No. S222620

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

BRANDON LANCE RINEHART,

Defendant and Appellant.

Third Appellate District, Case No. C074662
Plumas County Superior Court, Case No. M1200659
Honorable Ira Kaufman, Judge

DEFENDANT AND APPELLANT'S MOTION FOR JUDICIAL NOTICE

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April 21, 2015

Appellant hereby moves, pursuant to Evidence Code §§ 452 & 459, and California Rules of Court 8.252(a) and 8.520(g), for judicial notice of the following attached documents:

Federal Materials

Exhibit 1 is the case of *In re Shoemaker*, 110 I.B.L.A. 39 (July 13, 1989).

Exhibit 2 is a high-level administrative appeal from an adverse decision by the Tahoe National Forest Supervisor to the Deputy Regional Forester dated February 11, 2011.

Exhibit 3 is an opinion of the Office of the Solicitor, U.S. Department of Interior dated November 14, 2005, concerning regarding legal requirements for determining mining claim validity before approving a mining plan of operations.

State Materials

Exhibit 4 is Excerpts of the Suction Dredge Permitting Program Draft Subsequent Environmental Impact Report of the California Department of Fish and Game dated February of 2011.

Exhibit 5 is Senate Bill No. 637, dated February 27, 2015.

Exhibit 6 is ruling on cross-motions for summary judgment finding § 5653.1 preempted by operation of federal law in *In re Suction Dredge Mining Cases*, Coordinated Case No. JCCP4720 (San Bernardino Cty. Jan. 12, 2015).

Why the Matter To Be Noticed Is Relevant to the Appeal.

This material is relevant to the appeal first because this appeal concerns California's regulation of mining on federal land, a matter that is also regulated by the federal government. The exhibits consist of (1) an opinion of the Interior Board of Land Appeals construing statutory provisions pertinent to this case; (2) an opinion of the U.S. Forest Service concerning statutory provisions pertinent to this case;[1] and (3) an opinion of the Office of the Solicitor, U.S. Department of Interior, concerning statutory provisions pertinent to the case. All of these materials inform the Court concerning the construction of the federal statutory provisions bearing on the question of preemption.

The remaining exhibits pertain to state law, and concern (4) a CEQA document issued by the Department of Fish and Wildlife in February 2011, which then became the target of the July 2011 amendment of Fish and Game Code § 5653.1; (5) a copy of SB 637, submitted to refute the People's claims in its Opening Brief (at 32-33) concerning "legislative expectations" with respect to suction dredging; and (6) an unpublished ruling of the Superior Court handling the

[1] The U.S. Forest Service regulates mining on federal land under regulations set forth at 36 C.F.R. Part 228. Those regulations provide, under certain circumstances, for Forest Service approval of a "Plan of Operations" for miners. See 36 C.F.R. §§ 228.4-228.5. If the Forest Service proposes terms for a miner's Plan of Operation that the miner regards as unreasonable, the miner is permitted to pursue administrative appeals within the Forest Service. 36 C.F.R. § 251.82(a)(4).

coordinated *Suction Dredge Mining Cases*, relevant to show that the constitutionality of § 5653.1 has been decided adversely to the People, and that the People have acknowledged that there is no date by which permits might issue (*cf.* Rule 8.1115(b) (res judicata and collateral estoppel)).

Whether the Materials Were Presented to the Trial Court

Only Exhibit 3 was presented to the trial court as Defendant's Second Supplemental Request for Judicial Notice on or about February 1, 2013, and no ruling was made on the Request.

Why the Matter Is Subject to Judicial Notice.

Evidence Code § 452(c) provides for judicial notice of the "official acts of the . . . executive . . . departments of the United States and of any state of the United States". All materials submitted herewith constitute official acts of either federal or state executive departments.

The Court of Appeals denied all parties' requests for judicial notice of on the ground that the materials had not been presented to the trial court. (Order filed Sept. 16, 2014.) However, Rule 8.252(a)(2)(C) permits an appellate court to consider material not presented to the trial court if otherwise "subject to judicial notice under Evidence Code §§ 451-53". *See also* Evidence Code § 459(a) ("reviewing court may take judicial notice of any matter specified in Section 452").

Whether the Matter Relates to Post-judgment Proceedings.

There are no post-judgment proceedings relevant for purposes of Rule 8.252(a)(2)(D). All of these materials predate Rinehart's conviction with the exception of SB 637 and the ruling in the *Suction Dredge Cases*.

Conclusion

For the foregoing reasons, Rinehart's requests for judicial notice should be granted.

Dated: April 21, 2015.

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Editor's note: 96 I.D. 315; Reconsideration denied by Order dated Oct. 10, 1989

ROBERT E. SHOEMAKER

IBLA 87-340 Decided July 13, 1989

Appeal from a decision of the District Manager, Medford District Office, Bureau of Land Management, rejecting a mining claimant's request to remove stream improvement structures placed by BLM under authority of the Surface Resources Act. OR MC 033947.

Affirmed as modified.

1. Mining Claims: Surface Uses--Surface Resources Act: Management Authority

   Fish and fish habitats are "other surface resources" which the Department of the Interior has authority to manage on the surface of mining claims under subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982).

2. Mining Claims: Surface Uses--Surface Resources Act: Management Authority

   The Surface Resources Act granted Federal agencies authority to manage and dispose of the resources found on the surface of mining claims. When Federal management of surface resources conflicts with the legitimate use of the surface or surface resources by a mineral locator so as to endanger or materially interfere with prospecting, mining, or

processing operations, or uses reasonably incident thereto, Federal management must yield to mining as the dominant and primary use.

110 IBLA 39

3. Mining Claims: Surface Uses--Surface Resources Act: Management Authority--Words and Phrases

"Endanger" and "materially interfere." The terms "endanger" and "materially interfere" used in subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), set forth the standard to be applied to determine whether a specific surface management action must yield to a conflicting legitimate use by a mining claimant. Where there is no evidence that such action endangers the claimant's operations, the question is whether the surface management activity will substantially hinder, impede, or clash with mining operations or a reasonably related use.

APPEARANCES: Robert E. Shoemaker, pro se.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Robert E. Shoemaker (Shoemaker) has appealed the January 22, 1987, decision of the District Manager, Medford District Office, Bureau of Land Management (BLM), rejecting a request to remove stream improvement structures placed by BLM on the Treetopper I placer mining claim, OR MC 033947, or be compensated for the loss of his mining rights. 1/ The claim was located by Robert E. Shoemaker and Jerry McLean on May 23, 1980, and occupies the SE^ SW^, sec. 27, T. 35 S., R. 7 W., Willamette Meridian, in Josephine County, Oregon. Maps in the case file show Pickett Creek to

1/ The decision states that the claimants have the right to appeal the decision "to the State Director, and thereafter to the Board of Land Appeals of the Department of the Interior." Appellant's notice of appeal was addressed to the district manager and was forwarded to the Board with the case file. It appears that BLM may have had in mind appeal procedures established under the surface management regulations. See 43 CFR 3809.4. Those regulations, however, are not applicable here because the decision on appeal concerns actions taken on the surface of a mining claim by BLM rather than the requirements imposed on mineral locators by 43 CFR Subpart 3809.

cross the claim diagonally, flowing from the southwest corner of the claim to the northern border near the northeast corner.

During the summer of 1986, BLM constructed 10 fish weirs in Pickett Creek within the Treetopper I's boundaries. A BLM report of a December 1, 1986, inspection it conducted after Shoemaker complained about the structures, describes them as follows:

> Each structure is composed of 2 foot diameter logs placed diagonally and perpendicular to the flow of the creek and tied into the banks with cables. Gravel was placed on the upstream side of most logs for spawning beds. Spacing of the structure is as shown on the attached map. The area affected by the structure is a three foot deep pool 10-15 feet long below the logs and up to 18 inches of gravel above the structure for 20 to 40 feet, depending on site conditions. There is an average of 60 feet of natural, undisturbed stream bed between each structure.

Included in the report are engineering diagrams of "typical" installations. Eight of them are "reverse log V installations" which consist of two 2-foot diameter logs placed to form a "V" pointing upstream. The logs are secured to each other, and to anchor trees or stumps on the stream banks or in the stream bed, with three-eighths-inch galvanized cable. The diagram of this kind of installation shows, instead of gravel, two rows of 18-24-inch diameter rock, individually placed, along the upstream side of each side of the "V," and a minimum of four cubic yards of rock fill, including boulders, on the downstream end of each of the logs that form the "V." A triangular pool approximately 15 feet from apex to base is formed or excavated immediately downstream of the apex of the "V." The design calls for an additional "cull" log to be placed and secured behind and parallel to one side of the

"V" and another "deadman" log to be buried in the streambed upstream of the point of the "V." The other two installations, one a "log sill," the other a "digger log," are also depicted as constructed of anchored logs and rock fill, except they are placed perpendicular to the flow of the creek.

The case file contains a copy of a Mining Feasibility Study of the claim done by Shoemaker, presumably in support of his original November 1986 complaint about the installation of the weirs. 2/ Shoemaker estimates that Pickett Creek is approximately 1,490 feet long as it crosses his claim. Of this, he estimates he had mined approximately 235 feet and that 322 feet of the remaining 1,255 feet of streambed have been covered by BLM's gravel. He says the water levels have been raised behind the weirs. As a result, in his view, a different type of mining equipment will have to be bought and ground sluicing will be eliminated, thus making these parts of the claim, i.e., those behind the weirs, "less economical to mine -- more work for the same amount of gold" (Study at 5). He estimates the gravel at "upwards to +4 ' feet thick near the weirs and down to 4"-6" inches deep at there ends [sic]." "During heavy rains and flood[s] there is no doubt that this gravel will move down stream covering and inter-mixing with gold bearing gravel making it increasing[ly] less economical to mine" (Study at 6). Shoemaker also comments that because of the weirs "gravel movement [through the] claim will come to a standstill, the bottom half will have little to no gravel bearing gold [sic] movement and the top end of claim will have stagnate

2/ Neither the case file submitted to the Board by BLM in response to Shoemaker's appeal nor the file for the mining claim submitted in response to our order of June 14, 1989, contains the original of this document, so the apparent color coding of the accompanying maps cannot be read.

[sic] movement" (Study at 8). Finally, Shoemaker explains that they began by working the claim at the upstream (southern) end but then shifted to the downstream end, where they found better deposits, and worked upstream. "But also sniping th[r]oughout the whole claim has been done, finding pockets with dredge, sl[u]ice box, and by panning" (Study at 9).

BLM conducted the December 1, 1986, inspection mentioned above "to determine if, in fact, those fishery improvements were materially interfering with the claimants[']activities." BLM describes Pickett Creek as follows:

> There is almost no gravel over bedrock which makes it easy for operating a suction dredge "sniping" for gold along bedrock. The natural water depth during summer is less than two feet. * * * [T]here are very little deposits outside the stream banks. Bedrock strikes at various angles but nearly perpendicular to the stream flow, forming natural riffles. The rock is highly fractured graphite shale-siltstone.

The author of the report comments that small suction dredges cannot work very much ground, and estimates that Treetopper I's claimants "couldn't possibly dredge more than 50 to 75 feet of their claim in a single operating season." "There are approximately 1,119 feet of exposed unaltered streambed not affected by fish structures on the claim, representing 73 percent of the stream length. This situation suggests that there is an adequate area in which to operate," the author observes. As to Shoemaker's concerns about raised water levels and increased costs, the report responds:

> 1. * * * [T]he water level is only raised a foot near the structure which may be to his benefit during his operating period.

The higher water level will extend the area to operate his suction dredge.

