MEMORANDUM

TO: THE COUNTY OF PLUMAS

FROM: BEST BEST & KRIEGER LLP, SPECIAL COUNSEL TO PLUMAS COUNTY

DATE: APRIL 15, 2024

SUBJECT: REVIEW OF REQUEST FOR DETERMINATION OF VESTED MINING RIGHTS FOR THE ENGELS-SUPERIOR MINES: CALIFORNIA-ENGELS MINING COMPANY (OWNER) / US COPPER CORP (APPLICANT) (ASSESSOR'S PARCEL NUMBERS 007-080-004-000 [ENGELS MINE] & 007-090-003-000 [SUPERIOR MINE])

I. INTRODUCTION

The County of Plumas ("**County**") retained Best Best & Krieger LLP ("**BBK**") on February 6, 2024, to undertake the review of the existing public hearing record for a request for determination of vested mining rights for the Engels-Superior Mines, in Plumas County, California (collectively the "**Mines**"). The purpose of this Memorandum is to document the independent review and analysis by Best Best & Krieger LLP of the request for determination of vested rights. For a summary of the public comments received by the County as of April 12, 2024, 5:00PM PST, please see Exhibit "**E**" and the table attached as Table "**1**."

II. PROJECT BACKGROUND & SUMMARY

A. The Vested Rights Application

On April 25, 2023, U.S. Copper ("**Applicant**") submitted a request, prepared by EnviroMINE Inc., for determination of vested mining rights to the Plumas County Planning Department, which included several parcels owned by California-Engels Mining Company ("**CEMCO**"), as identified by the following Assessor's Parcel Numbers ("**APN**"): 007-160-009-000, 007-160-002-000, 007-170-010-000, 007-170-011-000, 007-160-010-000, 007-160-011-000, 007-180-004-000, 007-180-002-000, 007-080-004-000, and 007-090-003-000. Collectively, these parcels comprise approximately 967 acres.

A historical summary ("**Background Report**"), with documentation including figures and exhibits, was submitted along with the request for determination of vested rights. The Background Report consists of documents and information that forms the basis for the vested mining rights request filed by the Applicant (see Exhibit "**A**").

On June 27, 2023, EnviroMINE Inc., on behalf of the Applicant, sent a letter to the Planning Department (see Exhibit "**B**") amending the April 25, 2023, request for determination of vested mining rights submittal that narrowed the geographic scope of the determination to the following two APNs, comprising 735.98 acres (collectively the "**Proposed Vested Rights Area**"):

1. APN 007-080-004-000 – Engels Mine parcel (509.37 acres)

2. APN 007-090-003-000 – Superior Mine parcel (226.61 acres)

The amended request was made by letter and included no revisions to the Background Report or new (or narrowed) background information relating to the Proposed Vested Rights Area.[1] The amended application for the smaller footprint, which includes the Mines, is herein referred to as the "**Application**."

The Planning Department requested the Applicant provide historical maps for the Mines on the Proposed Vested Rights Area. Two maps were received from EnviroMINE Inc., on behalf of the Applicant, on July 10, 2023 (See Exhibit "**C**").

B. Location & Setting

The Engels Mine parcel (509.37 acres) and the Superior Mine parcel (226.61 acres) encompass in total 735.98 acres in Plumas County, California. More specifically, the Mines are situated in Indian Valley approximately 5 miles north of the intersection of Diamond Mountain Road and Lights Creek Lane, or 11 miles northeast of the Town of Greenville, and approximately 28 miles east of Lake Almanor. These Mines, and other mines located at the convergence of the Cascades and the Sierra Nevada Mountains, produce a range of minerals and rock including gold, copper, silver, aggregate, sand, and gravel.

C. Public Hearing Summary

Plumas County has held two Zoning Administrator public hearings involving the Application. The following is a complete list of the meetings with the topic and topic description.

- Zoning Administrator Regular Meeting: October 11, 2023 @ 10:00 a.m. (Plumas County Permit Center Conference Room, 555 Main Street, Quincy)

Agenda Description: DETERMINATION OF VESTED RIGHTS OF MINING OPERATION(S) AS PER PLUMAS COUNTY CODE SECTION 9-5.05 VESTED RIGHTS - ENGELS-SUPERIOR MINES: CALIFORNIA-ENGELS MINING CO. (owner) / US COPPER CORP (applicant); APN 007-080-004-000 (ENGELS MINE / 509.37 acres) AND APN 007-090-003-000 (SUPERIOR MINE / 226.61 acres); T27N/R11E/Secs.3,4,9,7,8,17,18 MDM

[1] "We have included a map showing the remaining parcels (007-080-004 and 007-090-003) still included in the Application." Source: Quoted from the main body of the letter in Exhibit B. No other materials were provided in the letter.

Topic: Request for determination of vested rights for the Engels and Superior mines located at 9130 Diamond Mountain Road, unincorporated Plumas County, pursuant to Plumas County Code, Title 9 Planning and Zoning, Chapter 5 Permit to Mine and Reclamation, Sec. 9-5.05 (Vested rights). CEQA does not apply to this determination.

- Zoning Administrator Regular Meeting: December 13, 2023 @ 10:00 a.m. (Plumas County Fairgrounds, Mineral Building, 204 Fairground Road, East Quincy)

Agenda Description: CONTINUED PUBLIC MEETING – DETERMINATION OF VESTED RIGHTS - ENGELS-SUPERIOR MINES: CALIFORNIA-ENGELS MINING CO. (owner) / US COPPER CORP (applicant); APN 007-080-004 (ENGELS MINE) & APN 007-090-003 (SUPERIOR MINE); T.27N/R.11E/S.3,4,9,7,8,17,18 MDM

Topic: Request for determination of vested rights for the Engels and Superior mines (located at 9130 Diamond Mountain Road) for US Copper Corp pursuant to Plumas County Code, Title 9 Planning and Zoning, Chapter 5 Permit to Mine and Reclamation, Sec. 9-5.05 (Vested rights). APN 007-080-004 is 509.37 acres. APN 007-090-003 is 226.61 acres. Both parcels are zoned "GF" or General Forest. This item is continued from the October 11, 2023, Zoning Administrator meeting. Note – no decision will be made on this item at this meeting and the public comment opportunity will remain open following the conclusion of the item. Plumas County is in the process of contracting with a consultant with vested mining rights expertise to review the whole of the record. Another public meeting will be scheduled at a future date, time, and location once the consultant review is complete and any and all additional information is provided to the public.

III. APPLICABLE LAWS & LEGAL STANDARDS

A. Guidance on Vested Mining Rights

Over the years, several California courts have provided guidance regarding the determination of vested mining rights. In addition, various state and local laws will also apply to such determinations. A zoning ordinance usually exempts existing nonconforming uses because of financial hardships imposed on immediately ceasing a nonconforming use and the constitutional concerns with compelling their immediate discontinuance.[2] Nevertheless, when an existing use is permitted to continue as a nonconforming use, it must be similar to the use existing when the zoning ordinance became effective. (See *Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County* (1996) 12 Cal.4th 551, 552 ("***Hansen Brothers***").) The date that the ordinance became effective upon the nonconforming use is typically referred to as the "vesting date" and it establishes the guidepost for determining whether a particular mining activity is vested and is allowed to continue without compliance with the zoning enactment.

[2] See *McCaslin v. City of Monterey Park*, 163 Cal. App. 2d 339, 329 P.2d 522 (2d Dist. 1958), holding that 60 days is too short a period to amortize a nonconforming use.

An exception exists when the nonconforming use is a mining operation. Progression of the mining activities into other areas of the property is not considered a prohibited expansion or change of location of the nonconforming use if there is objective evidence that the mine owner, at the time the zoning ordinance was enacted and the mining use became nonconforming, intended to expand the mining operation into those areas. (See *Hansen Brothers* at 553.) The rationale for this "diminishing asset" doctrine is that the very nature of an excavating business is continuing use of the entire parcel of land for the exploitation of a diminishing resource. Thus, the nonconforming use activities may involve a vested right to use the entire parcel of land, even though only a portion was used when the ordinance regulating mining became effective. (See *Hansen Brothers* at 557.)

