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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

Coordination Proceeding Special Title (Rule 1550(b)) **SUCTION DREDGE MINING CASES**	Judicial Council Proceeding No. JCPDS 4720 **MINERS' JOINT REPLY TO DEPARTMENT'S OPPOSITION TO MINERS' MOTION FOR INJUNCTION** Judge: Hon. Gilbert G. Ochoa Dept.: S36 Date: June 23, 2015 Time: 8:30 a.m.
Included Actions:	
Karuk Tribe of California, *et al.* v. California Department of Fish and Game	RG 05211597 – Alameda County
Hillman, *et al.* v. California Department of Fish and Game	RG 09434444 – Alameda County
Karuk Tribe of California, *et al.* v. California Department of Fish and Game	RG 12623796 – Alameda County
Kimble, *et al.* v. Harris *et al.*	CIVDS 1012922 – San Bernardino County

Public Lands for the People, Inc. *et al.* v. California Department of Fish and Game	CIVDS 1203849 – San Bernardino County
The New 49'ers *et al.* v. California Department of Fish and Game, *et al.*	SCCVCV 1200482 – Siskiyou County
Walker v. Harris, *et al.*	34-2013-80001439 – Sacramento County
Foley *et al.* v California Department of Fish and Game, *et al.*	SCCVCV-13-00804 – Siskiyou County

Summary of Argument

In general, the Department fails entirely to come to grips with the substantial body of law cited in our request for relief, which demonstrates that the ordinary rule when a legislative scheme is found unconstitutional is that *the administrative agency is enjoined from enforcing the scheme*. Nor does the Department respond at all to the notion that CEQA-style warnings of potential effects do not amount to proof militating against entry of an injunction. Instead, the Department offers four principal arguments against entry of the injunction, all of which lack merit.

First, the Department argues that it should be allowed to continue to act in a grossly unconstitutional manner, harassing and prosecuting miners because the miners might violate some other law by suction dredging. But the Department previously and successfully asked this Court to determine that issues pertaining to an asserted invocation of the federal Clean Water Act (CWA), should not be considered in these proceeding and are not properly considered part of these proceedings. (Order Denying Leave to Amend, Jan. 29, 2015.) Moreover, as set forth below, the Department is wrong, and suction dredge miners are not required to apply for a CWA permit.

Second, the Department says "the Court should wait," reiterating the notion that "status quo" unconstitutionally established in 2009 should be maintained. The Department offers no response whatsoever to the numerous cases cited in our opening memorandum, which demonstrate that the fundamental rights of the miners should not be held hostage to unconstitutional conduct by the Department and its officials—conduct which continues to escalate.

Third, the Department advances environmental harm as an objection, failing entirely to respond to the arguments in the opening memorandum. Instead, the Department repeats the same tired speculation about potential impacts advanced in the CEQA process, with the new speculation that a drought could exacerbate adverse effects. But there is still no proof that a single fish will die by reason of the injunction, and no authority to suggest that even a few fish deaths would outweigh the rights of the miners.

Fourth, the Department claims that the injuries to the miners are not irreparable. Again the Department ignores all the legal authority cited to the contrary, offers no authority of its own, and makes such remarkable arguments as that not enough people have been arrested to make the injury significant. The injuries to Jerry Hobbs and others who have died and will die awaiting justice are certainly irreparable.

The Department finally retreats to the notion that the injunction is too broad, this time ignoring all the cases suggesting that the ordinary course for judges in the position of this Court is simply to reinstate the prior regulations.

Argument

I. SUCTION DREDGING IS NOT ILLEGAL ACTIVITY.

The starting point for interpretation of the federal Clean Water Act, as for any statute, is reading its plain language. First, there is no "default prohibition on *any* discharges to water". (Dept. Opp. 3.) The statute forbids the "discharge of any pollutant" (33 U.S.C. § 1311(a)), carefully defined to mean "any *addition* of any pollutant to navigable waters from any point source" (*id.* § 1362(12)(A) (emphasis added)).

