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BY FEDERAL EXPRESS

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *People v. Rinehart*, No. S22220 & the Court's Question:

"What effect, if any, does Senate Bill No. 637 (2015-2016 Reg. Sess.) (Stats. 2015, ch. 680) have on the issues in this case?"

To the Honorable Justices of the California Supreme Court:

We respond from two perspectives: (1) the narrow perspective, in which the Bill is formally irrelevant to Mr. Rinehart's conviction; and (2) the broader perspective, in which the bill may be viewed as part and parcel of the Legislative Assembly's ongoing unconstitutional interference with federal mining rights. On balance, SB 637 underscores the need for this Court's decision to dispel ongoing regulatory and judicial paralysis that cripples mining on federal lands in California.

1. The Narrow Perspective: How SB 637 Relates to Fish and Game Code § 5653.

Strictly speaking, Senate Bill 637 has no effect whatsoever on Mr. Rinehart's misdemeanor conviction. Mr. Rinehart was convicted in 2012 for violation of §§ 5653(a) and 5653(d) of the Fish and Game Code, forbidding the use of a suction dredge without a permit, and possession of a dredge within 100 yards of closed waters. Other than renumbering § 5653(d) to § 5653(e), the 2015 passage of Senate Bill 637 did not make any changes to these statutes, prospectively or retrospectively.

Mr. Rinehart challenges § 5653.1 of the Fish and Game Code insofar as it stopped the Department from issuing the required permit. SB 637 leaves § 5653.1 fully in place, including the portion pursuant to which the Department must certify that the new 2012 regulations "fully mitigate all identified significant environmental impacts" and that "a fee structure is in place that will fully cover all costs to the department related to the administration of the program". The Department has yet to issue any such certifications, and continues to claim on its website

that it is "prohibited from issuing any permits for suction dredging in California".[1]

Senate Bill 637 does contain, in § 4, provisions related to the foregoing certification requirements. It adds § 5653(d)(2), providing that the Department "may adjust the base fees for a permit described in this subdivision to an amount sufficient to cover all reasonable costs of the department in regulating suction dredging activities." However, as the Department noted in its Opening Brief, it already had such authority (Opening Brief at 8 n.4). It has yet to exercise any such authority, part and parcel of its ongoing refusal to exercise regulatory authority to allow permits.

Section 4 of Senate Bill 637 also addresses (in a complex and confusing way) the question of certifying full mitigation of all identified environmental impacts:

> "The Legislature also finds and declares that, except for water quality, after complying with the Governor's Executive Order B-10-11 regarding tribal consultation and additional consultation requirements pursuant to Chapter 532 of the Statutes of 2014, also known as Assembly Bill 52 (Gatto), the Department of Fish and Wildlife may determine, for purposes of Section 5653.1 of the Fish and Game Code, that significant environmental impacts to resources other than fish and wildlife resources caused by the use of vacuum or suction dredge equipment for the extraction of minerals are fully mitigated if a regulation adopted by the department to implement and interpret Section 5653 of the Fish and Game Code requires compliance with other laws and provides, in part, that nothing in a permit or amended permit issued by the department relieves the permittee of responsibility to comply with all applicable federal, state, or local laws or ordinances."

To understand the intent, it is important to note that the Legislature rejected an earlier iteration of this language, striking a former § 4(a) that would have simply declared:

> Except as provided by the changes made by this act, *the Legislature finds and declares that the regulations promulgated* by the Department of Fish and Wildlife in 2012 to implement and interpret Sections 5653 and 5653.1 of the Fish and Game Code *were consistent and in compliance with the Fish and Game Code, the California Environmental Quality Act* (Division 13 (commencing with Section 21000) of the Public Resources Code), *and the Administrative Procedure Act* (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

(9/4/15 Amended Assembly version of the Bill.)

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[1] https://www.wildlife.ca.gov/Licensing/Suction-Dredge-Permits (accessed 2/3/16).

