MINUTES OF THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA

AGENDA NO.
21.1
(MT 21749)

10:00 a.m. being the time set for public hearing on the recommendation from Transportation and Land Management Agency/Planning regarding the Public Hearing on Robertson's Ready Mix (RRM) Vesting Rights Determination Request (PAR210273) - Not a Project under CEQA. District 2. The Chairman called the matter for hearing.

John Hildebrand, Planning Department Staff, presented the matter.

Presentations by the following Applicant and County Counsel Representatives:

Kerry Shapiro, Applicant representative

Caroline Monroy, County Counsel representative

The following people spoke on the matter:

Jason Cloud
Vernon Logan
Morris Griddens
Ron Brown
Elsa Trouh
Bill Taylor
Warran Coalsen
Meindert Zwaagstra
Kim Decker
Leigh Dundas
David Hawkins
Scott Craft
Tuba Ebru Ozdil
Wes Speake
Paul E Macarru
John Nekson
Chris Willison

On motion of Supervisor Spiegel, seconded by Supervisor Perez and duly carried, IT WAS ORDERED that the matter is continued to June 27, 2023, at 10:00 a.m. or as soon as possible thereafter and the determination within 60 days of the hearing is subsequently continued; and it was further ordered that the public hearing is closed except for any newly discovered information and agreement between Robertsons and Pechanga.

Roll Call:
Ayes: Jeffries, Spiegel, Perez, and Gutierrez
Nays: None
Absent: None
Recused: Washington

I hereby certify that the foregoing is a full true, and correct copy of an order made and entered on May 2, 2023 of Supervisors Minutes.

WITNESS my hand and the seal of the Board of Supervisors
Dated: May 2, 2023
Kimberly A. Rector, Clerk of the Board of Supervisors, in
(seal) and for the County of Riverside, State of California.

By: _____ Deputy

AGENDA NO.
21.1

xc: Planning, COB

MINUTES OF THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA

AGENDA NO.
21.1
(MT 21412)

10:00 a.m. being the time set for public hearing on the recommendation from Transportation And Land Management Agency/Planning regarding the Public Hearing on PAR210273, Robertson's Vesting Mine Determination Request, Not a Project Under CEQA, District 2.

On motion of Supervisor Jeffries, seconded by Supervisor Spiegel and duly carried by unanimous vote, IT WAS ORDERED that the above matter is continued to Tuesday, May 2, 2023, at 10:00 a.m. or as soon as possible thereafter

Roll Call:
Ayes: Jeffries, Spiegel, Washington, Perez, and Gutierrez
Nays: None
Absent: None

I hereby certify that the foregoing is a full true, and correct copy of an order made and entered on March 28, 2023 of Supervisors Minutes.

WITNESS my hand and the seal of the Board of Supervisors
Dated: March 28, 2023
Kimberly A. Rector, Clerk of the Board of Supervisors, in
(seal) and for the County of Riverside, State of California.

By: _____ Deputy

AGENDA NO.
21.1

xc: Planning, COB

ROBERTSON'S

ROCK • SAND • BASE MATERIALS
READY MIX CONCRETE

May 1, 2023

Gary DuBois, JD, MSW
Director, Cultural Resources Department
Pechanga Band of Indians
P.O. Box 2183
Temecula, CA 92593

Re: Consultation

Dear Mr. DuBois:

Robertson's Ready Mix ("RRM") is respectfully providing this letter in response to issues raised by Pechanga Band of Indians (the "Tribe") in its communications to Riverside County regarding RRM's vested rights confirmation proceeding, scheduled to be heard by the Riverside County Board of Supervisors on Tuesday, May 2, 2023.

As an initial matter, RRM believes that the article published in the Press Enterprise wholly mischaracterizes RRM's actions and intent. RRM operates multiple properties and prides itself on great relationships with our neighboring tribes. In fact, RRM has several sites that are currently undergoing reclamation activities where tribal monitors are fully engaged in the process.

RRM welcomes tribal consultation, and will fully engage in consultation – formal, informal, or otherwise – with the Tribe at all appropriate times, and certainly all necessary processes during the reclamation plan approval process for this site, which is subject to the California Environmental Quality Act ("CEQA").

Please do not hesitate to contact me with any questions at any time.

Sincerely yours,

Christine Goeyvaerts
Robertson's Ready Mix

200 S. Main Suite 200 Corona, CA 92882
P.O. Box 1659 Corona, CA 92878-1659
(800) 834-7557

Submitted By: Kirry Shapiro - May 2, 2023 21.1

Boydd, April

From: Aquia Mail
Sent: Monday, May 1, 2023 9:47 AM
Cc: COB
Subject: Board comments web submission

Thank you for submitting your request to speak. The Clerk of the Board office has received your request and will be prepared to allow you to speak when your item is called. To attend the meeting, please call (669) 900-6833 and use **Meeting ID # 864 4411 6015 . Password is 20230502. You will be muted until your item is pulled and your name is called. Please dial in at 9:00 am with the phone number you provided in the form so you can be identified during the meeting.**

Submitted on May 1, 2023

Submitted values are:

First Name
John

Last Name
Nelson

Phone
6195153260

Agenda Date
05/02/2023

Agenda Item # or Public Comment
21749

State your position below
Oppose

Boydd, April

From: Aquia Mail
Sent: Monday, May 1, 2023 10:22 AM
To: john.nelson@procopio.com
Cc: COB
Subject: Board comments web submission
Attachments: draft-comment-letter(6758125.2(sca.docx

Thank you for submitting your request to speak. The Clerk of the Board office has received your request and will be prepared to allow you to speak when your item is called. To attend the meeting, please call (669) 900-6833 and use **Meeting ID # 864 4411 6015 . Password is 20230502. You will be muted until your item is pulled and your name is called. Please dial in at 9:00 am with the phone number you provided in the form so you can be identified during the meeting.**

Submitted on May 1, 2023

Submitted values are:

First Name
John

Last Name
Nelson

Phone
(619) 515-3260

Email
john.nelson@procopio.com

Agenda Item # or Public Comment
21

State your position below
Oppose

Attachments (Must be .pdf, .doc, or .docx)
draft-comment-letter(6758125.2(sca.docx

Boydd, April

From: Aquia Mail
Sent: Monday, May 1, 2023 10:22 AM
To: john.nelson@procopio.com
Cc: COB
Subject: Board comments web submission
Attachments: draft-comment-letter(6758125.2(sca.docx

Thank you for submitting your request to speak. The Clerk of the Board office has received your request and will be prepared to allow you to speak when your item is called. To attend the meeting, please call (669) 900-6833 and use **Meeting ID # 864 4411 6015 . Password is 20230502. You will be muted until your item is pulled and your name is called. Please dial in at 9:00 am with the phone number you provided in the form so you can be identified during the meeting.**

Submitted on May 1, 2023

Submitted values are:

First Name
John

Last Name
Nelson

Phone
(619) 515-3260

Email
john.nelson@procopio.com

Agenda Item # or Public Comment
21

State your position below
Oppose

Attachments (Must be .pdf, .doc, or .docx)
draft-comment-letter(6758125.2(sca.docx

PROCOPIO
525 B Street
Suite 2200
San Diego, CA 92101
T. 619.238.1900
F. 619.235.0398

JOHN NELSON
P. 619.515.3260
john.nelson@procopio.com

May 1, 2023

VIA EMAIL

Darren Edgington
Environmental PRoject Manager
Riverside County Planning Department
4080 Lemon Street, 12th Floor
Riverside, CA 92501

Re: **Robertson's Ready Mix Request for Determination of Vested Rights Application (Hubbs/Harlow Quarry Area)**

Dear Mr. Edgington:

On behalf our client the Pechanga Band of Indians (the "Tribe"), we provide these comments on the pending request of Robertson's Ready Mix Request ("RRM") for a determination of its Vested Rights Application for what it has deemed the Hubbs/Harlow Quarry Area ("Vested Rights Determination" or "Proposed Action"). This Proposed Action was continued from the February 28, 2023 Board of County Commissioners meeting to the May 2, 2023 meeting and remains unprepared for public hearing for the reasons provided herein.

The Proposed Action is an extraordinary request to remove from the County of Riverside's ("County") governing authority hundreds of acres of lands within its jurisdiction under the guise of a fiction contrived from a series of legal arguments, requested assumptions and extrapolations, improperly applied documentation, and storytelling by the only entity that would benefit from the decision—the requestor. We respectfully request that the County comply with its requirements under the California Environmental Quality Act ("CEQA") prior to issuing a decision on this matter, refuse to consider the Vesting Rights Determination until all pre-decisional processes have run their course.

Following this process, if the request survives, we believe that the County is precluded from affirming the vested rights for the reasons provided herein.[1]

The Riverside County Planning Staff in the February 28, 2023 Staff Report ("Staff Report") erroneously states that this Proposed Action is not subject to analysis under CEQA on the purported basis that approval of this Vested Rights Application is not a "discretionary action," rendering the County's decision to approve or deny the Proposed Action as outside the bounds of CEQA. This position is contrary to the CEQA statute, guidelines and case law interpreting their tenets. By failing to undertake the required CEQA analysis prior to considering a decision in this matter, the County is also not complying with AB 52, which requires public agencies to consult with tribes during the CEQA process where tribal cultural resources could be affected. As detailed further below and in confidential information which the Tribe can share with the County only through consultation, the Hubbs/Harlow Quarry Area is within the historic territory of the Tribe and is a location of significant cultural value to the Tribe triggering the consultation requirements of AB 52. See Public Resources Code Section 21074(a)(1)(A)-(B).

In addition to the County's obligation to comply with CEQA, we also write to clarify that the cultural resources that are of concern to the Tribe (and perhaps other tribes in the region) are subject to the State's public trust doctrine, and that any vested mining right that the County were to find in regard to the Proposed Action only exists subject to the public trust doctrine. As a consequence, any affirmative action by the County on this Proposed Action, including even partial recognition of the currently mined RRM property, must condition the determination upon compliance with the public trust doctrine that is applicable to the extant cultural resources for which the Tribe is a co-Trustee.[2]

While the County must comply with CEQA and its public trust obligations before proceeding with the analysis of the Proposed Action at the hearing, and without waiving's these objections to the County's process, the Tribe supports two of the proposed findings by the Riverside County Planning Staff in the Staff Report in regard to the Proposed Action, Case No. PAR210273, namely: 1) that RRM has not shown by a preponderance of the evidence that their predecessors in interest manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights Area as of the 1949 vesting date; and 2) even if they have shown the predecessor in interest had manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights area as of the 1949 vesting date, there is clear and convincing evidence that any vested right was abandoned when this property was sold to a third party, who did not mine the property and then sold to a developer who sought to build a residential community on this land. The Staff Report provides detailed and robust evidence in support of each of these two conclusions, which are independently fatal to the merits of the Proposed Action, and the Proposed Action should be denied on this basis.

However, in addition to the Tribe's objection to the County's failure to comply with CEQA, AB52 and the public trust doctrine, we are also writing to correct and clarify the legal requirements

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[1] The Staff Report concurs with our conclusion that the application is substantively defective and cannot be approved under the premises submitted; however, we believe that the support for denial of the application exceeds the bases stated in the Staff Report.

[2] As required by County Ordinance 555, these comments are relevant to the County's determination in demonstrating or delimiting the existence, nature, and scope of the claimed vested rights.

applicable to this determination that make it even less likely that the Proposed Action can be approved. As detailed below, the County lacks the legal and factual bases to find that even the existing RRM quarry has properly maintained its vested right, if it ever was held, and we ask that RRM be required to come into compliance with all current planning and zoning laws on its current quarry as a result of this determination. As identified below, the Staff Report provides the factual basis for this conclusion, but does not property conclude, as it must, that no vested rights can be shown to presently apply to any of the existing RRM operations at this location.

Finally, we ask that the currently scheduled May 2 hearing be postponed. Upon receipt and review of the voluminous application materials, we requested documents under the California Public Records Act in order to develop a more comprehensive administrative record in this matter. We should be provided full and complete responses to this request prior to the hearing on this proposed action. In an April 10, 2023 response to our request, the County stated that it would "produce documents on a rolling basis beginning April 17, 2023." The County made a first production of documents available on April 17, 2023; however, as of April 30, 2023, we have received no additional production, and the County has not confirmed that the production of documents is complete. We need either a notification from the County that the document production in response to our public records request is complete or, if further documents remain to be produced, additional time to receive and review those documents prior to any public hearing. Further, any response, supplement or change to the application or the Staff Report by RRM must be published and circulated as part of the application, and the public, including the Tribe, needs sufficient time to review and comment on any of those additional comments.

A. The Staff Report Incorrectly Concludes that No CEQA Analysis is Required for the Proposed Action

A determination of vested rights under section 2776 of the Surface Mining and Reclamation Act ("SMARA') and Riverside County Ordinance ("RCO") No. 555 is a discretionary project subject to California Environmental Quality Act ("CEQA") review. Prior to considering the Proposed Action, the County must prepare and certify a full environmental impact report ("EIR") on the direct and foreseeably indirect environmental changes that could result from RRM's request to drastically expand its mining activity. If the Application is disapproved, any future expansion of mining operations would require additional permitting and separate CEQA analysis.

i. The County's vested rights determination is a discretionary decision subject to CEQA review, which has not yet been conducted

The County of Riverside Planning Department Staff Report ("Staff Report") conclusion that the RRM vested rights determination "is not a project . . . [and] is not a discretionary project for the purposes of CEQA" is wrong and directly contradictory to California law. Instead, the vested rights determination is a discretionary agency decision to which CEQA applies.

CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies." (Pub Res C §21080(a)). According to the CEQA Guidelines (14 Cal Code Regs §§15000–15387), a "project" is broadly defined to mean "the whole of an action" which may result in either a "direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (*Id.* at §15378(a)). The CEQA Guidelines define a "discretionary project" as "a

project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity." (*Id.* at §15357). CEQA does not apply to an agency's nondiscretionary "ministerial" decisions. (Pub Res C §21080(b)(1); 14 Cal Code Regs §15060(c)(1)).

Under California law, vested rights determinations are not "ministerial" decisions. In *Calvert v. County of Yuba*, the California Court of Appeal, held that the adjudicatory determination of a mining company's vested rights claim under SMARA triggered procedural due process protections including notice and a right to a hearing for adjacent landowners. (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 629. The Court stated that SMARA's vested rights statute, section 2776, requires an analysis of "factual issues that must be resolved through the adjudicative exercise of judgment rather than the ministerial (automatic, nondiscretionary) application of fixed standards and object measurements." (*Id.* at 624). With regard to CEQA, the Court specifically stated, "the vested rights determination here is not a ministerial determination under CEQA." (*Id.* at 621) (emphasis added)).

Here, the RRM vested rights determination will require the resolution of factual issues through the adjudicatory exercise of judgment, such as whether the "vested right continues" and whether any "substantial changes" have been made in the mining operation other than in accordance with SMARA. (*see Id.* at 623). Although it appears readily apparent that any vested right in the mining operation was abandoned when the property was sold to a third party, and that RRM's predecessors in interest had no objective intent to expand surface mining activities into the proposed vested rights area (i.e., that substantial changes have been proposed that are not in accordance with SMARA), these are determinations that the County of Riverside Board of Supervisors ("County") must make based on the "adjudicative exercise of judgment rather than the ministerial (automatic, nondiscretionary) application of fixed standards and objective measures." (*Id.* at 624).

In a January 25, 2022, memorandum from RRM's counsel (Jeffer Mangels Butler & Mitchell LLP or "JMBM") to the County, JMBM attempts to argue that the Vested Rights Determination is not subject to CEQA because, while the determination is "not ministerial in the land use context" it "is ministerial for purposes of CEQA." [3] JMBM acknowledges that *Calvert* specifically stated the opposite: "**the vested rights determination here is not a ministerial determination under CEQA.**" (*Id.*) However, JMBM argues that the court does not actually mean this, apparently, because the "applicability of CEQA to a [vested rights determination] was never raised by Plaintiffs, and thus, was not at issue in the case, and there is no further analysis or authority in the Calvert decision on this subject."[4]

On the contrary, the court does analyze the applicability of discretionary determinations with respect to vested rights determinations, and it does so by referencing a CEQA decision:

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[3] Draft Memorandum ("Memo") dated 1/25/22 from Kerry Shapiro and Daniel Quinley to Shelly Clack and Caroline Monroy re Applicability of CEQA to RRM Vested Rights Determination.
[4] *Id.*

> [S]ection 2776 encompass several factual issues that must be resolved through the adjudicative exercise of judgment rather than the ministerial (automatic, nondiscretionary) application of fixed standards and objective measurements.
>
> A good example of this dichotomy is provided by a decision from this court, Ramey. (Ramey, supra, 45 Cal.App.3d 185, 119 Cal.Rptr. 266.) In Ramey, we concluded that the approval of a mobile home park construction permit was a discretionary act subject to CEQA rather than a ministerial act exempt from CEQA. (A ministerial decision under CEQA similarly involves only the use of fixed standards or objective measurements.) (*Calvert* at 624). (Emphasis added).

Here, JMBM is attempting to make the difficult argument that "ministerial" is defined differently in the land use context than in the CEQA context, even though *Calvert* states that the definitions are similar, and the definitions are, in fact, similar.[5]

JMBM further states that, for CEQA purposes, a "discretionary" act "requires that a lead agency have actual authority to shape, change, or condition a project based on environmental concerns" and that, in a vested rights determination, "the County cannot condition the existence of vested rights, as they are a matter of historical fact." (Memo). However, the CEQA guidelines' definition of "discretionary" is more expansive. According to the guidelines, "The key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve a project." (14 CCR § 15357) (emphasis added). In other words, the discretionary question turns not only on how the County might shape the project, but also on whether or not the County will approve the project. Here, the County must use its subjective judgment to determine whether or not to approve the Vested Rights Application, and the "historical facts" evidencing the existence of vested rights are highly contested. Thus, the County's decision as to "whether" to approve the Vested Rights Application is a discretionary decision subject to CEQA review.

Finally, JMBM argues that County Ordinance No. 555.20 "specifically prohibits the County from considering environmental impacts" in the Vested Rights Determination. (Memo). However, Ordinance No. 555.20 contains no such specific prohibition. Section 17(B)(2) of Ordinance No. 555.20 states: "Written comments and oral testimony other than that related to demonstrating or delimiting the existence, nature, and scope of the claimed vested rights shall not be considered by the Board of Supervisors in making the Vested Rights determination." Therefore, to the extent that environmental impacts affect the determination as to whether the "Operator has demonstrated its claim for a Vested Right," they may considered by the County. (Ordinance No. 555.20).

The Vested Rights Determination here is discretionary because, among other reasons, it involves a substantial change and increase in the extent mining operations at issue. In reclamation plans for the mining operation at issue, Riverside County acknowledged that any substantial change

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[5] According to the CEQA guidelines, "A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (14 CCR § 15369) (Emphasis added). According to *Calvert*, in the land use context "Ministerial actions involve nondiscretionary decisions based only on fixed and objective standards, not subjective judgment." (*Calvert* at 622). (Emphasis added).

to or expansion of mining operations would require CEQA review. In explaining why a reclamation plan is not subject to CEQA review, the Riverside County Planning Department's 2013 Notice of Exemption for Reclamation Plan No. RCL00118 ("NOE") specifically states: "The project is exempt under Section 15061(b)(3), because the only actions subject to County review and discretion are those strictly related to reclamation (i.e., not vested surface mining activities), that will take place on areas that have already been subject to substantial disturbance. The project will not change operations at the site nor extend mining operations, and will if anything, result in environmentally-beneficial effects." (Reclamation Plan Amendment No. RCL-118-S1 (2013)) (emphasis added). Additional reclamation plan amendments contain similar language as justification for why the reclamation plans are exempt from CEQA review: "RCL No. 118S2 will not change operations at the site, and will also not extend the life of the mining operation within the Amended RCL0018S2 boundary." (Reclamation Plan Amendment No. RCL-118-S2 (2016) (emphasis added)); "The project will neither change operations at the site nor extend mining operations . . . Therefore, the project is exempt under CEQA guidelines." (Reclamation Plan Amendment No. RCL-118-S4 (2020)) (emphasis added). This language indicates that determinations related to vested surface mining activities or activities that would change site operations or extend mining operations are not exempt from CEQA review.

Therefore, because the County's vested rights determination is a discretionary action that contemplates an extension of RRM's mining operations, the vested rights determination must be subjected to CEQA review.

ii. A vested rights approval requires a full and comprehensive EIR of both the underlying mining activity and any resulting development or activity

Although a disapproval of vested rights would not be subject to CEQA (Pub Res C §21080(b)(5); 14 Cal Code Regs §15270(a); *Las Lomas Land Co. v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 848), an approval of vested rights, which would expand RRM's mining operations, requires a full and comprehensive EIR.

Projects are defined under CEQA to include discretionary activity that could cause either a "direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment." (Public Res C § 21065). The CEQA Guidelines define "project" to mean "the whole of an action" including activity that involves the issuance of a lease, permit, license, certification, or other entitlement for use (14 Cal Code Regs § 15378; Public Res C § 21065; *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 259-263 (disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888)). California courts have broadly defined "projects" to include not only specific approvals, but also the underlying activity and any development or activity that could result from the approval. (*see County of Ventura v. City of Moorpark* (2018) 24 CA5th 377, 385; *see also RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1203). The CEQA Guidelines also state that CEQA is to be interpreted so as to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (14 Cal Code Regs § 15003(f); *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247). Any doubt as to whether an activity is a project subject to CEQA review should be resolved in favor of a finding that the action at issue is a project. (*see Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 4 Cal.3d 376, 393).

Here, the County should find the vested rights determination and underlying mining activity to be a project because it is a discretionary activity that will cause significant direct and indirect environmental impacts. The County should require a full EIR that identifies and describes the significant environmental impacts, including direct, indirect, and cumulative or long-term impacts that may result from an expansion of mining operations (Pub Res C §21100(b)(1); 14 Cal Code Regs §§15126(a), 15144–15145, 15151). This review must include an analysis of the following items:

- significant cumulative impacts (14 Cal Code Regs §15130);
- mitigation measures (Pub Res C §21100(b)(3); 14 Cal Code Regs §15126(b)(3));
- alternatives, including a "no project" alternative (Pub Res C §21100(b)(4); 14 Cal Code Regs §§15126, 15126.6); and
- environmental impacts that cannot be mitigated (Pub Res C §21100(b)(2)(A); 14 Cal Code Regs §§15126(b), 15126.2(b)).

Specific issues of concern relevant to these items include significant impacts to "land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (Pub Res C §21060.5). Particular attention should be focused on the analysis of impacts to:

- archeological and historic resources (Pub Res C §21083.2; 14 Cal Code Regs §15064.5(c)–(f);
- tribal cultural resources (Pub Res C §21080.3.1; *see* AB52 discussion below);
- air quality, including an evaluation of greenhouse gas emissions directly or indirectly attributed to the proposed project (*see Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502; see also *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 223) (emphasis added); and
- water supply (Pub Res C §21151.9; 14 Cal Code Regs §15206(b)).