1. Determining Vested Rights for Mining Activities

The determination of whether a particular use is vested can involve a complicated factual analysis because no single evidentiary test exists to determine the existence of active mining on a particular vesting date. Nevertheless, the *Hansen Brothers* court instructed that, "the burden of proof is on the party asserting a right to a nonconforming use to establish the lawful and continuing existence of the use at the time of the enactment of the ordinance. ".[3] *Hansen Brothers* and other cases have similarly provided guidance on the type of evidence that may be considered to determine whether or not an applicant has met its burden to demonstrate a vested mining operation on a vesting date. Such evidence may typically include, but is not limited to, historical accounts, leases and contracts, photographs, legal records, recorded documents, business records, county files, or other relevant and reliable resources. Other court cases have provided guidance on specific factors. These are summarized below:

a. The use of the land, not its ownership, at the time the use becomes nonconforming is paramount and determines the right to continue. Transfer of title does not affect the right to continue a lawful nonconforming use which runs with the land. (*Hansen Brothers* at 540.)

b. A nonconforming mining use includes all activities that were "integral parts" of the mining operation at the time a restrictive zoning ordinance was adopted. This includes "uses normally incidental and auxiliary to the nonconforming use." (*Hansen Brothers* at 565.)

c. Modernization of the mining operation is permitted. Nonconforming mines may change equipment as technology evolves. However, modernization does not authorize or allow an operation to effectively change uses. While replacement of equipment is allowed, the addition of new or use of new equipment that expands product lines or creates a "substantially different and adverse impact on the neighborhood" may be impermissible. (*Paramount Rock Co., Inc. v. County of San*

[3] *Hansen Brothers* at 564, quoting, *Melton v. City of San Pablo* (1967) 252 Cal.App.2d 794, 804.

Diego (1960) 180 Cal.App. 2d 217, 230 (noting that the addition of rock crusher was not part of the original vested right.)

d. Increased production may be allowed. A gradual and natural increase in a lawful, nonconforming use—for example, to meet growing demand—is not necessarily a prohibited expansion or intensification of the use. (*Hansen Brothers* at 573).

e. Vested mining rights are limited to the area into which the operator exhibited an intent to expand at the time the restrictive ordinance was passed. A party who desires to continue and expand excavation operations on property following a restrictive change in zoning of the property must meet a three-pronged test:

First, the party must prove that the excavation activities were actively being pursued when the law became effective; Second, the party must prove that the area they or desire to excavate was clearly intended to be excavated, as measured by objective manifestations and not by subjective intent; and Third, the party must prove that the continued operations do not, and/or will not, have a substantially different and adverse impact on the neighborhood. The mere intention or hope on the part of the landowner to extend the use over the entire tract is insufficient. The intent must have been objectively manifested by the operations in effect at the time of enactment of the ordinance. Thus, the right to expand mining or quarrying operations on a property is limited by the extent that the particular material was being excavated when the zoning law became effective. (*Hansen Brothers* at 533.)

f. The existence of separate parcels and barriers: A lack of extraction on separate "reserve" parcels, or the existence of barriers separating active and reserve areas weigh against finding an intent to mine all parcels. (*Dolomite Prods. Co., Inc. v. Kipers* (N.Y. App. Div. 1965) 260 N.Y.S. 2d 918, 921

g. Allowing non-mining uses on the property may indicate an owner does not intend to mine their entire property. (Hansen Brothers at 557.)

This Memorandum has considered all of these factors to analyze the evidence for vesting submitted in the Background Report for the Application.

B. Applicability of the Surface Mining & Reclamation Act ("**SMARA**")

Mining activities in California are governed by the Surface Mining and Reclamation Act ("**SMARA**"). SMARA was adopted in 1975 and was intended to impose comprehensive mining regulations for California designed to identify and protect valuable aggregate resources for mining use. (California Public Resources Code, Section 2700 et seq.) Section 2770 of SMARA provides that "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." However, those operating under vested rights are exempt from the SMARA permit requirements. Specifically, Section 2776(a) 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 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*."

Therefore, any person who seeks to mine without a SMARA permit must show that the mining operation was a legal nonconforming use prior to and continuously since the date the mining use became vested (i.e. the vesting date). If there is no applicable local vesting date, the date under SMARA is determined to be January 1, 1976. As discussed elsewhere in this memorandum, the vesting date for this Application is the date that Plumas County applied regulations to this property – July 8, 1958.

Reclamation Plans

For vested mining activities, mine owners or operators are also required to submit annual reports to the Supervisor of Reclamation. (Pub. Resources Code, § 2207, subd. (a).) For mines operated under a reclamation plan, the lead agency must inspect the mine at least once per year. (Pub. Resources Code, § 2774, subd. (b)). If the lead agency's inspection reveals that the mine is not in compliance with SMARA, the agency may issue an order requiring the operator to comply with SMARA, or "if the operator does not have an approved reclamation plan or financial assurances, cease all further activities." (*Id*. § 2774.1, subd. (a))

SMARA's reclamation plan requirements further extend to idle mines. SMARA provides that mines are considered "idle" when they meet the following criteria:

> "*Idle" means that an operator of a surface mining operation has curtailed production at the surface mining operation, with the intent to resume the surface mining operation at a future date, for a period of one year or more by more than 90 percent of its maximum annual mineral production within any of the last five years during which an interim management plan has not been approved*. [Pub. Resources Code, § 2727.1.]

Within ninety (90) days of a mining operation becoming idle, mine operators are required to submit an interim management plan to the lead agency. (Pub. Resources Code, § 2770.) "The approved interim management plan shall be considered an amendment to the surface mining operation's approved reclamation plan. The interim management plan shall only provide for necessary

measures the operator will implement during its idle status, to maintain the site in compliance with this chapter, including, but not limited to, all permit conditions." (*Ibid.*) Mines that fail to comply with these requirements must be considered "abandoned:"

Finally, unless review of an interim management plan is pending before the lead agency or an appeal is pending before the lead agency's governing body, a surface mining operation that remains idle for over one (1) year after becoming idle, as defined in Section 2727.1, without obtaining approval of an interim management plan shall be considered abandoned and the operator shall commence and complete reclamation in accordance with the approved reclamation plan. (Pub. Resources Code, § 2770, subd. (h)(6).)

C. Applicability of the California Environmental Quality Act (CEQA)

A determination of vested mining rights is not a project for the purposes of the California Environmental Quality Act ("**CEQA**"). CEQA applies to discretionary activities. A vested rights determination is not a discretionary project for the purposes of CEQA because the standards that govern the determination for the Proposed Vested Rights Area do not provide the County with the authority or discretion to condition, modify, or deny the Application based on environmental concerns. Thus, this determination can be deemed statutorily exempt pursuant to Section 15378 of the CEQA Guidelines.

While a vested rights determination for the Application is not a discretionary project under CEQA, we note that future actions to approve a reclamation plan or other land use entitlements (including a conditional use permit subsequently filed because the County found that no vested mining rights exist) will likely be subject to environmental review pursuant to CEQA and the CEQA Guidelines. Nothing in this memorandum should be construed to prejudice any such future CEQA analysis or determinations.

