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Via Electronic Mail Only

Board of Supervisors
Nevada County
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Re: Response to Idaho-Maryland Mine Vested Rights Petition

Dear Board Members:

On behalf of the Community Environmental Advocates Foundation, we write in response to the Idaho-Maryland Mine Vested Rights Petition ("Petition") submitted to the Nevada County Board of Supervisors ("Board") by Rise Grass Valley, Inc. ("Rise"). The Petition alleges that Rise holds a vested right to conduct gold mining operations throughout an extensive surface and subsurface estate in Nevada County that Rise calls the "Vested Mine Property" (the "Property"). The Property includes the site of the Idaho-Maryland Mine, a historical gold mine that closed permanently in 1956.

The Petition should be rejected. At the outset, the notion that Rise could retain a legal right to resume a nonconforming use that has not been carried out in nearly seventy years is absurd. Even assuming that a vested right to mine gold existed at some point, that right has long since been abandoned. The Petition attempts to avoid this obvious conclusion by distorting the law and the facts. Among other things, it ignores the unambiguous mandates in the County's Land Use and Development Code. It elides any distinction between mining gold and quarrying waste rock. And it glosses over volumes of evidence from numerous sources showing that all gold mining operations on the Property were, in fact, abandoned decades ago. But try as it might, Rise cannot escape the legal reality that it has no vested right to mine gold on the Property.

The Board should also recognize Rise's Petition for what it is. Rise has owned the subject Property for nearly seven years. It applied for County permits to begin gold mining operations four years ago. Yet only now is Rise claiming that it actually held

a vested right to mine gold all along. Rise's Petition is a cynical response to the County's Planning Commission's unanimous recommendation that the Board reject Rise's project and decline to certify its environmental impact report. Rise could have tried to make its case that the Planning Commissioners—and the County's residents—were wrong. Instead, Rise has opted to circumvent the legislative process by asserting that the County *must* allow Rise to build and operate its massive gold mine. This last-ditch argument is as wrong on the merits as it is undemocratic. The Board should deny Rise's Petition.

I. Even assuming there was ever a vested right to mine gold on the Property, that right has been abandoned for decades.[1]

Under both state caselaw and the Nevada County Land Use and Development Code, a property owner may acquire "a vested right to continue a use which existed at the time zoning regulations changed and the use thereafter became a nonconforming use." *Stokes v. Bd. of Permits Appeals* (1997) 52 Cal.App.4th 1348, 1353; *see also* Nevada County Land Use & Development Code ("LUDC") § L-II 5.19(B). However, as Rise's Petition acknowledges, the right to carry out a nonconforming use is not permanent. *See* Pet. 1. Rather, a vested right is lost upon abandonment of the nonconforming use. *See id.*; *Hansen Brothers Enterprises, Inc. v. Bd. of Supervisors* (1996) 12 Cal.4th 533, 569.

What the Petition fails to mention are other fundamental legal principles that must frame the Board's vested rights analysis. First, "[t]he 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." *Dienelt v. County of Monterey* (1952) 113 Cal.App.2d 128, 131. "Given th[is] objective . . . to eliminate

[1] To be clear, Rise also has not provided adequate proof (1) that a vested right to mine gold arose at any point, (2) that this right existed as to each of the many individual parcels that make up the current Property, or (3) that Rise's proposed uses of the Property would not constitute an improper enlargement or intensification of that right. *See Hansen Brothers Enterprises, Inc. v. Bd. of Supervisors* (1996) 12 Cal.4th 533, 552, 563. However, because any vested right to mine gold has so obviously been abandoned, the Board need not address these other necessary elements of a vested rights claim in order to reject Rise's Petition. For additional information concerning the historical ownership and use of the Property's individual parcels, please refer to the "Review and Analysis of the Rise Grass Valley Vested Rights Petition" submitted to the County by the Community Environmental Advocates Foundation on October 20, 2023 (hereafter "CEA Foundation Letter").

nonconforming uses, courts throughout the country"—including the California Supreme Court—"follow a strict policy against their extension or enlargement." *County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 687. Furthermore, neither courts nor the County hold "the power to waive or consent to violation of the zoning law." *Hansen Brothers*, 12 Cal.4th at 564.

The upshot is that the Board need not—and cannot—strain the law and the facts to resurrect a vested right that has clearly been abandoned. The expectation under the law is that nonconforming uses will be phased out over time. It is against this backdrop that Rise must prove that it somehow holds a legal entitlement to revive a business operation that no previous owner of the Property has carried out in sixty-seven years. For the reasons set forth below, it cannot.

