S222620

IN THE SUPREME COURT OF APPEAL OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

BRANDON LANCE RINEHART,

Defendant and Appellant.

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

ANSWER TO PETITION FOR REVIEW

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TO THE HONORABLE TANI GOREE CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Preliminary Statement

Defendant and appellant Brandon Rinehart respectfully urges this Court to reject the State's petition for review of a decision vacating his misdemeanor conviction and remanding for further proceedings in the trial court. Under the unusual circumstances of this case, neither defendant nor the State has had an opportunity to develop a factual record in this case, yet the Petition is filled with unfounded representations of fact on nearly every page, beginning with the first.

Suction dredge mining involves *individual* miners digging small holes *by hand* underwater and using a motorized vacuum hose to remove stream sediments containing gold and run them through a sluice box. To call this a "particularly environmentally sensitive form of mining" (Pet. at 1) is fanciful in a world of large-scale cyanide heap leaching and mountaintop removal. The State has been unable to advance evidence that this process has ever killed so much as a single fish or frog. Nor does this case involve mere "general encouragement" of mining by the federal government. (*Id.*) It involves a specific parcel of real estate granted to defendant by the United States for development of the mineral resources thereon.

The State of California successfully obtained limited concurrent jurisdiction to regulate mining on precisely this sort of parcel in the case of *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987). The Supreme Court

considered and rejected by a narrow 5-4 margin the claim that state regulatory regimes were categorically preempted, in no small part in reliance upon the State's repeated insistence at every level of litigation that it did not seek to prohibit mining. *Id.* at 586-87.

Now, having required for many years a permit to engage in suction dredge mining, the State wishes to uphold a statute, Fish and Wildlife Code § 5653.1, that bars the issuance of any and all further permits for suction dredging. This is thus not a case involving a general question of whether state environmental laws making mining commercially impracticable are preempted. (*Cf.* Pet. at 1.) Rather, it is a case about whether the State can shut down its longstanding permit program, shut down mining on federal land indefinitely, and criminally prosecute any miner who continues to mine for want of the permit the state now categorically refuses to issue.

Response to the State's Statement of the Issue

A concise, non-argumentative state of the issues presented for review, as required by Rule 8.504(b)(1), would be:

> "Is Fish and Wildlife Code § 5653.1's prohibition on the issuance of permits for suction dredging, as it applies to mining on federal land, preempted by federal mining law and policy?"

Response to the State's Introduction and Statement

As the Court of Appeal explained, the trial court "disallowed evidence relevant to the [federal preemption] question before [the Court of Appeals]" and there was in substance "no evidence in the record relevant to the operative issues

bearing on defendant's affirmative defense [of federal preemption]" (Slip op. at 19.) The State's numerous assertions of fact in its Petition should be disregarded pursuant to Rule 8.204's requirement that the references to facts are "limited to matters in the record" and such record references should be supported by citation. *See also* Rule 8.504(a) (Rule 8.204 applies to a petition for review).

The State refers the Court to *People v. Osborn*, 116 Cal. App.4th 764, 768 (2004) for a description of the suction dredging based on the record in that case. But the record is devoid of any information concerning dredging in this case, even the size of defendant's dredge. The State's assertion that the dredge nozzles are "typically four- to eight-inch[es] wide" is patent exaggeration. *See generally* 14 Cal. Code Regs. §§ 228(k)(1) & (k)(1)(E) (forbidding dredges larger than four inches in nearly all California water bodies, and only then with special permitting not available because of § 5653.1). The State's broad definition of "suction dredge" in its regulations in substance prohibits any motorized mining of underwater deposits, because it defines "suction dredge" as "the use of a suction system to vacuum material from a river, stream or lake for the extraction of minerals". 14 Cal. Code Regs. § 228(a).

The claim that adoption of Fish and Game Code § 5653.1 "was in response to a lawsuit exposing inadequacies in California's previous regulations" (Pet. at 9) is misleading at best; the State is refering to a 2006 Order and Consent Judgment also not of record. The reviewing court in that case made no findings of actual adverse environmental impacts, but rather held that "new information ha[d]

become available" which provided evidence that suction dredging "could result in environmental impacts different or more severe than the environmental impacts considered in the 1994 EIR . .". *Karuk Tribe v. Department of Fish and Game*, No. RG05 211597, Consent Decree ¶¶ 1-2 (Super. Ct. Alameda Cty. Dec. 20, 2006).

If the matter as to precisely how § 5653.1 arose were to be tried, the evidence would show that the *Karuk Tribe* court refused to shut down permit issuance unless and until suction dredging opponents presented evidence of harm in an evidentiary hearing and that opponents ultimately resorted to procuring legislative findings of harm that lack any sound foundation in fact. The question of whether and to what extent suction dredging causes appreciable environmental impacts is hotly disputed, and no record was made in the Court below on this subject. In any event, [f]ederal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment." *N. Ill. Chapter of Assoc. Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) (emphasis in original).

