

VESTED MINING RIGHTS *How to Maximize Their Value*

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Across the nation, the process to obtain surface mining and processing permits is becoming increasingly complex. Population pressures, expanding environmental regulations and community opposition have all combined to turn permitting a new operation, or extending an existing permit, into an expensive multi-year project with an uncertain outcome.

In these times, mine owners and operators should not overlook the value of older "vested" operations as they seek to expand existing operations or add to their mineral holdings. Vested mines are protected by a special set of rules. The type of protections afforded will vary somewhat from state to state. Generally speaking, however, all courts that have considered the matter not only allow a vested use to continue without the need to obtain a permit, but also in some cases allow the use to dramatically expand to meet modern market demands. Knowing how these rules work is critical for current operators of vested operations. It is also critical for companies that may be considering acquiring a vested operation and who need to understand just what it is they are buying.

VESTED MINING RIGHTS --- WHAT ARE THEY?

A vested mining right is a constitutionally protected property right to continue operating in a certain location and in a certain way without being required to conform to all current land use restrictions. Under most local zoning ordinances, a vested mining right falls into the category of a "nonconforming use" of land. The leading court case in this area has described a "nonconforming use" in this way:

A legal nonconforming use is one that existed lawfully before a zoning restriction became effective and that is not in conformity with the ordinance when it continues thereafter.... 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...

Hansen Brothers Enterprises v. Board of Supervisors, 12 Cal. 4th 533, 540 fn. 1 (1996).

FOR WHOM ARE VESTED RIGHTS IMPORTANT?

Vested rights are obviously important for owners and operators of vested, nonconforming operations. Further, they are also important for companies who are considering purchasing or leasing such operations. Owners and operators who are doing business under older, open-ended use permits also can benefit from the rules protecting vested mining operations.

WHY IS IT IMPORTANT TO KNOW YOUR LEGAL RIGHTS?

Knowing your legal rights as they relate to a vested mining operation is extremely important because, in every state, nonconforming uses of all kinds are disfavored by the law and by planning agencies.

Further, the public (including many local planners, state regulators and the judiciary) have an ingrained, negative attitude towards mining uses. When asserting your rights to continue or expand a vested operation, you must prepare to establish your case forcefully based upon a thorough knowledge of the special legal that have developed to protect such uses.

HOW IS THE SCOPE AND EXTENT OF A VESTED MINING RIGHT DEFINED?

Geographical Scope.

Land use agencies will often argue that a use permit is required when a vested operation seeks to expand operations into areas of the mine property not previously mined. Courts in most jurisdictions that have considered the question have rejected this argument. The rule is now well-established that a vested mining right ordinarily includes the right to complete mineral extraction from the entire mining property. The miner, however, must have "objectively manifested" its intent to mine the entire tract at the time the use first became nonconforming (usually at the time a use permit was first required).

Operational factors are used to determine this historical intent including 1) the physical nature of the mining parcel; 2) whether the mine consists of one or more parcels; 3) the steady continuation of mining (including the stockpiling) over time; 4) the existence of roads on the property; 5) where processing facilities are located on the property; and 6) the type of mining equipment used on the site.

Based on these factors, it is usually the case that a typical commercial mining operation can show these "objective manifestations" of the intent to mine the entire tract. In this case, the vested right would include the right to enlarge operations and intent to harvest from all areas of the mine.

Operational Scope (Production Volumes).

Even in cases where the local land use authority recognizes the geographical scope of the vested use, attempts are sometimes made to limit the miner's production volumes. Vested operators will face the argument that they can not produce at a level above their past annual maximum, or at a level above the average of past years production or that their increases in production (if allowed at all) should be restricted.

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Most courts that have considered this question have resolved it in favor of the mine operator. The courts have established the general rule that the natural and reasonable expansion of a quarry business to meet increased demand is not an impermissible enlargement or change in the use of the property. Stated another way, an increase in business volume alone is not an expansion of a nonconforming use where increased population created an increased demand for the aggregate used in road construction, an increase to meet that demand would not be construed as an enlargement or intensification of the use.

In one case, the California Supreme Court found that a potential 100% increase in production volumes from a mine alone would not qualify as an impermissible expansion of the vested operation.

Thus, in most circumstances, vested operations cannot be limited to past production volumes and can increase production to meet modern market demand.

Operational Scope (Equipment).

Another argument made to limit a vested mining operation is that the vested operation is not permitted to change or modernize mining methods and equipment.

But cases from around the country are generally uniform in holding that the adding and modernizing of equipment is not a prohibited change, provided that the new equipment does not change the fundamental nature of the use. For example, courts in Pennsylvania have held that the addition of "modern and more effective instrumentalities are used in the business will not bring it within the prohibition of the Ordinance if in fact there was an existing use, provided these are ordinarily and reasonably adapted to the carrying on of the existing business..." *Cheswick Borough v. Bechman*, 352 Pa. 79, 82-83 (1945). Similarly, the New Jersey Superior Court held that the miner should not be prevented from adding a rock crusher on the basis that such a machine was not in use at the time the use became nonconforming. The court held:

Let us assume an extreme situation where an owner is quarrying with only a pick and shovel, when an ordinance is passed making his operation nonconforming. Should we decide that thereafter the owner, his heirs, or assigns, may only quarry with a pick and shovel? We have decided in the instant case that the right to quarry extends to the owner's entire tract because not to permit it would, in effect, end the operation. The same reasoning is applicable to the problem of structures. We are of the opinion that in a "diminishing asset" case the holder of the nonconforming use should be permitted to modernize his operation; and change, add to, or increase the size of his equipment (though deemed to be structures), even though this increases his output and intensifies the use; provided that by such action he does not change the original protected nonconforming use.

Moore v. Bridgewater Township, 173 A. 2d 430, 442 (1961).

CONCLUSION

While each case will stand on its own particular facts and be controlled by the particular legal precedents of each jurisdiction, mine owners and operators should view older, vested

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operations for what they are: valuable assets which can often be legally expanded into highly productive modern operations without the need to obtain a new land use permit.

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