

IN THE  
COURT OF APPEAL OF THE STATE OF CALIFORNIA  
IN AND FOR THE  
THIRD APPELLATE DISTRICT

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THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON LANCE RINEHART,

Defendant and Appellant.

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Appellate No. C074662  
Appeal from a Judgment of the Superior Court  
of the County of Plumas, No. M1200659  
Hon. Ira Kaufman

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APPELLANT'S REPLY TO AMICUS CURIAE  
KARUK TRIBE *ET AL.* BRIEF

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## Summary of Argument

The notion that this case could impact “the health, safety and welfare of millions of Californians” (Karuk Br. 1) is preposterous. Suction dredging occurred for many decades before anti-mining activists colluded with the Tribe to turn anti-mining activism into a revenue stream, and to this day there is not one iota of proof that the practice has ever injured so much as a single fish or fish egg in the State of California, much less had any impact upon human health or safety. The factual allegations of the Karuk Tribe and its environmentalist allies<sup>1</sup> are erroneous, and their legal arguments are meritless.

The very notion that a supposed *amici curiae* are entitled to appear before this Court and supplement the record with these falsehoods is contrary to law. Any factual record is to be made in the Superior Court, not here, and the propositions advanced by the Karuk Tribe and the environmentalists are not the sort of which judicial notice can be taken.

Nor are the factually assertions of the Karuk Tribe and environmentalists even relevant. Appellant maintains that to the extent that the State of California

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<sup>1</sup> While the *amici* generally refer to themselves as interested in protection and restoration of native fish, in the case of the Karuk Tribe and fishing organizations, this is so they can kill them and eat them. When members of these entities kill a single fish, they have more adverse effect on the resource than any proven effect of suction dredge mining. While it is beyond the scope of this memorandum, there is substantial evidence that under the right environmental conditions (concretized stream bottoms), suction dredging increases wild fish populations. (*See* Final SEIR 4-50 to 4-51 (<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=43702>)). As the material just cited confirms, the claim that the Final SEIR has no effect on the SEIR material cited by the Tribe is not accurate. (*Cf.* Karuk Br. 3 & n.2.)

wishes to enact its own duplicative regulatory system for mining on federal land, it has to be a process that imposes reasonable permit conditions that do not materially interfere with mining. That environmental impacts are imaginable merely suggests that permit conditions may sometimes be appropriate, but in no way supports State power to prohibit the mining in general.

Finally, with respect to the legal arguments of the Karuk Tribe and environmentalists, Appellant is not asking this Court to overturn *California Coastal Commission v. Granite Rock Co.*, but to apply the principles laid out by the 5-4 majority that recognized a limited role for state regulation—and certainly did not countenance state prohibitions of mining on federal land. Again the Karuk Tribe and environmentalists attempt improperly to assert facts, suggesting that miners can use alternative methods to mine underwater placer gold deposits. These suggestions are false, in that none of the mining methods advanced by the Karuk Tribe and environmentalists can effectively excavate the deposits, and are not properly considered by the Court in any event. As a matter of federal preemption, the State’s refusal to issue any permits is a rule prohibitory in character, not regulatory, and cannot be reconciled with federal preemption law. *E.g., South Dakota Mining Ass’n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998) (prohibition on new or amended surface mining permits in one county is “prohibitory, not regulatory, in its fundamental character”).

## Argument

### I. THIS COURT SHOULD NOT CONSIDER THE FACTUAL ASSERTIONS OF THE KARUK TRIBE AND ENVIRONMENTALISTS.

The California Supreme Court has emphasized that *amici* may not circumvent longstanding rules against developing a factual record on appeal, and evading the rules of judicial notice. For example, in *People v. Castillo*, 49 Cal.4th 145, 156-58 (2010), the Supreme Court rejected an attempt by an *amicus* to induce the court to reply upon “factual assertions” contained in certain official letters.

