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MEMORANDUM

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

To: The New 49'ers Legal Fund
From: James L. Buchal
Date: January 22, 2015
Re: Supreme Court Grant of Review in Rinehart Case

On January 21, 2015, the California Supreme Court granted the State's petition for review of the Court of Appeals decision in *People v. Rinehart*. While we would have preferred that the Court of Appeals decision simply remain published and binding on Superior Courts in California, the Supreme Court rejected the State's alternative approach of simply de-publishing the opinion with no review, which would have left the Superior Courts with no guidance, and no immediate prospect of any guidance.

The grant of review has the potential to be positive for the mining community, because there is a reasonable chance that the Supreme Court will hold that § 5653.1 of the Fish and Wildlife Code is unconstitutional insofar as it flatly forbids the Department from issuing any permits. Specifically, the Court may take the approach we advocated before the Court of Appeals of striking down that statute now, as a matter of law, rather than remanding for further proceedings. This, in substance, is what Judge Ochoa has done in the San Bernardino litigation. (We do not expect Judge Ochoa to change his decision on account of the Supreme Court's decision to grant review.)

The primary attack on the Court of Appeals decision by the State and various amicus parties had to do with the Court of Appeals' instructions to the Superior Court on remand to consider, among other things, the degree to which regulation made mining commercially impracticable. This is a question that need not have been reached given the total ban on permits in § 5653.1.

Ordinary judicial prudence would counsel against issuing any abstract rulings on whether and to what extent specific permitting processes might be preempted unless and until an appropriate case arose where permits were available, but refused or conditioned on specific grounds. By holding § 5653.1 unconstitutional as a matter of law, the Supreme Court need not address any remand issues, or how specific permit conditions

should be reviewed, and can await a future case where such issues might appropriately be addressed.

For these reasons I am cautiously optimistic that the general principle of federal preemption of a refusal to issue permits will survive Supreme Court review, and that we will continue to make progress toward a workable permit system that is not unduly invasive of federal interests.

The briefing in the case should move rapidly, with the State required to file its opening brief within thirty days, our brief thirty days thereafter, and the State's reply brief twenty days later. We will probably be required to respond to one or more *amicus* submissions, and expect *amicus* submissions on our side as well. After the justices conclude that they have had sufficient time to consider the matter and that it is ready to be heard, it is scheduled for oral argument, which may take several months to a year. The written opinion then follows within ninety days of oral argument.

While the Court of Appeals decision remains in limbo during these proceedings, we expect further proceedings before Judge Ochoa within the next week to produce an order which may strongly affect how the 2015 dredging season in California plays out.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Buchal', with a stylized, cursive flourish.

James L. Buchal