IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Case No. C074662
	)	
Plaintiff and Respondent,	)	(Plumas Sup. Ct. No.
	)	M1200659)
vs.	)	
	)	
BRANDON LANCE RINEHART,	)	
	)	
Defendants and Appellant.	)	
	)	
	)	

APPLICATION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE; BRIEF OF AMICUS CURIAE KARUK TRIBE, CENTER FOR BIOLOGICAL DIVERSITY, FRIENDS OF THE RIVER, KLAMATH RIVERKEEPER, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, FOOTHILL ANGLER'S COALITION, NORTH FORK AMERICAN RIVER ALLIANCE, UPPER AMERICAN RIVER FOUNDATION, AND CENTRAL SIERRA ENVIRONMENTAL RESOURCE CENTER IN SUPPORT OF PLAINTIFF AND RESPONDENT THE PEOPLE OF THE STATE OF CALIFORNIA

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APPLICATION FOR PERMISSION TO FILE A BRIEF

AMICUS CURIAE

The Karuk Tribe, Center for Biological Diversity, Friends of the River, Klamath Riverkeeper, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Calfornia Sportfishing Protection Alliance, Foothill Angler's Coalition, North Fork American River Alliance, Upper American River Foundation, and Central Sierra Environmental Resource Center respectfully request permission to file the attached brief as *amicus curiae* in support of Plaintiff and Respondent The People of the State of California. The attached *amicus* brief provides the Court with context for the case and the potential results of a ruling that would permit suction dredge mining in California. No party or counsel to a party for the pending appeal has authored the proposed *amicus* brief in whole or in part or made monetary contribution intended to fund the preparation or submission of the attached brief.

Applicant's Statement of Interest

The Karuk Tribe is a federally recognized Indian Tribe with a population of approximately 3,400 members. Its headquarters is located in Happy Camp, along the Klamath River and in the vicinity of the Salmon and Scott Rivers. The Karuk Tribe has lived in northern California since time immemorial and its ancestors are considered among the earliest inhabitants of aboriginal California. The stated mission of the Karuk Tribe is to promote the general welfare of all Karuk people; establish equality and justice

for the Tribe; restore and preserve Tribal traditions, customs, language, and ancestral rights; and secure for themselves and their descendants the power to exercise the inherent rights of self-governance. Among the many goals of the Tribe is the protection and restoration of native fish and wildlife species that the Tribe has depended upon for traditional cultural, religious, and subsistence uses.

The Karuk tribe has sought to assure that suction dredge mining activities occurring on federal property comply with law protecting wildlife. (*Karuk Tribe of Cal. v. United States Forest Serv.* (9th Cir. 2012) 681 F.3d 1006 [requiring the United States Forest Service to consult with federal wildlife agencies when approving suction dredge mining plans on federal lands].) The Karuk Tribe also participated in a lawsuit that initially prompted the California Department of Fish and Wildlife to conduct environmental analysis under the California Environmental Quality Act of the suction dredge permitting program. (*Karuk Tribe of California et al. v. California Department of Fish and Game* (2005) Alameda County Superior Court No. RG05211597.)

The Center for Biological Diversity is an environmental non-profit membership organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has worked extensively throughout the United States, and especially in California, to advocate and litigate on the behalf of imperiled species and their habitats. The Center has been before this Court to work at the state level to enforce state environmental laws protecting endangered species in California. (*Center for Biological Diversity v. Fish & Game Comm.* (2008) 166 Cal.App.4th 597 [overturning decision by the California Department of Fish and Game

that denied protection endangered species].) The Center has also worked statewide to help ensure that the California Environmental Quality Act's requirements to disclose the impacts to endangered species are upheld during environmental review. (*Ctr. for Biological Diversity v. County of San Bernardino* (2008) 2008 Cal. App. Unpub. LEXIS 9281 [holding substantial evidence did not support the findings contained in the EIR regarding the impact of the project on threatened species].)

The Pacific Coast Federation of Fishermen's Associations ("PCFFA") is the largest trade organization of commercial fishing men and women on the west coast. PCFFA is a federation of 15 different port associations and marketing associations in California, Oregon and Washington. Collectively, PCFFA's members represent over 1,200 commercial fishing families, most of whom are small and mid-sized commercial fishing boat owners and operators. PCFFA has been active for nearly 30 years in efforts to rebuild salmon populations and correct water pollution problems in Northern Coast salmon-bearing streams and rivers, as well as watersheds connected to these rivers.

The Institute for Fisheries Resources is a non-profit organization responsible for meeting the fishery research and conservation needs of working men and women in the fishing industry by funding and executing PCFFA's expanding salmon habitat protection programs. From its inception, IFR has helped fishing men and women in California and the Pacific Northwest address salmon protection and restoration issues, with particular focus on improving water quality in salmon-bearing rivers and streams throughout California. IFR is an active leader in several salmon restoration programs affecting winter-run and spring-run chinook salmon and coho salmon, including the development

of better water quality standards and enforcement. IFR has actively advocated for the protection and restoration of flows and improving water quality critical to the health of California's North Coast rivers and streams and their economically important salmon runs.

Klamath Riverkeeper is a community-based non-profit corporation with offices in Orleans, California and Klamath Falls, Oregon. Klamath Riverkeeper works to restore water quality and fisheries throughout the watershed of the Klamath River and its tributaries, including the Shasta River watershed, bringing vitality and abundance back to the rivers in this watershed and to its people. Klamath Riverkeeper works closely with the Klamath River tribes, fishermen, and recreational groups, in all aspects of its programs. Klamath Riverkeeper has an active membership of people from all over the Klamath River Basin and the Western United States. Klamath Riverkeeper has specifically been involved since its inception in 2006 with efforts to improve ecosystem conditions on the Klamath River and its tributaries. Klamath Riverkeeper's members use the Klamath River and its tributaries for water contact recreation, wildlife observation and study, aesthetic enjoyment, and spiritual renewal. Klamath Riverkeeper's members particularly enjoy as a recreational, educational, and/or spiritual pursuit observing and studying the migration of anadromous fish, in the Klamath River watershed.