Importantly, with regard to cultural and biological resources, the County must consider substantial changes to the circumstances under which the mining operation was originally approved in the 1940s. The CEQA guidelines require that an EIR or negative declaration be prepared when, after an initial approval, "new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence" at the time will have one or more significant effects on the environment (14 Cal Code Regs §15162(a)(3)). Although these regulations are meant to address subsequent EIRs and negative declarations, their requirements can also be applied, as in this vested rights determination, to situations in which the initial approval process occurred prior to the adoption of CEQA or other relevant environmental laws. For example, any expansion of the vested rights area will require conformance with the requirements of the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP) because, even if vested rights are determined to exist for the entire 792 acre area, no vested or permitted surface mining activities in the expanded area occurred prior to the adoption of the MSHCP. Vested rights are not a license to

break otherwise applicable environmental laws; rather, vested rights simply provide the right to avoid conformance with otherwise applicable planning and zoning laws.

iii. Any future expansion of mining operations will require additional permitting and CEQA review

Absent a positive determination of vested rights, any expansion of mining operations will require a conditional use permit (CUP) in accordance with existing zoning and general plan requirements. Accordingly, any future permitting processes for new or expanded mining operations or reclamation will qualify as a "projects" necessitating CEQA review.

Here, as stated in the Staff Report, "if RRM does not have a vested right to conduct surface mining operations on the Proposed Vested Rights Area, mining activities must be conducted in accordance with current land use and mining ordinances and laws, which require a permit in addition to a reclamation plan and financial assurance." For the reasons discussed above, any new permitting process will necessitate CEQA review. Similarly, any subsequent reclamation plan applications may be considered separate CEQA projects necessitating individual CEQA review to the extent that those plans involve substantial changes to the initial EIR or authorization. (14 Cal Code Regs § 15162; *See Eldorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1596-1597).

B. Any Vested Rights Held by RRM Remain Subject to the Public Trust Doctrine and Require Analysis Prior To Any Further Approval

As discussed above, CEQA requires government actors to consider the environmental impacts of their actions before approving plans or committing to a course of action on a project. In 2014, the California legislature amended CEQA via Assembly Bill 52 ("AB52")[6] to add a new category of resources in need of protection, called "tribal cultural resources," and to "specify that a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource . . . is a project that may have a significant effect on the environment."[7] Under CEQA, a project is the whole of an action that can result in either a "direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment."[8]

Public Resources Code section 21074 provides the following definition for "tribal cultural resources":

(a) "Tribal cultural resources" are either of the following:

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[6] Cal. Stats. 2014, ch. 532, § 1(a), p.86.
[7] An act to amend Section 5097.94 of, and to add Sections 21073, 21074, 21080.3.1, 21080.3.2, 21080.3, 21083.09, 21084.2, and 21084.3 to, the Public Resources Code, relating to Native Americans, 2014 Cal. Stat. p. 86, § 9 (hereinafter, "AB52").
[8] Public Resources Code § 21065.

1. Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

   A. Included or determined to be eligible for inclusion in the California Register of Historical Resources.

   B. Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.

2. A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

(b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.

(c) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

AB52 clearly declares the public's interest in the protection of tribal cultural resources in the bill's Findings, Declarations, and Intent. AB52 further charges California Native American tribes with the obligation to manage, accept conveyances of, and act as caretakers of, tribal cultural resources.[9]

The California legislature also articulated findings regarding then-limited protections for tribal cultural resources, providing: (1) "Current state law provides a limited measure of protection for sites, features, places, objects, and landscapes with cultural value to California Native American tribes"; (2) "Existing law provides limited protection for Native American sacred places, including, but not limited to, places of worship, religious or ceremonial sites, and sacred shrines"; and (3) "Many of these archaeological, historical, cultural, and sacred sites are not located within the current boundaries of

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[9] *Id.*, § 1(b) ("In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following: . . . (8) Enable California Native American tribes *to manage and accept conveyances of, and act as caretakers of, tribal cultural resources.*" (emphasis added)).

California Native American reservations and rancherias, and therefore are not covered by the protectionist policies of tribal governments."[10]

Through this statement, the California legislature recognizes that tribal cultural resources were previously afforded inadequate protections under California law, an issue that AB52 seeks to remedy by bringing those resources within the protections of the public trust doctrine, and that tribal cultural resources that may be located on private property are nevertheless subject to the public trust protections afforded to those resources by law.

In *National Audubon Society v. Superior Court* (hereinafter, "*Mono Lake*"),[11] the California Supreme Court held that the public trust doctrine imposes affirmative duties upon the state, including the authority to exercise continuous supervision and control over trust resources.[12] Public and local government agencies are under an affirmative duty to protect public trust uses "whenever feasible."[13]

In the present case, there is significant reason to believe that cultural resources located in situ on the subject property were unknown or not sufficiently protected in the 1940s upon the alleged vesting of rights. However, courts have held that, where the public trust doctrine applies, it works a kind of conceptional severance of the property into *jus publicum* and *jus privatum* estates.[14] The California Supreme Court case *Marks v. Whitney*[15] is considered a leading example of this principle. In *Marks*, the Court held that the effect of the public trust doctrine's application to wetlands on private property was to divide the landowner's property into two different estates, similar to what occurs in the case of financial trust.[16] In short, the public trust doctrine's effect is to sever property to which it applies into different estates: the private landowner maintains recognized *jus privatum* rights, e.g., possession and alienation, but the landowner's *jus privatum* estate is burdened by the public's *jus publicum* rights, which restrain private development that is inconsistent with public rights.[17]

Whatever argument RRM may make regarding the fact that a property is owned privately in fee, or that certain rights in the property have vested, does nothing to extinguish the public's interest in the tribal cultural resources located thereon or the public's right to enforce those protections. No

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[10] AB52, § 1.
[11] 33 Cal.3d 419 (1983).
[12] *Id.*
[13] *Id.* at 446.
[14] Michael C. Blumm, The Public Trust Doctrine and Private Property: The Accommodation Principle, 27 Pace Envtl. L. Rev. 649, 658 (2010) (hereinafter, "Blumm, The Public Trust Doctrine and Private Property").
[15] 6 Cal.3d 251 (1971).
[16] Blumm, The Public Trust Doctrine and Private Property, *supra* note 9 at 658-59, n. 38 ("When money or land is held in a traditional trust, the trustee has legal title to the property, while the beneficiaries have equitable title. *See generally* American Law Inst., Restatement of Trusts (Third) (1992). The property is thus conceptually severed into two estates, *and the trustee has judicially enforceable obligations to the beneficiaries*." (emphasis added)).
[17] *See Marks*, 6 Cal.3d at 260 ("The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute . . . . It is within the province of the trier of fact to determine whether any particular use made or asserted by Whitney in or over these tidelands would constitute an infringement either upon the *Jus privatum* of Marks or upon the *Jus publicum* of the people. It is also within the province of the trier of fact to determine whether any particular use to which Marks wishes to devote his tidelands constitutes an unlawful infringement upon the *Jus publicum* therein." (internal citations omitted) (empahsis added)).

party's plans for development of a property acts to extinguish the public interest that exists in tribal cultural resources in situ or extracted from a subject property. Instead, the private landowner owns the property **subject to** the right of the State and tribes, the administrators of the public trust charged by statute with the trust's protection.

The duties and powers of the State as administrator of the public trust is an affirmation of the duty of the State to protect tribal cultural resources as commanded by law, surrendering that right of protection only in rare cases when the abandonment of the public's right is consistent with the purposes of the trust.[18]

C. RRM's Vested Mining Rights Determination Request is Deeply Flawed and Cannot Be Approved by the County Based upon the Record Before the Commission.

As previously noted, the Tribe supports two of the staff determinations in the Staff Report regarding the Vested Rights Application. Namely, the Tribe agrees that 1) that RRM has not shown by a preponderance of the evidence that their predecessors in interest manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights Area as of the 1949 vesting date, and 2) even if they have shown the predecessor in interest had manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights area as of the 1949 vesting date, there is clear and convincing evidence that any vested right was abandoned when this property was sold to a third party, who did not mine the property and then sold to a developer who sought to build a residential community on this land. The Staff Report provides detailed and robust evidence in support of each of these two conclusions.

However, we write not only to support these two conclusions, but to add additional factual and legal points that make clear that the County must deny the full Proposed Action on the record before it. The County's analysis of the legal test applicable to the vesting right's determination as to the expanded area appears to be correct.[19] (Staff Report, p. 10.) But the legal test applicable for the vesting rights determination is much narrower than what is argued by RRM's counsel (Jeffer Mangels Butler & Mitchell LLP or "JMBM"). In particular, JMBM argues that a vested rights determination can generally "look back" at the entire history of mining at a site prior to the establishment date to "determine the scope of vested rights." (See RRM RFD, p. 35) RRM argues that its proposed expansion to an area never before claimed in prior permits, and for an area that was not being actively mined at the date of vesting is an application of the "diminishing asset doctrine" recognized by the California Supreme Court in *Hansen Bros. Enters. v. Bd. of Supervisors* (1996) 12 Cal.4th 533 ("*Hanson Brothers*"). The standard to invoke this doctrine is difficult to meet, and requires significantly more evidence that what has been provided by RRM.

Building to this argument, JMBM initially summarizes its view of the proper basis of a vested mining right by broad references to general evidence of prior "surface mining

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[18] *See Mono Lake*, 33 Cal.3d at 441.

[19] The County appears to assume at the suggestion of RRM that it is the use of the land that makes the right vested, not an individual owner's objective intent, contrary to the opinion of the Attorney General on this point, which it should not have. See ___ Vested rights require the owner's intent to expand the exact mining type to the entire parcel at the time of vesting in 1949. Regardless, the County's analysis gives RRM the benefit of the doubt on this point, and it remains the case that no mining was occurring at the time of vesting in any event.

operations conducted as a 'legal non-conforming use' on or prior to the date of the enactment of the ordinance. (See *Id.*, p. 20) JMBM mischaracterizes the applicable legal test in *Hansen Brothers* regarding what is the proper basis for a proponent to support a vested rights determination:

> "Indeed, the Hansen Bros. Court made clear that in the surface mining context, the overall pre-SMARA history of surface mining operations (which in other administrative proceedings before the SMGB included activities that occurred more than 70 years prior to SMARA) must be considered in evaluating the vested right, not just a "snapshot" of time at or just prior to 1976. The rule is grounded in the principle that vested rights "run with the land" meaning that successive owners succeed not only to a purchased business, but to the rights and privileges that apply to that business under the vested rights doctrine. Thus the buyer of a property is entitled not just to the seller's vested right, but also to the benefit of the mining history prior to the date the mining use became nonconforming."

(*Id.*, p. 35-36) This quotation is simply **not** the legal test promulgated by the California Supreme Court, and is legally incorrect in several ways. The California Supreme Court in *Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County* (1996) 12 Cal. 4th 540 ("Hanson Brothers") states clearly that the primary question in regard to a determination of a vested right to mine in the first instance is a determination of a specific mining operation that was being operated on the property that RRM predecessors owned at the time a local zoning ordinance makes the use non-conforming. *Id.* at 542.

The "diminishing asset doctrine" does not change the analysis of the scope of vested rights. The doctrine was summarized succinctly by the California Supreme Court's decision in *Hanson Brothers* recognizing the doctrine in California:

> "Unlike other nonconforming uses of property which operate within an existing structure or boundary, mining uses anticipate extension of mining into areas of the property that were not being exploited at the time a zoning change caused the use to be nonconforming. The question thus arises whether this extension is a prohibited expansion of a nonconforming use into another area of the property. In those jurisdictions which have considered the question, the answer is a qualified "no" under the 'diminishing asset' doctrine, an exception to the rule banning expansion of a nonconforming use that is specific to mining enterprises.
> . . .
>
> "When there is objective evidence of the owner's intent to expand a mining operation, ***and that intent existed at the time of the zoning change***, the use may expand into the contemplated area."

(Emphasis added) *Id.* at 553. As such, the "diminishing asset doctrine" does not change the determination that must be made in the first instance regarding what the specific operations of a property owner were *at the time of the passage of a zoning regulation*. While the application of the "diminishing asset doctrine" the *Hansen Brothers* decision does allow for expansion onto other vested properties other than the currently mined property, each property and parcel must meet that test, and the burden is on RRM to show the specific

intent to expand operations onto each specific parcel at the time of vesting. Vested rights, however, still require the owner's intent to expand the exact mining type to the entire parcel at the time of vesting in 1949.[20]

The Supreme Court's test requires objective evidence of intent as of 1949 when the County's Ordinance took effect, for which it is the burden of RRM to provide.[21] Instead of providing this evidence, RRM and JMBM provides a broad sweep of history, and a lack of focus on the key time period, which appears to be intended to overcome the obvious fact that mining had ceased the property in question for a period of nearly 10 years at the time of the 1949 vesting rights determination date, and there is no relevant objective evidence of an intent to mine as of that critical date.[22] RRM's request for the Vesting Rights Determination incorrectly relies upon both historical and unrelated mining activity that ceased on the Hubbs/Harlow Quarry Area at issue well in advance of the vesting date in 1949[23], and also on evidence of mining that occurred after the required vesting date that is either essentially irrelevant or in fact harmful to RRM's position.[24] Evidence regarding mining for other substances such as historic mining generally part of the "Temescal Mining District" or Tin District,"[25] or for clay operations by offsite operators[26] is not probative of intent to extend aggregate mining for the entirely of the Proposed Vested Rights area by the predecessor in interest at the vesting date in 1949. Similarly, failed efforts in the 1930s to reopen a tin mine[27], a description of the property that failed to produce a transaction[28], and a 1948 survey now showing a proposed mine, but by its own terms, only showing "the relative locations of corners used by previous surveys; the theoretical corners shown on original Gov't. and Rancho Maps; and the corners and property lines established by the Compromise Agreement of 1895 and other deeds of record."[29] That is, it is only to establish properties boundaries, and nothing more can and should be inferred. This evidence in fact has no bearing on a determination regarding the objective intent in 1949 by the owners of the Hubbs Harlow Quarry since the mining resources at issue were not being used at all for nearly 10 years prior to the vesting date and show no objective intent by the owners at the vesting date to mine for aggregates across the entirety of the Proposed Vesting Rights area. Finally, a reserved mining right in a deed does not equal a vested mining right.[30] When

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[20] Riverside County first required a permit to mine on January 31, 1949. [Ex. 1] Riverside County Ordinance No. 348 (Jan. 31, 1949) at Art. XXIV, § 3.1. Therefore, to establish a vested right to mine without a permit, RRM must show that its operation was established as a legal nonconforming use when the County first required a permit in 1949, when the County's Ordinance regulating mining was added.

[21] *Hansen Brothers*, at 553.

[22] Staff Report, p. 5.

[23] See, e.g., Application, pp. 8, 10-13, 54-110.

[24] See, e.g., Application, pp. 15-17, 93-104. That RRM's predecessor sought a permit from the County rather than relying on any "vested rights" is noted by the Staff Report as a basis to conclude that there was no understanding of "vested rights" at the time of vesting rights and thereafter for many years. Without this intent, there is no basis for a "vested rights" determination presently.

[25] Application, pp. 54-106.

[26] Staff Report, p. 5.

[27] Staff Report, p. 27.

[28] Staff Report, p. 22, citing Ex. C-4.3 Kincheloe v. Harlow, Case No. 42415 (filed Jan. 20, 1947)

[29] Staff Report, p. 22, citing Application Ex. B-5.8 Record of Survey (May 1948).

[30]

examined with the correct legal test in mind, the evidence proposed by RRM is woefully inadequate to support a vested mining rights determination.

As such, contrary to JMBM's assertions, *Hanson Brothers* states that mining must be actively pursued as of the vesting date, even if the mining is temporarily idled, but there must be an ongoing intent to mine a specific operation.[31] An owner must have had the intent to expand that operation at the vesting date for the same purpose throughout the entire property for which the vested right is claimed. Since Riverside County adopted its first mining ordinance in 1949, prior mining history is only relevant to the extent that the evidence shows the specific intent of the owner of the mining property to extend that specific operation in existence in 1949. Applying the correct test, there is simply not enough factual support that there was any manifested objective intent as of 1949 by either F.M. Kuhry and Leilamae Harlow (who the record shows had jointly acquired the proposed vested rights area after E.E. Peacock's death in 1930) to mine for aggregate to support the Proposed Action. As noted by the Staff Report, "There is no direct evidence of Kuhry or Harlow engaging in mining activities on the Proposed Vested Rights Area in 1949 or leasing the property for mining operations."[32] Moreover, it is apparent that the indirect evidence in the form of a lack of activity also shows that RRM has not met is burden. From this it is apparent that there is no objective intent by RRM and its predecessors, or any prior transferor, to conduct operations that include mining the entirely of the new tract.

As stated by the Attorney General, a few preparatory acts are not likely to suffice to show the requisite investment. See 59 Op. Cal. Att'y Gen (1976) 641, 653 (stating that "a nominal amount of 'prospecting and exploratory activities' on particular land does not establish a vested right"). RRM cannot show employees hired, road system, equipment, plant or clearing of work areas or overburden or excavation on these parcels from ten years prior to 1949. it is further apparent from the record that no permit or reclamation plan for the entire Hubbs/Harlow Quarry Area has ever existed, and all permits issued for mining in this area after the vesting date by RRM contradict this request. That is, when RRM or its predecessor had the opportunity to prove up its supposed vested rights previously, it did not do so.[33] RRM appears to argue that unrelated, or very often illicit or temporary activities by adjacent property owners on or near the proposed Vested Mining Rights area is sufficient to support an intent to expand under the "diminishing asset doctrine."[34] This is simply not the case.

i. *The Court in Hansen Brothers made clear that the application of the "diminishing asset" doctrine did not justify a wholesale change in the principles of zoning in California.*

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[32] Staff Report, p. 4

[33] Staff Report, p. 7 ("However, these prior decisions did not consider and made no findings or representations about the remainder of the Proposed Vested Rights Area (the 600+ acre Brion Parcel)".

[34] See e.g., operation of the Cajalco Clay Pit which existed offsite to the West of the Proposed Vested Rights Area. As found by the Staff Report: "The Cajalco Clay Pit may have encroached upon on the Proposed Vested Rights Area. This activity is not attributed to the owner or operator of the Proposed Vested Rights Area and ceased in 1938, over a decade before the 1949 vesting date. Therefore, the Cajalco Clay Pit does not support a determination that a vested right to mine aggregate without a permit was established as of 1949 for the property within the Proposed Vested Rights Area." Staff Report, p. 5.

While the California Supreme Court approved the application of the "diminishing asset doctrine" in California in regard to determining the proper scope of the mining business at that moment of vesting, the application of that doctrine is limited to only what the owner at that time objectively manifested an intent to continue in regard to the specific business being conducted at that time. The doctrine does not allow for an expansion of a mining operation onto new parcels not contemplated by the owner at the time of vesting:

> Finally, a lawful nonconforming use may not be extended to adjacent property acquired after the zoning change went into effect except to the [*558] extent that the transferors of the property themselves had a vested right to engage in that nonconforming use on the transferred property. The court recognized this in *McCaslin* where it stated: "Of course, plaintiff's nonconforming use of the property in question cannot be expanded or extended to a separate parcel . . .." (*McCaslin*, *supra*, 163 Cal. App. 2d at p. 350.) In that case the applicable zoning ordinance contained that restriction (*id.* at p. 344), but that is the rule of general application. (See 8A McQuillin, *supra*, § 25.208, p. 128, and cases cited.) In another quarrying case, a New Jersey court held that even though the quarry owner [***794] had been permitted [**1340] by the previous owner of an adjacent tract to carry equipment across the adjacent tract, [****47] quarrying was not being conducted on that tract. Therefore when the quarry owner acquired the tract after a zoning change went into effect, the nonconforming quarry operation could not be extended onto the new tract. "The use at the time the ordinance was adopted established the non-conforming use which defendant was entitled to continue." (*Struyk v. Samuel Braen's Sons* (1951) 17 N.J.Super. 1 [85 A.2d 279, 281].)

Hanson Brothers at 557-558. This understanding is consistent with traditional understanding of zoning and land use. Zoning ordinances allow a use to continue only because compelling immediate compliance may be unconstitutional. *Jones v. City of Los Angeles* (1930) 211 Cal. 304. 310-11. Riverside County's General Plan and Zoning Code require compliance with all applicable zoning and permitting requirements, including for mining, except for vested rights.[35] Should a use cease under the Riverside County Zoning Code, any subsequent attempt to continue or restart the use must come into compliance with zoning requirements.[36] This requirement for a permit is codified by the County in regard to mining activities, as part of the Surface Mining and Reclamation Act of 1976 ("SMARA"), which also provides for vested rights incurred prior to the first required permit. Under Public Resources Code Section 2776,

> (a) No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this

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[35] Riv Co. Ord. Section 6. PERMIT REQUIRED. Unless exempted by the provisions of Section 5 (inapplicable) or Section 17 (Vested Rights) no person, firm, corporation or private association shall conduct surface mining operations in the unincorporated area of the County of Riverside without an approved Permit.

[36] Riv C. Ord. Section 17 provides that a vested right only continues for as long as there are no substantial changes in operations: "Any substantial changes made in a surface mining operation subsequent to January 1, 1976, except in accordance with SMARA and California Code of Regulations, title 14, section 3951 (repealed), shall require an approved Permit pursuant to this ordinance."

> 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.

As included in this statute, which is echoed in County Ordinance 555, the vested right only continues for "as long as no substantial changes are made in the operation except in accordance with this chapter." Further, the person must have as of the date required for an authorization, "in good faith and reliance upon a permit or authorization...diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations." Both of these conditions significantly narrow the potential vested mining right by limiting this potential right to **1)** only that supported by the objective intent of the vesting rights landowner at the time of vesting, and **2)** limiting expansion of the mining operation to only what was intended at that time of vesting, as evidence by then present mining operations and incurrence of substantial liabilities in support of such mining operation.

Particularly on these facts showing no active mining occurring at the critical time period or preparation for mining, case law in California supports a significantly narrower reading of the vested rights doctrine under Public Resources Code 2776 and consistent with California's zoning laws. Courts follow a "strict policy" against expansion. *County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 687. Under this policy, "the continued nonconforming use must be similar to the use existing at the time the zoning ordinance became effective..." *Edmonds v. County of Los Angeles* (1953) 40 Cal. 2d 642, 651. The use may not be enlarged or extend into other areas or properties. *Richfield v. City and County of San Francisco* (1933) 218 Cal. 83, 85; *City of Yuba v. Cherniavsky* (1931) 117 Cal.App. 568, 573. It also may not be changed to include activities not underway when the use became nonconforming. *Paramount Rock Company v. County of San Diego* (1960) 180 Cal.App.2d 217, 230. Nor may the use be operated in such a way as to make it more intensive than it was when it became nonconforming. *County of Orange v. Goldring* (1953) 121 Cal.App.2d 442, 447-48. Again, a non-conforming mining use includes only those activities that were "integral parts" of the mining operations at the time a restrictive ordinance was adopted. *Hanson Bros Enters* at 542. Non-conforming operations only include "uses normally incidental and auxiliary to the nonconforming use." *Id.* at 565.

ii. *Any vested right that may have existed has been abandoned by the sale of property to a developer with the intent to develop residential housing on the property.*

Vested Mining Rights can be abandoned 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.

Here, the actions of RRM also rise to the level of abandonment. The County's Staff Report succinctly and clearly identifies that basis for this abandonment.[37] As stated by the Staff Report, in 1983, Paul Hubbs sold approximately 660 acres (the "Brion Parcel") of the approximately 792.22-acre Proposed Vested Rights Area to S.T. & Koo International. Hubbs did not lease the Brion Parcel back for mining operations nor did Hubbs retain mineral rights in the Brion Parcel. The purchasers did not mine the Brion Parcel. In 2004, S.T. & Koo International authorized Cajalco Associates to seek entitlements for a residential development on the Brion Parcel, and then sold the Brion Parcel to Cajalco Associates. Cajalco Associates proposed to develop a single-family residential community on the property and submitted Pre-Application Review, General Plan Foundation Amendment, and Habitat Evaluation and Acquisition and Negotiation Strategy documents to the County. Hubbs' sale of the property without retaining any subsurface mineral rights or other restrictions on the sale of the Brion Parcel establishes a clear intent to abandon any vested rights to mine the property without a permit and is an overt act to abandon any such rights. The purchaser's substantial investment in seeking to develop the property for residential use and failure to pursue any mining activities for several decades also shows an intent and overt act to abandon any vested right to mine the Brion Parcel property without a permit.

