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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF NEVADA**

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| RISE GRASS VALLEY, INC., a Nevada corporation,<br><br>Petitioner and Real Party in Interest,<br><br>v.<br><br>BOARD OF SUPERVISORS OF THE COUNTY OF NEVADA, and the COUNTY OF NEVADA; and DOES 1-50, Inclusive,<br><br>Respondents. | CASE NO.: CU0001386<br><br>**RESPONDENTS BOARD OF SUPERVISORS OF THE COUNTY OF NEVADA AND COUNTY OF NEVADA'S OPPOSITION TO PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF ADMINISTRATIVE MANDATE**<br><br>**Date: January 9, 2026**<br>**Time: 10:00 a.m.**<br>**Dept.: 6**<br>**Judge: Hon. Robert Tice-Raskin**<br><br>Petition Filed: May 10, 2024 |

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## I. INTRODUCTION.

Petitioner Rise Grass Valley, Inc.'s vested-rights Petition is an attempt to convert a discretionary land-use denial into a perpetual entitlement. After years of pursuing approval through use permits, variances, and other County discretionary processes, and after the Nevada County Planning Commission unanimously recommended denial of its project, Petitioner abruptly pivoted to petition the County for a vested rights determination claiming no County approvals are required at all. It now asks this Court to declare that a gold mine that closed in 1956 is vested and still holds a permanent right to operate without discretionary approval and outside the County's land-use regulations in 2025.

That position defies both law and common sense. For decades, California courts have recognized that nonconforming uses are disfavored and are not intended to be perpetual. (*Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 459.) A vested right protects only an existing, lawful use that continues in operation, not one that ceased nearly seventy years ago. Zoning exists "to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards," and courts apply "a strict policy against extension or expansion of those uses," including efforts to revive uses "which have ceased operation." (*Hansen Bros. Enter., Inc. v. Bd. of Supervisors* (1996) 12 Cal.4th 533, 568 ("*Hansen*").) On September 10, 1954, the Board of Supervisors adopted Ordinance No. 196 (the "Ordinance"), which required a use permit for any mining in that zone where the Idaho-Maryland Mine was located, and which rendered any existing mining with no use permit a nonconforming use. Any nonconforming use that is discontinued for one year or more cannot resume and must conform to current zoning.

Petitioner leans heavily on *Hansen* while attempting to transform decades of inactivity into evidence of persistence, asserting that a vested right survived even though no owner mined, prepared to mine, or sought to mine throughout that time. But *Hansen* involved a mining enterprise that never stopped. The Idaho-Maryland Mine is the opposite. Underground mining ended in 1956, the shafts flooded, the power supply was cut, and the equipment was sold in 1957. Then all of the surface and underlying properties, and all of the mineral rights were sold off in 1963. In the following decades, no owner maintained the underground workings, dewatered the mine, preserved mining

infrastructure, or undertook any regulatory or physical preparations to resume underground mining.

Instead, successive owners repeatedly engaged in conduct affirmatively inconsistent with continuation of the use. The mining enterprise was dissolved. The mill site and other key operational lands were sold. Surface lands were subdivided and repurposed for industrial and later residential uses. The property was marketed and conveyed multiple times as a passive investment rather than as an operating mine. Under *Hansen*, prolonged inactivity may terminate a nonconforming use, but here the record shows more: overt acts and longstanding patterns of conduct that clearly show abandonment. Any vested right, if one ever existed, was extinguished decades ago.

Even apart from this history of abandonment, Petitioner never proved the particular vested right it now asserts. The record contains, at most, evidence that some underground mining and milling occurred in 1954. It does not show that, on October 10, 1954 ("the Ordinance Date"), the operator was conducting the broad range of activities Petitioner now claims, or that underground mining extended or was intended to extend across the 2,560 acres it labels the "Vested Mine Property." A vested right is defined by the use actually occurring at the time of vesting, not by historical activity, later interpretations, or generalized descriptions of operations from earlier decades. Petitioner offered no evidence that each parcel within the claimed area contained an active, lawful use on the Ordinance Date. It instead attempts to convert limited, localized activity into a vested mine-wide entitlement, a theory that no California case supports.

In summary, the Board of Supervisors ("Board") correctly concluded that Petitioner failed to prove the existence of the vested right it asserts. The record independently demonstrates that any such right was extinguished long ago through cessation of the use and through owners' overt acts inconsistent with continuation. The Idaho-Maryland Mine is a historic site with an abandoned use and not a continuing nonconforming use. The Board's denial of the vested rights petition was legally correct and the petition for writ of mandate should be denied.

## II. FACTUAL BACKGROUND.

County's responses to Petitioner's purported facts in support of its administrative "Idaho-

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Maryland Mine Vested Right Petition" are found at Administrative Record ("AR") 3738-3871.[1]

The Idaho Maryland Mine operated from the 1850s until 1956. (Open. Br. 7:3-8:14; AR 490-520.) Underground gold mining was at its peak historical production in 1939 (AR 513), was stopped during World War II (AR 514; AR 620-621), and resumed after the war but in an ever-diminishing capacity. (AR 515-520, 622-628, 1393-1394.)

The Ordinance set forth a comprehensive zoning plan for the unincorporated areas of the County that became effective on the Ordinance Date. (AR 1478-1487, 2770.) 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." (AR 1478-1487, 2770.)

Very little evidence has been presented by Petitioner as to the extent of the underground mining operations on the Ordinance Date. (Open. Br. 7:23-8:3; 20:4-6, 19-21.) There is no evidence in the record of any ancillary and auxiliary activities that were taking place at the mine on the Ordinance Date; all of the evidence cited by Petitioner is *prior* to October 10, 1954.

Idaho Maryland Mines Corporation stated it was in "critical" condition in 1955, and then in 1956 it ceased all mining operations. (Open. Br. 8:5-23; AR 519-520, 571-573, 632-634.) In 1957, all mining equipment was auctioned off, and eventually the buildings were removed, leaving only the silo. (AR 3885, 4156-4161.) The property owner went bankrupt in 1962 (AR 523, 1650-1652), and the entire mine property was auctioned off in 1963 and sold to William and Marian Ghidotti. (AR 523, 1652-1676.) During the following decades, the Ghidottis did not make any effort to resume underground mining of the closed mine, even when the price of gold increased. (AR 524, 778, 1966-1967, 1985, 2838.)

During the 1960s and 1970s, the waste rock that was left on the surface of the property was occasionally removed and sold off as aggregate. For example, for a few months between

[1] For the convenience of the Court, the particular pages of the Administrative Record cited in this brief are included in the "Appendix of Administrative Record Pages Cited in the County's Opposition Brief," filed herewith.

1964 and 1965 the waste rock lying in heaps on the property was crushed and removed for the purpose of providing aggregate for the construction of a local freeway, and not for the purpose of recovering any residual gold. (AR 523, 554, 654, 1697-1698.)

Also in the 1950s, 1960s and 1970s, some sawmill operations occurred on the Brunswick Industrial Site pursuant to use permits approved by the County, which operations had nothing to do with underground mining. (AR 521, 543-544, 547, 1620-1621, 3607-3608.)

In the 1980s, more waste rock removal and crushing occurred on the completely separate and non-contiguous property of the Centennial Industrial Site, along with crushing of off-site rock, under County-approved use permits that did not recognize any vested rights, and which explicitly forbade underground mining. (AR 525, 1769-1851, 1866-1867, 4023-4027, 4030.) (The Centennial Industrial Site and Brunswick Industrial Site are described and shown in the Draft Environmental Impact Report dated December 2021 (AR 43616-43617, 43619, 43779-43787.)) In the 1990s, quarrying and crushing of rock occurred on the property, again under County-approved use permits and an agreement with the City of Grass Valley, which activities were permitted for a limited time and again did not allow underground mining. (AR 526, 528-529, 1855, 1876-1888, 1997, 2001, 2011.) That quarrying was for the ultimate purpose of creating non-mining industrial building site(s) that were in close proximity to commercial and residential development. (AR 525, 1852-1862, 2001, 2013.) Also, Petitioner's predecessor explicitly sought and obtained a zoning change for the former sawmill property (the Brunswick Industrial Site) to explicitly provide for such industrial, non-mining uses, consistent with the County's preference for "some type of mixed industrial/ business park uses." (AR 529, 532, 2062-2078, 2085-2087, 2286-2288.)

The Idaho-Maryland Mine has remained closed from 1956 to the present. As the expert consultant hired by property owner's licensee stated in 1988: "Last production from the [Idaho-Maryland Mine] complex occurred in 1956 and the mine has been idle" ever since. (AR 1926.) John J. Vaughan, who "visited the Brunswick Timber Products Sawmill on Brunswick Road dozens of times" from 1969 through 1979, and has lived in the area for 56 years, testified:

> At no time during that 10 years [1969-1979] did I see anything but log storage and sawmill operations anywhere at the locations that Rise Gold now calls the Brunswick Industrial Site. [¶] There were no mining operations anywhere on

> the sawmill site. [¶] There were no mining operations on the acreage around the large concrete silo, which was not part of the sawmill. [¶] In addition, during the 56 years that I've lived here, I have driven by both the Brunswick site and the Idaho-Maryland Site (Centennial) hundreds if not thousands of times. [¶] Both locations have been abandoned for most of the years I have lived here. [¶] I have never seen any gold mining operations at either location. [¶] The only activity I have observed at Brunswick, prior to the current Community uses, was a sawmill. [¶] The only activity at Centennial was periodic rock crushing which stopped in the late 70s or early 80s. [AR 57164.]

The property owners understood there were no vested rights for underground mining because use permits were sought in the 1990s and 2000s to explore the possibility of reopening the mine. There was no reference to any vested rights. (AR 530-532, 2119-2120, 2127-2154, 2180-2182, 2213-2217, 2261-2263, 4576.) It was only recently the Planning Commission recommended to the Board a denials of Petitioner's use permit and other discretionary entitlements in May 2023 (AR 4577), that Petitioner raised the vested rights issue for the first time. Petitioner submitted its administrative Petition for a vested rights determination to the County on September 1, 2023. (AR 481-560.) In December 2023, the Board adopted Resolution No. 23-619, denying Petitioner's vested rights Petition. (AR 1-7.)[2]

After filing this action, Petitioner sold the Brunswick "sawmill" parcels (APNs 006-441-003, -004, and -005)–the same parcels it relied upon in its administrative Petition and before the Board to prove the scope and continuity of its alleged mining operations. (Open. Br. 6:6-15; AR 489, 517-521, 540-544, 547-548, 632.) So in its Opening Brief, Petitioner changes its theory of vested rights in order to accommodate the fact that it sold off those parcels.