A. The burden is on *Rise*, as the vested rights claimant, to demonstrate that its alleged right has not been abandoned.

It is blackletter law that the party *asserting* a vested right bears the "burden of proving its vested rights claim." *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 629 (citing *Hansen Brothers*, 12 Cal.4th at 564). Nonetheless, throughout its Petition, Rise attempts to shift this burden to the party *challenging* a vested rights claim. Citing the California Supreme Court's *Hansen Brothers* decision, Rise repeatedly asserts that the party challenging a vested rights claim must separately supply "clear and convincing evidence" of *both* an "intent" to abandon the vested right *and* "overt acts" showing abandonment of the right. *See* Pet. 1, 54, 66, 67, 68, 69.

Hansen Brothers says none of this. Apart from repeating the basic rule that the vested rights applicant bears the burden of proving the right's existence, *see* 12 Cal.4th at 564, *Hansen Brothers* sets forth no holding regarding either the *burden* or the *quantum* of proof for abandonment, *see id.* at 568–71. In particular, it does not state that the burden of proving abandonment shifts to the challenger of a vested rights claim. *See id.* And it never once uses the phrase "clear and convincing evidence." *See id.* Indeed, later unpublished state court decisions make clear that *Hansen Brothers* left these exact issues unresolved. *See, e.g.*, *Hardesty v. State Mining & Geology Bd.* (2017) 219 Cal.Rptr.3d 28, 45 (unpublished) (indicating *Hansen Brothers* did not address whether "abandonment must be shown by clear and convincing evidence," and assuming without deciding that standard applied).[2] And other, more recent vested rights cases suggest that it

[2] The Petition also cites *Pickens v. Johnson* (1951) 107 Cal.App.2d 778, 787, for the proposition that a vested rights challenger must prove abandonment with "clear and convincing" evidence. *See* Pet. 54 & n.552. *Pickens*, unlike *Hansen Brothers*, was not a

is the vested rights *applicant* who must prove that abandonment has not occurred, at least when—as in this case—there have been long periods of discontinued or inconsistent use. *See Stokes*, 52 Cal.App.4th at 1356 (indicating there needed to be "facts to which [*the applicant*] can point as evidence the prior owners intended to and in fact did continue to operate" the nonconforming use); *Calvert*, 145 Cal.App.4th at 625.

Additionally, although it is technically correct that "abandonment" entails both an "intention to abandon" and an accompanying "overt act, or failure to act," the caselaw is unequivocal that the *intention* to abandon a nonconforming use can be inferred entirely from a property owner's *conduct*. *See, e.g.*, *Hansen Brothers*, 12 Cal.4th at 569; *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 890 (holding a court is capable of "reasonably infer[ring]" an intention to abandon from a property owner's "conduct"); *Pickens*, 107 Cal.App.2d at 788 (recognizing "abandonment is a matter of intent which may be proved by the acts and conduct of the party who is alleged to have abandoned" the interest). Thus, to the extent the Petition implies that the "intent" and "overt acts" prongs of abandonment require different showing and different evidence, it misrepresents the caselaw. The Board is free to infer that any vested right has been abandoned based on the actions of prior Property owners alone.

Regardless, the outcome of Rise's Petition does not depend on nuanced questions about the exact evidentiary standard the Board should apply. This is a straightforward matter. Even assuming that the denial of a vested right must be supported by "clear and convincing evidence" that previous property owners intended to abandon gold mining operations on the Property, that evidence exists in droves. *See* Parts I.B. & I.C., *infra*.

B. Under the County Code, any vested right to mine gold expired by operation of law once this nonconforming use was discontinued for over a year.

The Board can deny Rise's Petition outright by applying a single, unambiguous provision of the Nevada County Code. Specifically, Section L-II 5.19 of the Nevada County Land Use and Development Code states:

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vested rights case, and thus lacked the background presumption that it is the applicant's burden to prove its vested right. *See Pickens*, 107 Cal.App.2d at 787–89. In any event, *Pickens* never explicitly articulated the "clear and convincing" evidence standard. Moreover, *Pickens* recognizes that abandonment can be demonstrated entirely through overt acts "from which an inference of abandonment can be drawn." *See id.*

> **B. Legal Nonconforming Uses.** A legal nonconforming use is any use lawfully in existence at the time this Chapter or amendments thereto takes effect, although such use does not conform to the provisions of this Chapter. Such use may continue subject to the following:
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> . . .
>
> 4. If the use is discontinued for a period of one year or more, any subsequent use shall be in conformity with all applicable requirements of this Chapter, except as follows: a) uses clearly seasonal in nature (i.e., ski facilities) shall have a time period of 365 days or more, b) surface mining operations shall comply with the provisions of Section 3.22.L providing for interim management plans.

