernadino recognized a

[25] *Hardesty v. State Mining & Geology Bd.* (2017) 219 Cal. Rptr. 3d 28, 44.
[26] *Id.*
[27] *See* June 12, 2019 Resolution to Adopt Findings of Vested Rights Determination by the Planning Commission, Merced County Planning Commission, available at: https://www.countyofmerced.com/AgendaCenter/ViewFile/Item/1033?fileID=10315; *see also* May 22, 2019 Planning Commission Staff Report re Merced River Mining – Petition of Vested Rights Determination, Merced County Planning Commission, available at: https://www.countyofmerced.com/AgendaCenter/ViewFile/Item/1026?fileID=9626.

vested right for the Chubbuck Mine after a 69-year cessation of mining activity[28] and a vested right for the Lone Pine Canyon Mine after a 53-year cessation of mining activity.[29]

C. The Vested Right Was Not Abandoned in the Immediate Aftermath of Ordinance No. 196.

Leaving aside the Memorandum's inappropriate reliance on cessation of mining activity as a factor that can solely prove abandonment, there are three specific bases that County Staff claims evidence an intent to abandon vested rights. Each of these three events occurred within five years of the enactment of Ordinance No. 196 and against the backdrop of increased operating costs and a depressed price of gold: subdividing and selling parcels of land, liquidation of mining equipment, and changing a company name while reinvesting some assets into non-mining business ventures. The Memorandum's discussion of these issues contains many factual errors. Once the factual record is corrected, it is clear that none of these events establish convincing evidence of an intent to abandon vested mining rights; in fact, some of them demonstrate the opposite: that the owners intended engage in future operations, though it is important to reiterate that *Hansen Brothers* does not require the Petitioner to demonstrate or even allege any such intent.

1. All Sales of Relevant Lands Maintained the Rights to Mineral Deposits Underlying Those Lands.

As the Petition discusses, certain surface properties comprising the Properties were sold between 1954 and 1960. In all cases, rights to the minerals under these properties were maintained.

The Memorandum disputes this fact, stating that "more than half of the properties sold off in 1954 that are discussed by Petitioner did *not* include a reservation of the mineral rights," "nearly all of the properties sold in 1955 did *not* include any reservation of mineral rights," and "in 1956 […] the fee title to *all* properties cited by Petitioner, are sold off in their entirety with *no* reservation of mineral rights." (Memorandum at pp. 25-26). The Memorandum claims that "such sales with the Subject Property without any reservation of mineral rights certainly demonstrated an intent to abandon mining operations." (Memorandum at p. 26). This is a clear misreading of the deeds effectuating these land sales that contradicts the Memorandum's analysis. The first paragraph of each relevant deed specifies that the deed only includes "the surface rights to a depth of 75 feet," or in some cases "the surface and sub-surface to a depth of 75 feet."[30] This language expressly withholds any mineral rights below 75 feet, meaning that such rights were retained by the mine owner. The sole exception is the deed from Idaho Maryland Mines Corporation to Dean and Gladys Perkins in January of 1954;[31] however, the lands covered by this deed are not claimed as part of the Subject Property.

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[28] *See* February 23, 2023 Planning Commission Agenda Actions, San Bernadino Planning Commission, at p. 2, available at: https://www.sbcounty.gov/uploads/lus/pc/PC%202-23-2023-Actions.pdf; *see also* February 23, 2023 Planning Commission Staff Report re Project No. PDCI-2022-00004, San Bernadino Planning Commission, available at: https://www.sbcounty.gov/uploads/LUS/PC/Braavos%20Vested%20Right%20STAFF%20REPORT%20FINAL.pdf.
[29] *See* March 7, 2019 Planning Commission Agenda Actions, San Bernadino Planning Commission, at p. 2, available at: https://www.sbcounty.gov/uploads/lus/pc/PC%203-7-19-Actions.pdf; March 7, 2019 Interoffice Memo to Planning Commission re Determination of Vested Rights, San Bernadino County, available at: https://www.sbcounty.gov/uploads/lus/pc/PC%20Memo%203-7-2016%20P201800609%20final.pdf.
[30] See Exhibits 183, 184, 189, 190, 191, 192, 200, 201, 202, 208, 203, 206, 212, 213, 214 to the Petition.
[31] Exhibit 181 to the Petition.

Further transfers of land by the mining company in 1960 intentionally sold only the portion of its mineral estate holdings which were "*non-contiguous*" and "*not accessible* through the main mine shafts," thereby expressly reserving the most important, core mineral rights necessary to facilitate future mining operations.[32] These were surplus mineral rights *outside* of the Idaho Maryland Mine, and they were sold to in order to preserved the core mineral rights. Again, these rights are not claimed as part of the Subject Property.