## III. APPLICABLE STANDARDS OF REVIEW AND BURDENS OF PROOF

### A. The "Substantial Evidence" Standard Applies Here.

The substantial evidence standard of review applies to this adjudicative administrative mandamus action. Because "the decision does not substantially affect a fundamental vested right,

[2] Petitioner alleges that Supervisor Heidi Hall did not recuse herself "based on bias she had exhibited in her public statements related to vested rights and proposed mining at the Idaho-Maryland Mine." (Open. Br. 14:4-12.) But Petitioner makes no argument beyond that allegation, and has therefore waived that allegation. (*See Orange Cty. Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 383 ["'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.' … "The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived."""] *See also* Cal. Rules of Court, rule 8.204 (a)(1)(B) [each point must be supported by argument and, if possible, by citation of authority].) The County hereby reserves the right to address that allegation at the hearing on the merits of the vested rights claim if Petitioner attempts to later raise an argument about that allegation.

the trial court considers only whether the findings are supported by substantial evidence in the light of the whole record." (*Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1525-1526 (citing *Strumsky v. San Diego Cty. Employ. Ret. Assn.* (1974) 11 Cal.3d 28, 32).)

Petitioner argues that this Court should exercise its "independent judgment upon the evidence" because this case involves a "fundamental vested right" and "a vested mining right is a type of legal nonconforming use and a fundamental property right protected by the takings clause of the United States and California Constitutions." (Open. Br., 2:5-9 ; 4:3-11; 17:10-12.) Petitioner is incorrect. "The determination whether a right is fundamental and vested for purposes of ascertaining the appropriate standard of judicial review in an adjudicative administrative mandamus action is made on a case-by-case basis." (*JKH Enter., Inc. v. Dep't of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1059.) Specifically, an agency's decision affects a "fundamental vested right" for purposes of the independent judgment standard of review where the government regulation "effectively precludes continuance of the company's [] business." (*Hansen, supra,* 12 Cal.4th at pp. 559-560; *see e.g., Goat Hill Tavern*, *supra*, 6 Cal.App.4th at pp. 1526-1529 [business owner had a fundamental vested right "to *continue operating an established business* in which he has made a substantial investment" for over 35 years, and nonrenewal of the permit would have put the tavern out of business.] The independent judgment standard does *not* apply where the regulation does not require the business to close, but merely "involves or affects purely economic interests." (*JKH, supra,* 142 Cal.App.4th at p. 1060; *see e.g., Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist*. (2011) 202 Cal.App.4th 404, 417; *Standard Oil Co. v. Felstein* (1980) 105 Cal.App.3d 590, 604; *Mobil Oil Corp. v. Super. Ct.* (1976) 59 Cal.App.3d 293, 305.) Here, the County's decision to deny the vested mining right sought by Petitioner did not require the discontinuance of any of the activities that Petitioner alleges were part of the underground mining business on the property. (Open. Br., 34:24-28 & 35:1-4.) That is because "the mine has been idle" since 1956. (AR 1926.)

Furthermore, Petitioner cites no authority to support its argument that the determination of the applicable standard of review depends upon whether "the members of that Board disclaimed the necessary expertise to decide the vested right question, openly relied on irrelevant factors, and folded improper policy-based judgments into the rationale for their votes." (Open. Br. 17:18-21.)

Rather, "the decisions of the agency are … given substantial deference and presumed correct." (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1146.)

Therefore, the substantial evidence standard of review applies here, and not the independent judgment standard of review. That means that the Court should "presume the correctness of the administrative ruling" by the Board of Supervisors as to the denial of the vested rights petition, and "all reasonable doubts must be resolved in favor of it." (*Ryan v. Calif. Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1077-1078.)

### B. Petitioner Fails To Show That The Clear And Convincing Burden Of Proof Applies Here.

Petitioner argues that the County must prove abandonment of the alleged vested rights by "clear and convincing evidence." (Open. Br. 2:25-3:2; 5:8-20.) However, none of the cases cited by Petitioner apply the clear and convincing evidence standard to the determination of whether vested rights have been abandoned. Indeed, *Hansen* does not even address the issue, and so it is not authority for Petitioner's position.

## IV. UNDER EITHER STANDARD OF REVIEW, THE EVIDENCE DOES NOT SUPPORT THE PARTICULAR VESTED RIGHT SOUGHT BY PETITIONER.

### A. Petitioner's Claim Is Contrary To Established Law Regarding The Police Power And Nonconforming Uses.

Petitioner begins its Opening Brief by essentially arguing that the County Code is subservient to individual's property rights. (Open. Br. 1:2-10.) The law holds the opposite. "[T]he police power is a developing factor so as to meet changing conditions in promoting the 'health, safety, morals, or general welfare of the public' and in its exercise a 'large discretion is vested in the legislative branch of the government.'" (*Consol. Rock Prod. Co. v. Los Angeles* (1962) 57 Cal.2d 515, 527; *see Euclid v. Ambler Realty Co*. (1926) 272 U.S. 365, 397 [police powers are "flexible".]) The legislative policy in zoning law is to further "the best interests and general welfare of the community as a whole" in where to locate "rock and gravel operations." (*Paramount Rock Co. v. Cty. of San Diego* (1960) 180 Cal.App.2d 217, 228-230.) Thus, the zoning ordinances here "are presumed to be valid and to have been promulgated by those familiar with local conditions." (*Consol. Rock, supra,* 57 Cal.2d at pp. 531-532.)

Here, those zoning principles are "of great concern to local governmental officials charged with responsibility of *eliminating nonconforming uses* of properties under their jurisdiction." (*Hansen, supra*, 12 Cal.4th at pp. 541-542 (emphasis added).) "'A nonconforming use is a lawful use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance.' Nonuse is not a nonconforming use." (*Hill v. City of Manhattan Beach* (1971) 6 Cal.3d 279, 285.) One commentator explains:

> Most nonconforming use provisions of zoning ordinances, although recognizing the right of a property owner to continue a nonconforming use existent at the time his property becomes subject to the new ordinance, prohibits any expansion or extension thereof and contemplates the eventual elimination of such uses through abandonment, obsolescence or destruction. Given the objective of zoning to eliminate nonconforming uses the California courts have generally followed a strict policy against their extension or enlargement. [1 Longtin, Cal. Land Use (2nd ed. 1987) Nonconforming Uses and Structures, § 3.82[1, p. 377-378.]

The Section 12.05.190 (formerly Section 29.2) of Nevada County Code follows that policy and provides that if a legal 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." (AR 3620-3621; County's Request For Judicial Notice, Ex. 1.) The Supreme Court in *Hansen* noted that this ordinance (as formerly Section 29.2) "strictly limits the scope of nonconforming uses." (12 Cal.4th at p. 582.) Therefore, as to nonconforming uses, nonuse is relevant regardless of any hopes and desires of the owner regarding the potential for that use in the future, and property rights are subservient to the County's police power to regulate the property in light of that nonuse.

### B. Petitioner Must Establish That *All* Of The Activities For Which It Seeks A Vested Right Were Occurring At The Mine On October 10, 1954. It Cannot.

Here, the relevant regulation is the County's zoning law enacted in 1954. Petitioner acknowledges: "[I]n 1954,…Nevada County adopted its first comprehensive zoning ordinance and imposed a use permit requirement for mining in the zone where the mine is located." (Open. Br. 17:24-25.) Petitioner also acknowledges that, "[a]ccording to *Hansen*, a vested right to mine is established on the date on which local zoning laws first required a use permit to conduct mining activities that were already ongoing. (12 Cal.4th at 540 n.1.) This is the [Ordinance Date]." (Open. Br., 18:12-14.) By seeking a vested right for underground mining for the Idaho-Maryland

Mine without a permit, Petitioner must prove that the aspects of the operation for which it seeks a vested right were occuring as of October 10, 1954. (*See Hansen, supra,* 12 Cal.4th at p. 564 ["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*." (Emphasis added.)].) As discussed below, Petitioner fails to show that.

### C. The Evidence Does *Not* Establish That The Activities For Which Petitioner Seeks A Vested Right Were Occurring On October 10, 1954.

Petitioner complains that the County did not make an affirmative finding on the particular vested rights sought by Petitioner here, even when some Supervisors recognized "that mining had been taking place in 1954." (Open. Br. 16:4-11.) But the observations of the Supervisors were accurate. The County correctly concluded that "Petitioner failed to present sufficient evidence to support an affirmative conclusion regarding the scope of Petitioner's alleged vested right" (AR 2-3), and that "the Petition lacks sufficient evidence to support an affirmative conclusion regarding the existence or scope of Petitioner's alleged vested right." (AR 3614.)

The Administrative Record here does not establish the particular vested right that is sought by Petitioner in this case. In *Hansen*, the Court applied the diminishing asset doctrine to a surface aggregate production operation (not an underground mine) that was a legal nonconforming use under a zoning ordinance that excluded mining from the permissible uses of the property. (*Id*. at pp. 540, 542.) That surface mining operation in *Hansen* consisted of both (1) "the removal of gravel and rock from the riverbed and its adjacent bank area" and (2) the quarrying of "the 'hillside' about 600 feet from the river for rock." (*Id*. at p. 541.) The Court concluded that the nonconforming use which the owner may claim a right to continue is

> the aggregate production business that was being operated on the property its predecessors owned in 1954 when the Nevada County zoning ordinance was adopted. That business, and the nonconforming use, include all aspects of the operation that were integral parts of the business at that time, including mining replenishable materials from the riverbed and banks and quarrying rock from the hillside; crushing, combining, and storing the mined materials which compose aggregate; and selling or trucking the aggregate from the property. [*Id.* at p. 542.]

Thus, the Supreme Court determined the vested right for the surface aggregate production

operation based on the evidence of what was occurring at the time of adoption of the Ordinance in 1954; the Supreme Court did *not* consider any evidence of any prior activities at the site *before* that ordinance was adopted. Applying those judicial guardrails, the Supreme Court held that the record in that case was inadequate to permit a determination by either the County's administrative body or the courts as to "the extent of the area over which an intent to quarry for rock was objectively manifested in 1954," and therefore "a court cannot determine on this record that *Hansen* is entitled to the relief it seeks." (*Id*. at p. 543.) Similarly in this case, the evidence in the administrative record is insufficient to prove the vested right that Petitioner demands in its vested rights petition and this case, i.e., the "relief it seeks" in the Opening Brief.