The Friends of the River ("FOR") is a non-profit organization dedicated to preserving and restoring California's rivers, streams, and their watersheds as well as advocating for sustainable water management. FOR accomplishes this goal by influencing public policy and inspiring citizen action through grassroots organizing.

FOR was founded in 1973 during the struggle to save the Stanislaus River from the New Melones Dam. Following that campaign, the group grew to become a statewide river conservation organization. FOR currently has nearly 6,000 members.

The California Sportfishing Protection Alliance ("CSPA") is a non-profit public benefit conservation and research organization established in 1983 for the purpose of conserving, restoring, and enhancing the state's water quality and fishery resources and their aquatic ecosystems and associated riparian habitats. CSPA has approximately 2,500 members who live, recreate and work in and around waters of the State of California, including waterways throughout the Sierra Nevada, Central Valley and the Sacramento-San Joaquin River Delta Estuary. CSPA has actively promoted the protection of water quality and fisheries throughout California before state and federal agencies, the State Legislature, and Congress and regularly participates in administrative and judicial proceedings on behalf of its members to protect, enhance, and restore California's water quality and fisheries.

The Foothills Anglers Coalition is a fisheries and aquatic habitat non-profit conservation organization dedicated to the protection and restoration of Sierra Nevada trout, steelhead, and salmon resources, along with their habitat and the Sierra Nevada foothill watersheds that sustain those resources, as well as the enhancement of the sport of fishing. They support an ecosystem-based approach to watershed management, and the protection and preservation of all native species, including wildlife and plant populations.

The North Fork American River Alliance ("NFARA") is a non-profit organization

created to protect and preserve the natural, cultural and historic beauties of the North Fork American River Canyon. NFARA is dedicated to the careful participation and planning of recreational along the North Fork of the American river.

The Upper American River Foundation ("UARF") is a member-based non-profit organization founded to conserve and protect the unique qualities of the Upper American River watersheds in Placer and El Dorado Counties. The objectives of UARF include identifying issues that need to be resolved, and developing cooperative involvement and funding that will be needed to help resolve them so that future generations will continue to be able to enjoy the same quality experiences that we have enjoyed during our lifetimes in the Upper American River Watershed.

The Central Sierra Environmental Resource Center ("CSERC") is a non-profit center that works to protect the remaining water, wildlife, and wild places in the central Sierra Nevada. CSERC serves as the foremost environmental defender of more than 2,000,000 acres of forests, rivers, lakes, wetlands, roadless areas, old growth groves, scenic oak woodlands, and other precious areas within the northern Yosemite region of the central Sierra Nevada.

Amici have been highly involved in the legal and factual background regarding suction dredge mining, which is the subject of this litigation. *Amici* are currently involved in a proceeding to assure that any statewide suction dredge mining program complies with the California Environmental Quality Act and other state laws protecting natural resources. (*In Re Suction Dredge Mining Cases*, Judicial Council Proceeding DS4720, San Bernardino County Superior Court.) Many of the *Amici* were also parties to

a case assuring that suction dredge mining permits issued by the California Department of Fish and Wildlife conformed with state law. (*Hillman et al. v. California Department of Fish and Game* (2009) Alameda County Superior Court Case No. RG09434444.)

Given the significant environmental and cultural resource impacts of suction dredge mining *Amici* share a common goal of ensuring that California's environmental laws and regulations are upheld to protect the public health, safety, and welfare. To our knowledge, this is the first appellate court to address the issue of preemption in the suction dredge mining context. Accordingly, resolution of this case will have significant ramifications for the protection of environmental and cultural resources statewide. *Amici* therefore have a substantial interest in the outcome of this action.

How Proposed Amicus Will Assist Court

Amici have significant expertise in suction dredge mining issues involved in this case and submit this brief in the hope that it will provide the Court with additional insight into the question of whether state regulation of suction dredge mining is preempted by federal law. *Amici* have been involved in factual and legal analysis of suction dredge mining for, in some cases, decades because of the use of suction dredge mining equipment in their communities, in watershed or fisheries where their members are active, and because of a desire to better understand the practice that has wide ranging environmental and cultural harms. *Amici* have been involved in the administrative process regarding the rules, regulations, and procedures for the issuance of suction dredge

mining permits and also in the judicial process regarding challenges to suction dredge activities when they fail to comply with the law.

This *amicus curiae* brief is also submitted to assist the Court in understanding the potential ramifications of this case for the impacts on California's health, safety, and welfare. This Court's decision impacts the health, safety and welfare of millions of Californians, sacred resources for Native Americans, and California's fish and wildlife. Suction dredge mining has a range of negative environmental impacts, the most acute of which is the discharge and pollution of California's waterways with the toxic contaminant mercury. This decision also has impacts for environmental regulations of other mining activities that are not before the Court in this proceeding. *Amici* therefore urge this Court to uphold the Appellant's conviction at the trial court for suction dredge mining without a permit.

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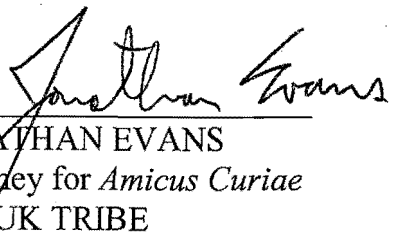
Dated at San Francisco, California on December 19, 2013.