In other words, the Memorandum's claim of sales that "certainly demonstrated an intent to abandon mining operations," are based on a clear factual error. In fact, the mineral rights were retained to all areas asserted in the Petition as the vested rights area and demonstrate an intent to retain the right and properties necessary to continue operations at the Mine, not an intention to abandon that right.

Elsewhere in the Memorandum, the County Staff's Historian opines that it is "sheer speculation" to assume that reservation of mineral rights demonstrates intent to resume underground mining operations in the future, citing the "history of mineral development in the United State [being marked by] speculative practices to reserve rights […] not all historical actors who have reserved such 'rights, moreover, have possessed a viable future plan for exploitation of those rights'." (Memorandum p. 25). It is absurd that the County would rely on this statement as applied to the Mine, given that the mineral reservations relate to one of the most productive gold mines in U.S. history. While the Historian's statement may apply to speculative reservation of mineral rights for lands with no history of mining or no indication of valuable mineral deposits, use of that statement in this context is clearly wrong and not even close to clear and convincing evidence of abandonment.

The Memorandum not only provides no certification of how the Historian has expertise in mining economics sufficient to opine on whether reservation of mineral rights would be speculative on this particular property, but the Historian's opinion on this point has no bearing on the legal analysis of vested rights: it is not incumbent on Rise to demonstrate any intent to resume underground mining; it is incumbent on any opponent of Rise's vested rights to demonstrate that a previous owner clearly intended to abandon vested mining rights.

2. The 1957 Auction of Certain Mining Equipment to Ensure Funds to Maintain Ownership of Mineral Deposits Does Not Demonstrate an Intent to Abandon the Vested Right to Mine those Same Deposits.

As discussed in the Petition, the Brunswick mine equipment, mineral processing plant, and related buildings and machinery were sold by auction on May 27th, 1957.[33]

The Memorandum asserts that the sale of mining equipment and buildings in 1957 constitutes clear evidence of an intent to abandon the vested mining right. (Memorandum at pp. 27-28). This assertion is based on a belief that sale of equipment would only occur if the mine owner intended to abandon mining altogether. However, this is an erroneous understanding of the gold mining industry and ignores the economic realities of the late 1950s.

[32] Exhibit 415 to the Petition.
[33] Exhibit 422 to the Petition.

The most valued and fundamental asset of a mining company is its mineral deposit and the ownership of these minerals. The Idaho Maryland Mine property was consistently one of the largest gold producers in California and the United States and had produced 2.4 million ounces of gold. As described above, the mine owner went to painstaking lengths to ensure that it maintained ownership over mineral deposits on the Subject Property.

At the time of the sale of this equipment by auction on May 27th, 1957, the Idaho Maryland Mines Corporation was in a dire financial condition. At the end of 1955, the corporation had $58,561 in cash, bullion, and accounts receivable and $202,146 in accounts payable and liabilities, including $70,605 in property taxes payable. Due to the depressed gold price, the Corporation was losing $217,587 per year by mining.[34] Property taxes had become delinquent in 1954 and the mining property would be forfeited within a 5-year period.[35] Essentially, the mine owner faced a choice: raise money quickly or risk losing ownership of the mineral deposits that comprised the Idaho Maryland Mining operation. The Corporation chose the former. The funds received from the auction of equipment on May 27, 1957 was used for payment of property taxes and to satisfy outstanding debt[36] and therefore was a necessary action in order to retain the mineral estate and surrounding surface property in order to maintain the ability to be able to reopen the mine in the future.

Unlike the underlying mineral deposits, mining equipment and buildings can be replaced and are incidental and auxiliary to a mining business. The entire replacement of the plants, building, and equipment could have been repaid within 2 years once gold prices increased. As of December 31st 1955, all plants, buildings, and equipment had a gross book value of $1,645,328.[37] In the years before the forced shutdown caused by World War II (detailed further in the Petition), mining operations at the Idaho Maryland Mining operation consistently generated annual revenues of ~$4,000,000 from gold bullion with net income of ~$1,000,000 (Petition pp. 27-31). In previous years, entire ore processing facilities were funded from mining a volume of rock only 5 feet wide and 10 feet deep.[38] Furthermore, the evidence establishes that mine management was successful in mineral exploration in the years leading up to 1957, despite a limited budget, and several renowned geologists prepared reports on the exploration potential of the mine establishing the potential for large amounts of future ore excavation and

[34] Exhibit 196 to the Petition
[35] Exhibit 195 to the Petition.
[36] See Appendix C, page 252 [attached as Exhibit K to Rise's November 26th 2023 letter to the County].
[37] See Exhibit 196 to the Petition.
[38] See Letter from Glenn Waterman, Geologist at Idaho Maryland from 1934- 1942, 1945-1947, New Exhibit 2018 attached to this Letter. ("On the 1450 level in the 3 vein #3 raise a 3-4 inch band of nearly solid gold about five feet in length and ten feet up-dip provided funds for a new 750- ton Idaho flotation mill!").

processing.[39, 40 ,41, 42] The Idaho Maryland Mines Corporation was aware that it would be some years before gold prices would be increased by the government but viewed such a price increase as inevitable.[43] Therefore, given the circumstances, it rationally chose to maintain its mineral holdings knowing that they had the ability to reacquire any mining equipment as needed in the future.