Suction dredging adds no pollutants to the water. The legislative history of the CWA confirms this commonsense understanding; Senator Ellender stated: "The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another." (Senate Debate on S. 2770, 92d Cong., reprinted in A Legislative History of the Clean Water Act of 1972, at 1386.) The Supreme Court has also recently confirmed this, holding that "'[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot'". *L.A. County Flood Control District v. NRDC, Inc.,* 133 S. St. 710, 713 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York,* 273 F.3d 481, 492 (2d Cir. 2001)).[1]

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[1] The Water Board recently ran afoul of this "addition" argument by offering testimony in federal criminal proceedings against a miner accused, among other things, of polluting a creek by the discharge of mining wastes from a sluice. *United States v. Godfrey*, No. 2:14-cr-00323, slip op. at 13 (N.D. Cal. June 4, 2015) (copy submitted herewith as Exhibit 2 to the Miners' Second Request for Judicial Notice). The Federal District Judge applied the "ladle of soup" analogy to find defendant not guilty on the pollution count: "Defendant's operation merely released

(continued...)

The contrary statement in *Rybachek v. EPA* (9th Cir. 1990) 904 F.2d 1276 is not controlling in light of these and other authorities, and is in any event *obiter dictum*; the *holding* of the case was that because "the material discharged is not coming from the streambed itself, but from outside it, this clearly constitutes an 'addition.'" *Id.* at 1285.

The *dictum* that "resuspension" may be interpreted as addition of a pollutant is also entirely inconsistent with the structure of the Act. Section 404 provides authority for the Secretary of the Army (acting through the U.S. Army Corps of Engineers) to issue permits "for the discharge of dredged or fill material". 33 U.S.C. § 1344(a). Section 402 provides authority for the Administrator of the United States Environmental Protection Agency (EPA) to issue permits "for the discharge of any pollutants". The U.S. Supreme Court has confirmed that these two permitting regimes were mutually exclusive, holding that § 402 "forbids the EPA from exercising permitting authority that is 'provided [to the Corps] in' § 404". *Coeur Alaska v. Southeast Alaska Conservation Council*, 557 U.S. 261, 273 (2009).

It has at all relevant times been obvious that discharges from suction dredges involve the "discharge of dredged material," and if they are to be regulated in accordance with law at all, they would be regulated under § 404, not § 402. *See also* 33 C.F.R. § 323.2(d)(1)(ii) (definition of dredged material). In short, the Department's (Water Board's) position that dredging constitutes an "addition" sufficient to invoke § 402 is contrary to *two* U.S. Supreme Court cases: *L.A. County* and *Coeur Alaska.*

The Department makes no showing that the Corps of Engineers believes miners must apply for a § 404 permit. They are already covered in most cases under Nationwide Permits which generally authorize "[d]redging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States" and mining discharges of dredged material involving "no more than 300 linear feet of stream bed" and covering no more than ½ acre—amounts far larger than suction dredging operations. (Miners' Second Joint RJN ("MRJN2"), Exhibit 2.) And they may be regarded as so

(...continued)
sediment that was already part of the creek-bed back into the creek." *Id.* at 17.

small as to be exempt from § 404 regulation entirely as *de minimis* discharges. *Cf., e.g., National Ass'n of Homebuilders v. Corps of Engineers*, 37 ELR 20028, No. 01-0274 (D.D.C. Jan. 30, 2007) (noting no regulation of "incidental fallback" involving "redeposit of small volumes of dredged material that is incidental to excavation activity [and] falls back to substantially the same place").

In short, there is in substance no chance that the responsible agency, the Corps of Engineers, will regard an injunction by this Court as fostering "illegal" activity. It is precisely because this is the case that our opponents, including the Water Board, are pressing to illegally assert jurisdiction under § 402 to attack the miners. That other states have gone down this unfortunate path does not make it lawful.

When and if the Water Board wishes to put to the test its untenable theory that suction dredge miners must be regulated as industrial facilities under the National Pollution Discharge Elimination System ("NPDES") set forth in § 402 of the Federal Water Pollution Control Act, it may do so, but this Court has already determined that such questions are to be left for future proceedings, and this Court should adhere to that position.

II. THERE IS NO PROCEDURAL REASON TO WAIT TO ISSUE AN INJUNCTION.

The Miners do believe that this Court's rulings striking down § 5653.1 and the 2012 regulations necessarily mooted all further claims in the case, other than the takings claim of The New 49'ers plaintiffs. Since the Department must develop new regulations, under a new statutory standard, it will necessarily have to develop further CEQA analysis to support those regulations. An advisory opinion on the issues arising in the present CEQA analysis, while potentially useful, is still an advisory opinion. We stipulated to a briefing schedule because this Court directed such action, not because we "abandoned" our position. (*Cf.* Dep't Opp. at 5.) This Court can and should enter final judgment with respect to the *Kimble* and *PLP* plaintiffs.

