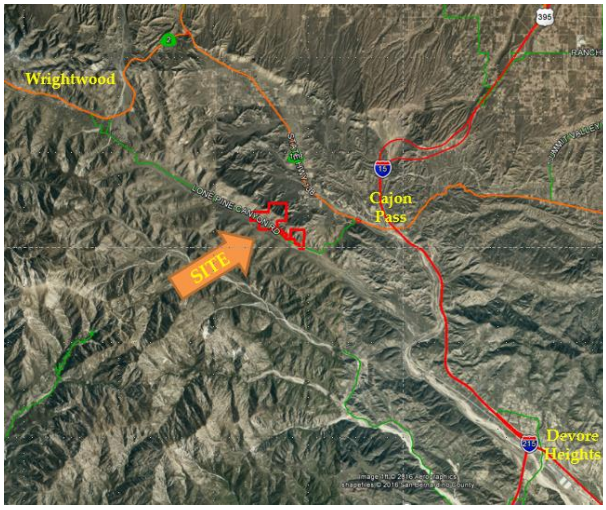
LAND USE SERVICES DEPARTMENT
PLANNING COMMISSION STAFF REPORT

HEARING DATE: February 21, 2019 **AGENDA ITEM: 2**

Project Description:

APNs:	0356-231-02, -03, 0356-241-02, -03, and 0351-161-03
Applicant:	El Cajon Associates, LLC
Community:	Wrightwood / 1st Supervisorial District
Location:	4 miles southeast of Wrightwood along Lone Pine Canyon Road
Project No.:	P201800609
Staff:	George Kenline
Rep.:	EnviroMINE, Inc.
Proposal:	Determination of Vested Mining Rights Based on Past and Anticipated Future Land Use

Vicinity Map N↑



Hearing Notices Sent On: February 10, 2019 **Report Prepared By: George Kenline**

SITE INFORMATION:
Parcel Size: 420 Total Acres.
Terrain: Steep with much of the site exceeding 40% grade.
Vegetation: Relatively dense native vegetation consisting of chaparral, scrub and scattered trees.

SURROUNDING LAND DESCRIPTION:

AREA	EXISTING LAND	LAND USE DISTRICT
Site	Vacant	Resource Conservation
North	Vacant	Resource Conservation
South	Vacant	Resource Conservation
East	Vacant	Resource Conservation
West	Vacant	Resource Conservation

	AGENCY	COMMENT
City Sphere of Influence:	N/A	N/A
Water Service:	N/A	N/A
Septic/Sewer Service:	N/A	N/A

STAFF RECOMMENDATION: **Deny** recognition and confirmation of Vested Mining Rights and **Require** a Mining Conditional Use Permit, in addition to a reclamation plan and financial assurances, for any mining activity on the El Cajon Property.[1]

1. In accordance with Section 86.08.010 of the Development Code, the Planning Commission action may be appealed to the Board of Supervisors

INTRODUCTION AND OVERVIEW:

The County of San Bernardino ("County") serves as the Lead Agency in land use jurisdiction and is responsible for implementing the requirements of the San Bernardino County Development Code ("Development Code") and the Surface Mining and Reclamation Act of 1975 ("SMARA", Public Resources Code Section 2710 et seq. and California Code of Regulations Section 3500 et. seq.). On July 2, 2018, Land Use Services received a request from El Cajon Associates, LLC ("El Cajon Associates" or "Applicant") to make a determination of vested mining rights for 420 Acres of land located approximately four miles southeast of Wrightwood along Lone Pine Canyon Road and west of the Cajon Pass (Exhibit A).

On August 9, 2018, Staff responded to the request with the understanding that the County typically considers recognition of Vested Mining Rights when reviewing applications for a Mining/Reclamation Plan (Exhibit B). Staff then suggested that if a Mining/Reclamation Plan is not being prepared, the applicant should submit a General Plan and Development Code Interpretation application to accomplish the goal of recognizing vested mining rights with a noticed public hearing before Planning Commission, as if it were an appeal of the Planning Director's decision. This application is consistent with that procedural suggestion.

Staff has reviewed and analyzed the request and all available pertinent evidence and believes that the applicant has not made a sufficient showing for a vested mining right to be legally recognized. This conclusion is guided by SMARA and various Court decisions as discussed below.

VESTED MINING RIGHTS DEFINED:

Formerly, Title 14 of the California Code of Regulations (CCR), Section 3951[1], defined a vested right as follows:

> *A vested right is the right to conduct a legal nonconforming use of real property if that right existed lawfully before a zoning or other land use restriction became effective and the use is not in conformity with that restriction when it continues thereafter. A vested mining right, in the surface mining context, may include but shall not be limited to: the area of mine operations, the depth of mine operations, the nature of mining activity, the nature of material extracted, and the quantity of material available for*

[1] This section was repealed on December 12, 2017, as the State Mining and Geology Board's authority to make vested rights determinations was rescinded by the Legislature, Public Resources Code § 2774.4. Nevertheless, this regulation retains utility as a means to evaluate vested rights in the mining context.

extraction.

A person shall be deemed to have a vested right or rights to conduct surface mining operations if, prior to January 1, 1976, the person has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations. Expenses incurred in obtaining the enactment of an ordinance in relation to a particular operation or the issuance of a permit shall not be deemed liabilities for work or materials. Expansion of surface mining operations after January 1, 1976 may be recognized as a vested nonconforming use under the doctrine of "diminishing assets" as set forth in Hansen Brothers Enterprises, Inc. v. Board of Supervisors (1996) 12 Cal.4th 533.

As a general rule, the law of nonconforming uses when handling "grandfathered" or "pre-existing uses" identifies three elements that must be in place for a property to have a vested right in a nonconforming use:

1) *The use must be in existence prior to the enactment of the restricting ordinance;*
2) *The use must have been lawful when begun; and*
3) *The use must be of substantial nature so as to warrant constitutional protection of a property right.*

The retroactive application of a zoning law ordinance that extinguishes a pre-existing nonconforming use, without due process, violates well-established constitutional principles. Therefore, the following presents information for the Planning Commission to consider for a quasi-judicial decision.

REGULATORY AND STATUTORY AUTHORITY AND CONSIDERATIONS:

The Development Code and SMARA requires that all individuals and operators contemplating surface mining must acquire (1) a permit from the County, and obtain (2) an approved plan and (3) financial assurances for reclamation prior to commencement. SMARA further requires that all existing or "vested" surface mining operations have an approved reclamation plan and financial assurances to insure implementation of the plan. Otherwise, after March 31, 1988, continuance of mining without an approved reclamation plan and financial assurances is impermissible, even for public agencies and vested mining operations.

Development Code Section 88.03.050 relating to Vested Rights states:

(a) Pre-SMARA and post-SMARA right to conduct surface mining operations. *A Conditional Use Permit shall not be required for any person who has obtained a vested right to conduct surface mining operations before January 1, 1976, as long as the vested right continues and as long as no substantial changes have been made in the operation except in compliance with SMARA, State regulations, and this Chapter. Where a person with vested rights has continued surface mining in the same area subsequent to January 1, 1976, the person shall obtain County approval of a Reclamation Plan covering the mined lands disturbed by the subsequent surface mining. In those cases where an overlap exists (in the horizontal and/or vertical sense) between pre-SMARA and post-SMARA mining, the Reclamation Plan shall require reclamation proportional to that disturbance caused by the mining after January 1, 1976 (i.e., the effective date of SMARA).*

(b) Other requirements applicable to vested mining operations. *All other requirements of State law and this Chapter shall apply to vested mining operations.*

The Development Code restrictions on vested rights for surface mining operations are guided by SMARA. Specifically, Public Resources Code (PRC) Section 2770 states:

(a) "Except as provided in this section, a person shall not conduct surface mining operations unless a permit is obtained from, a reclamation plan has been submitted to and approved by, and financial assurances for reclamation have been approved by the lead agency for the operation pursuant to this article.

(b) *"A person with an existing surface mining operation who has vested rights pursuant to Section 2776 and who does not have an approved reclamation plan shall submit a reclamation plan to the lead agency not later than March 31, 1988. If a reclamation plan application is not on file by March 31, 1988, the continuation of the surface mining operation is prohibited until a reclamation plan is submitted to the lead agency.*"

Further, PRC Section 2776(a) states:

"No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter as long as the vested right continues and as long as no substantial changes are made in the operation except in accordance with this chapter. A person shall be deemed to have vested rights if, prior to January 1, 1976, he or she has, in good faith and in reliance upon a

> *permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary therefore. Expenses incurred in obtaining the enactment of an ordinance in relation to a particular operation or the issuance of a permit shall not be deemed liabilities for work or materials."*

PRC Section 2004 defines a "person" to include *"any individual, firm, association, corporation, organization, limited liability company, or partnership, or any city, county, district, or the state or any department or agency thereof"*.

Absent an approved reclamation plan and financial assurances (with exceptions not applicable herein) surface mining is prohibited.

CASE LAW INTERPRETING VESTED RIGHTS UNDER SMARA:

A number of Court decisions (summarized in an article attached as Exhibit C) provide guidance for making findings for vested mining rights.

Hansen Brothers. The definitive decision on vested mining rights in California is the California Supreme Court case *Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County* (1996) 12 Cal. 4th 540 ("*Hanson Brothers*"). *Hansen Brothers* recognized that expansion of existing surface mining operations after January 1, 1976, may be recognized as a vested non-conforming use under the doctrine of "diminishing assets". The doctrine of diminishing assets recognizes that some nonconforming uses, especially mining, must be expanded in order for the nonconforming use to continue at all. The Court observed that the very nature of the excavating business contemplates the use of land as a whole, not a use limited to a portion of the land already excavated.

Mining law specialist Mark D. Harrison, Esq., who argued the case for the applicant in *Hansen Brothers*, summarized that case as follows (excerpted from Exhibit "D"):

> *A vested mining right is a constitutionally protected property right to continue operating in a certain location and in a certain way without being required to conform to all current land use restrictions. Under most local zoning ordinances, a vested mining right falls into the category of a "nonconforming use" of land. The leading court case in this area has described a "nonconforming use" in this way:*
>
> > *A legal nonconforming use is one that existed lawfully before a zoning restriction became effective and that is not in conformity with the ordinance when it continues thereafter.... The use of the land, not its ownership, at the time the use*

> *becomes nonconforming determines the right to continue the use. Transfer of title does not affect the right to continue a lawful nonconforming use which runs with the land...*
>
> *Land use agencies will often argue that a use permit is required when a vested mining use seeks to expand operations into areas of the property not previously mined.*

Calvert. The decision in the California Court of Appeals case *Calvert v. County of Yuba* (3rd Dist. 2006) 145 Cal. App. 4th 613 ("Calvert") recognized that the determination of a surface mining vested right is not ministerial and requires a public hearing with reasonable notice and opportunity to be heard.

Hardesty. *Hardesty v. State Mining and Geology Board* (3rd Dist. 2017) 219 Cal. Rptr. 3d 28, previously published at 11 Cal. App. 5th 2017[2] ("*Hardesty*") outlined SMARA findings by the State Mining and Geology Board for denying vested mining rights and exemption from a County mining permit. According to *Hardesty*: *"[T]he fact that mines were worked on the property years ago does not necessarily mean any surface or other mining existed when SMARA took effect, such that any right to surface mine was grandfathered."* The Court agreed with the trial court that there was a clear manifestation of intent to discontinue mine operations during the period from the 1940s until the early 1990s*: "[T]he evidence of abandonment was overwhelming."* The Court explained: *"[A] person's subjective 'hope' is not enough to preserve rights; a desire to mine when a land-use law [i.e., SMARA] takes effect is 'measured by objective manifestations and not by subjective intent.'"*

Keep the Code: An unpublished decision from the First District of the California Court of Appeals, *Keep the Code, Inc. v. County of Mendocino* (1st Dist. 2018) 2018 WL 6259477 (*"Keep the Code"*) indicated that:

> "[P]re-existing nonconforming uses" are not meant to be "perpetual." (citation) The policy of the law is for the elimination of any nonconforming use because its presence "endangers the benefits to be derived from a comprehensive zoning plan." (citation) Accordingly, and consistent with this policy, it has been held that " 'land which has not been used ... would not create a nonconforming use' " (citation), and attempts to continue

[2] Review of this case by the California Supreme Court was denied on August 9, 2017, and the case ordered not to be officially published, meaning citation in court is prohibited, Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115, 8.1120 and 8.1125. Nevertheless, the Planning Commission is not bound by this restriction and, in any event, this court's analysis and rationale for this decision is instructive.

nonconforming uses are barred when nonconforming uses have ceased operation (*Hansen, supra*, 12 Cal.4th at p. 568).

COUNTY'S LAND USE REGULATION OF MINING:

The County Code, portions of which regulated land uses within the County, was first enacted in 1951. For some land uses, the County Code identified certain zoning areas where such uses were permitted as a matter of right and did not require issuance of a use permit. In 1981, the County adopted a new Title 8 to the County's Code, commonly called the Development Code. In 1989, the Development Code was updated to include, among other things, the requirement for a Mining Conditional Use Permit (CUP). Surface mining operations that legally existed at the time of enactment of Mining CUP requirements were allowed to continue and operate to the full extent and intended use of the land (including the use of incidental or accessory facilities) at the time of the zoning change with an approved reclamation plan and related financial assurances.

Pursuant to SMARA, PRC Section 2774(a), every lead agency was required to adopt ordinances in accordance with the state policy, which established procedures for the review and approval of reclamation plans and financial assurances and the issuance of a permit to conduct surface mining operations. A mining ordinance required the establishment of procedures, one of which required at least one public hearing. The local ordinance is periodically reviewed by the lead agency and revised, as necessary, to ensure that the ordinance continues to be in accordance with state policy.

The County adopted its original SMARA ordinance (Ord. No. 2062) on March 29, 1976, to enact SMARA regulations as part of Title 6 of the County Code. On May 18, 1981, Ordinance No. 2540 was adopted to shift SMARA from Title 6 to Title 8 of the County Code. The County's SMARA ordinance was subsequently certified by the State Mining and Geology Board ("SMGB") on November 19, 1981. The Board of Supervisors later revised the County's SMARA ordinance (No. 3759) on April 12, 1999, which is currently listed on the State's directory of certified mining ordinances.

The Development Code and SMARA outline requirements for conducting surface mining operations and provide a comprehensive policy for regulation of surface mining operations to assure that adverse environmental impacts are prevented or minimized and mined lands are reclaimed to a usable condition. These requirements include the need to obtain a Mining Conditional Use Permit (CUP), and approval of a Reclamation Plan and financial assurances. An exception to obtaining a CUP may exist if a mining operation was legally established and in existence prior to permitting restrictions; thus a "vested mining right" if formally recognized by the County in a public hearing.

THE APPLICANT'S PROPERTY HISTORY, OWNERSHIP AND DEVELOPMENT:

El Cajon Associates' subject parcels of land are located within the Resource Conservation Zoning District (RC). Mineral resource development (mining) is an allowed land use in RC with an approved Mining CUP.

In addition, the SMGB implements a mineral lands classification protocol that identifies lands containing significant mineral deposits, including those with regional or statewide significance. The objective of the State's mineral resource zoning classification (found in SMARA) is to ensure, through appropriate lead agency policies and procedures, that mineral deposits of statewide or of regional significance are available when needed. The subject properties are currently classified by the State Geologist as Mineral Resource Zone MRZ-3a, an area with known mineral occurrence, but the mineral resource significance is undetermined by the State. MRZ-3a areas are classified as having a moderate potential for the discovery of economic mineral deposits. Further exploration work within these areas could result in the reclassification of specific localities as MRZ-2, which are typically indicative of existing mining operations or a significant mineral resource with measurable or probable reserves as determined by the State Geologist.

These additional facts are excerpted from the application, Exhibit "A":

1. Cajon Lime Products ("Cajon Lime") was formed about 1923 to exploit and develop the rich lime deposits on approximately 430 acres of mine and mill sites ("the El Cajon Property") in Lone Pine Canyon near Camp Cajon, a historic site located in the Cajon Pass. Four products that were to be produced included plaster, stucco, lime and hydrated lime (The Santa Fe Magazine, July, 1923).

2. Mining began at the El Cajon Property in 1924 (Shumway and Hill, 1945).

3. Also in 1924, The California Development Association (1924) listed Cajon Lime Products Co. of San Bernardino County as a source for lime and cement.

4. On March 15 and November 30, 1926, mineral patents listed in Table 1 were issued to Cajon Lime. (Table 1 and Exhibit A).

5. In 1927, Cajon Lime built a 125 ton/day lime plant on its mill site claim near the Atchinson Topeka and Santa Fe railroad tracks (Shumway and Hill, 1995; Logan, 1947).

6. A history of geologic investigation within the El Cajon Property notes field work by Dr. Gilbert Ellis Bailey of the University of Southern California prior to 1931. Dr. Bailey referenced the dike-like outcropping of dolomite near the mountaintop striking northwest and dipping to the south, comprising a block one mile long, one-half mile wide and 250 feet thick. His calculation (assuming an average of 13 cubic feet per ton for material of

this character) was that there were 268,000,000 tons of limestone and dolomite within the mineral block located on this Property.

7. El Cajon Associates, LLC, is a Nevada Limited Liability Company wholly-owned by the descendants of Michael P. Hannin ("MP") and Alice V. Hannin, originally from Toledo, Ohio.

8. MP loaned Cajon Lime the sum of $92,000.00 (equal to $1.4-million in 2018 dollars). Cajon Lime defaulted on this loan and thereafter MP acquired the El Cajon Property by Deed of Foreclosure, dated March 15, 1931. (Figures 1 and 2)

9. Sill Report of 1933

a. On September 25, 1933, MP had the El Cajon Property appraised by a respected local appraiser, Mr. Harley Sill (“Sill”). Mr. Sill inventoried the personal and real property located on the El Cajon Property at a value of $1,544,755.22 (1933 dollars). Development work on the El Cajon Property that was reported by Sill included a quarry, a tunnel that was driven 194 feet, another tunnel that was driven 39 feet, and a tramway.

b. In 1933, Sill published his report on the El Cajon property. After studying, sampling, testing and surveying a specific block of approximately 1,500 feet in length, 500 feet in width and 500 feet in height, constituting only ten percent (10%) of the El Cajon Property, Sill concluded that the portion of the El Cajon Property constituting that one, specific block contained a minimum of 28,800,000 tons of commercial limestone and dolomite (i.e.,: 1,500 feet in length and 500 feet in width by 500 feet in height, divided by 13 cubic feet per ton = 28,200,000 tons).

c. In his report, Sill refers to conversations with other engineers and geologists of the time (Mr. Robert Kinzie, Consulting Mining Engineer and Dr. Gilbert Ellis Bailey, Ph.D., Professor of Geology at the University of Southern California) who, after mapping the El Cajon Property, opined that the block contained on the order of 268,000,000 tons of ore, approximately ten times the amount actually blocked and sampled by Sill.

d. After Sill blocked out the aforementioned ore body, constituting 10% of the total patented mining claim on the El Cajon Property, he took samples from the existing operating quarry, the prospect tunnels, and surface samples on a 300-foot grid, collecting from twenty-nine (29) separate sites. He assayed, ground, calcined and tested the samples for lime and dolomite and submitted them to the Mission Stucco Company (“Mission”) for plasticity

tests. These tests were conducted by the Superintendent of Mission, Mr. Holdinghausen, in the presence of Mr. Sill.

e. Messrs. Sill and Holdinghausen found that the samples of limestone and dolomite ("dolomitic limestone" --- calcium magnesium carbonate) showed, "splendid plasticity and gave a very white color. The surface took a high polish and gave the appearance of highly polished, white marble. The samples passed every test of practical plasticity and were noted as the best material that Mr. Holdinghausen had ever worked on."

f. Messrs. Sill and Holdinghausen commented that the character of this dolomitic lime was "extremely favorable and gave the assurance that this material would meet the exacting requirements of the building materials trade."

g. Having followed the processing of the lime from the time it left the quarry through the different stages of its metamorphosis to a finished lime product (a dolomitic limestone processing plant was in full operation on Parcel 6 at that time), Sill opined that the material, low in magnesium oxide, could be mined commercially and fabricated into a high quality of commercial dolomitic limestone well suited to the building trade industry.

h. As an exhibit to his analysis contained in his September 25, 1933, appraisal, Sill prepared an engineered map of the site where the dolomitic limestone was mined and sent to the processing center on Parcel 6. A copy of this map is included in the Harley Sill Resource Evaluation (see Attachment A to Exhibit B).

i. The map shows the location of the two adits which were dug by hand and dynamite (200 feet into the side of the mountain) and which were mined, loaded into ore carts and rolled onto trucks and taken to Parcel 6 for processing. The map also shows where Sill took samples 1 through 5 and samples 19 through 26.

j. At the processing plant on Parcel 6, the dolomitic limestone was unloaded for assaying calcining, grinding, hydration and processing through a 150 foot rotary kiln. Attachment B is an appraisal showing the equipment maintained at the processing facility on Parcel 6. As the appraisal indicates, the appraised value of this equipment was $104,755.22 (1933 dollars).

10. MP worked the El Cajon property intermittently until he died in 1941 (Exhibit C).

11. In January 1945, Douglas Lime Products Company leased the limestone deposits and lime plant, did considerable work during 1945, and planned to produce lime and ground limestone of 40-, 80-, and 200-mesh for poultry and other industrial uses (Shumway and Hill, 1995; Logan, 1947).

12. After World War II, one of MP's daughters, Mary Hannin McCarroll (as agent for the son and three daughters of MP "Hannin Family", which term includes the descendants of MP) entered into a series of negotiations with prospective operators of the El Cajon Property. In most cases, the negotiations were frustrated due to either under-capitalization of the project or personnel problems (Exhibit B). Nevertheless, some mining and milling were accomplished by the Hannin Family during the period following MP's death.

13. Between 1950 and 1952, due to repeated burglaries, the building, kiln and equipment were dismantled by agents for Mary Hannin McCarroll. The mill with its reinforced concrete foundations, slabs, footings, piping, well, etc. remained intact (Exhibit C).

14. In 1951, samples that were collected by California Division of Mines and Geology staff yielded 54.66% CaO (Shumway and Hill, 1995). Also at that time, small tonnages of limestone were being mined in the area between Wrightwood and Cajon Pass (Wright et al., 1953).

15. August 8, 1951, the County of San Bernardino adopted Ordinance 687, the first zoning ordinance regulating land uses within the County. Mining was allowed as a by-right use in the M2 Zone. No record of the location of zoning districts is available for inspection; however, as an ongoing mining interest, it is assumed that the property would have been located within the M2 Zone.

16. During the period 1965-1966, the Hannin Family negotiated with Livingston Stone Company and Industrial Rock Company, which were engaged in mining and milling lime products in Pontiac, Illinois and San Bernardino, California. The negotiations led to the preparation of drafts of contracts of sale in which the consideration for the El Cajon Property was $650,000.00 (Exhibit C).

17. In 1966, Santa Fe Railroad (Railroad) resolved to install its railroad line directly across the Hannin's mill site. The Hannin Family learned of the Railroad's activities and notified it of their ownership of the mill site; of their pending contract with Livingstone Stone Company and Industrial Rock Company; and, warned the Railroad against its intended entry on the Hannin mill site. Notwithstanding the foregoing notice and warning, the Railroad proceeded to demolish the Hannin mill site (Exhibit C).

18. The Hannin Family then filed suit in the San Bernardino Superior Court and obtained a temporary injunction against the Railroad. The Railroad countered with an action in eminent domain and thereafter disregarded the injunction and proceeded to enter the Hannin Family's mill site. The Railroad made cuts and fills, created a roadway across the mill site and buried the Hannin Family's blocks of reinforced concrete in a loose fill on the mill site. All of these actions were allegedly in contravention of the injunction. Subsequently, the Railroad bypassed the mill site with its tracks and abandoned the eminent domain proceedings (Exhibit C).

19. Upon being appraised of the virtual destruction of the mill site, Livingstone Stone Company and Industrial Rock Company abandoned attempts to purchase the Hannin Property and renewed leases on different mining property in the Wrightwood area (Exhibit C).

20. Throughout the ensuing years, the Hannin Family continued to receive offers to mine the El Cajon Property. However, in each instance, it was determined that the various offerors did not possess the capital necessary to successfully conduct business. In one instance, the Hannin Family had squatters on the El Cajon Property and it was necessary to have the Sheriff's Officers remove them. There is still evidence of their trespass on one of the hillsides. The Hannin Family continued to pay property taxes and to protect the El Cajon Property from trespassers.

21. In early 1992, Mary Hannin McCarroll, then 79 years of age, turned over management of the El Cajon Property to her son, Neil McCarroll (“McCarroll”). In February 1992, McCarroll was approached by the United States Forest Service (“USFS”) concerning a possible land trade of the El Cajon Property (surrounded by USFS lands) for land outside of the San Bernardino National Forest. It was reasoned that this land exchange would be beneficial to both parties. After 8 years, the process was abandoned due to irreconcilable differences between the parties.

22. In 1995, the El Cajon Property was classified as MRZ-3a, area of known mineral occurrence of undetermined mineral resource significance (Shumway and Hill, 1995). Shumway and Hill provide that further exploration work within these areas could result in the reclassification of specific localities into MRZ-2a or MRZ-2b categories.

23. Two years later, in 1997, the Hannin Family hired a consulting geologist by the name of Richard Ganong to better determine the mineral resource significance. Mr. Ganong reviewed the 1933 Sill Report, conducted a geological survey and issued an Appraisal of Mineral Interests, dated March 31, 1997 (Exhibit D).

24. It was Mr. Ganong's opinion that the recoverable amount of dolomite and limestone was 28,800,000 tons. He estimated that the Net Present Value, as of March 31, 1997, of

the estimated future annual royalty income based upon 28,800,000 tons of dolomitic limestone at $1.50 per ton, discounted at 30%, for the next 20 years, was $7,162,000.

25. The cost for preparation and finalization of Exhibit "C" was in excess of $15,000.00, not counting the time and effort spent by the Hannin Family.

26. Following up on the mineral appraisal of Mr. Ganong, the Hannin Family hired Donald L. Fife and Associates to perform a geological investigation of the El Cajon Property in support of potential mineral development (Exhibit "E").

27. Thereafter, the Hannin Family listed the El Cajon Property with a series of commercial brokers, all of whom professed a knowledge of the limestone business and the connections necessary for finding an appropriate venture partner. None of the brokers were successful.

28. A member of the Hannin Family remembered that Mr. Ganong had mentioned years earlier that he was quite impressed with a gentleman by the name of Warren Coalson (“Coalson”), the President of EnviroMlNE, Inc. ("Enviro").

29. El Cajon Associates contacted Coalson who suggested that El Cajon Associates contact Danny Sims, Ph.D. P.G., C.E.G. of Sims Geological Services ("Sims") in order to obtain a Geologic Reconnaissance ("Recon") of the El Cajon Property which would be of interest to the cement producers in the vicinity.

30. Thereafter, Sims prepared the Recon in which he concluded that "the Property should be submitted to interested parties for consideration as a source for the high purity and high brightness limestone. The area is similar in size to the quarry area for the economic White Knob quarry, and it is likely that a significant volume of marble is present here."

31. The Recon was submitted to all the major mining and processing companies in the area and was met with some degree of interest, wherein El Cajon Associates filed this Request for Determination of Vested Rights with San Bernardino County.

32. El Cajon Associates contends: “From March 5, 1931 to date and in the future, it has always been and will be the intent of El Cajon Associates, LLC and the Hannin Family to mine and process the limestone resource on the El Cajon Property. Based upon its action and intent, as supported by the information provided herein, El Cajon Associates, LLC feels that it has established a Vested Right to continue to mine the El Cajon Property. Therefore, we respectively require a positive Determination of Vested Rights for mining on the El Cajon Property.”

ANALYSIS:

El Cajon Associates, LLC's vested mining rights claim, application and supporting mining-related historic documents indicate the property owners' desire to continue use of the El Cajon Property without the requirement of a Mining CUP to (at some point in time) develop their possessory mineral interests, which appears to have started back in 1923 (see Exhibit A). A review of the land use records suggests that areas of historic mining use were customarily and lawfully recognized by the County and a permitted use by right was established at the time a property was substantially explored and disturbed in pursuit of minerals. For purposes of this application, the operator's representative has indicated that mining activities (mining disturbances) were discontinued around 1966.

The recent *Hardesty* court case involving the SMGB decided that a federal mining patent - a deed perfected after working a mining claim - has no effect on vesting when SMARA became operative on January 1, 1976. The fact that mines were worked on the property years ago does not necessarily mean that mining may continue operating as a "nonconforming use" when SMARA took effect, such that any right to surface mining was grandfathered. The trial court in *Hardesty* found that through the 1970's, the Hardesty property "was essentially 'dormant'". *Hardesty* further describes the mining activity as "sporadic" and "limited" involving only very small portions of the property during this period, and there was virtually no evidence that those mining activities continued to exist at the time SMARA was enacted and made effective on January 1, 1976. Hardesty contended that the purported loss of mining equipment during WWII "and low gold prices, made it largely infeasible to resume mining".

To show that Hardesty had a vested right to engage in mining on his property, Hardesty's briefing emphasized evidence of mining on the property before 1976. However, Hardesty failed to prove "*any"* mining was occurring on or even reasonably before the date SMARA took effect. SMARA was designed to allow "*existing*, *operating"* surface mines to continue operating after its effective date without the need to obtain local permits. The Court indicated that SMARA's grandfather provision does not extend to truly dormant mines. A mining/reclamation plan had not been submitted by the SMARA deadline of March 31, 1988; therefore, Hardesty *"did not demonstrate an objective manifestation of intent to mine all"* and *"no evidence demonstrating authorization to mine was granted from the mid-1940s to January 1, 1976, or to the present date as well."*

Hansen Brothers did not discuss what facts were sufficient to show the required "*objective manifestation*" for intent to mine the entire tract of land. As stated by the Court (in the zoning context), *" '[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 [citation]. Mere cessation of use does not of itself amount to abandonment although the duration of nonuse may be a factor in determining whether*

the nonconforming use has been abandoned [citation]' " (Hansen Brothers, supra, 12 Cal.4th at p. 569, italics added.). Apart from adding *Hardesty's* view that the precedent states abandonment must be shown by clear and convincing evidence by the party relying on abandonment, *Hardesty* did not dispute the *Hansen Brothers* test as to abandonment. The *Hardesty* trial court upheld the SMGB's findings that any right to mine had been abandoned, finding *"a clear manifestation of intent to discontinue mine operations during the period from the 1940s until the early 1990s".*

SMARA itself does not preclude El Cajon Associates from mining. SMARA was enacted with respect to extant mining operations and merely requires assurances that surface mining operations develop adequate reclamation plans, a neutral state environmental rule. It also allowed then-active surface mines to bypass the need to obtain a local permit. However, SMARA's grandfather provision does not extend to truly dormant mines. Neither a dormant nor an abandoned use is a nonconforming use (*Hansen Brothers*, *supra* at p. 552). Nonuse is not a nonconforming use. A significant 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. No mining has occurred for decades within Lone Pine Canyon and the history of activities within the subject parcels indicate dormancy as it relates to active mining, prior to becoming eligible as a nonconforming land use when SMARA required a reclamation plan and the Development Code required a Mining CUP.

Based on the lack of mining activities when SMARA and permitting requirements became operative, "*diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary"* is the consideration that must be weighed in addition to historic and sporadic activity relating to the site's mineral resources in considering whether El Cajon Associates obtained vested mining rights.

The decision by Planning Commission shall be based on evidence in the record to support findings that the physical use of the land exhibited some level of activity relating to mining, such as material was being extracted, maintaining access, stockpiles and equipment or any other related use of the land that is objectively manifest and recognized as a nonconforming use. Since mining became dormant or discontinued prior to 1966, it would appear that a nonconforming use did not exist in 1976. If it is determined that El Cajon Associates LLC was not using their land for the purposes of mining, then a vested mining right that may have been created was not preserved and cannot be transferred to a successor owner.

PUBLIC COMMENTS:

No public comments have been received.

DETERMINATION OF VESTED RIGHTS FOR MINING FOR THE EL CAJON PROPERTY:

1. Preponderance of the Evidence: El Cajon Associates has the burden of proof in demonstrating a claim for vested mining rights. The Planning Commission shall determine whether El Cajon Associates, by a preponderance of the evidence, has demonstrated through oral testimony, exhibits and public comments, enough evidence to support the claim for vested mining rights. The amount of evidence required is a case by case basis.

2. Objective manifestation: A prior CCR Section 3963[3] provided the following guidance to the SMGB when adjudicating comparable claims:

"Relevant evidence in a proceeding for determination of a claim of vested rights shall be written or oral evidentiary statements or material demonstrating or delimiting the existence, nature and scope of the claimed vested right[s]. Such evidence shall include, but is not limited to, evidence of any permit or authorization to conduct mining operation on the property in question prior to January 1, 1976, evidence of mining activity commenced or pursued pursuant to such permit or authorization, and evidence of any zoning or land use restrictions applicable to the property in question prior to January 1, 1976." "Such evidence shall be measured by objective manifestations, and not subjective intent at the time of passage of SMARA, or laws, affecting Claimant's right to continue surface mining operations without a permit. In other words, there must be identifiable evidence or conditions that have a physical basis."

[3] Previously, the SMGB could, under certain circumstances, make a vested rights determination. This authority was abrogated by the the Legislature and the resulting regulations, specifically, 14 CCR §3950, "the [SMGB] shall not conduct vested rights determinations."

RECOMMENDATION That the Planning Commission:

1) **Deny recognition and confirmation of Vested Mining Rights and Require a Mining Conditional Use Permit, in addition to a reclamation plan and financial assurances, for any mining activity on the El Cajon Property.**

ATTACHMENTS:

Exhibit A: El Cajon Request for Vested Rights Determination for 420 Acres and Verified Request for Determination of Vested Rights, July 2, 2018

Exhibit B: County Response to El Cajon Vested Rights Determination, August 9, 2018

Exhibit C: Court Decisions

- Hansen Brothers
- Calvert
- Hardesty
- Keep the Code

Exhibit D: California Vested Rights Law, Mark D. Harrison, Esq., February 5, 1998

EXHIBIT A

El Cajon Request for Vested Rights Determination for 420 Acres and
Verified Request for Determination of Vested Rights, July 2, 2018

EnviroMINE, Inc.
Environmental & Mine Permitting Services

July 2, 2018

Mr. George Kenline
Engineering Geologist
County of San Bernardino
385 North Arrowhead Avenue, First Floor
San Bernardino, California 92415-0187

Re: Vested Rights Determination for 420 Acres Located Along Lone Pine Canyon Road

Dear Mr. Kenline

Our Client, El Cajon Associates, LLC, a California LLC, (El Cajon), requests a determination of vested rights for its properties located along Lone Pine Canyon Road, San Bernardino County, California (Figures 1 and 2). This property was originally owned by Alice V. Hannin and continues to be held by the heirs of Alice V. Hannin (through their wholly-owned LLC, El Cajon) with the intention of using the Property to extract rock and aggregate products found on the Property.

The subject Properties were initially acquired through patent from the Federal Government, dated November 30, 1926. Mineral extraction and processing followed significant investment in the operation and extended for more than forty (40) years. Operations were curtailed in 1966 when damage was inflicted by railroad construction crews, which unlawfully encroached onto the Properties and demolished a rotary kiln and factory which was actively operating at the site. Since that time, ongoing efforts have been undertaken to further characterize the minerals on the Properties and to identify potential mining interests to invest further in mineral resource development.

The California Surface Mining and Reclamation Act of 1975 (SMARA) identifies the requirements for conducting surface mining operations. These requirements include the need to obtain a local land use permit, reclamation plan and financial assurances. An exception to these criteria is the need to obtain a permit where evidence is presented identifying that the land use, i.e. mining, was occurring prior to the enactment of zoning restriction; thus, establishing a "vested mining right."

The area of Vested Mining Rights is an arcane one not often encountered by local planning agencies. Fortunately, this area has been very well defined and explained by one definitive case and one definitive commentary.

The definitive case is the California Supreme Court Case Hansen Brothers Enterprises v. Board of Supervisors, 12 Cal. 4th 533 (1996}, as reported in Lexis Nexis, (Hansen) and the commentary is the California Vested Rights Law commentary Vested Mining Rights and The Right to Expand Operations, February 5, 1998, by Mark D. Harrison, Esq. (Harrison) (All Full Citations are hereafter omitted as are quotation marks).

A Vested Mining Right is a property right to continue operating in a certain location and in a certain way without being required to conform to all current land use restrictions. Legally, a Vested Mining Right is a "nonconforming use" of land (Harrison, page 1).

The Hanson Court has defined a nonconforming use this way: A legal nonconforming use is one that existed lawfully before a zoning restriction became effective and that is not in conformity with the ordinance when it continues thereafter. The use of the land, not its ownership, at the time the use becomes nonconforming determines the right to continue the use. Transfer of title does not affect the right to continue a lawful nonconforming use which runs with the land (Harrison, page 1).

Here, the Hannin Family has clearly met the foregoing definition. Please refer to the Petition for the specific facts concerning this element. Mining on the Property was commenced on the entire Property at least fifty (50) years before the enactment of the County's Land Development Code. Moreover, a system of adits was excavated which led to a railroad on the Property which took ore from two hundred feet (200') from within the Property and dumped the ore into trucks for delivery to the Processing Plant on the Property. The value of the investment in the Property and the Processing Plant by Petitioner exceeded many millions of dollars in today's values.

Land use agencies will often argue that a use permit is required when a vested mining use seeks to expand operations into areas of the property not previously mined. (Harrison, page 2).

The Hanson Court rejected this argument. The Court established the rule that a vested mining right ordinarily includes the right to complete mineral extraction from the entire mining property. The miner, however, must have "objectively manifested" its intent to mine the entire tract at the time the use first became nonconforming (Harrison, page 2). Here, this intent was first manifested fifty (50) years before the use became nonconforming (See the foregoing Paragraphs which discuss adits 200 feet into the sides of the Mountain on the Property and the Sill Report of 1933 which values the entire Property on a unitary basis. Furthermore, the very nature of limestone is that it occurs in lens-shaped deposits spread throughout the Property. Additionally, there were roads which traversed the entire Property to access the several parcels and a railroad which also traversed large portions of the Property).

Even in cases where the land use agency recognizes the geological scope of the vested use, attempts are sometimes made to limit the miner's production volumes. Vested operators will face the argument that they cannot produce at a level above their past annual maximum, or at a level above the average of past years production or that their increases in production, if allowed at all, should be restricted (Harrison, page 2).

The Hanson Court rejected this argument. It concluded that California Law does not prohibit a gradual and natural increase in a lawful, nonconforming use of a property that is the subject of a vested right (Hanson, page 22).

Furthermore, the Hanson Court noted that the term "discontinued" in a zoning regulation dealing with a nonconforming use is sometimes deemed to be synonymous with the term "abandoned." The Court concluded that cessation of use alone does not constitute abandonment. Abandonment of a nonconforming use ordinarily depends upon a concurrence of two factors: (1) an intention to abandon; and (2) on 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 (Hanson, page 20).

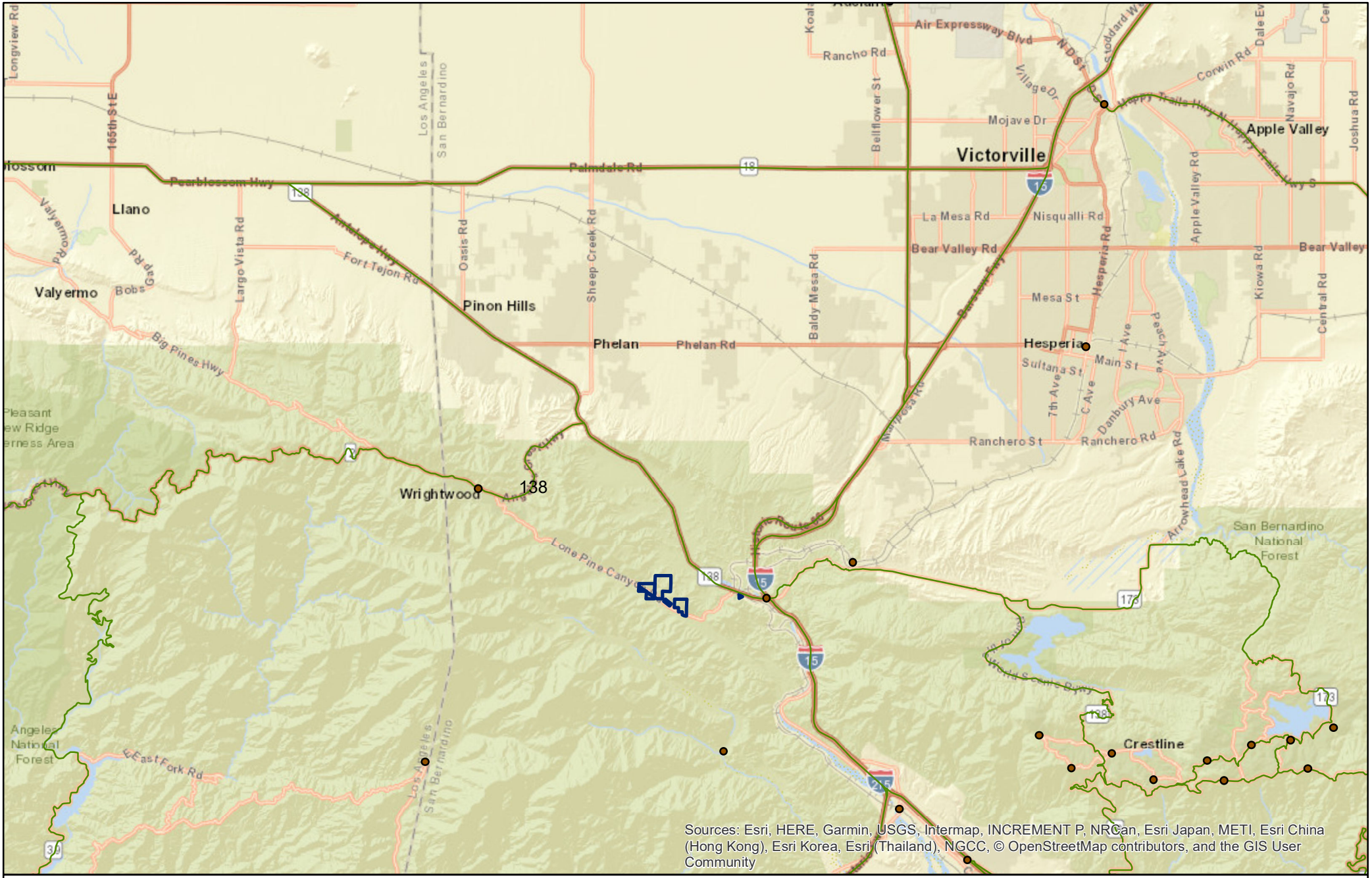
Here, the Petition makes it very clear that the Hannin Family never abandoned the vested right to mine the Property. If there is any remaining doubt, Mr. Neil McCarroll, the Grandson of MP will be on hand to testify, under oath, as to the true nature of the facts stated herein.

We feel that the two major issues which the Petitioner must establish in order to be granted a Determination of Vested Right are (1) that there was a significant investment-backed interest in the improvement of the Property for mining use; and (2) an ongoing intent to mine the Property and not to abandon the nonconforming uses thereon, i.e. mining. Further that we have demonstrated that both elements are present in this matter and that we are entitled to a Determination of Vested Rights.

Thank-you for your attention and professional courtesy with regard to this Petition.

Sincerely,
EnviroMINE, Inc.

Warren Coalson
President



EnviroMINE, Inc.

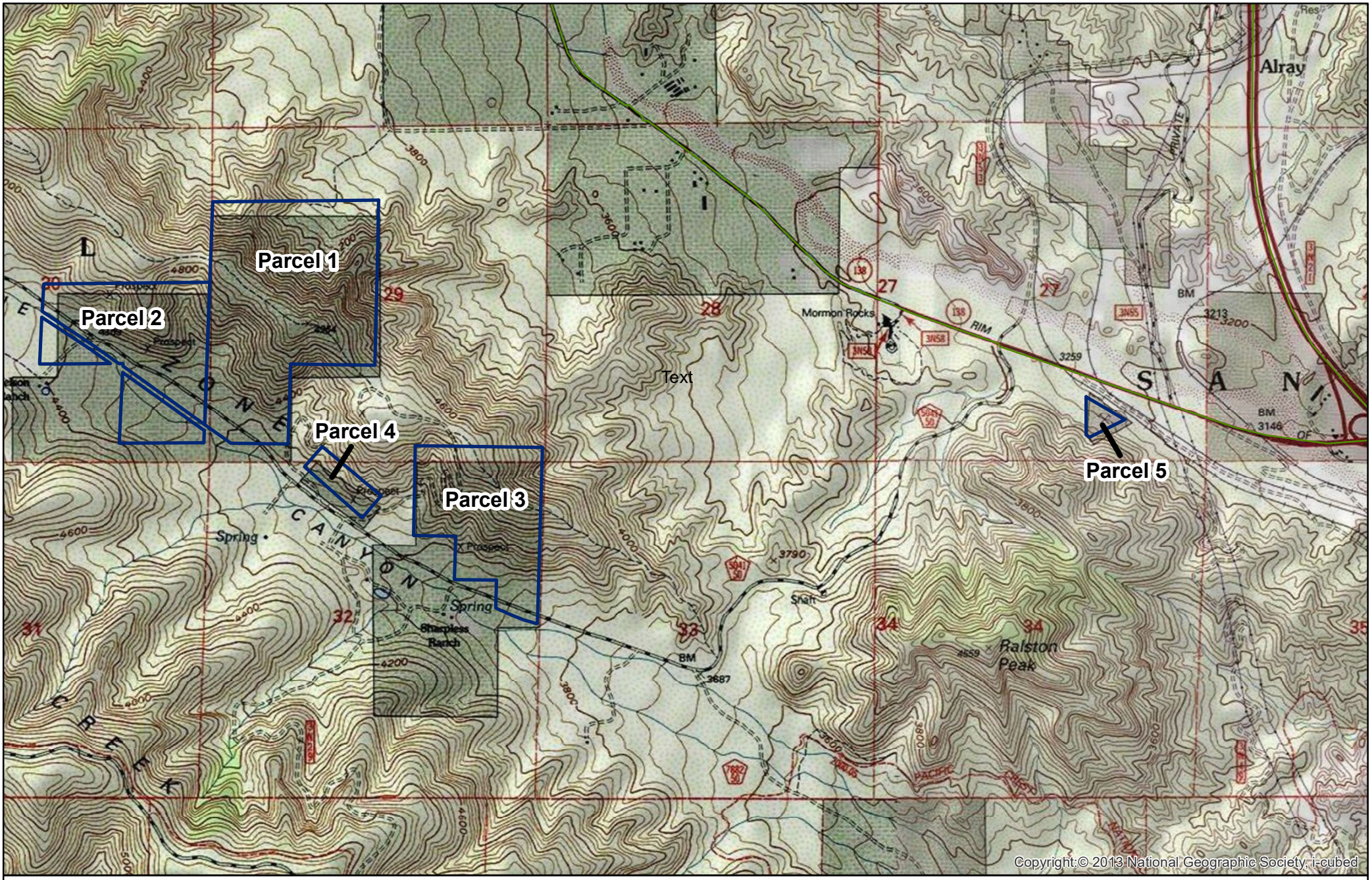
Figure 1:
EL Cajon Property Location Map

N

0 10,000 20,000
Feet

1 inch = 20,833 feet

Date: 2/15/17



EnviroMINE, Inc.

Date: 4/27/18

Figure 2:
EL Cajon Property

Site Ownership (423 Acres)

N

0 950 1,900
Feet

1 inch = 2,000 feet

VERIFIED REQUEST FOR DETERMINATION OF VESTED RIGHTS

FOR THE El CAJON MINE AND MILLSITES

Submitted to:

By:

EL CAJON ASSOCIATES, LLC,

a Nevada Limited Liability Company

June 30, 2018

EL CAJON ASSOCIATES, LLC, a Nevada Limited Liability Company, DECLARES AS FOLLOWS:

1. El Cajon Associates, LLC, is a Nevada Limited Liability Company wholly-owned by the descendants of Michael P. Hannin ("MP") and Alice V. Hannin, originally from Toledo, Ohio.

2. El Cajon Associates, through MP, obtained title to approximately 430 acres of mine and millsite properties located in Lone Pine Canyon ("El Cajon Property") from Cajon Lime Products ("Cajon Lime") in 1931 (Figures 1 and 2).

3. All of the land was originally acquired from the United States by Cajon Lime as **mineral patents** in 1926 (Table 1 and Exhibit A).

Table 1. El Cajon Property Mineral Patents:

Parcel	APN	Pat. #	Pat. Date	Name	Type of Claim	Twp.	Range	Sect.
1	35623102	975917	3/15/ 1926	Cajon Lime Prod. Co.	Placer	3N	6W	29
2	35623102	975917	3/15/ 1926	Cajon Lime Prod. Co.	Placer	3N	6W	30
3	35624103	975918	3/15/ 1926	Cajon Lime Prod. Co.	Placer	3N	6W	32
4	35624108	989905	11/30 /1926	Cajon Lime Prod. Co.	Lode	3N	6W	27
5	35116103	989905	11/30 /1926	Cajon Lime Prod. Co.	Millsite	3N	6W	32

4. Cajon Lime was formed about 1923 to exploit and develop the rich lime deposits near Camp Cajon. Four products that were to be produced included plaster, stucco, lime and hydrated lime (The Santa Fe Magazine, July, 1923).

