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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH HARDESTY, et al.,

Plaintiffs,

v.

SACRAMENTO METROPOLITAN AIR  
QUALITY MANAGEMENT DISTRICT,  
et al.,

Defendants.

No. 2:10-cv-02414-KJM-KJN

ORDER

After a lengthy jury trial, the Hardesty and Schneider plaintiffs obtained a verdict exceeding \$100 million against defendant Sacramento County and three defendant county officials based on defendants' actions the jury determined caused the closure of the Hardestys' sand and gravel mine and violated plaintiffs' constitutional rights under the First, Fourth and Fourteenth Amendments. Defendants' Renewed Motion for Judgment as a Matter of Law ("Renewed JMOL Mot."), ECF No. 537, and Motion for a New Trial ("New Trial Mot."), ECF No. 538, are before the court. Plaintiffs oppose the motions, ECF Nos. 547-48, and defendants have replied, ECF Nos. 550-51. The court heard oral argument on the motions on October 31, 2017, and then submitted the matters. *See* ECF No. 554. After careful consideration, for the reasons below, the court DENIES both motions.

1 I. BACKGROUND

2 A. Factual Background

3 Between 2008 and 2012, California and Sacramento County regulators  
4 investigated reports that the Hardesty family was operating a sand and gravel mine illegally on  
5 the Schneider family's ranch. As a result of the investigations, regulators ordered the Hardesty  
6 and Schneider families to cease the mining operation; the Hardesty and Schneider families  
7 eventually complied. What happened during the four years from initial reports to closure of the  
8 mine forms the core of the case that went to trial.

9 According to plaintiffs, after a long period of regulatory disinterest, government  
10 officials were spurred to action not by their discovery of any actual legal violations, but by their  
11 desire to appease plaintiffs' competitors as well as state legislators and local politicians motivated  
12 by campaign contributions. Plaintiffs centrally allege the County recognized the Schneiders'  
13 historical right to continue mining on their property, also called a "vested right," as early as 1994,  
14 but that defendants then revoked that right in 2009 without any process and in violation of the  
15 Schneiders' procedural and due process rights. The regulatory action that followed culminated in  
16 the permanent shutdown of the mining operation. The Schneiders also allege defendants  
17 retaliated against them by dramatically increasing in 2012 the financial deposit necessary to  
18 continue operating the mine, after they filed this case in 2010.

19 Defendants' theory of the case was that the County never revoked plaintiffs'  
20 vested right, if they had any such right. Instead, in a series of hearings in 2010 and 2011,  
21 defendants merely determined that plaintiffs had expanded the mining operation beyond its  
22 permissible scope. The subsequent regulatory action, including requiring an amended  
23 reclamation plan and greater financial assurances, were required under state law and none of these  
24 actions were improperly motivated.

25 B. Procedural Background

26 Following extensive summary judgment practice, plaintiffs' case proceeded to trial  
27 against the following defendants: Sacramento County; Robert Sherry, a former Planning Director  
28 for the County; Roger Dickinson, a former member of the Sacramento County Board of

1 Supervisors; and Jeff Gamel, a former Sacramento County Senior Planner and Aggregate  
2 Resources Manager. After a sixteen-day trial held from February 16 to March 16, 2017, the jury  
3 returned a unanimous verdict on plaintiffs’ Fourteenth Amendment procedural and substantive  
4 due process claims and the Schneiders’ additional claim resting on the First Amendment’s right to  
5 petition clause. *See* Jury Verdict, ECF No. 469. The jury found the County, but not the  
6 individual defendants, violated plaintiffs’ procedural due process rights, and awarded nominal  
7 damages of \$1 to each set of plaintiffs on these claims. *Id.* at 2-3. The jury found all defendants  
8 violated plaintiffs’ substantive due process rights, and awarded \$75 million to the Hardestys and  
9 \$30 million to the Schneiders. *Id.* at 4-5. The jury found the County, but not the individual  
10 defendants, violated the Schneiders’ right to petition the government for redress, and awarded the  
11 Schneiders \$30,000 on this claim. *Id.* at 6. The jury also found each individual defendant’s  
12 conduct was “malicious, oppressive, or in reckless disregard” of plaintiffs’ rights, and awarded  
13 punitive damages in the following amounts: \$25,000 against Dickinson, \$1 million against  
14 Gamel, and \$750,000 against Sherry, with Sherry’s payment broken down as \$500,000 for the  
15 Hardestys and \$250,000 for the Schneiders. *Id.* at 7-8.

16           After plaintiffs had rested their case but before the jury returned its verdict,  
17 defendants filed three motions for judgment as a matter of law under Federal Rule of Civil  
18 Procedure 50(a). ECF Nos. 350, 353, 443. In the first motion, defendants asserted they were  
19 entitled to judgment as a matter of law because plaintiffs failed to pursue relief by way of writ in  
20 state court, the County Board of Supervisors’ decision and Board of Zoning Appeals (“BZA”)  
21 decisions had preclusive effect, the Hardesty plaintiffs were not entitled to notice related to the  
22 Hardestys’ procedural due process claims, the Board of Supervisors’ hearings complied with  
23 procedural due process, and plaintiffs’ substantive due process claims failed. ECF No. 350 at 2-  
24 20.

25           In the second motion, defendants asserted defendants Dickinson and Sherry were  
26 not liable for conduct after 2010 and Dickinson was entitled to absolute immunity for his  
27 legislative acts and qualified immunity for his executive acts. ECF No. 353 at 2-4.

28

1                   In the third and final Rule 50(a) motion, defendants contended plaintiffs lacked a  
2 federally protected property interest, plaintiffs received procedural due process, adequate state  
3 process precluded finding a violation of procedural due process, the only remedy for a due  
4 process violation was to order the process due, the Hardestys were not entitled to notice or  
5 alternately received actual notice of certain hearings, plaintiffs failed to exhaust remedies in state  
6 court, board determinations were entitled to preclusive effect, plaintiffs' substantive due process  
7 claims failed, all defendants were entitled to qualified immunity and Dickinson was entitled to  
8 absolute immunity for some of his conduct, no evidence permitted a reasonable jury to conclude  
9 defendants retaliated against plaintiffs, no evidence supported awarding punitive damages, and  
10 defendants are entitled to judgment as a matter of law on a Williamson Act Claim. ECF No. 443  
11 at 17-88. These three motions preserved defendants' right to file a renewed motion for judgment  
12 as a matter of law. *See* Fed. R. Civ. P. 50(a)-(b).

13                   On July 7, 2017, defendants filed a renewed motion for judgment as a matter of  
14 law and, in the alternative, for a new trial. *See* Renewed JMOL Mot., ECF No. 537; New Trial  
15 Mot., ECF No. 538. As noted, plaintiffs jointly opposed the motions. Renewed JMOL Opp'n,  
16 ECF No. 547; New Trial Opp'n, ECF No. 548. Defendants filed replies. Renewed JMOL Reply,  
17 ECF No. 550; New Trial Reply, ECF No. 551. On October 31, 2017, the court heard both  
18 motions: Derek P. Cole, Gregory P. O'Dea and Mark O'Dea appeared for defendants; R. Paul  
19 Yetter, Christian J. Ward and George D. Robertson appeared for the Hardestys; and Glenn W.  
20 Peterson appeared for the Schneiders. H'rg Mins., ECF No. 554; *see* Hr'g Tr., ECF No. 556.

## 21       II.     LEGAL STANDARD

### 22           A.     Motion for Judgment as a Matter of Law

23                   Federal Rule of Civil Procedure 50(b) governs renewed motions for judgment as a  
24 matter of law ("JMOL"), which may be raised only after the court denies a Rule 50(a) motion for  
25 judgment made during trial. Rule 50(b) provides in pertinent part that the court may: "(1) allow  
26 judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or (3) direct the entry  
27 of judgment as a matter of law." Fed. R. Civ. P. 52(b)(1)-(3). In rendering a Rule 50 motion  
28 decision, the court views the evidence in the light most favorable to the non-moving party and

1 draws all reasonable inferences in favor of the non-moving party. *Krechman v. Cty. of Riverside*,  
2 723 F.3d 1104, 1109 (9th Cir. 2013) (citing *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961  
3 (9th Cir. 2009)). The court may not make credibility determinations or weigh the evidence.  
4 *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). “[A]lthough the court  
5 should review the record as a whole, it must disregard all evidence favorable to the moving party  
6 that the jury is not required to believe.” *Id.* at 151.

7 A Rule 50(b) motion for JMOL is not treated as a separate motion; instead, it is a  
8 renewed Rule 50(a) motion. *Go Daddy Software*, 581 F.3d at 961. Before the court submits a  
9 case to the jury, a party must make a Rule 50(a) motion for JMOL. *Id.* If the court denies the  
10 motion, and if the jury returns a verdict against the movant, the movant may renew its motion  
11 under Rule 50(b). *Id.* As that motion is a renewed motion, it must be limited to the same grounds  
12 as asserted in the prior Rule 50(a) motion; a party cannot properly “raise arguments in its post-  
13 trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict  
14 Rule 50(a) motion.” *Id.* (quoting *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir.  
15 2003)). The Ninth Circuit strictly construes the procedural requirements of Rule 50, because  
16 failing to move for JMOL before submission to the jury may “lull the opposing party into  
17 believing that the moving party has abandoned any challenge to the sufficiency of the evidence,  
18 and thereby prejudice the opposing party.” *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 887  
19 (9th Cir. 2002) (quoting *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1346  
20 (9th Cir. 1986)). Accordingly, a party completely waives an issue that it failed to first raise in a  
21 Rule 50(a) motion. *Wei Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1028-29 (9th Cir.  
22 2003).

23 “The test applied is whether the evidence permits only one reasonable conclusion,  
24 and that conclusion is contrary to the jury’s verdict.” *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062  
25 (9th Cir. 2006). The verdict will be upheld if it is supported by “substantial evidence.” *First*  
26 *Nat’l Mortg. Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1067 (9th Cir. 2011). Substantial  
27 evidence means “such relevant evidence as a reasonable mind might accept as adequate to  
28 support a conclusion,” *Fisher v. City of San Jose*, 558 F.3d 1069, 1074 (9th Cir. 2009)

1 (international quotations omitted), “even if it is also possible to draw a contrary conclusion.”  
2 *First Nat’l.*, 631 F.3d at 1067 (international quotations omitted). Judgment as a matter of law is  
3 appropriate, however, when the jury “could have relied only on speculation to reach its verdict.”  
4 *Lakeside-Scott v. Multnomah Cnty.*, 556 F.3d 797, 803 (9th Cir. 2009); *id.* (citing *Barnes v. Arden*  
5 *Mayfair, Inc.*, 759 F.2d 676, 680-81 (9th Cir. 1985) (reasonable inference “cannot be supported  
6 by only threadbare conclusory statements instead of significant probative evidence”).

7 B. Motion for New Trial

8 The court may grant a motion for a new trial for any historically recognized  
9 grounds for permitting a new trial. Fed. R. Civ. P. 59(a)(1)(A); *Zhang v. Am. Gem Seafoods, Inc.*,  
10 339 F.3d 1020, 1035 (9th Cir. 2003). A grant may be based on claims “that the verdict is against  
11 the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was  
12 not fair to the party moving.” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007)  
13 (citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)). The Ninth Circuit has  
14 held that a trial court may grant a new trial “only if the verdict is contrary to the clear weight of  
15 the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice.”  
16 *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 510 n.15 (9th Cir. 2000); *cf.*  
17 *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 845-46 (9th Cir. 2014)  
18 (“Ultimately, the district court can grant a new trial under Rule 59 on any ground necessary to  
19 prevent a miscarriage of justice.”).

20 Courts hold movants to a lower standard of proof on motions for a new trial than  
21 they do on motions for judgment as a matter of law. Thus, even if the court declines to grant  
22 judgment as a matter of law, it may order a new trial under Rule 59; in other words, a verdict may  
23 be supported by substantial evidence, yet still be against the clear weight of the evidence. *Landes*  
24 *Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371-72 (9th Cir. 1987). Unlike a  
25 motion for judgment as a matter of law, in addressing a motion for a new trial, “[t]he judge can  
26 weigh the evidence and assess the credibility of witnesses, and need not view the evidence from  
27 the perspective most favorable to the prevailing party.” *Id.* Instead, if, “having given full respect  
28 to the jury’s findings, the judge on the entire evidence is left with the definite and firm conviction

1 that a mistake has been committed,” then the motion should be granted. *Id.* (quoting 11 C.  
2 Wright & A. Miller, Federal Practice and Procedure § 2806, at 48-49 (1973)).

3           However, a motion for new trial should not be granted “simply because the court  
4 would have arrived at a different verdict.” *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002);  
5 *United States v. 40 Acres*, 175 F.3d 1133, 1139 (9th Cir. 1999). When a motion for a new trial is  
6 based on insufficiency of the evidence, “a stringent standard applies” and a “new trial may be  
7 granted . . . only if the verdict is against the great weight of the evidence” or “it is quite clear that  
8 the jury has reached a seriously erroneous result.” *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d  
9 1336, 1347 (9th Cir. 1984) (internal quotations and citations omitted). Further, the court should  
10 uphold a jury’s award of damages unless the award is based on speculation or guesswork. *See*  
11 *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1371 (9th Cir. 1992). Finally, the “denial of  
12 a motion for a new trial is reversible ‘only if the record contains no evidence in support of the  
13 verdict’ or if the district court ‘made a mistake of law.’” *Go Daddy Software, Inc.*, 581 F.3d at  
14 962 (citing *Molski*, 481 F.3d at 729).

15           Because defendants move both for renewed judgment as a matter of law and a new  
16 trial on many of the same issues, the court applies the standards applicable to each motion  
17 respectively, with its analysis organized by each claim implicated by the defense motions.

### 18 III. SUBSTANTIVE DUE PROCESS

19           Defendants contend plaintiffs did not offer sufficient evidence to prove they  
20 possessed any liberty or property interests protected by the substantive due process clause of the  
21 Fourteenth Amendment. Renewed JMOL Mot. at 5-9. Defendants also contend the County’s  
22 actions were rational, and plaintiffs failed to produce sufficient evidence to permit the jury to find  
23 the County’s actions lacked a rational basis, a necessary finding to establish a substantive due  
24 process violation. *Id.* at 10-30.

25           The Due Process Clause prohibits government officials from arbitrarily depriving  
26 a person of her constitutionally protected liberty or property interests. *See, e.g., Action Apartment*  
27 *Ass’n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1025-26 (9th Cir. 2007). But “only  
28 ‘egregious official conduct can be said to be arbitrary in the constitutional sense’: it must amount

1 to an ‘abuse of power’ lacking any ‘reasonable justification in the service of a legitimate  
2 governmental objective.’” *Shanks*, 540 F.3d at 1088 (quoting *Cty. of Sacramento v. Lewis*, 523  
3 U.S. 833, 846 (1998)); accord *N. Pacifica*, 526 F.3d at 484 (“The irreducible minimum of a  
4 substantive due process claim challenging land use regulation is failure to advance any  
5 governmental purpose.”). Only conduct that “shocks the conscience” violates the Due Process  
6 Clause. See, e.g., *United States v. Salerno*, 481 U.S. 739, 746 (1987).

7 In their motions, defendants dispute: (1) the existence of a protected liberty  
8 interest; (2) the existence of some property interests; (3) the sufficiency of the evidence to support  
9 a finding that these two interests are present in this case; and (4) the existence of a vested right to  
10 conduct surface mining operations. The court addresses these four disputes below.

11 A. Liberty Interest and Waiver

12 Defendants contend no plaintiff possessed a liberty or property interest. Renewed  
13 JMOL Mot. 6-9. Plaintiffs contend defendants have waived this argument. Renewed JMOL  
14 Opp’n at 5-7. The court agrees; defendants waived this argument as explained below.

15 The right to “follow a chosen profession free from unreasonable governmental  
16 interference comes within the ‘liberty’ and ‘property’ concepts of” substantive due process.  
17 *Greene v. McElroy*, 360 U.S. 474, 492 (1959). Plaintiffs contend defendants waived the claim  
18 that plaintiffs lacked any protectable liberty interests by not raising the claim in their original  
19 motions for judgment as a matter of law, as required by Federal Rule of Civil Procedure 50.  
20 Renewed JMOL Opp’n at 5-8. As discussed above, a Rule 50(b) motion is limited to the grounds  
21 first raised before the matter was submitted to the jury in a Rule 50(a) motion, and a party waives  
22 any issue not first asserted in a Rule 50(a) motion. *GoDaddy Software*, 581 F.3d at 961; *Zhang v.*  
23 *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1028-29 (9th Cir. 2003) (“The failure to raise this issue  
24 prior to the return of the verdict results in a complete waiver, precluding our consideration of the  
25 merits of the issue.”).

