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6
7 SUPERIOR COURT OF CALIFORNIA

8 COUNTY OF PLACER

9
10 MEADOW VISTA PROTECTION,

Case No. SCV 19614

11 Petitioners and Plaintiffs,

**DEFENDANT CHEVREUX
AGGREGATES, INC.'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
OPPOSITION TO MEADOW VISTA
PROTECTION'S MOTION FOR
SUMMARY ADJUDICATION**

12 v.

13 CHEVREUX AGGREGATES, INC.;
14 COUNTY OF PLACER; COUNTY OF
PLACER PLANNING DEPARTMENT; and
DOES 1- 50, inclusive,

DATE: May 15, 2007

TIME: 8:30 a.m.

DEPT.: 4

JUDGE: Hon. Charles D. Wachob

15 Respondents and Defendants.
16 _____/

Class II Disposition Date: January 12, 2008

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INTRODUCTION

In its Motion for Summary Adjudication ("MSA"), Plaintiff MEADOW VISTA PROTECTION ("MVP") seeks a ruling that CHEVREAU'S AGGREGATES, INC.'s ("CHEVREAU'S") Land Use Permit to operate an asphalt plant (LDA-786) has lapsed based on a crabbed reading of the 1995 version of Placer County's Zoning Ordinance ("Zoning Code"). By couching the debate over whether LDA-786 has lapsed, MVP seeks to isolate the Court's review of the issuance and operational history of the permit so as to destroy CHEVREAU'S's right to produce asphalt at the Meadow Vista quarry. MVP ignores CHEVREAU'S's affirmative defenses that CHEVREAU'S's surface mining operations, which include the asphalt plant, are fully vested and therefore not subject to the language of the 1995 Zoning Code [Answer, at ¶¶ 43, 47; 9:20-24, 9:25-28, 11:17-20, and 12:7-10]: (1) Defense to Second and Third Causes of Action – vested operations; (2) Seventh Affirmative Defense – vested pursuant to Surface Mining and Reclamation Act [SMARA] and the Zoning Code; (3) Seventeenth Affirmative Defense – statute of limitations; and (4) Twentieth Affirmative Defense – claims of permit invalidity are barred under the doctrine of vested rights.

Vesting is the dominant issue in this case, and is determinative of MVP's motion and the remaining causes of action in this case,¹ because LDA-786 cannot lapse if LDA-786 was authorized and approved as a historic vested intermittent use, accessory to the mining operations both pre-zoning statute and under LD-1030. LDA-786 cannot be reviewed without considering the *constitutional nature of CHEVREAU'S's vested surface mining operation*.²

The MSA is procedurally deficient because it does not address the entire Third Cause of

¹ The Fifth Cause of Action was voluntarily dismissed by MVP, and the Sixth and Seventh Causes of Action are "deemed dismissed" because MVP never amended its pleading after the Court sustained CHEVREAU'S's demurrer. MVP's Fourth "Cause of Action" for injunction is merely the remedy for the Second and Third Causes of Action.

² CHEVREAU'S offers a plethora of evidence establishing its vested status in the form of historic documents, public records, and testimony dating from 1946 through the present, including confirmation of such vesting from not only Placer County, but also Nevada County, California Division of Mines and Geology; Central Valley Regional Water Quality Control Board, and the Legislative Counsel for the California Legislature as well. In addition, CHEVREAU'S provides testimony through its expert, Lou Merzario, regarding the nature of mining operations throughout California, the applicability of zoning ordinances to intermittent uses, the numerous mining ordinances which treat operations such as asphalt and concrete production as component parts of the overall mining operation, and the application of the SMARA statute to CHEVREAU'S's historic mining operations.

1 Action in violation of CCP §437c(f)(1). MVP's MSA is based on incomplete and misleading
2 facts, some of which raise evidentiary issues which will be addressed in Chevreaux's
3 supplemental brief entitled Objections to Plaintiff's Evidence and filed in accordance with
4 California Rules of Court 3.1352 and 3.1354. Consideration of all the disputed facts requires
5 denial of the MSA, and judgment in favor of CHEVREAUX on both the Second and Third
6 Causes of Action.³

7 Finally, the lapse provision of the 1995 Code [MVP SMF Nos. 13, 14, and 15] does not
8 apply to CHEVREAUX's operations because of its vested status defense. This is a material issue
9 of fact in dispute. Materiality is measured by the law applicable to the legal theories put in issue
10 by the complaint. Anderson v. Heart Federal Savings & Loan Assn. (1989) 208 Cal.App.3d 202,
11 210, 256 Cal.Rptr. 180; see also Kelly v. First Astri Corp. (1999) 72 Cal.App.4th 263, 270, 84
12 Cal.Rptr.2d 810 [fact to be material must relate to a claim or defense that is in issue and must also
13 be necessary to judgment somehow]. As such, a material issue of disputed fact exists, and
14 therefore Plaintiff's Motion for Summary Adjudication must be denied.

15 STATEMENT OF FACTS

16 CHEVREAUX presents the following facts, which expand on that portion of MVP's
17 Statement of Facts with which CHEVREAUX agrees. A Separate Statement of Disputed and
18 Undisputed Material Facts ("SSDUMF") accompanies this Opposition in accordance with CCP
19 §437c(b) and CRC 3.1350(d). The facts are supported by CHEVREAUX's Evidence in Support
20 of Opposition ("CES") in accordance with California Rule of Court 3.1350(g).

21 **I. RELEVANT OPERATIONAL, LAND USE, AND REGULATORY HISTORY⁴**

22
23 ³ This Court has already ruled that Placer County, as the permitting agency, has absolute discretion to determine the
24 status of CHEVREAUX's permits. [Ruling on Submitted Matter at 2:6-13, 10/16/06.] Placer County was dismissed
25 by this Court after MVP failed to amend its Complaint. [Order Dismissing Action, 11/9/06.] Since the County is no
26 longer under this Court's jurisdiction, no relief can be fashioned relative to these permits. CHEVREAUX has brought
27 a Motion for Judgment on the Pleadings as to the Second, Third, and Fourth Causes of Action based on the Third
28 DCA's opinion (published after this Court ruled on the demurrers) in William Calvert v. County of Yuba, Western
Aggregates, LLC (2006) 145 Cal.App.4th 613, which will be heard concurrently with this motion.

4 For ease of reference, the above-referenced history has been depicted on a series of maps and charts prepared by
Mike Fleming, a Registered Civil Engineer. [SSDUMF No.1, CES Exhibits 6-10.] Mr. Fleming is a principal of
Western Planning & Engineering, the engineering and planning firm retained by CHEVREAUX in 1980, and charged
with primary responsibility for assisting with regulatory approvals for CHEVREAUX. As such, Mr. Fleming has an
extensive amount of personal and historical knowledge of CHEVREAUX's operations.

1 In 1946, CHEVREAUX began its historic surface mining operation -- dredging, quarrying,
2 and asphalt production -- at the Meadow Vista site⁵ on property it owned and/or leased near the
3 Bear River (the "Property"), prior to the enactment of any Placer County zoning ordinance
4 designating land uses. [SSDUMF Nos. 1 and 2.] Since 1946 to the present, CHEVREAUX has
5 continuously conducted surface mining operations on the Property. [SSDUMF No. 2.]

6 In 1963,⁶ Placer County enacted its first comprehensive zoning ordinance with designated
7 land uses consistent with CHEVREAUX's historic surface mining operation. The 1963 Zoning
8 Code included Recreation & Forestry or RF District, which provides: "development and
9 processing of natural resources including mines, quarries, . . . , rock crushers, *paving* and concrete
10 batch plants", and Industrial or M District, which included quarry, bitumen paving plant, and
11 concrete plants. [1963 Zoning Code.] "Accessory uses ... in any district may be permitted where
12 such uses ... are incidental to and do not alter the character of the premises in respect to their use
13 for purposes permitted in the District." 1963 Zoning Code version dated March 1964 (Section
14 9.012). [SSDUMF, No. 3.]

15 In 1965, Placer County adopted a General Plan which provides that mining has continued
16 and remains a major contribution to the County's economy, and has a photo depiction of the
17 Chevreux surface mining operations. [SSDUMF, No. 4.] Also in 1965, a new zoning ordinance
18 was adopted which mirrored the language of §§8.0651 and 9.012 of the 1963 Zoning Code.
19 [SSDUMF No. 5.]

20 In 1965, Edward Pruss obtained LD-1030⁷ to establish surface mining and processing
21 (shot-rock quarry) for the property shown on the map attached to the permit. The LD-1030
22 property was immediately adjacent to CHEVREAUX's property. [SSDUMF, No. 6.]

23 In 1968, a new zoning ordinance was adopted which mirrored the language of §§8.0651
24 and 9.012 of the 1963 Zoning Code. [SSDUMF No. 7.]

25
26 ⁵ The site of CHEVREAUX's surface mining operations is also referred to as the Lake Combie site.

27 ⁶ The Zoning Code was actually adopted in 1964, but is shown on all records as 1963. The 1965, 1968, 1984, and
1990 Zoning Codes have identical or similar wording for "RF District" and "Accessory Uses".

28 ⁷ The Permit for the quarry was originally Permit No. 1224, and then was changed to LD-1030.

1 In 1971, Joe Chevreaux purchased the Pruss property subject to LD-1030, and leased the
2 balance subject to LD-1030 from ARP. [SSDUMF No. 8.]

