IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

E064087
IN RE SUCTION DREDGE MINING CASES

THE NEW 49'ERS, INC., *et al.*; BEN KIMBLE, *et al.*; and
PUBLIC LANDS FOR THE PEOPLE, INC. *et al.*

Plaintiffs and Appellants,

v.

CALIFORNIA DEPARTMENT OF FISH & WILDLIFE, *et al.*

Defendants and Respondents.

Appeal from the Superior Court of San Bernardino County
Hon. Gilbert Ochoa, Department R-9
Coordinated Proceeding JCPDS4720
SCCVCV1200482 (Siskiyou County); CIVDS1012922 (San Bernardino County);
CIVDS1203849 (San Bernardino County)

MOTION FOR SUMMARY REVERSAL, OR, IN THE ALTERNATIVE, CALENDAR PREFERENCE, WITH SUPPORTING MEMORANDUM

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I. INTRODUCTION

Since 2009, miners holding Federal mining claims on Federal land have been prohibited by the State of California from engaging in suction dredge mining. Fish and Game Code § 5653.1. The miners immediately commenced litigation to challenge this ban, and after years of litigation, the Superior Court of California, the Honorable Gilbert G. Ochoa, followed every other reported case and ruled in January that both the State ban, and certain 2012 regulations limiting suction dredging, are preempted by the Supremacy Clause of the United States Constitution. Specifically, on cross-motions for summary adjudication, the Superior Court held:

> ". . . the State's extraordinary scheme of requiring permits and then pursuant to Fish and Game Code section 5653.1 refusing and/or being unable to issue permits for years stands "as an obstacle to the accomplishment of the full purposes and objectives of Congress" under *California Coastal Commission v. Granite Rock Co.* (1987) 480 U.S. 572 and a *de facto* ban created by Fish and Game Code section 5653.1 on suction dredge mining permits has rendered commercially impracticable the exercise of plaintiffs'/petitioners' mining rights as granted by the federal government."

(*See* Exhibit 1 to the Declaration of James L. Buchal filed herewith: Summary Adjudication Ruling at 19, 21.)

This appeal and motion arise because when presented with a motion to *enforce* this ruling, by halting respondents from their continued arrests and harassment of miners operating without the permits the State refuses to issue, the Superior Court refused any relief. Specifically, the Superior Court found, contrary to all available authority, that miners subjected to criminal prosecution for allegedly violating unconstitutional statutes and regulations did not suffer irreparable injury, an essential element of any request for

injunctive relief. Thus the State is permitted to enforce an unconstitutional statute and regulatory scheme, while the miners who resist such illegal enforcement are prosecuted criminally as violators of those very same unconstitutional statutes and regulations.

In the order denying relief (Buchal Decl. Ex. 4), the Superior Court also referred to—and may have been motivated by—the fact that the Supreme Court recently granted review of the Third Appellate District's decision in *People v. Rinehart* (2014) 230 Cal.App.4th 419. In that case, the Third District unanimously concluded that Rinehart had a potential defense to criminal charges for dredging without a permit on the ground that the statutory prohibition on suction dredge mining without a permit was unconstitutional, and remanded for trial. The Supreme Court's grant of review then depublished the case. We expect the Supreme Court may well revise the Third District's decision by directing the Superior Court to acquit Rinehart outright. Regardless of how the Supreme Court may rule, it was summarily reversible error for the Superior Court to decline to exercise equitable discretion on the ground that the opinion was depublished.

In short, this is clear case for summary reversal, and the case should be remanded forthwith with instructions for the Superior Court to find irreparable injury as a matter of law and exercise its equitable discretion concerning the miners' request for relief.

II. STATEMENT OF THE CASE

Suction dredge mining is a technique used in gold-bearing rivers and waterways. The miner uses a suction hose to vacuum water and gravel from the bottom of a stream. *See also People v. Osborn* (2004) 116 Cal.App.4th 764, 768 (describing activity in detail). California riverbeds are often made up of alluvial gravel, containing gold and

other heavy minerals washed out of the mountains. Miners and prospectors pursue suction dredge mining because it is the only practical, economical, and environmentally sound method for extracting precious metals in commercially significant amounts from the rivers, streams, lakes, and waterways in California.

