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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

Coordination Proceeding Special Title (Rule 1550(b))	Judicial Council Proceeding No. JCPDS 4720
SUCTION DREDGE MINING CASES	**MINERS' JOINT REPLY TO KARUK OPPOSITION TO MINERS' MOTION FOR INJUNCTION**
	Judge: Hon. Gilbert G. Ochoa Dept.: S36 Date: June 23, 2015 Time: 8:30 a.m.
Included Actions:	
Karuk Tribe of California, *et al.* v. California Department of Fish and Game	RG 05211597 – Alameda County
Hillman, *et al.* v. California Department of Fish and Game	RG 09434444 – Alameda County
Karuk Tribe of California, *et al.* v. California Department of Fish and Game	RG 12623796 – Alameda County
Kimble, *et al.* v. Harris *et al.*	CIVDS 1012922 – San Bernardino County

Public Lands for the People, Inc. *et al.* v. California Department of Fish and Game	CIVDS 1203849 – San Bernardino County
The New 49ers *et al.* v. California Department of Fish and Game, *et al.*	SCCVCV 1200482 – Siskiyou County
Walker v. Harris, *et al.*	34-2013-80001439 – Sacramento County
Foley *et al.* v California Department of Fish and Game, *et al.*	SCCVCV-13-00804 – Siskiyou County

Summary of Argument

The Karuk Tribe and its allies provide this Court with an unparalleled collection of errors concerning the law, the history of these and related proceedings, and the effects of suction dredging. As to the law, every reported case is congruent with this Court's ruling, and there is no legal uncertainty militating against the grant of equitable relief. This Court found it unconstitutional to both require a permit (pursuant to § 5653 of the Fish and Game Code) and to refuse to issue any permits (pursuant to § 5653.1). The relief sought, barring the Department from demanding permits to operate, is a straightforward equitable remedy, in a context where the equitable powers of this Court are broad and flexible enough to implement Civil Code § 3423's command that every wrong should have its remedy. It is certainly not "illegal" for this Court to restrain enforcement against those miners operating in compliance with the 1994 regulations.

Nor will any significant environmental harm arise from the injunction. The Tribe's multitude of witnesses all sing the same old song of "potential", "possible," "theoretical," "could-be" effects. Their powerful biases are illustrated by their failure meaningfully to respond to the evidence presented in connection with this motion, and their total failure to offer any sense of any attempt to balance positive and negative impacts of suction dredging. They willfully ignore issues of scale and quantification. California law does not permit the Court to withhold a remedy on the basis of such speculation.

The Miners have proven their case for an injunction under multiple subsections of § 526 of the Code of Civil Procedure. They are being arrested for violations of regulations this Court has set aside, and in furtherance of the Department's illegal scheme. Their property is being seized. They are suffering massive and continuing economic loss, and the Tribe's suggestion that damages might somehow be paid for this is unsupported by any authority. Like the Department, the Tribe simply ignores case after case cited in our opening memorandum which establish that an injunction to avoid these economic injuries is a proper and long-standing remedy under California law.

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Argument

I. THIS COURT HAS POWER AND JURISDICTION TO ENTER THE REQUESTED INJUNCTION.

The Tribe acknowledges and even quotes this Court's holding striking down "the State's extraordinary scheme of requiring permits [pursuant to Fish and Game Code § 5653] and then pursuant to Fish and Game Code § 5653.1 refusing and/or being unable to issue permits for years" (Tribal Opp. 2; quoting Ruling at 19, 21.) Yet the Tribe claims that the Court "lacks authority to grant" relief against this scheme (Tribal Opp. 2) because it is "well beyond the jurisdiction of this court" (*id.* at 3).

This Court had and properly exercised jurisdiction to review the lawfulness of the entire "extraordinary scheme," as requested by the Miners, representing the impact of both §§ 5653 and 5653.1 of the Fish and Game Code working together. Section 187 of the Code of Civil Procedure generally provides that once jurisdiction is conferred on this Court, "all the means necessary to carry it into effect are also given".

"It has always been the pride of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication". *Times-Mirror Co. v. Superior Court* (1935) 3 Cal.2d 309, 331 (quoting *Humbolt Sav. Bank v. McCleverty* (1911), 161 Cal. 285). Indeed, "equitable relief is flexible and expanding, and the theory that for every wrong there is a remedy [Civ. Code § 3523] may be invoked by equity courts to justify the invention of new methods of relief for new types of wrongs". 11 Witkin, Summary of Cal. Law (9th ed. 1990), Equity, § 3, p. 681.

