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COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

IN RE SUCTION DREDGE MINING CASES

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

Plaintiffs and Appellants,

vs.

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

Defendants and Respondents,

KARUK TRIBE, *et al*.

Plaintiffs/Petitioners and Respondents

Appeal from the Superior Court of San Bernardino County
Hon. Gilbert Ochoa, Department S36J
Coordinated Proceeding JCPDS4720
SCCVCV1200482 (Siskiyou County); CIVDS1012922
(San Bernardino County); CIVDS1203849 (San Bernardino County)

PLAINTIFFS/PETITIONERS AND RESPONDENTS' OPPOSITION TO MOTION FOR SUMMARY REVERSAL OR CALENDAR PREFERENCE

Saxton & Associates
Lynne R. Saxton (SBN 226210)*
912 Cole Street, #140
San Francisco, CA 94117
Tel: (415) 317-6713
lynne@saxtonlegal.com

Center for Biological Diversity
Jonathan Evans (SBN 247376)
1212 Broadway, Suite 800
Oakland, CA 94612
Tel: (510) 844-7100
jevans@biologicaldiversity.org

Attorneys for Plaintiffs/Petitioners and Respondents

[Plaintiffs/Petitioners and Respondents Continued on Next Page]

PETITIONERS/PLAINTIFFS AND RESPONDENTS
KARUK TRIBE, CENTER FOR BIOLOGICAL DIVERSITY,
FRIENDS OF THE RIVER, KLAMATH RIVERKEEPER,
PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,
INSTITUTE FOR FISHERIES RESOURCES,
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE,
FOOTHILL ANGLER'S COALITION,
NORTH FORK AMERICAN RIVER ALLIANCE,
UPPER AMERICAN RIVER FOUNDATION AND
CENTRAL SIERRA ENVIRONMENTAL RESOURCE CENTER

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I. INTRODUCTION

Plaintiffs/Petitioners and Respondents Karuk Tribe *et al.* ("Petitioners") oppose the Motion for Summary Reversal or Calendar Preference filed by Plaintiffs and Appellants The New 49'ers, Ben Kimble, and Public Lands for the People ("Appellants'" or "Miners") on the grounds that the appeal is without jurisdiction and is clearly unfit for summary reversal.

Even assuming this Court does have jurisdiction to hear the Miners' appeal, this is not a rare situation where summary reversal is appropriate. At its core the Miners' arguments rely upon an unpublished decision—*People v. Rinehart* that is now under review at the California Supreme Court—to push forward with this frivolous appeal. Moreover, the Miners' claims of irreparable injury are not supported by the facts or law. Allowing the Miners to suction dredge mine in areas contaminated by historic mercury pollution during a period when California is experiencing the worst drought in recorded history would result in disastrous impacts to California's waterways, fish and wildlife, and cultural resources.

To the extent not covered in the following opposition brief, Petitioners join in the argument put forward by the Defendants and Respondents California Department of Fish and Wildlife *et al.*

II. ARGUMENT

A. Appellants' Motion is Not a Properly Appealable Order.

Appellants' appeal is without jurisdiction and must be dismissed. (*Art Movers, Inc. v. Ni West, Inc*. (1992) 3 Cal.App.4th 640, 649

[concluding that Code of Civil Procedure section 904.1 "is not applicable to interlocutory orders dismissing a cause of action for permanent injunctive relief"].) In *Art Movers* the court held that when a party brings a cause of action requesting permanent injunctive relief, and that relief is denied by summary adjudication, section 904.1 does not apply. (*Id.* at 643.) Section 904.1 applies only to orders regarding *pendente lite* injunctions, and does not apply to interlocutory orders denying permanent injunctive relief. (*Id.* at 649.)

Art Movers is directly on point. Appellants' appeal follows the denial of a permanent injunction following a decision on summary adjudication just like the appellants in *Art Movers*. There is no other appealable order that would apply. Thus, this Court should dismiss Appellants' summary reversal for lack of jurisdiction.

B. The Rare Outcome of Summary Reversal is Not Proper Here.

California courts use summary reversal only on those very rare occasions when the court is faced with a patently erroneous judgment or where the basis for the decision has been reversed by a higher court. "[T]he remedy of summary reversal is limited to situations where the proper resolution of the appeal is so obvious and without dispute that briefing would not serve any useful purpose. (*Weinstat v. Dentsply Intern., Inc.* (2010) 180 Cal.App.4th 1213, 1224.) Summary reversal is clearly improper where the decision relied upon by Appellants, and the lower

court, has been depublished and is under review at the Supreme Court, and where the issue on appeal is a fact-bound, substantive matter where the court exercised its equitable discretion.