5. Mining began at the El Cajon Property in 1924 (Shumway and Hill, 1945).

6. Also in 1924, The California Development Association (1924) listed Cajon Lime Products Co. of San Bernardino County as a source for lime and cement.

7. On March 15 and November 30, 1926, mineral patents listed in Table 1 were issued to Cajon Lime.

8. In 1927, Cajon Lime built a 125 ton/day lime plant on its millsite claim near the Atchinson Topeka and Santa Fe railroad tracks (Shumway and Hill, 1995; Logan, 1947).

9. MP loaned Cajon Lime the sum of $92,000.00 (equal to $1.4-million in 2018 dollars). Cajon Lime defaulted on this loan and thereafter MP acquired the El Cajon Property by Deed of Foreclosure, dated March 15, 1931.

10. On September 25, 1933, MP had the El Cajon Property appraised by a respected local appraiser, Mr. Harley Sill. Mr. Sill inventoried the personal and real property located on the El Cajon Property at a value of $1,544,755.22 (1933 dollars). Development work on the El Cajon Property that was reported by Sill included a quarry, a tunnel that was driven 194 feet, another tunnel that was driven 39 feet, and a tramway. The material was tested by the Mission Stucco Company and the results were excellent (Exhibit B).

11. MP worked the El Cajon property intermittently until he died in 1941 (Exhibit C).

12. In January 1945, Douglas Lime Products Company leased the limestone deposits and lime plant, did considerable work during 1945, and planned to produce lime and ground limestone of 40-, 80-, and 200-mesh for poultry and other industrial uses (Shumway and Hill, 1995; Logan, 1947).

13. After World War II, one of MP's daughters, Mary Hannin McCarroll (as agent for the son and three daughters of MP "Hannin Family", which term includes the descendants of MP) entered into a series of negotiations with prospective operators of the El Cajon Property. In most cases, the negotiations were frustrated due to either under-capitalization of the project or personnel problems (Exhibit B). Nevertheless, some mining and milling were accomplished by the Hannin Family during the period following MP's death.

14. Between 1950 and 1952, due to repeated burglaries, the building, kiln and equipment were dismantled by agents for Mary Hannin McCarroll. The mill with its reinforced concrete foundations, slabs, footings, piping, well, etc. remained intact (Exhibit C).

15. In 1951, samples that were collected by California Division of Mines and Geology staff yielded 54.66% CaO (Shumway and Hill, 1995). Also at that time, small tonnages of limestone were being mined in the area between Wrightwood and Cajon Pass (Wright et al., 1953).

16. August 8, 1951, the County of San Bernardino adopted Ordinance 687. The first zoning ordinance regulating land uses within the County. Mining was allowed as a by-right use in the M2 Zone. No record of the location of zoning districts is available for inspection; however, as an ongoing mining interest, it is assumed that the property would have been located within the M2 Zone.

17. During the period 1965-1966 the Hannin Family negotiated with Livingston Stone Company and Industrial Rock Company, which were engaged in mining and milling lime products in Pontiac, Illinois and San Bernardino, California. The negotiations led to the preparation of drafts of contracts of sale in which the consideration for the El Cajon Property was $650,000.00 (Exhibit C).

18. In 1966, Santa Fe Railroad (Railroad) resolved to install their railroad line directly across the Hannin's mill site. The Hannin Family learned of the Railroad's activities and notified them of their ownership of the mill site; of their pending contract with Livingstone Stone Company and Industrial Rock Company; and, warned the Railroad against their intended entry on the Hannin mill site. Notwithstanding the foregoing notice and warning, the Railroad proceeded to rip up and destroy the Hannin mill site (Exhibit C).

19. The Hannin Family then filed suit in the San Bernardino Superior Court and obtained a temporary injunction against the Railroad. The Railroad then countered with an action in eminent domain and thereafter disregarded the foregoing injunction and proceeded to trespass upon the Hannin Family's mill site. It made cuts and fills thereon at will, created a roadway across the mill site and buried the Hannin Family's blocks of reinforced concrete in a loose fill on the mill site. All of these actions were in contravention of the Court order and the Hannin's rights. Subsequently, the Railroad bypassed the mill site with their tracks and abandoned their eminent domain proceedings (Exhibit C).

20. Upon being appraised of the virtual destruction of the mill site, Livingstone Stone Company and Industrial Rock Company abandoned attempts to purchase the Hannin Property and renewed leases on different mining property in Wrightwood (Exhibit C).

21. Throughout the ensuing years, the Hannin Family continued to receive offers to mine the El Cajon Property. However, in each instance, it was determined that the various offerors did not possess the capital necessary to successfully conduct business. In one instance, the Hannin Family had squatters on the El Cajon Property and it was necessary to have the Sheriff's Officers remove them. There is still evidence of their trespass on one of the hillsides. The Hannin Family continued to pay property taxes and to protect the El Cajon Property from trespassers.

22. In 1995, the El Cajon Property was classified as MRZ-3a, area of known mineral occurrence of undetermined mineral resource significance (Shumway and Hill, 1995). Shumway and Hill provide that further exploration work within these areas could result in the reclassification of specific localities into MRZ-2a or MRZ-2b categories.

23. Two years later, in 1997 the Hannin Family hired a consulting geologist by the name of Richard Ganong to better determine the mineral resource significance. Mr. Ganong reviewed the 1933 Sill Report, conducted a geological survey and issued an Appraisal of Mineral Interests, dated March 31, 1997 (Exhibit D).

24. It was Mr. Ganong's opinion that the recoverable amount of dolomite and limestone was 28,800,000 tons. He estimated that the Net Present Value, as of March 31, 1997, of the estimated future annual royalty income based upon 28,800,000 tons of dolomitic limestone at $1.50 per ton, discounted at 30%, for the next 20 years, was $7,162,000.

25. The cost for preparation and finalization of Exhibit "C" was in excess of $15,000.00, not counting the time and effort spent by the Hannin Family.

27. Thereafter, the Hannin Family listed the El Cajon Property with a series of commercial brokers, all of whom professed a knowledge of the limestone business and the connections necessary for finding an appropriate venture partner. None of the brokers were successful.

28. A member of the Hannin Family remembered that Mr. Ganong had mentioned years earlier that he was quite impressed with a gentleman by the name of Warren Coalson, the President of EnviroMINE, Inc. ("Enviro").

29. We contacted Mr. Coalson who suggested that we contacted Danny Sims, Ph.D., P.G., C.E.G. of Sims Geological Services ("Dr. Sims") in order to obtain a Geologic Reconnaissance ("Recon") of the El Cajon Property which would be of interest to the cement producers in the vicinity.

30. Thereafter, Dr. Sims prepared the Recon in which he concluded that "the Property should be submitted to interested parties for consideration as a source for the high purity and high brightness limestone. The area is similar in size to the quarry area for the economic White Knob quarry, and it is likely that a significant volume of marble is present here."

31. The Recon was submitted to all the major mining and processing companies in the area and was met with some degree of interest, wherein we filed this Request for Determination of Vested Rights with San Bernardino County.

32. From March 5, 1931 to date and in the future, it has always been and will be the intent of El Cajon Associates, LLC and the Hannin Family to mine and process the limestone resource on the El Cajon Property. Based upon its action and intent, as supported by the information provided herein, El Cajon Associates, LLC feels that it has established a Vested Right to continue to mine the El Cajon Property. Therefore, we respectively request a positive Determination of Vest Rights for mining on the El Cajon Property.

Affirmation:

I have read the foregoing Verified Request for Determination of Vested Rights and know the contents thereof.

The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

Executed on June 30, 2018, at Mono County, California.

I declare (or certify) under penalty of perjury that the foregoing is true and correct.

EL CAJON ASSOCIATES, LLC.

By Neil McCarroll

Signature

References Cited:

Shumway, D. O. and Hill, R. L., 1995, Mineral land classification of a part of southwestern San Bernardino County, California: A part of the Eastern San Gabriel Mountains and the Western San Bernardino Mountains, DMG Open File Report 94-07.

Logan, C. A., 1947, Limestone in California, California Journal of Mines and Geology, v. 43, No. 3, July, 1947.

California Development Association, 1924, A classified index to the products and industries of California, V. 1.

Wright, L.A., Stewart, R.M., Gay, T.E, Jr., and Hazenbush, G.C., 1953, Mines and mineral deposits of San Bernardino County, California, in California Journal of Mines and Geology, 37 California State Division of Mines, v. 49., nos. 1 and 2, p. 49-257.

Attachments:

Figure 1	Regional Location Map
Figure 2	El Cajon Property
Exhibit A	Mining Claim Patents
Exhibit B	Harley Sill, Resource Evaluation
Exhibit C	Hannin et al. vs. Southern Pacific Company, et al.
Exhibit D	Appraisal of Mineral Interests in Lands Owned by The Hannin Family, by: Richard A. Ganong RG
Exhibit E	Mineral Resource Investigation: Appraisal of Hannin Limestone Deposit Lone Pine Ridge, by Donald L. Fife & Associates
Exhibit F	Evaluation of Limestone and Dolomite Resources at El Cajon Associates Lone Pine Mountain Properties, San Bernardino Mountains, San Bernardino County, California, by: Danny B. Sims PG

EXHIBIT A

Mineral Patents

4—1083-R.

Los Angeles 040990.

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, In pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, there has been deposited in the General Land Office of the United States the Certificate of the Register of the Land Office a Los Angeles, California, accompanied by other evidence, whereby it appears that the Cajon Lime Products Company

did, on January 12, 1926, duly enter and pay for that certain mining claim or premises, known as the Warner No. 1, Warner No. 2, and Warner No. 4 placer mining claims, situate in San Bernardino County, California, described as follows: the Warner No. 1 claim, comprising the south half of the northwest quarter and the north half of the southwest quarter of Section twenty-nine in Township three north of Range six west of the San Bernardino Meridian; the Warner No. 2 claim, comprising the north half of the southeast quarter and the southeast quarter of the southeast quarter of Section thirty, said Township and Range; and the Warner No. 4 claim, comprising the southwest quarter of the southwest quarter of said Section twenty-nine; the premises hereinbefore granted, containing three hundred twenty acres.

RECORD OF PATENTS: Patent Number 975917

6—2252

1

Form 4—1084-R.

Los Angeles 040990.

NOW KNOW YE, That there is therefore, pursuant to the laws aforesaid, hereby granted by the United States unto the said

Cajon Lime Products Company

, the said placer mining premises hereinbefore described;

TO HAVE AND TO HOLD said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said grantee above named and to **its successors** and assigns forever; subject nevertheless to the following conditions and stipulations:

FIRST. That the grant hereby made is restricted in its exterior limits to the boundaries of the said mining premises, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, which may have been discovered within said limits subsequent to and which were not known to exist on **September 22, 1925.**

SECOND. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist within the above-described premises at said last-named date, the same is expressly excepted and excluded from these presents.

THIRD. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of the courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

FOURTH. That in the absence of necessary legislation by Congress, the Legislature of **California,** may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to the complete development thereof.

IN TESTIMONY WHEREOF, I, **Calvin Coolidge,** President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, in the District of Columbia, the **FIFTEENTH** day of **MARCH** in the year of our Lord one thousand nine hundred and **TWENTY-SIX** and of the Independence of the United States the one hundred and **FIFTIETH**

(SEAL)

By the President: Calvin Coolidge

By Viola B. Pugh Secretary,

M. P. LeRoy

Recorder of the General Land Office.

RECORD OF PATENTS: Patent Number 975917

6—2266

2

4—1083-R.

Los Angeles 040991.

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, In pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, there has been deposited in the General Land Office of the United States the Certificate of the Register of the Land Office at Los Angeles, California, accompanied by other evidence, whereby it appears that the Cajon Lime Products Company

did, on January 12, 1926, duly enter and pay for that certain mining claim or premises, known as the Warner No. 3 placer mining claim, situate in San Bernardino County, California, described as the northeast quarter of the northeast quarter, the east half of the northwest quarter of the northeast quarter, the north half of the southeast quarter of the northeast quarter and the southeast quarter of the southeast quarter of the northeast quarter of Section thirty-two in Township three north of Range six west of the San Bernardino Meridian, and containing ninety acres.

RECORD OF PATENTS: Patent Number 975918

6—2282

1.

Form 4—1084-R.

Los Angeles 040991.

NOW KNOW YE, That there is therefore, pursuant to the laws aforesaid, hereby granted by the United States unto the said **Cajon Lime Products Company**

, the said placer mining premises hereinbefore described;

TO HAVE AND TO HOLD said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said grantee above named and to **its successors** and assigns forever; subject nevertheless to the following conditions and stipulations:

FIRST. That the grant hereby made is restricted in its exterior limits to the boundaries of the said mining premises, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, which may have been discovered within said limits subsequent to and which were not known to exist on **September 22, 1925.**

SECOND. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist within the above-described premises at said last-named date, the same is expressly excepted and excluded from these presents.

THIRD. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of the courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

FOURTH. That in the absence of necessary legislation by Congress, the Legislature of **California** may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to the complete development thereof.

IN TESTIMONY WHEREOF, I, **Calvin Coolidge,** President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, in the District of Columbia, the **FIFTEENTH** day of **MARCH** in the year of our Lord one thousand nine hundred and **TWENTY-SIX** and of the Independence of the United States the one hundred and **FIFTIETH**

(SEAL)

By the President: Calvin Coolidge

By Viola B. Pugh Secretary,

M. P. LeRoy

Recorder of the General Land Office.

RECORD OF PATENTS: Patent Number 975918

6—2266

Form 4—1061-R

Los Angeles 041487.

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, In pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the Plat and Field Notes of Survey and the Certificate of the Register of the Land Office at Los Angeles, California, accompanied by other evidence whereby it appears that the Cajon Lime Products Company

has entered and paid for the Cajon No. 2 lode mining and Cajon No. 2 mill site claims,

designated by the Surveyor General as Surveys Nos. 5849 A and 5849 B, respectively, embracing a portion of Sections twenty-seven and thirty-two in Township three north of Range six west of the San Bernardino Meridian, in San Bernardino County, California,

and bounded, described, and platted as follows: Beginning for the description of the Cajon No. 2 lode claim, at corner No. 1, a redwood post 4 x 6 inches, four feet long, marked C2 - 1 - 5849 A, from which the northwest corner to Section thirty-two in Township three north of Range six west of the San Bernardino Meridian, bears north seventy-six degrees fifty-six minutes west one thousand five hundred eighty-six and three-tenths feet distant;

Thence, first course, north forty-one degrees nine minutes east four hundred sixty feet to corner No. 2, a redwood post 4 x 6 inches four feet long, marked C2 - 2 5849 A;

Thence, second course, south forty-eight degrees fifty-one minutes east one thousand two hundred seventeen feet to corner No. 3, a redwood post 4 x 6 inches, four feet long, marked C 2 - 3 - 5849 A;

RECORD OF PATENTS: Patent Number 989905

GOVERNMENT PRINTING OFFICE

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Los Angeles 041487.

Thence, third course, south forty-one degrees nine minutes west two hundred thirty feet to a point from which discovery cut bears north forty-eight degrees fifty-one minutes west three hundred fifty-seven feet distant; four hundred sixty feet to corner No. 4, a redwood post 4 x 6 inches, four feet long, marked C2 - 4 - 5849 A;

Thence, fourth course, north forty-eight degrees fifty-one minutes west one thousand two hundred seventeen feet to corner No. 1, the place of beginning; the survey of the lode claim, as above described, extending one thousand two hundred seventeen feet in length along said Cajon No. 2 vein or lode;

Beginning, for the description of Survey No. 5849 B, the Cajon No. 2 mill site claim, at corner No. 1, a redwood post 4 x 6 inches, four feet long, marked C2 - MS - 1 - 5849 B, from which the southeast corner to Section twenty-seven, said Township and Range, bears south sixty degrees forty minutes east one thousand four hundred forty-seven feet distant; and corner No. 1 of said Cajon No. 2 lode claim, bears south eighty-five degrees fifty minutes west thirteen thousand sixty-nine feet distant;

Thence, first course, south sixty-four degrees ten minutes thirty seconds west six hundred twenty-six and forty-two-hundredths feet to corner No. 2, a redwood post 4 x 6 inches, four feet long, marked C2MS - 2 - 5849 B;

Thence, second course, north fifty-six degrees eighteen minutes west sixty-seven and nine-tenths feet to corner No. 3, a redwood post 4 x 6 inches, four feet long, marked C2MS - 3 - 5849 B;

Thence, third course, north twenty-nine minutes forty seconds east six hundred forty-five and twenty-four-hundredths feet to corner No. 4, a redwood post 4 x 6 inches, four feet long, marked C 2MS - 4 - 5849 B;

Thence, fourth course, south fifty-six degrees eighteen minutes east seven hundred thirty-eight and ninety-six-hundredths feet to corner

Los Angeles 041487.

No. 1, the place of beginning; the premises herein granted, contained in said Survey No. 5849 A. twelve acres and eight hundred fifty-two thousandths of an acre; and in said Survey No. 5849 B five acres; aggregating seventeen acres and eight hundred fifty-two thousandths of an acre.

989905

Form 4—1082-R

Los Angeles 041487.

NOW KNOW YE, That there is therefore, pursuant to the laws aforesaid, hereby granted by the United States unto the said

Cajon Lime Products Company

the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said vein , lode , or ledge , and of all other veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said survey extended downward vertically, although such veins, lodes, or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises: Provided, That the right of possession to such outside parts of said veins, lodes, or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes, or ledges: And provided further, That nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

TO HAVE AND TO HOLD said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said grantee above named and to its successors and assigns forever; subject, nevertheless, to the above-mentioned and to the following conditions and stipulations:

FIRST. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local laws, customs, and decisions of the courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

SECOND. That in the absence of necessary legislation by Congress, the Legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development. Reserving unto the United States, its permittee or licensee, the right to enter upon, occupy and use any part or all of that portion of the south half of the southeast quarter of said Section twenty-seven lying within 25 feet of the center line of the transmission line right of way of the Southern Sierras Power Company, for the purposes provided in the Act of June 10 1920 (41 Stat., 1063), and subject to the conditions and limitations of Section 24 of said Act.

IN TESTIMONY WHEREOF, I, Calvin Coolidge, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the THIRTIETH day of NOVEMBER in the year of our Lord one thousand nine hundred and TWENTY-SIX and of the Independence of the United States the one hundred and FIFTY-FIRST

(SEAL)

By the President: Calvin Coolidge

By Viola B. Pugh, Secretary,

M. P. LeRoy, Recorder of the General Land Office.

RECORD OF PATENTS: Patent Number 989905

6—2264

GOVERNMENT PRINTING OFFICE

4.

EXHIBIT B

Harley Sill, Resource Evaluation

September 25, 1933.

Cajon Lime & Chemical Co.,
San Bernardino County,
California.

Gentlemen:

SAMPLE DESCRIPTION:

The property of the Cajon Lime & Chemical Company lies on the eastern face of the range forming the western side of Cajon Pass running from San Bernardino to Victorville.

At an elevation of 4250 ft. near the north end of the property a small quarry has been started, at the western face of which a tunnel has been driven 194 ft. into the mountain. This tunnel was sampled in sections from its portal to the face. These samples are represented by samples Nos. 19 to 26 inclusive. With the exception of an $8\frac{1}{2}$ ft. section at the face, this tunnel shows a high grade of Dolomite. The face of the tunnel shows an impure Limestone low in both Calcium and Magnesium content. Sample No. 26 is representative of broken rock in the quarry.

Exhibit C

One hundred and fifty feet south from this tunnel is another short tunnel driven parallel to the one at the north which has attained a length of 39 ft. under cover with the sides continuing 11 ft. out into the quarry. This tunnel was also sampled in sections as indicated in the analyses. It shows about 20 ft. of a good grade of Dolomite from the cut in the quarry continuing 10 ft. into the tunnel. The remainder of the tunnel to the face is high Calcium Carbonate with only a small percentage of Magnesium, the average of which would probably not exceed 6½% of Magnesium Carbonate.

The side of the mountain covering the are contained in these holdings was roughly laid off into 300 ft. blocks and sampled from the quarry elevation at 4250 ft. to the summit of the ridge which rises to an elevation of 4750 ft.

Samples Nos 6 and 7 were taken in line with the south tunnel and at elevations of 250 ft. and 350 ft. above the quarry floor. These samples were taken from outcroppings lying beyond the face of either the north or south tunnels in an effort to determine whether or not commercial Dolomite would be encountered at these horizons. Results indicate that they are high in Lime and low in Magnesium.

Another series of samples was taken at a point in line with the tramway and extending from the quarry to the crest of the ridge. These samples are indicated by Nos. 8, 9 and 10 at distances of 450, 200 and 50 ft. respectively above the quarry and the upper terminus of the tramway. These samples also indicate high Lime with a minor Magnesium content. In this series of samples, as well as those represented by Nos. 6 and 7, the higher Magnesium content lies nearest the quarry elevation. This same fact is indicated by samples Nos 11 and 12. Samples Nos. 11, 12 and 13 were taken along a line approximately 300 ft. south of the tramway. Of these only sample No. 13, which lies approximately 150 ft. below the crest of the ridge, shows Dolomite of commercial grade. At this point there is a considerable cropping in place, of a good grade of Magnesium Carbonate.

Sample No. 14 was taken from a cropping approximately 250 ft. above the quarry and about 400 ft. south from the tramway. It also is a good grade of commercial Dolomite and is probably a continuation of the Dolomite area shown by Sample No. 13.

Sample No. 15 is still 100 ft. farther to the south and covers considerable area of Dolomite.

Sample No. 16 is taken at a horizon of 4250 ft. elevation which is the same as that of the quarry approximately 1200 ft. to the north. This sample is taken across an excellent face of Dolomite and is the best showing that came within my observation, within these holdings.

Sample No. 17 is taken approximately 500 ft. still farther to the south, probably on the same stratum of Dolomite Limestone indicated by sample No. 16. It also shows high grade Dolomite and is indicative of a considerable tonnage of Dolomite in the area south of the tramway.

A N A L Y S E S

Sample No.	Description	Calcium Carbonate	Magnesium Carbonate	Total
* 1	5' section starting from face	84.83%	7.68%	92.51%
* 2	2nd sect. 15' from #1	84.83	5.76	90.59
* 3	3rd sect. 25' from face	72.15	19.30	91.45
* 4	4th sect. 35' from face	58.38	33.75	92.13
* 5	5th sect. 40' from face	56.55	41.31	97.86
6	Directly above so. tunnel 250' higher	86.41	10.48	96.83
7	Directly above so. tunnel 350' higher	93.08	1.20	94.20
8	Directly above tramway - 450' higher at 4700	98.77	0.58	99.35
9	Directly above Tramway 200' up	89.22	1.85	91.07
10	Directly above tramway - 50' up - 4300	85.78	11.42	97.20
11	300' so. tramway - 4300	84.83	12.15	96.98
12	300' so. tramway - 4350	90.24	6.97	97.21
13	300' so. tramway - 4600	60.04	38.61	98.65
14	400' so. tramway - 4500	57.60	36.06	93.66
15	500' so. tramway - 4350	60.48	37.81	98.29
16	550' so. tramway - 4250	56.68	41.01	97.69
17	1000' so. tramway - 4250	57.7	40.66	98.36
18	Outcrop 40' below track - 100' no. tramway	91.16	2.54	93.70

* Samples from south tunnel.

Harley A. Sills
Consulting Engineer.

A N A L Y S E S

Sample No.	Description	Calcium Carbonate	Magnesium Carbonate	Total
19	8½' section face north tunnell 152' from mouth	36.69%	20.35%	57.04%
20	10' section to drift	57.11	42.52	99.63
21	10' cut in drift	56.4	43.0	99.4
22	10½' section toward mouth tunnel from drift	56.4	43.22	99.62
23	Next section 53' toward mouth tunnel	54.96	41.2	96.16
24	Next section 42½' in tunnel toward mouth	56.4	42.86	99.26
25	Next section 10' near mouth tunnel	57.11	42.23	99.34
26	Broken rock in quarry	54.96	40.92	95.88
27	Outcrop near crest hill south end deposit between 2000 - 2500' so. quarry	96.5	1.64	98.14
28	Outcrop near crest hill approx. 250' no. 27	90.2	1.90	92.10
29	49' cut along side so. tunnel	76.40	14.85	91.25

Harley A. Sill
Consulting Engineer.

A N A L Y S E S

Sample No.	Description	Calcium Carbonate	Magnesium Carbonate	Total
26	Bags 1 and 2	52.47%	39.74%	92.21%
26	Bags 3, 4 and 5	56.42	28.01	84.43
So. Tun.	Bags 4 and 5	68.67	22.65	91.32
2	North tunnel x-cut 10' ea. way	55.38	39.06	94.44
5	North tunnel 53½' - 42½' ..	56.62	41.32	97.94
6	Portal of tunnel	54.78	40.96	95.74
16	.....	58.1	40;54	98.64
17	.....	57.18	41.65	98.83

Harley A. Sill
Consulting Engineer.

L I M E T E S T S

In 1931 I made a study and sampling of this deposit and took a representative sample for testing purposes. Approximately 3,000 pounds of rock were mined from the north tunnel at stations #16 and 17. A sample was taken of the various places where the rock would be mined in order to determine the average quality of the material to be burned. The following samples represent the Dolomite treated:

	Calcium Carbonate	Magnesium Carbonate
Sample #1 -- #2, 5, 6 North Tunnel	55.59%	40.33%
" 2 -- #16	58.1	40.54
" 3 -- #17	57.18	41.65

The samples were mixed and a representative lot of 100# taken from three faces in the stratum about equi distant over a length of approximately 2,000 veet along the deposit.

A furnace was built that carried a charge of 100# of Dolomite. After loading, the rockwas raised to a temperature of approximately 1700 to 1800° Fahrenheit and maintained at this heat for 5½ hours for the sample from the north tunnel, and 6 hours for samples #16 and #17.

It was determined from these tests that a better quality,of lime could be made from a longer period of contact with a lesser degree of heat. A temperature in excess of 2200 to 2300° causes overburning with a resultant red coloration of the burned rock. At a slightly higher temperature some fusing takes place.

Sample #1, from the north tunnel, was burned first and the resulting calcine was a clear white color. This test was followed by samples #16 and 17 which were burned for a period of six hours. The rock in both cases burned pure white.

A series of four samples was taken from each calcine. It included the burned lump, putty, hydrated lime unground, and the same material ground to pass a 65 mesh screen. In all of the samples the material puttied snow white to a blue white color and had a smooth non-granular body. The ratio of water to raw lime was 1½ to 1. The calcined material was hydrated by hand and carried from 18 to 20% of water by weight. This is higher than the ordinary percentage carried by commercial lime.

A sample of 3# of hydrated ground Dolomite was taken from each of the calcines and submitted to the Mission Stucco Co. fro plasticity tests. These tests were conducted by the Superintendent, Mr. Holdinghausen, of the Mission Stucco, in my presence.

He prepared a sample of 2# each of the hydrated Dolomite submitted and mixed them with 6 ounces of sand or a ratio of about 18.7% of sand in the mix. The usual sand content, according to Mr. Holdinghausen, in 2½ to 3 ounces or 7.8% to 9.4%. These samples were then subjected to spreading and polishing tests.

The material from the north tunnel spread the best but the lime from both samples #16 and 17 spread excellently, applying smoothly without any rolling up back of the trowel. Sample #17 showed splendid plasticity and gave the whitest color, although all three samples were very white. The surface took a high polish and gave the appearance of highly polished white marble.

The Superintendent, who claims to have had a wide experience with a large number of calcium and dolomitic limes, stated that these samples passed every test of practical plasticity and were the best material he had ever worked on. His comments on the character of this dolomitic lime were extremely favorable and gave me the assurance that this material would meet the exacting requirements of the trade.

Having followed the procedure of the lime from the time it left the quarry through the different stages of its metamorphosis to a finished lime product, I believe that it can be mined commercially and fabricated into a high quality of commercial dolomite lime well suited to the building trades.

In order to accurately ascertain the tonnage of calcium and dolomitic limestone in this deposit a large amount of drilling, development and sampling would be necessary.

My sampling was confined to an area of approximately 1,500 ft. in length, 500 ft. in width and 500 ft. in height, the analyses of which are included in this report. However, this does not define the limits of the deposit and there appears to be a continuation of both calcium and magnesium-calcium carbonate of similar quality for a considerable distance beyond the limits of my examination.

Assuming an average of 13 cu. ft. per ton for material of this character, there would be a tonnage of 28,800,000 tons within the above described area.

I am aware that other engineers have examined this deposit and have estimated a far greater tonnage. In fact, I personally collaborated in making a subsequent examination with Mr. Robert Kinzie, a Consulting Mining Engineer, of

San Francisco, for San Francisco clients. Mr. Kinzie corroborated the findings of my previous examination.

Prominent among other reports is one made by Dr. Gilbert Ellis Bailey, Ph. D., while Professor of Geology at the University of Southern California, who states, in referring to the size of the Dolomitic area, that, "Resting on the Big Dike, at about 4,750 ft. contour, is a vast outcrop of Dolomite extending up to the summit at 5,000 ft. elevation; giving a thickness of 250 ft. This outcrop extends along the mountain top for over a mile; the strike or direction being northwest, or diagonally across the claims, and the dip is to the south, or towards Lone Pine Creek, the same dip as that of the crustal block. In other words, the outcrop of Dolomite measures one mile in length; by half a mile wide and 250 ft. deep."

According to these estimates there would be about 268,000,000 tons in this block. While I do not question these measurements, nevertheless this area is not entirely blocked by systematic development. I, therefore, believe that my estimate of 28,800,000 tons, which is approximately only 10% of that stated by Dr. Bailey, is conservative and can be easily produced in the area owned by this company.

The value of this deposit lies in its operation and the production and sale of limestone and its by-products, such as Liquid Carbon Dioxide for the manufacture of Dry Ice, in addition to the many uses of the limestone itself. Under these conditions I am placing a nominal value of 5¢ per ton. I believe that this valuation is particularly conservative because of the proximity of this deposit to railroad transportation. It is approximately a mile and a half from the Union Pacific and Santa Fe Railroad, while the plant lies about only 200 ft. from the main track with a spur into the plant.

The samples taken during my examination of this property, while not detailed nor exhaustive, nevertheless indicate a definite trend of the calcium limestone and dolomite.

This deposit, like many others, varies in the relative proportions of the calcium and magnesium, from pure limestone to pure dolomite.

Both classes of the limestone are of an exceptionally pure quality and in my opinion justify consideration for development and the production of dolomitic lime and its fabrication into many uses.

Yours very truly,

Harley A. Sill

Harley A. Sill
Consulting Engineer.

HAS*EP.

EXHIBIT C

Hannin vs. Southern Pacific Company

LONERGAN, JORDAN & GRESHAM
398 West Fourth Street
San Bernardino, California
Telephone: TUrner 4-2171

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

EDWARD M. HANNIN, et al.,

Plaintiffs

vs.

SOUTHERN PACIFIC COMPANY, et al.,

Defendants.

No. 134849

PLAINTIFFS' TRIAL BRIEF

I

STATEMENT OF THE CASE

The within suit originated January 11, 1967 as an action for injunction, and damages both compensatory and exemplary for willful trespass.

II

SUMMARY OF FACTS

In 1966 plaintiffs owned 500 acres containing lime and dolomite deposits, together with a millsite for processing said deposits. The millsite was located adjacent to the Santa Fe tracks below Cajon Pass. The mining claims and patented millsite had been acquired by the father of plaintiffs, a civil engineer, in 1932. The millsite contained a 160 foot rotary kiln together with extensive crushing equipment, conveyors, etc., enclosed in a sheet metal building. A loading dock was located next to a spur track leading from the Santa Fe main line.

The millsite was an indispensable adjunct of the mine, and

was used sporadically until plaintiffs' father became incapacitated and died in 1941. Thereafter World War II ensued and due to repeated burglaries of equipment, the building, kiln and equipment were dismantled by plaintiffs between 1950 and 1952. The site with its reinforced concrete foundations, slabs, footings, piping, well, etc. remained intact.

Subsequent to World War II plaintiffs entered into a series of negotiations with prospective operators of the mine and mill. In most cases the negotiations were frustrated due to either under-capitalisation of the project or personnel problems. Nevertheless some mining and milling were accomplished by plaintiffs during the period following their father's death.

In 1965-1966 plaintiffs began negotiations with Livingston Stone Company and Industrial Rock Co., which were and still are engaged in mining and milling lime products in Pontiac, Illinois and San Bernardino, California. The negotiations led to the preparation of drafts of contracts of sale in which the consideration for the properties was $650,000.00.

In 1966 defendants resolved to install their railroad line directly across plaintiffs' millsite. The plaintiffs learned of defendants activities and notified them of their ownership of the millsite; of their pending contract with Livingston Stone Company and Industrial Rock Co.; and, warned defendants against their intended entry on plaintiffs' property.

Notwithstanding the foregoing notice and warning, defendants proceeded to rip up and destroy plaintiffs' millsite. Plaintiffs then filed the within suit and obtained a temporary injunction. Defendants countered with an action in eminent domain and thereafter disregarded the foregoing injunction and proceeed to trespass upon plaintiffs' millsite. They made cuts and fills thereon at will, created a roadway across the millsite and buried plaintiffs' blocks of reinforced concrete in a loose fill on the

millsite. All of said actions were in contravention of the Court order and plaintiffs' rights. Subsequently they bypassed the millsite with their tracks and abandoned their eminent domain proceedings.

Upon being apprised of the virtual destruction of the millsite, Livingston Stone Company and Industrial Rock Co. abandoned attempts to purchase plaintiffs' interests, and renewed leases on mining property in Wrightwood. They continue at the present time to obtain their deposits from Wrightwood under their existing leases.

Plaintiffs herein seek damages measured by the cost of restoring their premises to their former position, together with exemplary damages for the deliberate wrongful entry and willful destruction of their premises. The cost of restoration would include: removing the present improper fill and reinforced concrete debris; grading; laying of concrete flooring with reinforced footings, boring of a new water well; replacing all water and oil pipes destroyed; replacing an oil reservoir; replacing an oil storage tank; and making reimbursement for soil tests and surveying of property made by plaintiffs and necessitated by the destruction of corner markers by defendants and by the creation of defendants of an improper and inadequate fill.

III

POINTS AND AUTHORITIES

(a) In a trespass action all damages which were proximately caused by the trespass or series of trespasses may be recovered. It is immaterial whether the same could have been anticipated. It is likewise immaterial that a portion of the loss was suffered after the trespass.

Hawthorne v. Siegel, 88 Cal App. 159

Cal. Civil Code Sec. 3333

48 Cal. Jr. 2nd, p. 47.

(b) If the trespass to land is of a permanent nature, then all damages past and prospective may be recovered in one action.

Hicks v. Drew, 117 Cal. 305.

(c) The award of damages itself should be such as to place the party injured in the position he would have occupied had the trespass not occurred.

Empire Gold Mining Co. v. Bonanza Gold Mining Co., 67 Cal. 406

48 Cal. Jr. 2nd, p. 50-51.

(d) If a fixture has a value that can be accurately ascertained without reference to the soil on which it stands or out of which it grows, recovery may be the value of the thing destroyed or the cost of its repair.

Menzies v. Geophysical Service, 116 Cal. App. 2nd, p. 419.

(e) If a trespass is aggravated by fraud, malice, oppression or a reckless disregard of the rights of others, exemplary damages may be allowed.

Dorsey v. Manlove, 14 Cal. 553

Jones v. Sanders, 158 Cal. 405.

14 Cal. Jr. 2nd, p. 825.

(f) In awarding damages the Court need not segregate compensatory and exemplary damages in its findings, unless requested to do so by either party.

Foley v. Martin, 142 Cal. 256.

Respectfully submitted,

LONERGAN, JORDAN & GRESHAM

By _____
Allen Gresham
Attorneys for Plaintiffs

EXHIBIT D

Appraisal of Mineral Interests in Lands Owned by The Hannin Family
by: Richard A. Ganong RG

APPRAISAL OF MINERAL INTERESTS

IN

LANDS OWNED

BY

THE HANNIN FAMILY
In San Bernardino County, California

AS OF

MARCH 31, 1997

Bakersfield, California
April 30, 1997

Richard A. Ganong
Registered Geologist
State of California No. 1456

GANONG

TABLE OF CONTENTS

APPRAISAL OF MINERAL INTERESTS

INTRODUCTION

The property appraised herein consists of three (3) non-contiguous parcels of land containing a total of four hundred ten (410) acres.

The property is located on the north side of the San Gabriel Mountains in Lone Pine Canyon, approximately five (5) miles southeast of the Town of Wrightwood, and approximately twenty (20) miles northwest of the Town of San Bernardino.

The property is accessed from Interstate 15 (approximately three (3) miles, exiting at State Route 138) by Lone Pine Canyon Road.

The property is unimproved, except for the old mines located thereon.

The purpose of this report is to present an opinion of Fair Market Value as of March 31, 1997, of the royalty interest in limestone and dolomite (marble) minerals contained in the Hannin Family property located in the San Bernardino National Forest.

A geologic field investigation of the property was conducted on February 13, 1997. The field investigation included several traverses across the property to identify and become familiar with the rock types present throughout the site. Observations were recorded about the accessibility of the property via Lone Pine Canyon Road and the railroad located adjacent to the property.

A review of the mineral economics of carbonate rocks in California and a history of geologic investigation within this

property was conducted by the undersigned to evaluate the potential of the site and its mineral valuation.

The main purpose of the investigation was to determine the value of the dolomite (magnesium carbonate) and limestone (calcium carbonate) as definitively mapped and sampled within the property boundaries.

LEGAL DESCRIPTION

The property is situated in the County of San Bernardino, State of California, and is more fully described in Exhibit A, attached hereto and incorporated herein. Please note that Parcel 6 is not included in this appraisal, as it is not included in the contemplated land use exchange with the U.S.F.S.

OWNERSHIP

Fee Title is (patented mining claims) vested in Alice V. Hannin (no status).

FIVE/YEAR SALES HISTORY

There have been no transfers of record of title to the property within the last five (5) years.

The present owner acquired title by deed recorded October 1, 1927, recorded in Book 428, Page 243, Official Records, San Bernardino County. The original policy of title insurance is attached hereto as Exhibit B and incorporated herein.

HISTORY OF MINING ON PROPERTY

A history of geologic investigation within this property notes field work by Dr. Gilbert Ellis Bailey of the University of Southern California prior to 1931.

Dr. Bailey referenced the dike-like outcropping of dolomite near the mountain top striking northwest and dipping to the south, comprising a block one mile long, one-half mile wide and 250 feet thick. His calculation (assuming an average of 13 cubic feet per ton for material of this character) was that there were 268,000,000 tons of limestone and dolomite within the mineral block located on the property.

In 1933, the distinguished mining engineer/geologist Harley A. Sill published his report on the Cajon Lime & Chemical Co. (now Hannin Family) property.

After studying, sampling, testing and surveying a specific block of approximately 1,500 feet in length, 500 feet in width and 500 feet in height, constituting only ten percent (10%) of the patented mining claim referred to herein, Mr. Sill concluded that the portion of the property constituting that one, specific block contained a minimum of 28,800,000 tons of commercial limestone and dolomite (i.e.: 1,500 feet in length and 500 feet in width x 500 feet in height ÷ 13 cubic feet per ton = 28,800,000 tons).

In his report, Mr. Sill refers to conversations with other engineers and geologists of the time (Mr. Robert Kinzie, Consulting Mining Engineer and Dr. Gilbert Ellis Bailey, Ph.D., Professor of Geology at University of Southern California) who, after mapping

the property, opined that the block contained in the order of 268,000,000 tons of ore, approximately ten times the amount actually blocked and sampled by Mr. Sill.

After Mr. Sill blocked out the aforementioned ore body constituting 10% of the total patented mining claim on the property, he took samples from the existing operating quarry, the prospect tunnels, and surface samples on a 300 foot grid, collecting from twenty-nine (29) separate sites. He assayed, ground, calcined and tested the samples for lime and dolomite plaster material. He took the samples of hydrated, ground dolomite and submitted them to the Mission Stucco Company for plasticity rests. These tests were conducted by the Superintendent of Mission, Mr. Holdinghausen, in the presence of Mr. Sill.

Messrs. Holdinghausen and Sill found that the samples of limestone and dolomite ("dolomitic limestone" -- calcium magnesium carbonate) showed,

> "splendid plasticity and gave a very white color. The surface took a high polish and gave the appearance of highly polished, white marble. The samples passed every test of practical plasticity and were noted as the best material that Mr. Holdinghausen had ever worked on."

Messrs. Sill and Holdinghausen commented that the character of this dolomitic lime was "extremely favorable and gave the assurance that this material would meet the exacting requirements of the building materials trade."

Having followed the processing of the lime from the time it left the quarry through the different stages of its metamorphosis to a finished lime product (a dolomitic limestone processing plant

was in full operation on Parcel 6 at that time), Mr. Sill opined that the material, low in magnesium oxide, could be mined commercially and fabricated into a high quality of commercial dolomitic limestone well suited to the building trade industry. A copy of Mr. Sill's report is attached hereto as Exhibit C and incorporated herein.

As previously noted, Mr. Sill blocked out the ore body by taking samples from an existing, operating quarry, prospect tunnels, and surface samples on a 300 foot grid.

He assayed, ground, calcined and tested the samples for lime and plaster building materials.

Mr. Sill placed "a nominal value of 5 cents per ton" on the ore in place.

Quoting Mr. Sill, "I believe that this valuation is particularly conservative because of the proximity of this deposit to railroad transportation. It is approximately a mile and a half from the Union Pacific and Sante Fe Railroad, while the plant lies about only 200 feet from the main track with a spur into the plant."

MINERAL VALUE OF THE PROPERTY

The object of valuing a minable property is to determine its salable, lease or royalty value for purposes of transfer of the property from a willing owner to a willing buyer or lessee. It is assumed that both vendor and vendee have a knowledge of all pertinent data and that the owner is not forced to deal at a sacrifice.

In order to determine the present value of a mining property, the following factors need to be evaluated:

1. The recoverable content of the ore tonnage;
2. The price of the mineral products;
3. The cost of production;
4. The life of the mine;
5. Risk; and,
6. Royalty value.

METHODOLOGY

There were no comparative sales of properties containing these commodities known to this investigator and no listings or postings of offered/bid prices or commodities markets were found.

However, cost/price and market data are found in the definitive work published in California in this area entitled Limestone and Dolomite Resources of California, California Division of Mines and Geology, Bulletin No. 194 (1973), the relevant pages of which are attached hereto and incorporated herein as Exhibit D.

Data in Exhibit D reflects costs, prices and values in the period 1969-1973. (This Bulletin has not been updated since 1973.) Therefore, these data were adjusted utilizing Consumer Price Indexes published by the U.S. Department of Labor, Bureau of Labor Statistics.

After adjusting the data contained in Exhibit D for the CPI increases since 1973, the results were discussed with and reviewed by representatives of mining and processing companies relating to current product value, mining and milling costs and appropriate mineral royalties. Among the companies contacted were Pluess-Staufer, Incorporated and Mitsubishi Portland Cement Company, the

two largest limestone and dolomite processing companies located in the same geographical area as the property.

Utilizing the above data, the Net Present Value of the estimated future annual royalty income, discounted at thirty percent (30%) for risk, and spread over the next twenty (20) years, was determined.

PROPERTY & LOCATION

The subject of this evaluation is an opinion of Fair Market Value of a royalty interest in limestone and dolomite minerals, owned in fee, on 410 acres in San Bernardino County, California.

Specifically, the properties are located in T3N, R6W, SBB&M, being in portions of Sections 29, 30 and 32. (See Exhibit E, attached hereto and incorporated herein.) With reference to latitude and longitude, the property is in close proximity to 34 deg. 15 min. north and 117 deg. 30 min. west.

From Cajon Junction (Interstate 15 and State 138) proceed westerly 1-1/8 mile son 138 to junction with Lone Pine Canyon Road, then southerly and westerly on Lone Pine Canyon Road 2-1/2 miles to the property. The village of Wrightwood is 5 +/- miles northwest of the property.

ECONOMICS OF CARBONATE ROCKS

The market value of carbonate rocks, as with all other commodities, is a function of proximity to the end user. In most instances, high transportation costs make a given ore body less desirable.

Data developed by California Division of Mines and Geology, in Exhibit D, logged 21 processing plants between 10 and 42 miles from the Hannin Property (see Exhibit F, attached hereto and incorporated herein).

The same reference schedules 23 different uses for limestone and 16 for dolomite with 1971 prices ranging from $9.00 to $15.00 per ton. Mining and grinding costs were in the order of $4.50 per ton with royalties in the neighborhood of $.50 per ton. The above numbers indicate that a successful operation might show a positive cash flow, before taxes, in the order of $4.00 to $10.00 per ton.

The CPI for January, 1997 indicates that a factor of 3.6 would be used to adjust 1970/71 prices to January, 1997. Conversations with managers active in the business today use rule of thumb $60.00 per ton value and $10.00 per ton mining and milling costs. These value/cost numbers indicate that the limestone dolomite business has inflated more than the CPI data, with factors of 4 to 6.67 for price and 2.5 for cost. Based upon the foregoing, it is the opinion of this appraiser that the transaction consummated between a willing buyer and seller today would result in a royalty consideration of at least $1.50 per ton.

As a result of the above, this appraiser has used a royalty participation of one dollar fifty cents ($1.50) per ton, a time period of twenty (20) years for depletion of the reserve, and a discount factor of thirty percent (30%) to arrive at the present value of the resulting cash flow.

GEOLOGY

The structure and stratigraphy of this area has been studied extensively over the past 65 years. Professors from the universities, graduate students, professional mining engineers and geologists have all had a hand at it. The proximity of this property to a growing giant urban area and to the "granddaddy" fault in California has made it a classroom for earth science students.

The Hannin property appears to be situated on a horst between the right lateral strike slip San Andreas fault on the south and a significant normal fault on the north. Conclusions from many studies and investigators are that the south block of the San Andreas has moved from 24 to several hundred miles northwesterly with respect to the north block. Exhibit G, attached hereto and incorporated herein, is a portion of a geological map prepared by Mr. T. L. Dibblee. He has mapped the marble (m) [limestone/ dolomite] outcrops on the Hannin property, the northeasterly dipping strata north of the normal fault, the surface trace of the San Andreas fault and the strata dipping southwesterly south of the San Andreas. The marble (m) as mapped by Dibblee is an ancient metamorphosed sedimentary rock of Precambrian to Mesozoic age.

QUALIFICATION STATEMENTS

The opinion of value arrived at in this investigation represents the best judgment of the appraiser after reviewing all the data found to be applicable.

Ownership of the property and other factual data provided by the Hannin family were accepted as represented.

CONCLUSION

As stated above, in order to determine the present value of a mining property, the following factors need to be evaluated:

1. The recoverable content of the ore tonnage. For the reasons stated above, my opinion is that this number equals twenty-eight million, eight hundred thousand (28,800,000) tons. The actual tonnage of ore recoverable on the property is in all likelihood far greater. However, I am utilizing only that block which has been definitively mapped and sampled.

2. The price of the mineral products. Based upon the data contained in this report and in Exhibit D, it is my opinion that the price of the mineral product is currently sixty dollars ($60.00) per ton for commercial grade dolomitic limestone such as that contained in the block as used, for example, for the production of sheet rock and plaster for the building trades industry.

3. The cost of production. Based upon the data contained in this report and in Exhibit D, it is my opinion that the cost of production is ten dollars ($10.00) per ton.

4. The life of the mine. Based upon the data contained in this report and in Exhibit D, it is my opinion that the market could easily absorb the tonnage specified herein over the space of twenty (20) years.

5. Risk. In my opinion, the appropriate discount for risk is thirty percent (30%).

6. Royalty value. There are many companies in the area that are looking to mine dolomitic limestone of commercial grade. Based upon the data contained in this report and in Exhibit D, it is my opinion that the fair market value of the royalty interest in the dolomitic limestone blocked herein is one dollar fifty cents ($1,50) per ton.

Based upon the foregoing, it is my opinion that the Net Present Value, as of March 31, 1997, of the estimated future annual royalty income based upon 28,800,000 tons of dolomitic limestone at $1.50 per ton, discounted at 30%, for the next 20 years is seven million, one hundred sixty-two thousand dollars ($7,162,000).

SCHEDULE OF REFERENCES

The following is a schedule of references used in this study:

1. California Division of Mines and Geology, Bulletin 194: "The Mineral Economics of the Carbonate Rocks, Limestone and Dolomite Resources of California, 1973."

2. Sill, Harley A.: "Analysis and Evaluation, Cajon Lime & Chemical Company, 1993." An unpublished private report.

3. Dibblee, T.A.,Jr.: "Geological Map of San Antonio Quadrangle, California," 1971. Unpublished document, U.S. Geological Survey.

4. South Coast Geological Society, Inc.: "Guidebook Number 17, Volume 2, San Andreas Fault, Cajon Pass to Wallace Creek," 1989.

