



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT

For Meeting Date: April 15, 2010

Agenda Item No. 10: Public Hearing (Continued): Request for Determination for Vested Rights, Big Cut Mine (CA Mine ID #91-09-00XX), Diane Anderson (Agent), Rick Churches (Operator and Claimant), El Dorado County.

INTRODUCTION: The State Mining and Geology Board (SMGB) serves as a Lead Agency in the implementation of the Surface Mining and Reclamation Act of 1975 (SMARA) in El Dorado County. On March 13, 2009, the SMGB received a Request for Determination for vested rights for the proposed Big Cut Mine (BCM), located in El Dorado County. At its May 14, 2009, regular business meeting, the SMGB moved to serve as the hearing officer during conduct of a public hearing for a vested right determination. At its September 11, 2009 regular business meeting, this matter was scheduled to be heard by the SMGB.

REGULATORY AND STATUTORY AUTHORITY AND CONSIDERATIONS: SMARA requires all individuals and operators to acquire a permit from the local lead agency, and to obtain a SMARA lead agency approved reclamation plan and financial assurances for reclamation, prior to the commencement of surface mining operations (Public Resources Code (PRC) Section 2770(a)). However, any person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall not 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 (PRC Section 2770(b)).

PRC Section 2776 further states:

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



Executive Officer's Report

SMGB regulations define a vested right and provides criteria for which a vested right is determined. California Code of Regulations (CCR) Section 3951 defines a vested right as follows:

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

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

The relevant criteria or evidence for determination of a claim of vested rights is discussed in CCR Section 3963, which states:

“Relevant evidence in a proceeding for determination of a claim of vested rights shall be written or oral evidentiary statements or material demonstrating or delimiting the existence, nature and scope of the claimed vested right[s]. Such evidence shall include, but is not limited to, evidence of any permit or authorization to conduct mining operation on the property in question prior to January 1, 1976, evidence of mining activity commenced or pursued pursuant to such permit or authorization, and evidence of any zoning or land use restrictions applicable to the property in question prior to January 1, 1976.



As to any land for which Claimant asserts a vested right for expansion of operations, Claimant shall produce evidence demonstrating that the Claimant clearly intended to expand into such areas. Such evidence shall be measured by objective manifestations, and not subjective intent at the time of passage of the law, or laws, affecting Claimant's right to continue surface mining operations without a permit."

In other words, the four criteria or relevant evidence, are:

1. Evidence of any permit or authorization to conduct mining operations on the property in question prior to January 1, 1976;
2. Evidence of mining activity commenced or pursued pursuant to such permit or authorization;
3. Evidence of any zoning or land use restrictions applicable to the property in question prior to January 1, 1976; and
4. For any land for which Claimant asserts a vested right for expansion of operations, Claimant shall produce evidence demonstrating that the Claimant clearly intended to expand into such areas. Such evidence shall be measured by objective manifestations, and not subjective intent at the time of passage of the law, or laws, affecting Claimant's right to continue surface mining operations without a permit.

CCR Section 3964 provides the burden of proof to be considered in making a determination of vested rights and states:

"Following the public hearing, the Board, if the Board conducted the hearing, or its committee, administrative hearing officer, or special master shall determine whether the Claimant, by a preponderance of the evidence, has demonstrated a claim for vested rights pursuant to Public Resources Code Section 2776."

BACKGROUND: Ms. Diane Anderson, on behalf of the claimant for the Big Cut Mine, filed a vested rights Request for Determination on May 13, 2009. A chronology of pertinent administrative procedural actions taken to date is summarized in Table 1 below:



**Table 1
Chronology of Pertinent Administrative Procedural Actions
Big Cut Mine
Request for Vested Rights Determination**

Administrative Action	Date Exercised
Receipt of Request for Determination with Administrative Record	March 13, 2009
Determination of Jurisdiction	April 3, 2009
Mailing of Notice of Pending Vested Rights Determination	May 15, 2009
Determination of Hearing Officer	May 14, 2009
Estimated Cost for Determination of Findings Provided to Claimant	August 12, 2009
Determination of Schedule	September 11, 2009
Commencement of Public Hearing	November 12, 2009
Receipt of Supplemental Information to Administrative Record	January 7, 2010
Further Public Notice	January 8, 2010
Notice/Submission of Written Materials	February 16, 2010
Submission of Responsive Written Materials	March 2, 2010
Continuation of Public Hearing	April 15, 2010

The Request for Determination received on March 13, 2009, is comprised of one volume which included 28 Exhibits. The Supplement to the Administrative Record was received on January 7, 2010, and the entire Administrative Record is accessible for review at:

El Dorado County Government Center
2850 Fairlane Court
Placerville 95667

and,

State Mining and Geology Board
801 K Street, Suite 2015
Sacramento, CA 95814



Submittal of Request for Determination: The claimant filed a vested right Request for Determination on March 13, 2009. A chronology of pertinent administrative procedural actions since receipt of the Big Cut Mine Request for Determination is summarized above in Table 1.