The Idaho Maryland Mines Corporation's decision to sell equipment to ensure funds to maintain the rights to mineral deposits cannot constitute any clear or convincing evidence of an actual intent to abandon mining of those same mineral deposits; on the contrary, the evidence suggests these actions were taken for precisely the opposite reason. The sale of equipment must be viewed in the context of concurrently retaining all important mineral rights and surface properties necessary to mine, which context proves the opposite of the Memorandum's conclusion by negating any implied intent to abandon.

3. A Corporate Name Change is Not Indicative of an Intent to Abandon Vested Rights.

Lastly, the Memorandum suggests that the Idaho Maryland Mines Corporation's decision to change its name to Idaho Maryland Industries in 1960 is evidence of an intent to abandon its vested mining rights.

The Memorandum offers no legal authority to suggest a simple corporate name change is sufficient to establish a clear intent to abandon a constitutional right or constitutes an act in furtherance of that claimed intent. Such a claim does not stand up to scrutiny. Mining is an industry, and the name "Idaho Maryland Industries" therefore still encompasses mining operations. Furthermore, the company's diversification into other businesses during a period when gold prices made underground gold mining infeasible does not constitute an intent to abandon a vested mining right.[44]

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[39] "The Morehouse, Idaho, and 6-3 faults converge downward. As their intersections approach each other, a much fissured and crackled zone should be expected along the locus of the entrance of mineralizing solutions. This zone should be thoroughly explored and justifies the deepening of the Brunswick vertical shaft." (Bateman Report August 1948 [Exhibit 407 to the Petition]).

[40] "Numerous exploration possibilities exist within both the Idaho Maryland and Brunswick properties any of which could give rise to the discovery of important new occurrences of ore. The possibilities are so numerous that they can only be touched upon briefly in the memorandum." (Hulin Report November 1951 [Exhibit 413 to the Petition]).

[41] "Six ledges, extensions of veins developed in the Brunswick, were discovered in the Idaho last May and have been explored and developed through a crosscut from the bottom of the Brunswick shaft and a deep winze sink from the 2700 foot Idaho level. The ore zone extends to the 2300-foot level of the Idaho and geologic conditions are said to be encouraging for persistence of veins to farther depth. Albert Crase, president and general manager of Idaho-Maryland Mines said recently the new orebodies assure 15 to 20 years of productive operations" (*The Los Angeles Times*, Sep 24, 1951, Exhibit 174 to the Petition).

[42] "Mine officials announced today a drill core taken from the Idaho Maryland Mine showed considerable free gold and well mineralized quartz. They described the core, taken by diamond drilling at the 1450 level of the Brunswick Shaft as the most interesting ever produced at the mine. A 181-foot-deep drill revealed 19 feet of quartz stringers showing considerable free gold and sulphides and 12 solid feet of well mineralized quartz." (*The Sacramento Bee*, Jun 20, 1953, Exhibit 175 to the Petition).

[43] "Nothing has occurred to alleviate the predicament in which the gold miner is placed by trying to meet 1955 costs with a 1934 price for his product. No changes have been made in monetary management or in the attitude of the Government towards the right of Americans to own gold. It is not expected that anything will be done specifically for the relief of the gold miner, but he will indirectly benefit when the inevitable revaluation of the dollar becomes necessary, and the gold standard is restored." (The 1954 Idaho Maryland Mine Annual Report (Exhibit 195 to the Petition at p. 4).

[44] *See, e.g., Hardesty v. State Mining & Geology Bd.* (2017) 219 Cal. Rptr. 3d 28, 44; *see also* New Exhibit 2030.

The Memorandum also cites a newspaper covering Idaho Maryland Industries' actions to seek relief under bankruptcy laws, noting that the news article does not mention the company's mining activities. The Memorandum fails to explain how an editorial decision of an independent newspaper could provide any evidence regarding the actual intent of the company to abandon a vested right to mine.

D. The Memorandum's Mischaracterization of the Activities of Landowners between 1960 and the Present Do Not Evidence Abandonment.

