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

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

To the Board of Supervisors:

I write on behalf of Rise Grass Valley, Inc. ("Rise"), the owner of the property comprising the Idaho-Maryland Mine, in partial response[1] to the October 27, 2023, letter from Ellison Folk of the Shute, Mihaly & Weinberger LLP law firm (the "October 27 letter") on behalf of the Community Environmental Advocates Foundation ("CEA"). CEA's October 27 letter denounces Rise's vested rights claim as "absurd," far-fetched," and "undemocratic." But CEA's hyperbole cannot overcome the fundamental error on which its opposition to Rise's petition is founded: it has wrongly conflated the *cessation* of the vested right to mine gold on Rise's property, which has indeed occurred, with *abandonment* of the vested right to mine gold, which has not. And a vested right to exploit a mineral estate can be extinguished only by the owner's intentional abandonment of the right. Based on our review of CEA's letter, Rise's vested rights petition, and the historical record, we believe that Rise possesses a vested right to mine gold on its property, which is ultimately enforceable through an action under both the United States and California Constitutions for an uncompensated taking of Rise's mineral estate.

First, the October 27 letter asserts without support that Rise "has not provided adequate proof … that a vested right to mine gold arose at any point." October 27 Letter at 2. In fact, there is simply no doubt that a vested right to mine the Idaho-Maryland Mine properties arose in 1954. *See* Mitchell Chadwick Letter at 2. At that time, Nevada County adopted a zoning code imposing a use permit requirement on mining operations. Because the Idaho-Maryland Mine was an existing use at that time, it became a vested nonconforming use and was not required to obtain a use permit for mining. Indeed, the Idaho-Maryland Mine continued to be actively mined thereafter without obtaining a use permit. CEA has previously acknowledged this point. In its October 15 submission to the County, CEA conceded that "[a]s an existing and continuing operation in 1954, the Idaho-

[1] Rise has also submitted on November 16, 2023, a letter from G. Braiden Chadwick of the Mitchell Chadwick law firm (the "Mitchell Chadwick Letter"), which addresses in greater detail the merits of Rise's vested rights petition and the factual and legal errors in CEA's submissions to the County. Our analysis here supports and supplements the Mitchell Chadwick analysis.

Maryland Mine probably was exempt from the Use Permit requirement at that time." October 15 Letter at 37. Thus, CEA's sole dispute concerns whether the vested right to mine the Idaho-Maryland Mine was subsequently abandoned, and the October 27 letter is plainly incorrect in asserting otherwise.

Second, CEA incorrectly applies the legal standard for abandonment. Initially, the October 27 letter correctly acknowledges that abandonment is determined by the *Hansen* two-part test, which depends on both: "(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." *Hansen Bros. Enters., Inc. v. Bd. of Supervisors of Nev. Cnty.*, 12 Cal. 4th 533, 569 (1996); October 27 Letter at 4 ("'[A]bandonment' entails both an 'intention to abandon' and an accompanying 'overt act, or failure to act.'"). But in the rest of the letter, CEA attempts to evade the requirements of the two-part test by collapsing them into one and claiming that the intent to abandon the vested right to mine the Idaho-Maryland Mine can be "inferred" solely from the property owners' cessation of mining operations. CEA fails to mention, however, that California precedents (including all the precedents CEA cites, *id*. at 4) on abandonment are clear: "Cessation of use alone does not constitute abandonment." *Hansen Bros. Enters.,* 12 Cal.4th at 569; *See also Gerhard v. Stephens*, 68 Cal.2d 864, 893–94 (1968) (holding that "nonuse alone does not establish intent" and finding no abandonment despite "plaintiffs' 47 years of nonuser, their apparent lack of concern with their interests, and their failure to give any visible indication of intent to make future use of their property"); *Pickens v. Johnson*, 107 Cal.App.2d 778, 787 (1951) (describing that "abandonment of property" requires "a clear and unmistakable affirmative act indicating a purpose to repudiate the ownership" and that "mere relinquishment … is not an abandonment of it"). Yet mere cessation is the only evidence CEA can muster in support of their abandonment claim. October 27 Letter at 7–11.