LUDC § L-II 5.19(B) (emphasis added). A virtually identical provision has existed in the Nevada County Code since the County enacted its first comprehensive zoning regulations in 1954. *See* Pet. Ex. 185 at 52[3] (providing, circa October 1954, that "[i]f any non-conforming use of land . . . is abandoned and/or ceases for any reason whatsoever for a period of not less than one year, any future use of such land . . . shall be in conformity to the zone in which it is located").

Rise's lengthy Petition never once mentions this provision. But that does not make its effect on the Petition any less determinative. Section L-II 5.19(B) means exactly what is says. And Rise explicitly concedes the few basic facts that are necessary to reject its Petition. It acknowledges that gold mining became a nonconforming use of the Property in October 1954, Pet. 55; that all "large-scale excavation and gold processing" on the Property "halted by 1956," Pet. 71; that within the next year the company had sold off all mining infrastructure from the Property and allowed the mine to flood, Pet. 37; that no "gold mining companies resumed exploratory work [or] engaged in

[3] The Petition's exhibits lack sequential page numbers. For ease of reference, citations to the Petition's exhibits refer to the page number of the PDF document in which the exhibit is included, per the files available on the County's website: https://www.nevadacountyca.gov/3860/Petition-for-Vested-Rights. For example, "Pet. Ex. 185 at 52" refers to page 52 of the document available at the link titled "IMM Vested Rights Petition – Exhibits 176 – 225": https://www.nevadacountyca.gov/DocumentCenter/View/50847/IMM-Vested-Rights-Petition---Exhbits-126---175.

efforts to re-open the Mine to produce gold" until approximately "40 years later," Pet. 72; and that the actual extraction and production of gold has *never* resumed on the Property, *see* Pet. 73–74. Thus, under Section L-II 5.19(B), any vested right to mine gold had been lost by operation of law by the 1960s.

The California Supreme Court's *Hansen Brothers* decision is entirely consistent with this analysis. There, the Court discussed an earlier iteration of Section L-II 5.19(B) that is materially identical to the current version. *See* 12 Cal.4th at 568–71 (discussing then-Nevada County Development Code section 29.2(B)). Because it ultimately concluded that the nonconforming "use" at issue had never been discontinued at all, the Court explicitly declined to rule on whether the County Code "is intended to automatically terminate all nonconforming uses whenever the use has ceased for" longer than the statutory period. *Id.* at 571 n.30. However, the Court voiced no doubts about whether the Code would terminate a nonconforming use automatically when—as here—*all* activities associated with the use had ceased for the statutory period.[4] *See id.*; *see also id.* at 571 ("This is not to say that future inactivity at the mine may not result in termination of that vested right . . . .").

Other cases decided after *Hansen Brothers* indicate that the Board should give Section L-II 5.19(B) its plain meaning and find that any vested right to mine gold has been automatically lost through discontinuance of the use. In *Stokes*, the court analyzed the effect of a municipal regulation that automatically voided any right to resume a nonconforming use after it had been discontinued for a three-year period. 52 Cal.App.4th at 1354 & n.4. After discussing the *Hansen Brothers* opinion at length, *see id.* at 1354–56, the court determined that the case "d[id] not assist" the vested rights applicant, *id.* at 1355. It emphasized that unlike in *Hansen Brothers*, *all* relevant uses of the subject property had stopped for a period of seven years, and thus any right to resume the previous nonconforming use had been lost. *See id.* at 1355–56. Significantly, the court went on to hold that although the municipal permitting board had *also* found "that the prior owners had intended to abandon the . . . nonconforming use," this additional finding of intent was "not necessary," given the code's automatic discontinuance provision. *Id.* at 1356.

[4] The Court, noting the "seasonal[ity]" of the aggregate quarrying business, did express some skepticism that a property owner could automatically lose a vested right to quarry if it were to cease the literal activity of quarrying for longer than the statutory period—provided, however, that the owner was still selling aggregate from its stockpiled stores throughout the time that quarrying was paused. *See id.* But in this case, once gold mining had ceased by 1956, all activities associated with gold mining also ended.

The Board should follow *Stokes* and apply the plain language of Section L-II 5.19(B). All gold mining operations on the Property stopped by 1956, by which time gold mining was a nonconforming use. No gold mine has operated on the Property in the more than six decades since. As a result, Section L-II 5.19(B) *requires* that the County deny Rise's Petition. *See Hansen Brothers*, 12 Cal.4th at 564 (emphasizing County lacks authority to consent to violations of its own zoning laws).

C. The historical record is clear that no vested right exists because prior Property owners *intended* to abandon—and *did* abandon—all gold mining operations.