As a general matter, Evidence Code § 450 provides that “judicial notice may not be taken of any matter unless authorized or required by law”. While Evidence Code § 452(c) provides for judicial notice of “official acts” of the executive departments of the State, the scope of these statutes does not extend to taking judicial notice of the “critical factual matters asserted in those documents”. *Castillo*, 49 Cal.4th at 158 (citing *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal.4th 1057, 1063 (1994), *overruled on other grounds*, *In re Tobacco Cases II*, 41 Cal.4th 1257 (2007)).

This is a long-standing proposition of California law, as demonstrated by this Court’s decision in *Beckley v. Reclamation Board*, 205 Cal. App.2d 734 (1962). In that case, litigants sought to have the court take judicial notice of two California Debris Commission reports. As this Court explained,

“These reports are based upon studies made by engineers with opinions and conclusions drawn from those studies. But engineers are not infallible, nor are all statements contained in the reports, even

though stated as facts, irrefutable. . . . To assert the immutableness of statements in official documents would constitute abdication by the courts in favor of adjudication by engineering fiat.” *Id.* at 742.

Appellant was entitled to trial by judicial processes, not the fiat of environmental regulators. The State did not attempt to present any evidence that any environmental harm would arise by reason of Appellant’s conduct, and the attempt by the Karuk Tribe and environmentalists to raise the specter of such harm should be rejected.

The Karuk Tribe and environmentalists cite *Bily v. Arthur Young & Co.*, 3 Cal.4th 370, 405 n.14 (1992) for the proposition that they are entitled to “facilitate informed judicial consideration of a wide variety of information and points of view”. (Karuk Br. at 3 n.1) In *Bily*, the Supreme Court did deny a motion to strike the challenged materials submitted by *amici*, but then, in the very same footnote, declared that the materials were “not part of the record, were not subjected to the testing mechanisms of the adversary process . . . , and do not qualify for judicial notice”. *Id.* at 405 n.14. Accordingly, the *Bily* court stated: “we have not considered them in our decision”. *Id.* In other words, while the Karuk Tribe and environmentalists may be given latitude to avoid motions to strike, it remains entirely improper for this Court to *consider* their factual submissions, as explained in *Castillo*.<sup>2</sup>

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<sup>2</sup> In the other case cited by the Karuk Tribe and environmentalists, *Rivera v. Division of Industrial Welfare*, 265 Cal. App.2d 576 (1968), this Court noted that “published material on social and economic conditions is habitually used without entering it into evidence” and that “Brandeis briefs,” which bring “social statistics

In addition to be inconsistent with the Evidence Code, consideration of the materials invoked by the Karuk Tribe and environmentalists would, as the *Castillo* Court explained, “augment the record on appeal ‘in contravention of the general rule that an appellate court generally is not the forum in which to develop an additional factual record’”. *Castillo*, 49 Cal.4th at 158 (quoting *People v. Peevy*, 17 Cal.4th 1184, 1207 (1998)). While this is especially true in criminal cases, where defendant is entitled to test the evidence against him by cross-examination, the California courts have also disapproved of attempts to put scientific evidence in appellate briefs in civil cases as well. *E.g.*, *Wilkinson v. Bay Shore Lumber Co.*, 182 Cal. App.3d 594, 599 n.3 (1986) (dry rot).

**II. THE KARUK TRIBE AND ENVIRONMENTALISTS’ SUGGESTION OF POTENTIAL ENVIRONMENTAL HARM DOES NOT BEAR AGAINST ANY FINDING OF PREEMPTION.**

The gist of the case for preemption is that the State of California is not permitted to pass a general prohibition on suction dredge mining, but to the extent it chooses to supplement federal regulation of mining on federal lands, the State must develop reasonable permit conditions. The specter of potential harm from suction dredging in some places, under some conditions, at some times, merely

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into the courtroom,” have become commonplace. *Id.* at 589 & n.20. This case does not involve the social sciences, where courts have erroneously assumed an ability to accept and reply upon such information (the very material cited by Brandeis in favor of the inferiority of women was subsequently discredited, *see generally* [http://en.wikipedia.org/wiki/Brandeis\\_Brief](http://en.wikipedia.org/wiki/Brandeis_Brief)), but the harder sciences, where the courts have rejected “Brandeis briefs”, *e.g.*, *Wilkinson v. Bay Shore Lumber Co.*, 182 Cal. App.3d 594, 599 n.3 (1986) (genesis of dry rot).

supports the concept that there is a role for California to play in identifying and regulating specific operations.

