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MEMORANDUM

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

To: The New 49'ers Legal Fund

From: James L. Buchal

Date: November 6, 2015

Re: Eimer & Gilliland Cases

On November 5, 2015, the hearing was held at the Siskiyou County Courthouse on the motions to suppress and/or dismiss filed for Derek Eimer and Dyton Gilliland. Because the DA did not file any argument supporting the constitutionality of § 5653.1, and limited his reply to technical arguments, it would have been quite easy for a Superior Court Judge to simply grant the motions. In these criminal proceedings, the particular judge assigned to is "luck of the draw," and we drew Judge Dixon.

The hearing was well-attended, despite an hour-long delay in getting underway. Prior to the hearing, Judge Dixon called the attorneys (Glen Germany from the DA's office and Bradley Solomon from the Attorney General's office were there for the State) into her office to announce her tentative decision: she wanted to wait for the Supreme Court's decision in the *Rinehart* case. She evidenced a good deal of familiarity with the issues, and even offered some remarks indicating familiarity with the claims concerning environmental impacts of suction dredging. I could not tell whether or not she had an open mind on the issues, but, as you may recall, she had written a good opinion for the local farmers harassed by the Department of Fish and Wildlife, though she was apparently reversed on appeal.

Notwithstanding her remarks as to how she intended to rule, when the hearing commenced, I made every available argument, including the fact that the *Rinehart* decision wasn't even supposed to be cited to the Court, might well result in a remand, would take years to decide, and that defendants would lose their livelihood for years while we wait. I also pointed out that their equipment had been seized, which prevented them from making a living anywhere else. In addition, I cited a California Supreme Court case that I dug up after the audience in chambers which held that the Sixth Amendment right to a speedy trial applies here, and that Mr. Gilliland had already been waiting six months.

Judge Dixon nevertheless adhered to her initial determination. She reiterated her view that the Supreme Court wouldn't have granted review if it weren't going to resolve the issue outright, and that she didn't want a waste of resources from making a decision that would likely be appealed. As to the right to a speedy trial, she interpreted the Sixth Amendment to apply only to delays caused by the prosecution, and not to stays issued by a court. In short, we are told that the convenience of the system outweighs federal statutory rights to mine, the Fourth Amendment right to be free from unreasonable searches and seizures, and the Sixth Amendment right to a speedy trial.

The bottom line is that she issued a stay of proceedings in both cases. In response to my forcefully stressing the issue of prejudice, she indicated we might make a motion for a return of the equipment, and after some haggling with the DA, that motion may be decided on the basis of written declarations with a telephone hearing. I told Eimer and Gilliland I would try and get such a motion filed later this month.

Judge Dixon also accepted my suggestion that we not have to go through all these proceedings over and over in each future case. Future cases will be automatically stayed after arraignment. The DA's office will give us notice of any future cases which are charged, and if the Legal Fund is willing to do so, we can file waiver of appearance forms and take care of the paperwork so no further action is required until *Rinehart* is decided.

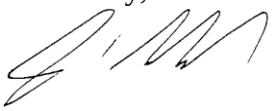
I would propose that we go ahead and make the motion to get Mr. Eimer and Mr. Gilliland's equipment back. The Fund could also recycle such a motion in other cases to attempt to secure the release of equipment in cases where the DA's one-year deadline has passed and no complaint is made.

If the motion is not successful, there will be an even better case for severe prejudice arising from the breach of Eimer and Gilliland's federal constitutional and statutory rights, and we may wish to consider taking a writ of review to the Court of Appeal. Such a writ, even if unsuccessful, will further build the case that California is, in substance, unwilling and unable to provide due process of law to miners, such that a federal court should step in.

While I was in Yreka, I had extensive discussions with Messrs. Krimm and Kleszyk concerning applications for state and federal water permits which we should discuss briefly when you get a chance. Mr. Kleszyk will investigate the costs of applying for individual § 404 certifications for individual miners. Years ago, when a Ranger in the Siskiyou National Forest in Oregon announced that a Plan of Operations would be required for disturbing so much as a tablespoon of dirt, the mining community organized to file hundreds if not thousands of proposed Plans of Operations, which caused the

Forest Service to back off. If the costs are not prohibitive, and California suction dredge miners can file hundreds of § 404 permits with the Corps of Engineers, it might lead to useful determinations or even a revival of the general permit.

Sincerely,



James L. Buchal