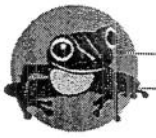

CENTER *for* BIOLOGICAL DIVERSITY

Because life is good.

October 17, 2014

Honorable Presiding Justice Harry E. Hull, Jr.
Honorable Justice Ronald B. Robie
Honorable Justice Andrea Lynn Hoch
Third District Court of Appeal
914 Capitol Mall
Sacramento, CA 95814

Re: *People v. Rinehart*, Case No. C074662 Request For Modification of the Opinion

Dear Justices Hull, Robie, and Hoch:

This letter is written on behalf of amicus curie the Karuk Tribe, Center for Biological Diversity, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Friends of the River, California Sportfishing Protection Alliance, Foothill Angler's Coalition, North Fork American River Alliance, Upper American River Foundation and Central Sierra Environmental Resource Center.

Amici seek a modification of the Court's opinion in *People v. Rinehart* (Sept. 23, 2014, No. C074662) —— Cal.App.4th —— [2014 WL 5020277] on grounds that the 1872 Mining Act has no effect on instream mining activity of the type practiced by Rinehart in navigable waterways. The 1872 Mining Act does not apply to lands beneath navigable waters because these lands are owned by the sovereign state of California and not the federal government. The 1872 Mining Act applies only to "lands belonging to the United States…" (30 U.S.C. 22.) Thus, the state should be free to enact land uses for environmental and public trust benefits on lands in their ownership without creating a conflict with federal law when the federal law doesn't apply to state lands. This issue was not yet been briefed or argued before the Appellate or trial courts in *Rinehart* and is a threshold question in determining whether federal preemption applies.

Under California Rules of Court, Rule 8.264(c), Rule 8.366(a), and Rule 8.888(b)(1), an appellate court may modify its decision until the decision is final. If the appellate court certifies a written opinion for publication after its decision is filed and before its decision becomes final, the finality period runs from the filing date of the order for publication. (Rules 8.264(b)(3); Rule 8.366(b)(3), 8.888(a)(2).) A finality period runs for 30 days. (Rules 8.264(b)(1); Rule 8.366(b)(3), 8.888(a)(1).) On September 23, 2014, the Appellate Court issued its unpublished opinion. The Court issued an order to publish the opinion on October 8, 2014. This request for modification is timely.

Alaska • Arizona • California • Florida • Minnesota • Nevada • New Mexico • New York • Oregon • Washington • Washington, DC

Jonathan Evans, Toxics and Endangered Species Campaign Director & Staff Attorney
351 California St., Ste. 600 • San Francisco, CA 94104
tel: (415) 436-9682 x 318 *fax:* (415) 436.9683 *email:* jevans@biologicaldiversity.org
www.BiologicalDiversity.org

Background

Fish and Game Code section 5653.1, enacted in 2009, requires that the Department of Fish and Wildlife (the "Department") ensure that any permits for suction dredge mining meet conditions related to environmental impacts, revenue recovery, and consultation with affected agencies. Section 5653.1 imposed a statewide moratorium on instream suction dredge mining that is to last until the Department completes administrative proceedings reviewing and enacting regulations on this type of mining.

Brandon Lance Rinehart was charged with violating the moratorium by operating suction dredge equipment in the Nugget Alley placer mining claim that Rinehart owned. This mining claim is registered with the U.S. Bureau of Land Management and is located in Plumas National Forest in Plumas County.

At trial, Rinehart asserted the defense that the 1872 Mining Act preempted the moratorium because the moratorium was an obstacle to the accomplishment and execution of an objective of Congress, namely, the grant of mining claims under the federal Mining Act. The trial court rejected the defense and found Rinehart guilty. He appealed. The Court of Appeal reversed, remanding to the trial court for further consideration of the preemption defense consistent with the opinion.

The specific questions that the Court of Appeal directed the trial court to resolve were as follows:

1. Does section 5653.1, as currently applied, operate as a practical matter to prohibit the issuance of permits required by section 5653?

2. If so, has this de facto ban on suction dredge mining permits rendered commercially impracticable the exercise of Rinehart's mining rights granted to him by the federal government?

(*Rinehart*, *supra*, slip. op. at p. 19 [2014 WL 5020277 at *10].)

1872 Mining Law

The Mining Act, 30 U.S.C. § 22 *et seq.*, provides in pertinent part:

> 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, . . . , 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.

(Emphasis added.)

