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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Siskiyou)

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CLIFTON H. MCMILLAN, III et al.,  
Plaintiffs and Appellants,  
v.  
COUNTY OF SISKIYOU,  
Defendant and Respondent.

C067581

(Super. Ct. No.  
SCSCCVPT081404)

OPINION ON REHEARING

Butte Creek Minerals, Ltd. (BCM) and its owner Clifton McMillan (McMillan) challenge the Order to Comply (Order) issued by the Siskiyou County Planning Department (the Department) with respect to a surface mining operation. The Order cites violations of both state mining law and the conditions of the use permit, and requires certain actions with 30 days.

The trial court denied plaintiffs' petition for a writ of mandate to vacate the Order and to remand for a vesting determination; plaintiffs appealed.

BCM and McMillan contend that they have a vested right to mine that, under the diminishing asset doctrine, extends to the entire property, not just the portion previously mined. They argue that because the mine is vested, no use permit is required (although they obtained a use permit), thus they need not comply with the *conditions* of the use permit, some of which are cited in the Order.

In our initial opinion, we held plaintiffs could not assert a vested right to mine Timberhitch Quarry. Plaintiffs petitioned for rehearing, while the County and others requested publication of our initial opinion. We denied publication, granted rehearing, requested supplemental briefing on four questions relating to vested rights, and invited letter briefs amici curiae. We have received supplemental letter briefs from the parties and seven letter briefs amici curiae.<sup>1</sup>

As we explain, we now hold that plaintiffs are entitled to a vesting determination and such determination may properly be based on actions of plaintiffs' predecessors in mining the Timberhitch Quarry. A determination of whether plaintiffs have a vested right to continue to mine Timberhitch Quarry, and, if so, the extent of that right, is a necessary prerequisite to enforcement actions because the vested determination governs the

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<sup>1</sup> We have received letter briefs amici curiae from William Calvert, Elfriede Calvert, and the Yuba Goldfields Access Coalition, and Western Aggregates LLC; two from Jim and Jack Williamson; John Taylor; the Pacific Legal Foundation; and Granite Construction Company, Vulcan Materials Company, Graniterock, Lehigh Hanson, Inc., and Knife River Construction.

coverage of the reclamation plan and the financial assurances. We shall reverse and remand for a vesting determination.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

##### *The Mine*

The property at issue is known as the Timberhitch Quarry or Timberhitch Pit and is located in the Butte Valley in eastern Siskiyou County. The property consists of about 1700 acres. The Timberhitch Quarry has two separate open-pit quarries within one-quarter mile of each other. The western pit was mined before 1976 and has mostly been reclaimed for agricultural uses. More recent mining has occurred in the eastern pit, which is about 20 acres in size and six to eight-feet deep.

McMillan acquired the property in 1967. He established a corporation, Timberhitch, Inc., and transferred the property to it. Timberhitch mined the property for sand, gravel and rock.

In 1971, Timberhitch entered into a Land Conservation Contract (a Williamson Act contract) with Siskiyou County (the County).<sup>2</sup> A second contract was executed the following year, adding additional land. In the County, surface mining was considered a compatible use with agricultural preservation and not subject to a use permit.

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<sup>2</sup> The Williamson Act, Government Code section 52100 et seq., authorizes contracts between local government and local landowners to preserve agricultural land by restricting use to agriculture or compatible uses in exchange for reduced property taxes. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 791.)

In 1989, McMillan partnered with Theodore Thom, M.D., who held title to the land as security for his investment. In 2003, McMillan established a new corporation for the mining business, BCM, and Thom deeded the mineral rights of the property to BCM.<sup>3</sup> Eventually, in May 2006, the Williamson brothers (Jack and Jim) acquired the surface rights to the property.

*Regulation of Mining Activity*

In the mid-1970's, the government began regulating surface mining. In 1974, the Siskiyou County Board of Supervisors adopted an ordinance that required a use permit for mining.<sup>4</sup> (Siskiyou Ord. No. 623, adding § 10-6.1502, subd. (d) to Siskiyou County Code (SCC).)

The next year, the Legislature enacted the Surface Mining and Reclamation Act (SMARA) (Pub. Resources Code, § 2770 et seq.). SMARA requires that every surface mining operation have a permit, a reclamation plan, and financial assurances to implement the planned reclamation. (Pub. Resources Code, § 2770, subd. (a).) Those with a vested right to conduct surface mining prior to 1976 are exempt from the permit requirement. (Pub. Resources Code, § 2776, subd. (a).)

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<sup>3</sup> McMillan and his wife own all of the stock in BCM.

<sup>4</sup> In its answer to the petition, the County asserts that a use permit was required for surface mining since 1958. It argues that since no use permit was obtained until 1979, mining at Timberhitch Quarry was not legal and therefore no vested rights arose. At the hearing before the Board of Supervisors, however, the County stated no use permit was required before 1974.

Regardless of vested status, all operations conducted after January 1, 1976, require a reclamation plan. (*Id.*, subd. (b).)

In response to SMARA, the Siskiyou County Board of Supervisors adopted chapter 5 of Title 10 of the SCC (SCC), entitled "Surface Mining and Reclamation." (SCC, § 10-5.101 et seq.) "The purpose of this chapter is to implement and supplement" SMARA. (SCC, § 10-5.101, subd. (a).)