Petitioner argues it has "put forward extensive evidence about mining activities at the Idaho-Maryland Mine *as of the* [Ordinance Date]*, October 10, 1954*." (Open. Br. 19:25-26.) But Petitioner only presents a minutia of evidence of what was actually happening at the mine as of that date; instead, Petitioner wrongly relies on events at the mine between 1851 through 1950, and not the Ordinance Date. "[A] court cannot determine on this record that [Petitioner] is entitled to the relief it seeks." (*Hansen, supra,* 12 Cal.4th at p. 543.)

The particular vested right that Petitioner seeks in this case (AR 559-560; Open. Br., 34:20-35:23) includes the following:

> 2. That pursuant to *Hansen Brothers*, the range of mining operations included tunneling, underground mining, exploration core drilling, blasting, crushing, sorting, stockpiling, waste rock placement, screening, distribution, transportation, sales of gold for commercial uses, building 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.
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> …
>
> 8. That the Petitioner has a vested right to produce at least 410,411 tons of ore per year and a greater amount if justified by market conditions without a use permit from the County. [Open. Br. 34:23 - 35:23; *see also id*., 3:22-24.]

However, the evidence in the record does *not* support that vested right sought by Petitioner.

Petitioner argues that "the evidence demonstrates that mining activities, including underground mining, were occurring on the [Ordinance Date]." (Open. Br. 20:3-4.) However, the

evidence Petitioner relies on is *not* what was happening on the Ordinance Date of October 10, 1954; instead, Petitioner looks to the "history of the Idaho-Maryland Mine" *before* the Ordinance Date. (Open. Br. 21:8-9.) [3] Petitioner points to the "unexplored areas of Mitchell Ranch and Loma Rica" in "the 1930s" (Open. Br. 21:11-14); the "development of the Mitchell Crosscut from 1933 to 1935" (Open. Br. 21:14-15; AR 1163-1173, 2359-2365); and the "1100-8 Crosscut…from 1938 to 1941." (Open. Br. 21:15-17; AR 1338-1345, 1366-1380). Petitioner alleges that "surface exploration was conducted and reopening commenced of two tunnels on the eastern part of the Mine Property: the Hooper and the Yellow Rose tunnels," based on evidence from 1941, 1949 and 1950. (Open. Br. 21:17-21; AR 2368-2383.) Petitioner relies on evidence from "1851" through the "late 1940s" regarding "underground tunnels and workings, buildings, processing infrastructure, roads, power lines, offices, and material stockpiles, as well as exploration work and drilling," and "annual reports and other record-keeping of the Idaho Maryland Mines Company, and in maps, aerial photography, books, contemporary news articles, and other sources." (Open. Br. 21:22-26 AR749-750, 765-768, 775-776, 781-782, 1338-1345, 1366-1380, 2334-2343, 2368-2383.) Petition refers to evidence from 1910-1916 and 1947 about how, "at the Brunswick Industrial Site, the past operators had used the surface property for entrances to underground tunnels and workings, buildings, workers corridors, power lines, heavy equipment, offices, and processing infrastructure, all directly supporting underground operations." (Open. Br. 22:7-10; AR 749-750, 765-768, 781-782, 2390-2391); Petitioner references "aerial photographs and topographical maps" taken in "1938" (Open. Br. 22:10-11; AR 543-544); Petitioner gives no date for either when "the Centennial Industrial Site was used for material stockpiling to support underground mining operations" (Open. Br. 22:11-12; AR 544), and no date for the "stored mine tailings and waste from the Brunswick Industrial Site at the Centennial Industrial Site." (Open. Br. 22:12-13; AR 544.) Petitioner then alleges that in "1851," "1879," "early 1900s," "1920s," "1921," "end of

[3] Petitioner frequently cites to pages in its own Petition in the administrative proceeding and the "associated exhibits" listed on those pages. But the Opening Brief does not state which "associated exhibits" Petitioner is relying on, and the Opening Brief does not state the pages in the Administrative Record where those "associated exhibits" are found. Also, many of the "associated exhibits" listed on pages of the administrative Petition that are cited in the Opening Brief are missing from the attachments to the Declaration of Martin P. Stratte. Therefore, the County and this Court must often guess what is the actual evidence in the Administrative Record that Petitioner is trying to rely on here.

1923," "the 1930s," "late 1930s," "throughout the 1940s," "late 1940s," and from documents dated 1942, 1947, 1949 and 1950, there was a "wide range of mining-related activities" of "quarrying, mining, material sales, milling and processing, crushing, hoisting and pumping, constructing headframes, tailings impoundment dams, machining and blacksmith shops, sawmill operations, treatment plants, employee garages, offices, underground workings, road construction, and power lines." (Open. Br. 22:15-19.) Petitioner concludes by citing the 1939 "volumetric scope of 410,411 tons of ore production annually." (Open. Br. 22:20-21; AR 548-549.) The expert historians S. Miltenberger & H. Norby, in *Peer Review Comments, Idaho-Maryland Mine Vested Right Petition*, observed that the evidence cited in the administrative Petition as to the sawmill activities (AR 519, 547, 1399-1401, 1406-1407, 2540-2541) "date to the 1940s and do not give any indication as to whether or not the Brunswick sawmill supported mining activities in the 1950s" (AR 4198-4201, 4218) and the only cited source that dates to the 1950s "is a 'Flowsheet of the Brunswick Mill,' with no apparent reference to a sawmill." (*Ibid*.) Therefore, none of the evidence cited by Petitioner of the *prior* history of the Idaho Maryland mine proves the vested rights claim that Petitioner is seeking in this case, because none of that evidence is what was actually happening on *October 10, 1954*. Again, the Supreme Court is explicit 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*." (Emphasis added.) (*Hansen*, *supra*, 12 Cal.4th at p. 564.)

Petitioner argues that "in October 1954, … the Idaho-Maryland Mine was engaged in underground mining and related mining activities, including mineral processing activities on the surface estate." (Open. Br. 2:12-14; 20:3-4.) However, very little information is contained in the record evidence cited by Petitioner regarding activities at the mine as of the Ordinance Date of October 10, 1954. According to Petitioner, that evidence provides:

- "During 1954, the mine produced and milled 88,632 tons of ore, and active mining occurred in at least 14 areas throughout the mine. AR 518, 630; Pet.Ex.178 (AR1455); Pet.Ex.179 (AR001457–1461)." (Open. Br. 7:23-8:3)

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- "[A]ll the ore produced underground in 1954 was hoisted to the surface through the New Brunswick Shaft and milled in the New Brunswick Ore Mill. AR000518, -630, -3576." (Open. Br. 20:4-6.)
- " The Idaho Maryland Mines Corporation's annual reports demonstrate production of gold at the mine in both 1954 and 1955…. AR00519; Pet.Ex.196 (AR001530–001537); AR003577. " (Open. Br. 20:19-21.)

While that limited evidence cited by Petitioner shows ever-diminishing underground gold mining and surface milling as of October 10, 1954, it does not contain any proof of ancillary and auxiliary activities on that date that Petitioner sweeps within its requested vested rights. Also, Petitioner cannot prove the particular vested right it seeks here because there is no proof in the evidence that on October 10, 1954, surface mining operations "were occurring on at least 175 surface acres," or that the owner "objectively intended to devote the entirety of the surface property and 2,560-acres of mineral right to support subsurface mining operations." (Open. Br. 35:14-20.) Nor has Petitioner proven a vested right to produce "at least 410,411 tons of ore per year and a greater amount if justified by market conditions without a use permit from the County." (Open. Br. 35:21-23; *see Hansen, supra,* 12 Cal.4th at p. 560 ["a vested right to continue a nonconforming use extends only to the property on which the use existed at the time zoning regulations changed and the use became a nonconforming use."]) Based on the foregoing, Petitioner's evidence does not establish that the activities for which Petitioner seeks a vested right were occurring on the Ordinance Date.

### D. Petitioner's Post-Filing Sale Of The Brunswick "Sawmill" Parcels Defeats The Vested-Rights Theory It Presented To The Board And This Court

Even if this Court credits Petitioner's unified theory of vested rights, that theory is now untenable. Petitioner's own conduct after filing this action undermines the foundation of its claim. The scope of the vested rights sought by Petitioner in the administrative Petition and in the Complaint in this case is therefore different from what Petitioner now seeks in its Opening Brief. After initiating this suit, Petitioner sold several of the Brunswick "sawmill" parcels (APNs 006-441-003, -004, and -005)–the same parcels it relied upon before the Board and in its administrative

Petition to prove the scope and continuity of its alleged mining operations. (AR 489, 517-521, 540-544, 547-548, 632.) Under Petitioner's own framing, those parcels were integral to a single, continuous operation spanning the entire "Vested Mine Property." Petitioner never advanced a parcel-by-parcel theory tied to activities as of October 10, 1954, as required by *Hansen.* By selling the very property used to demonstrate its vested rights, Petitioner destroyed the factual and legal basis of its unified-right theory. Now, Petitioner contends that although it "seeks recognition of a vested right to conduct mining activities as to these parcels," they are "severable … because they are not necessary for mining." (Open. Br. 6:13-15.) That position fails for the following reasons.

First, a vested right cannot attach to land the Petitioner no longer owns. A "lawful nonconforming use … runs with the land." (*Hansen*, *supra*, 12 Cal.4th at p. 540, fn. 1.) By conveying the sawmill parcels, Petitioner relinquished any basis to rely on them as part of a continuing mining operation. Any such right now resides, if at all, with the new owner, Mountain Enterprises, which is not a mining company and has shown no intent to continue or preserve any mining use. So even if a vested right once existed, the sale to, and ownership by, Mountain Enterprises amounts to abandonment as to those parcels.