What is undisputed is that the State began a series of statutory enactments, characterized as moratoriums, prohibiting the Department from issuing additional permits for suction dredging. It is also undisputed that notwithstanding a wide range of dredging in California waters, the Legislature singled out mining for precious metals, making no attempt to restrict "suction dredging conducted for regular maintenance of energy or water supply management infrastructure, flood

control, or navigational purposes"—or to limit any other forms of dredging at all. *See* Fish and Wildlife Code § 5653.1(d).

The Legislature also added a further provision uniquely discriminating against suction dredge mining. Unlike any other activity subject to CEQA review, the Department was required to find that its regulations would "fully mitigate all identified significant environmental impacts" (Fish and Game Code § 5653.1(b)(4)), without regard to the broader public interest. (*Cf.* Public Resources Code § 21081 (no "full" mitigation required, and overriding economic, legal, social, technological or other benefits" may outweigh even significant environmental impacts).

The EIR that was ultimately prepared in the wake of the 2006 Consent Decree is also itself not of record and not properly cited by the State. It is subject to ongoing legal challenges in a number of coordinated cases pending in the Superior Court of San Bernardino County. *In re Suction Dredging*, JCDS No. 4720. What is in the record is the Department of Fish and Wildlife's April 1, 2013 report to the Legislature, in which the Department summarized the results of that process. (*See* Slip op. at 10.[1])

Thus it is a matter of record that the Department formally found that the issuance of suction dredging permits under the 2012 regulations "will not be

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[1] This report is available on the Department of Fish and Wildlife's website at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=63843&inline=1 (accessed 12/2/14). Defendant objects to the State's attempt to introduce numerous other website documents not of record.

deleterious to fish". (Report at 3.) However, given the extraordinarily low threshold for "significance,"[2] the Department found potentially significant impacts involving birds, noise, possible disturbance of unknown historical or cultural artifacts, and water quality. (*Id.* & n.4.) To the extent it becomes relevant, evidence at trial will demonstrate that suction dredge miners working underwater have no greater impact on birds, noise, and artifacts than campers or anyone engaged in any motorized activity. The water quality impacts are evanescent, and a net benefit for wildlife habitat.

The State's uncited assertions of environmental harm in its Petition are entirely false or misleading, and each would be contested at trial. The State says "sucking rocks and gravel out of a streambed . . . risks killing the fish and amphibians in the streambed". (Pet. at 9.) This Court can take judicial notice that fish and amphibians do not live "in" streambeds. Evidence at trial can demonstrate that mining has been restricted since 1961 during the narrow seasonal windows when eggs are present in the streambed; that tiny invertebrates recolonize rapidly; and that no amphibians are injured at all. The State says that suction dredging "can also destroy the habitats that those animals and others use" (*id.*); experts at trial can testify that the holes left by suction dredges themselves form useful habitat, and that the process breaks up "concretized" streambeds to

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[2] The regulatory definition of "significant effect on the environment" includes any "*potentially* substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance". 14 Cal. Code Regs. § 15232 (emphasis added).

enhance fish spawning. The State claims that the mining "can stir up mercury contamination long buried from 19th Century gold mining activities" (*id.*); the evidence at trial will show that this happens after every thunderstorm and the dredgers in fact remove about 98% of the mercury for a net environmental benefit.

The Department has repeatedly confirmed in its Report to the Legislature that § 5653.1 made it impossible as a matter of law to issue further permits. That was because the Legislature intentionally imposed an impossible and unique condition on the issuance of further permits: full mitigation of all potentially significant effects. As the report explains,

> "the FSEIR includes a detailed discussion in Section 4.1, at pages 4-8 through 4-15, of the Department's substantive authority to address significant environmental effects in the regulations it is required to adopt to implement Section 5653. The latter portion of that discussion addresses the full mitigation condition added by AB 120 specifically, indicating the "*full mitigation* certification contemplated by Section 5653.1 does not provide the Department with the substantive legal authority necessary to address significant environmental effects beyond the reach of the Department's existing authority." (*Id.*, § 4.1, p. 4-15 (italics in original).) The CEQA Findings adopted by the Department in March 2012 also address AB 120 in a number of places, reiterating the same point."

(Report at 11.) The Department even provided recommendations for legislative changes, but the Legislative Assembly has never passed them. Unless and until the Legislative Assembly changes the law to increase the substantive authority of

the agency, further permits are effectively banned as a matter of law.[3]

Procedural History

Appellant, having made a discovery of a valuable gold deposit "locatable" under federal mining law, took the legally required steps to obtain a federally-registered placer mining claim on National Forest Land and did obtain such a claim. (*See* CT71-72.) Up until 2009, he would obtain a permit issued by the Department to operate a suction dredge on his claim, and he held a permit which was invalidated by operation of SB 670 in 2009. (*See* Tr. 47.) The parties have stipulated that but for the continuing statutory prohibition on issuing permits, he would have continued to apply for permits. (*Id.*) Issuance of permits would be, but for the statutory prohibition, a ministerial act. *See generally* 14 Cal. Code Regs. § 228.

