

Date: February 2, 2011

To: Members of the Board of Supervisors for Santa Clara County

From: Lehigh

Re: *Permanente Quarry Vested Rights Briefing*

MEMORANDUM

This memorandum reviews the scope of mining activities that are sufficient under the law to support vested rights, and summarizes the extent of mining activities at the Permanente site at key points in time.

1. Under State Law and County Regulations, "Mining Operations" Include Many Activities And Components.

Staff suggests that only areas subject to actual material extraction may support vesting. State law and County regulations, however, define the areas encompassed by mining operations to include:

- Areas in which surface mining operations will be, are being, or have been conducted;
- Private ways and roads appurtenant to any such area;
- Land excavations and workings;
- Areas containing mining overburden; and
- Areas in which structures, facilities, equipment, machines, tools, or other materials or property which result from, or are used in surface mining operations are located.

(Public Resources Code, §§ 2729, 2735; Santa Clara County Surface Mining and Reclamation Standards, § 3-L.)

2. Vested Mining Rights Include All Aspects Of The Operation.

The California Supreme Court, in *Hansen Brothers Enterprises, Inc. v. Nevada County* (1996) 12 Cal.4th 533, 565-566, held:

- "[T]he use may **not** be broken down into component parts and vested rights recognized for less than the entire business operation."
- "[T]he overall business operation **must** be considered . . . '[O]ne entitled to a nonconforming use has a right to . . . engage in uses normally incidental and auxiliary to the nonconforming use . . .'"
- "[O]pen areas in connection with an improvement existing at the time of the adoption of zoning regulations are exempt from such regulations . . . if such open areas were **in use or partially used** in connection with the use existing when the regulations were adopted."

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3. The Quarry Vesting Date Is 1948, According To Staff.

Staff's interpretation of the historical County zoning ordinances is that a use permit for the site was likely first required in 1948. Our position is that a use permit was not required until 1960. The site is clearly vested using either vesting date.

4. The Site Was Devoted To Extensive Mining Use Prior To 1948.

Maps (attached as **Exhibit A**) show the extent of quarry operations across all the parcels owned by Kaiser by 1948. The maps show that the mining use extends across the site, including the EMSA.

5. The EMSA Has Been Integral To Site Operations From 1941 To The Present.

By at least 1941, the EMSA was integral to overall operations on the site. Aerial photographs from 1942, 1948, 1955, 1974, 1980 and 2009 (attached as **Exhibit B**) show the progressive expansion of EMSA use. Mining uses and conjunctive site uses on the EMSA include:

- Massive grading at the site partially used for mining operations;
- Administrative buildings and parking areas that supported quarry operations;
- Overburden and other material storage; and
- Haul and access roads, including the top quarry road and the main site access road.

It is on the basis of the above uses that the County has previously found that the site, which includes the EMSA, is vested. The EMSA, like the rest of the site (excluding the cement plant) has never had a use permit. County Counsel and staff have represented as much on at least six (6) occasions to the Board; and on at least fifteen (15) occasions to the California Department of Conservation. (See **Exhibit C**).

6. Transfer Of Title To The EMSA Did Not "Abandon" Vested Rights.

Staff asserts that transfer of title to the EMSA to Kaiser Metals in 1942 "abandoned" vested rights to the area. This position is contrary to law. Vested rights "run with the land," and do not depend on who holds title. All portions of the site have changed hands many times over its 100-plus year history. Moreover, "abandonment" of vested rights requires showings of specific intent and objective actions that relinquish those rights. No such showings can be made here. The EMSA was integral to quarry and overall site operations by at least 1941, and mining uses in the area, such as material storage, only intensified after 1942. Metals manufacturing does not create the need to store overburden.