Second, by now describing the sawmill parcels as "not necessary," Petitioner repudiates the very theory on which it based its vested rights claim. It once held these parcels out as essential to demonstrate the scope and continuity of its vested rights; now, having sold them, it dismisses them as irrelevant. That reversal underscores the collapse of the theory of a single, indivisible vested right spanning the entire mine site that it asks this Court to accept. Nowhere in its administrative Petition, its Petition for Writ of Mandate here, or its Opening Brief, does Petitioner identify separate vested rights for individual parcels. A party may not argue a legal theory in the administrative proceeding below, and then, after an adverse decision, rely on a new theory in a writ of mandate claim challenging that decision. (*Cf. Cable Connection, Inc. v. DIRECTV, Inc*. (2008) 44 Cal.4th 1334, 1350, fn. 12 ["The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal."]) Having divested itself of the very property on which its claim depends, Petitioner cannot ask this Court to recognize a vested right it has relinquished.

## V. UNDER EVERY APPLICABLE BURDEN OF PROOF, UNDERGROUND GOLD MINING ON THE PROPERTY WAS ABANDONED IN 1957, AGAIN IN 1963, AND AT NUMEROUS TIMES IN THE FOLLOWING DECADES.

### A. The "Strict Policy" Against Extension Of Nonconforming Uses Applies To Efforts To Resume Underground Mining That Completely Ceased Years Ago.

"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*, *supra*, 127 Cal.App.2d 459.) *Hansen* explained that policy applies where the nonconforming use ceased a very long time ago:

> 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. [12 Cal.4th at p. 568.]

Here, Petitioner admits that there was a "Cessation of Gold Mining Activities" in the 1950s, and "does not dispute the underground mining ceased in 1956." (AR 487, 2811.) The California Division of Mines and Geology agrees. (AR 3934 ["The Idaho-Maryland stopped gold mining in 1956 and the Empire-Star group in 1957, closures that ended nearly 106 years of gold-mining operations in the Grass Valley district."].)

### B. Abandonment Of A Nonconforming Use Of Underground Mining Is Established By (1) An Intention To Abandon Underground Mining, And (2) An Overt Act Or Failure To Act That Implies The Owner Does Not Claim Or Retain Any Interest In Underground Mining.

In *Hansen,* the Supreme Court described the legal requirements for abandonment of a nonconforming use 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." (12 Cal.4th at p. 569.) Petitioner erroneously argues that, "[i]n attempting to show abandonment of the vested right to mine, the County essentially relies on mere cessation of use—exactly what *Hansen* held is insufficient to demonstrate abandonment." (Open. Br. 26:18-20; *see id.* at 2:22-23; 3:6-7; 4:25; 24:18-21.) Petitioner misrepresents the County's position, and misstates *Hansen*. The Third Appellate District described the rules of abandonment of a

nonconforming use in *Hansen* this way:

> Abandonment of a nonconforming use involves both an intent to abandon and "'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*, *supra*, 12 Cal.4th 533, 569.) Mere cessation of use alone is not enough, "'although the duration of nonuse may be a factor in determining whether the nonconforming use has been abandoned.'" [*Pallco Enterprises, Inc. v. Beam* (2005) 132 Cal.App.4th 1482, 1498.]

(*See also San Remo Hotel v. City and Cty. of San Francisco* (2002) 27 Cal. 4th 643, 684 (Baxter, BAXTER, J., Concurring and Dissenting) [*accord*].)

In *Hansen*, the Supreme Court held that abandonment of the nonconforming use did *not* occur in that particular case because "the evidence supports the finding of the superior court that Hansen Brothers' overall aggregate production business *has not been discontinued*." (12 Cal.4th at p. 543 (emphasis added).) That surface mining operation in *Hansen* consisted of (1) "mining replenishable materials from the riverbed and banks" (i.e., "the removal of gravel and rock from the riverbed and its adjacent bank area"); and (2) "quarrying rock from the hillside" (i.e., quarrying of "the 'hillside' about 600 feet from the river for rock"). (*Id*. at pp. 541, 542.) Since "rock quarrying is an integral part" of the "aggregate production and sale business," therefore "the fact that rock quarrying may have been discontinued for 180 days or more [under the Nevada County Code] is irrelevant" for abandonment purposes, because removal of gravel and rock from the riverbed and adjacent bank area continued, leading to the conclusion that "the aggregate business itself has not been discontinued." (*Id*. at p. 570.) Also, key facts that the Court highlighted in its discussion of abandonment were that "the *equipment* at the mine is *maintaining in working order* and … the company continues to remove aggregate from the site," and "the *plant, equipment, inventory, and utilities were maintained throughout the period* and the plant could be made operational within two hours." (*Id.* at pp. 545, 569 (emphasis added).) Thus, the facts in *Hansen* are fundamentally different from those in the case at bar. Here, all of the mining equipment was not maintained, was not operational on short notice, and was in fact completely sold off. That evidences an intention to abandon underground mining in this case.

The Court in *Hansen* also made the following statement about cessation of mining and abandonment that is highly relevant to the facts here involving the Idaho-Maryland Mine (which statement Petitioner fails to discuss in its Opening Brief):

/ / /

> 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. [*Id*. at pp. 570-571.]

Thus, *Hansen* recognized in the context of an aggregate production operation, that the "aggregate production" use was distinguishable from use of the property "only as a yard for storage and sales of stockpiled material." Contrary to Petitioner's argument, long cessation of the actual mining operation could indeed result in "termination" of the nonconforming use because of the property owner's failure to act during the period of cessation. (*See* Derek P. Cole, *Calif. Surface Mining Law* (2007), p. 151-152 ["closing a mine for a prolonged period might constitute an overt act of cessation" and "the longer the cessation of activities, however, the more likely an owner will be found to have abandoned the nonconforming use."])

Those principles were discussed in *Stokes v. Board of Permit Appeals* (1997) 52 Cal.App.4th 1348, 1354-1356, where a seven-year period of cessation of a nonconforming use as a bathhouse was sufficient to constitute abandonment of the vested right as a bathhouse:

> 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.]

Also 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. (*Id.* at p. 1356.) Thus, the likelihood of abandonment increases the longer the use has ceased.

### C. The Cessation Of All Underground Mining Operations, And Then The Sale Of All Mining Equipment At The Mine, Fundamentally Distinguishes This Case From *Hansen,* And Constitutes Evidence Of The Property Owner's Intent To Abandon Underground Mining As Of 1957.

In *Hansen*, the aggregate production operation had been "continuous since 1954" and "had not been discontinued for a period of six months" (12 Cal.4th at 545, 546, 550), and "plaintiffs were continuously operating some portion of their aggregate production business on the property." (*Stokes*, *supra*, 52 Cal.App.4th at p. 1355.) Here, by contrast, the expert consultant for the optionee of Petitioner's predecessor pointed out in 1988: "Last production from the

[Idaho-Maryland Mine] complex occurred in 1956 and the mine has been idle for the last 32 years." (AR 1926.) In July 1955, the President of Idaho-Maryland Mines Corporation stated that the firm was "in 'critical' condition" and may have to "discontinue operations." (AR 1454, 1455, 2771.) The company then "stopped its gold mining production on December 27, 1955, when it switched operations entirely to mining tungsten." (AR 632, 4161. ) In 1956 "[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." (AR 632.) 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." (AR 520; Open. Br. 8:5-23.) The Engineering & Mining Journal's December 1956 edition reported: "Idaho Maryland Mines Corp. wrote an obituary to goldmining operations at its historic mine at Grass Valley by selling the surface plant to Oro Lumber Co." (AR 3885. See AR 2980.) Even buildings were sold off. (AR 3889.) Thus, all "'uses normally incidental and auxiliary' to such nonconforming uses" (*Hansen*, 12 Cal.4th at p. 565) stopped in 1957. The County correctly concludes underground mining was abandoned, even if mine tailings left on the surface were later removed and crushed on occasion. *Hansen* is instructive here: "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 pp. 570-571.)

Then in 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." (AR 4158-4161.) A news article stated: "The cessation of active gold mining in the underground workings of the Idaho Maryland Mines Co. … marks the end of an era," and "the once great gold mining industry at Grass Valley, Calif. has rolled to a halt, perhaps permanently." (AR 520, 1600, 1601.) "For many years after most of the buildings had been removed" and "only the silo remained." (AR 4158, 4160.)

The reality that the "use of all structures necessary or incidental thereto" (*Hansen*, *supra*, 12

Cal.4th at 566) came to a complete end at the Idaho-Maryland Mine, materially distinguishes this case from the continuous aggregate production operation in *Hansen,* where "the plant, equipment, inventory, and utilities were maintained throughout the period and the plant could be made operational within two hours." (12 Cal.4th at 545, 546, 550, 569.) Here, cessation of all underground mining and selling off of all mining equipment are overt acts that carry the implication the owner of the Idaho-Maryland Mine did not retain any interest in the right to resume underground mining, and knowingly and intentionally relinquished any right the owner may have had to resume underground mining. Here, abandonment occurred as of 1957.

Petitioner takes the position that financial difficulty with underground mining allows the property owner to indefinitely cease all mining operations and eliminate all mining equipment under market conditions for gold improve, but still not be deemed to have abandoned the non-conforming underground mining use. But *Hansen* does not support that position. As the Court explained: "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 pp. 570-571.)

**D. The Owner's Selling Off Surface Parcels And Retaining Underlying Mineral Rights Shows A Hope For An Investment Opportunity, Not An Intention To Resume Underground Gold Mining.**

Petitioner repeatedly argues that the owner's transferring surface rights but retaining underlying mineral rights, or the mere ownership of mineral rights, is evidence that the owner did not intend to abandon the non-conforming underground mining use. (Open. Br. 8:24-9:3; 26:21-27:5; 28:1-29:15.) However, that argument is inaccurate for the following three reasons.

First, the essence of Petitioner's argument is that there can be no abandonment of any non-conforming underground mining use, even if the owner takes no effort in resuming underground mining and the mine remains "closed," as long as the owner has a hope, wish or desire to resume underground mining on a property with retained subsurface mineral rights, in some future decade or century "when economic conditions improved" (Verified Petition For Peremptory Writ of Mandate, ¶121) and when the political climate is just right. (Open. Br. 6:18-20; AR 2829-2836.) Petitioner's

argument that merely holding on to mineral rights prevents abandonment is inconsistent with the instruction in *Hansen* that "the duration of nonuse may be a factor in determining whether the nonconforming use has been abandoned." (12 Cal.4th at p. 569.)[4]

Second, under Petitioner's argument, virtually the entire County of Nevada would possess a vested underground mining rights merely because of the existence of retained mineral or subsurface rights. In fact, under Petitioner's position, every owner of fee property in California that was used for underground mining in the past could argue that they have the intention to resume underground mining (and have not abandoned any vested underground mining rights) merely because that fee necessarily includes the ownership of the underlying property and the minerals. Petitioner's position is fundamentally wrong because it thwarts the valid public policy affirmed in *Hansen* of reducing nonconforming uses(*id.* at p. 568), and it contradicts a public agency's police power to regulate land uses within its borders.