Respectfully submitted,

By: 

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UPPER AMERICAN RIVER FOUNDATION
CENTRAL SIERRA ENVIRONMENTAL RESOURCE CENTER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Code of Regulations

California Legislative History

Federal Statutes

Federal Regulations

Other Authorities

BRIEF OF AMICUS CURIAE KARUK TRIBE, CENTER FOR BIOLOGICAL DIVERSITY, FRIENDS OF THE RIVER, KLAMATH RIVERKEEPER, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, FOOTHILL ANGLER'S COALITION, NORTH FORK AMERICAN RIVER ALLIANCE, UPPER AMERICAN RIVER FOUNDATION, AND CENTRAL SIERRA ENVIRONMENTAL RESOURCE CENTER IN SUPPORT OF PLAINTIFF AND RESPONDENT THE PEOPLE OF THE STATE OF CALIFORNIA

I. INTRODUCTION

This case involves more than one miner's conviction for mining without a permit. This Court's decision impacts the health, safety and welfare of millions of Californians, sacred resources for Native Americans, and California's fish and wildlife. Suction dredge mining has a range of negative environmental impacts, the most acute of which is the discharge and pollution of California's waterways with the toxic contaminant mercury.

Amici are a diverse coalition of eleven tribal, conservation, and commercial and recreational fisheries groups who have worked to safeguard California's environmental and cultural resources from the negative impacts of suction dredge mining. *Amic*i seek to provide this Court with the broader context for the implications of finding preemption and overturning Appellant's conviction. Reversing the decision of the lower court would effectively decriminalize suction dredge mining without a permit in California. The result of which would be thousands of suction dredge miners resuming operations throughout the state without environmental regulations.

Appellant asks this Court to effectively overturn the U.S. Supreme Court's decision in *California Coastal Commission v. Granite Rock Co.*, which upholds California's ability to protect the environment through permit requirements for mining claims on federal land. In advancing this erroneous legal theory the Appellant bases his case on the patently false premise that Appellant is prohibited from mining. Ruling in favor of Appellant would set a dangerous precedent and undercut California's rights to enforce similar environmental statutes not before this Court. The trial court's ruling and Appellant's conviction should be upheld.

II. FACTS AND BACKGROUND

Suction dredge mining is a form of instream gold mining conducted largely by individual, recreational gold miners. Suction dredgers use motorized vacuum hoses, typically with 4" to 5" nozzles, to vacuum up the bottom of riverbeds. The river material is run over a sluice, which collects any heavier gold particles that may be present. The remaining riverbed material is then discharged back into the river. (*See Karuk Tribe of Cal. v. U.S. Forest Service* (9th Cir.2012) 681 F.3d 1006, 1012 [holding that suction dredge mining triggered the obligation to consult under the Endangered Species Act because of the impacts to wildlife].)

There is a growing body of law and science that documents the substantial human health and environmental impacts from suction dredge mining.[1] (*Karuk,*

[1] *Amici* provide this information "to assist the court by broadening its perspective on the issues raised by the parties" and to "facilitate informed judicial consideration of a wide variety of information and points of view that [] bear on

681 F.3d at 1028-1029; DelCotto, *Suction Dredge Mining: The United States Forest Service Hands Miners the Golden Ticket* (2010) 40 Envtl. L. 1021.) The most comprehensive analysis of the overall impacts was performed by the California Department of Fish and Wildlife ("Department") during its review of the Suction Dredge Permitting Program pursuant to the California Environmental Quality Act ("CEQA").[2] (Pub. Res. Code § 21000 *et seq*.) The Department sought to analyze the impacts of approximately 3,650 individual miners operating suction dredges throughout California.[3] During the CEQA analysis the Department found that unregulated suction dredge mining would have a range of potential environmental impacts including negative effects on biological resources, hazards and hazardous materials, cultural resources, hydrology and water quality, noise, recreation, aesthetics, and air quality.[4] Even after developing

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important legal questions." *Bily v. Arthur Young & Co*., 3 Cal. 4th 370, 405 fn. 14 (Cal. 1992); *Rivera v. Division of Industrial Welfare*, 265 Cal. App. 2d 576, 589-590 (Cal. App. 3d Dist. 1968) (Finding "no unfairness" when "published research material which is available to the public generally" is provided to the tribunal because, in part, the "Brandeis brief" providing studies to supplement the Court's decision has "become commonplace.")

[2] California Department of Fish and Wildlife, Suction Dredge Permitting Program, Subsequent Environmental Impact Report (March 2012) (hereafter "SEIR"), available at http://www.dfg.ca.gov/suctiondredge/ (last visited December 19, 2013). The Final SEIR incorporates the Draft SEIR without revisions affecting the cited material. (S*ee generally,*14 CCR §15132).

[3] For a fifteen year period ending in 2009 the Department issued an average number of approximately 3,200 suction dredge mining permits to California residents and 450 to non-residents. SEIR at 1-1, available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27390 (last visited December 19, 2013).

[4] SEIR at Appendix B, p. 34 of 115, available at

a program to minimize and avoid many impacts the Department found that significant impacts to water quality, cultural and historic resources, biological resources, and noise could not be avoided if suction dredge mining was allowed to continue in California.[5] Those unavoidable impacts that would exist even after implementation of the Department's 2012 regulations are discussed in more detail below.

a. Suction Dredge Mining has Significant and Unavoidable Impacts on Water Quality by Suspending Toxic Mercury and Sediment

One particularly pervasive and unavoidable impact of suction dredge mining is caused by the resuspension (dredging up) and discharge of mercury. (40 Envtl. L. at 1027-28.) The impacts are discussed in detail in the Department's environmental analysis of the program and 2012 regulations under CEQA.[6] Numerous other state and federal agencies, including the California State Lands Commission, State Water Resources Control Board,[7] and United States Geological

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https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27416 (last visited December 18, 2013).

[5] Appellant's Unopposed Motion to Correct the Record (dated October 23, 2013), Exhibit A (report to Legislature on status of moratorium) at 3, fn. 4.

[6] SEIR at pp. 4.2-32, 51-53, available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27396 (last visited December 11, 2013).

[7] *See e.g.* California Department of Fish and Wildlife Report to the Legislature Regarding Instream Suction Dredge Mining Under the Fish and Game Code (April 1, 2013) (hereafter "Legislative Report") at pp. 25-26, 36-37 of .pdf, available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=63843 (last visited December 19, 2013).

