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' OPPOSITION TO MOTION FOR SUMMARY REVERSAL OR, IN THE ALTERNATIVE, FOR CALENDAR PREFERENCE

KAMALA D. HARRIS
Attorney General of California
ROBERT W. BYRNE
Senior Assistant Attorney General
GAVIN G. MCCABE
Supervising Deputy Attorney General
BRADLEY SOLOMON
BARBARA SPIEGEL
* MARC N. MELNICK (SBN 168187)
J. KYLE NAST
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 622-2133
Fax: (510) 622-2270
E-mail: Marc.Melnick@doj.ca.gov
Attorneys for Respondents California Department of Fish and Wildlife, Charlton H. Bonham, and Kamala D. Harris

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INTRODUCTION

Summary reversal is only appropriate in the extreme case where no briefing is necessary to reverse the trial court's order or judgment. This is not such a case. There are many reasons why this appeal has no merit. There is the question of whether the order denying the injunction is even appealable. There is the merits of the underlying preemption question, including the trial court's reliance on an unpublished case. There is the question of whether summary adjudication was appropriate on the preemption question given the disputed factual issues. And there is the issue, raised by Appellants, of whether there was an abuse of discretion when the trial court found there was no irreparable harm. Many of these issues require briefing. Summary reversal is not appropriate.

Calendar preference also is not appropriate. The legal issue at the core of this matter is currently before the California Supreme Court in *People v. Rinehart*, a case that is fully briefed by the parties. It makes no sense for this Court to act before the Supreme Court issues a decision in that case. And there is no need for this Court to act, because suction dredge mining requires a permit under the federal Clean Water Act, and such a permit is years away from issuance.

Appellants' motion should be denied. If the Court does not grant Respondents' counter motion for dismissal, this appeal should proceed in the normal course.

STATEMENT OF THE CASE

Suction dredge mining is a method for obtaining gold from the bed of a water body. (*People v. Osborn* (2004) 116 Cal.App.4th 764, 768.) Miners typically use a motorized vacuum with a four-inch or wider suction opening. (*Ibid.*; *Karuk Tribe v. U.S. Forest Serv.* (9th Cir. 2012) 681 F.3d 1006, 1012 (en banc) ("*Karuk II*").) The vacuum, inserted into the bottom

of a stream, sucks gravel and other material, disturbing the bed of the stream and thus the habitat of anything living there. (*Osborn, supra*, 116 Cal.App.4th at pp. 768, 774-75; *Karuk II, supra*, 681 F.3d at pp. 1028-29.) The vacuum takes the material to the surface, where it can be processed to separate any gold that might be present. (*Karuk II, supra*, 681 F.3d at p. 1012; *Osborn, supra*, 116 Cal.App.4th at p. 768.) The remaining sand, gravel, and rocks are dumped back in or beside the water as "tailings." (*Karuk II, supra*, 681 F.3d at 1012; *Osborn, supra*, 116 Cal.App.4th at p. 768.) This mining activity is largely done for recreation. (*Osborn, supra*, 116 Cal.App.4th at p. 768; see also Declaration of Marc N. Melnick, filed concurrently, Exh. F, ¶¶ 15-22, tables 2, 3.) The Ninth Circuit, sitting en banc, has noted "ample evidence" that suction dredge mining may affect critical habitat for endangered species. (*Karuk II, supra*, 681 F.3d at p. 1028-29.)

In 1961, the Legislature enacted a permit program for suction dredge mining. (Stats. 1961, ch. 1816, § 1, p. 3864 [enacting original version of Fish & Game Code section 5653].) This program, which is administered by the California Department of Fish and Wildlife (the "Department"), has been designed to ensure that such mining "operation[s] will not be deleterious to fish." (Fish & G. Code, § 5653, subd. (b).) Using suction dredge mining equipment without a permit is prohibited. (*Id.*, § 5653, subd. (a).) So is using such equipment at places and times "closed" to such equipment by the Department, and possessing such equipment within 100 yards of waters that have been so closed. (*Id.*, § 5653, subds. (b), (d).)

In 2005, the Karuk Tribe challenged the Department's suction dredge mining permitting program in state court under the California Environmental Quality Act, in part because of "deleterious effects on Coho salmon." (Melnick Decl., Exh. Q (exhibit G, pp. 1-2) [Order and Consent Judgment filed Dec. 20, 2006 in *Karuk Tribe v. Calif. Dept. of Fish &*

Game, No. RG05 211597 (Super. Ct. Alameda County)].) The Alameda County Superior Court approved a consent decree requiring the Department to "conduct a further environmental review . . . of its suction dredge mining regulations." (Melnick Decl., Exh. Q (exhibit G, p. 3).)