But the evidence does not support the notion that mining may be prohibited entirely, for as we explained in our brief on the merits, Congress has already struck that balance and declared that where it is necessary to injure other resources in extracting valuable minerals from those particular areas where they are located, such extraction is to go forward without material interference.

### **III. THE KARUK TRIBE AND ENVIRONMENTALISTS’ “FACTS AND BACKGROUND” SECTION IS NOT FACTUAL.**

The Karuk Tribe and environmentalists identify four general environmental impacts they identify as “irreparable environmental harm” that could result from a preemption ruling. It is certainly true that the Department of Fish and Wildlife has produced a screed concerning “a range of *potential* environmental effects” (Karuk Br. at 3; emphasis added.<sup>3</sup>) Under California law and other modern environmental statutes, courts are at pains to explain that environmental review procedures are invoked without regard to the magnitude of any environmental threat.<sup>4</sup> Findings

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<sup>3</sup> At times, the Karuk Tribe and environmentalists assert that suction dredging “would have” rather than “could have” certain effects. *See, e.g.*, Karuk Br. at 3 & n.4 (citing SEIS Appendix B, at 34). That particular page discusses effects of “small, internal combustion engines” typically the size of lawnmower engines, again underscoring the degree to which impacts from the activity are, albeit “significant” for CEQA purposes, utterly insignificant in the context of human activities in California.

<sup>4</sup> The Karuk Tribe and environmentalists mislead the Court when they assert, for example, that the Endangered Species Act is invoked concerning suction dredging “because of the impacts to wildlife”. (Karuk Br. 2; citing *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1012 (9th Cir. 2012), *cert.*

of significance are required based on the mere “potential” for adverse effects. *See, e.g.*, 14 C.C.R. § 15065 (“Mandatory Findings of Significance”). Where experts disagree, a finding of significance is required. 14 C.C.R. § 15064(g).

What is especially misleading about citing to potential impacts identified during the CEQA process is that the Legislative Assembly has recognized, in substance, straightforward application of CEQA law would not prohibit suction dredge mining; rather the Assembly insisted that *unlike any other activity in California*, any and all “significant” effects of suction dredging must be fully mitigated. Fish and Game Code § 5653.1(b)(4). In removing administrative discretion to assess the magnitude of asserted effects, the Legislature cast regulation aside in favor of prohibition.

We discuss below the specific asserted impacts identified by the Karuk Tribe and environmentalists. Insofar as they have cited a large quantity of extra-record factual material, as a matter of self-defense we respond with corresponding extra-record factual material, copies of which are attached to this Response as Exhibits. But the right result is that the Court decline to reach the factual issues raised by the Karuk Tribe and environmentalists, because the questions presented are not appropriately resolved by competing citations in appellate briefs.

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*denied*, 133 S. Ct. 1579 (2013)). In fact, that very case explains that the Act is invoked based on a “may affect” standard which is a “relatively low” threshold for triggering consultation—“any possible effect . . . triggers” the Act. *Id.* at 1027 (citations omitted; emphasis in original).

**A. Allegations of Potential Mercury-Related Effects Are Exaggerated.**

There are occasional small deposits of mercury in some, but not all, California rivers and streams left over from historic mining practices. This mercury will eventually move downstream with the riverbed materials making their way to the ocean. (Exhibit 1 (comments submitted by David McCracken to the Department of Fish and Wildlife in connection with the suction dredge CEQA process), at 4-5) A single high-flow event in rivers with mercury deposits stirs up riverbed materials and moves more mercury in the river than suction dredgers possibly could. (Exhibit 2 (a Trillium Associates analysis of suction dredging and mercury submitted to the Department in connection with the suction dredge CEQA process), at 24.) By contrast, repeated scientific studies have demonstrated that suction dredging has no detrimental environmental impact on heavy metals concentrations in streams. (Exhibit 2, at 5-8; Exhibit 3 (comments of former EPA scientist), at 3, 4-6.)