Even assuming there are remaining causes of action to be adjudicated, the Department ignores the fact that "[a] permanent injunction is a determination on the merits that a plaintiff has prevailed *on a cause of action* for tort or other wrongful act against a defendant and that equitable relief is appropriate." *Art Movers, Inc. v. Ni W., Inc.* (1992) 3 Cal. App. 4th 640, 646. The

Department's citation of treatises referring to granting permanent injunctions with final judgment simply do not address the context here, where summary adjudication has been granted on a cause of action giving rise to equitable relief. In fact, permanent injunctions are commonly granted on an interlocutory basis. *See, e.g., Guntert v. City of Stockton* (1974) 43 Cal.App.3d 303 (granting permanent injunction before trial for damages); *Engle v. City of Oroville* (1965) 238 Cal.App.2d 266 (same).

There is simply no cause for drawing any distinction between summary adjudication of a claim requiring equitable relief and a judgment requiring equitable relief: a permanent injunction may be granted in either case. And there is no dispute that the Department's willful disregard of the Court's January ruling is "tending to render [the Court's summary adjudication] ineffectual" within the meaning of § 526(a)(3) of the Code of Civil Procedure—alone grounds for an injunction.

III. NO ENVIRONMENTAL HARMS MILITATE AGAINST ENTRY OF AN INJUNCTION.

The Department continues its studied refusal to provide any quantitative evidence of harm whatsoever, instead putting forth the same tired array of theoretical, possible effects. In a context where federal law requires mineral development on federal land notwithstanding some reasonable level of environmental impacts (already controlled through federal regulation), the possibility of adverse effects cannot be invoked to deny the injunction. Such a balance would itself frustrate federal policy.

A. The Department Fails to Prove Any Mercury-Related Harm Will Arise from the Injunction.

The Department makes little or no effort to respond to the evidence concerning the mercury issue other than to claim, falsely, that the Miners' witnesses are "speaking outside of any area of expertise they have".[2] Handwaving suggestions that the Department's analysis is

[2] What is especially ironic about this claim is that the Department cites peer reviewers with degrees in "Conservation Biology," "Ecology," "Oceanography," and "Geography and Environmental Engineering". (Qualifications posted on webpage cited at Dep't Opp. 4 n.3.)

"scientifically sound" does not begin to respond to specific argumentation. Nor does the Department respond to charges of selective misuse of data and improper Water Board pressure on the researcher—facts peer reviewers were either unaware of, or did not address. Vague generalities about harm may well be enough "substantial evidence" to conclude that CEQA analysis of a project is required (*cf.* Dep't Opp. at 4 n.4), but they are plainly not sufficient to deny entry of an injunction.

The Department next argues that, notwithstanding the 1994 and 2012 CEQA findings of no harm to fish, drought conditions could make harm worse. There is no dispute that suction dredging does not remove water from the rivers. "Drought" is yet another unquantified term, and the actual flows of the Klamath River show no precipitous drop. As set forth in the accompanying Reply Declaration of Joseph Greene, the Department's witness has no basis for asserting appreciably increased risk from dredging at all, and the net effect is probably *positive*, especially in drought conditions. (Green Reply Decl. ¶¶ 17-21.) The Department's own field biologist has confirmed Mr. Greene's testimony that suction dredge holes may form the only available habitat for fish in hot, dry conditions. (*See id.* ¶ 18 & Ex. 1.)

B. Prior Proceedings Do Not Show Harm.

The Department also argues that an injunction would somehow "overrule[] the Order and Consent Judgment agreed to by all parties and ordered by the Alameda County Superior Court". (Dep't Opp. at 8.) The Order, by its terms, did not require any changes whatsoever to the 1994 regulations. (Dep't RJN Ex. H, at 3 ("implement, *if necessary*, via rulemaking, mitigation measures;" emphasis added). The notion that "deleterious effects to fish [under the 1994 regulations] necessitated the Order and Consent Judgment" (Dep't Opp. at 7) is also fiction. The Order merely found that "new information provides evidence . . . that the pattern and practice of issuing suction dredge mining permits under the current regulations could result in environmental effects different or more severe than the environmental impact considered in the 1994 EIR". (Dep't RJN Ex. J, at 2.) Information sufficient to trigger a duty to investigate under CEQA is far different from evidence of harm relevant to evaluating a request for injunctive relief.

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IV. PLAINTIFFS ARE PLAINLY SUFFERING IRREPARABLE HARM.