Defendant was cited for dredging without a permit (and thereby illegally possessing a dredge) on June 16, 2012.[4] On October 30, 2012, defendant demurred to the charges against him on the ground that the State could not require

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[3] The FSEIR had also noted a second then-impossible condition for issuing permits: that "a fee structure is in place that will fully cover all costs to the department related to the administration of the program." (Report at 11.) The FSEIR noted that "because related fees are set by statute, any change to the existing fee structure *could only occur through legislation*". (*Id.*; emphasis added.)

[4] The State notes that the second of the three statutes barring the Department from issuing permits, AB 120, contained language stating that "notwithstanding § 5653," the use of suction dredges was illegal until the impossible conditions were met or June 30, 2016, "whichever is earlier". This was a drafting error that would have abolished the permit program entirely in 2016, and was promptly eliminated in a 2012 revision.

a permit, refuse categorically to issue any permits, and charge him as a criminal for failing to have the permit the State refused to issue. (CR5-17.) The State insisted that a full trial was required to resolve the federal preemption question (CR35-49), and the demurrer was overruled (CR63). The parties entered into a stipulation to narrow the focus for trial (CR68-70), and defendant prepared and filed an extensive offer of proof to further assist the trial judge in evaluating the preemption claim (CR71-85).

Trial was eventually held on May 15, 2013, and the parties then argued at length the question of federal preemption, insofar as the State had reversed its position concerning the demurrer and now contended that the question of federal preemption could be decided as a matter of law. The Superior Court concluded that the State of California had the "right" not to issue permits, and that no preemption claim could be made as a matter of law. (*See* Tr. 42.)

As to the offer of proof, the Court ruled that all of the evidence which proved the interference with mining caused by the State's refusal to issue permits was "irrelevant". Once this severely-truncated record was established, the Court found Appellant guilty:

> "I believe that although this is a—although technically a criminal case, this is basically more of an act of civil disobedience where Mr. Rinehart—basically, this is a test case where Mr. Rinehart believes he is being frustrated in his ability to earn a living or to mine, and the State would

disagree with that. Perhaps there's a better way to do that, but I think this is a case that needs to be taken up and needs to be resolved." (Tr. 52.[5])

The Court also expressed disapproval of the State's refusal to issue permits, stating: "I think the State needs to deal with it in an appropriate manner in terms of coming up with regulations . . .". (Tr. 53.) The Court found defendant guilty of both charges (CT377) and sentenced Appellant to three years' probation and $832 in fines and assessments, with the fine stayed pending successful completion of probation. (CT378.)

The Court of Appeals reversed, noting that the controlling U.S. Supreme Court case, *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), required a determination whether the State's refusal to issue permits "stand[s] as an obstacle to the accomplishment [and execution] of the full purposes and objectives of Congress" (*id.* at 581), and that owing to the trial court's refusal to accept evidence, "[o]n this record, we are unable to make that determination and we remand to the trial court for further proceedings on the issue of federal preemption". (Slip op. at 1.)

Summary of Argument

Neither of the two reasons advanced by the State for granting review has merit. First, this case does not address what the State characterizes as an "important question" of the State's general ability to "apply environmental

[5] Mining groups had already been attempting ever since 2009 to get federal and state *civil* courts to reach the merits of the preemption issue. *E.g., Public Lands for the People, Inc. v. California*, 2010 U.S. Dist. LEXIS 24531, No. 09-2566 (E.D. Cal. Mar. 16, 2010).

regulations". There is no environmental regulation involved, but rather a Legislative mandate to destroy a longstanding permitting program in favor of a blanket prohibition on issuing further permits. In addition, judicial prudence counsels in favor of permitting a factual record to be developed.

Second, the Court of Appeal correctly interpreted the controlling U.S. Supreme Court case, *Granite Rock*, which had directly addressed the scope of California's regulatory authority over mining on federal lands. If anything, the Court of Appeal was too cautious and could have easily found preemption as a matter of law because the State's statute "is prohibitory, not regulatory, in its fundamental character" based on the record before it. *South Dakota Mining Ass'n v. Lawrence County,* 155 F.3d 1005 (8th Cir. 1998).

Argument

I. THE COURT OF APPEAL DECISION DOES NOT INVOLVE AN IMPORTANT QUESTION OF LAW WITHIN THE MEANING OF RULE 8.500(b)(1).

This case does not involve any conflict among the Courts of Appeal. It does not create new law, but follows uniform federal preemption law settled in multiple state and federal cases. (*See infra* Point II.) It concerns a highly-unusual statute, Fish & Wildlife Code § 5653.1, which is not representative of California's environmental regulatory schemes in general. The State seeks review of the Court of Appeal decision even before a remand to develop a factual record can occur.

The unique nature of the statute and the procedural context make this case akin to one involving a "fact-specific issue does not present an issue worthy of review" under Rule 8.500(b)(1). *Metcalf v. County of San Joaquin*, 42 Cal.4th 1121, 1129 (2008).

