In Re:
IDAHO-MARYLAND MINE
VESTED RIGHTS PETITION
Dated September 1, 2023

NEVADA COUNTY BOARD OF SUPERVISORS

Board Agenda Memorandum

November 28, 2023

Prepared by:

Katharine L. Elliott
Nevada County
Office of the County Counsel
950 Maidu Avenue
Nevada City, CA 95959
(530) 265-1218

Diane G. Kindermann
Abbott & Kindermann, Inc.
2100 21st Street
Sacramento, CA 95818
(916) 456-9595

Submitted to:
Nevada County
Planning Department
950 Maidu Avenue, Suite 170
P.O. Box 599002
Nevada City, CA 95959
(530) 265-1222

NEVADA COUNTY BOARD OF SUPERVISORS
Board Agenda Memorandum

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NEVADA COUNTY BOARD OF SUPERVISORS
Board Agenda Memorandum

MEETING DATE: **December 13, 2023**

TO: **Board of Supervisors**

FROM: **Katharine Elliott, County Counsel**

Brian Foss, Planning Director
Diane Kindermann, Abbott and Kindermann, Inc.

SUBJECT: Public Hearing to Consider the Idaho-Maryland Mine Vested Right Petition dated September 1, 2023 prepared by Braiden Chadwick and Ryan W. Thomason of Mitchell Chadwick, LLP, on Behalf of Joseph Mullin, Rise Grass Valley, Inc. ("**Petitioner**") for a Formal Determination by the County of Nevada ("**County**") Concerning the Existence and Scope of Vested Mining Rights to Mine the 175.64-acre "Idaho Maryland Mine"("**Petition**") Comprised of the 119-acre Brunswick Industrial Site Assessor's Parcel Numbers (APNs): 006-441-003, 006-441-004, 006-441-005, 006-441-034, 009-630-037, 009-630-039 ("**Brunswick**"); and the Centennial Industrial Site APNs: 009-550-032, 009-550-037, 009-550-038, 009-550-039, and 009-560-036 ("**Centennial**") (collectively, the "**Subject Property**")

PETITIONER: Rise Grass Valley, Inc.

REPRESENTATIVE: Braiden Chadwick, Mitchell Chadwick LLP

STAFF RECOMMENDATION:

I. Environmental Action: Find the action statutorily exempt pursuant to Section 15378 of the California Environmental Quality Act ("**CEQA**") Guidelines from the requirement to prepare an Environmental Impact Report ("**EIR**") or a Negative Declaration, for the approval of a Resolution finding that the Applicant does not have a vested right to mine due to abandonment of the mining uses at the Subject Property ("**Resolution**"). The County's action to adopt the Resolution does not constitute a project that is subject to CEQA and the CEQA Guidelines.

II. Action: Adopt the Resolution finding that neither the Petitioner nor any other party has a vested right to mine at the Subject Property, as the mining use was abandoned (**Attachment 1**).

FUNDING:

No budget amendments are required.

ATTACHMENTS:

1. Resolution

2. Idaho-Maryland Mine Vested Right Petition

3. County's Responses to Petitioner's Facts and Evidence in Vested Rights Petition; including County Exhibits 1001-1027

STAFF COMMENT:

This Board Agenda Memorandum shall be read in conjunction with the County's Responses to Petitioner's Facts and Evidence in the Vested Rights Petition including County Exhibits 1001 to 1027 ("**County's Responses**"), **Attachment 3** hereto, which is incorporated herein by reference. The County's Responses chronologically respond to the facts raised in the Petition in the order in which those facts are set forth.

SITE DESCRIPTION

The Subject Property is located within unincorporated western Nevada County on approximately 175.64 acres, consisting of the Brunswick and Centennial Sites.

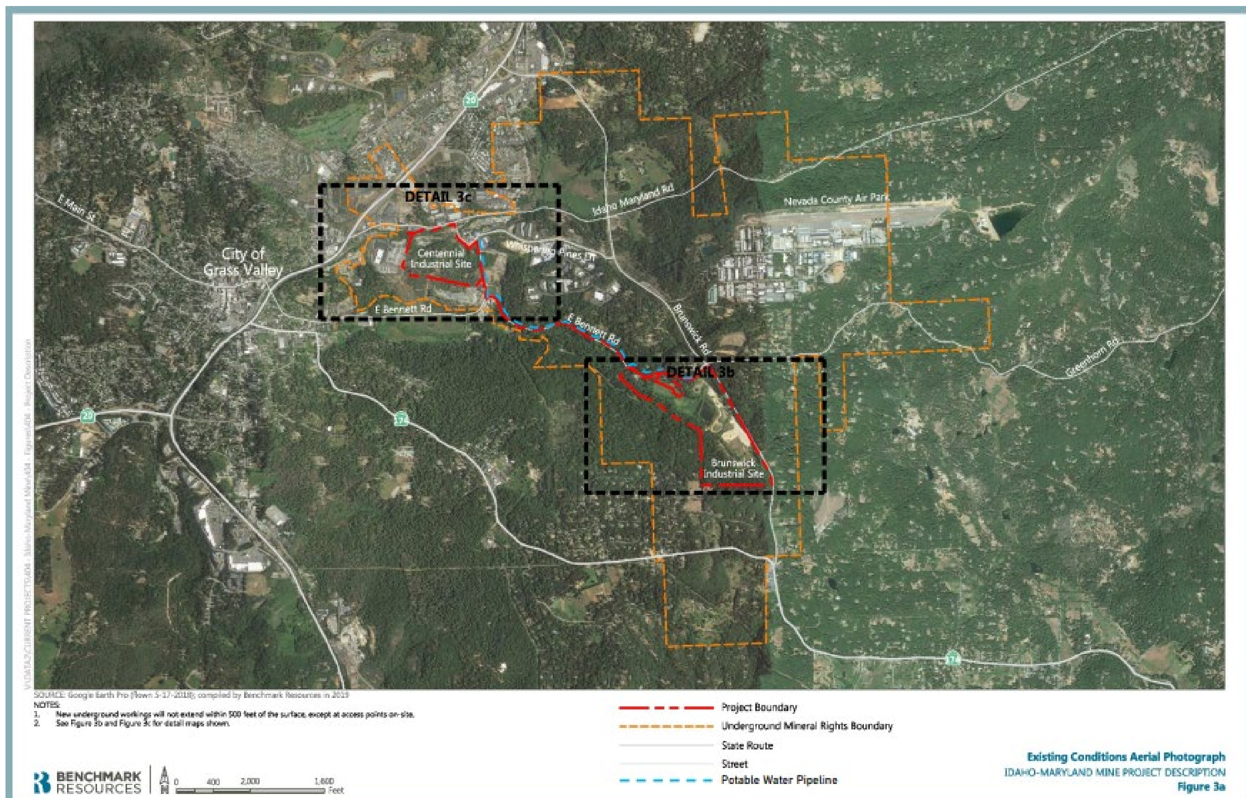

Figure 1: Location Map

Both Brunswick and Centennial are located within unincorporated western Nevada County and are owned by the Petitioner. The approximately 119-acre Brunswick Site is located southwest of the intersection of East Bennett and Brunswick Roads and is comprised of Assessor's Parcel Numbers (APNs): 006-441-003 (12503 Brunswick Road), 006-441-004 (12625 Brunswick Road), 006-441-005 (12791 Brunswick Road), 006-441-034 (12381 Brunswick Road), 009-630-037 (12369 East Bennett Road), and 009-630- 039 (12301 Millsite Road).

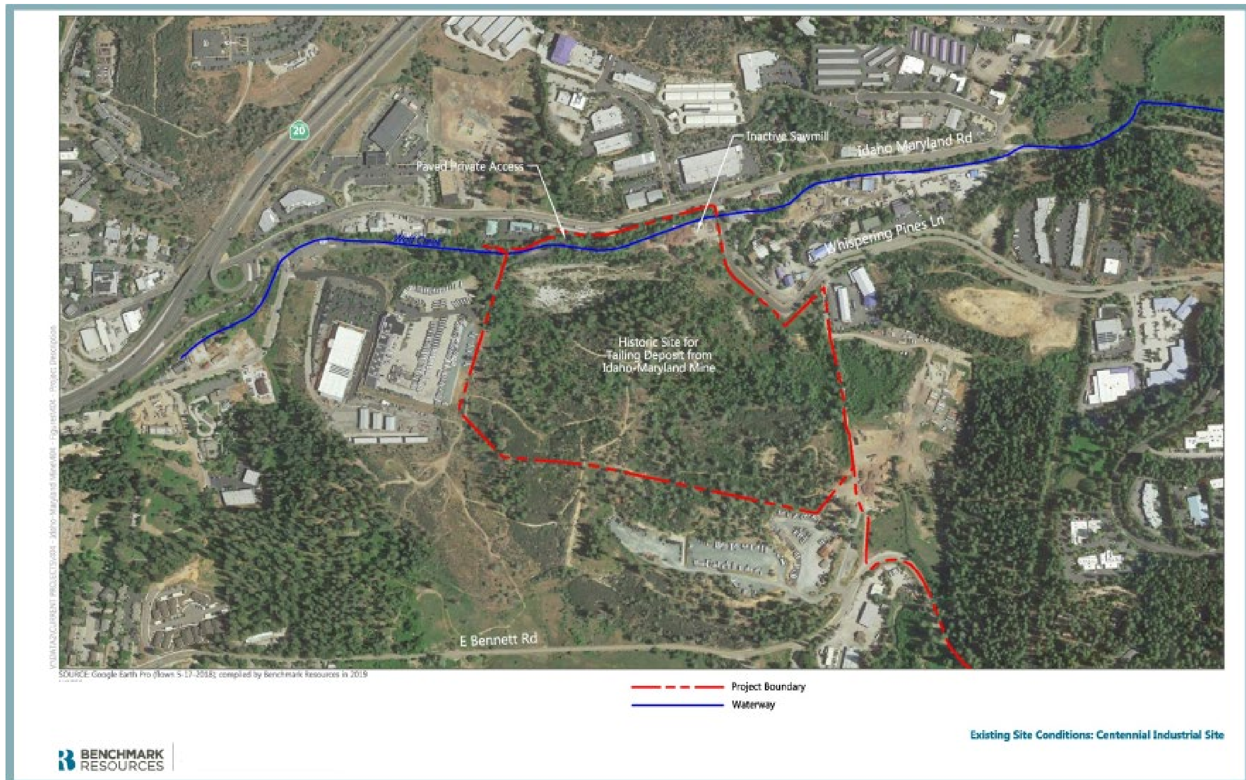

Figure 2: Subject Property (Centennial)

The approximately 56.41-acre Centennial Site is located southwest of the intersection of Idaho Maryland Road and Centennial Drive and is comprised of APNs: 009-550-032, 009-550-037 (10344 Centennial Drive), 009-550-038 (10350 Centennial Drive), 009-550-039 (10344 Centennial Drive), 009-550-040, and 009-560-036 (10350 Centennial Drive).

Petitioner alleges the overall mineral rights boundary encompasses approximately 2,585 acres and generally contains properties surrounding the Subject Property (Brunswick and Centennial), with the majority of additional surface land area located north of the Brunswick Site and east of the Centennial Site. This generally includes most of the Nevada County Airport and surrounding Air Park, as well as property along both sides of Brunswick Road, Greenhorn Road, and Idaho Maryland Road.

The Idaho-Maryland Mine encompasses an extensive system of approximately seventy-three (73) miles of underground tunnels, many raises, four (4) inclined shafts, and two (2) vertical shafts. The surface mining infrastructure at the Subject Property (Brunswick), was dismantled, and removed from the Subject Property and sold off entirely in 1956 and 1957.

Historically, underground gold mining occurred below the Subject Property, while aboveground portions of the Subject Property were used for various gold mining and processing activities. Several shaft entrances are located on the Brunswick Site. The shafts are covered to prevent access as the operations are abandoned. Other portions of the Subject Property (Brunswick) site include graveled or paved areas from previous land uses.

Current use of the Subject Property (Brunswick) includes the Gold Country Senior Services' community operation, which seeks to cut, store, and distribute firewood to seniors. Recent activities have also included use of the Subject Property (Brunswick) by a contractor performing vegetation trimming for PG&E. After the abandonment of mining in 1956 at the Subject Property (Brunswick), subsequent Subject Property owners obtained use permits for lumber operations or obtained tentative maps for residential uses. After abandonment of mining at the Subject Property (Centennial), one subsequent Subject Property owner obtained a short-term use permit for the harvesting, crushing, screening, and sale of waste rock left from the Idaho-Maryland Mine. The removal of that material was completed within approximately one (1) year. That use permit was then amended to allow importation of materials from an off-site development property for on-site rock processing while the equipment installed for the prior rock removal was still on the site.

The Subject Property (Brunswick) consists primarily of open space, with remnants of the previous sawmill operations still located on site from lumber and sawmill uses approved by the County with separate use permits between 1958 and 1994. The terrain of the open space portion of the Brunswick Site is typical of the lower Sierra Nevada foothills, varying from flat ridges and valleys to gently and moderately sloping hillsides. The Subject Property (Brunswick) is located adjacent to South Fork Wolf Creek with a portion of the creek running through the site and is dominated by mixed hardwood-conifer forests and developed areas, with smaller areas of wetlands and annual grassland.

The Subject Property (Centennial) consists of an existing approximately 5.6-acre engineered fill pad along its eastern boundary; up to approximately 28 acres of graded, revegetated areas; and the remainder consisting of natural habitats, such as montane hardwood-conifer, chapparal, montane-riparian, and annual grassland.

BACKGROUND:

<u>Abandoned Mining Operations:</u>

The Subject Property is a portion of the historic Idaho-Maryland Mine, which is an underground gold mine. The Idaho-Maryland Mine represents the ownership interest of a number of early-day producing mines, including the Eureka, Idaho, Maryland, and Brunswick mines. The mines date back to the mid- to late-19th Century. The Eureka, Idaho, and Maryland Mines were all located on the same vein, which is referred to as the Idaho #1 Vein. Mineralization was first discovered at an outcrop on the Eureka claim in 1851 and the Eureka Mine was a significant gold producer from 1863-1877. Mining at the adjacent Idaho Mine took place from 1867-1893. In the late 1800s, Maryland Gold Quartz Mining Co., which was formed to mine Maryland Mine, purchased the Idaho Quartz Mining Co. and its Idaho Mine. The name of the mine was changed to Idaho-Maryland Mine. In the early 1900s, the Idaho-Maryland Mines Company was formed. In the 1920s, Errol MacBoyle and associates formed a holding company, Idaho Maryland Consolidated Mines, Inc., which purchased the Idaho-Maryland Mine. Subsequently, in the early 1930s, Idaho

Maryland Consolidated Mines, Inc. acquired the Brunswick Mine from Brunswick Consolidated Gold Mining Company. As terminology can be confusing, it is important to note that "Idaho-Maryland Mine" referred to the entire ownership of several separate mines.

Some historical summaries from myriad sources indicate that the Idaho Maryland Mine produced up to 2,414,000 ounces of gold between 1866 and 1956. In 1941, the Idaho-Maryland Mine employed approximately one thousand (1,000) workers and was one of the largest lode gold mines in California and the United States, based on annual production. The Idaho Maryland Mine has been inactive since abandonment in 1956.