D. Possibility of Abandonment

A vested right to mine without a permit may be abandoned. Courts have routinely acknowledged and found that nonconforming uses are not intended to be perpetual. "That policy necessarily applies to attempts to continue nonconforming uses which have ceased operation."[4] Similarly, to determining the scope a vested right, analyzing whether a vested right has been maintained, or was abandoned, courts look to the objective manifestations of intent by the owner or owners of the property.[5]

In *Hansen Brothers*, the Supreme Court described the legal requirements for abandonment of a vested mining right as follows: "[A]bandonment of a nonconforming use ordinarily depends upon a concurrence of two factors: (1) An intention to abandon; and (2) an overt act, or failure to act, which carries the implication the owner does not claim or retain any interest in the right to the

4 *Hansen Brothers*, 12 Cal.4th at 568.
5 *Ibid.*

nonconforming use. (*Hansen Brothers* at 569.) Further, while the Applicant bears the burden of establishing their vested right by a preponderance of the evidence ("more likely than not"); if the Applicant meets their initial burden, and the County asserts that the vested rights have been abandoned, the County likely bears the burden of proving abandonment by clear and convincing evidence ("evidence is highly and substantially more likely to be true than untrue").[6]

Unfortunately, the Supreme Court's discussion in *Hansen Brothers* regarding the factual elements which demonstrate abandonment was not exhaustive and, instead, offered minimal legal standards for abandonment beyond the two-factor test of (1) intent to abandon and, (2) an overt act or failure to act. Nevertheless, other cases have provided some guidance. These include the following:

1. While cessation of a nonconforming use alone is not determinative of abandonment, the period of time the nonconforming use was discontinued is relevant to abandonment and the likelihood of abandonment increases the longer the nonconforming use was ceased. (*Hansen Brothers* at 569; *Stokes v. Bd. of Permit Appeals* (1997) 52 Cal.App.4th 1348, 1354

2. In order to avoid a finding of abandonment, the property owner must be able to identify evidence of their objective manifestations of intent to resume the nonconforming use throughout the period the nonconforming use was discontinued. (*Hansen Brothers* at 569; *Stokes* at 1354.)

3. The court in *Hansen Brothers* further explained that, despite episodic cessations of the nonconforming mining activities during economic downturns, they (the Hansen Brothers) continued to operate their business by selling from stockpiles and maintaining their operations in working order to resume mining activities when the market became economically viable again. (*Hansen Brothers* at 570-571.) So, while *Hansen Brothers* does not require that nonconforming mining activities have been continuously performed in order to avoid abandonment of the vested right, it does require that the intent to resume said activities be demonstrated throughout the period of cessation.

This memorandum has considered all of these factors to analyze the evidence for whether a vesting right was subsequently abandoned by Applicant or their predecessor.

[6] We note that while *Hansen Brothers*, does not explicitly state which party has the burden of proving abandonment of a vested right. However, other cases have implied such burden on the entity making that argument.

IV. ANALYSIS OF HISTORICAL EVIDENCE

A. Historical Summary

The Engels Copper Mining Company, incorporated in 1901, initially began operation on copper ore deposits of the Superior mine in 1880 by Henry Engels and his sons. In the early decades of the 1900s, the Mines were the largest producers of copper in California. However, declining prices soon paused production leading to a selloff of the equipment and infrastructure. From 1938 through present day, leases have allowed for further exploration, planning, and excavation of certain areas within the Mines footprint and the surrounding area.

As part of their Application, the Applicant, included a historical record in the Background Report, Section 2. "Summary of Supporting Facts" on report pages 7-13 or pdf pages 10-16. A selection of twenty-seven relevant supporting facts is reviewed below in light of the supplied evidence included as exhibits to the Background Report.

B. Review and Analysis of Applicant Supplied History

1. 1880: "Henry Engels and his sons (Charles and William) acquire the Superior Mine from the For Brothers on September 1, 1880."

The referenced acquisition is generally supported from the historical accounts included as exhibits. More specifically, Exhibit 2 to the Background Report references the 1880 date and inclusion of Henry Engels' sons as part of the operations.

2. 1883: "The Engels begin work on the Superior Mine as early as 1880 and discover the Engels Mine in 1883. Development at the Mines would continue over the next 30 years, including driving five adits into the deposits."

This information is taken from Exhibit 3 to the Background Report. Generally, the information would indicate that the Mines were developed from around 1880 through 1910s. Development, in this case, is not used as a synonym to mine, as the referenced report states that mining activities continued past the 1910s. Most likely, development refers to building the support features, bunks, offices, out buildings, etc. for the purposes of mining.

3. 1889: "The United States granted Henry Smith patent to APN's 007-160-10, 007-160-011, 007-170-101, and 007-170-011 on April 4, 1889."

The referenced patent is not included as supporting evidence to the claim. The listed APNs are not a part of the vested rights determination request.

4. 1901: "The Engels brothers incorporate Engels Copper Mining Company (E.C.M.Co) on June 19,1901."

This information is taken from Exhibit 3 and is supported by the documentation provided.

5. 1910: "Upper Camp was constructed at the Engels Mine to support mining operations. It contained bunkhouses/boarding houses, as well as a company store, hospital, school, and post office."

This description is taken from Exhibit 3. The only discrepancy being that the Post Office was established in 1916 and not as part of the original camp in 1910.

6. 1914: "The first mill in the United States to use the flotation process for copper concentration was built at the Upper Camp at the Engels Mine. The mill was originally designed to produce 150-tons per day but reached 400-tons per day by 1919."

This statement is a slight misstatement of the information provided. Exhibit 3 states that the Engels Mine was the "first mill in the United States to use *only* the flotation process to concentrate its copper ore…" (pdf page 54 of the Background Report). This is a minor misstatement and unrelated to the vesting process.

7. 1916-1938: "Indian Valley Railroad Company was incorporated on June 30, 1916 by E.C.M.Co…."

This statement is a correct statement of fact. Engels Copper Mining Company incorporated the Indian Valley Railroad Company in 1916 to move ore, passengers, and freight the 22 miles from Paxton to Engels. The railroad operated from 1916 until 1938.

8. 1917: "Construction of Lower Camp begins adjacent to the Superior Mine…"

This information was taken from Exhibit 3 which described Lower Camp as a "modern company town, built on Lights Creek beginning in 1917 and completed in 1924."

9. 1917: "The Superior Mill at Lower Camp began operation on November 1, 1917."

Exhibit 3 is the source of the information, which is correctly referenced.

10. 1918: "The United States granted E.C.M.Co patent to a portion of APN's 0007-080-004 and 007-090-030 on May 7 and September 28, 1918."

As these areas of land are of principal importance, copies of these patents should be included for verification purposes. However, the Background Report does not include a copy of the patents but just a reference to the patents.

11. 1919: "On November 1, 1919, the Engels Mill was closed at Upper Camp, and production shifted to the larger and more favorable located Superior Mill. The Superior Mill produced 1,000-tons per day from the consolidated mined materials from the Engels and Superior Mines."

This information accurately restates the description of the activities in Exhibit 3. Note that the reference to a mill is not the same as a mine. The Mines continued to operate as mines, but the material was milled at a centralized location, Superior Camp at Lower Camp.

12. 1914-1930: "Engels and Superior Mines reported total production of approximately 160 million pounds of copper, 23,000 ounces of gold, and 1.9 million ounces of silver. The mines were often the largest annual producers of Copper in California during this time period."

This information restates the description of the activities in the technical report Exhibit 2.

13. 1928: "The United States granted E.C.M.Co. patent to the final portions of APN's 007-080-004 and 007-090-003 on January 25 and 30, and April 19 and 28, of 1918."

As these areas of land are of principal importance, copies of these patents should be included for verification purposes. However, the Background Report does not include a copy of the patents.

14. 1930: "Both the Engels Mine and Superior Mine became idled due to economic conditions following years of low copper prices…"

All of the historical accounts included in the Background Report reference this period as one of a steep decline in mining operations due to the deflated price of copper.

15. 1932: "Following idling, the Mines continued employing a small staff to perform upkeep and maintenance on the Mines' equipment and infrastructure."

This information (as seen on page 15 of Exhibit 1) is taken from a 1932 annual report of the parent company to E.C.M.Co which stated the following "no future seen for mining Engels."

16. 1936: "E.C.M.Co. was merged into its holding company, California Copper Corporation (C.C.C.), on March 3, 1936 to form the California-Engels Mining Company (CEMCO)."