At its May 14, 2009, regular business meeting, the SMGB determined that the whole SMGB would act as the hearing officer during conduct of a public hearing for a vested right determination. On September 11, 2009, the SMGB held a pre-hearing conference hearing to address scheduling of the public hearing, and scheduled the hearing to commence on November 12, 2009. At the November 12, 2009, regular business meeting, it was decided that due to insufficient time for public comment, and to ensure proper noticing procedures, as well as at the request of the petitioner, the public hearing should be continued to April 15, 2010.

The Comment period was closed on February 16, 2010. The claimant's Rebuttal period closed on March 2, 2010. Additional comment letters by other interested parties were submitted at later dates, though all are considered late submittals. All documents received by the SMGB reflecting comments based on review of the Request for Determination, and rebuttals by the Claimant, are summarized in Table 2.

TABLE 2 Index to Pertinent Documents				
Item No.	Commenter	Author	Description	Date
1.0	Kronick, Moskovitz, Tiedemann & Girard	Scott Morris, legal counsel for claimant	Donovan Ranch Mine – Request for Vested Rights Determination	May 25, 2007
2.0	Kronick, Moskovitz, Tiedemann & Girard	Scott Morris, legal counsel for claimant	Vested Rights Determination	July 6, 2007
3.0	Law Office of Diane Anderson	Agent	Big Cut Mine Request for Determination	March 2009
4.0	State Mining and Geology Board	Stephen Testa, Executive Officer	Vested Rights Request for Determination	March 17, 2009
5.0	SMGB Chairman	Erin Garner	Determination of Jurisdiction	April 3, 2009
6.0	Department of the Army, U. S. Army Engineer District, Sacramento	Nancy A. Haley, Chief, California North Branch	Letter Correspondence	November 24, 2009



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7.0	Law Office of Diane Anderson, and Jeffer Mangels Butler & Marmaro LLP	Diane Anderson and Kerry Shapiro, agents and legal counsel for claimant	Big Cut Mine Supplement to the Request for Determination, with separate Executive Summary	January 2010
8.0	General Public	Mary Harris Nugent	Letter correspondence	February 3, 2010
9.0	General Public	Brad & Cindy White	Fax correspondence	February 9, 2010
10.0	General Public	Dorothy and Glenn Harris	Fax correspondence	February 10, 2010
11.0	General Public	Rick and Gale Taxera	Email correspondence	February 10, 2010
12.0	General Public	Gary and Lana Lentz	Letter correspondence	February 10, 2010
13.0	General Public	Louis and Sharon Hoffman	Letter correspondence	February 11, 2010
14.0	General Public	William Hill	Letter correspondence	February 12, 2010
15.0	County of El Dorado Development Services Department	Pierre Rivas, Principle Planner	Consideration of Vesting Rights to Mine for the Big Cut Mine, CA Mine ID #91-09-0016, Assessor's Parcel Number 051-430-16	February 12, 2010
16.0	Taylor & Wiley	John M. Taylor	Big Cut Vested Rights Determination	February 16, 2010
17.0	General Public	Stephen and Barbara Brown	Letter correspondence	February 20, 2010
18.0	General Public	James M. Moore	Letter of correspondence	February 22, 2010
19.0	Jeffer Mangels Butler & Marmaro LLP	Kerry Shapiro, agents and legal counsel for claimant	Responses to Public Comments on Hardesty's Request for Determination of Vested Rights, with cover letter dated March 2, 2010.	March 1, 2010
20.0	El Dorado Irrigation District	Jim Hilton, Real Estate Program Administrator	Letter of correspondence	March 25, 2010
21.0	El Dorado County Office of the County Counsel	Edward L. Knapp, Chief Assistant, County Counsel	Consideration of Vesting Right to Mine for the Big Cut Mine	April 2, 2010
22.0	General Public	Jerome Charlberg	Letter of correspondence	April 4, 2010



BACKGROUND

The subject site encompasses 149.75 acres, and is located off Big Cut Road, approximately 1.5 miles south of the town of Placerville, and about 2 miles northwest of Diamond Springs, in El Dorado County, California. The site and vicinity are underlain by meta-sedimentary basement rocks of Paleozoic age (230 to 600 million years before present; mybp), which are overlain by three sedimentary rock formations of Tertiary age (1 to 63 mybp). From oldest to youngest, these Tertiary deposits are auriferous gravels, Valley Springs formation of Oligocene (25 to 36 mybp) to Miocene age (13 to 25 mybp). The two primary deposits of the Valley Springs formation are the rhyolite volcanic rock member, and fluvial gravel deposits. The auriferous gravels were extensively mined during the latter half of the 19th Century. The younger gravel deposits would later be mined to produce road base and surfacing materials (Revised Reclamation Plan for Big Cut Mine dated July 11, 2008). In summary, historically, predecessors mined both gold and aggregate from the site and vicinity. The BCM site is situated on a south-facing slope, and characterized by two distinct east-west oriented benches.

Early Mineral Patents (1875 to 1878)

Several mineral patents were issued by the United States in the mid-1870s. These included Patent No. 1718 (Mineral Certificate No. 484), Patent No. 2964 (Mineral Certificate No. 497) and a portion of Patent No. 1386 (Mineral Certificate No. 305).