After its final closure in 1956, the Subject Properties and other portions of the Idaho-Maryland Mine tunnels were abandoned and allowed to naturally flood.

Zoning Designation History:

In 1954, the Nevada County Board of Supervisors ("**Board of Supervisors**") adopted Ordinance No. 196, which was the first ordinance regulating land use in the County. All unincorporated areas of the County, including the Brunswick and Centennial Sites, were zoned "A1", a holding zone requiring a Use Permit for most land uses including mining. In 1967, the Board of Supervisors adopted Ordinance No. 379 to amend Ordinance No. 196, which changed the zoning of those parcels previously zoned "A1" to "U" or Unclassified, another holding district. Both Sites were rezoned to "U" at this time. In 1970, the Board of Supervisors adopted Ordinance 500 to establish new zoning regulations and repeal Ordinances 196, 379, and all other ordinances in conflict. Both sites remained zoned "U" or (Unclassified) at that time.

In 1973, the Board of Supervisors adopted Ordinance 643 establishing the "M1" zoning designation generally on the Brunswick Site. In 1994, the Board of Supervisors adopted Ordinance 1853 to rezone the Subject Property (Brunswick) as "M1-SP" by establishing a Site Performance Combining District designation. The Site Performance Combining District designation includes a Master Plan establishing infrastructure improvement, design themes, and permitted land uses, Moving and Storage Facilities, RV Repair and Storage Lots, Contractors Equipment and Storage Yards, Lumber Yards, Recycling Centers, and other similar type uses for the Nevada County Business and Industrial Center. Sub-surface mining was not included in the permitted uses of the Site Performance Combining District. The Subject Property (Brunswick) is currently zoned "M1-SP."

In 1973, the Board of Supervisors adopted Ordinance 629 establishing the "M1" zoning designation generally on the Subject Property (Centennial). In 1993, the Board of Supervisors adopted Ordinance 1822 to rezone the Subject Property (Centennial) to "M1-ME" by establishing the Mineral Extraction Combining District designation as required as a Condition of Approval for Use Permit File Number U92-37 to allow for on-site rock harvesting as described in the Subject Property (Centennial) Permit History discussion below. In 1996, the Board of Supervisors adopted Ordinance 1923, which was subsequently superseded by Ordinance 1930 and Ordinance 1959 that rezoned the Subject Property (Centennial) to the "BP" or Business Park zoning designation. In 2016, the Board of Supervisors adopted Ordinance 2407 to rezone the Subject Property (Centennial) to "M1" or Light Industrial as the Base Zoning District with no additional Combining Districts. The Centennial Site currently remains zoned "M1."

Subject Property (Brunswick) Permit History:

1956	Mining ceased, all mining and processing equipment sold. Subject Property also sold in segments for non-mining activity through 1959. Last segment sold in 1963.
1958	County Planning Commission ("**PC**") granted Use Permit to new owner for lumber uses.
1964	PC approved a Use Permit for a lumber yard and planing mill.
1977	County Planning Department ("**Planning**") approved Site Plan to add one (1) sawdust drier.
1986	PC approved Tentative Map, subdividing Subject Property into five (5) residential and three (3) industrial parcels.
1986	Planning approved a Ministerial Site Plan to install one (1) lumber sorter.
1987	Planning approved Ministerial Site Plan to add 896 square feet to existing mill structure.
1990	Planning approved Ministerial Site Plan to replace a structure at mill.
1994	Sierra Pacific Industries ceased all sawmill operations.

By October 1957, all mining had ceased at the Subject Property, and all mining and processing equipment was sold. The Subject Property was also sold over the next few years. All subsequent legal uses of the Subject Property after the abandonment were authorized with Use Permits. In 1958, the Nevada County Planning Commission ("**Planning Commission**") approved a Use Permit for a sawmill and drying yard on the Brunswick Site (File Number U58-15). In 1964, the Planning Commission initially denied a Use Permit for a lumber yard and subsequently approved a Use Permit for a lumber yard and planing mill on the Subject Property (Brunswick) (File Number U64-31). In 1977, the Nevada County Planning Department ("**Planning Department**") approved a Site Plan to add a sawdust drier to the operation (File Number SP77-020). In 1986, the Planning Commission approved a Tentative Map, which was subsequently recorded in 1987 subdividing the Subject Property (Brunswick) into eight (8) parcels: five (5) for residential uses, and the other three (3) — which comprise the Subject Property (Brunswick) — for industrial uses (File Number FM 85-7). Also in 1986, the Planning Department approved a Ministerial Site Plan to install one (1) lumber sorter at the mill operation (File Number MSP86-016). In 1987, the Planning Department approved a Ministerial Site Plan to add 896 square feet to an existing structure at the mill operation (File Number MSP87-005). In 1990, the Planning Department approved a Ministerial Site Plan to replace a structure at the mill operation (File Number MSP90-002).

In 1994, Sierra Pacific Industries ceased sawmill operations. The Board of Supervisors then approved a Rezone through adopted Ordinance 1853 to establish a Site Performance Combining

District Zoning Designation on the Subject Property (Brunswick) to define development standards for a future industrial park to support light industrial uses including Office and Professional uses, Administrative and Research uses, Employment Center Support uses, Sales Office/Showroom uses, Conference Facilities, and other similar type uses (File Number Z93-004). As evidenced by Figure 4, below, which depicts aerial imagery of the site in 2005, all buildings related to the sawmill were removed prior to June 2005. A clay-lined pond, constructed for the sawmill circa 1988, and significant paved areas, remain from the sawmill operation.

Figure 3: Brunswick Industrial Site 2005 Imagery

<u>Subject Property (Centennial Industrial Site) Permit History:</u>

1956	Mining ceased, all mining and processing equipment sold. The Subject Property also sold in segments for non-mining activity through 1959. Last segment sold in 1963.
1980	PC approved short-term Use Permit and Surface Mining Reclamation Plan for a four-year surface operation harvesting, crushing, screening, and sale of waste rock.
1985	PC approved amendment to existing Use Permit to allow importation of materials from off-site development property for on-site rock processing.
1985	PC approved amendment to existing Use Permit to expand surface operation to allow borrow pit and relocate processing plant.

1992	PC approved Use Permit and Surface Mining Reclamation Plan to expand existing rock harvesting operations on Subject Property (Centennial) (File Number U92-037).
2003	All operations concluded. Buildings and equipment removed.
2004	Site reclamation complete. Remaining buildings removed.
2006	Reclamation completed and financial assurances released.

By October 1957, all mining had ceased at the Subject Property, and all mining and processing equipment was sold. The Subject Property was also sold over the next few years. All subsequent legal uses of the Subject Property after the abandonment were authorized with Use Permits. In 1980, the Planning Commission approved a short-term Use Permit and Surface Mining Reclamation Plan for a four-(4)-year surface operation on the Subject Property (Centennial) including harvesting, crushing, screening, and sale of waste rock left from the Idaho-Maryland Mine (File Number U79-41). The County understands that operation concluded in one (1) year. In 1985, the Planning Commission approved an amendment to the existing Use Permit to allow importation of materials from an off-site development property for on-site rock processing (File Number U85-025). In 1985, the Planning Commission approved an amendment to the approved Use Permit to expand the surface operation to allow for a six-(6)-acre on-site borrow pit for material to be processed in the rock crushing operation, to relocate the rock crushing and processing plant approximately three-hundred (300) feet, and to reclaim the borrow pit area with a six (6)-acre building pad on the Subject Property (Centennial) (File Number U86-045). In 1992, the Planning Commission approved a Use Permit and Surface Mining Reclamation Plan to expand existing rock harvesting operations on or around the Subject Property (Centennial) (File Number U92-037). In 2003, the operator concluded rock harvesting operations, removed all buildings, and removed all rolling equipment. On April 4, 2004, the operator completed the site reclamation. All buildings related to the rock harvesting and crushing operation were removed. In 2005, the Planning Department provided notice to the Department of Conservation's Office of Mine Reclamation that reclamation was completed, and in 2006 the County of Nevada and the Department of Conservation released their interest on financial assurance for the operation.

As evidenced by Figure 4 below, which depicts aerial imagery of the Subject Property (Centennial) in 2006, all buildings and rolling stock related to the rock crushing operation were removed prior to June 2006.

Figure 4: Subject Property (Centennial Site) 2006 Imagery

In or around 2005, the parcel containing the majority of the rock harvesting operation permitted on or around the Subject Property (Centennial) (Assessor Parcel Number 009-550-042) was sold to the current property owner, and the parcel was annexed into the City of Grass Valley in 2006 via City of Grass Valley Resolution 06-15 (County of Nevada LAFCo File Number 06-07). In 2006, the City of Grass Valley permitted the existing commercial structure (City of Grass Valley File Number 06BLD-0419), which received final inspections in 2008.

<u>Recent Mining Application History:</u>

<u>(Centennial)</u>

In 1996, in an effort to reopen the abandoned Idaho-Maryland Mine, Emperor Gold "Emgold" Mining Corporation was granted a Use Permit by the Planning Commission to dewater specific underground mine tunnels at the Idaho-Maryland Mine (File Number U94-017). Emgold allowed this permit to expire, and work on the dewatering project never occurred. In 2005, Emgold submitted an application to the City of Grass Valley to annex the Subject Property to the City and for a Use Permit to dewater specific areas of the Idaho-Maryland Mine and commence mining operations. Between 2005 and 2011, the City of Grass Valley initiated an environmental review

of the application consistent with CEQA. No environmental review document was certified and Emgold subsequently withdrew the annexation and Use Permit application.

Subject Property (Brunswick and Centennial)

Since 2018, the Petitioner has conducted exploration drilling at the Subject Property. In November 2019, the Petitioner submitted a Use Permit application to the Nevada County Planning Department to dewater specified subsurface areas and to extract and process gold from a specified subsurface area of the Idaho-Maryland Mine over an eighty (80)-year permit period. The gold mineralization processing and underground exploration and mining proposed to operate twenty-four (24) hours a day, seven (7) days a week during full operations. On May 11, 2023, the County Planning Commission recommended the County Board of Supervisors deny the project application. Petitioner then filed the Petition on September 1, 2023.

DISCUSSION OF SMARA, COUNTY ORDINANCES, AND ABANDONMENT EVIDENCE:

A. SMARA

The State Mining and Geology Board ("**SMGB**") is the lead agency pursuant to the Surface Mining and Reclamation Act of 1975 (Public Resources Code § 2710 *et seq*. and California Code of Regulations § 3500 *et. seq*.) ("**SMARA**") for the County. SMGB's authority includes review and approval of reclamation plans, and review and approval of financial assurance cost estimates and mechanisms. The County, however, retains its authority to approve, amend, or deny use permits for surface mining operations, and also to review and determine the existence and scope of vested mining rights. (Cal. Code Regs., tit. 14, § 3950 ["Where the board exercises or assumes some or all of the lead agency's powers pursuant to [SMARA], the board shall not conduct vested rights determinations"].) Accordingly, the Petitioner's request for a vested rights determination is properly submitted to and heard by the County.

A vesting date for a use would be the first date on which local zoning laws would otherwise require a Use Permit, or the backup vesting date as set forth in SMARA, whichever date occurs earlier. (See generally *City of Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 453–54.)

No single evidentiary test exists to determine the existence of active surface mining on a vesting date. A petitioner bears the burden of establishing active mining operations on a vesting date. (*Melton v. City of San Pablo* (1967) 252 Cal.App.2d 794, 804.) There is a variety of evidence to consider in determining whether or not a petitioner has met its burden to demonstrate an active mining operation on a vesting date. Such evidence may include, but is not limited to:

- historical photographs of mining operations or of actual surface disturbances, and photographs of haul roads;
- percipient witnesses, *e.g.*, property owners, mining operators, and neighbors of the Subject Property;
- business records such as production records, invoices for mining products, mineral leases for the property, historical mineral production records prepared by the State (dating back to the 1880s) to establish prior mining operations; and

- County files, *e.g.*, environmental reports, planning records, assessor and tax records, old newspaper articles, and old maps.

The County has considered the Petition and evidence from these categories in making its determination on this Petition.

B. Nevada County Ordinance No. 196 (1954)

In 1954, the Board of Supervisors adopted Ordinance No. 196, which set forth a comprehensive (for the time period) zoning plan for the unincorporated areas of the County. Section 7 of the Ordinance created an A-1 District, which provided that "any use not otherwise prohibited by law is permitted, except that for [specific enumerated uses] a use permit" was required. Among the enumerated uses requiring a use permit was "commercial excavation of natural materials within a distance of one thousand (1,000) feet from any public street, road, or highway." (*Ibid*.) Accordingly, it appears that mining was occurring on the Subject Property in 1954, following the passage of Ordinance No. 196.

C. Evidence Establishing Abandonment

The County ("**County**") serves as the Lead Agency in land use jurisdiction and is responsible for implementing the requirements of the County Land Use and Development Code ("**Development Code**") and SMARA.

This analysis is organized as follows:

I. Introduction and Overview
II. Questions Presented
III. Vested Mining Rights Defined
IV. County and State Mining Regulation
V. Abandonment of the Mining Use
VI. The Subject Property's History, Ownership and Use
VII. Analysis
VIII. Conclusion

I. INTRODUCTION AND OVERVIEW

The Petitioner states that it owns the Idaho-Maryland Mine allegedly consisting of 175 acres of surface land and a 2,560-acre mineral estate in the County which we are referring to as the Subject Property. On September 1, 2023, the County received the Petition which includes the Petitioner's background facts, legal arguments, requests for determinations, and four hundred twenty-nine (429) exhibits thereto (**Attachment 2**). The Petitioner requests that the County make the following determinations regarding its rights to mine the Subject Property:

1. That mining operations commenced at the Subject Property as early as 1851;

2. That pursuant to the *Hansen Brothers* decision, the range of mining operations included tunneling, underground mining, exploration core drilling, blasting, crushing, sorting, stockpiling, waste rock placement, screening, distribution, transportation, and sales of gold for commercial uses, buildings headframes, hoists, production plants, crushing plants, stamp mills, tailings impoundment dams, sawmills, silos, offices, assaying and engineering, dry storage, compressors, machine and engineering shops, service garages, parking garages, storage buildings, and power lines, along with equipment including conveyor belts, compressors, pumps, boilers, ore bins, power drills, arrastras, skips, locomotives, trams, and trucks and other vehicles, and uses incidental and auxiliary to mining operations;

3. That the scope and intensity of the mining operations expanded over time, including a peak production rate of 410,411 tons of ore per year, in response to market demand.

4. That the County first required a permit to conduct mining operations on October 10, 1954 (Ordinance No. 196) which represents the "vesting date;"

5. That as of the vesting date, the Idaho Maryland Mines Corporation had manifested its intent to conduct underground mining throughout its then-existing mine holdings, including the Subject Property (which includes the entire 2,560-acre reserved subsurface estate), that surface mining operations at the Mine were occurring on at least 175 surface acres, that all 175 acres now comprising the Subject Property were held under single ownership, and that owner at the time of vesting, a mining company, objectively intended to devote the entirety of the Subject Property and 2,560 acres of mineral rights to support subsurface mining operations;

6. That the vested right has not been abandoned; and

7. That the Subject Property has a vested right to produce at least 410,411 tons of ore per year and a greater amount if justified by market conditions.

