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OFFICE OF THE COUNTY COUNSEL

To: Board of Supervisors

From: Office of the Inyo County Counsel
Planning Department

Date: November 8, 2022

Re: Panamint Valley Limestone Quarry's Request for Confirmation of Vested Mining Rights Based on Past and Anticipated Future Land Use on 1,610 Acres

Recommended Action:

It is recommended that the Board:

- 1) Conduct public hearing on the Applicant's request for a Vested Mining Rights determination.
- 2) Find the recognition and confirmation of Vested Mining Rights is not a project subject to CEQA and direct staff to file a notice of exemption.
- 3) Adopt the proposed Resolution (included herein as Exhibit 2) memorializing a determination of Vested Mining Rights, requiring the submission of an updated reclamation plan and financial assurances prior to any mining activity at the Quarry that expands beyond the area already under the approved reclamation plan and covered by the current financial assurances, and adopting factual findings in support of the determination of Vested Mining Rights.

Alternative Recommendations:

- 1) Find that the Applicant failed to carry its burden to show that mining was occurring or an intent to mine existed at or near the time the use became nonconforming and determine that vested mining rights do not exist.

If the Board's intention is to deny the Applicant's request, staff recommends that the Board move to tentatively deny the application and direct staff to return with written findings within 30 days of November 8, 2022.

- 1) Continue the Public Hearing to a new date and time and provide specific direction to staff about actions to take prior to the Board considering the project.

Introduction and Overview:

Inyo County, through its Planning Department, serves as the Lead Agency in matters involving local land use activities and is responsible for implementing the County's land use and zoning codes as well as the requirements of the Surface Mining and Reclamation Act of 1975 ("SMARA", Public Resources Code ("PRC") section 2710 et seq. and California Code of Regulations section 3500 et seq.).

On August 29, 2022, the Inyo County Planning Department received an application from Shawn Barker Construction ("Applicant"), owner of a surface mining operation known as Panamint Valley Limestone Quarry ("Quarry"), requesting the County make a formal determination of Vested Mining Rights for the Quarry's 1,610 contiguous acres of land located on the east side of the Argus Range and the west side of Panamint Valley in the unincorporated area of the County. (Please refer to Exhibits A 1-5 of the Application, which is incorporated by reference as if fully set forth herein and can be found here:

<https://www.inyocounty.us/services/planning-department/surface-mining-and-reclamation-act-smara#:~:text=Vested%20Rights%202022%2D01%20Shawn%20Barker>)

Under SMARA, an operator cannot conduct surface mining operations unless it has: 1) obtained a permit from the County; 2) a reclamation plan has been submitted to and approved by the County; and 3) financial assurances to implement that reclamation have been approved by the County. An exception to the first requirement to obtain a use permit may exist if the mining operation began before local zoning ordinances first require a use permit for mining to occur. If such a showing can be made, a "vested mining right" is determined and replaces the need for a use permit. SMARA's other basic requirements for a reclamation plan and financial assurance to implement that plan will still apply. In other words, if the Applicant is found to have Vested Mining Rights, he will still need an approved reclamation plan, which plan will require environmental review under CEQA, and financial assurances to implement that plan.

Importantly, because the Quarry is located on both private land and federal land managed by the Bureau of Land Management ("BLM"), it too will have regulatory oversight over the Applicant's operations which are governed by federal permits.

Prior to 2017, the California State Mining and Geology Board made vested mining rights determinations. The law has recently changed, and now your Board is the appropriate body to make such determinations (See PRC 2774.4) and must do so through a noticed public hearing process. Thus, today's hearing is set in response to the Applicant's request for the Board to formally confirm the existence, scope, and extent of the legal nonconforming use at the Quarry.

To obtain a vested mining rights determination on the property, the Applicant must show, by a preponderance of evidence, that the mining operation was legally established and in existence, as

well as the geographic and operational scope of that pre-existing operation, prior to the passage of the County's zoning ordinance requiring a conditional use permit for surface mining.