The Department does not and cannot dispute that the threat of arrests are irreparable injury. Since this motion was filed, the Department has even escalated its unlawful campaign against the suction dredgers to traumatic home visits to seize dredging equipment. (*See* Declaration of David Guidero.) The Department blithely asserts that "it would be reasonable for the District Attorneys to agree to put these cases on hold" (Dep't Opp. at 9), while it continues its unlawful campaigns of harassment and abuse. But the Department provides no evidence that this has happened; plaintiffs show that at least one suction dredger has already spent time in jail. (Declaration of Dyton Gilland.)

To suggest that law enforcement officials should enforce prohibitions presently and undisputedly unconstitutional because someday a court might provide further relief is odd indeed. It speaks volumes that among the "public interests" relevant to entry of an injunction, the Department would give the public interest in lawful conduct by its officials no weight whatsoever.

The Department also complains that the plaintiffs have thus far identified only "seven misdemeanor actions," most of whom are "connected with these cases". (Dep't Opp. at 9.) The Department cites no case, and we are aware of none, in which the harm of enforcing an unconstitutional regulatory regime is not deemed irreparable because not enough people have been arrested.

As to economic harm, the Department claims that there is no specific proof of loss of the opportunity to recover gold. That fact was necessarily established in determining that the refusal to issue permits frustrated federal mineral development policy.[3] There is no dispute that the plaintiffs own mining claims and want to dredge them. The Department ignores all the cases permitting injunctions where property rights are merely threatened by unconstitutional conduct. The Department's speculation that "gold will remain where it is" (Dep't Opp. at 8) does no good when the only feasible means of extracting it remains prohibited. Nor does payment for the value

[3] The Miners presented detailed evidence on this point. *See* MRJN2¶ 5.

1 of the mining claim in a takings case compensate plaintiffs for gold they would have recovered in
2 the meantime, a quantity obviously "extremely difficult to ascertain" within the meaning of
3 § 526(a)(5) of the Code of Civil Procedure.

4 **V. THE SCOPE OF INJUNCTIVE RELIEF IS REASONABLE.**

5 The Department does not and cannot dispute that suction dredging continued under the
6 1994 regulations until 2009 without the loss of a single fish or fish egg, or any real harm of any
7 kind sufficient to deny the requested injunction. Nonetheless, the Department disparages relief
8 permitting operations under these regulations as "too broad in scope" (Dep't Opp. at 10), even as
9 it authorizes the Karuk Tribe and others to kill massive and often unregulated quantities of fish.

10 The Department violates CRC Rule 8.1115 by claiming that this Court adopted a
11 "*Rinehart* standard" when in fact this Court properly rejected that opinion's individualized, claim-
12 by-claim approach to federal preemption, and recognized that the prohibitory nature of § 5653.1
13 and the 2012 regulations as a matter of law. This Court struck down the statute and rules on their
14 face, paying no heed to the claim that gold panning by hand might remain "commercially
15 practicable".

16 No claim-specific proceedings are required to determine if any particular plaintiff or
17 others have lost a protected right, and there is no basis for limiting the injunction to consider
18 whether in "particular circumstances the application of the permit ban deprived the individual to
19 whom it was applied of a protected right". *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069,
20 1084. The *Tobe* case *upheld* an anti-camping ordinance against a facial challenge, as contrasted
21 to this Court's ruling generally declaring that requiring permits and refusing to issue them was a
22 regulatory choice categorically preempted by federal law. The quoted portion of the *Tobe* case
23 refers to a rule applied in certain criminal cases, rather than a general rule for injunctions
24 concerning unconstitutional cases.

25 Whether or not a permit requirement in § 5653 "standing alone" does not violate federal
26 law (Dep't Opp. at 11), this Court is not faced with a permit requirement "standing alone". As
27 the *Tobe* case explains, where "a plaintiff seeks to enjoin future, allegedly impermissible, types of
28 applications of a facially valid statute or ordinances, the plaintiff must demonstrate that such

application is occurring or has occurred in the past. *Tobe*, 9 Cal.4th at 1084. It is undisputed that the Department continues to cite and arrest suction dredge miners, and it is undisputed that the Department continues to refuse to issue permits. This is an unconstitutional application of § 5653 to suction dredge miners in California.

The Department next retreats to the notion that relief against this conduct should be limited to the plaintiffs in the case,[4] but does not and cannot distinguish the many cases we cited in our opening memorandum in which the offending governmental agencies were simply enjoined from enforcement.