CEA dresses its evidence up into five different categories, but all of them, individually and collectively, amount to mere cessation of use. The fact that mining has not occurred on the property since 1956 is merely a statement of cessation of use. *Id*. at 7. CEA complains about the *way* the mine operators ceased mining, including the sale of mining equipment incident to the cessation. *See id*. at 7–8. But again, these arguments are about the mine operators' cessation of mining. Additionally, none of the actions cited by CEA are inconsistent with resuming *future* mining, and therefore cannot be evidence of the "intention to abandon," which is a required part of the abandonment test. *Hansen Bros. Enters., Inc.*, 12 Cal.4th at 569.[2] The October 27 letter makes much of words like "former," "closed," "historic," "idle," and no longer "active" when applied to the Idaho-Maryland Mine, but these are statements describing cessation of use. October 27 Letter

[2] Primarily, CEA erroneously asserts that the mine operator in 1956 "sold off all mining infrastructure from the Property," October 27 Letter at 5, but critical mining infrastructure has been preserved on the property, like the concrete silo that is still visible on the site today. In any event, the mine operator sold equipment to pay urgent debts, not because it intended to abandon mining at the property altogether. Quite the opposite: by selling equipment to pay urgent debts, the mine owners acted to *preserve* ownership of the surface property and mineral estate precisely so that it could be mined in the future. *See* Mitchell Chadwick Letter at 14. CEA also points to the fact that the mine operator allowed the mine to flood in 1956, October 27 Letter at 5, 8, but operators allowed the mine to flood repeatedly *during the active life of the mine*, see Mitchell Chadwick Letter at 13, so this cannot be evidence of abandonment, either. The events surrounding 1956 demonstrate mere cessation of use due to unfavorable economic and other conditions, nothing more.

at 8–9. The letter further describes past plans to develop other uses on portions of the property in question, like developing a subdivision, *id*. at 9–10, but those plans were not inconsistent with the intention to resume mining and are not evidence of the intent to abandon, particularly because the owners simultaneously preserved their mineral estate and also marketed the property for sale as a gold mine. *See* Mitchell Chadwick Letter at 14–16. Lastly, California's toxic substances database merely identifies properties where mining has ceased—in CEA's own telling, California uses words like "inactive or abandoned" as synonyms and describes some of the Rise property as having "remained dormant." October 27 Letter, at 10. This too is merely a statement of cessation of use, and again, "[c]essation of use alone does not constitute abandonment." *Hansen Bros. Enters., Inc.*, 12 Cal. 4th at 569.

Third, in addition to failing to provide any evidence of abandonment beyond mere cessation of use, CEA has no rejoinder to the substantive evidence that Rise has produced demonstrating that all of the mine's owners have intended to preserve the property for mining and have taken affirmative steps evidencing that intent. *See* Idaho-Maryland Mine Vested Right Petition, September 1, 2023, at 7–49. These steps have included undertaking mineral exploration activities, contracting with mining companies, pursuing permits to mine, marketing the property for mining, reserving mineral rights, and speaking publicly about the relevant economic conditions necessary to resume mining. These acts are entirely *inconsistent* with the intent to abandon. Accordingly, there has been no abandonment based on the historical record Rise has put forward, and the facts CEA points to do not prove otherwise. *See also* Mitchell Chadwick Letter at 7–17. For the same reason, CEA's discussion of burdens of proof is irrelevant.[3] October 27 Letter at 3–4. Rise has proven that its right to mine vested in 1956 (which the County recognized in 1980, 1985, and 1986, *see* Mitchell Chadwick Letter at 10–11), and neither CEA nor anyone else has put forward evidence sufficient to show that that right has been abandoned.

Fourth, the October 27 letter (at pp. 1–2) suggests that Rise cannot have a vested right to mine because it is concurrently also seeking a use permit for mining from the County, but that is incorrect. Seeking a use permit does not indicate an owner's intent to abandon any preexisting rights, nor does it preclude the County from confirming the vested right now. *Consol. Rock Prods. Co. v. City of Los Angeles*, 57 Cal.2d 515, 534 (1962).