Even if Section L-II 5.19(B)(4) had not automatically voided any vested right to mine gold on the Property, the historical record is replete with evidence that the right has, in fact, been abandoned.

First, both the fact that gold mining has not occurred on the Property for sixty-seven years and the fact that any gold mining use was discontinued for decades longer than the deadline in Section L-II 5.19(B)(4) are strong evidence of abandonment. Virtually all cases recognize that although periods of nonuse alone may not be sufficient to prove abandonment, long lapses certainly are evidence of an intent to abandon. *Stokes*, 52 Cal.App.4th at 1355–56; *Hardesty*, 219 Cal.Rptr.3d at 45 (emphasizing property owner did not "actually mine for many, many years"); *Hansen Brothers*, 12 Cal.4th at 569 ("[T]he duration of nonuse may be a factor in determining whether the nonconforming use has been abandoned."). Moreover, *Hansen Brothers* noted that in all jurisdictions, nonuse for longer than a statutory deadline provides additional proof of abandonment. *See* 12 Cal.4th at 569 (explaining different jurisdictions have viewed such nonuse as either (1) being *sufficient* to prove abandonment, regardless of subjective intent; (2) creating a *presumption* of abandonment; or (3) providing *evidence* of abandonment). The caselaw and common sense all point to the same conclusion: When property owners discontinue a nonconforming use for sixty-seven years, and when that period of nonuse is sixty-six years longer than local law allows, they *intended* to abandon the use.

Second, the *manner* in which gold mining operations ceased strongly conveys an intent to permanently abandon the use. In 1957, just six months after the mine had ended all operations, the mining company that owned the Property conducted a two-day fire sale of any remaining mining infrastructure on the Property. Pet. 37–38; Pet. Ex.

422 at 159.[5] The mine shafts were allowed to flood. Pet. 37, 70; Pet. Ex. 419 at 153. The company planned to pivot to an entirely different business—aircraft manufacturing. Pet. Ex. 421 at 157. And, within five years, the company was bankrupt and the Property was sold at auction to a private couple. Pet. 40, 70.

Although "fluctuating mineral prices *may* induce an operator to close a mine temporarily, . . . that does not mean *all* gold mines were closed because of low prices, with the intent to reopen when profitable." *Hardesty*, 219 Cal.Rptr.3d at 44. The shuttering of the Idaho Maryland Mine was not the sort of temporary pause in operations to wait out a fluctuating market that can stave off abandonment. *See Hansen Brothers*, 12 Cal.4th at 569 (citing a North Carolina case in which "[t]here, as in [*Hansen Brothers*], the plant, equipment, inventory, and utilities were maintained throughout the [nonuse] period and the plant could be made operational within two hours"); *id.* at 570 n.29 (providing an example of a dairy business that discontinues the butter making portion of its operations "for several months when the demand for butter was low" and "stored butter was adequate to meet the need"). Rather, by the early 1960s, there simply were no mining facilities left to operate on the Property, and no mining company left to resurrect them.

Third, the admissions and behavior of prior Property owners show that they viewed gold mining as nothing more than a defunct, historical use. When applying for a County use permit to quarry waste rock in 1979, the then-Property owner described the Idaho-Maryland Mine as a "former" use of the Property. Pet. Ex. 232 at 24. The environmental analysis for the use permit describes the "gold mining operations" on the Property as "former" and "historic" and notes that "[l]ittle remains" of the old mine. Pet.

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[5] *See also* Jack Clark, *Gold in Quartz: The Legendary Idaho Maryland Mine* 246 (2005) ("The mining and milling of gold ore was discontinued as of December 27, 1955, and all operations turned to the production of tungsten."); *id.* at 248 ("On September 25, 1956, orders were received from the board of directors to cease nearly all tungsten production, abandon the Idaho shaft, and to allow both mines to fill with water, up to and including the Brunswick 1450-foot level."); *id.* ("Subsequent to the decision to allow the lower levels of both mines to fill with water, the surface plant of the Idaho Maryland mine was sold to the Oro Lumber Co. The sale included the mill, cyanide plant, headframe, hoists, compressors and several buildings."); *id.* at 252 ("All gold mining operations in the Grass Valley mining district ceased in July 1956, for the first time in over 105 years."); *id.* ("Beginning on May 21, 1957, a two-day auction was held at the New Brunswick mine to liquidate over 1400 lots of equipment and structures. These involved everything from the Old Brunswick, New Brunswick, and what remained of the Idaho Maryland mines.").

Ex. 251 at 20, 22, 29. The County staff report for the use permit similarly described the mine as "closed" and indicated operations were no longer "active." Pet. Ex. 252 at 60, 63.