In short, the Legislature considered and rejected the option of jettisoning a requirement for full mitigation of the so-called significant impacts related to birds, noise, cultural resources, and others. Instead, the Legislature still requires the Department to make the "fully mitigate" certifications. Section 4 first imposes consultation requirements that may be unconstitutionally implemented to allow Native American Tribes to impose land use controls on federal land by agreement with lead agencies. (*See* AB 55, § 7.) It then provides that the Department may find that that permittee compliance with other laws could fully mitigate so-called significant impacts "to resources *other than fish and wildlife resources*" (emphasis added). Hence the Department now emphasizes on its website that SB 637 "[c]onditions Department issuance of permits on regulations implementing the section that must ensure the use of vacuum or suction dredge equipment will not cause any significant effects to fish and wildlife".[2] No such certifications have been issued, and the Department's litigation position in this case is that *it lacks power to do so*. (Opening Brief at 7.)

In short, substantially the same "fully mitigate" barriers that made it legally impossible for Rinehart to get a permit when he was cited remain today. This is not for want of effort by the mining community. In the wake of the Court of Appeals decision below, a ruling was secured from the Coordination Judge (*In re Suction Dredge Mining Cases*, No. JCPSDS4720 (San Bernardino Cty.) finding the State's refusal to issue permits unconstitutional, but the Court on July 8, 2015 denied any equitable relief on the ground that the risk of imprisonment for mining without a permit did not constitute irreparable injury; an appeal to the Fourth District Court of Appeal was taken, followed by motions on August 5, 2015 for summary reversal, or to expedite, but no action was ever taken by the Fourth District, which is probably waiting for this Court. *In Re Suction Dredge Mining Cases*, No. E064087.

The mining community also moved for summary judgment before the Coordination Judge to remove the certification requirement from § 5653.1 by striking down AB 120 and SB 1018 for violation of the "single subject rule" in the Article IV, § 9 of the California Constitution. That would have left only the initial iteration of § 5653.1 (SB 670), which did not require the certifications. On January 20, 2016, however, the Coordination Judge refused to rule on the motion, instead staying all further proceedings until this Court rules in this case on the unrelated federal preemption issue.[3]

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[2] *Id.*

[3] The proceedings stayed included the miners' fully-briefed CEQA and APA claims that, among other things, the so-called "significant environmental impacts" were arbitrary and capricious, not supported by substantial evidence, and the product of what would be recognized in any other context as exaggeration or even fraud. With the passage of SB 637, the Karuk Tribe and its allies dismissed all their claims in exchange for a $340,000 payment by the Department. (*Cf.* Opening Brief at 33 n.16 ("issues are pending in trial court")).

2. The Broader Perspective: Expanding Prohibitions Heighten the Obstacles to Accomplishing the Full Purposes and Objectives of Federal Law

Senate Bill 637's most remarkable feature is the definitional section:

> "For purposes of this section [5653] and Section 5653.1, the use of vacuum or suction dredge equipment, also known as suction dredging, is the use of *a mechanized or motorized system* for removing or assisting in the removal of, or the processing of, material from the bed, bank, or channel of a river, stream, or lake in order to recover minerals."

(SB 637, §§ 2 & 3 (emphasis added).) With this revision, it is now clear that the Legislative Assembly is attempting to destroy not just the environmentally-sound and practical means of recovering underwater placer deposits with suction dredges, but also all motorized mining in the immediate vicinity of California's rivers, streams and lakes.

This expanded definition threatens to put an end to nearly all use of motorized methods of prospecting and mining within 100 yards of every California waterway. Only "recreational prospecting such as gold panning" is to be permitted, effectively turning the clock back on mining technology to the time before California was even a State. It is hard to imagine a more perverse progression of "obstacle[s] to the accomplishment of the full purposes and objectives of Congress" (*California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 581 (1987)) than SB 670, AB 120, SB 1018, and now SB 637.