EXHIBIT A

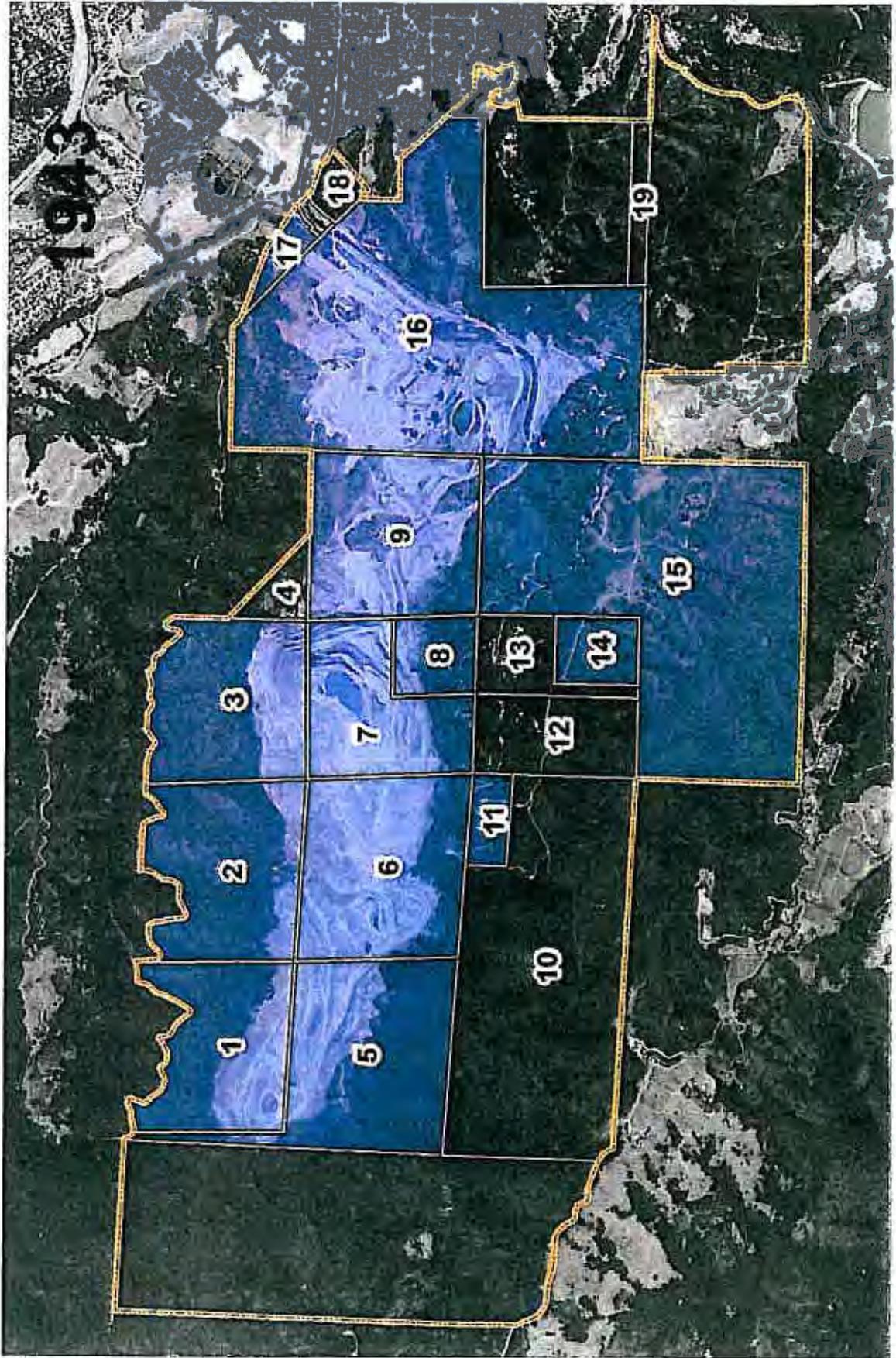