Throughout its Petition, Rise discusses various events from 1964 to present that demonstrate continuing efforts to engage in certain mining activities or maintain the option to resume mining operations in the future. For the Board's convenience, these actions are summarized in Exhibit B to this letter. This summary of evidence is offered to illustrate further the history of Subject Property and to demonstrate both that it was the intention of various landowners to resume mining at a future point and underscore why it is misleading to suggest that duration of nonuse is a factor of abandonment or that no mining activities have occurred at the site since 1957.

The Memorandum includes several pages dedicated to rebutting Rise's evidence of efforts to efforts to engage in mining-related activities. Much of this rebuttal is based on a misunderstanding of the facts. Exhibit A to this letter catalogues Rise's response to these factual inaccuracies. However, the Memorandum also suggests that simply rebutting Rise's presentation of the facts of post-1960 operations is tantamount to an argument for legal abandonment of vested rights. This is legally inaccurate.

As discussed at length throughout this letter, a finding of abandonment requires affirmative, clear, and convincing evidence of an intent to abandon gold mining and actions or inactions in furtherance of that intent. Under California law, abandonment *cannot* be shown by simply raising doubts or disputing Rise's evidence that landowners actively sought to resume mining over this period. In order to establish abandonment, the Memorandum must show affirmative clear and convincing evidence establishing that landowners actively intended to abandon the vested right to mine over this period, and it must provide evidence that actions or inactions during this period demonstrated that intent. Furthermore, such evidence must demonstrate more than mere cessation of mining activity, which, under *Hansen Brothers*, is not by itself sufficient to demonstrate an intent to abandon. The Memorandum not only fails to prove abandonment by clear and convincing evidence, the Memorandum's main points of contention fail to establish any evidence of abandonment at all.

1. The Removal of Waste Rock and Mill Sand in the 1960s and 1970s was Related to Mining and Does Not Establish Any Evidence of Intent to Abandon.

As discussed in the Petition, excavation and sale of waste rock and mill sand from mining operations occurred on the Subject Property from 1964-1979. (Petition at p. 40). The Memorandum asserts that "It is unclear of how indicative this was of an intent to resume gold mining operations." (Memorandum at p. 30). The Memorandum's contention misapplies the Vested Rights doctrine under *Hansen Brothers*.

The excavation and sale of waste rock from stockpiles on surface was part of the vested mining business, occurred during and after the operation of the underground gold mine, and predated the 1954 enactment of Ordinance No. 196.[45] In other words, sale of waste rock from mining operations was an "integral part" of the mining operation, which is included within the scope of the Subject Property's vested rights under *Hansen Brothers*.[46] Resumption of that activity during the 1960s and 1970s shows more than an intent to continue mining operations, it is an exercise of the very vested rights at issue in this matter.

The Memorandum asserts that this activity does not establish intent to resume underground mining but offers no argument as to how such activity could show actual intent to abandon the Subject Property's vested rights, beyond the clearly erroneous argument that a cessation of gold excavation during this period alone constitutes a demonstration of the requisite intent required for abandonment.

2. The Ghidotti's Actions during their Tenure as Owners do not Provide any Evidence of an Actual Intent to Abandon.

The Petition and Exhibit B both detail numerous actions taken by the Ghidottis that evidence an intent to continue mining activities at the Subject Property, not the least of which includes continuous sale of waste rock and mill sand as discussed above[47], the leasing of portion of the property to mining companies[48], discussions with a consultant about re-opening the gold mine[49], insurance of the property as a mining asset, and the purchase of additional surface lands to support future mining.[50]

The Memorandum attempts to cast doubt on certain pieces of evidence demonstrating the Ghidotti's efforts to continue mining activities, but fails to explain how disproving this evidence could establish an actual intent to abandon the vested rights. For instance, the Memorandum takes issue with a Declaration of Lee Johnson, in which Mr. Johnson testifies to the acquisition of an insurance policy for the Mine in 1977. The Memorandum criticizes the documents, noting that "Both historical study and scientific research have revealed the unreliability (and even instability) of human memory." (Memorandum at p. 29). No actual evidence rebutting the testimony of Mr. Johnson is included. Mr. Johnson was, in fact, the agent from Gold Cities Insurance Company who was directly responsible for acquiring this insurance policy. As detailed in Exhibit A, there are numerous factual issues with the Memorandum's dismissal of Mr. Johnson's testimony, including other pieces of evidence which corroborate the claims therein. The Memorandum also fails to explain how the dismissal of Mr. Johnson's testimony supports any conclusion that the Ghidotti's had an actual intent to abandon the vested rights. At best, even assuming that Mr. Johnson's testimony was inaccurate would provide no insight into the intent of the Ghidottis. Again, without presenting any actual evidence of the Ghidottis' intent to abandon their vested rights, the Memorandum fails to meet the burden necessary to establish that vested rights were abandoned.