In 1979, the Siskiyou County Planning Commission (Planning Commission) issued Timberhitch a five-year, renewable use permit, UP-31-79, to operate three gravel excavation sites. A reclamation plan was a condition of the permit and no bond was required. The permit noted its automatic termination if not used for the stated purpose for a period in excess of one year. The use permit was renewed in 1984 and 1989. The renewals required a \$10,000 security bond and public liability and property damage insurance in the amount of \$500,000.

In 1990, the Department wrote McMillan requesting the certificate of insurance and performance bond. In response, McMillan questioned the County's right to impose subsequent conditions on mining sites that were in existence before the requirement of a use permit was imposed. When McMillan provided a certificate of insurance, the Department wrote him that it did not meet the County's requirements.<sup>5</sup> Timberhitch's corporate

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<sup>5</sup> The record does not show that McMillan ever satisfied the insurance requirement.

powers were suspended in 1990 for failure to file the annual information statement and pay taxes.<sup>6</sup>

A new use permit, UP-79-31, was approved in 1993, but not issued to Timberhitch until 1998. This permit required security of \$2,600, insurance in the amount of \$500,000, and submission of a Hazardous Materials Business Plan (HMBP). Just prior to issuance of the use permit, the County Department of Public Health wrote the Department that it had not received an HMBP from Timberhitch. A site visit indicated the mine was not operating, but if the mine recommenced operation and the site contained specified amounts of solid, liquid or gas, or if it generated any waste, Timberhitch would be required to submit an HMBP.

The mine was inspected in 2003, 2004, and 2005. The inspection reports noted the mine appeared to have been idle since 2002 and the site remained compliant with the use permit and the reclamation plan. The quarried area was stable. Although the site had not been reclaimed, considerable vegetation had established itself naturally.

The status of the mine as compliant changed in 2006. At the request of the Williamson brothers, the new owners of the surface rights of the property, an inspection was conducted in

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<sup>6</sup> It is not clear from the record who, if anyone, conducted surface mining operations at the Timberhitch Quarry after Timberhitch's corporate powers were suspended and until BCM acquired the mineral rights. The record does not show that Timberhitch's corporate powers were ever revived.

August 2006. At this inspection, several violations were noted, including the presence of hazardous material. The 2006 inspection found the site was not in compliance with the use permit and the financial assurances were inadequate to complete reclamation of the quarry site. The mine had been idle since 2002; no reclamation had been conducted and about 23 acres remained disturbed and contained inoperative equipment and junk materials. An interim management plan (IMP) was requested for the idle mine.<sup>7</sup> A draft IMP had been submitted, but it was returned for revisions. An updated Financial Assurance Cost Estimate (FACE) and proof of insurance were also requested; the operator indicated he was unwilling to provide them. If the requested documents were not received, a public hearing would be set for revocation of the use permit.

After this inspection, there was a meeting between the Department and McMillan about the deficiencies at the site and considerable correspondence. The Williamson family also wrote the County about what they perceived as problems; they were particularly concerned about hazardous material on the property and the lack of insurance. The Department sent McMillan notice of the problems and the steps he needed to take.

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<sup>7</sup> SMARA requires an IMP within 90 days of a surface mining operation's becoming idle. "The [IMP] shall provide measures the operator will implement to maintain the site in compliance with this chapter, including, but not limited to, all permit conditions." (Pub. Resources Code, § 2770, subd. (h)(1).)

McMillan submitted a draft IMP in November of 2006 and a revised draft in April 2007. In November 2007, the Department rejected McMillan's draft IMP, requiring significant revisions, including obtaining liability insurance in the amount of \$500,000 and providing a FACE for areas disturbed after 1976. In addition, the Department of Public Health required an HMBP.

The State soon became involved.<sup>8</sup> The Office of Mine Reclamation (OMR) in the Department of Conservation threatened to remove the mine from the list of approved mines (the AB 3098 list) if a revised FACE was not submitted. The OMR inspected the mine in July 2007. A few weeks later, the OMR sent the Department a 15-day SMARA enforcement notice. The notice set forth the SMARA violations at the mine, which included the need for an amended reclamation plan, adjusted financial assurances, and an IMP. Unless the County took appropriate actions to remedy the violations, the Department of Conservation would step in to enforce SMARA. In September of 2007, the OMR removed the mine from the AB 3098 list.

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<sup>8</sup> SMARA provides for "home rule," with the local lead agency, usually the city or county, having primary responsibility for enforcing SMARA against mine operators. (Pub. Resources Code, §§ 2774.1, subd. (f)(1); 2728.) Despite "home rule," the Director of the State Department of Conservation may get involved in enforcement of SMARA after he has notified the lead agency of a violation and the lead agency fails to take action within 15 days, or the Director determines the violation amounts to "an imminent and substantial endangerment to the public health or safety, or to the environment." (Pub. Resources Code, § 2774.1, subd. (f)(1).)

*The Order to Comply*

These regulatory actions lead to the Department's issuing an Order on August 21, 2007. The Order is the subject of this appeal. The Order stated that the Timberhitch Quarry was in violation of SMARA as well as the conditions of the use permit. The Order directed BCM to provide, within 30 days, an updated reclamation plan, an IMP, an updated FACE, an HMBP, and proof of liability insurance in the amount of \$500,000. The draft IMP that had been submitted was inadequate due to the failure to include an HMBP, proof of \$500,000 of liability insurance, and an updated FACE.