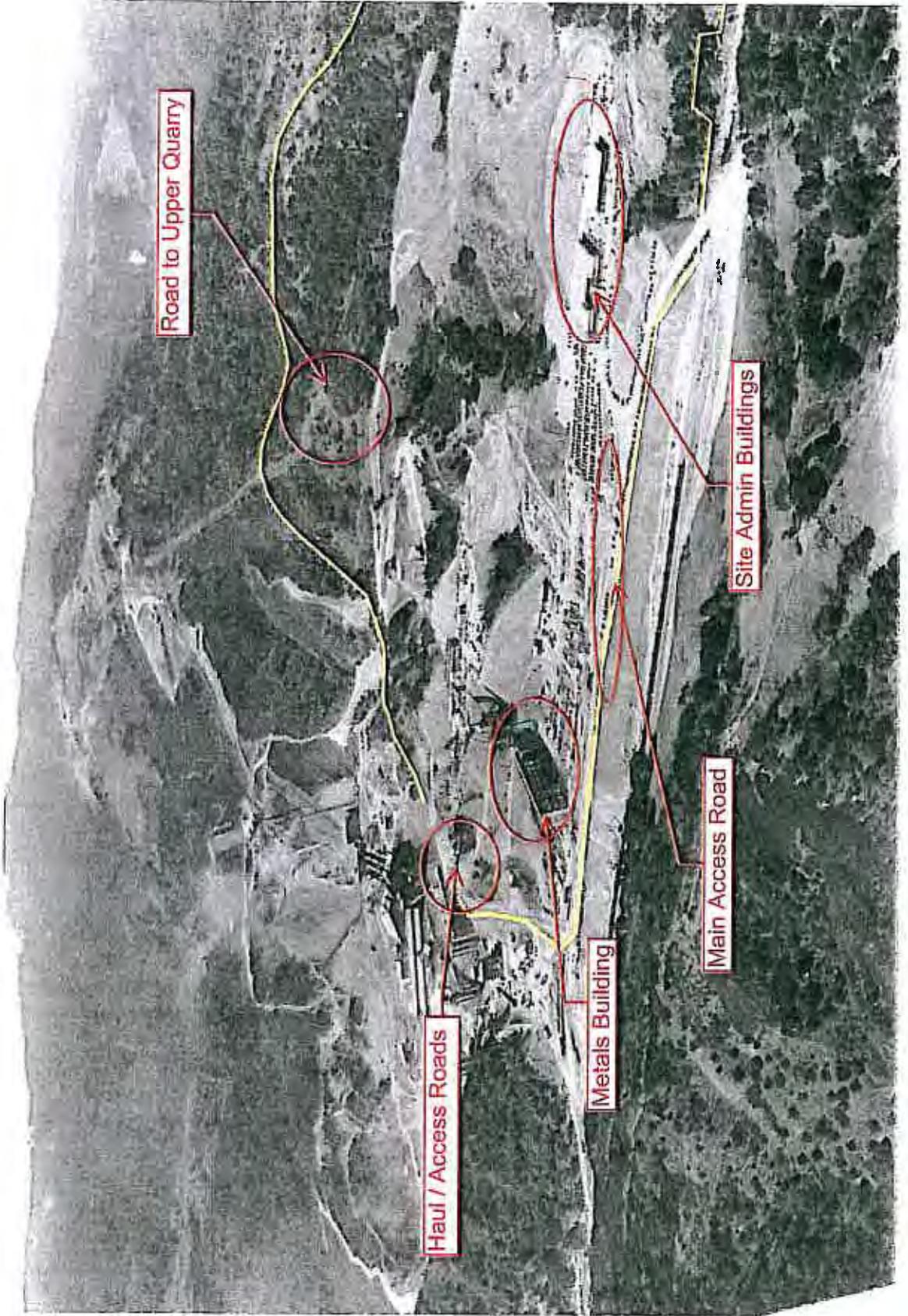