There are a myriad of regulatory systems in California that operate to issue or deny permits day in and day out. Fish and Wildlife Code § 5653.1 is entirely different: a law that forbids permit issuance unless an agency takes action it lacks legal authority to take. The statute was specifically crafted to halt permit issuance notwithstanding a CEQA process and revised regulations that met the statutory test: permit issuance "will not be deleterious to fish". *Id.* § 5653(b). Instead, the statute set an impossible standard for permit issuance which is applied nowhere else. Anyone digging anywhere in California might strike an artifact (the discovery of which is subject to comprehensive regulations[6]), but not all digging in California is halted until the risk of such an encounter is "fully mitigated". Anyone running a motor in California may cause noise, and the State is laced with noise regulations, but not all motorized operations are shut down for "full mitigation". Anyone hiking anywhere in California may disturb a bird, but not all

[6] *E.g.*, The Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 *et seq.*

human activities in California near birds are shut down for "full mitigation". It is difficult even to imagine what "full mitigation" could mean in these contexts.

This appeal does *not* implicate broader concerns as to federal preemption in the context of a properly functioning permit system. That permitting system was destroyed by the Legislative Assembly, when it barred the Department of Fish and Wildlife from issuing any further permits. The statute does not involve regulation; it involves prohibition. The alleged "broader implications" of the decision with respect to other regulatory matters are not yet properly before this Court, or any court. Absent the factual record yet to be developed, taking this case is not an optimal use of appellate resources.

The Courts of Appeal have already proven that they can make careful application of *Granite Rock* and federal preemption principles to avoid undue interference with California environmental statutes. Although the State tells this Court that the decision threatens California's Surface Mining and Reclamation Act (SMARA) of 1975 (Pet. at 11), the State does not tell this Court that the Fifth Appellate District has already analyzed *Granite Rock* in detail and upheld application of the California Environmental Quality Act (CEQA) to a SMARA reclamation plan. *Nelson v. County of Kern*, 190 Cal. App.4th 252, 280-82 (2010). The Courts of Appeal are fully capable of distinguishing between reasonable

environmental regulations and arbitrary prohibitions that plainly frustrate the application of federal law.

The notion that the case calls into question regulation of hydraulic mining approved in various 19th Century cases is based on a gross misreading of the precedents. *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (C.C.D. Cal. 1884) involved the appeal of a bill in equity to restrain hydraulic mining which was "overflowing and covering the neighboring lands [—non-federal private property—] with debris," including "thousands of acres" of "the finest farms, orchards and vineyards in the State". *Id.* at 756, 759 & 760.

The case did not involve federal mining claims or federal land, but land which had been sold to miners. As the Court explained, "the sale by the United States to a purchaser did not prevent the State from exercising whatever police power it may of right have over the subject". *Id.* at 810. The court correctly noted that there was no statutory authorization for such purchasers to use "adjacent lands for the purpose of depositing therein or thereon their mining debris". *Id.* at 810-11.

To the contrary, an 1866 federal mining statute expressly provided if operations would "injure or damage the possession of any settler on the public domain, the party committing such damage shall be liable to the party injured for such injury or damage". *Id.* at 774 (quoting § 9 of the 1866 Act). This law remains in effect (30 U.S.C. § 51), and again underscores Congress' careful division between state and federal law authority: the Congressional intention is to

get minerals on federal land developed, even to the extent of causing damage to neighboring settlers, provided that such damages may be compensated.[7]

II. THE COURT OF APPEALS CORRECTLY INTERPRETED SETTLED FEDERAL LAW.

In its Petition, the State invents a law of preemption that is utterly inconsistent with the *Granite Rock*'s controlling holding delineating the extent to which California regulatory systems are constrained by federal mining law. The State acts as if there were but one nonbinding precedent, *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), and a single federal statute, 30 U.S.C. § 22. Rather, there is a large body of law—*more than can be briefed here*—setting forth "the all pervading purpose of the mining laws . . . to further the speedy and orderly development of the mineral resources of our

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[7] This Court's decisions in *People v. Gold Run Ditch and Mining Co.*, 66 Cal. 138 (1884), and *County of Sutter v. Nicols*, 152 Cal. 688 (1908), are similarly inapposite. *Gold Run Ditch* was an action for injunction for nuisance like *Woodruff*. *Id.* at 146. No federal mining claims were involved and no question of preemption considered; rather, the case addresses claims that defendant acquired right to dispose of debris "from custom" and "by prescription and the statute of limitations". *Id.* at 151.

County of Sutter v. Nicols, 152 Cal. 688 (1908), did address questions of federal law, but not the federal law upon which defendant relies. The case concerned whether a federal permit issued by the California Debris Commission (created by Act of Congress approved March 1, 1893) barred actions for damages when, notwithstanding apparent compliance with the permit, injury to other private interests arose. The Court determined that the specific statutory provisions at issue "were designed to enable the commission to obtain all aid which it could derive from the suggestions of all interested persons" and "not intended to conclude and estop the owners of lands below with respect to subsequent injuries. *Id.* at 696. That, of course, was entirely consistent with 30 U.S.C. § 51.

country". *United States v. Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968) (quoting *Bagg v. N.J. Loan Co.*, 88 Ariz. 182, 354 P.2d 40 (1960)).