The Planning Commission held a public hearing to consider affirming the Notice to Comply. McMillan appeared as CFO of BCM. He argued that the information he had provided, including the Williamson Act contracts covering the land, established that he had a vested right to mine. He claimed that with a vested right that arose before 1976, he did not need a use permit. He noted that a list of mines in Siskiyou County showed no vested mines. He argued no one wanted to recognize vested rights.

The hearing was continued.<sup>9</sup> A supplemental staff report stated that even though mining, or natural resource development, was permitted in agricultural areas of the County under the

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<sup>9</sup> A tape recording of the continued hearing was not available due to "technical difficulties." Facts from that hearing are taken from the minutes.

Williamson Act, a use permit was still required to mine. A use permit was not required only for mines in production prior to 1974, as those mines were vested. In the case of Timberhitch Quarry, however, because the boundaries of the mining had expanded, a use permit was required.

At the continued hearing, McMillan continued to argue he had a vested right to mine the entire property, asserting "you go where the gravel is." He argued that since the County had rejected his IMP after the 60-day deadline for action, it was valid.

County Counsel noted that, had the mine been idle for five years, that fact would be substantial in determining whether the mine was still in use. He stated the provisions of the Williamson Act were not planning issues; before the Planning Commission was only the issue of whether the mine conformed to mining regulations and the conditions of the use permit.

The chairman noted a key issue was whether vested rights were lost because the mine was idle. He said staff faced the issue of establishing the area of vested rights.

The Planning Commission unanimously affirmed the Order.

*Appeal to the Board of Supervisors*

BCM appealed to the County Board of Supervisors. BCM appointed McMillan as its agent in the appeal.

At that hearing, McMillan reiterated his position that a vested miner was not required to have a permit. He noted that on a spreadsheet of mines in the County, not one mine was listed as vested, although there was much mining activity before 1976.

A member of the planning staff indicated there were five or six vested mines in the County. Staff indicated that any land disturbed after 1976 had to be reclaimed, even if that land had been disturbed before 1976. McMillan noted his argument was "totally misunderstood." He knew that every mine was subject to a reclamation plan, financial assurance, and an IMP. He was arguing that as a vested miner he did not have to have a use permit.

Staff argued that "we can only conclude" a determination was made at the time McMillan obtained the use permit and McMillan accepted the requirements and conditions. McMillan responded he relied on the Department to tell him what was required. "But implied consent is not achieved by something that I was hornswaggled or duped into accepting." McMillan requested a forum to determine vesting.

The supervisors decided they needed additional information on vested rights and the chain of title. The hearing was continued for a month.

Staff responded in writing to the supervisors' questions. As to vesting, staff reported that McMillan had refused to submit a map or legal description of the area disturbed before 1976. The use permit appeared to limit mining to 20 acres and McMillan had no evidence that he could mine all 1700 plus acres. The County had not made a vesting determination since McMillan had not provided information to substantiate a vested right. McMillan had not challenged the requirement of a use permit in

1979; he participated in two of the three five-year reviews. Staff concluded the use permit and its conditions were valid.

At the continued hearing, staff stated vesting was important to determine the areas requiring reclamation. There had been no five-year review of the use permit since 1993. A conservative estimate was that it would cost \$13,000 for reclamation.

McMillan again claimed he had the right to mine the entire acreage.

By a vote of four to one, the Board of Supervisors denied the appeal. The Board's resolution found: "Appellant has not presented any evidence to prove he has obtained a vested right to conduct surface mining operations by virtue of pre-1976 operations."

*Petition for Writ of Mandate*

BCM and McMillan petitioned for a writ of mandate and declaratory relief, contending the County abused its discretion and failed to proceed in the manner required by law by (1) failing to define vested rights; (2) failing to give effect to vested rights; (3) upholding FACE demands; (4) upholding insurance demands when the County was statutorily immune from liability; (5) upholding IMP and reclamation demands; and (6) in finding McMillan was not a party to the Williamson Act contracts because he did not own the property when BCM owned the mineral rights. They sought remand for further proceedings.

The petition alleged that after the Board of Supervisors voted to uphold the Order, plaintiffs discovered a spreadsheet

that listed the BCM mine as vested. They had requested this information before, but the spreadsheet they received was incomplete and did not identify Timberhitch Pit as vested.

The County answered, asserting numerous affirmative defenses, including lack of standing on the part of McMillan, failure to exhaust administrative remedies, statute of limitations, laches, failure to state a cause of action, and waiver of any claims of vesting.

The trial court granted in part petitioners' motion to supplement the administrative record. The court granted the motion as to, inter alia, the complete spreadsheet of mines in Siskiyou County, which noted a "v" for vesting next to the BCM mine. The motion was denied as to McMillan's declaration.

In its extensive statement of decision, the trial court first determined that McMillan lacked standing. Although the Order was directed to "Butte Creek Minerals, Inc. [sic] (Clifton McMillan)," it was speculative that McMillan would be personally liable for penalties or other costs of noncompliance. The court found McMillan failed to provide the Department with an adequate map to determine vesting, so BCM failed to establish a vested right. The court noted that a portion of Timberhitch *could be* vested, but it had not been determined.

The court exercised its independent judgment in deciding if BCM was a party to the Williamson Act contracts. It found the Williamson Act applied to BCM as the owner of the mineral rights. The Williamson Act contracts, however, provided no exemption from compliance with SMARA. The mine was not exempt

from the requirements of a use permit, a reclamation plan, IMP, FACE, and liability insurance.