The Karuk Tribe and environmentalists assert that where suction dredge miners “find gold, they find elemental (liquid) mercury and discharge it into waterways”, citing 40 Env'tl. Law at 1025. Neither the cited material nor any other evidence supports this claim. Miners commonly find gold without mercury, and in the few places where they do find mercury, the suction dredges safely (and at no cost to the State) recover approximately 98% of the mercury they encounter, thereby providing a very significant net environmental benefit. (Exhibit 3, at 1-2;

Exhibit 2, at 5.) Indeed, allowing suction dredge mining is the only practical way to catalog mercury “hotspots” in California rivers for potential remedial action. (Exhibit 1, at 6.) Were the facts concerning mercury to be established at trial, Appellant could demonstrate that responsible regulators outside California have applauded suction dredging’s effect of generally removing heavy toxic metals, including mercury and lead, from the riverine environment.

Against the obvious proposition that safely removing 98% percent of the mercury encountered is a good thing, the Karuk Tribe and environmentalists string-cite to an advocacy piece in *Environmental Law* containing numerous erroneous assertions about both suction dredge mining and mercury. (Karuk Br. at 4-7.<sup>5</sup>) The statement that “numerous state and federal government studies have traced the causal connection between legacy gold mining, contemporary suction dredge mining, and elevated mercury in fish, wildlife, and humans” (*id.* at 6) is categorically wrong insofar as it suggests well-documented proof of any causal relationship between contemporary suction dredge mining and elevated mercury in fish, wildlife and humans.<sup>6</sup>

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<sup>5</sup> Many of the assertions in this piece are in turn cited to another environmentalist advocacy piece put out by the Sierra Fund. *See, e.g.*, 40 *Envtl. Law* at 1025 nn. 21 & 24-26, 1027 nn. 45, 47 & 49 (citing The Sierra Fund, *Mining’s Toxic Legacy: An Initiative to Address Mining Toxins in the Sierra Nevada* (2008)).

<sup>6</sup> The Tribe and environmentalists footnote the SEIR at pp. 4.2-46 to -53 (Karuk Br. 6 n.15). A single “study” discussed at p. 4.2-46 to -47, based on observations comparing two years in one location, purported to find slightly higher mercury in invertebrates in the year when suction dredging occurred (2007). The SEIS claims that hydrologic conditions were similar for the two years, but available data from

As for the remaining 2% of mercury that is redeposited back into the stream, the Department emphasized that it could issue permits under appropriate regulations such that further closures to avoid or limit such discharges “are not believed to be necessary to avoid deleterious effects to fish, and are therefore considered infeasible”. (SEIS at 5-29.) In short, as even the SEIS confirmed the lack of harm to fish, the Karuk Tribe and environmentalists began to raise the specter of human health effects.

While mercury is a potentially toxic element, mercury toxicity to humans from eating fish is an issue created by misunderstanding and exaggeration, since nearly all fish contain more selenium than mercury, and selenium destroys the effects of mercury toxicity by binding to the mercury. Actual surveys of California fish show no significant mercury contamination in areas where suction dredge mining continued for years, and that the fish have more selenium than mercury.<sup>7</sup> Attached as Exhibit 4 is a copy of a PowerPoint presentation which two retired EPA scientists gave to the Department in connection with preparation of

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the gauge at Marysville suggests that this is not true. (Attached as Exhibit 5 is a true copy of a printout from <http://cdec.water.ca.gov/cgi-progs/plotDaily2?staid=MRY> which shows a massive flow spike in 2007, and not in 2008, relevant to dislodge mercury deposits.) *The SEIS candidly admits that there no other data available* (p. 4.2-46), much less multiple studies.

<sup>7</sup> See California Water Board, *Contaminants in Fish from California Rivers and Streams* (2011) (available at [http://www.waterboards.ca.gov/water\\_issues/programs/swamp/docs/rivers\\_study/rs\\_rptonly.pdf](http://www.waterboards.ca.gov/water_issues/programs/swamp/docs/rivers_study/rs_rptonly.pdf)), at 2 (“River and stream locations outside the Delta region all had low or moderate methyl mercury contaminations” with “low concentrations” in trout”); see also Appendix 2 (reporting very low concentrations in the Klamath River, a focal area for suction dredging.)

the revised suction dredging regulations, confirming that there was no mercury-related risk to human health whatsoever, much less an emergency.