The facts relating to the history and operation of the Mine are extensive. Staff's conclusions rely on: a) information set forth in the Petition; b) the County's Responses (**Attachment 3**); and c) California law, notably Nevada County ordinances and SMARA, and legal principles expounded in court decisions and legal treatises as applied to the facts (collectively, the "**Evidence**").

Staff has reviewed and analyzed all pertinent Evidence and concludes that whatever right to mine existed as of 1954, if any, has been abandoned commencing in 1956.

II. QUESTIONS PRESENTED

A. Did Rise's Predecessor Acquire a Vested Right to Mine?

In 1954, Nevada County adopted Ordinance No. 196, which required a use permit for excavation or smelting within one thousand (1000) feet of a public road. The evidence demonstrates that mining activity occurred at the Idaho Maryland Mine beginning in the 1800's. However, the specifics of what activity was occurring in 1954 are unknown. 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 one thousand (1000) feet of a public road.

Accordingly, the Petition lacks sufficient evidence to support an affirmative conclusion regarding the existence or scope of Petitioner's alleged vested right which the Petition claims may have accrued upon the adoption of Ordinance No. 196. An affirmative conclusion regarding the existence or scope of a vested right is unnecessary, however, because the evidence and applicable legal standards demonstrate that any right to mine the Subject Property was abandoned.

B. If There Was a Vested Right, Has it Been Abandoned?

The purpose of vested rights is to protect economic investment by ensuring that the government does not demand an immediate cessation of existing uses of property. However, the factual history confirms that the owners of the Subject Property terminated their mining investment by ceasing operations and liquidating all assets. Over the years of approximately 1956-1959, the Idaho Maryland Mining Company completely divested itself of the gold mining business by liquidating all of its mining equipment through sales and auctions, dividing the formerly mined lands into separate parcels and selling them to various entities for non-mining uses, changing their name to remove "mining," and reinvesting their assets into non-mining business ventures.

Accordingly, Staff has concluded that any right to mine which may have been vested upon adoption of the 1954 zoning ordinance has since been abandoned. Further, each use of the Subject Property since that period of abandonment was either non-mining related or conducted under the various permits required of non-vested rights holders.

III. VESTED MINING RIGHTS DEFINED

In *Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County* (1996) 12 Cal.4th 533 (*Hansen Brothers*), the Supreme Court explained the rationale and legal standard for vested rights as follows:

> A zoning ordinance or land-use regulation which operates prospectively and denies the owner the opportunity to exploit an interest in the property that the owner believed would be available for future development, or diminishes the value of the property, is not invalid and does not bring about a compensable taking unless all beneficial use of the property is denied. However, if the law effects an unreasonable, oppressive, or unwarranted interference with an existing use, or a planned use for which a substantial investment in development costs has been made, the ordinance may be

> invalid as applied to that property unless compensation is paid. Zoning ordinances and other land-use regulations customarily exempt existing uses to avoid questions as to the constitutionality of their application to those uses. "The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected."
>
> Accordingly, a provision which exempts existing nonconforming uses "is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses." The exemption may either exempt an existing use altogether or allow a limited period of continued operation adequate for amortization of the owners' investment in the particular use.
>
> When continuance of an existing use is permitted by a zoning ordinance, the continued nonconforming use must be similar to the use existing at the time the zoning ordinance became effective. [Citation.] Intensification or expansion of the existing nonconforming use or moving the operation to another location on the property is not permitted. [Citation.] "[I]n determining whether the nonconforming use was the same before and after the passage of a zoning ordinance, each case must stand on its own facts." [Citations.] [*Hansen Brothers*, *supra*, 12 Cal.4th at pp. 551-552.]

The *Hansen Brothers* court further instructed that, "the burden of proof is on the party asserting a right to a nonconforming use to establish the lawful and continuing existence of the use at the time of the enactment of the ordinance." (*Hansen Brothers*, *supra*, 12 Cal.4th at p. 564 (quoting *Melton v. City of San Pablo* (1967) 252 Cal.App.2d 794, 804).)

IV. COUNTY AND STATE MINING REGULATION

A. <u>Nevada County Ordinance No. 196 (1954)</u>

In 1954, the County Board adopted Ordinance No. 196, which Ordinance set forth a comprehensive zoning plan for the unincorporated areas of the County. Section 7 of the Ordinance created an A-1 District, which provided that "any use not otherwise prohibited by law is permitted, except that for [specific enumerated uses] a use permit" was required. Among the enumerated uses requiring a use permit was "commercial excavation of natural materials within a distance of one thousand (1,000) feet from any public street, road, or highway." (*Ibid.*)

Consequently, the County first required a permit to mine in 1954; therefore, any person who seeks a vested right to mine without a permit must show that their operation was a legal nonconforming use since 1954.

B. California Surface Mining and Reclamation Act of 1975 ("SMARA"), Public Resources Code §§ 2710, *et seq.*

In 1975, California enacted SMARA whose purpose is to encourage "[t]he production and conservation of minerals" while ensuring that "[a]dverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses." (Pub. Resources Code, § 2712.) "At the heart of SMARA is the general requirement that every surface mining operation have a permit, a reclamation plan, and financial assurances to implement the planned reclamation." (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 617; citing Pub. Resources Code, § 2770, subd. (a).) Pursuant to section 2770 of SMARA, "a person shall not conduct surface mining operations unless a permit is obtained from, a reclamation plan has been submitted to and approved by, and financial assurances for reclamation have been approved by the lead agency."

Mine owners or operators are also required to submit annual reports to the Supervisor of Reclamation. (Pub. Resources Code, § 2207, subd. (a).) For mines operated under a reclamation plan, the lead agency must inspect the mine at least once per year. (Pub. Resources Code, § 2774, subd. (b)). If the lead agency's inspection reveals that the mine is not in compliance with SMARA, the agency may issue an order requiring the operator to comply with SMARA, or "if the operator does not have an approved reclamation plan or financial assurances, cease all further activities." (*Id*. § 2774.1, subd. (a).)

Each mine operating under a SMARA permit must have only one approved reclamation plan which the operator must update and have approved before implementing any "change or expansion . . . that substantially affects the completion of the previously approved reclamation plan," i.e., a "substantial deviation." (Cal. Code Regs., tit. 14, § 3502, subd. (d).) Where the operator expands into an area not covered by the approved reclamation plan, the operator must submit an amended plan that "ensures adequate reclamation for the [expanded] . . . operation." (*Id*. § 3502, subd. (g).) In addition, the lead agency must require financial assurances from the operator to ensure that reclamation is performed as required by SMARA and must adjust the amount of financial assurances annually to account for any additional land disturbances. [Pub. Resources Code, § 2773.1, subd. (a).]

However, those operating under vested rights are exempt from the permit requirement. Specifically:

> No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter as long as the vested right continues and as long as no substantial changes are made in the operation except in accordance with this chapter. A person shall be deemed to have vested rights if, prior to January 1, 1976, the person has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations. Expenses incurred in obtaining the enactment of an ordinance in relation to a particular operation or the issuance of a permit shall not be

> deemed liabilities for work or materials. [Pub. Resources Code, § 2776, subd. (a).]

Stated succinctly, if a person has, in good faith and with the requisite authorizations (that is, legally), diligently commenced surface mining operations and incurred substantial liabilities for surface mining work and materials before 1976, that person has a vested right to conduct surface mining operations and need not secure the permit otherwise required by SMARA, provided those vested rights have continued and no substantial changes to the operation have occurred. However, although vested rights holders are not required to obtain a use permit for their mining activities, SMARA still requires a reclamation plan be approved for surface mining "operations conducted after January 1, 1976" and surface mining operations which are, "to be conducted." (Pub. Resources Code, § 2776, subd. (b).) Section 2770 of SMARA required that vested rights holders submit a reclamation plan for their mining operation by March 31, 1988, or such operation would be prohibited. (*Id.* at § 2770.)

SMARA's reclamation plan requirements further extend to idle mines. The legislature determined that mines are considered "idle" when they meet the following criteria:

> "Idle" means that an operator of a surface mining operation has curtailed production at the surface mining operation, with the intent to resume the surface mining operation at a future date, for a period of one year or more by more than 90 percent of its maximum annual mineral production within any of the last five years during which an interim management plan has not been approved. [Pub. Resources Code, § 2727.1.]

Within ninety (90) days of a mining operation becoming idle, mine operators are required to submit an interim management plan to the lead agency. (Pub. Resources Code, § 2770.) "The approved interim management plan shall be considered an amendment to the surface mining operation's approved reclamation plan for purposes of this chapter. The interim management plan shall only provide for necessary measures the operator will implement during its idle status, to maintain the site in compliance with this chapter, including, but not limited to, all permit conditions." (*Ibid.*) The legislature further determined that the consequence of a mine operator failing to comply with this requirement is that the mine must be considered "abandoned:"

Unless review of an interim management plan is pending before the lead agency or an appeal is pending before the lead agency's governing body*, a surface mining operation that remains idle for over one (1) year after becoming idle, as defined in Section 2727.1, without obtaining approval of an interim management plan shall be considered abandoned* and the operator shall commence and complete reclamation in accordance with the approved reclamation plan. (Pub. Resources Code, § 2770, subd. (h)(6), emphasis added.)

C. <u>County's Post-SMARA Mining Requirements</u>

In 1978, after the adoption of SMARA, the County adopted Ordinance No. 835, enacted in April 1978. This Ordinance amended the County's Development Code by adding a section entitled "Surface Mining Permit and Reclamation Plan." Most relevant here is Subsection L-II 31B.4.D.E, which provides:

A person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall submit to the Planning Department and receive, within a period of 12 months, approval of a reclamation plan for operations to be conducted after January 1, 1976, unless a reclamation plan was approved by the County of Nevada prior to January 1, 1976, and the person submitting that plan has accepted responsibility for reclaiming the mined lands in accordance with that plan. Nothing in this ordinance shall be construed as requiring the filing of a reclamation plan for, or the reclamation of, mined land on which surface mining operations were conducted to, but not after, January 1, 1976.

The current version of that Development Code provides, in part, as follows:

Sec. L-II 3.22 Surface Mining Permits and Reclamation Plans

E. Vested Rights. No person who obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit to mine, so long as the vested right continues and as long as no substantial changes have been made in the operation except in accordance with SMARA, State regulations, and this Section. Where a person with vested rights has continued surface mining in the same area subsequent to January 1, 1976, he/she shall obtain County approval of a Reclamation Plan covering the mined lands disturbed by such subsequent surface mining. In those cases where an overlap exists (in the horizontal and/or vertical sense) between pre- and post-Act mining, the Reclamation Plan shall call for reclamation proportional to that disturbance caused by the mining after the effective date of the Act (January 1, 1976).

All other requirements of State law and this Section shall apply to vested mining operations.

K. Financial Assurances.

1. To ensure that reclamation will proceed in accordance with the approved Reclamation Plan, the County shall require as a condition of approval Security that will be released upon satisfactory performance. The applicant may pose Security in the form of a surety bond, trust fund, irrevocable letter of credit from an accredited financial institution, or other method acceptable to the County and the State Mining and Geology Board as specified in State regulations, and which the County reasonably determines are adequate to perform reclamation in accordance with the surface mining operation's approved Plan.

2. Financial assurances will be required to ensure compliance with elements of the Reclamation Plan…. [¶]

3. Cost estimates for the financial assurance shall be submitted to the Planning Department with the Use Permit and/or Reclamation Plan

application. The Planning Director shall forward a copy of the cost estimates, together with any documentation received supporting the amount of the cost estimates, to the State Department of Conservation for review. [¶]….[¶]

L. Interim Management Plans.

1. Within ninety (90) days of a surface mining operation becoming idle, the operator shall submit to the Planning Department a proposed Interim Management Plan (IMP). The proposed IMP shall fully comply with the requirements of SMARA, including but not limited to all Use Permit conditions, and shall provide measures the operator will implement to maintain the site in a stable condition, taking into consideration public health and safety. The proposed IMP shall be submitted on forms provided by the Planning Department and shall be processed as an amendment to the Reclamation Plan. IMPs shall not be considered a project for the purposes of environmental review.

2. Financial assurances for idle operations shall be maintained as though the operation were active, or as otherwise approved through the idle mine's IMP [¶]….[¶]

5. The IMP may remain in effect for a period not to exceed 5 years, at which time the Planning Commission may renew the IMP for another period not to exceed 5 years or require the surface mining operator to commence reclamation in accordance with its approved Reclamation Plan.

M. **Annual Report Requirements**. Surface mining operators shall forward an annual surface mining report to the State Department of Conservation and to the County Planning Department on a date established by the State Department of Conservation, upon forms furnished by the State Mining and Geology Board.

N**.** **Inspections**. The Planning Department shall arrange for inspection of a surface mining operation within 6 months of receipt of the Annual Report required in subsection M, to determine whether the surface mining operation is in compliance with the approved Use Permit and/or Reclamation Plan, approved financial assurances, and State regulations. In no event shall less than one inspection be conducted in any calendar year. …All inspections shall be conducted using a form approved and provided by the State Mining and Geology Board.

D. <u>County's Regulation of Nonconforming Uses</u>

Generally, a nonconforming use is one which was valid when brought into existence, and due to a subsequent regulation, it is no longer conforming. (*City of Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 453; 43 Ops.Cal.Atty.Gen. 144, 147 (1964); and *Hill v. City of Manhattan Beach* (1971) 6 Cal.3d 279, 285.) The underpinnings of the nonconforming use concept were to develop a strategy for addressing pre-existing uses of land when a new zoning ordinance was introduced or modified.

Since the introduction of the nonconforming use concept in the 1950's, the trend has been unmistakably to impose increasing restrictions on such uses in order to prevent their becoming further entrenched and to encourage their conversion to conforming uses. (1 Longtin, Cal. Land Use (2nd ed. 1987) Nonconforming Uses and Structures, § 3.82[1], p. 377-378.)

The Development Code provides in part:

Sec. L-II 5.19 Legal Nonconforming Uses and Structures

A. Purpose. Within the zoning districts established by this Chapter, there may be uses and structures which were lawful before the effective date of the applicable terms of the regulations, but which are prohibited, regulated or restricted under the terms of the regulations currently in effect or by future amendments. Relative to such uses and structures, it is the purpose of this Section to:

1. Reduce them to conformity or to eliminate them through abandonment, obsolescence, or destruction due to strict provisions against changes that could perpetuate them.

2. Provide for their regulation and to specify the circumstances and conditions under which they may continue to exist until brought into conformity, removed, or terminated.

