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

Re: **Idaho-Maryland Mine Vested Right Petition**

To the Board of Supervisors:

We write on behalf of Rise Grass Valley, Inc. ("Rise"), the owner of the property comprising the Idaho-Maryland Mine, regarding the Board Agenda Memorandum of November 28, 2023 (the "Memorandum"). The Memorandum's recommendation that the Board of Supervisors deny Rise's vested right petition is based on insupportable legal and factual errors. This letter draws your attention to some of those errors.[1] Because of these errors, we urge you to reject the Memorandum and its recommendation. The facts and law support Rise's vested right petition and do not support any finding that the vested right to mine at the Idaho-Maryland Mine has been abandoned.

*First*, the Memorandum refuses to acknowledge that the right to mine vested in the Idaho-Maryland Mine property in 1954, even though the Memorandum can cite *no evidence* to dispute Petitioner's showing that the right to mine vested at that time. The Memorandum concedes that "mining was occurring on the Subject Property in 1954, following the passage of [Nevada County's zoning] Ordinance No. 196." Memorandum at 11. That is the essential fact that demonstrates the existence of a vested right to mine the Idaho-Maryland Mine beginning in 1954. Yet the Memorandum concludes without support that "the Petition lacks sufficient evidence to support an affirmative conclusion regarding the existence or scope of Petitioner's alleged vested right." *Id*. at 13. That conclusion is inconsistent with the Memorandum's own statement two pages earlier, *id*. at 11, and is inconsistent with the evidence Rise has submitted—evidence the Memorandum does not refute at all. *Id*. at 13 (two paragraphs citing *none* of the evidence put forward by Rise, yet concluding that "Petitioner does not confirm" that regulated activities were occurring in 1956 or that "they occurred within one thousand (1000) feet of a public road"). In fact, Rise's evidence clearly establishes that activities regulated by Nevada County's zoning Ordinance No. 196 were occurring at the Idaho-Maryland Mine in 1956 and were occurring within 1,000 feet of a public road. December 10, 2023, Rise Letter re: "Board Agenda Memo for Idaho

[1] The December 10, 2023 letter from Christopher Powell of Hansen Bridgett LLP on behalf of Rise provides important additional information about the Memorandum's flaws.

Maryland Mine Vested Rights Petition, at 1–3 ("December 10 Letter"). There is no evidence to the contrary.

*Second*, the Memorandum admits that the burden of proof in an abandonment case falls on *the party asserting abandonment*, and yet the Memorandum repeatedly does the opposite and imposes a duty on Rise to prove an intent to mine since 1956. Memorandum at 24–25. In a section titled "The Burden of Proof for Abandonment," the Memorandum cites: (1) California cases placing the burden of proof on the party asserting abandonment in the context of a vested right determination; (2) precedents from Washington state concluding that the burden of proof falls on the party asserting abandonment; (3) other California precedents outside the vested right context that conclude that the burden of proof falls on the party asserting abandonment; and (4) general principles of law that place the burden of proof on the party asserting abandonment. *Id*. In other words, *all* of the Memorandum's sources point in a single direction: the County bears the burden to prove abandonment. Yet despite the weight of the relevant legal authorities, County Staff's Memorandum attempts to override this clear legal mandate by placing the burden on the property owner: "[I]n order to avoid a finding of abandonment, the property owner must be able to identify evidence of their objective manifestations of intent to resume the nonconforming use throughout the period the nonconforming use was discontinued." Memorandum at 22. This claimed requirement is not found in nor can be deduced from *Hansen Brothers* nor any other California mining cases discussing abandonment of vested rights. In fact, consistent with the California Supreme Court's holding in *Hansen Brothers*, there is not a single reported California case in which a vested mining right has been abandoned solely due to lack of onsite activity. In the sole recent California case that found an abandonment of vested mining rights, the court's finding was premised on an official document explicitly certifying to the government "that all mining had ceased, with no intent to resume, which was uniquely persuasive evidence of abandonment." *Hardesty v. State Mining & Geology Bd.*, 11 Cal. App. 5th 790, 814 (2017) (Ordered Not Published). The Memorandum's legal conclusion is incorrect because it misapplies the burden of proof.

*Third*, although the Memorandum is quick to conclude that abandonment has occurred, it takes no position on *when* abandonment occurred, which is insufficient to meet the legal standard for abandonment. The Memorandum acknowledges the *Hansen Bros.* two-part test for abandonment of a vested right: Abandonment "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." *Hansen Bros. Enter., Inc. v. Bd. of Super.*, 12 Cal. 4th 533, 569 (1996). Yet the Memorandum never concludes exactly *when* the two-factor test was satisfied such that the vested right to mine the Idaho-Maryland Mine became abandoned or states what overt act or alleged failure to act the County is relying on to determine that Rise's vested property right has been abandoned. For example, the Memorandum suggests that abandonment may have been complete in 1956 based on the cessation of mining alone, Memorandum at 26 ("[A]ll mining completely *stopped* in 1956 and all "uses normally incidental and auxiliary … had *ceased*," "[t]hus, … the mining operations at the Idaho-Maryland Mine were abandoned."), a position that is clearly inconsistent with *Hansen Bros.*, 12 Cal. 4th at 569 ("Mere cessation of use does not of itself amount to abandonment …"). But the Memorandum later says that "the fact that all mining equipment and all buildings … were removed from the