Summary reversal is for situations where the trial court ignored or misunderstood an order from a higher court, or, as in *Weinstat*, where the Supreme Court announced a sweeping, retroactive rule change after the trial court's decision. (*Weinstat*, 180 Cal.App.4th at 1224 *Melancon v Walt Disney Prods*. (1954) 127 Cal.App.2d 213, 214 [issue on appeal had been previously determined adversely to appellant by the California Supreme Court in a related matter]; *People v Geitner* (1982) 139 Cal.App.3d 252, 254 [reversal was compelled by a decision of the California Supreme Court].) Appellants' motion does not meet these narrow standards.

1. Appellants' Motion, Based on a Depublished Case to Support Summary Reversal, Must be Rejected.

At its core the thrust of Appellants' motion relies upon a decision that has been depublished because it was accepted by review by the Supreme Court. (Appellants' Opening Brief at 3 ["We expect the Supreme Court may well revise the Third District's decision by directing the Superior Court to acquit Rinehart outright."], Appellants' Opening Brief at 9 ["two California courts have so ruled, and the matter is pending before the Supreme Court."]) This clearly does not warrant summary reversal.

The ruling of the San Bernardino County Superior Court relied

heavily on findings and legal proscriptions in *People v. Rinehart* (2014) 230 Cal.App.4th 419, which has been depublished. (Exhibit 1 to Appellants' Decl. of James L. Buchal, Summary Adjudication Ruling at 9-17; California Rules of Court, rules 8.1105(e)(1), 8.1115(a).) This greatly influenced the Superior Court in denying the injunction:

> *People v, Rinehart*, Case No. S222620, is currently before the Supreme Court, and the appellate decision heavily relied on by this Court was depublished shortly after this Court issued its ruling on the summary adjudication motions. As all the parties are aware, the Third Appellate District's opinion in *Rinehart* examined the issue of federal preemption and the enforceability of Fish and Game Code section 5653 in light of the provisions of Section 5653.1. As a result, the very issue that was at the center of this Court's January 2015 ruling is now up for review.

(Exhibit 4 to Appellants' Decl. of James L. Buchal, Order Denying Injunction at 2.) Appellant is in the exact opposite posture to where summary reversal is appropriate. Instead of a clear decision from a higher court ruling on the matter at bar, the decision relied upon by the lower court and Appellant's is no longer good law because it has been depublished by a higher court. Apellant's motion must fail.

As noted by Appellants, California Rule of Court 8.1115(a) provides "[a]n opinion of a California Court of Appeal… 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." (Appellants' Opening Brief at 13 [emphasis added].) The Superior Court was prohibited from relying upon *People v.*

Rinehart in ruling on the Miners' motion for a permanent injunction, just as Appellants are prohibited from relying on that unpublished case for support their motion for summary reversal.

2. The Lower Court Properly Found That The Miners Have Not Established Irreparable Injury.

The Miners' claims of irreparable injury are contradicted by the facts and are legally unsound. The burden is on the Miners to show that an injunction is supported by the evidence. (*Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1043.) The lower court correctly analyzed the facts presented below and used its equitable discretion to find that the Miners did not meet that burden.

1. The Miners' Claims of Irreparable Injury are Incorrect.

The Miners' argument that the moratorium is causing irreparable injury is contradicted by the facts and the law. The Miners claim, without support, that suction dredge mining 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." (Appellants' Opening Brief at 4.) Even if this were correct, the lower court correctly found that these claims should proceed as monetary damages and not under a theory of equitable relief. (Appellant's Opening Brief at 8, 11.)

As an initial matter, the Miners' claims of economic harm are belied

by the fact that, as the Ninth Circuit found, suction dredge mining is a *recreational* activity:

> Commercial gold mining in and around the rivers and streams of California was halted long ago due, in part, to extreme environmental harm caused by large-scale placer mining… However, small-scale recreational mining has continued. some recreational miners conduct mechanical 'suction dredging' within the streams themselves.

(*Karuk Tribe of Cal. v. United States Forest Serv*. (2012) 681 F.3d 1006, 1011-12). The court also concluded that Plaintiff the New 49ers is "a recreational mining company." (*Id*. at 1014.)

The Miners' claim that limitations on suction dredge mining for gold is an irreparable injury to their recreational interests is also contradicted by the facts. (Appellants' Opening Brief at 10.) Again, as the Ninth Circuit found, there are numerous ways for recreational gold miners to mine for gold:

> recreational miners "pan" for gold by hand, examining one pan of sand and gravel at a time. Some conduct "motorized sluicing" by pumping water onto streambanks to process excavated rocks, gravel, and sand in a sluice box … Finally, some recreational miners conduct mechanical "suction dredging."