Episodic Tunnel Mining (estimated pre-1866)

Existing tunnels extend in a north-westerly direction across what appears to be the entire length of the property. Three levels of tunnels reflecting past mining activities have been reported to exist, covering an estimated 150 feet of vertical depth throughout the property. The upper tunnel is approximately 1,200 feet in length. The tunnels range in size, but frequently are reported to be on the order of six feet in height and 4 feet wide.

Landecker Mine (circa 1902)

The Landecker Mine, according to County records, operated during the early 1900s (noted in the *Register of Mines and Minerals of El Dorado County, California, State Mining Board, April, 1902*). The drift mine was on 64 acres along what is recorded as Coon Hollow Channel (elevation 1900, Sections 17 and 20, T 10 N, R 11 E).



Ownership (1921)

The property was purchased in 1921 by Stanley Triplett, who subsequently leased the property to others for mining purposes. In 1942, and in the interest of national defense, the War Production Board (WPB) of the United States Government regulated the mining industry causing nonessential mines (i.e., gold mines) to cease operations, including any mining activities being conducted on the BCM site. The national WPB's primary task was converting civilian industry to war production. It was dissolved shortly after the defeat of Japan in 1945, and was replaced by the Civilian Production Administration in late 1945, and terminated by 1947.

January 1, 1976 Activities

As of January 1, 1976, there were no mining activities documented. No reclamation plan or financial assurances were documented for any surface mining activity.

El Dorado County Measure A (1985-1988)

On April 16, 1985, the County Board of Supervisors adopted Measure A (Resolution No. 77-85), which *“prohibit all open pit or surface mining operations on the County within 10,000 feet of any existing or planned residential, church, hospital or school use unless it is found and determined that: (1) such project will not have any adverse impact upon the environment; and (2) the project will not discourage residential use.”*

Resolution No. 77-85 was amended (County Board of Supervisors Resolution No. 271-88) on August 2, 1988; whereas, the word “any” adverse impact on the environment is interpreted to mean *“any significant impact on the environment as defined and interpreted in the California Environmental Quality Act, the implementing regulations, and all applicable judicial decisions.”*

New Ownership (1988)

In the mid-1980s, the property was purchased by Clinton and Kathleen Donovan. No surface disturbance from mine related activities are evident at time of purchase. Donovan entered into an agreement with Barney Sand and Gravel to operate an aggregate production (sand and gravel) operation.



Unpermitted Surface Mining Operation, Barney’s Sand and Gravel (approx. 1991 – 1999)

At least two episodes of unpermitted surface mining activities occurred since the early 1990s (i.e., conduct of surface mining activities in absence of a SMARA lead agency approved reclamation plan or financial assurance, and without a permit or documentation of the recognition of a vested right by the SMARA lead agency). According to County and Office of Mine Reclamation (OMR) records, Barney’s Sand and Gravel operated an unpermitted surface mining operation from approximately 1991 until 1997. No permit was ever pursued, nor was a reclamation plan or financial assurance approved by the County during this period. A chronology of pertinent events and activities is summarized below:

1994	Five acres disturbed based on 1994 Mining Operation Annual Report. Sixteen acres were noted as vested and disturbed prior to 1976.
1994 to 1997	Approximately 5 to 7 acres disturbed, with one acre of disturbance reported for 1997. The Mining Operation Annual Report for 1997 notes that the mine is “ <i>Closed with no intent to resume.</i> ”
Circa late 1997	Complaint received from adjacent neighbor by County that mining activity was occurring on Donovan Ranch property.
August 13, 1998	Notice of Violation issued by County in accordance with SMARA and County Codes, and Notice to Cease and Desist Any and All Mining Activities issued by County Planning Department to Clinton Donovan.
August 27, 1998	Site operated by Barney’s Sand and Gravel (CA Mine ID #91-09-0016). A final inspection for closure was performed with “ <i>Approved reclamation complete,</i> ” noted in the 1998 Surface Mining Inspection Report, as prepared by County mine inspector, William Mitchell (consultant with Resource Design Technology), dated September 10, 1998. Inspection report notes “ <i>Post closure monitoring inspection within 6 months to confirm effectiveness of seeding</i> ” (RFD 2009, Exhibit 7). No reclamation plan noted.



September 8, 1998 1997 Mining Operation Annual Report received by County and noted “*Closed with no intent to resume.*”

June 29, 1999 1998 Mining Operation Annual Report notes during the reporting year “*Closed-reclamation certified complete by lead agency.*”

Unpermitted Surface Mining Operation, Donovan Ranch (2002 - 2003)

November 6, 2002 SMGB notified by County of alleged unpermitted surface mining operation.

November 12, 2002 OMR accompanied by County performed a site inspection. Between 20 and 25 acres were noted as recently disturbed. Operable equipment staged on site. An inventory of such equipment was compiled.

November 25, 2002 County issued to the landowner a Notice of Violation in accordance with SMARA and County Code.

December 12, 2002 SMGB issued a Notice of Violation for operating a surface mine without possession of an approved reclamation plan, financial assurance and permit.

January 28, 2003 Preliminary consideration of vested rights made by County, with additional documentation requested by County (further discussed under Section 3.5).