Additionally, case law indicates that separate parcels and artificial barriers go against intent of vested rights. Except when tangibly connected to parcels where extraction is taking place or showing signs of preparation, courts usually do not consider reserve parcels part of the nonconforming use. See *Dolomite Prods Co. Inc. v Kipers* (N.Y. App. Dev. 1965) 260 N.Y.S. 2d 918, 921:

> "Artificial barriers present the same dilemma. When roads separate the active and proposed reserve areas, courts usually consider those reserve areas distinct and not part of the nonconforming use."

See also *Fred McDowell, Inc. v. Bd of Adjust. Of Township of Wall* (N.J. Super. Ct, App. Div. 2000) 757 A. 2d, 822, 827 (construction of freeway separated min lot and reserve lot, making access to the reserve lot from the mine lot impractical). Here, Cajalco Road cuts off all land from this claimed vested right to the north of Cajalco Road as impractical. **See Exhibit "A"** Although the entirely of the Brion parcel has been abandoned, certainly the burden to show any intent to mine above Cajalco

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[37] Staff Report, p. 6.

Road is higher given the lack of ability to access the property through Cajalco Road given the current infrastructure or lack thereof.

Also, the Tribe has reviewed many separate parcels and sales for this proposed Vested Rights Determination, and the management of these parcels goes against the stated intent to mine. Use of mining property for non-mining uses shows intent to not mine entire area. See *R.K. Kibblehouse Quarries v. Marlborough Township* (Pa. Commw. 1993) 630 A. 3d 937, 944. While there can be a difference if use of land is helpful for maintaining land for mining, such as grazing to keep area free of vegetation, activity ongoing on a property not consistent with mining is instead detrimental to an abandonment argument. See *Town of W. Greenwich v. A. Cardi Realty Assoc.* (R.I. 2001) 786 A.2d 354, 361.

Here, there is a patchwork of property uses currently on the proposed area for the Vested Rights Determination, indicating no intent to mine by RRM. Attached as Exhibit "B" is a summary of the current ownership of parcels and ownership. While it may be the case that mining rights have been reserved with deeds, such reservations are meaningless once there is an effort to turn a property into another use, and there is no activity indicating that the property is being managed in a way to preserve mining rather than seeking some other economic activity. Vesting rights are not same as reserved rights in mining lease, so even if there were a reservation, there is no apparent intent from anyone before now to mine this whole area for aggregate. Indeed, selling parcels or encumbering them with long-term leases and uses contrary to any argued intent is important to consider.

Finally, case law supports the argument that RRM's predecessors had the intent to abandon any right they had prior to the vesting period in 1949. As stated in *Hansen Brothers*, "the duration of nonuse may be a factor in determining whether the non-conforming use has been abandoned." Hanson Brothers at 569. In two cases, nonuse for periods of seven and tens years, coupled with the absence of other preservative activity, reflected an intent to abandon nonconforming mining operations. See *Lane County v. Bessett* (Or. Ct. App. 1980) 612 P. 2d 297, 301; *Holloway Ready Mix Co. v. Monfort* (Ky Ct. App. 1971) 474 S.W.2d 80, 83.

C. The County 's Staff Opinion makes clear that the vested rights for the existing parcel are also on shaky grounds, and there is no time limit for revisiting this under California law.

As noted, the Tribe support the two (tentative) determinations from the Staff Report, namely that RMR has failed to provide the preponderance of the evidence that their predecessors in interest manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights Area as of 1949, and even if they had, there is clear and convincing evidence that any vested right was abandoned when this property was sold to a third party, who did not mine the property and then sold to a developer who intended to build (and acted to build) a residential community on this land.

However, the Tribe disagrees that RRM has met its burden to establish that there is, in fact, an existing vested right to conduct aggregate quarrying on approximately 135.17 acres of the Proposed Vested Rights Area where RRM currently operates ("Current Operations"). The Staff Report only notes that the historical operation of a quarry on a portion of the existing operations may support a determination of vesting on the Current Operations:

> The establishment of the Blarney Stone Quarry supports a finding that at least a portion of the Proposed Vested Rights Area within the existing RRM's current mining operation had been used for stone and gravel quarrying prior to 1949 and that mining had commenced, and substantial liabilities *may* have been incurred for the operation. However, because the quarry was not active for approximately nine years before the 1949 vesting date and at least four years after the vesting date, *the lack of activity weighs against finding a vested right to continue quarrying without a permit because quarrying was not an active use to which the land was being put on the vesting date and therefore was not a legal, nonconforming use after 1949.*

Despite this, at best, qualified support for a determination for a vested rights determination, this characterization in fact hightlights a lack of evidentiary support for RRM's position. It is surprising, therefore, given that RRM has the burden of proof on this point, that the Staff Report concludes that the vesting rights should be confirmed for the location of the Current Operations.

In significant part, it appears that the County's basis for confirming the vesting rights for the Current Operations is the County's prior approvals of vesting rights. The Staff Report notes that:

> "Harlow's lessee's, Livingston Rock and Gravel, first obtained a permit in 1959 to operate a rock quarry. Obtaining a permit does not mean a vested right did not exist. However, seeking a permit indicates that the operator may have understood that their operation was not a legal nonconforming use.
>
> Staff believes obtaining a permit is consistent with reports that the quarry had been idle for about ten years prior to the adoption of the zoning ordinance and therefore was not an existing or continuing nonconforming use in 1949.
>
> Subsequently, in 1970, Paul Hubbs' applied for a Conditional Use Permit for his mining operation. The Conditional Use Permit application was described by County as an "expansion" of the original 1959 permit. This permit also had a termination date of 1990. This permit shows that the County and the operators understood that permits were required to authorize such uses, and that conditions could be placed on the operation.
>
> Nonetheless, just two years later, the County recognized vested rights for Paul Hubbs's operations in the 1982 Reclamation Plan on the grounds that the quarry operations had continuously operated since the 1950s. Subsequent County decisions were made based on this initial determination and the current Reclamation Plan recognizes a vested rights boundary of approximately 135.17 acres"

JMBM argues that this prior determination means that "the County's interpretation of Ordinance 358 is well-established, and its application of Ordinance No. 348 to the S-4 area now well settled." (Application, p 113.)

But according to the California Supreme Court, the fact that the County has previously determined that a mining interest is vested is still subject to the independent judgment of the Courts. As noted by *Hanson Brothers*, the County lacks the power to waive or consent to violation of

the zoning law. *Hanson Brothers*, at p. 564, citing to *City of Fontana v. Atkinson* (1963) 212 Cal. App. 2d 499, 507-508; *Western Surgical Supply Co. v. Affleck* (1952) 110 Cal. App. 2d 388. The court must make its own decision as to the legal impact of the facts in the record, and is not bound by any concessions of law that a party may have made. (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal. 4th 1028, 1043, fn. 11,) As such, superior court must exercise its independent judgment in making determinations based on the administrative record. *Hanson Brothers* at 559, citing to *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal. 3d 28, 34-35; see *Halaco Engineering Co. v. South Central Coast Regional Com* (1986) 42 Cal. 3d 52, 63-66.)

We respectfully request that the County comply with its requirements under CEQA prior to issuing a decision on this matter, refuse to consider the Vesting Rights Determination until all pre-decisional processes have run their course. Following this process, if the request survives, we believe that the County is precluded from affirming the vested rights for the reasons provided herein

Very truly yours,

John Nelson

Cc: Steve Bodmer, General Counsel, Pechanga Band of Indians
Paul Macarro, Cultural Coordinator, Pechanga Band of Indians

Boydd, April

From: Aquia Mail
Sent: Monday, May 1, 2023 1:59 PM
To: john.nelson@procopio.com
Cc: COB
Subject: Board comments web submission
Attachments: pechanga-_-rrm-_-comment-letter-5.1.2023(6875195.1.pdf

Thank you for submitting your request to speak. The Clerk of the Board office has received your request and will be prepared to allow you to speak when your item is called. To attend the meeting, please call (669) 900-6833 and use **Meeting ID # 864 4411 6015 . Password is 20230502. You will be muted until your item is pulled and your name is called. Please dial in at 9:00 am with the phone number you provided in the form so you can be identified during the meeting.**

Submitted on May 1, 2023

Submitted values are:

First Name
John

Last Name
Nelson

Phone
6195153260

Email
john.nelson@procopio.com

Agenda Item # or Public Comment
21

State your position below
Oppose

Attachments (Must be .pdf, .doc, or .docx)
pechanga-_-rrm-_-comment-letter-5.1.2023(6875195.1.pdf

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DEL MAR HEIGHTS
LAS VEGAS
ORANGE COUNTY
SCOTTSDALE
SAN DIEGO
SILICON VALLEY
WASHINGTON, D.C.

May 1, 2023

VIA EMAIL

Darren Edgington
Environmental PRoject Manager
Riverside County Planning Department
4080 Lemon Street, 12th Floor
Riverside, CA 92501

Re: **Robertson's Ready Mix Request for Determination of Vested Rights Application (Hubbs/Harlow Quarry Area)**

Dear Mr. Edgington:

On behalf our client the Pechanga Band of Indians (the "Tribe"), we provide these comments on the pending request of Robertson's Ready Mix Request ("RRM") for a determination of its Vested Rights Application for what it has deemed the Hubbs/Harlow Quarry Area ("Vested Rights Determination" or "Proposed Action"). This Proposed Action was continued from the February 28, 2023 Board of County Commissioners meeting to the May 2, 2023 meeting and remains unprepared for public hearing for the reasons provided herein.

The Proposed Action is an extraordinary request to remove from the County of Riverside's ("County") governing authority hundreds of acres of lands within its jurisdiction under the guise of a fiction contrived from a series of legal arguments, requested assumptions and extrapolations, improperly applied documentation, and storytelling by the only entity that would benefit from the decision—the requestor. We respectfully request that the County comply with its requirements under the California Environmental Quality Act ("CEQA") prior to issuing a decision on this matter, refuse to consider the Vesting Rights Determination until all pre-decisional processes have run their course.

Following this process, if the request survives, we believe that the County is precluded from affirming the vested rights for the reasons provided herein.[1]

The Riverside County Planning Staff in the February 28, 2023 Staff Report ("Staff Report") erroneously states that this Proposed Action is not subject to analysis under CEQA on the purported basis that approval of this Vested Rights Application is not a "discretionary action," rendering the County's decision to approve or deny the Proposed Action as outside the bounds of CEQA. This position is contrary to the CEQA statute, guidelines and case law interpreting their tenets. By failing to undertake the required CEQA analysis prior to considering a decision in this matter, the County is also not complying with AB 52, which requires public agencies to consult with tribes during the CEQA process where tribal cultural resources could be affected. As detailed further below and in confidential information which the Tribe can share with the County only through consultation, the Hubbs/Harlow Quarry Area is within the historic territory of the Tribe and is a location of significant cultural value to the Tribe triggering the consultation requirements of AB 52. See Public Resources Code Section 21074(a)(1)(A)-(B).

In addition to the County's obligation to comply with CEQA, we also write to clarify that the cultural resources that are of concern to the Tribe (and perhaps other tribes in the region) are subject to the State's public trust doctrine, and that any vested mining right that the County were to find in regard to the Proposed Action only exists subject to the public trust doctrine. As a consequence, any affirmative action by the County on this Proposed Action, including even partial recognition of the currently mined RRM property, must condition the determination upon compliance with the public trust doctrine that is applicable to the extant cultural resources for which the Tribe is a co-Trustee.[2]

While the County must comply with CEQA and its public trust obligations before proceeding with the analysis of the Proposed Action at the hearing, and without waiving's these objections to the County's process, the Tribe supports two of the proposed findings by the Riverside County Planning Staff in the Staff Report in regard to the Proposed Action, Case No. PAR210273, namely: 1) that RRM has not shown by a preponderance of the evidence that their predecessors in interest manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights Area as of the 1949 vesting date; and 2) even if they have shown the predecessor in interest had manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights area as of the 1949 vesting date, there is clear and convincing evidence that any vested right was abandoned when this property was sold to a third party, who did not mine the property and then sold to a developer who sought to build a residential community on this land. The Staff Report provides detailed and robust evidence in support of each of these two conclusions, which are independently fatal to the merits of the Proposed Action, and the Proposed Action should be denied on this basis.

However, in addition to the Tribe's objection to the County's failure to comply with CEQA, AB52 and the public trust doctrine, we are also writing to correct and clarify the legal requirements applicable to this determination that make it even less likely that the Proposed Action can be approved. As

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[1] The Staff Report concurs with our conclusion that the application is substantively defective and cannot be approved under the premises submitted; however, we believe that the support for denial of the application exceeds the bases stated in the Staff Report.

[2] As required by County Ordinance 555, these comments are relevant to the County's determination in demonstrating or delimiting the existence, nature, and scope of the claimed vested rights.

detailed below, the County lacks the legal and factual bases to find that even the existing RRM quarry has properly maintained its vested right, if it ever was held, and we ask that RRM be required to come into compliance with all current planning and zoning laws on its current quarry as a result of this determination. As identified below, the Staff Report provides the factual basis for this conclusion, but does not property conclude, as it must, that no vested rights can be shown to presently apply to any of the existing RRM operations at this location.

Finally, we ask that the currently scheduled May 2 hearing be postponed. Upon receipt and review of the voluminous application materials, we requested documents under the California Public Records Act in order to develop a more comprehensive administrative record in this matter. We should be provided full and complete responses to this request prior to the hearing on this proposed action. In an April 10, 2023 response to our request, the County stated that it would "produce documents on a rolling basis beginning April 17, 2023." The County made a first production of documents available on April 17, 2023; however, as of April 30, 2023, we have received no additional production, and the County has not confirmed that the production of documents is complete. We need either a notification from the County that the document production in response to our public records request is complete or, if further documents remain to be produced, additional time to receive and review those documents prior to any public hearing. Further, any response, supplement or change to the application or the Staff Report by RRM must be published and circulated as part of the application, and the public, including the Tribe, needs sufficient time to review and comment on any of those additional comments.

A. The Staff Report Incorrectly Concludes that No CEQA Analysis is Required for the Proposed Action

A determination of vested rights under section 2776 of the Surface Mining and Reclamation Act ("SMARA") and Riverside County Ordinance ("RCO") No. 555 is a discretionary project subject to California Environmental Quality Act ("CEQA") review. Prior to considering the Proposed Action, the County must prepare and certify a full environmental impact report ("EIR") on the direct and foreseeably indirect environmental changes that could result from RRM's request to drastically expand its mining activity. If the Application is disapproved, any future expansion of mining operations would require additional permitting and separate CEQA analysis.

i. The County's vested rights determination is a discretionary decision subject to CEQA review, which has not yet been conducted

The County of Riverside Planning Department Staff Report ("Staff Report") conclusion that the RRM vested rights determination "is not a project . . . [and] is not a discretionary project for the purposes of CEQA" is wrong and directly contradictory to California law. Instead, the vested rights determination is a discretionary agency decision to which CEQA applies.

CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies." (Pub Res C §21080(a)). According to the CEQA Guidelines (14 Cal Code Regs §§15000-15387), a "project" is broadly defined to mean "the whole of an action" which may result in either a "direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (*Id.* at §15378(a)). The CEQA Guidelines define a "discretionary project" as "a project which requires the exercise of judgment or deliberation when the public agency or body decides

to approve or disapprove a particular activity." (*Id.* at §15357). CEQA does not apply to an agency's nondiscretionary "ministerial" decisions. (Pub Res C §21080(b)(1); 14 Cal Code Regs §15060(c)(1)).

Under California law, vested rights determinations are not "ministerial" decisions. In *Calvert v. County of Yuba*, the California Court of Appeal, held that the adjudicatory determination of a mining company's vested rights claim under SMARA triggered procedural due process protections including notice and a right to a hearing for adjacent landowners. (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 629. The Court stated that SMARA's vested rights statute, section 2776, requires an analysis of "factual issues that must be resolved through the adjudicative exercise of judgment rather than the ministerial (automatic, nondiscretionary) application of fixed standards and object measurements." (*Id.* at 624). With regard to CEQA, the Court specifically stated, "the vested rights determination here is not a ministerial determination under CEQA." (*Id.* at 621) (emphasis added)).

Here, the RRM vested rights determination will require the resolution of factual issues through the adjudicatory exercise of judgment, such as whether the "vested right continues" and whether any "substantial changes" have been made in the mining operation other than in accordance with SMARA. (*see Id.* at 623). Although it appears readily apparent that any vested right in the mining operation was abandoned when the property was sold to a third party, and that RRM's predecessors in interest had no objective intent to expand surface mining activities into the proposed vested rights area (i.e., that substantial changes have been proposed that are not in accordance with SMARA), these are determinations that the County of Riverside Board of Supervisors ("County") must make based on the "adjudicative exercise of judgment rather than the ministerial (automatic, nondiscretionary) application of fixed standards and objective measures." (*Id.* at 624).

In a January 25, 2022, memorandum from RRM's counsel (Jeffer Mangels Butler & Mitchell LLP or "JMBM") to the County, JMBM attempts to argue that the Vested Rights Determination is not subject to CEQA because, while the determination is "not ministerial in the land use context" it "is ministerial for purposes of CEQA." [3] JMBM acknowledges that *Calvert* specifically stated the opposite: "**the vested rights determination here is not a ministerial determination under CEQA.**" (*Id.*) However, JMBM argues that the court does not actually mean this, apparently, because the "applicability of CEQA to a [vested rights determination] was never raised by Plaintiffs, and thus, was not at issue in the case, and there is no further analysis or authority in the Calvert decision on this subject."[4]

On the contrary, the court does analyze the applicability of discretionary determinations with respect to vested rights determinations, and it does so by referencing a CEQA decision:

> [S]ection 2776 encompass several factual issues that must be resolved through the adjudicative exercise of judgment rather than the ministerial (automatic, nondiscretionary) application of fixed standards and objective measurements.

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[3] Draft Memorandum ("Memo") dated 1/25/22 from Kerry Shapiro and Daniel Quinley to Shelly Clack and Caroline Monroy re Applicability of CEQA to RRM Vested Rights Determination.
[4] *Id.*

> A good example of this dichotomy is provided by a decision from this court, Ramey. (Ramey, supra, 45 Cal.App.3d 185, 119 Cal.Rptr. 266.) In Ramey, we concluded that the approval of a mobile home park construction permit was a discretionary act subject to CEQA rather than a ministerial act exempt from CEQA. (A ministerial decision under CEQA similarly involves only the use of fixed standards or objective measurements.) (*Calvert* at 624). (Emphasis added).

Here, JMBM is attempting to make the difficult argument that "ministerial" is defined differently in the land use context than in the CEQA context, even though *Calvert* states that the definitions are similar, and the definitions are, in fact, similar.[5]

JMBM further states that, for CEQA purposes, a "discretionary" act "requires that a lead agency have actual authority to shape, change, or condition a project based on environmental concerns" and that, in a vested rights determination, "the County cannot condition the existence of vested rights, as they are a matter of historical fact." (Memo). However, the CEQA guidelines' definition of "discretionary" is more expansive. According to the guidelines, "The key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve a project." (14 CCR § 15357) (emphasis added). In other words, the discretionary question turns not only on how the County might shape the project, but also on whether or not the County will approve the project. Here, the County must use its subjective judgment to determine whether or not to approve the Vested Rights Application, and the "historical facts" evidencing the existence of vested rights are highly contested. Thus, the County's decision as to "whether" to approve the Vested Rights Application is a discretionary decision subject to CEQA review.

Finally, JMBM argues that County Ordinance No. 555.20 "specifically prohibits the County from considering environmental impacts" in the Vested Rights Determination. (Memo). However, Ordinance No. 555.20 contains no such specific prohibition. Section 17(B)(2) of Ordinance No. 555.20 states: "Written comments and oral testimony other than that related to demonstrating or delimiting the existence, nature, and scope of the claimed vested rights shall not be considered by the Board of Supervisors in making the Vested Rights determination." Therefore, to the extent that environmental impacts affect the determination as to whether the "Operator has demonstrated its claim for a Vested Right," they may considered by the County. (Ordinance No. 555.20).

The Vested Rights Determination here is discretionary because, among other reasons, it involves a substantial change and increase in the extent mining operations at issue. In reclamation plans for the mining operation at issue, Riverside County acknowledged that any substantial change to or expansion of mining operations would require CEQA review. In explaining why a reclamation plan is not subject to CEQA review, the Riverside County Planning Department's 2013 Notice of Exemption for Reclamation Plan No. RCL00118 ("NOE") specifically states: "The project is exempt under Section

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[5] According to the CEQA guidelines, "A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (14 CCR § 15369) (Emphasis added). According to *Calvert*, in the land use context "Ministerial actions involve nondiscretionary decisions based only on fixed and objective standards, not subjective judgment." (*Calvert* at 622). (Emphasis added).

15061(b)(3), because the only actions subject to County review and discretion are those strictly related to reclamation (i.e., not vested surface mining activities), that will take place on areas that have already been subject to substantial disturbance. The project will not change operations at the site nor extend mining operations, and will if anything, result in environmentally-beneficial effects." (Reclamation Plan Amendment No. RCL-118-S1 (2013)) (emphasis added). Additional reclamation plan amendments contain similar language as justification for why the reclamation plans are exempt from CEQA review: "RCL No. 118S2 will not change operations at the site, and will also not extend the life of the mining operation within the Amended RCL0018S2 boundary." (Reclamation Plan Amendment No. RCL-118-S2 (2016) (emphasis added)); "The project will neither change operations at the site nor extend mining operations . . . Therefore, the project is exempt under CEQA guidelines." (Reclamation Plan Amendment No. RCL-118-S4 (2020)) (emphasis added). This language indicates that determinations related to vested surface mining activities or activities that would change site operations or extend mining operations are not exempt from CEQA review.

Therefore, because the County's vested rights determination is a discretionary action that contemplates an extension of RRM's mining operations, the vested rights determination must be subjected to CEQA review.

ii. A vested rights approval requires a full and comprehensive EIR of both the underlying mining activity and any resulting development or activity

Although a disapproval of vested rights would not be subject to CEQA (Pub Res C §21080(b)(5); 14 Cal Code Regs §15270(a); *Las Lomas Land Co. v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 848), an approval of vested rights, which would expand RRM's mining operations, requires a full and comprehensive EIR.

Projects are defined under CEQA to include discretionary activity that could cause either a "direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment." (Public Res C § 21065). The CEQA Guidelines define "project" to mean "the whole of an action" including activity that involves the issuance of a lease, permit, license, certification, or other entitlement for use (14 Cal Code Regs § 15378; Public Res C § 21065; *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 259-263 (disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888)). California courts have broadly defined "projects" to include not only specific approvals, but also the underlying activity and any development or activity that could result from the approval. (*see County of Ventura v. City of Moorpark* (2018) 24 CA5th 377, 385; *see also RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1203). The CEQA Guidelines also state that CEQA is to be interpreted so as to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (14 Cal Code Regs § 15003(f); *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247). Any doubt as to whether an activity is a project subject to CEQA review should be resolved in favor of a finding that the action at issue is a project. (*see Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 4 Cal.3d 376, 393).