The Department also does not dispute that the ordinary course in litigation such as this, based on the several cases we cited, is that when one set of regulations is struck down, the prior ones return in effect. Instead, the Department seeks *sub rosa* reconsideration of this Court's ruling striking down the 2012 regulations, speculating that notwithstanding the order granting the motions for summary adjudication, the Court was really "focused on the moratorium". (Dep't Opp. at 11.) This Court properly recognized that the 2012 regulations were themselves a prohibition, and they operate as a prohibition for these plaintiffs. (*E.g.,* Cutler Decl. ¶ 3; Stanford Decl. ¶ 3; Muller Decl. ¶ 2; Derrick Decl. ¶ 3; Kleszyk Decl. ¶ 5; Sonnenburg Decl. ¶ 2 (mining claims closed under the 2012 regulations).[5]) An injunction allowing the Department to enforce the voided 2012 regulations would simply maintain an unconstitutional prohibition for these and many other plaintiffs and suction dredgers.

The Department acknowledges that, before its response was due, the Department had clarification that under plaintiffs' proposed injunction, it would retain its authority to regulate conduct in violation of the 1994 regulations *other than the requirement of having a permit.* (Dep't Opp. at 11; *see also* Exhibit J to Department's RJN (copy of 1994 regulations).) For clarity, the Miners are filing a revised Proposed Order herewith with this clarification. Yet the

[4] Even under the extraordinarily-limited approach of limited relief to parties, at a minimum, relief would extend to all members of The New 49'ers and PLP, not just the individual parties.

[5] The Department's complaint that The New 49'er plaintiffs did not challenge all of the 2012 regulations has no weight insofar as they successfully challenged the very regulatory provisions that closed their claims to dredging.

Department asks this Court to include a requirement that the miners obtain a permit (Dep't Opp. at 11), and asks for sixty days' further delay to develop a permitting process (Dep't Opp. at 12 n.9). This is yet another instance of the Department's ongoing strategy of justice delayed is justice denied.

It would not merely destroy yet another mining season. There is no reason to believe that the Department would actually get a permit program in operation within sixty days; to list all the Department's past broken promises on timing in suction dredge cases would cause us to exceed the page limitations for this memorandum. And even if this Court entered an injunction requiring permit issuance by a date certain, the Department would simply appeal it, leaving it stayed and the miners still locked off their claims. Only an injunction restraining enforcement gives any relief to the miners.

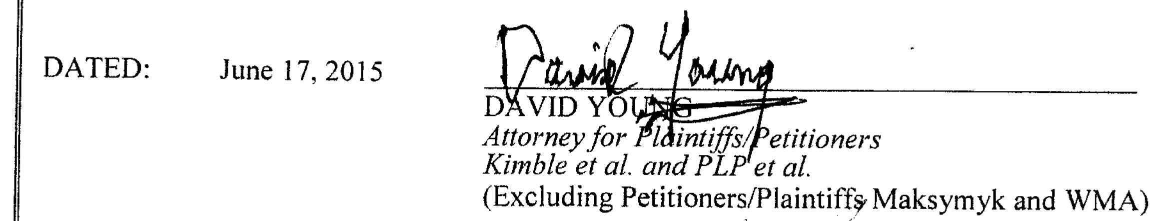
The Department offers no practical reason why a permit should be required when the Department would retain full authority under the injunction to enforce all other provisions of the 1994 regulations. Requiring the Department to develop a permit program is more intrusive relief than simply limiting enforcement efforts.

Conclusion

For the foregoing reasons, and the reasons stated in our opening memorandum, this Court should grant the Miners' requested injunction.

Respectfully submitted,

DATED: June 17, 2015



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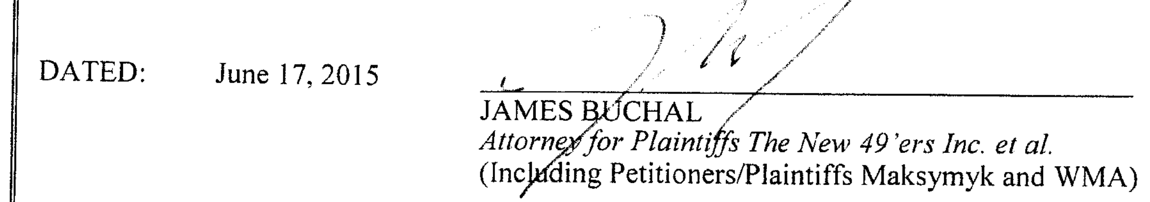
DATED: June 17, 2015



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PROOF 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 June 17, 2015, I caused the following document to be served:

MINERS' JOINT REPLY TO DEPARTMENT'S OPPOSITION TO MINERS' MOTION FOR INJUNCTION

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