The court found that even if the full spreadsheet were to show that the mine was vested, other evidence supported the finding of no actual vesting determination; therefore, the absence of the full spreadsheet was not prejudicial.

The court denied the petition and the complaint for declaratory relief. The judgment, including the award of costs and litigation expenses, was against both BCM and McMillan.

## **DISCUSSION**

### I

#### *Mootness*

The County contends the issues raised by this appeal are moot. It asserts the Timberhitch Quarry has been idle since 2002 without an approved IMP, so the mine is considered abandoned under Public Resources Code section 2770, subdivision (h)(6) [mine that is idle for over one year without an IMP that is approved or under review is considered abandoned and reclamation must commence].<sup>10</sup> The County argues that BCM and McMillan have lost any right to conduct surface mining operations or secure a vesting determination.

Plaintiffs contend their failure to gain approval of the IMP is due to the County's insistence in including conditions of

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<sup>10</sup> Under recently enacted Public Resources Code section 2777.5, an idle mining operation without an approved IMP may be returned to idle status provided certain conditions are met.

the use permit, the issue on appeal. Moreover, they contend "the case cannot possibly be moot" because the County refuses to consent to vacating the Order.

We agree with the plaintiffs on this point. Where there is an outstanding judgment against the appellant, the case is not moot. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 730; *Green v. Superior Court* (1974) 10 Cal.3d 616, 622.)

## II

### *Standing*

Plaintiffs further contend the trial court erred in determining that McMillan had no standing to bring the petition for a writ of mandate. They argue that he was named in the Order and McMillan is an operator of the mine.<sup>11</sup>

A petition for a writ of mandate may be filed by a "party beneficially interested." (Code Civ. Proc., § 1086.) "To establish a beneficial interest, the petitioner must show he or she has some special interest to be served or some particular right to be preserved or protected through issuance of the writ. [Citation.] Stated differently, the writ must be denied if the petitioner will gain no direct benefit from its issuance and

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<sup>11</sup> Under SMARA, an operator is defined as: "Any person who is engaged in surface mining operations, himself, or who contracts with others to conduct such operations on his behalf, except a person who is engaged in surface mining operations as an employee with wages as his sole compensation." (Pub. Resources Code, § 2731.) BCM is listed as the mine operator in the inspection reports of 2004-2006. Timberhitch is listed as mine operator in 2003.

suffer no direct detriment if it is denied. [Citation.] This standard is applicable to proceedings in administrative mandate . . . ." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232-1233 (*Waste Management*), disapproved on another ground in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155.) The interest must be direct and substantial. (*Waste Management, supra*, 79 Cal.App.4th at p. 1233.)

The Order is directed to BCM. The parenthetical notation of McMillan appears to be only a contact reference. The 2006 inspection report lists BCM as the mine operator. As the trial court found, it is speculative that McMillan has any liability under the Order.

The petition alleged that under a contract renewed annually, McMillan is the assignee of BCM's mineral extraction rights under the mineral grant deed. In answering, the County denied this allegation based on lack of information. As an affirmative defense, the County alleged McMillan is not an owner or operator and thus does not have standing. The points and authorities in favor and in opposition to the petition are not included in the record, nor is a transcript of any oral argument. The County never responded to the allegation of an assignment of rights, and the issue was neither addressed by anyone in the administrative proceedings nor mentioned in the trial court's statement of decision.

If McMillan were the assignee of the extraction rights to Timberhitch Quarry, he would have standing to petition for a

writ of mandate. (See *Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co.* (2011) 191 Cal.App.4th 1394, 1402 [assignee of claim has right to sue on it].) The record, however, does not show that McMillan ever proved his status as assignee. Tellingly, there is no mention of the assignment in the trial court's thorough 26-page statement of decision. "'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' [Citation.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) McMillan has failed to show the trial court erred in concluding that he lacked standing. "Lack of standing is a fatal jurisdictional defect that requires judgment against the plaintiff. [Citation.]" (*Scott v. Thompson* (2010) 184 Cal.App.4th 1506, 1510.)

However, although McMillan lacked standing, he is a proper party to this appeal. Any "party aggrieved" may appeal. (Code Civ. Proc., § 902.) "One is aggrieved when the judgment has an immediate, pecuniary, and substantial effect on his interests or rights. [Citation.]" (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1342.) McMillan was clearly aggrieved and may appeal because the judgment, including the award of costs, *despite the trial court's finding that he lacked standing*, is against him *personally*, as well as BCM.

### III

#### *Standard of Review*

Inquiry on administrative mandamus extends to “whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (Code Civ. Proc., § 1094.5, subd. (b).)

In determining whether findings are supported by the evidence, the standard of review depends on the nature of the right involved. (Code Civ. Proc., § 1094.5, subd. (c).) “If the administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence. [Citations.] The trial court must not only examine the administrative record for errors of law, but must also conduct an independent review of the entire record to determine whether the weight of the evidence supports the administrative findings. [Citation.] If, on the other hand, the administrative decision neither involves nor substantially affects a fundamental vested right, the trial court’s review is limited to determining whether the administrative findings are supported by substantial evidence. [Citations.]” (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313.) For purposes of applying the independent judgment test, a “fundamental vested right” is one that is already possessed as

opposed to a right that is merely sought. (*Kalway v. City of Berkeley* (2007) 151 Cal.App.4th 827, 832.)