Staff has reviewed and analyzed the request and all available pertinent evidence submitted by the Applicant and believes that the Applicant has made a sufficient showing for a Vested Mining Right to be legally recognized. This conclusion is guided by SMARA, various Court decisions as summarized below, the application and its referenced materials, and provided within the proposed findings

Vested Mining Rights Defined:

Under California law, a "vested right" is the right to continue an activity that "existed lawfully before a zoning restriction became effective," even though that use is "not in conformity with the ordinance when it continues thereafter." *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996), 12 Cal.4th 533, 540, fn. 1, 541. Whether a use is vested turns on the date on which a zoning ordinance first restricted the use and on evidence of use of, or objective intent to use, the land as of that "vesting date." *Id.* at 542, 560-61.

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 information, as well as evidence provided to the Board by the Applicant during today's hearing, is presented for the Board to consider for a quasi-judicial decision.

County's Land Use Regulation of Mining:

Inyo County's original zoning ordinance was adopted in 1960, through Ordinance No. 78, but was silent as to mining restrictions or regulations. The County's first zoning law ordinance that required a use permit to mine was not adopted until May 20, 1970, through Ordinance No. 182 (see Exhibit F-3 of the Application). May 20, 1970 is therefore considered the "vesting date" for purposes of this analysis. Ordinance 182 also provided that any nonconforming uses established prior to the ordinance may continue.

SMARA was enacted in 1975 and required all surface mining operations in the state – including vested operations – to have an approved reclamation plan. Pursuant to SMARA, every lead agency is 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. Inyo County SMARA ordinance is codified in Chapter 7 of the Inyo County Code.

Regulatory and Statutory Authority Considerations:

Determinations of vested mining rights are supported by Inyo County Code Chapters 7.70 and 18.12 and SMARA (PRC §2710 et seq. and California Code of Regulations §3500 et seq.). As stated above, persons wishing to conduct surface mining operations in the County must first acquire (1) a conditional permit from the County (or a vested rights determination) and obtain (2) an approved Reclamation Plan and (3) provide 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.

Sections of the Inyo County Code Applicable to Vested Rights:

Section 7.70.020 B.:

A person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall submit to the county planning department a reclamation plan for operations to be conducted after January 1, 1976.

With regard to the Applicant’s request for a vested rights determination, Section 7.70.020 B makes clear that any mining at the Quarry after such determination is made that serves to expand its current operations will still require the Applicant to submit a reclamation plan for the review and approval of the County Planning Commission and by default this will require environmental review under CEQA as a discretionary action.

Section 18.78.230:

Any use lawfully occupying a building or land, at the time of adoption of the ordinance codified in this title or of any subsequent amendment thereto, which does not conform to the regulations of the district in which it is located is a nonconforming use, and may continue except as otherwise provided herein...

Section 18.78.230 is basically a description of grandfathering law. As applied to the current request for confirmation of vested rights, in the simplest of terms, it means that since the Quarry was established before the County adopted the requirement for mines to obtain conditional use permits, the use (as a mining operation) may continue without a conditional use permit issued by the County. In this way, any confirmation of vested rights essentially memorializes the fact that mining has been, and will continue to be, an allowed use as was provided for in the County Code at the time the Quarry was established.

In 1991, the County approved a Reclamation Plan and CUP to modernize the existing Quarry and apply SMARA’s standards (see Exhibit F-5 of the Application). The reclamation plan and

use permit applied to approximately 250 acres, representing that portion of the Quarry being operated at that time and in the foreseeable future, but did not address or consider the remaining unexcavated portions (i.e., the bulk of the acreage under consideration today). The County's staff report at the time expressly stated that the County had treated the Quarry as a legal nonconforming use and did not expressly suggest the operator was abandoning any aspect of its vested rights by applying for the permit. That a use permit was sought at that time does not necessarily indicate the owner's intent to abandon any preexisting rights nor does it preclude the County from confirming these rights now. (See *Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 Cal.2d 515, 534.)

Case Law Interpreting Vested Rights Under SMARA:

A number of Court decisions 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 ("*Hansen 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. 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.