July 1, 2003 SMARA site inspection performed by SMGB’s inspector; numerous issues identified. Unpermitted surface mining operation documented and confirmed. A minimum of 15 to 20 acres deemed disturbed.

January 31, 2006 In *Dan Tankersley et al. v. State Mining and Geology Board* (Court of Appeal, 3rd Appellate District, CO49372), it was concluded that the weight of the evidence supported the SMGB’s findings, and based on the SMG’s inspector’s report alone (Stephen Testa with Testa Environmental Corporation), substantial evidence supported this conclusion.



Considerations Regarding Vested Rights Determination by County (2003)

On January 28, 2003, County representatives met with Rick Churches and Wendell Flint, attorney for Rick Churches. Attorney representing operator requested County find the owner has a “right-to-mine” since 1) U.S. Patent precludes County from permitting authority, 2) site is vested pursuant to SMARA, State law and that the site has not been abandoned, and 3) mine is a legal non-conforming use under local County Ordinance because continuous mining has occurred per Title 17 and Chapter 8.6 of the County Code (County’s Development Services Department correspondence dated February 12, 2010). County noted that a U. S. Patent does not preclude state or county permitting regulatory authority, but would consider all other evidence and convene a hearing, if appropriate; no additional information was provided to the County by claimant.

2000-2006 Calvert Lawsuit

In October 2000, William Calvert and the Yuba Goldfields Access Coalition filed a lawsuit against Yuba County and the State, including the SMGB and Director of the Department of Conservation (*William Calvert et al. v. County of Yuba et al.*, Sacramento Superior Court No. 00SC01434). The initial case challenged Yuba County’s vested rights determinations for five of the original eight Yuba Goldfields mining operators (Western, Nordic, Yuba River Properties, Silica Resources, and Garcia Sand and Gravel). It also challenged the Reclamation Plan of Cal Sierra, but not the “vested” gold mining operation located on the same property as Western’s aggregate operations. By 2004, the five operators other than Western were dismissed from the case based on settlement agreements acknowledging their vested rights. The vested rights of Teichert and Baldwin were never challenged.

Five distinct claims were asserted against the County and State in the Calvert lawsuit:

- Failure to direct actions against Western for violating SMARA.
- Failure to direct actions against Western for violating SMARA for not having a permit or vested rights.
- Failure to direct actions against Western for failure to have a Reclamation Plan.
- A claim against the State regarding assumption of the County’s lead agency role.
- A claim that the County violated due process requirements of notice and hearing in determining that Western had vested rights.

Before the case went to trial on the substance of Western’s vested rights, the Superior Court dismissed four of the five claims in the lawsuit. On the fifth claim, the Superior Court concluded proper notice and hearing was necessary before Yuba County could make any vested rights determination as to Western’s surface mining operation. Following appeals on both sides, the District Court of Appeals upheld the Superior Court’s decision, but remanded



the due process and determination to the SMGB for implementation (Third DCA, 145 Cal.App.4th 613, Exhibit 12).

Following the DCA ruling, the SMGB began preparation of Vested Rights Regulations (CCR, Title 14, Art. 15, Sections 3950 to 3965). In February 2007, Western submitted to the SMGB a Notice of Intent to seek confirmation of its vested rights, and between March and September 2007, the SMGB held several public hearings and discussed preliminary concerns and comments from various stakeholders. The regulations for conduct of a vested rights hearing were approved in February 2008. The claimant for the Big Cut Mine submitted its RFD in March 2009.

Additional Unpermitted Surface Mining Activities Documented (2006)

2006	Property sold by Donovan around 2006 to Joseph Hardesty and Rick Churches.
April 4, 2006	SMARA mine inspection performed by SMGB's inspector; violations and corrective measures reported.
April 25, 2007	SMARA mine inspection performed by SMGB's inspector; additional violations and corrective measures reported.

DISCUSSION: Documents reviewed and considered in analysis of the claimant's request for determination of vested rights for 149.75 acres located in the County of El Dorado are summarized in Table 2. The review included:

- Summation of evidence provided by the claimant for mining activity for the site which the claimant is seeking vested rights.
- Consideration of other factors pertinent to the SMGB in its consideration of vested rights, including criteria set forth in the SMGB's regulations and the *Hanson Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533 lawsuit.
- Summation of information for the SMGB's consideration as required in CCR Section 3964 of the SMGB's regulations.

In addition, all written comments received, and as summarized in Table 2, have been reviewed and considered, in preparation of the findings set forth herein.

In considering the evidence before the SMGB, and prior to the SMGB making its determination, the following discussion is made.



Preponderance of the Evidence: The claimant has the burden of proof in demonstrating its claim for vested rights. For most civil claims, there are two different evidentiary standards that a claimant must meet: preponderance of the evidence, and clear and convincing evidence. A third standard, proof beyond a reasonable doubt, is used in criminal cases and very few civil cases. The SMGB shall determine whether the Claimant, by a preponderance of the evidence, has demonstrated through testimony and exhibits, enough evidence to support the claim for vested rights. The amount of evidence required can vary from claim to claim, or in this case per Section. The amount of evidence that constitutes a preponderance cannot be reduced to a simple formula, and has been generally described as just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true. It is difficult to translate this definition and apply it to evidence in a case, but the definition serves as a helpful guide to judges and juries in determining whether a claimant has carried his or her burden of proof.