(*Karuk*, 681 F.3d at 1012.) The Fish and Game Code also specifically notes that any restriction on suction dredge mining "does not prohibit or restrict nonmotorized recreational mining activities, including panning for gold. (Fish & Game Code, § 5653.1(e).) Nothing prevents the Miners from using other methods of recreational mining. Any claim that the

Miners are prohibited from recreational mining on their claims or prospecting is not supported by the facts.

2. The Miners' Claims That Their Arrests Constitute Irreparable Harm Fail Because Mining Without A Permit is Illegal.

The Miners cannot establish irreparable harm based on their arrests and threats of arrest for mining without a permit because mining without a permit is illegal. The Miners know full well that suction dredge mining without a permit is against the law (Fish and Game § 5653(a)), yet they attempt to obtain injunctive relief that allows them to proceed with unpermitted suction dredge mining. (Appellants' Opening Brief, Buchal Decl. at 3.) The U.S. Supreme Court has upheld California's ability to require a permit for mining on federal lands. (*Cal. Coastal Com. v. Granite Rock Co*. (1987) 480 U.S. 572, 594.)

To the extent any of the Miners' claims of injury are predicated on the Department's enforcement of Fish and Game §5653's permit requirement, the Court should ignore such arguments. Their arrests for violating that law cannot be grounds for a finding of irreparable injury. (*Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 342 ["While a plaintiff may ignore an unconstitutional ordinance, this does not, and cannot, mean that a person may proceed contrary to an ordinance and then claim that it is unconstitutional because of the results and effects *of his own*

actions in disregard of the ordinance."] (emphasis in original); *see also* Cal. Civil Code § 3517 ["[n]o one can take advantage of his own wrong"].)

The cases that the Miners cite for this proposition are inapposite. (*See, e.g., Hillman v. Britton* (1980) 111 Cal.App.3d 810.) In *Hillman,* for example, plaintiffs were threatened with arrest for soliciting money for their church, in violation of a local ordinance that the court found to be unconstitutional. But that is not the case here where Fish and Game Code Section 5653 is a valid and enforceable law. In fact, the lower court's ruling acknowledges that states have the power to require permits for mining on federal claims. (Exhibit 1 to Appellants' Decl. of James L. Buchal, Summary Adjudication Ruling at 9.) Thus, there is no irreparable harm.

3. An Injunction is Improper Because Suction Dredge Mining Would Cause Severe Harm to the Public.

Even if a court determines that monetary damages are insufficient to compensate the plaintiff, a court may deny injunctive relief if there is "evidence of severe harm and hardship to the public." (*Cota v. County of Los Angeles* (1980) 105 Cal.App.3d 282, 292.) Suction dredge mining, particularly under the 1994 regulations, will cause serious harm to the environment, cultural resources and human health. Thus, even if the Court finds the Miners' claims of irreparable injury to be credible, injunctive relief should still be denied.

The Legislature found that suction dredge mining "results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state." (Stats. 2009, ch. 62 (S.B. 670) § 2 [2009 Cal ALS 62 § 2 (Lexis)].) There is a well established body of law and science that documents the substantial human health and environmental impacts from suction dredge mining. (*Karuk*, 681 F.3d at 1028-1029; DelCotto, *Suction Dredge Mining: The United States Forest Service Hands Miners the Golden Ticket* (2010) 40 Envtl. L. 1021.) One particularly pervasive and unavoidable impact of suction dredge mining is caused by the resuspension (dredging up) and discharge of mercury. (40 Envtl. L. at 1027-28.) The Ninth Circuit has also recognized the wide ranging and well-known impacts of suction dredge mining to fisheries and cultural resources. (*Karuk*, 681 F.3d at 1019, 1029.) A wealth of evidence was also presented to the court below clearly establishing that suction dredging under 30 year old regulations caused harm to the environment, cultural resources and human health.

III. CALENDAR PREFERENCE IS NOT WARRANTED HERE

This Court should not grant a calendar preference to expedite the appeal. The Miners previously appealed, yet subsequently dismissed an appeal for a previous injuction. (Appellants' Opening Brief at 8-9.) The Appellants had ample opportunity to pursue this claim by appealing the denial of the preliminary injunction, but refused to do so. Forcing

expedited briefing when this matter could have been resolved at an earlier phase would prejudice other cases that did not engage in this procedural chicanery.