Here, the County should find the vested rights determination and underlying mining activity to be a project because it is a discretionary activity that will cause significant direct and indirect environmental impacts. The County should require a full EIR that identifies and describes the

significant environmental impacts, including direct, indirect, and cumulative or long-term impacts that may result from an expansion of mining operations (Pub Res C §21100(b)(1); 14 Cal Code Regs §§15126(a), 15144–15145, 15151). This review must include an analysis of the following items:

- significant cumulative impacts (14 Cal Code Regs §15130);
- mitigation measures (Pub Res C §21100(b)(3); 14 Cal Code Regs §15126(b)(3));
- alternatives, including a "no project" alternative (Pub Res C §21100(b)(4); 14 Cal Code Regs §§15126, 15126.6); and
- environmental impacts that cannot be mitigated (Pub Res C §21100(b)(2)(A); 14 Cal Code Regs §§15126(b), 15126.2(b)).

Specific issues of concern relevant to these items include significant impacts to "land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (Pub Res C §21060.5). Particular attention should be focused on the analysis of impacts to:

- archeological and historic resources (Pub Res C §21083.2; 14 Cal Code Regs §15064.5(c)–(f));
- tribal cultural resources (Pub Res C §21080.3.1; see AB52 discussion below);
- air quality, including an evaluation of greenhouse gas emissions directly or indirectly attributed to the proposed project (*see Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502; see also *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 223) (emphasis added); and
- water supply (Pub Res C §21151.9; 14 Cal Code Regs §15206(b)).

Importantly, with regard to cultural and biological resources, the County must consider substantial changes to the circumstances under which the mining operation was originally approved in the 1940s. The CEQA guidelines require that an EIR or negative declaration be prepared when, after an initial approval, "new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence" at the time will have one or more significant effects on the environment (14 Cal Code Regs §15162(a)(3)). Although these regulations are meant to address subsequent EIRs and negative declarations, their requirements can also be applied, as in this vested rights determination, to situations in which the initial approval process occurred prior to the adoption of CEQA or other relevant environmental laws. For example, any expansion of the vested rights area will require conformance with the requirements of the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP) because, even if vested rights are determined to exist for the entire 792 acre area, no vested or permitted surface mining activities in the expanded area occurred prior to the adoption of the MSHCP. Vested rights are not a license to break otherwise applicable environmental laws; rather, vested rights simply provide the right to avoid conformance with otherwise applicable planning and zoning laws.

iii. Any future expansion of mining operations will require additional permitting and CEQA review

Absent a positive determination of vested rights, any expansion of mining operations will require a conditional use permit (CUP) in accordance with existing zoning and general plan requirements. Accordingly, any future permitting processes for new or expanded mining operations or reclamation will qualify as a "projects" necessitating CEQA review.

Here, as stated in the Staff Report, "if RRM does not have a vested right to conduct surface mining operations on the Proposed Vested Rights Area, mining activities must be conducted in accordance with current land use and mining ordinances and laws, which require a permit in addition to a reclamation plan and financial assurance." For the reasons discussed above, any new permitting process will necessitate CEQA review. Similarly, any subsequent reclamation plan applications may be considered separate CEQA projects necessitating individual CEQA review to the extent that those plans involve substantial changes to the initial EIR or authorization. (14 Cal Code Regs § 15162; *See Eldorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1596-1597).

B. Any Vested Rights Held by RRM Remain Subject to the Public Trust Doctrine and Require Analysis Prior To Any Further Approval

As discussed above, CEQA requires government actors to consider the environmental impacts of their actions before approving plans or committing to a course of action on a project. In 2014, the California legislature amended CEQA via Assembly Bill 52 ("AB52")[6] to add a new category of resources in need of protection, called "tribal cultural resources," and to "specify that a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource . . . is a project that may have a significant effect on the environment."[7] Under CEQA, a project is the whole of an action that can result in either a "direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment."[8]

Public Resources Code section 21074 provides the following definition for "tribal cultural resources":

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[6] Cal. Stats. 2014, ch. 532, § 1(a), p.86.
[7] An act to amend Section 5097.94 of, and to add Sections 21073, 21074, 21080.3.1, 21080.3.2, 21080.3, 21083.09, 21084.2, and 21084.3 to, the Public Resources Code, relating to Native Americans, 2014 Cal. Stat. p. 86, § 9 (hereinafter, "AB52").
[8] Public Resources Code § 21065.

(a) "Tribal cultural resources" are either of the following:

1. Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

   A. Included or determined to be eligible for inclusion in the California Register of Historical Resources.

   B. Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.

2. A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

(b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.

(c) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

AB52 clearly declares the public's interest in the protection of tribal cultural resources in the bill's Findings, Declarations, and Intent. AB52 further charges California Native American tribes with the obligation to manage, accept conveyances of, and act as caretakers of, tribal cultural resources.[9]

The California legislature also articulated findings regarding then-limited protections for tribal cultural resources, providing: (1) "Current state law provides a limited measure of protection for sites, features, places, objects, and landscapes with cultural value to California Native American tribes"; (2) "Existing law provides limited protection for Native American sacred places, including, but not limited to, places of worship, religious or ceremonial sites, and sacred shrines"; and (3) "Many of these

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[9] *Id.*, § 1(b) ("In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following: . . . (8) Enable California Native American tribes *to manage and accept conveyances of, and act as caretakers of, tribal cultural resources.*" (emphasis added)).

archaeological, historical, cultural, and sacred sites are not located within the current boundaries of California Native American reservations and rancherias, and therefore are not covered by the protectionist policies of tribal governments."[10]

Through this statement, the California legislature recognizes that tribal cultural resources were previously afforded inadequate protections under California law, an issue that AB52 seeks to remedy by bringing those resources within the protections of the public trust doctrine, and that tribal cultural resources that may be located on private property are nevertheless subject to the public trust protections afforded to those resources by law.

In *National Audubon Society v. Superior Court* (hereinafter, "*Mono Lake*"),[11] the California Supreme Court held that the public trust doctrine imposes affirmative duties upon the state, including the authority to exercise continuous supervision and control over trust resources.[12] Public and local government agencies are under an affirmative duty to protect public trust uses "whenever feasible."[13]

In the present case, there is significant reason to believe that cultural resources located in situ on the subject property were unknown or not sufficiently protected in the 1940s upon the alleged vesting of rights. However, courts have held that, where the public trust doctrine applies, it works a kind of conceptional severance of the property into *jus publicum* and *jus privatum* estates.[14] The California Supreme Court case *Marks v. Whitney*[15] is considered a leading example of this principle. In *Marks*, the Court held that the effect of the public trust doctrine's application to wetlands on private property was to divide the landowner's property into two different estates, similar to what occurs in the case of financial trust.[16] In short, the public trust doctrine's effect is to sever property to which it applies into different estates: the private landowner maintains recognized *jus privatum* rights, e.g., possession and alienation, but the landowner's *jus privatum* estate is burdened by the public's *jus publicum* rights, which restrain private development that is inconsistent with public rights.[17]

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[10] AB52, § 1.
[11] 33 Cal.3d 419 (1983).
[12] *Id.*
[13] *Id.* at 446.
[14] Michael C. Blumm, The Public Trust Doctrine and Private Property: The Accommodation Principle, 27 Pace Envtl. L. Rev. 649, 658 (2010) (hereinafter, "Blumm, The Public Trust Doctrine and Private Property").
[15] 6 Cal.3d 251 (1971).
[16] Blumm, The Public Trust Doctrine and Private Property, *supra* note 9 at 658-59, n. 38 ("When money or land is held in a traditional trust, the trustee has legal title to the property, while the beneficiaries have equitable title. *See generally* American Law Inst., Restatement of Trusts (Third) (1992). The property is thus conceptually severed into two estates, *and the trustee has judicially enforceable obligations to the beneficiaries*." (emphasis added)).
[17] *See Marks*, 6 Cal.3d at 260 ("The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute . . . . It is within the province of the trier of fact to determine whether any particular use made or asserted by Whitney in or over these tidelands would constitute an infringement either upon the *Jus privatum* of Marks or upon the *Jus publicum* of the people. It is also within the province of the trier of fact to determine whether any particular use to which Marks wishes to devote his tidelands constitutes an unlawful infringement upon the *Jus publicum* therein." (internal citations omitted) (empahsis added)).

Whatever argument RRM may make regarding the fact that a property is owned privately in fee, or that certain rights in the property have vested, does nothing to extinguish the public's interest in the tribal cultural resources located thereon or the public's right to enforce those protections. No party's plans for development of a property acts to extinguish the public interest that exists in tribal cultural resources in situ or extracted from a subject property. Instead, the private landowner owns the property **subject to** the right of the State and tribes, the administrators of the public trust charged by statute with the trust's protection.

The duties and powers of the State as administrator of the public trust is an affirmation of the duty of the State to protect tribal cultural resources as commanded by law, surrendering that right of protection only in rare cases when the abandonment of the public's right is consistent with the purposes of the trust.[18]

C. RRM's Vested Mining Rights Determination Request is Deeply Flawed and Cannot Be Approved by the County Based upon the Record Before the Commission.

As previously noted, the Tribe supports two of the staff determinations in the Staff Report regarding the Vested Rights Application. Namely, the Tribe agrees that 1) that RRM has not shown by a preponderance of the evidence that their predecessors in interest manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights Area as of the 1949 vesting date, and 2) even if they have shown the predecessor in interest had manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights area as of the 1949 vesting date, there is clear and convincing evidence that any vested right was abandoned when this property was sold to a third party, who did not mine the property and then sold to a developer who sought to build a residential community on this land. The Staff Report provides detailed and robust evidence in support of each of these two conclusions.

However, we write not only to support these two conclusions, but to add additional factual and legal points that make clear that the County must deny the full Proposed Action on the record before it. The County's analysis of the legal test applicable to the vesting right's determination as to the expanded area appears to be correct.[19] (Staff Report, p. 10.) But the legal test applicable for the vesting rights determination is much narrower than what is argued by RRM's counsel (Jeffer Mangels Butler & Mitchell LLP or "JMBM"). In particular, JMBM argues that a vested rights determination can generally "look back" at the entire history of mining at a site prior to the establishment date to "determine the scope of vested rights." (See RRM RFD, p. 35) RRM argues that its proposed expansion to an area never before claimed in prior permits, and for an area that was not being actively mined at the date of vesting is an application of the "diminishing asset doctrine" recognized by the California Supreme Court in *Hansen Bros. Enters. v. Bd. of Supervisors* (1996) 12 Cal.4th 533 ("*Hanson Brothers*"). The standard to invoke this doctrine is difficult to meet, and requires significantly more evidence that what has been provided by RRM.

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[18] *See Mono Lake*, 33 Cal.3d at 441.

[19] The County appears to assume at the suggestion of RRM that it is the use of the land that makes the right vested, not an individual owner's objective intent, contrary to the opinion of the Attorney General on this point, which it should not have. See 59 Ops. Cal. Atty. Gen. 641, 656-58. Vested rights require the owner's intent to expand the exact mining type to the entire parcel at the time of vesting in 1949. Regardless, the County's analysis gives RRM the benefit of the doubt on this point, and it remains the case that no mining was occurring at the time of vesting in any event.

Building to this argument, JMBM initially summarizes its view of the proper basis of a vested mining right by broad references to general evidence of prior "surface mining operations conducted as a 'legal non-conforming use' on or prior to the date of the enactment of the ordinance." (See *Id.*, p. 20) JMBM mischaracterizes the applicable legal test in *Hansen Brothers* regarding what is the proper basis for a proponent to support a vested rights determination:

> "Indeed, the Hansen Bros. Court made clear that in the surface mining context, the overall pre-SMARA history of surface mining operations (which in other administrative proceedings before the SMGB included activities that occurred more than 70 years prior to SMARA) must be considered in evaluating the vested right, not just a "snapshot" of time at or just prior to 1976. The rule is grounded in the principle that vested rights "run with the land" meaning that successive owners succeed not only to a purchased business, but to the rights and privileges that apply to that business under the vested rights doctrine. Thus the buyer of a property is entitled not just to the seller's vested right, but also to the benefit of the mining history prior to the date the mining use became nonconforming."

(*Id.*, p. 35-36). This quotation is simply **not** the legal test promulgated by the California Supreme Court, and is legally incorrect in several ways. The California Supreme Court in *Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County* (1996) 12 Cal. 4th 540 ("Hanson Brothers") states clearly that the primary question in regard to a determination of a vested right to mine in the first instance is a determination of a specific mining operation that was being operated on the property that RRM predecessors owned at the time a local zoning ordinance makes the use non-conforming. *Id.* at 542.

The "diminishing asset doctrine" does not change the analysis of the scope of vested rights. The doctrine was summarized succinctly by the California Supreme Court's decision in *Hanson Brothers* recognizing the doctrine in California:

> Unlike other nonconforming uses of property which operate within an existing structure or boundary, mining uses anticipate extension of mining into areas of the property that were not being exploited at the time a zoning change caused the use to be nonconforming. The question thus arises whether this extension is a prohibited expansion of a nonconforming use into another area of the property. In those jurisdictions which have considered the question, the answer is a qualified "no" under the 'diminishing asset' doctrine, an exception to the rule banning expansion of a nonconforming use that is specific to mining enterprises.
>
> . . .
>
> When there is objective evidence of the owner's intent to expand a mining operation, ***and that intent existed at the time of the zoning change***, the use may expand into the contemplated area.

Id. at 553 (emphasis added). As such, the "diminishing asset doctrine" does not change the determination that must be made in the first instance regarding what the specific operations of a property owner were *at the time of the passage of a zoning regulation*. While the application of the "diminishing asset doctrine" the *Hansen Brothers* decision does allow for expansion onto other vested properties other than the currently mined property, each property and parcel must meet that test, and the burden is on RRM to show the specific intent to expand operations onto each specific parcel at the time of vesting. Vested rights, however, still require the owner's intent to expand the exact mining type to the entire parcel at the time of vesting in 1949. [20]

The Supreme Court's test requires objective evidence of intent as of 1949 when the County's Ordinance took effect, for which it is the burden of RRM to provide. [21] Instead of providing this evidence, RRM and JMBM provides a broad sweep of history, and a lack of focus on the key time period, which appears to be intended to overcome the obvious fact that mining had ceased the property in question for a period of nearly 10 years at the time of the 1949 vesting rights determination date, and there is no relevant objective evidence of an intent to mine as of that critical date.[22] RRM's request for the Vesting Rights Determination incorrectly relies upon both historical and unrelated mining activity that ceased on the Hubbs/Harlow Quarry Area at issue well in advance of the vesting date in 1949[23], and also on evidence of mining that occurred after the required vesting date that is either essentially irrelevant or in fact harmful to RRM's position.[24] Evidence regarding mining for other substances such as historic mining generally part of the "Temescal Mining District" or Tin District,"[25] or for clay operations by offsite operators[26] is not probative of intent to extend aggregate mining for the entirely of the Proposed Vested Rights area by the predecessor in interest at the vesting date in 1949. Similarly, failed efforts in the 1930s to reopen a tin mine[27], a description of the property that failed to produce a transaction[28], and a 1948 survey now showing a proposed mine, but by its own terms, only showing "the relative locations of corners used by previous surveys; the theoretical corners shown on original Gov't. and Rancho Maps; and the corners and property lines established by the Compromise Agreement of 1895 and other deeds of record."[29] That is, it is only to establish properties boundaries, and nothing more can and should be inferred. This evidence in fact has no bearing on a determination regarding the objective intent in 1949 by the owners of the Hubbs Harlow Quarry since the mining resources at issue were not being used at all for nearly 10 years prior to the vesting date and show no objective intent by the owners at the vesting date to mine for aggregates across the

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[20] Riverside County first required a permit to mine on January 31, 1949. [Ex. 1] Riverside County Ordinance No. 348 (Jan. 31, 1949) at Art. XXIV, § 3.1. Therefore, to establish a vested right to mine without a permit, RRM must show that its operation was established as a legal nonconforming use when the County first required a permit in 1949, when the County's Ordinance regulating mining was added.

[21] *Hansen Brothers*, at 553.

[22] Staff Report, p. 5.

[23] See, e.g., Application, pp. 8, 10-13, 54-110.

[24] See, e.g., Application, pp. 15-17, 93-104. That RRM's predecessor sought a permit from the County rather than relying on any "vested rights" is noted by the Staff Report as a basis to conclude that there was no understanding of "vested rights" at the time of vesting rights and thereafter for many years. Without this intent, there is no basis for a "vested rights" determination presently.

[25] Application, pp. 54-106.

[26] Staff Report, p. 5.

[27] Staff Report, p. 27.

[28] Staff Report, p. 22, citing Ex. C-4.3 Kincheloe v. Harlow, Case No. 42415 (filed Jan. 20, 1947).

[29] Staff Report, p. 22, citing Application Ex. B-5.8 Record of Survey (May 1948).

entirety of the Proposed Vesting Rights area. Finally, a reserved mining right in a deed does not equal a vested mining right.[30] When examined with the correct legal test in mind, the evidence proposed by RRM is woefully inadequate to support a vested mining rights determination.

As such, contrary to JMBM's assertions, *Hanson Brothers* states that mining must be actively pursued as of the vesting date, even if the mining is temporarily idled, but there must be an ongoing intent to mine a specific operation.[31] An owner must have had the intent to expand that operation at the vesting date for the same purpose throughout the entire property for which the vested right is claimed. Since Riverside County adopted its first mining ordinance in 1949, prior mining history is only relevant to the extent that the evidence shows the specific intent of the owner of the mining property to extend that specific operation in existence in 1949. Applying the correct test, there is simply not enough factual support that there was any manifested objective intent as of 1949 by either F.M. Kuhry and Leilamae Harlow (who the record shows had jointly acquired the proposed vested rights area after E.E. Peacock's death in 1930) to mine for aggregate to support the Proposed Action. As noted by the Staff Report, "There is no direct evidence of Kuhry or Harlow engaging in mining activities on the Proposed Vested Rights Area in 1949 or leasing the property for mining operations."[32]2 Moreover, it is apparent that the indirect evidence in the form of a lack of activity also shows that RRM has not met is burden. From this it is apparent that there is no objective intent by RRM and its predecessors, or any prior transferor, to conduct operations that include mining the entirely of the new tract.

As stated by the Attorney General, a few preparatory acts are not likely to suffice to show the requisite investment. See 59 Op. Cal. Att'y Gen (1976) 641, 653 (stating that "a nominal amount of 'prospecting and exploratory activities' on particular land does not establish a vested right"). RRM cannot show employees hired, road system, equipment, plant or clearing of work areas or overburden or excavation on these parcels from ten years prior to 1949. it is further apparent from the record that no permit or reclamation plan for the entire Hubbs/Harlow Quarry Area has ever existed, and all permits issued for mining in this area after the vesting date by RRM contradict this request. That is, when RRM or its predecessor had the opportunity to prove up its supposed vested rights previously, it did not do so.[33] RRM appears to argue that unrelated, or very often illicit or temporary activities by adjacent property owners on or near the proposed Vested Mining Rights area is sufficient to support an intent to expand under the "diminishing asset doctrine."[34] This is simply not the case.

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[30] *See generally*, *Hansen Brothers*, at 564.

[31] *Hansen Brothers*, at 553 ("When there is objective evidence of the owner's intent to expand a mining operation, and that intent existed at the time of the zoning change, the use may expand into the contemplated area.").

[32] Staff Report, p. 4

[33] Staff Report, p. 7 ("However, these prior decisions did not consider and made no findings or representations about the remainder of the Proposed Vested Rights Area (the 600+ acre Brion Parcel)".

[34] See e.g., operation of the Cajalco Clay Pit which existed offsite to the West of the Proposed Vested Rights Area. As found by the Staff Report: "The Cajalco Clay Pit may have encroached upon on the Proposed Vested Rights Area. This activity is not attributed to the owner or operator of the Proposed Vested Rights Area and ceased in 1938, over a decade before the 1949 vesting date. Therefore, the Cajalco Clay Pit does not support a determination that a vested right to mine aggregate without a permit was established as of 1949 for the property within the Proposed Vested Rights Area." Staff Report, p. 5.

i. *The Court in Hansen Brothers made clear that the application of the "diminishing asset" doctrine did not justify a wholesale change in the principles of zoning in California.*

While the California Supreme Court approved the application of the "diminishing asset doctrine" in California in regard to determining the proper scope of the mining business at that moment of vesting, the application of that doctrine is limited to only what the owner at that time objectively manifested an intent to continue in regard to the specific business being conducted at that time. The doctrine does not allow for an expansion of a mining operation onto new parcels not contemplated by the owner at the time of vesting:

> Finally, a lawful nonconforming use may not be extended to adjacent property acquired after the zoning change went into effect except to the [*558] extent that the transferors of the property themselves had a vested right to engage in that nonconforming use on the transferred property. The court recognized this in *McCaslin* where it stated: "Of course, plaintiff's nonconforming use of the property in question cannot be expanded or extended to a separate parcel . . . ." (*McCaslin*, *supra*, 163 Cal. App. 2d at p. 350.) In that case the applicable zoning ordinance contained that restriction (*id.* at p. 344), but that is the rule of general application. (See 8A McQuillin, *supra*, § 25.208, p. 128, and cases cited.) In another quarrying case, a New Jersey court held that even though the quarry owner [***794] had been permitted [**1340] by the previous owner of an adjacent tract to carry equipment across the adjacent tract, [****47] quarrying was not being conducted on that tract. Therefore when the quarry owner acquired the tract after a zoning change went into effect, the nonconforming quarry operation could not be extended onto the new tract. "The use at the time the ordinance was adopted established the non-conforming use which defendant was entitled to continue." (*Struyk v. Samuel Braen's Sons* (1951) 17 N.J.Super. 1 [85 A.2d 279, 281].)

Hanson Brothers at 557-558. This understanding is consistent with traditional understanding of zoning and land use. Zoning ordinances allow a use to continue only because compelling immediate compliance may be unconstitutional. *Jones v. City of Los Angeles* (1930) 211 Cal. 304. 310-11. Riverside County's General Plan and Zoning Code require compliance with all applicable zoning and permitting requirements, including for mining, except for vested rights.[35] Should a use cease under the Riverside County Zoning Code, any subsequent attempt to continue or restart the use must come into compliance with zoning requirements.[36] This requirement for a permit is codified by the County in regard to mining activities, as part of the Surface Mining and Reclamation Act of 1976 ("SMARA"),

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[35] Riv Co. Ord. Section 6. PERMIT REQUIRED. Unless exempted by the provisions of Section 5 (inapplicable) or Section 17 (Vested Rights) no person, firm, corporation or private association shall conduct surface mining operations in the unincorporated area of the County of Riverside without an approved Permit.

[36] Riv C. Ord. Section 17 provides that a vested right only continues for as long as there are no substantial changes in operations: "Any substantial changes made in a surface mining operation subsequent to January 1, 1976, except in accordance with SMARA and California Code of Regulations, title 14, section 3951 (repealed), shall require an approved Permit pursuant to this ordinance."

which also provides for vested rights incurred prior to the first required permit. Under Public Resources Code Section 2776:

> (a) No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter as long as the vested right continues and as long as no substantial changes are made in the operation except in accordance with this chapter. A person shall be deemed to have vested rights if, prior to January 1, 1976, the person has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations. Expenses incurred in obtaining the enactment of an ordinance in relation to a particular operation or the issuance of a permit shall not be deemed liabilities for work or materials.