2. There is, at most, 18 inches of gravel over the natural gravels where the log weirs have been placed. The BLM is not restricting the claimant from mining through those gravels, and we recognize there is some minimal amount of additional effort to remove those gravels. This might be interpreted as materially interfering, but remember the bureau requires other operators to comply with state environmental regulations which attaches additional costs to miners for reclamation work or operating methods. * * * [W]e feel that our structures do not violate his rights and do not prevent him from mining his placer claim. [3/]

BLM's January 22, 1987, decision rejected Shoemaker's concern that the weirs would prevent new gold from migrating onto his claim. "[I]n fact, any gold that might migrate downstream will be trapped by the structures on your claim. The BLM does not object to you mining the gravels collected behind the log weirs," the decision stated. The decision also rejected his concerns about raised water levels and increased costs:

Our mineral examiner has found that the water level will not be significantly raised and that although we have placed gravel above the logs, there is ample area remaining on your claim that the structures have not affected. Furthermore, the amount of increased effort required on your part at or adjacent to the structures is not that significant. Because of the nature of the placer deposit on your claim, you are limited to use of portable suction dredge and hand tools for mining on your claim. We believe for this form of mining there is ample undisturbed stream bed available to you.

3/ The Dec. 1, 1986, inspection report concludes:

"The BLM fishery habitat improvement program is an essential program to revive the fishery population which has been so severely impacted by both logging and placer mining over the past 100 years. We believe that the fishery program and mining activities can co-exist and do co-exist over most of the district. It is, however, unfortunate that a small minority of the mining community will always be present which will not cooperate with federal programs."

The decision concluded with an expression of regret that Shoemaker was not notified of BLM's intention to install the weirs before they were installed. "In the spirit of cooperation, we are willing to work with you to remove a few of the structures to expand some of your working area to expose more bedrock," the decision stated, and suggested meeting to discuss what measures could be taken "to reach an amicable agreement."

The case file also contains a document, prepared by a Medford District fishery biologist, entitled "Pickett Creek Position Paper" and dated February 11, 1987. 4/ This paper explains that BLM places logs and boulders in selected stream segments in order "to create deep pools for young fish to live in and provide better spawning habitat for adult fish." "Occasionally,

4/ This document was placed in the file after BLM made its decision but before Shoemaker filed his notice of appeal on Feb. 18, 1987.

"The Board of course finds it helpful to have the kind of background and analysis that BLM provided in this case, either directly or via the Office of the Solicitor, and welcomes its submission. * * * If it is placed in the file after BLM makes its decision but before a person files a notice of appeal, there is no regulation requiring that it be sent to affected parties; nevertheless, in fairness BLM should mail a copy of it to such persons at the time it is placed in the file so that they may consider it in deciding whether to appeal the decision and what to say in a statement of reasons."
Amoco Production Co., 101 IBLA 152, 156-57 (1988).

Cf. Metropolitan Water District of Southern California, 109 IBLA 327, 329 n.2 (1989):

"BLM is advised that, under 43 CFR 4.27(b)(1), it is required to furnish appellants copies of all communications that concern the merits of the appeal and that are placed into the official record after the notice of appeal is filed. This includes not only answers and other pleadings filed with the Board, but also copies of memoranda that are not addressed directly to the Board, because we will nevertheless have them before us in the file as we consider the appeal. Appellant is normally to be provided the opportunity to respond to such communications by BLM. 43 CFR 4.27(b)(1). In the present case, we choose not to delay our decision by requiring service of this memorandum. However, BLM is further advised that failure to comply in the future may, in appropriate circumstances, result in the imposition of sanctions against it. 43 CFR 4.27(b)(2)." These statements apply to BLM's Chronology of Events in this case, which was placed in the case file after the filing of the appeal.

as in the case of Pickett Creek, we also place gravel so that spawning areas are available immediately. * * * In some cases, Pickett Creek for instance, we've dug and blasted pools in bedrock to try to improve on a natural condition." "Anadromous fish belong to everyone and in part are dependent on public land," the paper continues:

> We have identified specific potential project sites throughout the district. It would be irresponsible for us to avoid an area just because it contains a mining claim, especially since * * * Public Law 167 (Multiple Use Act) gives us the authority to manage surface resources, interpreted by us to include water and fisheries, on mining claims to the extent that our activities do not materially interfere with prospecting, mining or processing operations.

The paper enumerates several reasons why its author does not believe BLM's management significantly affects Shoemaker's claim. In addition to those mentioned in the inspection report summarized above, the paper suggests the series of log structures "may actually act as a riffle board, trapping any gold that may work its way downstream onto the claim during high winter streamflow."

Appellant's notice of appeal states that previously Pickett Creek "was a very economical mining creek because there was so much bedrock outcropping throughout the claim. It acted as a big sluicebox catching gold and washing out (off) waste rock down stream * * *." Now, appellant says:

> The fish weirs placed over our claim clog the movement of gravel through the claim. The road gravel behind the weirs completely bury the gold burying [sic] gravel. With the weirs in, the water take behind them is raised. It wouldn't be as bad with weirs catching native gravel behind them but with weirs with road gravel dumped behind them, * * * [t]he heavier matter [e.g., placer gold]

> will be caught in the round gravel and trapped working its way down to the bottom, but with +200 yards of gravel to move before reaching the gold bearing gravel will make it highly impractically [sic] and economically unfeasible to mine.

Appellant states that the "bottom two weirs are over considerable gravel beds."

Appellant contends that placement of the structures in Pickett Creek was "an infringement on my basic mining rights, granted in 1872 and revised under the Public Law 167 of 1955," i.e., granted by the Mining Act of 1872 and "revised" by section 4(b) of the Surface Resources Act of 1955, P.L. 84-167, 69 Stat. 367, 368-69, codified at 30 U.S.C. § 612(b) (1982). He also says Or. Rev. Stat. § 517.520 "was not followed." 5/ Shoemaker says the weirs of his choice should be removed or he should be awarded compensation for the loss of his rights.

Section 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), provides:

5/ Appellant cites the Oregon statute as "State Law § 108-504" and gives its title. The section of the Oregon statutes which bears the title "Maintenance of fishing conditions; cooperation of placer and fishing interests" is section 517.520 and is part of a statute establishing and granting powers to the Rogue River Coordination Board. See Or. Rev. Stat. §§ 517.510-517.550. The statute gives that Board jurisdiction over placer mining operations on the Rogue River and its tributaries and authorizes it to regulate placer mining operations for the mutual benefit of placer mining interests and fishing interests. Pickett Creek is a tributary of the Rogue River. The report of BLM's Dec. 1, 1986, mining inspection states: "The new state regulations for operating dredges within the stream channel precludes mining on tributaries to the Rogue River between September 15 and June 15, except where the Oregon Department of Fish and Wildlife grant a waiver. Mr. Shoemaker was not granted a waiver." No copy of these regulations is contained in the case file.

> Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto * * *. [Emphasis added.]

[1] The phrase "other surface resources," underlined above, is ambiguous. United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277, 1280 (9th Cir. 1980); United States v. Richardson, 599 F.2d 290, 294 (9th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); United States v. Curtis-Nevada Mines, Inc., 415 F. Supp. 1373, 1375, 1377 (E.D. Cal. 1976). From the legislative history of the Act, however, we have no difficulty concluding that the phrase includes fish and fish habitats.

The legislation was intended to provide statutory authority "which would operate to encourage mining activity on our vast expanse of public lands compatible with utilization, management, and conservation of surface resources such as water, soil, grass, timber, parks, monuments, recreation areas, fish, wildlife, and waterfowl." (Emphasis added.) H.R. Rep. No. 730, 84th Cong., 1st Sess. 3, reprinted in 1955 U.S. Code Cong. & Admin. News 2474, 2475. One of the problems the legislation was intended to address was that mining claims frequently blocked access

> to agents of the Federal Government desiring to reach adjacent lands for purposes of managing wild-game habitat or improving fishing streams so as to thwart the public harvest and proper management of fish and game resources on the public lands generally, both on the located lands and on adjacent lands. [Emphasis added.]

Id. at 6, 1955 U.S. Code Cong. & Admin. News at 2478-79.

Like the House report, the Senate report states, in discussing conflicts between surface and subsurface uses: "Surface uses include stock grazing, forestry, soil-erosion control, watershed purposes, fish and wildlife preservation, and recreational areas." (Emphasis added.) S. Rep. No. 554, 84th Cong., 1st Sess. 3. The Senate report also notes the problem of mining claims having prevented access for the "proper management of fish and game resources on the public lands generally, both on the located lands and on adjacent lands." Id. at 5 (emphasis added).

After passage of the Surface Resources Act, the Department of the Interior promulgated regulations under its authority. 21 FR 7619 (Oct. 4, 1956). One portion of the regulations was apparently based in part on this legislative history. In relevant part it states:

> Except as such interference may result from uses permitted under the act, the locator of an unpatented mining claim subject to the act may not interfere with the right of the United States to manage the vegetative and other surface resources of the land, * * * or prevent agents of the Federal Government from crossing the locator's claim in order to reach adjacent land for purposes of managing wild-game habitat or improving fishing streams so as to thwart the public harvest and proper management of fish and game

resources on the public lands generally, both on located and on adjacent lands.

43 CFR 3712.1(b).

From these statements it is clear that fish and fish habitats are within the intended scope of the "other surface resources" that BLM has authority to manage on the surface of mining claims under 30 U.S.C. § 612(b) (1982). From the information in the record before us, it is apparent that installing weirs in streams is a recognized technique of enhancing fish habitats, and is thus an acceptable management practice.

However, employing this practice is subject to the statutory limitation, underlined above, that "any use of the surface of any * * * mining claim by the United States * * * shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto * * *." We must therefore consider whether the weirs placed on the Treetopper I claim endanger or materially interfere with the operations conducted by the claim owners.

Like "other surface resources," the terms "endanger" and "materially interfere" are general. Although the terms are not precise, the legislative history is clear as to their intended effect. In reference to the portion of the statute containing the terms, the House and Senate reports both state:

> This language, carefully developed, emphasizes the committee's insistence that this legislation not have the effect of modifying

> longstanding essential rights springing from location of a mining claim. Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator; the United States would be authorized to manage and dispose of surface resources, or to use the surface for access to adjacent lands, so long as and to the extent that these activities do not endanger or materially interfere with mining, or related operations or activities on the mining claim. [Emphasis added.]

H.R. Rep. No. 730, 84th Cong., 1st Sess. 10, reprinted in 1955 U.S. Code Cong. & Admin. News 2474, 2483; S. Rep. No. 554, 84th Cong., 1st Sess. 8-9.

Similar language appears in the legislative history concerning subsection 4(c) of the Act, which in part provides:

> Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, * * * no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under subsection (b) of this section.

30 U.S.C. § 612(c) (1982). The House and Senate reports contain identical statements concerning this provision: "This language, read together with the entire section, emphasizes recognition of the dominant right to use in the locator, but strikes a balance, in the view of the committee, between competing surfaces uses, and surface versus subsurface competing uses." (Emphasis added.) H.R. Rep. No. 730, 84th Cong., 1st Sess. 10, reprinted in 1955 U.S. Code Cong. & Admin. News 2474, 2483; S. Rep. No. 554, 84th Cong. 1st Sess. 9.

Senator Anderson of New Mexico, who introduced the Senate version of the bill, made similar comments on the Senate floor. First, in responding to criticism of the legislation he stated: "On a claim located after enactment, the locator would have full right to all surface resources of the claim which may be needed for carrying on mining activities." 101 Cong. Rec. 9334 (June 28, 1955). He went on to describe subsection 4(c) as recognizing "that a mining claimant has the first right, the first call on any and all surface resources of his claim which he needs for carrying on activities related to mining." Id.

