

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

**In Re: Suction Dredge Mining Cases**

Case No. E064087

San Bernardino County Superior Court, Coord. Case No. JCPDS4720  
The Honorable Gilbert G. Ochoa, Judge

**RESPONDENTS' COUNTER MOTION FOR  
DISMISSAL**

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## INTRODUCTION

Pursuant to California Rules of Court, rules 8.54 and 8.57, Respondents California Department of Fish and Wildlife, Charlton H. Bonham, and Kamala D. Harris hereby move the Court for dismissal of this appeal. The grounds for this motion is that this appeal is from an order denying a motion for a permanent injunction. As such, it is not appealable, and should be dismissed. This motion is based on the declaration of counsel and accompanying exhibits filed concurrently with this motion, as cited below.

## STATEMENT OF THE CASE

Appellants here challenge a statutory moratorium on suction dredge mining (see Fish & G. Code, § 5653.1, subd. (b)) as well as regulations adopted in 2012 by the California Department of Fish and Wildlife (see Cal. Code Regs., tit. 14, §§ 228, 228.5), on a variety of grounds. (Declaration of Marc N. Melnick, filed concurrently, Exhs. A, B, C [pleadings]; see also *People v. Osborn* (2004) 116 Cal.App.4th 764, 768, 774-75 [describing suction dredge mining and its impacts]; *Karuk Tribe v. U.S. Forest Serv.* (9th Cir. 2012) 681 F.3d 1006, 1012, 1028-29 (en banc) [same].)

The plaintiffs in the *Kimble v. Harris* action originally brought a motion for preliminary injunction against enforcement of the moratorium. The trial court denied the motion on August 28, 2013, finding that the plaintiffs did not meet their burden on irreparable harm. (Melnick Decl., Exh. G.) The *Kimble* plaintiffs appealed to this Court (see No. E059864), and that appeal was stayed while the parties were engaged in settlement discussions in the coordinated trial court proceedings. (Melnick Decl., ¶ 4, Exh. H.) The *Kimble* plaintiffs made repeated requests that the stay be extended. (Melnick Decl., ¶ 4.) The appeal was never briefed, and was

voluntarily dismissed by the *Kimble* plaintiffs on February 3, 2015. (Melnick Decl., Exh. U.)

Meanwhile, the parties brought cross-motions for summary adjudication on the issue of preemption. A hearing was held on May 1, 2014, after which the trial court stayed the case while settlement negotiations were ongoing. (Melnick Decl., Exh. M.) The trial court issued a ruling on January 21, 2015. (Buchal Decl., ¶ 2 & Exh. 1.) After the parties argued about the form of a formal order (including whether it should include injunctive relief), the trial court issued an order in early May 2015 (but dated nunc pro tunc for May 1, 2014). (Melnick Decl., ¶ 3 & Exh. N.)

The Miners then brought the motion for injunction which is the subject of this appeal. That motion was based on the trial court's order on the cross-motions for summary adjudication, as well as evidence purporting to show irreparable harm. (Buchal Decl., Exh. 3; Melnick Decl., Exhs. O, P.) The trial court denied the motion for an injunction at the hearing on June 23, 2015, and a formal order was entered on July 8, 2015. (Buchal Decl., Exhs. 3, 4.)

### ARGUMENT

The denial of a preliminary injunction is appealable under Code of Civil Procedure section 904.1, subdivision (a)(6). (*Bishop Creek Lodge v. Scira* (2000) 82 Cal.App.4th 631, 633.) But the denial of a permanent injunction is not appealable. (*Ibid.*) Rather, that issue must be raised on an appeal from the judgment. (*Ibid.*)

Here, the Miners' notice of motion in the trial court did not state whether the motion was one for a permanent injunction or a preliminary injunction. (See Buchal Decl., Exh. 2.) It was based on the trial court's granting of the Miners' motions for summary adjudication of the Miners' preemption claims. (Buchal Decl., Exh. 2.) And the relief requested was

not limited in time (such as until the time judgment is entered). (Buchal Decl., Exh. 2.) But a judgment had not been entered, and proceedings continue in the trial court. (Melnick Decl., Exh. T.) These circumstances led Respondents to characterize the motion below as “in the nature of an interlocutory (preliminary) injunction, not a permanent injunction.” (Melnick Decl., Exh. P, p. 5.)

But the Miners did not agree. They said flat out: “This is not a motion for a preliminary injunction.” (Melnick Decl., Exh. O, p. 2.) The Miners argued they “qualif[ied] for a permanent injunction.” (Melnick Decl., Exh. O, p. 2.)

The Court should hold the Miners to their word. As an appeal from the denial of a permanent injunction, this Court has no jurisdiction. This appeal should be dismissed.

#### CONCLUSION

For all of these reasons, Respondents’ motion should be granted.

Dated: August 25, 2015

Respectfully submitted,

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