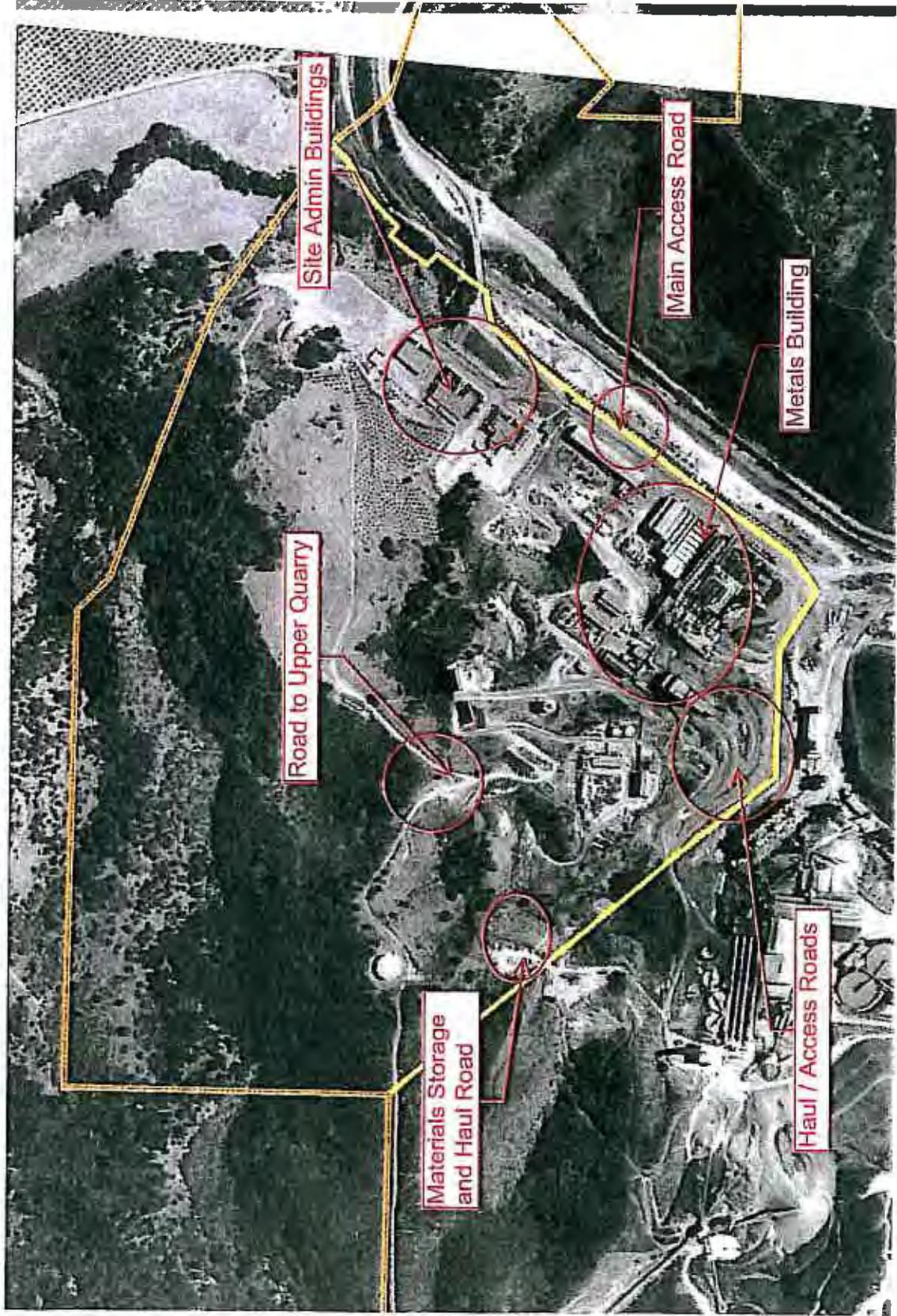