When these statements are considered in relation to the mining laws as they stood at the time, it is clear that the legislation did not diminish the rights of locators to use the surface of mining claims. The Mining Law of 1872 provides that locators of mining claims "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations." 30 U.S.C. § 26 (1982). Although once understood by some to mean that a locator had an unrestricted right to make use of the surface in whatever manner and for whatever purpose chosen, the judicial decisions addressing the matter made clear that the right to use the surface and surface resources was limited to uses "reasonably necessary in the legitimate operation of mining," Teller v. United States, 113 F. 273, 280 (8th Cir. 1901), or "incident to mining operations." United States v. Rizzinelli, 182 F. 675, 684 (D. Idaho 1910). Thus, in declaring that mining claims subsequently located "shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto" (30 U.S.C. § 612(a)

(1982)), the Surface Resources Act was "simply declaratory of the law as it existed prior to 1955." Bruce W. Crawford, 86 IBLA 350, 364, 92 I.D. 208, 216 (1985) (emphasis in original, footnote omitted); see United States v. Curtis-Nevada Mines, Inc., 611 F.2d at 1280-81.

[2] The change made by the Surface Resources Act was to create in the United States explicit authority "to manage and dispose of the vegetative surface resources * * * and to manage other surface resources." 30 U.S.C. § 612(b) (1982). Previously, Governmental agencies had been unable to do so once a mining claim had been located, even though the locator had only a limited right to use the same resources. See Bruce W. Crawford, supra at 365-66, 92 I.D. at 216-17. Congress recognized that there would be instances in which Federal management of the surface resources found on a mining claim would conflict with legitimate use of the surface and surface resources by the claimant. The balance it struck in order to resolve such conflicts was to specify that the authority the statute granted would apply only so long as and to the extent that Federal use of the surface did not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." 30 U.S.C. § 612(b) (1982); see United States v. Curtis-Nevada Mines, Inc., 611 F.2d at 1283, 1285. When it does, Federal surface management activities must yield to mining as the "dominant and primary use," the mineral locator having a first and full right to use the surface and surface resources. 6/

6/ Cf. United States v. Curtis-Nevada Mines, Inc., 611 F.2d at 1286: "[I]n the event that public use interferes with prospecting or mining activities * * * [t]he mining claimant can protest to the managing federal agency about public use which results in material interference and, if unsatisfied, can bring suit to enjoin the activity."

[3] Understood in this context, the terms "endanger" and "materially interfere" set forth the standard to be applied to determine whether a specific surface management action must yield to a conflicting legitimate use by a claim owner and may be given their ordinary meanings. To "endanger" is "to bring into danger or peril." Webster's New Collegiate Dictionary (1977) at 375. In this case there is no evidence that the weirs cause danger or peril to appellant's operations, so we turn to whether the weirs "materially interfere" with them. To "interfere" is "to interpose in a way that hinders or impedes"; and "material" means "being of real importance or great consequences." Webster's New Collegiate Dictionary (1977) at 602, 709. Webster's Third New International Dictionary (1971) defines "material" as "being of real importance or great consequence: substantial" (at 1392), and "interfere" as "to come in collision: to be in opposition: to run at cross-purposes: clash <interfering claims> -- used with with" (at 1178 (emphasis in original)). Thus, the question is whether BLM's fish weirs substantially hinder, impede, or clash with appellant's mining operations.

Although there are some disparities between BLM's reports of the effects of its installing the weirs and appellant's, e.g., concerning the maximum depth of the gravel, even BLM's version of facts in this case leads us to conclude that BLM materially interfered with appellant's mining operations. The logs are 2 feet thick and fixed in place. The gravel BLM deposited covers at least 20 percent of the streambed (Position Paper at 1). Although the gravel BLM deposited may be "less than 15 inches in most locations" (Position Paper at 2) and "at most, 18 inches" over the

natural gravel (Inspection Report at 2), before it was deposited there was almost no gravel over the bedrock, making it easy to operate a suction dredge. Id. at 1.

The statement in BLM's decision that "there is ample area remaining on [the] claim that the structures have not affected" does not negate the fact that it has obstructed 20 percent of the total streambed (and more of the unworked streambed). Nor do we believe BLM's judgment that "the amount of increased effort required on [appellant's] part at or adjacent to the structures is not that significant" is reasonable. Removing up to 18 inches of gravel from 20 percent of the streambed in order to be able to operate a suction dredge on the native gravels and fractured bedrock would in our view substantially impede appellant's mining operations.

The record indicates that after its January 22, 1987, decision, BLM attempted to negotiate with Shoemaker. A February 5, 1987, Conversation Record of a conference of five members of BLM staff states: "Bob Bessey [Medford District Fishery Biologist] explained that the lower 2 weir[s] were the most important structures and that we should remove the upper structures and all present agreed. Gerard Capps was to arrange meeting with Mr. Shoemaker (Senior) to inform him of our decision and explain reasons." A February 6, 1987, Conversation Record indicates appellant's father told BLM if it was not willing to remove the lower two weirs there was nothing to meet about. We interpret these documents as evidencing an intent by BLM, at one point, to accommodate appellant by removing all but

the lower two weirs. 7/ In view of our conclusion that the 10 weirs, taken together, materially interfere with appellant's mining operations, we find the appropriate resolution of this case is to direct BLM to undertake what it offered to do, i.e., remove all but the lower two weirs. Leaving the lower two weirs would not materially interfere with appellant's operations, especially in light of the fact no gravel was placed by one of them. See Study at 1.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified to the extent that the upper eight weirs should be removed.

Will A. Irwin
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

7/ We note that the Pickett Creek Position Paper indicates an offer was made to appellant regarding removal of fewer than eight weirs.

USDA United States Department of Agriculture | Forest Service | Pacific Southwest Region

Regional Office, R5
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Vallejo, CA 94592
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File Code: 1570/2810
Appeal No.: 11-05-00-0025-A251-2
Date: February 11, 2011

Walt Wegner
23501 Burbank Boulevard
Woodland Hills, CA 91367-3009

CERTIFIED RETURN RECEIPT REQUESTED

Dear Mr. Wegner:

This letter is in response to your January 4, 2011, letter requesting second level review of Tahoe National Forest Supervisor Tom Quinn's November 10, 2010, decision. Supervisor Quinn's decision was to affirm, in part, District Ranger Genice Froehlich's June 22, 2010, decision that it was your responsibility to obtain any necessary permits or waivers from the California State Regional Water Quality Control Board for your proposed mining operations on the "Dredge" group of mining claims on the Yuba River Ranger District, Tahoe National Forest.

On May 26, 2010, you submitted a proposed Plan of Operations (Plan) to conduct suction dredging operations on the subject mining claims. Yuba River District Ranger Froehlich responded by letter dated June 22, 2010, that included Conditions of Approval for the Plan and requested that you sign and date the Plan and return the signed Plan for District Ranger Froehlich's approval. Included as part of the Conditions of Approval were the following two statements:

a. A valid California Fish and Game dredge permit is required for all nozzle operators.

b. California Water Quality Board may require permits for your activities.

On August 27, 2010, you appealed District Ranger Froelich's decision to Tahoe National Forest Supervisor Tom Quinn. The Forest Supervisor identified three appeal issues in your appeal (in bold below). Forest Supervisor Quinn issued a first level decision on your appeal in a letter to you dated November 10, 2010. These issues and Forest Supervisor Quinn's decisions on each of those issues are summarized below:

1. **A valid California Fish and Game dredge permit is not available, and therefore it is unreasonable to require this as a condition for authorizing the plan of operations.**

Forest Supervisor Quinn reversed the original decision that included the statement: "A valid California Fish and Game dredge permit is required for all nozzle operators." He instructed the District Ranger to remove this statement from the conditions of approval for your plan.

2. The Forest Service has failed to prepare the requisite environmental statement in accordance with 36 CFR 228.4(f).

Forest Supervisor Quinn found that the record did not support documentation of the authorized officer's compliance with NEPA and instructed the District Ranger to complete the appropriate level of NEPA analysis and documentation prior to approving the Plan.

3. The Forest Service should remove any references to the California Water Quality Control Board for permits in the conditions of approval.

Forest Supervisor Quinn affirmed the District Ranger's decision that it was your responsibility to obtain any necessary permits or waivers from the California Regional Water Quality Control Board. Supervisor Quinn states in the appeal decision, "I affirm the District Ranger's decision relative to appeal issue 3: the conditions of approval should state that it is your responsibility to obtain any necessary permits or waivers from the California State Regional Water Quality Control Board for your operations."

Your second level appeal, dated November 23, 2010, and received in this office on January 7, 2011, only appealed the third item of Forest Supervisor Quinn's November 10, 2010, first level appeal decision.

I affirm Forest Supervisor Quinn's decision on Item 3, as described above.

I reviewed the entire appeal record that I received on January 21, 2011. In your January 4, 2011, letter requesting a second level review of the decision, you provided additional information. The second level review is conducted with only the existing record and no additional information shall be added to the file as per 36 CFR 251.87(c)(2). I concur with Forest Supervisor Quinn's decision that the statement "California Water Quality Board may require permits for your activities" should remain in the conditions of approval, and it is "your responsibility to obtain any necessary permits or waivers from the California State Regional Water Quality Control Board for your operations."

This constitutes the final administrative determination of the Department of Agriculture and is not subject to further review as per 36 CFR 251.88(e)(3).

Sincerely,

/s/ Daniel J. Jirón (for)
DANIEL J. JIRÓN
Deputy Regional Forester
Appeal Deciding Officer

United States Department of the Interior

OFFICE OF THE SOLICITOR

M-37012

NOV 14 2005

Memorandum

To: Secretary
Director, Bureau of Land Management

From: Solicitor

Subject: Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations

I. Introduction

The Mining Law of 1872 (hereinafter "Mining Law") opens "all valuable mineral deposits in lands belonging to the United States" and "the lands in which they are found" to exploration, occupation and purchase. 30 U.S.C. § 22. The Mining Law thereby authorizes citizens and those who have declared their intention to become citizens to enter federal lands that are open to the operation of the Mining Law to explore for valuable mineral deposits and develop those minerals. *Id.* §§ 22, 23, 28, 35. The Mining Law also establishes requirements for self-initiating property rights in the form of unpatented mining claims. *Id.* Before beginning mining operations, however, operators must obtain government approval of a proposed plan for mining operations. 43 C.F.R. Subpart 3809 (2004).

In 2001, former Solicitor John Leshy issued an opinion, concurred in by former Secretary Bruce Babbitt, that addressed use of the surface of unpatented mining claims for purposes ancillary to mining. *Use of Mining Claims for Purposes Ancillary to Mineral Extraction*, M-37004 (Jan. 18, 2001) (hereinafter "2001 Opinion"). By ancillary, we mean that the surface uses are: (1) related to or accompany the mining activities or (2) are viewed as supplementary to or as an auxiliary activity relative to the removal of the mineral from the ground. That opinion concluded that the Department of the Interior should not approve a proposed plan for mining operations if the claimant is proposing to use mining claims solely for purposes ancillary to mining without also developing minerals from those claims. 2001 Opin., at 15. The opinion suggested that the Department could approve this sort of proposed mining operation only if:

(1) the Department determined that the mining claims were valid despite being used for ancillary purposes,

(2) the claimant relocated the mining claims being used for ancillary purposes as mill sites, or

(3) the Department determined that the plan could be authorized as a matter of discretion under other applicable public land laws.