Hansen Brothers articulates four key principles relevant to this application.

1. Under the "diminishing asset" doctrine, a vested mining operation may expand into portions of a tract of land that was not yet disturbed on the vesting date if the record shows an objective manifestation of the operator's intent to devote the entire area to the operation.
2. A vested mining right includes the right "to engage in uses normally incidental and auxiliary to the nonconforming use."
3. Increases in production to serve market demand are part of the vested right, and do not represent a change or expansion of use.
4. Vested Mining Rights can be abandoned only upon the occurrence of two factors:
 - a. Intent of the owner to abandon the right; and
 - b. There must be an overt act, or failure to act, that implies the owner/operator no longer claims a vested mining right.

The party claiming abandonment of a vested right has the burden of showing, by clear and convincing evidence, that a landowner knowingly and intentionally waived its vested rights.

Hardesty. *Hardesty v. State Mining and Geology Board* (3rd Dist. 2017) 219 Cal. Rptr. 3d 28, previously published at 11 Cal. App. 5th 2017¹ (“*Hardesty*”). *Hardesty* is the only California case that has found an abandonment of Vested Mining Rights. The court held that a landowner abandoned his vested mining right by certifying to the government in an official document “that all mining had ceased, with no intent to resume, which was uniquely persuasive evidence of abandonment.” (*Hardesty* at p. 814.) This explicit certification documented and signed by the landowner evidenced an intent to abandon and discontinue mining operations. No such statement or certification exists in relation to the Quarry.

Summary of the Applicant’s Property History, Ownership and Development:

The Quarry is located on both private land and federal land managed by the Bureau of Land Management (“BLM”) and is comprised of 12 patented mining claims and a number of unpatented mining claims. The current operations, which are the subject of the 1991 CUP issued by the County, are focused near the mouth of Revenue Canyon and mining disturbance extends south to Bendire Canyon. In general, the Quarry boundaries track prominent limestone exposures on the eastern edge of the range. Access is from Nadeau Road via State Highway 179 (Trona Wildrose Road). Please refer to Exhibits A1-5 of the Application for maps and Exhibit E for federal mining claims.

The record shows that small-scale mining commenced at the Quarry as early as 1909 and by the 1950s the level of development had increased dramatically. In 1955, the West End Chemical Company acquired federal mining claims for part of the Quarry and began mining and processing limestone at a commercial scale to support its manufacturing of borax, soda ash, sodium sulfate, and lime. In 1956, West End merged with another chemical manufacturing company, and the new entity installed a rotary kiln and made other improvements enabling a significant increase in Quarry production. After 1970, commercial-scale mining uses continued and still exist today. Please refer to Exhibits B-E of the Application for documentation in support of historical operations.

Ownership of the Quarry has changed through transactions in 1974, 1990, 1997 and 2015, and at all times, mining and processing remained the sole land use at the Quarry. The Applicant has owned and operated the Quarry since 2015. The Quarry has operated as a mine at all relevant times prior to and after the adoption of the County’s applicable zoning ordinance (in 1970)².

A full history of the mine and backup factual documentation are included in the application and referenced materials, which are incorporated herein by reference. The Application can be found at the following link: <https://www.inyocounty.us/services/planning-department/surface-mining-and-reclamation-act-smara#:~:text=Vested%20Rights%202022%2D01%20Shawn%20Barker>

¹ 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.

² The right to use the land as a nonconforming use runs with the land, not the owner. Transfer of title does not affect the right to continue a lawful nonconforming use. *City of Los Angeles v. Gage* (1954) 127 Cal.App.2d 442.

Analysis:

The County has historically treated the Quarry as a legal nonconforming use but has not made a formal determination concerning the scope and extent of that use. The Applicant is now requesting that formal determination be made.

As outlined above, in making its determination, the Board should look at the four key points:

1. Did the Quarry's operations commence before the May 20, 1970 vesting date?
2. What was the geographic scope of the non-conforming use on the vesting date?
3. What are the operational and volumetric scope of those rights?
4. Has there been any termination or abandonment of the vested right?