Survey,[8] have also studied suction dredge mining and the mercury-based hazards imposed on human health and the environment.

The link between suction dredge mining and mercury stems from the gold mining practices of the 1850's through the early 1900's and their extensive use of mercury. (40 Envtl. L. at 1027.)[9] From the 1850's through the early 1900's, gold mining operations used massive amounts of mercury, because it binds with gold and aids in the retrieval process.[10] (*Id*. at 1025.) The USGS estimates that each operation annually lost 10%-30% of mercury to adjacent streams and rivers.[11] In total, an estimated 3 to 8 million pounds of mercury were lost, predominantly into the waters of the Sierra Nevada and Klamath-Trinity regions, regions where suction dredging has been pervasive.[12] (*Ibid*.) Presently, suction dredge miners target locations where historic gold mining occurred. However, where they find gold, they find elemental (liquid) mercury[13] and discharge it into waterways. (*Ibid*.)

The mercury used in these historic operations is, without question, responsible for elevated mercury levels found in fish and humans today.[14] (40

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8 United States Geological Survey, Mercury Contamination from Historic Gold Mining, Fact Sheet FS-061-00, (May 2000) (hereafter "USGS" available at http://ca.water.usgs.gov/mercury/fs06100.html (last visited December 19, 2013).

9 SEIR at pp. 4.2-44, 51; USGS at pp. 1, 2-3.

10 USGS at pp. 1, 2-3.

11 *Id*. at p. 3.

12 *Id*. at p. 3.

13 SEIR at pp. 4.2-46; USGS at pp. 2-3.

14 SEIR at pp. 4.2-46, 53; USGS at pp. 1, 2-3, 5.

Envtl. L. at 1027-28.) An intermediate link is suction dredge mining. Numerous state and federal government studies have traced the causal connection between legacy gold mining, contemporary suction dredge mining, and elevated mercury in fish, wildlife and humans.[15] (*Ibid*.) The Department's CEQA Report found that one suction dredge miner using a (relatively) small 4" nozzle and dredging where historic gold mining occurred can contribute 10% of an *entire watershed's* mercury load in one mining season.[16] If the dredger uses a larger nozzle or multiple dredgers are present (or both), the result is a substantially higher contribution to the overall mercury loading for an entire watershed.[17]

The link between mercury and suction dredge mining is, in part, due to the fact that suction dredge mining occurs in the summer, when river conditions are ideal for the resuspended elemental (liquid) mercury to convert into the more toxic methylmercury.[18] Because methylmercury is highly water soluble, it is also more bioavailable.[19] Methylmercury is then taken up into the food web where it bioaccumulates, resulting in the highest concentrations in fish -- and the wildlife and humans who eat them.[20] (40 Envtl. L. at 1025.) The mercury levels in fish taken from California's streams and rivers where historic mining occurred are generally above critical threshold levels under state regulations for toxics and

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15 SEIR at pp. 4.2-46, 53.
16 SEIR at pp. 4.2-41, 52; Department's Report to the Legislature at p. 37.
17 SEIR at pp. 4.2-52.
18 SEIR at pp. 4.2-46, 52; Department's Report to the Legislature at p. 37.
19 SEIR at p. 4.2-44-45; USGS at 5.
20 USGS at p. 3.

human health.[21] The levels are so high that they pose human health risks.[22] The State Water Resources Control Board has designated 178 waterbodies in California as "impaired" due to mercury levels that exceed water quality standards under the federal Clean Water Act.[23] Fish consumption warnings are also common for fish taken from California's rivers and streams where legacy mining occurred and, therefore, where suction dredge mining would threaten water quality.[24]

b. Suction Dredge Mining has Significant and Unavoidable Impacts to Cultural, Historic, and Archeological Resources

The Department identified the significant environmental impacts of suction dredge mining on the state's historic, cultural, and archeological resources through its CEQA analysis.[25] Historic, cultural, and archeological resources can qualify together and in concert as areas of importance under CEQA. (14 Cal. Code Regs. § 15064.5(a)(3)). These resources may also be eligible for recognition under the National Register of Historical Resources, California Register of Historical Resources, or a municipal local register of historic places. (36 Code Fed. Reg. § 60.4.; Pub. Res. Code §§ 5024.1, 5020.1(k).) The activities associated with

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21 SEIR at pp. 4.2-51, 53; USGS p. 5.
22 USGS pp. 5.
23 SEIR at pp. 4.2-12.
24 SEIR at pp. 4.2-53; USGS at p. 5.
25 SEIR at pp. 4.5-11-15, available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27405 (last visited December 19, 2013.)

suction dredge mining—such as the alterations of riverbeds, waterbodies, and banks, flow diversions, use of power wenches for the movement of instream boulders or wood, establishment of mining encampments, access to those encampments, and the use and movement of that mechanized equipment—can result in the demolition, destruction, relocation, or alteration of a range of historic, cultural, and archeological resources.[26]

Laws protecting California's historic resources recognize that a range of objects, buildings, and sites can be historically significant due to their architectural or cultural significance.(Pub. Res. Code §§ 5020.1(j).) Examples of historic resources that could be impacted by suction dredge mining include tribal and community remains, historic mining sites, objects of historical importance, and other sites that have the potential to yield information important to statewide history.[27]

Archaeological resources also qualify for greater protections as prehistoric resources of past human life and cultures, including individual artifacts or objects.[28] Riverine settings, where suction dredge mining occurs, are considered highly sensitive for the existence of archeological resources due to the extensive use of waterways by pre historic peoples and cultures.[29] Prehistoric archaeological sites generally found along riverways include permanent or semi-

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[26] SEIR at pp. 4.5-12-13.
[27] *Id*. at p. 4.5-12.
[28] *Id*. at p. 4.5-14.
[29] *Ibid*.

