No. S222620

IN THE SUPREME COURT 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
Honorable Ira Kaufman, Judge

ANSWERING BRIEF ON THE MERITS

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COUNTERSTATEMENT OF THE ISSUE FOR REVIEW

Does the State's scheme of both requiring suction dredge miners to obtain permits and categorically refusing to issue them frustrate the purposes of federal mining law within the meaning of the Supremacy Clause of the U.S. Constitution?

INTRODUCTION

Rinehart does not challenge the State's right to regulate his operations, but the State's right to suspend indefinitely a longstanding permitting process through § 5653.1 of the Fish and Game Code. Because this case does not concern what permit conditions might be imposed to limit environmental harm, the People's insinuations of harm to "fish, water quality, and other resources in California" (People's Opening Brief on the Merits at 1 (hereafter "People's Br.")) should not distract the Court. In fact, the Department of Fish and Wildlife was developing (and did develop) a revised set of regulations, mining under which would not be "deleterious to fish." If permitted to present evidence—the Superior Court allowed no such evidence—Rinehart would show that the use of suction dredges for placer mining in the State of California under prior permits had no appreciable adverse environmental effects whatsoever.

While California obtained in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), the power to issue permits for

mining on federal land, that power remains subject to the substantive limitations provided by Congress on the exercise of regulatory power to restrict mining. A hundred years of federal and state precedent confirms the limited state role with respect to the traditionally federal realm of mining on federal lands. The People thus present a remarkable distortion of both the law of federal preemption and the history of mining regulation in California, but cannot avoid the obvious conclusion that shutting down a longstanding permit program "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," *Granite Rock*, 580 U.S. at 581 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Allowing the Legislature to shut down mining on federal mining claims because of the asserted need to evaluate environmental risks from the tiny suction dredges operated by gold miners, which have operated in California for decades, while all other, larger suction dredging may proceed apace, plainly frustrates the purpose of federal mining law.

The Court of Appeals properly applied the law of federal preemption, and if it erred at all, it erred because of the People's remarkable insistence that restricting mining for all practical purposes to gold panning by hand was sufficient to avoid a preemption finding. The Court of Appeals could and should have determined that the State's scheme was prohibitory as a matter of law. Contrary to the statements of the People, the

Court of Appeals did not make the touchstone of preemption whether or not the State's regulatory scheme had made the mining "commercially impracticable" in the sense of being unprofitable. It merely cited evidence concerning the degree of interference with the federal purpose of fostering commercial mining as among the factual questions to be developed upon remand, if necessary. The right result, however, is to set aside Rinehart's conviction without reaching the question of whether any particular instance of the State's actual exercise of permitting authority might be preempted.

BACKGROUND

A. The Purposes and Objectives of Congress in the Federal Mining Law.

Unlike nearly any other economic activity, mining can only occur at the location where the minerals are found, and one cannot explore for or develop mineral deposits without disturbing the natural environment in ways now commonly regarded as significant. Nonetheless, Congress has struck the balance between protecting the natural environment and extracting the minerals in favor of extracting the minerals—subject to reasonable environmental protection that do not "materially interfere" with

the mining.[1] A large body of federal law confirms this proposition. *See, e.g., United States v. Backlund*, 689 F.3d 986, 997 (9th Cir. 2012) (regulatory authority "is cabined by Congress' instruction that regulation not 'endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto;'" quoting 30 U.S.C. § 612(b)).

At the core of the People's position is the notion that Congress, legislating with plenary authority under the Property Clause, intended to allow the states to strike an entirely different policy balance effectively prohibiting mining on federal lands, and destroying mining industries vital to the Nation's interests. In context where Congress has demanded that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals" (43 U.S.C. § 1701(a)(2)),[2] it is not

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[1] 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, the National Research Council (NRC) reported to Congress that "BLM and the Forest Service are appropriately regulating the suction dredge mining operations at issue under current regulations as casual use or causing no significant impact, respectively". NRC, *Hardrock Mining on Federal Lands* 96 (Nat'l Academy Press 1999).

[2] The State's assertion that suction dredge mining "is largely done for recreation" (People's Br. 5) is not based on any facts of record, and is akin to asking the Court to infer that because there are more sport fishers in California, there is no commercial fishing industry.

surprising that every reported case has rejected this position, and this Court should too.

