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BY FEDERAL EXPRESS

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

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

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

To the Honorable Justices of the California Supreme Court:

We focus on the effects of SB 637 in this reply, and ignore the People's more general and gross misstatements of preemption law in their Letter. (*E.g.*, People's Letter at 1 ("only relevant issue" is whether "it is impossible to comply with both the challenged state law and federal mining law").) We continue to maintain that the State lacks authority categorically to prohibit permits either on a permanent or "temporary" basis. Nevertheless, we ask this Court to reject the People's invitation to utilize the passage of SB 637 to conclude that "California's moratorium on permits is, indeed, a temporary measure". (People's Letter at 2.) Regrettably, this is not the case.

Future Actions by the Department of Fish and Wildlife.

It is all well and good that the People claim that the Department of Fish and Wildlife now has authority someday, somehow to issue permits for suction dredge mining. But it speaks volumes that the People cannot identify a single step the Department has taken toward this goal since passage of SB 637. While the People claim that SB 637 "provid[es] a path by which the agency may satisfy all of the conditions for the issuance of permits to resume" (*id.* at 3), that path is illusory in terms of putting the mining community, including Rinehart, anywhere near getting a permit.

It has been now been more than four months since SB 637 passed and the Department of Fish and Wildlife has done nothing but modify its website to state in red letters that the "use of vacuum or suction dredge equipment, otherwise known as suction dredging, is currently prohibited and unlawful throughout California".[1] Were this Court the appropriate court in

[1] https://www.wildlife.ca.gov/Licensing/Suction-Dredge-Permits (accessed 2/28/16).

which to generate a factual record, we could demonstrate that the Department is refusing even to provide miners with applications for permits at this juncture, much less act upon them.

Even if the Department were to actually exercise authority to pass still further regulations concerning birds, cultural resources, and noise, this could take many, many years. The Department will likely assert that because it will be expanding the scope of regulations to include wildlife and all other imagined impacts, a whole new CEQA process is required. (*See also* SB 637, § 4 (referring to new CEQA requirements through "Assembly Bill 52 (Gatto)".) The Department will then assert that it has no money to conduct a CEQA process, much less all the other processes that form the fatally twisted "path".

That was its excuse after entering into a consent decree in 2006 promising CEQA review. Only under threat by further litigation, including potential contempt of court, resulted in some funding eventually becoming available in 2009. Then three more years were consumed. This time around, there is no consent decree the Department can be compelled to perform. Absent this Court's holding requiring a functioning permit process, years of further litigation may be required to compel the Department to act.

Future Actions by the State Water Resources Control Board.

Even worse defects arise through the additional layer of regulation contemplated for the Water Board. The Board dutifully reports on its website that it "is evaluating the options available to the Water Boards to address water quality permitting of suction dredge mining projects."[2] However, as noted in our opening letter, *this is precisely what the Board has been doing since 2007.* Any holding by this Court that permitting may be forbidden indefinitely while the State contemplates how to revise what was a perfectly-adequate existing permitting system is a recipe for transfinite inaction.

Here such a holding would also be a sanction for prohibition. The Water Board has formally advised the Department of Fish and Wildlife that "the indefinite continuation of the existing moratorium is the State Water Board's recommendation and *is the only option that fully mitigates all environmental impacts*" (emphasis added). The Board also proposed that "this activity [be] permanently prohibited" as an alternative to the "indefinite continuation" of the moratorium.[3]

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http://www.waterboards.ca.gov/water_issues/programs/npdes/suction_dredge_mining.shtml (accessed 2/28/16).

[3] These statements are contained in a letter from the Executive Director of the State Resources Control Board to the Director of the Department of Fish and Wildlife, dated March 11, 2013. We have previously briefed the misconduct at the Water Board, in concert with others, attempting to generate a record supportive of water quality impacts (especially concerning mercury). The Board invokes such concerns in support of the prohibition, but there are vast areas where toxic metals are not even an issue.