The trial court concluded that while a portion of Timberhitch Quarry might be vested, it had not been so determined. Absent a vesting determination, the court found there was no fundamental vested right and applied the substantial evidence standard of review.

Plaintiffs assert that because a vested right was at issue, the court was required to apply the independent judgment test. They rely on *Halaco Engineering Co. v. South Central Coast Regional Com.* (1986) 42 Cal.3d 52, 57, in which our Supreme Court held the independent judgment standard of review is proper on review of an administrative decision denying a vested rights claim under the Coastal Act. Further, in *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 550 (*Hansen Brothers*), the high court noted, with implicit approval, that the trial court applied the independent judgment standard in a case involving a claim of vested mining rights.

Any error in the trial court's application of the proper standard of review is of little matter here because, as we explain *post*, we hold plaintiffs are entitled to a vesting determination as a matter of law. On questions of law in mandate proceedings, we apply our independent judgment without reference to the trial court's actions. (*Santa Clara Valley Transportation Authority v. Rea* (2006) 140 Cal.App.4th 1303, 1313.)

IV

*Vested Rights*

Plaintiffs contend they have a vested right to mine the entire property of Timberhitch Quarry without a use permit because the property was mined before 1976, the date of SMARA's implementation.<sup>12</sup> They contend the trial court erred in upholding the County's refusal to make a vesting determination. They argue the County must make a vesting determination before imposing the Order. Plaintiffs request a writ of administrative mandamus requiring the County to develop a vesting procedure and conduct a vesting determination.

The County responds that the issue of vesting needs to be "put in perspective." The County contends the issue of vesting was not before the Board of Supervisors and is not at issue on appeal; only the Order is the subject of the appeal. It contends that the requirement of an updated reclamation plan and an updated FACE is not affected by whether there is a vested right. It asserts that nothing in the Order prevents plaintiffs from submitting the necessary documentation to obtain a vesting determination.

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<sup>12</sup> Amici Western Aggregates LLC, Granite Construction Company, Vulcan Materials Company, Graniterock, Lehigh Hanson, Inc., and Knife River Construction contend a common law vested right to mine Timberhitch Quarry arose in 1974 when the County passed an ordinance requiring a permit to mine. Amici contend SMARA merely recognized this vested right in 1976. As the question of whether the vested right arose in 1974 or 1976 is not relevant to our analysis, we need not answer it.

The County fails to acknowledge that some of the demands in the Order, such as the requirement of an HMBP and insurance, are based solely on the conditions of the use permit.<sup>13</sup> Plaintiffs (correctly) argue that if the use permit were not required, there would be no basis for requiring compliance with its conditions.

McMillan clearly and repeatedly raised the issue of vesting as a defense to his failure to comply with the conditions of the use permit. Indeed, he first raised the issue in 1990, in response to the County's demand for proof of insurance. In the current proceedings, the supervisors continued the matter, requesting additional information from staff on the issue of vesting. Because the issue of vesting affects whether plaintiffs must comply with *all* the terms of the Order, the issue is properly before us.

A. *The Law*

The concept of vested rights arises frequently in the land use context. "In light of the state and federal constitutional takings clauses, when zoning ordinances or similar land use regulations are enacted, they customarily exempt existing land

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<sup>13</sup> In its supplemental brief after the grant of rehearing, the County acknowledges that some conditions of the Order--those based on the permit--would not apply if plaintiffs have a vested right. Further, as discussed *post* in Part IV. E., the vesting determination is an essential first step in SMARA enforcement. It governs the coverage of the reclamation plan and the financial assurances to implement it. The SMARA requirements cannot be divorced from the vesting determination.

uses (or amortize them over time) to avoid questions as to the constitutionality of their application to those uses.

[Citation] Such exempted uses are known as nonconforming uses and provide the basis for vested rights as to such uses.

[Citation.]” (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 623 (*Calvert*), citing *Hansen Brothers, supra*, 12 Cal.4th 533, 551-552.) An exemption for vested rights appears in both SMARA and the SCC.

SMARA requires that the entity conducting surface mining operations have a permit, an approved reclamation plan, and approved financial assurances for reclamation. (Pub. Resources Code, § 2770, subd. (a).) However, “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.” (Pub. Resources Code, § 2776, subd. (a).)

This statute also addresses a second aspect of vesting--the requirement of reclamation.<sup>14</sup> "Nothing in this chapter shall be construed as requiring the filing of a reclamation plan for, or the reclamation of, mined lands on which surface mining operations were conducted prior to January 1, 1976." (Pub. Resources Code, § 2776, subd. (c).) Plaintiffs do not challenge the need to provide a reclamation plan. (AR 961)

The SCC contains an identical definition of vested rights in the mining context. (SCC, § 10-5.103, subd. (w).) If a vested right to conduct surface mining operations is obtained before January 1, 1976, no use permit is required "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." (SCC, § 10-5.106, subd. (a).) A use permit is required for any surface mining operation which is not determined to be vested. (SCC, § 10-5.107.) "A use permit