Objective manifestation: CCR Section 3963 states “*As to any land for which Claimant asserts a vested right for expansion of operations, Claimant shall produce evidence demonstrating that the Claimant clearly intended to expand into such areas. Such evidence shall be measured by objective manifestations, and not subjective intent at the time of passage of the law, or laws, affecting Claimant’s right to continue surface mining operations without a permit.*” In other words, there must be identifiable evidence or conditions that have a physical basis.

Mining Operation: PRC Section 2776 states that “*A person shall be deemed to have vested rights if, prior to January 1, 1976, he or she has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary therefor.*” CCR Section 3951 further states “*A vested mining right, in the surface mining context, may include but shall not be limited to: the area of mine operations, the depth of mine operations, the nature of mining activity, the nature of material extracted, and the quantity of material available for extraction.*”

PRC Sections 2729 and 2735 defines mined lands and surface mining operations. PRC Section 2729 defines mined lands to include “*...the surface, subsurface, and ground water of an area in which surface mining operations will be, are being, or have been conducted, including private ways and roads appurtenant to any such area, land excavations, workings, mining waste, and areas in which structures, facilities, equipment, machines, tools, or other materials or property which result from, or are used in, surface mining operations are located.*”

PRC Section 2735 defines surface mining operations to mean “*...all, or any part of, the process involved in the mining of minerals on mined lands by removing overburden and*



mining directly from the mineral deposits, open-pit mining of minerals naturally exposed, mining by the auger method, dredging and quarrying, or surface work incident to an underground mine. Surface mining operations shall include, but are not limited to:

- (a) Inplace distillation or retorting or leaching.*
- (b) The production and disposal of mining waste.*
- (c) Prospecting and exploratory activities.”*

Thus, mining activities or operations in considering evidence may include presence of stockpiles, plant operations transportation features (i.e., haul roads, truck scales, conveyors, etc.) and business or administration structures (e.g. office and storage facilities). Production of mined materials, and equipment used for such activity can also be considered as evidence. Prospecting and exploratory activities may include, but not be limited to, corings, trenchings, drill holes for cut samples, special reports about resources, surveys and blueprints for proposed expansion of activities.

EVIDENCE FOR CLAIMANT’S VESTED RIGHTS HEARING

Documentation in the claimant’s 2009 RFD and 2010 RFD Supplement to assess property boundaries and ownership for the vested rights determination was reviewed (2009 RFD, page 2, Exhibits 2 and 3). Evidence required by SMARA related to permits, mining activity, and zoning, and other factors to consider in the vested rights determination, were also evaluated. The review addresses that information provided in the 2009 RFD and 2010 RFD Supplement, and other data in the geologic literature or public comments received by the SMGB.

Location of Property in 2009 Request for Determination

The claimant is seeking confirmation of vested rights for aggregate mining on 149.75 acres of land (2009 RFD, Exhibit 3). The subject land is located on the Placerville, U.S. Geological Survey (USGS) 7.5-minute topographic quadrangle within portions of:

- N ½ of the NE ¼ of Section 20 and NW ¼ of the NW ¼ of Section 21 in Township 10 North, Range 11 East, M.D.M.

Detailed legal descriptions of the areas requested for the vested rights determination are provided by Section, Township, and Range by Grant Deed (2009 RFD, Exhibit 2).

A list of current El Dorado County Assessor’s Parcel Numbers (APN) for adjacent landowners is provided in Exhibit 1 of the 2009 RFD. The APN for the subject site is #051-430-16-100. The Big Cut Mine grant deed was recorded at the El Dorado County tax assessor’s office on July 30, 1988, in Book 2972, Pages 93 through 98 (2009 RFD, Exhibit



2). It is my understanding that specific property information filed with El Dorado County regarding the location of any property to be vested must be referenced both by Section, Township, and Range and by County Assessor's Parcel Number.

Ownership of Property in 2009 Request for Determination

The current land owner for the 2009 RFD is Joseph and Yvette Hardesty. Wells Fargo Bank, Los Angeles, serves as the Lessee or Lien Holder.

Permits Prior to January 1, 1976

No evidence in the 2009 RFD or 2010 RFD Supplement exist demonstrating that a permit for aggregate or gold surface mining operation on the claimant's lands prior to January 1, 1976, has been issued by the County. Furthermore, it is clear from the record that the County never received supporting documents in order to convene a public hearing to consider whether the claimant had established vested rights. Barney's Sand and Gravel surface mining operation from 1991 – 1999 was deemed by the County and the SMGB as an unpermitted surface mining operation. The absence of a permit, approved reclamation plan and financial assurance caused the operator to cease operations, and reclaim the site which was completed to the County's satisfaction in 1998.

Zoning and Land Use Restrictions Prior to January 1, 1976

The site is currently zoned Agricultural (A). The currently proposed end use, should surface mining commence, is cattle grazing and agricultural land use.