5. Kemp, James Furman: "A Handbook of Rocks," 1942.

6. Dana, Edward Salisbury & Ford, William E.: "A Textbook of Mineralogy," 1932.

EXHIBIT E

Mineral Resource Investigation:
Appraisal of Hannin Limestone Deposit Lone Pine Ridge
By: Donald L. Fife & Associates

MINERAL RESOURCE INVESTIGATION: APPRAISAL OF HANNIN LIMESTONE DEPOSIT LONE PINE RIDGE

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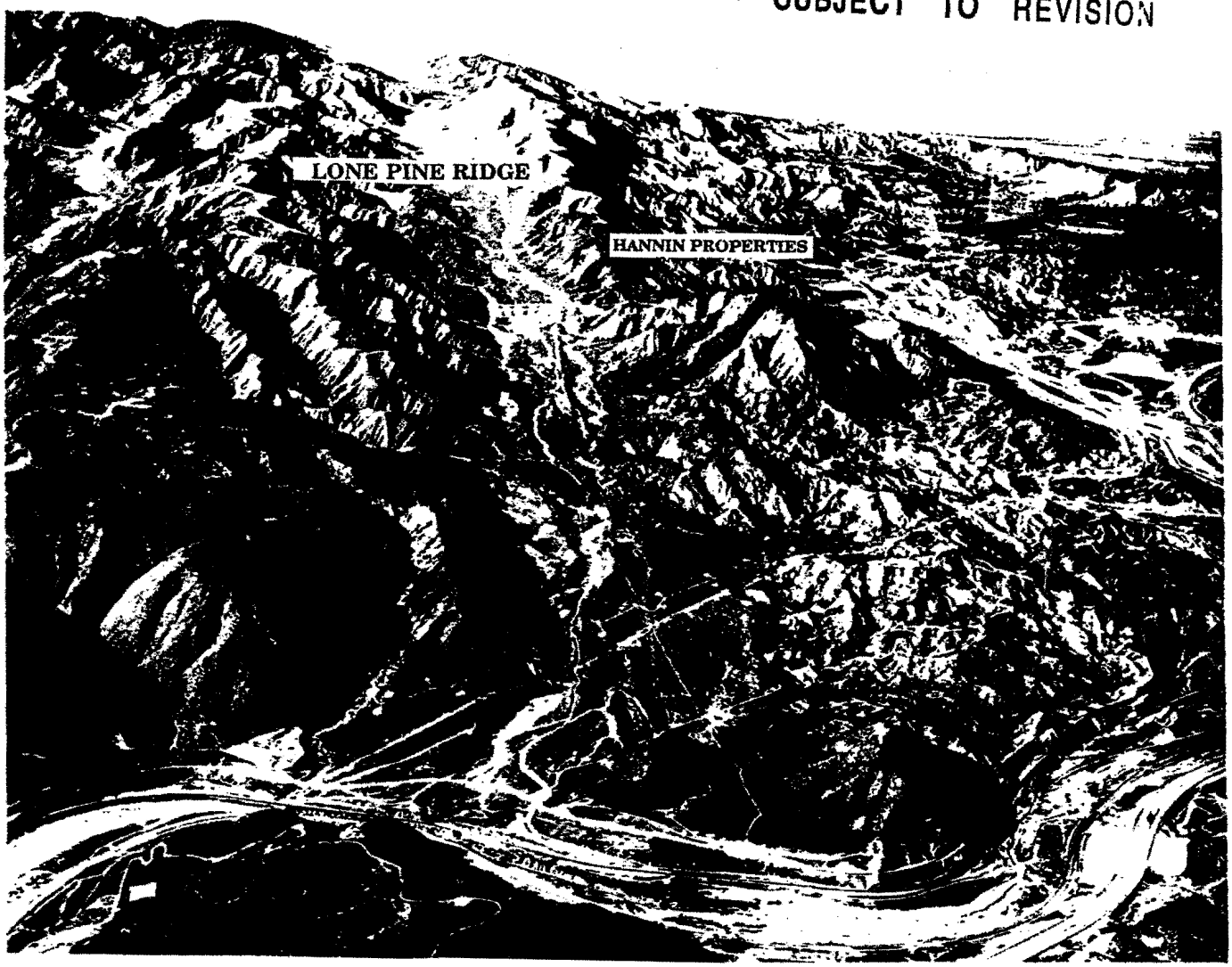
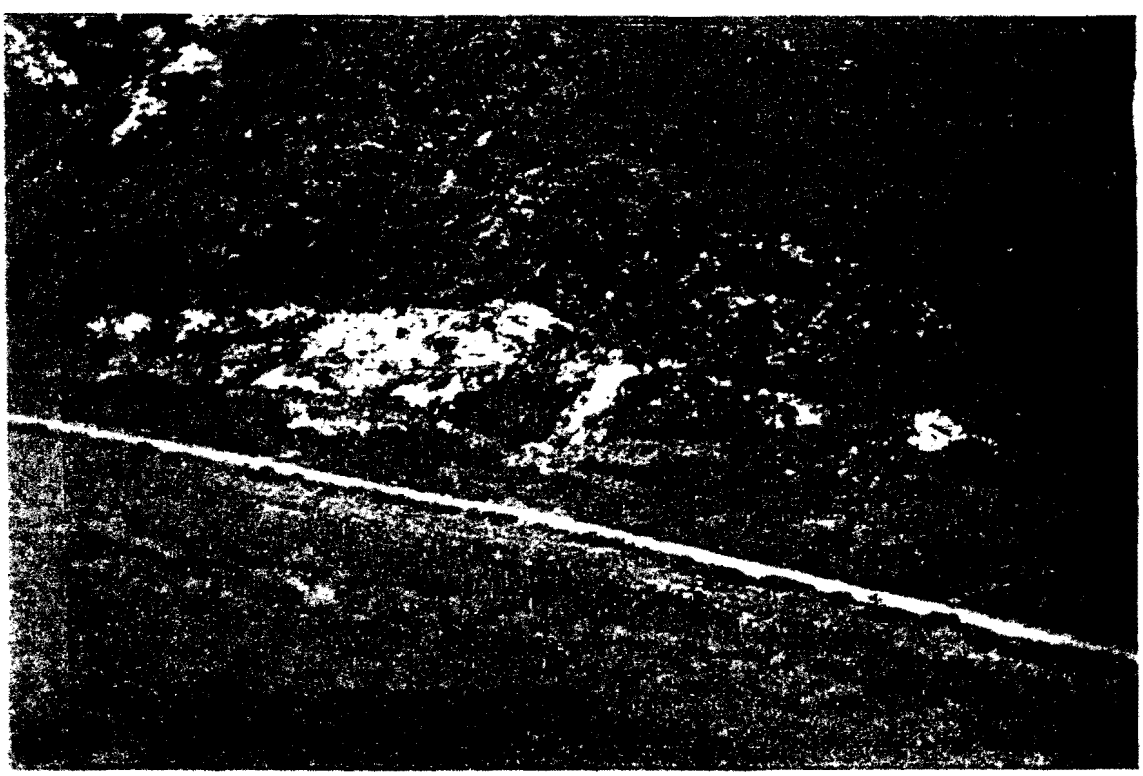


by Donald L. Fife & Associates
Tustin, California 92781-1054
Tel. (714) 544-8406: Fax 731-3745



MINERAL RESOURCE INVESTIGATION
AND APPRAISAL OF HANNIN LIME PROPERTY
LONE PINE RIDGE
TELEGRAPH PEAK QUADRANGLE, CALIFORNIA

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for

Neil McCarroll, Esq.
Post Office Box 1768
Mammoth Lakes, California
93546

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Tustin, California 92781-1054
Tel. (714) 544-8406: Fax (714) 731-3745

INTRODUCTION

Location

The Hannin Property consists of 410 acres covering portions of Lone Pine Ridge and Lone Pine Canyon.(see Figures 1 and 2) in the Telegraph Peak U.S. Geological Survey 7.5 minute quadrangle, San Bernardino County, California. There are three parcels of fee simple property patented under the U.S. Mining Laws in the 1920's. All this property is within the boundaries of the San Bernardino National Forest. For description of the parcels see Appendix A. The locations for this investigation were taken from the Appraisal Report by Richard A.Ganong dated March 31, 1997. The elevation ranges from about 4,000 to 5,000 feet in elevation above sea level. Steeper slopes along Lone Pine Ridge range up 45 degrees. Access to the property is along a paved county road between the mountain community and ski resort of Wrightwood 4 miles to the northwest and Interstate 15 in Cajon Pass 3 miles to the east. A millsite belonging to the Hannin family lies adjacent to the ~~mail~~ rail lines passing through Cajon Pass. The property itself has numerous mining roads that have been used by the U.S. Forest Service for fire suppression activities over the years. These roads access the several mining excavations that served the Cajon Lime operations in the 1920's through the mid 1940's, These mining roads are mostly in disrepair and need regrading to facilitate motorized access. These roads were used to suppress a major wildland fire along the south west side of Long Pine Ridge circa 1983. The slopes of Lone Pine Ridge as covered with dense chaparral of the upper sonoran life zone, Rain fall is estimated be be about 15 to 20 inches per year, mostly falling between October and March with snow staying on the ground for up to a few days during the winter months. Electrical power is available from southern California Edison within a mile of the property. Ground water appears to be available from the alluvial portions of the property in Lone Pine Canyon as further down the canyon the alluvium is the source of several permanent springs. Year round operations can be expected with the exception of a few days of snowfall in the winter.

Method of Investigation

A Reconnaissance of the property was made with Mr. McCarroll and his geologist, Mr. Richard Ganong during August 1997 and four more days were spent in the examining outcrops and field checking our aerial photographic interpretation of the geology. These photographs were ordered from the U.S. Forest Service, Photographic Laboratory in Salt Lake City, Utah. The photos used were 1983 vertical color 9 x 9 inch stereo pairs covering the property and adjoining lands. Mr. McCarroll supplied us with an appraisal report by Mr. Ganong which included a 1931 Mining Engineering report by Harvey Sill, who examined the mining operations Cajon Lime. Cajon Lime had several underground excavations from which they mined dolomitic limestone and processed this material into lime(CaO) at their lime kiln and millsite adjacent to the railroad in Cajon Pass about 2 miles east of the limestone deposits. A. R. Brown assisted with an extensive search of

the literature, particularly of geologic mapping of or related to the Hannin property. He personally visited various libraries to facilitate obtaining copies of hard to acquire geologic maps of the Lone Pine Ridge area. Thomas W. Dibblee, Jr. kindly sent us his latest mapping along Lone Pine Canyon. Visits were made to review the San Bernardino National Forest files and aerial photographic collection. Library research was conducted at the University of California Riverside and Pomona College. Contacts were made with the U. S. Bureau of Land Management, U.S. Geological Survey, and California Division of Mines and Geology for data on the geology and mineral estate of the property. Several geologists and local citizens familiar with the property were interviewed. A long time resident on the north side of Lone Pine Ridge, whose property has an old mining road from Lone Pine Ridge running through his property, claimed that some scheelite (tungsten) was found or mined from Lone Pine Ridge during the 1940's and 1950's. As the geologic setting (scarns) is favorable for scheelite (CaWO4), several hours were spent after dark, making a reconnaissance of the property with an ultraviolet lamp. Only a portion of the property was covered along the Lone Pine Canyon side (southwest side) of Lone Pine Ridge. Fluorescent secondary calcite was found wide spread on the property, but no obvious scheelite occurrences where found. Although in this geologic environment they cannot be ruled out. The world class Andrew Curtis Tungsten Mine lies on a few miles west of the property on the south slopes of Mt. Baldy. The investigation was directed in part to confirm the reserves estimates of Mining Engineer Harvey Sill who examined the deposit in 1931,

Previous work

Lone Pine Canyon and the San Andreas fault were first mapped geologically by Andrew Lawson's expedition (1908) sponsored by the Carnegie Institute after the April 1906 San Francisco earthquake. The January 8,1857 Magnitude 8 Fort Tejon earthquake reportedly ruptured the ground for more than 200 miles from Lone Pine Canyon to the south Coast Ranges near Cayamama Valley. Recently the December 8, 1812 earthquake that killed 40 people in the collapse of mission San Juan Capistrano was tied to trees that were knocked over but not killed near Wrightwood along the San Andreas fault. In 1931 mining engineer Harvey Sill examined the underground working of the Cajon Lime company and measured what he considered the marble ore bodies being mined. His report does not contain geologic maps and cross sections needed to confirm his measurements and estimates. The noted geologist Levi Noble lead a field trip to Lone Pine Canyon for the 1946 (?) World Geologic Congress and made the area famous ever since. Dr. Kerry Sieh of Cal Tech presently maintains a seismograph station at the northwest coroner of the property on Indian Spring Ranch (Nielson Ranch of the Telegraph Peak quad). Robert Yerkes, presently with the U.S. Geological Survey in Menlo Park, California did his master's thesis on Lone Pine Canyon and Ridge in 1951 at Pomona College under Professor A.O. Woodford. Yerkes was the first geologist to try detail mapping the crystalline rocks in Lone Pine Ridge. Although he didn't recognize the structural complexity, he did map lenses or beds of carbonate marble and some of the more obvious landslides.

Loren Wright and others (1953) Mines and Mineral Deposits of San Bernardino County, California list the Cajon Lime operations and refer to earlier reports of the state mineralogist by mining geologists Tucker and Logan who visited the area in the 1930's and 1940's. Thomas W. Dibblee, Jr. mapped the area for the U.S. Geological Survey in 1958 as part of the San Antonio (Mt. Baldy) 15 minute quadrangle at a scale of 1 inch to the mile (1:62,500). He later revised his map scale and produced a geologic map of the area on the Telegraph Peak 7.5 minute quadrangle at 1 inch to 2,000 feet (1:24,000). He sent us his latest revision at this same scale. The American Association of Petroleum Geologists, Geological Society of America, South Coast geological Society and several other organizations published geologic guidebooks of the Lone Pine Ridge and Canyon between 1964 and 1994 most ignored the crystalline bed rock of Lone Pine Ridge. University of California Riverside geologists Douglas Morton, Michael Wood, and John Foster published a U.S. Geological Survey open file report on the area in 1991. Most mapping has been at scales of 1:62,500 or 1:24,000, thus the carbonate units on the Hannin property tend to be idealized. And many of the landslides obscuring the bedrock are too small to map. Geologist Howard Brown of Omya California (formerly Pluess-Staufer, Inc.), Lucerne valley, California did a reconnaissance of Lone Pine Ridge in the 1980's (Personal Communication 1997). Shumway and Hill (1995) have published the State Division of Mines and Geology Mineral Land Classification of the area, but designate the reserves on the Hannin property as large unknown. In Harvey Sill 1931 report he suggests that his estimates should be confirmed by further develop drilling and mapping. The latest mapping we have is the 1:24,000 scale supplied this fall be Thomas W. Dibblee, Jr. of the Dibblee Geological Foundation. Y

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GEOLOGIC SETTING

Regional

The Hannin property lies in the Transverse Range Geologic Province along the transitional boundary between the San Bernardino and San Gabriel Mountains. This region is one of the most tectonically active regions of the north American continent.. These mountain blocks are separated by the San Andreas rift zone which is generally considered to have shifted more than 100 miles in a right-lateral fashion during the last 10 to 15 million years. This strongly suggests that older rocks on opposite sides of the fault may not be closely related.

The San Bernardino Mountain Block and the San Gabriel Mountain Block are basically structural mirror images of each other being "squeezed up" by forces created by the great bend in the normally northwest southeast trending San Andreas fault. These mountain ranges are only 1 to 2 million years old and are being uplifted at the relate of about 25 feet per 1,000 years with about 7 feet of erosion for a gross up lift of 18 feet per thousand years.! The older crystalline rocks range up to 2 billion years old. The metasediments in the Cajon terrane are believed to be preMesozic, most likely Paleozoic where carbonate marbles are found.

Cajon Valley is separated from Lone Pine Ridge by a normal fault which is obscured by slope wash and landslides in several areas. Cajon Pass and Lone Pine Canyon, its most prominent tributary are basically the result of erosion along or related to deformation and shearing in the San Andreas rift zone. These drainages flow westward into the Santa Ana River and to the Pacific Ocean near Newport Beach, California. Cajon Valley is part of a box canyon in soft sedimentary rocks that are being rapidly eroded northward and eastward and will eventually capture the Mojave River and tributaries which currently flow into Death Valley or in wet cycles to the Colorado River and into the Sea of Cortez.

The San Andreas fault separates two very different terranes or rock types in this region. The trace of the San Andreas fault trends north 55 degrees west up Lone Pine Canyon. To the south Pelona Schist is the principal formation which varies from green schist metamorphic facies to lower amphibloite grade schist which is believed to be of Late Cretaceous to Lower Tertiary age. The source rocks of the Pelona Schist were sandstone, and graywacke mixed with basalt flows, volcanoclastic rocks, chert and limestone. Actinolite and sercite mica dominate the play (platy) metamorphic minerals in many outcrops. North of the San Andreas rift zone along Lone Pine Ridge, the rocks consist of a complex of gneiss and marble of preCretaceous age intermixed with intrusive tonolite of probable Cretaceous age (Morton and others, 1990). These rocks have been profusely intruded and migmatized by younger granitic rocks. Some banding and/or schistosity is

suggestive of sedimentary origin and others are suggestive of igneous and metamorphic origin.

This complex is bounded on the north by the Cajon Valley Fault (Woodburne and Golz, 1972). This fault was active during the middle Miocene. Northeast of this fault (see Figure 3) is a sequence of Late Tertiary to Holocene sediments. Lone Pine Ridge Rise as a horst (uplift block between two faults) structure between the the San Andreas and Cajon Valley fault. The area has been intensely deformed and subjected to cataclastic and rock avalanche landslides and secondary landslide failures.

This mass wasting has masked and covered the complex gneiss/marble bedrock along Lone Pine Ridge. Landslides are common throughout the region. Catastrophic type avalanche deposits appear to be localized in areas of older plutonic and gnesicic and cataclastic gneiss. Examples of dissected large Pleistocene avalanche landslide deposits can be found along the northwest inside of Lone Pine Ridge (See Figure 5). Many landslides are produced by slowly spreading snout of ridges. Sackungen-like features, such as hill and ridge top trenches are found along ridge lines and hill tops (Morton and others, 1990).

Geology of Lone Pine Ridge.

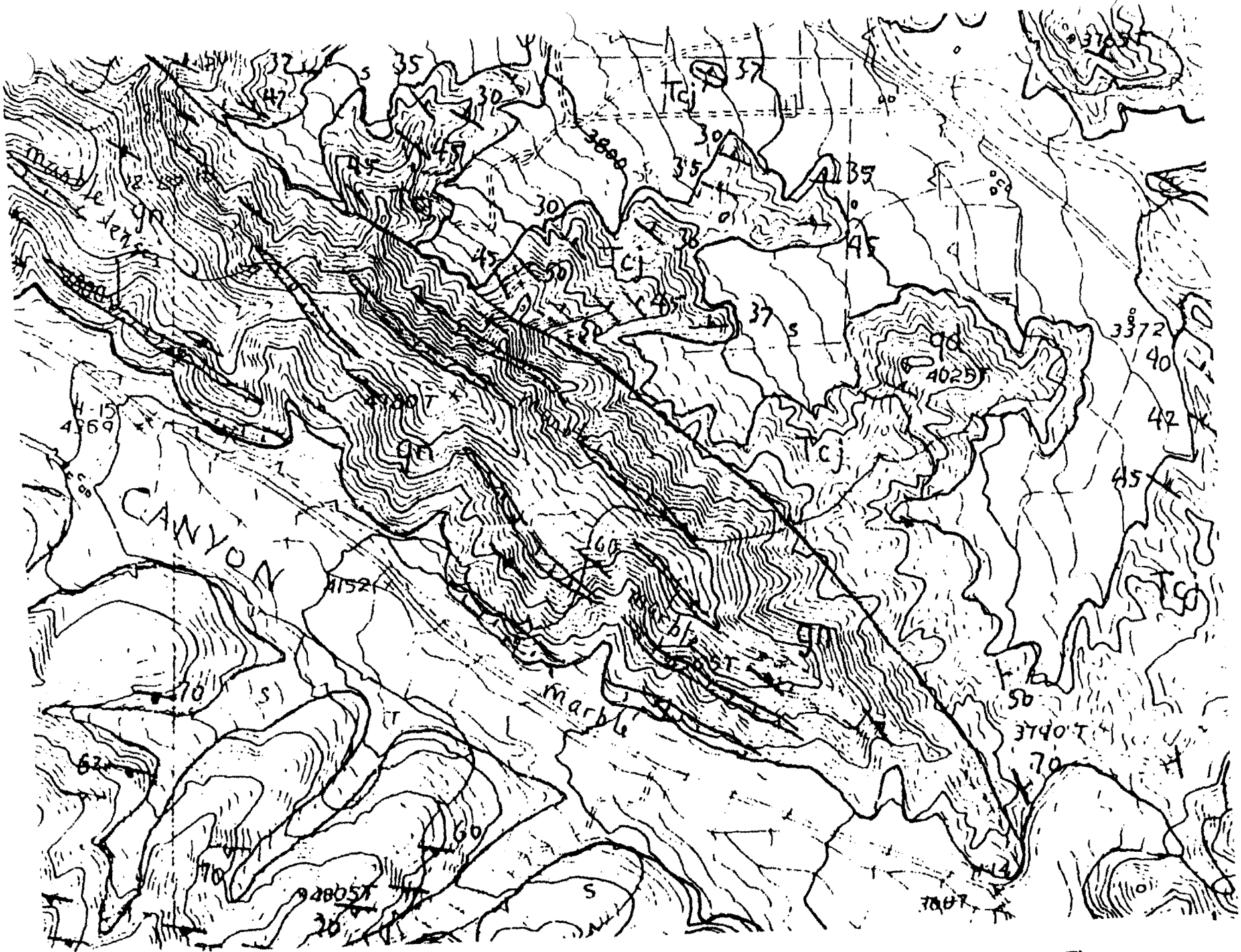
The Hannin property lies on a fault bounded "horst" referred to by Yerkes (1951) as Lone Pine Ridge. The controlling faults are the Late Tertiary Cajon normal fault on the northeast and the active San Andreas right-lateral fault on the southwest. The San Andreas rift has been deeply eroded forming the northwest trending Lone Pine Canyon or Lone Pine Valley as it is sometimes called. Most geologic mapping has ignored the igneous-metamorphic marble bearing complex that is Lone Pine Ridge. Yerkes was one of the first to try to define the crystalline bedrock here. In his 1951 thesis interprets ridge as a fairly simple tilled block homoclinally dipping to the northeast (see Figure 7).

Crystalline rock in this ridge has gone through repeated episodes of metamorphism, igneous intrusions, and deformation. The original sedimentary rocks were probably arkosic or siliceous sands with carbonate (limestone/dolomite)) reef deposits deposited shallow water. Wave action may have purified them be removing lighter organic matter or heavier impurities. Most likely this was in a tropical environment during the Paleozoic (?). This would make them contemporaneous with the Victorville and Lucerne Valley limestone provinces being mined within 30 miles of the property. The sedimentary rocks were first metamorphosed while deeply buried, into calcite and dolomitic marbles and quartzofeldspathic schists or gneiss. Metamorphism appears to be in the range of medium grade amphibole facies. The marble beds appear as elongated lenses up to several hundred feet in length and up to 100 feet or more in "stratigraphic" thickness. They have been faulted and folded and tectonically deformed. A northeast dip may be dominant, but surface creep and landslides made many dip uncertain.

Due to its juxtaposition with the San Andreas rift zone Lone Pine Ridge crystalline rocks have undergone numerous episodes of deformation and hydrothermal alteration. Hydrothermal alteration is evident in many locations on and adjoining the property. While not the focus of this investigation, significant evidence of gold mineralization related to hydrothermal alteration was observed on our first reconnaissance of the property. Geologist Ganong submitted a channel sample to an assay lab, which confirmed 0.2 ounces of gold per ton (see Appendix). This suggests a more intensive sampling program for precious metals should be considered. The geologic setting is favorable for low temperature hydrothermal or hot spring precious metals. Not part of this investigation, but an adjoining patented lode claim owned by the Hannin family was patented for gold, making our discovery less of a surprise.

The surface of Lone Pine Ridge is obscured in many place be large and small landslides and slope creep covering in in place bedrock. Some of this mantle of loose material covers and. or involves displacing marble down slope. Slope wash and landslide material containing white marble frequently masks the underlying outcrops of carbonate rock. Yerkes (1951), Morton (1990) and Dibblee (1976; 1997) have mapped marble lenses on regional scales as discontinuous lenses. Some of these may not be discontinuous, but are obscured by landslide and slope wash debris.

Morton and Woodburne (1991) describes the crystalline bedrock units in the local area:
Landslides about throughout the area. Catastropic-type of avalanche deposits appear to be localized to terrain of older plutonic and metamorphic rocks and cataclastic gneiss, excluding the Pelona Schist. Examples of dissected large Pleistocene avalanche landslides are in Cajon valley and adjacent areas. The Cajon Valley landslide consists of gneiss, marble, and tonalitic rock deposits on sedimentary rocks of Cajon Valley. Landslides, excluding avalanche type of deposits are pervasive in the Pelona Schist south west of the San Andreas fault. Most of the landslides located within the Pelona Schist terrane lack classic landslide morphology. Many landslides exhibit ridge line or ridge top creep features, suggesting incipient landsliing.Many Sackungen-like ridge top trenches lack any readily visible deformed material below the trenches. Sackungen-like scarps occur in rock s other than Pelona Schist, such as the scarps south east of Circle Mount on the north side of Lone Pine Canyon.



GEOLOGIC MAP HANNIN PROPERTIES (Modified From Dibblee 1997)

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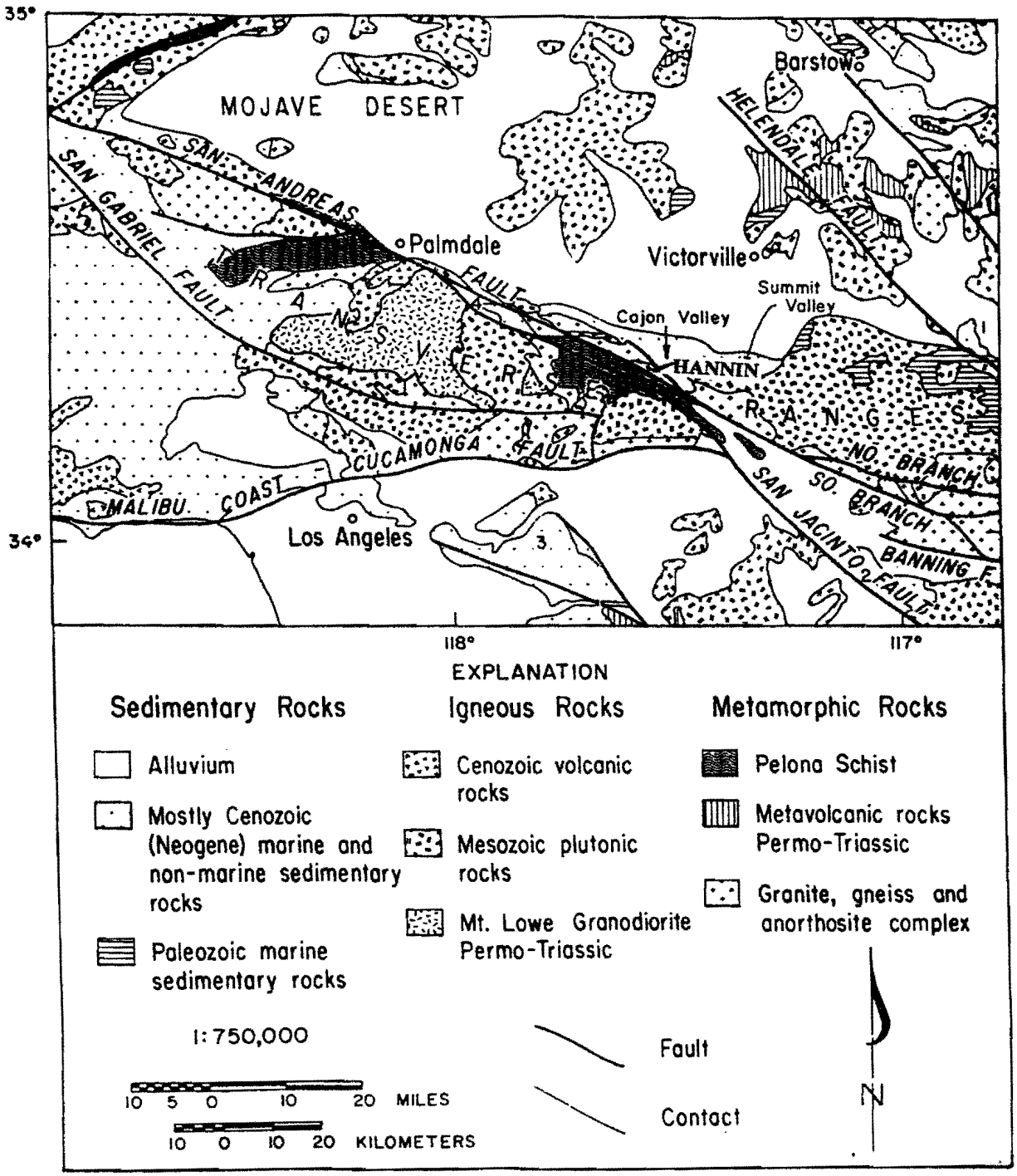
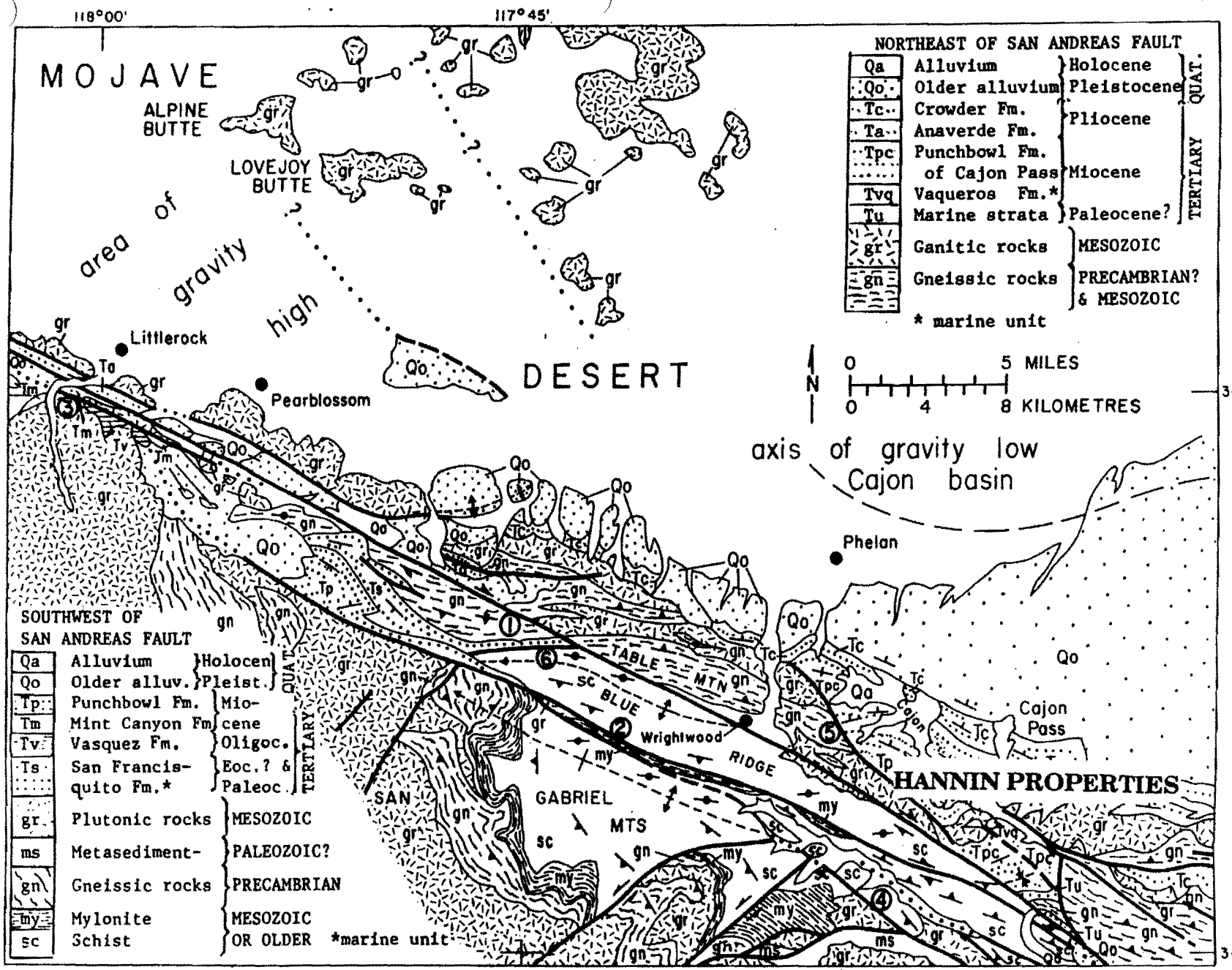
GEOLOGIC CROSS SECTION (After Yerkes, 1951)



REGIONAL GEOLOGIC MAP



Geology along the San Andreas fault from Littlerock to Cajon Pass. Generalized from Dibblee (1970). Major faults as follows: 1, San Andreas (active); 2, Punchbowl; 3, Nadeau; 4, San Jacinto; 5, Cajon Valley; 6, Fenner.

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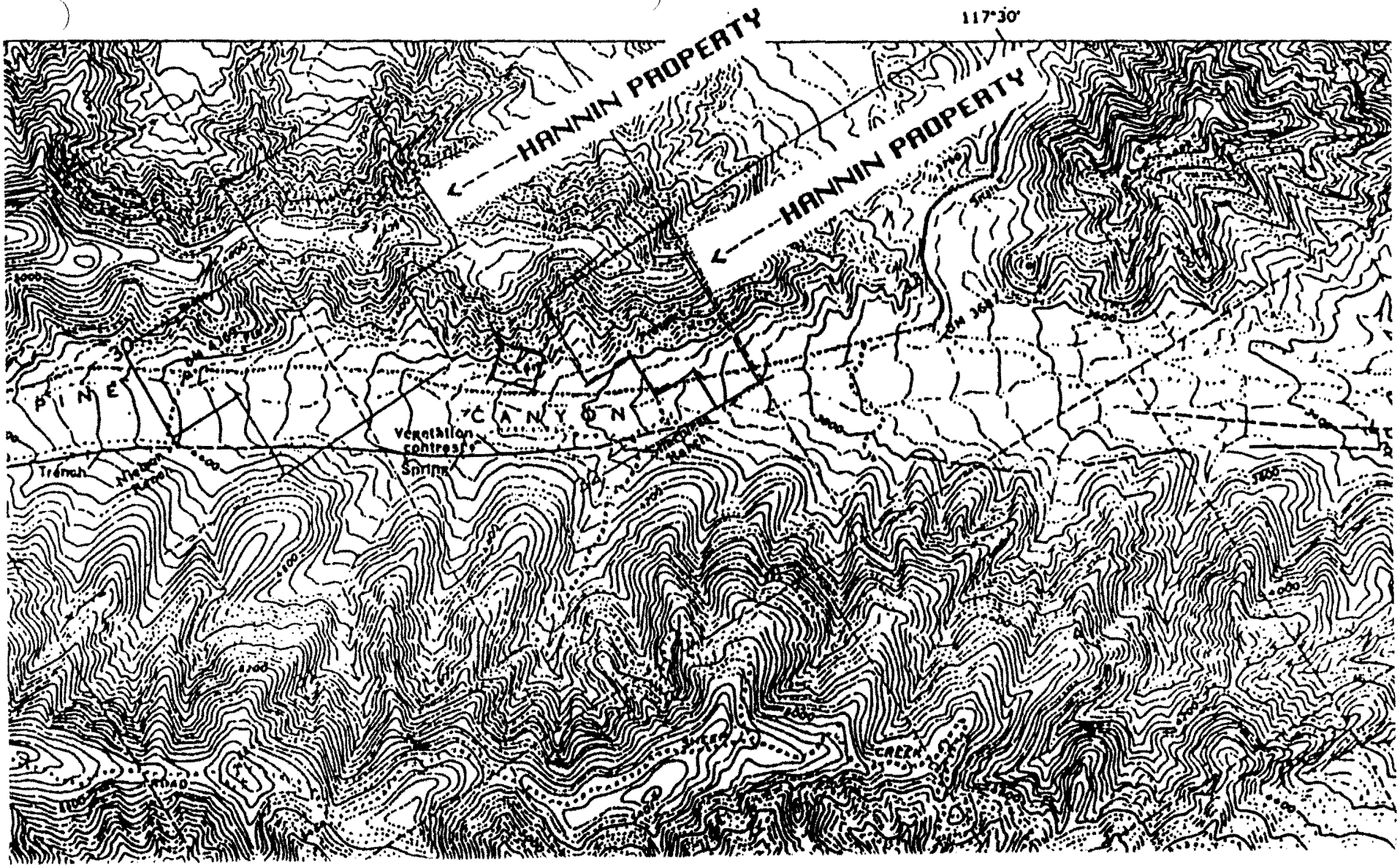


MAP SHOWING RECENTLY ACTIVE BREAKS ALONG THE SAN ANDREAS FAULT
BETWEEN TEJON PASS AND CAJON PASS, SOUTHERN CALIFORNIA

By
Donald C. Ross
1969

Other recently active breaks that have not
produced distinctive surficial
features may be present

EXHIBIT F

Evaluation of Limestone and Dolomite Resources at El Cajon Associates Lone Pine Mountain Properties, San Bernardino Mountains, San Bernardino County, California
by: Danny B. Sims PG

Evaluation of the Limestone and Dolomite Resources at El Cajon Associates Lone Pine Mountain Properties, San Bernardino Mountains, San Bernardino County, California

Danny B. Sims, Ph.D., P.G., C.E.G.
Sims Geological Services
Poway, CA

April 25, 2017

Introduction

El Cajon Associates, LLC owns several parcels of land located in the San Bernardino Mountains that were previously mined for marble that ranges in composition from dolomite to high purity limestone. El Cajon Associates asked Dr. Sims of Sims Geological Services to review historic documents, make a site visit to inspect the property, and provide an evaluation of the property. The purpose of the work is to support El Cajon and its broker, EnviroMINE, Inc., in attracting a potential purchaser.

The property, located in sections 29, 30 and 32 T3N, R6W is referred to in various reports as the Cajon Property, the Hanin Family Property and Lone Pine Mountain. This report refers to the property as Lone Pine Mountain.

Mr. James De Carolis of EnviroMINE, Inc. assisted with carrying samples during the site visit but all other work was performed by Dr. Sims. Dr. Sims has no financial interest in a potential sale of the property.

Scope of Work

The scope of work for this project was provided in a proposal dated February 16, 2017. The proposed activities included:

- Review of prior reports that were provided by El Cajon Associates with the goal of identifying where the different areas that are discussed in the reports are located on a current topography map.
- A site visit to check the areas that are described, to inspect prior sample sites, make a geology map for major features and collect samples.
- Submission of samples for thin section preparation and analysis. The preparation would be done by an outside lab and Dr. Sims would analyze the thin sections in his lab. The thin section work is to look for textures that indicate whether the dolomite has reaction potential with concrete aggregate.
- Testing of the rock to determine purity of dolomite or limestone. The testing is to be performed by a cement company using x-ray florescence.
- Research of prior material uses, potential uses and report preparation. The report would include results of analyses, a map with geology and sample sites, and an evaluation.

Following a site visit and research of literature, it was determined that the potential use with the greatest economic potential is high purity limestone. The thin section analysis for determination of the potential for carbonate reaction of dolomite in concrete was not performed.

Reports Provided by El Cajon Associates

Documents that were provided include:

- Undated (1997?) report by Donald Fife and associates that appears to be incomplete in regards to the body of the report and does not contain appendices that are referenced,

- A March 31, 1997 report by Richard Ganong that does not contain Exhibits A-G (pages 14-80),
- Two pages from "Smith's Emry Report", undated, and
- A September 25, 1933 report by Harvey Sill along with Appendum No. 2 and Cross Section A-A' (both additional documents are dated 1998).

Summary of Prior Geological Data

Shumway and Hill (1995) DMG open file report:

> About 2 miles south of Wrightwood, numerous small quarries trend southeast from Sec 24, T3N, R7W to Sec 32, T3N, R6W. Small discontinuous marble lenses in Pelona Schist are located on Lone Pine Ridge in the eastern San Gabriel Mountains. The white, coarse-grained marble displays impurities such as iron oxides, some sericite, mica and graphite. Samples collected for this study were analyzed by x-ray florescence and yielded 99.17% $CaCO_3$ and 98.81% $CaCO_3$. Samples collected in 1951 by Division of Mines and Geology staff yielded 54.66% CaO [about 97.5% CaCO3] (Wright and others, 1953). The marble was mined for lime production before 1927.

Donald Fife Report:

- A topographic map for the area was annotated with locations of limestone lenses. It is unclear whether this map was the product of 4 days of mapping performed by Fife or it was provided by Dibblee. This map is referred to throughout this report as the "Fife map".

Richard Ganong Appraisal:

- This economic analysis provides only a summary of prior geologic work.

Smith's Emry Report:

- A limestone body that is located near the top of Lone Pine Mountain in Property 3 (defined later in this report) is estimated to contain 3 million tones

Sills Report:

- Samples were taken from a tunnel that was driven 194 feet into the mountain and on the surface on a 300 foot grid spacing. The location of the tunnel was "at an elevation of 4,250 ft. near the north end of the property". Another tunnel located 150 feet south of the first tunnel was also sampled.
- Analyses of samples report total calcium carbonate and total magnesium carbonate. Loss on ignition and other oxide components are not reported.
- It appears that the purest limestone samples were obtained from the highest elevations.
- Dolomite was processed and it had high brightness.

These reports provide that the carbonate rocks range in composition from dolomite to high purity limestone that have been hydrothermally altered to marble. Limestone is most common at high elevations. The carbonate rocks are in lenses of variable thickness and the lenses contain variable amounts of schist that occurs as dikes or irregular shaped blocks.

The focus of the Sills report was on identifying a resource of high grade dolomite and sampling likely favored potential dolomite zones. The locations for samples that were collected by Sills could not be determined for this report. It is particularly puzzling that Sills describes the sample sites as being on the north side of the property while it appears that most prior work was on the southeast end of the property.

Site Visit

Review of prior geological data provided a basis for planning a one-day site visit. In preparation for a site visit, the approximate property boundaries were plotted on Google Earth. The properties are labeled as properties 1 through 3 (Figure 1). The Fife map and USGS geology maps containing carbonate rock locations were also plotted on Google Earth. The Sills sample locations could not be determined because the report and later appendum and cross section lack latitude and longitude or other reliable fiducials.

With this background information, a plan was developed and the properties were investigated by Dr. Sims on February 21, 2017. Mr. James De Carolis of EnviroMINE, Inc. assisted with carrying samples. Two traverses were made. One traverse investigated Properties 1 and 2 with the purpose of identifying the locations of carbonate rocks on property 2 and those indicated by the Fife map on the north face of Lone Pine Mountain in property 1 (Figures 2, 3 and 4). The second traverse was intended to explore the limits of the relatively large carbonate body that is indicated on USGS geologic maps (Figure 5), that is located within property 3 (Figures 6 and 7).

Geologic Map

A map of the locations of carbonate rocks was made using multiple data sets. Traverse tracks were documented by a hand-held GPS. Notes were taken along the traverses and observation/sample sites were marked with the GPS to record note-taking locations (Tables 1 and 2). Notes contained in Tables 1 and 2 were used to color code the traverse tracks on Google Earth by the rock type. Where the underlying rock type or the notes were uncertain the track was not colored (Figure 8). This data set was considered to have the greatest weight in developing the geologic map.

Using the track data and notes as ground truth, it is evident that carbonate rock zones are light colored on the Google Earth image. Using this criterion and other observations made during the site visit as guides, the satellite image was used to locate likely areas of carbonate rock (Figure 9).

The areas of carbonate rock that were indicated on the Fife map were added to the track data and the satellite interpretation data into a single compiled map (Figure 10).

An updated geologic map for the location of carbonate bodies was made by interpreting contacts from the three data sets (Figure 11). A map with carbonate rock contacts only is presented in Figure 12. The map outlines the estimated limits of carbonate bodies in outcrop and buried by colluvium. Estimates were not made for possible carbonate rock locations under alluvium.

Samples Collection and Analyses

Samples of marble were collected at many outcrops. Samples were chosen by selecting material that appeared to be typical in the immediate area. Anomalously coarse grained recrystallized rock was not sampled.

A cement company previously agreed to analyze 10 samples using x-ray florescence. Thirteen samples were ultimately submitted so that a good geographic distribution was obtained. The samples that were submitted were from locations ELA-1, ELA-6, ELA-8, ELA-9, ELA-12, ELA-16, ELA-18, ELA-21, ELA-22, ELA-23, ELA-25, ELA-28 and ELA-30 (Tables 1 and 2 and Figure 13).

Samples were inspected under a binocular microscope. One contains up to 8% mica that is golden-colored (this is a sample that was not submitted for analysis). Mica is otherwise not present. Flake graphite is present in at least trace amounts in about one third of the samples. The maximum graphite content is approximately 3% and this amount is present in two samples.

Graphite is a contaminant for high brightness limestone or dolomite but flake graphite is also a valuable mineral that is mined from marble and other rocks at concentrations over about 5%.

All samples were cut with a tile saw and washed to prepare them for analysis. One sample was analyzed only in one spot. All other samples were marked so that 2 or 3 spots were analyzed on each cut surface. Summary sample results that report average values for each sample are presented in Table 3. The average $CaCO_3$ values are plotted at each sample site in Figure 14. The full results are presented in Appendix A.

The results are unexpected in that the high magnesium values that were reported by Sills were not reproduced. The carbonate rocks are generally high calcium. This is true for samples at low and high elevations. Silica that is reported is likely cryptocrystalline quartz.

Conclusions

- The property is poorly explored and described. Prior reports lacked sufficient maps to identify where the areas that were examined are located. Usable sample locations do not exist. However, prior samples and reports indicate that the property has marble that may be a high purity and high brightness limestone.
- The traverses made for this study were designed to map out the approximate limits of previously recognized carbonate rock bodies. Samples collected for this study were selected to be representative of all carbonate rocks at the sample site.
    - Because the traverses were made to map limits of carbonate rock bodies, most sample sites are at contacts where the limits were being mapped.

- Sample test results are generally positive for high purity limestone at all elevations.
- High purity and high brightness limestone is potentially an economic mineral if it is mineable and in good abundance.
- The geometry of the marble lenses is not well-known but it appears that if there is sufficient quality and quantity, they could be mined in open pits.
- The igneous host rock is mixed with the limestone and it would be mined as waste. In Property 1, this rock contains areas where the rock is too fissile and contains too much mica to make good aggregate, but much of the material observed south of Property 1 is not platy and might make good aggregate.

Recommendations

- The property should be submitted to interested parties for consideration as a source for high purity and high brightness limestone. The area of marble is similar in size to the quarry area for the economic White Knob quarry (Brown, 2015 and Figure 15), and it is likely that a significant volume of marble is present here.
- The marble distribution at the surface is roughly estimated. A detailed map using GPS survey should be made to better define the distribution of marble.
- Systematic sample collection should be performed to identify distribution and variability of grade. This would include greater sample density within carbonate units, and not mostly at contacts.
- The marble-bearing ground located between and surrounding the properties appears to be US Forest Service land that is open to mineral entry. Prior to any work involving heavy equipment that would draw attention to the area, the Forest Service land should be claimed.
    - Consideration should be given to the apex rule because marble lenses that continue at depth are the property of the owner of mineral rights where the lens is at its highest elevation, even where a lens passes into the neighboring property.
    - As much as possible, consideration should be given to claim geometry so that a valid discovery is likely to be made on each claim.
    - Mill site claims should be staked in the valley to provide operating room.
- Based upon the surface work, a drilling strategy should be developed to test the most favorable units at depth and determine volumes.

References

Brown, H., 2015, Geology, mining, and fluorescent minerals at the Omya California White Knob Quarry, San Bernardino Mountains area of southern California, *in* Z. Lasemi, ed., Proceedings of the 47th Forum on the Geology of Industrial Minerals: Illinois State Geological Survey, Circular 587.

Shumway, D. O. and Hill, R. L., 1995, Mineral land classification of a part of southwestern San Bernardino County, California: A part of the Eastern San Gabriel Mountains and the Western San Bernardino Mountains, DMG Open File Report 94-07.

Tables

El Cajon Associates			
Lone Pine Mountain Site Visit, March 21, 2017			
Properties 1 and 2			
Observation #	Location (WGS84)	Elevation	Notes
Ela1	N34 18.570 W117 31.796	4193 ft	Carbonate with vigorous reaction to HCl. 10 x 40' outcrop. 10% recrystallized to 1/2" plus crystals. No FeOx
Ela2	N34 18.601 W117 31.748	4362 ft	Likely schist to here. 20 foot subcrop of marble with weak reaction and back in schist.
Ela3	N34 18.628 W117 31.742	4423 ft	Start into marble and change in slope angle.
Ela4	N34 18.662 W117 31.728	4546 ft	Entering pod of schist and similar pod exposed in gully to east.
Ela5	N34 18.693 W117 31.700	4679 ft	Out of limestone and into schist
Ela6	N34 18.969 W117 31.774	4763 ft	Passed through marble workings in saddle and in marble outcrop here. Marble extends about 200' downhill in pods but rock is very loose for walking.
Ela7	N34 18.995 W117 31.876	4930 ft	Entering back in marble after walking through schist uphill from Ela6
Ela8	Estimated Location		150 feet west of Ela 7 in marble
Ela9	N34 18.994 W117 31.928	4960 ft	Marble is coarse grained and broken
Ela10	N34 18.991 W117 31.955	4973 ft	Into schist
Ela11	N34 19.087 W117 32.094	4917 ft	Marble float for last 100'. In marble here.
Ela12	N34 19.128 W117 32.135	4903 ft	Outcrop on south side of ridge looks like large body of marble.
Ela13	N34 19.157 W117 32.239	4857 ft	Starting down south slope in limestone.
Ela14	N34 19.125 W117 32.223	4816 ft	Seeing mix of marble and schist.
Ela15	N34 19.107 W117 32.215	4798 ft	In schist. Remainder of traverse through schist/greenstone with few small pods of marble.