From this perspective, the various legal obstacles advanced by the Tribe are makeweights. Whether or not the 1994 regulations were repealed in 2012, this Court has power to include their provisions as conditions in a decree, and the Tribe offers no case to the contrary. The exercise of the Court's equitable powers does not require "compliance with the Administrative Procedures Act". (Tribal Opp. 1.)

Nor does the notion that the injunction might be "deleterious to fish" bar an injunction as a matter of law. The Tribe cites Departmental "admissions" in the consent decree case (Tribal Opp. 6) to suggest that permit issuance under the 1994 regulations would be deleterious to fish, but as we demonstrate in response to the Department, the judge made no such finding. Nor did the second Alameda County Judge make a "deleterious" finding; he premised his ruling on purely legal and CEQA issues. (*See* Tribal RJN Ex. B, at 9-10.) Only the Department has made such a finding (*id.* Ex. F, at 23), but neither the Tribe nor the Department offers any explanation of what "deleterious to fish" means in this context, or how that might be weighed by a court of equity.

The Tribe points out that the Department's own finding might bar it from issuing permits on a statewide basis. But this Court is not bound by limitations on the Department's permitting authority, and the injunction is not statewide, but limited to federal lands. The Miners do not ask the Court to compel the Department to violate the law; they ask that the Department be "commanded to develop and implement a program to issue suction dredging permits under regulations that do not stand as an obstacle to the full purposes and objectives of federal mining law". (Proposed Order ¶ 3.)

Moreover, federal law rejects the Tribe's extreme position that no mining can proceed if it is "deleterious" in any sense to any fish. The premise of federal mining law is that minerals must be extracted *in situ*, and whatever reasonable environmental mitigation measures may be imposed, they may not materially interfere with the mining. *E.g.*, 30 U.S.C. § 612(b). The State of California simply may not constitutionally insist that mining may only proceed if there is no environmental impact whatsoever—which we previously demonstrated was a standard uniquely imposed against suction dredge mining.

The "illegality" cases cited by the Tribe do not support its position. *People ex rel. Younger v. F.E. Crites*, Inc. (1975) 51 Cal.App.3d 961 primarily concerns the interpretation of § 526 of the Code of Civil Procedure and Civil Code § 3423. We demonstrated in our opening memorandum that these statutes did not prevent injunctions when the statutory scheme involved had been held unconstitutional; no such claim was made in the *Crites* case. The Tribe's other "illegality" case demonstrates that "execution of [even] a constitutional statute sought to be

unconstitutionally applied may [also] be prevented by injunction". *Downey v. California State Board of Pharmacy* (1948) 85 Cal.App.2d 30, 36 (citing *Brock v. Superior Court* (1939) 12 Cal.3d 605, 609-610). In short, there is no legal bar to the injunction.

II. THERE IS NO LEGAL UNCERTAINTY TO BAR ENTRY OF AN INJUNCTION.

Lacking any legal obstacle to the injunction, the Tribe asks this Court to rely on the *Rinehart* case to find "uncertainty" in the law. The case "must not be cited *or relied on* by a court or party". CRC Rule 8.1115(a) (emphasis added). *Every* reported case addressing state-law-based refusals to issue permits to mine on federal lands has found preemption. *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998); *Brubaker v. Board of County Commissioners*, 652 F.2d 1050 (Colo. 1982); *Elliott v. Oregon Int'l Mining Co.*, 654 P.2d 663 (Or. Ct. App. 1982); *see also Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980); *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984). There is no reason for this Court to imagine that its own opinion, built upon this framework is uncertain.

The Tribe also asks the Court to consider its latest legislative "water quality" initiative, seeking yet another permitting regime for suction dredge mining, as a reason to refrain from issuing an injunction. As we demonstrate in the reply to the Department, this Court has already determined that the water quality issues are not part of this litigation. Further baseless attacks on suction dredging mining may be dealt with in further proceedings.

The Tribe even ignores this Court's Order granting summary adjudication, which struck down § 5653.1 and the 2012 regulations in their entirety, by imagining that further guidance is needed to figure out which portions of the regulations "survived" notwithstanding the order. (Tribal Opp. 8.) *None did.* While an appropriate equitable remedy will properly "preserve residuary constitutional applications" of a statutory scheme (*id.* (citing cases)), the Miners seek an appropriate remedy in the Proposed Order by preserving the 1994 framework—other than the permit requirement. In substance, the Tribe is moving for reconsideration of the Court's January ruling, or making its arguments on appeal, which have no place here.