3 In 1971, CHEVREAUX obtained LDA-691⁸ for an asphaltic concrete plant on its original
4 Property. [SSDUMF No. 9.]

5 In 1972, CHEVREAUX obtained Permit LDA-786 in order to relocate the asphalt plant
6 600 feet from the location permitted in LDA-691, to the property covered under LDA-1030.
7 [SSDUMF, No. 10.]

8 In 1975, the California Legislature passed Public Resources Code §§2710 et seq.
9 [SMARA] with the express intent to provide for the protection of mined lands and permit the
10 continued mining of minerals. SMARA §2711(b). Under SMARA, “[n]o person who has
11 obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be
12 required to secure a permit”, and “[a] person shall be deemed to have vested rights if, prior to
13 January 1, 1976, the person has, in good faith and in reliance upon a permit or other
14 authorization, if the permit or other authorization was required, diligently commenced surface
15 mining operations” [Emphasis added]. SMARA §2776(a). [SSDUMF No. 12.]

16 On August 21, 1976, the Placer County Board of Supervisors added Subchapter 26
17 “Surface Mining and Reclamation” to Chapter 30 of the Placer County Code in conformance with
18 SMARA.⁹ [SSDUMF, No. 13.]

19 In 1983, the California Department of Conservation, Division of Mines and Geology,
20 prepared “Mineral Land Classification of the Joe Chevreaux Company Property” under
21 authorization of SMARA [§2761(b)]. In accordance with the mandates of SMARA, the Division
22 evaluated the Joe Chevreaux Company and concluded that high quality aggregate resources
23 (quality, suitability, and threshold value) exist in the Chevreaux properties, warranting the Mineral
24 Resource Zone-2 (MRZ-2) classification. [SSDUMF, No. 14.] Placer County was notified of this
25 Classification pursuant to SMARA by letter dated June 16, 1983, addressing the land-use threat of
26 continued residential growth along the boundaries of the Chevreaux mineral properties. Section
27

28 ⁸ Condition 5 of LDA-691 was subsequently stricken the following year when Permit LDA-786 was issued.

⁹ CHEVREAUX has been able to locate the cover communication, but not the hearing minutes.

1 2762 of SMARA required the County to establish mineral resource management policies in its
2 General Plan that: (1) recognize the mineral lands classification information; and (2) emphasize
3 the conservation and development of identified mineral resources. [SSDUMF, No. 15.]

4 In 1983 and 1984, Placer County adopted a series of Emergency Ordinances to establish
5 interim zoning to review uses of land which may conflict with quarry operations. [SSDUMF No.
6 16.]

7 In 1984, Placer County adopted the Mineral Resource Conservation Plan ("MRCP") as
8 part of the County's General Plan and the Final EIR. The section titled Mining Operations
9 Inventory states that CHEVREAUX's mining operations include quarrying, processing, and
10 asphalt concrete and permits LDA-786, LDA-691, and LD-1030. [SSDUMF, No. 17.]

11 In 1984, Placer County adopted an ordinance amending the Zoning Code to add a Mineral
12 (-MR) combining zone district which included the existing land being mined, as well as other
13 property owned or leased by CHEVREAUX in the vicinity. [SSDUMF, No. 18.]

14 In April 1985, CHEVREAUX prepared and submitted a Reclamation Plan encompassing
15 its entire holdings—owned and leased—to Placer County as SMARA Permit CUP-853. [CES Ex.
16 C-9.] On January 20, 1986, Placer County adopted the Chevreaux Reclamation Plan and SMARA
17 Permit CUP-853. [SSDUMF No. 19.]

18 In 1990, Placer County adopted a new zoning ordinance which mirrored the language of
19 §§8.0651 and 9.012 of the 1963 Zoning Code. [SSDUMF No. 21.]

20 In 1994, CHEVREAUX obtained a permit to add a portable concrete batch plant to the
21 existing surface mining operations. [SSDUMF No. 22.]

22 In 1995, Placer County adopted a new Zoning Ordinance, which included the Lapse
23 provision, but also states that the requirements of the new ordinance are not retroactive in their
24 effect on a use of land that was lawfully established before the new ordinance or any applicable
25 amendment became effective, except where an alteration, expansion, or modification to an
26 existing use is proposed. §17.02.030 [SSDUMF No. 23.]

27 In 1996, the Meadow Vista Community Plan, Final and Draft Environmental Impact
28 Report under Chevreaux Quarry (page 9-17) included asphalt concrete as part of the operation,

1 although it notes that at the time, "[t]here is no asphalt concrete plant at this location, although a
2 permit has been obtained for such operations." [SSDUMF, No. 24.]

3 **II. PLACER COUNTY VALIDATION OF HISTORIC OPERATIONS AND** 4 **PERMITS**

5 Placer County has issued numerous opinions, authored correspondence, and made oral
6 statements at public meetings confirming the validity of CHEVREAUX's surface mining
7 operations. [SSDUMF, No. 27.]

8 **A. 1972 McMahan Memorandum.** On May 25, 1972, the date LDA-786 was
9 approved, then Placer County Planning Director McMahan confirmed the historic and intermittent
10 nature of asphalt production when he responded on the day LDA-786 was approved to then-
11 Supervisor Thompson's questions related to the approval of the asphalt permit LDA-786:

12 "It is also my understanding that starting in 1947 an asphalt concrete plant began
13 operation on *an intermittent basis*.

14 In 1963 comprehensive zoning was established for the Meadow Vista . . . area.
15 This zoning established Industrial zoning for the Chevreaux plant and Recreation-
16 Forestry (RF) zoning around Lake Combie *All of these zones permit*
17 *excavation, quarrying, and related uses and facilities* subject to the approval of a
18 Conditional Use Permit." [Emphasis added.]

19 [CES Exs. A-20 and B-24.] This letter confirms that CHEVREAUX's surface mining operation
20 is consistent with the Zoning Code, including asphalt, which is a related use to the mining, and
21 that the County understood that the permit contemplated an "intermittent use."

22 **B. 1985 Rose Opinion.** In 1985, Placer County Counsel Lyle D. Rose wrote Opinion
23 No. 85-07 regarding CHEVREAUX's vested rights under SMARA. The opinion concludes that
24 the Chevreaux operation has a vested right to extract minerals without a permit based upon its
25 mining activities undertaken prior to January 1, 1976, and may conduct future surface mining
26 without a permit on lands which are owned or leased by CHEVREAUX but upon which there has
27 not been any past mineral extraction activity.

28 "It is our opinion that . . . *any surface mining operations which establish the*
existence of a vested right under SMARA may expand into areas set aside for
mining even though these areas were not being mined at the time of adoption of
SMARA or local ordinances which implement that act." [Emphasis added].
[CES Exs. A-42 and B-61.]

1 Vested rights under SMARA include those without a permit and those in reliance
2 upon a permit prior to January 1, 1976. SMARA §2776(a). The Rose opinion also states:
3 "in order to preserve his vested right, CHEVREAUx must include all land for which such
4 right is claimed in a reclamation plan" The approved Reclamation Plan includes all
5 holdings of CHEVREAUx, owned and leased, including the areas covered by LD-1030
6 and LDA-786. [SSDUMF, No. 19; CES Ex. C-9.]

7 **C. 1987 McMahan Letter.** Placer County Planning Director McMahan
8 reconfirmed LDA-786's validity in a letter dated July 31, 1987, eleven (11) years after
9 asphalt production stopped because of lack of market demand. [CES Exs. A-47 and B-
10 67.]

11 **D. 1988 Grand Jury Findings.** In 1988, the Placer County Grand Jury
12 investigated CHEVREAUx's operations in Meadow Vista (after residents challenged
13 them) and concluded:

14 "The County Planning Department position is that no use permit is required for
15 the existing operations. Section 2640 of Ordinance 3459-B provides a vested
16 right for the operation of the sand, gravel and rock quarry at Lake Combie. The
17 Planning Department relies on a legal opinion of County Coun[se]l . . . , which
holds that expansion of the operation is also grandfathered and does not require a
use permit." [CES Ex. B-68.]

18 **E. 2001 APCD Issuance of ChevreauX/Kiewit-Pacific Air Quality Permit.** In
19 February 2001, 25 years after LDA-786 was approved, APCD issued an air quality permit for the
20 Kiewitt-Pacific asphalt plant on the ChevreauX property (Permit AC-01-51) after receiving
21 confirmation from the Planning Department that CHEVREAUx's land use permit for same was
22 still valid. See detailed discussion under Section O, below. [SSDUMF No. 25.]

23 **F. 2004 APCD Issuance of Air Quality Permit for ChevreauX Asphalt Plant.** In
24 2004, APCD issued ChevreauX an air quality permit for an asphalt plant on the ChevreauX
25 property (Permit AC-04-66) after receiving confirmation from the Planning Department that
26 ChevreauX's land use permit for same was still valid. See detailed discussion under Section O,
27 below. [SSDUMF No. 26.]

28 **G. February 2005 Bill Combs Emails re Teichert/ChevreauX.** In 2005, Teichert

1 applied for an Authority to Construct an asphalt plant on Chevreaux's property covered under the
2 2004 Permit (AC-04-66) for a Caltrans improvement project for I-80. Public controversy over the
3 Teichert plant ensued. On February 7, 2005, Bill Combs, Senior Planner, sent an email to Tom
4 Christofk, Director of Placer County APCD, and Fred Yeager, Planning Director, stating that:

5 "...we held the meeting today with APCD and DPW Staff on the Chevreaux-
6 Teichert matter. I gave a brief background of our permit research and that we
7 were leaning toward a determination that LDA-786 vests the proposed operation,
but emphasized to the group that that was not a final conclusion to be made public
until we got the word from you." [CES Ex. B-89.]