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[45] See Rise Letter to the County dated November 16, 2023 a p. 11-12; *see also* Exhibit 112 to the Petition, pp. 8-9 (stating that in 1933, 29,286 tons of waste was mined in development of drifts, crosscuts, raises, and winzes); Exhibit 375 to the Petition, Exhibit 376 to the Petition.
[46] *Hansen Brothers*, *supra*, 12 Cal.4th at 565.
[47] Exhibits 232, 235, 248 to the Petition; *see also* New Exhibit 2006 attached to this Letter.
[48] Exhibit 250 to the Petition.
[49] Exhibit 254 to the Petition.
[50] Exhibits 230 and 235.

The Memorandum observes that Marion Ghidotti's failed to immediately re-open the mine in the 1970's after the rise of gold prices in the 1970's. (Memorandum at p. 32). However, as the Petition explains, Marion Ghidotti took numerous steps during the 1970s to prepare for the resumption of mining operations. (Petition at pp. 5, 41, 42). The Ghidotti's actions related to the Ancho-Eire mine, a separate gold mine they owned shows their intent to maintain their property rights and participate in the gold mining industry.[51] Furthermore, as explained in the Petition, underground gold mining in the California Motherlode, including the Idaho-Maryland mine, did not recommence immediately after the end of a fixed gold price in 1971.[52] Instead, open pit heap leaching became the predominant mining method, given its lower mining costs and ability to use a less skilled workforce when compared to an underground mine.[53] This competition for capital no doubt delayed Marion Ghidotti's plans for developing and re-opening the mine. The Memorandum fails to explain why Marion Ghidotti should have been reasonably expected to re-open a major underground gold mine within a few years during a period when such mining was still not competitive for attracting investment or how the failure to immediate start gold mining evidences an actual intent to abandon the vested right to underground gold mining, especially when Marion Ghidotti was contemporaneously purchasing further surface lands fit for future mining the period of underground mining cessation.

3. The BET Group's Actions during their Tenure as Owners do not Provide any Evidence of an Actual Intent to Abandon

The Memorandum raises the BET Group's sale of a portion of the surface area of the Subject Property for residential purposes, arguing that this action "evidenced their intent to abandon the mine *as to those sold off properties*." (Memorandum at p. 37, emphasis added). However, the Memorandum ignores key facts that argue against their speculative conclusion that this sale evidences intent to abandon mining altogether. The mineral rights to all properties were retained, therefore preserving the right for underground mining operations.[54] The County Planning Commission noted as much, stating that the subdivision was occurring in "a recognized mining area" which created difficulties in "allowing residential development in an area where the mineral rights are being retained."[55] Importantly, while the BET Group sold subdivided lots 1-5 and 8 for residential development, it retained Lot 6 (APN 09-630-37) and 7 (APN-09-630-39), which include the infrastructure needed to access the underground mine and mineral deposits underneath all of the lots. The Memorandum has no further evidence to suggest that, in light of these reservations and retentions, BET Group intended to abandon the vested right to underground mining on the properties – all the Memorandum includes is a conclusory statement "reservation of mineral and other subsurface rights within the creation of residential subdivision is fairly typical, and in the absence of other evidence of an intent by BET Group to mine this alone does not support [an intent to resume mining]." (Memorandum at pp. 37-38). This conclusory statement again misunderstands the legal burden required under the law– demonstrating that there is no evidence that the BET Group intended to resume mining is not sufficient to show abandonment; the Memorandum must establish clear and convincing evidence that the BET Group intended to abandon mining altogether.

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[51] The Ghidotti's purchased the Ancho-Eire mine in 1963 and Marion Ghidotti filed a quiet title action in 1964. After gold prices rose in the 1970's the property was sold to persons engaged in the mining industry. See Exhibits 235, 241, 242, and New Exhibit 2022.
[52] Exhibits 233 and 234 to the Petition.
[53] Exhibit 243 to the Petition.
[54] Exhibits 265, 266, 267, 270, 271, 272, 273 to the Petition.
[55] *See* Minutes of the Nevada County Planning Commission Hearing (Jan. 9, 1986) (Exhibit K of Rise's November 16th, 2023 letter to the County).

The Memorandum also highlights a comment from a real estate broker, Charles W. Brock, who stated "we are not selling a mine" to a newspaper. (Memorandum at p. 40). Mr. Brock was never an owner of the Subject Property and therefore it was impossible for him to form the necessary intent or perform an act to effect abandonment, nor does the Memorandum explain why his statement provides any evidence as to the intent of the Subject Property's owners. Furthermore, his advertisement listing the property was placed on a website with the name minelistings.com and is titled “Historic California Gold Mine for Sale,”[56] casting significant doubt on his statement.