After the entry of the consent decree, the Legislature, in 2009, enacted a temporary moratorium on all suction dredge mining pending the environmental review required by that consent decree. (Stats. 2009, ch. 62, enacting Fish & G. Code, § 5653.1.) The statutory moratorium applies only to motorized suction dredge mining. (Fish & G. Code, § 5653.1, subd. (e).) It does not affect any other form of mining, such as "nonmotorized recreational mining activities, including panning for gold"; nor does it affect mining outside the water. (*Ibid.*; see also Cal. Code Regs., tit. 14, § 228, subd. (a) [definition of suction dredge mining].) Those other forms of mining can be profitable. (Melnick Decl., Exh. L (Clay decl., ¶¶ 22, 23, 25-31; Solomon decl., exhs. A, B).) The Legislature found this moratorium necessary because "suction or vacuum 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, § 2.)

The Legislature altered the moratorium once during the course of the Department's environmental review and once shortly after the review was completed. The original statute provided that the moratorium would expire once the Department's environmental review was completed and any necessary new regulations were adopted and became operative. (Stats. 2009, ch. 62.) A 2011 amendment provided that the moratorium would end at the earlier of two times: either with the completion of the environmental review and enactment of new regulations which "fully mitigate all identified significant environmental impacts" of suction dredge mining and create a permit "fee structure … that will fully cover all costs," or on a date

certain – June 30, 2016. (Stats. 2011, ch. 133, § 6.) In a 2012 amendment enacted approximately four months after the Department completed its environmental review, the Legislature eliminated the 2016 sunset, meaning that the moratorium now is set to expire only with the enactment of regulations that fully mitigate impacts and a fee structure covering administrative costs. (Stats. 2012, ch. 39, § 7; see Fish & G. Code, § 5653.1, subd. (b).) The 2012 amendment also required that the Department recommend to the Legislature any "statutory changes or authorizations" needed for the Department to enact regulations satisfying the statutory conditions for ending the moratorium. (Fish & G. Code, § 5653.1, subd. (c)(1).)

Meanwhile, in March 2012, the Department completed its required environmental review and adopted new suction dredge mining regulations. (See Melnick Decl., Exh. V ("2013 Legislative Report"), p. 1a; see also Cal. Code Regs., tit. 14, §§ 228, 228.5 [regulations]; see generally https://www.wildlife.ca.gov/Licensing/Suction-Dredge-Permits [website containing links to environmental impact report documents].) In formal rulemaking findings, the Department found that the new regulations – mainly time, place, and manner restrictions – would prevent suction dredge mining from being "deleterious to fish," as required under Fish and Game Code section 5653, subdivision (b). (2013 Legislative Report, p. 3; Cal. Code Regs., tit. 14, §§ 228, 228.5; see specifically Cal. Code Regs., tit. 14, § 228 [opening paragraph, stating "the Department finds that suction dredging subject to and consistent with the requirements of Sections 228 and 228.5 will not be deleterious to fish"].) However, given the specific statutory authority governing suction dredge regulations found in Fish and Game Code section 5653, the Department was not able, in that context, to adopt regulations necessary to avoid certain other significant environmental effects. (2013 Legislative Report, pp. 3, 14.) Specifically, the Department

explained in its 2013 report to the Legislature that it lacked authority to enact regulations necessary to prevent the likelihood that suction dredge mining "would resuspend and discharge mercury and other trace minerals, and increase turbidity and discharge of suspended sediment; could impact historical and unique archeological resources; expose the public to noise levels in excess of controlling local standards; and impact special status passerines (nesting birds) associated with riparian habitat, and affect non-fish wildlife species and their habitats." (*Id.*, p. 3 fn. 4.) The 2013 Legislative Report therefore made recommendations for legislative action intended to permit further administrative regulations that would allow for the lifting of the moratorium. (*Id.*, p. 14.)

During the course of these legislative and administrative actions, between 2009 and 2015, these coordinated actions were filed. The three actions relevant here are called *The New 49'ers*, *Kimble*, and *Public Lands for the People* (or *PLP*), and this brief refers collectively to the plaintiffs in those three actions as "the Miners." (Melnick Decl., Exhs. A, B, C.) All three actions include preemption claims, with *The New 49'ers* challenging the moratorium and the 2012 regulations, *Kimble* challenging the moratorium, and *PLP* challenging the 2012 regulations and the Department's related environmental review conducted under the California Environmental Quality Act. The plaintiffs include organizations purporting to represent all miners, and *The New 49'ers* case is styled as a class action.

The *Kimble* plaintiffs 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 in the coordinated trial court proceedings had brought cross-motions for summary adjudication on the preemption issue. 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] (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 Miners sought injunctive relief for all potential suction dredge miners, rather than just for the plaintiffs. And they sought to suction dredge mine without the requirement of a permit, even though they did not challenge Fish and Game Code section 5653's permit requirement and that requirement would not be preempted under the specific holding of *California Coastal Commission v. Granite Rock Co.* (1987) 480 U.S. 572. 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.)