8 On February 8, 2005, Bill Combs sent an email to Tom Christofk and Fred Yeager stating that:

9 "... Fred met with Tony [La Bouff, County Counsel] yesterday and they have
10 come to the conclusion that LDA-786 has established the right for this operation
11 to proceed, subject, of course, to meeting your Department's permitting
12 requirements. Fred has given the OK to make this decision public (but not in
writing yet) so you can send general public inquiries my way, if you get them."
[CES Ex. B-90.]

13 On February 16, 2005, Bill Combs sent an email to Wes Zicker, Director of Public Works,
14 in response to Mr. Zicker's statement that "it is my understanding that Planning and County
15 Counsel are in agreement that the subject temporary plant [Teichert] is covered by LDA-786 and
16 subject to the conditions of that approval." Mr. Combs stated: "... I have been working with
17 Scott Finley (Deputy County Counsel) on the County's position, which has not been officially
18 rendered yet, but Scott expects to have it on Monday." [CES Ex. B-91.]

19 **H. February 25, 2005 County Counsel Memorandum.** On February 25, 2005,
20 County Counsel Anthony J. La Bouff issued a Memorandum to Planning Director Fred Yeager,
21 stating that CHEVREAU had a vested right in LDA-786, and that it appeared that the permit had
22 not lapsed.

23 "Regardless of the language of our ordinance, use permits do not automatically
24 terminate. They would lapse only after appropriate notice is given and an
25 opportunity to be heard has occurred. (See, Bauer and Fort Bragg cited above). To
26 date, the County has made no such finding and in contrast *has acted as if there has
not been a lapse*. It could be argued that the permit holder could reasonably rely
upon such actions of the County in exercising its business judgments." [CES Exs.
A-60 and B-93.] [Emphasis added.]

27 **I. March 2005 Representation to MVP Member Cheryl Berg.** On March 30,
28 2005, MVP member Cheryl Berg wrote a letter to County Counsel stating that Bill Combs had

1 advised her that the "County believes Chevreaux's asphalt permit dating back to 1972 is valid."
2 [CES Ex. L-14.]

3 **J. June 2005 John Marin Comments at MAC Meeting.** On June 2, 2005, John
4 Marin, Director of the Placer County Community Development Resource Agency, made a
5 statement at the Meadow Vista Municipal Advisory Council Meeting that the [Teichert] plant is
6 allowable provided that they [Chevreaux/Teichert] meet conditions of permits. [CES Ex. B-101.]

7 **K. July 2005 County Counsel Letter.** On July 1, 2005, Deputy County Counsel
8 Scott Finley wrote a letter to Alex Constantino, Chair of the Meadow Vista Municipal Advisory
9 Committee (MAC), stating that:

10 "As you may know, in a memo of February 25, 2005, the Office of the County
11 Counsel determined as a matter of legal interpretation that Chevreaux Aggregates,
12 Inc. had a vested right in LDA-786. The law is clear that once a vested right has
13 been obtained by exercise of the entitlements allowed under the terms of the
14 permit, that permit becomes a property right that cannot be revoked or limited
15 without providing the property owner the safeguards required by due process.

16 ...

17 Unless a permit is explicitly limited in time, once it has been approved and
18 exercised, the County has no jurisdiction to simply order the permit be brought
19 before it again for review without complying with the County's ordinance
20 procedures." [CES Ex. B-103.]

21 **L. August 2005 Declarations of Supervisors and Planning Commissioners.** On
22 August 2, 2005, Declarations were provided to County Counsel executed by former Placer
23 County Board of Supervisors and Planning Commissioners Alex Ferreira, Robert Mahan,
24 Theresa Cook, Douglas Hoffman, and Gerda Percival for the purpose of providing the County
25 with historical evidence as to the intentions of the Supervisors and Commissioners to protect
26 Chevreaux's mining interests from potential encroachment. As set forth in the Declarations,
27 there were numerous hearings over the years addressing the Chevreaux mining operations located
28 at the Meadow Vista Quarry, including adoption of its Reclamation Plan, and use permits related
to quarry products, including asphalt. The Declarations further state that it was their
understanding that asphalt concrete operations were a part of the overall mining operations, and
had been ongoing since prior to their election or appointment to the Board or Commission. [CES
Exs. E-2, 3, 4, 5, and 6.]

1 **M. 2006 APCD Issuance of Revision to Chevreux Asphalt Permit AC-04-66.** On
2 March 27, 2006, APCD issued Permit AC-06-31 for a revision to Chevreux's Asphalt Air
3 Quality Permit (AC-04-66), after receiving confirmation from the Planning Department that
4 Chevreux's land use permit for same was still valid. See detailed discussion under Section O,
5 below. [CES Ex. H-119.]

6 **N. May 2006 Bill Combs Email.** On May 22, 2006, Bill Combs, Planning
7 Department, sent an email to Don Duffy, APCD stating "I believe the County's position has been
8 outlined in memos from County Counsel (2/25/05 and 7/1/05) that a valid use permit (LDA-786)
9 exists ..." [CES Ex. B-107.]

10 **O. 2006 Johnson Public Statement.** On June 1, 2006, Michael Johnson, the current
11 Placer County Planning Director, at the Meadow Vista MAC meeting stated unequivocally:
12 "[LDA-786] will never lapse", a fact MVP acknowledges in its own Verified Complaint [MVP
13 Complaint, at ¶8:2-4, Plaintiff's Ex. 9].

14 **P. Planning's Statements Made to APCD With Each Permit Renewal re Permit**
15 **Validity.** On July 28, 1972, the Placer County Health Department issued a Permit to Operate an
16 Asphalt Plant to CHEVREUX (Fresno Paving). [SSDUMF No. 11.] Thereafter, the Placer
17 County Air Pollution Control District ("APCD") was formed and such permitting authority was
18 transferred to APCD. [SSDUMF No. 31.] APCD continued to issue renewals of Authority to
19 Construct/Permits to Operate for CHEVREUX's surface mining operations upon receiving
20 verbal confirmation from the Planning Department as to the validity of its land use permits.
21 [SSDUMF, No. 31.] This procedure included verifying the validity of LDA-786 for the purpose
22 of issuing permits for the 2001 and 2004 asphalt plant APCD permits.

23 On April 10, 2007, the deposition of John Finnell was taken in this action. When asked if
24 APCD has a procedure to verify land use permit validity prior to issuing an APCD permit, Mr.
25 Finnell responded: "We check with the Placer County Planning Department, verify that they have
26 appropriate land use permits." [CES Ex. F at 14:17-25.] This procedure was followed when the
27 Kiewitt 2001 and Chevreux 2004 Authority to Construct/Temporary Permits to Operate were
28 issued. [Id., at 26:11-24 and 92:9-93:19.]

1 On April 19, 2007, the deposition of Tom Christofk, APCD Air Pollution Control Officer
2 and Director of Air Pollution Control, was taken in this action. When asked if APCD has a
3 procedure to verify land use permit validity prior to issuing an APCD permit, Mr. Christofk
4 responded: "It is a process in processing authority to constructs to check with the lead agency or
5 the land use authority to ensure compatible land use. ... The district has a requirement to ensure
6 that there's applicable land use compatibility with permits. ... The methods are done by the
7 individual permit engineer who is running that particular application." [CES Ex. G at 33:2-23.]
8 Examination by Mrs. Barnes: "So it's not abnormal for one of your engineers to indicate that
9 what they do is pick up the phone and call planning and confirm it via a phone call? Answer:
10 "That's correct. That's not abnormal." [Id., at 34:3-6.] Mr. Christofk then read from notes that
11 he wrote dated May 18, 2006 regarding CHEVREAU'S application [CES Ex. G-185] which
12 state: "New AC issued after asking planning if it was a valid use permit." [Id., at 92:18-93:10.]
13 Examination by Mrs. Barnes: "How would you know that the new AC was issued after asking
14 planning if it was a valid use permit?" Answer: "Staff would have briefed me. ... It would have
15 likely been the permit engineer on this project, I think Don Duffy mostly." [Id., at 93:14-21.]
16 Mr. Christofk further stated the following: "I can tell you that the County or land use authority in
17 this case has determined that there's a valid use permit for this facility." [Id., at 127:21-24.]

18 **Q. APCD Deposition Testimony that APCD Permits Do Not Expire.** APCD
19 permits do not expire, even if the expiration date has come and gone, unless action to revoke is
20 taken by APCD. [SSDUMF, No. 32.] John Finnell confirmed this in his deposition:
21 Examination by Mrs. Barnes: "If permits that Chevreaux has are – have an expiration date but
22 you haven't, you meaning the district, hasn't moved to notify Chevreaux's permit holder that they
23 have expired, Chevreaux can treat them as continuing?" Answer: "Yes." [CES Ex. F at 54:18-
24 24.] Mr. Finnell: "Technically, the permit expires and the normal operating procedure we have
25 considered that that authority to construct valid until we initiate an action to cancel that, that
26 permit or authority to construct." [Id., at 97:3-6.] "We had treated those as continuing to be valid
27 unless the applicant canceled or we notified the applicant that we were canceling the permit."
28 [Id., at 105:14-106:2.] Examination by Ms. Thompson (for MVP): "Approximately how many

1 times generally can an authority to construct be renewed by an applicant?" Answer: "I don't
2 believe there's a limit on time that they [the applicant] can continue to ask for an extension." [Id.,
3 at 106:7-12.] In the deposition of Don Duffy, he was asked if the permits had an expiration point.
4 Answer: "They need to be renewed annually. ... And they need to pay the permit fee annually.
5 And if that's done, then it's renewed for another year." [CES Ex. H at 127:21-24.]