26 Because defendants addressed only a substantive due process interest in a vested  
27 right to mine in one of their Rule 50(a) motions, ECF No. 443 at 17-30, defendants have waived  
28 the claim that plaintiffs lacked any cognizable liberty interest, including one based on their right

1 to pursue a chosen occupation. Defendants had notice at summary judgment that the court  
2 specifically found the Constitution protects two rights the plaintiffs asserted: “The Hardestys and  
3 Schneiders claim the County defendants stripped them of their vested right to operate a surface  
4 mine, which deprived them of their right to pursue their chosen profession and to devote their  
5 land to a legitimate use. The Constitution protects both of these interests.” ECF No. 283 at 65.  
6 Further, defendants filed three Rule 50(a) motions, supported by more than 100 pages of briefing.  
7 See ECF Nos. 350, 353, 443. Defendants had ample opportunity to raise and preserve any issues  
8 in their Rule 50(a) motions and the record reflects they took full advantage of that opportunity.  
9 Defendants did not claim in their Rule 50(a) motions that plaintiffs lacked any protectable liberty  
10 interests. See ECF Nos. 350, 353, 443 at 17-30 (asserting only that plaintiffs have no “federally  
11 protected property interest”). Accordingly, defendants have waived the argument that plaintiffs  
12 lacked any cognizable liberty interest.

13 In reply, defendants cite *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir.  
14 2013), and *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004), to argue waiver  
15 rules apply only to “the assertion of new *claims*, not new *arguments* regarding a claim that was  
16 already asserted.” Renewed JMOL Reply at 24-25 (emphasis in original). But neither case  
17 addresses Rule 50 motions. See *Pallares-Galan*, 359 F.3d at 1095 (addressing waiver of  
18 appellate claims to determine whether to apply the plain error or the de novo standard of review);  
19 *Thompson*, 70 F.3d at 1098 (addressing waiver of new arguments albeit in habeas context). Nor  
20 does either case account for the importance of first raising issues in the Rule 50(a) motion. See,  
21 e.g., *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003) (explaining one purpose  
22 of first raising issues in a Rule 50(a) motion is that “it calls to the court’s and the parties’ attention  
23 any alleged deficiencies in the evidence at a time when the opposing party still has an opportunity  
24 to correct them”); *Janes*, 279 F.3d at 887 (observing that “failing to make a motion for JMOL at  
25 the close of *all* the evidence may lull the opposing party into believing that the moving party has  
26 abandoned any challenge . . . .”) (original emphasis, internal quotation marks and citation  
27 omitted).

1 Defendants themselves proposed instructing the jury that “the Constitution protects  
2 plaintiffs’ interests in the right to pursue their chosen profession,” further evincing defendants’  
3 waiver of this argument. ECF No. 317 at 8. Their proposed instruction also stated “plaintiffs  
4 allege that defendants . . . deprived them of their Substantive Due Process Rights under the  
5 Fourteenth Amendment to the Constitution by stripping them of their right to operate a vested  
6 mine, which deprived them of their right to pursue their own chosen profession.” *Id.* Defendants  
7 cannot now complain that plaintiffs lacked the right to stand on a claim based on their asserted  
8 right to pursue their chosen profession. Despite objecting to a draft final jury instruction on  
9 substantive due process, ECF No. 427 at 35, defendants did not object to the court’s instructing  
10 the jury “that the Constitution protects plaintiffs’ interests in the right to pursue their chosen  
11 occupation or profession.” *Id.*; *see* ECF No. 461 at 23-24 (final jury instruction given, stating  
12 “the Constitution protects a plaintiff’s legitimate interests in his or her property and in the right to  
13 pursue his or her legitimate, chosen occupation or profession”).*see United States v. Perez*, 116  
14 F.3d 840, 845 n. 7 (9th Cir.1997) (holding jury instruction issues may be waived by defendant’s  
15 attorney); *United States v. Baldwin*, 987 F.2d 1432, 1437 (9th Cir.1993) (“Where the defendant  
16 himself proposes the jury instruction he later challenges on appeal, we deny review under the  
17 invited error doctrine.”); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1493 (9th Cir.  
18 1986) (“A party who requests an instruction invites any error contained therein and, absent an  
19 objection before the instruction is given, waives appellate review of the correctness of the  
20 instruction.”); *United States v. Sumner*, 125 F. App’x 118, 120 (9th Cir. 2005) (denying review  
21 under invited error doctrine where defendant’s counsel proposed jury instruction that mirrored  
22 model jury instruction defendant claimed on appeal was error).

23 Because the court instructed the jury using wording that was substantively similar  
24 to that defendants proposed, defendants have waived their argument based on liberty interest  
25 under Rule 50 as well as the invited error doctrine.

26 B. Property Interest and Waiver

27 Defendants also contend no plaintiff possessed a protected property interest.  
28 Renewed JMOL Mot. 6-9. Plaintiffs contend defendants also have waived this argument.

1 Renewed JMOL Opp'n at 5-8. Generally, "[t]he right of [an owner] to devote [his] land to any  
2 legitimate use is properly within the protection of the Constitution." *Harris v. Cty. Of Riverside*,  
3 904 F.2d 497, 503 (9th Cir. 1990) (quoting *Washington ex rel. Seattle Title Trust Co. v. Roberge*,  
4 278 U.S. 116, 121 (1928)).

5 Defendants have waived their claim that the Hardestys lacked a property interest  
6 independent of the Schneiders. Defendants argued in their Rule 50(a) motion only that the  
7 Hardestys were not entitled to notice under the Surface Mining and Reclamation Act (SMARA)  
8 based on the Hardestys' inability to cure a zoning violation. ECF No. 443 at 55-59. Defendants'  
9 claims, that plaintiffs lacked a property interest because they "have not applied for and been  
10 denied a conditional use permit" or otherwise failed to comply with zoning laws, ECF No. 443 at  
11 17-30, do not logically extend to the claim that the Hardestys lacked a property interest  
12 independent of the Schneiders because contending only one party can have that property interest  
13 is distinct from contending only one party could have had a property interest. Contending neither  
14 party had a property interest in the Rule 50(a) motion would not have "call[ed] to the court's and  
15 parties' attention" the "alleged deficiencies in the evidence" about the Hardestys' lacking a  
16 separate property interest distinct from the Schneiders that defendants now raise. *Freund*, 347  
17 F.3d at 761; *see Go Daddy*, 581 F.3d at 962-63. Defendants waived this new claim.

18 But defendants have not waived their claim that the Schneiders lacked a property  
19 interest absent lead agency approval. Defendants raised the following argument in their Rule  
20 50(a) motion: "Plaintiffs' claim of a vested right does not create an entitlement to mine without  
21 complying with zoning laws." ECF No. 443 at 17-19. This argument logically extends to  
22 defendants' Rule 50(b) argument that the Schneiders not only exceeded the scope of any vested  
23 right they might have, but also that the Schneiders could not act upon such a right until a lead  
24 agency approved their reclamation plan, meaning the Schneiders lacked a property interest absent  
25 that approval. Renewed JMOL Mot. at 18-22. Thus, the court will address the merits of this  
26 argument.

27 That said, defendants' claim fails on the merits. Defendants assert the Schneider  
28 plaintiffs "could not have demonstrated a valid right to mine in any manner contrary to" their

1 reclamation plan because “even vested-right mining operations are subject to [a statutory]  
2 prohibition on substantially deviating from a reclamation plan *until* lead agency approval is  
3 obtained.” Renewed JMOL Mot. at 7 (original emphasis, citing Cal. Pub. Res. Code § 2777).  
4 However, as explained immediately below, *infra* III.C., the evidence at trial permitted the jury to  
5 infer that the vested right recognized in the 2002 reclamation plan as attaching to the Schneider  
6 Historical Mine (SHM ) covered the entire SHM tract without limits on production method or  
7 production amount. JX099 Exs. A-G (maps showing areas covering almost all land within the  
8 perimeter of the SHM tract and maps showing where mining was projected to occur in the future).  
9 In reply, defendants appear to implicitly concede this argument with respect to lead agency  
10 approval in asserting plaintiffs “could never have had valid expectations to mine SHM outside of  
11 the mining use recognized in the 2004 County staff letter to Jay Schneider or outside of the  
12 parameters established in the reclamation plan approved in 2002.” Renewed JMOL Reply at 27.  
13 Moreover, “[v]ested rights [in mining], if established and continued, generally cannot be  
14 conditioned.” *Calvert v. Cty. of Yuba*, 145 Cal. App. 4th 613, 626 (2006). In any event, the  
15 mandatory language of California Public Resources Code section 2776—that a person “shall be  
16 deemed to have vested rights” when meeting certain requirements—undermines the assertion that  
17 plaintiffs required lead agency approval for their asserted property rights. Unless defendants  
18 could show an impermissible expansion of the property rights at issue here, or a “substantial  
19 deviati[on] from” the 2002 reclamation plan, *see infra* III.D., the jury’s finding of a property right  
20 is supported by substantial evidence.

21 C. Evidence of Liberty or Property Interests

22 Even assuming waiver of some of its Rule 50 arguments, defendants maintain “the  
23 [c]ourt does still have authority to rule” given defendants’ motion for a new trial. Hr’g Tr.at  
24 20:1-15. The court therefore examines whether the verdict respecting plaintiffs’ liberty or  
25 property interests was against the clear weight of the evidence. *Passantino*, 212 F.3d at 510 n.15.

26 1. Liberty Interest in Pursuing a Chosen Occupation

27 The clear weight of the evidence admitted at trial supports the conclusion plaintiffs  
28 had liberty interests in pursuing their chosen occupations. Evidence shows the Hardestys had a

1 liberty interest in their chosen occupation as SHM mine operators, *e.g.*, Rep.'s Tr. (RT)1672:13-  
2 1675:13, 1677:20-24, 1678:3-6 (Hardesty Test.), and the Schneiders had a liberty interest in their  
3 occupation of owning and maintaining their ranch property and selling aggregate from their land  
4 to the mining operator and customers. *See, e.g.*, RT 1266:8-1267:6; 1272:23-1274:5 (Schneider  
5 Test.). As part of pursuing their occupation, the Schneiders handled issues such as establishing  
6 recognition of their vested right to mine, negotiating the reclamation plan and filing annual  
7 reports. *E.g.*, JX021; JX099; RT 1294:18-22, 1373:20-1374:20, 1443:25-1444:1, 1499:11-16  
8 (Schneider Test.). The jury heard unrebutted testimony that selling mining aggregate to a mining  
9 operator has been the Schneiders' family plan "since 1935." RT 1273:14-1274:4 (Schneider  
10 Test.). And that sale of aggregate was "fundamental to the survival of the ranch" because "the  
11 mining income supplemented the income of the older generation and put the infrastructure back  
12 into the ranch to keep the building and the roads and everything repaired." *Id.* 1285:2-22.

13           The court finds the clear weight of the evidence supports a jury determination that  
14 plaintiffs had liberty interests in pursuing their chosen occupations. *See* ECF No. 469 at 4 (jury  
15 verdict finding violation of Hardesty and Schneider plaintiffs' substantive due process rights,  
16 which requires finding a federally protected liberty or property interest); ECF No. 461 at 23-24  
17 (final jury instructions requiring a finding of either a "liberty or property interest protected by the  
18 Constitution").

## 19           2.     Property Interest as Operators and Landowners

20           The clear weight of the evidence also supports plaintiffs' claim to have property  
21 interests in the land as mine operators and for the Schneiders also, as landowners. For instance,  
22 the Hardestys invested 30 years and millions of dollars into conducting their mining operations,  
23 re-investing earnings, at times millions of dollars, back into the operation. RT 1673:9-1674:8,  
24 1684:4-18 (Hardesty Test.); 1351:18-24, 1354:11-14 (Schneider testifying to the "well developed  
25 financial relationship" between the Schneiders and the Hardestys and the Schneiders' informed  
26 belief that the Hardestys would have continued their mining operation well into the future).  
27 California Public Resources Code section 2776 supports the existence of a property right  
28 belonging to the Hardestys because that statute recognizes vested rights for any person "to

1 conduct surface mining operations,” not just landowners, and it vests that right in a person who  
2 has “diligently commenced surface mining operations and incurred substantial liabilities for work  
3 and materials necessary for the surface mining operations.” *See Calvert*, 145 Cal. App. 4th at  
4 630-31 (discussing “property rights” that “have been founded and deemed vested . . . under  
5 SMARA”).

6 The court finds the clear weight of the evidence supports plaintiffs’ claim to hold  
7 property interests as mine operators, and the Schneiders’ additional claim to a property interest as  
8 landowners.

9 3. Property Interest in Goodwill of Mining Business.

10 The clear weight of evidence shows the Hardestys also had a property interest in  
11 the goodwill of their mining operation. “The goodwill of one’s business is a property interest  
12 entitled to protection; the owner cannot be deprived of it without due process.” *Soranno’s Gasco,*  
13 *Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). Here, plaintiffs presented evidence of Joe  
14 Hardesty’s building up his mining business over 30 years and accumulating “over 300  
15 customers.” RT 1677:20-1678:6 (Hardesty Test.). Hardesty developed “a good working business  
16 relationship” with the Schneiders and their ranching business. *Id.* 1678:19-24. Furthermore, the  
17 Hardestys were positioned to meet high demand during the economic boom of the mid-2000s. *Id.*  
18 1679:4-7. Hardesty testified credibly that he developed new techniques that allowed him to get  
19 the sand and gravel cleaner more easily and otherwise grow the business, improving its efficiency  
20 and allowing for sale of additional products. *Id.* 1680:15-17; 1688:19-1689:1. According to  
21 Hardesty, he “had so many” customers because they were satisfied with the work he did for them.  
22 *Id.* 1688:3-5. This evidence supports a jury determination that the Hardestys held a property  
23 interest in the goodwill of their mining operation. *See* ECF No. 469 at 4 (jury verdict finding  
24 violation of Hardesty and Schneider plaintiffs’ substantive due process rights, which requires  
25 finding a federally protected liberty or property interest); ECF No. 461 at 23-24 (final jury  
26 instructions requiring a finding of either a “liberty or property interest protected by the  
27 Constitution”).

1                   4.       Property Interest in Devoting Land to Legitimate Uses

2                   The clear weight of the evidence cited above supports the finding of a property  
3 interest in devoting land to legitimate uses as well—notably here, mining operations. Courts have  
4 long recognized a property interest in devoting one’s land to a legitimate use. *See, e.g.,*  
5 *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928); *Harris v. County*  
6 *of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990. And “[m]ineral rights have long been regarded as  
7 an interest in land” under California law. *CCPA No. 1 v. Cty. of Sonoma*, 122 Cal. App. 4th 1614,  
8 1634 (2004).

9                   D.       Meaning of Vested Right, Nonconforming Use, and Scope of Right

10                  Defendants contend they had a legitimate government objective in addressing an  
11 impermissibly expanding nonconforming use at the SHM. Renewed JMOL Mot. at 17-19.  
12 Plaintiffs contend substantial evidence supports and the clear weight of the evidence is not  
13 against the finding that plaintiffs had a vested right to mine the entire SHM tract, and that vested  
14 right did not limit method or production levels. Renewed JMOL Opp’n at 23-29. Plaintiffs are  
15 correct. As the first step in explaining this conclusion, the court explains the nature of a vested  
16 right to mine under California law.

17                  In California, a person has a “vested right to conduct surface mining operations” if,  
18 “prior to January 1, 1976, the person has, in good faith and in reliance upon a permit or other  
19 authorization, if the permit or other authorization was required, diligently commenced surface  
20 mining operations and incurred substantial liabilities for work and materials necessary for the  
21 surface mining operations.” Cal. Pub. Res. Code § 2776(a). This vested right requires no permit  
22 “as long as no substantial changes are made in the operation except in accordance with this  
23 chapter.” *Id.* A surface mining operation with vested rights must still obtain approval of a  
24 reclamation plan and provide financial assurances. *Calvert v. Cty. of Yuba*, 145 Cal. App. 4th  
25 613, 617 (2006).

26                  As recognized by the California Court of Appeals, “In light of the state and federal  
27 constitutional takings clauses, when zoning ordinances or similar land use regulations are  
28 enacted, they customarily exempt existing land uses (or amortize them over time) to avoid

1 questions as to the constitutionality of their application to those uses.” *Id.* at 623 (citing *Hansen*  
2 *Bros. Enterp., Inc. v. Bd. of Supervisors*, 12 Cal. 4th 533, 551-52 (1996)). These “exempted uses  
3 are known as nonconforming uses and provide the basis for vested rights to such uses.” *Id.*  
4 (citing *Hansen Bros.*, 12 Cal. 4th at 551-52).

5 Here, in 1994, the Sacramento County Senior Planner, Richard Maddox, accepted  
6 evidence of a vested right to mining on the SHM from Jay Schneider. JX021. The county did not  
7 require Schneider to obtain a permit, but it did require a reclamation plan and financial assurances  
8 for all mining activities that had occurred since January 1, 1976. JX025; *see* JX072 (inter-  
9 department correspondence, dated December 28, 2001, from Environmental Coordinator Dennis  
10 Yeast stating, “Due to a long established practice of mining the County and State have formally  
11 recognized Schneider’s vested right to mine without approval of a Use Permit.”); JX071 (inter-  
12 department correspondence, dated November 13, 2001, from the Office of the County Counsel to  
13 Mr. Yeast, the Environmental Coordinator, stating, “Because the Schneider mine has a vested  
14 right to conduct mining, a use permit is not required under the Surface Mining and Reclamation  
15 Act (SMARA).”).