Additionally, starting in 1991, state and local law required owners of any property that includes an "active" or "idle" mine to file an annual report with the state describing the mine's status. *See* Pub. Res. Code § 2207(a)(6); *see also* LUDC § L-II 3.22(M) (imposing same requirement); *Hardesty*, 219 Cal.Rptr.3d at 34 & n.6 (indicating property owners claiming a vested right to mine are also required to file these annual reports). Rise has put forth no evidence showing that *any* annual report was ever submitted to the state. This suggests that no Property owner in over thirty years has understood the Property to contain even an "idle" mine.

Fourth, evidence that a previous owner planned to use a property for purposes that are different from the nonconforming use—even when those plans do not materialize—can be enough to prove that the nonconforming use has been abandoned. *See Stokes*, 52 Cal.App.4th at 1356 (endorsing municipality's finding that prior owners showed intent to abandon nonconforming bathhouse use when they filed an application to convert the building to a senior center/shelter). That is exactly what occurred here. In the 1980s, the BET Group engaged in extensive planning to develop a residential subdivision, called "BET Acres," on a portion of the surface estate. *See* Pet. 43–44; Pet. Ex. 261 at 118–29 (geotechnical evaluation for residential subdivision project). The Property owners went so far as to secure approval of a final map for the subdivision. *See* Pet. Ex. 263 at 175–78. According to the real estate agent that represented the BET Group at this time, they had no intention of either reopening a gold mine on the Property or selling the Property as a mining asset. *See* Declaration of Charles W. Brock ¶¶ 5, 7 (included as "Attachment A").

Similarly, in 1993, Sierra Pacific Industries applied for and received a rezoning of a portion of the Property, with the intention of securing the County's approval that any of the potential future "uses . . . contemplated" in the application "would be considered appropriate for th[e] site."[6] Pet. Ex. 282 at 313; *see also* Pet. 46; Pet. Ex. 282 at 313–15. None of the potential uses involved mining. *See* Pet. Ex. 281 at

[6] Additionally, throughout the 1970s, the same portion of the Property was used for a commercial logging and sawmill business, which involved no mining operations. *See* Declaration of John J. Vaughan ¶¶ 2–7 (included as "Attachment B"). This is further evidence that the Property's owners intended to abandon gold mining and had instead transitioned portions of the Property to alternative, commercially viable uses. *See Stokes*, 52 Cal.App.4th at 1356.

298–303. Thus, whatever "hopes" any Property owners might have held that gold mining might one day resume, their *actions* showed that they did not intend to restart mining. *See Hardesty*, 219 Cal.Rptr.3d at 35, 45 (emphasizing mere "hope[s]" and "dreams" of resuming mining cannot prevent abandonment of a vested mining right).

Fifth, the State of California has long understood the Property's mining operations to be permanently closed. The California Department of Toxic Substances Control's ("DTSC") EnviroStor database states that the "Idaho Maryland Mine Property" was "identified as an abandoned mine in 1989."[7] It similarly describes the "Centennial M-1 Property" as having "remained dormant" "[s]ince 1956."[8] Moreover, in 2006, DTSC launched a statewide "Abandoned Mine Lands Site Discovery Process" to better identify and track "inactive or abandoned mines" from which toxic mine wastes might be leaching.[9] DTSC "selected the former Idaho Maryland Mine" as its single starting example to demonstrate the capabilities of the new Abandoned Mine Lands process.[10] In other words, the Idaho Maryland Mine is not just *an* abandoned mining operation; it was the poster child for abandoned mines in California.

Against this bevy of facts proving abandonment, Rise can muster only three counterexamples. First, it points out that in several transactions involving the Property, sellers reserved certain mineral rights. Pet. 35, 36, 38, 39, 44, 45, 46. Second, without producing any of the actual insurance documents, Rise claims that a single former owner insured the Property "as a mining asset" in 1977. Pet. 42, 71 (citing a declaration from August 2023). Third, the same owner allegedly said around 1980 that "there has been some consideration of re-opening the mine." Pet. 42; Pet. Ex. 254 at 95. These three ambiguous facts fall far short of refuting the reams of clear countervailing evidence. As set forth above, the events in 1977 and 1980 came over two decades after the mine permanently closed, and thus well after the Board can and should reasonably find that

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[7] "Idaho Maryland Mine Property (29100007)," EnviroStor, California Department of Toxic Substances Control, available at https://www.envirostor.dtsc.ca.gov/public/profile_report?global_id=29100007.

[8] "Centennial M-1 Property (60000716)," EnviroStor, California Department of Toxic Substances Control, available at https://www.envirostor.dtsc.ca.gov/public/profile_report?global_id=60000716.