As reference in the 1932 annual report of C.C.C., the purpose of the dissolution of the company was to "dispose of all assets and dissolve."

17. 1937: "CEMCO attempted to restart idled production by selling 144,000 shares of additional stock to raise proceeds to resume operations at the mines….

This information is taken from a newspaper article that does indicate that the Mines would reopen if the funding round was successful."

18. 1938: "The equipment from the mines were removed and stored in the machine shop, warehouse, and storage yards for future use."

This is a correct account of the information provided in Exhibit 5.

19. 1939: "Exploratory work was performed to determine if the site could be dredged for gold production. Exploratory work was favorable…."

The specific article from 1939 does reference exploratory work. However, the work proposed was not part of the entire area, but to a smaller 200-acre gravel deposit area of the 4,500 acres owned at the time. The Engels Mine is referenced for location purposes, but the Superior Mine is not referenced.

20. 1940-1947: "During the 1940's. there was an effort to open previously producing copper mines, include the Mines… By 1944, development work was underway and the mines were considered active. However, the mines were never approved for reopening by the War Production Board…."

The supporting documentation includes various notes in newspaper articles that reference "preliminary" operations or something akin to the potential of restarting operations. Operations are never mentioned as being restarted and the preliminary necessities are never described in particular. Further, no evidence is shown as to what mines would eventually operate or for what purposes.

21. 1947-1951: "Newmont Mining, a large multinational mining company, leased the Mines in 1947. By 1951, Newmont had performed mineral exploration and created a preliminary geologic map of the Lights Creek area in which the Mines are located."

The unsubstantiated referenced lease is not included as evidence in the Exhibits.

22. 1951-1959: "Indian Valley Chemical Company leased the mines in 1951 in hopes of continuing production and possibly making use of the tailings onsite…"

The referenced lease is not included as evidence in the Exhibits. The information is taken from an interview with Norman Lamb, President of CEMCO. This information is of critical importance to the determination of vested rights. However, the lease and information pertaining to the use of the lease is not included. There is a sole reference in the chain of title to a renewal of a lease by Indian Valley Chemical Company in 1959, however, as is shown in this Memorandum, 1959 is too late for the vesting date. The supporting documentation included in the Exhibits does not report if the lease was ever acted on by the company, what activities were performed, nor in what areas. No information has been provided to support the indication that from 1951-1959 the Indian Valley Chemical Company actually took steps to make use of the tailings onsite.

23. 1958: "On July 8, 1958, the Plumas County Board of Supervisors adopted its first comprehensive zoning ordinance. Section 61312.a.3 allowed mining in any zone by acquiring a use permit. The Mine Property was not placed within a specific zoning designation, so they fell into the "U" district which applied to all unincorporated parts of the county."

This is a correct description of the County's first Zoning Ordinance for mining activities.

24. 1960-1964: "Nye & Calhoun leased the site starting in 1960…."

Title evidence included in the Background Report does indicate that a 1960 lease is recorded to the parties indicated. However, the lease is not included as part of the package.

25. 1964: "Nye & Calhoun's lease ends, and CEMCO leased the properties to Placer Amex directly. Placer Amex held the lease until 1993."

Title evidence in the Background Report does indicate that a 1964 lease is recorded to the parties indicated. However, the lease is not included as part of the package.

26. 1993: "Placer Amex cancels its lease for the Mines. Permitting and development of their anticipated open-pit copper mine continued to be uneconomical based on inflation and a decline in copper prices."

Title evidence shows a recorded Release and Quitclaim Deed from 1993 evidencing the above stated facts. However, the quitclaim is not included as part of the package.

27. 2006-Present: "CEMCO leases the Mine Property to Sheffield Resources Ltd… US Copper acquires the mining lease on the Mines…."

The leases and ownership from 2006 through the present are not well documented in the Background Report. The Report references a CEMCO lease to Sheffield, however, the lease is not included. The Background Report states that Sheffield was acquired by Nevoro, which was acquired by Starfield Resources, which was acquired by US Copper Corp. (formerly Crown Mining Corp.) via a bankruptcy asset acquisition in 2013.

C. Basis of Legal Review

As noted previously, the Applicant bears the burden of establishing their vested right by a preponderance of the evidence ("more likely than not"). Thus, the research and documentation responsibility rests not on the County, but rather, the Applicant must produce a factual basis upon which the County can make an informed decision.

The *Hansen Brothers* court clearly stated that, "the burden of proof is on the party asserting a right to a nonconforming use to establish the lawful and continuing existence of the use at the time of the enactment of the ordinance."[7] This Memorandum does not upset this balance and fully relies on the information provided and reviewed above from the Applicant and presented in the Background Report.

[7] *Hansen Brothers*, 12 Cal.4th at 564 (quoting *Melton v. City of San Pablo* (1967) 252 Cal.App.2d 794, 804).

Below is a list of questions to be considered in a determination of vested mining rights. Each question will be reviewed and analyzed in turn based on the information provided by the Applicant in the Background Report and any other reasonably obtainable publicly available resources.[8]

i. What is the Vesting Date?
ii. What activities or evidence of activities were present on the described lands just prior to the Vesting Date?
iii. Could the Mines be considered common law abandoned prior to the Vesting Date?
iv. Is the vesting of mining rights as of July 8, 1958 for the Mines substantiated by the supplied record in the Background Report?
v. Assuming that the requested rights are vested, have the rights been abandoned as a matter of law since 1958?

i. <u>What is the Vesting Date?</u>

ANSWER: July 8, 1958

According to the Background Report submitted with the Application, the vesting date is July 8, 1958 ("**Vesting Date**"). Page 18 of the Background Report provides:

> *"On July 8, 1958, the Plumas County Board of Supervisors adopted its first comprehensive Zoning Ordinance. Section 61312.a.3 allowed mining in any zone if a use permit was obtained. This was the first Zoning Ordinance that required a use permit at the Mines. Since the County enacted the restrictive ordinance before the establishment of SMARA, the vesting date is July 8, 1958."*

This is confirmed by the County, as indicated in the October 11, 2023 staff report;

> "*… Section 61312.a.3 permitted mining activities (removal of natural materials, including building and construction materials) of various types in any District (zone) with a use permit*…"

Thus, this analysis assumes that Section 61312.a.3 is the applicable date that the County first began to regulate mining activities within the jurisdiction and that Section 61312.a.3 is the applicable Vesting Date.

[8] Only one other document outside the Background Report was used for the purpose of this Memorandum. It is the Breach Notice discussed in question *v.* of this section, C. Basis of Legal Review.

ii. What activities or evidence of activities were present on the described lands just prior to the Vesting Date?

ANSWER: The Applicant has not provided sufficient information to make any determination on the type of physical operations that were occurring on the property just prior to the Vesting Date.

The Applicant's Background Report evidences significant mining activities within the subject properties at certain times prior to the Vesting Date. Though the historical accounts provide necessary background, the specific history just prior to the Vesting Date is most determinative to the County's analysis. Mining activities are clearly evident in the record from the early 1880s until the late 1930s. During this 50 year span, there is evidence of excavation, construction, milling, sales, and transportation. Clearly, mining of copper, silver, and gold was well established from 1880 until the late 1930s.

The mid 1930s represents a turning point for the owner/operator of the Mines. As often referenced in the Applicant's materials, the price of copper dropped, during the time of the Great Depression, rendering the Mines uneconomical. As early as 1932, the parent company to E.C.M.Co, California Consolidated, in their eighteenth annual report, reference on page 15 of the Background Report, recognized the decline in prices and its effect on the viability of mining. Copper prices decreased from 18 cents per pound in 1930 to 5.75 cents per pound in 1932.