The Congressional goal of "economically sound and stable domestic mining, minerals, metal and mineral reclamation industries" set forth in 30 U.S.C. § 21a(1) cannot possibly be achieved by outlawing the use of equipment manufactured by an entire small-scale mining industry. A simple Google search identifies dozens of manufacturers of the equipment (typically small businesses), such as http://www.keeneeng.com, http://jogmining.com, www.hecklerfabrication.com, www.angusmackirk.com, www.dahlkedredge.com, www.goldcube.net.

This is the fourth bill attacking small-scale prospecting and mining, while continuing to exempt "suction dredging conducted for regular maintenance of energy or water supply management infrastructure, flood control, or navigational purposes" (§ 5653.1(d)), along with all other motorized (non-mining) activities conducted in, on and around the rivers of California. SB 637 confirms that the state is not attempting any even-handed and reasonable environmental regulation of federal mining activities, but is attempting to destroy any and all modern placer mining near California rivers. Ironically, the expanded definition would, if SB 637 were applied in any fashion other than an invidious, discriminatory attack on miners such as Mr. Rinehart, immediately shut down most of the State's sand, gravel and aggregate mineral industries upon which vital State infrastructure depends.

Having defined the "use of vacuum or suction dredge" equipment to include all motorized equipment and all mining near water bodies, the Bill then creates an entirely new regulatory system by adding § 13172.5 to the Water Code, empowering the Water Board to

"[p]rohibit any particular use of, or methods of using, vacuum or suction dredge equipment, or any portion thereof, for the extraction of minerals . . .". Again one sees a sort of invidious discrimination against precisely that which Congress has sought to foster and encourage: the development, i.e., extraction, *of minerals*. Many types of motorized equipment used in the processing of mineral samples and small quantities of placer material manifestly have no water quality impact at all, such as battery-operated (dry) spiral concentrators.

Nevertheless, we anticipate that the People will emphasize that SB 637 is ostensibly aimed at the protection of water quality. Among other things, SB 637 prohibits the issuance of any permits for the use of vacuum or suction dredge equipment unless and until the miner presents the Department with either:

> "(A) A copy of waste discharge requirements or a waiver of waste discharge requirements issued by the State Water Resources Control Board or a regional water quality control board in accordance with Division 7 (commencing with Section 13000) of the Water Code"; or
>
> "(B) A copy of a certification issued by the State Water Resources Control Board or a regional water quality control board and a permit issued by the United States Army Corps of Engineers in accordance with Sections 401 and 404 of the Federal Water Pollution Control Act (33 U.S.C. Secs. 1341 and 1344, respectively) to use vacuum or suction dredge equipment."

While issues concerning such water quality permitting are beyond the scope of this appeal, it is worth noting that the U.S. Army Corps of Engineers has for decades issued national and regional permits for the discharge of dredged materials at the insignificant levels involved in activities such as Rinehart's, including such permits as the current NWP 19 ("Dredging of no more than 25 cubic yards") or NWP 44 (mining-related discharges of dredged materials affecting "not more than 300 linear feet of stream bed").[4] Until 2000, the Corps issued general permits in California specific to suction dredging, which were approved by the State.

All these permits were and are issued under § 404 of the federal Clean Water Act, 33 U.S.C. § 1344, which requires, pursuant to § 401, 33 U.S.C. § 1341, that the State certify that the permits are compliant with water quality standards. The State Water Board declined to issue a general certification of the general permits in 2012, and initial contacts with the Regional Water Boards suggests that the State Water Board, which engineered the "dredges are a mercury problem, not a mercury solution" scheme discussed in our Answering Brief to Amici Karuk Tribe *et al.* (at pp. 10-21), will cause the Regional Boards deny such certifications, leading to further litigation.

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[4] This Court can take judicial notice of such permits, available for review on the U.S. Army Corps of Engineers website at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_corrections_21-sep-2012.pdf.