B. Legal Nonconforming Uses. A legal nonconforming use is any use lawfully in existence at the time this Chapter or amendments thereto takes effect, although such use does not conform to the provisions of this Chapter. Such use may continue subject to the following:

1. No use shall be:

   a. Enlarged or intensified,

   b. Extended to occupy a greater area of land or a portion of a structure than that occupied at the time this Chapter, or any amendment thereto takes effect, or

   c. Moved in whole or in part to any other portion of the parcel of land occupied at the time this Chapter or any amendment thereto takes effect.
   [¶]….[¶]

4. If the use is discontinued for a period of one year or more, any subsequent use shall be in conformity with all applicable requirements of this Chapter, except as follows: a) uses clearly seasonal in nature (i.e., ski facilities) shall have a time period of 365 days or more, b) surface mining

> operations shall comply with the provisions of Section 3.22.L providing for interim management plans.

SMARA does not preempt or usurp traditional city and county regulatory powers. SMARA's author added language to make clear that it did not restrict:

> The power of any city or county to regulate the use of buildings, structures and land as between industry, business, residences open space (including agriculture, recreation, the enjoyment of scenic beauty, and the use of natural resources), and other purposes. [*Id*. Section 2715(f).]

The Development Code and SMARA require that all individuals and operators contemplating surface mining acquire (1) a permit from the County and obtain (2) an approved plan and (3) financial assurances for reclamation prior to commencement. SMARA further requires that all existing or "vested" surface mining operations have an approved reclamation plan and financial assurances to insure implementation of the plan. Otherwise, after April 1979, twelve (12) months after adoption of Ordinance 835, continuance of mining without an approved reclamation plan and financial assurances was impermissible, even if there were mining operations.

V. ABANDONMENT OF THE MINING USE

A. <u>Establishing the Abandonment of The Mining Use</u>

Courts have routinely acknowledged and found that nonconforming uses are not intended to be perpetual. "It was not and is not contemplated that pre-existing nonconforming uses are to be perpetual. The presence of any nonconforming use endangers the benefits to be derived from a comprehensive zoning plan." (*Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 459.) "The ultimate purpose of zoning is . . . to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected. [citation] We have recognized that, given this purpose, courts should follow a strict policy against extension or expansion of those uses. [Citation] That policy necessarily applies to attempts to continue nonconforming uses which have ceased operation." (*Hansen Brothers*, *supra*, 12 Cal.4th at p. 568.) Similarly, to determining the scope a vested right, in analyzing whether a vested right has been maintained, or was abandoned, courts look to the objective manifestations of intent by the owner or owners of the property. (*Ibid .)*

Specifically, in *Hansen Brothers,* the Supreme Court described the legal requirements for abandonment of a vested right as follows:"[A]bandonment of a nonconforming use ordinarily depends upon a concurrence of two factors: (1) An intention to abandon; and (2) an overt act, or failure to act, which carries the implication the owner does not claim or retain any interest in the right to the nonconforming use (8A McQuillin, [Municipal Corporations (3d ed. 1994)], § 25.192; 1 Anderson, American Law of Zoning, § 6.58). The Supreme Court's discussion in *Hansen Brothers* regarding the factual elements which are demonstrative of the factors of abandonment was not exhaustive and, instead, offered minimal legal standards for abandonment beyond the two-factor test of (1) intent to abandon and, (2) an overt act or failure to act. However, the analysis by the court in *Hansen Brothers*, *Hansen Brothers*'s progeny, and other relevant sources have further developed the factual elements that give rise to abandonment.

1. Length of Time the Nonconforming Use Has Been Suspended

Hansen Brothers made clear that cessation of the nonconforming use, ***alone***, would be insufficient to constitute abandonment. (*Hansen Brothers, supra*, 12 Cal.4th at p. 569.) However, the court went on to confirm that the duration for which the nonconforming use has been discontinued ***is*** a relevant factual consideration "in determining whether the nonconforming use has been abandoned [citation]." (*Hansen Brothers, supra*, 12 Cal.4th at p. 569 [quoting *Union Quarries, Inc. v. Board of County Com'rs* (1970) 206 Kan. 268 [478 P.2d 181, 186-187]; see also *Dusdal v. Warren* (Mich.1971) 196 N.W.2d 778, 781 ["Abandonment in the contemplation of the law is something more than mere nonuser. It is rather a nonuser combined with an intention to abandon the right to the nonconforming use."].) In discussing the *Hansen Brothers* test for abandonment, Derek P. Cole, in his legal treatise *California Surface Mining Law*, states:

> "The critical prong of this test is the first, dealing with intention. While closing a mine for a prolonged period might constitute an overt act of cessation, the closure itself does not necessarily indicate that an owner intended abandonment of rights.
>
> …
>
> The longer the cessation of activities, however, the more likely an owner will be found to have abandoned the nonconforming use. As the California Supreme Court noted in *Hansen Bros.*, "the duration of nonuse may be a factor in determining whether the nonconforming use has been abandoned." 12 Cal.4th 569. In two cases, nonuse for periods of seven and ten years, coupled with the absence of other preservative activity, reflected an intent to abandon nonconforming mining operations. *See, Lane County v. Bessett* (Or. Ct. App. 1980) 612 P. 2d 297, 301; *Holloway Ready Mix Co. v. Monfort* (Ky. Ct. App. 1971) 474 S.W. 2d 80, 83." (Derek P. Cole, *California Surface Mining Law* (2007) ("**Cole**"), p. 151-152.)

Similar to the *Lane County* and *Holloway Ready Mix Co.* cases cited by Cole, the court in *Stokes v. Board of Permit Appeals* held that a seven (7)-year period of cessation of a property's nonconforming use as a bathhouse was sufficient to constitute abandonment of the vested right to operate the building as a bathhouse despite zoning changes effecting that use. (*Stokes v. Bd. of Permit Appeals* (1997) 52 Cal.App.4th 1348, 1354.)

The plaintiff in *Stokes* argued that, under *Hansen Brothers*, cessation of the property's nonconforming use was insufficient to show the property had been abandoned because the "discontinuance of use is not synonymous with abandonment." (*Id.* at 1354-1355.) However, the *Stokes* court focused on the facts that the nonconforming use had been discontinued for seven (7) years and, during that time, the property was not put to any lawful use, concluding, "[t]hese facts establish more than a temporary vacancy, but rather an intentional decision to abandon the premises." (*Id.* at 1354.) The *Stokes* court compared these facts to *Hansen Brothers*, where the Hansens had only discontinued their nonconforming mining, "for periods of 180 days and up to 3

years, because stockpiles were sufficient to meet demand." (*Id.* at 1355.) Based on these differences between the periods of cessation, the *Stokes* court concluded:

> "In *Hansen*, plaintiffs were continuously operating some portion of their aggregate production business on the property. Here, by contrast, Stokes's predecessors had completely vacated the building for seven years and the building had not been used for *any* purpose at the time plaintiff took possession. There are no facts to which Stokes can point as evidence the prior owners intended to and in fact did continue to operate the property as a bathhouse or for a related use." (*Id.* at 1355-1356.)

Read together, *Hansen Brothers* and *Stokes* establish that, while cessation of a nonconforming use *alone* is not determinative of abandonment, the period of time the nonconforming use was discontinued *is* relevant to abandonment and the likelihood of abandonment increases the longer the nonconforming use was ceased. *Hansen Brothers* and *Stokes* further confirm 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.

2. <u>Preparation for Resumption of Nonconforming Property Use</u>

In addition to the length of time a nonconforming use was discontinued, courts place significant emphasis on the objective manifestations of the owner's intention to resume the nonconforming use in determining whether or not the use has been abandoned. (Cole, *supra*, at pp. 151, 152.) Cole's treatise on California mining law again provides relevant guidance on this element of abandonment:

> "Yet, even in an economic downturn, an owner cannot maintain the right to continue a nonconforming use simply by shutting the gates and doing nothing during closure. To reflect an intent to continue, the owner must instead sell, or attempt to sell, stored and stockpiled material. *See, Union Quarries, Inc. v. Bd. Of County Commr's* (Kan. 1970) 478 P. 2d 181, 187 (although mine had ceased extraction, owner indicated intent to continue operations by selling from stockpiles); *Bither v. Baker Rock Crushing Co.* (Or. 1968) 438 P2d 988, 993 (despite cessation of mining, mine preserved right to continue by selling materials from stockpiles). The operator must also keep the plants and equipment in good order for prompt resumption of activity. *See S. Equip. Co., Inc. v. Winstead* (N.C. Ct. App. 1986) 342 S.E. 2d 524, 527. *But see County of DuPage v. K-Five Constr. Corp.* (Ill. App. Ct. 1994) 642 N.E. 2d 164, 165, 168 (dismantling plant in absence of asphalt production for ten years reflected intent to abandon such production). The operator must also continue making royalty or lease payments as it may be required to pay others *See Union Quarries*, 478 P. 2d 187." (Cole, *supra*, at 151.)

Cole highlights that an operator must demonstrate their intention to continue a nonconforming use by maintaining the operation in such a way that they are prepared to resume the nonconforming

activities. The *Southern Equipment Co.* case cited by Cole was also relied upon by the *Hansen Brothers* court who, in finding that the vested right had not been abandoned, noted:

> In *Southern Equipment Co*. v. *Winstead* (1986) 80 N.C.App. 526 [342 S.E.2d 524], the court held that under the applicable ordinance the failure to operate a concrete mixing facility for six months during a business slowdown, while the operator filled orders from another plant, was not a cessation of operation. There, as in this case, the plant, equipment, inventory, and utilities were maintained throughout the period and the plant could be made operational within two hours. (*Hansen Brothers*, *supra*, 12 Cal.4th at p. 569.)

The court in *Hansen Brothers* further explained that, despite episodic cessations of the nonconforming mining activities during economic downturns, the Hansen Brothers continued to operate their business by selling from stockpiles and maintaining their operations in working order to resume mining activities when the market became economically viable again. (*Id.* at 570-571.) So, while *Hansen Brothers* does not require that nonconforming mining activities have been continuously performed in order to avoid abandonment of the vested right, it does require that the intent to resume said activities be demonstrated throughout the period of cessation.

3. Intent to Resume Nonconforming Use Must Have Been Maintained by Previous Owners of the Property

Pertinent to Rise's instant petition is the effect of parcels changing hands after the initial zoning changes which made the then-existing uses nonconforming. As explained in more detail below, it has been nearly seventy (70) years since the County's 1954 zoning ordinance and, in that time, the historic Subject Property has been separated into various parcels and sold to multiple separate owners. California law establishes that, in order for the vested right to have survived to the present, the vested right must have persisted through each of the interim owners from the time the initial use became nonconforming.

The court in *Hansen Brothers* states that, where an owner is seeking to assert a vested right to a nonconforming use over multiple parcels that were acquired after the zoning change, the previous owners must have themselves maintained a vested right to that nonconforming use. (*Id.* at 557-558.) The abandonment of a vested right by a previous owner was demonstrated in the *Stokes* case. In *Stokes*, after ceasing the nonconforming use, as a bathhouse, the previous owner filed an application to permit converting their property into a senior center, which was a permitted use. (*Stokes*, *supra*, 52 Cal.App.4th at p. 1356.) The Board of Permit Appeals found that the application demonstrated an intent to abandon the nonconforming use, which had been ceased, and the Court of Appeal states that this intent to abandon, "is a separate ground for defeating a nonconforming use."

Accordingly, for a nonconforming use to persist through changes in ownership across the various parcels, the vested right must have been maintained by each of the interim owners. This means that, to the extent these interim owners did not put the properties to the nonconforming use, they must have performed objective acts evidencing their intent to do so in the future. Otherwise, any vested right to that nonconforming use would be abandoned.

B. The Burden of Proof for Abandonment

In *Hansen Brothers*, the Supreme Court does not explicitly state which party has the burden of proving abandonment of a vested right. In *Palico Enterprises, Inc. v. Beam* (2005) 132 Cal.App.4th 1482, 1497-1498, the Court of Appeal also does not state which party has the burden of proving abandonment of a nonconforming use. Nevertheless, the court's explanation as to why the party that advocated for abandonment failed to persuade the court appears to be an implicit recognition that such party had the burden of proof on that issue.

Courts in other states, however, that rely on the same secondary authority cited in *Hansen Brothers* have held that the burden of proving abandonment of a vested right is on the party asserting abandonment, which normally is the local governmental agency. For example, the Washington Court of Appeal held:

> However, once the landowner establishes that a legal nonconforming use existed, the burden shifts to the municipality asserting that the nonconforming use was abandoned to show that the landowner abandoned or discontinued the use after the enactment of the relevant zoning ordinance. [*McMilian v. King County* (Wash.Ct.App. 2011) 255 P.3d 739, 745 (citing *Van Sant v. City of Everett*, 69 Wn. App. 641, 648, 849 P.2d 1276 (1993), which quotes 8A Eugene McQuillin, The Law of Municipal Corporations § 25.191 (3d ed. 1986 rev.)).]

The Washington court went on to explain:

> King County attempts to misplace the burden on the landowner, *McMilian*, to establish that the alleged legal nonconforming use was not abandoned after 1958. However, once a landowner has proved that a valid nonconforming use was lawfully established at the time the relevant zoning code was enacted, the burden of proving that a nonconforming use was subsequently abandoned, such that it should no longer be recognized, is properly placed on the party asserting abandonment, here King County. [*Id*. at p. 745, fn. 4.]

(See *Dusdal v. Warren*, supra, 196 N.W.2d at p. 781 ["The burden of proving abandonment was on the city."])

Additionally, California courts have held in other circumstances that the party asserting abandonment has the burden of proving abandonment. (See, e.g., *Group Property, Inc. v. Bruce* (1952) 113 Cal.App.2d 549, 559 [where defendant argued the plaintiff abandoned an option to purchase leased property, "[a]bandonment is never presumed, but must be made to appear affirmatively by the party relying thereon"]; *Weideman v. Staheli* (1948) 88 Cal.App.2d 613, 616 [where plaintiffs contended that an easement had been abandoned, "the burden rests upon the party alleging abandonment to prove the same by satisfactory and competent evidence"].)

Furthermore, the general rule is that a party making a claim must provide the evidence to support that claim. (See *Washington v. Washington* (1949) 91 Cal.App.2d 811, 813 ["Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative

allegation (Code Civ. Proc., § 1869), but the party holding the affirmative of the issue must produce evidence to support it, and if such evidence is not produced the finding must be against such party. (Code Civ. Proc., § 1981). *See, e.g., La Prade v. Dept. of Water & Power* (1945) 27 Cal.2d 47, 51.)
Regardless, as explained in full, below, Staff believes that, under any standard of review, the evidence supports a finding that if a vested right to mine ever existed it has since been abandoned.

VI. THE SUBJECT PROPERTY'S HISTORY, OWNERSHIP AND USE

This Staff Report provides a thorough discussion of the history, ownership and use of the Subject Property in the Site Description and Background, the Analysis section entitled "Evidence Establishing Abandonment," and in the County's Responses in **Attachment 3**.

VII. ANALYSIS

A. Whatever Mining Activities Were Occurring At The Subject Property When The County Ordinance Was Adopted In 1954 Were Abandoned by 1956

In 1956, the owners of the Subject Property ceased operations, sold all mining equipment by 1957, and then sold all of the Subject Property over the next couple of years. The owners of the Subject Property purposefully eliminated the mining uses to which the Subject Property had previously been put. The record before the County demonstrates that there has been no continuity of mining on the Subject Property for over sixty-five (65) years. The area of mining operations contracted in the early 1950s, ceased in 1956, and then the Subject Property was sold off for non-mining purposes. Contrary to what the Petitioner states, there has been no continuity of intent to mine, nor have there been continuous overt acts demonstrating that intent to mine for over sixty-five (65) years. Therefore, the mining use was abandoned.