Fifth and finally, CEA emphasizes repeatedly that Section L-II 5.19 of Nevada County's zoning code extinguishes any nonconforming use that is discontinued for more than a year, and it criticizes Rise for not mentioning this provision in its petition. October 27 Letter at 4–7. But Rise did not mention this provision because it has no bearing on the question whether Rise's vested right has been abandoned. *See* Mitchell Chadwick Letter at 4–5. The County "is without power to impair or destroy the obligations of … vested rights, and any statute which affects a vested right cannot be given retrospective operation." *Pardee Constr. Co. v. Cal. Coastal Comm.*, 95 Cal. App. 3d 471, 479 (1979) (quoting *Est. of Thramm v. Tilsner,* 80 Cal. App. 2d 756, 765 (1947). This local provision (and all others like it throughout California) are superseded by the takings clauses of the United States and California Constitutions. Both Constitutions prohibit government from taking private property for a public use without paying just compensation. As applied to zoning

[3] For the reasons stated in the Mitchell Chadwick Letter, at 2–4, CEA's discussion of burdens of proof is also legally incorrect.

restrictions, this means that if applying a zoning code to a preexisting use "effects an unreasonable, oppressive, or unwarranted interference with an existing use … the ordinance may be invalid as applied to that property unless compensation is paid." *Hansen Bros. Enters.,* 12 Cal.4th at 551–52. For that reason, "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.'" *Id*. at 552, citing *Cnty. of San Diego v. McClurken*, 37 Cal.2d 683, 686 (1951). These types of provisions may, like Nevada County's, exempt a nonconforming use, whether permanently or for a period of time. But even when they are time-limited, they may not destroy a *vested* right. Accordingly, by operation of constitutional law (both state and federal), a party may be prohibited from resuming a nonconforming use only if the "nonconforming use has been voluntarily abandoned." *Hansen Bros. Enters., Inc.*, 12 Cal. 4th at 552. For the reasons already given, the vested right to mine the Idaho-Maryland Mine has never been voluntarily abandoned.

Our firm has independently analyzed the facts and law underlying not only Rise's vested rights petition but also its pending application for a use permit, and we believe that Rise will have suffered a compensable, unconstitutional taking if the County denies both the vested rights petition and the use permit. The Takings Clause of the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The California Constitution's equivalent clause is at least as protective as its federal counterpart. *Better Hous. For Long Beach v. Newsom*, 452 F. Supp. 3d 921, 935 (C.D. Cal. 2020) ("Other than protecting 'damaged' as well as 'taken' property … the California Takings Clause is interpreted identically to its federal counterpart."). Additionally, California law recognizes a mineral estate as a freehold property interest apart from a surface estate. *Gerhard*, 68 Cal.2d at 879 (mineral rights, where unlimited, are "a freehold interest, an estate in fee, and real property or real estate"). Accordingly, if the County denies both Rise's vested right petition and its use-permit application, then the County will have taken Rise's *entire* mineral estate, a separate freehold estate under California law, without just compensation. That act would constitute an unconstitutional taking of Rise's mineral estate. *See*, *e.g.*, *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414—15 (1922) (holding that a state law that made "it commercially impracticable to mine certain coal" had "the same effect for constitutional purposes as appropriating or destroying it" and recognizing the law "as a taking"); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) ("[T]he Fifth Amendment is violated when land-use regulation … *denies an owner economically viable use of his land*." (emphasis in original) (cleaned up)); *Whitney Benefits Inc. v. U.S.*, 926 F.2d 1169, 1174 (Fed. Cir. 1991) (holding that, where "Wyoming recognizes separate mineral and surface estates," "[the government] took Benefits' *coal rights*" unconstitutionally, so consideration of other property interests, like surface rights, was not warranted (emphasis in original)).

The remedy for an unconstitutional taking is the payment of just compensation, which is the fair market value of the property taken. Based on comparable mines and historic yield at the Idaho-Maryland Mine, Rise's mineral estate is conservatively estimated to be worth at least $400 million.

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.)