The California Department of Fish & Wildlife ("Department") has regulated suction dredge mining pursuant to California Fish & Game Code ("CF&GC") § 5653, *et seq.* since 1961, and until 2009 issued permits for suction dredge mining in the rivers, streams and waterways of California. The Department asserts jurisdiction to issue permits even when such mining occurs on Federal lands, on Federal mining claims and pursuant to Federal mining laws. There is no dispute that the mining at issue here occurs within National Forest lands and lands administered by the United States Bureau of Land Management, on Federally-issued mining claims.

Until the 2009 ban, miners and prospectors previously applied, paid for, and received a permit from the Department. *See* Fish and Game Code § 5653. The suction dredge mining program in California was subjected to a California Environmental Quality Act ("CEQA") review, Public Resources Code § 21000 *et seq.*, conducted in 1994, and the 1994 Regulations for suction dredge mining were issued pursuant to that review. Before the Superior Court, appellants sought to reinstate those 1994 regulations given the Superior Court's striking down of the more restrictive 2012 regulations.[1]

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[1] Such a result is standard where, as here, a court strikes down a new set of regulations. *Lockyer v. U.S. Department of Agriculture* (2009 9th Cir.) 575 F.3d 999, 1020; *Paulsen v. Daniels* (2005 9th Cir.) 413 F.3d 999, 1008; *Klamath Siskiyou Wildlands Ctr. v. Boody* (2006 9th Cir.) 468 F.3d 549, 562.

There is no record of any suction dredger ever killing so much as a single fish under either set of regulations, which limit operations when fish eggs are present in the alluvial gravels the miners process. As demonstrated in the record before the Superior Court, the tiny scale of suction dredge mining does not result in any appreciable harm to the environment.[2]

III. STATEMENT OF RELIEF SOUGHT IN TRIAL COURT

After the Court granted the appellants' Motions for Summary Adjudication regarding preemption, holding unconstitutional the State's statutes and regulations prohibiting suction dredge mining on Federal lands, the appellants moved the Court for an order restraining and enjoining the State from (1) enforcing the provisions of the Fish & Game Code prohibiting suction dredge mining in the rivers, streams and water ways of California without a permit so long as miners operated in compliance with the 1994 regulations; (2) enjoining the enforcement of the unconstitutional 2012 Suction Dredge Mining Regulations promulgated pursuant to § 5653.1 of the Fish & Game code; and (3) mandating the development of a permit program and regulations that do not stand as an obstacle to the full purposes and objectives of Federal mining law. (*See* Buchal Decl. Ex. 2 (joint motion for an injunction).)

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[2] The Surface Mining & Reclamation Act, Pub. Res. Code § 2710 et seq., which is the California standard for significant environmental disturbance, specifically exempts from its provisions: "Prospecting for, or the extraction of, minerals for commercial purposes where the removal of overburden or mineral product in less than 1,000 cubic yards in any one location, and the total surface area disturbed is less than one acre." Public Resources Code § 2714(d). Vacuum and suction dredge mining does not come close to removing 1,000 cubic yards in any one location or impacting a surface area anywhere near one acre.

A hearing was held on the miner's motion for an injunction before Judge Ochoa on June 23, 2015. At the conclusion of the hearing, the Court denied the miner's motion for an injunction. This appeal followed on July 9, 2015.[3]

The Court squarely held that the miners would not suffer irreparable injury from continued enforcement of the State's illegal scheme. (*See* Buchal Declaration Ex. 4, at 2 (order following hearing).) The Court noted that the issue of federal preemption upon which the Court ruled was currently before the California Supreme Court in *People v. Rinehart,* Case No. S222620. (*Id.*)

Thus, even though the Court had found that enforcing the permit requirements in Fish & Game Code §§ 5653 & 5653.1, and the 2012 Suction Dredge Mining Regulations, was unconstitutional, and preempted by the Supremacy Clause of the United States Constitution, the Court determined to await further developments, whenever those might occur. Miners have already died awaiting resolution of these issues since 2009, and as set forth below, many are likely to die, or become unable to mine, if this appeal is considered in the ordinary course. Accordingly, appellants present this motion for summary reversal, or, in the alternative, for calendar preference.

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[3] Although the Notice of Appeal was delivered July 9th, it was not until July 29th that the case reached this Court, hence the timing of this motion.

IV. STATEMENT OF APPEALABILITY

The June 23, 2015 order denying appellants' motion for an injunction is an appealable order. *See* Code of Civil Procedure § 904.1(a)(6). The appeal was timely filed July 9, 2015.