Id.

The 2001 Opinion was recently withdrawn by an opinion entitled *Rescission of 2001 Ancillary Use Opinion*, M-37011 (Nov. 14, 2005). However, while the opinion was in effect, it was cited by some outside parties for the proposition that the Department must conduct a validity examination of all mining claims and mill sites included in a proposed mining plan of operations before it may approve the plan. Although the 2001 Opinion did not conclude that the Department was under such an obligation, it suggested that validity examinations might be required under certain circumstances where the claimant is proposing to use mining claims solely for purposes ancillary to mining without also developing minerals from those claims. 2001 Opin., at 15. Because this conclusion conflicts with current Departmental regulations, I have analyzed whether the Department is legally obligated to determine the validity of mining claims and mill sites before it may approve a plan of operations. Based on the analysis set out below, I conclude that, although the Department may determine claim validity at any time until a patent is issued, the Department is under no legal obligation to determine mining claim or mill site validity before approving a proposed plan of operations to explore for or develop minerals on lands open to the Mining Law's operation.

II. No Law Requires a Claim Validity Determination Before Mine Plan Approval on Lands Open to the Operation of the Mining Law

The Mining Law nowhere requires that the Secretary determine mining claim or mill site validity before allowing exploration or mineral development. *See* 30 U.S.C. §§ 22 *et seq.* In addition, none of the laws that have amended the Mining Law require validity determinations before approving mining operations. For example, nothing in the Surface Resources Act of 1955 requires such a validity determination. *Id.* §§ 611-614. The determination that is provided for in the Surface Resources Act decides whether mining claims located before 1955 can be found to be free from the surface rights restrictions imposed by the Act. *Id.* § 613(a). This *surface rights* determination does not require that the Department determine *claim validity*. Rather, it merely requires that the Department investigate whether a pre-1955 claimant was "in actual possession of or engaged in the working of such lands" at the time of the law's enactment to be free of its effects.

Likewise, nothing in the Federal Land Policy and Management Act ("FLPMA") requires a validity determination before a mine plan approval. Only four provisions of FLPMA amend the Mining Law. 43 U.S.C. § 1732(b). None of the four provisions require that the Secretary determine mining claim or mill site validity before approving a plan of operations. Congress

expressly provided that no other provision of FLPMA "shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress." 43 U.S.C. § 1732(b). As a result, no Departmental regulations require validity determinations before approving a mine plan on open lands.[1] Rather, the Department's current surface management regulations require validity determinations before approving a plan of operations *only* if the lands are *withdrawn* from appropriation under the Mining Law. *See* 43 CFR § 3809.100 (2004).[2]

Decisions of the Department and the U.S. Forest Service recognize that no law requires that the Secretary determine mining claim or mill site validity before approving a plan of operations on lands open to entry under the Mining Law (hereinafter "open lands"). *W. Shoshone Def. Project*, 160 IBLA 32, 57 (2003) ("while [the Bureau of Land Management ("BLM")] always possesses the authority to investigate the validity of unpatented mining claims, it is not required to do so, nor should it suspend consideration of a plan of operations even when it decides to conduct a validity examination of the affected claims to determine whether to initiate a contest."); *see also Cottonwood Res. Council*, App. No. 02-01-00-0004 (Forest Serv. Dec. 21, 2001) ("Except in special circumstances where the Forest Service may need to establish clear

[1] Nevertheless, the BLM has unconstrained discretion to initiate a mining claim validity examination at any time before a patent is issued. *Cameron v. United States*, 252 U.S. 450, 460 (1920) ("so long as the legal title remains in the government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void"); *Freese v. United States*, 639 F.2d 754, 757 n.1 (Ct. Cl. 1981) ("The United States has the power under the mining laws to initiate a contest of the validity of unpatented mining locations."). Because the government has discretionary power but no legal obligation to determine claim validity on open lands, neither the claimant nor any third party can compel BLM to determine claim validity as a condition of mine plan approval. *See Southwest Res. Council*, 94 Interior Dec. 56, 67 (1987) (concluding that application of FLPMA's "unnecessary or undue degradation" standard presumes the validity of the use).

[2] The Department's regulations also disallow mining claimants from beginning mining operations for minerals that may be "common variety" minerals until after BLM has determined that the minerals are an uncommon variety. 43 C.F.R. § 3809.101 (2004). The inquiry involved in a common variety determination, like the surface rights determination under the Surface Resources Act, is not a validity determination. Common variety determinations consider only the nature of the mineral deposit, including whether the mineral has some property giving it distinct and special value, to determine whether the mineral at issue is locatable. *United States v. McClarty*, 17 IBLA 20 (1974). By contrast, a validity determination considers primarily whether there is a reasonable expectation of success in developing a paying mine. *In re Pac. Coast Molybdenum Co.*, 75 IBLA 16, 28-30 (1983). If a mining claimant has discovered a deposit of an uncommon variety mineral, or any locatable mineral for that matter, the claim may still be found to be invalid if the deposit is not economically viable.

title to the lands involved (e.g., in wilderness areas and other withdrawn areas, in land adjustment cases where the lands are segregated, or in mineral patent applications), there is no legal requirement or land management need for the Forest Service to conduct validity determinations on unpatented mining claims.").

In practice, the Department has determined the validity of only a very small percentage of the hundreds of thousands of unpatented mining claims and mill sites on the public lands.[3] This is because the Mining Law allows citizens to enter the public lands and locate mining claims and mill sites without pre-approval from the government. The Department is not involved in a mining claimant's decision to locate a mining claim or mill site. As a result, the Department simply does not know and, as shown above, *need not know*, whether these mining claims and mill sites are valid before approving a proposed plan for exploration or mining operations on open lands.

In summary, because no law requires that the Secretary determine mining claim or mill site validity before approving a mine plan on open lands, the Department is under no legal obligation to do so.[4]

III. A Claim Validity Determination is Required Before Mine Plan Approval on Withdrawn Lands

When lands are withdrawn from entry under the Mining Law, the Mining Law's authorization for citizens to explore for and develop minerals on those public lands terminates. *Id.* § 1714; *United States v. Snyder*, 72 Interior Dec. 223 (1965); *see also United States v. Boucher*, 147 IBLA 236, 243 (1999) ("'Where the Government subsequently withdraws the land from mineral entry and location, permission to prospect is thereby revoked and only claims then supported by a discovery are protected from the withdrawal.'") (quoting *United States v. Niece*, 77 IBLA 205, 207 (1983)). As a result, it is not lawful for the Department to approve a plan of operations for mining activities on withdrawn lands unless and until it determines the validity of the pre-existing claims and mill sites proposed to be used for those operations. In the case of mining claims, the Department must verify whether the claimant has located a valid mining claim, including whether the claimant has discovered a valuable mineral deposit as of the withdrawal date, before approving a plan of operations because only claims perfected before the withdrawal establish a valid existing property interest. *Freese v. United States*, 639 F.2d 754,

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[3] *See* Mark Squillace, *The Enduring Vitality of the General Mining Law of 1872*, 18 Envtl. L. Rep. 10,261, 10,266 (1988) (stating that the government rarely considers the validity of an unpatented mining claim).

[4] To the extent the 2001 Opinion implied anything other than this conclusion, the implication can only be characterized as policy advice that has been withdrawn, as previously mentioned.

757 (Ct. Cl. 1981).

The Department's current regulations reflect this understanding. The BLM will not authorize mining operations on withdrawn lands until BLM has determined claim validity. 43 C.F.R. § 3809.100 (2004).

VI. Summary and Conclusion

Based on the foregoing analysis, I conclude that, although the Department is authorized to determine claim validity at any time until a patent is issued, the Department is under no legal obligation to determine mining claim or mill site validity before approving a proposed plan of operations to explore for or develop minerals on lands open to the Mining Law's operation. However, when lands are withdrawn from entry under the Mining Law, the Department must verify whether the mining claims and mill sites included in a proposed mine plan are valid before approving the plan.

Sue Ellen Wooldridge
Solicitor

I concur in this opinion:

Secretary of the Interior

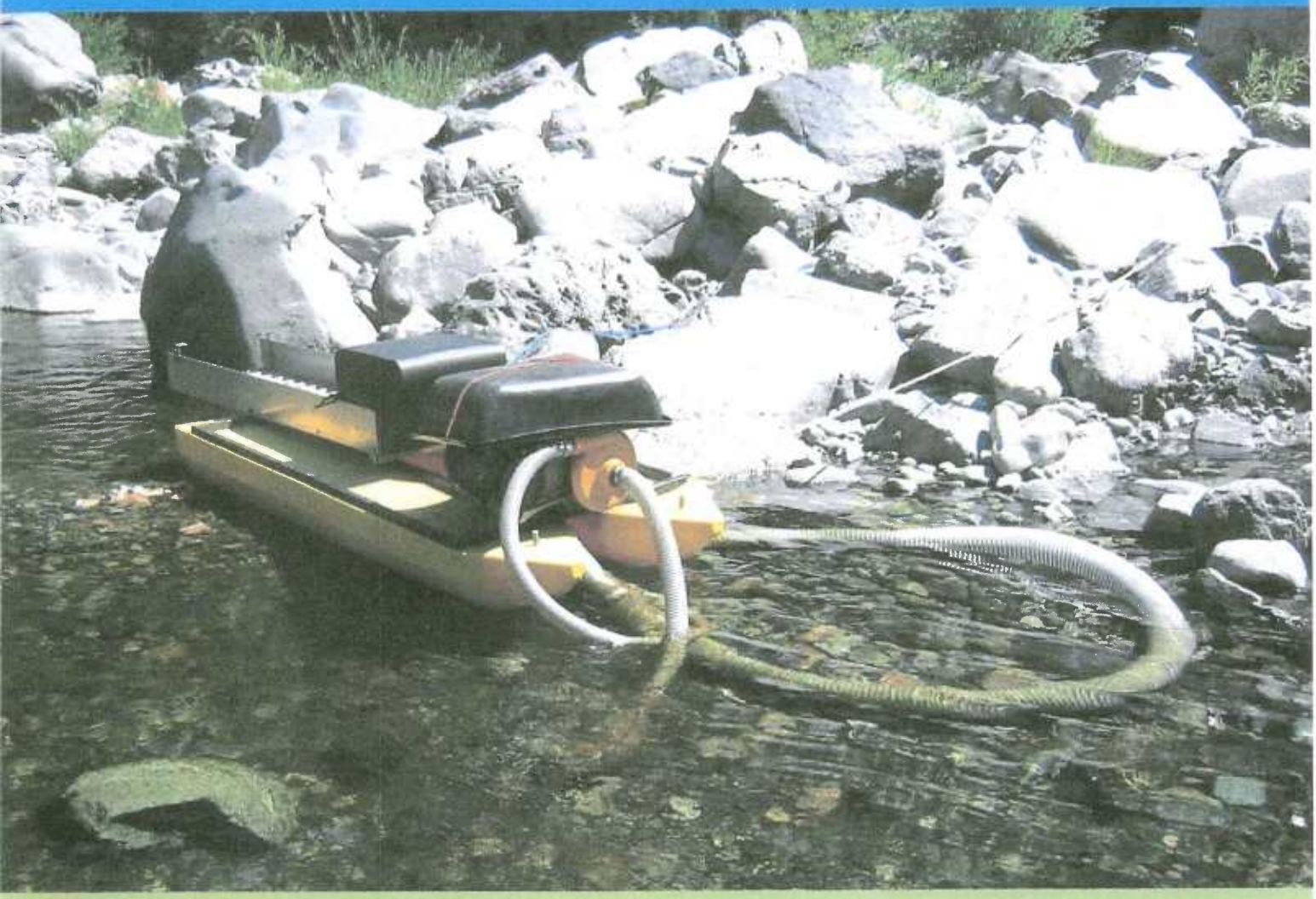
Nov 17, 2005
Date

Suction Dredge Permitting Program

Draft Subsequent Environmental Impact Report

California Department of Fish and Game

February 2011



Horizon
WATER and ENVIRONMENT

RESOURCES AGENCY
CALIFORNIA
DEPARTMENT
FISH & GAME

Key Issues and Significant Impacts

This section discusses key issues of concern relative to the Proposed Program and the conclusions of this document regarding those issues, as well as any significant impacts that were identified. This is not a comprehensive discussion of impacts of the Proposed Program, for which the reader is directed to Table ES-2, Summary of Impacts and Mitigation Measures, at the end of this chapter.

