

## MEMORANDUM

TO: Caroline Monroy  
Darren Edgington

FROM: Kerry Shapiro  
Daniel Quinley

DATE: September 22, 2022

RE: Abandonment Principles Applicable to Vested Mining Rights

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### I. Introduction

On June 16, 2022, the County of Riverside ("County") e-mailed Robertson's Ready Mix ("RRM") and requested "information regarding the non-abandonment of any vested mining rights on the Brion Parcel [an approximately 680 acre portion of the Hubbs Harlow Vested Rights Area ("HH VRA"), colloquially known as the "Brion Parcel"] beginning around 1982 [when the Brion Parcel was created]." Accordingly, this memorandum summarizes abandonment principals under California law applicable to vested mining rights, and specifically addresses the potential application of those abandonment principles to certain documents within the County's files recently provided to RRM related to the Pre-Application Review for a potential housing development on the Brion Parcel known as "Twin Creeks" proposed by Cajalco Associates, LLC.

As discussed in greater detail below, the issue of "abandonment" of vested rights is not implicated in connection with the Twin Creeks Pre-Application Review ("PAR") for multiple reasons, including:

1. During the entirety of the Twin Creeks PAR, the interested party – Cajalco Associates, LLC – was not the owner of the Brion Parcel and thus had no power or ability to express an intent or otherwise take action to waive vested rights, which are Constitutionally-protected property rights held by the owner of the property;
2. Even if Cajalco Associates was somehow empowered to be able to waive such a property (which it was not), there is no evidence to demonstrate any intent or affirmative act (the requirements for waiver) that actually waived the vested rights on the Brion Parcel;

3. Once a vested right was established on the Brion Parcel as of 1949 (which RRM asserts is the case here), the vested right holder (RRM) does not bear the burden of demonstrating non-abandonment; rather, any party asserting the established vested right was abandoned bears the burden to prove, by “clear and convincing evidence,” that the vested right was abandoned. RRM has seen no evidence, let alone clear and convincing evidence, of abandonment.

## II. Analysis

### A. Waiver and Abandonment of a Vested Right to Mine is a Factual Question that Requires Clear and Convincing Evidence of Both Clear Intent and an Overt Act

The U.S. and California Supreme Courts unequivocally direct that “[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”<sup>1</sup> Accordingly, for waiver of a constitutionally protected right to be effective, there must be a knowing intent to relinquish or abandon that right: “Waiver is the intentional relinquishment or abandonment of a known right, or privilege, with knowledge of the facts.”<sup>2</sup> The pivotal question of fact in determining whether abandonment has occurred is “the intention of the party who allegedly relinquished the known legal right.”<sup>3</sup> Moreover, waiver or abandonment only be found when it is shown that party allegedly waiving the right had actual knowledge that the right existed.<sup>4</sup>

California Supreme Court case law specific to vested mining rights has been unequivocal that waiver may be established only where the party asserting waiver provides clear and convincing

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<sup>1</sup> *People v. D’Arcy* (2010) 48 Cal. 4th 257, 284 (citing *Brady v. United States* (1970) 397 U.S. 742, 748); see also *Hansen Bros. Enterprises Inc., v. Board of Supervisors* (“*Hansen*”) (1996) 12 Cal.4th 533, 550 (“All recognize the constitutional principles under which Hansen Brothers claims a vested right.”)

<sup>2</sup> 30 Cal.Jur 3d Estoppel and Waiver § 32.

<sup>3</sup> *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga et al.* (2009) 175 Cal.App.4th 1306, 1320 (citing *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Care & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60).

<sup>4</sup> See *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107-108; *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1174, 1189; *In re Sheena K.* (2007) 40 Cal.4th 875, 881, fn. 1; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31. As stated in *In re De Neef*: “[P]rimary essentials of a waiver are knowledge and intent. Before one may be deemed to have waived a right granted by statute he must be shown to have knowledge of the right and an intent to waive or forego it.” (1941) 42 Cal.App.2d 691, 694 (emphasis added).

evidence of (1) “clear intent” by the vested right holder to waive its rights, (2) coupled with an overt act, or failure to act, reflecting such an intent.<sup>5</sup>

Inadvertent or implied waiver of constitutionally protected rights cannot occur. Waiver of such rights “must be voluntary and knowing act done within sufficient awareness of the relevant circumstances and likely consequences.”<sup>6</sup> Indeed, constitutionally-protected rights are afforded additional protections against inadvertent or implied waiver.<sup>7</sup> Accordingly, a constitutionally-protected vested mining right cannot be waived inadvertently or implied, as made clear by the court in *Calvert I*: “A waiver of a constitutional right requires a knowing and intentional relinquishment of that right, and such a waiver is disfavored in the law.”<sup>8</sup>

**B. Neither SMARA Nor Ordinance 555 Contain Any Express Provisions Regarding Waiver of Existing or Non-Conforming Uses**

Neither SMARA nor Riverside County’s Ordinance 555 contain any provisions detailing when waiver or abandonment of a vested surface mining right might occur. The lack of such a provision is, indeed, unlike other cases where county ordinances specifically allow for abandonment of a non-conforming use which has been discontinued after a specific period of time.<sup>9</sup> Accordingly, there are no applicable statutory provisions that would effectuate a determination of waiver or abandonment, and the high-bar under case law for proving such a waiver remains applicable to the vested right at issue here.<sup>10</sup>