1. Did the Quarry's operations commence before the May 20, 1970 vesting date?

As detailed above, and demonstrated in greater detail during the hearing, the Quarry has a long and well-documented history that supports a finding that surface mining operations began before the County first required a use permit for mining in May of 1970.

The Quarry's mining operations began as early as 1909 and, in any event, were in full swing by 1955 and have continued since that time. The record demonstrates that mining operations expanded over time through both development and progressive land acquisitions, including construction of roads and various infrastructure, and by 1963, the Quarry's operator had secured rights to all 1,610 acres of patented and unpatented mining claims.

2. What was the geographic scope of the non-conforming use on the vesting date?

According to the court in *Hansen Brothers*, the geographic scope of a vested mining use extends to the entire tract of land which the operator objectively intended to devote to mining uses. The determining factor, with respect to the geographic scope of vested rights, is "whether the nature of the initial nonconforming use, in the light of the character and adaptability to such use of the entire parcel, manifestly implies that the entire property was appropriated to such use prior to adoption of the restrictive zoning ordinance." (*Hansen Brothers*, at 557.) In other words, a vested mining operation may expand into portions of a tract of land that was not yet disturbed or fully excavated on the vesting date if the record shows an "objective manifestation" of the operator's intent to devote the entire area to the operation. (*Hansen Brothers* 555-556) This is the "diminishing asset" doctrine and has been adopted by most courts that have reviewed the issue.

As applied to the Quarry, the rights to the entire 'tract' of 1,610 acres (the acreage to which this application applies) intended for extraction of limestone was secured by the mine operator by 1963, well before the County passed its applicable zoning provisions. The record shows that the location of the claims correspond to an exposed limestone deposit that outcropped in a north-to-south manner and are intended as a part of a contiguous, integrated, and expanding commercial surface mining operation. The operation included mineral extraction, stockpiling, crushing, processing, hauling, roads and infrastructure and at all relevant times mining was the sole use on the tract. These facts support a finding that the requisite intent to use the entire 1,610 tract for mining purposes existed.

3. What are the operational and volumetric scope of those rights?

As discussed in *Hansen*, 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” (*Hansen Brothers*, at p 565.)

For commercial surface mining operations, such as the Quarry, this includes, but is not limited to, mining, blasting, crushing, stockpiling, processing, trucking, and selling extracted product as well as all equipment used to effectuate such activities. The modernization and upgrading of any necessary equipment would also be included in the Quarry’s operational scope vis a vis its vested rights. *Hansen Brothers* recognized that vested mining uses can and do evolve. (*Id.* at 571-575.) As the court explained, however, operational changes made in conjunction with a vested mining use does not, by itself, establish that the vested use has been unlawfully expanded. (*Id.* at 573-575.) Instead, the inquiry must focus on whether the change (or modernization or addition of equipment) affects the fundamental nature of the underlying vested use. (*Id.* at 565-566, 571-575.) In other words, in making its determination under this question, the Board should look to the fundamental nature of the Quarry’s use at the vesting date to determine the operational scope.

With regard to volumetric scope, the court’s guidance in *Hansen Brothers* is similarly useful. *Hansen Brothers* recognized that an increase in production to serve market demand is part of the vested right, as originally contemplated, and does not represent an expansion of use as a matter of law. (*Hansen Brothers*, p. 572-573.) The record shows that the Quarry’s historic volumetric production has fluctuated in response to market demand and by 1957 it was producing limestone at an estimated rate of 600,000 tons per year. The law would support production at that level, with increases above the levels existing at the vesting date as needed to meet market demand.