B. Mining Activities at the Subject Property Were Abandoned as of 1956

1. Idaho Maryland Mines Corporation began selling off portions of the Subject Properties in 1954

Beginning in 1954, the owner of the Subject Property began to sell off portions of the Subject Property. Even as to those portions of the Subject Property that were sold off by Idaho Maryland Mines Corporation in 1954 with a reservation of the subsurface mineral rights (Response to Facts, No. 5), that reservation did not indicate an intent to resume mining in the future. "The history of mineral development in the United States is marked by speculative practices to reserve 'rights' that may in the future be sold, and which may or may not be bona fide. Not all historical actors who have reserved such "rights, moreover, have possessed a viable future plan for exploitation of those 'rights'." (S. Miltenberger, Ph.D., Principal & H. Norby, M.A., Senior Historian, *Peer Review Comments, Idaho-Maryland Mine Vested Right Petition* ("**Historian**"), Comment No. 75.) Thus, Petitioner's statement that "[t]he only plausible reason for requiring these exclusions in the deeds is that the company intended to resume underground mining operations at these properties in the future" is incorrect and is sheer speculation.

Also, contrary to the assertions in the Petition, half of the properties sold off in 1954 that are discussed by Petitioner did *not* include a reservation of the mineral rights. (Response To Facts,

No. 5; Pet. Exhibits 181, 183.) Such sales of the Subject Property without any reservation of mineral rights certainly demonstrated an intent to abandon mining operations.

2. Mining Activities Stopped in 1956, and Additional Properties are Sold Off, Which Evidence an Intent to Abandon the Mining

In February 1955, dozens of employees are terminated, and development is limited solely to tungsten exploration. (Jack Clark, *Gold In Quartz* ("**Clark**") pp. 242-243.) In July 1955, a local newspaper reported that the President of Idaho Maryland Mines Corporation stated that the firm was "in 'critical' condition" and may have to "discontinue operations." (County's Response, No. 7, **Attachment 3**.)

During 1955, additional portions of the Subject Property are sold off for non-mining uses. Contrary to Petitioner's assertions, the deeds to nearly all of the properties sold in 1955 did *not* include any reservation of mineral rights (Response to Facts, No. 8; Pet. Exhibits 189, 190, 191, 192.) Again, that demonstrated an intent to abandon mining operations. As to the single deed that did include such a reservation of mineral rights, that is not an indication of an intent to resume underground mining in the future. (Historian, Comment No. 75.)

Then on December 27, 1955, all gold mining activities ceased at the Idaho Maryland Mine. (Clark, p. 252; Pet. Exhibit 216; Response to Facts, No. 9.) Even Petitioner concedes that there was a "Cessation of Gold Mining Activities." (Petition, p. 4.) "A small crew of men began removing all trolley motors, ore cars, mucking machines, drills, hoses, slushers, etc., from all levels below the 2000-foot level, including the 3280-foot level." "Now that gold mining had ceased, the *future of the mine focused entirely* on the production of tungsten." (*Ibid*. (emphasis and underline added).) But then, as Petitioner explains, "the Board of Directors of the Idaho Maryland Mines Corporation orders on September 25th [1956] the cessation of nearly all tungsten production, the unoccupancy of the Idaho shaft, and that the mines be allowed to flood to the 1,450-foot level of the Mine." (Petition, p. 37.)

In 1956, Idaho Maryland Mine Corporation sells off even more properties. Contrary to Petitioner's assertions, the fee title to *all* of the properties cited by Petitioner, are sold off in their entirety, with *no* reservation of mineral rights. (Response to Facts, No. 11; Pet. Exhibits 200, 201, 202, 203, 206, 208.) That even includes the Brunswick sawmill site. (Response to Facts, No. 11; Pet. Exhibit 205.)

Thus, *all* mining activities at the Idaho Maryland Mine ceased in 1956. This case is completely different from *Hansen Bros. Enterprises v. Board of Supervisors, supra,* 12 Cal.4th 533, where there was an "aggregate production business, of which mining for the component is an aspect" and "mining uses of the Hansen Brothers' property are incidental aspects of the aggregate production business," where the quarry was inactive but there was a "*continuing* aggregate business," and where "the aggregate business has *not been discontinued*" and "the aggregate business itself has *not been discontinued*." (*Id.* at pp. 565, 566, 569-570). (Emphasis added.) Petitioner's representations to the Board that the "operations had been ceased for years" in the *Hansen Brothers* case. (Chadwick letters to Board, November 14, 2023, p. 12), is patently false. Here, by contrast, all mining completely *stopped* in 1956, and all "'uses normally incidental and auxiliary to the nonconforming uses'" (*id.* at p. 565) had *ceased*. Thus, unlike the aggregate business in *Hansen Brothers*, the mining operations at the Idaho-Maryland Mine were abandoned.

3. <u>All Of The Mining Equipment Was Sold Off In 1957, and the Mine Buildings Were Eventually Removed, Which Evidence an Intent and Overt Actions to Abandon the Mine</u>

Page 252 of the Clark book describes the complete liquidation of mining equipment at the Idaho Maryland Mine in 1957. Petitioner omits any reference to that page, and intentionally omits that page in its Appendix. The relevant portion of page 252 states the following:

> A Successful Auction-1957
>
> After the mine closed, the salvage crew continued removing equipment from underground. On March 15, 1957, the last cage of items was hoisted to the surface in the New Brunswick shaft. The electric power to the mine then was disconnected at the Brunswick substation. These two great gold producers became a casualty of the low price of gold and an inflated economy that left gold mining in its wake.
>
> On April 30, 1957, Nevada County Tax Collector Alma Hecker and Auditor/Controller John T. "Tom" Trauner jointly announced the good news that the county of Nevada and two school districts had received a check for $102,291.98 from the Idaho Maryland Mines Corp. for payment of local taxes. That amount included $34,930.33 for the current fiscal year, and $67,361.56 for delinquent taxes and late penalties. Payment of these taxes was made possible by the sale of mining equipment owned by the mine. The Milton J. Wershow and David Weisz companies of Los Angeles had been employed to auction off all saleable equipment and buildings. Beginning on May 21, 1957, a two-day auction was held at the New Brunswick mine to liquidate over 1400 lots of equipment and structures. These involved everything from the Old Brunswick, New Brunswick, and what remained of the Idaho Maryland mines. Buyers representing mining companies from many parts of the world, cities, counties, lumber mills, and interested people came to participate. Over 1,000 reviewed the items that were neatly arranged throughout the mine yard and in buildings.
>
> The auction was a huge success, with the bidding brisk at times. Management was quite satisfied with the outcome, especially for the prices received for items such as the Marcy 86 ball mills, hoists, headframes and compressors. President Bert C. Austin announced that the money received would satisfy all outstanding debts and leave the corporation with a surplus of cash. [Clark, p. 252.]

Petitioner also omits any reference to (and excludes from its Appendix) the pages of the Clark book that contain a photograph of the Brunswick site with this statement: "For many years after most of the buildings had been removed, this was all that was visible of the New Brunswick mine. Finally only the silo remained." That removal of buildings is also depicted in the photographs on page 251 of Clark, which photographs from the Clark book are also omitted in Petitioner's Appendix.

The removal of all mining equipment and all buildings (except the silo) from the Subject Property materially distinguishes this case from *Hansen Bros.* There, the Court noted: "[I]n this case, the plant, equipment, inventory, and utilities were *maintained* throughout the period and the plant could be made operational within two hours." (*Id*. at p. 569 (emphasis added).) But here, the "use of all structures necessary or incidental thereto" (*Id*. at p. 566) came to an end at the Idaho Maryland Mine. Thus, the fact that all mining equipment and all buildings (except the silo) were removed from the Subject Property in March 1957 is conclusive evidence of both an intention to abandon the mine, and an overt act that carries the implication the owner of the remaining Subject Properties and operator of the mine does not claim or retain any interest in the right to whatever nonconforming use existed in October 1954.

A July 1957 news article cited by Petitioner states that "[l]arge-scale mining at the Idaho-Maryland [mine] ended when the company filed its stockpile quote of tungsten for the government," that "[t]he *removal of pumps, compressors, hoists, mine rails* and other salvage jobs is going ahead," that "[m]ine officials, questioned concerning the future, are hopeful but *not optimistic*," that "[t]he cessation of active gold mining in the underground workings of the Idaho Maryland Mines Co. … marks the *end of an era*," and that "the once great gold mining industry at Grass Valley, Calif. has *rolled to a halt*, *perhaps permanently*." (Pet. Exhibit 209 (emphasis added); Response To Facts, No. 12.) "[A] veteran miner gazed at the rusting equipment of a deserted shaft and shook his head sadly. 'Something better happen,' he said, 'and it had better be quick. Otherwise, we may as well *leave all this gold to the ages*.'" (Pet. Exhibit 416.)

4. <u>The Subject Property Was Divided Up, Which Evidences an Intent and Overt Actions to Abandon Mining on the Subject Property</u>**.**

Additional portions of the Subject Property are sold off in 1957. (Petitioner omits from its Appendix page 249 from the Clark book, which includes a photograph with the statement: "A salvage crew prepares *the Subject Property* for sale." (Emphasis added.)) Contrary to Petitioner's assertions, the properties are *not* "always" sold in 1957 "with a reservation of the mineral estate and the continuing right to explore and develop the Mine in the future." (Response To Facts, No. 13; Pet. Exhibit 212.) The County's Response to Facts, No. 13, demonstrates that Petitioner is simply wrong when it argues that: "In every instance, the Company expressly reserved both the mineral estate and mining rights. . .. (Letter to Clerk of Board of Supervisors from G. Braiden Chadwick, dated November 15, 2023.) Even the reservations of the mineral estate in the Quitclaim Deeds to Sierra Nevada Memorial Hospital, which are highlighted by Petitioner, were "subject to the express limitation that the foregoing reservation shall not include any right of entry upon the surface of said land." (Pet. Exhibits 213, 214; Response To Facts, No. 13.) Those continuing sales of portions of the Subject Property evidence an intention to abandon the Idaho Maryland Mine. Again, even deeds that contain reservation of the mineral rights do not necessarily indicate an intent to resume mining in the future, contrary to Petitioner's assertions. (Historian, Comment No. 75.)

Then in 1959 and 1960, the Idaho Maryland Mines Corporation transferred additional portions of the Subject Properties. Petitioner asserts that an August 1959 transfer to Oliver Investment Company, and immediate transfer to Sum-Gold Corporation Inc., reserved mineral rights. (Petition, pp. 38-39, 70; Pet. Exhibit 218; Response to Facts, No. 15.) However, the minutes of the "one meeting of the Board of Directors of Idaho Maryland Mines Corporation (Exhibit 216)

are "not produced in their entirety, however - in fact it does not appear that any of the corporate minutes proffered as evidence in the petition are - which makes it making it difficult to evaluate if all relevant information is presented." (Historian, Comment No. 37.) Furthermore, Petitioner simply avoids any discussion of the fact that only a few months later, in January 1960, the Board of Idaho Maryland Mines Corporation authorized the sale to "Sum-Gold Corporation approximately 2,500 acres of mineral rights, which have heretofore been abandoned by non-payment of taxes." (Pet. Exhibit 217, p. 127; Response to Facts, No. 15.) Petitioner similarly omits whatever deeds were used to effectuate such transfer of mineral rights to Sum-Gold Corporation in early 1960.

C. No Mining Activity Occurred in the 1960s or 1970s, Thereby Evidencing an Intent to Abandon The Mine.

1. The Corporation Eliminates The Word "Mines" From its Name

Idaho Maryland Mines Corporation changed its name to Idaho Maryland Industries Inc. in 1960, thereby eliminating the word "Mines" from its name (Petition, p. 39), while at the same time the Corporation's Board discussed "the advisability of selling certain mineral rights belonging to the Corporation." (Pet. Exhibit 217, p. 168; Historian, Comment No. 39.) Then, when the Corporation files for bankruptcy in 1962 (Petition, p. 40) there is no mention in the news article cited by Petitioner of anything relating to mining activities. (Pet. Exhibit 223; Response to Facts, No. 18.) Those facts are further evidence that the Corporation had abandoned its mining operations at the Idaho Maryland Mine.

2. The Ghidottis Did Not Undertake Any Efforts to Resume Mining at Any Time in the 1960s

Idaho Maryland Industries Inc. auctioned 2,630 acres of mineral rights and 78.531 acres of surface rights of the Subject Property in 1963 and sold them to William and Marian Ghidotti. (Petition, p. 40; Pet. Exhibits 224, 225.) The Ghidottis purchased the property as an investment. The fact that William Ghidotti bought those rights with "no immediate plans" (Pet. Exhibit 226), along with the fact that the Ghidottis never took any actions throughout the 1960s to resume mining on the Subject Property demonstrates that the Idaho Maryland Mine had been abandoned that entire decade.

Many of the Petitioner's arguments rely upon the statements in a Declaration of Lee Johnson. (Petition, pp. 40, 70-71; Pet. Exhibit 227.) Petitioner repeatedly relies upon Mr. Johnson's "understanding" of what the Ghidottis "believed," even though Mr. Johnson's statements lack foundation, and there is no evidence that they are based on his personal knowledge. (Responses to Facts, Nos. 19, 20, 25, 29, 30.) Additionally,

> As a historical source, a declaration such as Lee Johnson's (Exhibit 227) is problematic, particularly for the factual assertions made here. Both historical study and scientific research have revealed the unreliability (and even instability) of human memory. Historical interpretation is based upon a critical examination of documentation made at or near the occurrence of an event. Memoirs and reminiscences often drafted years after an event are consulted as sources but treated with caution. Corroboration from sources closer or contemporaneous in time with the events described are

> frequently sought. Relying on this declaration to ascertain William and Marian Ghidotti's thoughts or intentions - in the absence of independent supporting documentation - is methodologically suspect for a historian. [Historian, Comment No. 44.]

Thus, the Declaration of Lee Johnson cannot be used to support a conclusion about the "intent" of William and Marian Ghidotti not to abandon Idaho Maryland Mine.

Also, Petitioner's assertions about William Ghidotti purportedly being an owner of stock in mining companies, a "gold investor," "gold enthusiast" and collector of "gold and quartz specimens" (Petition, pp. 40, 41, 70-71) do not indicate an intent by Mr. Ghidotti to resume mining on the Subject Properties. (Response To Facts, Nos. 19.) Indeed, the fact that "William Ghidotti "reportedly was open to offers to purchase 'the mineral rights' raises a historical question as to his motivations. Was his interest mostly or exclusively speculative? If so, how much intent to mine or revive mining operations can be fairly ascribed to Ghidotti?" (Historian, Comment No. 41.)