**C. The Submission of a the Twin Creeks PAR Does Not Establish an Intent to Waive or Abandon Vested Rights and Is Not an Overt Act Sufficient to Demonstrate Waiver or Abandonment**

The Twin Creeks PAR is, quite simply, no evidence, and certainly not clear and convincing evidence, of either an intent to waive or actual waiver of vested rights and does not demonstrate

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<sup>5</sup> *Hansen* 12 Cal.4th at 569 (citing 8A McQuillin, Municipal Corporations (3d ed. 1994) § 24.192) (emphasis added)

<sup>6</sup> *In re M.L.*(2012) 210 Cal.App.4th 1457, 1469 (emphasis added).

<sup>7</sup> *See, e.g., In re Hannie* (1970) 3 Cal.3d 520 (applying heightened waiver standard to statutory right); *see also City of Ukiah*, 64 Cal.2d at 107 (emphasizing that the high standard for proving waiver is “particularly apropos in cases in which the right in question is one ‘favored’ by the law.”).

<sup>8</sup> *Calvert v. County of Yuba* (“*Calvert I*”) (2007) 145 Cal.App.4th 613, 628.

<sup>9</sup> *See Hansen*, 12 Cal.4th at 541, n.2.

<sup>10</sup> The lack of statutory provisions detailing conditions of abandonment under SMARA are also contrasted with other statutory schemes, such as the California Coastal Act, which explicitly incorporated an automatic waver of vested rights, unless the party claiming such rights filed a claim with the Coastal Commission. *See Cal. Code Reg.*, tit. 14, §13201; *see LT-WR, L.L.C. v. California Coastal Comm.* (2007) 152 Cal.App.4th 770, 785.

any of the factors – either intent or (in)action – necessary to establish knowing, intentional waiver of a vested right

First, the entity who initiated the Twin Creeks PAR – Cajalco Associates LLC – was not, during the time of the PAR process, the holder of the vested right. Based on the files provided by the County, the PAR was submitted in March 2004, and the process concluded in July 2004. During this period, Cajalco Associates ***was not*** the holder of the vested right; rather, the landowner and vested right holder was ST & Koo International.<sup>11</sup> There is no indication that ST & Koo International initiated the PAR process, or was in any way involved with Cajalco Associates, LLC's engagement with the County at this time. Accordingly, the non-landowner's PAR process cannot serve to demonstrate an intent, by the landowner, to waive or abandon vested rights.<sup>12</sup>

Second, the PAR process is insufficient to demonstrate and is not an act (or failure to act) that would effectuate a waiver. The PAR process is, exactly as its name implies, a process that occurs ***prior*** to any formal application.<sup>13</sup> It is, essentially, a process where an interested party can vet a project and metaphorically “kick the tires,” of a potential development project. The PAR process in general, and the Twin Creeks PAR in particular, is a speculative process – there is no formal application to the County and there are no assurances or affirmative steps taken other than determining whether a proposed development is feasible.

Furthermore, it is telling that at the conclusion of the Twin Creeks PAR, the County identified numerous issues with the Twin Creeks development, as presented during the PAR process, that essentially made the proposed project ***infeasible***. Accordingly, Cajalco Associates, LLC's engagement with the PAR does not demonstrate an intent to waiver or abandon the vested rights; nor is it an action sufficient to demonstrate actual waiver or abandonment; it only serves to demonstrate the Cajalco Associates, LLC was interested in determining whether a housing development was feasible, perhaps as a pre-condition to eventually purchasing the property. .

Third, and finally, it is critical to note that RRM does not bear the burden of proof of demonstrating non-waiver and non-abandonment.<sup>14</sup> That burden rests squarely on a party

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<sup>11</sup> Cajalco Associates, LLC purchased the property in September 2004, before selling it in 2007. During this three-year period, RRM is unaware of any further efforts to pursue the Twin Creeks housing development.

<sup>12</sup> See *City of Ukiah v. County of Mendocino* (1987) 196 Cal.App.3d 47, 56-67 (vested rights are held by the landowner and can only be waived by the landowner).

<sup>13</sup> Ordinance No. 752 (as amended through 752.2), Riverside County (1997), <https://www.rivcocob.org/ords/700/752.2.pdf> (stating that the purpose of the PAR is to “[a]dvise a prospective applicant of currently County standards and requirements,” and otherwise streamline and shorten the processing of a formal application).

<sup>14</sup> See *Group Prop., Inc. v. Bruce*, (1952) 113 Cal.App.2d 549, 559 (1952) (“Abandonment is never presumed, but must be made to appear affirmatively by the party relying thereon.”).

asserting that a vested right was abandoned. Here, no party has yet asserted or provided evidence that RRM (or its predecessors-in-interest) have abandoned the vested right.

### **III. CONCLUSION**

For the legal and factual reasons discussed above, the Twin Creeks PAR does not present any evidence of waiver or abandonment of the vested right to mine within the HH VRA.