In any event, as these experts and others emphasize, mercury does not form the potentially toxic compound methylmercury in areas of high dissolved oxygen such as gold-bearing creeks where gold dredging occurs, but more in low-dissolved oxygen areas such as swamps and deltas. (Exhibit 3, at 4.)

The Karuk Tribe and environmentalists emphasize collaboration between the Department of Fish and Wildlife and its environmental consultant to portray a single suction dredge miner as producing 10% of a watershed's mercury load. (Karuk Br. at 6.) In fact, any trier of fact could identify the analysis as bordering on fraudulent. The Department's consultant conducted an "experiment" involving a massively contaminated area and equipment that recirculated mercury-contaminated water and sediments hundreds of times, unlike suction dredges. (*See* Exhibit 1, at 5-6; Exhibit 2, at 9.) Use of this bogus data makes the Department's conclusions concerning mercury in its environmental analysis of suction dredging plainly wrong. (Exhibit 2, at 14-18.)

Ironically, the Department and ostensible opponents of suction dredging support the use of equipment to clean up mercury-contaminated sediments that leave far more mercury behind than suction dredges (Exhibit 1, at 7-8), and suggest that the Department's statements represent acquiescence to political pressure rather than evenhanded assessment of the facts before it.

**B. Impacts to Cultural, Historic and Archeological Resources.**

The assertion that the Department identified “significant environmental impacts of suction dredge mining on the state’s historic, cultural and archeological resources” (Karuk Br. 7) is at best misleading. As the SEIR acknowledged, the Department did no more than suggest that such resources “might be present in areas of suction dredge mining” and “potential damage to or destruction of such resources is unknown” but “cannot be entirely discounted”. (*E.g.*, DSEIR at 4.5-12.) Just as the record is devoid of any evidence that suction dredgers have injured so much as single fish, the record is devoid of any evidence that suction dredges have injured so much as a single historic, cultural or archeological resource.<sup>8</sup>

Nor is there any evidence of any such resource on Appellant’s mining claim. Appellant is governed by 36 C.F.R. § 261.9, which requires him to avoid “digging in, excavating, disturbing, injuring, destroying, or in any way damaging any prehistoric, historic, or archaeological resource, structure, site, artifact, or property”. In addition, federal regulations require immediate reporting of any

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<sup>8</sup> The notion that the Tribe has “multiple sacred sites along the Klamath River that would be seriously impacted by unregulated suction dredging” is grossly misleading. The U.S. Forest Service held meetings between the Tribe and miners resulting in agreements to avoid the Tribal swimming hole and other areas of *specific* concern for the Tribe. *See, e.g., Karuk Tribe of California v. U.S. Forest Service*, 379 F. Supp.2d 1071, 1082 & n.7 (N.D. Cal. 2005), *rev’d*, 681 F.3d 1006 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013). In fact, though the District Court’s opinion does not report it, with the assistance of the Forest Service, the miners and the Tribes reached agreement to avoid numerous specific sites of concern to the Tribe and shook hands on that agreement—only to have the Tribe faithlessly breach it by commencing litigation without notice to the miners.

inadvertent discovery of “human remains, funerary objects, sacred objects, or objects of cultural patrimony”. 43 C.F.R. § 10.4.

What the Tribe is really talking about, as reflected in the CEQA process, is a notion of “Traditional Cultural Properties” (TCPs), which no longer bears any resemblance to the areas protected by the foregoing federal regulations.

According to the SEIS, “one defined TCP is a ‘riverscape,’ or ‘a river and its environs, including their natural and cultural resources, wildlife, and domestic animals,’” and such TCPs can be determined significant under CEQA. (SEIS at 4.5-7.) The Karuk Tribe now claims that essentially the entire Klamath riverscape is a TCP, such that any non-Tribal activity is significant.