EXHIBIT B

1942



1948



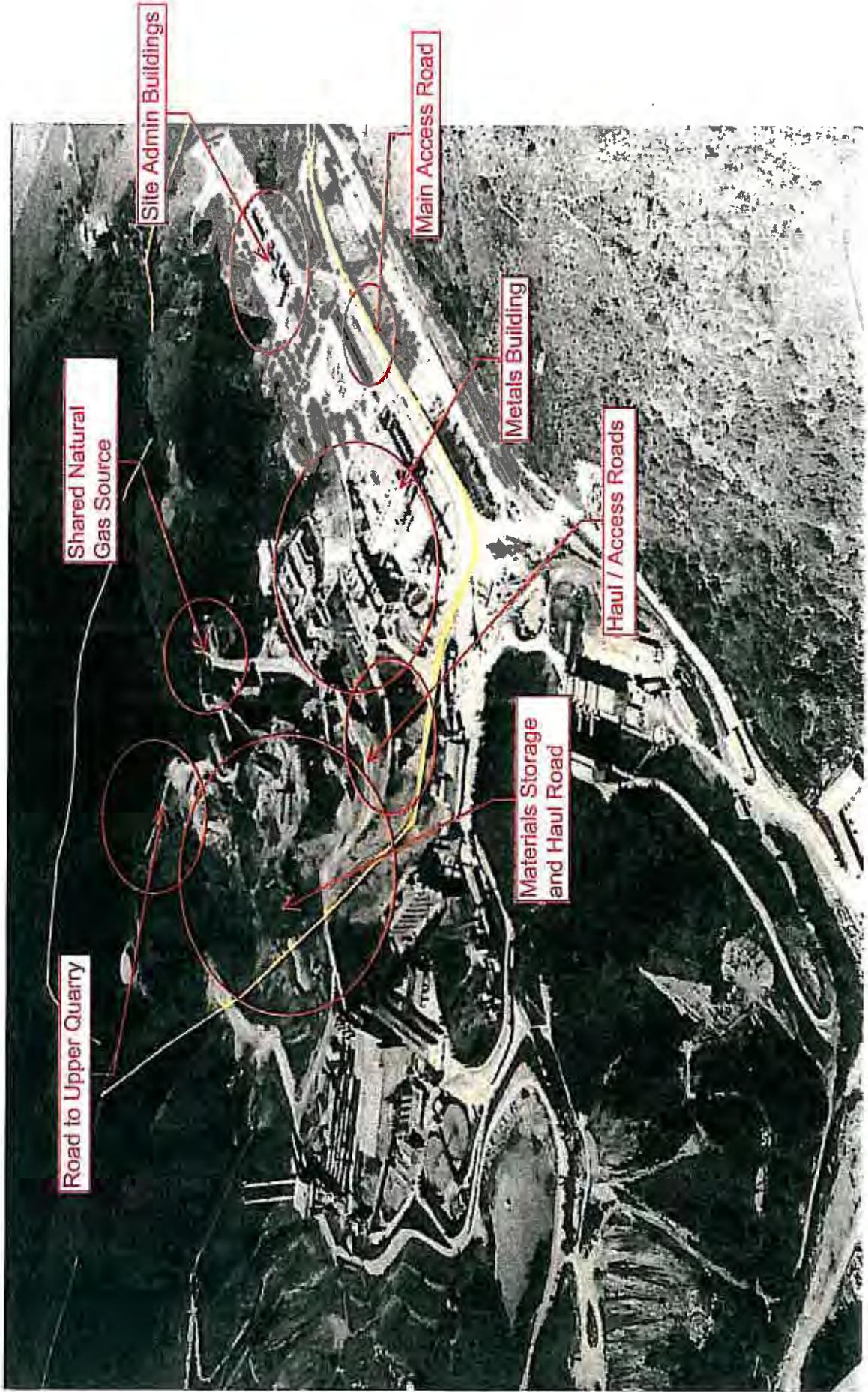
1948



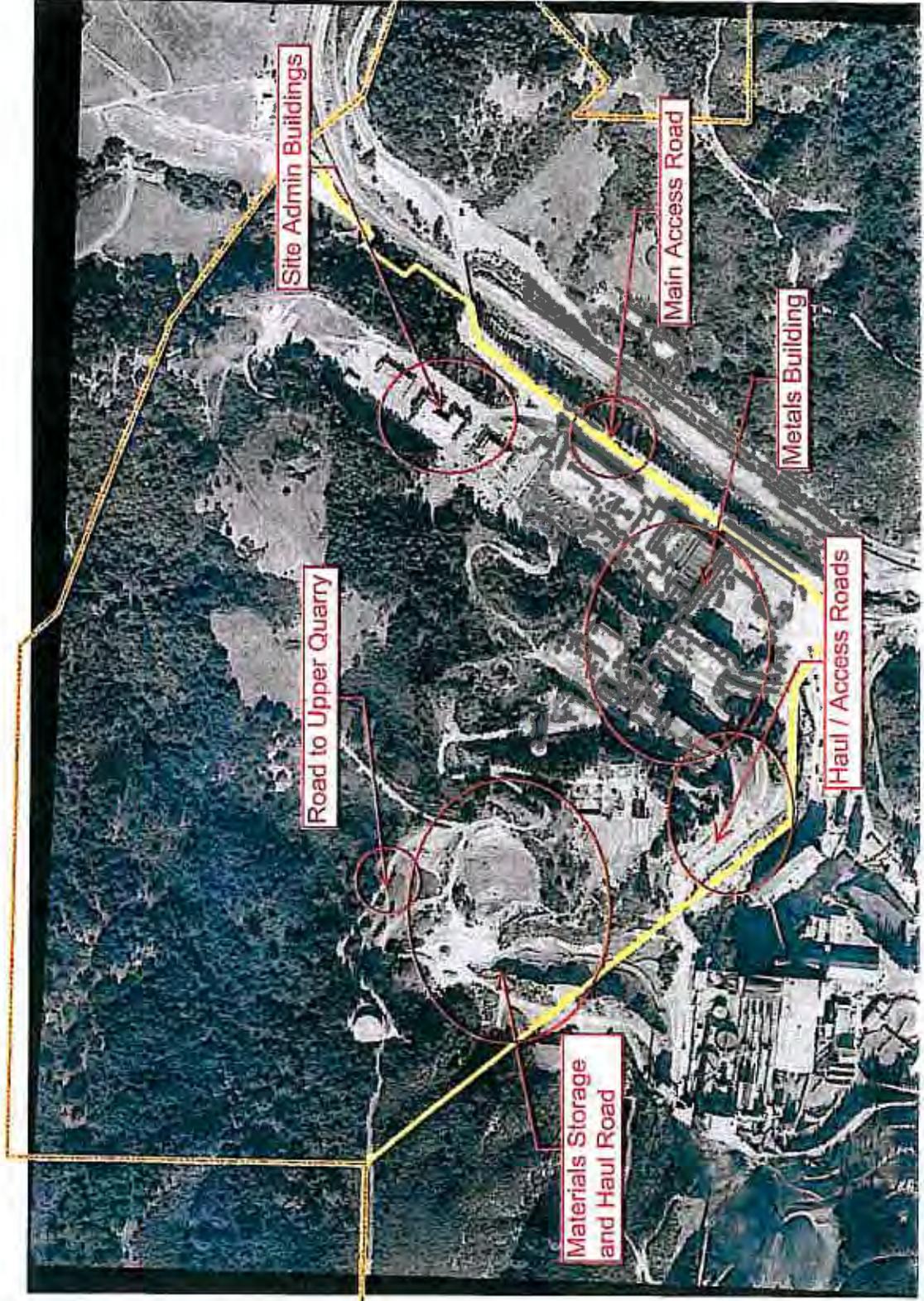
Materials Storage
and Haul Road

Haul / Access Roads

1955



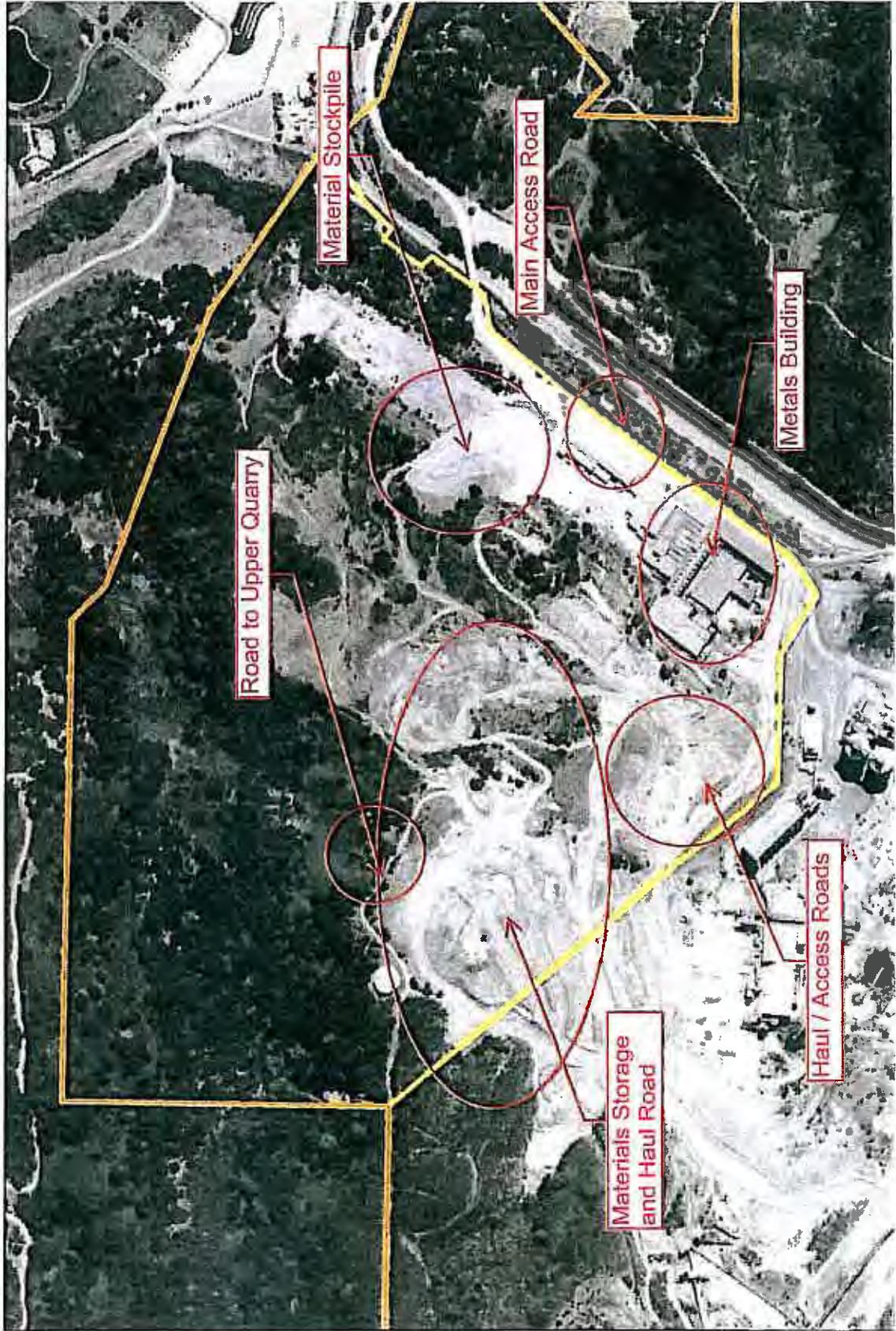
1974



1980



2009





	1948 Limits
	1950 Limits
	1963 Limits
	1985 Limits
	2010 Limits



PERMANENTE QUARRY EMSA DEVELOPMENT HISTORY

Enviro  **Inc.**

Date January 2011
 Property Boundary: Surveyed by
 Dunbar and Craig Land Surveys
 Aerial: 2010, USDA NAIP

EXHIBIT C

Santa Clara County's Prior Acknowledgements of Vested Rights For the Permanente Quarry

The Quarry has always operated in an open and obvious way. The County has been fully apprised of these operations, and confirmed the Quarry's vested rights through numerous affirmations.

On at least six (6) occasions (February 1971, April 1971, May 1972, December 1980, March 1985, January 1994), County Counsel's office or the Planning Department advised members of the Board of Supervisors or Planning Commission that the Quarry was vested.

