CIV-150112-JCP-DS4720-MISC-154102

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System Code: CIV
Case Number: DS4720
Case Type: JCP
Action Code: MISC
Action Date: 01/12/15
Action Time: 3:41
Action Seq: 0002
Printed by: KPOLA

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Ruling on Motions for Summary Adjudication on Issue of Federal Preemption filed.

NEW FILE

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, t*here 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.