While a full discussion of this administrative development is beyond the scope of this memorandum, it constitutes a pernicious misuse of historic preservation statutes, and a gross violation of equal protection of law. The federal lands are simply not the property of the Karuk Tribe, but are a public resource to be enjoyed by all Americans under federal laws. It is the miners who have special statutory rights to enjoy such federal lands, not the Karuk Tribe. The gold-bearing rivers of California are as much Traditional Cultural Properties of California mining culture as of the Karuk Tribe, and the Tribe’s unreasonable opposition to sharing those rivers with the miners is not a factor sufficient to override federal mining law and policy.

**C. Impacts to Biological Resources Are Non-Existent and/or Unrelated to this Appeal.**

Lord Kelvin, the Scottish scientist, famously remarked that

. . . when you can measure what you are speaking about, and express it in numbers, you know something about it; but when you cannot express it in numbers, your knowledge is of a meagre and unsatisfactory kind; it may be the beginning of knowledge, but you have scarcely, in your thoughts, advanced to the stage of science, whatever the matter may be.

W. Thomson, *1 Popular Lectures* 73 (May 3, 1883). Appellant is aware of only one scientific study that has ever tried to *quantify* adverse effects of suction dredge mining upon any biological resource.

Specifically, in response to environmentalist claims of harm relating to the Siskiyou National Forest, the U.S. Forest Service engaged a fisheries professor at Oregon State University, who constructed an exhaustive data set and concluded:

“ . . . any effect that may exist could not be detected at the commonly used Type I error rate of 0.05. . . . the analysis was able to detect a negative effect of another mining process, [hydraulic mining,]

“ . . . Localized, short-term effects of suction dredge mining have been documented in a qualitative sense. However, on the scales occupied by fish populations, such local disturbance would need a strong cumulative intensity of many operations to have measurable effects. Local information reveals that most suction dredge miners more or less adhere to guidelines that have recently been formulated by the Forest Service, but there are individual cases where egregious mismanagement of the immediate environment has occurred, particularly with respect to damaging river banks in various ways.[<sup>9</sup>] This analysis cannot account for individual

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<sup>9</sup> Such damage is prohibited not only by the Forest Service, but also by California law not challenged in this appeal; § 1602 of the Fish and Game Code prohibits any “substantial” alteration of a stream bank.

transgressions, and a study to do so at an appropriate scale would be very expensive if feasible.

*“Given that this analysis could not detect an effect averaged over good and bad miners and that a more powerful study would be very expensive, it would seem that public money would be better spent on encouraging compliance with current guidelines than on further study.”*

P. Bayley, *Response of fish to cumulative impacts of suction dredge and hydraulic mining in the Illinois subbasin, Siskiyou National Forest, Oregon* (April 2003) (copy attached as Exhibit 6; emphasis added; citations omitted).

Utterly unable to prove any significant adverse impacts to biological species in the water where suction dredge mining is occurring, the SEIS for the first time develops the theory that the miners working underwater may somehow impact birds. Thus the SEIR asserted potential “effects on special status passerines associated with riparian habitat”.

Specifically, the Department identified certain bird species (SEIR Table 4.3-3) and concluded that allowing suction dredging might lead to significant impacts on several of these species. Specifically, the Department identified three species of Willow Flycatchers, the Least Bell’s Vireo, and the Western Yellow-Billed Cuckoo, and asserted “the potential to disturb breeding” although regulations kept miners out of most of the critical habitat during the nesting season. (SEIR at Table 4.3-3.) By the Final SEIR, however, the Department

admitted that the “likelihood of disturbance is considered relatively low . . .”.  
(FSEIR at 4-35.<sup>10</sup>)

The CEQA process did not develop evidence detailing the effects of miners working underwater on birds in the air, relying instead upon general statements that human presence may interfere with birds. (SEIR at 4.3-48.) There is no evidence that any miners, much less Appellant, were operating in the vicinity of the bird habitat—most of them are native to Southern California or found in large river deltas hundreds of miles downstream from where mining is occurring. (*Id.* Table 4.3-3.)