Subject Property in 1957 is conclusive evidence of both an intention to abandon the mine, and an overt act." Memorandum at 28. Yet the Memorandum also cites the failure to mine in the 1960s and 1970s as "[e]videncing an [i]ntent to [a]bandon [t]he [m]ine," *id*. at 29, and it cites the "[l]ong [c]essation of [m]ining [a]ctivities" as "warrant[ing] the conclusion that mining at the Idaho Maryland Mine was abandoned," *id*. at 33. Elsewhere, the Memorandum cites property sales, *id*. at 37, use permit applications, *id*. at 38–40, and the failure to satisfy certain alleged reporting requirements, *id*. at 41–44, all as evidence of abandonment. Yet the Memorandum never commits to any one of these alleged events as the moment of abandonment—a factual finding that the *Hansen Bros.* test clearly requires the County to make. Memorandum at 44 (concluding that "[m]ining operations were abandoned at the Subject Property commencing *as early as* 1956") (emphasis added). In effect, the Memorandum describes a series of alleged acts and omissions that *might* have constituted abandonment, and then concludes that the sum total *is* evidence of abandonment at some point between 1956 and the present. This is incompatible with Rise's due process right to know the factual basis for depriving Rise of its vested right to mine, a property right that is protected by the U.S. and California constitutions.

*Fourth*, the Memorandum applies an impossibly high standard to the historical evidence Rise has cited while uncritically relying on inferior historical evidence for its own conclusions. This inconsistency is indicative of bias and unfairness. For example, the Memorandum relies on the opinion of an alleged "Historian" to discredit the Declaration of Lee Johnson, which Rise has submitted, based on the unreliability of human memory. *Id*. at 29. Yet later, the Memorandum accepts uncritically the Declaration of Charles W. Brock as it relates to the intentions of the BET Group. *Id*. at 37. This double standard is more egregious in light of the evidence Rise has supplied that refutes the Brock declaration—in particular, *Brock's own real estate listing* advertising a "Historic California Gold Mine for Sale." *Id*. *See also id.* at 28 (relying on alleged quote of unnamed miner with no nexus to any property owner); *id*. at 25–26 (concluding that initial land sales did not reserve mineral rights based on factually incorrect reading of historic deeds). The Memorandum's repeated reliance on the Historian to criticize the quality of historical evidence put forward by Rise is also an additional demonstration of how the Memorandum turns the appropriate burden of proof upside down. Because the *County* bears the burden of proving abandonment, it is the *County* that must offer compelling historical evidence of the abandonment factors; Rise is not obligated to provide compelling historical evidence of an intent to mine throughout the property's history (though Rise has done so nonetheless).

*Fifth*, the Memorandum relies on past and present use permit applications as evidence of abandonment, *id*. at 38–41, but such applications are consistent with possessing a vested right and cannot evidence abandonment in any event. Sound business reasons justify pursuing a use permit even where the property owner has a vested right. For example, where an owner proposes to intensify a land use or expand the scope of an otherwise vested right, it may be prudent to seek greater community buy-in for future operations. Likewise, it is not unreasonable for an owner to believe that the use permit process will lead to productivity more efficiently or sooner than a vested right determination. Regardless, Rise's vested right to mine is a property right protected by the U.S. and California Constitutions, and "[a] waiver of a constitutional right requires a knowing and intentional relinquishment of that right." *Calvert v. Cnty. of Yuba*, 145 Cal. App. 4th 613, 628 (Cal. App. 2006). "[S]uch a waiver is disfavored in the law." *Id*. Rise's vested right to mine could not

have been knowingly and intentionally relinquished by any owner's decision to pursue a use permit, a decision that is entirely compatible with the existence of a vested right.

Nevada County should not adopt the Memorandum's analysis, which is fundamentally flawed and both legally and factually incorrect. The Memorandum unquestioningly accepts the legal framework set out by the opposition group, Community Environmental Advocates Foundation, in the October 27, 2023 letter drafted by the Shute, Mihaly & Weinberger LLP law firm. That letter is an advocacy piece, and a discredited one at that. The same law firm submitted an amicus brief in the *Hansen Bros.* case on behalf of California counties, supporting Nevada County as defendant, and made the same legal arguments now found in its October 27 letter. The *Hansen Bros.* amicus brief argued that (1) constitutionally protected property rights should be subordinated to zoning plans and therefore expire within the time period specified in the zoning ordinance; (2) the existence of a vested right depends on objective acts advancing it, not subjective intent; and that (3) any vested right to mine is limited to previously mined portions of the property (a rejection of the diminishing asset doctrine). Yet the California Supreme Court *rejected* all three of these arguments in the *Hansen Bros.* decision.