Table 1. Locations (WGS 84) and notes for observation points along the traverse through Properties 1 and 2.

El Cajon Associates			
Lone Pine Mountain Site Visit, March 21, 2017			
Property 3			
Ela16	N34 18.437 W117 31.441	4055 ft	New traverse. Prospect on USGS map and dump. Carbonate is orange and iron oxide stained. Bedding is 220; 16 (right hand rule)
Ela17	N34 18.419 W117 31.388	4041 ft	Appears to be covered adit
Ela18	N34 18.404 W117 31.363	4056 ft	Mix of marble and schist to here with marble subcrop here.
Ela19	N34 18.410 W117 31.342	4097 ft	East limit of marble may be here (fog reduced visibility to 40' for remainder of traverse)
Ela20	N34 18.465 W117 31.373	4196 ft	Schist to here but marble follows contour west of here and below here.
Ela21	N34 18.491 W117 31.362	4253 ft	Schist to this outcrop of marble
Ela22	N34 18.553 W117 31.327	4484 ft	Schist to this outcrop of marble
Ela23	N34 18.600 W117 31.337	4604 ft	Marble started 75 feet before this point.
Ela24	N34 18.632 W117 31.370	4666 ft	Once on the ridge it has been mix with more schist than marble.
Ela25	N34 18.647 W117 31.405	4668 ft	All marble since dropping off ridge
Ela26	N34 18.636 W117 31.450	4529 ft	On road. Marble with schist pod to here.
Ela27	N34 18.614 W117 31.443	4516 ft	Mostly marble road cut.
Ela28	N34 18.579 W117 31.437	4485 ft	Mostly marble road cut.
Ela29	N34 18.595 W117 31.475	4430 ft	Contact with schist is 017; 71.
Ela30	N34 18.555 W117 31.499	4297 ft	Mix of marble and schist to here with marble outcrop here.
Ela31	N34 18.522 W117 31.503	4262 ft	Top of tram path that is straight down hill?
Ela32	N34 18.582 W117 31.528	4231 ft	Mix of marble and schist to here with marble outcrop here. Contact is 340; 27
Ela33	N34 18.598 W117 31.532	4235 ft	Schist to here
Ela34	N34 18.590 W117 31.555	4214 ft	Schist is oxidized and hydrothermally altered
Ela35	N34 18.585 W117 31.546	4166 ft	Schistosity is 359; 67

Table 2. Locations (WGS 84) and notes for observation points along the traverse through Property 3.

SAMPLE	C3S	SiO2	Fe2O3	CaO	Al2O3	MgO	SO3	K2O	CaCO3
A1	9366.34	2.05	0.29	56.68	0	#VALUE!	#VALUE!	0.01	101.22
A6	9302.67	5.59	0.30	55.69	0	#VALUE!	0.06	0.13	99.44
A8	8579.38	69.50	0.28	25.90	0	3.57	#VALUE!	0.01	46.25
A9	9369.53	1.87	0.28	56.06	0	7.78	< LOD	0.01	100.11
A12	9299.63	5.49	0.31	53.51	0	#VALUE!	#VALUE!	0.01	95.56
A16	9359.73	2.36	0.29	55.74	0	#VALUE!	#VALUE!	0.01	99.53
A18	9315.82	4.35	0.49	51.26	0	5.41	0.07	0.15	91.54
A21	9366.18	2.05	0.33	56.51	0	#VALUE!	#VALUE!	0.01	100.92
A22	9345.84	2.90	0.34	52.24	0	#VALUE!	#VALUE!	0.08	93.28
A23	9261.63	7.85	0.31	52.55	0	#VALUE!	#VALUE!	0.17	93.83
A25	9206.90	10.89	0.33	52.41	0	#VALUE!	#VALUE!	0.01	93.58
A28	9371.51	1.80	0.44	57.20	0	#VALUE!	#VALUE!	0.01	102.14
A30	9345.51	3.16	0.31	56.53	0	#VALUE!	0.0765	0.01	100.95

Table 3. Summary table for x-ray florescence analyses of samples submitted for this report. All samples other than A9 had more than one spot analyzed on the sample surface and the reported values are average values for each sample. Full analyses are presented in Appendix A.

Figures

Figure 1. Approximate property boundaries for properties 1 through 3. Additional parcels on the south side of the road and near the interstate were not visited and are not shown on this map.

Figure 2. Properties 1 and 2 with traverse line in light blue. Locations for geological notes and samples are indicated by the prefix “Ela”. Points labeled with the prefix “ELPP” are “prospect” locations on USGS maps.

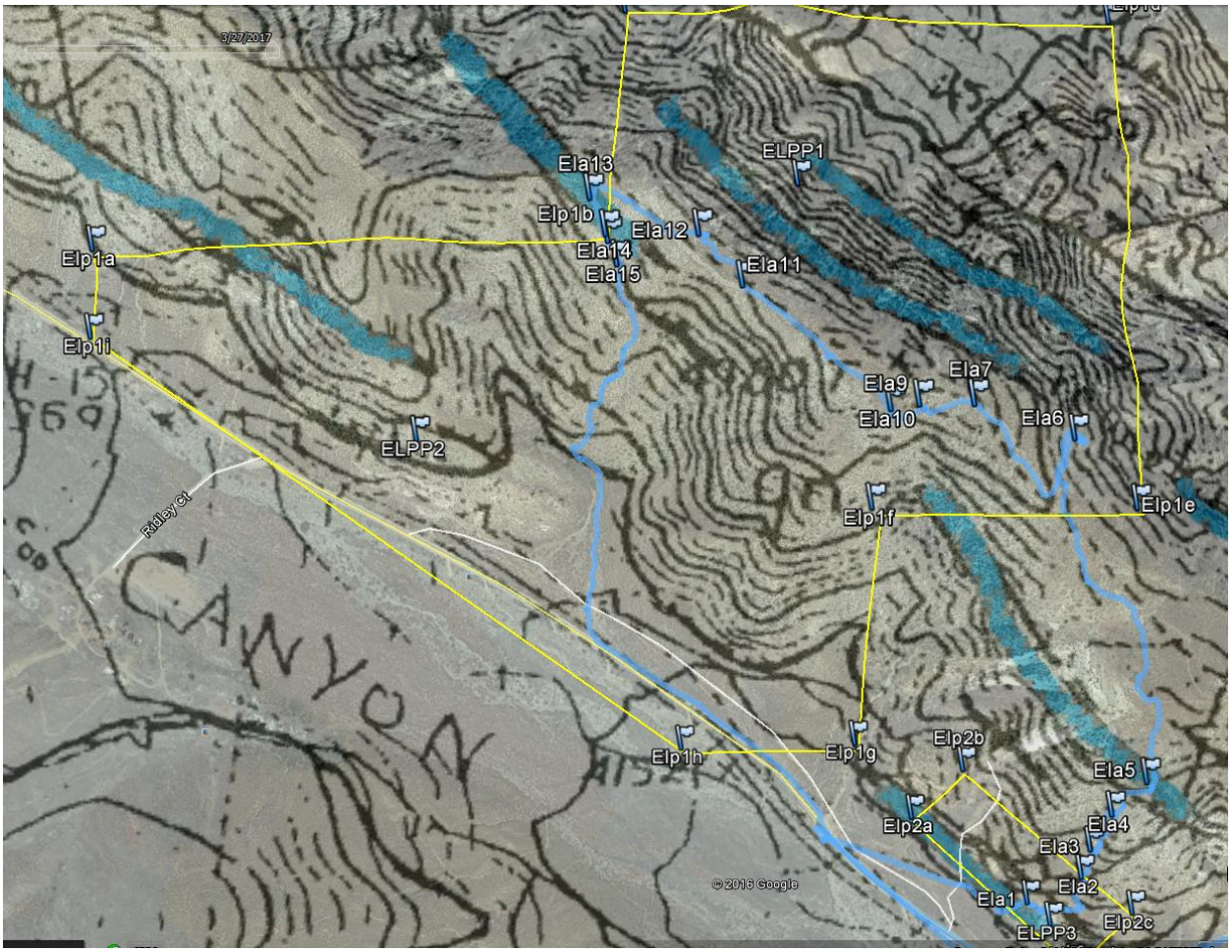


Figure 3. Same map as in Figure 2 with the limestone/dolomite map of Fife overlain on the satellite image.

Figure 4. The north side of Lone Pine Mountain within Property 1. Limestone/dolomite is the white rock.

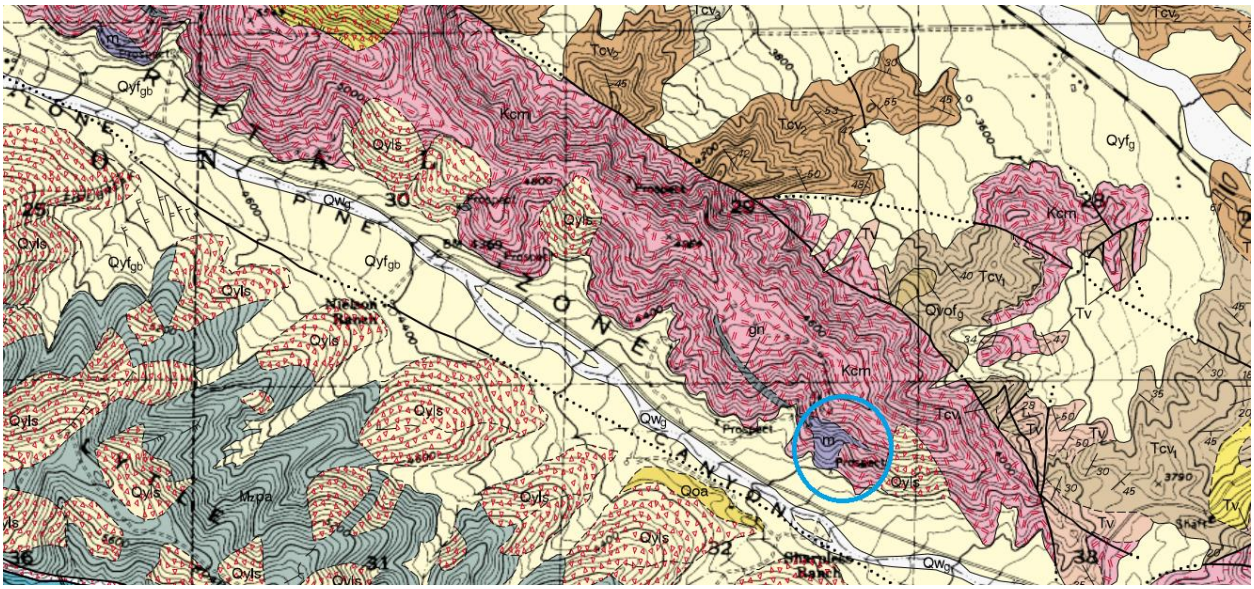


Figure 5. The USGS Telegraph Peak 7.5 minute series map indicates only one limestone body within the area (in blue circle). This is located within Property 3.

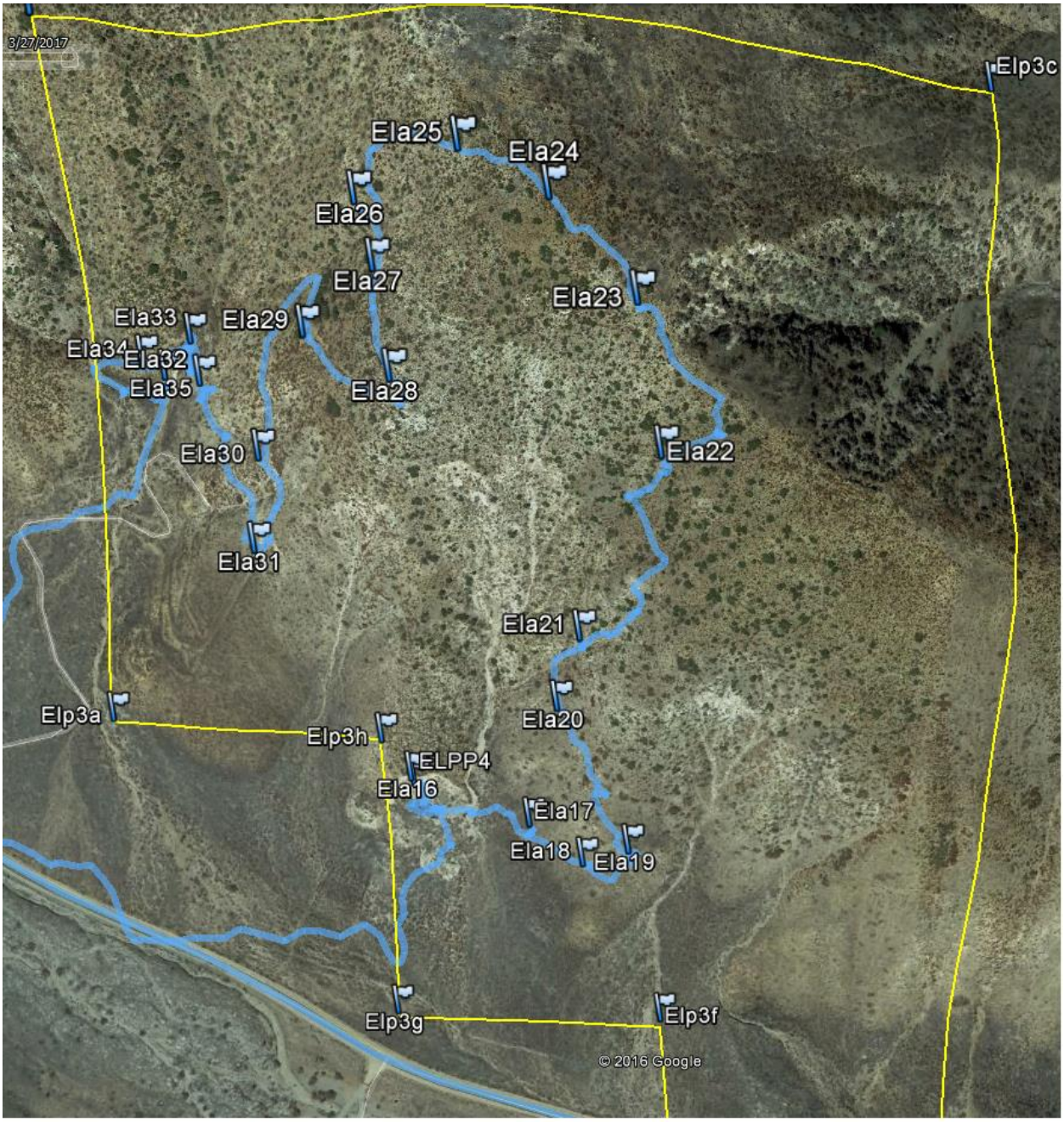


Figure 6. Property 3 with traverse line in light blue. Locations for geological notes and samples are indicated by the prefix "Ela". Points labeled with the prefix "ELPP" are "prospect" locations on USGS maps. The traverse was designed to define the limits of the carbonate rock body indicated on the USGS geology map.

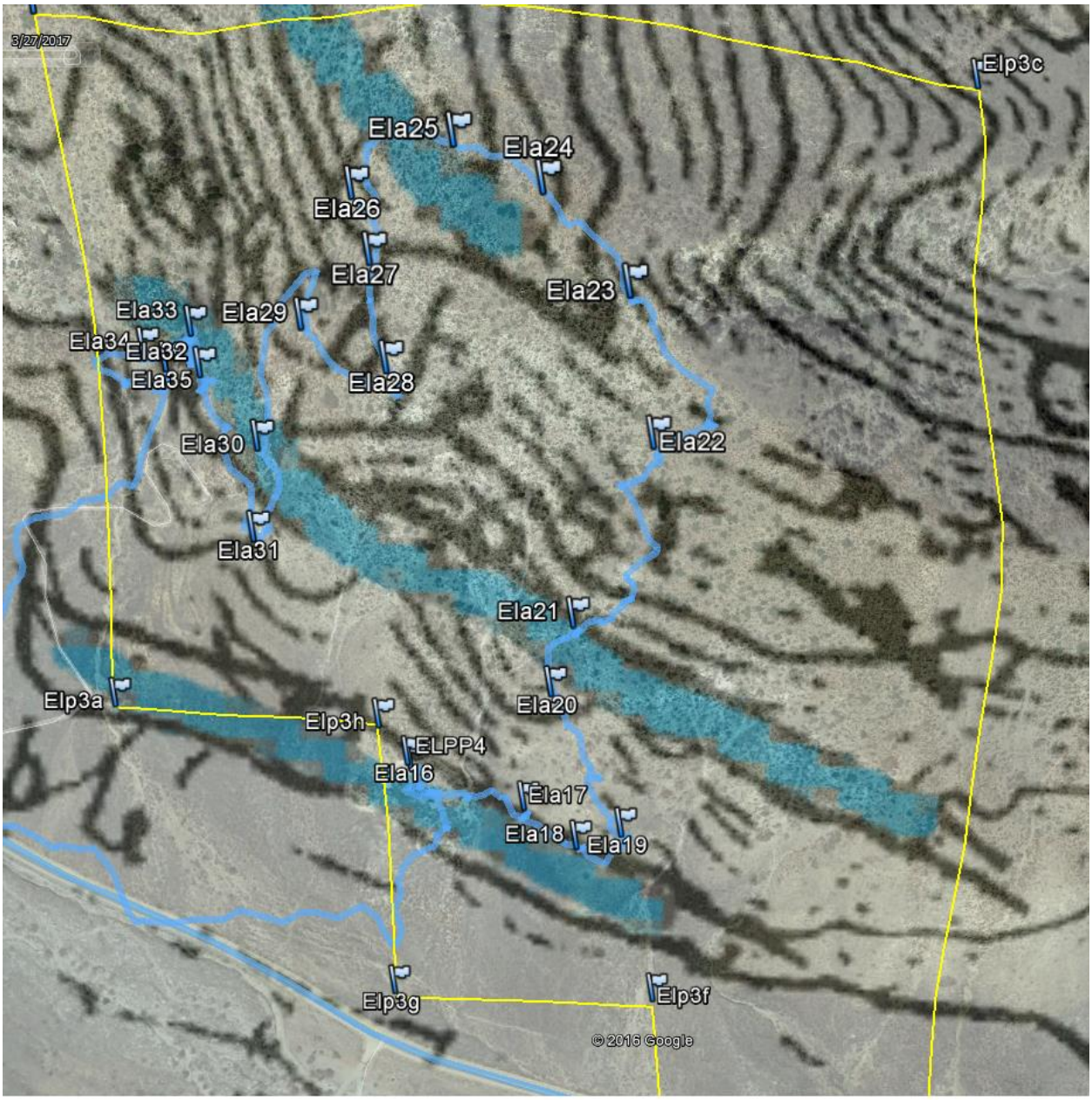


Figure 7. Same map as in Figure 6 with the limestone/dolomite map of Fife overlain on the satellite image. The USGS map depiction for this property appears to be most accurate. This carbonate rock body is not a narrow lens.

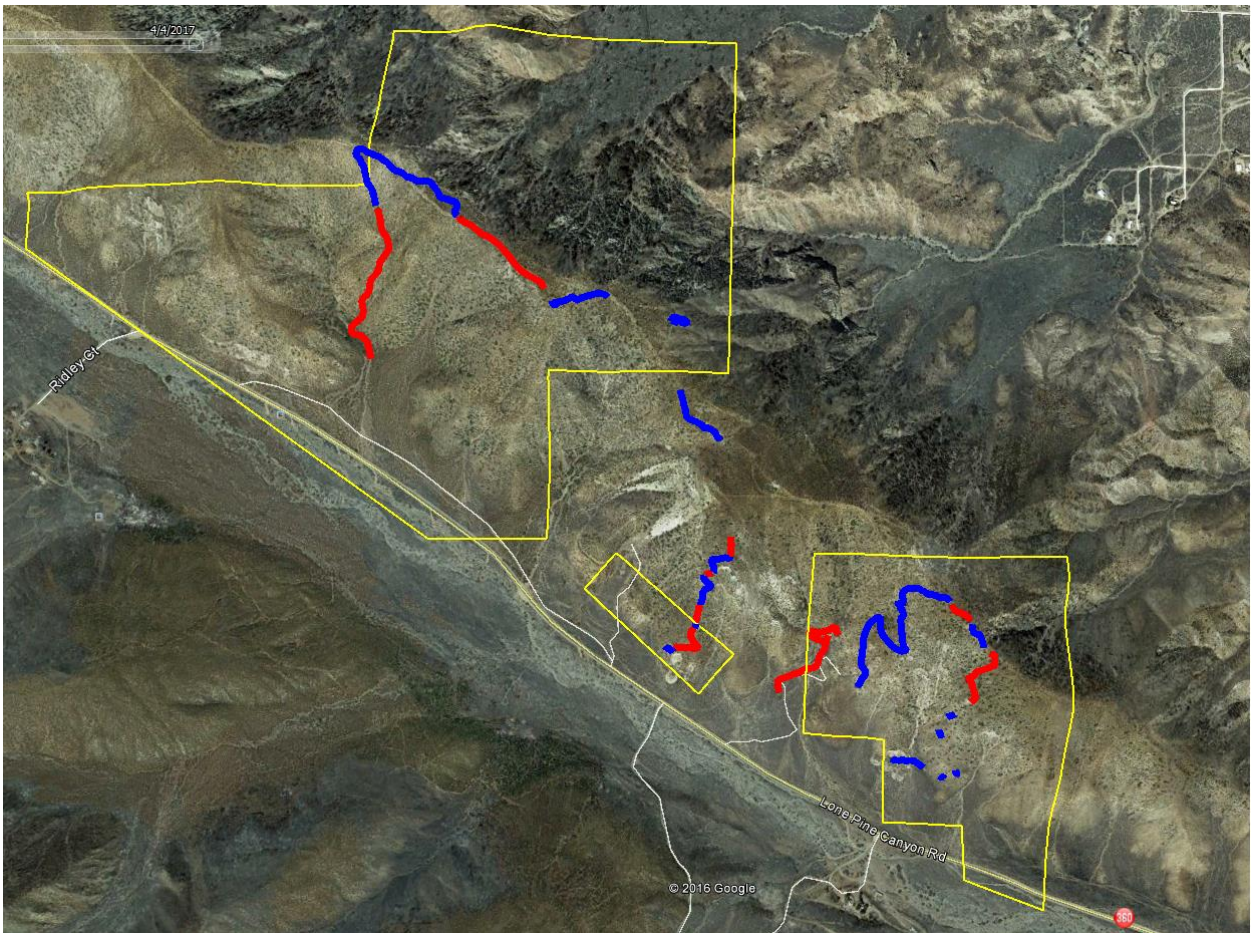


Figure 8. Color coded traverses. The traverse paths were logged by a hand-held GPS. The rock type was noted while walking the traverses. The ground was covered with talus in most areas so the rock contacts are estimated using float mapping techniques. Lines colored blue indicate areas of carbonate rock. Lines colored red are non-carbonate and typically schist in the southern area and greenstone in the northern area. Uncolored areas are a mix of the two rock types or segments where it was otherwise uncertain what the underlying rock type was.

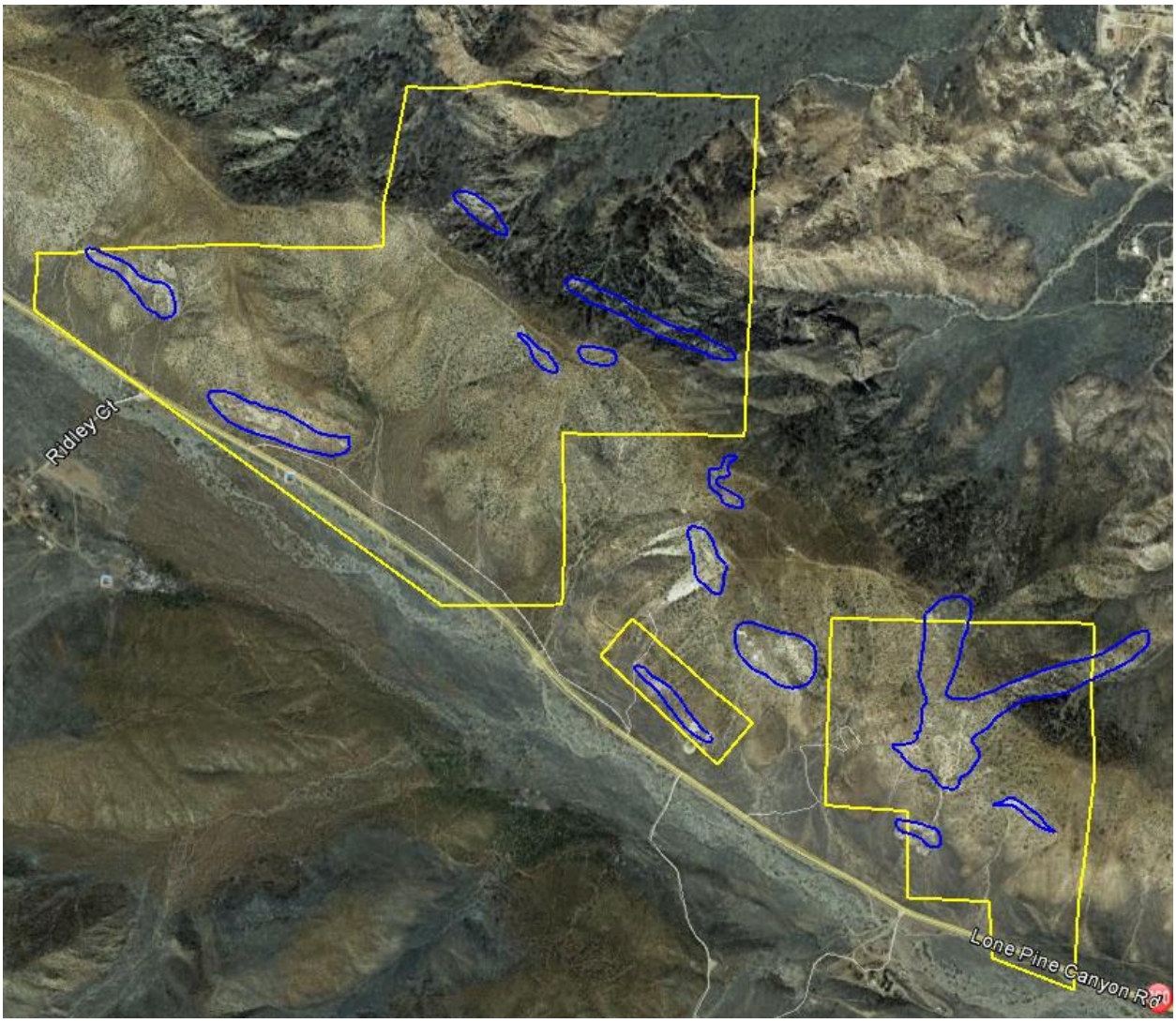


Figure 9. Areas of carbonate rocks as identified from Google Earth are outlined in blue. The basis for the interpretation is correlation of data obtained on the traverses with coloration of carbonate rock locations on the satellite image.

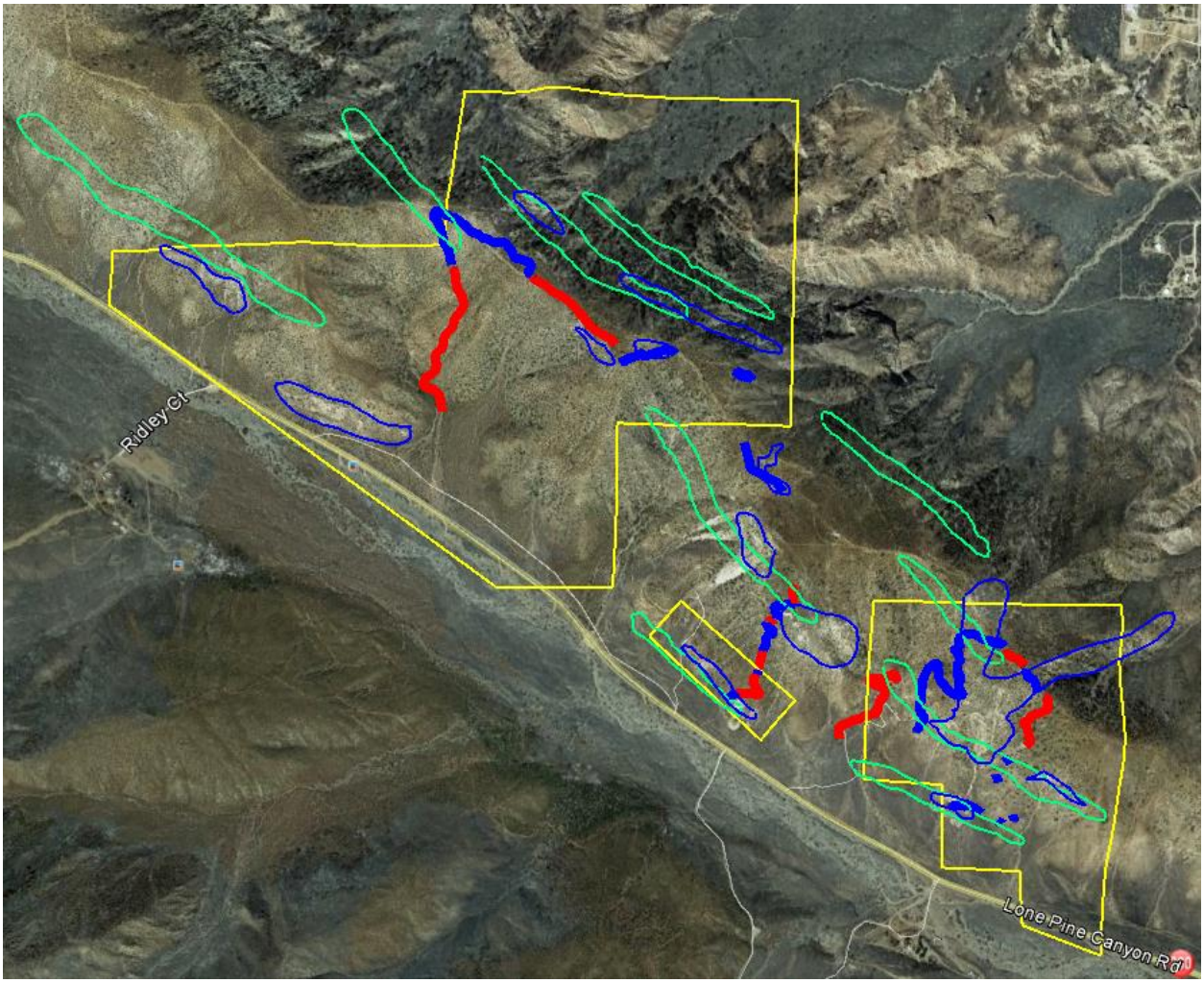


Figure 10. Geology along traverse tracks (red and blue thick lines), carbonate rocks from satellite image interpretation (outlined with light blue lines) and carbonate rock locations from the Fife map (outlined with thin green lines). The highest confidence is placed on the traverse tracks. Carbonate rocks are difficult to see on the north side of the mountain in the satellite image. All of the data were used to interpret the carbonate rock locations shown in Figures 11 and 12.

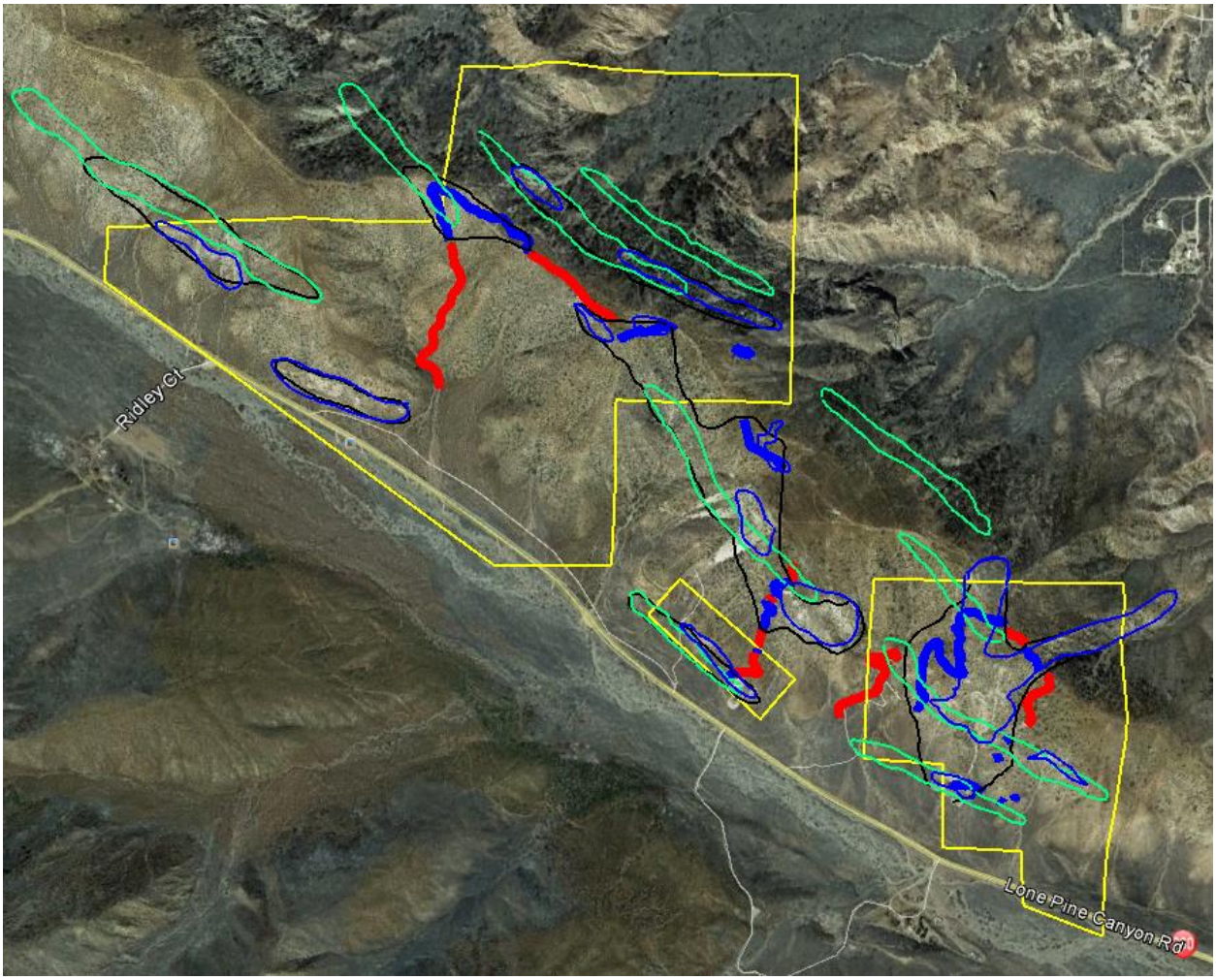


Figure 11. Contacts for carbonate rocks are thin black lines. The contact locations are interpreted from all data sets that are included with the map. The interpretation for the limits of carbonate rocks is intended to be conservative. Blocks of non-carbonate rock are included within the identified zones and the percentage of non-carbonate rock is not estimated here.

Figure 12. Interpreted carbonate rock contacts are thin black lines.

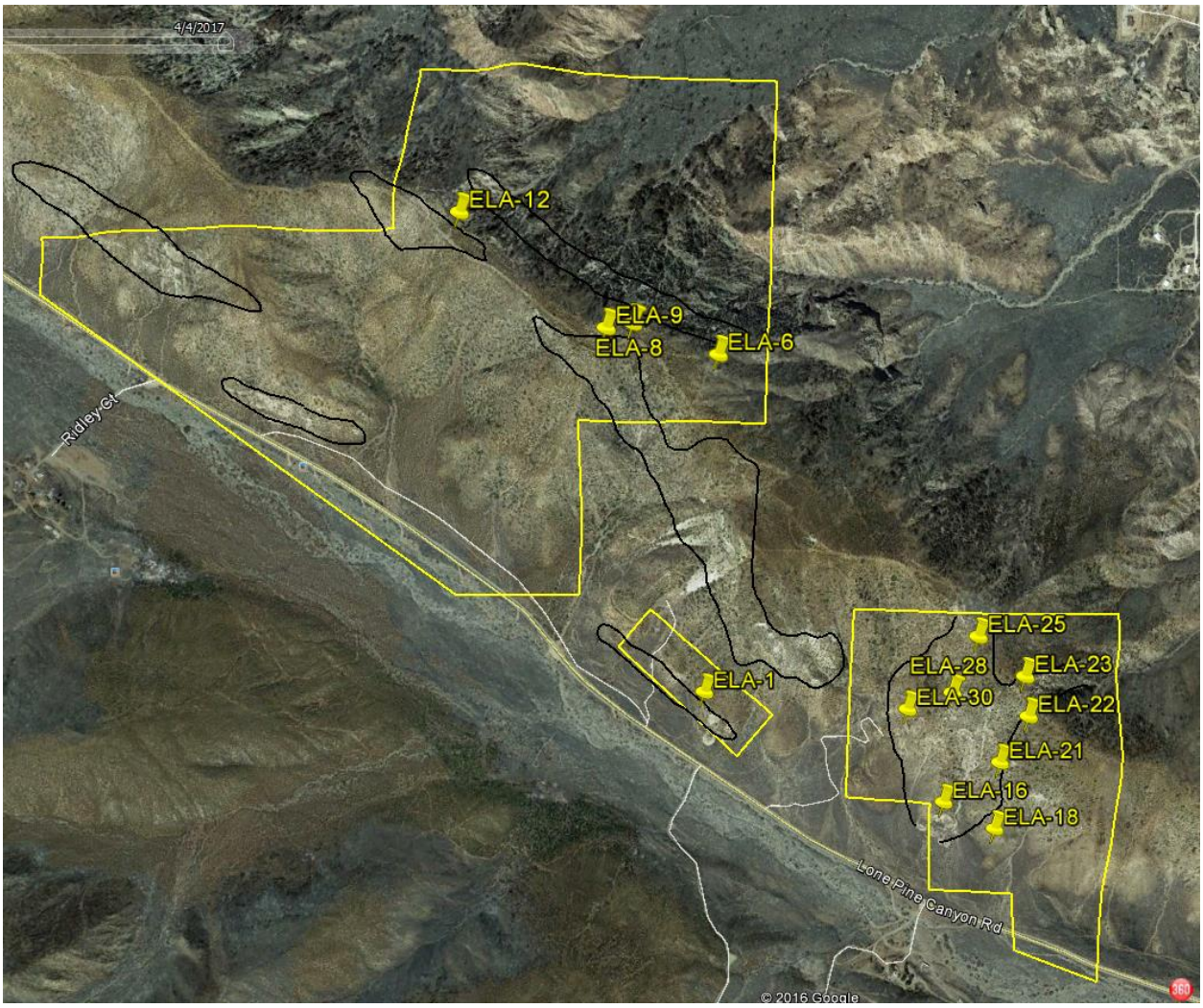


Figure 13. Locations for samples submitted for analysis of calcium carbonate and magnesium carbonate content by x-ray florescence. It is noteworthy that the main goal of the traverses was to define the outer limits of the large marble bodies and the samples therefore come mostly from the periphery.

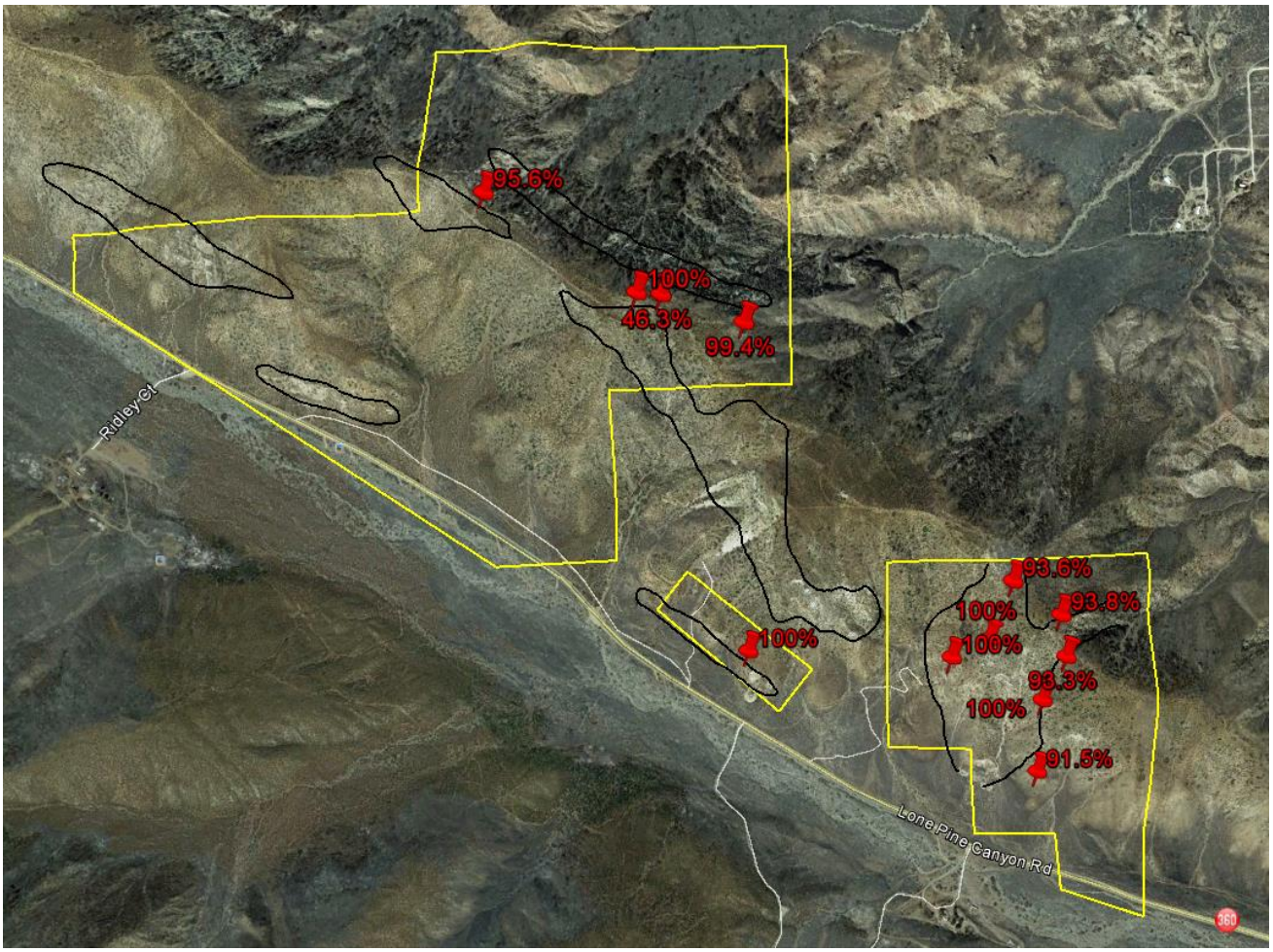


Figure 14. $CaCO_3$ contents of samples analyzed using x-ray florescence for this report. Most samples were analyzed on 2 or 3 spots and values shown are the average value for all spots that were analyzed.

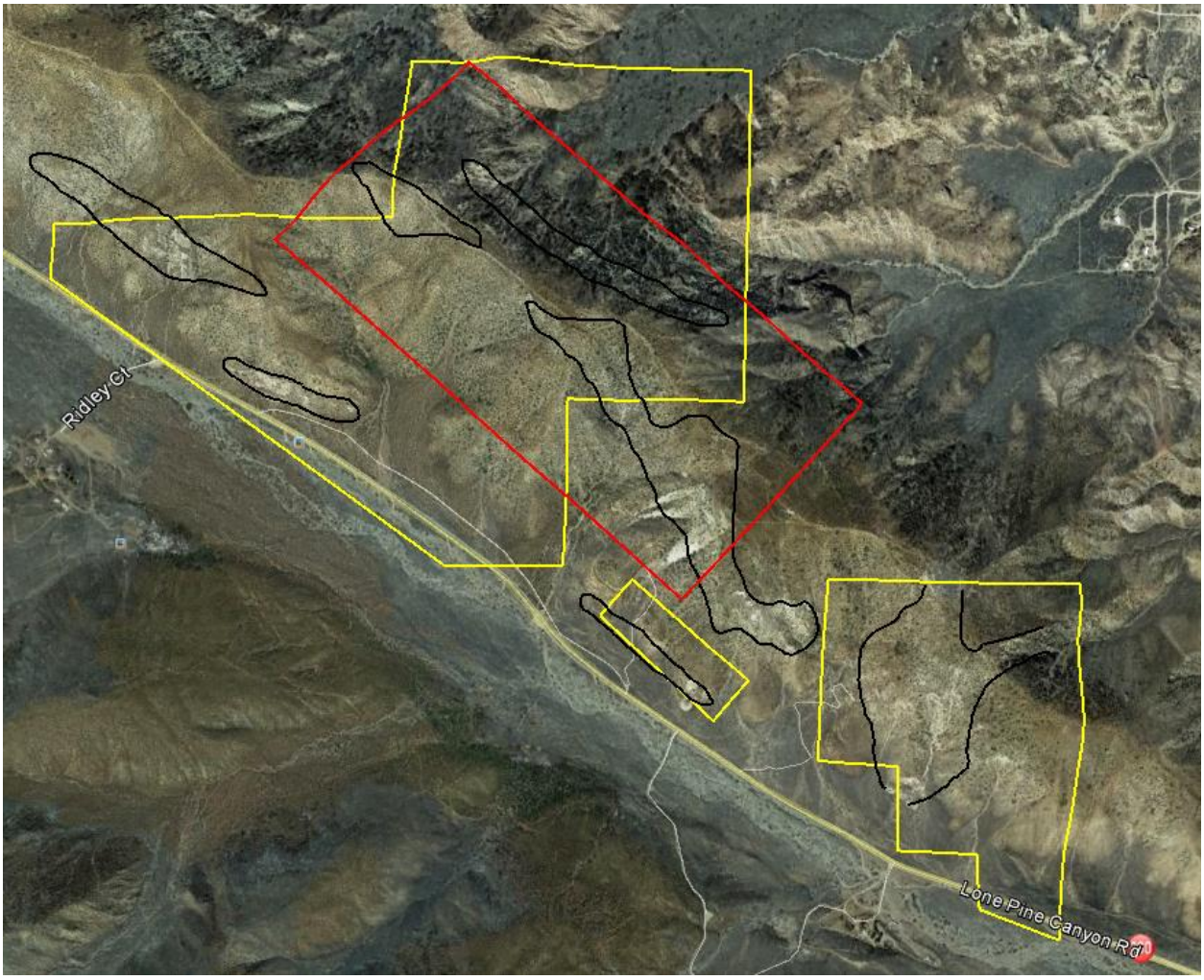


Figure 14. Carbonate rock contacts are thin black lines and property boundaries are yellow lines. The red rectangle is 4,000 feet by 2,000 feet. This is the approximate area of the limits of the quarry at the White Knob deposit (Brown, 2015). This comparison is made only to indicate that the total volume for all carbonate rocks in this section of Lone Pine Mountain could be somewhat like that at White Knob if these carbonate rocks continue with depth. Prior reports estimate the dip of the bodies to be 60 degrees to the southwest but that was not confirmed by the site visit made for this report. Actual tonnage, grade and operational considerations cannot be compared because there are not yet enough data for Lone Pine Mountain.