The proceedings below continue, with a hearing currently scheduled in January 2016 on the claims challenging the Department's 2012 rulemaking under the California Environmental Quality Act,

Administrative Procedure Act, and Fish and Game Code. (Melnick Decl., Exh. T.)

ARGUMENT

I. THE COURT SHOULD NOT SUMMARILY REVERSE

A Court of Appeal has the power to summarily reverse, but only "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.) Thus, in *Melancon v. Walt Disney Productions* (1954) 127 Cal.App.2d 213, the Second Appellate District summarily reversed the trial court's order where the California Supreme Court had recently ruled on the very question at issue. And, in *Weinstat*, the parties agreed that reversal was appropriate. (180 Cal.App.4th at p. 1223.) In this matter, however, a motion for summary reversal cannot be granted without oral argument, if requested, which Respondents would request here. (See *Moles v. Regents of Univ. of Calif.* (1982) 32 Cal.3d 867, 871-72.) As explained below, there is no circumstance here justifying reversal, no less summary reversal. If not dismissed (as suggested in Respondents' counter motion), this case should be briefed and argued, based on the record.

A. Denial of a permanent injunction is not appealable

There is a serious issue of jurisdiction here. 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. The Court should consider granting Respondents' counter motion seeking dismissal on this point. Certainly, the trial court's order should not be summarily reversed in this appeal.

B. The trial court was correct in denying the injunction

If the Court characterizes the Miners' motion as a motion for preliminary injunction, the standard of review is whether the trial court abused its discretion. (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 849-50.) There must be a "clear showing" of an abuse of discretion, and whether to grant an injunction "generally rests in the sound discretion of the trial court." (*Husain v. McDonald's Corp.* (2012) 205 Cal.App.4th 860, 867, citing cases.) (The same standard applies to a permanent injunction. (*Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal.App.4th 359, 390; see also *San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 952 ["The granting, denying, dissolving, or refusal to dissolve a

permanent injunction rests within the sound discretion of the trial court."]; *Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1041 [calling this decision "essentially discretionary"].))

Review examines both factors relevant to a preliminary injunction: whether the plaintiff will prevail on the merits and the harm that will occur if relief is not granted. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.)[1] A public statute may be enjoined only "where the statute or ordinance is invalid *and* a showing is made of irreparable injury." (*Leach v. City of San Marcos* (1989) 213 Cal.App.3d 648, 660-61, emphasis in original.) If a question of law is presented on the merits, that "can sometimes be determinative . . . for example, when the defendant shows that the plaintiff's interpretation is wrong as a matter of law and thus the plaintiff has no possibility of success on the merits." (*Hunter v. City of Whittier* (1989) 209 Cal.App.3d 588, 596, cited in *Acuna*, *supra*, 14 Cal.4th at p. 1137 fn. 5.) "Even where the question of law is not entirely determinative, it may be appropriate for the appellate court to express its opinion in order to clarify or narrow the issues for trial." (*Hunter*, *supra*, 209 Cal.App.3d at p. 596; see also *Hilb, Rogal & Hamilton Ins. Services v. Robb* (1995) 33 Cal.App.4th 1812, 1823 [reviewing merits issues even after

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[1] If this Court were reviewing the denial of a permanent injunction, that review would examine the merits and irreparable injury issues, but the review is done under an even more deferential standard. The issuance of a permanent injunction depends on whether "equitable relief is appropriate." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 646.) As an equitable remedy, a court "can, and undoubtedly would, deny injunctive relief where such relief would be inequitable." (*Feminist Women's Health Center v. Blythe* (1993) 17 Cal.App.4th 1543, 1554, internal quotation marks and citations omitted.) Injunctive relief may be denied even if the plaintiff prevails on his claim. (E.g., *Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 801.) Appellants do not even attempt to address this overarching standard.

affirming trial court ruling on harm].) Issues of pure law are reviewed de novo. (*Acuna*, *supra*, 14 Cal.4th at p. 1137.)

The Miners' counsel, in his declaration, expresses the view that the merits is a "matter[] for the Superior Court on remand." But that ignores the case law discussed above as well as the overarching appellate principle that this Court will uphold the ruling below based on any valid reason. (E.g., *Unisys Corp. v. Calif. Life & Health Ins. Guarantee Ass'n* (1998) 63 Cal.App.4th 634, 640.) Moreover, Code of Civil Procedure section 906 explicitly allows this Court to review intermediate orders that affect the order appealed from (without Respondent needing to appeal that intermediate order). "Section 906 permits review of an intermediate ruling which is a necessary predicate to the appellant's claim of error. A successful challenge to the ruling shows the appellant suffered no prejudice. In other words, no foul, no harm." (*Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1671.) In this appeal, Respondents intend to raise the issue of whether the trial court should have granted summary adjudication to the Miners on the preemption claims. That summary adjudication ruling was the foundation for the Miner's motion for injunction. Respondents believe that summary adjudication ruling was in error.