"Operations closed down in July, 1930; upkeep/maintenance work few caretakers; sluicing soil from hydraulic operations to tailings; soil will be seeded; Calaveras operation closed May, 1930; copper as 5.75 cents, ore reserves at Engels low grade no future seen for mining Engels, possible liquidation." The account from 1932 continues in the Background Report from the April 1932 meeting minutes of E.C.M.Co. "resolution to dissolve California Consolidated Corp, E.C.M.Co to dispose of all assets and dissolve (E.C.M.Co Minutes Vol 4:234)." By 1936, the parent and subsidiary companies had all merged leaving the California-Engels Mining Company, CEMCO, owning the patents to the land but no longer mining the property. From then on, CEMCO positioned itself as a landlord to mining leases rather than an operator.

From 1939 through the 1958 Vesting Date, the Background Report references multiple attempts to restart mining operations at the Mines by CEMCO or other interested parties. Of particular significance is the 1951 lease by Indian Valley Chemical Company (see historical item #22 in the above historical review). The Background Report states on page 9 that the Indian Valley Chemical Company leased the mines in 1951 "in hopes of continuing production and possibly making use of the tailings onsite." Further, the Report states that "Paul Schwartz, president of CEMCO at the time, invested $25,000 into developing a new method to process the tailings."

Exhibit 20 to the Background Report, "Chain of Title History," does not show a record of any lease from 1951 to the Indian Valley Chemical Company. If this lease exists, it is not included in the Background Report. However, the Chain of Title History does reference a recorded "Renewal of Lease" recorded in the Plumas County records on 11/24/1959. Subsequently, there is another recorded document in the Chain of Title History titled "Notice of Breach of Lease of Mining

Agreement of 1954 and resulting action" recorded on the same day 11/24/1959. As descriptive as these 1959 documents may appear, they still do not describe what happened from the execution of the original mining agreement in 1954 to the Vesting Date in 1958.

There are no factual accounts on record in the Background Report that depict any mining activity from 1951 through 1958. This does not mean that no mining activities were occurring during this period. Rather, this conclusion means, specifically, that the evidence, provided in the Background Report, allows for no inference or assumption that mining activities were occurring during the 1950s. In other words, the Background Report does not allow for any informed conclusion on the actual activities, mining or otherwise, occurring at the Mines or the surrounding property just prior to and at the Vesting Date.

iii. Could the Mines be considered abandoned pursuant to common law standards prior to the Vesting Date?

ANSWER: The Background Report provides substantial evidence to support a conclusion that mining activity were common law abandoned by 1936.

The County bears the burden of proving abandonment by clear and convincing evidence (evidence is highly and substantially more likely to be true than untrue) for a conclusion of abandonment.

Evidence of cessation or idling of mining activities is not enough to substantiate a conclusion of abandonment. "Cessation of use alone does not constitute abandonment."[9]

Common law abandonment, as referenced in the *Hansen Brothers* case and describe above, requires two parts, (1) 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; and (2) an intent to abandon.

In the case of *Hardesty v. State Mining & Geology Bd.*, 219 Cal. Rptr. 3d 28, 30 (Ct. App. 2017), as modified (May 31, 2017), the landowner, Hardesty, appealed to Superior Court a decision by the State Mining and Geology Board (Board), which found that there are no vested rights to surface mine at the Big Cut Mine in El Dorado County (Hardesty lost in Superior Court and on appeal again to the Court of Appeals). Hardesty had requested a determination of vested rights for 150 acres of land near Placerville, known as the Big Cut Mine with the SMARA vesting date of January 1, 1976. Until the 1940's the land was mined for gold, and from the 1940's until the 1990's the land was mostly dormant. In the 1990's the mining shifted from hydraulic, drift, and tunnel to unpermitted surface aggregate and gold mining. Though Hardesty argues "the existence of federal mining patents confers vested mining rights forever",[10] the appeals court concluded the Board had

[9] *Hansen Brothers*, 12 Cal.4th at 569.

[10] *Hardesty v. State Mining & Geology Bd.,* 219 Cal. Rptr. 3d 28, 38 (Ct. App. 2017), as modified (May 31, 2017). Note that the *Hardesty* case is unpublished but nevertheless provides guidance on this topic.

ruled properly showing that no evidence of mining was presented on the vesting date and that any rights were abandoned, "a person's subjective 'hope' is not enough to preserve rights."[11]

As described in *Hardesty* case, "[t]he 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."[12] Prior to the *Hansen Brothers* and *Hardesty* opinions, the Supreme Court of California, in *Gerhard v. Stephens* (1968) opined that "[a]s we shall point out, 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 * * *.' (*Smith v. Worn*, supra, 93 Cal. 206, 213, 28 P. 944, 945.)"[13]

Intent, however, is difficult to ascertain because it requires knowledge of the mental state of the individual making the decision. Intent is the reason behind the actions. Because the mental reasoning of the individuals is often not part of the record, any conclusion must infer intent from action or lack of action, as a manifestation of intent.[14] Thus any determination of abandonment must be clearly evidenced in the record via action or lack of action. In this instance, the record evidences acts that infer abandonment activities during the 1930s. Each part of the common law abandonment test is discussed below.

(1) Overt Act: Any reasonable interpretation of ending mining operations of any kind or quality could potentially include the selling off of the equipment and assets. The overt act part of the abandonment test does not require certain actions, but takes the record as a whole and judges the actions taken, each in turn, to make a determination. One abandonment determination will look different than another solely based on the differing circumstances. In the case of Mines, overt action may include the closing down of all operations and the resulting "sale and dismantling of the plants, the town site and equipment by 1938." (Background Report, page 2) While the Mines were active, the property hosted "bunkhouses/boarding houses, as well as a company store, hospital, school, and post office" (Background Report, page 7). The breakdown of operations occurred in two phases. The first phase was to shunt all operations but keep the equipment maintained. Operations were concluded in 1930 (Background Report, page 8). In 1932, "the Mines continued employing a small staff to perform upkeep and maintenance on the Mines' equipment and infrastructure" (Background Report, page 8). However, as referenced above, soon thereafter, the mines were completely physically abandoned and even the infrastructure was sold and moved.

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11 *Ibid.*, at 45.

12 *Ibid*., at 44.

13 *Gerhard v. Stephens*, 68 Cal. 2d 864, 889, 442 P.2d 692, 712 (1968).

14 "While abandonment is a matter of intent which may be proved by the acts and conduct of the party who is alleged to have abandoned the property in controversy, a finding of abandonment must be based upon evidence from which an inference of abandonment can reasonably be drawn." *Pickens v. Johnson*, 107 Cal. App. 2d 778, 788, 238 P.2d 40, 46 (1951).

By 1939, the railroad spur that serviced the Mines ceased operating, and even the rails, tracks, and cars were removed and sold (Background Report, Exhibit 1, page 19).

(2) Manifestation of Intent: The manifestation of the intent to abandon may be inferred from the record of events.

First, the action of dismantling the town including the wooden buildings and pulling up the railroad lines is strong evidence to support a manifestation of intent to abandon operations. Physical infrastructure can be sold without the intent to abandon operations. However, the complete removal of all vestiges of the town and transportation points to a larger scale intent to stop operations rather than pause until prices rebound. If only physical equipment, such as engines or haulers, were removed and sold, the intent may not rise to the level of abandonment. However, the added effort necessary to remove buildings is hard to argue down to a temporary idling of operations, because the efforts would be wasted as the buildings would be rebuilt, at least to some degree, when operations resumed.

Second, the Background Report evidences a clear corporate decision to abandon operations at the Mines in the 1932 corporate records of both California Consolidated Corporation and E.C.M.Co. (Background Report, Exhibit 1, page 15). On April 4, 1932 the board of California Copper Corporation wrote into the corporate report that "ore reserves at Engels[15] low grade no future seen for mining Engels, possibility of liquidation." On the same day, the same board members serving for E.C.M.Co. agree to a "resolution to dissolve California Consolidated Corp., E.C.M.Co to dispose of all assets and dissolve (E.C.M.Co Minutes Vol 4:241." There is some confusion in the record on what the corporate relationships were between California Consolidated Corp. and California Copper Company. However, by 1936 all companies had merged into CEMCO, the current existing entity. The phrased used in the 1932 board report is clear, "ore reserves at Engels low grade no future seen for mining Engels." If the liquidation of the assets was made purely on the basis of the current cost of copper on the market, then the board would have no reason to reference the ore grade in the mines. However, the liquidation of the assets and the wrapping up of business and merging of the corporate structures, in light of the phrasing of the corporate records referenced above, give a clear intent on abandonment of the mines not just because of the price of copper, but also because the low grade quality of the ore negated all future mining.