[9] California Department of Toxic Substances Control, *Abandon Mine Lands Site Discovery Process* 1, 2 (2006), available at https://dtsc.ca.gov/wp-content/uploads/sites/31/2016/01/SMBRP_AML_Guidance.pdf.

[10] DTSC, *supra* note 9, at App. D, p. 1.

abandonment occurred. And the blanket reservation of a property's mineral rights is a typical, boilerplate deed provision that reflects no clear intent to resume *any* form of mineral exploitation, let alone gold mining. Additionally, as even the Petition acknowledges, not all sales of the Property included a reservation of mineral rights. *See* Pet. 39; Pet. Ex. 217 at 198 (resolving in 1959 to sell the Property's mineral rights, which the seller describes as having "been abandoned by non-payment of taxes").[11]

D. Rise's claims regarding waste rock quarrying are irrelevant.

Perhaps recognizing the weaknesses in its claim of a vested right to *mine gold*, Rise attempts to bolster its Petition with other, unrelated evidence. Its reasoning goes something like this: Since the 1960s, some of the Property's parcels have been used intermittently for the quarrying of waste rock. *See* Pet. 4–5, 42, 68, 71, 75–76. The County issued a permit for these operations in 1980, when it characterized waste rock quarrying as an "existing, nonconforming use" of these parcels.[12] *See* Pet. 42, 66–68, 75–76. And because—at least according to Rise—the *Hansen Brothers* decision says that a vested right to engage in *some* mining use entails a vested right to engage in "mining" generally, the County's 1980 permitting decision regarding *waste rock quarrying* was

[11] The first specific proposals to restart gold mining on the Property did not emerge until the late 1980s, over four decades after the mine closed. *See* Pet. 44; Pet. Ex. 262 at 131; Pet. Ex. 267 at 190. For the reasons set forth above, any vested right to mine gold had already long since been abandoned by the time those plans arose. In any event, these later proposals—none of which came to fruition—evince nothing more than a speculative hope to resume mining, which is insufficient to prevent a finding of abandonment. *See Hardesty*, 219 Cal.Rptr.3d at 45.

[12] As discussed further in the CEA Foundation Letter, there is no indication that the County, when it described waste rock processing as an "existing, non-conforming use," intended to find that the Property owner held a *vested right* to quarry waste rock. *See* CEA Foundation Letter 7 (citing Pet. Ex. 252 at 60). That conclusion would have been inconsistent with the information known to the County in 1980—namely, (1) that waste rock quarrying would have become an inconsistent use in 1954 when the County's first zoning regulations took effect, but (2) that no waste rock processing actually began on the Property until *after* "the mine closed" in 1956 or 1957. *See* footnote 13, *infra*. Thus, it seems that the County meant to characterize waste rock quarrying as an existing use of the Property that conflicted with current zoning regulations. However, as discussed in-text, even assuming that the County recognized a vested right to quarry waste rock, this finding would be irrelevant to Rise's current Petition.

effectively a concession that Rise holds a vested right to *mine gold*. *See* Pet. 66–69, 75–76.

This far-fetched theory has no basis in law or fact. Starting with the law, Rise again distorts the holding of *Hansen Brothers*. At issue in that case was an aggregate production business. 12 Cal.4th at 543–44. The quarry owner separately mined different types of rock from two distinct areas of its property—one a riverbed and the other a hillside—and then combined the different materials into a single aggregate end product for sale. *Id.* at 545, 549, 567 & n.24. Because the owner could store excess material on-site, there were occasionally long periods in which the owner did not need to actively quarry the hillside area. *Id.* at 549, 565. Rejecting claims that the owner had abandoned a vested right to mine the hillside, specifically, the Court concluded that the relevant unit of analysis for vested rights purposes was the entire "operation of an aggregate production business." *Id.* at 565. Because the "materials that comprise[d the] aggregate" always came from *both* the riverbed and hillside mining areas, those two mining activities were "integral," "component parts" of the overall operation that could not be abandoned "independent[ly]" of one another. *Id.* at 566–67.

However, *Hansen Brothers* expressly acknowledged that *if* one of the mining uses had been an "independent aspect of the business," any vested right to that use could be "broken down"—and lost—separately from the broader mining operations. *Id.* at 567. And it very much did *not* hold that a vested right to carry out one type of "mining" guarantees a broader right to carry out all other, distinct mining uses on a property. Rather, *Hansen Brothers* emphasized that the scope of a vested right in the mining context is limited to "the *particular material* [that] is being excavated." *Id.* at 557 (emphasis added); *see also id.* (citing favorably *County of Du-Page v. Elmhurst-Chicago Stone Co.*, 165. N.E.2d 310, 313 (Ill. 1960), which held a vested right to mine is limited to "the particular asset" being mined); *Paramount Rock Co. v. County of San Diego* (1960) Cal.App.2d 217, 228 (concluding a vested right to extract sand and premix concrete materials did not encompass a right to crush rocks for use in concrete premixing); *Hardesty*, 219 Cal.Rptr.3d at 43–44 (holding vested right to engage in subsurface mining did not encompass right to surface mining). Thus, in *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 625, the court questioned how the "alleged vested right" to *aggregate* mining could have been "continuous," since the subject site had historically hosted two distinct mining operations—"gold mining[,] and not simply aggregate mining."