permanent habitation sites, temporary camps or food processing localities, and isolated artifacts.[30] Archaeological materials that could be disturbed or destroyed by suction dredge mining along waterways include stone tools (e.g., projectile points, knives, scrapers, hammerstones, or mortars); middens containing heat affected rocks, artifacts, or shellfish remains; stone milling equipment (e.g., mortars, pestles, handstones, or milling slabs); pottery; or basketry.[31]

Many of the areas impacted by suction dredge mining are also Traditional Cultural Properties for Native American tribes in California and can be considered significant historic resources. (14 Cal. Code Regs. § 15064.5(a)(3).)[32] Traditional Cultural Properties are recognized for their important role in Native American communities because of their significance in the tribe's history and their importance in maintaining the continuing cultural identify of the community.[33] These sites also take on a spiritual significance for the tribes as sacred areas and places of ancestral importance. Through the CEQA review the Department recognized that the riverscapes and ceremonial sites in areas impacted by suction dredge mining are Traditional Cultural Properties that could be impacted by suction dredge mining activities, resulting in significant impacts to those sites throughout the state.[34]

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30 *Ibid*.
31 *Id*. at p. 4.5-6.
32 *Id*. at pp. 4.5-7, 13.
33 *Id*. at pp. 4.5-7.
34 *Id*. at pp. 4-5-13-14.

In fact the Karuk Tribe, one of the *Amici* groups, has multiple sacred sites along the Klamath River that would be seriously impacted by unregulated suction dredge mining. As the Ninth Circuit found suction dredge mining and other mining operations have the potential to "impact the [Karuk] Tribe's ability to enjoy the spiritual, religious, subsistence, recreational, wildlife, and aesthetic qualities of the areas affected by the mining operations" and "could directly and adversely harm the Tribe and its members." *Karuk*, 681 F.3d at 1019.

The demolition, destruction, relocation, or alteration of historic, archeological, and cultural resources from suction dredge mining leads to unavoidable impacts to those historic, archeological, and cultural resources.[35] These unavoidable impacts are due to the lack of training within the mining community in identifying and avoiding these sites, the statewide scale of the activity and impacts, and the lack of enforceable mitigation proposed by the Department in adopting the suction dredge mining program.[36] The general public, including the mining community, does not have the training necessary to properly identify and avoid historic, archaeological, or cultural sites that are not evident to the casual observer. Thus, regulations are required. Similarly, preserving the integrity of those sites when resource extraction occurs adjacent to the site requires skills and expertise that are not generally available to those outside the field of historic preservation. The numerous historic sites and objects throughout the state

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35 *Id*. at p. 4.5-11-15.

36 SEIR at pp. 4.5-12-13; Legislative Report at p. 32 of 38 of .pdf.

are not properly identified or catalogued for identification or avoidance by the mining community and there are no enforceable standards to help assure that historic sites are avoided.

c. Suction Dredge Mining has Significant and Unavoidable Impacts to Biological Resources

Unregulated suction dredge mining would result in numerous impacts to ecosystems, fish, and wildlife.[37] (40 Envtl. L. at 1029-1030). There is a wide range of direct and indirect impacts to biological resources from suction dredge mining and *Amici* only provide a brief summary of some of those impacts here. The Ninth Circuit has recognized the harms to fish resulting from suction dredge mining. *Karuk,* 681 F.3d at 1029. Direct impacts include mortality from the activity itself through the suction and entraining of fish and eggs in the dredge, killing and altering habitat for the organisms fish feed on, and mercury poisoning of a range of organisms in aquatic systems. (*Ibid.*; 40 Envtl. L. at 1027-28, 1038) Indirect impacts to biological resources results from habitat modifications to the waterbodies, dewatering of streams, destruction of riverine vegetation, changes in water turbidity and temperature, and disturbance of wildlife and habitat. (*Ibid*.)

Even with a regulatory program designed to minimize harm suction dredging can impact special status birds by altering their behavior, movement, distribution, and reproduction.[38] The use of motorized equipment associated with

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[37] SEIR at Appendix B pp. 43-66 of .pdf.

[38] SEIR at p. 4.3-48, available at

suction dredges and the activity itself causes birds to abandon or avoid normal nesting behavior.[39] These impacts can be especially detrimental to special status birds protected under the federal and state Endangered Species Acts such as the bank swallow, least bell's vireo, and willow flycatcher.[40]

d. Suction Dredge Mining has Significant and Unavoidable Impacts due to Noise

Unregulated suction dredge mining would have harmful impacts due to noise. The Department's environmental review determined that even with regulations limiting the time, place, and manner of suction dredge mining the program would result in significant and unavoidable noise impacts.[41] The operation of gasoline powered suction dredge motors and gasoline powered generators in mining camps creates noise in the existing quiet environments of the surrounding recreational areas and wildlife habitat.[42] Even the smallest suction dredge motor of 5 horsepower generates noise at a level of 70 decibels, which is in excess of many local noise standards.[43]

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https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27399 (last visited December 19, 2013.)

[39] *Id*. at p. 4.3-48.

[40] *Id*. at p. 4.3-48.

[41] SEIR at p. 4.7-9, available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27407 (last visited December 19, 2013.)

[42] *Id*. at p. 4.7-9.

[43] *Id*. at p. 4.7-9.

e. Recent California Legislative History

As noted in Appellant and Respondent's briefs, the state of California has taken steps to regulate the environmental impacts of suction dredge mining. (App.Op.Brf. at 2-6; Resp.Brf. at 2.) It is important to place those changes into context to understand why the legislature and two separate governors enacted statutory changes to limit the impacts of suction dredge mining three times in four years.

The link between suction dredge mining and mercury, and the health and environmental impacts caused from suction dredge mining, led the State Legislature to enact Section 5653.1[44] as urgency legislation. (Stats. 2009, ch. 62 (S.B. 670) § 2 [2009 Cal ALS 62 § 2 (Lexis)].) While urgency legislation requires two- thirds approval in both houses, it also allows the statute to take effect the following day. (*Ibid.*) Here, the Legislature found that suction 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, and, in order to protect the environment and the people of California pending completion of a court-ordered environmental review by the Department of Fish and Game[45] and the operation of new regulations, as necessary, it is necessary that this act take effect immediately.