6 **III. OTHER STATE AND LOCAL AGENCY VALIDATION OF HISTORIC** 7 **OPERATIONS**

8 Placer County is joined by Nevada County, California Division of Mines and Geology;
9 Central Valley Regional Water Quality Control Board, and the Legislative Analyst for the
10 California Legislature, who have all acknowledged CHEVREAUX's historic surface mining
11 operations. [SSDUMF, No. 28.]

12 **A. 1962 Department of Fish & Game Correspondence.** On January 5, 1962,
13 Robert D. Montgomery of the California Department of Fish & Game wrote a letter to Joe
14 Chevreux regarding agent Bob Butler's visit to the Chevreux sand and gravel operations,
15 acknowledging it was a "clean operation." [CES Ex. A-7.]

16 **B. 1983 DMG Mineral Lands Classification.** As stated above, on January 1, 1983,
17 the California Department of Conservation, Division of Mines and Geology stated in its Report
18 entitled "Mineral Land Classification of the Joe Chevreux Company Property" that "the Joe
19 Chevreux Company has been able to successfully market their crushed aggregate since the late
20 1960's." [CES Ex. A-35.]

21 **C. 1984 & 1985 Nevada Irrigation District Letters.** On August 22, 1984, James P.
22 Chatigny, Nevada Irrigation District ("NID") wrote a letter to the Placer County Board of
23 Supervisors stating that NID is quite pleased with the ongoing operations being performed by
24 CHEVREAUX on NID-leased lands in Placer County. [CES Ex. A-40.] On June 5, 1985, Mr.
25 Chatigny wrote a letter To Whom It May Concern verifying that NID has had an agreement with
26 Joe Chevreux to lease the Property for surface mining operations since 1946. [CES Ex. A-41.]

27 **D. 1987 Nevada County Adoption of Chevreux's Reclamation Plans**
28

1 On July 23, 1987, Jean Jacobs, Nevada County Planning Commission Clerk, wrote a letter
2 to Joe Chevreux advising him that Nevada County had adopted the Reclamation Plan he
3 submitted. [CES Ex. A-45.]

4 **E. 1989 SWRCB Administrative Order.** In 1989, the California State Water
5 Resources Control Board, Central Valley Region, (SWRCB) issued Administrative Order WQ 89-
6 4 in response to a petition by the Lake Combie Association, Inc. requesting review of Order No.
7 88-025. SWRCB found that "The sand and gravel mining extraction activity in the Reservoir
8 [CHEVREUX's surface mining operation] appears to be an on-going project and thus exempt
9 from CEQA. As noted in the record, the mining/extraction has been continuous since 1946. Both
10 Counties [Nevada and Placer] recognize this fact and chose to treat the mining extraction activity
11 as having received a vested right." [CES Ex. A-49.]

12 **F. 2005 Legislative Counsel Opinion.** On December 9, 2005, the Legislative
13 Counsel of California issued its opinion, Mining: Vested Rights - #05 21355, that CHEVREUX
14 may conduct mining on its entire tract of property, leased and owned, as included in the
15 Reclamation Plan. [CES Ex. A-64.] Legislative Counsel opinions, though not binding, are
16 entitled to great weight when the courts attempt to discern legislative intent. California Assn. of
17 Psychology Providers v. Rank (1990) 51 Cal.3d 1, 17.

18 ARGUMENT

19 MVP's sole argument in support of this MSA is that the 1995 Zoning Code lapse
20 provision applies to CHEVREUX's vested 1972 permit, thereby taking away CHEVREUX's
21 property right to operate an asphalt plant on an intermittent basis. In so doing, MVP necessarily
22 ignores all of CHEVREUX's defenses of vested rights and statutes of limitations. Indeed, this
23 Court need not reach MVP's argument because there are no disputed facts as to all of
24 CHEVREUX's vesting defenses,¹⁰ which are established as a matter of law. CHEVREUX's
25 defenses include: (1) CHEVREUX's rights to manufacture asphalt on an intermittent basis
26 since 1963 as an accessory use to its historic surface mining operation that began near the Bear

27 _____
28 ¹⁰ CHEVREUX responded to MVP's "meet and confer" letter regarding LDA-786, asserting its vesting defenses
which are directly relevant to the merits of its motion. [Barnes Dec., at ¶3, CES Exs. E and E1.]

1 River is a vested non-conforming use; (2) CHEVREAU's rights to manufacture asphalt at its
2 present site as an accessory use under LD-1030 that vested in 1965; (3) CHEVREAU's vested
3 rights to manufacture asphalt as an approved intermittent use since 1972 under LDA-786; (4)
4 CHEVREAU's rights to manufacture asphalt are deemed vested under SMARA beginning
5 1976; and (5) all relevant statutes of limitation to challenge the approvals of these permits have
6 long expired. All of these issues establish that the 1995 Zoning Code lapse provisions cannot be
7 read to preclude vested pre-existing uses such as CHEVREAU's.

8 MVP completely ignores the vesting of CHEVREAU's entire surface mining rights—
9 dredging, quarrying, and asphalt production, both historic without a permit, and permitted under
10 LD-1030 [1965] and LDA-691 and 786 [1971 and 1972].¹¹ Once vested rights are established,
11 they can only be lost by legal abandonment (not by statute) which is defined as the cessation of all
12 mining activity coupled with a demonstrable intent not to resume mining. Hansen Brothers
13 Enterprises, Inc. v. Board of Supervisors of Nevada County (1996) 12 Cal.4th 533, at 569
14 [hereinafter "Hansen"]. MVP does not attempt to satisfy the Hansen test on abandonment, relying
15 instead on an incorrect assertion that Hansen only applies to non-conforming uses. The
16 components of CHEVREAU'S non-permitted historic surface mining operation vested as non-
17 conforming uses upon enactment of the first Zoning Code in 1963 [CES Ex. C-6], and vested as
18 conforming uses under LD-1030 in 1965 and LDA-786 in 1972 [CES Ex. C-7]. CHEVREAU'S
19 operations in their entirety, including the asphalt operations as an accessory use, were confirmed
20 as vested pursuant to SMARA in 1976 [CES Ex. C-8.] CHEVREAU had at the time of vesting,
21 and continues to have, the desire and intent to continue all components of its surface mining
22 operation, including asphalt production, and MVP has not produced any evidence of intent to
23 abandon. Therefore, such vested rights, which can only terminate by abandonment, cannot be
24 deemed to have lapsed.

25 I. THE MSA DOES NOT DISPOSE OF THE THIRD CAUSE OF ACTION

26 MVP's only argument in support of its MSA relies on the applicability of the 1995 Zoning
27

28 ¹¹ LDA-691 was a prior location for an approved asphalt plant. Since 1972, all permitting for asphalt operations have been referenced by Placer County under LDA-786.

1 Code lapse provision (not the entire Third Cause of Action). MVP's VC raises two claims to
2 challenge LDA-786: the lapse issue; and alternatively, that CHEVREAU'S proposed asphalt
3 plant is sited an alleged "1,000 feet" from its prior site. [VC 7:14-19; 9:21-24.] The MSA fails to
4 discuss or lay a predicate for the second issue in any manner. CCP §437c(f)(1) prevents
5 adjudication which does not dispose of the entire cause of action, or defense.

6 **II. CHEVREAU'S RIGHT TO PRODUCE ASPHALT VESTED AS AN**
7 **ACCESSORY USE TO ITS HISTORIC SURFACE MINING OPERATION**
8 **WHICH BEGAN IN 1946, AND AS SUCH IS CONSIDERED A**
9 **CONSTITUTIONALLY PROTECTED PROPERTY RIGHT**

10 The dominant, pivotal issue in this case, cutting across the Second, Third, and Fourth
11 Causes of Action, is whether CHEVREAU'S entire surface mining operations—historic non-
12 permitted and permitted—authorizing dredging, quarrying, and asphalt production—are vested as
13 a matter of law.

14 This Court's confirmation that CHEVREAU has vested rights to lawfully operate mining
15 and accessory operations, including asphalt production, without permits will also confirm Placer
16 County's prior determinations that a temporary and seasonal discontinuance of a component use
17 of a vested mining operation such as asphalt production does not lapse as long as any other
18 component of the business is continuous. Hansen, 12 Cal.4th at 566-67. Asphalt production at the
19 site of a mining operation is customarily considered a related, incidental, accessory use to the
20 mining operation, and is simply one component of a vested surface mining operation. See Markey
21 v. Danville Warehouse & Lbr., Inc. (1953) 119 Cal.App.2d 1, 5-6; Fairview Neighbors v. County
22 of Ventura (1999) 70 Cal.App.4th 238, 246; see also Merzario Dec. ¶5.