Lastly, the Memorandum questions why the BET Group waited until seven years after the enactment of the Marketable Record Title to record a “notice of intent to preserve interest in all mineral rights and interests,” and suggests that the decision to record such a notice is not evidence of an intent to resume mining and in fact is evidence of abandonment. (Memorandum at pp. 36-37). California law allows surface owners with severed mineral estates to file a quiet title action against the severed mineral estate owner in certain circumstances,[57] but that action can be completely pre-empted by certain actions by the mineral estate owner including filing a notice of intent to preserve those mineral rights within any 20 year period.[58] Accordingly, the most logical explanation of this filing is that after learning of the new law offering new optional protections for severed mineral rights, the BET group filed a notice of intent to preclude a quiet title action to extinguish those rights. The filing of a notice of intent seven years after the act was passed is not entirely surprising given that the filing of a notice of intent is not mandatory and was a new legal tool to protect mineral rights. The County’s strained interpretation stating that this filing to preserve the mineral rights somehow evidenced abandonment of the vested right is a remarkable inversion of the facts.

E. Applications for Use Permits are Not Evidence of an Intent to Abandon a Vested Right

The Memorandum suggests that Use Permits sought by owners of the Subject Property since the late 1980s constitute evidence that either the owners "understood" that there was no vested right to mine the Subject Property or demonstrated an intent to abandon a vested right to mine the Subject Property.[59] (Memorandum at pp. 38-41). The Memorandum does not cite any legal authority to support its assertion that an application for a permit to conduct a use on a property evidences an intent to abandon any vested rights on that property, especially when the permit sought is for precisely the type of activity covered under the vested right.

California precedent suggests that the operation of use permits for a property do not necessarily have a bearing on the vested rights on that property. In *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal. App. 4th 1519, a city attempted to argue that the expiration of a use permit granted to conduct additional activities at an existing legal-conforming business use required the business owner to discontinue his entire business. The Court affirmed the trial court's

[56] Exhibit 307 of the Petition.
[57] Cal. Civ. Code sections 883.210-883.270.
[58] Cal. Civ. Code section 883.220.
[59] The Memorandum cites certain actions by Emgold Mining Corporation in its argument on this point. As the Memorandum concedes, Emgold Mining Corporation was a lessee of the property. The Memorandum does not include any legal authority that a lessee of a property, as opposed to the owner of that property, could ever effectuate an abandonment of a vested right on the property.

determination that the business owner maintained a vested right to continue his legal conforming business.

Several of the use permit applications associated with the Subject Properties involved activities beyond the scope of the vested right asserted here. For example, Emgold planned a larger mining operation and a tile factory, which was not part of the vested mining operation. Further, as stated by the California Third District Court of Appeal, "a waiver of a constitutional right requires a knowing and intentional relinquishment of that right, and such a waiver is disfavored in the law."[60] It violates this principal to equate a use permit application or approval with waiver of a vested right when there is no accompanying evidence of a knowing and intentional relinquishment.

In addition, recent determinations of vested rights in other California counties confirm that a use permit for mining activities does not preclude a finding of vested rights. In 2022, the Inyo County Board of Supervisors recognized a vested right for the Panamint Valley Limestone Quarry based on a vesting date of May 20, 1970, even though the applicant had applied for and received a use permit for a portion of the quarry in 1991.[61] Similarly, in 2020, the Yuba County Planning Commission recognized a vested right for the Spring Valley Quarry based on a vesting date of April 13, 1971, even though the applicant had applied for and received multiple use permits for a portions of the quarry in after 1971.[62]

Despite the Memorandum's suggestion that an application for a use permit must evidence an understanding that vested rights have been abandoned, there are many business reasons for an operator to apply for a Use Permit rather than asserting a legal non-conforming use. The business reasons for Rise's decision to apply for a conditional use permit in 2019 are provided in New Exhibit 2016 (Declaration of Benjamin Mossman) attached to this letter.

F. There are no Legitimate Bases under SMARA or Related Local Law to Conclude that the Mine is Abandoned Pursuant to State Law

The Memorandum attempts to argue that any mining right for the Subject Property has been abandoned by virtue of the landowner's failure to comply with Surface Mining and Reclamation Act (SMARA). However, each of these claims suffers from two fatal defects: first, SMARA applies to surface mining operations, not underground mining operations and explicitly exempts activities occurring prior to 1976 or activities involving removal of overburden or mineral product less than 1,000 cubic yards or disturbance of less than one acre. The only documented surface mining disturbance after 1976 that exceeded the SMARA threshold had a County-approved reclamation plan in compliance with SMARA and the County ordinances.