A. An Abstract of Federal Mining Law and Policy.

Among the 19th Century statutes, 30 U.S.C. § 22 provides that "all valuable mineral deposits in lands belonging to the United States shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase . . .". Congress considered a role for state law, and left only the remedy for damage to neighboring lands in 30 U.S.C. § 51 discussed above. The State argues that 30 U.S.C. § 22's references to "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" leaves some role for state law, but this language contains no reference to state law at all, and underscores federal supremacy. As the Supreme Court explained in *Butte City Water Co. v. Baker,* 196 U.S. 119 (1905), any "right to supplement Federal legislation conceded to the State may not be arbitrarily exercised; nor has the State the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the Congressional laws." *Id.* at 125.

In the 20th Century, Congress has declared "the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries". 30 U.S.C. § 21a(1).

The Multiple Use Act of 1955 made it clear that even federal agencies were limited in their substantive ability to interfere with mining:

> "Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto . . .*" 30 U.S.C. § 612(b) (emphasis added)."

This statute confirms the long-standing federal policy of facilitating mining of claimed mineral deposits, and subordinating all other uses, including the protection of other "surface resources" such as fish and wildlife, to mining. *See also* H. Rep. No. 730, 84th Cong., 1st Sess. 10, *reprinted in* 2 U.S. Code Cong. & Admin News, at 2483 (1955) (Multiple Use Act does "not have the effect of modifying long-standing essential rights springing from location of a mining claim. Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator . . .").

Under this statute and other authority, the federal courts have repeatedly held that "use of the surface" through regulation of mining to protect surface resources such as fish and wildlife is permissible, *but cannot "materially interfere" with prospecting, mining or processing operations.* Most recently, in *United States v. Backlund*, 689 F.3d 986 (9th Cir. 2012), the Ninth Circuit

confirmed that the regulatory authority of the Forest Service "is cabined by Congress' instruction that regulation not 'endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.'" *Id.* at 997 (quoting 30 U.S.C. § 612(b)).

Congress wisely recognized that unlike many other forms of economic activity, mineral development has to occur where the minerals are located, and some adverse environmental effects may be unavoidable. Section 5653.1 rejects this policy by insisting that any and all conceivable effects be "fully mitigated," without any regard for whether it is possible to do so and still extract the minerals. As noted above, this "full mitigation" policy uniquely discriminates against suction dredge mining.

Congress manifestly conferred no plenary power on the State to halt mining on federal land. Rather, the 1955 statute carved out only a limited role for state law which gave effect to "the laws of the States . . . relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim". 30 U.S.C. § 612(b). Significantly, Congress carved out no general role for state regulation of mining on federal land at all, and it is utterly unreasonable to imagine that Congress intended to permit States to halt mining, a result inconsistent with the entire history of Congressional legislation in

the mining area.[8]

That does not mean that the State is without power to do such things as *regulate* the use of "dynamite or poisons" (Pet. at 25); it merely means that the regulation must be reasonable in the context of the mineral development at issue. *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), approving a Forest Service restriction on dynamite blasting, required the Forest Service to demonstrate that the dynamite "methods of exploration were unnecessary and were unreasonably destructive of surface resources and damaging to the environment". *Id.* at 295. It would, however, obviously interfere with federal mineral development policy to *prohibit* the use of dynamite in mining, an act that would stand akin to California forbidding law enforcement officers, including federal officers, from using firearms.[9]

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[8] Congress has repeatedly acted to protect miners from regulation by federal land management agencies. *See, e.g.,* Proposed Forest Service Mining Regulations: Hearings before the Subcommittee on Public Lands, House Committee on Interior and Insular Affairs, 93rd Cong., 2d Sess. (Mar. 7-8, 1974). More recently, Congress asked the National Research Council to reassess the adequacy of this regulatory framework. The National Research Council reported back that "BLM and the Forest Service are appropriately regulating these small suction dredge mining operations under current regulations as casual use or causing no significant impact, respectively". NRC, *Hardrock Mining on Federal Lan*ds 96 (Nat'l Academy Press 1999).

[9] With respect to poisons, the State refers to *Seven Up Pete Venture v. Montana,* 144 P.3d 1009 (2005), but it did not involve any claim of federal preemption whatsoever.

B. The Court of Appeal Got Preemption Right.

In light of the unique and powerful federal policies favoring mineral development, multiple courts have easily determined that various state law-based restrictions on the development of federal mining claims are preempted. Thus in *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), the U.S. Court of Appeals for the Eighth Circuit struck down a "county ordinance prohibiting the issuance of any new or amended permits for surface metal mining within the Spearfish Canyon Area". *Id.* at 1006. As the Eight Circuit explained:

> "The ordinance's de facto ban on mining on federal land acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act. Congress has encouraged exploration and mining of valuable mineral deposits located on federal land and has granted certain rights to those who discover such minerals. Federal law also encourages the economical extraction and use of these minerals. The Lawrence County ordinance completely frustrates the accomplishment of these federally encouraged activities. A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution. The ordinance is prohibitory, not regulatory, in its fundamental character. The district court correctly ruled that the ordinance was preempted."