(*Ibid*.) Since the Legislature enacted Section 5653.1 in 2009, it has been amended twice. Both times the Legislature responded to the Department's failed attempt to

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[44] All citations in text are to the California Fish and Game Code, unless otherwise stated.

[45] The Department changed its name from the Department of Fish and Game to the Department of Fish and Wildlife on January 1, 2013. (Fish and Game §700, as amended by Stats. 2012, ch. 559 (AB 2402) §8.)

adopt suction dredge mining regulations with sufficient protections over human health and the environment. (Stats. 2011 ch. 133 (A.B. 120) § 6 [2011 Cal ALS 133 § 6 (Lexis)]; Stats. 2012, ch. 39 (S.B. 1018) § 7 [2012 Cal ALS 39 § 7 (Lexis)].)

In its original version, Section 5653.1's moratorium would have lifted when the Department completed an environmental review of its suction dredge mining program and updated its regulations. (Stats. 2009, ch. 62 (S.B. 670) § 2 [2009 Cal ALS 62 § 2 (Lexis)].) However, when the Department released its draft Environmental Impact Report and regulations in February of 2011, the Department took the position that its regulatory authority was limited to "deleterious impacts to fish" pursuant to Section 5653.[46] The Department claimed that the scope of its regulations was statutorily limited to fish and all non-fish issues were outside of its jurisdiction. Therefore, even though the Department had identified mitigation measures for other harms, such as discharges of mercury, it did not adopt them.[47] The Department contended that it could not adopt

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[46] Findings of Fact of the California Department of Fish and Game as a Lead Agency under the California Environmental Quality Act (Pub. Resources Code, §21000 et seq.) for the Suction Dredge Permitting Program (Fish & G. Code, § 5653 et seq.) as analyzed in the Suction Dredge Permitting Program Subsequent Environmental Impact Report (SCH No. 2009112005) March 16, 2012 (Hereafter "Findings" at pp. 1-2, 81 available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=44270 (last visited December 19, 2013)

[47] *Id*. at pp. 1-2, 81.

mitigation provisions for the discharge of mercury because it was a "water quality" issue and, thus, outside of the "deleterious to fish" category.[48]

The Legislature's response was to amend Section 5653.1 to require, "notwithstanding section 5653…," the Department to complete the CEQA review and rulemaking, fully mitigate all identified significant environmental impacts, and adopt a fee structure to cover all costs of the program.[49] (Stats. 2011 ch. 133 (A.B. 120) § 6 [2011 Cal ALS 133 § 6 (Lexis)].) A 2016 sunset provision was also added. (*Ibid*.) In March of 2012, the final regulations were released. The Department still did not adopt the mitigation provisions, maintaining a lack of authority to do so.[50] The Legislature amended Section 5653.1 for the second time and struck the sunset provision, thus ensuring the full mitigation of significant environmental impacts to be adopted by the Department. (Fish and Game Code § 5653.1(b); Stats. 2012, ch. 39 (S.B. 1018) § 7 [2012 Cal ALS 39 (Lexis)].)

Thus, the Legislature acted three times in four years to ensure proper regulations were in place to protect the environment, water quality and human health from the harmful impacts of suction dredge mining. The moratorium was

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48 *Id*. at p. 55.

49 Prior to the moratorium, the Department subsidized $1.5 million of the program's $1.8 million budget annually from the General Fund. (Bill Analysis, AB 120, Budget Committee (June 10, 2011) at p. 3, available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_120_cfa_20110614_174820_asm_floor.html (last visited December 18, 2013).)

50 Findings at p. 81.

designed to remain in effect until sufficiently protective regulations are adopted by the Department.

III. ARGUMENT

Appellant is seeking to decriminalize suction dredge mining throughout California by overturning the conviction of one miner who suction dredge mined without a permit. Obtaining a court approved sanction for suction dredge mining to occur without permit protections for the health, safety, and welfare of the public, the environment, or wildlife would lead to irreparable harm for California. Suction dredge mining leads to mercury contamination of rivers and reservoirs already overburdened with mercury, poisons fisheries and wildlife, and desecrates cultural resources, among a range of other harms.

Appellant's arguments must fail because they contradict U.S. Supreme Court precedent in *California Coastal Commission v. Granite Rock Co.*, which upholds California's ability to protect the environment through permit requirements on mining claims on federal land. (1987) 480 US 572. The devastation that would be wrought on California's environment and laws regulating environmental protection would all be based on the straw man argument that Appellant is prohibited from mining, which is patently false. A ruling in favor of Appellant would also set a dangerous precedent and undercut long established environmental regulations on a range of mining laws.

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a. Irreparable Environmental Harm Will Result If the Moratorium Is Lifted.

Overturning Appellant's conviction would effectively lead to unregulated suction dredge mining on federal claims throughout the state because the mining would occur without a permit and would be free from prosecution. Unregulated suction dredge mining would have wide ranging and significant impacts to public health and the environment. It is well recognized that suction dredge mining results in significant environmental impacts to biological resources, hazards and hazardous materials, cultural resources, hydrology and water quality, noise, recreation, aesthetics, and air quality.[51] Some of the most acute harms, even under controlled conditions, result from mercury contamination, irreparable harm to cultural and historic resources, and biological impacts from noise and disturbance. (*Supra* at. § II.a-d.)

In authorizing a controlled suction dredge mining program, the Department characterized approval of its 2012 regulations with "unease":

> The Department's unease is rooted… in the prospect that the revised regulations, once approved and effective, if and when the moratorium is lifted, will cause significant and unavoidable effects on the environment, particularly on non-fish biological resources that the Department holds in trust for the people of California… Yet, the prospect that the remaining significant effects are lessened by the revised regulations, and likely further still by other legal safeguards, makes no more palatable the approval of regulations the Department has determined will cause significant impacts on the environment.[52]

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51 SEIR at Appendix B p. 34 of .pdf.