Environmental factors potentially affected by the Program include:

- Hydrology and Geomorphology
- Water Quality and Toxicology
- Biological Resources
- Hazards and Hazardous Materials
- Cultural Resources
- Aesthetics
- Noise
- Recreation
- Transportation and Traffic, and
- Mineral Resources.

Chapters 4 and 5 of this EIR document address each of these environmental topics and the impacts of the Program.

Specific issues that were determined in this SEIR to have significant and unavoidable impacts related to water quality, cultural, noise, and cumulative water quality impacts. See Chapters 4.2 *Water Quality and Toxicology*, 4.5 *Cultural Resources*, 4.7 *Noise*, and Chapter 5 *Other Statutory Considerations* (which discusses cumulative water quality impacts) for a detailed discussion of these impacts.

Significant and Unavoidable Impacts

Water Quality Impacts Associated with Suction Dredge Discharges

Mercury Resuspension and Discharge

Suction dredging has the potential to contribute to: (1) watershed mercury loading to downstream reaches within the same water body and to downstream water bodies, (2) methylmercury formation in the downstream reaches/water bodies, and (3) bioaccumulation in aquatic organisms in these downstream reaches/water bodies. The associated increase in health risks to wildlife (including fish) or humans consuming these organisms is considered a potentially significant impact.

Potential mitigation measures to reduce the impact would necessarily involve actions to avoid or reduce total mercury discharge from areas containing elevated sediment mercury

and/or elemental mercury from suction dredging activities under the Program. However, a comprehensive set of actions to mitigate the potential impact through avoidance or minimization of mercury discharges has not been determined at this time, nor is its likely effectiveness known. This impact would remain potentially significant until such time that a sufficient and feasible mitigation program is developed, but there is no guarantee that this type of mitigation is practicable. As such, this impact is considered significant and unavoidable. For a more complete discussion of this impact, please refer to the discussion under Impact WQ-4 (Chapter 4.2 *Water Quality and Toxicology*).

Resuspension and Discharge of Other Trace Metals

Generally, discharge of trace metals at typical sites should have less than significant impacts. However, suction dredging at known trace metal hot-spots resulting from acid mine drainage and characterized by contaminated sediment (e.g., low pH levels and high metal concentrations in the pore water) would remobilize potentially bioavailable forms of metals and has the potential to increase levels of one or more trace metals in water body reaches such that the water body reach would exceed California Toxics Rule metals criteria by frequency, magnitude, and geographic extent that could result in adverse effects to one or more beneficial uses, relative to baseline conditions. This impact is considered to be potentially significant.

Potential mitigation measures to reduce the impact would necessarily involve identifying known trace metal hot-spots associated with past mining operations (e.g., problematic sites with acid mine drainage) and stating in the Regulations Program that these identified sites are closed to suction dredging. However, because not all locations of such contamination are known, the feasibility with which contaminated sites could be identified at a level of certainty that is sufficient to develop appropriate closure areas or other restrictions for allowable dredging activities is uncertain at this time. As such, this impact is considered significant and unavoidable until such time that a sufficient and feasible mitigation program is developed. For a more complete discussion of this impact, please refer to the discussion under Impact WQ-5 (Chapter 4.2 *Water Quality and Toxicology*).

Effects on Special-Status Passerines Associated with Program Activity

Specific disturbance mechanisms include noise associated with dredge rigs, dredgers accessing streams, direct disturbance of riparian habitat, alteration of prey resource base, and suction dredging encampment activities at night (e.g., lights and noise). Suction dredging activities that occur during the passerine breeding season may alter behavioral patterns of special-status passerine species.

Potential for impacts to special-status passerine species would largely be minimized with incorporation of the proposed regulations, but not completely avoided. The potential for direct disturbance of nests or adverse behavior modifications due to human activity would remain. For several of these species, even a small disturbance could be substantial considering the restricted population and/or range of the species in question. Mitigation measures are available to reduce impacts to a less-than-significant level for passerines that may be affected (including avoidance as a Best Management Practice), however, CDFG does not have the jurisdictional authority under this Program to adopt or enforce mitigation for impacts to species not defined as "fish" in the Fish and Game Code. Therefore, impacts to these passerine species are considered significant and unavoidable. For a more complete

discussion of this impact, please refer to the discussion under Impact BIO-WILD-2 (Chapter 4.3 *Biological Resources*).

Cultural Resource Impacts Associated with Program Activity

Effects on Historical Resources

Program activities have the potential to result in a substantial adverse change in the significance of a historical resource due to possible demolition, relocation, or alteration. Similarly, the introduction of increased human activity in around the state's waterways could cause a substantial adverse change to traditional cultural properties. For these reasons, impacts to historical resources and traditional cultural properties resulting from suction dredge mining activities are considered potentially significant. However, as CDFG does not have the jurisdictional authority to mitigate impacts to these resources, impacts to historical resources and traditional cultural properties are therefore considered significant and unavoidable. For a more complete discussion of this impact, please refer to the discussion under Impact CUL-1 (Chapter 4.5 *Cultural Resources*).

Effects on Unique Archaeological Resources

Riverine settings are considered highly sensitive for the existence of significant archaeological resources. Suction dredge mining activities could cause a substantial adverse change to a unique archaeological resource through riverbed suctioning and screening activities that could disturb or destroy cultural materials which may be located just below the surface of the riverbed or along its banks. Impacts to unique archaeological resources resulting from suction dredge mining could also occur through increased human activity in the vicinity of the state's waterways. Such impacts to unique archaeological resources are considered potentially significant. However, CDFG does not have the jurisdictional authority to mitigate impacts to unique archaeological resources. As such, impacts to such resources are therefore considered significant and unavoidable. For a more complete discussion of this impact, please refer to the discussion under Impact CUL-2 (Chapter 4.5 *Cultural Resources*).

Temporary Noise Impacts Associated with Program Activity

Suction dredging activities have potential to generate noise in excess of local noise standards, which would be a significant impact. Although all recreationists using noise-generating equipment, including suction dredge miners, are equally required to abide by local noise ordinances, violations can still occur. Violations can be reported at any time to the local authorities who have the jurisdiction to enforce applicable regulations as appropriate. However, because local noise standards are outside of the scope of the Program to enforce, the impact cannot be discounted. As such, this impact was identified as significant and unavoidable. For a more complete discussion of this impact, please refer to the discussion under Impact NZ-1 (Chapter 4.7 *Noise*).

Cumulative Effects on Wildlife Species and their Habitats

Suction dredging and ancillary activities are likely to co-occur with several bird species. Of greatest concern are the incremental effects of the Proposed Program on species that are very rare and are likely to occur in close proximity to suction dredging activities. As described in Chapter 4.3, *Biological Resources*, suction dredging activities may lead to

significant impacts on several of these species at the individual (Proposed Program) level. The incremental contribution of these impacts is also considered considerable at the cumulative level. This impact is considered significant; no feasible mitigation is available, and as such, the impact is considered significant and unavoidable. For a more complete discussion of this impact, please refer to the discussion under Impact CUM-2 (Chapter 5, *Other Statutory Considerations*).

Cumulative Water Quality Effects of Suction Dredge Discharges

Turbidity/TSS Discharges from Suction Dredging

Although the regulations under the Proposed Program would reduce the potential incremental contribution of the suction dredge discharges to a cumulative impact in impaired waters, sediment discharges would not be entirely avoided. Where such discharges are occurring in water bodies with existing turbidity/TSS impairments, the incremental contribution from suction dredging would be cumulatively considerable. To reduce these effects, potential mitigation could include closures or restrictions on suction dredging in waterbodies impaired for sediment. However, such closures are infeasible as they are not within CDFG's jurisdiction to implement. No other feasible mitigation has been identified within CDFG's jurisdictional authority. As such, this cumulative impact is considered significant and unavoidable. For a more complete discussion of this impact, please refer to the discussion under Impact CUM-6 (Chapter 5, *Other Statutory Considerations*).

Mercury Resuspension and Discharge from Suction Dredging

Although the regulations under the Proposed Program would reduce the potential for flouring and reduce the potential incremental contribution of the suction dredge discharges to the significant cumulative impact, mercury discharges would continue. Such discharges associated with Program activities would make a cumulatively considerable contribution to existing cumulative impacts related to watershed mercury loading, methylmercury formation in downstream areas, and bioaccumulation in aquatic organisms (and associated risks related to human or wildlife consumption). To reduce these effects, potential mitigation could include closing mercury contaminated watersheds, limiting the number of permits in areas impaired for mercury, or further restrictions on nozzle size, number of permits, and hours/days spent dredging. However, such measures are considered infeasible since they are not within CDFG's jurisdiction to implement (they are not considered necessary to avoid deleterious effects to aquatic species). Therefore, this impact would be significant and unavoidable. For a more complete discussion of this impact, please refer to the discussion under Impact CUM-7 (Chapter 5, *Other Statutory Considerations*).

Alternatives Considered

The purpose of the alternatives analysis in an EIR is to describe a range of reasonable alternatives to the Program that could feasibly attain most of the objectives of the Program. Section 15126.6 (b) of the CEQA Guidelines requires that the alternatives reduce or eliminate significant adverse environmental effects of the Proposed Program; such alternatives may be more costly or otherwise impede to some degree the attainment of the Program's objectives. The range of alternatives considered must include those that offer substantial environmental advantages over the Proposed Program and may be feasibly

SENATE BILL No. 637

Introduced by Senator Allen

February 27, 2015

An act to add Section 13172.5 to the Water Code, relating to water quality.

LEGISLATIVE COUNSEL'S DIGEST

SB 637, as introduced, Allen. Water quality: suction dredge mining: permits.

Existing law prohibits the use of any vacuum or suction dredge equipment by any person in any river, stream, or lake of this state without a permit issued by the Department of Fish and Wildlife.

Under existing law, the State Water Resources Control Board and the California regional water quality control boards prescribe waste discharge requirements in accordance with the federal Clean Water Act and the Porter-Cologne Water Quality Control Act (state act). The state act, with certain exceptions, requires a waste discharger to file certain information with the appropriate regional board and to pay an annual fee. The state act additionally requires a person, before discharging mining waste, to submit to the regional board a report on the physical and chemical characteristics of the waste that could affect its potential to cause pollution or contamination and a report that evaluates the potential of the mining waste discharge to produce acid mine drainage, the discharge or leaching of heavy metals, or the release of other hazardous substances.

