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April 30, 2015

By e-mail (ggillott@amadorgov.org)

Gregory Gillott
810 Court Street
Jackson, CA 95642

Re: Legal Basis for Referendum

Dear Mr. Gillott:

Thank you for your April 28, 2015 e-mail raising the question of whether the reclamation plan is properly the subject of a referendum. The reclamation plan is a legislative action that is properly the subject of a referendum. In this letter, we provide the research and analysis supporting that conclusion. At the same time we ask that if you have any support for a contrary conclusion, you advise us of that so we might consider it as well. The County electorate's strong interest in being able to vote on each legislative aspect of the Newman Ridge Quarry and Edwin Center project is of paramount importance and can not lightly be interfered with.

Legislative actions involve the enactment of general laws, standards or policies, such as general plans or zoning ordinances. (2 Longtin's Cal. Land Use (2d ed.1987) § 11.10, 989-990.) A reclamation plan is like a general plan, a specific plan, a local coastal plan, and a development agreement, all of which are legislative actions (*O'Loane v. O'Rourke* (1965) 231 Cal.App.2d 774; *Yost v. Thomas* (1984) 36 Cal.3d 561, 571; *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 537; *Santa Margarita Area Residents Together v. San Luis Obispo County* (2000) 84 Cal.App.4th 221, 227.)

In an analogous situation, the court in *Yost v. Thomas* (1984) 36 Cal.3d 561 ("*Yost*") explained that the California Coastal Act "leaves wide discretion to a local government not only to determine the contents of its land use plans, but to choose how to implement these plans. Under such circumstances a city is acting legislatively and its actions are subject to the normal referendum procedure." (*Id.* at 573.) The *Yost* court further explained:

> No such tightly circumscribed duty is imposed on local governments by the Coastal Act. The act does not dictate that a local government must build a hotel and conference center – that decision is made by the local government. It merely requires local governments to comply with specific policies – but the decision of whether to build a hotel or whether to designate an area for a park remains with the local government. A local government is acting legislatively in making this decision as well as in implementing it.

(*Yost, supra*, 36 Cal.3d at 573, *emphasis added.*)

Likewise, the Surface Mining and Reclamation Act does not dictate that a local government must approve a reclamation plan if it satisfies certain enumerated criteria. While it, like the Coastal Act, requires the local agency to comply with specific policies, the decision whether to approve a reclamation plan remains with the local government:

> Every lead agency shall adopt ordinances in accordance with state policy that establish procedures for the review and approval of reclamation plans and financial assurances and the issuance of a permit to conduct surface mining operations, except that any lead agency without an active surface mining operation in its jurisdiction may defer adopting an implementing ordinance until the filing of a permit application. The ordinances shall establish procedures requiring at least one public hearing and shall be periodically reviewed by the lead agency and revised, as necessary, to ensure that the ordinances continue to be in accordance with state policy.

(Pub. Resources Code, § 2774, *emphasis added.*) In making this decision whether to approve the reclamation plan and in implementing the plan, Amador County is acting legislatively.

Reclamation plan challenges have been brought as Code of Civil Procedure Section 1085 cases, which are challenges to legislative action. In *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, petitioners challenged the lack of a valid reclamation plan. The Court of Appeal explained:

> Under SMARA, '[a]ny person may commence an action on his or her own behalf against the [B]oard, the State Geologist, or the

> director [of the Department of Conservation] for [a traditional] writ of mandate ... to compel the [B]oard, the State Geologist, or the director to carry out any duty imposed upon them pursuant to [SMARA].' (§ 2716.)

(*Calvert, supra,* 145 Cal.App.4th at 632.) The traditional writ of mandate under Code of Civil Procedure section 1085 is used to review actions taken by an administrative agency in its legislative capacity. (*Karlson v. City of Camarillo* (1980) 100 Cal.App.3d 789, 798.)

The Supreme Court has confirmed the presumption in favor of the right of referendum, as well as a "liberal construction" of this power:

> '[W]e will presume, absent a clear showing of the Legislature's intent to the contrary, that legislative decisions of a city council or board of supervisors ... are subject to initiative and referendum.' This presumption rests on the fact that the 1911 amendment to the California Constitution conferring the right of initiative and referendum was '[d]rafted in light of the theory that all power of government ultimately resides in the people' and that 'the amendment speaks of initiative and referendum, not as a right granted the people, but as a power reserved by them.' [Citation.] It is " 'the duty of the courts to jealously guard this right of the people [citation].... '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right [to local initiative or referendum] be not improperly annulled.' " (*Ibid.*)

(*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775-76, *emphasis added.*)

In our research, we have not discovered any case law indicating that a reclamation plan cannot be the subject to referendum. We ask that if you have encountered any you provide that to us. In light of the absence of any authority precluding a referendum on the reclamation plan and the presumption in favor of the right of referendum, the reclamation plan must be regarded as properly the subject of a referendum.

Even if there is a question as to whether the referendum will be valid if enacted, it is error to keep the matter off the ballot:

> It is not a [a clerk's] function to determine whether a proposed [referendum] will be valid if enacted … These questions may involve difficult legal issues that only a court can determine. The right to propose [referendum] measures cannot properly be impeded by a decision of a ministerial officer, even if supported by the advice of the city attorney, that the subject is not appropriate for submission to the voters.

(*Farley v. Healey* (1967) 67 Cal.2d 325, 327.)

Lastly, you asked that we address what may be the appropriate remedy in the event you regard action on the reclamation plan as administrative and thus not properly the subject of a referendum. Without a doubt, the entire referendum must be placed on the ballot. If someone believes the reclamation plan may not be referended, that party can litigate the issue and attempt to obtain a declaration from a court to that effect. However, pre-litigation challenges are heavily disfavored. (*Independent Energy Producers Association v. McPherson* (2006) 38 Cal.4th 1020, 1029-1030, 1032.) The best course is to place the referendum on the ballot. If there is a concern with all or part of it after an election determines if it passes or not, that can be adjudicated in a post-election challenge.

Please let me know if you have any additional questions or concerns. Thank you.

Sincerely,

Douglas Carstens
Chatten-Brown & Carstens
Attorneys for Ione Valley Land, Air, and Water Defense Alliance (LAWDA)