Id. at 1011 (emphasis added). The State's refusal to issue any permits for suction dredge mining in California is manifestly "prohibitory, not regulatory, in its fundamental character" and constitutes a *de facto* ban on mining.

The Supreme Court of Colorado and the Oregon Court of Appeals have reached similar conclusions. *Brubaker v. Board of County Commissioners*, 652 P.2d 1050 (Colo. 1982) (county's refusal to issue drilling permit overturned); *Elliott v. Oregon Int'l Mining Co.*, 654 P.2d 663 (Or. Ct. App. 1982) (county

ordinances prohibiting surface mining in some areas preempted); *see also Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979) ("The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress"). *Every published case to consider mining bans has found preemption.*[10]

Faced with this wealth of contrary authority which easily supports the Court of Appeal's decision, the State takes two tacks: it seeks to reinterpret *Granite Rock*, and it attempts a restatement of the entire law of federal preemption. The Court of Appeal properly found these stratagems unpersuasive.

1. The State misreads *Granite Rock*.

Granite Rock's holding was that federal mining law and policy did not fully occupy the field of regulation; there remained room for state regulatory systems that did not stand as an obstacle to federal objectives. *Granite Rock* in no sense endorsed any categorical state refusals to issue permits for mining.[11] To the

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[10] There is only one case to the contrary, an unpublished opinion in which a *pro se* litigant practicing law for his co-owners without a license buried his preemption claim in a mass of meritless objections and botched the briefing. *Pringle v. Oregon*, No. 2:12-cv-003090-SU, 2014 WL 795328 (D. Or. Feb. 25, 2014).

[11] It appears the Supreme Court was not fully informed concerning mining law. As the State acknowledges, the Court only "mentioned" 30 U.S.C. § 612(b), and made its decision, in part, based on the erroneous concession that the 19th Century mining laws had not considered environmental impacts. In fact, Congress' early concern that mining operations would "injure or damage the possession of any settler on the public domain" (30 U.S.C. § 51), a statute apparently not briefed to the Court, confirmed the limited role Congress intended for state laws protecting the environment around mines. Had the *Granite Rock* court been fully informed

contrary, the State was then at great pains to assure every court involved that it did "not seek to prohibit mining of the unpatented claim on national forest land". *Granite Rock*, 480 U.S. at 586-87 (citing numerous statements by the State). Having obtained regulatory authority, however, the State now seeks to prohibit the mining of defendant's unpatented claim on national forest land through § 5653.1.

The Supreme Court, however, repeatedly warned that the State lacked prohibitory power; while environmental regulation with reasonable permit conditions was not preempted, "land use planning" was:[12]

> "The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities.

Id. at 587. Here the challenged statute, declaring that only "nonmotorized recreational mining activities, including panning for gold" may proceed in the

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on mining law, the 5-4 decision might have come out the other way and found "field preemption" because, among other things, *expressio unius est exclusio alterius* with respect to the role of state law on federal mining claims.

[12] The State correctly notes that *Granite Rock* "assumed" the preemption of land use planning, but this was not a mere assumption "for the sake of argument". (Pet. at 23.) Rather, the opinion carefully set forth express statutory provisions "limit[ing] states to an advisory role in federal land use management decisions". *Granite Rock*, 480 U.S. at 585. No one has disputed until this case that prohibiting mining uses is land use planning, and the State does not seriously dispute it, but instead argues that the land use planning feature should be viewed as temporary.

waterways of the State (Fish & Game Code § 5653.1(e)), is a choice of use that constitutes forbidden land use planning—as well as causing "material interference" in violation of 30 U.S.C. § 612(b). It is a categorical ban on a particular use of land, not a reasonable attempt to regulate such use, and cannot be given effect on defendant's federal mining claim. The State lacks power to zone federal mining claims on federal land into "recreational" areas.

In *Granite Rock*, the Supreme Court repeatedly noted that federal pre-emption extended beyond prohibitory enactments such as § 5653.1 *to the permit conditions themselves*: "We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law." *Id.* at 593. Rather, "the Coastal Commission's identification of a possible set of permit conditions not pre-empted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement." *Id.* at 589; *see also id.* at 593 (noting the "narrow" nature of the Court's holding). This case, despite the State's vigorous argument to the contrary, does not concern detailed regulation on the order of permit conditions; it concerns only the categorical refusal to issue permits.

The case is thus on all fours with *South Dakota Mining*, for "unlike *Granite Rock*, we are not confronted with uncertainty as to what conditions must be met to obtain a permit . . . the [legislation] is a *per se* ban on all new or amended permits . . .". *South Dakota Mining*, 155 F.3d at 1011. The Court of Appeal's remand order seeks confirmation of this simple proposition in the face of the

State's obfuscation and refusal to permit a factual record to be made in the trial court.