Again, whether and to what extent individual suction dredge mining operations should have permit conditions relating to birds has nothing to do with this appeal; this appeal concerns whether California may lawfully ban the mining throughout the State. For the State to single out and ban suction dredge mining because of extraordinarily unlikely effects on birds, while permitting every other human activity out of the water and closer to the birds, manifestly poses an obstacle to Congress’ important national mining objectives.

**D. Noise Impacts Are Overblown and Unrelated to this Appeal.**

Just like lawnmowers, suction dredges do make noise.<sup>11</sup> As the SEIR notes, “use of a motor boat, ATVs” and even “ringing telephones” may violate these

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<sup>10</sup> <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=43701>.

standards (SEIR at 4.7-9), yet the Department found that “suction dredge activities have potential to generate noise in excess of local noise standards” and “the impact cannot be discounted”. (SEIR at 4.7-9 to 4.7-10.) Whatever that may mean, the DSEIR contains nothing to suggest any more threat than that posed by a ringing telephone.

In 1994, the Department had concluded that “suction dredging . . . is afforded equal rights to use public lands to participate in the activity”. (SEIR at 4.7-8.) This was wrong, in that only the miners have a statutory right to occupy federal lands. In any event, the existence of selfish Tribal representatives and environmentalists who are offended at the notion that they may, for example, have to kayak or fish within earshot of an operating gasoline engine, and are unwilling to share the National Forests with the miners, is simply irrelevant to the questions presented on this appeal.

#### **E. The Legislative History.**

Speculation as to reasons the Legislative Assembly enacted the prohibition challenged here is not pertinent to the outcome of this appeal. No trier of fact faced with competent testimony on these issues would accept the factual propositions advanced by the Karuk Tribe and environmentalists. In fact, the iron control of the Legislative Assembly by allies (or worse) of the Karuk Tribe and environmentalists meant that no fair hearing was ever permitted before that body.

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<sup>11</sup> The Karuk Tribe and environmentalists claim the smallest motor is five horsepower (Karuk Br. 12.) This is off by a factor of two. *See* SEIR Exhibit B, at 35 (2.5 horsepower).

To the extent that facts concerning suction dredging beyond those in the record below are required—and they are not—Appellant is entitled to have his case determined by facts of record, presented by witnesses subject to cross examination, not the political power of the Karuk Tribe and environmentalists. At most, the legislative history shows the Assembly’s desire for a functioning permit system that addresses asserted environmental impacts, but the Assembly’s desire cannot, in the teeth of federal mining law and policy, simply prohibit the mining unless and until the Legislative Assembly issues new law.

**IV. THE LEGAL ARGUMENTS OF THE KARUK TRIBE AND ENVIRONMENTALIST ARE MERITLESS.**

Continuing their consistent pattern of error, the Karuk Tribe and environmentalists claim that Appellant seeks a “court approved sanction for suction dredging to occur without permit protections”. (Karuk Br. 16.) What Appellant seeks is a judicial declaration that § 5653.1 of the Fish and Game Code is pre-empted as a matter of federal law. Once the Legislature’s unconstitutional attempt to stop the Department from issuing permits is struck down, the Department will remain free under *Granite Rock* to operate a permitting regime.

The specter of “unregulated suction dredge mining on federal claims throughout the state” (Karuk Br. 17) is pure fiction. It is pure fiction because the mining is and will continue to be regulated by federal authorities under 36 C.F.R.

Part 228 and other authorities.<sup>12</sup> And it is pure fiction because once the ban on issuing permits is lifted, the Department can commence issuing them, and impose reasonable permit conditions. The Department may have expressed its “unease” (*see* Karuk Br. 17) that there will be the occasional sound of lawnmower engines in the state, or a miner might somehow strike some hidden cultural or archeological resources unknown to other federal and state regulators, but no appreciable damage is remotely likely to occur. *Again, the mining proceeded for decades without a single documented, specific example of any specific harm whatsoever.* The Department’s unease is not grounded in reason or fact, but in extreme deference toward the Karuk Tribe and environmentalists and their concerns.