B. California's Regulation of Suction Dredge Mining.

In 1961, California enacted a permit program to ensure that suction dredge mining was not "deleterious to fish" (Fish & Game Code § 5653(b)). Specifically, § 5653.9 requires regulations, pursuant to which the Department generally limited suction dredging to times of the year when fish eggs would not be present in the gravel, and § 5653(d) provides that it is unlawful to possess a suction dredge within 100 yards of waters that are closed.

The current version of these regulations is set forth at 14 Cal. Code Regs. § 228 *et seq.,* classifying the sensitivity of various areas and limiting mining periods. The Department formally found that the issuance of suction dredging permits under these regulations "will not be deleterious to fish".[3] Notwithstanding this conclusion, the Legislature adopted a carefully-crafted scheme to prohibit the mining. The subtleties of the scheme are important to understanding why it cannot pass muster as a mere reasonable environmental regulation consistent with federal law.

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[3]California Department of Fish and Wildlife Report to the Legislature Regarding Instream Suction Dredge Mining Under the Fish and Game Code ("Report"), April 1, 2013, at 3.

The People correctly note that the initial version of § 5653.1 merely placed a hold on permits until the Department completed California Environmental Quality Act (CEQA) review and promulgated new regulations. Effective July 26, 2011, however, § 5653.1 was amended to require that suction dredge mining could not be permitted unless their issuance under new regulations was determined to "fully mitigate all identified significant environmental impacts". Fish & Game Code § 5653.1(b)(4).

California law has an extraordinarily low threshold for "significance," where "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). The Department stretched to find "potentially significant" impacts involving birds, noise, possible disturbance of unknown historical or cultural artifacts, and water quality. (Report at 3 n.4.[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

[4] The Department's stretches have been challenged in the coordinated cases *In re Suction Dredging*, Case No. JCCP4720 (San Bernardino County).

campers or anyone engaged in any motorized activity. Rinehart could also demonstrate that water quality impacts are evanescent, and a net benefit, because the miners enhance fish habitat and remove toxic metals that would otherwise continue to leach downstream. All of this evidence, which Rinehart has had no opportunity to present, would be relevant for assessing the reasonableness of particular permit-based restrictions on mining.

But no permit conditions are before the Court. Rather, the question is whether § 5653.1 of the Fish and Game Code, as amended, operates as a prohibition preempted by federal law. The legislative history of § 5653.1 demonstrates that its unique requirement of "full mitigation" of "all identified significant environmental impacts" *was designed as a prohibition carefully crafted to stop permit issuance*. The Legislature derailed the ordinary course of the CEQA and regulatory process that had only required findings, among other things, that permit issuance "not be deleterious to fish".

At the time the Legislature amended § 5653.1 to add the "fully mitigated" language to the initial statute (the amendment effective July 26, 2011), the Department had already released its February 2011 Draft Subsequent Environmental Impact Review (DSEIR) listing the assertedly-"significant and unavoidable impacts" of suction dredge mining. (*See* Report at 4 n.5 & 3 n.4 (final study showed "impacts *remained* significant;"

emphasis added); *see also* Rinehart Request for Judicial Notice ("R-RJN") Ex. 4 (excerpts from DSEIR)). The "fully mitigate all identified significant environmental impacts" language was a response to specific findings in the DSEIR, with the purpose and effect of ensuring that "full mitigation" was both factually and legally impossible.

The concept of "full mitigation" had heretofore been employed in the context of compensation for "actual damages to fish, plant, bird, or animal life and habitat". *E.g.,* Fish and Game Code § 10211(a)(2). "Fully mitigating" potential risks of vanishingly small probability is an entirely different matter. Anyone digging anywhere in California might strike an artifact, but it appears the intention was to insist that "fully mitigate" meant not to dig at all, existing protections for artifacts being regarded as insufficient.[5] Anyone running a motor in California may cause noise, but it appears the intent was to "fully mitigate" noise in the wilderness by not allowing any, existing noise regulations being regarded as insufficient. Anyone hiking anywhere in California might disturb a bird, causing it to fly away from human contact, but it appears the intent was to "fully mitigate" the risk by singling out miners, existing bird protection regimes being

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

regarded as insufficient. (*See also* R-RJN Ex. 4, at ES-14 ("no feasible mitigation is available").)