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III. THE MINERS ARE SUFFERING IRREPARABLE HARM.

The Tribe claims that the Miners had a "duty to comply with Fish and Game Code § 5653" (Tribal Opp. 9), even though this Court held that scheme of requiring permits pursuant to § 5653, and refusing to issue them pursuant to § 5653.1, was against the law. The Tribe then asserts that arrests of miners for want of a permit are not irreparable injury.

It should be noted that the Department is not merely enforcing the § 5653 permit requirement. Miners have also been cited for violations of § 5653.1, for violation of specific provisions of the 2012 regulations this Court struck down, and for possession of a dredge within 100 yards of water closed under those regulations. (*E.g.*, Buchal Decl. Ex. 3, at 3; Gilliland Decl. ¶ 5 & Ex. 1; Jones Decl. Ex. 1.) The Miners are not engaging in any "wrong;" it is the Department that is engaging in a wrong by enforcing provisions of law set aside by this Court.

Moreover, the Tribe misunderstands the "no one can take advantage of his own wrong doctrine" as set forth in *Wilkins v. San Bernardino* (1946) 29 Cal.2d 332. The question in *Wilkins* was whether plaintiff could build in violation of the zoning ordinance and then resist enforcement on the grounds of the hardship of the teardown. *See id.* at 335. The resulting rule of law was that the validity of the zoning ordinance was to be evaluated without regard to the hardship. This Court has already found the permitting scheme invalid without regard to arrest and other hardships to the Miners. The Miners are not seeking any unfair advantage, but a decree effectuating their rights as already determined by the Court.

As to economic harm, the Tribe quibbles with the weight of the evidence, The Tribe's evidence concerning lack of harm to the local communities is based on the testimony of a store owner where the mining was shut down. (McCracken Reply Decl. ¶ 8 (responding to Hatten Decl.)). The fisherman's testimony of how salmon "can be adversely affected" by suction dredging (Bitts Decl. ¶ 6; *see also id.* ¶ 15 (impact "could" occur)) is uninformed speculation, and does not begin to prove any economic losses have ever arisen, or would ever arise, from suction dredging. Mr. Bitts does not and could not testify that the shutdown since 2009 has improved his business one iota. The "increased . . . quality of our client's river [rafting] experience" since 2009 doesn't prove economic effects either. (S. Anderson ¶ 4.)

In our opening memorandum, we cited numerous cases addressing unconstitutional interference with future economic gain, confirming equitable relief is appropriate. The Tribe does not even attempt to distinguish these cases, instead suggesting that miners might merely estimate how much gold they might have extracted (ignoring the fact that some had no prior operating experience), and then somehow recover damages. This is obviously a case where "it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief". Code of Civil Procedure § 526(a)(5).

IV. THE TRIBE'S PUBLIC INTEREST ARGUMENTS DO NOT MILITATE AGAINST ENTRY OF AN INJUNCTION.

The Tribe claims that multiple courts and agencies find suction dredging to "cause grave environmental harm" (Tribal Opp. 1). Such baseless rhetoric is precisely why some *quantification* of harm is vital. Under federal mining law and policy, which governs the public interest determination, the relevant question is whether the Tribe has identified some sort of harm that might be reasonably mitigated without materially interfering with mining. The Tribe has not even attempted to do so, and the evidence it does present does not begin to show "grave" harm.

A. There Remains No Proof a Single Fish Will Die.

None of the witnesses provide any indication of the *magnitude* of the asserted effects, offering nothing but a hail of adjectives concealing the extraordinary position that any encounter between a fish and a human is "deleterious to fish," even if it results in the fish swimming away. The witnesses remain willfully blind to the question of scale, regarding, perhaps as a matter of faith, *any* effect as being of grave concern, without regard to its magnitude. Moreover, none of them offer testimony specific to the scope of dredging under the injunction, but rather irrelevant testimony concerning unregulated dredging. (*See* Reply Green Decl. ¶¶ 2-6.)

The Tribe's lead witness, whom the Tribe dubs "California's most respected and preeminent fish biologist Dr. Peter Moyle" (Tribal Opp. 13), is an environmental activist with such extreme views and ideologically-tainted view of reality that he has opined that logging in the Pacific Northwest will cause the trees to "run out". (2d MRJN Ex. 3.) He complains that dredging is a "chronic unnatural disturbance" without even bothering to account for the evidence

that this disturbance, like plowing a field, can increase ecological productivity. (Reply Decl. Greene ¶ 12.)