23 **A. CHEVREAU'S HISTORIC SURFACE MINING OPERATIONS**

24 Attached to the Declaration of Michael E. Fleming ("Fleming Dec.", CES Ex. C), a
25 principal professional for Western Planning and Engineering, Inc., CHEVREAU'S engineering
26 and planning firm since 1980, are four maps (Exs. 6, 7, 8, 9) and a table (Ex. 10) prepared after
27 his review of Assessor's maps, leases, deeds, business records, interviews, historical
28 photographs, and use permits, submitted to assist the Court in understanding graphically the time,
extent, and nature of CHEVREAU'S holdings from 1946 to the present, and to clearly identify

1 the properties vested pre-zoning and through permits and SMARA. Exhibit 6, "Chevreaux
2 Holdings, 1963" shows CHEVREAUX's holdings utilized for surface mining as of the time of
3 enactment of the 1963 Zoning Code. Exhibit 7, "Asphalt Use Permit, LDA-786" shows the
4 parcels approved for location of an asphalt plant under LDA-786 (identical to those shown in
5 LD-1030). Exhibit 8, "Chevreaux Holdings, 1976" shows CHEVREAUX's holdings as of the
6 time of the vested right date of January 1, 1976 pursuant to SMARA section 2776. Exhibit 10,
7 "Chevreaux Parcels History" provides the activities over time on each parcel.

8 **B. AN ASPHALT PLANT IS AN ACCESSORY USE TO SURFACE MINING**

9 At all times of vesting of CHEVREAUX's surface mining operations in 1963, 1965, 1972,
10 and 1976, the respective Zoning Codes described asphalt (paving) as one of the accessory uses in
11 development and processing of minerals: "development and processing of natural resources
12 including mines, quarries, ..., rock crushers, paving and concrete batch plants." [SSDUMF Nos.
13 3, 5, 7, and 21.] The 1964, 1965, and 1968 versions (Section 9.012.) and 1990 version (Section
14 1700(b)) of the Placer County Zoning Code state: "Accessory uses ... in any district may be
15 permitted where such uses ... are incidental to and do not alter the character of the premises in
16 respect to their use for purposes permitted in the District" [SSDUMF Nos. 3, 5, 7, and 21], and "A
17 use accessory to any permitted use and customarily a part thereof, which use is clearly incidental
18 and secondary to the permitted use and which does not change the character thereof." (1968,
19 Section 1.202.) Any such activity, when co-located within the area of a surface mining operation,
20 is in fact an accessory use to the surface mining operation; and LDA-786, although permitted
21 under its own land use entitlement, is an accessory use to the surface mining operation approved
22 under LD-1030. [Merzario Dec ¶5.] This position is confirmed by Tom Christofk, APCD
23 Director of Air Pollution Control, who stated in his deposition that the asphalt plant operations
24 were a component part of the entire quarrying operations. [CES Ex. G at 127:25-128:6.]

25 Such an interpretation is consistent with land use policies in many counties. Other
26 counties also consider asphalt plants as accessory to surface mining when the activities are co-
27 located within a single operation, such as that of CHEVREAUX. Local jurisdictions routinely
28 consolidate the various land uses into a single permit. When this occurs, the land use entitlement

1 required is directly associated with activity considered to be the more intensive, with the other
2 related activities defined as accessory uses to the primary use.¹² [Merzario Dec. ¶¶5, 6.]

3 Lapse has not occurred when viewing LDA-786 as an accessory use to the surface mining
4 operation, because CHEVREAU's surface mining operation has been continuous since 1946,
5 and there has never been a time when mining operations have been curtailed or idled. [SSDUMF
6 No. 2.] The primary permitted land use is that of surface mining under LD-1030, issued in 1965.
7 Because LDA-786 is an accessory use to the surface mining permitted under LD-1030, and the
8 permit covers the same physical area as LD-1030, which has never been idle, lapse should not
9 apply to any LD-1030 accessory uses. [Merzario Dec. ¶¶5, 6.] Therefore, CHEVREAU's
10 asphalt production is authorized as a vested accessory use to its historic surface mining operation
11 which began in 1946, and it's permitted surface mining operation which was approved in 1965.

12 **C. CHEVREAU'S SURFACE MINING OPERATIONS ARE CONTINUOUS**
13 **AND SEASONAL; AND ITS ASPHALT OPERATIONS ARE SEASONAL**
14 **AND INTERMITTENT IN NATURE DUE TO MARKET FORCES**

15 CHEVREAU's surface mining operations are continuous and seasonal. It is normal for
16 certain components of the entire operation to operate on an intermittent basis due to supply and
17 demand. CHEVREAU's surface mining operations, including asphalt production, have been
18 continuous since 1946, and there has never been a time when mining operations have been
19 curtailed or idled. As set forth in the Declaration of Judy Simpson, CHEVREAU's bookkeeper
20 and office manager since 1979 and current Chief Financial Officer and Treasurer:

21 "Based on my review of Chevreau's records and, since 1979 of my own
22 personal knowledge, I can state that in 1946, Chevreau commenced its
23 surface mining operations on the Property, which have been ongoing and
24 continuous since that time. Chevreau's surface mining operations are
25 comprised of the activities depicted on Exhibit 10 of the Fleming Dec.

26 ...

27 Based on my review of Chevreau's records and, since 1979 of my own
28 personal knowledge, I can state that Chevreau's surface mining
operations included the production of asphalt on an intermittent basis."
[CES Ex. A.]

Among many historical records supporting CHEVREAU's claims to asphalt operations

¹² The clearest codification of these mining accessory uses is the Ventura County Non-Coastal Zoning Ordinance, Section 8102-0. Others include Alameda County General Ordinance, Section 6.80.060 A-D and Shasta County, Section 17.88.020 A. [Merzario Declaration ¶¶5, 6.]

1 located on holdings pre-1963 is an (objective) photograph showing the Baldwin asphalt plant
2 operating on the CHEVREAU property in 1956. [CES Ex. A-4.] County Counsel Anthony J.
3 La Bouff noted the following in his February 25, 2005 memo to Planning Director Fred Yeager:

4 "Fluctuation in level of activity and location is to be expected as normal business
5 market demand ebbs and flows. To determine if there is an expansion of the use
6 requires a factual finding that the purpose and character of the operation has
7 changed. Here, it does not appear the purpose has ever changed, i.e., **the periodic,
intermittent processing of asphalt.**" [Emphasis added.] [CES Exs. A-60 and B-
93.]

8 CHEVREAU'S Reclamation Plan dated April 1987, which the County adopted,
9 describes the operations as "continuous, seasonal and intermittent, depending on the market for
10 the material." [CES Ex. B-63.] Consistent with these understandings and statements,
11 CHEVREAU'S records and testimony show that it produced asphalt intermittently between
12 1947 to the present:

13	1947-1948	Placer Hills Road, Clipper Gap to Colfax, Placer
14		County Project and other county and private jobs.
15	1949-1952	Highway 40 (I-80) Auburn to Clipper Gap State of
16		CA project and other county and private jobs.
17		Westbrook & Pope, Sacramento, CA and
18		Fredrickson & Watson, Oakland, CA
19	1956-1960	Auburn to Newcastle, I-80, Colfax to Grass Valley
20		Highway, Placer Hills Road, Clipper Gap to
21		Meadow Vista, Combie Road, Meadow Vista to
22		Lake Van Giesen, Highway 49, Bear River to Lime
23		Kiln Road (7 miles), State Stockpiles and several
24		other county and private jobs. Baldwin Contracting
25		Co., Marysville, CA and Isabell Construction Co.,
26		Reno, Nevada. [CES Ex. A-4.]
27	1961-1970	Private jobs.
28	1971-1974	Fresno Paving/Kaiser Sand & Gravel, I-80
		(Auburn to Clipper Gap)
	1975	Fresno Paving Hwy 20, Penn Valley, Hwy 49
	2001	Kiewit Pacific Company I-80

[Simpson Dec. at ¶¶3 and 4, CES Ex. A.]

23 The County has acted consistent with the intermittent nature of CHEVREAU'S
24 operations. APCD continued to issue Permits to Operate the asphalt plant, no matter the length of
25 time that has elapsed between use/production or the last permit (25 years between Fresno and
26 Kiewit; 3 years between Kiewit and Chevreau), as set forth above in Sections II E&F of the
27 Statement of Facts, and the February 25, 2005, County Counsel Memorandum immediately above.
28

1 **D. ASPHALT PLANTS ARE INTERMITTENT IN NATURE AND**
2 **THEREFORE NOT A USE SUBJECT TO THE LAPSE PROVISION**

3 MVP's assertion that LDA-786 has lapsed fails to acknowledge the intermittent nature of
4 asphalt production. By its very nature, production at an asphalt plant is directly dependant upon
5 the local markets. Since 1947, an asphalt plant has been operating on the site of the present
6 CHEVREAUX dredging and quarrying operations in Meadow Vista. The asphalt plant operations
7 took place on an intermittent basis, and have been permitted as an intermittent use under two land
8 use permits approved by Placer County: (1) LDA-691 on May 27, 1971, authorizing an asphalt
9 plant at the Meadow Vista site; and (2) LDA-786 on May 25, 1972, authorizing the relocation of
10 the asphalt plant permitted under LDA-691. [SSDUMF, Nos. 2, 29 and 30; Merzario Dec. ¶5.]

11 As further described in the Merzario Dec. at ¶8, the following factors can result in
12 prolonged periods of time between active use of an asphalt plant, and its being shut-in or removed
13 from the site for prolonged periods of time : (1) asphalt plants are defined as being portable; (2)
14 asphaltic concrete must be applied within the temperature range prescribed by each paving
15 contract, which results in travel time and ambient temperature becoming limiting factors; (3)
16 projects located in relatively remote areas, such as the CHEVREAUX project, are highly
17 dependent upon governmental contracts, particularly those of Caltrans [which has jurisdiction
18 over both I-80 and Highway 49].