The Court of Appeal decision was if anything far too deferential to the State. (*See also* Point III *infra*.) Rather than strike down the statute as prohibitory in character as a matter of law, the Court of Appeal gave the State an opportunity, on remand, to demonstrate that which no other government has been so brazen as to claim in this context: that the opportunity to pan minute amounts of gold by hand does not, as a matter of fact, frustrate federal mineral development policy. All of the State's complaints about the workability of the Court of Appeal remand complain about the very opportunity for factfinding the State sought—which it may yet have the wisdom to eschew.

2. The State's reinvention of preemption law must be rejected.

The State also attempts to sidestep *Granite Rock* by reference to a plethora of other preemption cases, but *Granite Rock* is controlling. Thus while the State notes cases involving concurrent authority over federal lands, *Granite Rock* repeatedly emphasized Congress' "unlimited power . . . over the use of federal lands". *Id.* at 591. The Court of Appeal correctly stated the simple preemption issue framed by *Granite Rock*: whether the State's prohibition on permits "stand[s] as an obstacle to the accomplishment [and execution] of the full purposes and objectives of Congress". Slip op. at 1 (quoting *Granite Rock*, 480 U.S. at 581).

Given the Property Clause and the history of Federal mining law, all of the State's cases concerning an alleged presumption against preemption and the historic police powers of the State are utterly inapposite. *Granite Rock* makes no reference to any such presumption or deference to historic police powers, just like numerous other U.S. Supreme Court cases which either ignore the presumption or explain that it is "not triggered when the State regulates in an area where there has been a history of significant federal presence". *United States v. Locke*, 529 U.S. 89, 108 (2000); *see also Arizona v. United States*, 132 S. Ct. 2492 (2012) (no mention of presumption in immigration context); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (no mention in national energy policy context); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n,* 461 U.S. 190 (1983) (same); *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (no mention in Property Clause context); *accord Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 n.3 (6th Cir. 2005) (presumption "disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time"), *aff'd*, 550 U.S. 1 (2007).

The State advances a U.S. Bureau of Land Management regulation it claims allows any and all restrictions on mining (43 C.F.R. § 3809.3), but that regulation is plainly bad law. It is premised on the patently erroneous view, set forth in the Federal Register notice of adoption, that preemption "occurs *only* when it is impossible to comply with both Federal and State law at the same time". 65 Fed. Reg. 69,998, at 70,008-009 (Nov. 21, 2000) (emphasis added).

"Impossibility" is a species of preemption, and is arguably true here,[13] but it is not required for "obstacle" preemption. As a matter of law, "both forms of conflicting state law are 'nullified' by the Supremacy Clause": (1) conflicts "that prevent or frustrate the accomplishment of a federal objective" and (2) conflicts "that make it 'impossible' for private parties to comply with both state and federal law". *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873-74 (2000). Section 5353.1's criminalization of all but nonmotorized mining plainly frustrates the accomplishment of the federal objective to develop minerals on federal lands.

Quite apart from its total failure to understand and apply pre-emption law, the BLM regulation is also flatly inconsistent with 30 U.S.C. § 612(b). Neither BLM nor any other federal agency has power to declare that some inchoate policy of "protection for public lands" trumps § 612(b)'s express protection of mineral development on federal mining claims. Agency authority comes only from Congress, and Congress cannot possibly have empowered BLM to authorize the State to do that what BLM itself could not do.

BLM's gross error distinguishes this case from *RCJ Med. Servs., Inc. v. Bonta*, 91 Cal. App.4th 986 (2001), where neither party contended that the federal

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[13] Federal policy imposes not merely a right to mine, but also a duty to do so. Pursuant to 30 U.S.C. § 28, "On each claim located after the 10th day of May 1872, that is granted a waiver under section 28f of this title, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year." There is a limited right to utilize mere "surveys", rather than actual mining, to meet the statutory requirement, but it can only last two years. *Id.* § 28-1(d). In substance, the State refuses to permit that which federal law requires.

regulation was "an impermissible construction of the federal statut[e]". *Id.* at 1004. It is also worth noting that defendant's claim is on Forest Service land, not BLM land. For all these reasons, the Court of Appeal properly declined to defer to BLM's regulation on preemption.

Ultimately, federal preemption does not depend upon any express Congressional recognition of a preemption issue at all. As the Supreme Court has explained, "[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply . . .". *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000). The law of preemption in the mining context is precisely such well-settled law, a fact that fully accounts for and again distinguishes every preemption case upon which the State relies.

C. The Court of Appeals Did Not Make Commercial Practicability the "Touchstone" for Preemption Analysis.

The Court of Appeal's remand told the trial court to address "*at least* these two questions: (1) Does § 5653.1, as currently applied, operate as a practical matter to prohibit the issuance of permits required by § 5653; and (2) if so, has this de facto ban on suction dredging permits rendered commercially impracticable the exercise of defendant's mining rights granted to him by the federal government?" (Slip op at 19; emphasis added.) These two questions were designed to accommodate the two meritless attacks by the State: (1) that the statute should somehow be viewed as merely "temporary" and not a *de facto* ban on permits; and

(2) that even if permits were banned, there was still no interference with mining because defendant could still mine by hand.