As included in this statute, which is echoed in County Ordinance 555, the vested right only continues for "as long as no substantial changes are made in the operation except in accordance with this chapter." Further, the person must have as of the date required for an authorization, "in good faith and reliance upon a permit or authorization...diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations." Both of these conditions significantly narrow the potential vested mining right by limiting this potential right to **1)** only that supported by the objective intent of the vesting rights landowner at the time of vesting, and **2)** limiting expansion of the mining operation to only what was intended at that time of vesting, as evidence by then present mining operations and incurrence of substantial liabilities in support of such mining operation.

Particularly on these facts showing no active mining occurring at the critical time period or preparation for mining, case law in California supports a significantly narrower reading of the vested rights doctrine under Public Resources Code 2776 and consistent with California's zoning laws. Courts follow a "strict policy" against expansion. *County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 687. Under this policy, "the continued nonconforming use must be similar to the use existing at the time the zoning ordinance became effective..." *Edmonds v. County of Los Angeles* (1953) 40 Cal. 2d 642, 651. The use may not be enlarged or extend into other areas or properties. *Richfield v. City and County of San Francisco* (1933) 218 Cal. 83, 85; *City of Yuba v. Cherniavsky* (1931) 117 Cal.App. 568, 573. It also may not be changed to include activities not underway when the use became nonconforming. *Paramount Rock Company v. County of San Diego* (1960) 180 Cal.App.2d 217, 230. Nor may the use be operated in such a way as to make it more intensive than it was when it became nonconforming. *County of Orange v. Goldring* (1953) 121 Cal.App.2d 442, 447-48. Again, a non-conforming mining use includes only those activities that were "integral parts" of the mining operations at the time a restrictive ordinance was adopted. *Hanson Bros Enters* at 542. Non-conforming operations only include "uses normally incidental and auxiliary to the nonconforming use." *Id.* at 565.

> *ii. Any vested right that may have existed has been abandoned by the sale of property to a developer with the intent to develop residential housing on the property.*

Vested Mining Rights can be abandoned 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.

Here, the actions of RRM also rise to the level of abandonment. The County's Staff Report succinctly and clearly identifies that basis for this abandonment. [37] As stated by the Staff Report, in 1983, Paul Hubbs sold approximately 660 acres (the "Brion Parcel") of the approximately 792.22-acre Proposed Vested Rights Area to S.T. & Koo International. Hubbs did not lease the Brion Parcel back for mining operations nor did Hubbs retain mineral rights in the Brion Parcel. The purchasers did not mine the Brion Parcel. In 2004, S.T. & Koo International authorized Cajalco Associates to seek entitlements for a residential development on the Brion Parcel, and then sold the Brion Parcel to Cajalco Associates. Cajalco Associates proposed to develop a single-family residential community on the property and submitted Pre-Application Review, General Plan Foundation Amendment, and Habitat Evaluation and Acquisition and Negotiation Strategy documents to the County. Hubbs' sale of the property without retaining any subsurface mineral rights or other restrictions on the sale of the Brion Parcel establishes a clear intent to abandon any vested rights to mine the property without a permit and is an overt act to abandon any such rights. The purchaser's substantial investment in seeking to develop the property for residential use and failure to pursue any mining activities for several decades also shows an intent and overt act to abandon any vested right to mine the Brion Parcel property without a permit.

Additionally, case law indicates that separate parcels and artificial barriers go against intent of vested rights. Except when tangibly connected to parcels where extraction is taking place or showing signs of preparation, courts usually do not consider reserve parcels part of the nonconforming use. See *Dolomite Prods Co. Inc. v Kipers* (N.Y. App. Dev. 1965) 260 N.Y.S. 2d 918, 921:

> Artificial barriers present the same dilemma. When roads separate the active and proposed reserve areas, courts usually consider those reserve areas distinct and not part of the nonconforming use.

See also *Fred McDowell, Inc. v. Bd of Adjust. Of Township of Wall* (N.J. Super. Ct, App. Div. 2000) 757 A. 2d, 822, 827 (construction of freeway separated min lot and reserve lot, making access to the

[37] Staff Report, p. 6.

reserve lot from the mine lot impractical). Here, Cajalco Road cuts off all land from this claimed vested right to the north of Cajalco Road as impractical. **See Exhibit "A"** Although the entirely of the Brion parcel has been abandoned, certainly the burden to show any intent to mine above Cajalco Road is higher given the lack of ability to access the property through Cajalco Road given the current infrastructure or lack thereof.

Also, the Tribe has reviewed many separate parcels and sales for this proposed Vested Rights Determination, and the management of these parcels goes against the stated intent to mine. Use of mining property for non-mining uses shows intent to not mine entire area. See *R.K. Kibblehouse Quarries v. Marlborough Township* (Pa. Commw. 1993) 630 A. 3d 937, 944. While there can be a difference if use of land is helpful for maintaining land for mining, such as grazing to keep area free of vegetation, activity ongoing on a property not consistent with mining is instead detrimental to an abandonment argument. See *Town of W. Greenwich v. A. Cardi Realty Assoc.* (R.I. 2001) 786 A.2d 354, 361.

Here, there is a patchwork of property uses currently on the proposed area for the Vested Rights Determination, indicating no intent to mine by RRM. **Attached as Exhibit "B" is a summary of the current ownership of parcels and ownership**. While it may be the case that mining rights have been reserved with deeds, such reservations are meaningless once there is an effort to turn a property into another use, and there is no activity indicating that the property is being managed in a way to preserve mining rather than seeking some other economic activity. Vesting rights are not same as reserved rights in mining lease, so even if there were a reservation, there is no apparent intent from anyone before now to mine this whole area for aggregate. Indeed, selling parcels or encumbering them with long-term leases and uses contrary to any argued intent is important to consider.

Finally, case law supports the argument that RRM's predecessors had the intent to abandon any right they had prior to the vesting period in 1949. As stated in *Hansen Brothers*, "the duration of nonuse may be a factor in determining whether the non-conforming use has been abandoned." Hanson Brothers at 569. In two cases, nonuse for periods of seven and ten years, coupled with the absence of other preservative activity, reflected an intent to abandon nonconforming mining operations. See *Lane County v. Bessett* (Or. Ct. App. 1980) 612 P. 2d 297, 301; *Holloway Ready Mix Co. v. Monfort* (Ky Ct. App. 1971) 474 S.W.2d 80, 83.

C. The County's Staff Opinion makes clear that the vested rights for the existing parcel are also on shaky grounds, and there is no time limit for revisiting this under California law.

As noted, the Tribe support the two (tentative) determinations from the Staff Report, namely that RRM has failed to provide the preponderance of the evidence that their predecessors in interest manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights Area as of 1949, and even if they had, there is clear and convincing evidence that any vested right was abandoned when this property was sold to a third party, who did not mine the property and then sold to a developer who intended to build (and acted to build) a residential community on this land.

However, the Tribe disagrees that RRM has met its burden to establish that there is, in fact, an existing vested right to conduct aggregate quarrying on approximately 135.17 acres of the Proposed Vested Rights Area where RRM currently operates ("Current Operations"). The Staff Report

only notes that the historical operation of a quarry on a portion of the existing operations **may** support a determination of vesting on the Current Operations:

> The establishment of the Blarney Stone Quarry supports a finding that at least a portion of the Proposed Vested Rights Area within the existing RRM's current mining operation had been used for stone and gravel quarrying prior to 1949 and that mining had commenced, and substantial liabilities *may* have been incurred for the operation. However, because the quarry was not active for approximately nine years before the 1949 vesting date and at least four years after the vesting date, *the lack of activity weighs against finding a vested right to continue quarrying without a permit because quarrying was not an active use to which the land was being put on the vesting date and therefore was not a legal, nonconforming use after 1949.*

Despite this, at best, qualified support for a determination for a vested rights determination, this characterization in fact highlights a lack of evidentiary support for RRM's position. It is surprising, therefore, given that RRM has the burden of proof on this point, that the Staff Report concludes that the vesting rights should be confirmed for the location of the Current Operations.

In significant part, it appears that the County's basis for confirming the vesting rights for the Current Operations is the County's prior approvals of vesting rights. The Staff Report notes that:

> Harlow's lessee's, Livingston Rock and Gravel, first obtained a permit in 1959 to operate a rock quarry. **Obtaining a permit does not mean a vested right did not exist. However, seeking a permit indicates that the operator may have understood that their operation was not a legal nonconforming use.**
>
> **Staff believes obtaining a permit is consistent with reports that the quarry had been idle for about ten years prior to the adoption of the zoning ordinance and therefore was not an existing or continuing nonconforming use in 1949.**
>
> Subsequently, in 1970, Paul Hubbs' applied for a Conditional Use Permit for his mining operation. The Conditional Use Permit application was described by County as an "expansion" of the original 1959 permit. This permit also had a termination date of 1990. This permit shows that the County and the operators understood that permits were required to authorize such uses, and that conditions could be placed on the operation.
>
> Nonetheless, just two years later, the County recognized vested rights for Paul Hubbs's operations in the 1982 Reclamation Plan on the grounds that the quarry operations had continuously operated since the 1950s. Subsequent County decisions were made based on this

> initial determination and the current Reclamation Plan recognizes a vested rights boundary of approximately 135.17 acres.

(emphasis added). JMBM argues that this prior determination means that "the County's interpretation of Ordinance 358 is well-established, and its application of Ordinance No. 348 to the S-4 area now well settled." (Application, p 113.)

But according to the California Supreme Court, the fact that the County has previously determined that a mining interest is vested is still subject to the independent judgment of the Courts. As noted by *Hanson Brothers*, the County lacks the power to waive or consent to violation of the zoning law. *Hanson Brothers*, at p. 564, citing to *City of Fontana v. Atkinson* (1963) 212 Cal. App. 2d 499, 507-508; *Western Surgical Supply Co. v. Affleck* (1952) 110 Cal. App. 2d 388. The court must make its own decision as to the legal impact of the facts in the record, and is not bound by any concessions of law that a party may have made. (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal. 4th 1028, 1043, fn. 11,) As such, superior court must exercise its independent judgment in making determinations based on the administrative record. *Hanson Brothers* at 559, citing to *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal. 3d 28, 34-35; see *Halaco Engineering Co. v. South Central Coast Regional Com* (1986) 42 Cal. 3d 52, 63-66.)

We respectfully request that the County comply with its requirements under CEQA prior to issuing a decision on this matter, refuse to consider the Vesting Rights Determination until all pre-decisional processes have run their course. Following this process, if the request survives, we believe that the County is precluded from affirming the vested rights for the reasons provided herein.

Very truly yours,

John Nelson

Cc: Steve Bodmer, General Counsel, Pechanga Band of Indians
Paul Macarro, Cultural Coordinator, Pechanga Band of Indians

Exhibit A

Map Showing Cajalco Road

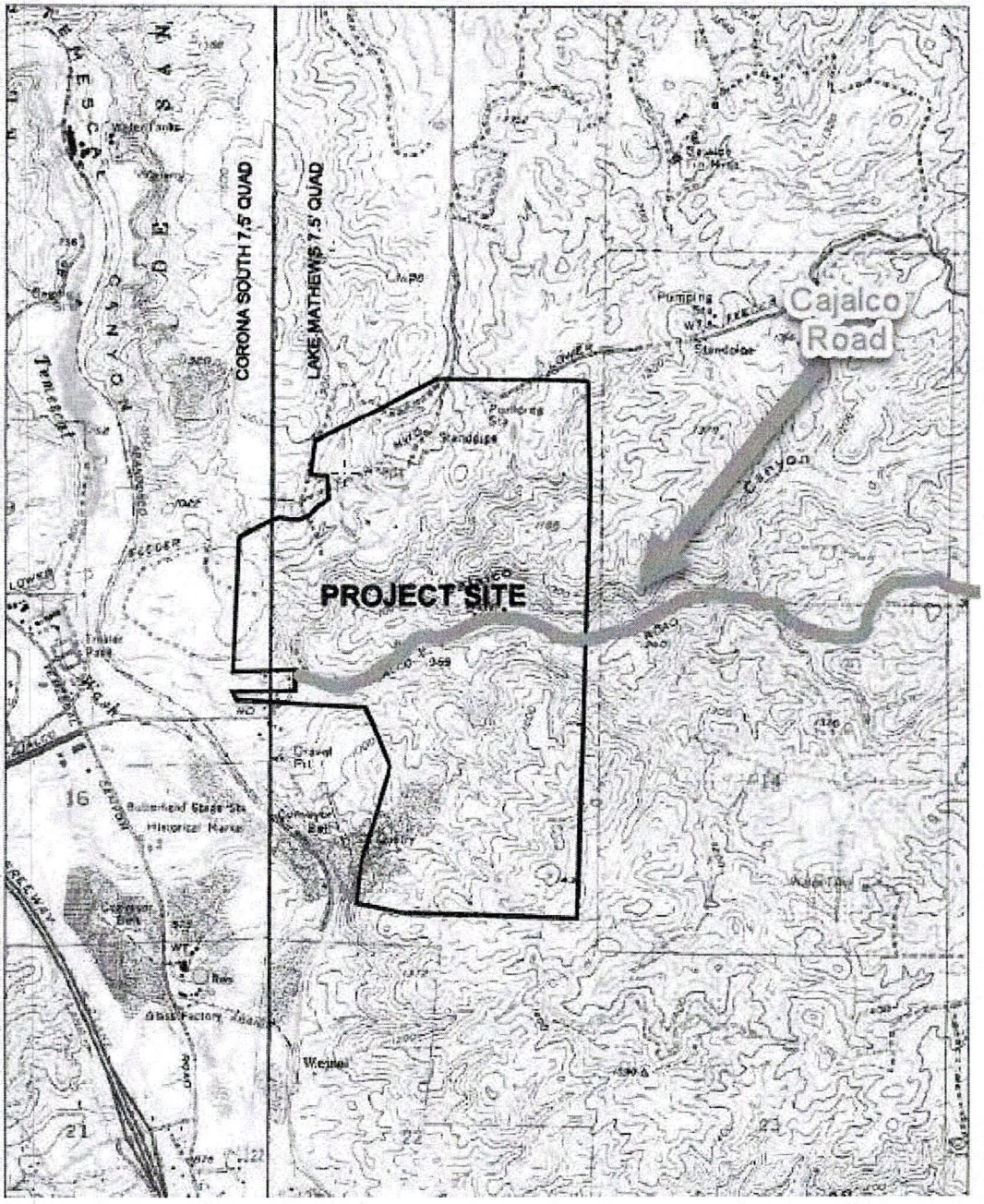

Exhibit B

Summary of Current Ownership of Parcels

The following is the history of the acquisition of land now owned by Cajalco Road Quarry, LLC ("Cajalco Quarry"), Corona Cajalco Road Development, LP ("Cajalco Development") and Robertson's Ready Mix, Ltd. (collectively, "RRM Entities"). There are 122 parcels comprising 792.22 acres of land.

I. APNs Acquired September 2, 2004

By Grant Deed recorded September 2, 2004 in the Riverside County Recorder's Office as Document No. 2004-0697355, S.T. & Koo International Corp, a Liberian corporation, granted Cajalco Associates, LLC, a Delaware limited liability company ("Cajalco Associates") the following APNs (the "Brion Parcel"):

281-020-020	281-070-023	281-150-028	281-270-008
281-030-007	281-080-022	281-160-004	281-280-001
281-030-011	281-080-024	281-170-007	281-290-008
281-030-013	281-090-002	281-170-008	281-300-003
281-040-009	281-100-005	281-190-029	281-310-004
281-040-011	281-100-028	281-200-004	278-160-037
281-050-004	281-100-040	281-210-003	278-160-040
281-050-006	281-100-041	281-210-005	278-170-001
281-050-007	281-110-015	281-230-014	278-180-028
281-060-020	281-120-008	281-240-005	278-180-029
281-060-024	281-120-009	281-250-009	278-180-031
281-060-027	281-130-009	281-260-004	
281-070-019	281-140-022	281-260-007	

By Grant Deed recorded June 19, 2007 in the Riverside County Recorder's Office as Document No. 2007-0400464, Cajalco Associates granted the Brion Parcel to Corona Twin Creeks LLC.

II. APNs Acquired September 17, 2009

By Grant Deed recorded September 17, 2009 in the Riverside County Recorder's Office as Document No. 2009-0485123, Corona Twin Creeks LLC, a limited liability company granted Cajalco Development the following APNs in addition to the Brion Parcel[1]:

278-160-010	278-160-016	281-040-003	281-060-025
278-160-011	278-160-031	281-060-001	281-110-004
278-160-012	278-180-007	281-060-002	281-110-006
278-160-013	281-020-016	281-060-016	281-130-005
278-160-014	281-230-008	281-060-017	281-190-013
278-160-015	281-040-002	281-060-018	

[1] To reduce space, only the APNs in addition to the Brion Parcel are listed here, although all APNs were listed in the September 17, 2009 Grant Deed.

III. APNs Acquired April 30, 2010

By Grant Deed recorded April 30, 2010 in the Riverside County Recorder's Office as Document No. 2010-0199408, Natalie Giovanetti, Trustee of the Natalie Giovanetti Revocable Trust, dated October 15, 2002 granted Cajalco Development the following APNs:

281-290-001 281-280-004

IV. APN Acquired May 27, 2010

By Grant Deed recorded May 27, 2010 in the Riverside County Recorder's Office as Document No. 2010-0244760, John Skirrow and Eileen J. Skirrow, husband and wife granted Cajalco Development the following APN:

281-110-003

V. APN Acquired October 12, 2010

By Grant Deed recorded October 12, 2010 in the Riverside County Recorder's Office as Document No. 2010-0487122, Esquiel Cortez and Delia Cortez, husband and wife as Joint Tenants granted Cajalco Development the following APN:

281-300-001

VI. APNs Acquired September 20, 2011

By Grant Deed recorded September 20, 2011 in the Riverside County Recorder's Office as Document No. 2011-0416809, First American Title Insurance Company, as Trustee under that certain Deed of Trust dated December 26, 2008, executed by Temescal Cliffs-8, LLC as Trustor, granted Cajalco Quarry, the following APNs:

279-530-063[2] 279-530-064[3] 281-220-003

VII. APNs Acquired October 18, 2011

By Grant Deed recorded October 18, 2011 in the Riverside County Recorder's Office as Document No. 2011-0457028, First American Title Insurance Company, as Trustee under that certain Deed of Trust dated September 28, 2007, executed by Temescal Cliffs-8, LLC as Trustor, recorded on October 3, 2007, granted Cajalco Quarry the following APNs:

279-530-060[4]	281-150-027	281-220-002	281-260-006
279-530-061[5]	281-180-021	281-220-007	281-290-007
281-140-021	281-190-028	281-230-013	

[2] Renumbered from 279-231-011.
[3] Renumbered from 279-231-017.
[4] Renumbered from 279-231-006.
[5] Renumbered from 279-231-018.

VIII. APNs Acquired March 31, 2015

By Grant Deed recorded March 31, 2015 in the Riverside County Recorder's Office as Document No. 2015-0130219, Riverside Cement Company granted Cajalco Quarry the following APNs:

281-180-006	281-150-019	281-190-020
281-180-007	281-190-012	281-190-014

IX. APNs Acquired May 3, 2016

By Grant Deed recorded May 3, 2016 in the Riverside County Recorder's Office as Document No. 2016-0176741, the Tax Collector of Riverside County granted Cajalco Quarry, through purchase of tax-defaulted property the following APNs:

281-150-014

X. APNs Acquired May 16, 2016[6]

By Grant Deed recorded May 16, 2016 in the Riverside County Recorder's Office as Document No. 2016-0198597, Temescal Cliffs-8, LLC granted Cajalco Quarry the following APNs:

281-140-001	281-140-017	281-150-018	281-190-004
281-140-002	281-230-001	281-150-017	281-190-006
281-140-013	281-230-002	281-180-010	281-190-011
281-140-014	281-190-019	281-180-014	281-190-018
281-140-015	281-190-015	281-180-015	281-260-002
281-140-016	281-140-019	281-190-002	281-230-004

XI. APNs Acquired May 17, 2016

By Grant Deed recorded May 17, 2016 in the Riverside County Recorder's Office as Document No. 2016-0200562, Temescal Cliffs-8, LLC granted Cajalco Quarry the following APNs:

278-180-027 281-100-012 281-100-014

XII. APN Acquired July 28, 2016

By Grant Deed recorded July 28, 2016 in the Riverside County Recorder's Office as Document No. 2016-0319604, Flavio O. Jimenez and Sandra Jimenez, husband and wife, and Jose Luis Ulloa and Glenis M. Ulloa, husband and wife, all as Joint Tenants, granted Cajalco Quarry the following APN:

281-260-003

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[6] These parcels were purchased in connection with a Memorandum of Exclusive Option to Purchase recorded May 9, 2012 in the Riverside County Recorder's Office as Document No. 2012-0212983 by and between Temescal Cliffs-8, LLC and Cajalco Quarry.

Boydd, April

From: Aquia Mail
Sent: Monday, May 1, 2023 4:12 PM
To: eozdil@pechanga-nsn.gov
Cc: COB
Subject: Board comments web submission
Attachments: rrm-vested-mining-right-pechanga-cultural-comments-to-bos-2.27.23.pdf

Thank you for submitting your request to speak. The Clerk of the Board office has received your request and will be prepared to allow you to speak when your item is called. To attend the meeting, please call (669) 900-6833 and use **Meeting ID # 864 4411 6015 . Password is 20230502. You will be muted until your item is pulled and your name is called. Please dial in at 9:00 am with the phone number you provided in the form so you can be identified during the meeting.**

Submitted on May 1, 2023

Submitted values are:

First Name
Ebru

Last Name
Ozdil

Phone
951-770-6313

Email
eozdil@pechanga-nsn.gov

Agenda Date
05/02/2023

Agenda Item # or Public Comment
Agenda Item # 21.1 21749 - Robertson's Ready Mix

State your position below
Oppose

Attachments (Must be .pdf, .doc, or .docx)
rrm-vested-mining-right-pechanga-cultural-comments-to-bos-2.27.23.pdf

PECHANGA CULTURAL RESOURCES

Pechanga Band of Indians

Post Office. Box 2183 • Temecula, CA 92593
Telephone (951) 770-6300 • Fax (951) 506-9491

February 22, 2023

Mr. Darren Edgington
Project Planner
Riverside County Planning Department
4080 Lemon Street, 9th Floor
Riverside, CA 92502

Re: Pechanga Band of Indians Concerns Regarding Robertson's Ready Mix (RRM) Request for a Determination of Vested Rights for Approximately 792.22 Acres

Dear Mr. Edgington:

This correspondence is submitted by the Pechanga Band of Indians (hereinafter, "the Tribe"), a federally recognized Indian tribe and sovereign government, in response to the County's public hearing notification for the Board of Supervisors. The Tribe requests consultation with the County of Riverside concerning the cultural and environmental impacts of the above listed Project and would like to submit this letter as a written comment to the Board of Supervisors.

We request that this correspondence be part of the official record for this Project.

THE RRM VESTED RIGHTS REQUEST FOR 792.22 ACRES PROJECT AREA IS WITHIN THE *PAYÓMKAWISH* TRIBAL TERRITORY, THE TRADITIONAL CULTURAL PROPERTY (TCP) AND TRADITIONAL CULTRUAL LANDSCAPE (TCL) OF THE PECHANGA BAND OF INDIANS

Numerous known cultural resources and village sites significant to the Tribe's cultural heritage and history, and deemed significant under California and federal law, are located within and adjacent to the proposed vested rights area, which encompasses approximately 792.22 acres. While historic accounts and anthropological and linguistic theories are important in determining traditional *Payómkawichum* (Pa-YOM-kah-which-um, Luiseño) territory; our songs and oral traditions are our primary source of information. They define our identity, beliefs, and traditional territories. Our songs and oral accounts have transferred history and knowledge through the generations for thousands of years.