4. Has there been any termination or abandonment of the vested right?

As outlined in the *Hansen* case, property rights cannot be abandoned unless the owner intends to abandon its rights and further, performs an overt act, or failure to act, suggesting that it is disclaiming its rights. (*Hansen Brothers*, supra, 12 Cal.4th at 569.). 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. *Id.*

Indeed, historical cases, as well as common mining practice, confirm that holding a mineral reserve as inventory does not result in abandonment:

There are many cases where from non-use of a right the inference of abandonment may fairly be made; but that does not apply to such a case as this. It is not so generally true that the owner of mines does work every mine, which he has a right to work; and therefore the relinquishment of the right can not be presumed from the non-exercise of it. It is well known that mines remain unwrought for generations; that they are frequently purchased or reserved, not only without any view to immediate

working, but for the express purpose of keeping them unwrought until other mines shall be exhausted, which may not be for a long period of **time**. It is impossible therefore to infer that this right is extinguished, though there is no evidence of the exercise of it....”

(*Seaman v. Vawdrey*, 16 Vesey, Jr. 390. High Court of Chancery, 1810³.)

The *Hardesty* case is the only California case to have found an abandonment of a vested mining right. Critical in the *Hardesty* court’s finding was that the operator Hardesty’s signed and certified on an official government document that the mine was closed and the operator had no intent to resume operations.

The record supports the conclusion that vested mining rights have never expressly been abandoned in relation to the Quarry. The Quarry has been used for the sole purpose of mineral extraction since 1970 and while periods of inactivity have occurred, the record suggests they have occurred in response to market demand rather than an overt act to cease operations, and the Quarry has consistently been maintained in a condition that allowed operations to resume. Further, holding mining claims in inventory does not equate to abandonment and is common practice in the mining world. Further, the fact that the Quarry secured a use permit from the County in 1991 along with its reclamation plan, does not suggest a waiver of vested rights. (*Consolidated Rock Products Co. supra*, 57 Cal.2d at 534

In summary, as May 20, 1970, the vesting date, the Quarry’s owners had acquired claims to the entire 1,610 acres subject to this application, the Quarry was a major surface mining and mineral processing operation that had legally commenced operating many years prior, and its owners were focused on future growth and expansion. Therefore, the facts presented support a finding of Vested Mining Rights across the 1,610 acres covered by this application.

PUBLIC COMMENTS:

No public comments have been received as of the date of this report was published.

Determination of Vested Rights for Mining for the Panamint Valley Limestone Quarry:

1. Preponderance of the Evidence: The Applicant has the burden of proof in demonstrating a claim for Vested Mining Rights. The Board shall determine whether the Applicant, 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 determined on a case-by-case basis.

Recommendation that the Inyo County Board of Supervisors:

Recommended Action:

It is recommended that the Board:

³ As explained above, the Seaman cases in non-binding precedent in a California court but the analysis and rationale for this decision may be considered instructive for purposes of a quasi-judicial determination

- 1) Conduct public hearing on the Applicant's request for a Vested Mining Rights determination.
- 2) Find the recognition and confirmation of Vested Mining Rights is not a project subject to CEQA and direct staff to file a notice of exemption.
- 3) Adopt the proposed Resolution (included herein as Exhibit 2) memorializing a determination of Vested Mining Rights, requiring the submission of an updated reclamation plan and financial assurances prior to any mining activity at the Quarry that expands beyond the area already under the approved reclamation plan and covered by the current financial assurances, and adopting factual findings in support of the determination of Vested Mining Rights.

Alternative Recommendations:

- 1) Find that the Applicant failed to carry its burden to show that mining was occurring or an intent to mine existed at or near the time the use became nonconforming and determine that vested mining rights do not exist.
If the Board's intention is deny the Applicant's request, staff recommends that the Board move to tentatively deny the application and direct staff to return with written findings within 30 days of November 8, 2022.
- 1) Continue the Public Hearing to a new date and time and provide specific direction to staff about actions to take prior to the Board considering the project.

ATTACHMENTS:

Exhibit 1: The Application materials, incorporated herein and referenced throughout this report, can be found at the following link: <https://www.inyocounty.us/services/planning-department/surface-mining-and-reclamation-act-smara#:~:text=Vested%20Rights%202022%2D01%20Shawn%20Barker>

Exhibit 2: Proposed Resolution with required Factual Findings and Vesting Determinations.