From defendant's perspective, the first question was the product of the State's successful deployment, through three iterations of legislation, of a complicated prohibition ostensibly containing achievable objectives for re-starting the issuance of permits. The Court of Appeal apparently credited the State's misleading arguments that the refusal to issue permits was only temporary, notwithstanding the April 1, 2013 admissions that further legislation was required before permits could issue again. That concession alone could and should (*see infra* Point III) compel a finding of preemption.

The second issue presents at least colorable issues of fact, but not the sort of case-by-case analysis of permit conditions contemplated in *Granite Rock.* Rather, the question is limited to the case at hand: whether the unique refusal even to issue permits forecloses mining as a practical matter. Again, the State brought this issue on itself by refusing to admit what should be obvious: that recreational mining *by hand* does not vindicate the commercial mineral development objectives of federal law. Congress sought "economically sound and stable domestic mining, minerals, metal and mineral reclamation industries," 30 U.S.C. § 21a(1), and categorically denying permits to an entire industry of small-scale commercial dredgers obviously stands as an obstacle to the achievement of that goal.

The State echoes the unsuccessful litigant in *South Dakota Mining*. The restriction there concerned "new or amended permits for surface metal mining in what was known as the Spearfish Canyon area". (Pet. at 17.) This was 10% of the county (*id.* at 1007), as opposed to the statewide ban here. It allowed existing permitholders to continue mining, rather than cancelling all permits mid-season in 2009 and thereafter. The restriction barred only surface mining (in an area where there were only surface deposits); this restriction bars only suction dredge mining statewide, barring development of the underwater placer deposits on defendant's mining claim and others similarly situated.

The losing party in the *South Dakota* case nonetheless argued that "because the ordinance only bans one type of mining, surface metal mining, and does so only within a limited area, the ordinance does not prevent the accomplishment of the purposes and objectives of federal mining law. *Id.* at 1009. Here the State argues in substance that limiting mining to mining by hand does not frustrate the Congressional goal of fostering mineral development and "economically sound and stable" mineral industry. Insofar as the State vigorously sought the opportunity to present its case that it is no obstacle to require defendant to mine by hand—a case that a more prudent investment of taxpayer resources would obviously eschew—the State cannot fairly be heard to complain that this requires a factual, case-by-case trial to prove.

As to whether federal preemption may depend upon the price of the minerals involved, there is no doubt at some fantastic price, mineral development

might occur even by hand in some fantastically-inefficient way, but the trial court may still properly determine that outlawing motorized development still frustrates the federal objectives. All these questions should be left for the development of a factual record in the courts below.

For all the State's imagined problems of judicial administration under the Court of Appeal decision, it is worth noting that suction dredge mining proceeded under a regulatory regime in California for more than fifty years without any challenges to the regulation as being preempted by federal law. It was only the extraordinary legislation since 2009 that drew such litigation, because § 5653.1 has flatly prohibited any permits *at all* from being issued. When permit issuance resumes, and if challenges to particular permit or regulatory conditions proceed, future courts will have ample opportunity to flesh out the scope of federal preemption. For this Court to review the question now, even before the factual record is assembled in this case, is plainly premature.

III. SHOULD THE COURT GRANT REVIEW—AND IT SHOULD NOT—IT SHOULD FIND THAT FEDERAL PREEMPTION EXISTS AS A MATTER OF LAW ON THE RECORD BEFORE THE COURT.

As noted above, the only arguable error in the Court of Appeal opinion is that it did not go far enough, and simply direct the trial court to issue a judgment of acquittal. Section 5653.1, when read in conjunction with the State's concessions in the April 1, 2013 report to the Legislature that further legislation is required before permits may once again issue, shows a frustration of federal

mining objectives as a matter of law. It is obviously "prohibitory, not regulatory, in its fundamental character". *South Dakota Mining*, 155 F.3d at 1011.

The Court might spare defendant and the taxpayers a great deal of future expense, by simply ordering review and then retransferring to the Court of Appeals with instructions that § 5653.1 is declared to be unconstitutional as a matter of law, and defendant's conviction is vacated. *See* Rule 8.528(d). With § 5653.1 struck down, permits can once again issue, and further questions of federal preemption, if any, can be left for another day. This result would vindicate the trial court's commonsense reaction, regrettably not embodied in his formal ruling, that the State needs to regulate suction dredging "in an appropriate manner". (Tr. 53.)

Unless and until § 5653.1 is set aside, the so-called "temporary" moratorium will continue. This is a manifest injustice and continuing hardship for thousands of California miners.

Conclusion

For the foregoing reasons, this Court should either deny review, or enter an order pursuant to Rule 8.258(d) striking down § 5653.1 as a matter of law and vacating defendant's conviction.

Dated: December 5, 2014.

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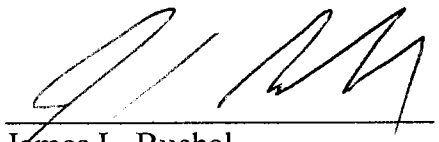
CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 8,335 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: December 5, 2014.



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