19 It is clear from the record that CHEVREAUX's asphalt plants have been intermittently
20 operated for many years by a variety of different operators. [SSDUMF No. 30.] The recent
21 controversy surfaced when Teichert Construction applied to APCD for an Authority to Construct
22 and Permit to Operate, relying on CHEVREAUX's APCD AC-04-66. [Merzario Dec. ¶8.]
23 Teichert withdrew the application because its contractual obligations with Caltrans would not
24 accommodate any form of delay to address the controversy raised by residents of Meadow Vista.
25 As a result, Teichert was forced to transport asphaltic concrete from a distant county to satisfy the
26 terms of its Caltrans contract. It is important to note that, had Teichert elected to proceed despite
27 the controversy, the "lapse" now being alleged would be moot. [Merzario Dec. ¶8.]
28

1 The argument about Teichert aside, asphalt plants and their respective rates of production
2 are directly related to local demand for the product. It is an industrial norm that these facilities,
3 when idled by slow demand, are either shut-in in situ, or relocated to an area where the product is
4 in demand. When this occurs, the underlying land use has not been abandoned. Were this to be
5 the case, every jurisdiction in the state would be involved in the continuous permitting and re-
6 permitting of asphalt plants every time the market demand swings from slow demand to high
7 demand for this product. [Merzario Dec. ¶8.]

8 The record is replete with evidence that the County acknowledged the intermittent nature
9 of CHEVREAUX's asphalt plant. [SSDUMF Nos. 29 and 30.] To the extent that the 1995
10 amendment to the zoning law prohibits intermittent operations, CHEVREAUX's right to conduct
11 an intermittent asphalt plant was lawful prior to 1995, and would be a vested non-conforming use.
12 CHEVREAUX's intermittent asphalt operation, if dormant for more than a year, would be lawful
13 and allowed because CHEVREAUX has a permit which allows intermittent use. Even if the
14 zoning law has changed, only prospectively can the County prohibit intermittent operations.

15 **III. CHEVREAUX'S RIGHT TO PRODUCE ASPHALT VESTED AS AN**
16 **ACCESSORY USE WHEN ITS LAND USE PERMITS WERE ISSUED IN**
17 **1965 AND 1972, AND AS SUCH IS CONSIDERED A**
CONSTITUTIONALLY PROTECTED PROPERTY RIGHT

18 CHEVREAUX's asphalt operations are included as an accessory use under LD-1030. The
19 general plan documents, Mineral Resource Conservation Plan (1984), and Meadow Vista
20 Community Plan (1996) explicitly refer to the CHEVREAUX surface mining operation as
21 including asphalt production. [See discussion on zoning codes consistency with general plan in
22 §VIII.B below.] In 1965, when LD-1030 was originally approved, and in 1971 and 1972, when
23 LDA-691 and LDA-786 were originally approved, the zoning code provided for asphalt as an
24 accessory use.¹³ Therefore, the mining and accessory uses under LD-1030, LDA-691, and LDA-
25 786 became vested conforming uses. The 1995 Zoning Code provides that a nonconforming use
26 means a use of land that was lawfully established, but does not meet the permit requirements.

27 ¹³ Recreation & Forestry (RF) Zoning District where LD-1030 and LDA-786 are located provided: "development and
28 processing of natural resources including mines, quarries, ..., rock crushers, paving and concrete batch plants."
[SSDUMF Nos. 3, 5, 7, and 21.]

1 Merzario opines that LDA-786 is actually an accessory use to the permitted surface mining
2 operation, not a stand-alone operation, and the permit was unnecessary.¹⁴ [Merzario Dec. ¶6.]
3 Asphalt is a component part of the entire quarry operation. [Tom Christofk Deposition, CES Ex.
4 G pp. 127-128.] It is clear that LDA-786 has been treated as an accessory use to the surface
5 mining permitted under LD-1030. The land use was approved by the County, is well established
6 by CHEVREAU, and may continue as an authorized and permitted land use. [See discussion of
7 conforming vs. non-conforming use in Argument VII below.]

8 **IV. CHEVREAU'S RIGHT TO PRODUCE ASPHALT VESTED AS AN**
9 **INTERMITTENT USE WHEN ITS LAND USE PERMITS WERE ISSUED**
10 **IN 1965 AND 1972, AND AS SUCH IS CONSIDERED A**
11 **CONSTITUTIONALLY PROTECTED PROPERTY RIGHT**

12 The evidence in this case is replete with documents that discuss the intermittent nature of
13 CHEVREAU's operations [see Argument II.D above]. Since asphalt production was an existing
14 use (part of the historic mining operation) prior to enactment of the 1963 Zoning Code (requiring
15 a permit), it was a vested, non-conforming use. Because CHEVREAU's operations were vested,
16 it could lawfully continue its mining operation without a permit, in non-conformity to the permit
17 requirement. [Argument VII, *infra*.] However, County Counsel felt that a public hearing should
18 be held in light of recent controversy over another project in order to "remove any question of
19 legal difficulty in the future." [CES Exs. A-12 and B-11.]

20 In approving LDA-786 separately, Placer County authorized the installation and operation
21 of an asphalt plant within the LD-1030 quarry area. Subsequently, CHEVREAU, as permittee,
22 has established the use via a series of individual contractors who have each in turn installed and
23 operated an asphalt plant on-site. In each instance, the intermittent nature of the asphalt business
24 is readily apparent. [Merzario Dec. ¶6.] Supporting this view, County Counsel's memo to
25 Planning Director Fred Yeager dated 2/25/05 [CES Exs. A-60 and B-93; Merzario Dec. ¶6 states:

26 "Fluctuation in level of activity and location is to be expected as normal business
27 market demand ebbs and flows. To determine if there is an expansion of the use
28 requires a factual finding that the purpose and character of the operation has
29 changed. *Here, it does not appear the purpose has ever changed, i.e., the
30 periodic, intermittent processing of asphalt.*" [Emphasis added.]

14 An example of "stand-alone batch plant" is provided by Ventura County Non-Coastal Zoning Ordinance, Section 8107-42.2. [Merzario Dec. ¶6.]

1 LDA-786, as an intermittent, accessory use under LD-1030, is but one component of that
2 operation, which vested in 1965 and cannot lapse. MVP acknowledges in its complaint that LDA-
3 786 was approved as an intermittent use – they are betting the farm that prior intermittent uses are
4 wiped out by the 1995 Zoning Code, even in the face of the post-1995 confirmations identified in
5 Argument II.C and SSDUMF No. 27.

6 **V. CHEVREAU'S RELIANCE ON PERMITS AND SUBSTANTIAL** 7 **INVESTMENT**

8 On June 14, 1985, County Counsel Lyle D. Rose issued an Opinion (85-07) stating:

9 “with respect to the Chevreau operation, it is clear that it has operated for many
10 years with large expenditures of money in support of the operation. Thus, even
though it is in its infancy in terms of total proposed project, it nevertheless must be
deemed to have incurred substantial liabilities.” [CES Exs. A-42 and B-61.]

11 CHEVREAU has in fact expended substantial sums of money in support of its surface mining
12 operation and rights to produce asphalt, in reliance on the County's authorization and permits.

13 As set forth in the Simpson Declaration:

14 “Over the years, the Chevreau companies spent extraordinary amounts to acquire
15 equipment and either purchase outright or lease property sufficient for its quarry
operations. ... Depreciation schedules [for 1986 and 1987] indicate equipment
16 purchases of mixers in 1959, 1971 and 1979 at an initial cost of \$693,000; batch
plant installation at Meadow Vista at a cost of \$202,596.26; crushers, drag lines,
17 and assorted plant equipment totaling \$2,350,000.00, exclusive of office and
small equipment, and capital value of real property leased and purchased as of
18 1986. The 1997 schedule of equipment depreciation indicates mining operations
equipment purchased totaling approximately \$3,555,000.00. Since 2001 we have
19 additionally purchased \$1,200,000 of mining equipment to construct a new plant
in support of our operations and to relocate the plant out of the flood plain.
20 Chevreau purchased and constructed the Gencor asphalt concrete plant by April
2006 for an initial cost of \$1,182,000 and total costs to date of \$1,562,000.
21 Again, this figure is exclusive of the costs of real property purchases or leases in
support of the mining operations.” [Simpson Dec., at ¶5, CES Ex. A.]

22 **VI. CHEVREAU'S RIGHTS TO PRODUCE ASPHALT VESTED IN 1976** 23 **PURSUANT TO SMARA**

24 MVP's attacks, like those brought by the Lake Combie Association in the mid-80s, are the
25 very types of attacks against the mining industry that SMARA was designed to protect. SMARA
26 §2711(a). [SSDUMF No. 12.] When SMARA was enacted in 1975, it required all counties to
27 have local ordinances and general plans conforming to the goals and policies of SMARA.
28 [SMARA §2757.] Therefore, the 1963 Zoning Code became a part of the SMARA enforcement

1 scheme as of January 1, 1976, when SMARA became effective. Mineral Assns. Coalition v. State
2 Mining (2006) 138 Cal.App.4th 574, 585-587. Because of the regulatory preemption
3 contemplated under SMARA, MVP's action against CHEVREAUX violates Calvert v. County of
4 Yuba (2006) 145 Cal.App.4th 613 [2007 Cal. App. LEXIS 8].¹⁵ CHEVREAUX's surface mining
5 rights as of 1976, whether by historical pre-1963 vesting or permitted vesting afterwards, are
6 SMARA protected as vested rights as of 1976. SMARA §2713 confirms all rights to mine are
7 protected as valuable property rights which cannot be "taken" without just compensation, thus
8 confirming the constitutional protection of CHEVREAUX's mining rights. California
9 Constitution, Art. I, §19; CCP §1230.010. SMARA's enactment in 1976 required all mining
10 operators, including vested rights operators, to adopt reclamation plans. CHEVREAUX did so in
11 1985, and its SMARA Permit CUP-853 and Reclamation Plan also confirmed CHEVREAUX's
12 vested rights as requested by the County. [1985 Rose Opinion, CES Exs. A-42 and B-61.]