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<sup>14</sup> Throughout these proceedings the County viewed the issue of vesting only in terms of the reclamation requirement. For example, when McMillan argued to the Board of Supervisors that vested miners were not required to have permits, Deputy Planning Director Sandy Roper responded that reclamation was required for all land disturbed on or after January 1, 1976. Staff argued that a map of the area disturbed prior to 1976 was needed to determine vesting. After the initial hearing, in response to the Board's question why vesting was important, staff responded: "It is important to determine what portions of the mine are vested because areas that are not vested are subject to reclamation." In its brief, the County continues to view vesting only in terms of reclamation. The County seems not to understand plaintiffs' argument that, under Public Resources Code section 2776, a vested right eliminates the permit requirement.

shall also be required for the expansion of a surface mining operation beyond the boundaries of the vested area." (*Ibid.*)

Generally, a nonconforming land use may continue only if it is similar to the use existing when the land use regulation became effective.<sup>15</sup> "Intensification or expansion of the existing nonconforming use, or moving the operation to another location on the property is not permitted. [Citation.]" (*Hansen Brothers, supra*, 12 Cal.4th at p. 552.) Applying this rule to mining is problematic because unlike other uses that operate within an existing structure or boundary, mining anticipates expansion into new areas of the property as the resources are excavated. (*Hansen Brothers, supra*, at p. 553.) In *Hansen Brothers*, our Supreme Court considered whether "this extension is a prohibited expansion of a nonconforming use into another area of the property." (*Ibid.*)

The Supreme Court concluded the answer was no. It found the diminishing asset doctrine, "an exception to the rule banning expansion of a nonconforming use that is specific to mining enterprises," applied in California. (*Hansen Brothers, supra*, 12 Cal.4th at pp. 553, 559.) Under the diminishing asset

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<sup>15</sup> The County's general zoning ordinance limits a nonconforming use to the geographical area that the use occupied on or before June 17, 1974. "Except as otherwise provided in this article, all uses of land . . . existing on or before June 17, 1974, may be continued although the particular use . . . does not conform to the provisions of this chapter . . . ; provided, however, no nonconforming . . . use of land may be extended to occupy a greater area of land . . . than is occupied on or before June 17, 1974." (SCC, § 10-6.2501.)

doctrine, "[w]hen 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." (*Hansen Brothers, supra*, at p. 553.)

The diminishing asset doctrine recognizes that mining anticipates expansion into areas not previously used. "The very nature and use of an extractive business contemplates the continuance of such use of the entire parcel of land as a whole, without limitation or restriction to the immediate area excavated at the time the ordinance was passed. A mineral extractive operation is susceptible of use and has value only in the place where the resources are found, and once the minerals are extracted it cannot again be used for that purpose. "Quarry property is generally a one-use property. The rock must be quarried at the site where it exists, or not at all. An absolute prohibition, therefore, practically amounts to a taking of the property since it denies the owner the right to engage in the only business for which the land is fitted." [Citations.] *An entire tract is generally regarded as within the exemption of an existing nonconforming use, although the entire tract is not so used at the time of the passage or effective date of the zoning law.*' [Citation.]" (*Hansen Brothers, supra*, 12 Cal.4th at pp. 553-554, original italics.)

Here, plaintiffs contend they have a vested right to mine the entire Timberhitch Quarry, even portions that were not mined before 1976, based on the diminishing asset doctrine. Before the requirement of a use permit went into effect (in 1974 under

the SCC and in 1976 under SMARA), in reliance on the authorization provided by the Williamson Act contracts, under which mining was permitted, surface mining was conducted at Timberhitch Quarry. Plaintiffs contend the intent was to mine the entire property as "you go where the gravel is."

The County contends the diminishing asset doctrine does not apply in surface mining cases governed by SMARA. We disagree; both *Hansen Brothers* and *Calvert* involved SMARA.

*B. Obtaining a Vested Right*

Public Resources Code section 2776 (section 2776) provides that a permit is not required for one "who has obtained a vested right to conduct surface mining operations prior to January 1, 1976." The parties disagree on what a mine operator must do to "have obtained" a vested right.

Plaintiffs contend that section 2776 is self-executing and since there was mining at Timberhitch Quarry before 1976, they have a vested right to continue mining without a permit. They rely on the portion of section 2776 that provides: "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." (Pub. Resources Code, § 2776, subd. (a).)

The County contends the mine operator must formally establish the vested right and the vested right must be

established before any transfer of the property for the successor to retain the vested right. The County's position finds support in a 1976 opinion by the Attorney General addressing several issues relating to vested rights under section 2776.<sup>16</sup> (59 Ops.Cal.Atty.Gen. 641 (1976).) One of the questions before the Attorney General was whether the vested right to conduct surface mining operations without a permit is a property right and whether it is transferable through sale or other means. (59 Ops.Cal.Atty.Gen. 656 (1976).) The Attorney General's analysis began by noting that the acquisition of a vested right is grounded on equitable principles of estoppel and the exemption from the permit requirement extends only to those who incurred substantial liabilities in reliance on existing permits or authorization. "This rule means that since the exemption created by section 2776 is by its own terms a vested right, and since the acquisition of a vested right is based on estoppel, only the person who acted in reliance on a governmental approval and is thus in a position to estop a revocation of the approval may claim that his reliance has ripened into a vested right. In that sense, the *creation* of a

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<sup>16</sup> The opinion does not address the situation in this case where no permit was required to mine before 1976. The opinion notes, "We do not address the question of the existence or scope of any potential vested rights in those cases where no governmental permit or authorization was required prior to January 1, 1976. Although section 2776 suggests such cases exist (". . . If such permit or other authorization was required. . . ."), no such case has been brought to our attention." (59 Ops.Cal.Atty.Gen. 654, fn. 6.)

vested right is a personal process, and a successor in interest to real property may not assert that his predecessor's actions created a vested right in favor of the successor, where the predecessor did not himself establish the vested right." (*Id.* at pp. 656-657, original italics.) Once the vested right has been established, however, it is a property right and may be transferable to a successor in interest. (*Id.* at p. 657.)