[15] There is conflicting evidence on the extent of mining activities at Superior Mine. The Background Report evidences a shift in focus to the Engels Mine by 1910. The Superior Mine is only referenced in historical accounts such as Exhibit 2 and 3. In the corporate reports of Exhibit 1, the Superior location is referenced as the Superior Mill. References to "Engels" when referencing production numbers seems to reference the Engels Mine.

However, E.C.M.Co also owned interests in mines elsewhere. The corporate reports appear to differentiate between the Calaveras Copper Company assets and the Engels-California Mining Company assets by referring to them as either Engels or Copperopolis (see page 14 of Exhibit 1, see entry for 4/26/30). Reference to "Engels" when discussing all operations seems to reference all mining operations including both the Engels and Superior Mines.

The Background Report provides a basis for determining that the Mines were common law abandoned by the owner / operators by 1939 as indicated by (1) the overt actions of shunting operations and dismantling all of the facilities including the buildings, and (2) the manifestation of intent to abandon the Mines as depicted in the level of physical abandonment and the record of corporate conclusions in the 1932 annual report for the owner / operators of the Mines.

iv. *Is the vesting of mining rights as of July 8, 1958 for the Mines substantiated by the supplied record in the Background Report?*

ANSWER: The Applicant does not provide adequate information on the history of the Mines to substantiate a determination that the mining rights are vested as of the Vesting Date.

Based on the prior discussions, the evidence supports the following supposition:

- The Mines were actively mined for copper, gold, and silver from 1880 through 1930.
- Mining operations were abandoned during the period of 1930-1938.
- Vested rights cannot rely on the prior operations post abandonment regardless of future intentions, actions, or agreements.
- Because the Applicant presents no evidence of physical mining activities up to and on July 8, 1958, including the prior years, no determination can be made based on the evidence provided that any rights have vested, mining or otherwise.

A hypothetical rebuttal, to the above conclusion and prior discussions, could include the following.

First, it is an accepted fact that mining operations were continuous and robust geographically and operationally for the 50 year span from 1880 through 1930.

Second, there is clear evidence of at least sporadic leasing of the property and potential preparations, testing, and exploration during the period of time between 1930 and 1958.

Third, an idling of operation does not inherently evidence an abandonment or lack of mining activity.

Fourth, the prior mining activities and intent to lease and operate at the Vesting Date should substantiate a finding of vested rights to mineral exploitation. To support the hypothetical rebuttal, the argument would quote *Hardesty*, "[t]he 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."[16] The activities and operations at the time of vesting would not look at the actions of the parties in the 1950s, but rather, back up in time to when the Mines were last operational, the 1920s, for the scope of the rights vested. Not that there were mining activities

[16] *Hardesty*, 219 Cal. Rptr. at 44.

occurring in the 1950s, but that the sporadic leasing and other activities from 1930 – 1958 carried the operational scope of the 1920s to the Vesting Date.

However, this hypothetical rebuttal is not substantiated by the record or case law.[17]

The *Hardesty* court was clear on the point of idling at the date of vesting. The court stated without any uncertainty:

> [A] use must be present *at the time* a new law takes effect, to be considered a nonconforming use. (*Id.* at pp. 540-568, 48 Cal.Rptr.2d 778, 907 P.2d 1324; see *Communities for a Better Environment v. South Coast Air Quality Management Dist*. (2010) 48 Cal. 4th 310, 323, fn. 8, 106 Cal.Rptr.3d 502, 226 P.3d 985 ["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, 329 P.2d 522 ["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, 48 Cal.Rptr.2d 778, 907 P.2d 1324 ["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.' We have recognized that, given this purpose, courts should follow a strict policy against extension or expansion of those uses. That policy necessarily applies to *attempts to continue nonconforming uses which have ceased operation*." (*Hansen Brothers*, at p. 568, 48 Cal.Rptr.2d 778, 907 P.2d 1324, italics added.)[18]

Though the hypothetical rebuttal argument relies on the *Hansen Brothers* court to support the legal theory that idling cannot destroy a prior established operational scope, it is a miss application of law. The *Hardesty* court explains this further. "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, 48 Cal.Rptr.2d 778, 907 P.2d 1324; *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 629, 51 Cal.Rptr.3d 797 (Calvert); *Melton v. City of San Pablo* (1967) 252 Cal.App.2d 794, 804, 61 Cal.Rptr. 29 ['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.)"[19] Thus, the discussion on idling of operations cannot be legally used to support a conclusion of vested mining rights unless the idling ended prior to the vesting date and operations recommenced.

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[17] "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, 51 Cal.Rptr.3d 797.)" *Ibid.* at 45.

[18] *Hardesty,* 219 Cal. Rptr. at 42–43.

[19] *Ibid.* at 43.

In this instance, there is no evidence in the record that operations ever recommenced prior to the Vesting Date. Further, the hypothetical rebuttal fails to account for the corporate operation change. The organization that exited the mergers of the 1930s, CEMCO, was no longer a mining operator. CEMCO oversaw leasing of the property. To say that the operations of a closed company created a vested right in a future corporate structure fails to account for the corporate decisions on the record. E.C.M.Co and California Consolidated, concluded and divested, not from ownership of the land, but from the physical ability to mine the land. CEMCO, the resulting ownership entity became a holding company for the land patent, with no inherent ability to operationally exploit the minerals, which is present in its reliance on seeking out other independent operators for the Mines. Any operations that occurred during 1880 through 1920, could not be automatically conferred on any subsequent lessee operator of the Mines, particularly since E.C.M.Co removed necessary equipment and mill works from the property used in their mining operations . In other words, one cannot infer from the mere existence of a lease on the lands by a mining company that the same type of mining would occur as prior operators.

Evidence must be presented by the Applicant that the operator of the Mines at the Vesting Date was actually operating the mines for the purposes of mineral extraction to sustain a determination that the rights to mine for copper, gold, silver, and construction aggregate products were vested. No such evidence has been presented in the record provided by the Applicant.

v. *Assuming that the requested rights are vested, have the rights been abandoned as a matter of law since 1958?*

ANSWER: The Background Report provides substantial evidence that a conclusion could be made that mining activity was abandoned as a matter of law either by 1960 or during the 1993 – 2006 idle period.

Abandonment, as a matter of law, is a factual determination based on the code ordinance at the time of the abandonment. Plumas County has included abandonment of legal non-conforming use in its Zoning Ordinance since the referenced 1958 Plumas County Code of Ordinances. The 1958 and current Zoning Ordinance versions are quoted below:

> Section 61331. Non-Conforming Uses
>
> a. The lawful use of land or buildings existing at the effective date of Plumas County Ordinance No. 368, although such does not conform with the provisions hereof may be continued, but if the non-conforming use is discontinued for a period of one year, any future use shall be in conformity with the provisions of this chapter, unless and until a use permit shall first have been secured. (July 8, 1958 Plumas County Code of Ordinances, Zoning Ordinance)

> Section 9-2.502. General Provisions
>
> (d)(3) The lawful nonconforming use of land or structures, if discontinued for a period of one year, may be resumed only upon the issuance of a special use permit. (Plumas County Code of Ordinances, Title 9 Planning and Zoning, Chapter 2 Zoning § 4, Ord. 86-623, eff. February 6, 1986, as amended by § 1, Ord. 89-719, eff. November 2, 1989, and § 1, Ord. 92-800, eff. January 21, 1993)

Further, there are statutory guidelines in the Surface Mining and Reclamation Act concerning abandonment of a mining claim. Though much of SMARA does not apply when vested rights are granted, mining operators must still comply with certain aspects of SMARA including Article 5. Reclamation Plans and the Conduct of Surface Mining Operations [2770-2764]. Pursuant to Section 2770(b), the lessee of the Mines in 1976 was required to submit a reclamation plan by March 31, 1988, else "the continuation of the surface mining operation is prohibited until a reclamation plan is submitted to the lead agency" (SMARA Public Resources Code Section 2770(b)).[20]

Under Section 2770(h)(1), upon idling of the mine, "the operator shall submit an interim management plan to the lead agency for review." As it pertains to abandonment as a matter of law SMARA states the following in Section 2770(h)(6):

> [A] surface mining operation that remains idle for over one year after becoming, as defined in Section 2727.1, without obtaining approval of an interim management plan shall be considered abandoned and the operator shall commence and complete reclamation in accordance with the approved reclamation plan.