16 The County Board of Supervisors approved a final reclamation plan for SHM  
17 November 2002, and the plan has not been amended since. JX099.

18 The reclamation plan describes the mining operation this way:

19 Material is excavated and classified, processed and stockpiled in  
20 anticipation of market demand and seasonal considerations. When  
21 the stockpiles are sufficiently diminished to justify further  
22 excavation or when there is an actual or anticipated market demand  
for a particular material, then such material is excavated, classified  
or processed as necessary and prudent, thus avoiding unnecessary  
excavation.

23 *Id.*, Ex. 099 at 5. The plan anticipated a “low annual average of sand and gravel mined,” so  
24 reclamation was determined to proceed in annual phases. *Id.* It also anticipated mining would  
25 proceed in three phases. *Id.* The first area would be mined between 2003 and 2023, the second  
26 between 2023 and 2063 and the third after 2063. *Id.*

27 Defendants contend they had a legitimate government objective in addressing  
28 nonconforming use at the SHM based on three impermissibly expanding uses: (1) “mining

1 outside areas intended to be mined when the use became nonconforming”; (2) “employing new  
2 mining methods or activities not used at the inception of the nonconforming use”; and  
3 (3) “increasing production levels.” Renewed JMOL Mot. at 17. The court addresses these three  
4 contentions below.

5 1. Mining Outside the Area of the Original Nonconforming Use

6 Defendants contend plaintiffs impermissibly expanded their nonconforming use by  
7 mining outside areas intended to be mined when the use became nonconforming—that is, when  
8 the use no longer was in conformity with a zoning restriction. Renewed JMOL Mot. at 17-18; *see*  
9 *Hansen Bros.*, 12 Cal. 4th at 540 n.1. Plaintiffs insist the jury “was entitled to understand”  
10 evidence that plaintiffs’ vested right encompassed “all mining activity on the entire [SHM] tract.”  
11 Renewed JMOL Opp’n at 25. A jury finding that plaintiffs’ vested right to mine encompassed the  
12 entire SHM tract is not against the clear weight of the evidence, given the state of the law.  
13 Nonconforming mining uses are subject to the “diminishing asset doctrine,” which permits  
14 mining uses to expand into new areas as long as their owners intended to mine these new areas  
15 when the mining uses became nonconforming. *Hansen Brothers*, 12 Cal. 4th at 553. The  
16 diminishing asset doctrine requires: (1) the owners’ manifested objective intentions to mine the  
17 new areas; and (2) those intentions existing at the time their uses became nonconforming. *Id.* As  
18 the California Supreme Court recognized, “[s]uch a business must operate, if at all, where the  
19 resources are found.’ If it may not expand, it cannot continue.” *Id.* (citing *Lockard v. City of Los*  
20 *Angeles*, 33 Cal.2d 453, 467 (1949)). “Were the diminishing asset doctrine inapplicable, a mining  
21 enterprise would be required to immediately initiate mining on all areas of its property lest, under  
22 a subsequent zoning change, its right to further mining be extinguished.” *Id.* at 559.

23 Defendants concede that “the historical record concerning what was determined  
24 with respect to SHM in 1994 was, at best, ambiguous.” Renewed JMOL Mot. at 17. Against this  
25 backdrop, this is precisely the type of determination a jury was entitled to make as the factfinder.  
26 Although defendants observe that a 1994 letter from Richard Maddox to Jay Schneider (JX021)  
27 referenced only two of the SHM parcels, comprising “only 300 acres of the much larger SHM  
28 property,” Renewed JMOL Mot. at 17-18, the 1994 letter also refers broadly to the “Gravel

1 Mining Operation and “the mining operation.” The jury was entitled to read this letter as  
2 encompassing all mining activity at SHM. On cross-examination, defendant Jeff Gamel  
3 acknowledged the lack of limitations in the 1994 letter, discussed more fully below. *See* RT  
4 2060:25-2061:11 (agreeing that nothing in 1994 letter limited amount of production at SHM, the  
5 quantity of ore or gravel SHM could develop, the type of excavation or mining operation at SHM,  
6 or nothing that would limit the various kinds of aggregate, sand, gravel, pebbles, etc.). His  
7 testimony as to a lack of limitations also permitted the jury to conclude the vested right here  
8 extended to the entirety of SHM.

9           Additionally, the approved 2002 reclamation plan arguably contemplates  
10 expansion into new areas at the time the mining uses became nonconforming. *See* JX099. Jay  
11 Schneider testified to his understanding that the County “completely acknowledged our vested  
12 rights.” RT 1319:4-15. Evidence before the jury reflected the County’s understanding was  
13 similar. *E.g.*, JX141 (e-mail from Aggregate Resources Manager Mike Winter describing 2002  
14 reclamation plan proceeding as “the hearing to declare the mine’s vested status and to approve the  
15 reclamation plan”); PX568 at 145:21-24 (BZA hearing transcript in which County Counsel stated  
16 the “Reclamation Plan and that issue of what is vested pursuant to SMARA was decided at the  
17 time that the current Reclamation Plan was approved by the Board of Supervisors in 2002.”).

18           Maps attached to the 2002 reclamation plan also permitted the jury to infer  
19 plaintiffs’ vested right to mine at the SHM encompassed the entire tract, including expansion into  
20 new areas. These maps featured a bold-dotted line for the entire “PERIMETER OF THE  
21 SCHNEIDER HISTORIC MINING TRACT” and show areas covering almost all land within the  
22 perimeter of the SHM tract. JX099, Exs. A-G. Additionally, other maps show areas where  
23 mining was projected to occur in the future. *Id.*, Exs. F-G; *see also, e.g.*, JX071 (internal  
24 memorandum from Michele Bach, Supervising Deputy at Office of County Counsel, to Dennis  
25 Yeast, Environmental Coordinator, noting 2002 reclamation plan showed areas to be mined in the  
26 future); RT 387:8-13, 400:10-17 (testimony of plaintiffs’ expert Bly-Chester about reclamation  
27 plan maps distinguishing “pre-1976 mined areas” from “things that had intended to be mined”  
28 and that “the Hardesty operations” were “[c]ompletely within” areas covered by the 2002

1 reclamation plan); RT 674:17-675:5 (defendant Sherry testimony acknowledging reclamation  
2 plan map shows areas that have been mined and areas not yet mined).

3 Defendants' own lack of clarity about the maps associated with the 2002  
4 reclamation plan supports the conclusion that a jury finding that plaintiffs' vested right  
5 encompassed the entire SHM tract was not against the clear weight of the evidence. For instance,  
6 defendant Dickinson testified that "[i]t looks like a good portion of that map has been shaded"  
7 when asked if the shaded areas of the map looked limited to Dickinson. RT 1196:19-21.  
8 Although Dickinson testified that he "would eyeball it at less than half," Dickinson also testified  
9 that he did not know "what it [the shading] means." *Id.* 1196:22-1197:1. Defendant Gamel  
10 testified the maps were "very confusing because of the color overlay." RT 2063:17-19. And  
11 defendant Sherry testified that he "can't tell" and did not "know what the colors mean" in  
12 reference to maps with legends indicating estimates as to where mining likely would occur in the  
13 next 20, 40, and 100 years at the time the plan was adopted. RT 701:6-704:20.

14 To support their contention that plaintiffs impermissibly expanded their  
15 nonconforming use, defendants refer to evidence that County staff had referred to SHM as a  
16 "small scale operation." Renewed JMOL Mot. at 19 (citing JX084 at 6:22). But the jury also  
17 heard and saw evidence that the Hardesty mining operation remained a relatively "small  
18 operation" compared with competitors such as Teichert, Vulcan and Granite. *Compare, e.g.,* JX  
19 484 at 24 (reported tonnage level for SHM at above 610,000 tons per year), *with* JX671 at 31-33  
20 (describing Teichert quarry in Sacramento County producing 135 million tons from pits up to 200  
21 feet deep and Granite quarry producing 354 million tons from a pit up to 400 feet); RT 508:9-  
22 509:1, 515:2-516:6 (Gamel Test.); RT 551:6-16 (Wheatley Test.). Thus, the jury could  
23 reasonably infer the SHM mining operation was still a relatively small-scale operation despite any  
24 expansion within the SHM tract.

25 In support of their impermissible expansion contention, defendants also observe  
26 "[t]he historical information Jay Schneider had provided the County prior to the 1994 letter did  
27 not expressly reference any intent to mine" the area near the Cosumnes River, "well north of  
28 Meiss Road," or "to mine the area to the extent it was being excavat[ed] by 2010." Renewed

1 JMOL Mot. at 18. Defendants also point to evidence of plaintiffs’ excavating new pits near the  
2 Cosumnes River, north of Meiss Road. *Id.* (citing JX 484 at 22, showing no pit near the river in  
3 2004, and JX 484 at 23, showing pit as of 2007). Defendant Gamel also testified to his opinion  
4 that some of plaintiffs’ mining in 2009 was not located in the area set out for mining between  
5 2002 and 2022 in the 2002 Reclamation plan. RT 2164:18-2165:17; *see* JX099 at 15-16. But  
6 none of this evidence necessarily undercut the substantial evidence elsewhere in the record--  
7 notably, the 2002 reclamation plan maps and related testimony--, as discussed above, that  
8 plaintiffs’ vested right included the areas plaintiffs mined in 2009 at the time they were mining.  
9 Nor are Gamel’s opinion combined with a lack of historical evidence originally submitted by  
10 Schneider against the clear weight of the evidence in support of the verdict here: the County’s  
11 1994 letter spoke broadly about the SHM tract, the 2002 reclamation plan and its various maps  
12 were before the jury as evidence, and defendants themselves testified to a lack of clarity about the  
13 various maps in the 2002 reclamation plan. In sum, the evidence defendants cite does not shift  
14 the clear weight of the evidence.

15 Altogether, there was substantial evidence to support a jury finding that the  
16 plaintiffs’ vested right to mine encompassed the entire SHM tract. And in light of defendants’  
17 own uncertain testimony and the other evidence of record, it is not for this court to override the  
18 jury’s verdict given that the jury’s finding that the vested right to mine encompassed the mining  
19 plaintiffs engaged in at the time was not against the clear weight of the evidence.

## 20 2. Employing New Mining Methods

21 Defendants rely on *Endara v. City of Culver City*, 140 Cal. App. 2d 33, 38 (1956),  
22 to assert that “[n]ew types of mining methods added after the nonconformity are prohibited,”  
23 including as relevant here plaintiffs’ excavating riverbed aggregate near the banks of the  
24 Cosumnes River. Renewed JMOL Mot. at 17 n.14, 18. Here again, it is the court’s job to review  
25 the evidence of record in light of the law, rather than to write on a clean slate. Performing this  
26 exercise, the court concludes that substantial evidence supports a finding that the vested right  
27 incorporates mining methods in place through 2010.

1 As noted above, Sacramento County’s 1994 letter stated that information  
2 submitted by Jay Schneider “has been accepted as evidence of vested interest and therefore, we  
3 are not requiring a use permit for the mining operation.” JX021. That letter does not impose any  
4 limitations on production methods. *Id.* In fact, Jay Schneider informed the county by submitting  
5 historical drill logs (JX001), with historical materials submitted by letter (JX011), that mining  
6 methods at SHM had historically varied and might change depending on technological and  
7 market conditions; at times in the 1940s, mining areas were located along the river and river  
8 terrace. RT 1302:22-25, 1308:3-15, 1312:21-1313:16. Although defendants refer to this  
9 historical material as providing only “vague indications,” Renewed JMOL Mot. at 18, the jury  
10 heard Schneider’s testimony and the historical material was admitted into evidence; it was for the  
11 jury to weigh the information in the context of the complete trial record. Defendant Gamel also  
12 testified the 1994 letter contained nothing that would limit the type of excavation or mining  
13 operation on SHM. RT 2061:6-8. Nor does the 2002 reclamation plan contain limits on the type  
14 of mining. JX099. Taking all of the evidence of record into account, the clear weight of the  
15 evidence does not contravene a finding that plaintiffs’ vested right incorporates the mining  
16 methods plaintiffs used through 2010.

### 17 3. Increasing Mining Production Levels

18 Substantial evidence supports the jury’s finding that plaintiffs’ vested right  
19 included varying production levels based on demand. The defendants’ argument that plaintiffs’  
20 increased production in subsequent years was an impermissible expansion of a nonconforming  
21 use is unavailing. *See* Renewed JMOL Mot. at 18-19.

22 According to defendants, “nonconforming mining uses are only entitled to  
23 ‘gradual and natural’ increases in production” to “meet the demands of population growth.”  
24 Renewed JMOL Mot. at 17 (citing *Hansen Brothers*, 12 Cal. 4th at 573). That plaintiffs  
25 expanded, enlarged, relocated, and increased annual production by over ten times over fifteen  
26 years was not disputed. JX287; JX483; JX484; DXA at 80. The dispute, however, is whether  
27 this increase was such that it exceeded plaintiffs’ vested right. Defendants argue plaintiffs  
28 increased production too rapidly, specifically pointing to the increase from 10,000 tons in 1995 to

1 “over 240,000 tons” by 2007. Renewed JMOL Mot. at 18-19. Defendants cite Jay Schneider’s  
2 trial testimony that the SHM operation historically had produced between 5,000 and 25,000 tons  
3 per year. RT 1477:20-1478:12. Additionally, defendants note when plaintiffs sought approval of  
4 their reclamation plan in 2002, the mining operation was described as a “small scale tailing  
5 mining operation”— a mining operation separating the valuable fraction of an ore from the  
6 uneconomic fraction—that at the time mining ceased there would be at most a “maximum of 4.5  
7 acres” per year of disturbed area and from which they expected “low annual production.” JX080  
8 at 5, 11. Defendants contrast those stated 4.5 acres per year with an inspection finding a total of  
9 90 acres disturbed as of 2009 and 176 acres disturbed as of 2010, JX526 at 8, three to five times  
10 the 4.5 acre yearly projection.

11           Yet other substantial evidence supported a jury finding that the production increase  
12 was limited to meeting population increases such that the increase remained within the scope of  
13 plaintiffs’ vested right. Much of the evidence shows no volume-based limitation on the vested  
14 interest. For instance, as noted above as well, evidence permitted the jury’s finding that the  
15 vested right was not limited in production levels except by the boundaries of the SHM tract. The  
16 1994 letter from the County’s Richard Maddox describing the vested right says nothing at all  
17 about production volume. JX021. Defendant Gamel conceded it was correct that nothing in the  
18 1994 letter limited the amount of production from the SHM, nothing limited the quantity of ore or  
19 gravel that the mine could develop and nothing would limit the various kinds of aggregate. RT  
20 2060:25-2061:11. Schneider testified that the historical use of SHM showed variation in how  
21 much “material was excavated in a short period of time.” RT 1302:22-25. Intensity in mining  
22 also varied over time. *Id.* 1308:6-15, 1314:7-1315:23. Even the 2002 reclamation plan does not  
23 state a limit on the quantity of production. JX099. In fact, the reclamation plan specifically  
24 observes, ““Material is excavated and classified, processed and stockpiled in anticipation of  
25 market demand and seasonal considerations.” JX099, Ex.099, at 5.

26           Furthermore, as stated in *Hansen Brothers*, 12 Cal. 4th at 573, “where increased  
27 population creates an increased demand for the aggregate used in road construction, an increase in  
28 production to meet that demand would not be construed as an enlargement or intensification of

1 the use.” *See id.* (“Neither an increase in the number of patrons or in the volume of goods sold  
2 [for a hypothetical grocery store operating as a lawful, nonconforming use] would be considered  
3 an enlargement or intensification of the use”). Between 2003 and 2008, demand for mining  
4 aggregate increased. JX131, 139, 157, 230, 341. The jury heard testimony and received evidence  
5 that there was a critical shortage of local aggregate for Sacramento County. RT 395:11-396:2  
6 (Bly-Chester Test.); RT 505:1-24 (Gamel Test.). On March 23, 2009, Gamel, who was then  
7 Aggregate Resources Manager for the County, made a presentation to the Board of Supervisors  
8 about the “Importance of Aggregate Materials,” especially the importance of having a local  
9 supply, and noted the critical shortage of local supply in the Sacramento region, which he  
10 reported was “Less than 10% of the 50-Year Need.” JX671. In this same presentation, Gamel  
11 urged the County to prioritize huge quarries operated by large operators Teichert, Granite and  
12 other participants who entered into a funding agreement with the County to meet the critical need  
13 for local aggregate. *Id.* at 30-32; RT 507:1-10 (Gamel Test.).