On at least fifteen (15) other occasions, the Planning Department told the California Department of Conservation that the Quarry was vested. This includes a November 27, 2006 letter to the Department's former director, as well as every inspection report of the Quarry since 1993.

On at least twelve (12) different occasions, the County's acknowledgement of vested rights is directly implied from particular actions. In March 1985, for instance, the County approved the reclamation plan, which would not have been legal without a use permit if the County did not also consider the Quarry to be vested.

These affirmations are listed below, and detailed in Lehigh's Appendix G, and also in the exhibits to the staff report.

- On May 8, 1939, the Board of Supervisors granted Kaiser a use permit to operate the cement plant. The Board did not require a use permit for the continued operation of the quarry, which by then had been operating for nearly 40 years, and which would supply material for the cement plant. This is strong evidence that the Board of Supervisors believed the quarry was an existing, legal operation at that time.
- In 1950 and 1955, the County granted amendments to the use permit. Again, nothing in the record of these proceedings suggests the quarry was not fully accepted as a legal, nonconforming operation.
- On August 23, 1956, the Planning Commission confirmed that Kaiser possessed the right to operate the rock plant as part of its existing use of the Facility, in response to an earlier inquiry from the company.
- On February 22, 1971, a County staff memorandum to a Supervisor described the quarry as "a lawful nonconforming use" which "may continue to operate" in accordance with its nonconforming status.
- On April 12, 1971, County Counsel wrote to Supervisor Victor Calvo, explaining that the "quarry, being a nonconforming use" was legally allowed to expand to the entire parcel owned on the effective date of the zoning ordinance.