As defined in our Creation Account and oral tradition, the *Payómkawish* Ancestral Territory encompasses approximately 2,000 square miles, which includes all of Western Riverside County and northwestern San Diego County. The northern border follows the Santa Ana River and covers the western slopes of the San Jacinto Mountains to the east. At Idyllwild, the boundary turns to the south, including Aguanga, and then extends east again to the middle of San Jose de Valle (Warner Valley). At Lake Henshaw it turns southwest, and incorporates Escondido, all of San Marcos, and Bataquitos Lagoon. The Pacific Ocean and the southern Channel Islands create the western border. The mainland coastal areas of Carlsbad, Oceanside, and all of Camp Pendleton are also included. At the northern border of Camp Pendleton, the territory curves east and skirts the ridgeline of the Santa Ana Mountains up to the northern boundary, the Santa Ana River.

The 792.22-acre area proposed for a vested rights determination lies directly within the area called *Túu'uv*,[1] a Traditional Cultural Property (TCP) located near the intersection of Cajalco Road and the I-15 interchange. In the early 1930's, John P. Harrington, linguist and ethnographer for the Bureau of American Ethnology, accompanied *Payómkawish* consultants from Corona to Temecula on a place name trip.[2] They identified several *Payómkawish* villages and places along Temescal Canyon Road, which closely parallels Interstate 15. *Túu'uv* is chronicled in traditional songs and is named in a long list of places located within the Ancestral *Payómkawish* territory. One of Harrington's consultants remembers stopping there with her parents to gather cactus fruits. This area is generally considered to be more ancient than the surrounding areas.

Another named place to the south of *Túu'uv* is *'Anóonga*. This place name is derived from the word *'anó* meaning coyote, and is to the east of *Paxávxa*. The ancient trail which stretched from the coast to the San Jacinto Plain connected *Paxávxa, 'Anóonga,* and *Túu'uv* with the large villages in the Lake Matthews/*Qaxáalku* region and the villages further east. This trail became the present-day Cajalco Road. This main artery, now named Cajalco, derives from our language's term Qaxáalku, meaning "at the quails."

THE PROJECT IMPACTS TO CULTURAL RESOURCES

The proposed expansion of the mining rights is located in a highly sensitive region of *Payómkawichum* territory. The Tribe understands that Robertson's Ready-Mix ("RRM") claims a recognized vested right to mine a 132-acre portion of the Hubbs Harlow Quarry without a permit and is seeking a determination from Riverside County that its true vested mining rights actually consists of 792.22 acres within Hubbs Harlow Quarry. The Tribe is very concerned about both the protection of unique and irreplaceable cultural resources, such as *Payómkawichum* village sites, cultural resources,

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[1] John Peabody Harrington. 1986. The Field Notes of John Peabody Harrington in the Smithsonian Institution 1907-1957. Kraus International Publications, White Plains, NY. Microfilm Edition. Volume 3, California / Great Basin Reel 1, Frame 223.

[2] *Id.*

sacred sites, and possible ancestral remains that may be impacted by the mining activities. The Tribe believes the proper and lawful assessment and treatment of cultural resources needs to be conducted to preserve and protect Ancestral remans and sacred items likely to be discovered in the course of the work.

The Tribe requests County of Riverside require the applicant adhere to the proper permitting process to ensure appropriate environmental assessments can be undertaken for CEQA, NEPA, and Section 106 and other applicable federal and California law.

We thank you for the opportunity to submit this information. The Tribe looks forward to participating in the environmental review process and working with the County of Riverside to protect the invaluable Pechanga village sites and cultural resources. If you have any questions, please contact Ebru Ozdil, Pechanga Cultural Analyst, at (961) 770-6313 or at eozdil@pechanga-nsn.gov.

Sincerely,

Gary DuBois, JD, MSW
Director, Cultural Resources Department
Tribal Historic Preservation Officer

PROCOPIO
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T. 619.238.1900
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DEL MAR HEIGHTS
LAS VEGAS
ORANGE COUNTY
SCOTTSDALE
SAN DIEGO
SILICON VALLEY
WASHINGTON, D.C.

May 1, 2023

VIA EMAIL

Darren Edgington
Environmental PRoject Manager
Riverside County Planning Department
4080 Lemon Street, 12th Floor
Riverside, CA 92501

Re: **Robertson's Ready Mix Request for Determination of Vested Rights Application (Hubbs/Harlow Quarry Area)**

Dear Mr. Edgington:

On behalf our client the Pechanga Band of Indians (the "Tribe"), we provide these comments on the pending request of Robertson's Ready Mix Request ("RRM") for a determination of its Vested Rights Application for what it has deemed the Hubbs/Harlow Quarry Area ("Vested Rights Determination" or "Proposed Action"). This Proposed Action was continued from the February 28, 2023 Board of County Commissioners meeting to the May 2, 2023 meeting and remains unprepared for public hearing for the reasons provided herein.

The Proposed Action is an extraordinary request to remove from the County of Riverside's ("County") governing authority hundreds of acres of lands within its jurisdiction under the guise of a fiction contrived from a series of legal arguments, requested assumptions and extrapolations, improperly applied documentation, and storytelling by the only entity that would benefit from the decision—the requestor. We respectfully request that the County comply with its requirements under the California Environmental Quality Act ("CEQA") prior to issuing a decision on this matter, refuse to consider the Vesting Rights Determination until all pre-decisional processes have run their course.

Following this process, if the request survives, we believe that the County is precluded from affirming the vested rights for the reasons provided herein.[1]

The Riverside County Planning Staff in the February 28, 2023 Staff Report ("Staff Report") erroneously states that this Proposed Action is not subject to analysis under CEQA on the purported basis that approval of this Vested Rights Application is not a "discretionary action," rendering the County's decision to approve or deny the Proposed Action as outside the bounds of CEQA. This position is contrary to the CEQA statute, guidelines and case law interpreting their tenets. By failing to undertake the required CEQA analysis prior to considering a decision in this matter, the County is also not complying with AB 52, which requires public agencies to consult with tribes during the CEQA process where tribal cultural resources could be affected. As detailed further below and in confidential information which the Tribe can share with the County only through consultation, the Hubbs/Harlow Quarry Area is within the historic territory of the Tribe and is a location of significant cultural value to the Tribe triggering the consultation requirements of AB 52. See Public Resources Code Section 21074(a)(1)(A)-(B).

In addition to the County's obligation to comply with CEQA, we also write to clarify that the cultural resources that are of concern to the Tribe (and perhaps other tribes in the region) are subject to the State's public trust doctrine, and that any vested mining right that the County were to find in regard to the Proposed Action only exists subject to the public trust doctrine. As a consequence, any affirmative action by the County on this Proposed Action, including even partial recognition of the currently mined RRM property, must condition the determination upon compliance with the public trust doctrine that is applicable to the extant cultural resources for which the Tribe is a co-Trustee.[2]

While the County must comply with CEQA and its public trust obligations before proceeding with the analysis of the Proposed Action at the hearing, and without waiving's these objections to the County's process, the Tribe supports two of the proposed findings by the Riverside County Planning Staff in the Staff Report in regard to the Proposed Action, Case No. PAR210273, namely: 1) that RRM has not shown by a preponderance of the evidence that their predecessors in interest manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights Area as of the 1949 vesting date; and 2) even if they have shown the predecessor in interest had manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights area as of the 1949 vesting date, there is clear and convincing evidence that any vested right was abandoned when this property was sold to a third party, who did not mine the property and then sold to a developer who sought to build a residential community on this land. The Staff Report provides detailed and robust evidence in support of each of these two conclusions, which are independently fatal to the merits of the Proposed Action, and the Proposed Action should be denied on this basis.

However, in addition to the Tribe's objection to the County's failure to comply with CEQA, AB52 and the public trust doctrine, we are also writing to correct and clarify the legal requirements applicable to this determination that make it even less likely that the Proposed Action can be approved. As

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[1] The Staff Report concurs with our conclusion that the application is substantively defective and cannot be approved under the premises submitted; however, we believe that the support for denial of the application exceeds the bases stated in the Staff Report.

[2] As required by County Ordinance 555, these comments are relevant to the County's determination in demonstrating or delimiting the existence, nature, and scope of the claimed vested rights.

detailed below, the County lacks the legal and factual bases to find that even the existing RRM quarry has properly maintained its vested right, if it ever was held, and we ask that RRM be required to come into compliance with all current planning and zoning laws on its current quarry as a result of this determination. As identified below, the Staff Report provides the factual basis for this conclusion, but does not property conclude, as it must, that no vested rights can be shown to presently apply to any of the existing RRM operations at this location.

Finally, we ask that the currently scheduled May 2 hearing be postponed. Upon receipt and review of the voluminous application materials, we requested documents under the California Public Records Act in order to develop a more comprehensive administrative record in this matter. We should be provided full and complete responses to this request prior to the hearing on this proposed action. In an April 10, 2023 response to our request, the County stated that it would "produce documents on a rolling basis beginning April 17, 2023." The County made a first production of documents available on April 17, 2023; however, as of April 30, 2023, we have received no additional production, and the County has not confirmed that the production of documents is complete. We need either a notification from the County that the document production in response to our public records request is complete or, if further documents remain to be produced, additional time to receive and review those documents prior to any public hearing. Further, any response, supplement or change to the application or the Staff Report by RRM must be published and circulated as part of the application, and the public, including the Tribe, needs sufficient time to review and comment on any of those additional comments.

A. The Staff Report Incorrectly Concludes that No CEQA Analysis is Required for the Proposed Action

A determination of vested rights under section 2776 of the Surface Mining and Reclamation Act ("SMARA") and Riverside County Ordinance ("RCO") No. 555 is a discretionary project subject to California Environmental Quality Act ("CEQA") review. Prior to considering the Proposed Action, the County must prepare and certify a full environmental impact report ("EIR") on the direct and foreseeably indirect environmental changes that could result from RRM's request to drastically expand its mining activity. If the Application is disapproved, any future expansion of mining operations would require additional permitting and separate CEQA analysis.

i. The County's vested rights determination is a discretionary decision subject to CEQA review, which has not yet been conducted

The County of Riverside Planning Department Staff Report ("Staff Report") conclusion that the RRM vested rights determination "is not a project . . . [and] is not a discretionary project for the purposes of CEQA" is wrong and directly contradictory to California law. Instead, the vested rights determination is a discretionary agency decision to which CEQA applies.

CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies." (Pub Res C §21080(a)). According to the CEQA Guidelines (14 Cal Code Regs §§15000–15387), a "project" is broadly defined to mean "the whole of an action" which may result in either a "direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (*Id.* at §15378(a)). The CEQA Guidelines define a "discretionary project" as "a project which requires the exercise of judgment or deliberation when the public agency or body decides

to approve or disapprove a particular activity." (*Id.* at §15357). CEQA does not apply to an agency's nondiscretionary "ministerial" decisions. (Pub Res C §21080(b)(1); 14 Cal Code Regs §15060(c)(1)).

Under California law, vested rights determinations are not "ministerial" decisions. In *Calvert v. County of Yuba*, the California Court of Appeal, held that the adjudicatory determination of a mining company's vested rights claim under SMARA triggered procedural due process protections including notice and a right to a hearing for adjacent landowners. (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 629. The Court stated that SMARA's vested rights statute, section 2776, requires an analysis of "factual issues that must be resolved through the adjudicative exercise of judgment rather than the ministerial (automatic, nondiscretionary) application of fixed standards and objecti measurements." (*Id.* at 624). With regard to CEQA, the Court specifically stated, "the vested rights determination here is not a ministerial determination under CEQA." (*Id.* at 621) (emphasis added)).

Here, the RRM vested rights determination will require the resolution of factual issues through the adjudicatory exercise of judgment, such as whether the "vested right continues" and whether any "substantial changes" have been made in the mining operation other than in accordance with SMARA. (see *Id.* at 623). Although it appears readily apparent that any vested right in the mining operation was abandoned when the property was sold to a third party, and that RRM's predecessors in interest had no objective intent to expand surface mining activities into the proposed vested rights area (i.e., that substantial changes have been proposed that are not in accordance with SMARA), these are determinations that the County of Riverside Board of Supervisors ("County") must make based on the "adjudicative exercise of judgment rather than the ministerial (automatic, nondiscretionary) application of fixed standards and objective measures." (*Id.* at 624).

In a January 25, 2022, memorandum from RRM's counsel (Jeffer Mangels Butler & Mitchell LLP or "JMBM") to the County, JMBM attempts to argue that the Vested Rights Determination is not subject to CEQA because, while the determination is "not ministerial in the land use context" it "is ministerial for purposes of CEQA." [3] JMBM acknowledges that *Calvert* specifically stated the opposite: "**the vested rights determination here is not a ministerial determination under CEQA.**" (*Id.*) However, JMBM argues that the court does not actually mean this, apparently, because the "applicability of CEQA to a [vested rights determination] was never raised by Plaintiffs, and thus, was not at issue in the case, and there is no further analysis or authority in the Calvert decision on this subject."[4]

On the contrary, the court does analyze the applicability of discretionary determinations with respect to vested rights determinations, and it does so by referencing a CEQA decision:

> [S]ection 2776 encompass several factual issues that must be resolved through the adjudicative exercise of judgment rather than the ministerial (automatic, nondiscretionary) application of fixed standards and objective measurements.

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[3] Draft Memorandum ("Memo") dated 1/25/22 from Kerry Shapiro and Daniel Quinley to Shelly Clack and Caroline Monroy re Applicability of CEQA to RRM Vested Rights Determination.
[4] *Id.*

> A good example of this dichotomy is provided by a decision from this court, Ramey. (Ramey, supra, 45 Cal.App.3d 185, 119 Cal.Rptr. 266.) In Ramey, we concluded that the approval of a mobile home park construction permit was a discretionary act subject to CEQA rather than a ministerial act exempt from CEQA. (A ministerial decision under CEQA similarly involves only the use of fixed standards or objective measurements.) (*Calvert* at 624). (Emphasis added).

Here, JMBM is attempting to make the difficult argument that "ministerial" is defined differently in the land use context than in the CEQA context, even though *Calvert* states that the definitions are similar, and the definitions are, in fact, similar.[5]

JMBM further states that, for CEQA purposes, a "discretionary" act "requires that a lead agency have actual authority to shape, change, or condition a project based on environmental concerns" and that, in a vested rights determination, "the County cannot condition the existence of vested rights, as they are a matter of historical fact." (Memo). However, the CEQA guidelines' definition of "discretionary" is more expansive. According to the guidelines, "The key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve a project." (14 CCR § 15357) (emphasis added). In other words, the discretionary question turns not only on how the County might shape the project, but also on whether or not the County will approve the project. Here, the County must use its subjective judgment to determine whether or not to approve the Vested Rights Application, and the "historical facts" evidencing the existence of vested rights are highly contested. Thus, the County's decision as to "whether" to approve the Vested Rights Application is a discretionary decision subject to CEQA review.

Finally, JMBM argues that County Ordinance No. 555.20 "specifically prohibits the County from considering environmental impacts" in the Vested Rights Determination. (Memo). However, Ordinance No. 555.20 contains no such specific prohibition. Section 17(B)(2) of Ordinance No. 555.20 states: "Written comments and oral testimony other than that related to demonstrating or delimiting the existence, nature, and scope of the claimed vested rights shall not be considered by the Board of Supervisors in making the Vested Rights determination." Therefore, to the extent that environmental impacts affect the determination as to whether the "Operator has demonstrated its claim for a Vested Right," they may considered by the County. (Ordinance No. 555.20).

The Vested Rights Determination here is discretionary because, among other reasons, it involves a substantial change and increase in the extent mining operations at issue. In reclamation plans for the mining operation at issue, Riverside County acknowledged that any substantial change to or expansion of mining operations would require CEQA review. In explaining why a reclamation plan is not subject to CEQA review, the Riverside County Planning Department's 2013 Notice of Exemption for Reclamation Plan No. RCL00118 ("NOE") specifically states: "The project is exempt under Section

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[5] According to the CEQA guidelines, "A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (14 CCR § 15369) (Emphasis added). According to *Calvert*, in the land use context "Ministerial actions involve nondiscretionary decisions based only on fixed and objective standards, not subjective judgment." (*Calvert* at 622). (Emphasis added).

15061(b)(3), because the only actions subject to County review and discretion are those strictly related to reclamation (i.e., not vested surface mining activities), that will take place on areas that have already been subject to substantial disturbance. The project will not change operations at the site nor extend mining operations, and will if anything, result in environmentally-beneficial effects." (Reclamation Plan Amendment No. RCL-118-S1 (2013)) (emphasis added). Additional reclamation plan amendments contain similar language as justification for why the reclamation plans are exempt from CEQA review: "RCL No. 118S2 will not change operations at the site, and will also not extend the life of the mining operation within the Amended RCL0018S2 boundary." (Reclamation Plan Amendment No. RCL-118-S2 (2016) (emphasis added)); "The project will neither change operations at the site nor extend mining operations . . . Therefore, the project is exempt under CEQA guidelines." (Reclamation Plan Amendment No. RCL-118-S4 (2020)) (emphasis added). This language indicates that determinations related to vested surface mining activities or activities that would change site operations or extend mining operations are not exempt from CEQA review.

Therefore, because the County's vested rights determination is a discretionary action that contemplates an extension of RRM's mining operations, the vested rights determination must be subjected to CEQA review.

ii. A vested rights approval requires a full and comprehensive EIR of both the underlying mining activity and any resulting development or activity

Although a disapproval of vested rights would not be subject to CEQA (Pub Res C §21080(b)(5); 14 Cal Code Regs §15270(a); *Las Lomas Land Co. v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 848), an approval of vested rights, which would expand RRM's mining operations, requires a full and comprehensive EIR.

Projects are defined under CEQA to include discretionary activity that could cause either a "direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment." (Public Res C § 21065). The CEQA Guidelines define "project" to mean "the whole of an action" including activity that involves the issuance of a lease, permit, license, certification, or other entitlement for use (14 Cal Code Regs § 15378; Public Res C § 21065; *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 259-263 (disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888)). California courts have broadly defined "projects" to include not only specific approvals, but also the underlying activity and any development or activity that could result from the approval. (*see County of Ventura v. City of Moorpark* (2018) 24 CA5th 377, 385; *see also RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1203). The CEQA Guidelines also state that CEQA is to be interpreted so as to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (14 Cal Code Regs § 15003(f); *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247). Any doubt as to whether an activity is a project subject to CEQA review should be resolved in favor of a finding that the action at issue is a project. (*see Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 4 Cal.3d 376, 393).

Here, the County should find the vested rights determination and underlying mining activity to be a project because it is a discretionary activity that will cause significant direct and indirect environmental impacts. The County should require a full EIR that identifies and describes the

significant environmental impacts, including direct, indirect, and cumulative or long-term impacts that may result from an expansion of mining operations (Pub Res C §21100(b)(1); 14 Cal Code Regs §§15126(a), 15144–15145, 15151). This review must include an analysis of the following items:

- significant cumulative impacts (14 Cal Code Regs §15130);
- mitigation measures (Pub Res C §21100(b)(3); 14 Cal Code Regs §15126(b)(3));
- alternatives, including a "no project" alternative (Pub Res C §21100(b)(4); 14 Cal Code Regs §§15126, 15126.6); and
- environmental impacts that cannot be mitigated (Pub Res C §21100(b)(2)(A); 14 Cal Code Regs §§15126(b), 15126.2(b)).

Specific issues of concern relevant to these items include significant impacts to "land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (Pub Res C §21060.5). Particular attention should be focused on the analysis of impacts to:

- archeological and historic resources (Pub Res C §21083.2; 14 Cal Code Regs §15064.5(c)–(f));
- tribal cultural resources (Pub Res C §21080.3.1; *see* AB52 discussion below);
- air quality, including an evaluation of greenhouse gas emissions directly or indirectly attributed to the proposed project (*see Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502; see also *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 223) (emphasis added); and
- water supply (Pub Res C §21151.9; 14 Cal Code Regs §15206(b)).

Importantly, with regard to cultural and biological resources, the County must consider substantial changes to the circumstances under which the mining operation was originally approved in the 1940s. The CEQA guidelines require that an EIR or negative declaration be prepared when, after an initial approval, "new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence" at the time will have one or more significant effects on the environment (14 Cal Code Regs §15162(a)(3)). Although these regulations are meant to address subsequent EIRs and negative declarations, their requirements can also be applied, as in this vested rights determination, to situations in which the initial approval process occurred prior to the adoption of CEQA or other relevant environmental laws. For example, any expansion of the vested rights area will require conformance with the requirements of the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP) because, even if vested rights are determined to exist for the entire 792 acre area, no vested or permitted surface mining activities in the expanded area occurred prior to the adoption of the MSHCP. Vested rights are not a license to break otherwise applicable environmental laws; rather, vested rights simply provide the right to avoid conformance with otherwise applicable planning and zoning laws.

iii. Any future expansion of mining operations will require additional permitting and CEQA review

Absent a positive determination of vested rights, any expansion of mining operations will require a conditional use permit (CUP) in accordance with existing zoning and general plan requirements. Accordingly, any future permitting processes for new or expanded mining operations or reclamation will qualify as a "projects" necessitating CEQA review.

Here, as stated in the Staff Report, "if RRM does not have a vested right to conduct surface mining operations on the Proposed Vested Rights Area, mining activities must be conducted in accordance with current land use and mining ordinances and laws, which require a permit in addition to a reclamation plan and financial assurance." For the reasons discussed above, any new permitting process will necessitate CEQA review. Similarly, any subsequent reclamation plan applications may be considered separate CEQA projects necessitating individual CEQA review to the extent that those plans involve substantial changes to the initial EIR or authorization. (14 Cal Code Regs § 15162; See *Eldorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1596-1597).

B. Any Vested Rights Held by RRM Remain Subject to the Public Trust Doctrine and Require Analysis Prior To Any Further Approval

As discussed above, CEQA requires government actors to consider the environmental impacts of their actions before approving plans or committing to a course of action on a project. In 2014, the California legislature amended CEQA via Assembly Bill 52 ("AB52")[6] to add a new category of resources in need of protection, called "tribal cultural resources," and to "specify that a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource . . . is a project that may have a significant effect on the environment."[7] Under CEQA, a project is the whole of an action that can result in either a "direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment."[8]

Public Resources Code section 21074 provides the following definition for "tribal cultural resources":

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[6] Cal. Stats. 2014, ch. 532, § 1(a), p.86.
[7] An act to amend Section 5097.94 of, and to add Sections 21073, 21074, 21080.3.1, 21080.3.2, 21080.3, 21083.09, 21084.2, and 21084.3 to, the Public Resources Code, relating to Native Americans, 2014 Cal. Stat. p. 86, § 9 (hereinafter, "AB52").
[8] Public Resources Code § 21065.

(a) "Tribal cultural resources" are either of the following:

1. Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

   A. Included or determined to be eligible for inclusion in the California Register of Historical Resources.

   B. Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.

2. A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

(b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.