SB 637 thus exacerbates the vice of singling out and discriminating against mining as the only activity as to which "full mitigation is required," because the Legislature insists on such discrimination in a context where the governing agency insists *"full mitigation" can only be met through prohibition.* Every other activity in California, of course, can proceed notwithstanding asserted environmental impacts, on the basis of a Statement of Overriding Considerations (Public Resources Code § 21081(b)). Insofar as SB 637 leaves the "full mitigation requirement" in place, it necessarily operates as a prohibition, disguised by the claimed potential exercise of agency discretion that is always on the verge of occurring, yet will never occur.

SB 637 Constitutes Continued Unconstitutional and Material Interference with Mining on Federal Lands.

SB 637 confirms that the State seeks to exercise the authority it obtained in *Granite Rock* by breaching its repeated promises to the United States that it would not prohibit mining, and putting forth an ongoing and evolving campaign of "material interference" with mining operations on federal land in violation of 30 U.S.C. § 612(b). Worse still, SB 637 expands the State's policy of prohibition far beyond suction dredgers to include any prospector who would use any modern mechanized system.

As just one example, SB 637 makes it unlawful for a prospector to make use of even the smallest 12-volt motorized device (*e.g.*, a pump) within 100 yards of an active waterway without first obtaining a suction dredge permit, and first a water quality permit, neither of which are available. No other motorized activities are prohibited in this fashion; pumps and motors can be found in most watercraft on California's waterways. But a prospector is not even allowed to *possess* such motorized devices within 100 yards of an active waterway even when there is no impact to water quality whatsoever.

This appeal arose because Rinehart was cited for not having a permit the State refused to allow the Department to issue. SB 637 now ensures that the State will never issue permits, while expanding the scope of the prohibition to every modern small-scale miner in California. If the State wishes to have an entirely duplicative state regulatory program rather than just allowing federal agencies to manage federal land uses, it must provide a functional one, not some Kafkaesque monstrosity that lumbers forward, consuming vast taxpayer, judicial and miner resources while never managing to issue permits as the years, and perhaps decades, slowly pass by. The miners are not asking for special rights; outside the mining context, ordinary environment permit applicants have rights to such a functional process.[4]

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[4] California's Cabinet level agency—the California Environmental Protection Agency–publicizes those rights on its website.
(http://www.calepa.ca.gov/ContactUs/BillOfRights.htm (accessed 2/29/16)).

Conclusion

Respect and comity for the federal sovereign does not permit the State of California to assert regulatory authority without a reasonable, functional and non-prohibitive permitting system in place. This Court's holding to that effect will finally give the State an incentive responsibly to exercise regulatory authority.[5]

Respectfully submitted,

James L. Buchal
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[5] By way of response to the State's citation of *Quesada v. Herb Thyme Farms, Inc.*, 62 Cal.4th 298 (2015), we note that this Court's invocation of the "presumption against preemption" refers to preemption of "state-law causes of action" and areas "where the subject matter has been the long-standing subject of state regulations in the first instance". *Id.* at 312. These circumstances are not present here. As to the views of federal agencies, the *Quesada* case concerned a context where the federal agencies providing "uniform standards for organic certification" confirmed the obvious point that the operation of such certification standards could and did operate hand in hand with "state law consumer remedies for deception". *Id.* at 317. Again, there is no evidence that the U.S. Forest Service or Bureau of Land Management gave any specific consideration to the challenged moratorium as operating hand in hand with policies for the extraction of minerals. To the contrary, we provided an example of the Forest Service's administrative action to approve a suction dredging plan of operations and to remove any requirement for an unavailable state permit.

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(d) of the California Rules of Court, I hereby certify that this supplemental reply letter brief contains 1,433 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: March 1, 2016

James L. Buchal
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Brandon Rinehart

DECLARATION OF SERVICE

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

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

On March 1, 2016, I served the following document:

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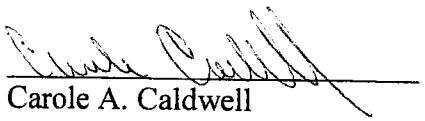

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