Under the act, "[i]f a person locates a valuable mineral deposit on federal land, and perfects the claim . . . , the claimant shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, although the United States retains title to the land." (*Cal. Coastal Commn. v. Granite Rock* (1987) 480 U.S. 572, 575.) As noted by the Court of Appeal, the intent of the Mining Act was "to reward and encourage the discovery of minerals that are valuable in an economic sense." (*Rinehart*, *supra*, slip op. at p. 13 [2014 WL 5020277 at *7] [quoting *United States v Coleman* (1968) 390 U.S. 599, 602].)

Public Trust Doctrine

It is a basic and well-settled rule of the common law, stretching back hundreds of years, that ownership of the beds of navigable waters resides in the sovereign in trust for the people, a principle known as the Public Trust Doctrine. (See *Shively v. Bowlby* (1894) 152 U.S. 1, 11.) The interest of the people, as reposed in the sovereign, is for the most part inalienable. (*Illinois Central R.R. Co. v. Illinois* (1892) 146 U.S. 387, 453-54.)

In the United States, the "sovereign" in question is the *state*. (*Martin v. Waddell* (1842) 41 U.S. 367, 367.) According to the U.S. Supreme Court, upon statehood the people "held the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." (*Ibid.*) Moreover, and importantly for states such as California, states admitted to the Union after the original thirteen are entitled, under the so-called equal footing doctrine, to the lands beneath *their* navigable waters (subject to the same public trust) in the same manner as the original states. (*Pollard v. Hagan* (1845) 44 U.S. 212, 228-29.)

For this reason, the U.S. Supreme Court held that once a state is admitted into the Union, the sovereignty and dominion over the navigable rivers within the state's boundaries resides "in the State, and not in the United States." (*Goodtitle v. Kibbe* (1850) 50 U.S. 471, 477-78.) As such, after statehood Congress has no power to grant any title in the beds underlying such waters. (*Ibid.*) Congressional grants of land bordering on or bounded by navigable water convey interest only to the high-water mark; the remainder is left to "the sovereign control of each state, subject only to the rights vested by the constitution of the United States." (*Shively*, *supra*, 152 U.S. at p. 58.)[1]

This principle is true whether the interest purportedly granted by Congress is in the form of a fee or mining interests. The Alaska Supreme Court in 1905, for example, approved of language promulgated by then-U.S. Secretary of the Interior Ethan Hitchcock who, in reviewing an application for a mining claim in Alaska, stated that, insofar as the applicant claimed lands

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1 There has only been one exception to this rule, and it concerns the Arkansas River. (*Choctaw Nation v. Oklahoma* (1970) 397 U.S. 620, 622-28; see *Cherokee Nation of Okla. v. Muskogee City-County Port Authority* (E.D. Okla. 1983) 555 F.Supp. 1015, 1017.) But the U.S. Supreme Court subsequently recognized that the exception was created because of "very peculiar circumstances" arising from an "unusual history" of treaties between the United States and Indian tribes. (*Montana v. United States* (1981) 450 U.S. 544, 555, fn. 5.) Such circumstances are not present here.

under navigable water, the claims "are without authority of law and therefore void," and that "the Land Department is without authority to grant any concessions whatever with reference to the desired occupancy or working of said tide lands for mining purposes or otherwise." (*Heine v. Roth* (1905) 2 Alaska 416, 425.) The "general rule" recognized by the court was that "whether gravel deposits lying on the beds of water courses may be appropriated under the placer laws will depend on circumstances. If the stream is navigable, certainly no right to appropriate its bed can be sanctioned. The beds of such rivers and their banks as far as high-water mark belong to the state, and not to the federal government." (*Ibid.*)

Although Congress is free to grant mining interests on federal lands within the state of California, the land underlying navigable riverbeds is *by definition* not federal land. The Mining Act does not apply as a threshold matter. Moreover, any attempt by the federal government to convey an interest in these state lands is *void*.

Thus, the moratorium established in Fish and Game Code §5653.1 does not present an obstacle to or otherwise conflict with the Mining Act for suction dredge mining under navigable waterways. If the California Legislature had passed a ban on mining methods that occur on dry land, then preemption could plausibly occur. But the moratorium is concerned with suction dredge mining, and where this activity takes place in or over navigable water, section 5653.1 cannot conflict with any interest conveyed by the federal government.[2]

Navigable Waters

In light of the above, the court must therefore answer the following question: who is the owner of the title of the riverbed where Rinehart conducted his purportedly illegal activity? If the state of California possesses the title, then preemption would not apply.