Third, the owner's retention of the underlying mineral rights only indicates that a potential future investment opportunity exists, not an intention on the part of the owner resume underground mining. Those mineral rights can be used for all manner of activities that were not engaged in on the Ordinance Date. As S. Miltenberger & H. Norby states:

> 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." [AR 4221-4223, 4236.]

Thus, contrary to Petitioner's argument, the mere retention of mineral rights is fully consistent with a finding that any vested right to resume underground mining was abandoned.

### E. The Idaho Maryland Mines Corp. Eliminated The Word "Mines" From Its Name, And Then Auctioned Off All Of The Mine Property As Of 1963, Which Reaffirmed The Corporation's Intention To Abandon Underground Mining.

Idaho Maryland Mines Corporation changed its name to Idaho Maryland Industries Inc. in 1960, eliminating the word "Mines" (AR 522), while the Corporation's Board discussed "the

[4] For example, Federal law regarding mining rights on Federal lands certainly does not accept Petitioner's argument. (*See e.g.,* 30 U.S.C.S. § 27: "Where a tunnel is run for the development of a vein or lode, or for the discovery of mines," the "failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

advisability of selling certain mineral rights belonging to the Corporation." (AR 1626-1633.) That demonstrates an intention to move away from underground gold mining. Indeed, when the Corporation files for bankruptcy in 1962, there is no mention in the news article of anything relating to mining activities. (AR 523, 1650-1652.)

Following that bankruptcy in 1963, the company auctioned all of its remaining mineral rights and surface parcels and sold them to William and Marian Ghidotti. (AR 523, 1652-1676.) Petitioner ignores the simple reality that by selling off all of the mine properties in 1963, thereby making underground mining *impossible* for Idaho Maryland Industries Inc., the company unequivocally demonstrated that it did not have any intention to engage in underground mining. And that sale constituted an unmistakable overt act that (1) implied the company did not claim or retain any interest in the right to the nonconforming use of underground mining; and (2) knowingly and intentionally relinquished any right the owner may have had to resume underground mining. (*Hansen*, 12 Cal.4th at p. 569.)

Petitioner's argument that the Idaho Maryland Industries Inc. **"**conveyed the mine at auction *as a mine* to mine owner and gold investor William Ghidotti" (Open. Br. 29:10-11; 9:10-14 (citing AR 523, 1653, 1655-1676) is both factually incorrect and legally misleading. The newspaper notice cited by Petitioner only states that the auction was for "2630 ACRES OF MINERAL RIGHTS" and "Approx. 78.531 Acres SURFACE RIGHTS." (AR 1653.) Neither that notice, nor the Quit Claim Deed to the Ghidottis, said anything about the sale being the conveyance of a "mine." (AR 1654-1676.) Furthermore, Petitioner appears to argue that somehow an intention to resume underground mining flowed from Idaho Maryland Industries, Inc., to the Ghidottis in the company's sale of the properties to the Ghidottis in 1963. However, that makes no legal sense for three reasons. First, while any vested right for underground mining that may actually exist at the time of sale stays with the land, any past *intention* of the seller to resume underground mining does not inure to the benefit of the buyer, and is not imputed to the buyer. Second, even if it was theoretically possible to transfer such an intention from the seller to the buyer in such a sale—which it is not—the reality in the case at bar is that Idaho Maryland Industries, Inc., in fact could not transfer such an intention to the Ghidottis, as discussed above, the company had no such intention at the time it sold the

property. Third, Petitioner has not presented any case law that recognizes the theoretical transfer of an *intention* to mine, which is what Petitioner's argument is based upon.

In summary, even if there was no abandonment of any vested right as of 1957, there certainly was abandonment as of 1963 when the company sold all of the property (all surface, underlying ground and mineral rights) to the Ghidottis.

### F. The Ghidottis Engaged In Overt Acts, And Failured To Act, Which Demonstrate No Intention Or Interest To Resume Underground Mining.

#### 1. While the Ghidottis allegedly purchased the property as an "investment" and as "gold enthusiasts," there is no evidence they intended to resume underground mining.

When the Ghidottis purchased the property from Idaho Maryland Industries Inc., Mr. Ghidotti stated that "he had no immediate plans but had bought the land as an investment." (AR1677-1678.) That is not an indication that he intended to reopen the underground gold mine. Petitioner's assertions about Mr. Ghidotti purportedly being an owner of stock in mining companies, a "gold investor," "gold enthusiast" and collector of "gold and quartz specimens" (Open Br. 9:10-12, AR 523, 524, 553-554, 1652-1678) do not indicate an intent by Mr. Ghidotti to resume underground mining on the property. Indeed, another auction bidder of gold specimens alongside Mr. Ghidotti stated: "It isn't the value of the gold, it's the history." (AR1690-1691.) In fact, Petitioner's admission that Mr. Ghidotti "keeps the gold 'to show to prospective buyers, if and when he decided to *sell* the mineral rights'" (AR 523, 656 (emphasis added)) demonstrates that Mr. Ghidotti's intention was only to sell off the mineral rights at some future time, and not to resume underground mining. As S. Miltenberger & H. Norby point out:

> That Ghidottis 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? [AR 4215.]

There is no evidence that the Ghidottis ever took any actions in the 1960s or 1970s to resume underground mining while the mine remained "idle" (AR 1926); and such "failure to act … caries the implication the owner does not claim or retain any interest in the right to the nonconforming use" of underground mining. (*Hansen*, 12 Cal.4th at p. 569.)

Petitioner argues that "[t]he Ghidottis began processing rock located on the property *for residual gold.*" (Open. Br. 9:15 (emphasis added).) The argument is unsupported by any evidence in the record. While the Ghidottis "operated a rock crusher on the property for four months" in "1964 or 1965" (Open. Br., 9:15-17, citing AR 523, 1698), the evidence cited by Petitioner shows that such rock crushing and hauling off the waste rock was *not* for the purpose of recovering any residual gold, but for the purpose of providing aggregate for the construction of a local freeway. (AR 523, 554, 1697-1698.) Indeed, Ms. Ghidotti wrote in 1979 that since 1964 or 1965 "people have been coming in and taking rock without permission" and "[t]hat is why I am selling what rock is left." (AR 1697-1698.) She said nothing about the recovery of residual gold, and nothing about resuming underground mining or reopening the mine.

Petitioner states that the Ghidottis "thought they could potentially reopen the Mine themselves." (AR 526.) That statement contradicts Petitioner's own admission that Mr. Ghidotti sought to sell the mineral rights. And Petitioner's reliance on the Declaration of Lee Johnson for that statement (AR 526) is unavailing, because the statement is not in the declaration, and Petitioner even admits that the statement "is not attributable to Lee Johnson." (AR 2879.)

Petitioner further relies on the statement in the Declaration of Lee Johnson that "[t]he entire time that Marian Ghidotti and Bill Ghidotti owned the Mine, *I believe* that 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." (Open Br. 9:10-12; 10:16-18; AR 523, 1679, 1681.) But that statement (i) is contradicted by the evidence showing that Ms. Ghidotti used surface parcels as a "horse ranch" (AR 1867) [which also contradicts Petitioner's assertion that the Ghidotti's did not use the property "for any other purpose" than a mine (AR 10:17-18)]; (ii) is only about the belief of *Mr. Johnson*; (iii) constitutes inadmissible hearsay; (iv) is not based on statements actually made by the Ghidottis, but rather Mr. Johnson's belief of what those thoughts of the Ghidottis might be; (v) was made during the course of this dispute with the County and for the explicit purpose of supporting the Petitioner's position; and (vi) lacks foundation as to how Mr. Johnson knows about what the Ghidottis actually "thought." Mr. Johnson's statement is inadmissible. (*Cf. People v. Flores* (2021) 70 Cal.App.5th 100, 108 [while "statements made by

jurors during deliberations are admissible under Evidence Code section 1150," "[the juror's] subjective understanding of the punishment discussions are evidence of internal thought processes and therefore inadmissible."]) Also, Mr. Johnson's statement in *2023* is simply not credible. (*See* S. Miltenberger & H. Norby, *Peer Review Comments* (AR 4216).)

Petitioner attempts to support Mr. Johnson's statement by arguing that "he is a member of the Ericka Erickson family, who owned the mine property from 1980 through 2017 and knew Marian Ghidotti personally for 9 years." (AR 2811-2812.) However, that argument is without foundation. There is no evidence that Mr. Johnson or the Erickson family ever heard anything Mr. Ghidotti said. And Petitioner's reliance upon Mr. Johnson's relationship as the son-in-law of Ms. Erickson (AR 1679, 2812) indicates that Mr. Johnson's statement about what the Ghidottis "thought" is, at best, derived from "the Ericka Erickson family" and not the Ghidottis. Again, that is inadmissible hearsay, so the Board was not obligated to treat his statement as credible, substantiated evidence. Mr. Johnson's statement remains untrustworthy and unsubstantiated.

**2. The removal of waste rock and rock crushing demonstrated the Ghidottis did not retain any interest in underground mining.**

Petitioner argues that occasional waste rock removal and rock crushing activities on the property "[f]rom 1967 through 1979" preclude a finding of abandonment of the non-conforming underground mining use. (Open Br. 9:15-22; 32:4-24.) Petitioner is wrong for four reasons.