Under the County and SMARA regulatory schemes, only a showing of inaction is required for the determining agency to conclude that the mine has been abandoned. In *Hansen Brothers*, the court weighed the balance between a vested right and the purpose of zoning which is described as reducing "reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected."[21] Thus, the court recognizes that the abandonment via a zoning ordinance is fundamentally different than from the common law application due to the application of land use development code as opposed to a manifestation of personal intent. "We have recognized that, given this purpose, courts should follow a strict policy against extension or expansion of those uses. (*County of San Diego v. McClurken*, supra, 37 Cal.2d 683, 687, 234 P.2d 972.) That policy necessarily applies to attempts to continue nonconforming uses which have ceased operation."[22] The prior two prong abandonment test for common law

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[20] It is not the prevue of this memo or determination of the County to consider the implications of the Applicant's past operations of the Mines post March 31, 1988 without a submitted reclamation plan to the California Department of Conservation . The State Mining and Geology Board retains jurisdiction over SMARA regulatory delinquencies. Pursuant to Section 3950 "the board shall not conduct vested rights determinations."

[21] *Hansen Brothers*, 12 Cal.4th at 568.

[22] *Ibid.*

abandonment no longer applies. The court in *Hansen Brothers* required only that the determination of cessation of operations under a zoning ordinance not be arbitrary or irrational. "In construing an ordinance which limits continuation of nonconforming uses; however, the court must also assume that the county did not intend an arbitrary or irrational application of its provisions."[23]

Though in *Hansen Brothers*, the court appears to support the 'arbitrary and capricious' standard for a determination of discontinued use for the purposes of zoning ordinances, the court admits that case law is not uniform in its interpretation of discontinued. The nonuse of the property for the specified period in the zoning ordinance could create (i) a presumption of abandonment, (ii) evidence but not conclusive evidence of abandonment, or (iii) a complete termination of the right to engage in the non-conforming use of the property.

The plain reading of the Plumas County 1958 Zoning Ordinance Section 61311 uses the term "discontinued." This analysis interprets the term "discontinued" to mean something more than mere idling or pausing and something less than absolute proof of complete abandonment.

Below is a review of the historical accounts to determine if, as a matter of law, the Mines could be considered "discontinued", or abandoned for the purposes of this discussion, assuming a July 8, 1958, vesting started the one year abandonment timer.

On November 19, 1959, CEMCO filed Notice of Breach of Lease of Mining Agreement of 1954 (included as Exhibit "**D**" and referenced herein as "**Breach Notice**") concerning their lease of the property to the Indian Valley Chemical Company. This notice, among other things, claimed that the Indian Valley Chemical Company had breached the mining agreement in the following specific ways:

1. Failure to diligently operate said property;
2. Failure to operate said property in any fashion whatever;
3. Failure to install any machinery or equipment;
4. Failure to mine or operate said property;
5. Failure to extract any metal or mineral therefrom;
6. Failure to exploit and mine said premises for the purpose of extracting and selling the valuable minerals therein;
7. Failure to operate not less than 120 days per year.

The Breach Notice provides circumstantial evidence that not only did the Indian Valley Chemical Company fail to mine the property in the prior years, that Indian Valley Chemical Company failed to install any equipment on the property, extract, exploit, mine, or sell any valuable minerals. Being that the Vesting Date is July 8, 1958, CEMCO, is declaring in the recorded instrument that as of November 19, 1959, that the Indian Valley Chemical Company failed "to operate said property in any fashion whatever." Further, the Applicant does not offer evidence of any subsequent mining activity on the property until the early 1960s under a new lease with a new operator. Thus, even if

[23] *Ibid.* at 568–69.

there was evidence of vested mining rights at the Vesting Date, any such vested rights could be reasonably seen to have been relinquished within a few years.

Moving forward in time and granting the Applicant the benefit of the doubt and the assumption that if the property was under a lease there was necessarily mining activity, the Background Report still does not evidence that mining has continued since the early 1960s. From 1964 through 1993, CEMCO leased the Mines to Placer Amex (also known as Placer Dome U.S., Inc.) who operated the mines to an unknown or varying degree over almost thirty (30) years. However, as the Applicant described in the Background Report on page 12 under the "1993" listing, "Placer Amex cancels its lease for the mines. Permitting and development of their anticipated open-pit copper mine continued to be uneconomical based on inflation and a decline in copper prices." The Mines would not be under another lease for mining activities until 2006, pursuant to a lease entered into with Sheffield Resources Ltd., thirteen years later.

There are no records provided by the Applicant in the Background Report to indicate that any mining activity occurred during this thirteen year period. What the Background Report does describe on page 2 of Exhibit 20 "Chain of Title History" is a conversion of the land use from mining to timber, quoted below.

> *"The mineral deposits and prospects were not deemed economically feasible under the conditions at the time and so a Non-Industrial Timber Management Plan on the mining properties was approved by the California Department of Forestry (now CALFIRE) and became effective July 2, 1999. Application was made to the California Tree Farm Committee of the American Tree Farm System for approval of its timber lands as a tree farm. This was accepted as California Tree Farm No. 2611 on July 17, 1999."*

As the submitted record, quoted above, reads, the Applicant openly states that instead of pursuing any mining activity, the lands were instead used for timber. This analysis acknowledges that both mining uses and timber uses are permitted uses in the county code. However, for practical purposes, the Background Report contained no information that the timber operation was planned to accommodate the potential or existing mining operations. The plain reading of the words state that the land was utilized for timber. The words do not, in any plain reading, indicate that timber operations commenced in such a way that they would not interfere with mining, nor do they indicate that the timber was done in such a way that more mining areas would be open. Again, the plain reading of the words is taken at face value to indicate that the land was solely being used as a timber operation and nothing else.

The conversion of the property from the mining industry to the lumber industry without filing the SMARA required interim management plan evidences an intent to abandon any mining operations on the property. The timber and mining operations are inherently functionally different such that it is reasonable to assume that, to a certain extent, they are mutually exclusive when trying to occupy the same lands, not adjacent lands. The Background Report does not include information to explain the potential incompatibility of uses.

Moreover, SMARA does not afford an operator the opportunity to substitute a Non-Industrial Timber Management Plan for the interim management plan required to be approved. The Applicant does not claim in the Background Report that the 1993-2006 period was exempt from SMARA requirements. Nor does the Applicant argue or present evidence that the other documents could be used to satisfy the SMARA requirements in light of the lack of filing of any interim management plan.

The plain reading of SMARA and the application of Plumas County Zoning Code requirements would indicate that any vested rights were relinquished during the thirteen year period of discontinued use from 1993-2006.

V. IMPACT OF THE NUMBER 10-LEVEL MINE MATTER

A. Procedural History of the Number 10-Level Mine Matter

The Background Report includes information relating to a vested rights opinion provided by the County Planning Director as part of a request for approval of a reclamation plan. Specifically, Plumas County Planning & Building Services, on Thursday October 20, 2011, received a letter from CEMCO, represented by Travis Deem, for the determination of vested rights for an aggregate source located near the Number 10-Level of the Engels mine, named the Indian Valley Rock Mine.