1. The Miners are wrong on the merits

There are three independent reasons why the Miners are wrong on the merits, there is no preemption, and thus there is no justification for an injunction of any kind.

First, a review of the trial court's ruling on summary adjudication, finding preemption, (see Buchal Decl., Exh. 1) shows that it was based solely on the Third Appellate District's decision in *People v. Rinehart*. But the California Supreme Court granted review in that case. (*People v. Rinehart* (Jan. 21, 2015) 340 P.3d 1044.) It did so before the trial court entered a final, formal order on the cross-motions for summary

adjudication. (Melnick Decl., ¶ 3, Exh. N.) "[A]n opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing." (Cal. Rules of Court, rule 8.1105(e)(1).) As such, the *Rinehart* opinion "must not be cited or relied upon by a court or a party in any other action." (*Id.*, rule 8.1115(a); see also *People v. Kennedy* (2012) 209 Cal.App.4th 385, 400; *People v. Superior Court (Clark)* (1994) 22 Cal.App.4th 1541, 1547-48.) The trial court's ruling on the cross-motions for summary adjudication is, therefore, in error.

Second, the federal mining laws do *not* preempt state environmental laws. This issue is before the California Supreme Court in *Rinehart*. As such, it is clearly not an issue that should be decided on a motion for summary reversal. It is not an issue that "is so obvious and without dispute that briefing would not serve any useful purpose." (*Weinstat, supra*, 180 Cal.App.4th at p. 1224.) Respondents do not wish to burden the Court, on this motion, with a full briefing on that issue, but a summary of our primary arguments are as follows:

- A cornerstone in preemption analysis is the presumption against preemption: that in "all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 778 [quoting *Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1060, internal quotation marks and ellipses omitted]; see also *Wyeth v.Levine* (2009) 555 U.S. 555, 565.) Thus, if two readings of a federal statute are plausible, courts "have a duty to accept the reading that disfavors pre-emption." (*Bates v. Dow Agrosciences LLC* (2005)

544 U.S. 431, 449; see also *Brown, supra*, 51 Cal.4th at p. 1064 [applying *Bates*].)

- A congressional purpose to encourage an activity does not by itself preempt state law. (*Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609, 633-34; see, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Com.* (1983) 461 U.S. 190, 221-23.) Rather, preemption must arise from specific statutory language.
- The "free and open" provision of 30 U.S.C. § 22 encourages mining not by exempting federal land from state requirements but by declaring that the United States, as the property owner, gives permission for citizens to enter those lands and take valuable minerals without prosecution for trespass or theft. (See *Colvin Cattle Co., Inc. v. United States* (Fed.Cl. 2005) 67 Fed.Cl. 568, 571 ["As the Supreme Court recognized in *Jennison v. Kirk* [(1878) 98 U.S. 453, 457], the purpose of the [1866 Act] is to 'give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts . . . .'"]; *Woodruff v. North Bloomfield Gravel Mining Co.* (C.C.D. Cal. 1884) 18 F. 753, 774 [the Mining Act of 1866 merely "legalize[d] what were before trespasses upon the public lands, and made lawful, as between the occupants and the United States, that which before was unlawful"].) This is confirmed by the legislative history of the Mining Act of 1866.
- The specification under 30 U.S.C. § 22 that a miner's exploration and occupation of federal land shall be "under regulations prescribed by law, and according to the local

customs or rules of miners in the several mining districts" likewise indicates an understanding that state authority will be preserved.

- By its own terms, the limitation under 30 U.S.C. § 612(b) on federal agency action to that which does not "materially interfere" with mining only applies to federal action, and not state action.
- The U.S. Bureau of Land Management administers the federal mining laws, and has promulgated a formal regulation about preemption on public lands, stating that: "If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart." (43 C.F.R. § 3809.3.) "State law or regulation is preempted only to the extent that it specifically conflicts with Federal law," which occurs "only when it is impossible to comply with both Federal and State law at the same time." (Mining Claims Under the General Mining Laws; Surface Management, 65 Fed.Reg. 69998, 70008-09 (Nov. 21, 2000).) The courts should defer to this federal agency determination.
- The U.S. Supreme Court's decision in *Granite Rock* examined preemption under federal mining laws, including the Mining Act of 1872 (30 U.S.C. § 22 et seq.) and the Surface Resources and Multiple Use Mining Act of 1955 (30 U.S.C. § 601 et seq.). (480 U.S. at pp. 582-84.) The Court found no intent to preempt state laws, either in those federal mining statutes or in their implementing regulations. (*Ibid.*) Noting the mining company's "conce[ssion] that the Mining Act of 1872, as originally passed,

expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation," *Granite Rock* looked to the regulations that federal agencies had promulgated. (480 U.S. at p. 582.) The Court reasoned that "[i]f ... it is the federal intent that [miners] conduct [their] mining unhindered by any state environmental regulation, one would expect to find the expression of this intent in these [federal agency] regulations." (*Id.* at pp. 582-83.) The Court found that the federal mining "regulations . . . not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations [to mine on federal land] will comply with state laws." (*Id.* at p. 583) As examples, the Court noted federal regulatory provisions requiring compliance with state air quality, water quality, and solid waste standards, as well as general state environmental protection laws – regulations which remain in place today. (See *id.* at pp. 583-84, citing to 36 C.F.R. §§ 228.5(b) & 228.8(a), (b), (c) & (h).) The Court also rejected the plaintiff's argument that the state regulations were invalid because they were "duplicative" of federal permitting requirements. (480 U.S. at pp. 593-94.) And it rejected the dissenting opinion's position that federal law could not permit a regime whereby "state regulators, whose views on environmental and mining policy may conflict with the views of the Forest Service, have the power, with respect to federal lands, to forbid activity expressly authorized by the Forest Service." (Compare *id.* at p. 594 with *id.* at p. 606 [conc. & dis. opn. of Powell, J.].)

- The decisions cited by Mr. Rinehart in favor of preemption, primarily *South Dakota Mining Association v. Lawrence County*

(8th Cir. 1998) 155 F.3d 1005, failed to consider all these points, and are not persuasive precedent. Contrary to the Miners' contentions, two recent cases have held that state restrictions on suction dredge mining are not preempted. (*Beatty v. Washington Fish & Wildlife Comm'n* (Wash. Ct. App. 2015) 341 P.3d 291, 307-08; *Pringle v. Oregon* (D. Or. Feb. 25, 2014) 2014 WL 795328, *7-*8.)

- *Granite Rock*'s reference to "commercial impracticability" was dicta made in reference to potential preemption of state land use laws by federal land use statutes (which have not been relied on here by the Miners). But the moratorium at issue here is not a land use statute. It is an environmental regulation of equipment, and prohibits suction dredge mining only until the significant environmental effects are mitigated (and the permit fees cover the administrative expenses of the program). (See Fish & G. Code, § 5653.1.)
- *Granite Rock* upheld the imposition of a California permitting requirement for mining a federal mining claim. (480 U.S. 572.) A moratorium to consider and address environmental impacts, like at issue here, can properly be considered a common part of that permitting process. (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 337-38 & fns. 31-34.)

(See also Melnick Decl., Exh. W [People's opening brief in *Rinehart*].) Simply, the trial court's finding of preemption when ruling on the cross-motions for summary adjudication is contrary to the federal mining laws and U.S. Supreme Court precedent interpreting those laws.

Third, the trial court should not have granted summary adjudication to the Miners on the preemption issue because even under the erroneous

"commercial impracticability" standard used by the trial court, there were material disputed issues of fact. (Melnick Decl., Exhs. I, J, K, L.) Again, this motion is not the place for a full exposition of these issues. The primary issue is that Respondents disputed whether the Miners had proven beyond dispute that the moratorium or the regulations made mining on the Miners' mining claims unprofitable. (Melnick Decl., Exhs. I (p. 5), J (p. 4), K (pp. 2-3).) This was because the Miners' evidence was inadmissible, because the website of appellant The New 49'ers itself explains in detail the ways to profitably mine by methods other than suction dredge mining, and because Respondents' expert – a retired federal mineral examiner with a wealth of experience and knowledge – opined that this is the case. (Melnick Decl., Exhs. I (p. 5), J (p. 4), K (pp. 2-3), L (Clay decl., ¶¶ 22, 23, 25-31; Solomon decl., exhs. A, B).) Thus, as Respondents will explain in full briefing, even if the trial court was correct on the scope of preemption here, the trial court should not have granted summary adjudication – and there would have been no basis for the Miners' motion for an injunction.

Fourth, the trial court found not only that the moratorium was invalid, but that the 2012 regulations were preempted as well. It did this by granting summary adjudication in the *Public Lands for the People* case, which only challenges those regulations. But in its order, the trial court *never* discussed those regulations. (See Melnick Decl., Exh. N; Buchal Decl., Exh. 1.) Rather, it was focused on the moratorium. (Melnick Decl., Exh. N; Buchal Decl., Exh. 1.) By not discussing the regulations, and how they might make suction dredge mining commercially impracticable, the trial court's ruling is reversible unless this Court can uphold that ruling on some other basis. (*Unisys Corp.*, *supra*, 63 Cal.App.4th at p. 640.) That would be difficult, since there was conflicting evidence as to whether the regulations made suction dredge mining unprofitable. (Melnick Decl., Exh. L (Clay decl., ¶¶ 34-39; Stopher decl., ¶¶ 8-21).)

For these reasons, the Miners are wrong on the merits, the trial court should not have granted them summary adjudication on their preemption claims, and thus there was no basis for any order for injunctive relief.