Appendix A

Sample Test Results

SAMPLE	Units	Sigma Valu	C3S	C3S Error	SiO2	SiO2 Error	Al2O3	Al2O3 Erro	Fe2O3	Fe2O3 Erro	CaO	CaO Error
A23A	%	2	9355.096	0	2.512	0	< LOD	0	0.289	0	53.854	0
A23B	%	2	9168.162	0	13.19	0	0.74	0	0.331	0	51.238	0
A12A	%	2	9207.682	0	10.327	0	< LOD	0	0.365	0	50.113	0
A12B	%	2	9333.515	0	3.62	0	0.733	0	0.296	0	53.789	0
A12A	%	2	9277.646	0	6.761	0	< LOD	0	0.292	0	54.193	0
A12B	%	2	9345.841	0	2.995	0	< LOD	0	0.284	0	54.063	0
A12C	%	2	9333.458	0	3.732	0	< LOD	0	0.297	0	55.41	0
A16A	%	2	9356.793	0	2.509	0	< LOD	0	0.299	0	55.696	0
A16B	%	2	9363.683	0	2.146	0	< LOD	0	0.28	0	55.531	0
A16C	%	2	9358.721	0	2.421	0	< LOD	0	0.292	0	55.989	0
A18A	%	2	9289.36	0	5.61	0	1.703	0	0.52	0	50.003	0
A18B	%	2	9335.639	0	3.35	0	< LOD	0	0.519	0	51.356	0
A18C	%	2	9322.453	0	4.099	0	0.807	0	0.418	0	52.419	0
A22A	%	2	9350.33	0	2.648	0	< LOD	0	0.319	0	51.796	0
A22B	%	2	9341.352	0	3.145	0	< LOD	0	0.363	0	52.679	0
A30A	%	2	9331.33	0	3.914	0	< LOD	0	0.326	0	56.38	0
A30B	%	2	9359.682	0	2.4	0	< LOD	0	0.287	0	56.68	0
A8A	%	2	8734	0	47.017	0	< LOD	0	0.292	0	34.507	0
A8B	%	2	8424.755	0	91.973	0	< LOD	0	0.271	0	17.298	0
A25A	%	2	9168.927	0	13.152	0	< LOD	0	0.327	0	51.296	0
A25B	%	2	9253.657	0	8.155	0	< LOD	0	0.334	0	53.872	0
A25C	%	2	9198.102	0	11.354	0	< LOD	0	0.336	0	52.052	0
A6A	%	2	9366.653	0	2.057	0	< LOD	0	0.282	0	57.308	0
A6B	%	2	9238.696	0	9.117	0	1.627	0	0.322	0	54.065	0
A1A	%	2	9368.04	0	1.936	0	< LOD	0	0.291	0	55.907	0
A1B	%	2	9364.632	0	2.17	0	< LOD	0	0.288	0	57.461	0
A28A	%	2	9372.017	0	1.78	0	< LOD	0	0.543	0	57.429	0
A28B	%	2	9370.997	0	1.818	0	< LOD	0	0.338	0	56.966	0
A21A	%	2	9367.898	0	1.971	0	< LOD	0	0.302	0	56.713	0
A21B	%	2	9365.658	0	2.094	0	< LOD	0	0.336	0	56.89	0
A21C	%	2	9364.99	0	2.094	0	< LOD	0	0.341	0	55.941	0
A9A	%	2	9369.532	0	1.865	0	< LOD	0	0.277	0	56.062	0

MgO	MgO Error	SO3	SO3 Error	K2O	K2O Error	CaCO3	CaCO3 Erro	Si	Si Error	Al	Al Error	Fe
< LOD	0	< LOD	0	0.007	0	96.167	0	1.174	0.102	< LOD	0.441	0.202
< LOD	0	< LOD	0	0.327	0	91.497	0	6.164	0.234	< LOD	0.491	0.231
< LOD	0	< LOD	0	0.007	0	89.487	0	4.826	0.213	< LOD	0.383	0.255
< LOD	0	< LOD	0	0.007	0	96.053	0	1.691	0.132	< LOD	0.539	0.207
< LOD	0	0.02	0	0.007	0	96.773	0	3.159	0.171	< LOD	0.498	0.204
< LOD	0	< LOD	0	0.007	0	96.541	0	1.399	0.115	< LOD	0.606	0.199
4.306	0	< LOD	0	0.007	0	98.947	0	1.744	0.127	< LOD	0.622	0.208
4.192	0	0.007	0	0.007	0	99.457	0	1.172	0.097	< LOD	0.467	0.209
< LOD	0	< LOD	0	0.007	0	99.162	0	1.003	0.093	< LOD	0.466	0.196
< LOD	0	< LOD	0	0.007	0	99.98	0	1.131	0.103	< LOD	0.711	0.204
7.553	0	0.016	0	0.225	0	89.291	0	2.622	0.157	0.901	0.391	0.363
3.852	0	0.093	0	0.113	0	91.708	0	1.565	0.115	< LOD	0.713	0.363
4.823	0	0.105	0	0.116	0	93.606	0	1.915	0.129	< LOD	0.515	0.292
< LOD	0	< LOD	0	0.044	0	92.492	0	1.237	0.108	< LOD	0.529	0.223
4.185	0	< LOD	0	0.117	0	94.07	0	1.47	0.114	< LOD	0.415	0.254
< LOD	0	0.101	0	0.007	0	100.678	0	1.829	0.126	< LOD	0.56	0.228
< LOD	0	0.052	0	0.007	0	101.214	0	1.122	0.094	< LOD	0.435	0.201
3.603	0	< LOD	0	0.007	0	61.619	0	21.97	0.381	< LOD	0.475	0.204
3.546	0	< LOD	0	0.007	0	30.889	0	42.978	0.457	< LOD	0.314	0.189
4.327	0	0.043	0	0.007	0	91.6	0	6.146	0.23	< LOD	0.658	0.229
< LOD	0	< LOD	0	0.007	0	96.201	0	3.811	0.181	< LOD	0.717	0.233
< LOD	0	< LOD	0	0.007	0	92.949	0	5.306	0.221	< LOD	0.66	0.235
< LOD	0	0.079	0	0.007	0	102.336	0	0.961	0.087	< LOD	0.841	0.197
< LOD	0	0.036	0	0.254	0	96.544	0	4.26	0.196	0.861	0.363	0.225
< LOD	0	0.032	0	0.007	0	99.834	0	0.905	0.085	< LOD	0.438	0.204
< LOD	0	< LOD	0	0.007	0	102.609	0	1.014	0.09	< LOD	0.745	0.202
< LOD	0	0.03	0	0.007	0	102.552	0	0.832	0.078	< LOD	0.571	0.38
< LOD	0	< LOD	0	0.007	0	101.724	0	0.85	0.088	< LOD	0.57	0.237
5.485	0	< LOD	0	0.007	0	101.274	0	0.921	0.086	< LOD	0.646	0.211
< LOD	0	< LOD	0	0.007	0	101.59	0	0.979	0.09	< LOD	0.569	0.235
6.269	0	0.067	0	0.007	0	99.895	0	0.978	0.086	< LOD	0.571	0.239
7.777	0	< LOD	0	0.007	0	100.111	0	0.871	0.082	< LOD	0.585	0.194

Fe Error	Ca	Ca Error	Mg	Mg Error	S	S Error	K	K Error	P	P Error	Cl	Cl Error
0.014	38.467	0.706	< LOD	4.507	< LOD	0.054	< LOD	0.04	< LOD	0.057	< LOD	0.013
0.017	36.599	0.669	< LOD	3.396	< LOD	0.04	0.27	0.042	< LOD	0.064	< LOD	0.013
0.02	35.795	0.66	< LOD	3.719	< LOD	0.058	< LOD	0.039	< LOD	0.062	< LOD	0.013
0.016	38.421	0.729	< LOD	3.201	< LOD	0.039	< LOD	0.043	< LOD	0.062	0.069	0.012
0.014	38.709	0.694	< LOD	3.037	< LOD	0.041	< LOD	0.061	< LOD	0.057	0.077	0.012
0.015	38.616	0.733	< LOD	3.797	< LOD	0.053	< LOD	0.038	< LOD	0.059	0.057	0.011
0.015	39.579	0.722	< LOD	3.884	< LOD	0.059	< LOD	0.038	< LOD	0.057	0.061	0.011
0.015	39.783	0.713	< LOD	3.725	< LOD	0.038	< LOD	0.047	< LOD	0.053	0.112	0.012
0.013	39.665	0.725	< LOD	5.252	< LOD	0.038	< LOD	0.039	< LOD	0.056	0.06	0.012
0.014	39.992	0.71	< LOD	3.498	< LOD	0.048	< LOD	0.059	< LOD	0.055	< LOD	0.018
0.028	35.716	0.649	4.55	2.718	< LOD	0.041	0.186	0.037	< LOD	0.056	0.113	0.013
0.027	36.683	0.654	< LOD	3.472	< LOD	0.042	0.093	0.032	< LOD	0.055	0.183	0.014
0.023	37.442	0.67	< LOD	3.654	< LOD	0.043	0.096	0.032	< LOD	0.055	0.024	0.009
0.017	36.997	0.692	< LOD	2.982	< LOD	0.042	< LOD	0.044	< LOD	0.057	< LOD	0.017
0.02	37.628	0.684	< LOD	3.635	< LOD	0.037	0.097	0.033	< LOD	0.056	0.052	0.01
0.017	40.271	0.722	< LOD	5.305	< LOD	0.044	< LOD	0.047	< LOD	0.059	0.186	0.015
0.014	40.486	0.715	< LOD	3.9	< LOD	0.04	< LOD	0.039	< LOD	0.053	0.163	0.014
0.013	24.648	0.469	< LOD	2.563	< LOD	0.033	< LOD	0.031	< LOD	0.082	0.034	0.01
0.011	12.356	0.286	2.136	1.209	< LOD	0.034	< LOD	0.023	< LOD	0.104	0.1	0.011
0.017	36.64	0.69	< LOD	3.475	< LOD	0.04	< LOD	0.046	< LOD	0.067	0.057	0.01
0.018	38.48	0.716	< LOD	2.657	< LOD	0.036	< LOD	0.043	< LOD	0.057	0.158	0.013
0.018	37.18	0.713	< LOD	4.699	< LOD	0.038	< LOD	0.058	< LOD	0.064	0.115	0.015
0.013	40.935	0.752	< LOD	4.406	< LOD	0.043	< LOD	0.042	< LOD	0.048	0.143	0.014
0.017	38.618	0.727	< LOD	5.015	< LOD	0.041	0.21	0.047	< LOD	0.063	0.048	0.011
0.014	39.934	0.756	< LOD	4.597	< LOD	0.041	< LOD	0.045	< LOD	0.049	0.354	0.019
0.014	41.044	0.756	< LOD	3.288	< LOD	0.034	< LOD	0.045	< LOD	0.05	0.249	0.016
0.029	41.021	0.776	< LOD	6.164	< LOD	0.039	< LOD	0.046	< LOD	0.05	0.146	0.013
0.018	40.69	0.751	< LOD	4.285	< LOD	0.04	< LOD	0.043	< LOD	0.052	< LOD	0.019
0.015	40.51	0.745	< LOD	4.081	< LOD	0.04	< LOD	0.044	< LOD	0.049	0.032	0.011
0.018	40.636	0.761	< LOD	5.263	< LOD	0.037	< LOD	0.045	< LOD	0.052	0.034	0.011
0.018	39.958	0.729	< LOD	3.999	< LOD	0.041	< LOD	0.041	< LOD	0.055	0.201	0.015
0.013	40.044	0.75	4.685	2.869	< LOD	0.039	< LOD	0.042	< LOD	0.058	0.039	0.011

Ti	Ti Error	V	V Error	Cr	Cr Error	Mn	Mn Error	Co	Co Error	Ni	Ni Error	Cu
< LOD	0.073	< LOD	0.012	< LOD	0.014	< LOD	0.047	< LOD	0.009	< LOD	0.015	< LOD
< LOD	0.051	< LOD	0.012	< LOD	0.012	< LOD	0.048	< LOD	0.015	< LOD	0.014	< LOD
< LOD	0.048	< LOD	0.011	< LOD	0.014	< LOD	0.03	< LOD	0.012	< LOD	0.014	< LOD
< LOD	0.084	< LOD	0.014	0.015	0.007	< LOD	0.03	< LOD	0.01	< LOD	0.02	< LOD
< LOD	0.085	< LOD	0.013	0.013	0.008	< LOD	0.029	< LOD	0.009	0.016	0.011	< LOD
< LOD	0.054	< LOD	0.012	< LOD	0.013	< LOD	0.029	< LOD	0.01	< LOD	0.021	< LOD
< LOD	0.054	< LOD	0.011	< LOD	0.012	< LOD	0.03	< LOD	0.01	< LOD	0.026	< LOD
< LOD	0.08	< LOD	0.012	< LOD	0.015	< LOD	0.034	< LOD	0.015	< LOD	0.025	< LOD
< LOD	0.054	< LOD	0.015	< LOD	0.018	< LOD	0.031	< LOD	0.009	< LOD	0.015	< LOD
< LOD	0.055	< LOD	0.014	0.014	0.006	< LOD	0.048	< LOD	0.015	< LOD	0.015	< LOD
0.079	0.033	< LOD	0.012	0.012	0.007	< LOD	0.047	< LOD	0.013	< LOD	0.014	< LOD
0.068	0.034	< LOD	0.012	< LOD	0.01	< LOD	0.029	< LOD	0.016	< LOD	0.014	< LOD
0.07	0.034	< LOD	0.013	< LOD	0.012	< LOD	0.05	< LOD	0.015	< LOD	0.017	< LOD
< LOD	0.051	< LOD	0.01	< LOD	0.014	< LOD	0.042	< LOD	0.015	< LOD	0.015	< LOD
< LOD	0.053	< LOD	0.012	< LOD	0.013	< LOD	0.041	< LOD	0.013	< LOD	0.014	< LOD
< LOD	0.055	< LOD	0.018	0.018	0.006	< LOD	0.037	< LOD	0.011	< LOD	0.014	< LOD
0.056	0.037	< LOD	0.011	< LOD	0.01	< LOD	0.037	< LOD	0.009	< LOD	0.025	< LOD
< LOD	0.047	< LOD	0.007	< LOD	0.011	< LOD	0.031	< LOD	0.008	< LOD	0.013	< LOD
< LOD	0.015	< LOD	0.007	< LOD	0.006	< LOD	0.031	< LOD	0.01	< LOD	0.012	< LOD
0.07	0.038	< LOD	0.018	< LOD	0.013	< LOD	0.036	< LOD	0.017	< LOD	0.015	< LOD
< LOD	0.06	< LOD	0.015	< LOD	0.018	< LOD	0.039	< LOD	0.011	< LOD	0.014	< LOD
0.059	0.039	< LOD	0.015	0.021	0.008	< LOD	0.036	< LOD	0.015	< LOD	0.015	< LOD
< LOD	0.066	< LOD	0.015	< LOD	0.016	< LOD	0.033	< LOD	0.011	< LOD	0.014	< LOD
0.082	0.041	< LOD	0.014	< LOD	0.018	< LOD	0.042	< LOD	0.01	< LOD	0.016	< LOD
< LOD	0.064	< LOD	0.013	< LOD	0.024	< LOD	0.027	< LOD	0.011	< LOD	0.023	< LOD
< LOD	0.066	< LOD	0.013	< LOD	0.024	< LOD	0.036	< LOD	0.009	< LOD	0.016	< LOD
< LOD	0.065	< LOD	0.013	< LOD	0.016	< LOD	0.035	< LOD	0.021	< LOD	0.015	< LOD
< LOD	0.065	< LOD	0.014	< LOD	0.015	< LOD	0.04	< LOD	0.017	< LOD	0.014	< LOD
< LOD	0.064	< LOD	0.014	< LOD	0.02	< LOD	0.033	< LOD	0.017	< LOD	0.015	< LOD
< LOD	0.108	< LOD	0.015	< LOD	0.015	< LOD	0.033	< LOD	0.015	< LOD	0.015	< LOD
0.07	0.041	< LOD	0.012	< LOD	0.017	< LOD	0.045	< LOD	0.012	< LOD	0.018	< LOD
< LOD	0.104	< LOD	0.018	< LOD	0.021	< LOD	0.047	< LOD	0.008	< LOD	0.015	< LOD

Cu Error	Zn	Zn Error	As	As Error	Se	Se Error	Rb	Rb Error	Sr	Sr Error	Zr	Zr Error
0.007	< LOD	0.003	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.05	0.002	< LOD	0.002
0.007	< LOD	0.005	< LOD	0.002	< LOD	0.002	0.003	0.001	0.046	0.002	< LOD	0.002
0.007	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.047	0.002	< LOD	0.002
0.008	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.049	0.002	< LOD	0.002
0.006	< LOD	0.005	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.041	0.002	< LOD	0.002
0.007	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.048	0.002	< LOD	0.002
0.007	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.051	0.002	< LOD	0.002
0.007	< LOD	0.003	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.023	0.002	< LOD	0.002
0.007	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.022	0.002	< LOD	0.002
0.007	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.021	0.001	< LOD	0.002
0.007	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.046	0.002	< LOD	0.002
0.006	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.05	0.002	< LOD	0.002
0.006	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.051	0.002	< LOD	0.002
0.006	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.027	0.002	< LOD	0.002
0.007	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.03	0.002	< LOD	0.002
0.008	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.009	0.001	< LOD	0.002
0.007	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.01	0.001	< LOD	0.002
0.006	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.021	0.001	< LOD	0.002
0.006	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.011	0.001	< LOD	0.002
0.009	0.006	0.003	< LOD	0.003	< LOD	0.002	< LOD	0.002	0.093	0.003	< LOD	0.003
0.007	< LOD	0.006	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.083	0.003	< LOD	0.002
0.007	< LOD	0.006	< LOD	0.003	< LOD	0.002	< LOD	0.002	0.088	0.003	< LOD	0.002
0.007	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.012	0.001	< LOD	0.002
0.007	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.018	0.001	< LOD	0.002
0.007	< LOD	0.003	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.008	0.001	< LOD	0.002
0.007	< LOD	0.003	< LOD	0.003	< LOD	0.002	< LOD	0.002	0.009	0.001	< LOD	0.002
0.006	< LOD	0.005	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.015	0.001	< LOD	0.002
0.011	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.009	0.001	< LOD	0.002
0.007	< LOD	0.005	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.012	0.001	< LOD	0.002
0.007	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.019	0.001	< LOD	0.002
0.006	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.018	0.001	< LOD	0.002
0.006	< LOD	0.004	< LOD	0.002	< LOD	0.002	< LOD	0.002	0.017	0.001	< LOD	0.002

Nb	Nb Error	Mo	Mo Error	Pd	Pd Error	Ag	Ag Error	Cd	Cd Error	Sn	Sn Error	Sb
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.006	< LOD	0.005	< LOD	0.006	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.006	< LOD	0.006	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.004	< LOD	0.005	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.005	< LOD	0.005	< LOD	0.006	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.004	< LOD	0.005	< LOD	0.005	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.005	< LOD	0.005	< LOD	0.006	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.004	< LOD	0.004	< LOD	0.005	< LOD	0.008	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.004	< LOD	0.005	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.005	< LOD	0.005	< LOD	0.006	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.004	< LOD	0.004	< LOD	0.006	< LOD	0.007	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.004	< LOD	0.005	< LOD	0.004	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.006	< LOD	0.004	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.004	< LOD	0.005	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.007	< LOD	0.005	< LOD	0.006	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.004	< LOD	0.007	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.004	< LOD	0.007	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.004	< LOD	0.004	< LOD	0.005	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.003	< LOD	0.004	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.004	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.004	< LOD	0.005	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.004	< LOD	0.004	< LOD	0.006	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.004	< LOD	0.005	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.004	< LOD	0.006	< LOD	0.006	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.006	< LOD	0.005	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.004	< LOD	0.005	< LOD	0.007	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.004	< LOD	0.004	< LOD	0.006	< LOD	0.006	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.005	< LOD	0.005	< LOD	0.006	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.004	< LOD	0.008	< LOD	0.005	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.004	< LOD	0.005	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.005	< LOD	0.005	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.004	< LOD	0.005	< LOD	0.005	< LOD	0.005	< LOD
< LOD	0.002	< LOD	0.002	< LOD	0.003	< LOD	0.005	< LOD	0.006	< LOD	0.005	< LOD

Sb Error	W	W Error	Au	Au Error	Pb	Pb Error	Bi	Bi Error	Bal	Bal Error
0.006	< LOD	0.016	< LOD	0.003	< LOD	0.002	< LOD	0.002	60.398	0.602
0.006	< LOD	0.021	< LOD	0.003	< LOD	0.004	< LOD	0.002	56.319	0.625
0.006	< LOD	0.016	< LOD	0.003	< LOD	0.002	< LOD	0.003	59.334	0.598
0.006	< LOD	0.025	< LOD	0.003	< LOD	0.002	< LOD	0.003	59.255	0.65
0.006	< LOD	0.021	< LOD	0.003	< LOD	0.002	< LOD	0.002	58.037	0.616
0.006	< LOD	0.019	< LOD	0.006	< LOD	0.002	< LOD	0.002	59.915	0.639
0.006	< LOD	0.018	< LOD	0.003	< LOD	0.003	< LOD	0.002	55.913	0.687
0.006	< LOD	0.017	< LOD	0.003	< LOD	0.002	< LOD	0.002	56.35	0.666
0.006	< LOD	0.017	< LOD	0.003	< LOD	0.003	< LOD	0.002	59.303	0.614
0.006	< LOD	0.018	< LOD	0.003	< LOD	0.002	< LOD	0.002	58.887	0.611
0.005	< LOD	0.022	< LOD	0.003	< LOD	0.003	< LOD	0.002	55.399	0.681
0.005	< LOD	0.021	< LOD	0.004	< LOD	0.003	< LOD	0.002	58.813	0.619
0.005	< LOD	0.015	< LOD	0.003	< LOD	0.002	< LOD	0.002	56.716	0.655
0.006	< LOD	0.019	< LOD	0.006	< LOD	0.002	< LOD	0.002	61.706	0.598
0.006	< LOD	0.017	< LOD	0.004	< LOD	0.002	< LOD	0.002	58.077	0.645
0.006	< LOD	0.017	< LOD	0.004	< LOD	0.002	< LOD	0.002	57.623	0.622
0.005	< LOD	0.017	< LOD	0.004	< LOD	0.003	< LOD	0.002	58.199	0.615
0.005	< LOD	0.015	< LOD	0.003	< LOD	0.002	< LOD	0.002	51.156	0.583
0.005	< LOD	0.014	< LOD	0.003	< LOD	0.002	< LOD	0.002	42.422	0.558
0.006	< LOD	0.017	< LOD	0.003	< LOD	0.002	< LOD	0.003	54.309	0.668
0.006	< LOD	0.02	< LOD	0.003	< LOD	0.002	< LOD	0.002	57.447	0.619
0.006	< LOD	0.016	< LOD	0.003	< LOD	0.002	< LOD	0.002	57.284	0.619
0.006	< LOD	0.017	< LOD	0.004	< LOD	0.002	< LOD	0.002	57.936	0.618
0.006	< LOD	0.027	< LOD	0.003	< LOD	0.002	< LOD	0.002	55.748	0.633
0.006	< LOD	0.026	< LOD	0.003	< LOD	0.004	< LOD	0.002	58.804	0.622
0.006	< LOD	0.023	< LOD	0.003	< LOD	0.002	< LOD	0.002	57.72	0.63
0.006	< LOD	0.024	< LOD	0.003	< LOD	0.003	< LOD	0.002	57.77	0.63
0.006	< LOD	0.016	< LOD	0.004	< LOD	0.002	< LOD	0.002	58.438	0.619
0.006	< LOD	0.016	< LOD	0.004	< LOD	0.002	< LOD	0.002	55.111	0.681
0.006	< LOD	0.022	< LOD	0.004	< LOD	0.002	< LOD	0.002	58.359	0.619
0.005	< LOD	0.016	< LOD	0.003	< LOD	0.002	< LOD	0.002	54.911	0.683
0.006	< LOD	0.016	< LOD	0.003	< LOD	0.002	< LOD	0.002	54.323	0.71

EXHIBIT B

County Response to El Cajon Vested Rights Determination, August 9, 2018

385 N. Arrowhead Avenue, First Floor, San Bernardino, CA 92415 | Phone: 909.387.8311 Fax: 909.387.3223
www.SBCounty.gov

SAN BERNARDINO COUNTY

Land Use Services Department
Mining

Terri Rahhal
Director

August 9, 2018

Warren Coalson, President
EnviroMINE, Inc.
3511 Camino Del Rio South, Suite 403
San Diego, CA 92108

SUBJECT: REQUEST FOR DETERMINATION OF SURFACE MINING VESTED RIGHTS P201800427, APNs: 0356-231-02, 0356-241-03, 0356-241-08 AND 0351-161-03

Dear Mr. Coalson,

The County of San Bernardino (County) is in receipt of a request by El Cajon Associates, LLC to make a determination of "vested rights" (as it relates to surface mining) for 420 acres of land comprised of the subject Assessor's parcel numbers (APNs). The following represents staff's understanding and process for recognizing vested rights and a suggested course of action.

County staff is familiar with Public Resources Code (PRC) § 2776, the decision in California Supreme Court case (*Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County* (1996) 12 Cal. 4th 533, 540 fn.1 ("*Hanson Brothers*"), and a number of referenced mentions and citations of attorney Mark Harrison that is identified in your transmittal letter. In addition, staff is familiar with the Court of Appeals decision in *Calvert v. County of Yuba* (3rd Dist. 2006) 145 Cal. App. 4th 613 ("*Calvert*"), wherein the Court decision recognized the determination of a surface mining vested right is not ministerial and must require a public hearing with reasonable notice and opportunity to be heard. County staff appreciates the history of the mining activity conducted at the subject properties, recognizes the apparent presence of valuable mineral outcrops, and is now cognizant of the investment and early efforts involved in the extraction and beneficiation of the mineral resources for a market need.

Normally, the County's procedure for recognizing a claim of vested rights by surface mine owners is generally included with approved applications for a new Mining/Reclamation Plan or Revision to a prior-approved Reclamation Plan. Staff is not aware of any mine owner successfully obtaining recognition of claimed vested rights without an approved reclamation plan or pursuit thereof. PRC § 2770(b) provides that

> "A person with an existing surface mining operation who has vested rights pursuant to Section 2776 and who does not have an approved reclamation plan shall submit a reclamation plan to the lead agency not later than March 31, 1988. If a reclamation plan application is not on file by March 31, 1988, the continuation of the surface mining operation is prohibited until a reclamation plan is submitted to the lead agency."

This statute continues, however the recent enactment of AB 1142 in 2017 provides the following underlined modification:

> "For the purposes of this subdivision, a reclamation plan existing prior to January 1, 2017, may consist of all or the appropriate sections of any plans or written agreements

> previously approved by the lead agency or another agency, together with any additional documents needed to substantially meet the requirements of Sections 2772 and 2773 and the lead agency surface mining ordinance adopted pursuant to subdivision (a) of Section 2774, provided that all documents, which together were proposed to serve as the reclamation plan, are submitted for approval to the lead agency in accordance with this chapter."

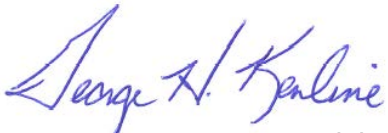
Hansen Brothers also recognized that expansion of existing surface mining operations after January 1, 1976, may be recognized as a vested non-conforming use under the doctrine of "diminishing assets". Provided that mining cannot be conducted without an approved reclamation plan, it is difficult to describe prior disturbances and consider the intent and scope of planned mining operations into the future and/or make a determination as to whether or not substantial compliance can be anticipated with Surface Mining and Reclamation Act of 1975 ("SMARA") and the County's reclamation provisions. The very existence of prior exploratory work and development of a mineral resource can be limited and distinguished from a viable mining operation and/or right to mine without a permit. Accordingly, after 1976, an approved reclamation plan is necessary to ensure that planned reclamation of a particular mine site is technically feasible so as to satisfy the objectives of SMARA and the County's reclamation provisions.

Hanson Brothers has made it clear that abandonment of vested mining rights is wholly controlled by constitutional law and as long as a mine operator continues some aspects of a vested surface mining operation, even when operated at a significantly reduced level, the underlying vested rights remains intact. Staff notes that mining at the subject properties has been idle or not active for well over 50 years. Just as SMARA and the County's Development Code do not define the term "abandoned" outside the context of the idle mine provisions pursuant to PRC § 2770(h)(6), SMARA or the Development Code contains no language that states or suggests "abandoned" in terms of underlying rights.

Staff has conducted a file review for the above listed properties and was not able to locate copies of the original Land Use zoning maps, any permits or approved reclamation plans and/or any notations of a public hearing for mining-related activities. In these circumstance, staff does not believe it could support El Cajon Associates, LLC's claim that it has vested mining rights at the subject properties. This position would be reconsidered if it were made part of an application for a reclamation plan approval or amendment thereof.

As we discussed over the phone, the County does not have an application that is specific to making a vested rights determination. However, the County's process includes a General Plan and Development Code interpretation, which should accomplish the same objectives. The application is available online (http://www.sbcounty.gov/uploads/LUS/Planning/Applications/GeneralPlanDevelopmentCodeInterpretation.pdf) and has a fee of $1,274.00. This procedure would result in a noticed public hearing as required by *Calvert* and a determination that is appealable to the Planning Commission and, thereafter, to the Board of Supervisors.

Sincerely,



GEORGE H. KENLINE, Mining/Engineering Geologist

EXHIBIT C

Exhibit C: Court Decisions

- Hansen Brothers
- Calvert
- Hardesty
- Keep the Code

HANSEN BROTHERS ENTERPRISES v. BOARD OF SUPERVISORS OF COUNTY OF NEVADA

Court of Appeal, Third District, California.

HANSEN BROTHERS ENTERPRISES, Plaintiff and Appellant, v. BOARD OF SUPERVISORS OF the COUNTY OF NEVADA et al., Defendants and Respondents.

No. C017070.

Decided: November 15, 1994

The Diepenbrock Law Firm and Mark D. Harrison, Sacramento, for plaintiff and appellant. Harold E. Degraw, Nevada City, for defendants and respondents.

In response to a law requiring mines to have reclamation plans, the owner of a mine asked the county to approve a plan based on substantial future increases in mining activities. The county declined because the property was not zoned for mining and the contemplated operations were more than those which the owner had a prior vested right to continue, despite the zoning ordinance, as a legal nonconforming use. The owner petitioned for a writ of administrative mandate to require the county to approve the plan. The trial court denied the petition. We affirm and hold a property owner with the vested right to continue mining as a nonconforming use may not substantially intensify mining operations without acquiring a use permit from the county.

FACTS AND PROCEDURE

Hansen Brothers Enterprises (Hansen Brothers) owns approximately 67 acres of property along the Bear River. The property consists of the riverbed, adjacent hills, and a flat yard. Sixty acres of the property is in Nevada County, and seven acres lies across the river in Placer County. The property is called Bear's Elbow Mine. Hansen Brothers uses the property for aggregate mining and processing and has done so since it acquired the property in 1954. The mine was in operation for eight years before Hansen Brothers bought it.

Between 1955 and 1989, Bear's Elbow Mine produced 209,000 cubic yards of aggregate, 44,700 from the Nevada County side. Average annual yield for the 34 years of operation is 6,200 cubic yards total, 1,300 from the Nevada County side. There were large volumes removed from the property; however, their main source was renewable river deposits in the riverbed. In recent years this supply has dwindled because a dam was constructed upstream. While minimal quarrying was done on the hillsides, there has been no such quarrying in years. Fifteen-foot-tall trees have overgrown the previously quarried areas.

In 1954, the Nevada County Board of Supervisors (the Board) adopted zoning ordinances which did not provide for mining on the Hansen Brothers property. However, the mine remained in operation as a legal nonconforming use under what today is Article 29, section L–II 29.2 of the county's Development Code. This section provides:

"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, may continue as follows:

"A. No such use shall be enlarged or intensified. Nor shall any such use be extended to occupy a greater area of land than that occupied at the time of the adoption of this Ordinance. Nor shall any such use be moved in whole or in part to any other portion of the lot or parcel of land occupied at the time of the adoption of this Chapter or amendment thereto.

"B. If the nonconforming use is discontinued for a period of one hundred eighty (180) days or more, any following use shall be in conformity with all applicable requirements of this Chapter."

In 1975, the Surface Mining and Reclamation Act (SMRA) was passed in California. (Pub.Resources Code, § 2710 et seq.) The SMRA required mining operators, as a condition to continued operations, to submit a reclamation plan to the relevant lead agency for approval. (See Pub.Resources Code, § 2770.) The lead agency in this case is the county, represented by the Board. (See Pub.Resources Code, § 2728.) The SMRA requires mining operators to obtain a use permit unless the operator had a vested right to conduct the mining prior to 1976 and the operation has not substantially changed. (Pub.Resources Code, §§ 2770, subd. (a); 2776.) The "vested right" referred to in section 2776 of the Public Resources Code is the right, protected by due process concerns, to continue the use existing at the time a zoning ordinance is passed even though the ordinance does not allow such use. (See Livingston Rock etc. Co. v. County of L.A. (1954) 43 Cal.2d 121, 126, 272 P.2d 4 (Livingston Rock).)

To comply with the SMRA, Hansen Brothers prepared a reclamation plan for Bear's Elbow Mine and submitted it to Nevada County. Claiming the vested right to mine both the riverbed and the hillsides, Hansen Brothers included mining operations over the entire 60–acre Nevada County parcel in its plan for the next 100 years or more. It proposed to remove 5,000,000 cubic yards of materials, ranging anywhere from 5,000 to 250,000 cubic yards per year and leaving 500,000 cubic yards of waste. Where mining from the hillsides has been abandoned in recent years, Hansen Brothers proposed to excavate and extract virtually all of them to a maximum anticipated depth of 350 feet.

The reclamation plan represented a major change both in volume of materials and location of the mining efforts. For more than three decades, from 1955 to 1989, Hansen Brothers mined a total of 44,700 cubic yards of aggregate from the Nevada County portion of Bear's Elbow Mine. This amounted to 1,300 cubic yards annually. The plan proposed extraction of up to 250,000 cubic yards per year, a possible 200–fold increase. While most of the aggregate was taken from Placer County and virtually all of it was removed from the riverbed, the plan proposed extraction mostly from the hillsides in Nevada County.

After review by the planning commission, the Board considered the reclamation plan. It made no findings concerning the mining activities in the riverbed, but it found Hansen Brothers abandoned the hillside quarrying for more than 180 days. In making this finding, the Board concluded the storage of materials previously extracted from the hillsides was insufficient to constitute continuance of the hillside mining operation. The Board also found the reclamation plan contemplated an enlargement and intensification of the mining operation far beyond Hansen Brothers's vested rights. Based on these findings, the Board refused to approve the reclamation plan and returned it to Hansen Brothers for revision and resubmission. The Board noted Hansen Brothers would need a conditional use permit to conduct the operations proposed in the reclamation plan.

Asserting it had a vested right to conduct the mining operation contemplated by the reclamation plan, Hansen Brothers filed a petition for writ of administrative mandate (Code Civ.Proc., § 1094.5) and complaint for damages, injunctive relief, and declaratory relief. The parties recognized a determination on the petition for writ of administrative mandate would resolve the major issue in the case concerning vested rights. Accordingly, they stipulated to and the trial court approved a bifurcation of the petition from the remainder of the proceedings.

The trial court heard the petition for writ of administrative mandate and issued a statement of decision denying it. The court agreed with the Board that (1) Hansen Brothers abandoned the hillside mining operation and (2) the reclamation plan contemplated "a substantial expansion and intensification of any previous use of the property and a substantial change in operations." To facilitate finality, Hansen Brothers stipulated to dismissal of the remaining causes of action in the complaint (see Connolly v. County of Orange (1992) 1 Cal.4th 1105, 1111, 4 Cal.Rptr.2d 857, 824 P.2d 663), and the court entered judgment. Hansen Brothers appeals.

The parties agree the facts are undisputed. Accordingly, we need only determine the legal effect of those facts. (Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal.3d 52, 75, 227 Cal.Rptr. 667, 720 P.2d 15.)

DISCUSSION

Enactment of zoning ordinances is a legitimate exercise of the police power. (Livingston Rock, supra, 43 Cal.2d at p. 126, 272 P.2d 4.) Courts may not diminish the effect of a zoning ordinance unless it is arbitrary and unreasonable. (Beverly Oil Co. v. City of Los Angeles (1953) 40 Cal.2d 552, 560, 254 P.2d 865 (Beverly Oil).) If a zoning ordinance impairs the vested right in an existing use of property, considerations of due process come into play. In some, although not all, cases, the property owner's due process right to continued use of the property overcomes the police power exerted in the zoning ordinance. (See id. at p. 557, 254 P.2d 865 for discussion of interplay between due process rights and police power.)

To avoid doubt as to constitutionality, zoning ordinances often include provisions permitting continued nonconforming use of the property by an owner already engaged in such use at the time the ordinance was adopted. (Livingston Rock, supra, 43 Cal.2d at p. 127, 272 P.2d 4.) This type of exception to the zoning ordinance, however, generally prohibits expansion or intensification of the nonconforming use and provides for expiration of the exception if the owner abandons the nonconforming use. (See Sabek, Inc. v. County of Sonoma (1987) 190 Cal.App.3d 163, 166–168, 235 Cal.Rptr. 350 and cases cited therein.)

The spirit of zoning ordinances and accompanying provisions allowing continued nonconforming uses is to restrict, not increase, the nonconforming use. (Edmonds v. County of Los Angeles (1953) 40 Cal.2d 642, 651, 255 P.2d 772.) Accordingly, courts generally sustain restrictions on extension or enlargement of a nonconforming use, thereby enforcing the zoning ordinance and upholding the police power. (County of San Diego v. McClurken (1951) 37 Cal.2d 683, 686–687, 234 P.2d 972 (McClurken).)

For example, in McClurken, the defendant used property within the plaintiff county for storage of paint, lumber, steel beams, fuel, and other items and did some preliminary grading for permanent structures. (37 Cal.2d at p. 685, 234 P.2d 972.) The fuel was stored in movable tanks. (Id. at p. 687, 234 P.2d 972.) The plaintiff county enacted a zoning ordinance, zoning part of the subject property as residential, but allowed continuance of the defendant's use of the property under a provision permitting uses which were nonconforming when the ordinance was enacted to be continued. (Id. at pp. 686–687, 234 P.2d 972.) Thereafter, the defendant built four permanent fuel storage tanks on the residentially-zoned portion of the property, increasing the fuel storage capacity on the property by more than five times. (Id. at p. 687, 234 P.2d 972.)

The county brought an action to compel the defendant to remove the nonconforming fuel tanks. (McClurken, supra, 37 Cal.2d at p. 684, 234 P.2d 972.) Judgment was entered for the defendants, but the Supreme Court reversed. (Id. at pp. 684, 692, 234 P.2d 972.) It held: “Such a formidable expansion can hardly be viewed as a mere continuance of the nonconforming use consisting of the intermittent storage of lumber and scrap metal, preliminary grading, steel beam storage, or even the use of movable tanks. [The new permanent tanks] constitute an unwarranted enlargement of that nonconforming use.” (Id. at pp. 687–688, 234 P.2d 972.)

In a mining operation, the relationship between the vested right to mine on the property and the restriction on expansion of a zoning ordinance presents unique problems because the mine is a diminishing asset. (McCaslin v. City of Monterey Park (1958) 163 Cal.App.2d 339, 349, 329 P.2d 522.) “The very nature and use of an extractive business contemplates the continuance of such use of the entire parcel of land as a whole, without limitation or restriction to the immediate area excavated at the time the ordinance was passed. A mineral extractive operation is susceptible of use and has value only in the place where the resources are found, and once the minerals are extracted it cannot again be used for that purpose.” (Ibid.)

In McCaslin, the plaintiff, owner of 70 acres, mined decomposed granite as an existing use when the city enacted a zoning ordinance which did not allow mining on the subject property. (163 Cal.App.2d at p. 344, 329 P.2d 522.) The zoning ordinance temporarily permitted preexisting nonconforming uses, but prohibited expansion of such uses. (Id. at pp. 344–345, 329 P.2d 522.) An amendment to the zoning ordinance singled out the plaintiff's mining operations and prohibited it as a public nuisance. (Id. at p. 345, 329 P.2d 522.)

The plaintiff sought a judicial declaration the zoning ordinance was unconstitutional and void as to him, and the city cross-complained seeking an injunction on further mining. (McCaslin, supra, 163 Cal.App.2d at pp. 345–346, 329 P.2d 522.) The trial court held in favor of the plaintiff, finding he had a vested right to continue his mining operation. (Id. at p. 346, 329 P.2d 522.) On appeal, the city complained the trial court failed to apply the provision prohibiting expansion of nonconforming uses. Even if allowed to continue mining, argued the city, the plaintiff was limited to further expansion of the portion of the property already excavated. (Id. at p. 349, 329 P.2d 522.)

The Court of Appeal rejected the city's reasoning. It held the entire tract fell within the exemption of preexisting uses from the effect of the zoning ordinance. (McCaslin, supra, 163 Cal.App.2d at p. 349, 329 P.2d 522.) To prohibit mining of the entire tract, reasoned the court, would constitute an unconstitutional taking of property without due process of law. (Ibid.)

Hansen Brothers asserts the holding in McCaslin mandates reversal of the determination it did not have a vested right to continue mining operations as reflected in the reclamation plan. It attempts to equate the mining operation in McCaslin with its own and thereby obtain the benefit of the McCaslin holding that it is entitled to mine the entire property as a vested right.

The dispositive difference between McCaslin and this case, however, is the absence of any indication the plaintiff in McCaslin intended to intensify the mining operation. There is no indication he desired to do anything but maintain the status quo. Here, the reclamation plan proposes mining of 5,000,000 cubic yards of aggregate over the next 100–or–so years, at a possible peak production of 250,000 cubic yards in but a single year, even though the mine produced only 209,000 cubic yards in more than three decades spanning from 1955 to 1989. In addition, the plan proposed to extract the nonrenewable hillsides instead of the renewable riverbed theretofore exploited. Such a formidable intensification of use is not addressed in McCaslin, but in McClurken (the fuel storage tank case) an analogous intensification was held to go beyond the vested right to continue a nonconforming use. (See McClurken, supra, 37 Cal.2d at pp. 688–689, 234 P.2d 972.)

Although there may exist a logical argument extending McCaslin to give Hansen Brothers the right to mine over the next 100 years as planned, this argument extends logic beyond the limits of common sense. Due process does not support and common sense does not sustain an ambitious intensification of Hansen Brothers's nonconforming mining operations. Simply put, due process requires the government to allow the company to continue in its prior beneficial use of the land, no more. The zoning ordinance, an exercise of the police power, effectively freezes the right to use the land in the nonconforming way at its present level and then progressively prohibits uses that are abandoned.

The constitutional mandate and the only justification for allowing a landowner to use the land in ways prohibited by a zoning ordinance is that government, in determining appropriate land uses, cannot, in most cases, deprive the landowner of its present use. Hansen Brothers's advocacy here loses sight of the foundation of McCaslin and all other nonconforming use cases. Due process does not give license to vastly intensify a nonconforming use. Instead, the zoning ordinance, under command of due process, indulges the nonconforming use's existence while tolerating no expansion.

The permissible limitation of nonconforming uses made under vested rights is reflected in the municipal ordinance applied by the Board here. “No [nonconforming] use shall be enlarged or intensified.” (Nevada County Development Code, art. 29, § L–II 29.2, subd. (a).)

Hansen Brothers contends it is improper to assess the character of the mining operation by the volume of aggregate extracted because the operation must be allowed to fluctuate with market demands. It denies such fluctuation is "intensification" or "substantial change." While we grant small fluctuations may not compromise the vested right, the intensification contemplated in Hansen Brothers's reclamation plan exceeds the vested right. The use, not the intended use, is the measure by which exception to the zoning ordinance works. That Hansen Brothers intends to increase its operation as the market demands does not bring it within the vested right exception to enforcement of the zoning ordinances. "The intention to expand the business in the future does not give [Hansen Brothers] the right to expand a nonconforming use." (McClurken, supra, 37 Cal.2d at p. 690, 234 P.2d 972.) "The purpose of the landowner in purchasing the property must yield to the public interest in the enforcement of a comprehensive zoning plan." (Ibid.)

Our distinguished colleague denies an increase in mining activities can be an intensification of a nonconforming use beyond the vested rights, not even when an owner who previously engaged in very limited and renewable aggregate removal from a small part of the property now proposes a possible 200–fold increase in extraction, excavating the entire Nevada County area, which was previously barely touched, to a depth of 350 feet. As long as it was a mining operation before the zoning ordinance was adopted, he reasons, the government can do nothing to prevent intensification of the extraction without paying the owner. While we may agree with much of his philosophy, we do not write on a clean slate. Our position in the judicial hierarchy compels us to consider this case in light of precedent that controls either directly or by compelling analogy. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937; see also County of Santa Clara v. Superior Court (1992) 2 Cal.App.4th 1686, 1691, fn. 3, 5 Cal.Rptr.2d 7.)

Generally, intensification of a previous use, though intended by the property owner at the time the zoning ordinance was passed, is not part of the owner's vested rights. (McClurken, supra, 37 Cal.2d at pp. 689–690, 234 P.2d 972.) The dissent proposes no authority to except mining from this principle. "The purpose of a zoning law is to regulate the use of land." (Morehart v. County of Santa Barbara (1994) 7 Cal.4th 725, 750, 29 Cal.Rptr.2d 804, 872 P.2d 143, italics in original.) The ordinance in question here only regulates the use of land beyond the use to which the land was put before enactment of the ordinance. Thus, it does not interfere with vested rights and does not constitute a taking for which the government must provide compensation. (See Livingston Rock, supra, 43 Cal.2d at p. 127, 272 P.2d 4.)

If undertaken as set forth in the reclamation plan, this mining operation would go beyond what due process requires and the local ordinance and state law allow as a nonconforming use. The intensification of the mining operation represented in the plan is unjustified, using as a reference point the scope of the operation before the zoning through the time the plan was submitted to the Board.

The intensification of mining operations contemplated by the reclamation plan was only one reason the Board denied approval of the plan. To this point, we have not discussed the abandonment of the hillside quarrying or the change in mining from the river deposits in the riverbed to the hillsides. We need not consider these other reasons given by the Board for denial because the intensification of operations alone exceeds the vested right to conduct the mining operation as planned. Since there was no right to conduct the mining operation as planned, the Board validly denied approval, requiring Hansen Brothers to either obtain a conditional use permit to conduct the operation as planned or change the plan to reflect the scope of its vested right to continue the mining operation.

DISPOSITION

The judgment is affirmed.

The Board denied approval of Hansen Brothers' reclamation plan on two bases: (1) increased production and (2) excavation on the hillside. The majority addresses only the first, concluding the substantial increase contemplated in the reclamation plan exceeds any allowable fluctuation in the vested right. I

would hold the Board may not apply the zoning ordinance to limit the Hansen Brothers' mining operations to historic levels without the payment of just compensation for the value of the property thereby taken. For the guidance of the parties on remand, I would also address the second basis as well. In my view, Hansen Brothers' vested right to extract aggregate is not limited to the river bed but includes any portion of the property containing aggregate. I would therefore hold the Board may not apply the zoning ordinance to prohibit mining in any part of the property without the payment of just compensation for the value of property thus taken.

I

The Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." This provision is applicable to the states by virtue of the Fourteenth Amendment. (Keystone Bituminous Coal Assn. v. DeBenedictis (1987) 480 U.S. 470, 481 fn. 10, 107 S.Ct. 1232, 1240 fn. 10, 94 L.Ed.2d 472, 486 fn. 10.) The California Constitution also prohibits the deprivation of "life, liberty, or property" without due process. (Cal. Const., art. I, § 7, subd. (a).)

Twentieth Century history confirms the wisdom of the solicitude for property rights enshrined in the Bill of Rights. "[I]n a free government almost all other rights would become utterly worthless if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature and the rulers." (Joseph Story, Commentaries on the Constitution of the United States (Little, Brown & Co. 1891) Vol. 2, § 1790, pp. 568–570.) Justice Story's nineteenth century dictum prefigured the monstrous tyrannies of the century to follow.

The just compensation clause is bound up with the concept of "natural rights," including liberty and property, which exist independent of government. (Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (Harvard Univ. Press 1985) pp. 5–6.) It is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (Armstrong v. United States (1960) 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554, 1561.)

Despite the unambiguous constitutional command, the protection of property interests mandated by the just compensation clause began to erode before the ink on the Bill of Rights had dried. From the outset, the judiciary demonstrated a marked reluctance to invoke the provision in the face of popular social legislation perceived as addressing the transient ills of the day. The intent of the framers was initially subverted by limiting the clause to cases of actual physical appropriation of property. (See Mugler v. Kansas (1887) 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205.) In time, this approach was rejected by Justice Holmes, who ventured that "property may be regulated to a certain extent, [but] if regulation goes too far it will be recognized as a taking." (Emphasis added; Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322, 326.) Alas, the courts still refused to recognize regulatory takings, interpreting Justice Holmes's limitation, expressed as "too far," to encompass infinity. (See, e.g., New State Ice Co. v. Liebmann (1932) 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747; United States v. Carolene Products Co. (1937) 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234; Goldblatt v. Hempstead (1962) 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130; Penn Cent. Transp. Co. v. City of New York (1978) 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631; Keystone Bituminous Coal Assn. v. DeBenedictis, supra, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472.)

These later decisions betray adherence to an unprincipled dual standard for the protection of property and liberty interests, relegating property rights to the "legal dust bin." (James Oakes, 'Property Rights' in Constitutional Analysis Today, 56 Wash.L.Rev. 583, 608; James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (Oxford Univ. Press 1992) (hereafter Ely) 133–134.) That dichotomy mocks the manifest intent and understanding of the framers, immanent in the Bill of Rights, that liberty and property rights are closely related and the protection of property is essential to the enjoyment of liberty. (Lynch v. Household Finance Corp. (1972) 405 U.S. 538, 552, 92 S.Ct. 1113, 1121, 31

L.Ed.2d 424, 435; Ely, at p. 134.) Over two hundred years ago, James Madison wrote: "Government is instituted no less for protection of the property, than of the person, of individuals." (The Federalist, No. 54, at p. 369 (Heritage Press 1945).)

Recently there has been a modest reawakening to the fundamental principles underlying the just compensation clause. In cases such as Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677, Lucas v. So. Carolina Coastal Council (1992) 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, and Dolan v. City of Tigard (1994) 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304, the court has stated no more than the obvious: that government regulation of property which does not actually further its stated purpose (Nollan and Dolan) or which renders property commercially worthless (Lucas) is a taking for which compensation is required.[1]

In concluding Hansen Brothers may be prohibited from expanding its business beyond the historic norm, the majority misapprehends the effect of the just compensation clause on a mineral extraction business. This case is not about whether the Board may prohibit the expansion of mining operations on the Hansen Brothers' property. For purposes of this appeal, we may assume the Board's legislative power is broad enough not only to prohibit expansion but to shut down the operation altogether. However, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (Pennsylvania Coal Co. v. Mahon, supra, 260 U.S. at p. 416, 43 S.Ct. at p. 160, 67 L.Ed. at p. 326.)

Were I writing on a clean slate, I would conclude that, except for cases of nuisance affecting the property rights of others, due process requires compensation for any public restriction on any lawful uses of private property, both current and prospective. I can conceive of no principled reason why the burden of all restrictions on private property for the benefit of the public should not be borne by the public.