The statute was designed to ensure not only that the Department could not make the "fully mitigated" finding as a factual matter, but also that it was *legally impossible to do so.* The Legislature responded to the Department's repeated statements in the DSEIR (R-RJN Ex. 4, at ES-12 to -14) that it lacked jurisdictional authority to fully mitigate by *demanding that the Department exercise authority the Legislature knew the Department did not have.*

The Department reiterated this conclusion in its Report to the Legislature:

> "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 did provide recommendations for legislative changes to grant the jurisdictional authority, but the Legislature has never

passed them. Unless and until the Legislature changes the law, further permits are effectively banned *as a matter of law*.

As general matter, under CEQA, "individual projects may be approved in spite of one or more significant effects thereof". Public Resources Code § 21002. There are a myriad of regulatory systems in California that operate to issue permits day in and day out, because agencies can generally exercise administrative discretion to proceed with projects notwithstanding so-called "significant environmental impacts".

The requirement for suction dredging permits to "fully mitigate" is unique, and further demonstrates that the State does not seek neutrally-prescribed environmental standards, but to obstruct federal policy. The statute exempts all other "suction dredging conducted for regular maintenance of energy or water supply management infrastructure, flood control, or navigational purposes". Fish & Game Code § 5653.1(d).

C. Rinehart's Case.

Rinehart, 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.[6]) Up until 2009, he obtained a suction dredging permit from the Department, but the 2009 permit he

[6] All "CT" references are to the Clerk's transcript of the record.

purchased was revoked by operation of SB 670 in the middle of the mining season. (*See* Tr. 47.[7]) 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.

In an act the Superior Court Judge called "civil disobedience" (Tr. 38 & 52), Rinehart proceeded to mine without a permit, and was charged with two misdemeanor counts: suction dredge mining without a permit (Fish and Game Code § 5653(a)) and unlawful possession of a suction dredge near a waterway (*id.* § 5653(d)).

On October 30, 2012, Rinehart filed a demurrer, arguing that given facts of which the Court could take judicial notice, including the fact that he was operating on his own federal mining claim on federal land and that the State refused to issue mining permits, the prosecution could not be maintained under the Supremacy Clause. (CT5-34.) The People responded that Rinehart's constitutional challenge could not be determined by demurrer (CT35-36); that factual issues barred resolution of the question of federal preemption (CT36-39); and that there was no federal preemption (CT39-47).

[7] All "Tr." references are to the reporter's transcript of the bench trial, held May 15, 2013.

On December 18, 2012, the parties argued the demurrer, which was overruled by the Court. (CT63.) Thereafter the parties entered into a Joint Stipulation of Facts and Procedure, approved by the Court, which established a novel procedure to resolve the defense of federal preemption utilizing an offer of proof. (CT68-70.) The parties stipulated as follows:

> "On or about June 16, 2012 Defendant Brandon L. Rinehart did use vacuum and suction dredge equipment in the County of Plumas in a river or stream in the Plumas National Forest in an area closed to suction dredge mining by the State of California, and did not then possess a valid permit issued by the California Department of Fish and Wildlife, then known as the Department of Fish and Game, to use his vacuum and suction dredge equipment."
>
> "On or about June 16, 2012 Defendant Brandon L. Rinehart did possess vacuum and suction dredge equipment in the County of Plumas in the Plumas National Forest, and within 100 yards of an area closed to suction dredge mining by the State of California."
>
> "The conduct identified in Paragraphs 1 and 2 occurred within the boundaries of the "Nugget Alley" placer mining claim owned by Defendant, and registered with the U.S. Bureau of Land Management with Serial Number CAMC0297113."

(CT68-69: Joint Stipulation of Facts and Procedure ¶¶ 1-3.)

Thereafter, a bench trial was held. The foregoing stipulation was introduced into evidence as the prosecution's case-in-chief. (Tr. 6.) The parties then argued at length the question of federal preemption, for the People had reversed their 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 paragraphs 1-5 of the offer of testimony by Appellant would be admitted (*see* Tr. 43), but ¶¶ 6-9, and all testimony from the two mining experts, would not be admitted as "irrelevant based on my preemption decision" (Tr. 43). The parties then stipulated to the admission of ¶¶ 1-5 (Tr. 45), plus the facts that Rinehart's permit was nullified by the Legislature's initial statute in 2009, and that he would have continued to apply for such permits had they been available (Tr. 47.) The parties also stipulated to the admission of certain documents as to which requests for judicial notice had been made, which were then denominated as Defendant's Exhibits A-F. (Tr. 47-50.)