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[60] Calvert, Fn. 8.
[61] *See* November 8, 2022 Memorandum re Panamint Valley Limestone Quarry's Request for Confirmation of Vested Mining Rights, Office of the Inyo County Counsel, p. 5, available at: https://www.inyocounty.us/sites/default/files/2022-11/Final%20Staff%20Report%20%281%29.pdf; *see also* November 8, 2022 Minutes of the Board of Supervisors at p. 3, available at: https://www.inyocounty.us/sites/default/files/2022-12/20221108Minutes%20w%20edits.pdf.
[62] *See* November 18, 2020 Planning Commission Staff Report re Determination of Vested Mining Rights for the Spring Valley Quarry, Yuba County Community Development & Services Agency, p. 4, available at: https://cms7files.revize.com/yubaca/CDSA_DRC_PC_Planning/November%20PC/PC%20Staff%20Report%20Spring%20Valley%20Vested%20Mining%20and%20Exhibits.pdf.

The Memorandum claims that mine owners have failed to file a reclamation plan under SMARA and are therefore in violation of the statute. However, imposing this requirement on the Subject Property requires a tortured reading of SMARA. Public Resources Code section 2776(c) clearly states that a reclamation plan is not required for "mined lands on which surface mining operations were conducted prior to January 1, 1976." "Surface mining operations," while inclusive of surface work incident to an underground mine," do not include any underground mining works.[63] Furthermore, SMARA does not apply to any removal of overburden or mineral product totals less than 1,000 cubic yards in any one location nor if the total surface area disturbed is less than one acre."[64] The Memorandum has not identified any surface mining operation in excess of 1,000 cubic yards or one acre of disturbance since 1976 – with the exception of the rock crushing activity under Use Permit U79-41, which the Memorandum acknowledges had an approved reclamation plan. (Memorandum at p. 43). Accordingly, there is no outstanding requirement for the mine owner to file a reclamation plan. If any activities constituting a surface mining operation subject to SMARA occurs in the future, a reclamation plan will be submitted to the County.

The Memorandum also claims that Public Resources Code section 2207 requires the mine owner to separately submit an annual production report. (Memorandum at p. 42). This is a misstatement of the law. Public Resources Code section 2207(f) explicitly exempts surface mining operations that are exempt under SMARA from reporting, so this requirement does not apply. The County merely speculates that this requirement was not complied with but provides no evidence, much less clear and convincing evidence, that there was a failure to report, or even there were, how this would prove abandonment.

The Memorandum claims that SMARA required the landowner to file an interim management plan when the mine's production had been curtailed for at least a year and that failure to file such a plan has rendered any vested right to mine the Subject Property abandoned. (Memorandum at p. 43). Again, this misstates the law. SMARA only applies to surface mining occurring after 1976. The only surface mining in excess of SMARA's 1,000 cubic yard or 1-acre threshold after 1976 was on the Centennial Industrial Property, which had a County-approved reclamation plan. Subsequent use permit amendment documents imply that that area was fully reclaimed and therefore would not need an interim management plan.[65] If an interim management plan were necessary, the County as SMARA lead agency would have been responsible for sending a violation notice – but the County included no evidence of a violation in this regard in the record. The County's assertion that an interim management plan should have been submitted 30 years ago, with no evidence that it ever considered failure to do so as a violation until now, is not clear and convincing evidence of abandonment.

Furthermore, it's not clear what right the Memorandum is claiming that SMARA non-compliance would cause to be abandoned. Even if the requirement for an interim management plan applied to the Subject Property, failure to comply would only affect any surface mining operation in excess of 1,000 cubic yards or one acre of disturbance: all rights to underground mining, other areas of the vested property not within that reclamation plan boundary, and incidental surface work less than 1,000 cubic yards or one acre of disturbance would be wholly unaffected. Even though there is no evidence whatsoever of a SMARA violation in the record, it is worth noting

[63] Public Resources Code section 2735.
[64] Public Resources Code section 2714.
[65] *See* New Exhibit 2007 at p. 1, (""with the exception of some final grading, clean up and equipment removal, the approved reclamation of the site has been completed."

that SMARA uses the term “abandoned” to denote an obligation to commence reclamation and does not state that it equates to abandonment of a vested mining right.[66]

Lastly, the Memorandum cites provisions in County Code requiring a reclamation plan and interim management plan that parallel SMARA requirements as additional proof of violation and hence abandonment. The County Code explicitly incorporates SMARA[67] and includes the same exemptions as SMARA.[68] Accordingly, the County Code cannot provide any independent basis to conclude that the vested right has been abandoned, as any such argument suffers from the same shortcoming identified above.