Yet it has long been accepted legal orthodoxy that adoption of a zoning ordinance may prohibit certain uses of private property without payment of just compensation. (See Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, 47 S.Ct. at 114, 71 L.Ed. 303; Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 Cal.2d 515, 20 Cal.Rptr. 638, 370 P.2d 342; Beverly Oil Co. v. City of Los Angeles (1953) 40 Cal.2d 552, 254 P.2d 865; Edmonds v. County of Los Angeles (1953) 40 Cal.2d 642, 255 P.2d 772; Rehfeld v. City and County of San Francisco (1933) 218 Cal. 83, 21 P.2d 419.) And while an existing, nonconforming use may not be so restricted (see Livingston Rock & Gravel Co. v. County of Los Angeles (1954) 43 Cal.2d 121, 126, 272 P.2d 4), a proposed expansion of that use may be prohibited, in the case of commercial property, where it would effect a change in the basic nature of the business (4 Rathkopf, The Law of Zoning and Planning (4th ed.) § 51A.04, p. 51A–49; 6 Powell on Real Property, ¶ 871[3][c][ii]).

In concluding Hansen Brothers may not expand its mining operation as contemplated in the reclamation plan, the majority apparently view the proposed increase as a change in the fundamental nature of the business. They rely primarily on San Diego County v. McClurken (1951) 37 Cal.2d 683, 234 P.2d 972, in which the court concluded erection of four permanent storage tanks on a parcel of property, increasing storage capacity five-fold, where only movable tanks had been used for intermittent storage in the past, was not a continuation of an existing use and could be prohibited consistent with due process. Other cases in which the result turns on a perceived change in the fundamental nature of the business have also involved erection or expansion of permanent structures. (See, e.g., Beverly Oil Co. v. City of Los Angeles, supra, 40 Cal.2d 552, 254 P.2d 865 [addition of oil wells to existing field]; Edmonds v. County of Los Angeles, supra, 40 Cal.2d 642, 255 P.2d 772 [increase in trailer park from 20 to 50 units requiring expansion of utility houses]; Rehfeld v. City and County of San Francisco, supra, 218 Cal. 83, 21 P.2d 419 [extension of a grocery store 22 feet backward onto a vacant lot].)

I am aware of no paramount decisional authority in which a change in the nature of a mineral extraction business, wrought solely by an increase in production, warranted restriction as a nonconforming use.[2] This is not surprising. The same general rules that might be applied to more typical businesses are not readily transferable to a mining operation. "By its very nature, quarrying involves a unique use of land.

As opposed to other nonconforming uses in which the land is merely incidental to the activities conducted upon it, quarrying contemplates the excavation and sale of the corpus of the land itself as a resource." (Syracuse Aggregate Corp. v. Weise (1980) 51 N.Y.2d 278, 434 N.Y.S.2d 150, 153–154, 414 N.E.2d 651.) Since an extractive business involves a wasting asset, it has a finite life. Whether all of the minerals are extracted in a brief span or over a longer period of time, the total amount extracted is the same.

An increase in production in an extractive business is not a change in the basic nature of the business. The nature of the business is to extract as much of the available minerals as may profitably be marketed and as surrounding circumstances will permit. Whether all of the available minerals are extracted in one year or one hundred years is immaterial. In fact, under certain circumstances, it might well be in the public's interest if the rate of extraction were increased, since this would hasten the eventual termination of the nonconforming use. In my view, the Board erred in denying approval of the reclamation plan on the basis of the proposed increase in production.

II

The Board also erred in concluding the hillside may not be mined. As explained in McCaslin v. City of Monterey Park (1958) 163 Cal.App.2d 339, 349, 329 P.2d 522: "The very nature and use of an extractive business contemplates the continuance of such use of the entire parcel of land as a whole, without limitation or restriction to the immediate area excavated at the time the ordinance was passed." The great weight of authority from other jurisdictions is in accord. (See, e.g., Gibbons & Reed Co. v. North Salt Lake City (1967) 19 Utah 2d 329, 431 P.2d 559, 564; Moore v. Bridgewater Township (1961) 69 N.J.Super. 1, 173 A.2d 430; County of DuPage v. Elmhurst–Chicago Stone Co. (Ill.1960) 18 Ill.2d 479, 165 N.E.2d 310, 313; Hawkins v. Talbot (1957) 248 Minn. 549, 80 N.W.2d 863, 865–866; Cheswick v. Bechman (1945) 352 Pa. 79, 42 A.2d 60, 62; contra, Flanagan v. Hollis (1972) 112 N.H. 222, 293 A.2d 328; Wayland v. Lee (1950) 325 Mass. 637, 91 N.E.2d 835.)

If the Board's position on this issue is upheld, it would leave no principled basis to prevent the Board also from prohibiting mining further up or down the river or at greater depths than previously attained. In effect, the mining operation would have to cease immediately because only property previously used, i.e., where the ore had already been extracted, could be mined. The absurdity of such a result is self-evident.

As explained in Syracuse Aggregate Corp. v. Weise (1980) 51 N.Y.2d 278, 286, 434 N.Y.S.2d 150, 153–154, 414 N.E.2d 651, 655: "By its very nature, quarrying involves a unique use of land. As opposed to other nonconforming uses in which the land is merely incidental to the activities conducted upon it, quarrying contemplates the excavation and sale of the corpus of the land itself as a resource. Depending on customer needs, the land will be gradually excavated in order to supply the various grades of sand and gravel demanded. Thus, as a matter of practicality as well as economic necessity, a quarry operator will not excavate his entire parcel of land at once, but will leave areas in reserve, virtually untouched until they are actually needed.

"It is because of the unique realities of gravel mining that most courts which have addressed the particular issue involved herein have recognized that quarrying constitutes the use of land as a 'diminishing asset'. Consequently, these courts have been nearly unanimous in holding that quarrying, as a nonconforming use, cannot be limited to the land actually excavated at the time of enactment of the restrictive ordinance because to do so would, in effect, deprive the landowner of his use of the property as a quarry." (Citations omitted.)

In my view, Hansen Brothers has a constitutional right to pursue its mining operation on any part of its property and to increase production as desired, consistent with the law of nuisance.

Even assuming that I would disagree with the majority's analysis of the hillside issue, their failure to address the issue is unfortunate. As a result of the majority decision, Hansen Brothers must submit a new reclamation plan. Even if the new plan does not contain a proposed increase in production, there is no reason to believe Hansen Brothers will abandon its plan to mine the hillside and the matter will be

back before the courts on one of the very issues now before us. The question should be resolved here and now so that further court proceedings on that issue may be averted.

I would reverse the judgment and remand with directions to the trial court to issue a writ of mandate compelling the Board to approve Hansen Brothers' reclamation plan.

FOOTNOTES

1. Dolan held that a forced public dedication in exchange for a permit to expand a business on private property must be roughly proportional to the impact of the proposed construction on public interests. In dissent, Justice Stevens, with no apparent sense of irony, lamented that "property owners have surely found a new friend today." (Dolan v. City of Tigard, supra, 512 U.S. at p. ––––, 114 S.Ct. at p. 2326, 129 L.Ed.2d at p. 329.) The irony is that even as Justice Stevens was deploring the high court's rebuff of government's attempt to coerce property owners, lovers of freedom were rejoicing that millions of people the world over had finally been rescued from coercive government or, to use Justice Stevens's phrase, had "found a new friend." It is paradoxical that in the world's oldest democracy there is significant support for the principle that property rights are subordinate to the coercive whims of government.

2. Although the court in Beverly Oil Co. v. City of Los Angeles, supra, 40 Cal.2d 552, 254 P.2d 865 upheld a zoning ordinance prohibiting the owner of property containing oil wells from increasing the number of wells or extending existing wells to a greater depth in order to tap the reserves at lower levels, there was no indication the owner desired to increase production. The court did not address the issue of just compensation but instead noted the owner received reciprocal benefits from the ordinance because surrounding owners were not permitted to sink wells and, as oil is a migratory substance, the plaintiff could extract oil from beneath surrounding land. (40 Cal.2d at p. 559, 254 P.2d 865.) The court concluded the owner failed to prove there had been an impairment of its property interests. (Ibid.)

NICHOLSON, Associate Justice.

BLEASE, J., concurs.

WILLIAM CALVERT et al., Plaintiffs and Appellants,
v.
COUNTY OF YUBA et al., Defendants and Respondents; WESTERN AGGREGATES LLC, Real Party in Interest and Appellant.

C047857

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

145 Cal. App. 4th 613; 51 Cal. Rptr. 3d 797; 2006 Cal. App. LEXIS 1918; 2006 Daily Journal DAR 15903

December 5, 2006, Filed

NOTICE: As modified Jan. 3, 2007.

SUBSEQUENT HISTORY: Modified by *Calvert v. County of Yuba, 2007 Cal. App. LEXIS 8 (Cal. App. 3d Dist., Jan. 3, 2007)*

PRIOR HISTORY: [***1] APPEAL from a judgment of the Superior Court of Sacramento County, No. 00CS01434, Raymond M. Cadei, Judge.

SUMMARY: CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted summary adjudication to adjacent landowners on a challenge to a county's determination that a mining company had vested rights under the Surface Mining and Reclamation Act of 1975 (SMARA) (*Pub. Resources Code, § 2710 et seq.*). The trial court ruled against the adjacent landowners' claims seeking enforcement of SMARA. The county made the vested rights determination under *Pub. Resources Code, § 2776*, without notice and without a hearing. (Superior Court of Sacramento County, No. 00CS01434, Raymond M. Cadei, Judge.)

The Court of Appeal affirmed the judgment as modified to vacate certain remand conditions and to impose conditions requiring the mining company to either prove its claim of vested rights in a public adjudicatory hearing or obtain a permit to conduct surface mining based on a public adjudicatory hearing. The court held that the county's determination violated the procedural due process requirements under *U.S. Const., 5th Amend.*, and *Cal. Const., art. I, § 7, subd. (a)*, of reasonable notice and an opportunity to be heard. The determination was adjudicative, not ministerial, because it encompassed factual issues that had to be resolved through the adjudicative exercise of judgment. Because the surface mining operation implicated the diminishing asset doctrine, the mining company had to show that the area it desired to excavate was clearly intended to be excavated at the time the permit requirement went into effect. The determination implicated significant or substantial deprivations of the adjacent landowners' property rights, and their settlement of claims against the mining company did not waive due process protections. The adjacent landowners were not entitled to a writ of mandate under *Pub. Resources Code, § 2716*, to enforce SMARA because there was no clear violation. Private enforcement actions are not authorized by *Pub. Resources Code, § 2774.1, subd. (g)*. (Opinion by Davis, J., with Blease, Acting P. J., and Hull, J., concurring.) [*614]

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Estoppel § 3--By Filing Legal Proceedings or Pleadings Therein--Inconsistent Positions in Litigation.--The principle of judicial estoppel forecloses a litigant from taking inconsistent positions that suit its purposes at different points in the litigation and that impinge on the integrity of the judicial process.

(2) Administrative Law § 89--Limitations on Availability of Judicial Review or Relief--Exhaustion of Administrative Remedies--Exceptions--Inadequate Remedies.--One need not exhaust inadequate remedies in order to challenge their sufficiency.

(3) Constitutional Law § 107--Procedural Due Process--Significant or Substantial Property Deprivation--Adjudicative Governmental Action.--The California and federal Constitutions prohibit the government from depriving persons of property without due process (*U.S. Const., 5th Amend.*; *Cal. Const., art. I, § 7, subd. (a)*). In line with this constitutional bedrock, an adjudicative governmental action that implicates a significant or substantial property deprivation generally requires the procedural due process standards of reasonable notice and opportunity to be heard. Legislative action generally is not governed by these procedural due process requirements because it is not practical that everyone should have a direct voice in legislative decisions; elections provide the check there. Ministerial action is generally not within this constitutional realm either. This is because ministerial decisions are essentially automatic based on whether certain fixed standards and objective measurements have been met.

(4) Mines and Minerals § 11--Operations--Surface Mining--Vested Rights.--Generally, for a nonconforming land use to be allowed to continue, the use must be similar to the use existing at the time the land use law became effective. Intensification or expansion of the use is prohibited. This general principle, however, does not apply neatly to surface mining operations. This is because, unlike other nonconforming uses in which the land is merely incidental to the activities conducted upon it, surface mining contemplates the excavation and sale of the land itself, and the excavated land is a diminishing asset that requires expanding the mining into nonexcavated areas to continue the land use. In this situation, California follows the diminishing asset doctrine. Under that doctrine, a vested right to surface mine into an expanded area requires the mining owner to show (1) part of the same area was being [*615] surface mined when the land use law became effective, and (2) the area the owner desires to surface mine was clearly intended to be mined when the land use law became effective, as measured by objective manifestations and not by subjective intent.

(5) Constitutional Law § 107--Procedural Due Process--Discretionary and Ministerial Functions.--Statutory policy, not semantics, forms the standard for segregating discretionary from ministerial functions.

(6) Constitutional Law § 107--Procedural Due Process--Adjudicatory Land Use Proceedings.--Adjudicatory land use decisions substantially affect the property rights of adjacent landowners may constitute property deprivations within the context of procedural due process, requiring reasonable notice and an opportunity to be heard for those landowners before the land use decision is made. Due process notice and hearing requirements are triggered only by governmental action which results in significant or substantial deprivations of property, not by agency decisions having only a de minimis effect on land. The property interests of adjacent landowners are at stake in such an adjudicatory land use proceeding, and procedural due process protections are therefore invoked.

(7) Estoppel § 20--Rights and Privileges Waivable--Constitutional Rights.--A waiver of a constitutional right requires a knowing and intentional relinquishment of that right, and such a waiver is disfavored in the law.

(8) Parties § 1.2--Standing--Injury of Sufficient Magnitude.--A party lacks standing if it lacks a real interest in the ultimate adjudication because it has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.

(9) Courts § 36--Prospective and Retroactive Decisions--Judicial Discretion--Factors Considered--Fairness and Public Policy.--Generally, judicial decisions are applied retroactively. But considerations of fairness and public policy may limit such application.

(10) Mines and Minerals § 11--Operations--Surface Mining--Vested Rights--Procedural Due Process.--The trial court properly granted summary adjudication to adjacent landowners who challenged a county's determination that a mining company had vested rights under the Surface Mining and Reclamation Act of 1975 (*Pub. Resources Code, § 2710 et seq.*) to mine aggregate. This determination, which was made [*616] without notice to adjacent landowners or to the public and without a hearing, violated procedural due process requirements of reasonable notice and an opportunity to be heard.

[7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 1043; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 73; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § § 984, 986, 949; 8 Witkin, Cal. Procedure, Extraordinary Writs, § 72.]

(11) Mandamus and Prohibition § 5--Conditions Affecting Issuance--Duty and Right to Performance.--For petitioners to obtain a traditional writ of mandate, they must show: (1) a clear, present and usually ministerial duty on the part of a public entity; and (2) a clear, present, and beneficial right on the petitioners' part to the performance of that duty.

(12) Mines and Minerals § 12--Actions and Proceedings--Surface Mining--Private Enforcement Not Contemplated.--The Legislature has created a comprehensive administrative scheme to enforce the Surface Mining and Reclamation Act of 1975, *Pub. Resources Code, § 2710 et seq.*, indicating that private enforcement is not contemplated.

(13) Mandamus and Prohibition § 9--Conditions Affecting Issuance--Effectiveness and Necessity--Action Already Performed.--A writ of mandate will not issue to compel an action that already has been performed.

COUNSEL: Jeffer, Mangels, Butler & Marmaro, Kerry Shapiro, Paul L. Warner and Melanie L. Tang for Real Party in Interest and Appellant Western Aggregates LLC.

Weinberg, Roger & Rosenfeld, David A. Rosenfeld, Christian L. Raisner, Theodore Franklin and M. Suzanne Murphy for Plaintiffs and Appellants William Calvert and Yuba Goldfields Access Coalition.

No appearance on behalf of Defendant and Respondent County of Yuba.

Bill Lockyer, Attorney General, Tom Greene, Chief Assistant Attorney General, Mary E. Hackenbracht, Assistant Attorney General and Russell B. Hildreth, Deputy Attorney General, for Defendants and Respondents Department of Conservation and State Mining and Geology Board.

JUDGES: Davis, J., with Blease, Acting P. J., and Hull, J., concurring.

OPINION BY: DAVIS [*617]

OPINION:

[**800] **DAVIS, J.**--This appeal involves the Surface Mining and Reclamation Act of 1975. (SMARA; *Pub. Resources Code, § 2710 et seq.*) Our principal conclusion is that if an entity claims a vested right pursuant to SMARA to conduct a surface mining operation that is [***2] subject to the diminishing asset doctrine, that claim must be determined in a public adjudicatory hearing that meets procedural due process requirements of reasonable notice and an opportunity to be heard. We give this conclusion limited retroactive effect. We shall affirm the judgment with certain modifications.

Background

The Legislature enacted SMARA in 1975 "to create and maintain an effective and comprehensive surface mining and reclamation policy." (*Pub. Resources Code, § 2712.*) n1 Through SMARA, the Legislature intended to: prevent or minimize adverse environmental effects and reclaim mined lands; encourage the production and conservation of minerals while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment; and eliminate residual hazards to the public health and safety. (*§ 2712, subds. (a)-(c).*)

n1 Hereafter, undesignated section references are to the Public Resources Code.

At the heart of [***3] SMARA is the general requirement that every surface mining operation have a permit, a reclamation plan, and financial assurances to implement the planned reclamation. (*§ 2770, subd. (a)*; *People ex rel. Dept. of Conservation v. El Dorado County (2005) 36 Cal.4th 971, 984* [**801] *[32 Cal. Rptr. 3d 109, 116 P.3d 567]* (*El Dorado*).)

Under *section 2776 of SMARA*, though, "[n]o person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to [SMARA] as long as the vested right continues and as long as no substantial changes are made in the operation ... . A person shall be deemed to have vested rights if, prior to January 1, 1976, he or she has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary therefor." Notwithstanding a vested right to conduct surface mining operations, the two other basic requirements of SMARA--a reclamation plan and financial assurances--apply to operations conducted after January 1, 1976. (*§ § 2776, 2770, subds. (b),* [***4] *(c).*) [*618]

Recognizing the diverse conditions throughout the state, SMARA provides for "home rule." This means the local lead agency, usually a city or county, has primary responsibility to implement the provisions of SMARA. (*§ 2728*; *El Dorado, supra, 36 Cal.4th at p. 984.*) The State Mining and Geology Board (the Board), which is part of the Department of Conservation within the Resources Agency, may step into the shoes and assume the role of the local lead agency if the Board finds that the local agency has not been fulfilling its duties under SMARA. (*§ § 601, 660, 2774.4.*)

The action before us arises from the determination of Yuba County (County or the County) in May 2000 that Western Aggregates LLC (Western) has a vested right to mine "aggregate" (sand, gravel and rock for construction) from approximately 3,430 acres in the Yuba Goldfields. The Yuba Goldfields consists of approximately 10,000 acres bordering the Yuba River; it once had been mined for gold and now contains massive aggregate deposits resulting from the placer/hydraulic mining of gold dating to the 19th century.

County determined Western's vested rights after the superior court in a previous lawsuit [***5] (the *Gilt Edge* lawsuit) had concluded in 1999 that County's zoning authorization for surface mining in the Yuba Goldfields was not a proper substitute for a SMARA permit. After this lawsuit, County invited all mine operators, including Western, to apply for a vested rights determination pursuant to SMARA.

In February 2000, Western filed with County its vested rights submittal, consisting of a six-page cover letter, a 70-page memorandum of law and fact, and nearly 370 exhibits. In May 2000, County sent Western a determination letter. The letter stated that the community development director had found, based on Western's vested rights submittal and materials in County's files, that Western has a vested right to mine aggregate in the 3,430 acres of the Yuba Goldfields. This determination was made without notice to adjacent landowners or to the public, and without a hearing. (Western does not presently mine the total 3,430 acres, but is mining in roughly one-third of this area, apparently intending to move into unmined areas as mined areas are depleted of aggregate. Western also has its sights on about 5,000 additional acres in the Yuba Goldfields.)

Challenging the County's vested [***6] rights determination as to Western (and other mining operators), William Calvert and the Yuba Goldfields Access Coalition (collectively, Petitioners) sued the County, the state (including the Board and the Director of the Department of Conservation; collectively, the State) and Western (real party [**802] in interest). Calvert has lived on his ranch in the Yuba Goldfields since 1974 and owns property 300 feet from Western's property. The Yuba Goldfields Access Coalition is a nonprofit organization [*619] that includes Yuba County residents and taxpayers. The coalition seeks to open the Yuba Goldfields for public recreational use and establish environmentally sound uses of the Goldfields' natural resources and the Yuba River.

The operative pleading is the Petitioners' third amended complaint and petition for writ of mandate, which the trial court reorganized and clarified. All parties on appeal have accepted this reorganized and clarified pleading, and have used it as the centerpiece of their appeals. We will do likewise.

Petitioners' complaint and petition, as it pertains to Western, contains the following five reorganized causes of action: first--a claim against the County and the State to take [***7] enforcement action against Western for allegedly violating SMARA by operating without a permit or a valid reclamation plan, seeking as a remedy an injunction or a writ of mandate; second and third--direct actions against Western for violating SMARA by, respectively, not having a permit or vested rights and not having a valid reclamation plan, and seeking an injunction; fourth--a claim against the State that it abused its discretion by not enforcing SMARA and not taking over the functions of the County as the lead agency, and seeking a writ of mandate; and fifth--a claim that County violated due process requirements of notice and hearing in determining that Western has vested rights to mine the 3,430 acres, and seeking a writ of mandate to remand the matter for proper proceedings.

Western moved for summary adjudication or summary judgment, and Petitioners moved for summary adjudication. (*Code Civ. Proc., § 437c.*) The trial court granted Western summary adjudication on the first through

fourth causes of action, and granted Petitioners summary adjudication on the fifth. Given the ruling on the fifth cause of action, the trial court denied Western's motion [***8] for summary judgment as Western's motion did not dispose of all five causes of action. The cross-motions for summary adjudication did account for all five causes of action, though, and the trial court entered a judgment on this summary adjudication.

Western and Petitioners, in an appeal and a cross-appeal respectively, have appealed their losses here. The only mining operation involved in these appeals is Western's.

Discussion

1. *Fifth Cause of Action--Vested Rights Determination and Procedural Due Process*

We start with the fifth cause of action because it sets the stage for discussing the others. [*620]

On the fifth cause of action, as noted, Petitioners moved successfully for summary adjudication, the trial court finding that the County had violated procedural due process requirements of reasonable notice and hearing in determining that Western has vested rights to mine the 3,430 acres at issue in the Yuba Goldfields. (The parties have continued to use this 3,430-acre figure, although it may be overstated by 120 acres. We will use it as well, and express no view regarding the 120-acre issue.)

In its original summary adjudication order regarding this cause of action, [***9] the trial court issued a writ of mandate that vacated County's vested rights determination as to Western and remanded for further proceedings in compliance with procedural [**803] due process. Western then moved for clarification, noting that this order did not specify whether the County or the Board would conduct the remanded proceedings. In a modification to the order (carried into the judgment), the trial court remanded to the County for further proceedings, subject to the following three conditions: County was not required to hold a new vested rights proceeding; Western was not required to request one; and if County did hold such a proceeding, it had to satisfy procedural due process requirements of reasonable notice and opportunity to be heard. (The trial court's modified order had also noted that other administrative bodies were not foreclosed from determining Western's vested rights if legally authorized or required to do so.)

Western appeals from that portion of the judgment on the fifth cause of action that states that Western's vested rights must be determined pursuant to procedural due process requirements of reasonable notice and opportunity to be heard. Petitioners cross-appeal [***10] from the modified portion of this judgment setting forth the three remand-related conditions.

Before we tackle the merits of these claims, we must address several threshold issues tendered by Western.

First, Western claims we lack jurisdiction because Petitioners did not pray in their complaint for a remand for a public hearing on Western's vested rights determination, and did not specify in their notice of appeal that they were appealing the modified portions of the judgment as to the fifth cause of action. As Western acknowledges, however, Petitioners, in the operative complaint and petition, allege that County's vested rights determination was improperly made " 'without public notice' " and " 'without affording the public an opportunity to comment.' " A remand for a proper procedure that meets these requirements goes without saying. As for their notice of cross-appeal, Petitioners stated in part that they were appealing the portion of the judgment "incorporating the *Modified Orders* Granting Summary Adjudication [i.e., the remand-related three conditions regarding the fifth cause of action]." (Italics added.) [*621]

Next, Western asserts that Petitioners have abandoned their arguments [***11] regarding reclamation plan deficiencies. Not so. Those deficiencies have been a part of Petitioners' case since they filed their complaint and petition. In their brief on appeal, Petitioners define the nature of their action in the following terms: "This action seeks enforcement of SMARA as to a broad expanse of the Yuba Goldfields--in particular, the requirement that all surface mining operations be conducted pursuant to permit and that the permit be conditioned upon a valid reclamation plan ... approved by the lead agency."

As for its final complement of threshold contentions, Western argues that Petitioners are foreclosed from claiming procedural due process requirements as to the vested rights determination by the principles of judicial estoppel, statute of limitations and failure to exhaust administrative remedies. We take these in turn.

(1) The principle of judicial estoppel forecloses a litigant from taking inconsistent positions that suit its purposes at different points in the litigation and that impinge on the integrity of the judicial process. (*Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 181 [70 Cal. Rptr. 2d 96]*.) The problem for Western on this point is that [***12] the examples it cites of Petitioners' purported inconsistencies regarding their due process position show that Petitioners have *consistently* maintained this position *against Western*. For example, Petitioners moved to sever the issue of procedural due process with respect to [**804] vested rights from other issues, and Western opposed this motion on nonsubstantive grounds. Petitioners opposed Western's motion to join two other mining operators as indispensable parties, arguing that these two operators had entirely different mining operations from Western's. And Petitioners settled with operators other than Western even though vested rights of these operators had not been established in due process hearings.

(2) As for the statute of limitations, Western contends that Petitioners failed to meet the short statute of limitations under the California Environmental Quality Act. (CEQA; *§ 21000 et seq*.) County filed a notice that its vested rights determination as to Western--a ministerial determination, County maintained--was exempt from CEQA. However, Petitioners do not challenge the vested rights determination on CEQA grounds; therefore, the CEQA statute of limitations does not apply. In [***13] any event, as we shall see later, the vested rights determination here is not a ministerial determination under CEQA.

And, finally, there is a fundamental problem with Western's claim of Petitioners' failure to exhaust administrative remedies: The essence of Petitioners' fifth cause of action is that the administrative procedure the County used to determine Western's vested rights is constitutionally inadequate. As [*622] the state Supreme Court remarked in rejecting a similar claim, "[o]ne need not exhaust inadequate remedies in order to challenge their sufficiency." (*Horn v. County of Ventura (1979) 24 Cal.3d 605, 611 [156 Cal. Rptr. 718, 596 P.2d 1134]* (*Horn*).)

That brings us to the substance of Western's appeal involving the fifth cause of action: Is the vested rights determination regarding Western's surface mining operation as to the 3,430 acres subject to procedural due process requirements of reasonable notice and opportunity to be heard? Our answer: Yes.

To begin our analysis, we set forth some basic principles of how procedural due process applies generally to land use decisions.

There are three general types of actions that local government agencies take in land use [***14] matters: legislative, adjudicative and ministerial. (2 Longtin's Cal. Land Use (2d ed. 1987) § 11.10, p. 989 (Longtin's); see also *Horn, supra, 24 Cal.3d at pp. 612, 615-616*.) Legislative actions involve the enactment of general laws, standards or policies, such as general plans or zoning ordinances. (Longtin's, *supra*, pp. 989-990.) Adjudicative actions--sometimes called quasi-judicial, quasi-adjudicative or administrative actions--involve discretionary decisions in which legislative laws are applied to specific development projects; examples include approvals for zoning permits and tentative subdivision maps. (Longtin's, *supra*, p. 990.) Ministerial actions involve nondiscretionary decisions based only on fixed and objective standards, not subjective judgment; an example is the issuance of a typical, small-scale building permit. (*Ibid.*; see *Horn, supra, 24 Cal.3d at p. 616*; see also *Friends of Westwood, Inc. v. City of Los Angeles (1987) 191 Cal.App.3d 259, 271-272 [235 Cal. Rptr. 788]* (*Friends of Westwood*); *People v. Department of Housing & Community Dev. (Ramey) (1975) 45 Cal.App.3d 185, 193-194 [119 Cal. Rptr. 266]* [***15] (*Ramey*).)

(3) The state and federal Constitutions prohibit the government from depriving persons of property without due process. (*U.S. Const., 5th Amend.*; *Cal. Const., art. I, § 7, subd. (a)*.) In line with this constitutional bedrock, an adjudicative governmental action that implicates a significant [**805] or substantial property deprivation generally requires the procedural due process standards of reasonable notice and opportunity to be heard. (*Horn, supra, 24 Cal.3d at pp. 612-616*.) Legislative action generally is not governed by these procedural due process requirements because it is not practical that everyone should have a direct voice in legislative decisions; elections provide the check there. (*Id. at p. 613*; see Longtin's, *supra*, § 11.10, p. 990.) Ministerial action is generally not within this constitutional realm either. This is because [*623] ministerial decisions are essentially automatic based on whether certain fixed standards and objective measurements have been met. (*Horn, supra, 24 Cal.3d at pp. 615-616*.)

There is one more legal principle that plays a pivotal role in our analysis: the principle of vested rights. In light [***16] of the *state* and *federal constitutional takings clauses*, when zoning ordinances or similar land use

regulations are enacted, they customarily exempt existing land uses (or amortize them over time) to avoid questions as to the constitutionality of their application to those uses. (*Hansen Brothers Enterprises, Inc. v. Board of Supervisors (1996) 12 Cal.4th 533, 551-552 [48 Cal. Rptr. 2d 778, 907 P.2d 1324]* (*Hansen*).) Such exempted uses are known as nonconforming uses and provide the basis for vested rights as to such uses. (*Ibid.*)

(4) Generally, for a nonconforming land use to be allowed to continue, the use must be similar to the use existing at the time the land use law became effective. Intensification or expansion of the use is prohibited. (*Hansen, supra, 12 Cal.4th at p. 552*.) This general principle, however, does not apply neatly to surface mining operations. This is because, unlike other nonconforming uses in which the land is merely incidental to the activities conducted upon it, surface mining contemplates the excavation and sale of the land itself, and the excavated land is a " 'diminishing asset' " that requires expanding the mining into nonexcavated areas to continue the land [***17] use. (*Id. at pp. 553-556*.) In this situation, California follows the "diminishing asset" doctrine. Under that doctrine, a vested right to surface mine into an expanded area requires the mining owner to show (1) part of the same area was being surface mined when the land use law became effective, and (2) the area the owner desires to surface mine was clearly intended to be mined when the land use law became effective, as measured by objective manifestations and not by subjective intent. (*Id. at pp. 555-556*; see *id. at p. 576* (conc. opn. of Werdegar, J.).)

With these principles in mind, Western contends that its vested rights determination is ministerial. Petitioners counter that this determination is adjudicative and requires the procedural due process protections of reasonable notice and an opportunity to be heard for persons significantly affected by the determination. We agree with Petitioners.

We start with the SMARA statute on vested rights. *Section 2776* states as pertinent: "No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to [***18] [SMARA] as long as the *vested right continues* and as long as *no substantial changes* are made in the operation except in accordance with [SMARA]. A person shall be deemed to have vested rights if, [*624] prior to January 1, 1976, he or she has, in [**806] *good faith* and in reliance upon a permit or other authorization, if the permit or other authorization was required, *diligently commenced* surface mining *operations* and *incurred substantial liabilities* for work and materials *necessary therefor*." (Italics added.)

These italicized portions of *section 2776* encompass several factual issues that must be resolved through the adjudicative exercise of judgment rather than the ministerial (automatic, nondiscretionary) application of fixed standards and objective measurements.

A good example of this dichotomy is provided by a decision from this court, *Ramey*. (*Ramey, supra, 45 Cal.App.3d 185*.) In *Ramey*, we concluded that the approval of a mobilehome park construction permit was a discretionary act subject to CEQA rather than a ministerial act exempt from CEQA. (A ministerial decision under CEQA similarly involves only the use of fixed standards or objective [***19] measurements.) Although the approval process in *Ramey* involved a large number of "ministerial" decisions applying "fixed" design and construction specifications, there were other approval decisions where the standards were "relatively general": for example, " 'sufficient' " supply of lighting; "satisfactory" sewage disposal; "adequate" water supply; and " 'well-drained' " site. (*Ramey, supra, 45 Cal.App.3d at p. 193*; see also *Friends of Westwood, supra, 191 Cal.App.3d at pp. 270-271*.) These relatively general approval decisions did not have the agency, in ministerial fashion, " 'merely appl[ying] the law to the facts ... us[ing] no special discretion or judgment in reaching a decision.' " (*Mountain Lion Foundation v. Fish & Game Com. (1997) 16 Cal.4th 105, 117 [65 Cal. Rptr. 2d 580, 939 P.2d 1280]*.) Instead, these general approval decisions involved "relatively personal decisions addressed to the sound judgment and enlightened choice of the [agency]... . Inevitably they evoke[d] a strong admixture of discretion." (*Ramey, supra, 45 Cal.App.3d at p. 193*; see *Friends of Westwood, supra, 191 Cal.App.3d at p. 272*.)

The same can be said, [***20] and has been said, for *section 2776*'s issues of "substantial changes ... in the operation," and "in good faith ... diligently commenced ... operations and incurred substantial liabilities for work and materials necessary therefor." In construing *section 2776* in a 1976 opinion, the Attorney General concluded that determining "substantial change[s]" in operations and " 'substantial liabilities' " for work and materials constitute questions of fact which can only be determined on a case-by-case basis in a proper vested rights proceeding before the lead agency. (*59 Ops.Cal.Atty.Gen. 641, 643, 655-656 (1976)*; see also *Horn, supra, 24 Cal.3d at p. 614* [subdivision development approvals involve the application of general standards to specific parcels of real property; such governmental conduct, affecting the relatively few, is " 'determined by facts peculiar to the individual case' and is 'adjudicatory' in nature"].) [*625]

Furthermore, the vested rights determination here encompasses more than just these factual issues set forth in *section 2776*. Western's extractive surface mining operation implicates the diminishing asset doctrine. Consequently, Western [***21] must show that the area it desires to excavate was " 'clearly intended' " to be excavated--as measured by objective manifestations, not subjective intent--when the vested rights trigger of a new law was pulled. (Western concedes this triggering occurred when County's first mining regulation [**807] --a mining permit ordinance--became effective in April 1971.) (*Hansen, supra, 12 Cal.4th at p. 556*, italics omitted; see *id. at p. 576* (conc. opn. of Werdegar, J.).) Moreover, there are issues here regarding whether the alleged vested right has been "continu[ous]" (*§ 2776*), as the subject site has involved gold mining and not simply aggregate mining.

The sheer quantity and complexity of these factual issues illustrate why the government agency in *Hansen* held a public adjudicatory hearing--with testimony from nearby landowners--and made a findings-based determination regarding a diminishing asset claim of vested rights to mine aggregate on a 67-acre parcel of riverbed and adjacent land. (See *Hansen, supra, 12 Cal.4th at pp. 540-544, 545-546, fn. 9, 568*.) Bear in mind, we are dealing here with a diminishing asset claim of vested rights to mine aggregate on [***22] *3,430 acres* of river-related land, which is *more than five square miles* and *more than 50 times the size* of the area at issue in *Hansen*.

(5) *Ramey* noted, importantly, that "[s]tatutory policy, not semantics, forms the standard for segregating discretionary from ministerial functions." (*Ramey, supra, 45 Cal.App.3d at p. 194*.) SMARA's policy is to assure that adverse environmental effects are prevented or minimized; that mined lands are reclaimed to a usable condition; that the production and conservation of minerals are encouraged while giving consideration to recreational, ecological and aesthetic values; and that residual hazards to the public health and safety are eliminated. (*§ 2712*.) A public adjudicatory hearing that examines all the evidence regarding a claim of vested rights to surface mine in the diminishing asset context will promote these goals much more than will a mining owner's one-sided presentation that takes place behind an agency's closed doors.

A vested rights determination acts as the fulcrum in SMARA policy because it (or its analogue, a permit to surface mine) governs the coverage of the reclamation plan and, in turn, the financial [***23] assurances to implement the plan. (*§ § 2770, subds. (a)-(c), 2772, subd. (c)(5), (6)*; see *El Dorado, supra, 36 Cal.4th at p. 984* [permit, plan and assurances are the heart of SMARA].) A vested rights determination functions in the SMARA scheme as does a surface mining permit--it sets the tone for all that follows. Western concedes the law is settled that the issuance of such permits "is adjudicatory in nature and therefore subject to notice and hearing requirements." (*Hayssen v. Board* [*626] *of Zoning Adjustments (1985) 171 Cal.App.3d 400, 404 [217 Cal. Rptr. 464]* (*Hayssen*).) A similarity in function between permits and vested rights argues for a similarity in their issuance. Western asserts, though, that vested rights are to be distinguished from conditional permits such as surface mining permits. That is true. Vested rights, if established and continued, generally cannot be conditioned (although they can be limited in time--for example, through amortization of investment). (See *Hansen, supra, 12 Cal.4th at p. 552*.) This recognition, however, does not foreclose vested rights from being established in a basic procedure similar to [***24] that for such permits.

We conclude, then, that the determination of Western's vested rights claim to surface mine in the diminishing asset context presents an adjudicative rather than a ministerial determination.

The question remains whether this adjudicative determination implicates significant or substantial deprivations of property [**808] to trigger procedural due process protections. (*Horn, supra, 24 Cal.3d at pp. 612, 616*; *Scott v. City of Indian Wells (1972) 6 Cal.3d 541, 548-549 [99 Cal. Rptr. 745, 492 P.2d 1137]* (*Scott*); *Hayssen, supra, 171 Cal.App.3d at p. 404*.) We conclude it does.

(6) In *Horn* and *Scott*, our state Supreme Court emphasized that adjudicatory land use decisions--in those cases, approvals for significant development projects--which " 'substantially affect' " the property rights of adjacent landowners may constitute property " 'deprivation[s]' " within the context of procedural due process, requiring reasonable notice and an opportunity to be heard for those landowners before the land use decision is made. (*Horn, supra, 24 Cal.3d at pp. 615-616*; *Scott, supra, 6 Cal.3d at pp. 548-549*.) Due process [***25] "notice and hearing requirements are triggered only by governmental action which results in 'significant' or 'substantial' deprivations of property, not by agency decisions having only a de minimis effect on land." (*Horn, supra, at p. 616*.) "It is ... now settled law that the property interests of adjacent landowners are at stake in [such an adjudicatory] land use proceeding, and that procedural due process protections are therefore invoked." (*Hayssen, supra, 171 Cal.App.3d at p. 404*, citing *Scott, supra, 6 Cal.3d at p. 549*.)

Here, Western's vested rights claim involves mining aggregate on over 3,400 acres. Western presently mines on about 1,200 acres, so Western is claiming almost a threefold increase pursuant to vested rights. The mining at issue is extractive surface mining with an expansive appetite. This description itself is enough to envision significant environmental consequences and adverse effects to adjacent properties. As such, property owners adjacent to the proposed mining have significant property interests at stake. (*Horn, supra, 24 Cal.3d at p. 616*; *Aries Dev. Co. v. California Coastal Zone Conservation Com. (1975) 48 Cal.App.3d 534, 541 [122 Cal. Rptr. 315]* [***26] (*Aries*).) [*627]

Petitioner Calvert presents a typical example of the property deprivations at play for adjacent landowners. In the complaint and petition, Calvert, who owns a house and ranch land within 300 feet of Western's property, alleged that Western's mining operation exposed his property to dust, noise, and air, water and toxic pollution; furthermore, Western's operation has damaged at-risk species of chinook salmon and steelhead trout and made area roadways more dangerous. Calvert has adequately described a property deprivation "substantial" enough to require procedural due process protection. (See *Horn, supra, 24 Cal.3d at p. 615* [plaintiff there alleged sufficiently that the proposed development project would interfere with his property access and increase traffic congestion and air pollution].) Consequently, Calvert and the other property owners adjacent to Western's vested rights-claimed mining operation are entitled to reasonable notice and an opportunity to be heard in an evidentiary public adjudicatory hearing before that vested rights claim is determined. (*Horn, supra, 24 Cal.3d at pp. 612, 616*; *Scott, supra, 6 Cal.3d at pp. 548-549*; [***27] *Hayssen, supra, 171 Cal.App.3d at p. 404*; *Aries, supra, 48 Cal.App.3d at p. 541*.)

Pursuant to court questioning at oral argument, however, Western maintained [**809] that Calvert has forfeited any claim of substantial property deprivation by settling a prior federal lawsuit against Western (for $ 10,000, along with other plaintiffs, we note) and by dismissing with prejudice his original third cause of action here against Western for nuisance. In the settlement agreement in the federal suit, Calvert reserved "the right to bring and prosecute a lawsuit in state court alleging violations of ... (SMARA)" by the County, the State and Western, and also reserved the right to "bring a nuisance claim against Western predicated on alleged noise and vibration from Western's operations," but the nuisance claim could not include "any claim for alleged water or air pollution by Western, which claims [were] ... explicitly waived and released ... ." Of course, Calvert has brought the present state court action, which includes the SMARA causes of action, and which also included, originally, a nuisance cause of action against Western that was based essentially on allegations [***28] of dust and air pollution. Calvert has since dismissed with prejudice this nuisance cause of action against Western.

We conclude that the settlement of the federal lawsuit against Western for $ 10,000 and the dismissal of the nuisance cause of action against Western do not mean that Calvert has forfeited or waived his constitutional right to receive notice and an opportunity to be heard from the governmental entity that will determine Western's vested rights claim. The record cited by Western at oral argument does not disclose the substance of the federal lawsuit--Western's counsel at oral argument referred to it as the "Proposition 65" suit (Proposition 65 covers pollution discharges and warnings)--but Calvert, along with other plaintiffs, settled that suit for $ 10,000. Even assuming that Calvert has settled and dismissed any property deprivation [*628] claims he has against Western, that only means that Calvert is foreclosed from making any further such claims against Western. Calvert's fifth cause of action here for notice and hearing regarding Western's vested rights determination--under SMARA--is *not* a claim *against Western* for property deprivation. Rather, it is a claim [***29] *against the County* for violating procedural due process requirements of notice and hearing in determining that Western has vested rights to mine the 3,430 acres. And Calvert is not maintaining this procedural due process claim against the County *for* his property deprivation, but *because* of such deprivation. Recall that due process "notice and hearing requirements are triggered only *by governmental action* which results [or will result] in 'significant' or 'substantial' deprivations of property." (*Horn, supra, 24 Cal.3d at p. 616*, italics added.)

In other words, while Calvert may be foreclosed from seeking any further remedy against Western for property deprivation, he is still entitled to due process notice from, and an opportunity to be heard before, the governmental entity deciding Western's vested rights claim because he has "suffered [a] significant deprivation of property" related to that claim. (See *Horn, supra, 24 Cal.3d at p. 615* [rejecting argument that landowner "suffered no significant deprivation of property which would invoke constitutional rights to notice and hearing"].)

Moreover, as we have explained, Western's [***30] vested rights determination centers on factual issues involving Western's mining operations and intent. And for over 30 years, Calvert has lived and ranched in the area that is the subject of that determination. Why should Calvert be foreclosed from having his say before the

governmental entity deciding these factual issues and [**810] making that determination simply because he has settled his property deprivation claims against Western?

(7) A waiver of a constitutional right requires a knowing and intentional relinquishment of that right, and such a waiver is disfavored in the law. (See *City of Ukiah v. Fones (1966) 64 Cal.2d 104, 107-108 [48 Cal. Rptr. 865, 410 P.2d 369]*; see also *Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal.4th 1, 31 [44 Cal. Rptr. 2d 370, 900 P.2d 619]*; 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 104, p. 208.) It cannot seriously be argued that Calvert knowingly and intentionally relinquished his constitutional right to notice and hearing from the governmental entity deciding Western's vested rights claim simply because he settled a federal lawsuit against Western (for $ 10,000, along with others) and dismissed a nuisance cause of action against Western, where [***31] neither action involved this constitutional notice and hearing right.

(8) Nor can there be any dispute that Calvert has standing to maintain the fifth cause of action. The question of property deprivation sufficient to obtain [*629] due process-based notice and hearing regarding adjudicatory land use decisions must be distinguished from the question of standing to bring the fifth cause of action. Although Western has thrown every threshold procedural roadblock it can think of at Petitioners, it has not claimed that they lack standing to bring the fifth cause of action. Nor could it. A party lacks standing if it lacks "a real interest in the ultimate adjudication because [it] has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented." (*California Water & Telephone Co. v. County of Los Angeles (1967) 253 Cal.App.2d 16, 23 [61 Cal. Rptr. 618]*; see 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 73, pp. 132-133.) That certainly cannot be said here. As attested to by the $ 10,000 settlement in the federal lawsuit and by the scores [***32] of pages devoted to appellate briefing on the fifth cause of action, Calvert has suffered and stands to suffer an injury of sufficient magnitude through the governmental determination of Western's vested rights claim to assure that all of the relevant facts and issues have been adequately presented.

We conclude that the governmental determination of Western's vested rights claim implicates property deprivations significant or substantial enough to trigger procedural due process protections for landowners, including Calvert, adjacent to Western's proposed vested rights mining operation.

Western raises several other counterpoints to the conclusion we have reached regarding the necessity for public notice and hearing as to Western's vested rights claim, aside from its argument that a vested rights determination is a ministerial one. We are unpersuaded.

Western first raises a trio of statutory points. As Western correctly observes, SMARA does not specify a procedure for making a vested rights determination. But given the factual issues raised by SMARA's vested rights statute (*§ 2776*) and by the diminishing asset doctrine, and given that Western has the burden of proving its vested [***33] rights claim (*Hansen, supra, 12 Cal.4th at p. 564*), the existence, nature and scope of such rights must be determined pursuant to some procedure even if SMARA fails to specify one. It goes without saying that that procedure must be a constitutional one.

Along similar statutory lines, Western also notes that SMARA, unlike the California [**811] Coastal Act of 1976 (§ *30000 et seq.*) or the federal Surface Mining Control and Reclamation Act of 1977 (*30 U.S.C. § 1201 et seq.*), does not contain a procedure for a public hearing to determine vested rights. As Western acknowledges in its briefing, though, these non-SMARA statutes do not contain this procedure, but regulations enacted pursuant to them do. (*§ 30000 et seq.*; *Cal. Code Regs., tit. 14, § § 13200-13205, 13059*; *30 U.S.C. § 1201 et seq.*; *30 C.F.R. § § 761.11, 761.16* (2005).) Furthermore, the state [*630] coastal act statute on vested rights has been characterized as "remarkably similar" to the SMARA statute on vested rights, *section 2776*. (See *§ 30608*, former § 27404 [as characterized in *59 Ops.Cal.Atty.Gen., supra, at p. 647*].) [***34]

And for the third point in Western's statutory trilogy, *section 2774 of SMARA* states that every lead agency shall adopt ordinances establishing procedures that require at least one public hearing for the review and approval of reclamation plans and financial assurances and the issuance of surface mining permits. (*§ 2774, subd. (a).*) Although *section 2774* does not mention vested rights determinations, the section recognizes that public hearings are required to address the complex, judgment-based issues raised by permits, reclamation plans and financial assurances. We have seen that vested rights determinations in the diminishing asset context raise analogous complexities and judgment calls. Western, however, sees a distinction: determinations of mining permits and reclamation plans look to the future and involve what should happen, while determinations of vested rights look to the past and involve what has happened. Actually, it can be said that vested rights determinations, particularly in the

diminishing asset context, look to the past to look to the future. But semantics aside, Western's observation is of little help in deciding what procedural due process requires. [***35] For that, we must look, not so much to the past or to the future, but to what is being decided and to the consequences of that decision.

Finally, Western is concerned that if a public adjudicatory hearing is required to confirm vested rights, public hearings will have to be held statewide for all operations based on vested rights. As we have emphasized, though, our decision applies only to an entity claiming a vested right under SMARA to conduct a surface mining operation that is subject to the diminishing asset doctrine.

(9) This concern does raise, however, the issue of whether our decision should be given prospective or retroactive effect. Generally, judicial decisions are applied retroactively. But considerations of fairness and public policy may limit such application. (*Woods v. Young (1991) 53 Cal.3d 315, 330 [279 Cal. Rptr. 613, 807 P.2d 455]*; see *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 193 [98 Cal. Rptr. 837, 491 P.2d 421]*; see also 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 984, p. 1038.) We prefer to steer a middle course of limited retroactivity here, making our decision apply to all cases, including [***36] the one before us, in which no final judgment on appeal has yet been rendered, or in which an administrative determination of SMARA-based vested rights, in the context presented here of diminishing asset surface mining, is yet to be made or has been made and is still subject to administrative or judicial review. (See 9 Witkin, Cal. Procedure, *supra*, Appeal, § 986, pp. 1042-1043, & cases cited therein.) Our concern is that property rights may have been founded and deemed vested in accordance [*631] with a less formal vested rights determination under SMARA, which does not specify a procedure for this determination. (See 9 Witkin, Cal. Procedure, *supra*, Appeal, § 949, p. 992 [perhaps the strongest of the considerations that influence courts to follow an established rule is that property rights have been founded and have become vested in accordance with the rule].)

[**812] **(10)** We conclude the trial court properly granted Petitioners summary adjudication on their fifth cause of action against Western. County's determination that Western had vested rights under SMARA to mine aggregate on the 3,430 acres violated procedural due process requirements of reasonable notice and an opportunity to be heard.