14 This substantial evidence supports the implicit jury finding that the vested right  
15 included varying production levels based on demand, and the clear weight of the evidence is not  
16 against such a finding. *See* ECF No. 469 at 4 (jury verdict finding violation of Hardesty and  
17 Schneider plaintiffs’ substantive due process rights, which requires finding a federally protected  
18 liberty or property interest); ECF No. 461 at 14 (final jury instruction stating “[t]he Schneiders’  
19 claimed right to mine or allow mining on their land is based on their ownership of the land and  
20 the history of mining on the land, which they say gave rise to the vested right to mine”).

21 Because substantial evidence supports a jury finding that plaintiffs had a vested  
22 right to mine the entire SHM tract without limitation as to method or production levels,  
23 defendants’ argument they had a legitimate government objective in addressing an impermissibly  
24 expanding nonconforming use also is unavailing.

25 The court now turns to the parties’ contentions regarding defendants’ violation of  
26 plaintiffs’ substantive due process rights.

1 E. Violation of Substantive Due Process Rights

2 As discussed above, substantial evidence supported the conclusion that plaintiffs  
3 had a vested right to mine the SHM tract without limits on methods or production. A substantive  
4 due process claim requires a showing of government officials' arbitrarily depriving a person of  
5 her constitutionally protected liberty or property interests—here, the vested right to mine. *See,*  
6 *e.g., Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d at 1025-26. This deprivation must  
7 lack a legitimate governmental objective. *Shanks*, 540 F.3d at 1088. If plaintiffs' vested right has  
8 not impermissibly expanded, then defendants have no legitimate governmental interest in  
9 curtailing that vested right. But the parties dispute whether an improper motivation can show  
10 lack of a legitimate governmental objective and whether plaintiffs suffered a complete  
11 deprivation of their vested right. The court addresses these remaining disputes below.

12 1. Improper Motivation

13 Defendants contend improper motivation alone is insufficient to establish lack of a  
14 legitimate governmental purpose. Renewed JMOL Mot. at 27 n.32; Renewed JMOL Reply at 8.  
15 The court disagrees. Numerous cases detail the relevance of improper motivations in the context  
16 of substantive due process claims. For instance, in *Del Monte Dunes v. City of Monterey*, 920  
17 F.2d 1496, 1508 (9th Cir. 1990), the Ninth Circuit determined a substantive due process claim  
18 must be heard at trial where plaintiffs asserted that a city council “abruptly changed course” and  
19 rejected a plan motivated “not by legitimate regulatory concern but by political pressure from  
20 neighbors and other residents of the city to preserve the property as open space.” The appellate  
21 court ruled this substantive due process claim must go to trial despite the district court's previous  
22 reliance on “the affidavits and exhibits the parties had submitted” to dismiss plaintiffs' due  
23 process claim. *Id.* at 1507. Like defendants in *Del Monte Dunes*, defendants here changed course  
24 in their vested rights determinations after being the subject of political pressure. Substantial  
25 evidence showed defendants recognized plaintiffs' vested right in operating the SHM for years  
26 before abruptly changing course and taking steps to deprive plaintiffs of their vested right. *See*  
27 *e.g., JX021* (1994 letter recognizing vested right); *JX 099* (2002 reclamation plan recognizing  
28 vested right); *JX287* (April 2009 letter asserting plaintiffs' mining was “not protected by

1 [plaintiffs’] vested right” without notice or a hearing). Substantial evidence of record was  
2 available to support the jury’s decision: there was information on political influence brought to  
3 bear from at least one competitor mining company, Teichert, in the form of contributions to  
4 funding a County employee position; holding multiple meetings with County employees and  
5 discussing the *Hansen Brothers* decision as it relates to plaintiffs; drafting findings and providing  
6 them to County staff for use in the County’s ruling on the SHM; and signing a renewed funding  
7 contract with the County the day after the Board rejected the Schneiders’ appeal. *See* JX506;  
8 JX508 . *See, e.g.*, JX 356; JX363; JX392; JX487; JX506-JX508; RT 341:23-343:7, 370:11-19  
9 (Winter Test.); RT 534:15-23; RT 1232:7-1233:13. This substantial evidence supports the jury’s  
10 implicit finding that defendants lacked a legitimate governmental interest in depriving plaintiffs  
11 of their vested right to mine. *See* ECF No. 469 at 4 (jury verdict finding violation of plaintiffs’  
12 substantive due process rights); ECF No. 461 at 23-24 (requiring finding defendants’ conduct  
13 lacked “any reasonable justification in the service of a legitimate governmental purpose” to  
14 establish defendants’ conduct was arbitrary as a required element of plaintiffs’ substantive due  
15 process claim); *Swenson v. Siskiyou Cty.*, 498 F. App’x. 719, 721 (9th Cir. 2012) (holding  
16 summary judgment was not proper “because, viewing the evidence most favorably to [the  
17 plaintiff], he raised a genuine dispute of material fact as to whether defendants acted in an  
18 arbitrary and irrational manner when they invalidated a vested property interest due to political or  
19 other considerations”).

20 In *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990), the Ninth Circuit held  
21 “the rational relation test will not sustain conduct by state officials that is malicious, irrational or  
22 plainly arbitrary.” Despite acknowledging that “a water moratorium may be rationally related to  
23 a legitimate state interest in controlling a water shortage, [plaintiffs] ha[d] raised triable issues of  
24 fact surrounding the very existence of a water shortage.” *Id.* Like the *Lockary* plaintiffs, the  
25 Schneider and Hardesty plaintiffs presented substantial evidence—discussed above—to support  
26 their position that they had engaged in no impermissible expansion of a vested right to mine at the  
27 SHM. Even if defendants’ actions could be rationally related to a legitimate state interest in  
28 regulating vested rights in mining operations, substantial evidence supported the conclusion there

1 was no impermissible expansion of the plaintiffs’ vested right. The *Lockary* defendants’ refusal  
2 to issue water hookups to plaintiffs is analogous to defendants here refusing to affirm plaintiffs’  
3 vested right.

4 Ninth Circuit case law also details a violation of substantive due process rights  
5 where a defendant singles out “one individual to be treated discriminatorily.” *Bateson v. Geisse*,  
6 857 F.2d 1300, 1303 (9th Cir. 1988). Here, substantial evidence was available in the record to  
7 support a conclusion plaintiffs were singled out in contrast to other vested right holders. *See* RT  
8 990:23-25 (Storelli testifying she had “never heard of [a vested mine] that lost its vested right”).

9 Contrary to defendants’ contentions, Renewed JMOL Mot. at 20-26, acting  
10 “simply to ensure compliance with all the applicable rules” may not be sufficient on its own to  
11 defeat claims the defendants acted “in an arbitrary and unreasonable manner” and with  
12 “improper” motives, especially where demands and burdens placed on the plaintiff “were unique  
13 to that plaintiff.” *David Hill Dev., LLC v. City of Forest Grove*, No. 3:08-CV-266-AC, 2012 WL  
14 5381555, at \*25 (D. Or. Oct. 30, 2012). At least one court in this district has recognized “that a  
15 defendant’s ‘invention’ of an illegitimate reason to support a land use action and regulation can  
16 be arbitrary and capricious.” *Merrill v. Cty. of Madera*, No. 1:05-CV-0195 AWI SMS, 2013 WL  
17 1326542 at \*7 (E.D. Cal. Mar. 29, 2013). Here, substantial evidence indicates the burdens  
18 defendants placed on plaintiffs were unique—again, as a county official testified, she had “never  
19 heard of [a vested mine] that lost its vested right.” RT 999:23-25 (Storelli Test.).

20 Defendants still contend any conceivable basis for their legitimate conduct defeats  
21 plaintiff’s substantive due process claims as a matter of law. Renewed JMOL Mot. at 19.  
22 Defendant relies on *Shanks v. Dressel*, 540 F.3d 1082, 1089 (9th Cir. 2008), in which the Ninth  
23 Circuit found it “fairly debatable” that the city “rationally furthered its legitimate interest in  
24 facilitating residential housing in a residential neighborhood by issuing a building permit to the  
25 [plaintiff]s.” *Id.* Yet the court also observed there was “no suggestion . . . of a sudden change in  
26 course, malice, bias, pretext, or, indeed, anything more than a lack of due care on [city  
27 defendant’s] part.” *Id.* In contrast here, there was significant evidence on which the jury could  
28 have relied of defendants’ improper motive and abrupt change from recognizing plaintiffs’ vested

1 right from 1994 to 2009 until defendants' April 2009 letter changing course. JX021 (1994 letter);  
2 JX099 (2002 reclamation plan); JX288 (April 2009 letter informing plaintiffs they do not have a  
3 vested right to mine and ordering plaintiffs to cease mining operations).

4 Defendant also cites *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936,  
5 944, 946 (9th Cir. 2004), to argue evidence of "improper motive" or an "impermissible motive" is  
6 limited to equal protection claims. But the cited case made no such pronouncement. Considering  
7 all of the authority cited above, the court observes an improper motivation may undercut a  
8 showing of some legitimate governmental interest under Ninth Circuit law sufficient to establish a  
9 substantive due process violation. Substantial evidence supported the jury's finding of improper  
10 motivation by defendants here.

## 11 2. Evidence of Improper Motivation

12 Because defendants argue in their motion for a new trial that plaintiffs "failed to  
13 offer sufficient evidence that the County and individual [d]efendants acted arbitrarily," New Trial  
14 Mot. at 3, the court addresses the clear weight of the evidence as to defendants' improper  
15 motivation. The court finds the clear weight of evidence of improper motivation does not run  
16 counter to the jury's finding of defendants' liability for substantive due process violations.

17 Upon careful review, the trial record is replete with evidence that permitted the  
18 jury to conclude defendants ceased to recognize plaintiffs' vested right based on improper  
19 motivation, and not a legitimate governmental interest. For instance, the jury could reasonably  
20 have concluded this decision was based on an improper motivation in the form of political  
21 pressure from donors. As part of a funding contract negotiated with a select few, competitor  
22 Teichert and two other large mining competitors committed large sums of money to finance the  
23 County's regulation of mining, including funding the salary and benefits of a full-time Aggregate  
24 Resources Manager to inspect all mining operations in the County; this full-time position was  
25 ultimately filled by defendant Jeff Gamel. *E.g.*, JX508; RT 341:23-343:7, 370:11-19 (Winter  
26 Test.). No other mining company could join the funding contract without the consent of all  
27 parties, including the large mining companies who were original signatories. JX508 at 6, §9.  
28 Evidence also shows Teichert's taking concerted steps to inform various government officials and

1 agencies about Hardesty, one of its competitors. *E.g.*, JX507 (Teichert Strategy Matrix about  
2 Hardesty Sand and Gravel and including Teichert interactions with the County); JX375 at 2  
3 (detailing importance of County, which, as lead agency, “ha[d] the biggest handle,” and stating  
4 that “everything else will pile on top of it”; *see also, e.g.*, RT 438:2-6 (Gamel testifying that  
5 County, as lead agency, governs mining operations within County). The jury did receive in  
6 evidence in an email from Teichert employee John Lane to defendant Gamel, copying Teichert  
7 attorney Kate Wheatley, stating Teichert’s motivation was simply “a call for fairness and level  
8 playing field.” JX143. Wheatley testified she had the same understanding as to Teichert’s  
9 intentions with respect to the SHM. RT 622:2-11. It was for the jury to weigh this evidence, and  
10 the jury was entitled to disregard it and credit the other evidence before it.

11 Evidence also permitted the jury’s implicit finding that political pressure was  
12 applied through multiple meetings involving Teichert, Dickinson, Gamel, Sherry and others from  
13 2009 through 2010. *E.g.*, JX363; JX392; JX487; JX507. Counsel for Teichert even informed  
14 County counsel of its view that the *Hansen Brothers* decision “did not sanction the substantial  
15 increase in production” occurring at SHM in response to County counsel’s concerns that *Hansen*  
16 *Brothers* prevented the County from requiring a permit. JX356 (December 2009 email chain).  
17 Gamel also acknowledged having “heard something like that” in connection with Teichert’s  
18 lawyers drafting findings and providing them confidentially to the BZA staff for the Board of  
19 Supervisor’s ruling on the SHM. RT 534:15-23. Gamel acknowledged a conflict of interest if  
20 Teichert provided draft findings for the Board to use in rejecting the appeal of the SHM, even if  
21 the final findings did not track Teichert’s proposed language. *Id.* 2082:12-19. The clear weight  
22 of this evidence does not run counter to a jury finding of political pressure exerted by Teichert.

23 A conclusion that Teichert exerted political pressure may also have been supported  
24 by evidence of the timing of campaign contributions to Dickinson and funding contributions to  
25 the County. RT 1229:9-1232:6 (Dickinson Test.). Although Dickinson testified he did not pay  
26 attention to when contributions were made and did not know immediately if a contribution was  
27 made, Dickinson did confirm an entry in his campaign finance records, which “are a matter of  
28 public record,” showed Teichert made a contribution to him the day before the September 28,

1 2010 hearing at which the Board rejected the Schneiders' appeal. *Id.* 1231:8-19. On a separate  
2 note, the day after that hearing denying the SHM appeal, Teichert signed a renewed funding  
3 contract with the County for the Aggregate Resources Manager position. *Id.* 1232:7-1233:13; *see*  
4 JX506; JX508.

5           The jury also could have given weight to additional evidence in finding that  
6 County decisions were based on personal or political loyalties to Teichert. For instance, after the  
7 first full-time Aggregate Resources Manager, Mike Winter, took another position within  
8 Sacramento County, defendant Gamel replaced Winter. RT 370:11-19. Before Winter took his  
9 new position, he had conferred with Teichert's attorney and asserted the SHM was a vested mine.  
10 RT 369:6-25; JX141; JX143. Gamel, Winter's replacement, had already engaged in  
11 communication with Teichert about the SHM: Before attaining the Aggregate Resources  
12 Manager position, Gamel had responded to Teichert's complaint that "[t]he Hardesty operation  
13 continues to expand its [sic] operations and sales without any federal, state, or local permits and  
14 operate under the thinly veiled guise of vested rights," by informing Teichert, "We will see what  
15 we can do." JX143 (September 2007 e-mail chain).

16           Evidence of other close communications with Teichert is not scarce in this record.  
17 For instance, in the same e-mail in which he thanked Teichert for the holiday gifts of cookies and  
18 olive oil, to which he "look[ed] forward each year," Gamel informed Teichert he was working  
19 with the Office of Mining and Reclamation (OMR) to partner on the site inspection of the SHM  
20 and stated, "We will let you know of any new developments." PX676. Soon after, on December  
21 23, 2008, OMR inspected the mine, looking for potential violations. PX676; RT 457:20-459:25,  
22 546:3-24 (Gamel Test.); RT 1769:21-1770:12 (Hardesty Test.).

23           The jury also may have given weight to Gamel's at times conflicting testimony  
24 about his interactions with Teichert. He denied, in his deposition before trial, of any 2007  
25 communications with Teichert. RT 463:12-16 (Gamel Test.). At trial, Gamel did not "recall any  
26 conversations in 2007" with Teichert about the SHM, and he stated, "I don't know why I would  
27 be" when asked if he should not have been talking to Teichert about SHM. *Id.* 464:18-24. Yet an  
28 email chain and Gamel's testimony eventually revealed Teichert's sending Gamel aerial

1 photographs of the SHM and complaining about Hardesty Sand & Gravel while telling Gamel to  
2 be discrete—all before Gamel was appointed as Aggregate Resources Manager. JX143; RT  
3 465:3-467:18 (Gamel Test.). As noted, Gamel had informed Teichert, “We will see what we can  
4 do.” JX143; RT 468:10-14 (Gamel Test.). Contrary to his earlier deposition testimony, Gamel  
5 eventually admitted at trial that he had been talking with Teichert about Hardesty Sand & Gravel  
6 since 2007. RT 468:1-20. By 2008, Gamel had called the Army Corps of Engineers and told  
7 them about Teichert’s interest in the Hardesty mining operation. JX152. While the jury was  
8 reminded in standard jury instructions that naturally people sometimes forget things, it also was  
9 charged with ultimately making decisions regarding credibility. ECF No. 461 at 8 (Final Jury  
10 Instruction No. 7, instructing the jury in part that “You may believe everything a witness says, or  
11 part of it, or none of it” and instructing the jury it may account for “the witness’s memory”).  
12 Gamel’s vacillating about his communications with Teichert permitted the jury to infer some  
13 level of improper motivation in the context of the other evidence of political ties and pressure  
14 reviewed above.