This bill would require, by July 1, 2017, the State Water Resources Control board to establish a permitting process for suction dredge mining and related mining activities in rivers and streams in the state, consistent with requirements of the state act. The bill would require that the regulations, at a minimum, address cumulative and water quality impacts

of specified issues. A person who violates these regulations would be liable for an unspecified penalty. The bill would provide that the state board is not prohibited from adopting regulations that would prohibit suction dredge mining, if the state board makes a certain finding relating to water quality objectives, to the extent consistent with federal law. The bill would prohibit these provisions from affecting any other law, including the California Environmental Quality Act and specified provisions relating to streambed alteration requirements.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 13172.5 is added to the Water Code, to read:

13172.5. (a) On or before July 1, 2017, the state board shall establish by regulation a permitting process for suction dredge mining and related mining activities in rivers and streams in the state. The regulations shall be consistent with the requirements of this division and, at a minimum, address cumulative and water quality impacts of each of the following:

(1) Mercury loading to downstream reaches of rivers and streams affected by suction dredge mining.

(2) Methylmercury formation in water bodies.

(3) Bioaccumulation of mercury in aquatic organisms.

(b) A person who violates a regulation adopted pursuant to this section shall be liable in the amount of ____ ($____).

(c) Nothing in subdivision (a) shall prohibit the state board from adopting regulations that prohibit suction dredge mining if the state board finds that prohibition is necessary to regulate waste discharges that violate or impair water quality objectives or other criteria under this division, to the extent consistent with federal law. In making this determination, the state board may consider, but is not limited to, soil types, fueling and re-fueling activities, and horsepower limitations.

(d) This section does not affect any other law, including the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) and the Department of Fish and Wildlife's streambed alteration

requirements described in Chapter 6 (commencing with Section 1600) of the Fish and Game Code.

O

SUCTION DREDGE MSA RULING

Included Actions

- ***Kimble, et al. v. Harris, et al.***, Case No. CIVDS1012922, San Bernardino County, filed September 15, 2010 ("*Kimble*");
- *Karuk Tribe, et al, v. Calif. Dept. of Fish & Game,*[] *et al.*, Case No. RG12623796, Alameda County, filed April 2, 2012 ("*Karuk II*");
- ***Public Lands for the People, et al. v. State of California, et al.***, Case No. CIVDS1203849, San Bernardino County, filed April 12, 2012 ("*PLP*");
- ***The New 49'ers, Inc., et al. v. Calif. Dept. of Fish & Game, et al.***, Case No. SCCVCV1200482, Siskiyou County, filed April 13, 2012 ("*New 49'ers*");
- *Walker v. Kamala Harris, et al.*, Case No. 34-2013-80001439, Sacramento County, filed March 14, 2013 ("*Walker*"); and
- *Foley v. California Dept. of Fish and Wildlife, et al.* Case No. SCCVCV13-00804, Siskiyou County, filed July 1, 2013 ("*Foley*").

Motions: Motions for Summary Adjudication on Issue of Federal Preemption:

(1) Plaintiff Kimble, et al. motion for summary adjudication on its 1st Cause of Action

(2) Plaintiff PLP, et al. motion for summary adjudication on its 4th Cause of Action

(3) Plaintiff New 49'ers, et al. motion for summary adjudication on its 2nd Cause of Action

(4) Defendant CDFW motion for summary adjudication re Kimble Second Amended Complaint (SAC), 1st Cause of Action

(5) Defendant CDFW motion for summary adjudication re PLP First Amended Complaint (FAC), 4th Cause of Action

(6) Defendant CDFW motion for summary adjudication re New 49'ers FAC, 2nd Cause of Action

Request for Judicial Notice

a. In each of the three of CDFW's motions for summary adjudication, CDFW requests judicial notice under Evid. Code § 452(c) (official legislative acts) of the following:

Exhibits A, B, C, and E , various statutes or bills before Congress; Exhibits D, F, G, H, I, J, and M, excerpts from the Congressional Globe or Congressional Record; and Exhibits K and L, congressional committee reports or excerpts from such reports. CDFW argues that all of these documents are relevant to the sole issue presented in this motion - preemption - because the "critical question" in every preemption analysis is congressional intent. (*Louisiana Public Service Com. v. F.C.C.* (1986) 476 U.S. 355, 369.) The Court **Grants judicial notice of CDFW's Ex. A – M.**

b. In opposition to CDFW's motion, New 49'ers request judicial notice under Evid. Code § 452(c) (official executive acts) of: Exhibit 1, a Federal Register Notice issued by the Forest Service on June 6, 2005, "Clarification as to When a Notice of Intent to Operate and/or Plan of Operation is Needed for Locatable Mineral Operations on National Forest System Lands," 70 Fed. Reg. 32,713 (June 6, 2005); Exhibit 2 , a high-level administrative appeal from an adverse decision by the Tahoe National Forest Supervisor to the Deputy Regional Forester; and Exhibit 3, an excerpt of a Forest Service Schedule of Proposed Action (SOPA) in the Plumas National Forest.

In opposition to CDFW's motions, Kimble and PLP also request judicial notice under Evid. Code § 452(c) of New 49'ers Ex. 1 and Ex. 3. The Court **Grants judicial notice of Plaintiffs Kimble, PLP and New 49'ers Ex. 1-3.**

c. In each of the Kimble and PLP motions for summary adjudication, Kimble and PLP request judicial notice under Evid. Code 452(c) (official executive acts) of : Exhibit A, an E-mail from Mark Stopher, Environmental Project Manager, CDFW, Subject: Suction dredge status July 26, 2011, sent July 26, 2011, 3:49 PM; Exhibit B, April 1, 2013, CDFW Report to the Legislature Regarding Instream Suction Dredge Mining Under The Fish and Game Code (April 1, 2013) ("Report to Legislature"); and Exhibit C, Cal. Code Regs, tit. 14, §228 and §228.5 Suction Dredging. The Court **Grants judicial notice of Kimble and PLP Ex. A-C.**

d. *For the first time in reply*, Kimble and PLP make a second request for judicial notice under Evid. Code § 452(c) (official executive acts) of: Exhibit 1, United States Department of the Interior, Bureau of Land Management, Colorado, Minerals/Mining Frequently Asked Questions; Exhibit 2, United States Department of the Interior, Office of the Solicitor Memorandum, Dated November 14, 2005 To: Secretary, Director, Bureau of Land Management From: Solicitor Subject: Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations Concurrence by Secretary of Interior, Gale S. Norton November 17, 2005; and Exhibit 3, State of California, Office of Administrative Law, Notice of Approval of Regulatory Action dated April 27, 2012.

Consideration of evidence offered for the first time in reply or evidence not referenced in the moving party's separate statement rests with the sound discretion of the trial court, as explained by the court in *San Diego Watercrafts v. Wells Fargo Bank* (2002) 102 Cal. App. 4th 308, 315-316. Here, the 2nd RJN of Kimble and PLP is not evidence in support of any particular undisputed fact, but rather, part of Plaintiffs' legal

argument that federal mining claims are presumed valid, i.e., that the Mining Law does not require determination of claim validity before allowing exploration or mineral development. The Court **Grants judicial notice of Kimble and PLP Ex. 1-3.**

e. The New 49'ers motion for summary adjudication does not include any request for judicial notice.

f. In opposition to the Kimble, PLP and New 49'er motions for summary adjudication, the Karuk Tribe and Coalition request judicial notice under Evid. Code § 452(c) (official executive and legislative acts) of: Ex. A - Legislative Counsel's Digest, California 2009 Legislative Service, 2009 Portion of 2009-2010 Regular Session; 2009 Cal. Legis. Srv. Ch. 62, §§ 1, 2(S.B. 670) (West), dated August 6, 2009 (enactment of Fish and Game §5653.1); Ex. B - Legislative Counsel's Digest, California 20l l Legislative Service, 2011 Portion of 2011-2012 Regular Session; 2011 Cal. Legis. Serv. Ch. 133, §6 (A.B. 120) (West), dated July 26, 2011 (2011 amendment of Fish and Game §5653.1); Ex. C - Bill Analysis, AB 120, (Budget Committee), dated June 8, 2011 (2011 amendment of Fish and Game §5653.1); Ex. E - Chapter 4.2, Water Quality and Toxicology, "Draft" Subsequent Environmental Impact Report from the California Department of Fish and Wildlife (previously named Department of Fish and Game), dated February 2011; Ex. F - California Department of Fish and Wildlife Report to the Legislature Regarding Instream Suction Dredge Mining Under the Fish and Game Code, Department of Fish and Wildlife, Charlton Bonham, Director, April 1, 2013; Ex. G - Mercury Contamination from Historic Gold Mining in California, Fact Sheet FS-061-00, United States Geological Survey, Department of the Interior, Charles N. Alpers and Michael P. Hunerlach, dated May 2000; Ex. H - Chapter 43, Biological Resources,

"Draft" Subsequent Environmental Impact Report from the California Department of Fish and Wildlife (previously named Department of Fish and Game), dated February 2011; Ex. I - Suction Dredge Permitting Program, Final Subsequent Environmental Impact Report, California Department of Fish and Game, March 2012; and Ex. J - Findings of Fact of the California Department of Fish and Game, Suction Dredge Permitting Program Final SEIR, pursuant to CEQA, dated March 16, 2012. The Court **Grants judicial notice of Karuk Tribe Ex. A-C and E- J.**

Suction Dredge Mining in California

In general, CDFW regulates suction dredging and the use of any related equipment in California pursuant to F & G Code § 5653 specifically. Under that authority since 1995, the use of any vacuum or suction dredge equipment by any person in any river, stream or lake in California is prohibited, unless authorized under a permit issued by CDFW (F & G Code, § 5653 (a).)

F & G Code § 5653 states in its entirety:

> (a) The use of any vacuum or suction dredge equipment by any person in any river, stream, or lake of this state is prohibited, except as authorized under a permit issued to that person by the department in compliance with the regulations adopted pursuant to Section 5653.9. Before any person uses any vacuum or suction dredge equipment in any river, stream, or lake of this state, that person shall submit an application for a permit for a vacuum or suction dredge to the department, specifying the type and size of equipment to be used and other information as the department may require.
> (b) Under the regulations adopted pursuant to Section 5653.9, the department shall designate waters or areas wherein vacuum or suction dredges may be used pursuant to a permit, waters or areas closed to those dredges, the maximum size of those dredges that may be used, and the time of year when those dredges may be used. If the department determines, pursuant to the regulations adopted pursuant to Section 5653.9, that the operation will not be deleterious to fish, it shall issue a permit to the applicant. If any person operates any equipment other than that authorized by the permit or conducts the operation in any waters or

area or at any time that is not authorized by the permit, or if any person conducts the operation without securing the permit, that person is guilty of a misdemeanor.
(c) The department shall issue a permit upon the payment, in the case of a resident, of a base fee of twenty-five dollars ($25), as adjusted under Section 713, when an onsite investigation of the project size is not deemed necessary by the department, and a base fee of one hundred thirty dollars ($130), as adjusted under Section 713, when the department deems that an onsite investigation is necessary. In the case of a nonresident, the base fee shall be one hundred dollars ($100), as adjusted under Section 713, when an onsite investigation is not deemed necessary, and a base fee of two hundred twenty dollars ($220), as adjusted under Section 713, when an onsite investigation is deemed necessary.
(d) It is unlawful to possess a vacuum or suction dredge in areas, or in or within 100 yards of waters, that are closed to the use of vacuum or suction dredges.

[Added Stats 1986 ch 1368 § 23. Amended Stats 1988 ch 1037 § 1; Stats 1994 ch 775 § 1 (AB 1688); Stats 2006 ch 538 § 185 (SB 1852), effective January 1, 2007.]

Pursuant to SB 670 (effective 8/6/09), AB 120 (effective 7/26/11) and SB 1018 (effective 6/27/12), F & G Code § 5653.1, a conditional proscription against vacuum and suction dredging activities was enacted.