A further sign that neither Dr. Moyle nor any of the other witnesses should be regarded as even-handed scientists is that they do not offer any reasoned response to the numerous *beneficial* effects of suction dredging set forth in the Joseph Greene Declaration and, in many cases, previously acknowledged by the Department.[1] Greene provided reasoned explanations of how phenomenon with potential negative impacts—*e.g.*, the existence of tailing piles, turbidity—have positive benefits as well, and noted that no efforts have been made to assess the *net* impact. (*See generally* Greene Reply Decl. ¶¶ 7-14.)

The Tribe does not and cannot dispute the only quantitative study showing no significant impacts (by Professor Bayley), other than to complain that the data "were not sensitive to the local impacts of dredging". (Moyle ¶ 19.) It may be disappointing to Professor Moyle that data do not display his ideologically-driven ecological sensitivity, but data are objective measurements, and those measurements, unlike the biased opinions of sensitives, shows no effect on fish populations. Dr. Duffy complains the study was "inconclusive" (Duffy ¶ 31), meaning it did not prove zero effects of suction dredge mining—but it did prove that the effects were insignificant. The Tribe's grossly mischaracterizes the testimony concerning this study in its memorandum. (Tribal Opp. 15.)

Notwithstanding the weight of paper filed, the Court is left with no evidence that so much as a single fish or fowl would die as a result of suction dredging—in a context where Mr. Bitts and his friends are permitted to kill hundreds of millions of dollars' worth of salmon for commercial gain (Bitts Decl. ¶ 7), and sportsmen on the Klamath can kill and keep up to nine adult salmon right now, in assertedly critical conditions (2d MRJN Ex. 1).

B. No Humans Will Die Either.

As expected, the Tribe highlights a short-term and utterly insignificant risk that some

[1] Professor Moyle does acknowledge that dredgers provide fish food, but complains that the fish eating the food are usually the more common rainbow trout (Moyle ¶ 15), as if that nullified the benefits of a greater food supply for the less common fish as well.

dredgers may encounter mercury while performing the highly beneficial service of removing nearly all of it they might encounter from the rivers. The Tribe concedes that dredgers remove 98% of the mercury, but complains that the remaining 2% is "hazardous waste".

There is no hazard here sufficient to invoke public interest as a basis for denying an injunction. Testimony about "health risks" has little meaning in a context where no human being has ever suffered mercury poisoning from eating California fish and all available data indicates that this will never happen. (Wise Reply Decl. ¶¶ 7-23 (explaining selenium protections).) The one or two reservoirs in California with "do not eat" advisories" (Monahan Decl. at 10), they are closed under the 1994 regulations and have nothing to do with this motion. (Wise Reply Decl. ¶ 10.) Dr. Monahan's testimony that "California rivers and streams . . . are impaired for mercury" (*id.* at 18) is a gross overstatement. (*See* Wise Reply Decl. ¶¶ 2-3.)

There is no dispute that mercury is constantly moving downstream from historic deposits (*e.g.*, Monahan Decl. at 5) and that mercury levels spike with increased river flows; facts utterly inconsistent with the Tribe's assertion that mercury would remain locked in riverbeds forever but for suction dredging. (Tribal Opp. 17.) Nor is there some special mechanism by which dredges might release mercury that makes it more dangerous than the mercury released from erosion (*id.*); rivers are highly dynamic environments that grind rocks round—as well as grinding mercury. It has at all relevant times been obvious that allowing the dredgers to clean the environment is in the public interest.

The opposing witnesses do not deign to respond to the detailed testimony of Ms. Wise, Mr. Maksymyk and Dr. Seal explaining in detail why assertions that dredges will "flour" mercury, or dredging will appreciably increase background mercury levels, are just wrong. (*See* Wise Reply Decl. ¶¶ 4-6.) The Miners' witnesses have described in detail how the USGS Fleck 2011 report, which forms the cornerstone of Dr. Monahan's testimony, was irredeemably flawed. Dr. Monahan's defense of the work of Dr. Alpers is simply misinformed, and there remains no basis for relying upon the work, the cornerstone of the mercury attack orchestrated by the Water Board and the Sierra Fund that employs Dr. Monahan. (*See generally* Maksymyk Reply Decl.)

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C. Intangible Harm to Cultural Resources Does Not Outweigh Harm to Miners.