Applying this view of a vested right under section 2776--as a personal right of the person who relied on prior authorization which must be established by that person, not his successor--would defeat plaintiffs' claim to a vested right because here no one established a vested right. The parties agree that no vesting determination has been made, and a vesting determination is the remedy plaintiffs seek. During the period Timberhitch conducted surface mining operations, it did not assert a vested right.<sup>17</sup> Instead, it obtained a use permit, which was renewed. We decline to follow the Attorney General's Opinion, however, because it is contrary to well-established law on the continuation of nonconforming uses as applied in *Hansen Brothers*.

In *Hansen Brothers*, plaintiff operated an aggregate production business that its predecessors had operated in 1954

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<sup>17</sup> McMillan argues as though he and Timberhitch are one and the same. Timberhitch, however, was a corporation. "Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations.]" (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.)

when Nevada County adopted a zoning ordinance that prohibited mining. (*Hansen Brothers, supra*, 12 Cal.4th at pp. 540, 542, 561.) Because the mine was operated prior to the enactment of SMARA, the permit requirement of section 2776 did not apply, but the requirement of a reclamation plan did. (*Hansen Brothers, supra*, at p. 547.) Hansen Brothers, claiming a vested right to mine the entire 60-plus acre area, submitted a reclamation plan for that area. The Planning Commission found that the vested nonconforming use status had been lost through discontinuance and that the proposed excavation would be a prohibited intensification of the nonconforming use. (*Id.* at p. 548.) Although the Board of Supervisors, the trial court, and the appellate court agreed, the Supreme Court reversed and remanded for a determination of the scope of the vested right under the diminishing asset doctrine. (*Id.* at p. 576.) The court concluded Hansen Brothers could claim a vested right to continue the nonconforming use conducted by its predecessors in 1964. (*Id.* at p. 542.) The court noted, "The use of the land, not its ownership, at the time the use becomes nonconforming determines the right to continue the use. Transfer of title does not affect the right to continue a lawful nonconforming use which runs with the land. [Citation.]"<sup>18</sup> (*Id.* at p. 541, fn. 1.)

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<sup>18</sup> Amicus John Taylor urges us to reject this portion of the *Hansen Brothers* holding, which cites McQuillen on Municipal Corporations as authority. But we are required to follow decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The court reviewed the various parcels at issue to determine whether the present owner had a vested right and determined the evidence established a vested right only as to two parcels. (*Hansen Brothers, supra*, 12 Cal.4th at p. 564.) This conclusion, however, did not preclude a new hearing "at which evidence may be presented on whether the previous owners of the 2 remaining parcels had vested mining rights on those parcels at the time they were conveyed to Hansen Brothers." (*Hansen Brothers, supra*, at p. 565, fn. 23.) Under *Hansen Brothers*, a mine operator may assert a vested right based on the conduct of a predecessor.

Thus, plaintiffs may properly base their claim of a vested right to continue mining Timberhitch Quarry on the fact that a predecessor entity mined the quarry prior to the adoption of the SCC ordinance requiring a permit, and prior to the enactment of SMARA. This does not mean, however, that plaintiffs have established a vested right to mine *all* of Timberhitch Quarry simply by showing that mining occurred at Timberhitch Quarry before 1976. As we discuss immediately *post*, because the scope and continued vitality of plaintiffs' vested right to mine, if any such right is found to exist, is subject to numerous and complex factual questions, a vesting determination at a public hearing is necessary.

#### *C. Vesting Determination*

The SCC sets forth how a vested right to surface mining is determined. "The horizontal boundaries of the vested rights shall be determined by the Planning Director based on

information presented by the operator to substantiate the vested right. The Planning Director shall evaluate the information presented by the operator. Additional information may be requested by the Planning Director if it is determined to be needed to evaluate the possible vested rights." (SCC § 10-5.106, subd. (d).)

The County first contends plaintiffs did not raise the issue of vested rights in their appeal to the Board of Supervisors. We disagree. One reason stated for the appeal is that the Order conflicts with state law and the County Code, citing section 2776 and SCC § 10-5.106, which are both provisions dealing with vested rights. In their petition for a writ of mandate, plaintiffs first claim the County failed to make a vesting determination. Thus plaintiffs raised the issue of vested rights below.

The County next contends that plaintiffs failed to provide sufficient information for the Planning Director to make a vesting determination. The County contends, and the trial court found in denying the petition for a writ, that plaintiffs failed to provide a map showing pre-1976 mining activity. This was the conclusion of staff in response to questions by the Board of Supervisors about vested rights.

Plaintiffs' vested right claim, however, is not limited to the area mined before 1976. Instead, they claim a vested right to mine the entire Timberhitch Quarry under the diminishing asset doctrine approved in *Hansen Brothers*, described *ante*. Although McMillan did not specifically mention the diminishing

asset doctrine, he claimed before the Planning Commission that he had a vested right to mine the entire property. His reasoning was the same as that underlying the diminishing asset doctrine--"you go where the gravel is." Plaintiffs' claim of a vested right, therefore, is not dependent on a map showing areas mined before 1976 and it cannot be rejected solely due to their failure to provide such a map. Instead, plaintiffs' claim to a vested right requires a hearing to resolve numerous factual issues.