15           Teichert communicated with other County employees as well. Even if those  
16 communications in themselves were a common practice of a large company doing business in the  
17 County, the jury was entitled them to consider them in the context of all the evidence presented in  
18 resolving plaintiffs’ claims. As noted, Teichert communicated its concerns about competition  
19 from Hardesty to the County. *E.g.*, JX507 at 9-11 (Teichert Strategy Matrix detailing contacts  
20 with County officials); RT 580:1-20, 587:4-589:4 (Wheatley Test. about Teichert Strategy  
21 Matrix, including “tactics or developments” to pursue for “the [SHM]” and list including  
22 Dickinson, Gamel, and Sherry as contacts); RT 585:7-15 (Wheatley Test. of multiple meetings  
23 between Teichert and the County, including Gamel); JX132 (John Lane complaining that  
24 Hardesty was “now attempting to steal our customers through the sale of very cheaply priced  
25 product”); JX141 (August 2007 e-mail chain between Winter and Teichert lawyer Wheatley  
26 about vested status of Hardesty Sand & Gravel operation at SHM); JX143; JX234 (January 2009  
27 e-mail chain setting up meeting between Gamel, Winter, and lawyers for Teichert); JX392;  
28 JX434. Defendants Dickinson, Sherry and Gamel were among the “primary contacts” between

1 Teichert and the County. JX507; RT 587:16-588:11 (Wheatley Test.). These regular contacts and  
2 the open communication lines between Teichert, County employees and defendants themselves  
3 demonstrate the clear weight of the evidence is not against a jury finding of defendants having an  
4 improper motivation in determining plaintiffs lacked a vested right.

5           The jury’s conclusion was further supported by the County’s repeatedly ordering  
6 plaintiffs to stop mining altogether despite an increased demand for mining aggregate in  
7 Sacramento County. *Compare* JX287, JX421, JX447, RT 528:10 (Gamel acknowledging the  
8 April 2010 letter “does say shut down” if plaintiffs do not get a use permit and rezone), RT  
9 714:17-20 (Sherry acknowledging “[w]e did not” tell plaintiffs they could scale back their mining  
10 operation to their original vested right and continue mining), *and* RT 1461:9-14 (Schneider  
11 testifying about an order saying “cease mining operations immediately, initiate an application for  
12 an amended reclamation plan within seven days, initiate reclamation of pits”), *with* JX131,  
13 JX139, JX157, JX230, JX341, JX671 (Gamel presentation on shortage of local supply), RT  
14 395:11-396:2 (Bly-Chester Test.), *and* RT 505:1-24 (Gamel Test.). In his presentation discussing  
15 a shortage of local supply, Gamel specifically urged the County to prioritize huge quarries  
16 operated by Teichert, Granite and other participants in the funding agreement with the County to  
17 meet the critical need for local aggregate. JX671 at 30-32; RT 507:1-10 (Gamel Test.). But on  
18 cross-examination during trial, Gamel was asked: “But the last thing you want to do is lose an  
19 actual existing source of sand and gravel in Sacramento County, true?” He answered: “I would  
20 say that’s true, yes.” RT 514:8-10. Yet significantly, neither Gamel nor Sherry ever suggested –  
21 or apparently considered suggesting – the option of plaintiffs’ paring back their mining during a  
22 permitting process to some smaller scale tied to the County’s initial recognition of their vested  
23 right, consistent with *Hansen Brothers*, 12 Cal. 4th at 575.

24           Taken together, the evidence reviewed here provided substantial support for a  
25 conclusion that defendants operated with an improper motive. It is not the only conclusion the  
26 jury could have reached, but it is not the court’s job to reweigh the evidence and superimpose its  
27 own conclusions after the fact. When considered together with the substantial evidence  
28 supporting the conclusion that plaintiffs had a vested right to mine and did not impermissibly

1 expand that vested right, the court cannot rule as a matter of law that defendants should have  
2 prevailed on plaintiffs’ substantive due process claims because defendants had a legitimate  
3 governmental objective. Nor can the court find the clear weight of the evidence above weighs  
4 against the jury verdict in favor of plaintiffs on substantive due process claims. *See* ECF No. 469  
5 at 4 (jury verdict finding County and Sherry liable for violation of Hardesty plaintiffs’ substantive  
6 due process rights and County, Sherry, Dickinson and Gamel liable for violation of Schneider  
7 plaintiffs’ substantive due process rights).

8  
9 3. Complete Deprivation

10 Notwithstanding the evidence that could have supported the jury’s conclusion of  
11 an improper motivation, defendants contend there was no “complete” or “total” substantive due  
12 process violation and the verdict therefore conflicts with *Dittman v. California*, 191 F.3d 1020,  
13 1029 (9th Cir. 1999). Renewed JMOL Mot. at 5-6. In *Dittman*, the plaintiff challenged a  
14 requirement to disclose his social security number as part of an application for an acupuncture  
15 license and the court deemed this requirement a “‘complete prohibition’ on entry into a profession  
16 that implicates a person’s liberty interest in pursuing an occupation or profession of her own  
17 choice.” *Id.*

18 Here, substantial evidence supported the jury’s finding the plaintiffs experienced a  
19 complete deprivation of their substantive due process rights. Although defendants contend the  
20 County’s later permit requirement was not a complete or “total prohibition on their ability to  
21 engage in the occupation of mining,” Renewed JMOL Mot. at 6-7, case law is clear that “[a]  
22 mineral extractive operation is susceptible of use and has value only in the place where the  
23 resources are found, and once the minerals are extracted it cannot again be used for that purpose.”  
24 *Hansen Bros.*, 12 Cal. 4th at 553. Thus, action prohibiting mining at SHM is a total prohibition  
25 or complete deprivation of any associated substantive due process rights. Even requiring a permit  
26 to mine is a complete deprivation of the vested right to mine because that permit is not necessary  
27 when one has a vested right to mine. *See* Cal. Pub. Res. Code § 2776(a) (“No person who has  
28

1 obtained a vested right to conduct surface mining operations . . . shall be required to secure a  
2 permit . . .”).

3           The April 2009 letter sent to plaintiffs evinces a complete deprivation because the  
4 letter did not provide the option for plaintiffs to scale back their mining operations to “its former  
5 level,” with the County then “seek[ing] an injunction if the owner does not obey” as dictated by  
6 *Hansen Brothers*. 12 Cal. 4th at 575. Instead, that letter ordered plaintiffs to cease mining  
7 operations completely until they obtained a permit, which required meeting conditions that had  
8 the effect of ending the mining operation as explained below. JX287. As defendant Gamel  
9 admitted, this letter informed plaintiffs they did not have a vested right in the property. RT  
10 526:21-527:1 (Gamel Test.). The letter stated the County had found that “the mining that is  
11 presently occurring on your property is not protected by your vested right, and the only remedy to  
12 permit you to continue mining on the property is to file for and receive approval of a conditional  
13 use permit and rezone.” JX287. Gamel, who authored the letter, testified that the County “came  
14 to a conclusion that” SHM was not “still a vested operation” before April 2, 2009. RT 524:16-18.  
15 Gamel further testified that this determination was entirely unilateral, with no notice or hearing to  
16 plaintiffs: “We did not have a hearing. This was an internal matter.” *Id.* 525:6. Gamel ultimately  
17 agreed that, with no public hearing, the County simply told Schneider and Hardesty they did not  
18 have a vested right any more. *Id.* 525:10-15.

19           The deprivation stemming from the April 2009 letter remained a complete or total  
20 deprivation because subsequent hearings about the SHM did not permit adjudication of plaintiffs’  
21 claim to an underlying vested right. *E.g.*, RT 2081:9-11 (Gamel testifying that vested right “was  
22 not the issue before the Board of Supervisors”); RT 2257:14-19 (Derby testifying that hearings  
23 before Board of Supervisors and BZA concerned the notices of alleged zoning violations, not  
24 reaffirmation of the vested right); RT 1214:8-24 (Dickinson testifying that 2010 appeal to Board  
25 was about a violation of the zoning code and “was not focused or directed to whatever vested  
26 right there may have been”); RT 999:12-19 (Storelli testifying that if one needs a conditional use  
27 permit, one by definition would not be in possession of a vested right). In the County hearings,  
28 Dickinson proclaimed his view that the vested right simply did not exist. *E.g.*, JX483-101:17.

1 During trial, however, as noted above, a County official testified, she had “never heard of [a  
2 vested mine] that lost its vested right.” RT 999:23-25 (Storelli Test.).

3 Hardesty’s own testimony about the dismantling of his mining business and his  
4 loss of livelihood provided strong evidence from which the jury could have concluded the  
5 Hardestys in particular suffered a complete and total deprivation. Hardesty testified that  
6 defendants’ conduct forced him to sell off his expensive, handcrafted equipment for scrap, let all  
7 his employees go and incur \$5 million in debt, borrowed from family and friends. RT 1739:6-17,  
8 1746:15-24, 1748:19-1752:10. Hardesty explained his equipment was “not so movable” because  
9 it included “big conveyor belts,” so he felt he had no choice but to have “sold and scrapped it.”  
10 *Id.* 1789:16-1790:3.

11 Schneider’s testimony also provided the jury with information it could reasonably  
12 have relied on to conclude he suffered a complete deprivation. Schneider testified he attempted  
13 to have another mine operator take over after defendants shut down the Hardesty operation. RT  
14 1140:22-25 (Light Test.); 1333:7-1336:4 (Schneider Test.). But it was not feasible for another  
15 operator to resume mining in light of the County’s refusal to continue recognizing the vested right  
16 and its requirement that Schneider obtain a conditional use permit, rezone his land, and post a  
17 large bond before allow mining to continue, a process that witnesses testified could take ten years  
18 and cost millions of dollars. *E.g.*, RT 1140:22-25 (Light Test.); 1333:7-1336:4, 1337:25-1338:3  
19 (Schneider Test.); 1707:21-1708:5 (Hardesty Test.); 2255:22-25 (Derby Test.).

20 The evidence reviewed above is substantial and supports the jury’s determination  
21 that Hardesty and Schneider each experienced a complete deprivation of their vested right to  
22 operate the SHM, resulting in the destruction of their respective leasehold interest, mining  
23 operation and livelihoods connected with the mine. Based on the above, the clear weight of the  
24 evidence also does not run counter to the jury’s verdict finding substantive due process violations.

25 F. Jury Instructions on Vested Right

26 At hearing defendants asserted the court cannot find that the jury properly found a  
27 vested right without the court’s having provided a jury instruction clarifying that the *Hansen*  
28 *Brothers* case “allow[s] a local public entity to make a decision” about the impermissible

1 expansion of the vested right, “which is allowed to have some degree of expansion by its very  
2 nature.” Hr’g Tr. at 55:20-56:4. Defendants did not raise this issue in their briefing. *See*  
3 Renewed JMOL Mot.; Renewed JMOL Reply; New Trial Mot.; New Trial Reply. Nevertheless,  
4 the court addresses this argument because the vested rights issue is at the heart of this case.

5 Defendants’ belated contention conflicts with their objection at trial “to any  
6 instructions to the jury on procedural and substantive due process that are in any way premised on  
7 the theory that the defendants improperly and impermissibly revoked plaintiffs’ alleged vested  
8 right to mine.” ECF No. 427 at 1. Defendants in fact proposed striking an entire set of proposed  
9 instructions on “California Mining Law and Vested Rights,” including instructions on the *Hansen*  
10 standard. *Id.* at 29-32. The court ultimately did not instruct the jury on the *Hansen Brothers* case,  
11 though the court did instruct the jury that the Schneiders claimed a “vested right to mine.” ECF  
12 No. 461 at 14. The court finds defendants have waived this argument under the invited error  
13 doctrine.

14 Regardless, the jury did not need instruction on the *Hansen Brothers* case to  
15 understand the factual dispute between the parties about a vested right to mine, and the law  
16 applicable to it. Resolving that factual dispute based on the instructions the court did give  
17 permitted the jury to make the legal determination about the existence of a legitimate  
18 governmental interest asserted by defendants—that the plaintiffs’ lack of vested right, or  
19 expansion beyond that vested right, permitted the assertion of a legitimate governmental interest  
20 in regulating mining activity and avoiding environmental damage and attendant costs shouldered  
21 by the public. The jury found, based on the evidence before it, that this asserted interest was not a  
22 legitimate interest. Defendants’ own testimony on the confusing nature of the 2002 reclamation  
23 plan maps and the County’s prior 1994 determination of plaintiffs’ rights provided the jury with a  
24 factual basis to disbelieve defendants’ assertion of having only a legitimate interest, offered in the  
25 face of plaintiffs’ claims; the jury was free to weigh the County’s position along with the totality  
26 of the evidence, including the evidence that could support the conclusion of improper motive. It  
27 was, as noted elsewhere, for the jury to make credibility determinations among conflicting  
28 narratives. On the trial record, the jury was entitled to determine whether the County staff

1 actually concluded the SHM nonconforming use had impermissibly expanded or if County staff  
2 instead reached that conclusion pretextually in response to political pressure from plaintiffs'  
3 competitor.

4 G. Excessive Damages

5 Defendants also contend a new trial must be granted because the jury's award of  
6 \$105 million for substantive due process violations was based on an improper measure of  
7 damages. New Trial Mot. at 4-5. According to defendants, "The proper measure of damage  
8 should have taken into account the difference in the fair market value of the SHM property as a  
9 result of the [p]laintiffs' loss of the right to continue their mining operation." *Id.* Additionally,  
10 defendants contend plaintiffs relied on the inherently unreliable testimony of expert witness  
11 Gilbert Coleman to justify asking for excessive substantive due process damages. *Id.* at 5-6.

12 At hearing, defendants conceded their excessive damages challenge was limited to  
13 "[their] Rule 59 motion" and was "not a basis for [their] Rule 50(b) motion . . . ." Hr'g Tr. at  
14 46:9-21. The court therefore addresses defendants' excessive damages claims under Rule 59  
15 only. Courts "will not disturb an award of damages on appeal unless it is clearly unsupported by  
16 the evidence." *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760 (9th Cir. 1985). "An  
17 otherwise supportable verdict must be affirmed unless it is 'grossly excessive' or 'monstrous' or  
18 'shocking to the conscience.'" *Id.* (citation omitted). Under Rule 59, having carefully  
19 considered this question, the court does not find the damages awarded excessive, monstrous or  
20 shocking to the conscience.

21 1. Proper Measure of Damages

22 According to defendants, as noted, "The proper measure of damage should have  
23 taken into account the difference in the fair market value of the SHM property as a result of the  
24 [p]laintiffs' loss of the right to continue their mining operation." New Trial Mot. at 4-5. The  
25 court disagrees.

26 The jury was instructed that "[d]amages means the amount of money that will  
27 reasonably and fairly compensate the plaintiffs for any injury or loss you find was caused by the  
28 defendants." ECF No. 461 at 28. Lost profits and business expenses, a form of injury or loss, are

1 an appropriate measure of damages in cases involving violations of due process rights. For  
2 instance, in *Chalmers*, plaintiff was entitled to a damages award including “initial cost” and “net  
3 profit” when the defendant city violated plaintiff’s due process rights by preventing her from  
4 operating her T-shirt vending business. 762 F.2d at 755-56, 760. Additionally, in *Silver Sage*  
5 *Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 817-19 (9th Cir. 2001), the Ninth  
6 Circuit concluded a jury award of damages, including lost profits, was not against the clear  
7 weight of the evidence when the defendant city council failed to approve plaintiff’s mobile home  
8 park project.

9 Here, plaintiffs face a situation not unlike that of the plaintiff in *Chalmers*  
10 although the size of the two businesses appears quite different. Here, municipal defendants  
11 violated plaintiffs’ due process rights by shutting down and preventing operation of the SHM.  
12 See also *Benigni v. City of Hemet*, 879 F.2d 473, 475, 480 (9th Cir. 1988) (refusing to disturb jury  
13 award of compensatory and punitive damages where police officers harassed bar owner,  
14 eventually forcing him to sell at a loss). The jury was instructed to apply—and is presumed to  
15 correctly apply—this measure of compensation “for any injury or loss,” which would include lost  
16 profits and business expenses. See *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (“[A] jury is  
17 presumed to follow its instructions.”). Such a measure is appropriate and serves the purpose of  
18 awarding damages in § 1983 actions, to compensate the aggrieved party. *Chalmers*, 762 F.2d at  
19 760 (citing *Carey v. Phipus*, 435 U.S. 247, 254-55 (1978))

20 Defendants instead cite to *Herrington v. Sonoma County*, 834 F.2d 1488, 1498  
21 (9th Cir. 1987), contending the appropriate measure of damages is inverse condemnation based  
22 on a denial of all viable use of the land. In that case, plaintiffs owned a parcel of farmland they  
23 wished to develop into a residential subdivision, and their substantive due process claim arose  
24 from a preliminary decision by defendant county that temporarily thwarted the planned  
25 development. *Id.* at 1490. Unlike the plaintiffs here, the plaintiffs in *Herrington* did not have a  
26 long-running, successful business operation tied to an occupational liberty interest. The loss  
27 suffered by plaintiffs here was not merely the lost value of the land itself, but instead the lost  
28 value of the dismantled mining operation that had sustained plaintiffs for many years. In other

1 words, a difference in the value of the land itself does not capture the harm suffered by the  
2 aggrieved parties. Damages based on losses from plaintiffs’ dismantled mining operation—the  
3 loss of a liberty interest, not solely a property interest—appropriately measure the damages in this  
4 case. In arriving at a dollar amount, the jury had before it evidence that supported the conclusion  
5 defendants’ conduct forced SHM to permanently close, and Hardesty to sell his expensive  
6 handcrafted equipment for scrap at a loss of “[a]pproximately \$1.7 million.” RT 1791:1-2. This  
7 case is therefore closer to *Chalmers*, 762 F.2d at 755-56, 760, and *Benigni*, 879 F.2d at 475, 480,  
8 than to *Herrington*. And, unlike there plaintiffs in *Herrington*, who “never had the ‘right’ to  
9 construct a 32-unit subdivision,” 834 F.2d at 1504, the plaintiffs here originally had a recognized  
10 vested right to conduct the mining operation.