On Friday October 21, 2011, the Planning Director for the Plumas County Planning & Buildings Services responded, via letter, stating that he agreed with the presented arguments that the aggregate site is vested. However, the Planning Director indicated that a reclamation plan for the operations would still need to be filed pursuant to SMARA. Soon thereafter, Turner Excavating, Inc. filed the Number 10-Level Mine Reclamation Plan ("**Reclamation Plan**"). The Reclamation Plan was approved and went into effect on September 1, 2012.

BBK has reviewed the information in the Background Report concerning the circumstances surrounding the Planning Director's letter and has determined that it likely does not represent a formal decision to grant vested mining rights. Generally, a determination of vested rights is based on a factual review of the records with the purpose of applying those facts to define limits on physical operations. While the Planning Director's letter indicates an opinion regarding vested rights, this analysis concludes that it is determinative to establish the substantive and expanded vested rights to mine requested in the Application.

First, the determination was made a part of a request for reclamation plan approval. A request for a determination of vested rights is inherently separate from the determination of the sufficiency of a reclamation plan. Each determination is based on different sections of the law, and each is determined from different records of evidence. An approval of a reclamation does not carry with it a determination of a vested right. Rather, there needs to be a separate and distinct determination for each action.

Second, according to both *Hansen Brothers* and SMARA, such vested rights determinations must be made as part of a public hearing. There is no evidence the vested rights themselves were the focus of any hearing held for the reclamation plan. Indeed, the agenda description for the reclamation plan noted the following:

> "***HEARING – PERMIT TO MINE & RECLAMATION PLAN: TURNER EXCAVATING, INC. (California-Engels Mining Company, Owner): APN 007-080-004; T.27N/R.11.E/S.8 MDM. Planner: Rebecca Herrin***
>
> *Proposal to mine up to 100,000 cubic yards of construction aggregate from an existing previously disturbed overburden pile, including a seasonal rock crushing/screening plan. The total area to be reclaimed is +/- 2.88 acres. The estimated end of mining is January 1, 2032, with timber management as the proposed land use after reclamation. This project is located off Diamond Mountain Road, approximately 11 miles northeast of Greenville. Negative Declaration No. 661 has been prepared for this project*." (See June 13, 2012, Plumas County Zoning Administrator Regular Meeting Agenda.)

As noted in the description, the reclamation plan was approved along with the adoption of a Negative Declaration pursuant to the California Environmental Quality Act (CEQA). The approved Negative Declaration noted that "…the (reclamation plan) project will not have a significant effect on the environment because the initial study uncovered no evidence to the contrary…" (See Approved Negative Declaration dated June 27, 2012.) The initial study includes a detailed "project description" that comprehensively describes the project being analyzed. While the project description assumes that the "Number 10-Level Mine is a vested aggregate mine in Plumas County…" other statements reflect the limited nature of the request and the approval granted. For example, the project description in the Initial Study notes the following:

1. "This proposal to mine up to 100,000 cubic yards of construction aggregate from an existing previously disturbed overburden pile…"

2. "California-Engels Mining Company has maintained records showing these overburden piles have been exploited for aggregate material since at least as early as 1964 by numerous private and public entities. Based upon records provided by the owner it appears that approximately 50% of the original pile has been removed by past operators. Due to this long history of continued use, the site has been declared a vested aggregate operation by the County of Plumas."

3. The objective of the reclamation program is to clean up the pre-SMARA … mine overburden, restore the original surfaces to a stable condition, prevent erosion and ensure public safety."

4. Mining will be conducted with the goal of uncovering the original soil surface already in place. As soon as a section is exposed, a 30ft by 30ft fenced test plot will be set up to determine the viability of the proposed seed mix."

Finally, though not determinative on the intent of the parties at the time, the approved reclamation plan also considered future mining of similar piles of overburden. Instead of inferring that other nearby sites are similarly vested, the reclamation plan assumes additional approvals would be necessary. It notes:

> "The area excavated under this reclamation plan is limited to the pile of tunnel overburden and no material will be left after mining concludes. Other existing piles of tunnel overburden at nearby areas, not associated with this plan may be mined under separate approvals and plans in the future." (See page 13 "Future Mining of Site")

Thus, it appears that to the extent any vested rights determination was granted by the Planning Director's letter or the approved reclamation plan, those vested mining rights were limited to removal of aggregate from existing overburden piles and not the more expansive mining rights requested in the Application.

VI. CONCLUSION ON APPLICANT REQUESTED VESTED RIGHTS DETERMINATIONS

The Applicant, on page 22 of the Background Report, in Section 8. "Requested County Determination," requests the County make the following 5 factual and legal determinations ("**Determination**") with respect to the Engels-Superior Mines vested mining rights.

Each is reviewed considering the (1) supplied record, (2) the Background Report, and (3) the discussions included in this Memorandum.

> *Determination 1: Mining operations commenced at the Mines as early as 1880 with commercial operations occurring and expanding responsive to market demand.*
>
> Response: The Background Report evidences significant mining starting as early as 1880, supporting Determination 1.
>
> *Determination 2: The County first adopted a use permit requirement applicable to mining operations on the Mine Property as of July 8, 1958, which is prior to enactment of SMARA. Thus, July 8, 1958, is the "vesting date" for purposes of evaluating the existence and scope of vested mining rights at the Mines.*
>
> Response: The Background Report and the Plumas County Code of Ordinances supports a determination that the vesting date is July 8, 1958, supporting Determination 2.
>
> *Determination 3: Prior to the vesting date, mining operations occurred at the Mines, encompassing 967 acres. Since operations commenced, evidence shows that mining expanded over time and as necessary to produce multiple materials in*

response to market demand. Mining operations utilized all such mobile and processing equipment as reasonable and necessary to crush, wash, sort, stockpile, load, and otherwise manage copper, gold, silver, and construction aggregate products from the Mines.

Response: The Background Report evidences mining operations prior to the vesting date that naturally expanded due to market demands which utilized extensive digging, sorting, and processing equipment for the exploitation of copper, gold, and silver. The record is not clear about the exploitation of construction aggregate. The aggregate at the time was created as a result of removing it from the tunnels as overburden. There are no records presented that the aggregate was sold as a commodity and that the operation's purpose was for the development of an aggregate mine. The record partially supports Determination 3 as to copper, silver, and gold, but not as to construction aggregate products.

<u>Determination 4:</u> *The Mines became vested in 1958 and the owner has never waived or abandoned its vested right to mine. There is no evidence in the record of an intent or overt act by the owner to abandon the Mines vested rights. Additionally, the vested rights already proven and accepted by the County for the Indian Valley Rock Mine applies to the entire Mine Property.*

Response: The Background Report does not contain enough information to substantiate a vesting as of 1958. Further, the record presents numerous arguments that the mining operations were abandoned by operation of common law by 1938 and as a matter of law by 1960 or during the 1993-2006 discontinuance period. As discussed in this Memorandum, the Indian Valley Rock Mine vesting matter is not determinative of the rights in question for the Engels-Superior Mines. The record does not support Determination 4.

<u>Determination 5:</u> *Evidence in the record establishes an "objective manifestation of intent" to continue mining the Engels-Superior Mines, and a vested right exists allowing mining operations to expand across the entire Mine Property. This vested mining right includes the right to mine, process, sort, stockpile, haul and distribute the materials previously described from the Mines, including all uses typically ancillary to such mining operations. Finally, the vested mining right includes the right to produce material in response to market demand, subject only to the "substantial change" rule established in the Hansen Brothers decision.*

Response: Because the Background Report does not support Determination 4, the argument that the record does not support the objective manifestation to continue mining the Engels-Superior Mines must also apply to Determination 5. The record does not support Determination 5.