Here, the historical record is unambiguous that waste rock quarrying and gold mining were never a single unified "business" analogous to the two halves of the aggregate quarrying operation in *Hansen Brothers*. Indeed, there is no evidence that

waste rock quarrying and gold production ever even occurred on the Property at the same time.[13] And the fact that the waste rock material accumulated on the Property in the first place is proof enough that this rock was not being used for any purpose while the gold mine was operational. In other words, gold mining was an "independent aspect" of the historical use of the Property, and thus any vested right to mine gold must be "broken down"—and deemed abandoned—separately from any right to quarry waste rock. *See* 12 Cal.4th at 566; *see also Calvert*, 145 Cal.App.4th at 625. As a result, the Board should simply dismiss as irrelevant the Petition's entire discussion of waste rock quarrying.

Additionally, the County's permitting materials from 1980 could not have been more clear that the County was recognizing waste rock processing—and waste rock processing *alone*—as a nonconforming use of the Property. The staff report for the permit described the "existing, non-conforming use" as "mine rock . . . be[ing] sold and taken from the [P]roperty." Pet. Ex. 252 at 60. Similarly, the permit itself described the proposed "operation" as "involv[ing] harvesting, crushing, screening, and sale of waste rock left from the Idaho-Maryland Mine." *Id.* at 69. Far from recognizing any additional or broader vested right to mine gold, the permit expressly prohibited the permittee from "remov[ing] from the site" any "material beyond the depth of rock waste material." *Id.* at 71; *see also id.* at 46 (explaining, in the reclamation plan for the waste rock operations, that the "mineral commodity to be mined" is limited to "mine waste rock tailings and mill sand"). Moreover, as discussed above in Part I.C., to the extent that the permitting materials alluded to the historical mining uses of the Property at all, it was to note that those uses had been discontinued and that the mine was closed.

In sum, Rise's repeated insistence that the County recognized a broader vested right to "mining" that includes gold mining is either a misunderstanding of the law

[13] As referenced above, it is undisputed that all gold extraction and production activities on the Property ceased by 1956. The earliest concrete evidence of any waste rock collection or quarrying is nearly a decade later, in 1964 or 1965. *See* Pet. 4, 40, 42; Pet. Ex. 231 at 22. Apart from one ambiguous remark in the County staff report for Use Permit U79-41 that "the property owner has indicated that mine rock has been sold and taken from the property continuously *since the mine closed*," *see* Pet. Ex. 252 at 60 (emphasis added), there is nothing in the record suggesting that waste rock collection began any earlier. Additionally, this comment indicates that (1) waste rock quarrying and gold mining never occurred simultaneously on the Property; and (2) waste rock quarrying had not yet begun when the County's zoning regulations took effect in 1954. *See* footnote 12, *supra*.

or a flagrant misstatement of the historical record. Waste rock quarrying and the County's handling of it have nothing to do with the current Petition.

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Despite the Petition's best efforts to complicate things, this is an easy matter. Any vested right to mine gold on the Property was lost decades ago. The plain language of the County Code compels that conclusion. And even if it did not, the evidence is clear that the Property's owners *intended* to abandon commercial gold mining, a use that no one has carried out in sixty-seven years. The Board must deny the Petition.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Ellison Folk

Ryan Gallagher

Attachments:
A. Declaration of Charles W. Brock (October 19, 2023)
B. Declaration of John J. Vaughan (October 18, 2023)

cc: Julie Patterson Hunter, Clerk of the Board, clerkofboard@nevadacountyca.gov
Katharine Elliott, County Counsel, county.counsel@nevadacountyca.gov
Matt Kelley, Senior Planner, matt.kelley@co.nevada.ca.us
Laurie Oberholtzer, CEA Foundation, laurieoberholtzer3@hotmail.com
Ralph Silberstein, CEA Foundation, ralphasil@gmail.com

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ATTACHMENT A

DECLARATION OF CHARLES W. BROCK

I, Charles W. Brock, declare as follows:

1. I am over 18 years of age and have personal knowledge of the facts contained in this declaration which is true, correct and complete. If called upon to testify I could and would testify as to the truth of the facts stated herein.
2. I have been a licensed Realtor in California since 1968, and obtained my Brokers License in 1981. (Lic. # 00328328)
3. In 1980 I was introduced to the heirs of the Estate of Marian Ghidotti, by their attorney Richard Hawkins. The three executors of this estate were Erica Erikson, Mary Bouma and William Toms (aka. "the BET Group").
4. In 1981 I represented the Estate of Marian Ghidotti in the sale of 14 parcels which comprised what was referred to as "The Ghidotti Ranch", in Penn Valley, CA.
5. Throughout the mid 1980's I remained in contact with the BET Group and worked on planning to sell their holdings 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 soils contamination, let alone reopening and operating a gold mine. This viewpoint was clearly communicated to me by each of the three executors. In 1986 the decision was taken to subdivide acreage at the Old Brunswick Mine in order to raise funds to address toxics soils, so that the balance of their holdings might be better prepared for sale. In January of 1987 local surveyor Al Beeson was engaged by the BET Group and recorded County Final Map #85-7 (BET Acres), subdividing 5 residential lots on the site of the Old Brunswick Mine. This same map delineated contiguous remaining lands which are now owned by Rise Gold and are commonly known as the "Brunswick Industrial Site", located at the intersection of East Bennett Rd. and Brunswick Rd. Between January 4, 1987 and August 23, 1987 I represented the BET Group, closing escrows on each of these 5 parcels. Proceeds from these sales were later used to pay taxes and begin

efforts to conduct soils sampling on the Centennial site holdings, in preparation for marketing the remaining former mine parcels. In 1992 I assisted the BET Group contract with Vector Engineering to conduct soils testing.

6. I did not represent the BET Group as they entered a Lease with Option to Buy with Emgold Mining in early/mid 2000's. After an approximate 7 year effort, Emgold failed to certify their Environmental Impact Report and abandoned their Lease with Option to Buy the former mine property.
7. In June of 2014, I listed the remaining holdings formerly known as the Idaho Maryland Mine for sale. Within the body of the Listing Agreement it was stated, "Subject property was once an operating gold mine (Idaho Maryland Mine), and portions of the surface soil is known to be contaminated". Historical information, data and core samples were made available to the market, however, the sellers wanted the market to clearly understand that the Idaho Maryland Mine was not a permitted, operating mine, and that the BET Group would not be participating in any mine clean-up or permitting activity as a condition of sale. This condition of sale was clearly stated, in a remark I made at that time which was quoted in the Grass Valley Union newspaper (June 11. 2014) where I said "we are not selling a mine". Measures taken to arrive at our asking price were based on comparable sales of similarly zoned light industrial and residential properties.

I, Charles W. Brock, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 10/19/23

By: _____

Charles W. Brock

ATTACHMENT B

DECLARATION OF JOHN J. VAUGHAN

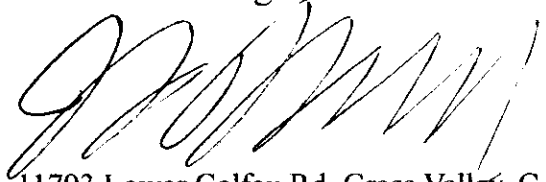
I, John J Vaughan, declare as follows:

1. I am over 18 years of age and have personal knowledge of the facts contained in this declaration, which is true, correct and complete. If called upon to testify I could and would testify as to the truth of the facts stated herein.
2. I have lived in Nevada County (Grass Valley and Nevada City) since 1967.
3. From 1969 through 1979 I worked at Robinson Enterprises running their internal information technology department, including software development.
4. During that time, I was tasked with creating a database and software to validate log scaling information. The end result was to compare the number of board feet delivered by Robinson Enterprises logging trucks to information prepared by the US Forest Service Log Scaling workers at the Brunswick Timber Products Sawmill on Brunswick Road (then owned by Bill Pendola, also called the Bohemia Mill).
5. As part of that work, I visited the Brunswick Timber Products Sawmill on Brunswick Road dozens of times to observe the process.
6. At no time during that 10 years did I see anything but log storage and sawmill operations anywhere at the locations that Rise Gold now calls the Brunswick Industrial Site.
7. There were no mining operations anywhere on the sawmill site.
8. There were no mining operations on the acreage around the large concrete silo, which was not part of the sawmill.
9. 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.
10. Both locations have been abandoned for most of the years I have lived here.
11. I have never seen any gold mining operations at either location.
12. The only activity I have observed at Brunswick, prior to the current Community uses, was a sawmill.
13. The only activity at Centennial was periodic rock crushing which stopped in the late 70's or early 80's.

I, John J. Vaughan, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATE: 10/18/2023

BY: John J. Vaughan



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