11           2.     Reliable Expert Testimony

12           Defendants contend the substantive due process damages were excessive, in part  
13 because they were based on Gilbert Coleman’s “inherently unreliable” expert testimony. New  
14 Trial Mot. at 5-6. Here as well, the court disagrees. The substantive due process damages are  
15 supportable by evidence before the jury, including Coleman’s testimony. Although defendants  
16 correctly identify problems with Coleman’s testimony, including Coleman’s contradictions in  
17 relying on different sets of tax returns, defendants themselves highlight Coleman’s other  
18 testimony that supports the jury verdict.

19           Coleman’s testimony bore some indicia of reliability. For instance, Coleman  
20 testified that he determines value by looking at profitability and other factors. RT 1521:4-24.  
21 Coleman considers the track record of a business to make his calculations, which here included  
22 Hardesty Sand & Gravel’s success for 30 years as a profitable business with a strong local  
23 demand for aggregate. RT 2369:2-23; *see also* JX671 (Gamel presentation on critical shortage of  
24 aggregate in Sacramento County).

25           Although Coleman’s testimony about his reliance on tax returns was not reliable  
26 (*see* RT 1622:24-1623:21, 1624:12-1626:20, 1627:21-1628:3, 1628:4-1634:18), the jury was  
27 exposed to the unreliability and able to weigh it subject to proper instruction. Defendants admit  
28 Coleman provided a revised valuation based on a \$1-per-ton payment the Schneiders were

1 supposed to receive. RT 1654:1-25, RT 2104:14-23. Moreover, Coleman testified that, based on  
2 the information he had seen, he had no doubt there was enough sand and gravel at the SHM to  
3 last for the next 100 years at the production levels he had observed. RT 1576:1-5. Coleman  
4 based this testimony on discussions with Hardesty and Schneider. RT 1575:19-22. Coleman’s  
5 conclusion is consistent with Hardesty’s testimony, based on Hardesty’s excavating “hundreds of  
6 test holes on th[e] [Schneider] ranch,” that he “could easily mine at the rate of pace that [he] was  
7 for another 75 or 100 years real easy.” RT 1747:1-20, 1748:2-5 (Hardesty Test.); *see also* JX11;  
8 JX 13 (test holes excavated by Schneider family); *Silver Sage*, 251 F.3d at 819-21 (concluding  
9 damages expert’s assumption was supported by “fully consistent” testimony from plaintiff  
10 partner).

11 Schneider’s testimony also supports Coleman’s conclusion about the quantity of  
12 sand and gravel at the SHM. For instance, Schneider testified there were at least “27 million tons  
13 of material that we know is in reserves,” which has “been mapped out” and known “for years and  
14 years and years.” RT 1348:18-21. And Schneider also testified that one can sell aggregate to  
15 purchasers “from stockpiles . . . or from reserve areas that haven’t been mined yet.” RT 1273:11-  
16 13. Those stockpiles have existed since the 1930s, with “[a] great deal of them in the Forties and  
17 early Fifties.” RT 1309:25-1310:3.

18 Contrary to defendants’ suggestion, Coleman was not restricted to the testimony of  
19 expert Jeff Light as the basis for forming his conclusions about the aggregate reserves and their  
20 ability to sustain the Hardesty mining business over the coming decades. Light testified only as  
21 to certain areas, comprising only a part of the total acreage of the Schneider ranch, and not the  
22 entire SHM tract. *See* RT 1117:21-1121:8. The jury was entitled to assess the testimony of  
23 Hardesty and Schneider independently, as well as Coleman’s reliance on their testimony in his  
24 calculations.

25 Observing all of these facts, the court does not find the substantive due process  
26 damages awarded to the Schneiders excessive or against the clear weight of the evidence. If the  
27 jury applied the \$1-per-ton price for the Schneiders, considered by Coleman during his testimony,  
28 to Schneiders’ testimony of at least 27 million tons in reserves, the jury would have arrived at a

1 calculation of \$27 million in damages, discounted to \$21.6 million using Coleman’s methodology  
2 of multiplying \$27 million by 0.8. *See* RT 2383:15-21 (Coleman Test.). After adding the \$6.43  
3 million in past losses deemed admitted by the court (RT 2392:10-13), a total damages calculation  
4 for the Schneiders’ substantive due process claim would be \$28.03 million. In light of  
5 Schneider’s testimony and Hardesty and Coleman’s testimony on mining for another 75-100  
6 years, a jury crediting those statements and calculating damages based on 30 million tons—  
7 establishing a total of \$30.43 million in damages after discounting—is not excessive.

8 Defendants’ own suggested average tax return values for the Schneider family—\$404,776 per  
9 year, New Trial Mot. at 7 n.2, and an alternative measure from the \$1-per-ton measure of  
10 damages—would still permit a jury award of \$30,716,560 after discounting Coleman’s  
11 methodology and including the \$6.43 million in past losses, if the jury credited as it could have at  
12 least 75 more years of operation of the SHM based on the collective testimony of Hardesty,  
13 Schneider, and Coleman.

#### 14 IV. PROCEDURAL DUE PROCESS

15 Defendants contend plaintiffs were provided procedural due process as a matter of  
16 law, and insufficient evidence supported the jury verdict that the County violated the due process  
17 rights of the Hardesty and Schneider plaintiffs. Renewed JMOL Mot. at 30; New Trial Mot. at  
18 18. The court disagrees.

19 Due process requires not just notice but also, crucially, the “opportunity to be  
20 heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319,  
21 333 (1976) (internal quotation marks omitted). In most circumstances, the Constitution requires a  
22 hearing before the government deprives a person of liberty or property. *Zinermon*, 494 U.S. at  
23 127.

24 California law requires agencies to resolve claims of vested rights to conduct a  
25 surface mining operation through public hearings. *Calvert*, 145 Cal. App. 4th at 629 (citing Cal.  
26 Pub. Res. Code § 2776). The hearings must follow procedures similar to those required for  
27 approval of land use permits. *Id.* at 626. These hearings must determine the issues of “existence,  
28 nature and scope” of the asserted rights under a constitutional procedure. *Id.* at 629. The *Calvert*

1 court held “that if an entity claims a vested right pursuant to SMARA to conduct a surface mining  
2 operation that is subject to the diminishing asset doctrine, that claim must be determined in a  
3 public adjudicatory hearing that meets procedural due process requirements of reasonable notice  
4 and an opportunity to be heard.” *Id.* at 617. In the *Hansen* case referenced above as well, the  
5 California Supreme Court has outlined the proper process in a case in which a county believes a  
6 mining operator has exceeded the scope of their vested right: “the county may order the operator  
7 to restrict the operation to its former level, and seek an injunction if the owner does not obey.”  
8 *Hansen Bros.*, 12 Cal. 4th at 575. These “[v]ested rights, if established and continued, generally  
9 cannot be conditioned.” *Calvert*, 145 Cal. App. at 626. Once a vested rights determination under  
10 SMARA is final and no longer subject to review, “property rights [] have been founded and  
11 deemed vested.” *Id.* at 630.

12 A. Initial Vested Right Determination

13 Because the procedural due process violation here involves a claim of deprivation  
14 of plaintiffs’ right to due process before the County deprived plaintiffs of their vested right to  
15 mine, the court first addresses the evidence establishing plaintiffs’ vested right.

16 As discussed previously, the evidence at trial permitted the jury to find that the  
17 County recognized a broad-ranging vested right in a 1994 letter and reaffirmed it in the 2002  
18 reclamation plan. *See* JX021; JX099. Approval of the vested right determination involved a  
19 formal proceeding in connection with approving the reclamation plan in 2002. *See, e.g.*, JX141  
20 (August 2007 e-mail from Winter to Teichert lawyer Wheatley describing 2002 reclamation plan  
21 proceeding as “the hearing to declare the mine’s vested status and to approve the reclamation  
22 plan”). County counsel later advised the BZA that the scope of the vesting had been determined  
23 by the Board of Supervisors in 2002 and could not be revisited: “That Reclamation Plan and that  
24 issue of what is vested pursuant to SMARA was decided at the time that the current Reclamation  
25 Plan was approved by the Board of Supervisors in 2002.” PX568 at 145:21-24. In its 2002  
26 adoption of the reclamation plan, at a noticed public hearing, the Board of Supervisors expressly  
27 noted the reclamation plan’s appealability. JX71 at 2. No one ever appealed the 2002 reclamation  
28 plan approval. Substantial evidence therefore permitted the jury to infer plaintiffs’ vested right

1 existed as early as 1994 or at least by 2002, and the clear weight of the evidence is not against a  
2 finding that plaintiffs had a vested right to mine at SHM by 2002.

3 B. Deprivation without Process: The April 2009 Letter

4 Defendants contend the County’s April 2, 2009 letter asserting plaintiffs’ mining  
5 was “not protected by [plaintiffs’] vested right” (JX 287) was not self-executing and therefore did  
6 not deprive plaintiffs of a vested right. Renewed JMOL Reply at 22-23; Hr’g Tr. at 13:1-3.  
7 Substantial evidence permitted the jury to infer the opposite—that the April 2, 2009 letter  
8 deprived plaintiffs of their vested right to mine without any hearing—and the clear weight of the  
9 evidence is not against such a finding.

10 Substantial evidence supports the conclusion the letter did not contemplate any  
11 process related to a determination of plaintiffs’ vested right. As defendant Gamel testified, the  
12 2009 letter informed Schneider and Hardesty they did not have a vested right to mine on the  
13 Schneider property. RT 526:21-527:1 (Gamel Test.). The letter, penned by defendant Gamel and  
14 signed by defendant Sherry (JX287; RT 685:11-20, 687:7-19, 687:24-25), stated the County had  
15 found that “the mining that is presently occurring on your property is not protected by your vested  
16 right, and the only remedy to permit you to continue mining on the property is to file for and  
17 receive approval of a conditional use permit and rezone.” JX287.

18 Defendants direct the court to Sherry’s testimony that the April 2009 letter, instead  
19 of being a unilateral deprivation of a vested right, was a request for plaintiffs “to contact Jeff  
20 Gamel” for a “further dialogue . . . about this situation.” RT 691:18-19. However, when asked  
21 about the 2009 letter’s content with respect to an enforcement action, Sherry responded “[t]here  
22 was no specific enforcement action intended.” *Id.* 752:5-14. Sherry contended the letter only  
23 threatened an enforcement action for failing to file a permit within 30 days “to convey to Mr.  
24 Schneider that it was important to respond to this letter.” *Id.* 752:15-19. That no one from the  
25 County replied to a response letter sent by Schneider’s counsel reinforces Sherry’s testimony that  
26 no enforcement action, with attendant procedures, was intended based on the April 2009 letter.  
27 *See* JX302; RT 752:22-755:7 (Sherry Test.). Thus, this letter and the related testimony permitted  
28

1 the jury to infer the County made a vested rights determination prior to sending the letter, without  
2 any form of hearing. Such a determination was in direct conflict with the holding in *Calvert*.

3 Defendants also suggest a September 14, 2010 presentation by Gamel and Derby  
4 to the Board of Supervisors is evidence that the April 2009 letter was not self-executing. There,  
5 Gamel and Derby characterized “Code Enforcement” zoning violation notices issued in April and  
6 May 2010 as enforcing the “April 2009” determination by the “Planning Director . . . that a Use  
7 Permit and a Re-zone was required” and the “continuing operation” of the Mine following that  
8 April 2009 determination as “in violation of the Sacramento Zoning Code.” JX484 at 4. This  
9 evidence was before the jury; the jury reasonably could have found it lended further support to a  
10 determination that the April 2009 letter communicated a decision that plaintiffs no longer had any  
11 vested right to mine and had no way to contest the decision.

12 Additional testimony supports the conclusion the County made its vested rights  
13 determination without any form of process. Gamel, who authored the letter, testified that he and  
14 others “came to a conclusion that it was not” “still a vested operation” before April 2, 2009. RT  
15 524:16-18 (Gamel Test.). Gamel further testified that this determination was entirely unilateral,  
16 with no notice or hearing to plaintiffs: “We did not have a hearing. This was an internal matter.”  
17 *Id.* 525:6. Gamel agreed that, with no public hearing, the County simply told Schneider and  
18 Hardesty they no longer had a vested right. RT 525:10-15. Gamel confirmed the County “did not  
19 give them any advance notice,” explaining “[t]his was our first letter to them regarding that  
20 issue.” RT 526:19-20.

21 The jury was therefore entitled to infer that defendants never had any intention of  
22 opening a dialogue and that the April 2, 2009 letter operated as a deprivation of plaintiffs’ vested  
23 right to mine without any form of process, much less the process prescribed by *Hansen Brothers*,  
24 12 Cal. 4th at 575: ordering restriction of mining to a defined level of vested right and seeking an  
25 injunction if plaintiffs did not obey. Furthermore, the clear weight of the evidence is not against  
26 the jury’s finding that the County violated plaintiffs’ due process rights by depriving them of their  
27 vested right to mine without the required process under *Calvert*, *Hansen Brothers*, and the U.S.  
28 Constitution.

1 C. Opportunity to Be Heard

2 Defendants contend plaintiffs had sufficient opportunity to be heard at Board of  
3 Supervisors hearings in 2010. Renewed JMOL Mot. at 30-36. But this argument is unavailing  
4 because those hearings pre-supposed plaintiffs' lack of a vested right to mine at the SHM tract.

5 Substantial evidence permitted the jury to conclude that the Board of Supervisors  
6 hearings in 2010 did not involve a vested rights determination. For instance, when asked whether  
7 the Board in September 2010 "affirmed the vested rights of the Schneider Historic Mine," Gamel  
8 testified, "That was not the issue before the Board of Supervisors." RT 2081:9-11. Similarly,  
9 Tammy Derby testified that the hearings before the Board and BZA concerned notices of alleged  
10 zoning violations, not reaffirmation of the vested right. RT 2257:14-19. Defendant Dickinson  
11 testified that the 2010 appeal to the Board was about a violation of the zoning code and "was not  
12 focused or directed to whatever vested right there may have been." RT 1214:8-24. Additionally,  
13 Cindy Storelli testified that if one needs a conditional use permit, one by definition is not vested.  
14 RT 999:12-19. In the course of the hearings, Jay Schneider "asked more than once why the board  
15 would not deal with the issue of" the vested right. RT 1495:6-10 (Schneider Test.). In response to  
16 his questions, "They would say things like, you just lost it. They would say things— Mr.  
17 Dickinson would say things like, I don't know if you had that vested right. The same one he  
18 voted for. . . . The different staff members would have different reasons to say we're not  
19 recognizing it. You lost it." *Id.* 1495:11-19. And "all of the hearings . . . based on . . . alleged  
20 zoning violations" followed because of the County's position that the vested right it had  
21 recognized in 1994 and reaffirmed in 2002 no longer existed. *Id.* 1498:4-13. This evidence  
22 permitted the jury to infer that the Board of Supervisors hearings did not address at all plaintiffs'  
23 vested rights. Thus, these hearings could not serve as an opportunity to be heard as required to  
24 satisfy due process and *Calvert*.

25 Substantial evidence from the County hearing transcripts themselves supports a  
26 jury finding that the 2010 hearings did not provide post-deprivation process addressing the  
27 County's vested right determination. Supervisor Notolli and County counsel clarified the  
28 September 14, 2010 hearing was "not on a vested right determination . . . just on whether a

1 zoning code violation” occurred,” and County counsel informed the Board of Supervisors that  
2 Schneider would need to “go across the street to the courts” to argue the vested right  
3 determination. JX483 at 69:14-70:23. County counsel also informed the BZA during its hearings  
4 that the vested rights determination was not at issue there: “That Reclamation Plan and that issue  
5 of what is vested pursuant to SMARA was decided at the time that the current Reclamation Plan  
6 was approved by the Board of Supervisors in 2002.” PX568 at 145:21-24. Despite this staff  
7 report and the transcripts of past proceedings, defendant Dickinson stated in the hearings his view  
8 that the vested right simply did not exist. *E.g.*, JX483-101:17. Although plaintiffs presented  
9 some discussion at the hearings through counsel about vested rights and the effect of *Hansen*  
10 *Brothers*, (*e.g.* PX 568 at 17-18, 100-02, 140, 170, 418), their counsel’s statements were not  
11 considered on the merits. The court does not find the clear weight of the evidence is against a  
12 jury finding that the 2010 hearings did not provide a form of post-deprivation process addressing  
13 the County’s deprivation of plaintiffs’ vested right to mine.