V. APPELLANTS' MOTION FOR SUMMARY REVERSAL, OR IN THE ALTERNATIVE FOR CALENDAR PREFERENCE

Appellants move this Court for summary reversal of the trial court's June 23, 2015 order denying an injunction against enforcement by respondents of a statutory scheme the trial court had found unconstitutional in a ruling on Motions for Summary Adjudication. They move in the alternative for calendar preference. These motions are supported by the accompanying Declarations of William Christensen, Ray Derrick, Myrna Karns, George Kendall, Charles Montgomery, Rip Ripple, and Judy Shirey as well as the Buchal Declaration presenting materials from the record pursuant to Rule 8.57(b).

As noted above, the Superior Court previously held, on cross-motions for summary adjudication, that "the State's extraordinary scheme of requiring permits [for suction dredge mining on federal lands] and then refusing to issue them" was unconstitutional because it was preempted by federal mining law and policy.[4] The Superior Court's ruling was consistent with the result reached in *every other reported case* to consider the issue of state-law prohibitions on Federal mining claims. *South Dakota Mining Ass'n v. Lawrence County* (8th Cir. 1998) 155 F.3d 1005; *Brubaker v. Board of County Commissioners* (Colo. 1982) 652 F.2d 1050; *Elliott v. Oregon Int'l*

[4]Buchal Decl. Ex. 1: Summary Adjudication Ruling at 19, 21.

Mining Co. (Or. Ct. App. 1982) 654 P.2d 663; *see also Ventura County v. Gulf Oil Corp.* (9th Cir. 1979) 601 F.2d 1080, *aff'd mem.,* (1980) 445 U.S. 947; *Skaw v. United States* (Fed. Cir. 1984) 740 F.2d 932. It was also consistent with the Third District's decision in *People v. Rinehart* (2014) 230 Cal.App.4th 419, depublished when the California Supreme Court granted review. As set forth below, to the extent the Superior Court's refusal to exercise its equitable discretion was on account of *Rinehart*, the Superior Court plainly erred, for the Superior Court was forbidden by Rule 8.1125 from relying on such depublication.

The fundamental error demanding summary reversal was the Superior Court's ruling—where there was and is no dispute that respondents are citing, arresting, and seizing the property of, and even jailing, suction dredge miners—that no irreparable harm was present in the case. While "not disputing that harm is occurring to your clients," (Buchal Decl. Ex. 3: Hearing Transcript at 13), the trial court held such harm, and the loss of the opportunity to mine, not irreparable, and compensable by money damages.

In substance, the Superior Court has refused to exercise its equitable discretion premised on two gross errors of law, errors that are properly subject to summary reversal.

A. The Superior Court's Finding of No Irreparable Injury Was So Grossly Erroneous as to Merit Summary Reversal.

The Superior Court's Minute Order denying the injunction begins by declaring: "This Court has already ruled, in denying the earlier motion for preliminary injunction brought by the *Kimble* plaintiffs, that the plaintiffs/petitioners will not suffer irreparable injury from the continued status quo—a ruling which the *Kimble* plaintiffs appealed but

then voluntarily dismissed." However, no such motion was brought by the other appellants (*see* Attachment to Notice of Appeal, identifying Kimble and other parties), and the Superior Court agreed with these appellants that the prior ruling was not binding on these appellants. (Buchal Decl. Ex. 3: Hearing Tr. at 9 ("I agree with you there, Mr. Buchal").)

Moreover, a different record was presented at the time the *Kimble* plaintiffs brought their motion for a preliminary injunction, and when denied, filed an appeal. At that time, no California court had ruled that the prohibition on suction dredge mining, set forth in CF&GC § 5653.1, was unconstitutional, and preempted by the Supremacy Clause of the United States Constitution. Since that time, two California courts have so ruled, and the matter is pending before the Supreme Court.

In any event, the Court grounded its ruling on the asserted absence of irreparable injury, stating at the hearing:

> "Maybe you can explain to the Court what the irreparable injury to your clients. I know they have harm, and I know that they have injuries. But for the issuance of the preliminary injunction, there needs to be irreparable injury. That injury is something other than that can be dealt with through damages as in, I'm losing my house today. I don't want to be kicked out of my house. That's an irreparable injury. You need a preliminary injunction so the bank doesn't sell it." (Buchal Decl. Ex. 3: Hearing Tr. at 9-10.)