Under section 2776, " 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*."

(Italics added.) "These italicized portions of section 2776 encompass several factual issues that must be resolved through the adjudicative exercise of judgment" and require a hearing. (*Calvert, supra*, 145 Cal.App.4th at p. 624.)

Plaintiffs' vested rights claim also involves the diminishing assets doctrine, which raises additional factual questions. Plaintiffs must show not only that part of the property was used to quarry or excavate when the zoning law became effective, but also "there must be evidence that the owner or operator at the time the use became nonconforming had exhibited an intent to extend the use to the entire property owned at that time." (*Hansen Brothers, supra*, 12 Cal.4th at p.

556.) That intent must be demonstrated by "objective manifestations and not by subjective intent." (*Hansen Brothers, supra*, at p. 556; see *id.* at p. 576 (conc. opn. of Werdegar, J.).)

Another relevant factual question is whether plaintiffs have abandoned any vested right they may have had. Section 2776 excuses the permit requirement only "as long as the vested right continues." SCC § 10-6.2501 permits a legal nonconforming use to continue provided such use has not been wholly discontinued for one year. Here, there was evidence there had been no mining at Timberhitch Quarry since 2002.<sup>19</sup> The Chairman of the Planning Commission identified the key issue as whether vesting was lost because the mine was idle, but this issue was not resolved. Whether plaintiffs have abandoned the vested right to continue mining Timberhitch Quarry is another question to be answered by a vesting determination hearing.

"[I]f an entity claims a vested right pursuant to SMARA to conduct a surface mining operation that is subject to the diminishing asset doctrine, that claim must be determined in a public adjudicatory hearing that meets procedural due process requirements of reasonable notice and an opportunity to be heard." (*Calvert, supra*, 145 Cal.App.4th at p. 617.) Adjacent property owners "are entitled to reasonable notice and an

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<sup>19</sup> Plaintiffs contend they have not abandoned mining; they assert they "stockpiled rock and continued to sell it, and maintained processing and batching equipment."

opportunity to be heard in an evidentiary public adjudicatory hearing before that vested rights claim is determined.

[Citations.]” (*Calvert, supra*, at p. 627.)

The County contends its procedure for determining vested rights is “quite adequate” and provides due process. But the procedure set forth in SCC § 10-5.106(d) does not comply with the requirements set forth in *Calvert*. For example, the County’s procedure provides, “No public notice is required for this determination.” (*Ibid.*) However, public notice of the hearing is required by *Calvert*. (*Calvert, supra*, 145 Cal.App.4th at p. 627.) The County’s procedure is not adequate.

#### *D. Estoppel*

In a catch-all argument headed, “Other Points which Undermine Appellants’ Position,” the County argues plaintiffs are *estopped* from challenging the requirement of a use permit because plaintiffs obtained a permit, renewed it, and never before challenged the requirement. Some amici advance this same argument, at times characterizing plaintiffs’ actions as a waiver.

The County’s failure to properly present this argument under a separate heading, rather than under a general catch-all heading, forfeits the contention. (Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Roscoe* (2008) 169 Cal.App.4th 829, 840.) Further, the County did not plead estoppel as an affirmative defense to the petition for a writ of mandate. The question of estoppel is generally a factual question (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 266) and,

consequently, the County cannot raise this issue for the first time on appeal. (See, e.g., *Central National Ins. Co. v. California Ins. Guarantee Assn.* (1985) 165 Cal.App.3d 453, 460 [equitable estoppel "must be pleaded, either as a part of the cause of action or as a defense"].)

Because the County did not properly raise this argument, we decline to address it. If appropriate, the County may raise its estoppel argument in the vesting determination hearing.

*E. Remedy*

"A vested rights determination acts as the fulcrum in SMARA policy because it (or its analogue, a permit to surface mine) governs the coverage of the reclamation plan and, in turn, the financial assurances to implement the plan. [Citations.] A vested rights determination functions in the SMARA scheme as does a surface mining permit—it sets the tone for all that follows." (*Calvert, supra*, 145 Cal.App.4th at p. 625.)

Because we deem a vested rights determination necessary to determine what is required to comply with SMARA in terms of reclamation and financial assurances, and because the County has failed thus far to provide plaintiffs with such a determination, we must reverse, in its entirety, the judgment that upheld the Order. Once it has been determined whether, and to what extent, plaintiffs have a vested right to continue to mine Timberhitch Quarry, further enforcement actions may be taken as necessary.

Because we reverse the judgment, we need not address plaintiffs' other contentions.

**DISPOSITION**

The judgment is reversed. We direct the trial court to issue a writ of mandate ordering the County to rescind its Order to Comply, to vacate existing notices of violations and penalties with respect to Timberhitch Quarry, and to conduct a vesting determination in compliance with *Hansen Brothers, supra*, 12 Cal.4th 533 and *Calvert, supra*, 145 Cal.App.4th 613, as to plaintiffs' claim of a vested right to continue mining Timberhitch Quarry. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(b).)

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DUARTE, J.

We concur:

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NICHOLSON, Acting P. J.

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HULL, J.