14 Evidence from the hearing transcripts themselves also supports a finding that  
15 plaintiffs did not have an opportunity to be heard in other ways during these hearings. *See, e.g.*,  
16 PX 568 at 364-367 (Board of Supervisors voting without permitting testimony from plaintiffs);  
17 *see also* RT 1341:16-1342:20 (Schneider Test.); RT 1344:11-1345:2 (Schneider testimony that  
18 his attorneys were denied opportunities to cross-examine other witnesses or ask their own  
19 witnesses questions at a hearing); RT 1450:19-23 (Schneider testimony that they were not  
20 allowed to answer the County’s argument). At other times, evidence showed plaintiffs did not  
21 have access to notice of the charges or relevant documentary evidence. *See, e.g.*, RT 811:1-3,  
22 811:17-812:4 (Carl Simpson, code enforcement official, testifying Schneider was unable to obtain  
23 file underlying a violation notice despite other cases having such a file); JX289 at 12:21-23; *see*  
24 *also* JX289 at 13:19-14:2; JX 469 at 8:10-21 (Dickinson stating “all those things in the record . .  
25 will be made available to you” when they were not available at that time to plaintiffs). The jury  
26 therefore had substantial evidence to infer plaintiffs were denied procedural due process rights  
27 throughout the 2010 hearings, and the clear weight of the evidence is not against such a finding.

1 D. Remedy

2 1. Waiver

3 According to plaintiffs, defendants waived argument as to the appropriate remedy  
4 for a procedural due process violation because they “conceded that a procedural due process  
5 violation can support an award for compensatory ‘damages for the actual injury occasioned by the  
6 violation of plaintiffs’ right to due process.’” Renewed JMOL Opp’n at 64 (citing ECF No. 443  
7 at 13, 16). However, defendants expressly asserted “[e]ven if plaintiffs were not provided due  
8 process, the remedy is for plaintiffs to be provided the process they were due.” ECF No. 443 at  
9 13, 16. Defendants have therefore preserved their argument as to the appropriate remedy for a  
10 procedural due process violation here.

11 2. Appropriate Remedy

12 Defendants contend the remedy for a procedural due process violation is to order  
13 the process due, not to present the case to the jury for an award of damages. Renewed JMOL  
14 Mot. at 48-49. But the Supreme Court authority defendants cite underscores that nominal  
15 damages are a correct result, if not the automatic minimum, when a plaintiff proves denial of  
16 procedural due process but not actual injury resulting from the procedural denial itself. *Carey*,  
17 435 U.S. at 266 (“[W]e believe that the denial of procedural due process should be actionable for  
18 nominal damages without proof of actual injury.”). “By making the deprivation of such rights  
19 actionable for nominal damages without proof of actual injury, the law recognizes the importance  
20 to organized society that those rights be scrupulously observed . . . .” *Id.* at 266. Defendants’  
21 citation to *Brady v. Gebbie*, 859 F.2d 1543, 1551 (9th Cir. 1988), supports the possibility of  
22 ordering “the process that was due” only in addition to “any attendant damages which directly  
23 resulted from the failure to give the proper procedure.” Defendants have not shown plaintiffs are  
24 not entitled to nominal damages as a matter of law, and the clear weight of the evidence is not  
25 against the jury verdict awarding nominal damages.

26 V. FIRST AMENDMENT RETALIATION

27 Defendants contend “undisputed evidence shows that the demand for [a] greater  
28 financial assurance [from plaintiffs to fund reclamation at their mining operation] was the result

1 of a process that had begun almost two years before” the Schneider plaintiffs first brought this  
2 case. Renewed JMOL Mot. at 56. Defendant asserts that process was based on inspections  
3 indicating plaintiffs “had substantially deviated from the SHM reclamation plan.” *Id.* In other  
4 words, “there was utterly no temporal connection between the Schneiders’ filing of their lawsuit  
5 in late 2012 and the demand for the increased financial assurance.” *Id.* at 57. Defendants’  
6 argument is unavailing given the totality of the record before the jury. Substantial evidence  
7 permitted a jury inference that defendants took action against the Schneider plaintiffs for filing  
8 suit against defendants and the clear weight of the evidence is not against such a finding.

9           A First Amendment retaliation claim has three elements: (1) plaintiff was engaged  
10 in protected activity; (2) defendant’s actions injured plaintiff in a way that would chill a person of  
11 ordinary firmness from further protected activities; and (3) defendant’s actions were a response to  
12 plaintiff’s exercise of constitutionally protected conduct. *Corales v. Bennett*, 567 F.3d 554, 563  
13 (9th Cir.2009). These elements were captured in the court’s Final Jury Instruction 21, ECF  
14 No. 461 at 26-27, which told the jury the Schneiders were required to prove that: (1) their rights  
15 to petition for redress to the County and the courts were protected under the First Amendment;  
16 (2) the County took action against the Schneider Plaintiffs; and (3) chilling or punishing the  
17 Schneider Plaintiffs’ protected conduct was a substantial or motivating factor for the County’s  
18 action. Defendants do not contest the sufficiency of the evidence as to the first or third element,  
19 but only as to the second. *See generally* Renewed JMOL Mot.; Renewed JMOL Reply; New  
20 Trial Mot.; New Trial Reply.

21           Substantial evidence supported the jury’s finding that the County took action  
22 against the Schneider Plaintiffs in response to the plaintiffs’ filing suit, and that the action came in  
23 the form of dramatically increasing a Financial Assurance Cost Estimate (FACE) that plaintiffs  
24 would need to provide to maintain their mining activity. The FACE for SHM was historically  
25 low until June 10, 2011, when it briefly was increased from \$164,223 to \$830,490 before being  
26 reduced again to \$177,942 in February 2012. *Compare* PX568 at 165:9, *and* JX463 *with* JX559  
27 at 3, *and* JX 589 at 7. Specifically, the BZA lowered the FACE back to historic levels after a  
28 BZA hearing on December 21, 2011, at which the County presented testimony from its consulting

1 geologist, although plaintiffs were not given a chance to present their case. *Compare* PX568 at  
2 309:21-310:3, 303:23-306:5, *with id.* at 364:19-365:10. Nonetheless, after the December 2011  
3 hearing, the BZA set the FACE at \$177,942 as adequate to reclaim the mine based on its order to  
4 fill mine pits to no more than 30 feet deep. PX568 at 87:2-9, 382:10; JX 589 at 7. Defendants’  
5 consulting geologist even suggested plaintiffs might receive some money back at their next  
6 inspection. PX568 at 401:11.

7 But the FACE dramatically increased after the Schneider plaintiffs filed suit on  
8 September 27, 2012. Despite defendants’ delivering a letter on October 9, 2012 to the Schneiders  
9 notifying them their required FACE deposit of \$177,942 was final and approved (JX604 at 41; JX  
10 605 at 9), defendants conducted an annual inspection of the mine the next day. JX605.  
11 Defendants then issued an inspection report increasing the FACE deposit to \$8,817,074 or in the  
12 alternative \$901,336 if the plaintiffs filled their mine pits with fill from the SHM property itself.  
13 JX604; JX 605 at 21. The jury heard testimony from Schneider that even the \$901,336  
14 alternative would have involved using “several million dollars of [their] stockpile material.” RT  
15 1338:18-21.

16 Substantial evidence provided support for the jury’s inference that the increase in  
17 the FACE was not justified. Although the October 2012 inspection report states the BZA “ruled  
18 that final reclamation of the pit area would require the pits to be [completely] backfilled,” JX 605  
19 at 18, the BZA actually had ordered the pits filled to 30 feet or less. JX589 at 7. Additionally,  
20 defendants’ consulting geologist testified at trial that the SHM reclamation plan required only 30-  
21 foot pits, RT 2181:18-2182:3 (Bieber Test.), and plaintiffs’ consulting engineer testified as well  
22 that filling the pits completely was inconsistent with both the reclamation plan and common  
23 mining practice. RT 963:1-967:20. Additionally, defendants’ consulting geologist testified at  
24 trial there had been no change in conditions at the SHM despite the inspection report’s stating its  
25 ruling was based on “changes in condition” between the 2011 and 2012 inspections of the closed  
26 mine. RT 2206:9-10; JX 605 at 21; *see also* RT 950:11-20 (Olsen testimony that “[b]ecause there  
27 hadn’t been any mining activities done . . . the site really hadn’t changed.”).

1           Substantial evidence also supported a jury inference that defendants themselves  
2 caused the unjustified FACE increase. Defendants approached their consulting geologist and  
3 asked him to “determine what the cost would be if we have to import material to bring the site  
4 into . . . substantial conformity to surrounding topography” based on a BZA determination “that  
5 the 30-foot does not apply to the depths of the pits.” RT 2207:14-2208:2 (Bieber Test.). Yet  
6 defendants knew the mine had material on hand to use as fill, and the BZA had not determined  
7 the 30-foot standard did not apply. PX568 at 379:3. The consulting geologist testified that, had  
8 the County not directed him to calculate the costs of completely refilling pits, he would have  
9 continued interpreting the reclamation plan to allow 30-foot deep pits. RT 2210:25 (Bieber  
10 Test.).

11           The clear weight of the evidence here does not run counter to the jury verdict  
12 finding a First Amendment violation by the County. Although defendant Gamel testified the  
13 BZA had ordered the pits needed to be refilled if the reclamation plan was not amended, RT  
14 2090:17-2092:22, a compliance table adopted by that Board on December 12, 2011 mentions  
15 only filling pits to 30 feet deep. JX589 at 6-8. Gamel’s statements made in his letter of  
16 November 28, 2012, which was attached to an inspection report, that the BZA ordered the pits  
17 completely filled, JX605, simply are not consistent with the record of the Board’s actions in  
18 December 2011, at a hearing Gamel attended. PX 568 at 302. Additionally, this evidence, along  
19 with the timeline of events cited above, permitted while not requiring the jury to infer that the  
20 County intentionally took action against the Schneiders for filing suit.

21           Defendants’ reliance on plaintiffs’ refusal to file an amended reclamation plan,  
22 Renewed JMOL Mot. at 60-61, does not shift the clear weight of the evidence either. First, an  
23 amended reclamation plan is needed only where there is a substantial deviation from the  
24 previously approved reclamation plan. Cal. Code Regs. tit. 14, § 3502(d). But the substantial  
25 evidence cited throughout this order shows no substantial deviation. Second, requiring plaintiffs  
26 to file an amended reclamation plan for approval would conflict directly with plaintiffs’ claims in  
27 their lawsuit, and the alternative involved was to pay a price of at least \$901,336 and perhaps as  
28 high as \$8,817,074. Third, this rationale even if given some weight does not rebut defendant

1 Gamel’s statements misreporting on BZA orders or the relatively sudden and dramatic increase in  
2 the FACE very shortly after the Schneiders filed suit.

3 VI. MANDAMUS AND PRECLUSION

4 Defendants contend plaintiffs’ due process claims are barred as a matter of law for  
5 two reasons. First, they say this court must give preclusive effect to the Board of Supervisors’  
6 and BZA’s determinations. Renewed JMOL Mot. at 50-54. Second, plaintiffs did not first pursue  
7 or conclude state-court mandamus actions as required by California Code of Civil Procedure §  
8 1094.5. Renewed JMOL Mot. at 49, 52-53 The court rejects both contentions.

9 Preclusion law “is, of course, subject to due process limitations.” *Taylor v.*  
10 *Sturgell*, 553 U.S. 880, 891 (2008). The Ninth Circuit has made clear that administrative  
11 proceedings including legal adjudications receive preclusive effect only where “the state  
12 proceeding satisfies the requirements of fairness outlined in” *United States v. Utah Construction*  
13 *& Mining Co.*, 384 U.S. 394 (1994). *Miller v. Cty. of Santa Cruz*, 39 F.3d 1030, 1032-33 (9th  
14 Cir. 1994). “The fairness requirements of *Utah Construction* are: (1) that the administrative  
15 agency act in a judicial capacity, (2) that the agency resolve disputed issues of fact properly  
16 before it, and (3) that the parties have an adequate opportunity to litigate.” *Id.* at 1033.

17 Because plaintiffs lacked an adequate opportunity to litigate, the court need not  
18 give preclusive effect to the Board of Supervisors’ or BZA’s decisions. The court has already  
19 discussed the evidence on plaintiffs’ opportunity to litigate and declines to repeat it here. *See*  
20 *supra*, at IV.C. In any event, the court instructed the jury that it was not to consider the  
21 correctness or incorrectness of the Board of Supervisors’ or BZA’s determinations. ECF No. 461  
22 at 25. And of course “[a] jury is presumed to follow its instructions.” *Weeks v. Angelone*, 528  
23 U.S. 225, 234 (2000).

24 Even if plaintiffs had a full opportunity to litigate in the Board of Supervisors and  
25 BZA hearings, the court does not find any preclusion of plaintiffs’ due process claims. As the  
26 court has discussed above, the County’s deprivation of plaintiffs’ vested right to mine occurred  
27 without the required *Calvert* hearing, and the subsequent 2010 hearings did not permit plaintiffs  
28 to put defendants’ deprivation at issue. *See supra*, at IV.B-C. For this same reason, defendants’

1 reliance on California Code of Civil Procedure § 1094.5 fails. *See Embury v. King*, 191 F. Supp.  
2 2d 1071, 1084 (N.D. Cal. 2001), *aff'd*, 361 F.3d 562 (9th Cir. 2004), *as amended and aff'd*,  
3 No. 02-15030, 2004 WL 1088297 (9th Cir. May 17, 2004) (“Although section 1094.5 may  
4 provide an adequate opportunity to challenge a procedurally flawed administrative hearing, it  
5 does not provide an adequate opportunity to challenge an administrative decision rendered  
6 without any process at all.”).

## 7 VII. REMAINING ISSUES

### 8 A. Inconsistent Verdicts

9 Defendants argue a new trial must be granted because the jury verdicts are  
10 inconsistent. New Trial Mot. at 14-15. Defendants cite Jury Instruction 22, which addressed  
11 damages for procedural due process violations and explained “only nominal damages are  
12 recoverable for a deprivation of a property interest determined to be otherwise justified.” JI 22.  
13 According to defendants, because the jury awarded nominal damages for a violation of procedural  
14 due process, the jury necessarily determined the deprivation was “otherwise justified.” And  
15 because the procedural due process violation was otherwise justified, the jury’s verdict regarding  
16 procedural due process thus conflicted with the jury’s verdict finding a substantive due process  
17 violation based on an “arbitrary” violation of plaintiffs’ liberty or property interests. New Trial  
18 Mot. at 15 (“Thus, on the procedural due process claim, the Jury found that the deprivation of  
19 Plaintiffs’ property interest was justified, and in the substantive due process claim, the Jury found  
20 the deprivation of Plaintiffs’ property interest was unjustified, in that it was arbitrary. These two  
21 verdicts are inconsistent, and cannot be reconciled.”).

22 The court has a duty to reconcile the jury’s special verdict responses on any  
23 reasonable theory consistent with the evidence. *Pierce v. S. Pacific Transp. Co.*, 823 F.2d 1366,  
24 1369 (9th Cir. 1987) (citing, *inter alia*, *Gallick v. Baltimore & O. R.R.*, 372 U.S. 108, 119-22  
25 (1963)). A court may not disregard a jury’s verdict and order a new trial until it “attempt[s] to  
26 reconcile the jury's findings, by exegesis if necessary.” *Duk v. MGM Grand Hotel, Inc.*, 320 F.3d  
27 1052, 1058-59 (9th Cir. 2003) (quoting *Gallick*, 372 U.S. at 119). “Where there is a view of the  
28 case that makes the jury’s answers to special interrogatories consistent, they must be resolved that

1 way,” because to do otherwise “results in a collision with the Seventh Amendment.” *Id.* (quoting  
2 *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962)). The court “must  
3 accept any reasonable interpretation of the jury’s actions.” *Zhang v. Am. Gem Seafoods, Inc.*, 339  
4 F.3d 1020, 1038 (9th Cir. 2003).

5           Upon careful review, the court finds the record provides a reasonable  
6 interpretation for the jury’s actions: the jury could have found plaintiffs were unjustifiably  
7 deprived of their protected interests in violation of procedural due process, the unjustified  
8 deprivation did not proximately cause them actual damages, but defendants’ subsequent conduct  
9 violating their substantive due process rights did. Indeed, that is what plaintiffs asserted in  
10 closing argument. RT 2493:5-24 (asking only for “nominal damages” after asserting that  
11 procedural due process “is not the claim we believe all of the damages came from, but the county  
12 has to be called for that. They have to know what they did was wrong.”). Plaintiffs asserted they  
13 believed both substantive and procedural due process rights were violated, one “carried enormous  
14 consequences,” and “that the core issue in this case is substantive due process.” RT 2466:8-9,  
15 2496:21-22. When discussing substantive due process damages, plaintiffs asserted “the county  
16 refused to recognize the vested right, it shut the mine down.” RT 2498:3-4. This view, which  
17 takes account of the jury instructions as a complete package, makes the two verdicts consistent,  
18 and so they must be resolved this way. *Duk*, 320 F.3d at 1058-59 (quoting *Ellerman Lines*, 369  
19 U.S. at 364). Because the verdicts are not inconsistent, the court DENIES the request to grant a  
20 new trial on this ground.