Evidence of Mining Activity Prior to January 1, 1976

Mining and historical records in the 2009 RFD and 2010 RFD Supplement provide evidence of mining activity up to about the mid-1940s. Evidence for mining includes primarily the existence of shafts and an underground network of tunnels that extend below a large portion of the site. Such mining activity appeared to be primarily for gold derived from the Tertiary gravel deposits.

A 1966 date is documented to occur on a tunnel wall; however, there is no supportive evidence from the mid-1960s to January 1, 1976, and up to about the early 1990s, of any mining activity. At least two episodes of unpermitted surface mining activities occurred since the early 1990s (i.e., no SMARA lead agency approved reclamation plan or financial assurance).



Mining Depth

Historically, the deepest pre-1976 mining within the claimant's proposed vested rights area was up to about 150 feet below ground surface based on existing underground tunnels (2010 RFD Supplement, Exhibits 37 and 38). No drill log data is available. Estimated depth and thickness of Tertiary aggregates is uncertain.

Aggregate Mining Operations

Types of pre-1976 mining activities within the area of the claimant's 2009 RFD and 2010 RFD Supplement are described and documented in Exhibits 37, 38, and 39. Activities include initial placer and hydraulic mining, and tunneling in Tertiary gravel deposits for gold. Within the limits of the proposed vested rights area, the primary product produced prior to 1976 was gold. The following mining activities were associated with production of these commodities:

- Excavation of auriferous sand and gravel primarily via hydraulic mining.
- Gold recovery.
- Sidecasting of material after gold extraction forming tailings piles.

The amount of material available for extraction is uncertain. No specific information is provided in the 2009 RFD and 2010 RFD Supplement, and no estimate was made during review of the 2009 RFD and 2010 RFD Supplement.

The 2009 RFD and 2010 RFD Supplement provides no substantive information relating to aggregate mining prior to January 1, 1976.

4.4.7 Access and Haul Roads

Access roads are evident in various aerial photographs; however, evidence that suggest that such roads are haul roads used for mining purposes is insufficient.

Production and Sales

No historic or current production or sales records were contained in the 2009 RFD and 2010 RFD Supplement.



Other Mined Products

Only gold is referred to as a product prior to January 1, 1976 in the 2009 RFD and 2010 RFD Supplement.

Plant and Equipment Operations

Excavating methods that may have been used to mine gold and aggregate prior to 1976 are indicated by the nature of the bluffs that were hydraulically mined, and equipment found in tunnels which included ore cart rails, gold pans, shovels, etc. (2010 RFD, Exhibit 39).

Evidence Claimant Clearly Intended to Expand Operations

SMARA Section 3506.14 states that, for any land for which the claimant asserts a vested right for expansion of operations, there must be evidence that the claimant clearly intended to expand into such areas, as measured by objective manifestations and not subjective intent.

Market Reports

No marketing reports are incorporated in the 2009 RFD or 2010 RFD Supplement.

Reserves Maps

No reserves maps or reports are incorporated in the 2009 RFD or 2010 RFD Supplement.

Surface Mining Ordinances No. 2042, 2044, 2075, 3004, and 4467

Since 1979, following the adoption by the County of mining Ordinance No. 2042, five amendments have followed. These ordinances set forth procedures for the review and approval of reclamation plans, issuance of permits to conduct surface mining operations, and posting of bonds to ensure timely and proper reclamation of mined lands (2009 RFD, Exhibit 13). Although areas that were considered vested were exempt from obtaining a permit, no mining operations could be continued without the approval of a Reclamation Plan and financial assurances.

In 1979, the County established a surface mining and reclamation ordinance (Ordinance No. 2042; 2009 RFD, Exhibit 13). In Ordinance No. 2044, adopted on December 11, 1979, it states:



“No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to the provisions of this chapter as long as such vested right continues; provided, however, that no substantial changes have been made in any such operation except in accordance with the provisions of this chapter. A person shall be deemed to have such vested rights if, prior to January 1, 1976, he has in good faith and in reliance upon a permit or other authorization, if such permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary therefor. 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 of materials.

A person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall submit to the granting authority and receive, within a reasonable period of time, approval of a reclamation plan for operations to be conducted after January 1, 1976.

Nothing in this chapter shall be construed as requiring the filing of a reclamation plan for, or reclamation of, mined lands on which surface mining operations were commenced and terminated prior to January 1, 1976.”

This ordinance was amended in 1980 with no change in language (Ordinance No. 2075; 2009 RFD, Exhibit 13). On June 24, 1980, the County adopted Ordinance 3004 which established districts.

On November 4, 1997, El Dorado County adopted Ordinance No. 4467 (Ordinance No. 4467; 2009 RFD, Exhibit 13). Under Section 8.36.060 (Vested Rights) it is stated:

“No person who has established a vested right to conduct surface mining operations as a legal non-confirming use in conformance with chapter 17.20 of the county code prior to January 1, 1976, shall be required to secure a permit to mine, so long as the vested right continues and as long as no substantial changes have been made in the operation except in accordance with SMARA, State regulations, applicable state law, and this chapter. Where a person with vested rights has continued surface mining in the same area subsequent to January 1, 1976, said person shall obtain County approval of a reclamation plan and financial assurances covering the mined lands disturbed by such subsequent disturbed mining. In those cases where an overlap exists (in the horizontal and/or vertical sense) between pre- and post-Act mining, the reclamation plan shall call for reclamation proportional to that disturbance caused by the mining after the effective date of the Act (January 1, 1976).