2. The trial court's finding of no irreparable harm was not an abuse of discretion

The trial court found no irreparable harm here, and on that basis denied the injunction. (Buchal Decl., Exh. 4.)[2] Of course, the issue of whether harm is "irreparable" is within the trial court's discretion to determine. (*Husain, supra*, 205 Cal.App.4th at p. 867.) It was not an abuse of discretion here.

a. The Miners' economic harms did not justify an injunction

At the trial court, the Miners were primarily focused on asserted economic harms. In this motion on appeal, the Miners mention those harms again. But the trial court did not abuse its discretion in denying this motion for an injunction. When a judgment is entered in the future, the trial court can reconsider whether to grant some form of injunctive relief. (*Bishop Creek Lodge, supra*, 82 Cal.App.4th at p. 634.) Since a judgment has not yet been entered in this case, the issue is whether the Miners proved

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[2] The Miners also complain about the trial court referencing the *Rinehart* case in its order denying an injunction. (See Buchal Decl., Exh. 4.) But that is specious. The trial court did not cite to or rely on the depublished decision, as prohibited by California Rules of Court, rule 8.1115. Rather, it cited to the California Supreme Court case – No. S222620 – and relied on the pendency of that case to decline to issue injunctive relief at this time. There is nothing in Rule 8.1115 that prohibits courts from relying on the pendency of review in deciding how to manage their cases.

If anything, it is the trial court's citation to the depublished decision in its summary adjudication order that is clear error, perhaps justifying summary affirmance.

irreparable harm caused by a delay in granting that remedy. This was their burden. (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.) They did not satisfy this burden. They relied on declarations filed, some of which were filed at an earlier stage in these coordinated proceedings. In their brief on this motion, like the motion at the trial court, however, they provide no citations to specific statements, making it impossible for either Respondents or the Court to consider or address those declarations. It is well-settled that such a failure to identify specific evidence forfeits the argument. (*Miller v. Super. Ct.* (2002) 101 Cal.App.4th 728, 743.) A court is not obligated to "comb the record and the law for factual and legal support that a party has failed to identify." (*Quantum Cooking Concepts, Inc. v. LV Associates, Inc.* (2011) 197 Cal.App.4th 927, 934.) Moreover, the motion nowhere discusses how these alleged harms are irreparable. But a plaintiff seeking an injunction against a government agency must make "significant" showing of irreparable harm. (*Tahoe Keys, supra,* 23 Cal.App.4th at p. 1471.) Since the Miners' claims are economic, as the moving party, they must prove that the harms are not compensable. (*Ibid.*) Since the gold they seek to mine will remain where it is, it would seem hard to prove that any injury is irreparable. And Respondents submitted expert evidence that the vast majority of suction dredge miners do not earn significant amounts of money, but do the activity for recreation. (Melnick Decl., Exh. F, ¶¶ 15-22, tables 2, 3.) And it also bears remembering that the Miners – including the handful that have submitted declarations asserting they make a profit – have takings claims, seeking damages. (Melnick Decl., Exh. A, ¶¶ 45-59.) The Miners had already dismissed an appeal on the *Kimble* plaintiffs' motion for preliminary injunction, where the trial court ruled that the Miners' supposed economic losses do not constitute an irreparable injury.

There was no abuse of discretion in assessing the Miners' purported economic injuries.

b. Enforcement of the moratorium did not justify an injunction either

Implicitly acknowledging the insufficiency of their economic harms, the Miners focus on the potential for arrest as an irreparable harm as a matter of law. But that is not the case. The Miners can easily avoid that harm *by not suction dredge mining*. There is nothing compelling the Miners to suction dredge mine this season. As the trial court was aware, the vast majority of miners do so for recreation.[3] (Melnick Decl., Exh. F, ¶¶ 15-22, tables 2, 3.; Buchal Decl., Exh. 3, p. 12.)

Moreover, the Miners overstate the harm from the Department's continued enforcement of the moratorium. (It bears remembering that, absent a court order or a published decision from a Court of Appeal, the Department must continue to enforce state law. (Cal. Const. art. III, § 3.5.)) A violation of Fish and Game Code section 5653 is a misdemeanor. (Fish & G. Code, § 12000, subd (a).) As the evidence submitted by the Miners shows, this misdemeanor process is usually started with the issuance of a citation – a "ticket." These cases will be processed by each county's District Attorney consistent with the due process protections afforded all criminal defendants (including seeking return of equipment under Penal

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[3] The Miners claim that recreational opportunities are irreparable injury – something they did not claim at the trial court – but the only case that they can find to support that is a Florida federal district court case that involved recreational opportunities for people with disabilities *which would have no other opportunities for any recreation.* That that court found, in its discretion, irreparable injury does not mean that the trial court here abused its discretion in not finding irreparable injury here.