The agreed upon facts thus expanded to include:

> "1. Defendant would testify that he was working in the water within the boundaries of the "Nugget Alley" mining claim, one of two contiguous mining claims owned by he and his father and four other locators. He would testify that he and his father obtained the claims by making a discovery of a valuable locatable mineral, posting a Notice of Location on the claim as required by law, filing the Location Notice with Plumas County and then transmitting a copy of the file-stamped Location Notice to the U.S. Bureau of Land Management. He would offer as evidence a true copy of the Location Notice (previously filed as Exhibit 1 to the Declaration of Brandon Rinehart, filed on October 30, 2012). He would testify that the Location Notice identifies, and establishes, upon acceptance by BLM, the boundaries of the

claim, which are set forth in attached maps. He would offer pictures of the claim, and areas where gold is to be found (copies of which are attached hereto as Exhibit A), together with a picture of substantial quantities of gold recovered from the claim (Exhibit B).

"2. He would testify that BLM accepted the Location Notice and registered the Nugget Alley claim with Serial Number CAMC297113, and offer a true copy of a printout from the BLM LR2000 system (previously filed as Brandon Decl. Ex. 2), showing that this claim (and the adjacent claims) are in good standing with the United States, all required fees having been paid to all governmental entities. He would testify that the Nugget Alley Claim, though located on land to which the federal government has legal title (within the Plumas National Forest), is private property on which he and the other owners pay real estate taxes to Plumas County, and offer a true copy of the most recent tax bill from Plumas County (previously filed as Brandon Decl. Ex. 3).

"3. He would offer a map of the area (previously filed as Brandon Decl. Ex. 4) and testify that at the time he was cited by the game warden, he was at the location marked on Exhibit 4 as "approx. location of our placer workings when cited," within the boundaries the claim.

"4. He would testify that placer claims, by their nature, contain gold deposited by water bodies. He would testify that much of California has already been subject to significant mining activity that has extracted the gold near to, but outside of, flowing waters, and that the Nugget Alley claim has been hydraulically mined in the past to remove such gold.

"5. He would testify that he excavated test pits outside the water-covered areas of the claim to survey for the presence of recoverable gold and found no economically-significant quantity of gold outside the water-covered areas. He would testify that the gold remaining on the claim, and additional gold brought from upstream sources, has been concentrated by flowing waters and may be found beneath the waters of the claim.

In general, the trial court ruled "irrelevant" those portions of Appellant's offer of proof which related to the degree of interference that the State's refusal to issue permits posed to mining on his claim, and to mining of placer claims in the State generally.

Once the 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.)

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.)

D. The Court of Appeals Opinion.

On August 15, 2013, the Appellate Division of the Superior Court of Plumas County certified the case for transfer to the Court of Appeals pursuant to Rule 8.1005, and on October 4, 2013, the Court of Appeals took jurisdiction. The Court of Appeals carefully analyzed the federal

preemption issue, beginning with the observation that Congress possessed plenary power over federal lands pursuant to the Property Clause of the U.S. Constitution. *People v. Rinehart*, 230 Cal. App.4th 419, 430 (2014). The Court of Appeals recognized that the State of California might still enforce its laws on federal land so long as those laws did not conflict with federal law, and that *Granite Rock* provided guidance as to whether and to what extent state regulation of mining on federal mining claims had been preempted by federal law. *Id.* at 433-34.

The Court of Appeals then made a straightforward application of the *Granite Rock* test: "whether §§ 5653 and 5653.1, as presently applied, stand as obstacles to the accomplishment of the full purposes and objectives of Congress in passing the federal mining laws". *Id.* at 433. Building upon the almost precisely analogous finding that a general refusal to issue permits did so in the leading case of *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), the Court of Appeals found the State's refusal to issue permits here to create a "colorable" defense to Rinehart's criminal charges. *Rinehart*, 230 Cal. App.4th at 436.

Unfortunately, the Court of Appeals was under the impression that "because of a lack of funding, the Department is unable for financial reasons to fulfill the conditions set forth in section 5653.1, which results in a continuing, if not permanent, moratorium on suction dredge mining

permits". *Id.* at 433; *but cf.* People's Br. at 8 n.4 (People now acknowledge no funding issue). Accordingly, the Court of Appeals remanded for the trial court to address, among other things, the question "does § 5653.1, as currently applied, operate as a practical matter to prohibit the issuance of permits required by § 5653". *Id.* at 436.