- On May 9, 1972, County Counsel made a presentation to the Board of Supervisors. County's Counsel's handwritten notes from that meeting indicate that he described the quarry as a legal, nonconforming use.
- On August 18, 1972, the Kaiser Companies granted a Ridgeline Protection Easement to the County. The County sought the easement in recognition of Kaiser's vested rights. As recorded by a newspaper article, County counsel stated in a public meeting that "quarrying standards...do not apply to Kaiser since the Kaiser operation is a nonconforming use dating from 1939."
- On September 22, 1977, an internal County memorandum stated that the issue of vested rights had been researched and that "the rock quarrying operation was established on this site prior to any requirement of a use permit."
- In August 1977, Kaiser applied to the County to modernize the cement plant. The County approved the project, without raising any issue regarding the legal right of the quarry to operate.
- On December 15, 1980, a memorandum by Fifth District Supervisor to the Board acknowledged limits on the County's authority over quarrying operations.
- On March 27, 1984, the Planning Department wrote to Kaiser to advise the quarry of new County regulations that required the quarry to prepare a reclamation plan. The letter was clear that a use permit would not be required: "the Kaiser quarry has been continuously operated since 1932 and the property is exempt from the requirements for a use permit..."
- On March 7, 1985, the County approved the reclamation plan without requiring Kaiser to obtain a use permit. The absence of a permit would not have been legal under SMARA if vested mining rights did not exist. The staff report provided by the Planning Department further stated: "The quarry has no use permit, being a legal non-conforming use."
- On March 29, 1988, the Zoning Administrator confirmed vested rights in connection with a new line of aggregate products (known as mineral aggregates) which the company planned to process and sell. The Administrator stated that a permit was unnecessary: "Because of [the Facility's] status as a legal nonconforming use and the fact that this overburden already exists, puts this rock processing facility as a use which has been historically allowed at this site." The mineral aggregate plant was built next to the EMSA.
- On July 25, 1991, in connection with proposed rock plant upgrades, the Zoning Administrator stated "no discretionary permits are necessary from the County for the proposed modifications and additions. The proposal is consistent with Kaiser's historical quarrying uses."

- Since 1991, the County has reported the Facility as “vested” in annual inspection reports to the California Department of Conservation. The annual reports also reflect a good compliance history; at no time until 2006 did the County note any violations.
- In a January 4, 1994 memorandum to the Fifth District Supervisor, the County’s attorney described the Facility as a vested site.
- On June 7, 2006, the County provided the State Mining and Geology Board with background information regarding the Facility and certain legal deficiencies alleged by the Department of Conservation. The letter did not raise vested rights as an issue.
- On October 10, 2006, the County issued a notice of alleged SMARA violations at the Facility. The notice listed the known violations, but did not raise any issue of vested rights.
- On November 27, 2006, the Planning Department provided a report to the state Department of Conservation which specifically acknowledged the Facility’s vested rights (emphasis added):

Your letter also indicates you are interested in the zoning information regarding the Hanson Permanente Quarry and Cement Plant. Our records indicate that the quarry operation is located...[in areas] currently designated “Hillsides” by the County General Plan and Zoned “HS” under the Zoning Ordinance.

It should be noted that quarry operations are allowed in Hillside areas under Section 2.20.020 of the zoning ordinance, subject to obtaining a Use Permit... **In the case of the Hanson Permanente Quarry, the operation was established before the zoning ordinance regulations were adopted and therefore has been recognized by the County for many years as a legal non-conforming use.**

- On May 5, 2007, the Planning Department issued a public notice regarding the CEQA process for the Facility, which stated: “the mine is a vested mine, which means there is a right to mine on the project site.”
- On May 21, 2008, the County wrote to Lehigh to discuss the Facility’s compliance status, and to update the compliance schedule for the Facility. The letter did not raise any issue of vested rights.

- On June 20, 2008, the County issued a notice of alleged SMARA violations at the Facility with respect to the EMSA. The notice did not raise any issue of vested rights.
- On April 14, 2009, the County entered into an agreement with Lehigh which authorized Lehigh's continued use of the EMSA without a use permit, subject to applications for a reclamation plan amendment. At no time did the County raise or suggest that the Facility was not vested in its underlying uses. The County's actions are wholly consistent with over 70 years of the Facility's operation.