Code section 1538.5).[4] It would be reasonable for the District Attorneys to agree to put these cases on hold – either before filing, at the trial court, or on appeal – while the California Supreme Court considers *Rinehart* and provides a definitive answer to the question of whether the moratorium is preempted by federal law. It is not an abuse of discretion for the trial court to have (implicitly) concluded that any injury due to a few outstanding citations, put on hold pending resolution of *Rinehart*, should not be considered significant enough to allow the large scale suction dredge mining the Miners sought by this motion.

The cases cited by the Miners do not stand for the proposition that the threat of criminal enforcement in itself constitutes irreparable harm, as a matter of law and not subject to the discretion of the trial court. None of those cases held that the threat of criminal enforcement constitutes irreparable harm in all cases; in fact, none of those cases discuss the issue of irreparable harm in any detail at all. Moreover, the cases are distinguishable on other grounds as well. *Hillman v. Britton* (1980) 111 Cal.App.3d 810 involved First Amendment rights which are much different than the Miners' statutory rights under the federal mining laws. *McKay Jewelers v. Bowron* (1942) 19 Cal.2d 595 involved review of the granting of a demurrer, which of course only relates to whether a cause of action can be alleged, not whether injunctive relief should be granted. *Ebel v. City of Garden Grove* (1981) 120 Cal.App.3d 399 cited to *McKay Jewelers* for the

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[4] The only purported evidence of an arrest is of Mr. Gilliland – a *repeat* offender, that is, someone who was found suction dredge mining after already receiving a citation for doing that activity. (See Buchal Decl., Exh. 11.) But as the papers acknowledge, Mr. Gilliland was only held for a short period of time, presumably at the District Attorney's discretion. As the other purported evidence shows, the Fish and Game Wardens issuing citations have had no desire to arrest anyone.

proposition that an arrest can be sufficient to show irreparable injury, but again in the First Amendment context. *Novar Corp. v. Bureau of Collection & Investigative Services* (1984) 160 Cal.App.3d 1 simply noted in passing that "Novar alleged that it would be irreparably injured, and in the absence of any contrary indication in the record we must assume from the trial court's order granting the preliminary injunction that it found the allegation true." (160 Cal.App.3d at p. 5.) Similarly, *Barajas v. City of Anaheim* (1993) 15 Cal.App.4th 1808 stated that "the record demonstrating irreparable harm is clear and unrebutted." (15 Cal.App.4th at p. 1814.) The trial court must consider the issue of irreparable harm. Otherwise, the standard for an injunction against enforcement of a public statute would just be whether the statute is invalid, not whether "the statute or ordinance is invalid *and* a showing is made of irreparable injury." (*Leach, supra*, 213 Cal.App.3d at pp. 660-61, emphasis in original.) Here, the trial court followed this instruction, and did not abuse its discretion.

c. In addition, there is no harm because suction dredge mining would be a violation of federal law

There is an additional reason, not addressed by the trial court, that there is no irreparable harm. This is primarily a legal issue. "Respondents are free to urge affirmance of the [order] on grounds other than those cited by the trial court." (*Little v. Los Angeles County Assessment Appeals Bd.* (2007) 155 Cal.App.4th 915, 925 fn. 6.)

For at least twenty-five years, the law has been clear that suction dredge mining requires a permit under the federal Clean Water Act. (*Rybachek v. U.S. Envtl. Prot. Agency* (9th Cir. 1990) 904 F.2d 1276, 1285-86; see also Melnick Decl., Exh. E.) *Rybachek* is on point, and establishes this requirement. In *Rybachek*, the Ninth Circuit was addressing challenges to federal Clean Water Act regulations on placer mining. (904 F.2d at pp.

1283-84.) The Ninth Circuit described placer mining as activities that would clearly include suction dredge mining:

> Placer mining typically is conducted directly in streambeds or on adjacent property. The water usually enters the sluice box through gravity, but may sometimes also enter through the use of pumping equipment. At some point after the process described above, the water in the sluice box is discharged. The discharges from placer mining can have aesthetic and water-quality impacts on waters both in the immediate vicinity and downstream. Toxic metals, including arsenic, cadmium, lead, zinc, and copper, have been found at a higher concentration in streams where mining occurs than in non-mining streams.

(*Id.* at p. 1282.) But the miners in *Rybachek* "dispute[d] whether placer mining is even subject to regulation under the Clean Water Act." (*Id.* at p. 1285.) The Ninth Circuit rejected this argument. (*Id.* at pp. 1285-86.) It explained that "Congress made unlawful 'the discharge of any pollutant by any person' except as in compliance with the Clean Water Act" and that Congress "defined 'discharge of a pollutant,' in part, as 'any addition of any pollutant to navigable waters from any point source.'" (*Id.* at p. 1285, quoting 33 U.S.C. §§ 1311(a), 1362(12).) The Ninth Circuit held that the Clean Water Act covers discharges into streams and rivers, and that "even if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the Act." (*Rybachek*, *supra*, 904 F.2d at pp. 1285-86, citing various cases.) This holding has been followed by more recent Ninth Circuit cases. (See *United States v. Moses* (9th Cir. 2007) 496 F.3d 984, 991 ["simply dredging up and redepositing what was already there is sufficient to run afoul" of the Clean Water Act], citing *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs* (9th Cir. 2001) 261 F.3d 810, 814, affirmed by an equally divided U.S. Supreme Court in 537 U.S. 99 (2002), and *Rybachek*, *supra*, 904 F.2d at p. 1285.)