52 Findings at p. 76.

The Department recognized that the impacts from regulated suction dredge mining "are not acceptable."[53] Decriminalizing suction dredge mining would effectively eliminate all environmental safeguards on the practice and the resulting impacts would be more severe than previously analyzed because there would be no time, place, or manner restrictions on the activity.

The moratorium is still in effect because the Legislature mandated that the Department fully mitigate significant environmental impacts. (Fish and Game §5653.1(b)(4).) This mandate was issued because the harms caused by suction dredge mining are both serious and proven by a body of science. Should the Court find preemption and effectively lift the moratorium before the Department adopts sufficiently protective regulations, substantial harm will occur to human health, the environment, and cultural resources. Thousands of miners would be free to descend on California's waterways to suspend toxic metals from mercury hotspots, destroy salmon spawning beds, pollute watersheds used for drinking water supplies, damage ceremonial sites and sacred areas, and harm areas protected for endangered species. The Court must not permit this irreparable harm to the state.

b. Appellant's Case Is Bound by the U.S. Supreme Court's Decision in *Granite Rock*.

Finding preemption in this context would run contrary to precedent set by the U.S. Supreme Court allowing the state of California to protect the environment

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53 *Id.* at p. 2.

through permit requirements for mining under state law. (*California Coastal Commission v. Granite Rock* Co. (1987) 480 US 572.) The Granite Rock Company challenged the California Coastal Commission's authority to require a permit for mining on federal lands within the coastal zone. (*Ibid*.) California imposed this permit scheme in order to impose environmental regulation pursuant to the Coastal Act. *(Id.* at 586.) The Supreme Court held that the Property Clause of the Constitution and the Mining Act of 1872, among other federal environmental laws, do not preempt California's ability to require a permit for mining activity on federal lands. (*Id.* at 579-584.)

The Granite Rock Company argued that the "true purpose in enforcing a permit requirement is to prohibit Granite Rock's mining entirely." (*Id*. at 588.) The Supreme Court found that "Granite Rock's case must stand or fall" on whether the permitted activity could occur without preempting federal law. (*Ibid*.) Because the Coastal Commission could identify "a possible set of permit conditions not pre-empted by federal law [it was] sufficient to rebuff Granite Rock's facial challenge to the permit requirement." (*Id.* at 589.)

Granite Rock is directly on point in this case. Appellant attempts the same legal and factual line of attack that failed the Supreme Court's analysis in *Granite Rock*. Like the Granite Rock Company, Appellant argues that the Property Clause of the Constitution and Mining Act of 1872 provide the basis to preempt the Department's ability to regulate suction dredge mining on federal lands under Section 5653.1. (App.Op.Brf. at 14-16.) Similar to the Coastal Commission's use

of the Coastal Act to enforce environmental regulations the Department uses the Fish and Game Code to enforce environmental regulations to mitigate "significant environmental impacts." (Fish and Game Code 5653.1(b)(4).)

Appellant's attempt to proceed with a facial challenge to Department's permit requirements sets a heavy burden to overcome in demonstrating that there is no way for a permit to be issued that would allow Appellant to mine his claim. Appellant relies upon Granite Rock's argument that that the permit requirement prohibits mining entirely by depriving Appellant of his mining right. (App.OpBrf. at 24, Appellant's Reply Brief at 5.) As discussed in section III.c., below, there is certainly "a possible set of permit conditions not pre-empted by federal law." (*Granite Rock*, 480 U.S. at 589.) Appellant can proceed with other types of mining activity on his claim that are not subject to the permit requirements of the Department because they are not suction dredging extraction methods.

Appellant's novel reading of Granite Rock to impute a "material interference" standard into the Supreme Court's hypothetical of a "state environmental regulation so severe that a particular land use would become commercially impracticable" must be rejected. (App.Op.Brf. at 23.) Moreover, Appellant's "commercially impracticable" standard doesn't apply in this context because small-scale suction dredge mining is recreational in character. *Karuk*, 681 F.3d at 1011-1012 (describing suction dredge mining as "recreational" because "[c]ommercial gold mining in and around the rivers and streams of California was halted, in part, due to extreme environmental harm caused by large-scale placer

mining.") Indeed, the mining community recognizes the lack of profitability of suction dredge mining. (40 Envtl. L. at 1044.) As miners themselves have acknowledged, "it's very unlikely that you will strike it rich or make a big gold find," and "maybe one prospect in [fifty] will turn out to be something, and most of those won't turn out to be much." (40 Envtl. L. at 1044.)

Case law from sister states, cited by Appellant, is also informative. The general rule that develops is that if the state law completely bans the mining practice and the court explicitly finds that no other mining methods are available, the state statute will be found to be in conflict with the federal mining laws. (*See South Dakota Mining Association, Inc. v. Lawrence County* (1998, 8th Cir.) 155 F.3d 1005, 1007-1008 (county ordinance preempted because it fully banned the only method of mining claims at issue); *Elliott v. Oregon International Mining Co*. (Ore.1982) 654 P.2d 663, 668 (same). As discussed below Appellant has various other methods to mine his claim.

c. Gold Mining of Claims by Mr. Rinehart and Other Miners Can Proceed under Section 5653 *et seq*.

Gold mining by Appellant and other miners can still proceed in California as authorized under Section 5653.1. Yet Appellant asserts that "there is no question that the State's refusal to issue [suction dredge mining] permits deprived Appellant of his federal mining rights." (App.Op.Brf. at 24.) This assertion finds no basis in fact. Less environmentally destructive methods are available for mining in "in any river, stream, or lake." (Fish and Game Code § 5653(a).)

The Fish and Game Code provisions in question in this case require a permit for only one type of mining: mining using "vacuum or suction dredge equipment." (*Id*. §§ 5653, 5653.1.) In fact, the reach of the restriction on gold mining in California's rivers, streams, or lakes are explicitly limited and "does not prohibit or restrict nonmotorized recreational mining activities, including panning for gold." (*Id*. §5653.1(e).) There are various other types of gold mining techniques available for mining Appellant's claim. Appellant admits that other forms of mining such as gold panning could be used to mine the claims in question. (App.Op.Brf. at 28.)