Though counsel pointed out arrests, seizures and incarceration as irreparable injury (*see* Hearing Tr. at 15[5]), the trial court offered no explanation of its ruling, contrary to all

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[5] The trial court had before it extensive testimony from miners who had been threatened with arrest, arrested, incarcerated, and had equipment seized for want of the permit the State refused to issue, or violation of the regulations the trial court struck down. (*E.g.*, Buchal Decl. Exs. 5-7, 11 & 12.)

available law, that such arrests, seizures and incarceration were not irreparable injury.

Moreover, mining claims are also real property "in the fullest sense of the word". *Bradford v. Morrison* (1909) 212 U.S. 389, 395 (quoting *Forbes v. Gracey*, 94 U.S. 762, 767); *see also United States v. Shumway* (9th Cir. 1999) 199 F.3d 1093, 1103 ("the owner of a mining claim owns property, and is not a mere social guest of the Department of Interior to be shooed out the door when the Department chooses"). The miners have been "kicked out of their houses" since 2009.

The Superior Court also disparaged the interests of the miners, asking: "Do most miners make money, or do they lose money?" (Buchal Decl. Ex. 3: Hearing Tr. at 12.) Speculating without evidence, the trial court opined that "most of them lose money" and "[i]t's a form of recreation". (*Id.*) Although miners engage in suction dredging mining to find gold and make money, the deprivation of recreational opportunities *is* irreparable injury.[6]

The record before the Court showed numerous professional miners involved. (*See, e.g.,* Buchal Decl. Exs. 5-7, 11.) Many other miners supplemented their income, often modest pensions, by suction dredge mining. The record also showed suction dredge mining equipment manufacturers and suppliers who no longer have a California market for their goods, placing their whole business at risk. (*Id.* Ex. 10.) The record shows that for many miners, the loss of the ability to engage in suction dredge mining in

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[6] *E.g., Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach*, 846 F. Supp. 986, 992 (S.D. Fla. 1994) ("The elimination of the Dreher Park Center programs creates irreparable harm because these social, athletic, and other leisure programs present opportunities for recreation that are not being otherwise offered.")

California constitutes severe economic harm, and a marked decrease in their already modest standard of living. (*Id.* Ex. 9.)

The trial court's question assumed the very irreparability required under §§ 526(a)(5), allowing relief "[w]here it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief". Gold is where you find it. Until excavation occurs, the miners cannot have any real measure of what they might recover. The courts of California are obviously not going to award damages to miners testifying about the strikes they might have made.

The Superior Court nonetheless held that "[t]here's not something inherently special about gold mining like you might have an inherently special feeling about your home", and that appellants had merely presented "a money-damage issue." (Hearing Tr. at 13.) The Superior Court's error was sufficiently egregious that summary reversal is appropriate. The miners present something far more fundamental than "a money-damage issue." They present the fundamental issue as to whether the enforcement of a legislative scheme *already held unconstitutional*, causing undisputed harm and damage, in and of itself, constitutes irreparable harm.

Every reported case finds irreparable harm in such circumstances. *In Hillman v. Britton* (1980) 111 Cal.App.3d 810, members of a church who were threatened with prosecution or arrest if they engaged in charitable solicitation without obtaining a permit from the City of Fresno, suffered irreparable injury, and were entitled to an injunction, when the standards for obtaining the permit were unconstitutional, even though they had never applied for a permit and had never been arrested. Other cases confirming that

businesses may seek injunctions against the enforcement of unconstitutional conduct—all involving threatened loss of income—include *McKay Jewelers, Inc. v. Bowron*, 19 Cal.3d 595, 598 (1942); *Ebel v. City of Garden Grove*, 120 Cal.App.3d 399, 410 (1981) ("threatened arrest by the authorities or discontinuance of the method of conducting a business because of fear of arrest and prosecution is sufficient to show 'irreparable injury'"); *Novar Corp. v. Bureau of Collection & Investigative Services,* 160 Cal. App. 3d 1 (1984); *Barajas v. Anaheim,* 15 Cal.App.4th 1808, 1813 (1993) (reversing superior court denial of injunction based on supremacy issue); and *Hillman v. Britton*, 111 Cal.App.3d 810 (1980).

B. Any Refusal by the Superior Court to Exercise Equitable Discretion by Reason of Depublication of a Case Raising a Similar Issue Was Summarily Reversible.