13 This Court should note that the SMARA Permit, CUP-853 and Reclamation Plan, was
14 adopted after numerous and substantial public hearings; as were the relevant portions of the
15 County's General Plan incorporating the Mineral Resource Conservation Plan and the Meadow
16 Vista Community Plan that provide for asphalt production as part of CHEVREAUX's overall
17 surface mining operation, resulting in four emergency ordinances to protect the mining
18 community, the Mineral Resource Conservation Plan, Chevreux's Reclamation Plans, and Use
19 Permit 853. [SSDUMF No. 16.] Thus, MVP has no residual argument that MVP is entitled to a
20 public hearing on the issue of whether the SMARA Permit, CUP-853 and Reclamation Plan
21 issued in 1987 are valid. Calvert, at pp. 620-631.

22 **VII. ONCE VESTED RIGHTS ARE ESTABLISHED, THEY CAN ONLY BE**
23 **LOST BY LEGAL ABANDONMENT**

24 MVP's argument [at MSA 11:21-28; 12; 13 1-9] that Hansen only applies to non-
25 conforming uses is a red-herring. Hansen clearly applies to CHEVREAUX's vested constitutional
26 rights -- those established as non-conforming uses pre-1963 Zoning Code, and those as accessory
27
28

¹⁵ See Motion for Judgment on the Pleadings, which will be heard concurrently with this motion.

1 uses -- and do not lapse. But Hansen also applies to the vested conforming permitted uses (see
2 Argument II.A above).

3 When Placer County enacted its first zoning ordinance in 1963, the CHEVREAUX
4 properties were zoned for all components of surface mining -- mine, quarries, rock crushing,
5 paving, and concrete batch plants -- and required a land development permit to establish that use.
6 [SSDUMF, No. 3.] Therefore, CHEVREAUX's existing surface mining operation vested as a
7 lawful non-conforming use without a permit upon enactment of the zoning code. When LD-1030
8 was obtained in 1965, and LDA-786 in 1972, those surface mining and related, accessory
9 operations were consistent with the zoning, and as permitted uses became vested, lawful,
10 conforming uses:

11 "A nonconforming use describes a lawful use existing on the effective date of a
12 new zoning restriction that has continued since that time without conformance to
13 the ordinance. While the policy of the law is for elimination of nonconforming
14 uses, as a general rule, a new zoning ordinance may not operate constitutionally to
15 compel immediate discontinuance of an otherwise lawful established use or
16 business."

17 See City of Los Angeles v. Wolfe (1971) 6 Cal.3d 326, 337; Livingston Rock & Gravel Co. v.
18 County of Los Angeles (1954) 43 Cal.2d 121, 127. When the use is conforming, unlike a non-
19 conforming use, there is no policy of law to eliminate that use. Therefore, under the same
20 circumstances that a vested non-conforming use does not lapse, nor can it be restricted, absent an
21 objective showing of intent to abandon, a vested conforming use cannot lapse without such a
22 showing either.

23 Cessation of use alone does not constitute abandonment. Abandonment of a
24 nonconforming use ordinarily depends upon a concurrence of two factors: (1) An
25 intention to abandon; and (2) an overt act, or failure to act, which carries the
26 implication the owner does not claim or retain any interest in the right to the
27 nonconforming use. Hansen 12 Cal.4th 533, 569.

28 Asphalt operations under LDA-786, as a conforming land use, otherwise referred to as a
permitted use, may be changed or substantially changed, provided such changes fall within the
definition of an accessory use to surface mining. [CES Exs. A-60 and B-93; Merzario Dec. ¶6.]

MVP's argument that "Intent to Abandon is Irrelevant to the Application of the Lapse
Statute" obfuscates the facts of this case. The Hansen decision directly applies to the

1 constitutional rights vested pre-1963, and further applies to the rights vested by permit as
2 conforming uses. Whether vesting is established as a historic non-conforming use, or by permit,
3 intent to abandon must be objectively shown. Hansen, at 569. A showing of an intent to abandon
4 and overt act would be required to determine lapse. No such showing can be made. The Hansen
5 court determined that the use was one component of the overall surface mining operation/business
6 and, therefore, discontinuing one component did not result in abandonment, in the absence of the
7 intent to abandon, as long as any other component of the overall operation was continuous. This
8 discussion applies directly to CHEVREAU's temporary discontinuance of asphalt production,
9 which is only one component of its overall surface mining operation, and does not result in lapse,
10 because other components were continuous in operation.

11 Whether a use is non-conforming or conforming, that determination has no bearing on the
12 required intent to abandon as expressed by the Court for *all vested uses*. MVP makes no attempt
13 to argue that CHEVREAU intended to abandon its asphalt production use. Asphalt is an
14 acknowledged component of CHEVREAU's continuously operating surface mining [1963
15 through 1990 Zoning Codes; Mineral Resources Conservation Plan (General Plan); Meadow Vista
16 Community Plan (Specific Plan)] so that use did not cease because there was no intent to
17 abandon, mirroring the facts upheld in Hansen. The "Lapse Ordinance" does not apply because
18 CHEVREAU has vested rights to its pre-1963 and permitted activities, in addition to asphalt
19 production being an accessory, intermittent use. [SSDUMF Nos. 2, 29 and 30; Statement of Facts
20 II E-J.]

21 **VIII. THE 1995 "LAPSE ORDINANCE" STATUTE DOES NOT APPLY TO**
22 **CHEVREAU'S VESTED OPERATIONS**

23 **A. THE 1995 ZONING CODE DOES NOT APPLY RETROACTIVELY TO**
24 **LAWFUL USES OF LAND ESTABLISHED PRIOR TO ITS ADOPTION**

25 The language of the 1995 Zoning Code "Lapse Ordinance" does not apply to LDA-786,
26 and CHEVREAU's established vested uses and components of CHEVREAU's surface mining
27 operation are major disputed facts in MVP's MSA. Whether a fact is material will depend on the
28 issues involved as determined from the pleadings and applicable law. Billmeyer v. Plaza Bank of
Commerce (1995) 42 Cal.App.4th 1086, 1099.

1 The appropriate zoning code to apply is the one in effect at the time LDA-786 became
2 vested as an established lawful use. Avco Community Developers, Inc. v. South Coast Reg'l
3 Comm'n (1976) 17 Cal.3d 785, 791; Wheeler v. Gregg (1949) 90 Cal.App.2d 348, 365.
4 Intermittent asphalt production became vested as a component of the historic surface mining
5 operation as an existing lawful non-conforming use in 1963, when the first zoning code was
6 enacted with permit requirements; and then as a conforming permitted use in 1972 when LDA-
7 786 was approved. Contrary to MVP's assertions [MSA 9:18-28; 10 and 11], the "Lapse
8 Ordinance" of the 1995 Zoning Code only applies to those uses established after 1995. The 1995
9 Zoning Code expressly states that under §17.02.030, Applicability of Zoning Chapter:

10 "C. Continuation of an existing use. . . . the requirements of this Chapter are not
11 retroactive in their effect on a use of land that was lawfully established before this
12 Chapter or any applicable amendment became effective, except where an
13 alteration, expansion, or modification to an existing use is proposed, and as
14 provided by Sections 17.60.120, et seq. (Nonconforming Uses)." (Emphasis
15 added).

16 1995 Zoning Code, Edition #9 – January 2005 [SSDUMF No. 23.] Intermittent asphalt
17 production as a component of CHEVREAUX's surface mining operation vested as a lawfully
18 non-conforming use when the first zoning ordinance was enacted in 1963, because CHEVREAUX
19 had produced asphalt from 1947 to 1963. [SSDUMF No. 30.] LDA-786 vested as a lawfully
20 conforming use when it was obtained and relied on in 1972; LDA-786 vested again as a lawfully
21 conforming use under SMARA in 1976. Finally, asphalt production, as a lawfully conforming
22 related accessory use to the vested surfacing mining operation under CHEVREAUX's SMARA
23 Permit and Reclamation Plan [CUP-853], vested when it was adopted by Placer County in
24 1986/87. Therefore, the new "Lapse Ordinance" enacted in the 1995 Zoning Code cannot apply to
25 LDA-786, retroactively or prospectively. Placer County has confirmed the validity of LDA-786
26 four times since adoption of the 1995 ordinance, in 2001, 2004, 2005, and 2006, and continued
27 asphalt use at the quarry in the Mineral Resource Conservation Plan. [Argument II.C.]