To determine whether a riverbed's title is held by a state or the United States, the courts use a federal test. (*United States v. Oregon*, 295 U.S. 1, 14.) The test is derived from *The Daniel Ball* (1870) 77 U.S. 557, 563, in which the U.S. Supreme Court stated: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In questions of title, the court considers rivers on a segment-by-segment basis. (*PPL Montana, Inc. v. Montana* (2012) 132 S.Ct. 1215, 1229.) Also, the title test is concerned wholly with concepts of commercial navigability at the time of statehood. (*PPL Montana*, *supra*, 132 S.Ct. at p. 1228.) As set forth by the Supreme Court, the rule today is that a party seeking to establish state title to a riverbed using present-day evidence must show both that: (1) the modern watercraft "are meaningfully similar to those in customary use for trade and travel at the time of

2 It is for this reason that the case cited by the Court of Appeal, *South Dakota Mining Association, Inc. v. Lawrence County* (8th Cir. 1998) 155 F.3d 1005, 1010-11, is distinguishable. *South Dakota Mining* held that a county ordinance banning *surface* mining was preempted by the Mining Act. Here the issue is mining over navigable water, which falls outside the purview of the Mining Act entirely.

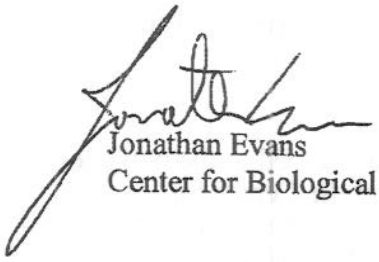
statehood"; and (2) the river's post-statehood condition "is not materially different from its physical condition at statehood." (*PPL Montana*, *supra*, 132 S.Ct. at p. 1233.) Thus, the question for the trial court is a fact-specific inquiry.

Conclusion

Amici respectfully ask the Court of Appeal to add a threshold question to the two found in its opinion. This initial question could entirely dispose of the other two: Did Rinehart's suction dredging activity take place in or over a riverbed whose title is owned by the state of California?

Thank you for your time and consideration of this issue.

Sincerely,



Jonathan Evans
Center for Biological Diversity

/s/
Lynne R. Saxton
Saxton & Associates

cc: See attached service list

PROOF OF SERVICE

I, Jonathan Evans, hereby declare:

I am a citizen of the United States, over the age of 18 years, and am not a party to this action. I am employed at the Center for Biological Diversity in the city and county of San Francisco. My business address is 351 California St, Suite 600, San Francisco, CA. 94104.

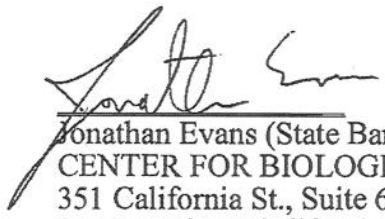
On October 17, 2014, I caused to be served the attached:

Letter Re: *People v. Rinehart*, Case No. C074662 Request For Modification of the Opinion

__X__ BY MAIL. I caused the above identified document(s) addressed to the party(ies) listed below to be deposited for collection in a sealed envelope at the Center for Biological Diversity office or a certified United States Postal Service box following the regular practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service with fully prepaid, first class postage on this day.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this Declaration was executed at San Francisco, California on October 17, 2014.



Jonathan Evans (State Bar No. 247376)
CENTER FOR BIOLOGICAL DIVERSITY
351 California St., Suite 600
San Francisco, California 94104
Telephone: (415) 436-9682
Facsimile: (415) 436-9683
Email: jevans@biologicaldiversity.org

SERVICE LIST

Matthew K. Carr
Deputy District Attorney
Plumas County District Attorney
520 Main St, Room 404
Quincy, CA. 95971
Attorney for Plaintiff

Marc N. Melnick
Deputy District Attorney
Office of the Attorney General
1515 Clay Street, Suite 2000
Oakland, CA. 94612
Attorney for Plaintiff and Respondent

James L Buchal
Murphy & Buchal LLP
3425 S.E. Yamhill, Suite 100
Portland, OR. 97214
Attorney for Defendant and Appellant

Jonathan Wood
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Attorney for Amicus Curiae

Honorable Ira Kaufman
c/o Clerk of the Court
Plumas County Superior Court
520 Main Street, Room 104
Quincy, CA. 95971