21           B.     Immunity

22                     1.     Absolute Immunity

23           Defendant Dickinson contends he is entitled to absolute immunity for his  
24 legislative acts and qualified immunity for his executive acts. Renewed JMOL Mot. at 64.

25           Courts in the Ninth Circuit examine four factors to determine whether an act may  
26 qualify for legislative immunity: (1) “whether the act involves ad hoc decisionmaking, or the  
27 formulation of policy”; (2) “whether the act applies to a few individuals, or to the public at large”;  
28 (3) “whether the act is ‘formally legislative [in] in character’”; and (4) “whether it bears ‘all the

1 hallmarks of traditional legislation.” *Bechard v. Rappold*, 287 F.3d 827, 829 (9th Cir. 2002)  
2 (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998)).

3           In *Kaahumanu v. Cty. of Maui*, 315 F.3d 1215, 1219-24 (9th Cir. 2003), the Ninth  
4 Circuit applied this four-factor analysis to a county council’s denial of plaintiff’s application for a  
5 conditional use permit. There, the Ninth Circuit upheld the district court’s conclusion that the  
6 council’s decision was “ad hoc” because the decision was “based on the circumstances of the  
7 particular case and did not effectuate policy or create a binding rule of conduct.” *Id.* at 1220.  
8 Nor did the decision “apply to the public at large in Maui County,” either. *Id.* at 1222. Although  
9 the council decision was formally legislative in character, this fact alone “does not in itself decide  
10 the issue.” *Id.* at 1223. The Ninth Circuit found the fourth factor weighed against finding that  
11 legislative immunity was available because the decision “was ad hoc rather than one of policy,” it  
12 “did not change Maui’s comprehensive zoning ordinance or the policies underlying it,” and it did  
13 not “affect the County’s budgetary priorities or the services the County provides to residents.” *Id.*  
14 at 1223-24. Thus, “[d]espite its formally legislative character, the decision was administrative  
15 and the individual members of the Maui City Council are therefore not entitled to legislative  
16 immunity.” *Id.* at 1224.

17           Like the council’s decision in *Kaahumanu*, defendant Dickinson’s voting decisions  
18 in this case are not entitled to legislative immunity: they were ad hoc, they affected the Hardestys  
19 and the Schneiders as individuals, and they were based on the particular circumstances involving  
20 the SHM. Thus, Dickinson is not entitled to absolute immunity.

## 21           2.     Qualified Immunity

22           Defendants also contend they are entitled to qualified immunity. As to Dickinson,  
23 defendants contend “[p]laintiffs offered no evidence that he acted in bad faith or with the  
24 knowing intention to violate their constitutional rights.” Renewed JMOL Mot. at 65. As to  
25 defendants Sherry and Gamel, defendants contend “there is no evidence” that these defendants  
26 “violated any constitutional rights of the [p]laintiffs.” *Id.* at 62-63. In part, defendants contend  
27 Sherry and Gamel could not violate substantive due process because these defendants “did not  
28 make any *final* determination regarding either vested rights or the requirement for a conditional

1 use permit and a rezone.” *Id.* at 63 (original emphasis). Defendants also contend plaintiff’s due  
2 process claims “do not implicate clearly established constitutional rights of which a reasonable  
3 person would have known.” Renewed JMOL Mot. at 63.

4 a) Standard

5 Qualified immunity “protects government officials ‘from liability for civil  
6 damages insofar as their conduct does not violate clearly established statutory or constitutional  
7 rights of which a reasonable person would have known.’” *Pearson v. Callahan*, 555 U.S. 223,  
8 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Two factors determine  
9 whether the defense of qualified immunity applies: (1) whether the facts “make out a violation of  
10 a constitutional right”; and (2) “whether the right at issue was ‘clearly established’ at the time of  
11 defendant's alleged misconduct.” *Pearson*, 555 U.S. at 232 (internal citation omitted). The court  
12 is not required to consider the two steps in sequential order, and may find a defendant entitled to  
13 qualified immunity if either factor is absent, i.e., if either the alleged facts do not make out the  
14 violation of a constitutional right, or the right at issue was not “clearly established” at the relevant  
15 time. *Id.* at 236-37.

16 A right is “clearly established,” if under case law existing at the time of the  
17 conduct at issue, a reasonable official would have understood that what he is doing violates that  
18 right. *Mullenix*, 136 S. Ct. at 308. While “officials can still be on notice that their conduct  
19 violates established law even in novel factual circumstances,” *Hope v. Pelzer*, 536 U.S. 730, 741  
20 (2002), “existing precedent must have placed the statutory or constitutional question beyond  
21 debate,” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

22 b) Clearly Established Law

23 Here, plaintiffs’ constitutional rights were clearly established at the time of the  
24 alleged misconduct, which began in 2009. California Public Resources Code § 2776(a) has been  
25 in place since 1975 and in its current form since January 1, 2007. *See* Stats. 1975, c. 1131, p.  
26 2793, § 11; Stats. 2006, c. 538 (S.B. 1852), § 560. The *Hansen Brothers* decision was decided in  
27 1996. 12 Cal.4th at 533. There, the California Supreme Court clearly held that nonconforming  
28 mining uses are subject to the “diminishing asset doctrine,” which permits mining uses to expand

1 into new areas as long as their owners intended to mine these new areas when the mining uses  
2 became nonconforming. *Id.* The state Court expressly stated the appropriate remedy “[w]hen it  
3 appears that a nonconforming use is being expanded”: “the county may order the operator to  
4 restrict the operation to its former level, and seek an injunction if the owner does not obey.”  
5 *Hansen Bros.*, 12 Cal. 4th 533 at 575.

6 Additionally, at least since 1990, it has been clearly established in this Circuit that  
7 action by government officials may be found to be arbitrary and irrational when it “was  
8 motivated, not by legitimate regulatory concerns, but by political pressure” or an improper  
9 motivation. *Del Monte Dunes*, 920 F.2d at 1508; *Benigni*, 879 F.2d at 478; *Bateson*, 857 F.2d at  
10 1303 (detailing violation of substantive due process rights where defendant singles out “one  
11 individual to be treated discriminatorily”).

12 c) Dickinson

13 Defendants contend “[p]laintiffs offered no evidence that [Dickinson] acted in bad  
14 faith or with the knowing intention to violate their constitutional rights.” Renewed JMOL Mot. at  
15 65. But this is not the test for qualified immunity. Because clearly established law existed at the  
16 time of the violation of plaintiffs’ substantive due process rights, the court need only address  
17 whether or not Dickinson participated in the violation the jury found.

18 Substantial evidence supported the conclusion Dickinson engaged in affirmative  
19 acts causing deprivation of plaintiffs’ substantive due process rights—namely, the deprivation of  
20 their vested right to mine. *See Lacey v. Maricopa Cty.*, 963 F.3d 896, 916 (9th Cir. 2012). For  
21 instance, Dickinson’s office contacted County staff about potential violations at SHM as early as  
22 October 2008. JX214; JX157 at 3. Dickinson met with Teichert and other defendants multiple  
23 times, including to discuss SHM. JX363; JX392; JX507. At a September 14, 2010 hearing,  
24 Dickinson announced he did not believe there was a vested right, JX483-014:23- 15:17, and he  
25 disavowed the County’s recognition of the vested rights in 1994. JX483-019:16-020:12. During  
26 a Board of Supervisors hearing, Dickinson called on one of Teichert’s attorneys to not only testify  
27 but also to introduce an “extensive letter, a whole series of exhibits attached to it which cover  
28 virtually every issue which was discussed here this afternoon.” JX483-079:15-21. Dickinson

1 also denied Schneider’s requested time to review evidence from Teichert. JX483-100:10-101:10.  
2 And Dickinson voted to close the SHM on September 28, 2010. JX483 at 104-07. At trial,  
3 Dickinson affirmed documentation showing Teichert made a campaign contribution to him the  
4 day before the critical hearing, although he also noted he would not have known of the donation  
5 at the time. As noted, Teichert agreed to help fund the County’s aggregate enforcement program  
6 the day after the hearing. RT 1231:15-24, 1232:9-1233:13. From this evidence, weighing it as  
7 instructed, it was not the jury’s only option but the jury could infer Dickinson engaged in  
8 affirmative acts causing the SHM to eventually permanently close without any legitimate  
9 governmental objective, but instead to satisfy Teichert as a donor.

10 d) Sherry and Gamel

11 Defendants contend “there is no evidence” that Sherry or Gamel “violated any  
12 constitutional rights of the [p]laintiffs.” *Id.* at 62-63. In part, defendants contend Sherry and  
13 Gamel could not violate substantive due process rights because these defendants “did not make  
14 any *final* determination regarding either vested rights or the requirement for a conditional use  
15 permit and a rezone.” *Id.* at 63 (original emphasis).

16 First, the court notes Sherry and Gamel would not be entitled to qualified  
17 immunity for acts in their official capacity, which qualify as acts of the County. *Owen v. City of*  
18 *Independence, Mo.*, 445 U.S. 622, 638 (1980); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124  
19 (1988); *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion). Thus, contentions  
20 about Sherry or Gamel acting in their official capacity as final policymakers—a form of  
21 municipal liability—are not relevant to a qualified immunity analysis. *See, e.g.*, RT 2279:2-5, 15-  
22 22 (Derby testimony that the planning department—of which Sherry was the director as of April  
23 2, 2009—had final decision-making authority “to determine whether there was a vested right or  
24 not,” and the code enforcement department would then follow the planning department’s  
25 directives to enforce zoning violations).

26 Regardless, both Sherry and Gamel engaged in affirmative acts that the jury could  
27 find caused a deprivation of plaintiffs’ substantive due process rights. For instance, Sherry  
28 transmitted to plaintiffs the April 2009 letter, which was drafted by Gamel and copied to

1 Dickinson. JX287; JX288. Gamel communicated via email with Teichert lawyer Wheatley about  
2 SHM two weeks before the April 2, 2009 letter was issued, and Gamel met with Wheatley a week  
3 before sending the e-mail. JX275; 649:12-650:10. Gamel had also responded to a complaint by  
4 Teichert about the SHM operating without permits under vested rights by stating to Teichert, “We  
5 will see what we can do.” JX143. Gamel then provided updates to Teichert, including in a  
6 “Teichert goodies” email to Teichert’s John Lane. PX676. From this substantial evidence, the  
7 jury was permitted to infer that Sherry and Gamel’s actions in communicating with Dickinson  
8 and Teichert about SHM, and in issuing the letter to plaintiffs declaring plaintiffs’ mining was  
9 “not protected by [plaintiffs’] vested right,” caused the deprivation of plaintiffs’ vested right to  
10 mine. To the extent a factual dispute remained as to the parties’ motives, a threshold resolution of  
11 that dispute remained an appropriate task of the jury in the context of a claim of qualified  
12 immunity. *See Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir. 2003); *Wilkins v. City of*  
13 *Oakland*, 350 F.3d 949, 955-56 (9th Cir. 2003).

14 C. Punitive Damages

15 Defendants argue the punitive damages awarded against the individual defendants  
16 are excessive and a new trial must be granted. New Trial Mot. 11-13. Defendants’ argument  
17 lacks merit.

18 At hearing, defendants conceded excessive damages “would have to be reserved  
19 for [their] Rule 59 motion” and was “not a basis for [their] Rule 50(b) motion . . . .” Hr’g Tr. at  
20 46:9-21. The court therefore addresses defendants’ excessive damages claims under Rule 59  
21 only.

22 When reviewing a punitive damages award for constitutional excessiveness a court  
23 should “consider three guideposts: (1) the degree of reprehensibility of the defendant’s  
24 misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the  
25 punitive damages award; and (3) the difference between the punitive damages awarded by the  
26 jury and the civil penalties authorized or imposed in comparable cases.” *State Farm Mut. Auto.*  
27 *Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). “Single-digit multipliers are more likely to  
28 comport with due process.” *Id.* at 425. Defendant contends no comparable cases exist for the

1 third guidepost—the difference between the punitive damages awarded by the jury and the civil  
2 penalties authorized or imposed in comparable cases. Renewed JMOL Mot. at 71. The court  
3 therefore addresses the first two guideposts below.

4 Here, the jury awarded punitive damages against Dickinson of \$25,000, Gamel of  
5 \$1,000,000 and Sherry of \$250,000, all to Schneider plaintiffs. ECF No. 469 at 7-8. The jury  
6 also awarded \$500,00 in punitive damages against Sherry to Hardesty plaintiffs, for a total of  
7 \$750,000 in punitive damages awarded against Sherry. *Id.*

8 Substantial evidence permitted the jury to infer a significant degree of  
9 reprehensibility of defendants’ misconduct. First, as previously discussed, ample evidence shows  
10 defendants communicating and coordinating with Teichert about the investigation of SHM’s  
11 vested right. *E.g.*, JX363; JX392; JX487; JX507. Campaign reporting records show Dickinson’s  
12 campaign fund received a contribution the day before his vote to close SHM, and Teichert agreed  
13 to help fund the County’s aggregate enforcement program the day after that hearing. RT  
14 1231:15-24, 1232:9-1233:13 (Teichert Test.). Gamel authored the April 2009 letter, and Sherry  
15 signed it, declaring plaintiffs’ mining was “not protected by [plaintiffs’] vested right.” JX287.  
16 Sherry signed this letter despite acknowledging the County never told plaintiffs they could scale  
17 back their mining operation to some “original” vested right. RT 714:17-20. Sherry also signed  
18 this letter apparently without understanding the maps attached to the 2002 reclamation plan. *See*  
19 RT 701:6-704:20 (testifying he “can’t tell” and did not “know what the colors mean” in reference  
20 to maps with legends indicating estimates as to where mining likely will occur in the next 20, 40,  
21 and 100 years). And Gamel testified to the County’s unilateral determination without a hearing.  
22 RT 524:16-18, 525:6. The sum total of this conduct resulted in the closure of SHM and plaintiffs’  
23 loss of livelihood. This evidence supports a jury finding that defendants’ conduct involved  
24 targets who “had financial vulnerability,” involved “repeated actions,” was “the result of  
25 intentional malice, trickery, or deceit,” or involved a “callous indifference to the constitutional  
26 rights of others.” *State Farm*, 538 U.S. at 419; *Dang v. Cross*, 422 F.3d 800, 807 (9th Cir.2005);  
27 *see also* ECF No. 461 (instructing jury they “may award punitive damages only if [they] find that  
28 a defendant’s conduct that harmed a set of plaintiffs was malicious, oppressive, or in reckless

1 disregard of the plaintiffs’ rights” and defining reckless disregard as “complete indifference to the  
2 plaintiffs’ safety or rights, or if the defendant acts in the face of a perceived risk that its actions  
3 will violate the plaintiffs’ rights under federal law”).

4 Examining the disparity between the actual harm suffered by plaintiffs and the  
5 punitive damages awarded reveals the punitive damages were not constitutionally excessive.  
6 The largest multiplier here is 3.33 percent—the value of Gamel’s punitive damages award  
7 divided by the substantive due process damages awarded to Schneider plaintiffs. The remaining  
8 punitive damages awards as to each defendant, when divided by their respective compensatory  
9 damages awards, do not reach even a single-digit multiplier. *See State Farm*, 538 U.S. at 425  
10 (“Single-digit multipliers are more likely to comport with due process.”).

11 The court finds the punitive damages awarded here were not excessive as to any  
12 defendant, given the applicable legal standards.

13 D. Williamson Act Claim

14 Defendants also contend the court must enter judgment as a matter of law as to a  
15 Williamson Act claim. Renewed JMOL Mot. at 72-74. But plaintiffs made no such claim or any  
16 related “disguised breach of contract claim,” Renewed JMOL Mot. at 72, and no claim of this  
17 kind was before the jury. *See* ECF Nos. 74 (Second Amended Complaint), 461 (final jury  
18 instructions). Only claims for violations of procedural due process, substantive due process, and  
19 right to petition the government were submitted to the jury. ECF No. 461 at 15, 21-24, 26-27  
20 (final jury instructions 14, 18, 19, 21). The court DENIES defendants’ request for renewed  
21 judgment as a matter of law on a non-existent claim.

22 VIII. CONCLUSION

23 For the reasons above, the court DENIES defendants’ motions for renewed  
24 judgment as a matter of law and for a new trial. This order resolves ECF Nos. 537 and 538.

25 IT IS SO ORDERED.

26 DATED: March 31, 2018.

27  
28   
UNITED STATES DISTRICT JUDGE