(c) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

AB52 clearly declares the public's interest in the protection of tribal cultural resources in the bill's Findings, Declarations, and Intent. AB52 further charges California Native American tribes with the obligation to manage, accept conveyances of, and act as caretakers of, tribal cultural resources.[9]

The California legislature also articulated findings regarding then-limited protections for tribal cultural resources, providing: (1) "Current state law provides a limited measure of protection for sites, features, places, objects, and landscapes with cultural value to California Native American tribes"; (2) "Existing law provides limited protection for Native American sacred places, including, but not limited to, places of worship, religious or ceremonial sites, and sacred shrines"; and (3) "Many of these

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[9] *Id.*, § 1(b) ("In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following: . . . (8) Enable California Native American tribes *to manage and accept conveyances of, and act as caretakers of, tribal cultural resources.*" (emphasis added)).

archaeological, historical, cultural, and sacred sites are not located within the current boundaries of California Native American reservations and rancherias, and therefore are not covered by the protectionist policies of tribal governments."[10]

Through this statement, the California legislature recognizes that tribal cultural resources were previously afforded inadequate protections under California law, an issue that AB52 seeks to remedy by bringing those resources within the protections of the public trust doctrine, and that tribal cultural resources that may be located on private property are nevertheless subject to the public trust protections afforded to those resources by law.

In *National Audubon Society v. Superior Court* (hereinafter, "*Mono Lake*"),[11] the California Supreme Court held that the public trust doctrine imposes affirmative duties upon the state, including the authority to exercise continuous supervision and control over trust resources.[12] Public and local government agencies are under an affirmative duty to protect public trust uses "whenever feasible."[13]

In the present case, there is significant reason to believe that cultural resources located in situ on the subject property were unknown or not sufficiently protected in the 1940s upon the alleged vesting of rights. However, courts have held that, where the public trust doctrine applies, it works a kind of conceptional severance of the property into *jus publicum* and *jus privatum* estates.[14] The California Supreme Court case *Marks v. Whitney*[15] is considered a leading example of this principle. In *Marks*, the Court held that the effect of the public trust doctrine's application to wetlands on private property was to divide the landowner's property into two different estates, similar to what occurs in the case of financial trust.[16] In short, the public trust doctrine's effect is to sever property to which it applies into different estates: the private landowner maintains recognized *jus privatum* rights, e.g., possession and alienation, but the landowner's *jus privatum* estate is burdened by the public's *jus publicum* rights, which restrain private development that is inconsistent with public rights.[17]

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[10] AB52, § 1.
[11] 33 Cal.3d 419 (1983).
[12] *Id.*
[13] *Id.* at 446.
[14] Michael C. Blumm, The Public Trust Doctrine and Private Property: The Accommodation Principle, 27 Pace Envtl. L. Rev. 649, 658 (2010) (hereinafter, "Blumm, The Public Trust Doctrine and Private Property").
[15] 6 Cal.3d 251 (1971).
[16] Blumm, The Public Trust Doctrine and Private Property, *supra* note 9 at 658-59, n. 38 ("When money or land is held in a traditional trust, the trustee has legal title to the property, while the beneficiaries have equitable title. *See generally* American Law Inst., Restatement of Trusts (Third) (1992). The property is thus conceptually severed into two estates, *and the trustee has judicially enforceable obligations to the beneficiaries*." (emphasis added)).
[17] *See Marks*, 6 Cal.3d at 260 ("The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute . . . . It is within the province of the trier of fact to determine whether any particular use made or asserted by Whitney in or over these tidelands would constitute an infringement either upon the *Jus privatum* of Marks or upon the *Jus publicum* of the people. It is also within the province of the trier of fact to determine whether any particular use to which Marks wishes to devote his tidelands constitutes an unlawful infringement upon the *Jus publicum* therein." (internal citations omitted) (empahsis added)).

Whatever argument RRM may make regarding the fact that a property is owned privately in fee, or that certain rights in the property have vested, does nothing to extinguish the public's interest in the tribal cultural resources located thereon or the public's right to enforce those protections. No party's plans for development of a property acts to extinguish the public interest that exists in tribal cultural resources in situ or extracted from a subject property. Instead, the private landowner owns the property **subject to** the right of the State and tribes, the administrators of the public trust charged by statute with the trust's protection.

The duties and powers of the State as administrator of the public trust is an affirmation of the duty of the State to protect tribal cultural resources as commanded by law, surrendering that right of protection only in rare cases when the abandonment of the public's right is consistent with the purposes of the trust.[18]

C. RRM's Vested Mining Rights Determination Request is Deeply Flawed and Cannot Be Approved by the County Based upon the Record Before the Commission.

As previously noted, the Tribe supports two of the staff determinations in the Staff Report regarding the Vested Rights Application. Namely, the Tribe agrees that 1) that RRM has not shown by a preponderance of the evidence that their predecessors in interest manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights Area as of the 1949 vesting date, and 2) even if they have shown the predecessor in interest had manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights area as of the 1949 vesting date, there is clear and convincing evidence that any vested right was abandoned when this property was sold to a third party, who did not mine the property and then sold to a developer who sought to build a residential community on this land. The Staff Report provides detailed and robust evidence in support of each of these two conclusions.

However, we write not only to support these two conclusions, but to add additional factual and legal points that make clear that the County must deny the full Proposed Action on the record before it. The County's analysis of the legal test applicable to the vesting right's determination as to the expanded area appears to be correct.[19] (Staff Report, p. 10.) But the legal test applicable for the vesting rights determination is much narrower than what is argued by RRM's counsel (Jeffer Mangels Butler & Mitchell LLP or "JMBM"). In particular, JMBM argues that a vested rights determination can generally "look back" at the entire history of mining at a site prior to the establishment date to "determine the scope of vested rights." (See RRM RFD, p. 35) RRM argues that its proposed expansion to an area never before claimed in prior permits, and for an area that was not being actively mined at the date of vesting is an application of the "diminishing asset doctrine" recognized by the California Supreme Court in *Hansen Bros. Enters. v. Bd. of Supervisors* (1996) 12 Cal.4th 533 ("*Hanson Brothers*"). The standard to invoke this doctrine is difficult to meet, and requires significantly more evidence that what has been provided by RRM.

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[18] See *Mono Lake*, 33 Cal.3d at 441.

[19] The County appears to assume at the suggestion of RRM that it is the use of the land that makes the right vested, not an individual owner's objective intent, contrary to the opinion of the Attorney General on this point, which it should not have. See 59 Ops. Cal. Atty. Gen. 641, 656-58. Vested rights require the owner's intent to expand the exact mining type to the entire parcel at the time of vesting in 1949. Regardless, the County's analysis gives RRM the benefit of the doubt on this point, and it remains the case that no mining was occurring at the time of vesting in any event.

Building to this argument, JMBM initially summarizes its view of the proper basis of a vested mining right by broad references to general evidence of prior "surface mining operations conducted as a 'legal non-conforming use' on or prior to the date of the enactment of the ordinance." (See *Id.*, p. 20) JMBM mischaracterizes the applicable legal test in *Hansen Brothers* regarding what is the proper basis for a proponent to support a vested rights determination:

> "Indeed, the Hansen Bros. Court made clear that in the surface mining context, the overall pre-SMARA history of surface mining operations (which in other administrative proceedings before the SMGB included activities that occurred more than 70 years prior to SMARA) must be considered in evaluating the vested right, not just a "snapshot" of time at or just prior to 1976. The rule is grounded in the principle that vested rights "run with the land" meaning that successive owners succeed not only to a purchased business, but to the rights and privileges that apply to that business under the vested rights doctrine. Thus the buyer of a property is entitled not just to the seller's vested right, but also to the benefit of the mining history prior to the date the mining use became nonconforming."

(*Id.*, p. 35-36). This quotation is simply **not** the legal test promulgated by the California Supreme Court, and is legally incorrect in several ways. The California Supreme Court in *Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County* (1996) 12 Cal. 4th 540 ("Hanson Brothers") states clearly that the primary question in regard to a determination of a vested right to mine in the first instance is a determination of a specific mining operation that was being operated on the property that RRM predecessors owned at the time a local zoning ordinance makes the use non-conforming. *Id.* at 542.

The "diminishing asset doctrine" does not change the analysis of the scope of vested rights. The doctrine was summarized succinctly by the California Supreme Court's decision in *Hanson Brothers* recognizing the doctrine in California:

> Unlike other nonconforming uses of property which operate within an existing structure or boundary, mining uses anticipate extension of mining into areas of the property that were not being exploited at the time a zoning change caused the use to be nonconforming. The question thus arises whether this extension is a prohibited expansion of a nonconforming use into another area of the property. In those jurisdictions which have considered the question, the answer is a qualified "no" under the 'diminishing asset' doctrine, an exception to the rule banning expansion of a nonconforming use that is specific to mining enterprises.
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> . . .
>
> When there is objective evidence of the owner's intent to expand a mining operation, ***and that intent existed at the time of the zoning change***, the use may expand into the contemplated area.

Id. at 553 (emphasis added). As such, the "diminishing asset doctrine" does not change the determination that must be made in the first instance regarding what the specific operations of a property owner were *at the time of the passage of a zoning regulation*. While the application of the "diminishing asset doctrine" the *Hansen Brothers* decision does allow for expansion onto other vested properties other than the currently mined property, each property and parcel must meet that test, and the burden is on RRM to show the specific intent to expand operations onto each specific parcel at the time of vesting. Vested rights, however, still require the owner's intent to expand the exact mining type to the entire parcel at the time of vesting in 1949. [20]

The Supreme Court's test requires objective evidence of intent as of 1949 when the County's Ordinance took effect, for which it is the burden of RRM to provide. [21] Instead of providing this evidence, RRM and JMBM provides a broad sweep of history, and a lack of focus on the key time period, which appears to be intended to overcome the obvious fact that mining had ceased the property in question for a period of nearly 10 years at the time of the 1949 vesting rights determination date, and there is no relevant objective evidence of an intent to mine as of that critical date.[22] RRM's request for the Vesting Rights Determination incorrectly relies upon both historical and unrelated mining activity that ceased on the Hubbs/Harlow Quarry Area at issue well in advance of the vesting date in 1949[23], and also on evidence of mining that occurred after the required vesting date that is either essentially irrelevant or in fact harmful to RRM's position.[24] Evidence regarding mining for other substances such as historic mining generally part of the "Temescal Mining District" or Tin District,"[25] or for clay operations by offsite operators[26] is not probative of intent to extend aggregate mining for the entirely of the Proposed Vested Rights area by the predecessor in interest at the vesting date in 1949. Similarly, failed efforts in the 1930s to reopen a tin mine[27], a description of the property that failed to produce a transaction[28], and a 1948 survey now showing a proposed mine, but by its own terms, only showing "the relative locations of corners used by previous surveys; the theoretical corners shown on original Gov't. and Rancho Maps; and the corners and property lines established by the Compromise Agreement of 1895 and other deeds of record."[29] That is, it is only to establish properties boundaries, and nothing more can and should be inferred. This evidence in fact has no bearing on a determination regarding the objective intent in 1949 by the owners of the Hubbs Harlow Quarry since the mining resources at issue were not being used at all for nearly 10 years prior to the vesting date and show no objective intent by the owners at the vesting date to mine for aggregates across the

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[20] Riverside County first required a permit to mine on January 31, 1949. [Ex. 1] Riverside County Ordinance No. 348 (Jan. 31, 1949) at Art. XXIV, § 3.1. Therefore, to establish a vested right to mine without a permit, RRM must show that its operation was established as a legal nonconforming use when the County first required a permit in 1949, when the County's Ordinance regulating mining was added.

[21] *Hansen Brothers*, at 553.

[22] Staff Report, p. 5.

[23] See, e.g., Application, pp. 8, 10-13, 54-110.

[24] See, e.g., Application, pp. 15-17, 93-104. That RRM's predecessor sought a permit from the County rather than relying on any "vested rights" is noted by the Staff Report as a basis to conclude that there was no understanding of "vested rights" at the time of vesting rights and thereafter for many years. Without this intent, there is no basis for a "vested rights" determination presently.

[25] Application, pp. 54-106.

[26] Staff Report, p. 5.

[27] Staff Report, p. 27.

[28] Staff Report, p. 22, citing Ex. C-4.3 Kincheloe v. Harlow, Case No. 42415 (filed Jan. 20, 1947).

[29] Staff Report, p. 22, citing Application Ex. B-5.8 Record of Survey (May 1948).

entirety of the Proposed Vesting Rights area. Finally, a reserved mining right in a deed does not equal a vested mining right.[30] When examined with the correct legal test in mind, the evidence proposed by RRM is woefully inadequate to support a vested mining rights determination.

As such, contrary to JMBM's assertions, *Hanson Brothers* states that mining must be actively pursued as of the vesting date, even if the mining is temporarily idled, but there must be an ongoing intent to mine a specific operation.[31] An owner must have had the intent to expand that operation at the vesting date for the same purpose throughout the entire property for which the vested right is claimed. Since Riverside County adopted its first mining ordinance in 1949, prior mining history is only relevant to the extent that the evidence shows the specific intent of the owner of the mining property to extend that specific operation in existence in 1949. Applying the correct test, there is simply not enough factual support that there was any manifested objective intent as of 1949 by either F.M. Kuhry and Leilamae Harlow (who the record shows had jointly acquired the proposed vested rights area after E.E. Peacock's death in 1930) to mine for aggregate to support the Proposed Action. As noted by the Staff Report, "There is no direct evidence of Kuhry or Harlow engaging in mining activities on the Proposed Vested Rights Area in 1949 or leasing the property for mining operations."[32]2 Moreover, it is apparent that the indirect evidence in the form of a lack of activity also shows that RRM has not met is burden. From this it is apparent that there is no objective intent by RRM and its predecessors, or any prior transferor, to conduct operations that include mining the entirely of the new tract.

As stated by the Attorney General, a few preparatory acts are not likely to suffice to show the requisite investment. See 59 Op. Cal. Att'y Gen (1976) 641, 653 (stating that "a nominal amount of 'prospecting and exploratory activities' on particular land does not establish a vested right"). RRM cannot show employees hired, road system, equipment, plant or clearing of work areas or overburden or excavation on these parcels from ten years prior to 1949. it is further apparent from the record that no permit or reclamation plan for the entire Hubbs/Harlow Quarry Area has ever existed, and all permits issued for mining in this area after the vesting date by RRM contradict this request. That is, when RRM or its predecessor had the opportunity to prove up its supposed vested rights previously, it did not do so.[33] RRM appears to argue that unrelated, or very often illicit or temporary activities by adjacent property owners on or near the proposed Vested Mining Rights area is sufficient to support an intent to expand under the "diminishing asset doctrine."[34] This is simply not the case.

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[30] See *generally*, *Hansen Brothers*, at 564.

[31] *Hansen Brothers*, at 553 ("When there is objective evidence of the owner's intent to expand a mining operation, and that intent existed at the time of the zoning change, the use may expand into the contemplated area.").

[32] Staff Report, p. 4

[33] Staff Report, p. 7 ("However, these prior decisions did not consider and made no findings or representations about the remainder of the Proposed Vested Rights Area (the 600+ acre Brion Parcel)".

[34] See e.g., operation of the Cajalco Clay Pit which existed offsite to the West of the Proposed Vested Rights Area. As found by the Staff Report: "The Cajalco Clay Pit may have encroached upon on the Proposed Vested Rights Area. This activity is not attributed to the owner or operator of the Proposed Vested Rights Area and ceased in 1938, over a decade before the 1949 vesting date. Therefore, the Cajalco Clay Pit does not support a determination that a vested right to mine aggregate without a permit was established as of 1949 for the property within the Proposed Vested Rights Area." Staff Report, p. 5.

i. *The Court in Hansen Brothers made clear that the application of the "diminishing asset" doctrine did not justify a wholesale change in the principles of zoning in California.*

While the California Supreme Court approved the application of the "diminishing asset doctrine" in California in regard to determining the proper scope of the mining business at that moment of vesting, the application of that doctrine is limited to only what the owner at that time objectively manifested an intent to continue in regard to the specific business being conducted at that time. The doctrine does not allow for an expansion of a mining operation onto new parcels not contemplated by the owner at the time of vesting:

> Finally, a lawful nonconforming use may not be extended to adjacent property acquired after the zoning change went into effect except to the [*558] extent that the transferors of the property themselves had a vested right to engage in that nonconforming use on the transferred property. The court recognized this in *McCaslin* where it stated: "Of course, plaintiff's nonconforming use of the property in question cannot be expanded or extended to a separate parcel . . . ." (*McCaslin*, *supra*, 163 Cal. App. 2d at p. 350.) In that case the applicable zoning ordinance contained that restriction (*id.* at p. 344), but that is the rule of general application. (See 8A McQuillin, *supra*, § 25.208, p. 128, and cases cited.) In another quarrying case, a New Jersey court held that even though the quarry owner [***794] had been permitted [**1340] by the previous owner of an adjacent tract to carry equipment across the adjacent tract, [****47] quarrying was not being conducted on that tract. Therefore when the quarry owner acquired the tract after a zoning change went into effect, the nonconforming quarry operation could not be extended onto the new tract. "The use at the time the ordinance was adopted established the non-conforming use which defendant was entitled to continue." (*Struyk v. Samuel Braen's Sons* (1951) 17 N.J.Super. 1 [85 A.2d 279, 281].)

Hanson Brothers at 557-558. This understanding is consistent with traditional understanding of zoning and land use. Zoning ordinances allow a use to continue only because compelling immediate compliance may be unconstitutional. *Jones v. City of Los Angeles* (1930) 211 Cal. 304. 310-11. Riverside County's General Plan and Zoning Code require compliance with all applicable zoning and permitting requirements, including for mining, except for vested rights.[35] Should a use cease under the Riverside County Zoning Code, any subsequent attempt to continue or restart the use must come into compliance with zoning requirements.[36] This requirement for a permit is codified by the County in regard to mining activities, as part of the Surface Mining and Reclamation Act of 1976 ("SMARA"),

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[35] Riv Co. Ord. Section 6. PERMIT REQUIRED. Unless exempted by the provisions of Section 5 (inapplicable) or Section 17 (Vested Rights) no person, firm, corporation or private association shall conduct surface mining operations in the unincorporated area of the County of Riverside without an approved Permit.

[36] Riv C. Ord. Section 17 provides that a vested right only continues for as long as there are no substantial changes in operations: "Any substantial changes made in a surface mining operation subsequent to January 1, 1976, except in accordance with SMARA and California Code of Regulations, title 14, section 3951 (repealed), shall require an approved Permit pursuant to this ordinance."

which also provides for vested rights incurred prior to the first required permit. Under Public Resources Code Section 2776:

> (a) No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter as long as the vested right continues and as long as no substantial changes are made in the operation except in accordance with this chapter. A person shall be deemed to have vested rights if, prior to January 1, 1976, the person has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations. Expenses incurred in obtaining the enactment of an ordinance in relation to a particular operation or the issuance of a permit shall not be deemed liabilities for work or materials.

As included in this statute, which is echoed in County Ordinance 555, the vested right only continues for "as long as no substantial changes are made in the operation except in accordance with this chapter." Further, the person must have as of the date required for an authorization, "in good faith and reliance upon a permit or authorization...diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations." Both of these conditions significantly narrow the potential vested mining right by limiting this potential right to **1)** only that supported by the objective intent of the vesting rights landowner at the time of vesting, and **2)** limiting expansion of the mining operation to only what was intended at that time of vesting, as evidence by then present mining operations and incurrence of substantial liabilities in support of such mining operation.

Particularly on these facts showing no active mining occurring at the critical time period or preparation for mining, case law in California supports a significantly narrower reading of the vested rights doctrine under Public Resources Code 2776 and consistent with California's zoning laws. Courts follow a "strict policy" against expansion. *County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 687. Under this policy, "the continued nonconforming use must be similar to the use existing at the time the zoning ordinance became effective..." *Edmonds v. County of Los Angeles* (1953) 40 Cal. 2d 642, 651. The use may not be enlarged or extend into other areas or properties. *Richfield v. City and County of San Francisco* (1933) 218 Cal. 83, 85; *City of Yuba v. Cherniavsky* (1931) 117 Cal.App. 568, 573. It also may not be changed to include activities not underway when the use became nonconforming. *Paramount Rock Company v. County of San Diego* (1960) 180 Cal.App.2d 217, 230. Nor may the use be operated in such a way as to make it more intensive than it was when it became nonconforming. *County of Orange v. Goldring* (1953) 121 Cal.App.2d 442, 447-48. Again, a non-conforming mining use includes only those activities that were "integral parts" of the mining operations at the time a restrictive ordinance was adopted. *Hanson Bros Enters* at 542. Non-conforming operations only include "uses normally incidental and auxiliary to the nonconforming use." *Id.* at 565.

ii. Any vested right that may have existed has been abandoned by the sale of property to a developer with the intent to develop residential housing on the property.

Vested Mining Rights can be abandoned 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.

Here, the actions of RRM also rise to the level of abandonment. The County's Staff Report succinctly and clearly identifies that basis for this abandonment. [37] As stated by the Staff Report, in 1983, Paul Hubbs sold approximately 660 acres (the "Brion Parcel") of the approximately 792.22-acre Proposed Vested Rights Area to S.T. & Koo International. Hubbs did not lease the Brion Parcel back for mining operations nor did Hubbs retain mineral rights in the Brion Parcel. The purchasers did not mine the Brion Parcel. In 2004, S.T. & Koo International authorized Cajalco Associates to seek entitlements for a residential development on the Brion Parcel, and then sold the Brion Parcel to Cajalco Associates. Cajalco Associates proposed to develop a single-family residential community on the property and submitted Pre-Application Review, General Plan Foundation Amendment, and Habitat Evaluation and Acquisition and Negotiation Strategy documents to the County. Hubbs' sale of the property without retaining any subsurface mineral rights or other restrictions on the sale of the Brion Parcel establishes a clear intent to abandon any vested rights to mine the property without a permit and is an overt act to abandon any such rights. The purchaser's substantial investment in seeking to develop the property for residential use and failure to pursue any mining activities for several decades also shows an intent and overt act to abandon any vested right to mine the Brion Parcel property without a permit.

Additionally, case law indicates that separate parcels and artificial barriers go against intent of vested rights. Except when tangibly connected to parcels where extraction is taking place or showing signs of preparation, courts usually do not consider reserve parcels part of the nonconforming use. See *Dolomite Prods Co. Inc. v Kipers* (N.Y. App. Dev. 1965) 260 N.Y.S. 2d 918, 921:

> Artificial barriers present the same dilemma. When roads separate the active and proposed reserve areas, courts usually consider those reserve areas distinct and not part of the nonconforming use.

See also *Fred McDowell, Inc. v. Bd of Adjust. Of Township of Wall* (N.J. Super. Ct, App. Div. 2000) 757 A. 2d, 822, 827 (construction of freeway separated min lot and reserve lot, making access to the

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[37] Staff Report, p. 6.

reserve lot from the mine lot impractical). Here, Cajalco Road cuts off all land from this claimed vested right to the north of Cajalco Road as impractical. **See Exhibit "A"** Although the entirely of the Brion parcel has been abandoned, certainly the burden to show any intent to mine above Cajalco Road is higher given the lack of ability to access the property through Cajalco Road given the current infrastructure or lack thereof.

Also, the Tribe has reviewed many separate parcels and sales for this proposed Vested Rights Determination, and the management of these parcels goes against the stated intent to mine. Use of mining property for non-mining uses shows intent to not mine entire area. See *R.K. Kibblehouse Quarries v. Marlborough Township* (Pa. Commw. 1993) 630 A. 3d 937, 944. While there can be a difference if use of land is helpful for maintaining land for mining, such as grazing to keep area free of vegetation, activity ongoing on a property not consistent with mining is instead detrimental to an abandonment argument. See *Town of W. Greenwich v. A. Cardi Realty Assoc.* (R.I. 2001) 786 A.2d 354, 361.