It is impossible to overstress the degree to which the mercury issue was the product of irrationality that no trier of fact should accept. In a context where mercury levels in rivers with historic mercury deposits spike with every heavy flow event as the mercury moves downstream, modern small-scale mining (not using mercury in its processes) either provides a benefit by removing 98% of the mercury encountered, or is utterly insignificant.

As far as the mining community is aware, neither the State Water Board nor any Regional Water Board has taken any action, as required by § 3 of SB 637 (new Water Code § 13172.5(c)(1), to "solicit stakeholder input by conducting public workshops" before adopting any waste discharge requirements or waivers of waste discharge requirements. The Water Board knows that the prior Corps general permit covering suction dredging (which it certified) had expired in 2000, and took no action for years. A Declaration filed in the Coordinated Litigation pending before the San Bernardino Court, dated April 30, 2013, from the lead manager for the relevant permitting activities, reported that:

- The Board has been studying the issue since 2007;
- The Board provided the Department of Fish and Wildlife with $500,000 to analyze water quality issues (funding the mercury broadside);
- ". . . it would be infeasible for suction dredge miners to obtain individual permits"; "a general permit would likely be the appropriate procedure";
- "It is anticipated that the process of drafting and adopting a general NPDES permit, along with the associated environmental review process pursuant to CEQA would take at least two to three years".

It is now nearly three years later, and the Water Board, as far as the Miners can tell, has done nothing, part and parcel of the State's general willful refusal to regulate as a means of prohibiting. The reference to an "NPDES" permit reflects the Board's attempt to invoke § 402 of the federal Clean Water Act, rather than the §§ 404/401 procedure previously used. Section 402 is much more complicated and was intended to cover large industrial producers discharging toxic wastes; it does not apply when the Corps has jurisdiction over the "discharge of dredged materials". *See also* 33 C.F.R. § 323.2(d) (definition of "discharge of dredged materials").

For all these reasons, the mining community is still working through the details of compliance with the water quality aspects of SB 637. However, in all probability the administrative agencies will continue to adopt the pretense of regulating while deferring forever any administrative action that could effectively issue any permits authorizing any motorized mining activities whatsoever. Unless this Court provides direction to the State's agencies establishing the right of California's small-scale miners to operate on federal lands under a *functioning* regulatory system, further litigation is highly likely.

Conclusion

Enough is enough. Reasonable environmental regulation does not include *seriatim* legislation designed to maintain year after year after year of prohibition in the guise that someday, somehow, an actual *regulatory* system might be developed—including the sabotage of what has been developed (through AB 120 and SB 1018) in favor of still further innovations (SB 637). All this legislation destroyed an effective and functioning permit system under which not so much as a single fish or even fish egg in California was ever hurt. No industry can reasonably be expected to survive such conduct, and Congress did not permit California arbitrarily to destroy what is perhaps the oldest industry in California: small-scale mining on federal lands.

This Court can and should reverse Rinehart's conviction, and declare that if the State of California wishes to cite miners on federal land for operating without a permit, it must first have a reasonable, functional and non-prohibitive permitting system in place. That would finally give the State an incentive actually to exercise regulatory authority.

Respectfully submitted,

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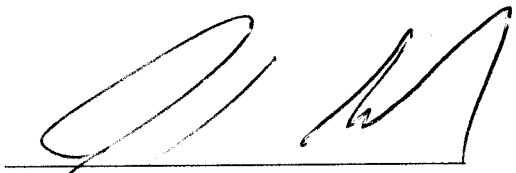
cc: Service List

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(d) of the California Rules of Court, I hereby certify that this supplemental letter brief contains 2,765 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: February 16, 2016



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DECLARATION OF SERVICE

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On February 16, 2016, I served the following document:

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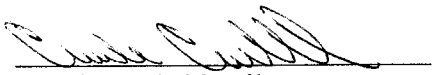

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