First, Petitioner argues that "[t]he excavation and sale of waste rock from stockpiles on the surface property was part of the vested mining business, occurred during and after the operation of the underground gold mine, and predated the 1954 enactment of Ordinance No. 196." (Open. Br. 32:6-8.) Petitioner's argument misapplies *Hansen* by arguing that "[t]he sale of waste rock from mining operations was an 'integral part' of the mining operation and is included within the scope of the vested right to mine under *Hansen*." (Open Br. 32:8-10.) Petitioner wrongly treats the waste rock in the underground mining operation at the Idaho-Maryland Mine like the removal of gravel and rock from the riverbed and adjacent bank in the aggregate production operation in *Hansen*, which is a completely different operation. In *Hansen*, the "aggregate production" consisted of two parts: (1) "the removal of gravel and rock from the riverbed and its adjacent bank area"; and

(2) the quarrying of "the 'hillside' about 600 feet from the river for rock." (12 Cal.4th at p. 541.) Because one of those two components of the aggregate production operation continued, therefore the overall operation was not abandoned. (12 Cal.4th at p. 570.) Contrary to Petitioner's argument, *Hansen* did not hold that the overall "aggregate production" operation continued because the ancillary and incidental activities of storage and removal of rock continued. As the Court explained: "This is not to say…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. (*Id*. at p. 571.) In other words, there was no abandonment of the aggregate production operation in *Hansen* because one of the two key parts of the operation had continued, not because the ancillary and auxiliary activities of rock removal or crushing had continued.

Second, the underground mining operation ceased in 1956 and the mine became "idle" for many decades. (AR 1926.) As late as 1979, "[t]he project site is unused except for the occasional removal of rock and sand waste by the owner of the property." (AR 1801.) Because "broken, hard rock lay in great heaps in the waste dumps of the *closed* mines" (AR 654 (emphasis added), removing and crushing waste rock for aggregate purposes did not constitute resumption or continuation of underground mining operations. Contrary to Petitioner's argument (Open. Br. 32:4-6), removing and crushing waste rock do not constitute "mining activities." For example, Petitioner notes that rock removal and crushing continued in the 1960s and 1970s (Open Br. 32:17-18) and the Declaration of Lee Johnson that Petitioner relies on states that "mining" had *not* "resumed" as of 1977. (AR 1681.) Also, North Star Rock Company, Inc., the BET Group's licensee, stated in 1985 that its "application for the amended permit is for *rock processing and sales, <u>not mining</u>* or harvesting of raw materials," and that such activities "are *<u>not mining activities</u>*." (AR 3022-3023 (emphasis and underline added).))

Third, Petitioner wrongly contends that Ms. Ghidotti prepared for "the resumption of mining operations" by "entering a licensing agreement for rock crushing on the mine property." (Open. Br. 32:27-33:2.) To the contrary, there is no evidence that the rock crushing activity was a preparation for resuming underground gold mining. That is because underground mining was expressly prohibited under the use permit, which required: (a) "[t]he use permit covers only removal of mine

waste and processing to restore the site to its original contours" (AR 1842); (b) "[e]arth excavation for a borrow pit is not included" (AR 1842); (c) "[n]o material beyond the depth of rock waste material shall be removed from the site" (AR 1843); (d) the operation was only for a period of four years (AR 1807, 1821, 1866-1867); (e) "the sites of mineral recovery will be reclaimed following the waste removal" (AR 1794); (f) "[r]eclamation of this site will end surface mining and storage of the waste rock" (AR 1822); and (g) the reclamation plan "restores the mined lands to a useable condition which is readily adapted for alternative land uses." (AR 525, 1769-1851, 1866, 4024-4025, 4027, 4030.) As S. Miltenberger & H. Norby point out in *Peer Review Comments*: "[T]he intended activities to be covered by the use permit do not appear consistent with historical gold mining activity." (AR 4234.) Contrary to Petitioner's argument, Ms. Ghidotti's and her licensee's acceptance of those permit conditions that prohibit underground mining, and their operation of the rock crushing and sales activities under those permit conditions, are overt acts that (1) show lack of any intention to resume underground mining; (2) carry the implication the owner does not claim or retain any interest in the right to the nonconforming use of underground mining; and (3) demonstrate she knowingly and intentionally relinquished any possible vested right for underground mining.

Fourth, any incidental or auxiliary activities that once supported underground mining do not preserve a vested right after the core operation ceases. Petitioner's claim that any continued "vested activity" prevents abandonment of all mining rights misreads *Hansen*. There, the Court explained that while aggregate storage and sale were integral to the 1954 business, the vested right could still terminate if the property later ceased functioning as an aggregate-production site and became merely a "yard for storage and sales." (12 Cal.4th at pp. 570–571.) Likewise, here, the existence or sale of waste rock does not perpetuate a right to resume underground mining that ended decades earlier.

**3. Sawmill activity on the Brunswick Property after 1954 is not evidence of an intent to resume underground mining.**

The analysis of waste rock removal and sales, above, also applies to Petitioner's arguments about every other ancillary and auxiliary activity on the property after 1954. Petitioner argues that the following activities were part of the underground mining operation and are covered by the

vested right it seeks here: "crushing, sorting, stockpiling, waste rock placement, …sawmills, … offices, …engineering, dry storage, …machine and engineering shops, service garages, parking garages, storage buildings, and power lines, along with equipment including … trucks and other vehicles …." (Open. Br. 35:20-35:4.) Petitioner argues that if any of these activities occurred on the property in the 1960s and 1970s, then the vested right for the entire underground mining operation in 1954 was not abandoned, even if such activities were separate and distinct from the closed underground mine. That argument is incorrect because it is not supported by *Hansen*. Furthermore, the surface and mineral rights of the Brunswick sawmill site were completely severed from the rest of the property in 1956. (AR 1593-1594.) Additionally, the Brunswick sawmill was "constructed and operated" beginning in 1958 under multiple use permits (AR 521, 543-544, 547, 1620-1621, 3607-3608) and permits issued in 1964 and 1965 to operate a lumber mill made no claim of vested rights or planned mining. (AR 3941-3979.) Thus, activities conducted after 1957 do not demonstrate any intent to resume underground mining.

**4. Ms. Ghidotti did not buy surface properties for underground mining.**

Petitioner argues that Ms. Ghidotti "purchased additional surface lands from Newmont Mining that were contiguous to the Centennial Industrial Site, for the purpose of facilitating future mining operations on the mine property" (Open. Br. 9 :25-27; AR 527), but provides no admissible evidence that supports that argument. Petitioner cites the Order settling the estate of Marian Ghidotti and the Declaration of Lee Johnson signed in *2023*. (Open. Br. 9:25-27; AR 524-525, 1679-1687, 1744-1765.) But the estate Order says nothing about Ms. Ghidotti's purpose in purchasing those surface lands (AR 1744-1765), and Mr. Johnson's declaration only contains inadmissible evidence. Mr. Johnson states in his declaration that "*I am aware* that Marian Ghidotti continued acquiring particular properties adjacent to the Mine in the 1970s, including property owned by New Mining in or about 1976" and "Marian acquired these particular properties because *she thought* it would be used in the future to support subsurface mining operations at the Mine." (AR 1681 (emphasis added).) The Johnson Declaration fails on every evidentiary level. It does not indicate that Mr. Johnson's statement is based on personal knowledge, nor does it explain how, when, where, or by what means he allegedly became "aware" of Ms. Ghidotti's purported "thought"

about future uses of the properties she acquired. He does not claim that Ms. Ghidotti ever expressed that thought in any oral or written communication, and nothing in the declaration shows that his statement is anything more than speculation or guesswork. Even assuming, contrary to the record, that his statement was based on something Ms. Ghidotti actually said, it would still be inadmissible hearsay. In short there is no admissible evidence that Ms. Ghidotti purchased additional surface properties in 1976 in order to resume underground mining.

**5. By Petitioner's logic, Ms. Ghidotti's failure to "insure" the mine property from 1963-1976 and 1978-1980 is a failure to act that implies she had no interest in the non-conforming underground mining use.**

Petitioner argues that "[i]n 1977, Marian Ghidotti insured the mine property as a mining asset because she believed it contained a large amount of unextracted gold and would someday generate significant revenue when mining resumed," and she insured "the mine as a gold mine." (Open. Br. 9:27-10:2; 32:25-33:2; AR 525.) The only evidence provided by Petitioner for that argument is the following statement in the Johnson Declaration in August 2023:

> Marian Ghidotti insured the Mine property as a mining asset for liability losses in 1977. I was responsible for insuring the Mine property at this time when I worked at Gold Cities Insurance Company. It was my impression that Marian wanted the Mine property insured because she viewed it as a valuable asset that contained a large amount of unextracted gold and would one day generate significant amounts of income when mining resumed. [AR 525, 1681.]

That statement is deficient for multiple reasons. It fails to specify what property was actually insured or how it was insured. It fails to clarify whether the policy for "liability losses" related to nonexistent underground mining or merely covered surface activities unrelated to gold mining. It fails to explain what it means to insure "the mine as a gold mine." And it does not establish that such insurance was a step in preparation for future underground mining. Moreover, Mr. Johnson's statement about Ms. Ghidotti's purpose for obtaining the insurance is inadmissible hearsay, a speculative impression of her alleged state of mind made more than four decades after the fact. Mr. Johnson could not possibly know Ms. Ghidotti's internal thought processes.

Even assuming, *arguendo,* Petitioner's point that "insuring the mine as a gold mine" for a single year is somehow a "step[] to prepare for the resumption of mining operations" (Open Br. 32:28-33:1)–which it is not–then Ms. Ghidotti's *not* "insuring the Mine" for 17 years (1963-1976,

1978-1980), is by Petitioner's own logic, a repeated failure to act implied that she did not retain any interest in the right to non-conforming underground mining use during that that time. Thus, under Petitioner's reasoning, the "evidence" of an insurance policy in 1977 actually supports the conclusion that underground mining was abandoned.

**6. Ms. Ghidotti's failure to resume underground mining when gold prices were high, and in light of Section 12.05.190 of the County Zoning Code, is additional evidence consistent with abandonment.**

Petitioner states 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." (AR 555; see Open. Br. 8:14-9:7; 25:18-26:3; 27:17-21, 31:4-6, 32:25-27.) That statement–which demonstrates that Ms. Ghidotti's failure to resume underground mining in the 1970s when "the price of gold [was] now rising" (AR 524)–is proof that she knowingly and intentionally relinquished any right she may have had to resume underground mining. Petitioner acknowledges that, "[o]n August 15, 1971, the United States terminate[d] convertibility of the U.S. dollar to gold, effectively bringing the Bretton Woods system to an end and allowing the price of gold to increase." (Open. Br. 9:24; AR 524, 2838.) Indeed, "gold moved from $35 in 1974 to $825 an ounce in early 1980" (AR 778, 1966-1967), and as late as 1991 "four hundred dollars per ounce is often cited as the bench mark price for deciding whether a gold mine is viable." (AR 1985.) If, as Petitioner contends, the management of the Idaho Manyland Mines Corporation believed that gold prices increasing in the future "would justify reopening the Mine" (AR 555, 2719-2729), then the fact that Ms. Ghidotti did not resume gold mining in the 1970s despite high gold prices demonstrates that she did not actually have any intention to resume underground mining. Even Petitioner's acknowledgement that Ms. Ghidotti "acquire[d]] several mining claims which she subsequently *sells* throughout the 1970's" when gold prices were high (AR 524, 778, 1715-1732), shows that Ms. Ghidotti had no intention to actually resume underground mining when she was aware that high gold prices made the underground gold mining worth pursuing. (AR 1867.)

