

No. S222620

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED WITH PERMISSION

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

SUPREME COURT
FILED

v.

JUL 07 2015

BRANDON LANCE RINEHART,

Frank A. McGuire Clerk

Defendant and Appellant.

Deputy

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

**DEFENDANT AND APPELLANT'S OPPOSITION TO REQUEST FOR
JUDICIAL NOTICE, MOTION TO STRIKE, AND ALTERNATIVE
MOTION FOR LEAVE TO PRESENT ADDITIONAL MATERIAL BY
CONDITIONAL SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE**

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July 2, 2015

This Court has long recognized that it is contrary to principles of fair play and substantial justice to permit an appellant to raise new points in a reply brief:

“Some additional points are made for the first time in their closing brief. We are not disposed to look with favor upon a point so made, unless good reason appears for the failure to make it in the opening brief. This practice is not fair to a respondent, and tends to delay the final disposition of appeals. This court has heretofore said, that while it is undoubtedly at liberty to decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not, an appellant should, under the rules, make the points on which he relies in his opening brief, and not reserve them for his reply, and that the court may properly consider them as waived unless so made.”

Hibernia Savings and Loan Society v. Farnham (1908) 153 Cal. 578, 584.

With Defendant and Appellant Brandon Rinehart permitted to make no factual record at trial, the People now ask this Court to take judicial notice of hundreds of pages of new material never considered by the trial court or Court of Appeals. The gist of the material presented is to claim that suction dredge mining has appreciable adverse environmental consequences and that alternative means of mining are available. The material the People have submitted is not appropriate for consideration in this case, and the propositions the People wish to establish are utterly untrue. Mr. Rinehart contends that this Court may find refusal to issue permits an unconstitutional prohibition without resolving these factual issues, but this Court deems it necessary to consider them, such consideration should only occur after a remand in which Rinehart is permitted to present evidence.

Asserted Environmental Impacts of Suction Dredge Mining

The People's Exhibits R-U concern asserted impacts of suction dredge mining, and constitute excerpts from a Draft Subsequent Environmental Impact Report concerning suction dredging. When and if the State of California exercises its discretion to permit suction dredge mining, such issues may appropriately be considered, but federal law does not permit a categorical prohibition on permits.

The People assert that the statements within Exhibits R-U constitute "an administrative decision which has not been overturned through administrative mandamus" and is "absolutely immune from collateral attack". People's Reply Br. at 24 n.13 (quoting *Citizens for Responsible Development v. City of W. Hollywood* (1995) 39 Cal.App.4th 490, 505).¹ That case concerned whether or not the City could rely upon its prior decision in concluding no EIR was required; it did not concern whether a criminal defendant is bound by statements in proceedings *to which he was not a party*.

Moreover, comments in a draft EIR hardly rise to level of a final agency action, such as that denying historic designation in the *West Hollywood* case.

¹ The People also assert that Mr. Rinehart "forfeited" any right to contest the asserted environmental impacts of suction dredging because he did not apprise the trial court of his intent to do so. To the contrary, in his demurrer Mr. Rinehart made it clear in his initial demurrer that he "denies that any adverse environmental impacts have occurred, would occur, or will ever occur from his dredging activities. Until the unlawful moratorium, dredging proceeded for years without injuring so much as a single fish in California." (Clerk's Transcript on Appeal at 8 (Demurrer at 4 n.2).)

Exhibit V does at least constitute agency findings, but they are findings based upon the defective EIR, and Mr. Rinehart had no opportunity to contest how they might relate to his mining operation in his criminal trial.

The People acknowledge ongoing litigation challenging the conclusions set forth in Exhibit R-V, yet claim that until that litigation is complete, Evidence Code § 664 and the case of *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 330, require this Court to presume the “findings” correct. *Faulkner* and § 664 merely concern the presumption that “official duty has been regularly performed”. A presumption is necessarily subject to rebuttal by fact, and it would be a denial of due process of law to establish an incontrovertible presumption in the fashion the People suggest. *Cf., e.g., Heiner v. Donnan* (1932) 285 U.S. 312, 329 (“a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case”).

