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MEMORANDUM

To: Dave McCracken, The New 49'ers Legal Fund
From: James L. Buchal
Date: October 18, 2017
Re: *In re Suction Dredge Mining* (San Bernardino Cty.)

As you may recall, the Court has repeatedly delayed resolution of several outstanding motions and issues, most of which were filed more than a year ago. These issues include: (1) the miners' attacks on the SEIR and 2012 regulations as violating CEQA and the APA; (2) the miners' "one subject" attack on AB 120 and SB 1018; (3) whether the Court should vacate its prior federal preemption decision in light of Rinehart; and (4) whether the takings claims should be dismissed as a matter of law.

Yesterday, shortly before noon, Judge Ochoa issued a tentative ruling, which appeared to reject the state's attempt to establish that there can never be a takings case for unpatented mining claims, but to deny our "one subject" motion. The tentative ruling seemed to ignore the CEQA/APA briefing entirely, and it was evident that the Court had not read all of the "one subject" briefs as well. In the tentative ruling, the Judge seemed to think that AB 120 and SB 1018 made no changes in substantive law, and therefore did not violate the "one subject" rule. Worst of all, he seemed convinced that somehow, because water quality permits were not yet available under SB 637, the miners could make no claims at all, because winning the case now would now not get them back in the water.

I traveled down to San Bernardino for the hearing, and after some delay, the Department sought an audience with the Judge in chambers. He confirmed that he had been unaware of the earlier CEQA/APA briefing and had not read all the "one subject" briefs. He also reaffirmed his view that somehow, SB 637 excused any need to resolve all these issues, which the Department resisted to the extent they were seeking guidance on the CEQA/APA issues. As to the taking claim, the Department threatened the Court with further hearings and a long trial if he did not dismiss it. After some discussion, the Judge declared that we might as well argue all the issues in open court, including the CEQA/APA issues. By this time, there was so little time left that he declared we could only have half an hour or so to argue, plus, perhaps, some rebuttal time.

Back in the courtroom, I outlined the history of how AB 120 and SB 1018 were substantive interferences in the consent decree/EIR process, and a perfect example of the sort of special interest legislation the "one subject" rule was invented to stop. And I explained that these cases had been filed long before SB 637 took effect, and that the Judge had resisted our attempt to bring the water quality issues into the case. The Department responded by misrepresenting the law of the "one subject" rule,

and, ironically, agreeing with me that it was not entirely satisfactory to declare that the miners lacked standing because of SB 637, because we would just be back again later when the Water Quality Board finally finished its process.

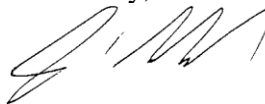
I then turned to CEQA and APA, but by then I had only fifteen minutes left, so I gave a highly abbreviated version of the argument, referring Judge Ochoa to the briefs for further guidance. The Department made the standard argument that the Court must believe anything it said (“a high degree of deference”). The Judge seemed somewhat uninterested in the argument, and asked the Department why the Karuk Tribe had been willing to walk away from the litigation, presumably believing its interests were adequately protected by SB 637. The Department had no answer. (Later on, the Tribal attorney, listening in, tried offer an answer, but I objected that they were no longer parties, and the Judge did not allow the Tribal attorney to speak.)

The Department then argued the takings motion, making some rather spectacular misrepresentations that unpatented mining claims were not property at all, and misrepresenting the cases involved. I had the apprehension, which will hopefully not be proved correct, that the Department’s threat to draw out the takings litigation might be pushing Judge Ochoa away from his tentative ruling in our favor.

In particular, my fear is that it will prove overwhelmingly attractive for the Judge to just string together a series of words that throw out the takings and “one subject” claims, and excuse himself from wrestling with the complex CEQA/APA claims. I closed by begging that if we could not stop the relentless legal and regulatory changes wiping us out, the minimal requirement of justice was that we be compensated when the mining claims were seized for fish reserves. I found it particularly discouraging when he complimented all of us on the quality of our advocacy, as if he were done with us, and the only remaining recourse was with the Court of Appeal.

A ruling is expected in a couple of months.

Sincerely,

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

James L. Buchal