As to the Karuk Tribe and environmentalists’ interpretation of *Granite Rock*, Appellant has adequately explained in the principal briefs why the relief he seeks is precisely congruent with, if not required by, *Granite Rock*. Again, the State sought to prohibit nothing in *Granite Rock*; it merely sought to impose reasonable conditions through a permit-issuing system, and the State will remain free to do so when Appellant’s conviction is reversed.

Lacking any basis in law for their arguments, the Karuk Tribe and environmentalists advance a whole additional series of factual assertions not tied

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<sup>12</sup> The Forest Service has, in a Federal Register Notice amending the Part 228 rules, explained in detail that the Forest Service regulates suction dredge mining on federal land and that “State regulation of suction dredge mining operations . . . is pre-empted when it conflicts with Federal law . . .”. 70 Fed. Reg. 32,713, 32,722 (June 6, 2005).

to evidence of record, suggesting that many miners are engaging in a largely recreational activity, in that it is unlikely that miners will “strike it rich”. (Karuk Br. 21.) The Congressional design for developing mineral deposits on federal lands depends upon the freedom of the miners to explore and occupy those lands, developing the resources they find, large or small. Congress granted Appellant his mining claim to develop the valuable minerals thereon, and the State cannot lawfully require a permit, refuse to issue any permits, and then hold him a criminal for exercising his federal rights.

As for “motorized sluicing” and other methods which might be employed to *process* excavated material (Karuk Br. 22), the Karuk Tribe and environmentalists cannot and do not explain how the material might come to be excavated in the first place. The detailed facts *of record* confirm that the suction system is the only means to extract the underwater deposits.

Moreover, when a handful of miners attempted to separate the motorized extraction of the material from subsequent processing, the Department responded with an emergency regulation which it claimed clarified, in substance, that any and all motorized extraction of underwater deposits fell within the statutory definition of a suction dredge. 14 Cal. Code Regs. § 228(a) (striking, *inter alia*, the word “motorized” from the definition of suction dredging). The State of California is manifestly attempting to restrict mining on federal land to the extraction of materials which might be accomplished by hand work only. To argue that the purposes of Congress can be vindicated by such hand work is offensive to reason.

California might as well enact a statute that federal employees are no longer allowed to drive on its roads, because, after all, they can still walk.

The final theory of the Karuk Tribe and environmentalists is that this Court ought not to strike down § 5653.1 because “it would likely prove precedential”. (Karuk Br. 23.) The precedent striking down mining prohibitions is already on the books; Appellants see no expansion of the scope of federal preemption. Whether and to what extent the State may have overreached in other areas is not before this Court, and future challenges, if any, can be defended on their own merits.

### **Conclusion**

It is difficult to understate the degree to which the position of the Karuk Tribe and environmentalists is extreme and unreasonable. Suction dredge mining involves tiny, one- to two-person operations, all traces of which generally disappear in the winter river flows, other than the permanent benefit of removing toxic materials from California’s waterways. To characterize suction dredging as “inherently hazardous” (Karuk Br. 25) is to assert, in substance, that the State of California may prohibit any and all mining, without regard to federal mining law and policy. No reported case reaches this result; every reported case compels this Court to set aside Appellant’s conviction.

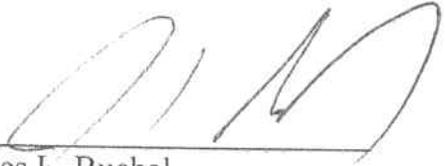
Dated: January 20, 2014.

  
James L. Buchal  
Counsel for Appellant

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) I hereby certify that this brief contains 5,551 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: January 20, 2014.



James L. Buchal  
Counsel for Appellant

**DECLARATION OF SERVICE**

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On January 20, 2014, I served APPELLANT'S REPLY TO AMICUS CURIAE KARUK TRIBE *ET AL.* BRIEF on the parties in said action as follows:

(X) (First Class US Mail) by placing a true copy thereof enclosed in a sealed envelope, addressed as shown below:

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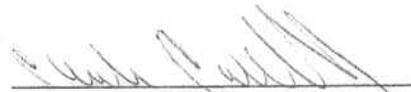
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