28 MVP's reliance on Fernandez-Vargas v. Gonzales (2006) 126 S.Ct. 2422 [MSA 10:16-17]
is misplaced. Fernandez-Vargas involved "an illegal alien challenging deportation under
immigration laws" where "the court concluded that application of the new laws to Fernandez-

1 Vargas was not retroactive because the new laws did not address *past conduct*, but rather
2 Fernandez-Vargas *continued conduct* in remaining in the country and thereby committing a
3 continuing violation.” [MSA 10:24-26.] There can be no prospective “continuing violation” in
4 the absence of any violation. CHEVREAUX is not in violation of the new Zoning Code, because
5 it does not apply retroactively, but only to uses established from and after promulgation -- in other
6 words, prospectively; and because Placer County claims no violation. [VC 2:24-28; 7:11-12;
7 7:23-28; 8:1-4.] The zoning codes under which CHEVREAUX’s rights vested, and all versions
8 of the zoning codes prior to 1995, did not contain that “Lapse Ordinance.”

9 Case law also confirms that intervening changes in law do not affect vested rights in
10 preexisting approved uses. According to the California Supreme Court in Avco, *supra*, 17 Cal.3d
11 at 791, once a landowner has secured a vested right, the government may not, by virtue of a
12 change in the zoning laws, prohibit construction authorized by the permit or other land use
13 activity upon which he relied. The decision in Avco has been the leading case on common law
14 vested rights for 30 years.¹⁶ The Avco court cited a conditional use permit as a possible example,
15 at 794. Before Avco, the court in Case v. The City of Los Angeles (1963) 218 Cal.App.2d 36 held
16 “When a property owner has a vested right to a permitted use, the city/county may not rezone that
17 property to prevent that vested use”, and cited Wheeler, *supra*, 90 Cal.App.2d at 365:

18 The theory of vested rights relates only to such rights as an owner of property may
19 possess not to have his property rezoned after he has started construction thereon or
was making a use thereof permitted by law

20 See also Calvert’s confirmation that mining operations are not subject to restrictive
21 readings of subsequent county zoning changes. Under Calvert at 623, the court (citing
22 Hansen) held that the general rule that non-conforming uses cannot expand does not neatly
23 apply to mining operations (such as Chevreaux’s), applying the diminishing asset doctrine.

24 **B. ZONING CODE REVISIONS MUST BE READ TO BE CONSISTENT**
25 **WITH THE GENERAL PLAN AND ANY APPLICABLE SPECIFIC PLAN**

26 The conflict provisions of the 1995 Zoning Code provide at §17.02.050D.2 that in the case
27 of an apparent conflict, the provisions of the general and community plans have precedence over

28 ¹⁶ *California Land Use Practice*, Continuing Education of the Bar, The Regents of the University of California, 2006,
Lindgren & Mattas, Vol. 2, Ch. 16, Vested Rights, p. 683.

1 the provisions of the Zoning Code. The general plan is a comprehensive, long-term plan for the
2 physical development of the county or city, and consists of statements of development policies
3 setting forth objectives, principles, standards, and plan proposals. Govt. Code §§65300 and
4 65302; see also Neighborhood Action Group v. County of Calaveras (1984) 156 Cal.App.3d
5 1176, 1183; Longtin's §2.03, p. 174. The general plan must comport with legislative policies
6 relating to surface mining -- SMARA, Pub. Res. Code §2757. Therefore, any interpretation of the
7 lapse provisions precluding an accessory use already identified in the general plan [MRCP Mining
8 Operations Inventory] and confirmed pursuant to SMARA would have no merit because it flies in
9 the face of the internal consistency test described above.

10 Placer County's General Plan supports overall surface mining, including accessory uses.
11 The zoning code has been consistent, and clearly included asphalt as a component of mining.
12 [SSDUMF, Nos. 3, 5, 7, and 21.] SMARA became effective in 1976, and deemed all lawful
13 mining permits as vested rights, which included LD-1030 and LDA-786. [SSDUMF, No. 12.]
14 Placer County incorporated SMARA into its Zoning Code [SSDUMF No. 13], and adopted
15 Mineral Reserve (MR) zoning on the CHEVREAUX properties. [SSDUMF, Nos. 16 and 17.]
16 Placer County adopted its Mineral Resource Conservation Plan which included **asphalt concrete**
17 and permits LDA-786, LDA-691, LD-1030. [SSDUMF, No. 18.] Relative to MVP's one-note
18 refrain, these determinations were made eight years after asphalt production temporarily ceased at
19 the Meadow Vista quarry.

20 The Zoning Code revisions continued to be consistent with the Mineral Resource
21 Conservation Plan, and after the 1995 Zoning Code revision included the "Lapse Ordinance," the
22 1996 Meadow Vista Community Plan (Specific Plan) included **asphalt concrete** as part of the
23 CHEVREAUX Quarry, and the County has repeatedly confirmed LDA-786's validity after
24 adoption of the 1995 Zoning Code. [SSDUMF, No. 27.] The consistent general and specific
25 plans' support of existing mining operations, including asphalt, indicates that the 1995 "Lapse
26 Ordinance" **cannot** apply to CHEVREAUX's current operations. [See also County Counsel
27 statements of February 25, 2005, Section II.H above.]
28

1 **IX. ALL RELEVANT STATUTES OF LIMITATION TO CHALLENGE THE**
2 **APPROVALS OF THESE PERMITS HAVE LONG SINCE EXPIRED**

3 All time limitations to challenge the validity of these operations have long since expired.
4 Neither MVP nor anyone else appealed the approvals of LD-1030 [approved 1965], LDA-786
5 [approved 1972], or CUP-853 [approved 1986] within the ten days mandated by Zoning Code
6 §17.60.110.C. CA Government Code §65009.c.1.E provides: “No action or proceeding shall be
7 maintained in any of the following cases by *any person unless* the action or proceeding is
8 commenced and service is made on the legislative body **within 90 days after the legislative**
9 **body's decision.**” (Emphasis added.) Even assuming that the Court somehow waived the 10-day
10 Zoning Code appeal requirement, MVP failed to challenge the validity of CHEVREAU's use
11 permits within the time period set forth in either Zoning Code or State law, and thus MVP's
12 causes of action for declaratory relief are barred. Pan Pacific Properties, Inc. v. County of Santa
13 Cruz (1978) 81 Cal.App.3d 244, 252-253. Held: An action challenging the validity of a local
14 zoning ordinance if not commenced within the time prescribed by local ordinance and/or state law
15 is barred]. Although MVP acknowledges it formed in 2005 [MVP's Undisputed Fact No. 3; See
16 MVP's Documentary Evidence, Exhibit 8 – Articles of Incorporation for MVP filed on **February**
17 **17, 2005**], MVP failed to bring an action within 90 days after County Counsel publicly advised
18 that LDA-786 was an approved intermittent use on February 25, 2005; or within 90 days of when
19 County Counsel issued its supplementary letter confirming that the County intended to take no
20 action adverse to CHEVREAU on July 1, 2005. Neither MVP nor any individual has sought to
21 challenge any of the Authorities to Construct approved by APCD **in 2001, 2004, 2005 or 2006.**
22 Thus, MVP has completely failed to adhere to the suit requirements under the Government Code,
23 and rights to assert some type of injury expired -- if they ever existed -- three years after Kiewit's
24 operations occurred, or 2004. Although the board members of MVP uniformly acknowledged
25 living in Meadow Vista when the Kiewit asphalt operations occurred in 2001, no member of the
26 public brought any kind of action to invalidate operations at that time. [SSDUMF Nos. 36 and
27 37.] Linda Lodwig has lived in Meadow Vista since 1974 [CES, Exhibit J at 12:13-21]. Dan
28 Foreman purchased his property in Meadow Vista in 1995 [CES, Exhibit K at 37:11-24]. Stewart

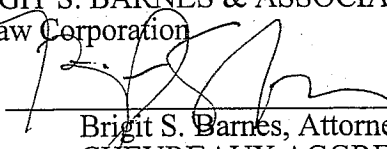
1 Feldman moved to Meadow Vista in 1977 [CES, Exhibit I at 22:12-16]. John Blodger moved to
2 Meadow Vista in 1967 [CES, Exhibit N at 14:5-12]. James Schreiber has lived in his Meadow
3 Vista home for almost 30 years [CES, Exhibit M at 17:9-12]. Cheryl Berg purchased his home in
4 Meadow Vista in 1999 [CES, Exhibit L at 13:15-16].

5 **CONCLUSION**

6 The lapse provision of the 1995 Code [MVP SMF Nos. 13, 14, and 15] cannot apply to
7 CHEVREAUX's operations because of its vested status defenses, and the foregoing arguments.
8 This is a material issue of fact in dispute. Materiality is measured by the law applicable to the
9 legal theories put in issue by the complaint. Anderson v. Heart Federal Savings & Loan Assn.
10 (1989) 208 Cal.App.3d 202, 210, 256 Cal.Rptr. 180; see also Kelly v. First Astri Corp. (1999) 72
11 Cal.App.4th 263, 270, 84 Cal.Rptr.2d 810 [fact to be material must relate to a claim or defense that
12 is in issue and must also be necessary to judgment somehow]; *see also* Addy v. Bliss & Glennon
13 (1996) 44 Cal.App.4th 205, 215. As such, a material issue of disputed fact exists, and therefore
14 Plaintiff's Motion for Summary Adjudication must be denied.

15 DATED: April 24, 2007

BRIGIT S. BARNES & ASSOCIATES, INC.,
A Law Corporation

16
17 By: 

Brigit S. Barnes, Attorney for
CHEVREAUX AGGREGATES, INC.