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MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

To: Dave McCracken, New 49'er Association
From: James L. Buchal
Date: August 2, 2013
Re: Status of Challenge to Emergency Rulemaking

On July 3, 2013, Siskiyou County Superior Court Judge Karen Dixon granted a temporary restraining order (TRO) forbidding the Department of Fish and Wildlife from enforcing its emergency amendment of the definition of "suction dredge". She also scheduled a full evidentiary hearing on July 30, 2013 concerning whether to enter a preliminary injunction continuing this temporary relief.

On July 10, 2013, the Department filed papers before San Bernardino County Superior Court Judge Gilbert Ochoa, seeking to "coordinate" the Siskiyou County action with six other cases pending before him. Coordination is a procedure pursuant to which cases "sharing a common question of fact or law" may be transferred to a single coordination judge. The Department did not attempt to expedite any ruling on the petition to coordinate or seek any other relief. We are opposing the petition for coordination because there are no common questions of law or fact, only an overlap with respect to the general issue of environmental impacts of underwater mining.

On July 11, 2013, the Karuk Tribe and its allies filed an application with Judge Ochoa to stay the Siskiyou County proceedings and accelerate decision on the Department's petition to coordinate the action. The Tribe did not seek to dissolve the TRO, instead attempting, in substance, to ensure that the preliminary injunction hearing was promptly heard in San Bernardino County, not Siskiyou County.

The Tribe's motion was heard on July 15, 2013, and Judge Ochoa took the matter under advisement, stating he would issue an opinion later that day. Later that day, a minute order appeared on the Court's website indicating only that the Tribe's motion for a stay had been granted until the petition for coordination had been heard. The Department's attorney then called the Court to seek clarification whether the stay extended to the TRO, and the Court amended the minute order on the website to add the words "temporary restraining order is stayed". In an e-mail, the Department's attorney told me that he had been told by the clerk

that “the entire Siskiyou County matter, including the TRO, is stayed until the petition for coordination is heard”. Interestingly, the Judge also signed a formal written order, submitted by the Tribe, which simply stated that “all proceedings . . . are stayed;” the formal order makes no specific reference to the TRO, and refuses the request to expedite a ruling on the petition.

There is a large body of law addressing what it means to “stay” a case in California law. Under this body of law, staying a case will stop any injunctions which are mandatory (that is, require affirmative action on the part of a party), but not affect injunctions which are prohibitory (that is, restrain a party from doing something). No case, however, addresses the effect of a stay issued in the coordination context. Citing this law, I attempted to seek clarification of Judge Ochoa’s ruling with a letter, copied to all counsel, but Judge Ochoa responded by refusing to read the letter and stating that “[i]n order for any substantive matter to be considered by the Court, the requesting party must request a hearing date and give notice to all parties”.

I believe the more reasonable interpretation of all these somewhat unusual circumstances is that Judge Ochoa intended to stay all proceedings, including the TRO, and made no specific, substantive ruling in response to the Department’s attorney’s telephone call. Because the Tribe did not request specific relief targeting the TRO, the only question before the Judge was whether all proceedings, including the TRO, were stayed. Insofar as the TRO is prohibitory in character, Judge Ochoa’s ruling in essence preserved the status quo among the parties at the time he issued the stay, which status quo will persist until such time as there is a ruling on the petition for coordination.

In a context where the miners had no notice of any application to *dissolve* the TRO, as opposed to simply staying it along with all proceedings, serious questions of due process of law would arise if the Department were to seek criminal prosecution of miners on the basis of the proceedings to date. Any ruling *dissolving* the TRO, as opposed to merely staying it along with the rest of the case, would constitute a gross abuse of discretion and may even be outside Judge Ochoa’s limited powers pending coordination of the actions.

That being said, the Department and Tribe may be expected to contend that the emergency regulation is now in effect, and that Judge Ochoa intended to dissolve the TRO. It is my understanding that the Department has thus far not attempted criminally to cite any miners for operations proceeding on the assumption that TRO remains in effect. In the event that the Department threatens to do so, it would be prudent to return to San Bernardino Court for clarification of the Judge’s intent.

Sincerely,



James L. Buchal