And because the People had strenuously argued that Rinehart might still engage in "nonmotorized recreational mining activities, including panning for gold" (§ 5653.1(e)), the Court of Appeals also asked the trial to determine on remand whether the permit denial "rendered commercially impracticable the exercise of defendant's mining rights granted to him by the federal government?" *Id.*

Rinehart contends that it is obvious as a matter of law that refusal to issue permits stands as an obstacle to accomplishment of the full purposes and objectives of Congress, but remains prepared to demonstrate on remand that recreational hand panning does not vindicate the Congressional purpose to develop mineral resources on federal lands.

Argument

I. OVERVIEW OF THE LAW OF FEDERAL PREEMPTION: WHY THE PEOPLE'S IMAGINATIVE REINTERPRETATION OF THAT LAW SHOULD BE REJECTED.

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Congress may preempt state law under the Supremacy Clause of the United States "by enacting an express preemption provision, or courts may infer preemption under one or more of three implied preemption doctrines: conflict, obstacle, or field preemption". *Brown v. Mortensen*, 51 Cal. 4th 1052, 1059 (2011). This case concerns whether the State's refusal to issue permits "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress". *Granite Rock*, 480 U.S. at 581 (quoting *Hines v. Davidowitz*, 312 U.S. 132, 142-43 (1941)). An "obstacle" need not be an *insurmountable* obstacle, and the "accomplishment of the *full* purposes and objectives" of federal law is not satisfied by *partial* accomplishment thereof.

While the People claim preemption may only be found if "State regulations make it impossible to comply with federal law" (People's Br. 11), it is well-established that impossibility is not required for "obstacle" preemption. As the Supreme Court has explained, "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); *see also id.* at 873 ("Congress would not want either kind of conflict").

Lacking any reported cases to support their position, the People attempt a restatement of the law of federal preemption by stitching together snippets from a variety of preemption cases. But in the federal preemption context, "each case turns on the peculiarities and special features of the federal regulatory scheme in question," *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Because *Granite Rock, Lawrence* and several other cases construe precisely the same federal regulatory scheme at issue here, they provide the most guidance for resolving this action. And they underscore that critical to analysis of preemption here is that the federal statutes involve Congressional action under Article IV, § 3 of the U.S. Constitution: the Property Clause.

As the Supreme Court has explained, under the Property Clause, Congress enjoys "complete power" over federal public lands. *Kleppe v. New Mexico*, 426 U.S. 529, 540-41 (1976) (overturning State attempts to regulate wildlife on federal land). State powers over federal lands cannot "extend to any matter that is not consistent with full power in the United States to protect its lands, control their use and to prescribe in what manner others may acquire right in them". *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917). This case is thus sharply distinguished

from the many cases cited by the People which concern Congressional trespasses on "a field which the States have traditionally occupied". (People's Br. 20.)

In particular, there is no presumption against preemption here. As this Court explained in *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal.4th 929, 938 (2007), "[t]here is a presumption against federal preemption *in those areas traditionally regulated by the states* . . ." (*Id.* at 938; emphasis added (*citing Rice*, 331 U.S. at 230). Suggestions of some general presumption against preemption that applies in "all cases" are unsupported *dicta* amply refuted by a legion of presumption cases involving plenary powers of Congress *that make no reference to the alleged presumption whatsoever.*

Most obviously, *Granite Rock* itself makes no reference to any such presumption or deference to historic police powers in this context. Other analogous cases include: *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) (Property Clause); *Sperry v. Florida*, 373 U.S. 379 (patents). This is no accident, for the Supreme Court

has explained that the presumption 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 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).

It is also important to understand that 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 People rely. Put another way, the question of development of mineral resources on federal land is a field in which the federal interest is sufficiently dominant that courts will easily infer that states may not frustrate that interest. *Cf. Rice*, 331 U.S. at 330.

The People anchor their restatement of the law of preemption upon *Wyeth v. Levine*, 555 U.S. 555 (2009), involving "common law negligence

and strict-liability theories;" plaintiff alleged a drug company failed to warn of a drug's danger, causing her to lose her arm. *Id.* at 559. This involved "a field which the States have traditionally occupied". *Id.* at 565 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Even more importantly, the Court carefully reviewed the relevant constellation of statutes and cited the express provisions where Congress addressed the preemption question and "took care to preserve state law" in the context before the Court. *Id.* at 567; *see also id.* at 574-75. The People's other cases are likewise distinguishable.