Suction dredge mining entails the use of a vacuum or suction system to remove and return material at the bottom of a river, stream, or lake for the extraction of minerals, primarily gold. (*People v. Osborn* (2004) 116 Cal.App.4th 764, 768; 14 Cal. Code Regs. (CCR), § 228(a).) "In suction dredge mining, the gravel within the active stream channel is suctioned from the bottom of the stream and processed over a sluice on a floating platform. A gasoline powered motor and pump are mounted on the floating platform for powering the suction apparatus and for driving the air pump which supplies air to the persons working underwater. The size of dredges used in California ranges from 2-inches to up to 10-inches or more." (*Karuk Tribe of Cal. v. U.S. Forest Service*

(N.D. Cal. 2005) 379 F.Supp.2d 1071, 1080, fn. 5, citations, quotation marks, and brackets omitted, rev'd on other grounds (9th Cir. 2012) 681 F.3d 1006.)

As set forth above under F & G Code 5653.1, *suction dredge mining throughout the State is prohibited* ***until*** *the Director of the CDFW certifies that (1) the Department has completed environmental review of its suction dredge regulations pursuant to the California Environmental Quality Act (CEQA); (2) CDFW promulgates new regulations, as necessary, based on that environmental review; (3) the new regulations are operative; (4) the new regulations "fully mitigate all identified significant environmental effects"; and (5) a "fee structure is in place that will fully cover all costs to the Department" related to administration of its suction dredge permit program. F & G Code, §5653.1(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.)*

On March 16, 2012, the CDFW completed the required environmental review and adopted updated regulations, effective April 27, 2013. But it has not certified completion of all five items required by § 5653.1(b), and ***the moratorium remains in effect.***

On April 1, 2013, CDFW pursuant to F and G Code § 5653.1(c) submitted its required report to the Legislature "on statutory changes or authorizations that, in the determination of the department, are necessary to develop the suction dredge regulations required by paragraph (2) of subdivision (b), including, but not limited to, recommendations relating to the mitigation of all identified significant environmental impacts and a fee structure that will fully cover all program costs."

Federal Preemption in General

Federal law can preempt state law in four ways: express, field, conflict and obstacle. (See generally *Viva! Intern. Voice for Animals v. Adidas Promotional Retail Ops., Inc.* (2007) 41 Cal.4th 929, 935-936; *California Federal Sav. & Loan Assn. v. Guerra* (1987) 479 U.S. 272, 280-281). (1) Congress can "pre-empt state law by so stating in express terms." (*Guerra, supra*, 479 U.S. at p. 280.) (2) In so- called field preemption, "congressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." (*Id.* at pp. 280-281, citation and quotation omitted) Finally, federal law may conflict with state law either (3) "because compliance with both federal and state regulations is a physical impossibility" (*id.* at p. 281), or (4) if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Ibid.*)

"Courts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it." *Viva!, supra*, 41 Cal.4th at p. 936.

The Supreme Court has set forth several rules regarding preemption. First, "in all pre-emption cases, and particularly in those in which Congress has legislated ... in a field which the States have traditionally occupied, [courts must] 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." *Wyeth v. Levine* (2009) 555 U.S. 555, 565; see also *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th

943, 957. Second, if two readings of a 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. Finally, a general federal purpose to encourage a particular activity does not, on its own, preempt state laws that do the opposite. See *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609, 633-34. Instead, "it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict." (*Id.*, at p. 634.)

People v. Rinehart

Subsequent to argument in the instant case, the case of People v. Rinehart, (2014) 230 Cal. App. 4th 419, was decided. Defendant Brandon Rinehart was charged with a violation of F & G. C. § 5653(a), in that he used vacuum and suction dredge equipment in a river, stream, or lake without a permit, and with a violation of F. & G. C. § 5653 (d), in that he possessed a vacuum and suction dredge within an area closed to the use of that equipment and within 100 yards of waters closed to the use of that equipment. The trial court rejected defendant's affirmative defense that § 5653 was unenforceable against him because the statute, as applied, was preempted by federal law, and it disallowed evidence relevant to the issue. The trial court then found defendant guilty of both offenses.

The Third Appellate District Court of Appeal reversed the judgment and remanded the cause. The court noted that F. & G. C. § 5653, ***requiring a permit from the state before persons may conduct suction dredge mining operations does not, standing alone, contravene federal law.*** However, the court could not determine on the record before it that, as a matter of law, the criminal provisions of § 5653, read in

light of the provisions of F. & G. C. § 5653.1, are rendered unenforceable because the California statutes have rendered the exercise of rights granted by the federal mining laws commercially impracticable, *given that the trial court had disallowed evidence relevant to the issue.* The matter thus had to be returned to the trial court for further proceedings on the issue of preemption, admitting whatever evidence, and hearing whatever argument, the trial court, in its discretion, deemed relevant and then ruling accordingly. Specifically, the trial court had to address at least whether § 5653.1, as currently applied, operated as a practical matter to prohibit the issuance of permits required by § 5653; and if so, whether that de facto ban on suction dredge mining permits had rendered commercially impracticable the exercise of defendant's mining rights granted to him by the federal government.

The *Rinehart* court addressed the fundamental principles of federal preemption as follows:

> The property clause of the United States Constitution "provides that 'Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' U.S. Const., Art. IV, § 3, cl. 2." (*Kleppe v. New Mexico* (1976) 426 U.S. 529, 535 [].) The United States Supreme Court has "repeatedly observed that '[the] power over the public land thus entrusted to Congress is without limitations.' " (*Id.* at p. 539 [], quoting *U.S. v. San Francisco* (1940) 310 U.S. 16, 29 [].)
>
> Even so, " 'the State is free to enforce its criminal and civil laws' on federal land so long as those laws do not conflict with federal law. [Citation.] The Property Clause itself does not automatically conflict with all state regulation of federal land. Rather, ... '[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.' [Citation.]" (*Granite Rock, supra*, 480 U.S. at pp. 580–581 [], italics added, quoting *Kleppe v. New Mexico, supra*, 426 U.S. at p. 543.) Put differently, "[T]he Property Clause gives Congress plenary

power over ... federal land ... ; however, even within the sphere of the Property Clause, state law is pre-empted only when it conflicts with the operation or objectives of federal law ... [citation]." (*Granite Rock*, at p. 593 [].)

"[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [Citations.] If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law [citation] or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, [citation]." (*Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, 248 []; see *Viva!, supra*, 41 Cal.4th at pp. 935–936.) (*Rinehart, supra*, 230 Cal.App.4th at pp. 430-431.)

The *Rinehart* court went on to describe the applicable federal mining law as follows:

The federal government's policy relating to mining and minerals is set forth at title 30 United States Code section 22: "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States ... under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

We deal here mainly with the General Mining Act of 1872.
"Under the Mining Act of 1872, 17 Stat. 91, as amended, 30 U.S.C. §22 *et seq.*, a private citizen may enter federal lands to explore for mineral deposits. If a person locates a valuable mineral deposit on federal land, and perfects the claim by properly staking it and complying with other statutory requirements, the claimant 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,' [citation], although the United States retains title to the land. The holder of a perfected mining claim may secure a patent to the land by complying with the requirements of the Mining Act and regulations promulgated thereunder [citation] and, upon issuance of the patent, legal title to the land passes to the patent holder." (*Granite Rock, supra*, 480 U.S. at pp. 575–576 [].)

The United States Supreme Court has recognized that the intent of Congress in passing the mining laws "was to reward and encourage the

> discovery of minerals that are valuable in an economic sense." (*United States v. Coleman* (1968) 390 U.S. 599, 602 [].)
>
> Constitutionally speaking, under most circumstances, the states are free to enact environmental statutes and regulations binding on those holding unpatented mining claims on federal lands so long as those statutes and regulations do not rise to the level of impermissible state land use regulations. (See *Granite Rock, supra*, 480 U.S. 572 [].) "The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." (Id. at p. 587 [].)
> (*Rinehart, supra*, 230 Cal.App.4th at pp. 431-432.)

The *Rinehart* court then noted that "[i]n 1961, the State of California enacted section 5653 directing California's Department of Fish and Wildlife (formerly known as the Department of Fish and Game) (Department) to issue permits if it determined the particular vacuum or suction dredge mining operation "will not be deleterious to fish." (Stats. 1961, ch. 1816, § 1, p. 3864.) Suction dredging is the use of a suction system to remove and return materials from the bottom of a stream, river or lake for the extraction of minerals. (Cal. Code Regs., tit. 14, § 228.) In 1988, amendments to the statute made it a misdemeanor to possess a vacuum or suction dredge in or within 100 yards of waters closed to the activity. (Stats. 1988, ch. 1037, § 1, p. 3371.)" (*Rinehart, supra*, 230 Cal.App.4th at p. 432.)

Ultimately, the legislature prohibited issuing any new permits under section 5653, and imposed a statewide moratorium on instream suction dredge mining. The current F. & G. C. § 5653.1 allows for the statutory moratorium to end upon the Department's certification that the following five conditions had been satisfied:

"(1) The [D]epartment has completed the environmental review of its existing [(1994)] suction dredge mining regulations . ...

"(2) The [D]epartment has transmitted for filing with the Secretary of State ... a certified copy of new regulations adopted, as necessary, pursuant to ... the Government Code.

"(3) The new regulations described in paragraph (2) are operative.

"(4) ***The new regulations described in paragraph (2) fully mitigate all identified significant environmental impacts.***

"(5) A fee structure is in place that will fully cover all costs to the [D]epartment related to the administration of the program." (Former § 5653.1, subd. (b); see § 5653.1, as amended by Stats. 2012, ch. 39, § 7, eff. June 27, 2012.)
(*Rinehart, supra*, 230 Cal.App.4th at pp. 432-433.)

In *Rinehart*, Defendant argued that because of a lack of funding, the Department is unable for financial reasons to fulfill the conditions set forth in section 5653.1, which results in a continuing, if not permanent, moratorium on suction dredge mining permits, which stands as an obstacle to congressional intent. In response to the argument that such permits may be issued again at some point in the future, Defendant responded that to accept that argument would be to allow any moratorium to stand on the promise that it would be lifted in the future. Defendant also argued that, where the government has authorized a specific use of federal lands, a state may not prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress. (*Rinehart, supra*, 230 Cal.App.4th at p. 433.)

The *Rinehart* court thus framed its analysis as whether sections 5653 and 5653.1, as presently applied, stand as obstacles to the accomplishment of the full purposes and objectives of Congress in passing the federal mining laws. (*Rinehart, supra*.) The court acknowledged that section 5653 requiring a permit from the state

before persons may conduct suction dredge mining operations does not, standing alone, contravene federal law, citing *Granite Rock, supra*, 480 U.S. 572 , which established that the requirement of a state permit to conduct certain activities on federal land is not categorically prohibited. (*Rinehart, supra.*)

Addressing the conditions attending the permit, the court stated:

> The question here is whether the requirements of section 5653.1, which requirements, defendant argues, cannot at the present time be met by the state, in fact operate to prohibit the issuance of a permit under section 5653. That is, according to defendant, there is at the current time a de facto ban on suction dredge mining in California imposed by the state through the operation of sections 5653 and 5653.1. Moreover, according to defendant, there is no economically feasible way to extract valuable mineral deposits at the site of his claim. Put simply, according to defendant, this combination of circumstances has the practical effect of the state taking away from him what the federal government has granted. Therefore, he argues, the state statutes are unenforceable because their operation, as to defendant, is preempted by federal law.
> (*Rinehart, supra*, 230 Cal.App.4th at p.434.)