All other requirements of State law and this chapter shall apply to vested mining operations.”

Claimant’s 2008 Reclamation Plan

No surface mining operation is currently in operation on site. At its meeting held on September 11, 2008, the SMGB’s Surface Mining Standards Committee moved to recommend to the full SMGB conditional approval of a proposed reclamation plan dated April 23, 2007, and revised July 11, 2008, pending completion of an environmental study.

Confirmation of Vested Rights by El Dorado County

There has been no confirmation of vested rights granted by El Dorado County.

No Substantial Change in Nature of Operations or Surrounding Lands

The mining of gold in the BCM vicinity began in the mid-to-late 1800s and continued episodically until the 1940s, and possibly up to the mid-1960s. The amount of gold produced is not documented.

Interpretation of Aerial Photographs

Based on observations made on October 18, 2002, GeoResource Management in their correspondence dated October 29, 2002, claims that there has been “*continuing mining use of the site from 1976 to the present*” (2010 RFD Supplement, Exhibit 44). Based on review of aerial photographs from September 1952 through 1998 to July 1997, and 1976 to present, Holdrege & Kull in a declaration dated January 7, 2010, discusses surface disturbance, and the presence of access roads, but does not correlate such disturbance to mining activity. The dates of the photographs reviewed (2010 RFD Supplement, Exhibits 45 through 50) are:

- September 2, 1952 (black and white frame)
- July 31, 1962 (black and white frame)
- 1973 (color infrared frame)
- 1978 (color frame)
- 1993
- 1998 (black and white frame)

Maximum Gold Resource Depth

To establish a maximum depth of gold resources essentially corresponds to the maximum depth of Tertiary gravel.



FINDINGS: The claimant is seeking confirmation of vested rights for surface mining of gold and aggregates on 149.75 acres of land located on the Placerville, U.S. Geological Survey (USGS) 7.5-minute topographic quadrangle within portions of:

- N $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Section 20 and NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 21 in Township 10 North, Range 11 East, M.D.M.

Based on review of Executive Officer's findings, and other documents received (as summarized in Table 2 herein), the following findings are made:

Finding No. 1: Within Sections 20 and 21, 149.75 acres are under consideration. Evidence for mining included the presence of historic hydraulic mining activities, and underground gold mining (extensive underground tunnel network, shafts, etc.) to around the mid-1940s. A 1966 date is documented to occur on a tunnel wall; however, there is no supportive evidence from the mid-1960s to the early 1990s of any mining activity. At least two episodes of unpermitted surface mining activities occurred since the early 1990s (i.e., no SMARA lead agency approved reclamation plan or financial assurance).

Finding No. 2: In addition, pursuant to CCR Section 3963, part of the findings necessary for vesting is that the lands in question were authorized for mining prior to SMARA. CCR Section 3963 states "*Such evidence shall include, but is not limited to, evidence of any permit or authorization to conduct mining operation on the property in question prior to January 1, 1976, evidence of mining activity commenced or pursued pursuant to such permit or authorization, and evidence of any zoning or land use restrictions applicable to the property in question prior to January 1, 1976.*"

Although areas that were considered by the County as vested were exempt from obtaining a permit, no mining operations could be continued without the approval of a Reclamation Plan and financial assurances. Mining Ordinance Nos. 2044, 2075, 3004 and 4467, clearly reflect this requirement for all vested surface mining operations. At no time after January 1, 1976, did there exist a SMARA lead agency approved reclamation plan or financial assurance.

Finding No. 3: No reclamation plan was submitted to the SMARA lead agency (County) prior to March 31, 1988. SMARA (PRC Section 2770(b)) states "*Any person with an existing surface mining operation who has vested rights pursuant to Section 2776 and who does not have an approved reclamation plan shall submit a reclamation plan to the lead agency not later than March 31, 1988. If a reclamation plan application is not on file by March 31, 1988, the continuation of the surface mining operation is prohibited until a reclamation plan is submitted to the lead agency.*"



Finding No. 4 – Executive Officer’s Preliminary Summary of Findings: The Executive Officer’s preliminary summary of findings, presented herein, is supported by the evidence in the record.

CONSIDERATION BEFORE THE SMGB: The SMGB must determine if vesting exists for the specific property within the 149.75 acres proposed to be vested based on the evidence. The 149.75 acres are located in the Placerville USGS 7.5-minute topographic quadrangle within portions of:

- N ½ of the NE ¼ of Section 20; and
- NW ¼ of the NW ¼ of Section 21 in Township 10 North, Range 11 East, M.D.M.

Detailed descriptions of specific property within each of the sections are provided by Section, Township, and Range (2009 RFD, Exhibits 2 and 3).