II. CALIFORNIA'S REFUSAL TO ISSUE MANDATORY SUCTION DREDGING PERMITS STANDS AS AN OBSTACLE TO THE ACCOMPLISHMENT AND EXECUTION OF THE FULL PURPOSES AND OBJECTIVES OF CONGRESS IN THE FEDERAL MINING LAWS.

A. The Court of Appeals Correctly Followed Overwhelming and Persuasive Precedent.

Every reported case addressing state-law-based refusals to issue permits to mine on federal lands has found preemption. South Dakota Mining Ass'n v. Lawrence County, 155 F.3d 1005 (8th Cir. 1998); *Brubaker v. Board of County Commissioners*, 652 F.2d 1050 (Colo. 1982); *Elliott v. Oregon Int'l Mining Co.*, 654 P.2d 663 (Or. Ct. App. 1982); *see also Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980); *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984). The People ask this Court to fragmentize the mining statutes and

search for some express Congressional intent regarding state environmental regulation, but all these cases have found the Congressional purpose to promote mineral development by opening federal lands and granting mining claims on them, exercised in the context of the plenary Property Clause power, sufficient to preempt state laws obstructing exploration or development of those claims.

In the leading case, 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". *Lawrence*, 155 F.3d 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). As the Eight Circuit noted, "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 . . .". *Lawrence*, 155 F.3d at 1011.

The Court of Appeals properly found this case "particularly useful" and "nearly directly on point," and reviewed its holding in detail. *Rinehart*, 230 Cal. App.4th at 434. Indeed, the only distinction identified by the Court of Appeals was that Fish and Game Code "§§ 5653 and 5653.1, read together or alone, do not *expressly* prohibit the issuance of suction dredge mining permits." *Id.* at 435 (emphasis in original). While the California Legislature was more subtle in its design than the people of Lawrence County, the People now acknowledge that no permits may be issued pending further legislation, making this a distinction without a difference.

B. Restrictions Frustrating the Purpose of Federal Law Are Preempted Whether Characterized as Environmental or Land Use Regulations: It is the Effect of the Challenged Restriction that Matters.

The People argue, however, that *South Dakota Mining* should be distinguished on the ground that the prohibition was found in a local zoning ordinance as opposed to a statewide "environmental regulation". (People's Br. 34.) But as the Court of Appeals, relying upon *Granite Rock*, explained, even environmental restrictions could "rise to the level of impermissible state land use regulations":

> "'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.'"

Rinehart, 230 Cal. App.4th at 432 (quoting *Granite Rock*, 480 U.S. at 587).

In declaring that only "nonmotorized recreational mining activities, including panning for gold" may proceed in the waterways of the State (Fish & Game Code § 5653.1(e)), the Legislature was choosing particular uses for federal lands throughout California. The People argue that only "use of any vacuum or suction dredge equipment" is prohibited (People's Br. 32), but the term refers to any "suction system to vacuum material from a river, stream or lake for the extraction of minerals" (14 Cal. Code Regs. § 228(a)(1)), and as a practical matter bars any commercial placer mining where deposits are underwater.[8] In substance, the People seek to repurpose Rinehart's mining claim into a wilderness preserve, where he might do no more than dip a pan into the Feather River. It is well-settled that such refusals to issue permits are preempted by federal law. *See, e.g., Skaw*, 740 F.2d at 940 (State of Idaho cannot ban suction dredging in the St. Joe River).

[8] Given the State's history of mining, this is where most of the valuable deposits are located. (*See* CT74, 77 (expert testimony offered)).

The People also claim that the Court of Appeals erred by even citing this portion of *Granite Rock* (*see* People's Br. 30) because the discussion relates only to preemption under federal land use laws. But federal mining laws are laws concerning the use of land, and the direct restriction of mineral uses frustrates both the purpose of specific federal mining statutes and their implementation in general federal land use statutes. This is not a case where the land "is used" with "damage to the environment . . . kept within prescribed limits". *Rinehart*, 230 Cal. App.4th at 432 (quoting *Granite Rock*, 480 U.S. at 587). It is a where the land use is outlawed to preventing any remote risk of any "potentially significant" damage to the environment.