III. The County has Recognized the Existence of Rise's Vested Right Nearly 30 Years after County Staff Claims the Right was Abandoned.

As explained in detail in the Petition, the County granted Use Permit U79-41 in 1980, authorizing harvest, crushing, screening and the sale of existing mine rock and tailings at the Centennial Industrial Site, located on a portion of the former Idaho Maryland Mine lands. This County Action explicitly recognized the vested right to conduct such activities on the Property. (Petition p. 42).

The Memorandum attempts to argue that this approval did not recognize vested rights on the property. (Memorandum at p. 34). The Memorandum states that "neither the Board of Supervisors not the Planning Commission made a formal determination of vested rights," and that "the intended activities to be covered by the use permit do not appear consistent with historical mining activities." (*Id*.) Neither claim stands up to scrutiny.

In the February 20, 1980 Staff Report approving this use, the County clearly notes that the requested use is not permitted under the property's M1 Light Industrial District zoning. However, the County grants the permit on the basis that "mine rock has been sold and taken from the property continuously since the mine closed, and so this use permit application is for the expansion of an existing, non-conforming use by the addition of a crusher and screening plant."[69] Granting of the use permit to crush mine rock on the basis of a permissible expansion of "an existing non-conforming use" occurring "continuously since the mine closed" is tantamount to determining that vested rights exist on the property. The Memorandum contends that this cannot be the case because the rock crushing itself is an "alteration" or "expansion" of the referenced non-conforming use. As explained in the Petition, "expansion" of the non-conforming use is in line with the operational scope authorized under vesting mining rights, which includes the right to “engage in uses normally incidental and auxiliary to the nonconforming use", including, in the case of the Idaho Maryland Mine, mining, *crushing*, processing, trucking, and transporting, and selling mined materials. (Petition at p. 53, emphasis added).

Accordingly, the Memorandum's argument against prior recognition of the vested right is one of mere semantics – the approval for Use Permit U79-41 did not use the exact words "vested right," but instead referenced "an existing, non-conforming use" dating back to mine operations that allowed the applicant to engage in rock crushing activities though they were not permitted

[66] Public Resources Code section 2770(h)(6).
[67] Nevada County Land Use and Development Code, Sec. L II 3.22(C)(1)
[68] Nevada County Land Use and Development Code, Sec. L II 3.22(D)(4).
[69] Exhibit 252 to the Petition.

under the current zoning code, and then-current site operations consisted of the occasional removal of mined rock and sand waste. This is a distinction without a difference.

IV. Conclusion

The Memorandum applies the wrong legal standard and shifts the burden to Rise to prove continuous intent to mine after vesting, which is essentially a requirement to disprove abandonment at all times since the vesting date. This approach is inconsistent with the California Supreme Court's ruling in *Hansen Brothers* and is, in fact, a complete inversion of the rule and the burden of proof. The Memorandum's erroneous understanding of the applicable legal standard and burden of proof explains why the County reached the conclusion that no vested mining right exists based solely on trivial doubts and speculation. Due to this erroneous understanding, the authors of the Memorandum believed that Rise had the burden of proof to negate abandonment and that simple doubts and questions about the evidence provided by Rise was sufficient to prove abandonment. To the contrary, under California law, a party opposing the recognition of a vested right must prove abandonment by clear and convincing evidence. In fact, the County has failed to provide any evidence of abandonment at all. The reason for this is simple: the owners of the Subject Property from 1954 until the present never intended to abandon their right to mine and never took an overt action evidencing intent to abandon because doing so would impair the value of the bulk of their property rights in the Subject Property (i.e., approximately 2,385 acres of severed mineral rights).

Rise has more than met its burden (preponderance of the evidence) to prove a vested right was created on October 10, 1954. The County has the burden to prove abandonment by clear and convincing evidence. Not only has the County not met this burden, the Memorandum does not allege a single piece of evidence that any of the owners intended to abandon the right to mine or took any overt acts to abandon that right. The Memorandum merely cast aspersions through doubt and speculation about the various owners' intent to resume operations at specific points in time, notwithstanding that Rise is under no obligation to show such intent. Failure to recognize vested rights would threaten to undermine constitutional property rights guaranteed by both the Federal and State Constitutions. Accordingly, Rise respectfully requests that the County find that a vested mining right was created in 1954, that right has not since been abandoned, and that vested right is still operative today.

Sincereley,

Christopher L. Powell
Senior Counsel

Attachments: Exhibit "A" (Rise Response to County Response to Facts and Evidence and Appendix of New Exhibits)
Exhibit "B" (Rise Timeline of Post-1954 Mining-related Activities)
Exhibit "C" (Other Historical Documents)

cc: Katherine Elliot, County Counsel