Now we turn to Petitioners' cross-appeal. As to the fifth cause of action, Petitioners properly obtained a writ of mandate to remand for constitutionally proper proceedings. (*Townsel v. San Diego Metropolitan Transit Development Bd. (1998) 65 Cal.App.4th 940, 953 [77 Cal. Rptr. 2d 231]* [***37] [ordinary mandate appropriate to compel agency to hold legally required hearing].) The trial court's modified judgment, as noted, imposed three remand-related conditions: County was not required to hold a new vested rights proceeding; Western was not required to request one; and if County held such a proceeding, it had to meet procedural due process requirements. In their cross-appeal, Petitioners contend these conditions have effectively foreclosed any remedy for the constitutional violation the trial court found pursuant to the fifth cause of action. We agree and resolve the cross-appeal as follows.

If Western wants to continue its aggregate mining in the Yuba Goldfields, it will either have to prove its claim of vested rights in a public adjudicatory hearing before the Board (*§ 2776*), or obtain a permit to conduct such surface mining in a public adjudicatory hearing before the County (*§ § 2770, subd. (a), 2774, subd. (a), 2774.4, subd. (a)*; *Hayssen, supra, 171 Cal.App.3d at p. 404*). This is because the Board has taken over the County's SMARA duties regarding Western. (*§ 2774.4*.) Under *section 2774.4*, when the Board takes over for a lead agency, it "shall [***38] exercise" any of the SMARA powers of that lead agency "except for permitting authority." (*§ 2774.4, subd. (a)*.) n2

n2 We have specified a deadline for this choice--vested rights or permit--in the Disposition section of this opinion. Apparently, Western has continued mining during the pendency of these proceedings and has not been, to this point, legally precluded from doing so. Until the vested rights or permit decision is made, Western may continue with its current mining, if any, in similar fashion but not expand or intensify that mining. (See *Bauer v. City of San Diego (1999) 75 Cal.App.4th 1281, 1296 [89 Cal. Rptr. 2d 795]* [city could not properly deem plaintiff's vested property rights based on an existing legal nonconforming use automatically terminated without providing plaintiff an opportunity to be heard]; see also *Hansen, supra, 12 Cal.4th at p. 552* [describing legal requirements for a continuance of a nonconforming use].) Western remains subject to all applicable SMARA provisions regarding reclamation plans and financial assurances as to any such ongoing mining. (*§ 2770*.)

[***39] [*632]

Furthermore, the Board will conduct any public adjudicatory hearing to determine Western's vested rights claim at an appropriate site within the County. (See, e.g., *§ 2774.4, subd. (c)* [the Board shall hold a public hearing as to a lead agency's *section 2774.4* deficiencies "within the lead agency's area of jurisdiction"].) Western remains subject to all applicable SMARA provisions regarding reclamation plans and financial assurances as to any authorized mining. (*§ 2770.*)

Notice of any public adjudicatory hearing regarding vested rights must be reasonably calculated to afford affected persons the realistic opportunity to protect their interests. Such notice must occur sufficiently prior to the determination of vested rights to provide a meaningful predeprivation hearing to affected landowners. (*Horn, supra, 24 Cal.3d at pp. 617-618*; see *§ 2774* [**813] [concerning public hearing regarding permit].) As suggested in *Horn*, an acceptable notice technique might include the mailing of notice to property owners of record within a reasonable distance of the subject property and the posting of notice at or near the project site. (*Horn, supra, 24 Cal.3d at p. 618.*) [***40] n3

n3 In light of our resolution of the fifth cause of action, we will not consider the parties' evidence and arguments regarding the existence, nature and scope of Western's alleged vested rights to mine aggregate in the 3,430-acre area. That will be the subject of the public adjudicatory hearing on vested rights, if that procedure is chosen.

2. *First Cause of Action--Mandate to Compel SMARA Enforcement*

In their first cause of action, Petitioners essentially seek a writ of mandate to compel the County and the State to enforce SMARA against Western for having no permit and no valid reclamation plan. We conclude the trial court properly granted summary adjudication to Western on this cause of action.

(11) Under SMARA, "[a]ny person may commence an action on his or her own behalf against the [B]oard, the State Geologist, or the director [of the Department of Conservation] for [a traditional] writ of mandate ... to compel the [B]oard, the State Geologist, or the director to carry out any duty [***41] imposed upon them pursuant to [SMARA]." (*§ 2716.*) For Petitioners to obtain a traditional writ of mandate, they must show: (1) a clear, present and usually ministerial duty on the part of the State or the County; and (2) a clear, present, and beneficial right on the Petitioners' part to the performance of that duty. (*Mobley v. Los Angeles Unified School Dist. (2001) 90 Cal.App.4th 1221, 1244 [109 Cal. Rptr. 2d 591]* (*Mobley*); *Code Civ. Proc., § § 1085-1086*; see 8 Witkin, Cal. Procedure, *supra,* Extraordinary Writs, § 72, p. 853, & cases cited therein.)

As noted, at the heart of SMARA is the requirement that every surface mining operation have a permit (or a vested right to mine), a reclamation plan, and financial assurances for reclamation. (*§ 2770, subd. (a)*; *El Dorado,* [*633] *supra, 36 Cal.4th at p. 984.*) From this, Petitioners argue that SMARA does not allow surface mining without a permit and an approved reclamation plan based on it, except where vested rights have been established, and that is not the case here. Petitioners assert that, with no established vested rights, Western's mining without a permit or [***42] a reclamation plan based on it simply cannot be ignored or excused. Having vacated County's vested rights determination, the trial court should immediately have issued a writ of mandate compelling the County and the State to enforce SMARA, Petitioners maintain.

Leaving aside any issues of how the principle of agency prosecutorial discretion may apply here (see, e.g., *Heckler v. Chaney (1985) 470 U.S. 821, 831-832 [84 L.Ed.2d 714, 105 S. Ct. 1649]*; see also *§ 2774.1, subd. (a)*), Petitioners cannot show that they meet the two basic requirements for issuance of a writ of mandate. n4

n4 We deny the State's request to take judicial notice regarding the prosecutorial discretion of the State Water Resources Control Board.

Western did establish its vested rights in a proceeding before the County. Furthermore, it is undisputed that Western has a reclamation plan that was approved in 1980. As the new lead agency, the State accepted the County's vested rights determination and is relying on that determination as well [***43] as on Western's 1980 [**814] reclamation plan to process an amendment to the plan.

As we and the trial court have concluded, County's procedure for determining Western's vested rights violated procedural due process, and a new proceeding will have to be held pursuant to reasonable notice and an opportunity to be heard. Thus, it has not been determined substantively that Western lacks vested rights, only that the procedure for determining vested rights was legally flawed. And Western does have an approved reclamation plan, although it is being updated.

In this muddled context, then, there is no clear, present and ministerial duty on the State's part to enforce SMARA against Western for having no mining permit and corresponding reclamation plan. Consequently, there is no clear, present and beneficial right on the Petitioners' part to such enforcement. Accordingly, Petitioners are not entitled to the writ of mandate they seek in the first cause of action, and summary adjudication in favor of Western was properly granted on this action.

3. *Second and Third Causes of Action--Direct Actions Against Western for SMARA Violations*

In their second and third causes of action, Petitioners [***44] allege direct actions against Western for violating SMARA by, respectively, not having a permit or [*634] vested rights and not having a reclamation plan. Petitioners seek injunctive relief in these causes of action.

After reviewing these matters, we conclude the trial court properly resolved them. We adopt the trial court's summary adjudication opinion on these causes of action as our own. With appropriate deletions and additions, that opinion reads as follows: n5

> n5 Single brackets without enclosed material indicate our deletions while double brackets with enclosed material indicate our additions to the opinion. (See, e.g., *People v. Coria (1999) 21 Cal.4th 868, 871, fn. 1 [89 Cal. Rptr. 2d 650, 985 P.2d 970]*.)

SMARA does not contain an explicit provision authorizing private enforcement through an action for an injunction against a mining operator. Instead, SMARA sets forth detailed provisions for administrative enforcement by the lead agency or the Director of the Department of Conservation. (See, [[e.g.,]] [] *[[§]] 2774.1*.) [***45] The only provision of SMARA that explicitly permits an action by a member of the public at large is [] *section 2716*, which permits "any person" to commence an action for a writ of mandate against certain state agencies or officers to compel them to carry out any duty imposed upon them pursuant to SMARA. This provision does not authorize a direct action against a mining operator.

(12) Petitioners rely on [] *section 2774.1[[, subdivision]](g)*, which states that "[r]emedies under this section are in addition to, and do not supersede or limit, any and all other remedies, civil or criminal." [[We are]] not persuaded that [[this provision]] authorizes private enforcement of SMARA. In *Moradi-Shalal v. Fireman's Fund Ins[[.]] Companies (1988) 46 Cal.3d 287 [250 Cal. Rptr. 116, 758 P.2d 58]* [[*Moradi-Shalal*]], the Supreme Court held that a similar provision in a comprehensive statutory scheme for administrative enforcement of unfair practices claims in the insurance business did not establish a private right of action against insurance companies that committed such practices. Here, as in *Moradi-Shalal*, the Legislature created a comprehensive administrative [***46] scheme to enforce SMARA, indicating that private enforcement was not contemplated, at least not in the form attempted here.

[**815] The fact that SMARA does not authorize enforcement actions by private parties does not mean that private parties affected by mining in violation of SMARA have no remedy. As the Supreme Court explained in *Moradi-Shalal*, apart from administrative remedies, the courts retain jurisdiction to impose civil damages or other remedies in appropriate common law actions based on [*635] traditional theories, i.e., based on law other than the administrative enforcement scheme itself. (*46 Cal.3d at [[pp.]] 304-305*.) In fact, SMARA explicitly recognizes and preserves the right of private parties to seek relief against mine operators under other law. (See [] *[[§]] 2715[[,*

subd.]](d).) As set forth therein, such relief might be sought in an action [[for]] private nuisance [[or for other appropriate private relief]]. [] The present action as it stands, however, is based purely on the alleged violations of SMARA. Petitioners' separate nuisance claim has been dismissed, and the Complaint/Petition does not purport to state a cause of action for [] any other [***47] claim arising outside of SMARA. []

[] Petitioners' [[second and third]] cause[[s]] of action [] therefore [[are]] not authorized by SMARA and the motion for summary adjudication [[regarding them was properly]] granted.

[End of quotation from the trial court's opinion.]

4. *Fourth Cause of Action--SMARA Enforcement and State as Lead Agency*

In their fourth cause of action, Petitioners seek a writ of mandate, claiming the State has abused its discretion by not enforcing SMARA and by not taking over the lead agency functions from the County.

(13) Summary adjudication was properly granted in Western's favor on this cause of action. We have already rejected the writ of mandate claim involving State SMARA enforcement in part 2 of the Discussion concerning the first cause of action. And the Board in this matter has already taken over the lead agency SMARA functions from the County. As the trial court noted, a writ of mandate will not issue to compel an action that already has been performed. (See *Mobley, supra, 90 Cal.App.4th at p. 1244*.)

Disposition

The judgment is modified as follows. The three conditions on remand specified in the judgment are vacated and the following conditions [***48] are imposed: If Western wants to continue its aggregate mining in the Yuba Goldfields, it will either have to prove its claim of vested rights in a public adjudicatory hearing before the Board (to be conducted within the County's area of jurisdiction), or obtain a permit to conduct such surface mining based [*636] on a public adjudicatory hearing before the County. Western will have 30 days from the issuance of this Court's remittitur to inform the Board and the County of its choice. Depending on that choice, the Board or the County will then proceed immediately to provide adjacent landowners reasonable notice and an opportunity to be heard. Western remains subject to all applicable SMARA provisions regarding reclamation plans and financial assurances.

As modified, the judgment is affirmed. Each party shall pay its own costs on appeal.
Blease, Acting P. J., and Hull, J., concurred.

Filed 4/17/17; pub. order 5/16/17 (see end of opn)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JOE HARDESTY et al., Plaintiffs and Appellants, v. STATE MINING AND GEOLOGY BOARD, Defendant and Respondent.	C079617 (Super. Ct. No. 34-2010-80000594-CU-WM-GDS)

In this suit under the Surface Mining and Reclamation Act of 1975 (SMARA) (Pub. Resources Code § 2710 et. seq.),[1] plaintiffs Joe and Yvette Hardesty (collectively, Hardesty), attack findings by the State Mining and Geology Board (Board). The Board's disputed findings conclude there are no vested rights to surface mine at the Big Cut Mine in El Dorado County (County, not a party herein). The findings in effect deny Hardesty a "grandfather" exemption from the need to obtain a County mining permit. (See § 2776,

[1] Further undesignated statutory references are to the Public Resources Code.

subd. (a).) The trial court denied Hardesty's mandamus petition, and Hardesty timely appealed from the ensuing judgment.

On appeal, Hardesty raises both substantive and procedural claims.

Substantively, in three somewhat interconnected claims, Hardesty contends the Board and the trial court misunderstood the legal force of his 19th century federal mining patents. He asserts they establish a vested right to surface mine after the passage of SMARA without the need to prove he was surface mining on SMARA's operative date of January 1, 1976. He argues that the Board and trial court misapplied the law of nonconforming uses in finding Hardesty had no vested right and separately misapplied the law in finding that his predecessors abandoned any right to mine. These contentions turn on legal disputes about the SMARA grandfather clause and the force of federal mining patents.

As we will explain, the *facts*, viewed in favor of the Board's and trial court's decision, undermine Hardesty's claims. A federal mining patent--a deed perfected after working a mining claim--has no effect on the application of state regulation of mining. This point was made emphatically in a recent California Supreme Court case, *People v. Rinehart* (2016) 1 Cal.5th 652 (*Rinehart*), about which we solicited supplemental briefing. Simply put, the fact that mines were worked on the property years ago does not necessarily mean any surface or other mining existed when SMARA took effect, such that any right to surface mine was grandfathered.

Procedurally, Hardesty alleges the Board's findings do not "bridge the gap" between the raw evidence and the administrative findings. Hardesty also challenges the fairness of the administrative process itself, alleging that purported ex parte communications by the Board's executive director, Stephen Testa, tainted the proceedings. However, we agree with the trial court's conclusions that, on this record, neither of these procedural claims proves persuasive.

Accordingly, we shall affirm the judgment denying the mandamus petition.

BACKGROUND

Preliminary Observations

We first note that Hardesty's briefing consistently draws evidentiary inferences in the light most favorable to himself, contrary to the appropriate standard of review, which requires us to draw inferences in favor of the judgment. (See *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824 ["Even when . . . the trial court is required to review an administrative decision under the independent judgment standard of review, the standard of review on appeal . . . is the substantial evidence test"].) "The reviewing court, like the trial court, may not reweigh the evidence, and is 'bound to consider the facts in the light most favorable to the Board, giving it every reasonable inference and resolving all conflicts in its favor.' " (*Jaramillo v. State Bd. for Geologists & Geophysicists* (2006) 136 Cal.App.4th 880, 889.) Hardesty also presumes that any evidence that was not directly contradicted--including expert evidence--must be accepted as true, contrary to applicable standards. (See *Hicks v. Reis* (1943) 21 Cal.2d 654, 659-660 ["Provided the trier of the facts does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted"]; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890 [rule applies to expert witnesses] (*Foreman & Clark*).)

Hardesty's contentions are unnecessarily muddled by his persistent refusal to acknowledge the *facts* supporting the Board's and the trial court's conclusions. "[Hardesty] has not waived the legal issues [he] raises. But in addressing [his] issues we will not be drawn onto inaccurate factual ground." (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291 (*Western Aggregates*).) Because Hardesty does not portray the evidence fairly, any intended factual disputes are forfeited.[2] (See

[2] Hardesty's trial court papers reflected the same flaw, which the Board pointed out to the trial court.

Foreman & Clark, supra, 3 Cal.3d at p. 881; *Western Aggregates, supra,* 101 Cal.App.4th at pp. 290-291.)

In 2009, Hardesty filed a Request for Determination (RFD) of his vested rights--later augmented by a 2010 supplement--outlining his legal and factual positions. The RFD includes a declaration of counsel that purports to affirm the truth of the facts contained in hundreds of pages of attachments. The attachments include an unpublished decision of this court in a tangentially related case, *Tankersley v. State Mining & Geology Bd*. (Jan. 31, 2006, C049372) 2006 Cal.App.Unpub. Lexis 835 (nonpub. opn.) (*Tankersley*), and extracts of private and apparently unsworn interviews of witnesses by Hardesty's counsel.[3] Hardesty also presented extracts of depositions taken in separate litigation between a non-party herein and his predecessors (*Legacy Land Co. v. Donovan*, El Dorado Super. Ct. No. PC20020116 (*Legacy Land*)), with no indication that the opposing side in that case had the same motivation to cross-examine as would an opponent of Hardesty's RFD. Some of these weaknesses in Hardesty's evidentiary submissions were pointed out at the Board hearing.

At the hearing itself, Hardesty bore the burden of proof. (Cal. Code Regs., tit. 14, § 3950.)[4] A Board regulation provides that "[r]elevant evidence in a proceeding for determination of a claim of vested rights shall be written or oral evidentiary statements *or material* demonstrating or delimiting the existence, nature and scope of the claimed vested right[s]." (Regs., § 3963, italics added.) The Board evidently interprets this

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[3] Under Board regulations, "All information submitted pursuant to this section shall be accompanied by a declaration or affidavit attesting to the true and accurate nature of the materials provided." (Regs., § 3952.) Hardesty's lengthy 2010 RFD supplement does not appear to have been accompanied by a declaration. However, the parties treat the supplement with the same dignity as the material contained in the RFD. We will do the same.

[4] Further references to "Regs." are to title 14 of the California Code of Regulations.

regulation to mean that "[t]estimony and comments presented at hearings need not conform to the technical rules of evidence provided that the testimony and comments are reasonably relevant to the issues before the [Board]." But the fact the Board *may* accept as true "material" which would not qualify as evidence in a court of law does not mean it was *compelled* to accept as true all material contained in Hardesty's documents. Instead, the flaws we have noted above, and others, gave the Board ample, rational grounds to reject much of Hardesty's evidence. (See *Hicks v. Reis*, *supra*, 21 Cal.2d at pp. 659-660.) Further, the Board also considered contrary evidence, principally contained in detailed written proposed findings drafted by Testa. These findings were based on Testa's investigation, as well as statements by members of the public at the hearing--statements not mentioned in Hardesty's briefs. Thus to the (great) extent that Hardesty's briefing is based on the implicit view that the Board and trial court were somehow compelled to accept his evidentiary submissions as true, the foundation of his briefing is undermined.

On the other hand, facts asserted by Hardesty in the trial court or on appeal may be deemed as admissions, and we may also accept as true facts agreed by the parties in their briefing on appeal. (See *Fremont Comp. Ins. Co. v. Sierra Pine* (2004) 121 Cal.App.4th 389, 394; *County of El Dorado v. Misura* (1995) 33 Cal.App.4th 73, 77.)

We make these observations at the outset, to explain our upcoming rejection of Hardesty's many factual assertions that are supported only by references to material that the Board and trial court were free to find was either inaccurate or simply unpersuasive as to the particular subject addressed.

The Basic Facts and Findings

Hardesty owns about 150 acres near Placerville, now known as the Big Cut Mine, but once known--if perhaps only in part--as the Landecker mine. For purposes of appeal, we accept that his property was formed from 19th century federal mining patents.

The land was mined for gold until the 1940's. During World War II, gold mining was restricted by the federal government to shift mining resources to minerals necessary

for military purposes. (See *United States v. Central Eureka Mining Co.* (1958) 357 U.S. 155, 157-161, 166-169 [2 L.Ed.2d 1228, 1230-1232].) A property history contained in Hardesty's RFD supplement concedes "There are no records presently available . . . to show what kind of mining business [Stanley Triplett, the owner from 1921 to 1988] conducted on the property after the war." The trial court found that through the 1970's, the property "was essentially 'dormant.' At most, there was sporadic, limited mining involving only a very small portion of the property during this period, and there is virtually no evidence that those mining activities 'continued' to exist at the time SMARA was enacted [effective January 1, 1976]." However, Hardesty's RFD sought to establish a vested right to mine the property for gold, sand, and gravel (as well as diamonds and platinum).

Although the wartime mining order was lifted in 1945, Hardesty contends that the purported loss of mining equipment during the war "and low gold prices, made it largely infeasible to resume mining"--a point we address in more detail, *post*, in our Discussion. The record contains a document showing the ounce price for gold was about $36 in 1970, rose to about $160 by 1975, shot up in 1980, and then fell significantly.

Clinton and Kathleen Donovan (Donovan) bought the land in 1988 from Stanley Triplett, who we accept had owned it since 1921. Donovan contracted to sell to Legacy Land, but the deal did not go through--leading to litigation--and he sold the property to Hardesty in 2006.[5]

The part of Hardesty's RFD outlining the history of the property consolidates the broad Triplett period of ownership, 1921-1988, but fails to describe what, if anything was happening on the property *on or immediately before* January 1, 1976.

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[5] The Board agrees Triplett took control of the property in 1921 and accepts Hardesty's present ownership for purposes of this case.

The trial court found that in the 1990's, unpermitted surface (open-pit) aggregate and gold mining began, different in nature from the "hydraulic, drift, and tunnel" mining that historically had been conducted on the land. The RFD alleged the new proposed open-pit mining was safer and better for the environment. Donovan had allowed Barney's Sand and Gravel (Barney's) to mine on the property beginning about 1992, Legacy Land bought out Barney's around 1994, and also attempted to buy the property itself from Donovan, but, as indicated, that deal was not consummated and instead led to litigation.

Our *Tankersley* decision involved what was described as the Donovan Ranch Property, but which the RFD treats as the same property at issue herein. According to *Tankersley*, "In 1998, [the County], the SMARA lead agency at the time, declared the mining site *closed and reclaimed*. [¶] By 2002, the Board had assumed authority over surface mining operations at the Property. On November 12, 2002, the State Office of Mining and Reclamation (OMR) and the County inspected the Property and determined that 20 to 25 acres had been disturbed by surface mining operations. The Board notified the Donovans of the results of the inspection and instructed them to cease all mining operations until they obtain a reclamation plan, financial assurances, and any necessary County permit." (Italics added.) During those proceedings, the Hardestys and Churches declared that they accepted full financial responsibility for reclamation of the land; Tankersley also claimed to be a partner in the mining operations, and all those parties (the Hardestys, the Churches, and Tankersley) were appellants.

As an alternative to the finding of no vested right, based on the lack of mining as of the date SMARA took effect, which we discuss in more detail, *post*, the Board and the trial court found that any right to mine had been abandoned. On a required state reporting form in 1998, Donovan checked a box to indicate the mine was "Closed with no intent to resume." This document stated reclamation was in progress. On the 1999 reporting form, Donovan checked a box to indicate the mine was "Closed-reclamation

certified complete by Lead Agency." But in prior years, Donovan had checked a box stating the mine was "Active." This change in reporting shows Donovan knew the difference between an "Active" mine, a "Closed" mine, and a mine that was both closed and for which reclamation had been completed.[6]

A letter submitted by the County to Testa in 2010 explained that Donovan "always asserted that he was not mining, but was only searching for gold as a hobby and used the gravel for on-site road work" and Donovan had not provided any records showing "continuous mining having occurred since the 1940s to the present time."

The trial court upheld the Board's finding that any right to mine had been abandoned, finding "a clear manifestation of intent to discontinue mine operations during the period from the 1940s until the early 1990s, and again when Mr. Donovan intentionally 'closed' the mine to facilitate a sale of the property."

There is no evidence that Triplett regularly mined the property after World War II, only vague and disconnected items showing sporadic activity. For example, some 1960's batteries and various dated tunnel markers were found, but there was no direct evidence why they were there or who put them there. In May 1971, Triplett wrote to a potential buyer, describing the property as *not* in a saleable condition, and describing some of its

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[6] Each form was signed under the following statement: "I certify that the information submitted herein is complete and accurate (failure to submit complete and accurate requisite information may result in an administrative penalty as provided for in Public Resources Code Section 2774.1)." The yearly report is required by section 2207, which has always required a mine owner or operator to specify "[t]he mining operation's status as active, idle, reclaimed, or in the process of being reclaimed." (§ 2207, subd. (a)(6); see Stats. 1990, ch. 1097, § 2, p. 4575.) Under the law in effect at the time of Donovan's reports, " 'Idle' means to curtail for a period of one year or more surface mining operations by more than 90 percent of the operation's previous maximum annual mineral production, *with the intent to resume those surface mining operations at a future date*." (Former § 2727.1, italics added, see Stats. 1990, ch. 1097, § 3, p. 4578.) Therefore, had Donovan retained an intention to resume operations at a later date, he could have so declared on the annual forms, which contained a box to indicate the mine was idle, rather than closed.

history. This included his belief in the possible location thereon of part of the "deep blue lead" that had proven rich in other places. Although he stated whether "the deep channel can be worked profitably or not, is speculation," he believed it had possibilities, and his intent would be to find a rich investor so that "if expectations failed, losses could be written off." Nothing in the letter hints at any active mining, and as the Board contends, it at best expresses Triplett's *hope* that mining--but not necessarily surface mining--would resume. Triplett's nephew, a geological engineer named Jim Brune, declared Triplett spoke with him about his belief in the deep blue lead, as well as where on the property Triplett "speculated the vein ran" and Triplett's purported intent to mine the property. Aerial photographs beginning in 1952 show some roads that were later expanded, but there was no hard evidence of what they were used for before 1976, and by Hardesty's own interpretation, they covered but a fraction of the property.

Significantly, at the Board hearing, *Hardesty's counsel conceded the mine was dormant until at least the late 1980's*, although counsel attributed this to market forces. Hardesty submitted other evidence, but the Board and the trial court could rationally reject it. There was no hard evidence, such as production records, employment records, equipment records, and so forth, showing any significant mining after World War II.

SMARA and Hardesty's Legal Attacks

As indicated, the key date for SMARA purposes is January 1, 1976, when the law became operative. SMARA requires that all surface mining operations have an approved reclamation plan and approved financial assurances to implement the plan. (§ 2770, subd. (a).) At the time of the hearing, the Board served as the lead agency for SMARA purposes in the County, although the County retained permitting authority. (See § 2774.4, subd. (a).) Persons with existing surface mining operations were required to submit reclamation plans by March 31, 1988. (§ 2770, subd. (b).) Absent an approved

reclamation plan and proper financial assurances (with exceptions not applicable herein) surface mining is prohibited. (§ 2770, subd. (d).)[7]

SMARA was enacted with the knowledge that many miners had extant private property rights, and the Legislature wanted to avoid paying compensation therefor. (See § 2713; *Surface Mining Operations—Vested Rights—Permit, Reclamation Requirements*, 59 Ops.Cal.Atty.Gen. 641, 644-645 (1976) (*Surface Mining*).) Accordingly, SMARA included the following grandfather provision, to avoid any property "takings" claims:

> "No person who has obtained a vested right *to conduct surface mining operations prior to January 1, 1976*, shall be required to secure a permit pursuant to the provisions of this chapter as long as such vested right continues; provided, however, that *no substantial changes may be made in any such operation except in accordance with the provisions of this chapter*. A person shall be deemed to have such vested rights if, prior to January 1, 1976, he has, in good faith and in reliance upon a permit or other authorization, if such permit or other authorization was required, *diligently commenced surface mining operations* and incurred substantial liabilities for work and materials necessary therefor. . . .
>
> "A person who has obtained a vested right *to conduct surface mining operations prior to January 1, 1976*, shall submit to the lead agency and receive, within a reasonable period of time, approval of a reclamation plan for operations to be conducted after January 1, 1976, unless a reclamation plan was approved by the lead agency prior to January 1, 1976 . . . .
>
> "Nothing in this chapter shall be construed as requiring the filing of a reclamation plan for, or the reclamation of, mined lands *on which surface mining operations were conducted prior to January 1, 1976*." (Former § 2776, Stats. 1975, ch. 1131, § 11, italics added.)[8]

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[7] Section 2770 and some other sections were recently amended. (See Stats. 2016, ch. 7, § 5.) We cite to the provisions in effect during the trial court litigation, as do the parties.

[8] Some of this language incorporates the general definition of "vesting" as used in building development cases. (See *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791 ["if a property owner has performed *substantial work and incurred substantial liabilities* in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in

The first paragraph of section 2776 forms the core of Hardesty's legal attacks on the Board's decision, because he is of the view that he established a vested right to mine through his 19th century mining patents and uncontested pre-World War II mining activity, in addition to his contested claims--impliedly rejected by the Board and trial court--of post-World War II mining activity. However, the italicized portion of the statute speaks of vested rights to *surface* mining, not *any* mining. "Surface mining involves stripping off the top of an area to reach minerals, in contrast to boring down through tunnels or shafts to extract them." (*Rinehart*, *supra*, 1 Cal.5th at p. 671, fn. 10.)

Hardesty's mandamus petition alleged his predecessors-in-interest acquired vested rights to mine via federal mining patents, and he alleged "completion of a valid mining 'location' vests equitable title in the locator, authorizes the locator to hold and mine the claim *indefinitely*, and creates a transferrable property interest." (Italics added.) His position is that this "vesting" under federal law equates to a "vested" right under SMARA, regardless of whether mining was still being conducted when SMARA took effect, or of the nature or scope of such mining.

After a public hearing, the Board adopted proposed findings prepared by Testa, and found the evidence did not support Hardesty's claim. On June 10, 2010, after receipt of objections from Hardesty's counsel as to several findings, the Board formally denied Hardesty's claim.

On July 9, 2010, Hardesty filed a mandamus petition to set aside the Board's action, and on January 6, 2015, filed the instant amended petition.

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accordance with the terms of the permit"], italics added.) It is also consistent with language from the then-recently adopted California Coastal Zone Conservation Act. (Former § 27404; see Ballot Pamp., Gen. Elec. (Nov. 7, 1972), text of Prop. 20, p. 32 [generally, a permit holder who "diligently commenced construction and performed substantial work . . . and incurred substantial liabilities" before act adopted was not required to obtain a regional coastal commission permit, if no substantial changes were made to the development]; see *Urban Renewal Agency v. California Coastal Zone Conservation Com.* (1975) 15 Cal.3d 577, 582-584.)

The trial court denied the petition after a hearing on March 27, 2015, and Hardesty timely appealed from the ensuing judgment.

The Board's Findings in Detail

As stated, the Board adopted proposed findings prepared by Testa, some of which reference documents submitted within Hardesty's RFD. These findings included the following. The property is located in an area within the County now zoned so as to generally prohibit surface mining within 10,000 feet of any residence absent a finding that the project would not have any adverse impact on the environment and would not discourage residential use. No evidence of post-World War II mining "other than recreational, was presented." No production records (such as drill logs, evidence of amount of material extracted, or "historic or current sales records") were produced by Hardesty. "A 1966 date appears written on a tunnel wall; however, there is no evidence correlating the existence of that mark with any mining activity." "Access roads are evident in various aerial photographs; however, there is no adequate evidence to demonstrate that such roads were haul roads used for mining purposes." Unpermitted surface mining by Barney's beginning around 1991 was halted by the County and the Board, and "[r]eclamation was completed to the County's satisfaction in 1998." Further unpermitted mining occurred in 2002-2003, until halted by the County. The County never made a finding of vested rights. No reclamation plan had been submitted by the SMARA deadline of March 31, 1988. Donovan "did not demonstrate an objective manifestation of intent to mine all" the property and "No documents or evidence were presented to support the overall scale of historic production conducted by" Donovan.[9]

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[9] There is a claim that at some point Donovan gave Legacy Land a box of documents detailing mining activities on the property, in aid of negotiating a sale of the property, but that those documents were lost to him, evidently after Legacy Land declared bankruptcy. This claim did not have to be believed.

The Board made several "Conclusions of Law," in part as follows: Hardesty had the burden of proof by a preponderance of the evidence to show vested rights to surface mine. For planned expansion, Hardesty had to produce evidence of clear intent to expand " 'measured by objective manifestations, and not subjective intent at the time of passage of the law, or laws, affecting [his] right to continue surface mining operations without a permit.' " (Partly quoting Regs., § 3963, italics omitted.) "No evidence demonstrating authorization to mine was granted from the mid-1940s to January 1, 1976, or to the present date as well."[10] "The cessation of mining activities subsequent to World War II, lasting through the 1990s and, even then, commencing for a brief period without authorization from [the] County and without submission and approval of reclamation plans and financial assurances as required by SMARA, coupled with a succession of land owners who did not conduct commercial mining operations during that period, precludes reliance on the pre-World War II historic gold mining operations as a basis for establishing a current vested right to mine" the property. "The historical record regarding gold mining prior to World War II, and the subsequent conduct of owners of the subject property demonstrates clear and knowing intent . . . to waive, abandon, or otherwise forego any vested right that may have pertained to those pre-World War II mining efforts."

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[10] This finding may be overbroad, as it is not clear any entity required "authorization" for surface mining before a County ordinance was adopted in 1979, as Hardesty insists. But this does not change the lack of proof his predecessors "commenced *surface* mining operations" (§ 2776, italics added) before SMARA took effect in 1976. Contrary to Hardesty's reading, the Attorney General did not opine that the lack of need of further approvals *precludes* a finding of substantial changes in the nature of the mining, but opined that each case turned on its particular facts--i.e., whether changes were substantial--and that needing further approvals would "certainly constitute" a substantial change. (*Surface Mining*, *supra*, 59 Ops.Cal.Atty.Gen. at pp. 643, 655-656.)

A formal resolution recites the Board accepted Testa's findings "and determined that a preponderance of evidence did not exist that demonstrated Big Cut Mine has vested rights" and the "Board denies the claim of vested right of Big Cut Mine's proposed surface mining operation located in the County."

The Trial Court's Ruling in Detail

The trial court found the Board's decision adequately linked the evidence with the findings. The trial court agreed with Hardesty that the party asserting abandonment had the burden of proof, but rejected Hardesty's claim that the Board shifted the burden of proof on this issue to Hardesty, as nothing in the Board's findings addressed the point one way or another, and "it is presumed that the Board acted properly." The trial court granted a motion to augment the record with declarations from Testa, Will Arcand, and Richard Thalhammer, described, *post*, and found no improper ex parte communications occurred.

The trial court also rejected Hardesty's view that the federal patents vest in him a right to mine the property regardless of what was happening on the effective date of SMARA, finding a lawful nonconforming use must be extant on such date.

Separately, the trial court found that even if Hardesty's legal view were correct, "the evidence shows there were substantial changes in the use of the property" in that "there is virtually no evidence of mining activities during the period from the 1940s through the 1980s" and even if there were, "aerial photos suggest any mining was limited to at most about six-tenths of an acre. For the vested right to include the remainder of the . . . property, [Hardesty] would have to produce objective evidence demonstrating that the owners clearly intended, on the effective date of [SMARA], to expand mining in to the remainder of the property. There is no such evidence in the record." Further, the nature of the mining had shifted from hydraulic, drift, and tunnel mining, to open-pit (that is, *surface*) mining, reflecting a substantial change in use.

Finally, the trial court found any vested right that may have existed had been abandoned: "There is a clear manifestation of intent to discontinue mine operations during the period from the 1940s to until the early 1990s, and again when Mr. Donovan intentionally 'closed' the mine to facilitate a sale of the property."

Accordingly, the trial court denied Hardesty's administrative mandamus petition.

DISCUSSION

I

Vested Rights Claims

Hardesty contends that the existence of federal mining patents confers vested mining rights forever, and that the Board and trial court erred by adding additional requirements, namely, continued mining operations, to find a vested right under SMARA. He further contends the trial court misapplied the "nonconforming use" zoning doctrine and thereby reached an erroneous conclusion. He adds that the Board and trial court misapplied the doctrine of abandonment. Because these three contentions of legal error overlap, we address them together.

Hardesty principally relies on the first paragraph of section 2776, arguing that he has a vested right to mine the property at issue. In his view, his federal mining patents, which would have been issued only upon proof of actual mining operations--though not necessarily *surface* mining operations--not only conveyed title to the property, they conveyed a vested right to mine. He contends that because those patents predate 1976, he is covered by section 2776's grandfather provision.

As we will explain, we agree the patents conferred on Hardesty vested rights *as a property owner*, but that is not the same as a vested right *to mine* the property absent compliance with state environmental laws. The Board and the trial court correctly concluded Hardesty had to show active surface mining was occurring on the effective date of SMARA, or at the very least show objective evidence that the then-owner contemplated resumption of such activities. Under the facts, viewed in the appropriate

light, Hardesty did not carry his burden to show that *any* mining was occurring or any intent to mine existed on the relevant date. Further, the Board and trial court correctly applied the "nonconforming use" and abandonment doctrines to the facts herein.

A. *Legal Effect of a Federal Mining Patent*

Early federal policy had been to reserve federal lands, but this shifted after the Civil War due to the need to pay off the ensuing national debt, and the West--then almost entirely owned by the federal government--was opened to mineral exploration. (See *Western Aggregates, supra,* 101 Cal.App.4th at pp. 293-294.) Since that time, after locating a claim and performing certain work and other requirements, the "holder of a perfected mining claim may secure a patent to the land by complying with the requirements of the Mining Act and regulations promulgated thereunder . . . and, upon issuance of the patent, legal title to the land passes to the patentholder." (*California Coastal Comm'n v. Granite Rock* (1987) 480 U.S. 572, 575-576 [94 L.Ed.2d 577, 588] (*Granite Rock*); see *Pathfinder Mines Corporation v. Hodel* (9th Cir. 1987) 811 F.2d 1288, 1291.)[11]

But " 'the State is free to enforce its criminal and civil laws' on federal land so long as those laws do not conflict with federal law. [Citation.] The Property Clause itself does not automatically conflict with all state regulation of federal land. Rather, . . . '[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power *to enact legislation* respecting those lands pursuant to the Property Clause. *And when Congress so acts,* the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.' " (*Granite Rock, supra,* 480 U.S. at pp. 580-581 [94 L.Ed.2d at p. 591], italics

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[11] We accept for purposes of this appeal that Hardesty's predecessors performed the work then required by the federal government. (See *Rogers v. DeCambra* (1901) 132 Cal. 502, 505-506 [federal land officials presumed to have followed proper procedures].)

added; see *State Regulation of Mining in Death Valley National Monument*, 60 Ops.Cal.Atty.Gen. 162, 163 (1977) ["California can regulate all mining within the Death Valley National Monument . . . regardless of land ownership status, pursuant to [SMARA], subject to preemption in particular instances of conflict with federal law"].) It is well settled that environmental concerns about mining and its after-effects are legitimate matters for state regulation. (See *Death Valley*, *supra*, 60 Ops.Cal.Atty.Gen. 162; *State ex rel. Andrus v. Click* (1976) 97 Idaho 791, 798-799 [554 P.2d 969, 976-977] (*Andrus*).)

Indeed, in a case involving a *different* open-pit mine also operated by Hardesty, we rejected his view that a "vested right" to mine under SMARA obviates the need to comply with state environmental laws: "Hardesty has cited no authority standing for the proposition that the holder of a vested mining right is exempt from complying with California's air pollution laws." (*Hardesty v. Sacramento Metropolitan Air Quality Management Dist.* (2011) 202 Cal.App.4th 404, 427.)

The United States Supreme Court has acknowledged that some state laws, although purportedly passed to regulate mining, could have the effect of halting all productive use of federally patented mining areas. "The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable." (*Granite Rock*, *supra*, 480 U.S. at p. 587 [94 L.Ed.2d at p. 595].) But the high court went on to hold that this result was *generally permissible*, and only precluded where a *direct conflict* between a state and a federal law was presented. (*Id*. at pp. 587-588 [94 L.Ed.2d at pp. 595-596].)

In a recent case involving a state prohibition (a moratorium) on dredge mining, our Supreme Court rejected the view that state laws that impact or even halt mining necessarily conflict with federal mining laws. Instead, the general purpose of federal mining laws is to delineate "the real property interests of miners vis-à-vis each other and

the federal government." (*Rinehart, supra*, 1 Cal.5th at p. 663.) "[T]he one area where the law *does* intend to displace state law is with respect to laws governing title. In other areas, state and local law are granted free rein." (*Ibid*.) "The mining laws were neither a guarantee that mining would prove feasible nor a grant of immunity against local regulation, but simply an assurance that the ultimate original landowner, the United States, would not interfere by asserting its own property rights." (*Id*. at p. 666.) "[I]f Congress intended to do more, we can reasonably infer it would have said so. It did not; indeed, quite to the contrary, it specifically noted the continuing obligation of miners with possessory interests, such as Rinehart, to obey state law. [Citations.] Collectively, the text and legislative history reveal no intent to displace state law." (*Id*. at p. 667.)

Most of the cases relied on by Hardesty which address vested mining rights involve disputes between competing private claimants, not between miners and government entities seeking to regulate them, and most predate *Granite Rock.* (See, e.g., *Watterson v. Cruse* (1918) 179 Cal. 379 [competing claim locators sought injunction]; *Ames v. Empire Star Mines Co., Ltd.* (1941) 17 Cal.2d 213 [injunction and accounting]; *Favot v. Kingsbury* (1929) 98 Cal.App. 284, 287-289 [suit to restrain issuance of state patent to competing claimants]; *Brown v. Luddy* (1932) 121 Cal.App. 494, 503-504 [quiet title]; *Montgomery v. Gerlinger* (1956) 146 Cal.App.2d 650 [quiet title].)

In his reply brief, Hardesty "does not dispute that a state may impose permit requirements that qualify as 'environmental regulation.' " He then cites cases holding that regulations were found preempted by federal mining law. His evident view is that if he cannot comply with a state law regarding vesting of nonconforming use (i.e., SMARA), that state law necessarily impairs his right to mine contrary to federal law. But, as just explained, *Rinehart* rejects this view of the law.

For example, Hardesty relies heavily on *South Dakota Mining Ass'n., Inc. v. Lawrence County* (8th Cir. 1998) 155 F.3d 1005, where a local ordinance prohibited new permits for surface mining, and companies that had mined for many years sued to enjoin

the ordinance. (*Id.* at p. 1007.) *Lawrence County* held the ordinance was preempted because "The ordinance's de facto ban on mining on federal land acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act." (*Id.* at p. 1011.) However, our Supreme Court summarized *Lawrence County* and *rejected* its analysis as follows:

> "We do not disagree that Congress adopted a real property regime in the Mining Law of 1872 with the larger purpose in mind of encouraging ongoing mineral exploration across the West. Where we part company is with the conclusion that such general, overarching goals would be frustrated by state and local determinations that the use of particular methods, in particular areas of the country, would disserve other compelling interests. Congress could have made express that it viewed mining as the highest and best use of federal land wherever minerals were found, or could have delegated to federal agencies exclusive authority to issue permits and make accommodations between mining and other purposes. It did neither, instead committing miners to continued compliance with state and local laws (30 U.S.C. § 26) and endorsing limits on destructive mining techniques imposed under such laws [citation]. These actions cannot be reconciled with the view that Congress intended preemption of such state and local determinations." (*Rinehart*, *supra*, 1 Cal.5th at p. 672.)

Thus, *Rinehart* rejected the view that state laws that make mining more difficult or even impracticable necessarily conflict with Congressional intent, and we are bound to do the same. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Hardesty also relies on *Brubaker v. Bd. of County Commrs., El Paso County* (Colo. 1982) 652 P.2d 1050, where holders of unpatented mining claims unsuccessfully sought local permits for test drilling approved by the federal government to see if they had located "valuable mineral deposits under federal mining law." (*Id.* at p. 1052.) *Brubaker* held the local entity sought "to prohibit the very activities contemplated and authorized by federal law" and therefore presented an obstacle to federal policy. (*Id.* at pp. 1056-1057.) However, as explained by our Supreme Court, *Brubaker* was decided before *Granite Rock*, and therefore is not persuasive. (*Rinehart*, *supra*, 1 Cal.5th at p. 671.) Further, other cases have recognized the legitimacy of applying environmental

laws, even if they increase the costs of mining. (See *Andrus, supra*, 97 Idaho at p. 797 [554 P.2d at p. 975] ["Neither the requirement of obtaining a permit or of restoring the land render it impossible to exercise [mining] rights specifically granted by the federal legislation, although they may make it more difficult"].)

SMARA itself does not preclude Hardesty from mining. SMARA was enacted with respect for extant mining operations and merely requires assurances that surface mining operations develop adequate reclamation plans, a neutral state environmental rule. It also allowed *then-active* surface mines to bypass the need to obtain a local permit. The fact that application of SMARA's requirements to a particular operation might make it more expensive to mine, perhaps to the point where mining is infeasible, is not precluded under *Rinehart*. (See also *Andrus, supra*, 97 Idaho at p. 797 [554 P.2d at p. 975].)

To the extent Hardesty contends he has a vested right to *surface mine* under section 2776, he simply failed to carry his burden to prove any substantial *surface* mining on the property had been conducted by that date. As the trial court found, substantial evidence shows that prior mining had been hydraulic, tunnel, and drift mining, not surface mining, which began in the 1990's, and which represented a substantial change, contrary to former section 2776's requirement "that no substantial changes may be made in any such operation except" according to SMARA's terms. The evidence before the Board supports this finding.

Accordingly, federal mining patents, alone, do not satisfy section 2776.[12]

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[12] Because Hardesty has not yet applied for a permit, it would be premature to hold that the permit process directly conflicts with some specific federal law. (See *Granite Rock, supra*, 480 U.S. at pp. 588-589 [94 L.Ed.2d at pp. 596-597] [party sought injunctive and declaratory relief, did not know what permit requirements would actually be imposed, and therefore was limited to arguing that no permit could be required under any circumstances].) References in the record and briefs to a 1979 County permit ordinance are unnecessary to address, because this appeal does not turn on it, nor were the Board's or trial court's findings hinged on noncompliance therewith, although an extraneous

B. *Proof of a Nonconforming Use*

To show he had a vested right to engage in mining on the property, Hardesty's briefing emphasizes evidence of mining on the property before 1976. However, Hardesty failed to prove *any* mining was occurring on or even reasonably before the date SMARA took effect. SMARA was designed to allow *existing, operating* surface mines to continue operating after its effective date without the need to obtain local permits. SMARA's grandfather provision does not extend to truly dormant mines.

Hansen Brothers Enterprises, Inc. v. Board of Supervisors (1996) 12 Cal.4th 533 (*Hansen Brothers*)--consistent with a long line of zoning cases--holds that a use must be present *at the time* a new law takes effect, to be considered a nonconforming use. (*Id.* at pp. 540-568; see *Communities for a Better Environment v. South Coast Air Quality Management Dist*. (2010) 48 Cal. 4th 310, 323, fn. 8 ["the traditional protection for nonconforming uses established *at the time* zoning restrictions become effective"], italics added; *McCaslin v. City of Monterey Park* (1958) 163 Cal.App.2d 339, 346 ["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"], italics added.) Neither a dormant nor an abandoned use is a nonconforming use. (*Hansen Brothers,* at p. 552 ["Nonuse is not a nonconforming use"].) As stated by our Supreme Court, " 'The ultimate purpose of zoning is . . . to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected.' [Citation.] We have recognized that, given this purpose, courts should follow a strict policy against extension or expansion of those uses. [Citation.] That policy necessarily applies to *attempts to continue nonconforming uses which have ceased operation*." (*Hansen Brothers,* at p. 568, italics added.)

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portion of the trial court's ruling references it and Testa's report mentioned it to explain that two separate periods of *post*-SMARA surface mining (by Barney's and by Donovan) were "unpermitted."

It was Hardesty's burden to prove he was conducting a nonconforming use *at the time the law changed*. (See *Hansen Brothers, supra*, 12 Cal.4th at p. 564; *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 629 (*Calvert*); *Melton v. City of San Pablo* (1967) 252 Cal.App.2d 794, 804 ["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"], second italics added.) Here, the relevant date is January 1, 1976, when SMARA took effect. The evidence, construed in the light most favorable to the Board's and the trial court's decisions, shows that no mining had been occurring for decades. Because, as explained, *ante*, Hardesty has forfeited any evidentiary contentions by portraying the evidence in the light most favorable to himself, we are not obliged to respond point-by-point to his many misstatements of the facts on this issue.

In *Stokes v. Board of Permit Appeals* (1997) 52 Cal.App.4th 1348, Stokes bought a vacant property in 1993 that had been used as a bathhouse, but not for at least seven years. In 1985, new zoning rules took effect. (*Id.* at p. 1351.) Local laws allowed legal, nonconforming uses to continue unless, inter alia, they had been discontinued or abandoned, and deemed a three-year period of disuse to reflect an intent to abandon. (*Id.* at pp. 1351-1352.) Stokes obtained permits and began work, but was stopped on the ground the long vacancy meant he had to obtain a conditional use permit. (*Id.* at p. 1352.) A local board upheld the stop order in part because the bathhouse had been closed for at least three years. (*Id.* at pp. 1352-1353.) Acknowledging that mere discontinuance of use does not *necessarily* reflect an intent to abandon, though it is a factor that may help show abandonment, *Stokes* explained that "Stokes's predecessors had completely vacated the building for seven years and the building had not been used for *any* purpose at the time [Stokes] 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 pp. 1355-1356.)

Here, the evidence shows Donovan bought a mine already in a state of disuse, much as Stokes bought a long-closed bathhouse. (See also *Walnut Properties, Inc. v. City Council* (1980) 100 Cal.App.3d 1018, 1024 [party bought a closed movie theater, "In other words, the property was not being put to a lawful use which use continued up to and after the time the use became unlawful or nonconforming"].) Donovan then certified to the government that the mine was closed in order to sell it. In the *Legacy Land* depositions, Donovan testified his intent in trying to sell the property "was to let them buy the property and [then] move on"; his wife in turn testified "everything was going to be closed so we could move and have our life together." This vitiates the claim he did not know what he was doing, or that he retained some subjective intention to mine, or have his successors mine the property, as Hardesty contends.