The Tribe's response confirms that its real interests do not involve cultural resources protected under any statute, such as Native American graves, or historical artifacts, but the fiction that federal land (not a reservation) is somehow a "Traditional Cultural Property" of the Tribe.[2] The Miners are the only user group with actual property rights, in their mining claims, to access federal lands.

The "intrusion of non-local or non-tribal persons" (Tribal Opp. 19) onto federal lands is done as a matter of right. The notion that the Tribe has inchoate regulatory authority to approve "appropriate time and place restrictions" is a bald assertion of power without legal foundation, and without significance to the resolution of this motion.

Mr. Hillman complains in generalities of "physical interference, interruption, and disturbance of Karuk religious ceremonies." (Hillman Decl. ¶ 10). This testimony is at best not specific enough to weigh in the scales of equity and at worst entirely misleading. (*See* McCracken Reply Decl. ¶¶ 32-37.) It would be patently unreasonable to require that miners accommodate "individual religious spiritual practices" (Hillman Decl. ¶ 8) by structuring their conduct so that individual members of the Tribe need never hear the distant sound of a dredge (*see id.* ¶ 10 (complaining of "audio disturbance")).

D. Karuk Assertions Concerning Birds and Noise Are Not Reasons To Deny the Injunction.

The Tribe's bird witness continues the pattern of offering unsubstantiated generalities without dealing with the extraordinarily-limited overlap between birds in the air and dredgers underwater. (I. Anderson Decl. ¶ 6.) Nor should a forester who complains that the miners need not identify spotted owl sites though he has to—*because he cuts down trees*—distract the Court. (Suter Decl. ¶ 6.) There is not a shred of evidence that any dredger will kill a bird, while windmills favored by environmentalists slaughter them constantly.

[2] The Tribe references CEQA provisions requiring consultation with respect to "tribal cultural resources" (Tribal Opp. 19), but this term is defined by statute to mean registered historical resources of limited scope, not "Traditional Cultural Properties". *See Public Resources Code* § 21074(a); *see also* 14 Cal. Code Regs. § 15064.5(a)(3) (no use of this term).

As to noise, injunction proceedings are not open-ended inquiries where legal rights may be nullified because of elite aesthetic preferences concerning experiences when visiting federal lands. The Tribe does not identify any authority for the proposition that a court of equity may restrict lawful activities merely because they make noise. All human beings make noise.

V. THERE IS NOT NEED FOR DETERMINATIONS ABOUT THE FEDERAL STATUS OF LAND.

Anyone can determine when they are driving into a National Forest, and almost anyone can tell when they are on BLM land—both are posted. There is no dispute that the federal government has issued mining claims to the Miners—"property in the fullest sense of that term," *Wilbur v. U.S. ex rel. Kruchnic* (1930), 280 U.S. 306, 316—and those similarly situated within such lands. The Tribe nonetheless argues that further proceedings are required to demonstrate that miners operating on National Forest lands and BLM lands are on federal land.

No such proceedings can occur. Under established precedent, this Court must take judicial notice that the U.S. Bureau of Land Management does not issue mining claims on state land, and even if it did, no party can challenge title of the United States in these proceedings. *See Livermore v. Beal* (1937) 18 Cal.App.2d 535, 545; *Monolith Portland Cement Co. v. J.R. Gillbergh* (1954) 129 Cal.App.2d 413, 419-20. [3]

Conclusion

For the foregoing reasons, and the reasons stated in our opening memorandum, this Court should grant the Miners' requested injunction.

Respectfully submitted,

DATED: June 17, 2015

DAVID YOUNG
Attorney for Plaintiffs/Petitioners Kimble et al. and PLP et al.
(Excluding Petitioners/Plaintiffs Maksymyk and WMA)

[3]The United States would obviously be an indispensable party to quiet title proceedings, and they can only occur, pursuant to 28 U.S.C. § 2409a, *in federal court*. 28 U.S.C. § 1346(f). And even if such proceedings occurred, and title were awarded to the State of California, the State would take the lands subject to extant mining claims (*see* 28 U.S.C. § 2409a(j)), raising the same preemption issues.

DATED: June 17, 2015

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PROOF OF SERVICE

I, Carole A. Caldwell, 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 within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On June 17, 2015, I caused the following document to be served:

MINERS' JOINT REPLY TO KARUK OPPOSITION TO MINERS' MOTION FOR INJUNCTION

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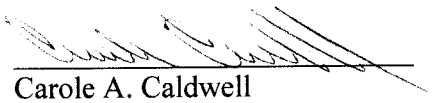

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