Before the *Hansen Bros.* decision, Nevada County agreed with the Shute, Mihaly & Weinberger LLP position. Based on the same erroneous beliefs about California law, Nevada County wrongly deprived Hansen Brothers Enterprises, Inc. of its vested right, as the California Supreme Court later determined. Nevada County should not commit the same error with regard to Rise. Other counties have correctly applied the law of vested rights and abandonment to recognize vested rights to mine in contexts like this one. The County of Merced has recognized a vested right to mine for the Kelsey Ranch Mine following a 58-year cessation of mining activity; and the County of San Bernardino has recognized a vested right to mine the Chubbuck Mine after a 69-year cessation of mining activity and a vested right to mine the Lone Pine Canyon Mine after a 53-year cessation of mining activity. *See* December 10, 2023 Letter of Christopher Powell on behalf of Rise, at 7–8. These decisions are consistent with California's law of vested rights as it applies to mining. Under California law, a mine owner does not abandon a vested right merely because it makes a "business judgment that a temporary—even if prolonged—hiatus should be made." *Hardesty v. State Mining & Geology Bd.,* 219 Cal. Rptr. 3d 28, 44 (Cal. App. Ct. 2017). "Otherwise, … an operator might be forced to continue operations at a loss—perhaps for decades," to preserve the vested right. *Id*. The law of abandonment in *Hansen Bros.* is clear, and Nevada County should follow that law, as the Counties of Merced and San Bernardino have done. Nevada County should reject the erroneous legal reasoning of the Memorandum.

To do otherwise will expose Nevada County to hundreds of millions of dollars in damages, plus litigation expenses, *see* 42 U.S.C. §§ 1983, 1988(b) and (c), because depriving Rise of its vested right to mine the Idaho Maryland Mine will effect a taking of its constitutionally-protected vested property right under both the U.S. and California constitutions. *See* November 17, 2023 Letter of Cooper & Kirk PLLC on behalf of Rise. Based on comparable mines and historic yield at the Idaho-Maryland Mine, Rise's vested right to mine is conservatively estimated to be worth at least $400 million.

Nevada County may also be exposed to damages on other claims. Sacramento County's recent experience in the *Hardesty* case is instructive. *Hardesty v. Sacramento County*, 824 F.

App'x 474 (9th Cir. 2020). There, the Ninth Circuit Court of Appeals affirmed a jury verdict that Sacramento County had deprived plaintiffs of their vested right to mine aggregate in violation of the plaintiffs' constitutional substantive due process rights. The plaintiffs' substantive due process rights were violated because the County had ordered the plaintiffs' mining operation to be shut down, "did so based on impermissible political motivations," and therefore "arbitrarily and unreasonably" deprived the plaintiffs of their mining profession. *Id*. at 477. Here, the Memorandum alone is indicative of biased and impermissible motivations and recommends an arbitrary and unreasonable decision. The Memorandum sets out legal conclusions before evaluating the applicable evidence or legal standard. For example, even the initial "Site Description" portion of the Memorandum describes the property repeatedly as "abandoned," before the Memorandum has supplied any legal or factual material to support such a claim. Memorandum at 4 ("The shafts are covered to prevent access as the operations are abandoned," and "[a]fter the abandonment of mining in 1956 …", a statement repeated twice). The Memorandum is *so* biased against Rise that it refuses to credit *a single factual or legal assertion* Rise has put forward, which is simply not plausible. The Memorandum appends a 135-page table devoted to attacking evidence and witness statements from Rise, including meritless and trivial attacks that are demonstrably false. The table claims that some deeds failed to preserve mineral rights when the plain language of the deed reveals the opposite, and even attempts to construe the filing of a "Notice of Intent to Preserve Interest in all mineral rights and interests in minerals" as evidence *of abandonment*. County's Responses to Petitioner's Facts and Evidence in the Vested Rights Petition at 22, 99–102; Memorandum at 28, 39. The Memorandum's over-the-top advocacy reveals bias against Rise and a fundamental misunderstanding of the *County*'s burden to prove abandonment of a vested right. Sacramento County ultimately settled the *Hardesty* case for $78.5 million (the combined value of two settlements). The vested right to mine gold at issue here is worth far more than the right to mine aggregate at issue in *Hardesty*.

The Memorandum's flaws as described in this letter materially affect its legal and factual conclusions, and if corrected, the Memorandum would *support* Rise's vested right petition. The Memorandum is flawed in other ways, too, as detailed in the December 10, 2023 Letter of Christopher Powell on behalf of Rise. We urge the Board of Supervisors to reject the Memorandum and conclude that a vested right to mine the Idaho Maryland Mine exists and is held by Rise. Any other conclusion would effect a taking of Rise's vested right to mine, for which just compensation is due.

Thank you for your attention to and consideration of the foregoing points.

Respectfully,

s/ Charles J. Cooper
Charles J. Cooper

cc:
Brian Foss (Nevada County)
Kit Elliot (Nevada County)
Diane Kindermann (Abbott & Kindermann, INC.)