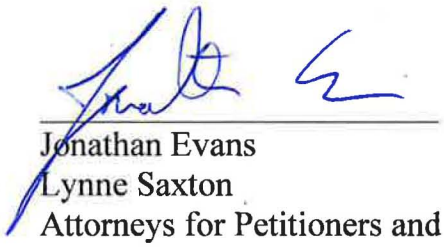
The California Supreme Court accepted review of *People v. Rinehart* (2014) 230 Cal.App.4th 419, to consider whether Fish and Game section 5653.1 is preempted by federal law. Since the California Supreme Court is going to review the very issue on which the Miners' proposed injunctions are based, any injunction issued now will likely have to be modified once *Rinehart* is decided and, in the meantime, allow environmentally destructive activities to occur based on an uncertain area of law. Also, the California Legislature is considering SB 637, which will require the State Water Resources Control Board to create permits for suction dredge mining that address mercury mobilization and require a new regulatory structure for any suction dredge mining that resumes. In the face of these pending changes, expedited briefing would be a waste of the resources of the Parties and the Court.

Finally, even under an expedited calendaring schedule it is unlikely that this Court will be able to issue a final ruling on this matter before the suction dredge mining season ends in the early fall. Expediting a calendaring schedule when no suction dredge mining would resume until after the spring of 2016 would be pointless.

IV. CONCLUSION

For the reasons set forth above the appeal should be dismissed and the calendar preference should be rejected.

August 25, 2015



Jonathan Evans
Lynne Saxton
Attorneys for Petitioners and Respondents

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court, I hereby certify that this brief contains 2,376 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Jonathan Evans
Attorney for Petitioners and Respondents

DECLARATION OF SERVICE

I, Jonathan Evans, 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 entitled cause. I am an employee of the Center for Biological Diversity and my business address 1212 Broadway, Suite 800, Oakland, CA. 94619.

On August 25, 2015, I served the following documents:

OPPOSITION TO MOTION FOR SUMMARY REVERSAL OR CALENDAR PREFERENCE

CERTIFICATE OF INTERESTED PERSONS AND ENTITIES

by transmitting a true copy in the matter listed above on the parties listed below:

James L. Buchal
MURPHY & BUCHAL LLP
3425 SE Yamhill Street, Suite 100
Portland, OR 97214
jbuchal@mbllp.com
Via E-mail & US Mail

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Court Programs and Services Division
(Civil Case Coordination)
455 Golden Gate Avenue
San Francisco, CA 94102
Via US. Mail

David Young, SBN 55341
LAW OFFICES OF DAVID YOUNG
11845 Olympic Boulevard, Suite 1110
Los Angeles, CA 90064
dyounglaw@verizon.net
Via E-mail & US Mail

Bradley Solomon
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Bradley.Solomon@doj.ca.gov
Via E-mail & US Mail

Honorable Gilbert Ochoa
Superior Court of California
County of San Bernardino
San Bernardino Justice Center
247 West 3rd Street
San Bernardino, CA 92415-0210
Via US. Mail

John Mattox
Department of Fish & Game
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
jmattox@dfg.ca.gov
Via E-mail

E. Robert Wright
Friends of the River
1418 20th St., Suite 100
Sacramento, CA 95811
bwright@friendsoftheriver.org
Via E-mail

Glen Spain
Pacific Coast Federation of Fisherman's Association
Southwest Regional Office
P.O Box 11170
Eugene, OR 97440
fishlifr@aol.com
Via E-mail

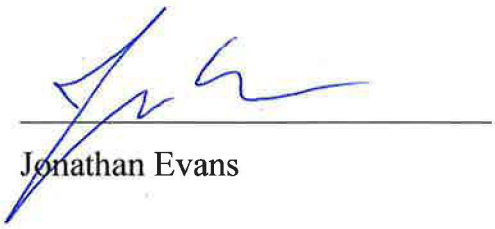
Marc Melnick
Office of the Attorney General
1515 Clay Street, Suite 2000
Oakland, CA 94612
Marc.Melnick@doj.ca.gov
Via E-mail

Jonathan Evans
1212 Broadway, Suite 800
Oakland, CA 94612
jevans@biologicaldiversity.org
Via E-mail

Lynne R. Saxton
Saxton & Associates
912 Cole Street, #140
San Francisco, CA 94117
lynne@saxtonlegal.com
Via E-mail

Keith Robert Walker
9646 Mormon Creek Road
Sonora, CA 95370
Via Us. Mail

James R. Wheaton
Environmental Law Foundation
1736 Franklin Street, 9th Floor
Oakland, CA 94612
wheaton@envirolaw.org
elfservice@envirolaw.org
Via E-mail



Jonathan Evans