In determining the area of mine operations to be vested, the SMGB may consider the following options based on the evidence:

- The entire 149.75 acres in the 2009 RFD and 2010 RFD Supplement as referenced in the Title Documents (2009 RFD, Exhibits 1 and 2).
- Some portion of the 149.75 acres in the 2009 RFD and 2010 RFD Supplement.
- None of the area proposed within the 2009 RFD and 2010 RFD Supplement.

The SMGB has three primary actions to consider.

Consideration No. 1: The SMGB must first consider acceptance of the findings set forth in the Executive Officer report herein (Motion No. 1). The SMGB can consider:

1. Acceptance of the findings as stated; or
2. Modifying the findings, and then accepting them.



Consideration No. 2: The second series of considerations the SMGB must undertake is determining whether the SMGB will recognize the vested rights claimed by the claimant (Motion No. 2).

Pursuant to CCR Section 3964, following the public hearing, the SMGB shall determine whether the Claimant, by a preponderance of the evidence, has demonstrated a claim for vested rights pursuant to PRC Section 2776. The determination shall identify upon what specific property the vested rights are established and the scope and nature of surface mining operations included within the established vested right or rights. For each Section, the SMGB can consider:

1. Recognition that the Claimants Vested Rights to mine, without limitations, are supported by persuasive preponderance of the evidence;
2. Recognition that the Claimants Vested Rights to mine, with specified limitations (to be listed), are supported by persuasive preponderance of the evidence; or
3. Determination that the vested rights claimed by the petitioner are not supported by a preponderance of the evidence.

The SMGB is required to make a determination no later than 60 business days after completion of the vested rights public hearing. Following adoption of the SMGB's final determination, notification will be made by certified mail to the party claiming vested rights and to the local agency originally holding SMARA lead agency status. Notification of the final determination of the SMGB shall also be made by regular mail to any person who commented at, or participated in, the public hearing, any person who has requested such notice, and shall be immediately posted upon the SMGB's website.

Consideration No. 3: Should the SMGB recognize the claimant's vested rights, in whole or in part, then an adequate reclamation plan must be prepared by the claimant that is reflective of the proposed surface mining operation in accordance with SMARA and the SMGB's regulations (Motion No. 3).



SUGGESTED MOTION LANGUAGE: The Executive Officer offers the following motions for the SMGB's consideration:

Motion No. 1 - for the SMGB to accept findings:

Mr. Chairman, in light of the information before the SMGB today, I move that the Board accept the findings developed by the Executive Officer, and in consideration of written comments received, accept the findings set forth by the Executive Officer.

Motion No. 2 - for the SMGB to recognize, with or without modification, or reject vested rights claim, for the proposed Big Cut Mine site:

Mr. Chairman, in light of the information before the SMGB today, I move that the Board [pick one] recognize the petitioner's claim of vested rights without limitations, [or] recognize the petitioner's claim of vested rights with certain specific limitations, [or] find that the petitioner's claim of vested rights is not supported by a preponderance of the evidence.



Motion No. 3 - for the SMGB to request claimant to provide an adequate reclamation plan should vested rights be granted:

Mr. Chairman, in light of the information before the SMGB today, I move that the Board notify the claimant that it must provide an adequate, SMARA compliant reclamation plan for the proposed surface mining operations to the SMGB office within 90 days from today.

Respectfully submitted:

Stephen M. Testa
Executive Officer



**Proceedings for
Request for Determination of Vested Rights**

FOR:

**Big Cut Mine
Richard Churches, and Joseph and Yvette Hardesty (Claimant)
Diane Anderson and Kerry Shapiro (Agents)**

The purpose of this Proceeding is to allow the Petitioner and the public to present arguments pertaining to the claimant's request for a vested rights determination for its proposed operations and lands located within the County of El Dorado. The Order of the Proceedings is set forth in the SMGB's regulations pursuant to CCR Section 3961.

Following the presentations, the SMGB will consider the issues before it and may ask questions of the participants.

The Order of the Proceedings will be as follows:

The public hearing will proceed in the following manner:

Thursday, April 15, 2010

1. Identification of the Record by the Executive Officer;
2. Statement on Behalf of the Executive Officer;
3. Statements on Behalf of Claimants for the Big Cut Mine;
4. Statement on Behalf of El Dorado County;
5. Statement on Behalf of El Dorado Irrigation District;
6. Statements on Behalf of the Public;

Please submit a "blue speakers card" if you wish to address the SMGB on this issue.

7. Other parties of real interest;



8. Rebuttal on Behalf of Claimants for the Big Cut Mine;
9. Deliberation of the SMGB;
10. Motion to close the public hearing.

Note: (a) Notwithstanding the above, the Chairman of the SMGB or the delegated committee's selected chair, or the Board's designee for purposes of conducting the hearing may in the exercise of discretion, determine the order of the proceedings, provide for additional testimony, or provide for additional rebuttal.

(b) The Chairman of the SMGB, or the SMGB's designee, may impose reasonable time limits upon statements and presentations and may accept written statements in lieu of oral statements. Written statements must be submitted at least five business days prior to the hearing.

(c) All statements of fact made at the hearing shall be under oath as administered by the Chairman of the SMGB, or the SMGB's designee.

(d) The public hearing shall be recorded either electronically or by other convenient means.