Former Associate Justice Joseph R. Grodin of the California Supreme Court has explained: "[the] only consequence of a depublication order is that the opinion is not published in the Official Reports, and is therefore not citable as precedent." (Grodin, *The Depublication Practice in the California Supreme Court* (1984) 72 Cal.L.Rev. 514, 522-523.) California Rules of Court, Rule 8.1125(d), establishes that such an order is not an expression of the court's opinion of the correctness of any law stated in the depublished opinion. As the Court of Appeals noted in *Mangini v. J.G. Durand International* (1994) 31 Cal. App. 4th 214, 219 provides: "Recent Supreme Court cases suggest that [the rule] means just what it says. (*See Cynthia D. v. Superior Court* (1993) 5 Cal. 4th 242, 254, fn. 9; *see also People v. Saunders* (1993) 5 Cal. 4th 580, 607-608 (dissenting opinion of Kennard, J.)

Consistent therewith, Cal Rules of Court, Rule 8.1115, Citation of Opinions, provides: "An opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." Ultimately, the Supreme Court's decision to depublish gives absolutely no meaning to the points raised in requests to depublish. As emphasized by the various courts that have discussed the issue, and Rule 8.1125 (d) itself, the act of depublishing means only that the case was depublished, nothing more and nothing less. To the extent the Superior Court relied upon depublication to deny the injunction, the Superior Court's error should be summarily reversed as a violation of Rule 8.1125 and otherwise.

VI. IN THE ALTERNATIVE, THIS COURT SHOULD EXPEDITE THE APPEAL.

Pursuant to § 36 of the Code of Civil Procedure,

> "(a) A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings:
>
> (1) The party has a substantial interest in the action as a whole.
>
> (2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation."

Thousands of miners throughout California have been unconstitutionally locked off their mining claims for years—not just appellants but members of the various organizations who are appellants—and many within this class meet the requirements of § 36.

We are filing herewith several declarations from such miners. For example, appellant Ray Derrick purchased his mining claim two weeks before the 2009

moratorium, and has been waiting ever since to suction dredge it. (Derrick Decl. ¶ 3.) He and his wife, with failing health, point out that "a major portion of our retirement dreams have been unlawfully taken from us". (*Id.* ¶ 6.) Unless calendar preference is granted, he will never be able to enjoy suction dredging their claim. (*Id.*) Many other miners have a substantial interest in the outcome of this appeal because they hold licenses to mine federal mining claims, and they too have waited since 2009 and are losing the ability to engage in this strenuous activity. (*E.g.*, Declarations of Myra Karns (age 77) Rip Ripple (74); William P. Christensen (72); Judy Shirey (72); George Kendall (71); Charles Montgomery (75); and Ray Derrick (72)).

The same set of attorneys representing appellants and respondents have briefed these issues *ad nauseum*, in multiple actions in the Superior Courts, as well as the Court of Appeals, and now the Supreme Court. There is no reason that the briefing cannot be completed forthwith.

Appellants also note that this is a case in the nature of an action to recover possession of real property, for which "all courts" shall give "precedence over all other civil actions therein, except actions to which special precedence is given by law. Code of Civil Procedure § 1179a. The valuable minerals in these claims are generally underwater, and banning the operation of suction dredges is for all practical purposes a dispossession of real property. In substance, the State has seized appellants' property and converted it to fish and wildlife preserves ever since 2009.

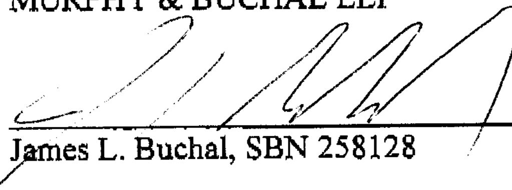
Conclusion

The undersigned attorneys have never before seen a case in which the State's conduct criminally prosecuting its citizens is adjudicated unconstitutional, but no relief is granted against such conduct. If the State may violate the Constitution at will without relief limiting such conduct, the law becomes, in Macbeth's words: ". . . a tale told by an idiot, full of sound and fury, signifying nothing." (W. Shakespeare, *Macbeth*, Act 5, scene 5, lines 19-28.)

Dated: August 5, 2015.

Respectfully submitted,

MURPHY & BUCHAL LLP



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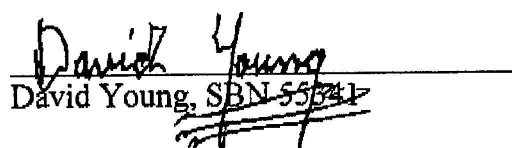

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