The Ninth Circuit outlined three methods for gold mining by small-scale gold miners. (*Karuk*, 681 F.3d at 1012.) As noted by Appellant miners are able to "'pan' for gold by hand, examining one pan of sand and gravel at a time." (*Ibid*.) Miners also conduct "motorized sluicing." (*Ibid*.) Motorized sluicing pumps water onto the banks of rivers, streams, or lakes to process excavated material, such as rocks, gravel, and sand in a sluice box, which helps to settle out the heavier gold deposits. (*Ibid*.) Other miners use a suction dredge. (*Ibid*.) In addition, there are also various other small and large scale methods available for Appellant to mine the claim in question.

The California Department of Conservation oversees mining reclamation and mineral resources in the state. As the authoritative state agency on mineral resources it produced a report on Placer Gold Recovery Methods detailing small scale, historic, and modern gold recovery methods for placer deposits like river,

stream, and lake deposits.[54] Small scale methods that use water to separate gold from ore without a large investment of equipment include the use of a gold pan, rocker, or various types of sluices.[55] Other types of mechanized equipment used for water based gold recovery include shaking tables or "[p]ortable, self-contained processing equipment [that] is available from a number of manufacturers."[56] When water isn't available as a separating method air can be substituted for use in dry tables or dry washers.[57] Other recovery methods developed during the modern era are more sophisticated and include pinched sluice systems, spiral concentrators, rotating spirals, helixes, jigs, various types of separators, and centrifugal concentrators.[58] Notably, the Department of Conservation's report does not identify suction dredge mining as a necessary method to extract gold deposits.

d. Finding Preemption in the Suction Dredge Mining Context Leads to the Preemption of Other Mining Laws Protecting Health, Safety and Welfare.

Should the Court overturn the conviction, it would likely prove precedential to reach further and prohibit other environmentally protective statutes not currently before this Court. Other provisions of the Fish and Game Code

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[54] California Department of Conservation, Placer Gold Recovery Methods (1986) (hereafter "Gold Recovery Methods") www.conservation.ca.gov/cgs/geologic_resources/gold/Documents/SP87.pdf (last visited December 19, 2013)

[55] *Id*. at pp. 3-8.

[56] *Id*. at pp. 8-9.

[57] *Id*. at pp. 10-11.

[58] *Id*. at pp. 12-21.

regarding suction dredge mining and state surface mining and reclamation laws would all be subject to preemption. Eroding environmental protections from dangerous and polluting mining practices threatens the health, safety, and welfare of all Californians and our environment.

California's suction dredge mining program requires the Department to close certain waters either seasonally or year round (*i.e.* permanently) if suction dredge mining will cause significant environmental impacts. (Fish and Game Code 5653(b).) It further prohibits the Department from issuing a permit if it would be "deleterious to fish." (*Ibid*.) California's waterways are known to harbor numerous fish species including over twenty two species protected under the federal or state Endangered Species Acts, such as Chinook salmon, steelhead trout, or green sturgeon. (16 USC § 1531 *et seq*., Fish and Game Code § 2050 *et seq*.). Many of California's rivers and reservoirs in the mountains where suction dredge mining occurs are also the main sources of drinking water for millions of Californians.

If the Court finds that the general provisions of the Property Clause of the Constitution or federal mining laws preempt the state from mitigating significant impacts of permits it issues pursuant to Section 5653.1, then other environmentally protective river closures pursuant to Section 5653(b) would also be prohibited. The result could be dramatically less regulation over suction dredge mining. This would be in stark contrast to the substantial efforts made by California Courts, the Legislature and numerous State agencies to ensure that the Department provides

more – not less - regulation over suction dredge mining and its impacts on human health, the environment and cultural resources.

A finding of preemption when miners are prohibited from using their preferred mining method in their preferred location would likely impact California's ability to enforce similar environmental statutes not before this Court. Hydraulic mining is prohibited in California if it results in "material injury to navigable streams or the [adjacent] lands". (Pub. Res. Code § 3981.) The State Mining and Reclamation Act requires the prevention or minimization of adverse environmental effects and the elimination of "[r]esidual hazards to the public health and safety." (Pub. Res. Code § 2712.) Some types of mining are inherently hazardous because of the environmentally sensitive nature of the location or the particularly hazardous products used during the mining process, such as mercury or cyanide. Appellant's vague claims about the Property Clause of the Constitution or federal mining laws could be equally applied to other California mining regulations resulting in environmental destruction across the state.

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IV. CONCLUSION

For the reasons set forth above and in the brief of Respondent The People of the State of California., *amicus curiae* respectfully request that the Court uphold the conviction.

Dated at San Francisco, California on December 19, 2013.

Respectfully submitted,

By: _____

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CERTIFICATE OF WORD COUNT

Counsel for *amici* hereby certifies that the brief contains 5, 228 words as determined by the word count function of the word processing software used to prepare the brief. The number of words in the brief therefore complies with the requirement of Rule of court 8.204(c).

December 19, 2013 Respectfully submitted,

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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 December 20, 2013, I caused to be served the attached:

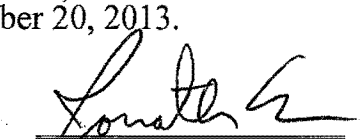
APPLICATION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE; BRIEF OF AMICUS CURIAE KARUK TRIBE, ET AL. IN SUPPORT OF PLAINTIFF AND RESPONDENT THE PEOPLE OF THE STATE OF CALIFORNIA

__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.

__X__ BY ELECTRONIC SERVICE. I caused the above identified document to be successfully submitted to the California Supreme Court via the Electronic Service of Appellate Briefs portal pursuant to the California Rules of Court Rule 8.212(c).

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 December 20, 2013.



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