Petitioner alleges that Ms. Ghidotti did not resume underground mining because of "labor and refurbishing costs" (Open. Br. 6:18-20; AR 523-524, 1703-1704, 2825-2826), resistance by

"environmental policy groups" (Open. Br. 6:18-20; AR 524, 1733-1740, 2829-2830) and "anti-mine activism of some residents and organizations." (Open. Br. 6:18-20; AR 524, 1737-1740, 2829-2831.) But the risks posed by such issues will always exist with underground gold mining (AR 2232, 2234, 2239, 2272, 2836-2837), and can be overcome if the owner truly wanted to engage in underground mining. (AR 1733-1734, 1902-1945, 2829-2838.) And Petitioner's assertion that "competition for capital no doubt delayed Marion [*sic*] Ghidotti's plans for developing and re-opening the mine" (AR 3588) is not supported by any evidence, and is purely speculative.

Thus, the evidence in the record refutes Petitioner's argument that "Marion [*sic*] Ghidotti took numerous steps during the 1970s to prepare for the resumption of mining operations." (AR 3588.) The fact that Ms. Ghidotti did not take any measures to resume underground gold mining in the 1970s, and did not resume when she is presumed to have been aware that Section 12.05.190 of the Zoning Code extinguished any nonconforming use that is discontinued for more than a year, proves her intent to abandon the underground mine.

### 7. In 1980, the County never recognized vested rights for underground mining, or for the "Vested Mine Property" described by Petitioner.

Petitioner argues that when the County issued conditional use permit U79-41 in 1980 for a rock crushing and gravel retail sales operation at the property, the County "specifically recognized that these mining activities were part of an existing, non-conforming use"; provided a "written confirmation that mining activities were an existing, nonconforming use of the property"; and recognized that "the mine property at that time hosted an 'existing, non-conforming use' for mining activities." Petitioner further claims that the County "recognized the rock crushing activities as a vested right"; "approved and acknowledged the vested right to continue mining operations at the Subject Property"; "recognized the Vested Right"; and "confirmed the Vested Mine Property had a vested right." (Open. Br. 10:4-7; 16:20-21; 17:26; 19:20-21; 22:22-15; AR 550, 551-552, 554, 557.) Petitioner's arguments are incorrect for three reasons.

First, the County staff processed the use permit in 1980 for "rock crushing and gravel retail sales" operation (AR 1774, 1793) as "an *alteration* of an existing, non-conforming use." (AR 1775 (emphasis added).) That is because, at the time of the use permit, "[l]arge mine waste

stock piles exist[ed] on the surface" of the property (AR 1820), and because County staff wrote that "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." (Open Br. 10:8-13; AR 831-1832, 4023.) Thus, the only existing, non-conforming use of the property recognized by County staff was that "*mine rock has been sold and taken from the property.*" Rock crushing and screening was *not* part of the existing, non-conforming use of harvesting and selling the waste rock but was an "alteration" and "expansion" of that use that necessitated the use permit.

Second, contrary to Petitioner's numerous arguments, the County never recognized the rock crushing activities as a "vested right," never approved any "vested right to continue mining operations at the property," never "confirmed the Vested Mine Property's vested right," and never made "an acknowledgement of the vested right that the County now seeks to disclaim." (Open. Br., 3:14-17; 10:6-7; AR 488, 550, 558-559.) Petitioner's argument is based on the fundamentally false premise that the County's recognition of the nonconforming use of removing and selling waste rock somehow equates to the County's recognition of a vested right for the entire "Vested Mine Property" including underground mining. The truth is that the County's recognition of a non-conforming use for removing and selling the waste rock did not recognize any right to engage in "mining activities," especially not underground mining. No County entity determined any "vested rights" in 1980. Also, the BET Group's licensee stated in 1985 that its "application for the amended permit is for <u>rock processing and sales, not mining</u> or harvesting of raw materials," and that such activities "are <u>not mining activities</u>." (AR 3022, 3023 (underline added).) Underground mining was expressly prohibited under the Use Permit U79-41. Furthermore, by imposing a time limit for rock crushing and sales operation, the County rejected any vested right for that operation. There is likewise no evidence that removal and sales of the waste rock is an "action[] taken indicating plans for future mining." (AR 557.) Thus, Petitioner is mistaken in arguing that the removal and sale of waste rock is an exercise of the "very vested rights at issue in this matter." (AR 3587.)

Third, Petitioner is also wrong when it argues that the County "vested the right to mine

for the entire Vested Mine Property" because "recognition of a vested right on a portion of the Mine Property necessarily extends to the entirety of the Vested Mine Property, and cannot be broken down to encompass less than the entire business operation." (Open Br. 10:4-7; 16:20-21; 22:22-15; AR 550, 551-552, 554.) The logic of that argument is erroneous because the County never "vested" any mining activity (as discussed above). Furthermore, as noted above, the removal and sale of waste rock is distinct from underground mining and *Hansen* makes clear that a vested right may properly be deemed terminated where active production has ended and the property is used solely for storage and sale of previously processed rock. (12 Cal.4th at pp. 570-571.) Accordingly, the incidental and auxiliary activities to underground mining that may occasionally occur on the property after the cessation of underground mining in 1956 (such as removal and sales of waste rock) do not preclude the conclusion by the Board and this Court that the underground mining has been abandoned.

ln its Petition, Petitioner argues that the County's statement in the staff report in 1980 in connection with Use Permit U79-41 means that there is a "*1980* vesting date, when the County confirmed the Vested Mine Property's vested right." (AR 551, 557.) That argument is patently wrong as to the action taken by the County as discussed above. But even assuming *arguendo* Petitioner's argument is true, then Petitioner is not entitled to a finding of vested rights because (i) the scope of the vested right in this case – based on Petitioner's argument - must be limited to only what was happening on the property as of 1980 (*Hansen, supra,* 12 Cal.4th at p. 564); (ii) only the removal, crushing and sales of waste rock on the surface of the property was even possibly occurring as of 1980, and no underground activities whatsoever were taking place at that time (AR 1831-1832, 4023); (iii) the rock removal, crushing and sales were not part of any underground mining operations in 1980; and (iv) all of the surface waste rock was completely removed as of 1985, and so there is nothing to continue from the operation sought in 1980. (AR 1880, 1885.) Thus, Petitioner's own argument leads to the conclusion that Petitioner is not entitled to the vested mining right it sought from the Board and now seeks from this Court.

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### 8. Ms. Ghidotti's leaving the property to the BET Group does not preclude the abandonment of the underground mining use.

Without any admissible evidence, Petitioner argues that Marian Ghidotti left the "Subject Property" to the BET Group because she believed they could resurrect the mine, knew that each member wanted the mine to resume operations, and thought they had the skills and resources to return the property to production. (Open Br. 1:20-22; AR 488, 525-526.) Petitioner relies on statements in the Johnson Declaration that contain the same evidentiary failures discussed above. (*See People v. Perez* (1992) 2 Cal.4th 1117, 1133.) As S. Miltenberger& H. Norby state:

> The 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. [AR 4221-4223, 4230.]

Also, leaving the property to the BET again shows that Ms. Ghidotti had no intent, herself, to ever resume underground mining.

## G. The Actions By The BET Group Support The Finding That The Non-Conforming Underground Mining Use Was Abandoned.

Petitioner argues that the BET Group, Petitioner's predecessor, "engaged in a variety of activities to preserve the right to conduct mining activities at the property and to attempt a restart of commercial-scale mining activities." (Open Br., 10:23-24.) However, for seven reasons, BET Groups' activities prove that the non-conforming underground mining use was abandoned.

> First, the real estate broker for the BET Group stated, under penalty of perjury: Throughout the mid 1980's I remained in contact with the BET Group and work on planning to sell their holding known as the former Idaho Maryland Mine. 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. This viewpoint was clearly communicated to me by each of the three executors. [AR 57162.]

Second, when the BET Group sold off the surface property and mineral rights to Petitioner, the real estate broker working directly with and for the BET Group stated: "We are not selling a mine." (AR 57163.) That is corroborated by the fact that the asking price was not based on gold reserves or even comparable sales of existing mining assets or properties. Instead, "[m]easures taken to arrive at our asking price were based on comparable sales of comparable

sales of similarly zoned light industrial and residential properties." (AR 57163.)

Third, the BET Group sold off a portion of the surface areas adjacent to the Brunswick Industrial Site in the 1980s for residential development with a reservation of the mineral rights. (Open Br. 33:5-7; AR 527, 1946-1950, 1956-1960, 1968-1978.) Contrary to Petitioner's argument, that did not indicate an intent to resume underground mining. Even Petitioner admitted during the administrative proceeding that such retention is "preserving the *right* for underground mining operations" (AR 3588 (emphasis added)), which is completely different than having an actual intention to engage in underground mining operations. As historians S. Miltenberger & H. Norby point out, "[r]eservation of mineral and other subsurface rights with the creation of 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." (AR 4221-4223, 4235.) Furthermore, selling off the surface parcels for residential development proves abandonment of underground mining. Petitioner highlights the opposition of neighboring residents to underground mining as being a reason why underground mining was not pursued at this property (as well as other properties in Nevada County and in the state of Nevada) in the 1970s and 1980s. (AR 524, 526, 2829-2837.) Assuming *arguendo* Petitioner's argument is true, then the BET Group's selling off surfaces properties in the 1980s for the express purpose of developing residential housing right over and next to the retained subsurface properties and mineral rights estate (i) supports the conclusion that the BET Group had no intention of resuming underground mining, and (ii) demonstrates that the BET Group was releasing any right or claim it had to underground mining. No reasonable person or entity would both encourage such residential development (with its very recent resistance to mining) AND expect to also reactivate underground gold mining at the historic Idaho Maryland Mine underneath and immediately adjacent to the residential homes that would be built.