3. <u>Whatever Removal of Waste Rock Occurred in The 1960s, That Activity Did Not Evidence an Intent to Resume Mining</u>

Even if some waste rock was removed from the surface of the Subject Property in the 1960s, that did not constitute a continuation of the mining activities that were nonconforming as of 1954. Indeed, even Petitioner does not allege that the mere removal of rock constitutes "mining." (Petition, p. 71.) That is in accord with *Hansen Bros*. After concluding that the nonconforming use in that case was "aggregate production," the Court explains:

> Hansen Brothers has a vested tight to continue all aspects of its aggregate business at the Bear's Elbow Mine. This is not to say that future inactivity at the mine may not result in termination of that vested right or that the county might not conclude that the property is no longer being used for aggregate production and is currently in use only as a yard for storage and sales of stockpiled material. [12 Cal.4th at p. 571.]

Here, there were no mining activities that occurred on the Subject Property after 1956 when mining ceased. At most, the Subject Property constituted a place for storage and sales of stockpiled mine tailings, where for a period of a few months in 1964 or 1965 a third party came on to the site to crush and haul off waste rock for the construction of the local freeway. (Petition, pp. 40, 71; Pet. Exhibit 231; F.D. Calhoun, *California Gold And The Highgraders: True Stories of the Mines and the Miners* ("Calhoun") (Pet. Appendix F]).) That waste rock was "already broken, hard rock [that] lay in great heaps in the waste dump at the Brunswick Mine." (Calhoun (Pet. Appendix F), p. 352-353.) Nothing in Ms. Ghidotti's discussion about that event indicated an intent to resume mining on the Subject Property. (Response To Facts, No. 40.) "[T]he activity described at the site is not focused on any revival of mining under the Ghidottis' ownership but rather on the sale 'of crushed rock left over from past mining operations'." (Historian, Comment No. 41.) "It is not clear from the sources provided that the Ghidottis intended to use what this petition refers to as the 'Centennial Industrial Site' for any activities outside of crushing and selling waste rock." (Historian, Comment No. 77.) "During this nine (9)- [year] period the only evidence of activity at the historical Idaho-Maryland Mine presented is of the operation of a rock crusher and the removal of 'mine rock wastes and mill sand.' It is unclear of how indicative this was of an intent to resume

gold mining operations." (Historian, Comment No. 42.) The fact that the County in 1980 found that rock crushing activities on the Subject Properties constituted an "expansion" of an existing nonconforming use, coupled with the fact that North Star Rock Company applied for a conditional use permit to engage in such rock crushing on the property owned by Marian Ghidotti, also demonstrate that the mining activities as a vested right had been abandoned on the Subject Properties as of the 1960s.

Petitioner also alleges that crushing the rock constituted "mining." Petitioner asserts: "As a result of a shortage in financing, active material sales were reduced, and the Mine was held in a state of suspension with intent to resume mining operations when possible until the resumption of mining, crushing and material sales activities in the 1960's and 1970's." However, "[c]omponent parts of Idaho-Maryland Mine were sold to various entities after the gold mine closed. There does not appear to have been a single entity holding the historical mine 'in suspension' as claimed by Petitioner for future gold mining development. The waste rock crushing, removal, and sales that began in 1964 was not described contemporaneously as a resumption of historical gold mining operations." (Historian, Comment No. 81.) Such rock crushing activities were not a mining activity that prevented the abandonment of the Idaho-Maryland Mine.

4. Any Sawmill Activities That Occurred on Any of The Subject Property Since 1956 Was Not Connected in Any Way With The Mining Activities at The Subject Property**.**

Petitioner alleges that the "mining operations" that are still visible at the Brunswick Industrial Site include "tree clearing to fuel the Brunswick sawmill," and that "the sawmill was originally constructed for the exclusive use and benefit of mining operations and continued to operate during the 1960's and 1970's pursuant to Use Permits U58-15, U64-30, and U64-31." (Petition, p. 60-61.) Petitioner also alleges that "the sawmill was, at the time of its construction, an auxiliary use of the Subject Property, with the purpose of facilitating the mining operation." (Petition, p. 63.) However, "[t]he presented history of this sawmill is not complete and does not follow the operations or longevity of this sawmill. It is unclear how long the initial sawmill was operational, and to what degree, if any, it was supporting mining after the 1940s." (Historian, Comment No. 71.) "Exhibits 159, 162, and 386 cited in Footnote 631 [of the Petition] and Exhibit 387 cited in Footnote 632 [of the Petition] date to the 1940s and do not give any indication as to whether or not the Brunswick sawmill supported mining activities in the 1950s. The only cited source that dates to the 1950s is Exhibit 380 in Footnote 631 and it is a 'Flowsheet of the Brunswick Mill,' with no apparent reference to a sawmill." (Historian, Comment No. 72.) Also, the Brunswick sawmill site was completely severed, both surface and subsurface mining rights, from the rest of the Subject Property by Idaho Maryland Mine Corporation in 1956. (Pet. Exhibit 206.) Furthermore, the fact that use permits were requested, and then issued by the County in 1958 and 1965 demonstrates that the operation of a sawmill on the site was not considered by either the property owner or the County to be a use conducted pursuant to a vested right. In addition, "[t]here is evidence (Exhibit 167) that by the 1940s, the Idaho-Maryland sawmill was operating in part to produce commercial lumber. Exhibit 215 is suggestive that a new sawmill was constructed after Summit Valley Pine Mill, Inc. was issued a use permit by Nevada County." (Historian, Comment No. 68.)

5. Even When The Prices of Gold Shot Up in the 1970s, and the Market Conditions Were Therefore Favorable to Resume Mining, the Owners of the Subject Property Nevertheless Made No Efforts to Resume Mining

Petitioner asserts that, "[a]s all authorities on the subject make clear, a fundamental component of any mining operation is monitoring market conditions, like those outlined above, and holding properties in reserve as inventory until extraction and production operations are financially sensible and can recommence." (Petition, p. 72.) Therefore, Petitioner argues that "due to market conditions which stagnated the price of gold, extraction and production operations were idled until the market conditions altered such that resuming such operations would be financially sensible – i.e., when the price of gold increased." (Petition, p. 72.) However, when the price of gold did increase, dramatically, in the 1970s (way higher than Petitioner's evidence concedes is the threshold for resuming mining activities (Petition, p. 41; Pet. Exhibits 58, 269, 276)), neither the owners of the subsurface mineral rights nor the owners of the surface estate on the Subject Property engaged in activities to resume mining activities on the Subject Property. (Response To Facts, No. 26.) If, as Petitioner asserts, that the management of the Idaho Manyland Mines Corporation believed that gold prices increasing in the future "would justify reopening the Mine" (Petition, p. 72, citing Exhibits 418, 419, 420, 421, 422), then the fact that the owners of the Subject Properties did not resume gold mining in the 1970s despite the high gold prices demonstrates that such owners did not have any intent to resume mining at the Idaho Maryland Mine. In short, mining activities were abandoned because no effort to resume mining occurred during favorable market conditions in the 1970s.

Marian Ghidotti did not pursue any of the activities that Petitioner states constitute "a manifestation of intent to utilize the entirety of the surface to support subsurface gold mining operations." (Petition, p. 59.) Ms. Ghidotti did not use the surface for mining use, for stockpiling material from the mine, for using roads for mining, for maintaining infrastructure for mining, or for site preparation or exploration for mining. The Petitioner's implied excuses for Ms. Ghidotti not engaging in mining activities are unavailing. Petitioner has failed to cite any case where the court has recognized resistance from environmental groups, 'anti-mining sentiments' from neighboring residents, or 'political opposition' to mining (Petition. p. 41) as valid excuses to delay mining activities so as to prevent abandonment when "the price of gold is now rising." (Petition, p. 41.) Even if those may be valid considerations, Petitioner's own evidence demonstrates such resistance to mining operations can be overcome, if the owner truly had an intention to resume mining. (Pet. Exhibits 243, 262; Response to Facts, No. 26.)

Furthermore, the fact that Ms. Ghidotti "acquires several mining claims which she *subsequently sells* throughout the 1970's" (Petition, p. 41 (citing Pet. Exhibits 236, 237, 238, 239, 240, 241, 242)(emphasis added))), and the fact that she only purchased "surface lands … contiguous to the Centennial Industrial Site" rather than the fee simple or the mineral rights (Petition, p. 4; Pet. Exhibit 248; Response To Facts, No. 29), are evidence that Ms. Ghidotti had no intention to resume mining on the Subject Properties.

6. Marian Ghidotti's Purported Insuring of "The Mine" Fails to Evidence Any Intent for Mining

Ms. Ghidotti allegedly "insured the Mine as a mining asset in 1977." (Petition, p. 42.) However, the purported evidence provided by Petitioner (a) fails to indicate what was "the Mine" that was

insured; (b) fails to indicate what "the Mine" was insured for; (c) fails to indicate that the purported insurance policy covered the mine as an asset, or whether the policy solely protected Ms. Ghidotti from liability for uses on the surface; and (d) fails to explain why Ms. Ghidotti would insure "the Mine" for only one year, over fifteen (15) years after she acquired ownership of the Subject Properties. Petitioner does not even produce a copy of any insurance policy with the Petition to back up any of the statements about that insurance event in 1977. Indeed, the statement about "insur[ing] the Mine as a mining asset" is vague and ambiguous; how and why would an insurance policy even do that if there are no mining operations going on? Thus, the alleged insurance policy in 1977 does not establish Ms. Ghidotti's intent to resume mining on the Subject Property.

7. The Long Cessation of Mining Activity on the Subject Properties Evidences an Intent to Abandon The Idaho Maryland Mine

Petitioner argues that "[i]t has long been recognized that mining property rights are not abandoned by a lapse of time," and that "the California Supreme Court found that suspension of mining activity alone does not constitute abandonment of the vested use." (Petition, p. 54 & fn. 554, citing *Hansen Brothers, supra,* 12 Cal.4th at p. 570, fn. 28).) In fact, what the Court actually stated in *Hansen Brothers.* is that "[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*." (12 Cal.4th at p. 569.) Here, the nearly seventy (70)-year cessation of mining activities on the Subject Property demonstrates abandonment. Petitioner fails to cite any case where a court has held that a nonconforming use was not abandoned after such a lengthy period when the nonconforming use had ceased. The position taken by Petitioner in this case would thwart the public policy recognized in *Hansen Brother*s to reduce nonconforming uses:

> "The ultimate purpose of zoning is … to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interest of those affected." We have recognized that, given this purpose, courts should follow a strict policy against extension or expansion of those uses. That policy necessarily applies to attempts to continue nonconforming uses which have ceased operation. [*Id.* at p. 568, citations omitted.]

Petitioner does not deny that mining activities ceased at the Idaho Maryland Mine for a very long period of time. That fact, in addition to the fact that no mining equipment or buildings to conduct mining operations existing on the site during that entire time since 1957, warrants the conclusion that mining at the Idaho Maryland Mine was abandoned.

D. When it Occasionally Issued Conditional Use Permits, The County Did Not Recognize Any Vested Rights for The Subject Property

In 1958, the County issued a use permit (U58-15) that authorized the *construction* and operation of a sawmill on the Brunswick site. (Response to Facts, No. 14; Pet. Exhibit 215.) The issuance of that use permit demonstrates the applicant Summit Valley Pine Mill, Inc.'s and the County's understanding that there was no vested right for such use, because a vested right would have precluded the need for such a permit.

The fact that North Star Rock Products applied in 1979 for a conditional use permit for a rock crushing operation (Petition, p. 42; Pet. Exhibits 251) demonstrates the understanding by the owner (Ms. Ghidotti) and the North Star Rock Products that vested rights did not exist on the site for such rock crushing operation. That application provided that "Aggregate only; no precious metal extraction" (Pet. Exhibit 251) further evidencing an understanding that mining operations to extract gold were not allowed. The consultant for the applicant stated:

> Existing Uses
> The project site is unused except for the occasional removal of rock and sand waste by the owner of the property. Lumber is also stored on the property.
>
> Existing Structures
> The only remaining structures on the site are two concrete towers which were used as the mill sand pond overflows and a small rock bridge abutment [Environmental Information Form: Idaho-Maryland Mine Rock Crushing Project, p. 10 (Exhibit 251).]

Thus, the consultant for the applicant recognized that the rock crushing operations, if any, had long since stopped and the equipment for such rock crushing, if any existed, was no longer on the property. The consultant's statements evidence abandonment of rock crushing operations on the property, even if they had existed fourteen (14) years earlier in the mid-1960s.

When the County granted conditional use permit U79-41 for such rock crushing operation in 1980 for a maximum period of four (4) years (Petition, pp. 42, 68; Pet. Exhibit 251, p. 26; Pet. Exhibit 254, p. 10; Response to Facts, Nos. 31, 32), neither the Board of Supervisors nor the Planning Commission ever made a formal determination of vested rights. (Exhibit 252.) Indeed, "the intended activities to be covered by the use permit do not appear consistent with historical gold mining activity." (Historian, Comment No. 47.)

Petitioner's argument that the County's permit "recognized the rock crushing activities as a vested right" (Petition, p. 71) is simply false. County staff wrote in a Memorandum that "[t]his permit is being processed as an *alteration* of an existing, non-conforming use." (Pet. Exhibit 251) (emphasis added).) The County Staff report (Pet. Exhibit 252) similarly states that the rock crushing was an "expansion" of the existing non-conforming use. The Staff report explains: "It is noted that the provisions of the 'M1' Light Industrial District in which the subject property is located do not allow gravel harvesting and processing as permitted or conditionally permitted uses. However, the property owner has indicated that mine rock has been sold and taken from the property continuously since the mine closed, and so *this use permit application is for* *expansion* *of an existing, non-conforming use* *by the addition* *of a crusher and screening plant*." (Pet. Exhibit 252 (emphasis and underline added).) Thus, rock crushing was an "alteration" or "expansion" of the "existing, non-conforming use" that was described by the consultant for the applicant as the "occasional removal of rock and sand wastes by the owner of the property." County Staff never recognized the rock crushing activities as the "existing, non-conforming use."

The fact that the Minutes of the Planning Commission hearing for Permit U79-41 states that "[t]he Hansen operation is predicated to last 200 years, and the Abbott operation is predicted to last 4 years" (Pet. Exhibit 254, pp. 10-11), demonstrates that the County unequivocally distinguished the

rock crushing activity here from the aggregate production operations described in the *Hansen Brothers* case.

Furthermore, the comment at that hearing that "Mrs. Ghidotti who owns the property intends to put it to some use other than a horse ranch in the future, because it is zoned Industrial, and there has been some consideration of re-opening the mine because of the price of gold" (Pet. Exhibit 254, p. 11) is not any recognition of any vested rights to resume mining on the Subject Property. That statement implicitly recognizes that "Re-opening the mine" could potentially be accomplished with a conditional use permit. Also, that statement indicates "that Marion Ghidotti (the owner, ca. 1980) was using the property as 'horse ranch' and was 'consider[ing]… re-opening the mine because of the price of the gold.' This implies that the historical Idaho-Maryland Mine was closed, and no mining operations were occurring." (Historian, Comment No. 7.)