Further, the record shows a proposed significant *change* in use since pre-1976 times. "The continuance of a nonconforming use 'is a continuance of the same use and not some other kind of use.' " (*County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 688; see *Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642, 651 ["enlargement of plaintiffs' trailer court to accommodate 30 more trailers is clearly a different use"]; *County of Orange v. Goldring* (1953) 121 Cal.App.2d 442, 446-447].) Surface mining is a changed use on Hardesty's property, when contrasted with the pre-SMARA use. Nor can Hardesty persuasively rely on post-1976 *unpermitted* surface mining--twice halted by the government--to show that surface mining was an extant use before 1976.

C. *Abandonment*

As an alternate basis for decision, the Board and the trial court found any right to mine was abandoned.

Preliminarily, we agree with Hardesty that extractive industries like mining often exist at the mercy of market forces. If the price dips, an operator may scale back or cease active operations, while retaining the intention to resume operations when prices recover. As an illustration of this, *Hansen Brothers* described a sister-state case where "the failure

to operate a concrete mixing facility for six months during a business slowdown, while the operator filled orders from another plant, was *not* a cessation of operation. There . . . the plant, equipment, inventory, and utilities were maintained throughout the period and the plant could be made operational within two hours." (*Hansen Brothers, supra*, 12 Cal.4th at p. 569, italics added.) The question in such cases is whether there is an intent to abandon or permanently cease operations, or instead a business judgment that a temporary--even if prolonged--hiatus should be made. Otherwise, as Hardesty suggests, an operator might be forced to continue operations at a loss--perhaps for decades--in order to await market recovery at some unknowable future point.

But this does not mean that every operator who closes a mine because of economic reasons retains an intention to reopen the mine one day, *although* we accept Hardesty's theoretical point that fluctuating mineral prices *may* induce an operator to close a mine temporarily while retaining the intention to reopen, to ride out the market. (See *Hansen Brothers, supra,* 12 Cal.4th at pp. 545-546, 569) [demand for mined aggregates fluctuates with the market; temporary closure during a business slowdown does not of itself constitute abandonment]; accord, *Pardee Construction Co. v. California Coastal Com*. (1979) 95 Cal.App.3d 471, 475, 481-482 [after building most planned units, developer allowed permits to lapse during a recession, but intended to complete remaining units when "sales warranted their construction"; held, no abandonment of vested right]; cf. *Miscovich v. Trych* (Alaska 1994) 875 P.2d 1293, 1296 ["Because government control held gold prices at $35 per ounce . . . mining was not economically feasible"].) But that does not mean *all* gold mines were closed because of low prices, with the intent to reopen when profitable. In other words, the fact national gold prices were low until shortly before SMARA took effect (January 1, 1976) does not *compel* a finding that future mining was intended by Hardesty's predecessors.

As stated by *Hansen Brothers*, in the zoning context, " '[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 [citation]. Mere cessation of use does not of itself amount to abandonment although *the duration of nonuse may be a factor in determining whether the nonconforming use has been abandoned* [citation].' " (*Hansen Brothers*, *supra*, 12 Cal.4th at p. 569, italics added.) Apart from adding his view that precedent states abandonment must be shown by clear and convincing evidence by the party relying on abandonment, Hardesty does not dispute the *Hansen Brothers* test as to abandonment.

Hardesty relies on cases such as *Gerhard v. Stephens* (1968) 68 Cal.2d 864, which held "abandonment hinges upon the intent of the owner to forego all future conforming uses of his property and the trier of fact must find the conduct demonstrating the intent 'so decisive and conclusive as to indicate a clear intent to abandon.' " (*Id*. at p. 889.) Assuming that equates to "clear and convincing" evidence, we find it difficult to conceive of clearer evidence of an intent to abandon than a certified statement by the owner to the government that the mine has been closed with no intent to reopen it, and the Board and the trial court could rationally find Donovan's statement meant what it said. Indeed, at the hearing one Board member gave his opinion that "the statements signed by the operator that the site is abandoned and reclamation is complete really [are] dispositive at this point and that bell cannot be un-rung by creative discussion later." Although the statement of one Board member does not necessarily reflect the views of the entire Board, here it would be rational for the whole Board to adopt that view.[13]

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[13] A leading treatise states that "[a]n abandonment may be effected by an instrument of relinquishment filed in the land office." (2 Lindley on Mines (3d ed. 1914) Abandonment and Forfeiture, § 644, p. 1601.) Here, Donovan filed with the government an instrument stating with exquisite clarity his intent to discontinue mining, consistent with the treatise.

As for Hardesty's view that the Board misapplied both the *standard* of proof and *burden* of proof, the Board found "clear and knowing intent" by Hardesty's predecessors to abandon. In our view, that was an adequate finding under a "clear and convincing" standard, particularly because, like the trial court did, we must presume the Board applied the correct law. (Evid. Code, § 664 [presumption that official duty has been performed]; see *Milligan v. Hearing Aid Dispensers Examining Com.* (1983) 142 Cal.App.3d 1002, 1008.) Further, the clear tenor of the factual findings, given the evidence, renders irrelevant any error about who bore the burden of proof.

Here, the evidence of abandonment was overwhelming. Although possibly Triplett had dreams of someone finding the elusive deep blue lead, he did not actually mine for many, many years. Further, a person's subjective "hope" is not enough to preserve rights; a desire to mine when a land-use law takes effect is "measured by objective manifestations and not by subjective intent." (*Calvert*, *supra*, 145 Cal.App.4th at p. 623.) Critically, Donovan certified to the government that all mining had ceased, *with no intent to resume,* which was uniquely persuasive evidence of abandonment. Indeed, it is difficult to conceive of clearer evidence that the mine was permanently closed than Donavan's certification, which is direct evidence of Donovan's intent to classify the mine as closed with no intent to reopen. Hardesty contends Donovan was illiterate, and that Donovan had been directed how to fill out the forms by a County employee and therefore the forms do not accurately reflect his true intentions, which purportedly were that the property should always be mined. These points were discussed at the Board hearing, and the Board and the trial court were free to weigh the evidence and find the documents Donovan filed meant what they said.

Moreover, two public commentators gave significant statements relevant to abandonment, not rebutted at the hearing and not mentioned in Hardesty's briefs. First, Mary Harris-Nugent, whose family has owned the Harris Ranch bordering the Big Cut Mine property since "the mid-1800's" and who had personally lived on the family ranch

for 52 years, stated "to my knowledge, there has been no operational surface mining of any kind . . . during my lifetime. [¶] The property has remained dormant and abandoned until Mr. Donovan purchased it. He built his home and a road to his ranch and that is about all the activity we [have] seen as the closest neighbors to him." Second, a neighbor of hers, Gail Taxera, has lived on Harris Road, a mile from the proposed mine, for over 50 years and had "never heard or seen signs of active mining with the exception of the activities during the time the Donovans occupied the property." (Recall that the Donovans did not buy the property until 1988, well after SMARA took effect.) The Board could rationally accept these public statements, corroborated by other information before the Board. They dovetail with Donovan's own documentation showing he ceased mining with no intention to resume.[14] Thus, viewed through the appropriate lens, overwhelming evidence supports the Board's and the trial court's findings of abandonment.

Even if the Board erred in assignment of the burden of proof, the trial court did not, and Hardesty has failed to show the outcome at the Board would have differed.

II

Adequacy of Administrative Findings

In a multi-part claim, Hardesty contends the Board's findings fail "to bridge the analytic gap between the raw evidence" and the Board's decision so as to prevent this court from evaluating the "analytic route the administrative agency traveled from evidence to action." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) In particular, he claims the decision rests on abandonment

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[14] Hardesty suggests Donovan's declarations applied to only a very small part of the entire property. Even if true, that point would not account for decades of nonuse and lack of hard evidence of mining on the rest of the property.

and argues the Board and trial court did not apply legally appropriate rules to find abandonment, nor do the facts support such a finding.

To the extent Hardesty separately attacks the *trial court's* decision in this section of his briefing, his points are forfeited, as he has failed to state the facts fairly, as explained in our Preliminary Observations, *ante*. We will address only his claim that the *Board's* findings were insufficient as a matter of law.

Two of the Board's findings were as follows:

> "The cessation of mining activities subsequent to World War II, *lasting through the 1990s* and, even then, commencing for a brief period without authorization from El Dorado County and without submission and approval of reclamation plans and financial assurances as required by SMARA, coupled with a succession of land owners who did not conduct commercial mining operations during that period, precludes reliance on the pre-World War II historic gold mining operations as a basis for establishing a current vested right to mine on Claimant's property." (Italics added.)

> "The historical record regarding gold mining prior to World War II, and *the subsequent conduct of owners of the subject property demonstrates clear and knowing intent by the claimant's predecessors to waive, abandon, or otherwise forego any vested right* that may have pertained to those pre-World War II mining efforts." (Italics added.)

These findings show the Board credited evidence presented to it--disputed by Hardesty but nonetheless substantial, as recounted above--that Hardesty's predecessors (1) stopped active mining operations long before 1976, *and* (2) abandoned the mine.

Administrative findings suffice when they both "inform the parties of the bases on which to seek review" and "permit the courts to determine whether the [administrative] decision is based on lawful principles." (*McMillan v. American General Finance Corp.* (1976) 60 Cal.App.3d 175, 185; see *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 516 ["The findings do not need to be extensive or detailed. ' "[W]here reference to the administrative record informs the parties and reviewing courts of the theory upon which an agency has arrived

at its ultimate finding and decision it has long been recognized that the decision should be upheld if the agency 'in truth found those facts which as a matter of law are essential to sustain its . . . [decision]' " ' "].)

The Board's findings here are sufficiently clear to permit judicial review, and further evidentiary detail was not necessary. This is not a case where there were many possible analytical routes to a decision: Either Hardesty and his predecessors mined (or intended to mine) the property actively before the relevant date or they did not, and Donovan either abandoned any right to mine by declaring the mine closed with no intent to reopen or he did not. The Board was presented with two starkly contrasting versions of history and emphatically rejected Hardesty's version. Contrary to Hardesty's implicit view, the Board was not required to discuss and dissect the raw evidence item-by-item. "Here, the analytic route is clear." (*Singh v. Davi* (2012) 211 Cal.App.4th 141, 152.)

Accordingly, we agree with the trial court that the Board's findings were adequate.

IV

Procedural Due Process

Hardesty contends the Board violated procedural due process because "after Hardesty requested a determination of vested rights, the Board's Executive Officer met with the County to discuss matters at issue, and reviewed the County's file. The County file was not submitted as part of the record, and no County witness appeared in person at the hearing." In his view, the contact between Testa and the County tainted the Board's hearing process. We disagree.

Hardesty relies on the rule that "one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisers in private." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 5 (*Beverage Control*).) But the flaw in Hardesty's claim is that Testa provided written reports to the Board that were in the public record and available to Hardesty, and there is no evidence that he provided any *other* information to the Board or

its members. Although Testa discussed the facts with County officials, no information from those discussions was shared with the Board *except* as reflected by Testa's reports. There is no evidence Testa gave the Board information not available to Hardesty.

The trial court granted a motion to augment the administrative record with declarations, a ruling not challenged on appeal. Testa declared he had no communications with the Board, or any member or advisor thereof about Hardesty's matter, except at public hearings, but spoke with Arcand and Thalhammer. Arcand, a senior engineering geologist with the Board, had no communications with the Board, or any member or advisor thereof about Hardesty's matter, but did speak with Testa. Thalhammer, a former deputy attorney general, had acted as the Board's legal advisor, had no communications with the Board, or any member or advisor thereof regarding Hardesty's matter, except at public hearings, but he did speak with Testa. This evidence supports the trial court's finding there were no ex parte communications with the Board. Everything Testa told the Board was a matter of public record and known to Hardesty.

Hardesty's complaint that Testa's discussions with County officials were improper ex parte communications is unsupported by authority holding a person who writes a publicly available report must include summaries of every source of information, therefore the point "is deemed to be without foundation and requires no discussion by the reviewing court." (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647.)

Further, as the trial court put it, not only was there "internal separation" between Testa and the Board, "Testa did not act as an advisor to the Board, but as an advocate for the agency. Thus, it was not inappropriate for [him] to communicate with the County or to prepare a 'staff recommended' decision prior to the hearing. It was up to the members of the Board to decide whether to accept that recommendation."[15]

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[15] Hardesty suggests the Board was limited to considering "submitted evidence . . . not to develop or investigate the facts." But the Board may consider "additional evidence"

In the lead case relied on by Hardesty, *Beverage Control*, *supra*, 40 Cal.4th 1, our Supreme Court invalidated a procedure whereby an agency prosecutor at the ALJ hearing then provided ex parte information to the full board. But *Beverage Control* also held that "nothing in the [Administrative Procedures Act] precludes the ultimate decision maker from considering posthearing briefs submitted by, and served on, each side. The Department if it so chooses may continue to use the report of hearing procedure, *so long as it provides licensees a copy of the report and the opportunity to respond*." (*Id*. at p. 17, italics added; see *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 531-532.) *Beverage Control* did *not* hold that a public entity "is precluded from soliciting or receiving a written analysis and recommendation from the agency's prosecuting attorney delivered to it as part of a public agenda packet along with the adversary's opposing analysis and recommendation." (*Pleasanton*, at p. 533.)

Hardesty contends anything Testa learned *from the County* should have been disclosed to him, but as the trial court correctly found, assuming any communications from the County that were not included in Testa's report took place, they would be irrelevant because they could not have affected the Board's decision. This is not a situation where the Board received ex parte information but denies it was considered. (Cf. *Beverage Control*, *supra*, 40 Cal.4th at p. 16 ["the agency engaging in ex parte discussions cannot raise as a shield that the advice was *not* considered"].) Further, before the hearing Hardesty had access to a letter from the County formally opposing his RFD, which describes the County's factual and legal objections. Thus, Hardesty had access to the County's views and an opportunity to respond, even if he did not know precisely what

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(see Regs., §§ 3956, 3961, subd. (b)) and it is both commonplace and unobjectionable for a public entity to consider a staff report made public before a hearing. (See, e.g., *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 225-230; *Tily B., Inc. v. City of Newport Beach* (1998) 69 Cal.App.4th 1, 14-15.)

the County may have told Testa apart from what Testa included in his report to the Board.

Thus, we agree with the trial court that there was no procedural unfairness.

DISPOSITION

The judgment is affirmed. Hardesty shall pay the Board's costs of this appeal. (See Cal. Rules of Court, rule 8.278(a).)

/s/
Duarte, J.

We concur:

/s/
Nicholson, Acting P. J.

/s/
Butz, J.

Filed 5/16/17

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JOE HARDESTY ET AL.,

Plaintiffs and Appellants,

v.

STATE MINING AND GEOLOGY BOARD,

Defendant and Respondent.

C079617

(Super. Ct. No. 34-2010-80000594-CU-WM-GDS)

ORDER DENYING PETITION FOR REHEARING & CERTIFYING OPINION FOR PARTIAL PUBLICATION

[NO CHANGE IN JUDGMENT]

* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of parts II and III of the Discussion.

THE COURT:

Plaintiffs Joe Hardesty et al., have filed a petition for rehearing with this court. Nonparty Steven L. Mayer of Arnold & Porter Kaye Scholer LLP has filed a request for publication with this court. It is hereby ordered:

1. Petitioners' petition for rehearing is denied.

2. The opinion in the above-entitled matter filed April 17, 2017, was not certified for publication in the Official Reports. For good cause it now appears part I of the opinion should be published in the Official Reports and it is so ordered.

BY THE COURT:

/s/
Nicholson, Acting P. J.

/s/
Butz, J.

/s/
Duarte, J.

EDITORIAL LISTING

APPEAL from a judgment of the Superior Court of Sacramento County, Timothy Frawley, Judge. Affirmed.

Diepenbrock Elkin Gleason LLP and Jennifer L. Dauer for Plaintiffs and Appellants.

Kamala D. Harris, Attorney General, David Chaney, Chief Assistant Attorney General, John Saurenman, Senior Assistant Attorney General, Christiana Tiedemann, Deputy Attorney General, David G. Alderson and Tara L. Mueller, Deputy Attorneys General, for Defendant and Respondent.

Filed 11/30/18 Keep The Code, Inc. v. County of Mendocino CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

KEEP THE CODE, INC., Plaintiff and Respondent, v. COUNTY OF MENDOCINO et al., Defendants and Appellants; FRANK J. DUTRA et al., Real Parties in Interest and Appellants.	A147544 (Mendocino County Super. Ct. No. SCUKCVPT1464207)

In 1972, the County of Mendocino amended its zoning ordinance to require landowners to secure a use permit to operate a commercial quarry and aggregate business on their property. Thereafter, in 2013, Northern Aggregates, Inc. (NAI) sought an exemption from the use permit requirement for its commercial quarry and aggregate business known as the Harris Quarry (quarry). The county granted NAI's request, finding that NAI had a vested right to operate its commercial quarry and aggregate business as a nonconforming use under the amended ordinance. Keep The Code, Inc. (KTC), a nonprofit organization, petitioned the trial court for a writ of mandate directing the county to set aside its vested right determination. After reviewing the administrative record and exercising its independent judgment, the court found NAI had no vested right to operate its business as a nonconforming use and set aside the county's contrary determination. We affirm.

PROCEDURAL BACKGROUND

On March 21, 2013, NAI filed an application with the county seeking a determination that it had a "vested right to conduct aggregate operations, including mining, conveying, screening, crushing, sorting, blasting, stockpiling, storing, transporting and selling aggregate on [its] 91-acre site" as a nonconforming use under the county's zoning ordinance. Following an investigation by county staff and a public hearing, the county's board of supervisors issued Resolution No. 14-068, on May 20, 2014, in which it was determined that NAI had a vested right to operate its commercial quarry and aggregate business as a nonconforming use.

KTC[1]filed a petition for a writ of mandate (Code Civ. Proc., § 1094.5) seeking to set aside Resolution No. 14-068. NAI and the county opposed the petition. Following argument by counsel, the trial court granted the petition and entered judgment in favor of KTC. A peremptory writ issued directing the county to set aside Resolution No. 14-068. NAI and the county filed timely notices of appeal.

DISCUSSION

A. Applicable Law

1. Common Law Concerning Vested Rights for Nonconforming Uses

As both the county and the trial court recognized, in *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533 (*Hansen*), our Supreme Court set forth the well-settled law in California governing nonconforming uses.

"A zoning ordinance or land-use regulation which operates prospectively, and denies the owner the opportunity to exploit an interest in the property that the owner believed would be available for future development, or diminishes the value of the property, is not invalid and does not bring about a compensable taking unless all

[1] In its petition, KTC describes itself as "a California non-profit corporation whose members include persons and entities who object to the unlimited expansion of and lack of sufficient environmental protection for mining activities at the Harris Quarry. Keep The Code's mission is to preserve and protect for the general public the natural environment, agriculture, and rural character of Mendocino County."

beneficial use of the property is denied. [Citations.] However, if the law effects an unreasonable, oppressive, or unwarranted interference with an existing use, or a planned use for which a substantial investment in development costs has been made, the ordinance may be invalid as applied to that property unless compensation is paid. [Citations.] Zoning ordinances and other land-use regulations customarily exempt existing uses to avoid questions as to the constitutionality of their application to those uses. 'The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected.' [Citation.]

"Accordingly, a provision which exempts existing nonconforming uses 'is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses.' [Citations.] The exemption may either exempt an existing use altogether or allow a limited period of continued operation adequate for amortization of the owners' investment in the particular use. [Citations.]" (*Hansen, supra,* 12 Cal.4th at pp. 551-552.)

Nonetheless, "pre-existing nonconforming uses" are not meant to be "perpetual." (*City of Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 459.) The policy of the law is for the elimination of any nonconforming use because its presence "endangers the benefits to be derived from a comprehensive zoning plan." (*Ibid.*) Accordingly, and consistent with this policy, it has been held that " 'land which has not been used . . . would not create a nonconforming use' " (*Hill v. City of Manhattan Beach* (1971) 6 Cal.3d 279, 285-286 (*Hill*)), and attempts to continue nonconforming uses are barred when nonconforming uses have ceased operation (*Hansen, supra,* 12 Cal.4th at p. 568).

The *Hansen* court acknowledged that the principles applicable to nonconforming uses "[do] not apply neatly to surface mining operations." (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 623, citing *Hansen, supra,* 12 Cal.4th at pp. 553-556.) "Unlike other nonconforming uses of property which operate within an existing structure or boundary, mining uses anticipate extension of mining into areas of the property that were not being exploited at the time a zoning change caused the use to be

nonconforming. The question thus arises whether this extension is a prohibited expansion of a nonconforming use into another area of the property. . . . [T]he answer is a qualified 'no' under the 'diminishing asset' doctrine, an exception to the rule banning expansion of a nonconforming use that is specific to mining enterprises." (*Hansen*, *supra*, at p. 553.) The qualification to the application of the diminishing asset doctrine is that "[a] vested right to quarry or excavate the entire area of a parcel on which the nonconforming use is recognized requires more than the use of a part of the property for that purpose when the zoning law becomes effective . . . . In addition there must be evidence that the owner or operator at the time the use became nonconforming had exhibited an intent to extend the use to the entire property owned at that time." (*Id*. at pp. 555-556, fn. omitted.)

2. Relevant Statutory Law Concerning Vested Rights for Surface Mining Operations in Mendocino County

Before mid-July 1972, no use permit was required for the operation of a commercial quarry and aggregate business on property in the county. Effective on July 20, 1972, the county's board of supervisors amended the county code to require a use permit to operate a commercial quarry and aggregate business on property in the county, including the Harris Quarry. (Mendocino County Ordinance No. 963, amending former ch. 20, art. II of Mendocino County Code.) Thereafter, in 1975, the state adopted the Surface Mining and Reclamation Act of 1975 (see Pub. Resources Code, § 2710 et seq., added by Stats. 1975, ch. 1131, § 11, pp. 2793-2803) (hereinafter SMARA).[2] Effective January 1, 1976, SMARA required a person to secure a use permit to conduct certain surface mining operations, which included a commercial quarry and aggregate business on property in the county. (Former § 2770, added by Stats. 1975, ch. 1131, § 11, p. 2799; see §§ 2729 [mined lands defined], 2735 [surface mining operations defined].) Of significance here, SMARA excepted from the use permit requirement

[2] All further unspecified statutory references are to the Public Resources Code. While SMARA has been amended since this litigation, the amendments are not relevant to our resolution of this appeal.

surface mining operations for which a person had a "vested right" to conduct such operations before January 1, 1976. (Former § 2776, added by Stats. 1975, ch. 1131, § 11, p. 2801.) SMARA also designated the county to act as the "lead agency" to enact local legislation establishing procedures for the approval of use permits to conduct surface mining operations in the county in accord with state policy. (Former §§ 2728, 2774, added by Stats. 1975, ch. 1131, § 11, pp. 2795, 2800; see § 2734 [" '[s]tate policy' means the regulations adopted by the [State Mining and Geology Board] pursuant to Section 2755"].) Thereafter, in 1979, the county's board of supervisors amended the county code to implement regulations relative to surface mining operations in the county. (Mendocino County Code, former § 22.16.060.) Consistent with the state law, Mendocino County Code former section 22.16.060 excepted from the use permit requirement surface mining operations in the county for which a person had a "vested right" before January 1, 1976.[3]

[3] Section 2776, subdivision (a) currently reads: "(a) No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter as long as the vested right continues and as long as no substantial changes are made in the operation except in accordance with this chapter. A person shall be deemed to have vested rights if, prior to January 1, 1976, the person has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations. Expenses incurred in obtaining the enactment of an ordinance in relation to a particular operation or the issuance of a permit shall not be deemed liabilities for work or materials." (Amended by Stats. 2006, ch. 538, § 560, pp. 4429-4430.)

Similarly, and using almost identical language to that used in SMARA, and as originally enacted in 1979, the vested rights ordinance in Mendocino County Code former section 22.16.060 provided, in pertinent part, as follows: "No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to the provisions of this chapter as long as such vested right continues; provided, however, that no substantial changes may be made in any such operation except in accordance with the provisions of this chapter. A person shall be deemed to have such vested rights if, prior to January 1, 1976, he has, in good faith, and in reliance upon a permit or other authorization if such permit or other authorization was required, diligently commenced surface mining operations and incurred

B. Trial Court's Decision

The court found that when the county amended its code on July 20, 1972, making a commercial quarry and aggregate business a nonconforming use, the property on which the quarry was situated was owned by Christ's Church of the Golden Rule (Church). The Church had acquired the property in 1963, and continued to own it until 1983. The court further found that for the entirety of the Church's ownership of the property (spanning the 1972 and 1979 amendments to the county code and the 1976 enactment of SMARA), the record was "absolutely devoid" of any credible or reliable evidence demonstrating that the Church *operated* the quarry as a commercial venture, had expended "any money in connection with quarrying activities and/or rock crushing or screening," or had incurred "any liabilities 'for work and materials necessary' " for surface mining operations. In so ruling, the court relied, in pertinent part, on written statements submitted by Tracy Livingston and Richard Tyrrell, who were members of the Church during its ownership of the property. The court found the Church members had "declared credibly and with sufficient personal knowledge" that the Church did not operate the quarry on a commercial basis and did not intend to expand quarry operations during its ownership. The court further found that the statements of Livingston and Tyrrell were more reliable than other declarations and statements of Frank Dutra, Bud Garman, and Wayne Waters,

substantial liabilities for work and materials necessary therefor. Expenses incurred in obtaining the enactment of an ordinance in relation to a particular operation or the issuance of a permit shall not be deemed liabilities for work or materials."

Mendocino County Code section 22.16.150, subdivision (A), adopted in 1999, currently provides: "No person who has obtained [a] vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to the provisions of this Chapter as long as such vested right continues and no substantial change is made in that operation. Any substantial change in a vested surface mining operation subsequent to January 1, 1976, shall require the granting of a permit pursuant to this Chapter. A person shall be deemed to have such vested rights if, prior to January 1, 1976, he has, in good faith, and in reliance upon a permit or other authorization if such permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary therefor. Expenses incurred in obtaining the issuance of a permit related to the surface mining operation shall not be deemed liabilities for work and materials."

who described some rock removal activities that occurred on the site at various times preceding and shortly following July 20, 1972.

Additionally, the court found that assuming a vested right to operate a commercial quarry and aggregate business as a nonconforming use existed on July 20, 1972, there was no evidence that would allow for the substantial expansion of the quarry "without a use permit . . . as a 'diminishing asset' operation" under *Hansen, supra*, 12 Cal.3d 540. In so finding, the court was mindful "that the quarry and aggregate business is seasonal and cyclical and that the court should assess the continuity of the operation in the light of the historical pattern. ([Mendocino County Code, former §] 22.16.060)." But, the court again relied on the statements of Livingston and Tyrrell, which demonstrated that during its ownership the Church had not operated the quarry on a commercial basis and did not intend to expand quarry operations. The court further found that even if it accepted the evidence offered by Dutra, Waters, and Garman, there were still substantial periods of approximately three years and four years of inactivity at the quarry site, which could not be attributed to the seasonal nature of the business, use of stockpiled material, or the use of other onsite resources. The court also rejected appellants' contention that a comparison of aerial photographs taken before and after July 1972 indicated a substantial increase in quarry activity from which the court could arguably determine the Church's intent to expand quarry operations. The court stated that, "[a]part from the fallacy of that argument, a comparison [of] the outline of the quarry boundaries as *actually delineated* on the photographs [record citations to "1965" aerial photograph and "1974 or 1981" aerial photograph] does not support that argument. Measuring each outlined area in cross-sectional directions at the widest points indicates that the outlined site on the 1974/81 aerial is no larger tha[n] the outlined site on the 1965 photo."[4]

[4] The trial court found that, "[b]ased on the scales provided on each phot[o], the area outlined in the 1965 photo is approximately 335' x 240['']. That outlined in the 1974/81 photo is approximately 225' x 125'."

C. Appellants' Contentions

1. Trial Court's Legal Determinations

Appellants make various arguments challenging the trial court's legal determinations, none of which requires reversal.

Appellants, throughout their briefs, complain about isolated statements made by the trial court relative to the law governing nonconforming uses. However, appellants' overarching claim of error is that NAI's right to operate its business as a legal nonconforming use was governed solely by the court's evaluation of how the property was used at the time it first became nonconforming on July 20, 1972, during the Church's ownership. According to appellants, the county's interpretation of its code allowed NAI to operate its business as a nonconforming use based on the use of the property for that purpose by *any* predecessor owner who incurred substantial liabilities *at any time*. As we now explain, we see no merit to appellants' arguments.

First, as noted above, "[a] legal nonconforming use is one that existed lawfully before a zoning restriction became effective and that is not in conformity with the ordinance when it continues thereafter." (*Hansen*, *supra*, 12 Cal.4th at p. 540, fn. 1.) Thus, whether a landowner can claim a right to a nonconforming use is to be determined by the use of the land at the time the use became nonconforming under the zoning ordinance restricting such use. (*Ibid.*) Accordingly, the trial court's finding, with which we concur, that July 20, 1972, was the appropriate date to determine the existence of a right to a nonconforming use, is consistent with the law. (*Id.* at p. 560.) In addition, the law of nonconforming uses provides that once a landowner acquires a right to use the property as a nonconforming use, the established (vested) right to continue the nonconforming use is a property right that can be transferred to a successor owner. (59 Ops.Cal.Atty.Gen. 641, 656-658 (1976).) Conversely, if at the time a zoning ordinance creates a nonconforming use the landowner is not using the land for that purpose, no vested right is created that can be transferred to a successor owner. (See *Hansen*, *supra*, at p. 568; *Hill*, *supra*, 6 Cal.3d at pp. 285-286 [" 'land which has not been used . . . would not create a nonconforming use' "].) Because the trial court here found that the Church

was not using the property as a commercial quarry and aggregate business on July 20, 1972, a nonconforming use did not exist that could be transferred to NAI as a successor owner.

We also conclude that appellants' arguments are "clearly at variance with" the pertinent language in the county code, as well as SMARA. Both the state law and the county code provisions under review provide, in pertinent part, "*A person* shall be deemed to have vested rights [in a nonconforming use] if . . . *the person has*" (§ 2776, subd. (a), italics added) or "*he has*" (Mendocino County Code, § 22.16.150, subd. (A), italics added; see *id*., former § 22.16.060) "diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations" before the effective dates of the law. (§ 2776, subd. (a); Mendocino County Code, § 22.16.150, subd. (A); see *id*., former § 22.16.060.) As a codification of the common law of nonconforming uses, the pertinent statutory language "suggests that the [law] extends [a vested right] only to those persons whose reliance upon existing permits or authorization induced them to initiate substantial performance of their projects and to incur substantial liabilities in connection therewith" *at the time the use became nonconforming because of the change in the law*. (*Urban Renewal Agency v. California Coastal Zone Conservation Com.* (1975) 15 Cal.3d 577, 586 [interpreting statutory language in former § 27404, a vested rights exemption provision essentially like § 2776].) Here, as we have noted, the Church had not diligently commenced and incurred substantial liabilities for work and material necessary for the operation of a commercial quarrying and aggregate business at the time the use became nonconforming. Consequently, the Church had not acquired a vested right that could be transferred to NAI as a successor owner. Moreover, appellants' expansive view of the statutory language is in contravention of the basic tenets of statutory construction. As our Supreme Court has cautioned, we do not presume that legislatures intend, when enacting statutes, " 'to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied.' [Citations.]" (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1325.) Instead, " ' "[a] statute will be construed in light of

common law decisions, unless its language ' "clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter . . . ." ' " ' " (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.) Appellants here have failed to cite to any statutory language or other relevant authority that the state or county intended, when enacting SMARA and the county code provisions, to depart from the common law governing nonconforming uses. To accept appellants' broad construction of the statutory language would require us to abrogate those common law rules governing nonconforming uses, which we decline to do.

2. Trial Court's Burden of Proof and Factual Findings

Appellants also make various arguments challenging the burden of proof imposed on the parties and the trial court's factual findings.

We first address appellants' assertion that the court misapplied the burden of proof in determining whether appellants acquired vested rights in the operation of the quarry. Appellants' legal argument, asserting that the court shifted the burden of proof to them, is based on a single sentence plucked from the court's decision which states: "Even allowing for the 1976-78 purchases [of aggregate] reported . . . , there is no evidence of the operation of a *commercial* quarry and aggregate business during the periods of 1963-75 and 1979-82." Appellants argue this language supports their contention that the court required appellants, rather than KTC, to present "evidence" establishing the operation of a commercial quarry during the years referred to by the court.

However, our review of the record establishes that the trial court did not err in its application of the required burden of proof. In resolving the parties' dispute, the court stated that NAI, as the party asserting a right to a nonconforming use, had the burden of proving before the county board of supervisors that, on July 20, 1972, when quarry operations first became a nonconforming use, "(1) [the] quarry operations had been diligently commenced . . . ; and (2) . . . the owner/operator had incurred substantial liabilities in reliance on the non-conforming use status." The court also indicated that KTC, as the petitioner in the trial court, had the burden of proving that the county's

finding in favor of NAI was not supported by the weight of the evidence, in order to establish an abuse of discretion justifying the issuance of the requested writ. (Code Civ. Proc., § 1094.5, subd. (c).) The court then turned to evaluate whether KTC had met its burden. In doing so, the court accorded the county's findings "a strong preference of correctness" but found that KTC had overcome any "presumption of correctness," which enabled the court to "substitute its own judgment to reject the findings" of the county board of supervisors once the court had "examined those findings under the appropriate standards." Given this record, we soundly reject appellants' argument that the court improperly shifted the burden of proof to them.

We further conclude that appellants' challenge to the trial court's factual findings fares no better than their legal challenge, discussed above. The law governing our review of the court's factual findings is well established. "In exercising its independent judgment," as in this case, "a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817 (*Fukuda*).) Nonetheless, "the presumption provides the trial court with a starting point for review—but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." (*Id.* at p. 818.) "[I]in exercising its independent judgment 'the trial court has the power and responsibility to weigh the evidence at the administrative hearing *and to make its own determination of the credibility of witnesses*.' [Citation.]" (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658.) On appeal, when an administrative adjudication is subject to the independent judgment test of review, " 'California fixes responsibility for factual determination[s] at the trial court rather than the administrative agency tier of the pyramid as a matter of public policy.' " (*Id*. at p. 659.) Consequently, "our review of the record is limited to a determination whether substantial evidence supports the trial court's conclusions and, in making that determination, *we must resolve*

all conflicts and indulge all reasonable inferences in favor of the party who prevailed in the trial court. [Citations.]" (*Id.* at pp. 659-660, italics added; see *Fukuda*, *supra*, 20 Cal.4th at p. 824.)

Appellants first contend there was "ample evidence" in the record to support the county's findings that "a person [had] 'diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations' " at the time the use became nonconforming in 1972, during the Church's ownership. Appellants fail, however, to acknowledge the standard of review we employ in reviewing the court's factual findings. Under the governing standard, we review the record to determine whether there is substantial evidence that supports the court's findings, not those of the county. Applying the correct standard, we have no trouble concluding that evidence exists to support the court's findings. Specifically, the court reasonably relied on the statements of church members Livingston and Tyrrell, who credibly asserted that the Church had not used the property as a commercial quarry and aggregate business at any time during the entirety of its ownership, which included when the use became nonconforming in 1972. While there was other evidence in the record that might have supported a contrary finding, as the court acknowledged, it was free to conclude such evidence was not sufficient to substantiate NAI's claim of a vested right to operate a commercial quarry and aggregate business as a nonconforming use.

Additionally, we see no merit to appellants' argument that the trial court erred by relying on the statements submitted by Livingston and Tyrrell, while discounting the declarations of Dutra and Waters, the statement of Bud Garman, and statements made by members of the county board of supervisors. "It is not our role as a reviewing court to reweigh the evidence or to assess witness credibility. [Citation.]" (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 (*Thompson*).) Moreover, appellants' reliance on *San Diego Unified School Dist. v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120, 1146, does not assist them here. Unlike the trial court in *San Diego Unified School Dist*., the trial court here explained its reasons for accepting the statements of the Church members and the basis for its rejection of the declarations and

statements of other witnesses. Nor does the fact that the court did not mention certain evidence, as appellants assert, require reversal. It was the court's role to review the administrative record, and "we presume the court performed its duty." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1324; Evid. Code, § 664.) Implicit in its ruling, the court found the evidence cited by appellants did not demonstrate that the Church was using or intended to use the property as a commercial quarry and aggregate business at the time the use became nonconforming. Appellants insist that "[a] composite aerial photo, comparing 1974 activity with prior quarry boundaries, shows the significant expansion of the quarry floor during the Church's ownership." However, whether there was a "significant" expansion of the quarry floor, from which a reasonable inference could be drawn that the property was being used as a commercial quarry and aggregate business during the Church's ownership, was a question of fact for the court as the trier of fact. The individual aerial photographs of the quarry site are fuzzy and do not delineate to the naked eye either structures, equipment, or stockpiles on the property, or, more significantly, that the property was being used as a commercial quarry and aggregate business. The photographs are annotated with circled areas, purportedly showing "the quarry;" arrows pointed at certain areas, purportedly showing, "structure;" and "apparent stockpile or equipment." The court was not required to accept appellants' descriptions of what was visible in the aerial photographs or what was visible in the consultants' composite photograph, which was created by overlaying the consultants' interpretation of individual aerial photographs.[5] " '[A]s a general rule, "[p]rovided the trier of fact does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted. [Citations.]" [Citation.] This rule is applied

[5] To the extent appellants assert that the trial court engaged in an "unauthorized private investigation" regarding the photographs and composite drawings of the quarry, we reject the assertion. The court was at liberty both to review the evidence and to determine the weight to assign to it. Thus, we conclude the court's review of the photographic evidence and its determination of the weight to assign the disparities in the composite overlaying the photographs was well within the ambit of the court's function as the trier of fact.

equally to expert witnesses.' [Citation.] The *exceptional* principle requiring a fact finder to accept uncontradicted expert testimony as conclusive applies *only* in professional negligence cases where the standard of care must be established by expert testimony." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632.) Nor are we persuaded by appellants' argument that the court made two prejudicial errors in its analysis of the evidence relative to various dates and differing scales on the individual aerial photographs. If appellants believed the court's decision was improperly influenced by the various dates or differing scales on the photographs, they could have brought the purported error to the court's attention by an appropriate objection under Code of Civil Procedure section 657 (motion for a new trial) or section 663 (motion to vacate judgment). (See *Thompson, supra*, 6 Cal.App.5th at pp. 981-982.) Their failure to do so indicates they did not deem the purported errors to be prejudicial, and we too find no prejudice.

We conclude our discussion by noting that appellants' "elaborate factual presentation" in their briefs, simply put, is an attempt to reargue on appeal factual issues that were decided adversely to them at the trial, which is "contrary to established precepts of appellate review," and "[a]s such, it is doomed to fail." (*Hasson v. Ford Motor Co*. (1982) 32 Cal.3d 388, 398-399.) Having determined the trial court did not err in making its factual findings or in applying the parties' respective burdens of proof, we see no merit to appellants' claims of error on these grounds.[6]

DISPOSITION

The judgment is affirmed. Respondent Keep The Code, Inc. is awarded costs on appeal.

[6] Considering our determination, the parties' remaining contentions do not need to be addressed.

_____
Jenkins, J.

We concur:

_____
Pollak, Acting P. J.*

_____
Ross, J.†

A147544/*Keep The Code, Inc. v. County of Mendocino*

* On Monday, November 26, 2018, the Commission on Judicial Appointments confirmed the Governor's appointment of Justice Pollak as the Presiding Justice of Division Four of this court.

† Judge of the San Francisco Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

EXHIBIT D

California Vested Rights Law, Mark D. Harrison, Esq.,
February 5, 1998

PRESENTATION FOR THE CONSTRUCTION MATERIALS ASSOCIATION OF CALIFORNIA
HOLIDAY INN CAPITOL PLAZA, SACRAMENTO, CA
FEBRUARY 5, 1998

VESTED MINING RIGHTS AND

THE RIGHT TO EXPAND OPERATIONS

BY MARK D. HARRISON, ESQ.

1. VESTED MINING RIGHTS---WHAT ARE THEY?

- Property right to continue operating in a certain location and in a certain way without being required to conform to all current land use restrictions.

- Legally, a vested mining right is a "nonconforming use" of land. The California Supreme Court has defined a nonconforming use this way:

A legal nonconforming use is one that existed lawfully before a zoning restriction became effective and that is not in conformity with the ordinance when it continues thereafter. [Citations omitted] The use of the land, not its ownership, at the time the use becomes nonconforming determines the right to continue the use. Transfer of title does not affect the right to continue a lawful nonconforming use which runs with the land [Citations omitted]...

Hansen Brothers Enterprises v. Board of Supervisors, 12 Cal. 4th 533, 540 fn.1 (1996)("Hansen").

2. FOR WHOM ARE VESTED RIGHTS IMPORTANT?

- Owners and operators of vested, nonconforming operations.

- Companies who are considering purchasing or leasing such operations.

- Owners and operators who are doing business under older, open-ended use permits.

3. WHY IS IT IMPORTANT TO KNOW YOUR LEGAL RIGHTS?

- Vested, nonconforming uses of all kinds are disfavored by the law and by planning agencies.

- The public (including many local planners, state regulators and the judiciary) have an ingrained, negative attitude towards mining uses. When asserting your rights to continue or expand a vested operation, you can expect, and must prepare for, opposition.

4. HOW IS THE SCOPE AND EXTENT OF A VESTED MINING RIGHT DEFINED?

A. Geographical Scope.

- Land use agencies will often argue that a use permit is required when a vested mining use seeks to expand operations into areas of the property not previously mined.

- In 1996, the California Supreme Court in Hansen Brothers Enterprises v. Board of Supervisors, 12 Cal. 4th 533 (1996), rejected this argument. The Supreme Court established the rule that a vested mining right ordinarily includes the right to complete mineral extraction from the entire mining property. The miner, however, must have "objectively manifested" its intent to mine the entire tract at the time the use first became nonconforming (usually at the time a use permit was first required).

- Hansen did not discuss what facts are sufficient to show the required "objective manifestation" of intent to mine the entire tract Law from other states, however, suggests that all operational factors are considered, such as 1) the physical nature of the mining parcel; 2) whether the mine consists of one or more parcels; 3) the steady continuation of mining (including the stockpiling) over time; 4) the existence of roads on the property; 5) where processing facilities are located on the property; and 6) the type of mining equipment used on the site.

- Based on these factors, it is usually the case that a typical commercial mining operation can show that it "objectively manifested" the intent to mine the entire tract. The vested right, therefore, would include the right to enlarge operations to harvest all areas of the mine. It is improper for a local agency to limit the geographical scope of the mining operation to less than the entire tract.

B. Operational Scope (Production Volumes).

- Even in cases where the local land use authority recognizes the geographical scope of the vested use, attempts are sometimes made to limit the miner's production volumes. Vested operators will face the argument that they can not produce at a level above their past annual maximum, or at a level above the average of past years production or that their increases in production (if allowed at all) should be restricted.

- Hansen, the only California legal authority that has addressed the question of whether an increase in production volumes impermissibly intensify or enlarge a vested mining use, rejected this argument.

- The evidence in Hansen was that, at unspecified times in the operation's history, aggregate production from the mine sometimes reached 200,000 tons (or 133,000 cubic yards) per year, although average annual production was far less. Hansen, supra, 12 Cal. 4th at 546. Hansen Brothers' reclamation plan application forecast a minimum yearly production of 5000 cubic yards and a maximum yearly production of 250,000 cubic yards per year. Id. at 574.

- The County of Nevada argued that under SMARA section 2776 (prohibiting "substantial changes" in vested mining operations without first securing a use permit) and its local nonconforming use ordinance (which prohibited "intensification" of a nonconforming use), the miner's future operations, as described in the reclamation plan, would impermissibly intensify the operation through an increase in production volumes.

- The Court began its analysis by stating that "...the natural and reasonable expansion of a quarry business to meet increased demand is not an impermissible enlargement or change in the use of the property." Id. at 572. The Court treated this conclusion as a corollary to the general rule that "an increase in business volume alone is not an expansion of a nonconforming use..." Id. at 573. The Court found that neither the County's nonconforming use ordinance nor SMARA section 2776 contained a "prohibition against a gradual and natural increase in a lawful, nonconforming use of a property, including quarry property...[W]here increased population created an increased demand for the aggregate used in road construction, an increase to meet that demand would not be construed as an enlargement or intensification of the use..." Id. Based on these legal principles, the Court held: "Unless Hansen Brothers proposes immediate removal of quantities of rock which substantially exceed the amount of aggregate materials extracted in past years, there is no impermissible intensification of use..." Id. at 575.

- Hansen, and its discussion of increased production, appears to stand for the proposition that a 100% increase in production volumes from a mine (133,000 cubic yards to 250,000 cubic yards) is not impermissible intensification of the use. This assumes that the mine production in question, like the mine involved in the Hansen case, is market driven and the increase is in response to market forces. The increase , to some degree, must be a "gradual and natural" expansion of the use and not an increase associated with the addition of massive new industrial instrumentalities or a fundamental change in the way the business operates.

- The significant point to take away from the Hansen case on the question of volume is that production increases (even relatively aggressive increases) are clearly allowable as part of a nonconforming mining use.

C. Operational Scope (Adding and Modernizing Equipment).

- Another argument made to limit a vested mining operation is that the vested operation is not permitted change or modernize mining methods and equipment.

- Although no California case has ever directly addressed the issue, Hansen does provide assistance in how to frame the general analysis.

- In Hansen, the California Supreme Court addressed Nevada County's claims that an aggregate production operation should be compartmentalized into separate "uses" (such as riverbed extraction, hillside extraction, storage and processing). The Court expressly rejected this type of cramped, definitional approach. The Court held that:

In determining the use to which the land was being put at the time the use became nonconforming, the overall business operation must be considered. '[O]ne entitled to a nonconforming use has a right to. . . engage in uses normally incidental and auxiliary to the nonconforming use. . . Furthermore, open areas in connection with an improvement existing at the time of the adoption of zoning regulations are exempt from such regulations as a nonconforming use if such open areas were in use or partially used in connection with the use existing when the regulations were adopted. ' The mining uses of the Hansen Brothers property are incidental aspects of the aggregate production business.

Hansen, supra, 12 Cal. 4th at 565-566 (quoting 8A McQuillin at section 25. 200, p. 89).

- Hansen clearly sanctions a unitary use theory in which the overall business operation is used as the vested rights benchmark. As a result, Hansen necessarily expands the existing use baseline, and arguably expands the range of allowable changes that can be made to a mining operation while maintaining overall similarity with the pre- existing use. Therefore, mine operators can, and should always, define the baseline operation as one that produces rock and aggregate products. All operations at the mine occur as ancillary components supporting this overall use.

- Cases from other jurisdictions are uniform in holding that the adding and modernizing of equipment is not a prohibited change, provided that the new equipment does not change the fundamental nature of the use. For example:

- In Cheswick Borough v. Bechman 352 Pa. 79, 82-83 (1945), the court held:

That modern and more effective instrumentalities are used in the business will not bring it within the prohibition of the Ordinance if in fact there was an existing use, provided these are ordinarily and reasonably adapted to the carrying on of the existing business...

- Similarly, in Moore, v. Bridgewater Township, 173 A.2d 430, 442 (1961) the Superior Court of New Jersey specifically rejected the claim that the miner should be prevented from adding a rock crusher on the basis that such a machine was not in use at the time the use became nonconforming. The court held:

Let us assume an extreme situation where an owner is quarrying with only a pick and shovel, when an ordinance is passed making his operation nonconforming. Should we decide that thereafter the owner, his heirs, or assigns, may only quarry with a pick and shovel? We have decided in the instant case that the right to quarry extends to the owner's entire tract because not to permit it would, in effect, end the operation. The same reasoning is applicable to the problem of structures. We are of the opinion that in a "diminishing asset" case the holder of the nonconforming use should be permitted to modernize his operation; and change, add to, or increase the size of his equipment (though deemed to be structures), even though this increases his output and intensifies the use; provided that by such action he does not change the original protected nonconforming use.

- As with all aspects of a nonconforming use, however, each case must ultimately stand on its own facts. There will come a point where the addition of new machinery will be considered fundamental change, rather than modernization. This usually occurs due to the fact that either the change in equipment is so massive so as to constitute a "new" use or the original use was clearly different from the use to be accomplished by employing the added equipment. For example:

- In DeFelice v. Zoning Board of Appeals, 32 A.2d 635 (1943), the Connecticut appeals court, while acknowledging the basic rule allowing modernization of equipment, nonetheless prohibited the miner's attempt to install a wet sand classifier. The wet sand classifier was 106 feet long, 85 feet wide and 40 feet in height. The floor area was 2,000 square feet. The structure was made mostly of steel with several concrete footings. The classifier also required a standing body of water sufficient to sustain a float 15 feet long and 10 feet wide equipped with a diesel suction dredge. This machinery would eventually convert the entire property into a permanent lake covering the entire mine acreage. The De Felice court found that this additional equipment would be a substantial departure from the original nature and purpose of the use which had been limited to sand excavation using, first picks and shovels, and later a steam

shovel. Id. at 638.

- Similarly, Paramount Rock Co. v. County of San Diego, 180 Cal. App. 2d 217 (1960) the court held that the addition of a large, rock-crushing unit consisting of "a system of crushers, vibrating screens, washing devices, electric motors and conveyor belts. . .[using] 576,000 gallons of water per day and [requiring] 250 horsepower to operate. . .and [occupying] an area about twice that occupied. . .", Id. at 222, by the preexisting concrete premix plant was not "substantially similar", Id. at 228, to the preexisting use.

5. CLOSING REMARKS