Here, there is a patchwork of property uses currently on the proposed area for the Vested Rights Determination, indicating no intent to mine by RRM. **Attached as Exhibit "B" is a summary of the current ownership of parcels and ownership**. While it may be the case that mining rights have been reserved with deeds, such reservations are meaningless once there is an effort to turn a property into another use, and there is no activity indicating that the property is being managed in a way to preserve mining rather than seeking some other economic activity. Vesting rights are not same as reserved rights in mining lease, so even if there were a reservation, there is no apparent intent from anyone before now to mine this whole area for aggregate. Indeed, selling parcels or encumbering them with long-term leases and uses contrary to any argued intent is important to consider.

Finally, case law supports the argument that RRM's predecessors had the intent to abandon any right they had prior to the vesting period in 1949. As stated in *Hansen Brothers*, "the duration of nonuse may be a factor in determining whether the non-conforming use has been abandoned." Hanson Brothers at 569. In two cases, nonuse for periods of seven and ten years, coupled with the absence of other preservative activity, reflected an intent to abandon nonconforming mining operations. See *Lane County v. Bessett* (Or. Ct. App. 1980) 612 P. 2d 297, 301; *Holloway Ready Mix Co. v. Monfort* (Ky Ct. App. 1971) 474 S.W.2d 80, 83.

C. The County's Staff Opinion makes clear that the vested rights for the existing parcel are also on shaky grounds, and there is no time limit for revisiting this under California law.

As noted, the Tribe support the two (tentative) determinations from the Staff Report, namely that RRM has failed to provide the preponderance of the evidence that their predecessors in interest manifested an objective intent to extend surface mining activities for aggregate to the entire Proposed Vested Rights Area as of 1949, and even if they had, there is clear and convincing evidence that any vested right was abandoned when this property was sold to a third party, who did not mine the property and then sold to a developer who intended to build (and acted to build) a residential community on this land.

However, the Tribe disagrees that RRM has met its burden to establish that there is, in fact, an existing vested right to conduct aggregate quarrying on approximately 135.17 acres of the Proposed Vested Rights Area where RRM currently operates ("Current Operations"). The Staff Report

only notes that the historical operation of a quarry on a portion of the existing operations **may** support a determination of vesting on the Current Operations:

> The establishment of the Blarney Stone Quarry supports a finding that at least a portion of the Proposed Vested Rights Area within the existing RRM's current mining operation had been used for stone and gravel quarrying prior to 1949 and that mining had commenced, and substantial liabilities *may* have been incurred for the operation. However, because the quarry was not active for approximately nine years before the 1949 vesting date and at least four years after the vesting date, *the lack of activity weighs against finding a vested right to continue quarrying without a permit because quarrying was not an active use to which the land was being put on the vesting date and therefore was not a legal, nonconforming use after 1949.*

Despite this, at best, qualified support for a determination for a vested rights determination, this characterization in fact highlights a lack of evidentiary support for RRM's position. It is surprising, therefore, given that RRM has the burden of proof on this point, that the Staff Report concludes that the vesting rights should be confirmed for the location of the Current Operations.

In significant part, it appears that the County's basis for confirming the vesting rights for the Current Operations is the County's prior approvals of vesting rights. The Staff Report notes that:

> Harlow's lessee's, Livingston Rock and Gravel, first obtained a permit in 1959 to operate a rock quarry. **Obtaining a permit does not mean a vested right did not exist. However, seeking a permit indicates that the operator may have understood that their operation was not a legal nonconforming use.**
>
> **Staff believes obtaining a permit is consistent with reports that the quarry had been idle for about ten years prior to the adoption of the zoning ordinance and therefore was not an existing or continuing nonconforming use in 1949.**
>
> Subsequently, in 1970, Paul Hubbs' applied for a Conditional Use Permit for his mining operation. The Conditional Use Permit application was described by County as an "expansion" of the original 1959 permit. This permit also had a termination date of 1990. This permit shows that the County and the operators understood that permits were required to authorize such uses, and that conditions could be placed on the operation.
>
> Nonetheless, just two years later, the County recognized vested rights for Paul Hubbs's operations in the 1982 Reclamation Plan on the grounds that the quarry operations had continuously operated since the 1950s. Subsequent County decisions were made based on this

> initial determination and the current Reclamation Plan recognizes a vested rights boundary of approximately 135.17 acres.

(emphasis added). JMBM argues that this prior determination means that "the County's interpretation of Ordinance 358 is well-established, and its application of Ordinance No. 348 to the S-4 area now well settled." (Application, p 113.)

But according to the California Supreme Court, the fact that the County has previously determined that a mining interest is vested is still subject to the independent judgment of the Courts. As noted by *Hanson Brothers*, the County lacks the power to waive or consent to violation of the zoning law. *Hanson Brothers*, at p. 564, citing to *City of Fontana v. Atkinson* (1963) 212 Cal. App. 2d 499, 507-508; *Western Surgical Supply Co. v. Affleck* (1952) 110 Cal. App. 2d 388. The court must make its own decision as to the legal impact of the facts in the record, and is not bound by any concessions of law that a party may have made. (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal. 4th 1028, 1043, fn. 11,) As such, superior court must exercise its independent judgment in making determinations based on the administrative record. *Hanson Brothers* at 559, citing to *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal. 3d 28, 34-35; see *Halaco Engineering Co. v. South Central Coast Regional Com* (1986) 42 Cal. 3d 52, 63-66.)

We respectfully request that the County comply with its requirements under CEQA prior to issuing a decision on this matter, refuse to consider the Vesting Rights Determination until all pre-decisional processes have run their course. Following this process, if the request survives, we believe that the County is precluded from affirming the vested rights for the reasons provided herein.

Very truly yours,

John Nelson

John Nelson

Cc: Steve Bodmer, General Counsel, Pechanga Band of Indians
Paul Macarro, Cultural Coordinator, Pechanga Band of Indians

Exhibit A

Map Showing Cajalco Road

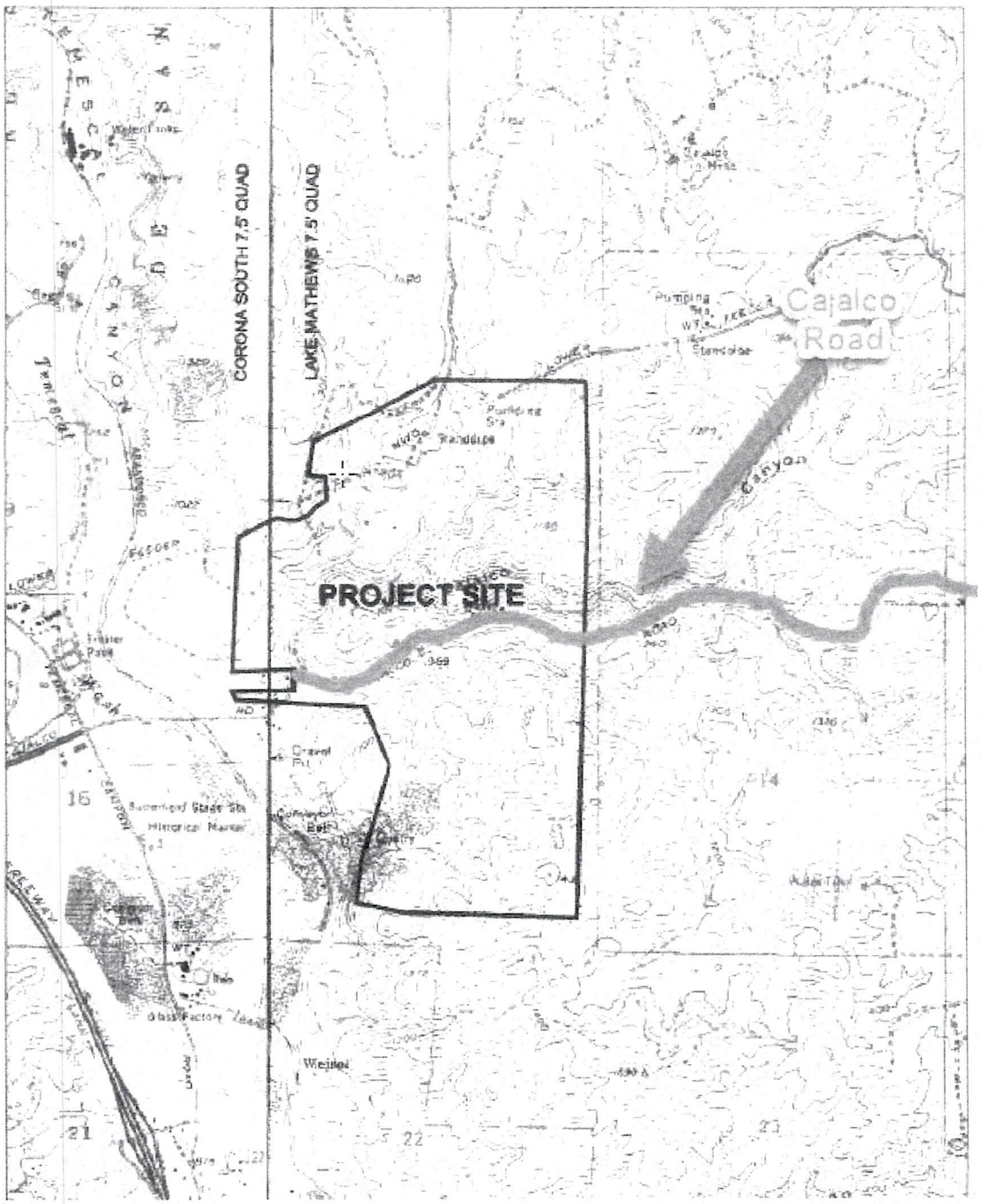

Exhibit B

Summary of Current Ownership of Parcels

The following is the history of the acquisition of land now owned by Cajalco Road Quarry, LLC ("Cajalco Quarry"), Corona Cajalco Road Development, LP ("Cajalco Development") and Robertson's Ready Mix, Ltd. (collectively, "RRM Entities"). There are 122 parcels comprising 792.22 acres of land.

I. APNs Acquired September 2, 2004

By Grant Deed recorded September 2, 2004 in the Riverside County Recorder's Office as Document No. 2004-0697355, S.T. & Koo International Corp, a Liberian corporation, granted Cajalco Associates, LLC, a Delaware limited liability company ("Cajalco Associates") the following APNs (the "Brion Parcel"):

281-020-020	281-070-023	281-150-028	281-270-008
281-030-007	281-080-022	281-160-004	281-280-001
281-030-011	281-080-024	281-170-007	281-290-008
281-030-013	281-090-002	281-170-008	281-300-003
281-040-009	281-100-005	281-190-029	281-310-004
281-040-011	281-100-028	281-200-004	278-160-037
281-050-004	281-100-040	281-210-003	278-160-040
281-050-006	281-100-041	281-210-005	278-170-001
281-050-007	281-110-015	281-230-014	278-180-028
281-060-020	281-120-008	281-240-005	278-180-029
281-060-024	281-120-009	281-250-009	278-180-031
281-060-027	281-130-009	281-260-004	
281-070-019	281-140-022	281-260-007	

By Grant Deed recorded June 19, 2007 in the Riverside County Recorder's Office as Document No. 2007-0400464, Cajalco Associates granted the Brion Parcel to Corona Twin Creeks LLC.

II. APNs Acquired September 17, 2009

By Grant Deed recorded September 17, 2009 in the Riverside County Recorder's Office as Document No. 2009-0485123, Corona Twin Creeks LLC, a limited liability company granted Cajalco Development the following APNs in addition to the Brion Parcel[1]:

278-160-010	278-160-016	281-040-003	281-060-025
278-160-011	278-160-031	281-060-001	281-110-004
278-160-012	278-180-007	281-060-002	281-110-006
278-160-013	281-020-016	281-060-016	281-130-005
278-160-014	281-230-008	281-060-017	281-190-013
278-160-015	281-040-002	281-060-018	

[1] To reduce space, only the APNs in addition to the Brion Parcel are listed here, although all APNs were listed in the September 17, 2009 Grant Deed.

III. APNs Acquired April 30, 2010

By Grant Deed recorded April 30, 2010 in the Riverside County Recorder's Office as Document No. 2010-0199408, Natalie Giovanetti, Trustee of the Natalie Giovanetti Revocable Trust, dated October 15, 2002 granted Cajalco Development the following APNs:

281-290-001 281-280-004

IV. APN Acquired May 27, 2010

By Grant Deed recorded May 27, 2010 in the Riverside County Recorder's Office as Document No. 2010-0244760, John Skirrow and Eileen J. Skirrow, husband and wife granted Cajalco Development the following APN:

281-110-003

V. APN Acquired October 12, 2010

By Grant Deed recorded October 12, 2010 in the Riverside County Recorder's Office as Document No. 2010-0487122, Esquiel Cortez and Delia Cortez, husband and wife as Joint Tenants granted Cajalco Development the following APN:

281-300-001

VI. APNs Acquired September 20, 2011

By Grant Deed recorded September 20, 2011 in the Riverside County Recorder's Office as Document No. 2011-0416809, First American Title Insurance Company, as Trustee under that certain Deed of Trust dated December 26, 2008, executed by Temescal Cliffs-8, LLC as Trustor, granted Cajalco Quarry, the following APNs:

279-530-063[2] 279-530-064[3] 281-220-003

VII. APNs Acquired October 18, 2011

By Grant Deed recorded October 18, 2011 in the Riverside County Recorder's Office as Document No. 2011-0457028, First American Title Insurance Company, as Trustee under that certain Deed of Trust dated September 28, 2007, executed by Temescal Cliffs-8, LLC as Trustor, recorded on October 3, 2007, granted Cajalco Quarry the following APNs:

279-530-060[4]	281-150-027	281-220-002	281-260-006
279-530-061[5]	281-180-021	281-220-007	281-290-007
281-140-021	281-190-028	281-230-013	

[2] Renumbered from 279-231-011.
[3] Renumbered from 279-231-017.
[4] Renumbered from 279-231-006.
[5] Renumbered from 279-231-018.

VIII. APNs Acquired March 31, 2015

By Grant Deed recorded March 31, 2015 in the Riverside County Recorder's Office as Document No. 2015-0130219, Riverside Cement Company granted Cajalco Quarry the following APNs:

281-180-006	281-150-019	281-190-020
281-180-007	281-190-012	281-190-014

IX. APNs Acquired May 3, 2016

By Grant Deed recorded May 3, 2016 in the Riverside County Recorder's Office as Document No. 2016-0176741, the Tax Collector of Riverside County granted Cajalco Quarry, through purchase of tax-defaulted property the following APNs:

281-150-014

X. APNs Acquired May 16, 2016[6]

By Grant Deed recorded May 16, 2016 in the Riverside County Recorder's Office as Document No. 2016-0198597, Temescal Cliffs-8, LLC granted Cajalco Quarry the following APNs:

281-140-001	281-140-017	281-150-018	281-190-004
281-140-002	281-230-001	281-150-017	281-190-006
281-140-013	281-230-002	281-180-010	281-190-011
281-140-014	281-190-019	281-180-014	281-190-018
281-140-015	281-190-015	281-180-015	281-260-002
281-140-016	281-140-019	281-190-002	281-230-004

XI. APNs Acquired May 17, 2016

By Grant Deed recorded May 17, 2016 in the Riverside County Recorder's Office as Document No. 2016-0200562, Temescal Cliffs-8, LLC granted Cajalco Quarry the following APNs:

278-180-027 281-100-012 281-100-014

XII. APN Acquired July 28, 2016

By Grant Deed recorded July 28, 2016 in the Riverside County Recorder's Office as Document No. 2016-0319604, Flavio O. Jimenez and Sandra Jimenez, husband and wife, and Jose Luis Ulloa and Glenis M. Ulloa, husband and wife, all as Joint Tenants, granted Cajalco Quarry the following APN:

281-260-003

---

[6] These parcels were purchased in connection with a Memorandum of Exclusive Option to Purchase recorded May 9, 2012 in the Riverside County Recorder's Office as Document No. 2012-0212983 by and between Temescal Cliffs-8, LLC and Cajalco Quarry.

Riverside County Board of Supervisors
Request to Speak

Submit request to Clerk of Board (right of podium), Speakers are entitled to three (3) minutes, subject to Board Rules listed on the reverse side of this form.

SPEAKER'S NAME: KERRY SHAPIRO

Address: 2 EMBARCADERO CENTER, 5th FL.

City: SAN FRANCISCO, CA **Zip:** 94111

Phone #: 415-984-9612

Date: 5/2/23 **Agenda #** 21.1

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

X **Support** _____ **Oppose** _____ **Neutral**

Note: If you are here for an agenda item that is filed for "Appeal", please state separately your position on the appeal below:

_____ **Support** _____ **Oppose** _____ **Neutral**

I give my 3 minutes to: [APPLICANT PRESENTATION]

BOARD RULES

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Riverside County Board of Supervisors
Request to Speak

Submit request to Clerk of Board (right of podium), Speakers are entitled to three (3) minutes, subject to Board Rules listed on the reverse side of this form.

SPEAKER'S NAME: Daniel Quinby

Address: 2 Embarcadero Cntr. Floor 5

City: San Francisco **Zip:** 94111

Phone #: 703-655-2559

Date: 5/2/2023 **Agenda #** 21.1

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

✓ **Support** _____ **Oppose** _____ **Neutral**

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_____ **Support** _____ **Oppose** _____ **Neutral**

I give my 3 minutes to: Kerry Shapiro
(Applicant Rep.)

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SPEAKER'S NAME: Neill Brower

Address: JMBM LLP, 1900 Ave. of Stars, 7th flr.

City: Los Angeles **Zip:** 91406

Phone #: 310 712-6833

Date: 5/2/2023 **Agenda #** 21.1

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

✓ **Support** _____ **Oppose** _____ **Neutral**

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_____ **Support** _____ **Oppose** _____ **Neutral**

I give my 3 minutes to: Kevin Shapiro [APPLICANT REP.]

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SPEAKER'S NAME: Jon Cloud

Address: _____

City: _____ **Zip:** _____

Phone #: _____

Date: _____ **Agenda #** 21.1

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_____**Support** _____**Oppose** _____**Neutral**

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I give my 3 minutes to: _____

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SPEAKER'S NAME: Vernon Logan

Address: _____

City: _____ **Zip:** _____

Phone #: _____

Date: _____ **Agenda #** 21.1

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

_____**Support** _____**Oppose** _____**Neutral**

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_____**Support** _____**Oppose** _____**Neutral**

I give my 3 minutes to: _____

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Riverside County Board of Supervisors
Request to Speak

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SPEAKER'S NAME: Morris Gidkens

Address: _____

City: _____ **Zip:** _____

Phone #: _____

Date: _____ **Agenda #** 21.1

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

_____**Support** _____**Oppose** _____**Neutral**

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SPEAKER'S NAME: Ray Brown

Address: _____

City: _____ **Zip:** _____

Phone #: _____

Date: _____ **Agenda #** 21.1

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

_____**Support** _____**Oppose** _____**Neutral**

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SPEAKER'S NAME: Elsa T. Trach

Address: _____

City: _____ **Zip:** _____

Phone #: (951) 756-9527

Date: _____ **Agenda #** 21.1

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

X **Support** _____ **Oppose** _____ **Neutral**

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_____ **Support** _____ **Oppose** _____ **Neutral**

I give my 3 minutes to: _____

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Request to Speak

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SPEAKER'S NAME: Bill Taylor

Address: _____

City: _____ **Zip:** _____

Phone #: _____

Date: _____ **Agenda #** 21.1

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Position on "Regular" (non-appealed) Agenda Item:

_____**Support** _____**Oppose** _____**Neutral**

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SPEAKER'S NAME: Warren Coalson

Address: _____

City: _____ **Zip:** _____

Phone #: _____

Date: _____ **Agenda #** 21.1

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Position on "Regular" (non-appealed) Agenda Item:

_____**Support** _____**Oppose** _____**Neutral**

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SPEAKER'S NAME: Meindert Zwaagstra

Address: _____

City: _____ **Zip:** _____

Phone #: _____

Date: _____ **Agenda #** 21.1

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SPEAKER'S NAME: Kim Decker

Address: _____

City: _____ **Zip:** _____

Phone #: _____

Date: _____ **Agenda #** 21.1

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_____**Support** _____**Oppose** _____**Neutral**

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SPEAKER'S NAME: Leigh Dundas

Address: _____

City: _____ **Zip:** _____

Phone #: (714) 594-9702

Date: 5/2/23 **Agenda #** 21.1

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Position on "Regular" (non-appealed) Agenda Item:

X **Support** _____ **Oppose** _____ **Neutral**

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Riverside County Board of Supervisors
Request to Speak

Submit request to Clerk of Board (right of podium), Speakers are entitled to three (3) minutes, subject to Board Rules listed on the reverse side of this form.

SPEAKER'S NAME: David Hawkins

Address: _____

City: _____ **Zip:** _____

Phone #: (949) 244-2264

Date: _____ **Agenda #** 21.1

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

_____**Support** _____**Oppose** _____**Neutral**

Note: If you are here for an agenda item that is filed for "Appeal", please state separately your position on the appeal below:

_____**Support** _____**Oppose** _____**Neutral**

I give my 3 minutes to: _____

BOARD RULES

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Riverside County Board of Supervisors
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SPEAKER'S NAME: Scott Craft

Address: PO Box 753

City: Lake Arrowhead **Zip:** 92352

Phone #: 909 907-0608

Date: May 2 2023 **Agenda #** 21.1

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

X **Support** _____ **Oppose** _____ **Neutral**

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I give my 3 minutes to: _____

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Riverside County Board of Supervisors
Request to Speak

online to in-person

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SPEAKER'S NAME: Tuba Ebru Ozdil

Address: 37705 Pechanga Road

City: Temecula **Zip:** 92592

Phone #: 661-435-0988

Date: 5/21 **Agenda #** 21.1

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

_____ **Support** _X_ **Oppose** _____ **Neutral**

Note: If you are here for an agenda item that is filed for "Appeal", please state separately your position on the appeal below:

_____ **Support** _____ **Oppose** _____ **Neutral**

I give my 3 minutes to: _____

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Riverside County Board of Supervisors
Request to Speak

Submit request to Clerk of Board (right of podium), Speakers are entitled to three (3) minutes, subject to Board Rules listed on the reverse side of this form.

SPEAKER'S NAME: Wes Speake

Address: 2623 Tourney Ln

City: Corona **Zip:** 92881

Phone #: 951-806-8626

Date: 5/2/23 **Agenda #** Robertson

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

_____**Support** ✓ **Oppose** _____**Neutral**

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I give my 3 minutes to: _____

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Riverside County Board of Supervisors
Request to Speak

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SPEAKER'S NAME: Paul E Macaro

Address: 32177 Corte Sabrinas

City: ~~Riverside~~ Temecula Riv. Cty **Zip:** 92592

Phone #: 951-770-6306

Date: 5/2/2023 **Agenda #** 21.1

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

_____ **Support** __✓__ **Oppose** _____ **Neutral**

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Riverside County Board of Supervisors
Request to Speak

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SPEAKER'S NAME: John Nelson

Address: 49 Sutton PL E

City: Palm Desert **Zip:** 92211

Phone #: (760)895-8032

Date: 5/2/23 **Agenda #** 21-1

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:

_____ **Support** _X_ **Oppose** _____ **Neutral**

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SPEAKER'S NAME: Chris Willson

Address: 9064 Cajalco Rd

City: Corona **Zip:** 92881

Phone #: 360·523·8875

Date: 5·2·23 **Agenda #**

PLEASE STATE YOUR POSITION BELOW:

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✓ **Support** _____ **Oppose** _____ **Neutral**

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