Petitioner argues that "the County has already approved and acknowledged the vested right to continue mining operations at the Subject Property as of 1980." (Petition, p. 67.) Not so. The Planning Department's "Notice Of Conditional Approval: Use Permit Application, for Use Permit No. U79-41 (Pet. Exhibit 252) explicitly states: "The use permit covers only removal of mine waste and processing to restore the site to its original contours. Earth excavation for a borrow pit is not included." Also, the Notice states: "No material beyond the depth of rock waste material shall be removed from the site." At no time did the Planning Commission make any findings or determination either in the Notice (Pet. Exhibit 252) or at the public hearing (Pet. Exhibit 254) of the scope of the vested rights of the Idaho Maryland Mine. (Response To Facts, No. 32.) In short, Petitioner's allegation that "the County vested the right to mine for the entire Vested Subject Property" (Petition, p. 67) is simply wrong.

E. Other Actions and Omissions by the Owners of The Subject Property in the 1970s and 1980s Demonstrate an Intent to Abandon The Mining Use

1. There is No Credible Evidence that Marian Ghidotti Left The Subject Property to the BET Group Because of Her Expectation that the BET Group Would Resume Mining

Petitioner argues that Marian Ghidotti left the "Subject Property to the BET Group" because "she believed the group would be capable of resurrecting the Mine," because she "knew that each of these individuals wished for the Mine to resume operations, and believed they could make this happen using their professional skills and training," and "because of her belief that they had the wherewithal and skillset to facilitate the development of the Subject Property back into production." (Petition, pp. 5, 42-43.) There is no credible evidence to support those assertions. Petitioner cites the Declaration of Lee Johnson, which lacks foundation and personal knowledge of these matters. (Responses To Facts, No. 33.) That statement about what another person other than the declarant (i.e., Ms. Ghidotti) thought or believed or knew is sheer speculation without any substantial evidence in support. (*See People v. Perez* (1992) 2 Cal.4th 1117, 1133 ["To be sufficient, evidence must of course be substantial. It is such only if it "reasonably inspires confidence and is of 'solid value.' By definition, 'substantial evidence' requires evidence and not mere speculation."]) That statement about what another person other than the declarant (*i.e.*, Ms. Ghidotti) "knew," and about what yet three other persons who comprised the BET Group "wanted," constitutes multiple layers speculation without any substantial evidence in support. (*Ibid*.) Furthermore, "[t]he source(s) of Ghidotti's belief - both why she possessed this stated

conviction and the recordation of her conviction - are unstated here. Individual beliefs, without attribution to documentation, cannot be evaluated historically." (Historian, Comment No. 8.)

Also, "[a]s a historical source, a declaration such as Lee Johnson's (Exhibit 227) is problematic, particularly for the factual assertions made here. Both historical study and scientific research have revealed the unreliability (and even instability) of human memory. Historical interpretation is based upon a critical examination of documentation made at or near the occurrence of an event. Memoirs and reminiscences often drafted years after an event are consulted as sources but treated with caution. Corroboration from sources closer or contemporaneous in time with the events described are frequently sought. Relying on this declaration to ascertain William and Marian Ghidotti's thoughts or intentions - in the absence of independent supporting documentation - is methodologically suspect for a historian." (Historian, Comment No. 44.)

For example, the statement in the Declaration of Lee Johnson that "[t]he entire time Marian Ghidotti and Bill Ghidotti owned the Mine … neither thought the Property would be used for anything except for mining and were convinced that the Mine would be operational again in the future" (Pet. Exhibit 227) is sheer speculation without any substantial evidence in support. (*See People v. Perez, supra,* 2 Cal.4th at p. 1133.) Nowhere does Mr. Johnson state where he obtained his knowledge of what Marian Ghidotti and Bill Ghidotti "thought."

Similarly, there is no evidence whatsoever presented by Petitioner supporting the assertion that, "[Marian Ghidotti and Bill Ghidotti] thought they could potentially reopen the Mine themselves." (Petition, p. 43.) No evidence in the Declaration of Lee Johnson (Pet. Exhibit 227) supports or even mentions that assertion. Nor is there any evidence presented by Petitioner that demonstrates any efforts actually taken by either Marian Ghidotti or Bill Ghidotti to "reopen the Mine themselves." Such allegations are simply made up by the Petitioner.

2. The Owners of The Subject Property Did Not File a Notice of Intent to Preserve an Interest in The Subsurface Mineral Rights Until 1989, Many Years After the Marketing Title Act was Enacted

Petitioner points out that the BET Group in 1989 "records a Notice of Intent to Preserve Interest in all mineral rights and interests in minerals." (Petition, p. 45.) However, that action by the BET Group does not refute the conclusion that mining at the Idaho Maryland Mine was abandoned. The "Notice of Intent to Preserve Interest" was recorded on December 8, 1989, "pursuant to Title 5 (commencing with Section 880.020) of Part 2 of Division 2 of the Civil Code (Marketable Record Title)." (Pet. Exhibit 275.) That recordation took place over seven (7) years after the enactment of the Marketable Record Title, Civ. Code 880.020, *et. seq*., by Stats. 1982 ch. 1268 § 1. Civil Code section 880.310 provides:

> (a) If the time within which an interest in real property expires pursuant to this title depends upon recordation of a notice of intent to preserve the interest, a person may preserve the person's interest from expiration by recording a notice of intent to preserve the interest before the interest expires pursuant to this title. Recordation of a notice of intent to

> preserve an interest in real property after the interest has expired pursuant to this title does not preserve the interest.
>
> (b) Recordation of a notice of intent to preserve an interest in real property does not preclude a court from determining that an interest has been abandoned or is otherwise unenforceable pursuant to other law, whether before or after the notice of intent to preserve the interest is recorded and does not validate or make enforceable a claim or interest that is otherwise invalid or unenforceable. Recordation of a notice of intent to preserve an interest in real property creates a presumption affecting the burden of proof that the person who claims the interest has not abandoned and does not intend to abandon the interest. [Emphasis added.]

The Petitioner does not explain why the BET Group waited over six (6) years after the enactment of Civil Code section 880.301 to record the Notice of Intent. Furthermore, the BET Group's recording of the Notice of Intent did not validate any interest that was otherwise invalid or unenforceable as of the time the Notice was recorded. (Civ Code, § 880.310, subd. (b); 5 Miller & Starr, Cal. Real Estate (3d. ed. 2000) § 11.62, p. 168.) Indeed, the filing of a Notice of Intent to Preserve Interest (Pet. Exhibit 275) appears to be affirmative evidence of an intent to retain whatever mineral rights may have been held by Bouma, Erickson, and Toms. However, no explanation is offered as to why Bouma, et al., made this filing in 1989. From a reading of the historical evidence presented thus far in the petition, the filing would appear to reflect concern that a question surrounded the purported efficacy of the rights, that a threat of extinguishment existed. (Historian, Comment No. 58.)

In short, the recordation of the Notice of Intent does not avoid the conclusion, and actually supports the conclusion, that any vested mining rights that existed in 1954 for the Idaho Maryland Mine were abandoned.

3. <u>The Successors to Marian Ghidotti, and the Predecessors to Rise Gold, Sold Off a Portion of The Subject Property for Residential Purposes</u>

In the 1980s, the successors of the Ghidottis, the BET Group, sold off a portion of the surface area of the Subject Properties for residential development. (Petition, pp. 5, 44, 73; Pet. Exhibit 263.) That evidenced their intent to abandon the mine as to those sold-off properties because (1) the gold prices were very high during that time (Pet. Exhibit 58); (2) creating neighboring residential homes would actually create the very "anti-mining" residential environment that Petitioner infers prevents gold mining activities in the 1970s and 1980s (Petition, pp. 41, 43); and (3) the real estate broker for the BET Group has stated: "*At no time during my representation of the BET Group did they ever consider reopening or operating any mining activity.* They were well aware of the toxic contamination on site and had limited resources to deal with soil contamination, let alone reopening and operating a gold mine." (Declaration of Charles W. Brock, ¶5.) Furthermore, the fact that the residential lots were sold off with a reservation of the mineral rights (Petition, pp. 44-45; Pet. Exhibits 265, 266, 267, 270, 271, 272, 273.) does not indicate an intent to resume mining at the Idaho Maryland Mine. "Reservation of mineral and other subsurface rights with the creation

of residential subdivisions is fairly typical, and in the absence of other evidence of an intent by BET Group to mine this alone does not support such a claim." (Historian, Comment No. 56.)

4. <u>The Use Permits Sought in the 1980s And 1990s do Not Evidence a Vested Right to Mine</u>

The "multiple applications for permits consistent with the intent to reopen the Mine and resume mining activities" in the late 1980s and early 1990s (Petition, pp. 71 -74) is evidence that the owners of the Subject Property understood that such "permits" were needed for such activities, and that such activities could not be conducted pursuant to any vested rights. Furthermore, at no time during the issuance of those permits did the County recognize any vested rights for mining. For example, "[i]nto 1985, no evidence is presented as to an effort to revive mining at the historical Idaho-Maryland Mine. North Star Rock Company instead continues its operations under an amended use permit." (Historian, Comment No. 53.) Use Permit U85-025, is then granted at North Star Rock Company's request in 1985 (Petition, p. 43; Pet. Exhibits 259, 260) because the company had "processed mine tailings from these historic mines until 1985 when the tailings were exhausted." (Pet. Exhibit 278).) County Staff explained:

> [T]his application is a proposed amendment to one issued in 1979 by the Nevada County Planning Commission (U79-41). That permit was issued to this applicant for the purposes of processing existing mine rock left on-site from earlier quartz mining activities. The purpose of processing this material was to crush it to produce road base rock material. *These on-site deposits are currently exhausted.* The primary purpose of this application is to receive the graded material to be taken from the proposed (and not yet approved) Wolf Creek Plaza site adjacent and to the south-west and also to process rock material extracted through that grading process. The graded material taken from the Wolf Creek Plaza site will be placed in an engineered fill on this site as part of this application. [Pet. Exhibit 259, emphasis added.)]

The use permit was similar to that issued earlier in 1980. Specifically, the "Notice Of Conditional Approval Use Permit Application," for Use Permit No. U85-25, includes condition number 11, which states that "[t]he use permit covers only removal of mine waste and processing to restore the site to its original contours," and condition number 12, which states that "[t]his permit covers the processing of rock material from off-site locations for a maximum of five years." (Pet. Exhibit 260.) The Notice also provides that "No material beyond the depth of rock waste material shall be removed from the site." (Pet. Exhibit 260.) In short, under Use Permit U85-025 the County still did not recognize any vested right for mining activities at the Idaho-Maryland Mine.

Furthermore, the actions and studies performed for the BET Group or lessees of the BET Group demonstrated that any vested rights for mining at the Idaho Maryland Mine had been abandoned. For example, in 1989 the "Proposal: Permitting Feasibility Study, Reactivation Project for the Idaho-Maryland-Brunswick Mine" (Pet. Exhibit 262) states: "Last production from the complex occurred in 1956 and *the mine has been idle for the last 32 years*." (Emphasis added.)

Also, the additional use permit obtained by North Star Rock Products, Inc. in 1992 (Petition, pp. 45-46, 73), demonstrates that the company still understands that its operations at the Idaho

Maryland Mine site required a use permit, and could not be conducted pursuant to any vested rights. (Responses To Facts, No. 43.) Also, the issuance of such use permit again did not represent the County's recognition of any vested rights, as the permits were limited in duration and use. (Responses To Facts, No. 43. See Pet. Exhibit 278 [10-year limit; "No expansion of current mining methods or product sales is proposed"].)

In addition, there is no indication by any of the companies that leased the Subject Properties from the BET Group that they understood there were existing vested rights to mine at the Idaho-Maryland Mine. For example, Mother Lode Gold Mines "options the Subject Property" and enters a "mining lease" with BET Group, but then relinquished its interest after only three (3) years. (Petition, 44-45; Pet. Exhibit 276.) "No explanation is given why Mother Lode Gold Mines 'relinquishes and returns the Subject Property' to BET Group only 3 years after acquiring its option. This once again raises questions as to the state of knowledge regarding the historical Idaho-Maryland Mine's viability." (Historian, Comment No. 59.) Then Consolidated Del Norte Ventures leases the Subject Properties from the BET Group (Petition, pp. 45-46; Pet. Exhibit 276), but "[n]o explanation is given for why Consolidated Del Norte Ventures relinquished its lease 2 years later." (Historian, Comment No. 60.) Those companies never indicated that there were vested rights to mine at the Idaho-Maryland Mine.

Then Emperor Gold Corporation (later Emgold Mining Corporation) leases the Subject Properties from the BET Group, holds an option to purchase the properties, obtains a permit to dewater the mine, and conducts exploration surface drilling. (Petition, pp. 46-48.) Emgold states the following in an announcement on June 17, 2003, which recognized the necessity to obtain a conditional use permit to reopen the mine, and not do so via vested rights:

> Emgold, through its wholly owned subsidiary, Idaho-Maryland Mining Corporation (formerly Emperor Gold (U.S.) Corp.) is also preparing the necessary documentation to submit applications to acquire a Use Permit to construct a decline and surface facilities to continue with the underground exploration and development of the Idaho-Maryland and ultimately put the mine back into production. It is anticipated that permitting will cost approximately US$500,000 and is expected to take fifteen to twenty-four months to complete. Emgold is confident that it will be able to obtain a *Use Permit* for the Idaho-Maryland. Since the early 1960's, 37 gold mines have applied for *permits in California and all have been approved and allowed to go into operation. Since 2002 three gold mines have received Use Permits to operate in California*. [Pet. Exhibit 294, emphasis added.]

An Emgold Press Release similarly stated: "The City of Grass Valley, California (the 'City') is nearing completion of the Draft Environmental Impact Report ('DEIR') for the Idaho-Maryland Gold Mine Project (the 'Project') which is expected to be published in late September or early October of 2008." (Pet. Exhibit 303.) "It is expected that the FEIR will be certified near the end of 2008. Upon approval of the Project by the Planning Commission and City's Council a *Conditional Mine Use Permit* will be issued for the Project." (Pet. Exhibit 303, emphasis added.) Again, Emgold announced: "The Planning Commission [for the City of Grass Valley] will be asked to review the entitlements for the Project which include a *Conditional Mine Use Permit (CMUP)*. (Pet. Exhibit 304.) "These are additional applications that were included as submissions to the City that also require *formal approval to allow the Project to move forward*." (Pet. Exhibit 304,

emphasis added.) "Assuming the FEIR is certified and entitlements approved by City Council, *final operating permits* would be obtained for the Project." (Pet. Exhibit 304, emphasis added.) "Emgold is permitting the operation of a 2,400 ton per day gold mine and gold processing facility as part of the Idaho-Maryland Project. Upon successful *completion of mine permits*, Emgold's plan is to become a mid-tier producing gold company within the next 5 years." (Pet. Exhibit 304, emphasis added.) After Emgold allows the lease and purchase agreement to expire, the advertisement to purchase the Subject Properties form the BET Group states: "From 2002 to 2012, Idaho Maryland Mining Corporation, a subsidiary of Emgold Mining Corp., under agreement with the mine owners, conducted studies, investigations, sampling, testing, etc. at the Idaho Maryland Mine and applied to California and local regulating agencies for *permission to reopen the mine*. (Pet. Exhibit 307, emphasis added.)