For all these reasons, Mr. Rinehart asks this Court to deny the People’s Supplemental Request for Judicial Notice and strike or disregard those portions of the Reply Brief relying upon it. In the alternative, transmitted herewith is Defendant and Appellant’s Conditional Supplemental Request for Judicial Notice, conditioned upon this Court’s acceptance of the People’s Supplemental Request for Judicial Notice or other additional evidence thereafter submitted (*e.g., by amici*).

The materials submitted, Exhibits 1-10, consist of evidence from the *Suction Dredging Cases*, Coordinated Case No. JCCP4720 (County of San Bernardino), demonstrating that some of the environmental conclusions proffered by the People were the product of what one witness called the “poorest excuse for science” that two experts had seen “in our combined 60+ years of scientific research”. (Appellant’s Conditional RJN Ex. 3, ¶ 24.²) In general, the testimony shows powerful positive environmental effects of suction dredge mining, and explains in detail why testimony to the contrary is unreliable and inaccurate.

Evidence Concerning Alternative Mining Techniques

The People’s Exhibit W is a declaration from a purported expert concerning, among other things, assertedly-available alternative means of mining. Rather than taking judicial notice of Exhibit W, this Court might take notice of the fact that one cannot extract gold from deep under alluvial deposits in river and streams without some sort of suction device, a proposition “of such common

² Mr. Rinehart’s criminal proceedings are not “quasi-judicial administrative mandamus proceedings” where “extra-record evidence may be considered . . . only if the evidence was unavailable at the time of the [agency decision] ‘in the exercise of reasonable diligence’ or if improperly excluded from the record.” *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 367. And even if they were, some of the evidence, such as the Department of Interior Inspector General’s report issued in December 2014, documenting improper political interference in the science of analyzing water quality effects from suction dredging, were not available at the time of the agency decision. (Appellant’s Conditional RJN Ex. 5, ¶ 25 & Ex. 1 thereto.)

knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute”. Evidence Code § 452(g).

In any event, the evidence is not admissible on appeal as hearsay, for Rinehart has had no opportunity to cross-examine the expert. One can scarcely imagine why we have trials, trial judges, evidentiary rulings, and evidence at all in the superior courts, if parties may simply proffer rank hearsay at will in the appellate process. At trial, Mr. Rinehart would deny that this mining regulator has any particular expertise whatsoever concerning suction dredge mining and the means of extracting precious metals from underwater placer deposits.

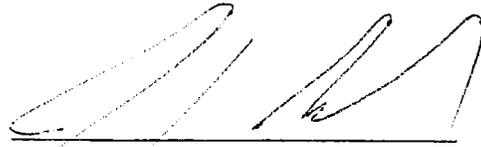
By way of conditional defense, in the event that this Court does determine to take evidence on appeal, Mr. Rinehart offers Exhibits 11-12 in the Conditional Supplemental Request for Judicial Notice, constituting materials contradicting the People’s expert, and with which he would be cross-examined. Again, the right result is to find § 5653.1 of the Fish and Game Code prohibitory as a matter of law, but if evidence of this nature is to be considered, Mr. Rinehart is entitled to have jury of his peers evaluate the credibility of the People’s expert against his own expert’s testimony—some of which was previewed in his Offer of Proof.

Conclusion

The People’s Reply Brief and Supplemental Request for Judicial Notice raise many new issues of grave constitutional consequence concerning a criminal defendant’s right to a fair trial. The right result in this case is for this Court to find

that the Legislative Assembly's scheme of requiring permits and ensuring they might never be issued cannot be given effect as a matter of law. To the extent this Court identifies factual issues it deems relevant for the federal preemption issue, the right result is remand, not trial by ambush by judicial notice on appeal.

Dated: July 2, 2015.



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DECLARATION OF SERVICE

July 2, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

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 July 2, 2015, I served the following documents:

DEFENDANT AND APPELLANT'S OPPOSITION TO REQUEST FOR JUDICIAL NOTICE, MOTION TO STRIKE, AND ALTERNATIVE MOTION FOR LEAVE TO PRESENT ADDITIONAL MATERIAL BY CONDITIONAL SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE; and

CONDITIONAL SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE

on the parties in said action as follows:

(X) (First Class US Mail) by placing a true copy thereof enclosed in a sealed envelope, addressed as shown below:

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