That the Miners in this case need a permit under the Clean Water Act is consistent with the fact that the State of Oregon, the State of Montana, and the U.S. Environmental Protection Agency ("EPA") (acting for the State of Idaho) have each recently issued general state-wide permits under the Clean Water Act's National Pollution Discharge Elimination System ("NPDES") for suction dredge mining activity. (See Melnick Decl., Exh. Q (exhibits A, B, C).) In California, the U.S. Army Corps of Engineers had, well before then, issued a general state-wide permit under a different part of the Clean Water Act for miners that had state suction dredge mining permits under Fish and Game Code section 5653, but that permit expired long ago. (Melnick Decl., Exh. Q (exhibit D).) Either of these Clean Water Act permits – under section 402's NPDES program operated by EPA and the States (33 U.S.C. § 1342) or under section 404's "dredged or fill material" program operated by the Army Corps (*id.* § 1344) – would allow a miner to avoid the Clean Water Act's default prohibition on any discharges to water. (See *id.* § 1311(a) ["Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."]; see also *Northwest Envtl. Defense Center v. Envtl. Quality Com.* (2009) 232 Or.App. 619, 223 P.3d 1071 [discussing application of sections 402 and 404 to small suction dredge mining operations].)

Below, the Miners argued – like their counterparts in *Rybachek* – that this requirement does not apply to them. They argued that *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.* (2013) 133 S.Ct. 710 compels a different result. But that case stands for the proposition that "flow of water out of a concrete channel within a river" is not a discharge of a pollutant. (133 S.Ct. at p. 711.) That and similar cases have to do with moving water itself from one location to another, not with moving rocks and sediment from one location to another, as discussed in

Rybachek. The Miners also implied that this would be "incidental fallback" which is not regulated; but that is limited to when a small proportion of the dredge material falls back into the same place from which it is dredged. (*Moses*, *supra*, 496 F.3d 984, 991-92; *National Mining Ass'n v. U.S. Army Corps of Engineers* (D.C. Cir. 1998) 145 F.3d 1399, 1401, 1404.) Suction dredging is different, both because it is not "incidental" and because the dredge material is deposited in another location. (See *National Mining Ass'n*, *supra*, 145 F.3d at p. 1406 [distinguishing *Rybachek*].) Lastly, the Miners claimed that nationwide permits issued by the Army Corps (for minor dredging and mining activities) covered their activities, but those nationwide permits require certification by California under section 401 of the Clean Water Act and that has been denied for those specific permits. (See Melnick Decl., Exh. S, p. 9 [denying nationwide permits 19 and 44, and others]; 33 U.S.C. § 1341(a)(1) [requiring state certification of compliance with Clean Water Act requirements for permits issued by federal agencies].)

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For all these reasons, the trial court was well within its discretion to find no irreparable harm, and to deny the injunction.

Moreover, when considering an injunction against public officials, such as here, the trial court must take the public interest into account. (*Tahoe Keys*, *supra*, 23 Cal.App.4th at p. 1473.) This would include consideration of the harm that might come as result of suction dredge mining activity. (Melnick Decl., Exh. R [discussing harms due to drought conditions].) Appellants do not even attempt to address these issues.

II. CALENDAR PREFERENCE DOES NOT MAKE SENSE

In making an alternative request for calendar preference, the Miners rely on Code of Civil Procedure sections 36 and 1179a. Neither applies here. Section 36 applies to such a request at the trial court, rather than one

An official from the State Water Resources Control Board, which would likely issue such a permit, has stated that such a permit is at least two years away. (Melnick Decl., Exh. E, ¶ 21.) Until that time, suction dredge mining would be a violation of federal law. There is no need for swift resolution of this appeal. The Miners cannot engage in suction dredge mining in violation of federal law.

For both of these reasons, the Court should not grant the motion for calendar preference. If the Court does not grant Respondents' counter motion, the parties can brief this appeal at a regular pace, and the Court can hold oral argument (and potentially request supplemental briefing) after the California Supreme Court issues its decision in *People v. Rinehart*.

CONCLUSION

For all of these reasons, the Miners' motion should be denied.

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Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
ROBERT W. BYRNE
Senior Assistant Attorney General
GAVIN G. MCCABE
Supervising Deputy Attorney General

MARC N. MELNICK
Deputy Attorney General
Attorneys for Respondents

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