Rinehart has consistently cited *Granite Rock* and the authorities cited therein, and the Court of Appeals properly invoked them as well, because the degree of interference with mining is obviously relevant to preemption. It has long been the rule that it is the *effect* of state law that matters in assessing preemption, not any legislative statement of *purpose*. *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971) (focus on purpose is "aberrational doctrine"). Here, the effect of § 5653.1 is obviously "prohibitory, not regulatory, in its fundamental character," *Lawrence*, 155 F.3d at 1011, whether it is characterized as regulating land use or environmental effects.

Finally, the *Granite Rock* Court invoked the "land use" discussion immediately after the State's representation that it was merely "seeking to regulate a given mining use so that it is carried out in a more environmentally sensitive and resource protective fashion" (*Granite Rock*, 480 U.S. at 587 (quoting State's position)), but the State now has different goals. It now refuses to exercise the authority it sought, instead prohibiting the mining. This change in goals makes the discussion relevant here. The State sought and obtained authority from the U.S. Supreme Court to institute a duplicative system of permitting on the representation that the State did "not seek to prohibit mining." *Granite Rock*, 487 U.S. at 586. Striking down § 5653.1 holds the State to this representation.

C. The 1872 Mining Law Contains Specific Purposes Frustrated by § 5653.1.

The People argue that the Court of Appeals and *Lawrence* do not properly analyze 30 U.S.C. § 22, and that a general Congressional purpose of promoting mining is not sufficient to find federal preemption. While the Court of Appeals recited one of many authoritative judicial declarations of the Congressional purpose "to award and encourage the discovery of minerals that are valuable in an economic sense," *Rinehart*, 230 Cal. 4th at 431 (quoting *United States v. Coleman*, 390 U.S. 599 (1968)), preemption is grounded on even more specific statutory language and purposes.

The 1872 Mining Law, 30 U.S.C. § 22, provided that

> ". . . all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States . . ."

Free and open exploration for underwater gold placer deposits—where most of the commercially-significant deposits remain in California—requires use of a suction dredge as the gold "has the tendency to sink down through the bed materials until it reaches some impervious layer (*See* CT77 (offer of proof).) Rinehart is not arguing, as the People suggest, that "free and open" means "'free' from state regulation" (People's Br. 12), but a rule that categorically closes federal lands to the tools needed to explore for valuable deposits is prohibitory and in obvious conflict with 30 U.S.C. § 22. As the Supreme Court of Colorado explained in *Brubaker*, when a county sought to prohibit core drilling to determine the validity of a claim,

> "the attempt by the Board to prohibit the appellants' drilling operations because they are inconsistent with the long-range plan of the County and with existing, surrounding uses reflects an attempt by the County to substitute its judgment for that of Congress concerning the appropriate use of these lands. Such a veto power does not relate to a matter of peripheral concern to federal law, but strikes at the central purpose and objectives of the applicable federal law. The core drilling program is directed to obtaining information vital to a determination of the validity of the appellants' mining claims. Recognition of a power in the Board to prohibit that activity would contravene the Congressional determination that the lands are "free and open to exploration and purchase," 30 U.S.C. § 22, and so would

> "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" under the mining laws.

Brubaker, 652 P.2d at 1056-57.

And we are not dealing with mere exploration here. Congress had an even more specific purpose than generally governing "all valuable mineral deposits in lands belonging to the United States". Congress determined to grant specific property rights to specific parcels for mineral development. *See* 30 U.S.C. §§ 26, 35. As the U.S. Supreme Court explained in *Wilbur v. United States*, 280 U.S. 306, 316-17 (1930):

> "The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is "real property" subject to the lien of a judgment recovered against the owner in a state or territorial court.

Rinehart's mining claim is in good standing with the federal government,[9] and he pays Plumas County property taxes on it. (CT71.)

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[9]The People reference "validity" of a federal mining claim, noting that Rinehart was required to discover a "valuable mineral deposit" (People's Br. 3), which he did. (CT71). The People lack standing to challenge "validity", which is best understood as a technical defense that can only be raised by the United States as a defense to patenting land (*see* R-RJN Ex. 3, at 3 n.1), and federal preemption in any event extends to state-law based restrictions on testing a claim for validity. *Brubaker*, 652 P.2d at 1052.