Thus, the companies that sought to resume mining on the Subject Property understood that a use permit would be needed to mine because there is no vested right. None of their efforts to resume mining support the Petitioner's position that there presently are vested rights to mine the Subject Property.

5. <u>Sierra Pacific's Application to Rezone the Property in December 1993, Demonstrates an Intent Not To Engage in Mining</u>

Petitioner mentioned that in 1993 "Nevada County rezones the sawmill property, including ET Acres Lot 8, to M1-SP to allow for 'service maintenance and repair, manufacturing and processing, warehousing and distribution facilities … office, professional and conference facilities." (Petition, p. 46 (citing Pet. Exhibits 281, 282).) Petitioner highlights the statement in the Minutes of the Board of Supervisors Meeting on December 14, 1993, that a representative of Sierra Pacific explained the Company's intent to use the site for "industrial purposes." (Id., p. 46 (citing Exhibit 282).) However, Petitioner omits the Staff analysis that explains: "As a result, [the rezone] would also show that the County prefers some type of mixed industrial/business park uses." (Pet. Exhibit 282, p. 425.) Indeed, the rezone imposes "more restrictive site development standards than would otherwise apply." (Exhibit 282, p. 426.) The "examples" of "industrial" uses in the Ordinance under those development standards does not include mining at all. (Pet. Exhibit 281 (Ordinance No. 1853) pp. 17-18.) Thus, contrary to Petitioner's argument, mining was not intended by Sierra Pacific for that "sawmill property, including BET Acres Lot 8."

6. <u>The BET Group Did Not Sell Off The Subject Property they Still Owned to Rise Gold as a Mine, and Even Rise Gold Recognized the Need to Obtain a Conditional Use Permit</u>

The real estate broker even commented to the newspaper: "We are not selling a mine." (Declaration of Charles W. Brock, ¶ 7). Indeed, the asking price was not based on comparable sales of existing mining assets or properties, or potential gold reserves on the Subject Property, but on "comparable sales of similarly zoned light industrial and residential properties." (Declaration of Charles W. Brock, ¶ 7.)

After Petitioner purchased the Subject Property, and after it conducted an exploration drilling program, Petitioner "applie[d] to the County of Nevada for a *use permit to re-open the Idaho-Maryland Mine* and is fully financed to complete the *permitting* process." (Petition, p. 49

(emphasis added).) Thus, even Petitioner recognized that a conditional use permit would be needed, because there is no vested right to mine.

Petitioner argues that "courts have determined that applying for and/or acquiring a use permit does not abandon or otherwise extinguish a vested right," citing *Goat Hill Tavern v. city of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1529, in support of that premise. (Petition, p. 55.) However, *Goat Hill Tavern* never discusses that premise, and never makes such a rule. In that case, "Goat Hill Tavern ha[d] been in operation for over 35 years as a legal nonconforming use. Ziemer invested over $1.75 million in its refurbishment, including substantial exterior facade improvements undertaken at the city's behest. He then sought a conditional use permit to allow the addition of a game room, which was granted on a temporary basis." (*Ibid*.) Not only are those facts distinguishable from the abandonment of a "legal nonconforming use," the court in that case never considered or decided the rule of law suggested by Petitioner. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.) Thus, the case law cited by Petitioner does not support Petitioner's position; and the fact that Petitioner, Emgold and others have sought use permits to conduct activities on the Subject Properties indicates a consistent and unbroken understanding (until 2023) that a conditional use permit, and not vested rights, was needed in order to resume mining activities at the Idaho Maryland Mine.

F. <u>Petitioner Has Failed to Comply With State Law and the County Development Code for Reclamation Plans and Annual Reporting and Such Failure Means The Mine is Considered Abandoned According to State Law</u>

In Petitioner's letter dated November 16, 2023, it alleges that Public Resources Code section 2776, subdivision (c), should be interpreted as stating that the owners of the Subject Properties were never required to submit a reclamation plan and are not required to submit annual reports. (Chadwick Letter to the Board, November 16, 2023, p. 11.) This interpretation is inconsistent with the plain reading of the statute and would render portions of SMARA meaningless.

1. <u>SMARA's Reclamation Plan Requirements Apply to Mine Owners Even If They Possess Vested Rights</u>

Public Resources Code section 2776, subdivision (c), states, "nothing in this chapter shall be construed as requiring the filing of a reclamation plan for, or the reclamation of, mined lands on which surface mining operations were conducted prior to January 1, 1976." (See also Nevada County Development Code Section L-II 31B.4.D.E.) Notably, reclamation is a term defined in the statute as follows:

> "Reclamation" means the combined process of land treatment that minimizes water degradation, air pollution, damage to aquatic or wildlife habitat, flooding, erosion, and other adverse effects from surface mining operations, including adverse surface effects incidental to underground mines, so that mined lands are reclaimed to a usable condition that is readily adaptable for alternate land uses and create no danger to public health or safety. The process may extend to affected lands surrounding mined lands, and may require backfilling, grading, resoiling, revegetation, soil

> compaction, slope stabilization, or other measures. (Pub. Resources Code, § 2733.)

Read with this definition in mind, Public Resources Code section 2776, subdivision (c) means that, SMARA does not require the retroactive submission of a reclamation plan for the mining activity previously conducted. Put another way, SMARA looks forward, not backward. In that regard, SMARA requires a reclamation plan for all mining activity conducted or to be conducted after January 1, 1976. (Pub. Resources Code, § 2776, subd. (b).) A contrary interpretation would render Public Resources Code section 2770, subdivision (b) meaningless – "A person with an existing surface mining operation who has vested rights pursuant to Section 2776 and who does not have an approved reclamation plan shall submit a reclamation plan to the lead agency not later than March 31, 1988." This is also supported by the current version of the County's Development Code, which provides in pertinent part:

> Where a person with vested rights has continued surface mining in the same area subsequent to January 1, 1976, he/she shall obtain County approval of a Reclamation Plan covering the mined lands disturbed by such subsequent surface mining. In those cases where an overlap exists (in the horizontal and/or vertical sense) between pre- and post-Act mining, the Reclamation Plan shall call for reclamation proportional to that disturbance caused by the mining after the effective date of the Act (January 1, 1976). (Nevada County Development Code Section L-II 3.22(E).)

Accordingly, SMARA and the County's reclamation plan requirements do apply to vested rights holders. The Petitioner's failure to comply constitutes additional evidence of their lack of intent to mine.

2. <u>Contrary to Petitioner's Assertions, Pub. Resources Code Section 2776(C) Does Not Negate the Annual Reporting Requirements of Section 2207</u>

Petitioner's November 16, 2023 letter further asserts that the annual reporting obligations of mine owners codified in Public Resources Code section 2207 are negated by Public Resources Code section 2776, subdivision (c). However, the language of section 2776, subdivision (c) is limited to Chapter 9, SMARA, of Division 2, Geology, Mines, and Mining, of the Public Resources Code, and is further limited to not requiring the reclamation of pre-1976 surface mining. (Pub. Resources Code, § 2776, subd. (c), ["Nothing in this chapter shall be construed as requiring the filing of a reclamation plan for, or the reclamation of, mined lands on which surface mining operations were conducted prior to January 1, 1976."].) Annual reporting is a requirement applicable to either owners or operators of mines within California which is separate from SMARA's reclamation plan provisions. (Pub. Resources Code, § 2207.) Rather, the annual reporting requirements are part of Chapter 2, the California Geological Survey, and require mine owners to report, in part, "the mining operation's status as active, idle, reclaimed, or in the process of being reclaimed." (Pub. Resources Code, § 2207.)

Accordingly, the owner or operator of the Subject Property was required to submit an annual report pursuant to Public Resources Code section 2207. However, the County is unaware of, and the Petitioner has failed to provide, any documents indicating this has occurred. This failure further demonstrates the lack of intent to mine.

3. The Actions of Petitioner's Predecessors in Interest in Permitting Rock Processing and Submitting a Reclamation Plan for The Idaho-Maryland Mine Demonstrate The Petitioner Understands The Mine Must Comply With SMARA

In 1980, the then owners of the Subject Property obtained Use Permit U79-41 for the "harvesting, crushing, screening, and sale of existing mine rock and tailings at the Centennial Industrial site." (Petition, p. 42.) The Petitioner asserts that these surface activities of harvesting and processing waste rock are inextricably linked to the regular operations of the gold mine. (November 16, 2023 Letter to the Board, p. 11.) If Petitioner is correct that the two activities are inherently part of the same operation, then the use permit received in 1980 would not have been necessary if they possessed a vested right for those activities.

With that in mind, Use Permit U79-41 *was* obtained and a Surface Mining Reclamation Plan for the Idaho-Mayland Mine Rock Crushing Project (the "Reclamation Plan") was required:

> This use permit application involves only about 40 acres out of the 110 acres, and this 40 acres [sic] is covered with mill sand and rock left from the historic hard rock mining operation. The application and reclamation plan indicates that approximately 400,000 to 500,000 tons of rock (270,000 cubic yards) and 10,000 tons of mill sand will be removed from the site. It is intended that the site will then be restored to its original contours and form, reclamation plan and ARC memo are attached for a complete understanding of the project which will also include a crusher and screening plant to process the waste rock and sand. (Petition, Exhibit 251, 1980 Use Permit No. 79-41.)

The Reclamation Plan required that the 40 acres involved in the 1980's rock crushing operations be reclaimed and restored to a condition that was either (1) graded to the contours of the land before it was covered with waste rock, or (2) leveled with a culvert drainage pipe installed to prepare the land for an "easy transition" to alternate uses. (Petition, Exhibit 251, Reclamation Plan, ¶ 23(a).) It was further required that reclamation of the site, "will end surface mining and storage of the waste rock."

4. When Petitioner's Mine Went Idle, They Were Required to Comply With SMARA and the County Development Code to Avoid Abandonment

As explained in Section D(IV)(B), above, SMARA defines a mine as "idle" when its production has been curtailed for at least one year *and* there is an intention to resume mining activities in the future. (Pub. Resources Code, § 2727.1.) Within ninety (90) days of a mining operation becoming idle, mine operators are required to submit an interim management plan to the lead agency. (Pub. Resources Code, § 2770 and Nevada County Development Code Section L-II 3.22(L).) The County is unaware of, and Petitioner has failed to provide, any evidence of any interim management plan for the Centennial Site when surface processing operations ceased. Accordingly, if the mining activities have stopped and there is no interim management plan, then state law dictates that the cessation cannot be considered an "idle mine" under Cal. Pub. Resources Code

section 2727.1 (i.e., cessation with an intent to resume mining). Instead, the mine is considered abandoned.

This is consistent with California case law and policy concerning zoning changes and the temporary nature of nonconforming property uses. (See *Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 459 ["It was not and is not contemplated that pre-existing nonconforming uses are to be perpetual"].) Further, SMARA's statutory provision defining an "idle" mine as, in part, a mine in which the operator intends to resume mining activities in the future and its provision establishing abandonment of the mining operation as the consequence of failure to comply with SMARA's interim management plan requirements during the mine's period of idleness are referential to one another. (See Pub. Resources Code, §§ 2727.1 and 2770(h)(6).) Read together, these portions of the statute reflect a policy determination by the California Legislature that mining operators who have curtailed production of their mine cannot be considered to have the intent to resume mining operations in the future, and therefore maintain the status of "idle," if they do not comply with SMARA. Failure to have a reclamation plan in place, and submit an interim management plan for idle mines, means the operator has chosen to abandon their mine, pursuant to state law.

Nevada County's Development Code further supports the interim management plan requirement:

> If the [nonconforming] use is discontinued for a period of one year or more, any subsequent use shall be in conformity with all applicable requirements of this Chapter, except as follows: a) uses clearly seasonal in nature (i.e., ski facilities) shall have a time period of 365 days or more, b) surface mining operations shall comply with the provisions of Section 3.22.L providing for interim management plans. (Nevada County Development Code Section L-II 5.19(B)(4).)

Therefore, as Petitioner has failed to submit an interim management plan following the cessation of mining activity on the Subject Property, whether gold mining or otherwise, state and local law compel a determination that the mining use of the Subject Property has been abandoned.

VIII. CONCLUSION

Pursuant to the Petitioner's requests, the County makes the following determinations with regard to the Subject Property:

1. Mining operations were abandoned at the Subject Property commencing as early as 1956;

2. Neither the Petitioner nor any other party has a vested right to mine at the Subject Property.

PUBLIC TESTIMONY RECEIVED REGARDING VESTED RIGHTS:

The County of Nevada received testimony from multiple residents, property owners, or other individuals with knowledge of historical activities on the Subject Property. No testimony was received that provided evidence of subsurface mining operations since 1957.

ENVIRONMENTAL REVIEW:

The County's action to approve the Resolution finding that neither Petitioner nor any other party has a vested right to mine at the Subject Property as the mining use was abandoned does not constitute a discretionary action subject to CEQA. The CEQA Guidelines define a "discretionary project" as a "*project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations, or other fixed standards. The key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve a project.*" (Cal. Code Regs., tit. 14, § 15357, emphasis added).

In this case, the County is functioning in a quasi-judicial capacity to make findings of fact based on a review of evidentiary materials supplemented by the Petitioners to support its claim of vested mining rights (i.e., a property right). The County's findings of fact are based on other evidentiary materials in the record including the County's own investigation of the facts, evidence received from the community and evidence received from federal, state or local regulatory agencies. County staff note that future actions to approve a Reclamation Plan or other land use entitlement may be subject to environmental review pursuant to CEQA and Guidelines.

SUMMARY:

In conclusion, staff recommend that the Board of Supervisors make a finding that the Petitioner has abandoned the mining use on the Subject Property. If the Board of Supervisors makes this finding, and if the Petitioner intends to pursue mining operations at the Subject Parcel, the Petitioner would be required to obtain a Use Permit. Therefore, this determination regarding vested rights is exempt from CEQA because it is not a project as defined by CEQA Guidelines Section 15378.

RECOMMENDATION:

Nevada County staff recommend that the Board of Supervisors take the following actions:

I. Environmental Action: Find the action statutorily exempt pursuant to section 15378 of the CEQA Guidelines from the requirement to prepare an EIR or a Negative Declaration for the approval of a Resolution finding that the Petitioner does not have a vested right to mine due to abandonment of the mining uses at the Subject Property ("**Resolution**"). The County's action to adopt the Resolution does not constitute a project that is subject to CEQA and the CEQA Guidelines.

II. Action: Adopt the Resolution finding that neither the Petitioner nor any other party has a vested right to mine at the Subject Property, as the mining use was abandoned (**Attachment 1**), and make the following findings, pursuant to Chapter 9 of the California Public Resources Code, Sections 2710, *et seq.*, known as the "Surface Mining and Reclamation Act of 1975," and Nevada County Land Use and Development Code Section L-II 3.21:

A. That the proposed action is consistent with SMARA statutes and regulations; and

B. That the County has regulatory authority and responsibility as the SMARA lead agency pursuant to Section L-II 3.22.D.1 of the Nevada County Land Use and Development Code and Public Resources Code Section 2728; and

C. That the proposed action is deemed necessary to protect the public health, safety, and general welfare.

Item Initiated by: Katharine Elliott, County Counsel

Approved by: Brian Foss, Planning Director