The *Rinehart* court specifically found the opinion of the United States Court of Appeals for the Eighth Circuit in *South Dakota Mining Assn. Inc. v. Lawrence County* (8th Cir. 1998) 155 F.3d 1005 (*South Dakota Mining*) nearly directly on point:

> In *South Dakota Mining*, the voters of Lawrence County, South Dakota, enacted an ordinance prohibiting the issuance of new or amended permits for surface metal mining in what was known as the Spearfish Canyon area. Plaintiffs in the action to permanently enjoin enforcement of the ordinance included mining companies that held federally patented and unpatented mining claims in the area and that had conducted surface mining operations consistent with federal law within Lawrence County for the 15 years before the ordinance was enacted. (*South Dakota Mining, supra*, 155 F.3d at p. 1007.)
>
> The record in the district court showed that surface metal mining was the only mining method that had been used to mine gold and silver deposits in the area for the previous 20 years. The record also showed that surface metal mining was the only mining method that could extract gold and silver within the Spearfish Canyon area even though, in other parts of South Dakota, underground and other types of gold and silver mining were

prevalent. Surface metal mining in the Spearfish Canyon area was the only mining method available, as a practical matter, because the gold and silver deposits in that area were located, geologically, at the earth's surface. The record showed that the mining companies had invested substantial time and money to explore the area for mineral deposits and to develop mining plans that conformed to federal, state, and local permitting laws. (*South Dakota Mining, supra*, 155 F.3d at pp. 1007–1008.)

The district court permanently enjoined enforcement of the ordinance holding that the General Mining Act of 1872 preempted the ordinance. (*South Dakota Mining, supra*, 155 F.3d at p. 1008.)

The Eighth Circuit Court of Appeals affirmed the district court's order. The court first found that the purposes and objectives of Congress in passing the General Mining Act of 1872 included "the encouragement of exploration for and mining of valuable minerals located on federal lands, providing federal regulation of mining to protect the physical environment while allowing the efficient and economical extraction and use of minerals, and allowing state and local regulation of mining so long as such regulation is consistent with federal mining law." (*South Dakota Mining, supra*, 155 F.3d at p. 1010.)

The court then found that "[t]he Lawrence County ordinance is a per se ban on all new or amended permits for surface metal mining within the area. Because the record shows that surface metal mining is the only practical way any of the plaintiffs can actually mine the valuable mineral deposits located on federal land in the area, the ordinance's effect is a de facto ban on mining in the area. ...

"The ordinance's de facto ban on mining on federal land acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act. Congress has encouraged exploration and mining of valuable mineral deposits located on federal land and has granted certain rights to those who discover such minerals. Federal law also encourages the economical extraction and use of these minerals. The Lawrence County ordinance completely frustrates the accomplishment of these federally encouraged activities. A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution. The ordinance is prohibitory, not regulatory, in its fundamental character." (*South Dakota Mining, supra*, 155 F.3d at p. 1011.)
(Rinehart, supra, 230 Cal.App.4th at pp. 434-435.)

The Rinehart court distinguished its case from *South Dakota Mining* in that sections 5653 and 5653.1, read together or alone, do not *expressly* prohibit the issuance of suction dredge mining permits. Nevertheless, the Rinehart court determined that has no bearing on the result because while the F. & G.C. sections here "do not expressly ban suction dredge mining, they do require a state permit for such mining and, however, as currently applied, California law as embodied in the words and application of section 5653.1 acts to prevent the issuance of such permits." (*Rinehart, supra*, 230 Cal.App.4th at pp. 435-436.) In the case at hand, *there is no particular argument from any party, that permits will not and cannot, be issued in the near or far future for years if ever. This is fundamentally unfair and clearly operates as a de facto ban.*

In any event, as argued by Rinehart, "in practical operation, sections 5653 and 5653.1, have, since 2009, banned suction dredge mining in California" and "there is no commercially viable way to discover and extract the gold or other minerals lying within his mining claims other than suction dredge mining, [so] the effect of the statutory scheme is to deprive him of rights granted to him under federal law." (*Rinehart, supra*, 230 Cal.App.4th at p. 436.)

The *Rinehart* court then stated:

> Put differently, and in the language of the hypothetical used by the court in *Granite Rock*, if sections 5653 and 5653.1 are environmental regulations that are "so severe that a particular land use [(in this case mining)] ... become[s] commercially impracticable" (*Granite Rock, supra*, 480 U.S. at p. 587), then they have become de facto land use planning measures that frustrate rights granted by the federal mining laws and, thus, have become obstacles to the realization of Congress's intent in enacting those laws. If that is the case, as defendant alleges, the Fish and Game Code provisions at issue here are unenforceable as preempted by federal mining law.

(*Rinehart, supra*, 230 Cal.App.4th at p. 436.)

Nonetheless, the *Rinehart* court, while acknowledging that defendant had made a colorable argument to that end, could not determine on the record before it that, as a matter of law, the criminal provisions of section 5653, read in light of the provisions of section 5653.1, were rendered unenforceable because the California statutes have rendered the exercise of rights granted by the federal mining laws "commercially impracticable." (*Granite Rock, supra*, 480 U.S. at p. 587.) (*Rinehart, supra*, 230 Cal.App.4th at p. 436.) In contrast, the record made by the miners in the instant case is sufficient.

Therefore, the *Rinehart* court returned the matter to the trial court for further proceedings on the issue of preemption, admitting whatever evidence, and hearing whatever argument, the trial court, in its discretion, deems relevant and then ruling accordingly. "Specifically, the trial court must address at least these two questions: (1) Does section 5653.1, as currently applied, operate as a practical matter to prohibit the issuance of permits required by section 5653; and (2) if so, has this de facto ban on suction dredge mining permits rendered commercially impracticable the exercise of defendant's mining rights granted to him by the federal government?" (*Rinehart, supra.*) The Court here, answers yes to both questions.

Kimble MSA on it's 1st COA and PLP MSA on it's 4th COA

Kimble argues that most suction dredge mining in California occurs on Federal lands where a miner has validly located and filed a Federal mining claim pursuant to Federal mining law. This creates, for the miner, an enforceable property right under Federal law to extract all minerals from his mining claim. Suction dredge mining is the only

economical and environmentally sound method for extracting minerals from California's rivers and streams. But F & G Code § 5653.1, since 2009, along with the CDFW new regulations in 2012, **prohibits** Federal prospectors and miners, who hold Federal mining claims and mineral estates, from engaging in suction dredge mining on Federal lands. Accordingly, Kimble contends they are entitled to summary adjudication of the federal preemption cause of action as a matter of law since the California statute and regulations impermissibly conflict with the 1872 General Mining Law, as amended, 30 U.S.C. §§ 22-54, and the 1976 Federal Land Policy Management Act, 43 U.S.C. §§ 1701 et seq. which provide that all valuable mineral deposits in lands belonging to the United States shall be "free and open" to mineral development.

Kimble argues that CDFW has admitted that its § 5653.1 constitutes a *complete prohibition* on suction dredge mining because the mandated new regulations have not and cannot fully mitigate all identified significant environmental impacts pursuant to F & G Code § 5653.1(b)(4) [1] and therefore constitutes a physical impossibility to comply with both State and Federal law, citing among other cases, *California Coastal Commission v. Granite Rock Co.* (1987) 480 U.S. 572, 581 ("*Granite Rock*"). Kimble argues:

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[1] Based on the 2012 FSEIR determinations of project-specific significant and unavoidable effects under CEQA in the areas of water quality and toxicology, biological resources, cultural resources, and noise, and significant and unavoidable cumulative effects under CEQA re: wildlife species and their habitats, water turbidity/TSS discharges and mercury resuspension and discharge, the CDFW's new (2012) regulations cannot "fully mitigate all identified significant environmental effects". (http://www.dfg.ca.gov/suctiondredge/). See, CDFW Findings of Fact for Suction Dredge Permitting Program, March 16, 2012. (Karuk Tribe RJN, Ex. J.)

"The general rule is that "where the state law stands as obstacle to the accomplishment the full purposes and objectives of Congress," it is preempted. [*Granite Rock, supra,*] 480 U.S. 575, 592, ...; see also *Perez v. Campbell*, 402 U.S. 637 (1971) ("any state legislation which frustrates the full effectiveness of Federal law is rendered invalid by the Supremacy Clause" regardless of the underlying purpose of its enactors). The "all-pervading purpose of the mining laws is to further the speedy and orderly development of the mineral resources of our country," *United States v. Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968); see also 30 U.S.C. § 21a(1) ("The continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in...the development of the economically sound and stable domestic mining, minerals, metal and mineral reclamation industries").

"To further these vital public policies the 1872 Mining Act declares:

> "...all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States..." 30 U.S.C. § 22.

PLP makes essentially the same arguments.

Ruling

On their motions for summary adjudication, the Court finds there is no triable issue of material fact on the issue of Federal Preemption and that as a matter of law and in actual fact, that the State's extraordinary scheme of requiring permits and then refusing to issue them whether and/or being unable to issue permits for years, stands "as an obstacle to the accomplishment of the full purposes and objectives of Congress" under *Granite Rock and a de facto ban.*

Material facts-1-5 (Kimble) Material Facts 1-6 (PLP)

Evidence - Declarations of Goldberg, Hobbs, Keene, Tyler, Maksymyk.

New 49'ers MSA on it's 2nd COA

In the second causes of action of the ***New 49'ers*** **FAC**, Plaintiffs allege that through the 1872 Mining Law, as amended and related statutes, Congress created federal property rights in mining claims in furtherance of general federal policy to foster mineral development on federal lands. Also Congress possesses plenary power over federal property under the Property Clause (U.S. Const. Art. IV, § 3.) (FAC, ¶62.) The New 49'ers allege that the CDFW Actions (F & G Code 5653.1 and regulations thereunder), individually and/or in any combination thereof, are void as against the U.S. Constitution on the ground of the Supremacy Clause (U.S. Constitution, Article VI, Clause 2), insofar as they interfere with the federal purpose of fostering mineral development on federal property, and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." (FAC, ¶63.)

The **New 49'ers** argue they are entitled to summary adjudication of their second cause of action for federal preemption of F & G Code § 5653.1 and portions of the regulations set forth at 14 Cal. Code of Regs. §§ 228 et seq., which operate to forbid Plaintiffs from mining their claims. *The New 49'ers acknowledge that the State of California has lawful power to enact reasonable environmental regulations* that do not materially interfere with mining operations (*Granite Rock*), however, the New 49'ers argue that the State cannot lawfully require permits and then refuse to issue them, forbid mining entirely in certain areas, or require miners to participate in a lottery to obtain a very limited number of permits.

Specifically, the New 49'ers contend the challenged statutory and regulatory restrictions on suction dredge mining are preempted by federal law based on its arguments regarding the nature of rights in mining claims under Federal law and regulations and the doctrine of federal preemption, generally, and in the mining context. The arguments of the New 49'ers are similar to those of PLP and Kimble.

Ruling

On its motions for summary adjudication, the Court finds there is no triable issue of material fact on the issue of Federal Preemption and that as a matter of law and in actual fact, that the State's extraordinary scheme of requiring permits and then refusing to issue them whether and/or being unable to issue permits for years, stands "as an obstacle to the accomplishment of the full purposes and objectives of Congress" under *Granite Rock and a de facto ban.*

Material Facts- 1-6

Evidence – Buchal declaration

CDW MSA against Kimble, PLP, and New 49'ers

The CDW motions for summary adjudication as to Kimble, PLP, and New 49'ers is denied for reasons discussed above.

Prevailing parties to prepare notice and order.