Fourth, the BET Group and their licensee accepted the conditions imposed by the County on Use Permit No. U85-25, which amended Use Permit U79-41 to allow importation of off-site rock for on-site processing. (AR 526, 1876-1888, 3016-3024.) Use Permit U85-25 was "subject to the original conditions attached to U79-41," including "only removal of mine waste and processing to restore the site to its original contours" was allowed; "[e]arth excavation for a

borrow pit is not included"; the processing of rock material from off-site locations is allowed "for a maximum of five years"; and "[n]o material beyond the depth of rock waste material shall be removed from the site." (AR 1879, 1880, 1881.) Those conditions did not allow underground mining, just like Use Permit U79-14. Furthermore, the off-site rock was to be used "as fill materials in the old tailings pond area to create an engineered building pad for future industrial uses"; and the "fill would be constructed to form the building site of a potential future industrial use (as per existing zoning)." (AR 3018, 3021.) That proves, by clear and convincing evidence, that the intent was to instead prepare the property for an industrial building that complies with the "existing zoning" –which forbids underground mining.

Fifth, in 1986, BET Group's licensee obtained Use Permit U86-45 that amended Use Permits U79-14 and U85-25 (AR 527, 1853, 3025-3049), the approval of which was intended to "result in the secondary benefit of creating a site usable for County/City designed industrial uses on property currently not suitable for a large industrial building due to slope constraints." (AR 3038.) Also, "the proposed use of the site would be a building location for an industrial building as per zoning"; the "[f]inal reclamation of the site is an industrial building pad"; and "[b]oth the operation of a rock processing facility and industrial buildings are consistent with existing County and City zoning and general plan designations." (AR 3042, 3043) That again proves, by clear and convincing evidence, an intent to prepare the property for "industrial buildings [that] are consistent with existing County and City zoning and general plan designations," which do not allow underground mining.

Sixth, the BET Group did not file a Notice of Intent to Preserve Interest in the subsurface mineral rights until 1989, many years after the Marketable Record Title Act, Civ. Code 880.020, *et. seq.* (1982 ch. 1268 §1). (AR 528, 1981-1983.) That failure to act demonstrates the owner did not claim any interest in the right to underground mining from 1980 to 1989, consistent with restrictive conditions and purposes of Use Permits U79-41, U85-25 and U86-45. Petitioner presents no evidence from the record to refute that. (Open Br. 31:18-24.)

Seventh, the BET Group and their licensee, North Star Rock Products, Inc., also accepted the conditions imposed by the County on Use Permit No. U92-37 (AR 528-529, 1990-2040) for

the expansion of the existing rock harvesting operation, where all existing factors of the operation "are proposed to remain as approved under the last permit [i.e., U86-045]," and where the permit expired in 2002. (AR 528-529, 1855, 1997, 2001, 2011.) "No expansion of current mining methods or product sales is proposed." (AR 2025.) While the project site was zoned "M1," which "does not specifically allow mining" (AR 2012), the County Staff found that the project satisfied the General Plan mining policy because "the land can be reclaimed for alternative uses." (AR 2001.) The County staff explained:

> Extensive grading of the site is required in order to develop the site under the existing zoning. The rock harvesting (quarrying) operation on this site has been effectively grading pads which may be used for commercial [or] industrial purposes in the future. This project would be expanding this grading operation by creating additional terraces. [¶][¶] … [S]taff recommends that the Commission make the finding that this project, in this location, is consistent with the "M1" zoning district assigned to the project site. This finding is based on the project providing the grading work for ultimate development of the site with uses expressly or conditional allowed in the "M1" zoning district, that the project is compatible with existing land uses in the area of the project site, and that the project meets the intent and purpose of the "M1" zoning district which is to provide areas of diverse industrial development in close proximity to commercial and residential development. [AR 2001, 2013.]

Use Permit U92-37 also provided: "Quarry or mining operations on that portion of the site currently within the jurisdiction of the City of Grass Valley shall not be permitted until a permit therefore is issued by the City of Grass Valley ["City"]." (AR 1997.) Therefore, the lessee entered into an Agreement with the City of Grass Valley that explained that "the nature of the proposed pit excavation and reclamation is to create future level building site(s)" (AR 525, 1852-1862), which displays an intention *not* to resume underground mining in the future. Thus, by agreeing to the conditions in Use Permit U92-37 and the language in the Agreement, the BET Group and its licensee acknowledged that the rock would be harvested and the land surface would be graded in a manner that would prepare the property in 10 years for non-mining industrial uses, including industrial building site(s) that is in close proximity to commercial and residential development. The facts here are akin to the *Stokes v. Board of Permit Appeals*, discussed above.

**H. Sierra Pacific Industries Also Abandoned Underground Mining.**

Sierra Pacific Industries (Petitioner's predecessor (AR 532, 2286-2288)) applied to the County to rezone the sawmill property in 1993 "to allow for 'service maintenance and repair,

manufacturing and processing, warehousing and distribution facilities … office, professional and conference facilities." (AR 529, 2062-2078, 2085-2087.) That rezone was for "industrial purposes" that do not include mining at all (AR 529, 2074-2075), but instead allowed for the County's preference of "some type of mixed industrial/business park uses." (AR 2085.) That overt act by Sierra Pacific Industries also demonstrates the owner's intention to use the property for industrial development, not underground mining – again, similar to the *Stokes* case.

## I. The Many Use Permits Over The Decades Show That The Property Owners And Licensees Uniformly Understood That There Was No Vested Right For Underground Mining In This Case.

Multiple owners of the property and their licensees, including Petitioner, have applied for use permits for various activities on the property that Petitioner alleges come within the vested right it seeks here. Such use permits demonstrate a consistent, decades-long, *understanding* of the property owners that use permits would be needed to resume underground mining. For example:

- In 1979, Ms. Ghidotti's licensee, North Star Rock Products, applied for Use Permit U79-14 for a rock crushing operation under conditions that did not allow underground mining. (Open. Br. 10:4-7; AR 525, 1773-1829.)
- In 1985, and again in 1986, Ms. Ghidotti's licensee applied for Use Permit U85-25 and U86-45 that amended Use Permit U79-14 and that permitted expanded rock crushing, again under conditions that did not allow underground mining. (AR 526, 1852-1862, 1876-1888.)
- In 1992, BET Group's lessee obtained both Use Permit U92-37 and an Agreement with the City, which expanding the rock harvesting operation, and which recognized that the property would be used for other non-mining industrial uses. (AR 525, 1852-1862, 1990-2040.)
- In 1994, Emperor Gold Corporation (later Emgold Mining Corporation) obtained Use Permit U94-017 to dewater the mine, and to conduct exploration surface drilling. (AR 530, 2119-2120, 2127-2154.) The 2-year use permit issued by the County does not recognize any vested right for underground mining: "Upon completion of the project, the New Brunswick Shaft shall be safely secured to prevent future mine entry. If prior to project completion, a new application is sought to reopen the mine, this condition may be sustained until a determination is made on that application." (AR 2147, 2148.) In 2003, Emgold affirms that a use permit is needed

to reopen the mine when it announces that it "is confident that it will be able to obtain a Use Permit for the Idaho-Maryland," because in the prior year "three gold mines have received Use Permits to operate in California." (AR 531, 2180-2182.) Five years later, Emgold reiterates its understanding (and that of the BET Group) as to the need for a "Conditional Mine Use Permit" for the project. (AR 531, 2213-2217. *See* AR 2261-2263 ["a subsidiary of Emgold Mining Corp., *under agreement with the mine owners*, …applied to California and local regulating agencies for *permission to reopen the mine*." (Emphasis added).])

- Petitioner admits it "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." (AR 532.)

Citing *Goat Hill Tavern* and *McCaslin* v. *Monterey Park* (1958) 163 Cal.App.2d 339, Petitioner argues that "applying for or receiving use permits does not indicate the relinquishment of a vested right." (Open Br. 33:33:20-34:1; AR 538.) But neither *Goat Hill Tavern* nor *McCaslin* makes such a rule or even discusses that premise, and "cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.) Petitioner's reference to other mining projects in California that received a vested rights determination in addition to obtaining use permits (Open Br. 34:9-16), is unavailing because Petitioner does not discuss whether the use permits in those other projects it cites included conditions that prevent the very vested rights that were also determined for those projects. Here, the use permits did not allow underground mining.

Thus, the many owners of the property have, through their consistent conduct over the decades, demonstrated their uniform understanding that a use permit (and not a vested rights determination) will be necessary to resume underground mining at the Idaho-Maryland Mine.

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## VI. CONCLUSION

The record evidence affirms the Board's decision that the record does not support the particular vested underground mining right Petitioner claims in this case. Also, substantial evidence supports the Board's decision, by every applicable standard of proof that even if a vested right once existed in October 1954, it was abandoned in 1957, again in 1963, and at numerous times in the following decades. Accordingly, Petitioner's petition for a writ of mandate for vested rights should be denied.

Dated: November 18, 2025

OFFICE OF THE COUNTY COUNSEL

By: /s/ *Katharine L. Elliott*
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BOARD OF SUPERVISORS OF THE COUNTY OF NEVADA and the COUNTY OF NEVADA

Dated: November 18, 2025

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## PROOF OF SERVICE

I, Karen Scott, declare as follows:

I am employed in the County of Sacramento, over the age of eighteen years and not a party to this action. My business address is 2100 21st Street, Sacramento, California 95818. On the date below, I served the foregoing document described as:

**RESPONDENTS BOARD OF SUPERVISORS OF THE COUNTY OF NEVADA AND COUNTY OF NEVADA'S OPPOSITION TO PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF ADMINISTRATIVE MANDATE**

On the parties listed below:

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*Admission Pro Hac Vice*

by the following means of service:

**BY MAIL:** I placed a true copy in a sealed envelope addressed on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

X **BY ELECTRONIC SERVICE [EMAIL]:** Sending a true copy of the above-described document(s) via electronic transmission from EFS and email address kscott@aklandlaw.com to the persons listed above on the date below. The transmission was reported as complete and without error. [CRC 2.251(i)(2), 2.256 (a)(4), 2.260].

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on November 18, 2025, at Sacramento, California.

Karen Scott
Karen Scott