Congress has required that this property right of Rinehart and others be exercised for mineral development, initially concerning itself with the "amount of work necessary to hold possession of a mining claim". 30 U.S.C. § 28. The People claim that § 28 only requires work "relating to the claim," rather than actual extraction of materials. (People's Br. 28.) It is certainly not impossible to comply with § 28 without suction dredging, but § 28 confirms that the overriding purpose of Congress, expressed throughout the mining laws, is to get the minerals out of the ground. A state law that turns mining claims into areas where only "work relating to the claim" can be performed obviously frustrates the primary objective of Congress.

Put another way, even if mining is not *required* under the statute, the case remains akin to *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25 (1996), where a federal statute authorized, but did not require, banks to sell insurance. A state statute forbidding such sales was preempted under "obstacle" preemption because there was no indication "the federal purpose is to grant the bank only a very *limited* permission, that is, permission to sell insurance *to the extent that state law also grants permission to do so*." *Id.* at 31. To the contrary, "normally Congress would not want the States to forbid, or to impair significantly, the exercise of a power Congress explicitly granted". *Id.* at 33.

As the Oregon Court of Appeals remarked in striking down restrictions akin to those in the *Lawrence* case, "Grant County cannot prohibit conduct which Congress has specifically authorized. That is the meaning of the Supremacy Clause." *Elliott*, 654 P.2d at 668. Congress did provide statutory mechanisms for closing areas to mining, involving *consultation* with states;[10] inferring state power to close the areas directly conflicts with these statutes as well.

For all these reasons, it is at best misleading for the People to suggest Congress had only a vague and general purpose to encourage mining. (People's Br. 11.) This case does not involve abstract declarations of national policy; it involves a specific grant of property rights by the United States, in specific land, to authorize Rinehart to engage in specific conduct: the extraction of the minerals. *See also Skaw,* 740 F.2d at 940 (because "plaintiffs had the property right to process and mine to exhaustion the minerals located on their unpatented claims," Idaho suction dredge mining restriction was preempted by federal law); *cf. Sperry*, 373 U.S. at 385 ("no State law can hinder or obstruct the free use of a license granted under an act of Congress").

The cases the People cite involve claims of federal preemptions arising from vague and general statutory purpose clauses such as:

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[10] (*See, e.g.*, 30 U.S.C. § 1281; 43 U.S.C. §§ 1712(e)(3) & 1714)

- "to reduce the demand for petroleum products and natural gas through programs designed to provide greater availability and use of this Nation's abundant coal resources". *Commonwealth Edison Co. v. Mont.*, 453 U.S. 609, 633 (1981) (quoting 42 U.S.C. § 8301(b)(3)); or

- "encourage widespread participation in the development and utilization of atomic energy for peaceful purposes" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 221 (1983) (quoting 42 U.S.C. 2013(d));

The numerous specific statutes discussed herein, their precise purposes obstructed by Fish and Game Code § 5653.1, amply distinguish this case.

D. Section 5653.1 Also Frustrates the Objectives of the 1955 Multiple Use Act.

With evolving notions of resource protection, Congress expressly limited the rights of mining claim holders in the Multiple Use Act of 1955, but provided specific and unique protections against regulatory encroachment:

> "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* . . . Provided further, *That nothing in this subchapter* and sections 601 and

> 603 of this title *shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States* which lie wholly or in part westward of the ninety-eighth meridian *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) (emphasis added)."

Two important points emerge from this statute. First, regulation to protect other interests, including environmental interests, may not materially interfere with mineral development. Second, Congress expressly carved out a limited role for state law, and manifestly had no intent that the state would be otherwise interfering with the mining.

1. The right to manage for other "surface resources" is limited.

Under this statute and other authority, the federal courts have repeatedly held that "use of the surface" includes regulation of the mining to protect surface resources, including fish and wildlife, and that although such regulation is permissible, it 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)). Another leading case is *United States v. Shumway*, 199

F.3d 1093 (9th Cir. 1999), which confirmed that the Forest Service may regulate, "but only to the extent that the regulations are 'reasonable' and do not impermissibly encroach on legitimate uses incident to mining and mill site claims". *Id.* at 1107.

Whether or not regulatory restrictions "materially interfere" with mining is to be evaluated on the commonsense basis of whether they will "substantially hinder, impede, or clash with appellant's mining operations". *See generally In re Shoemaker*, 110 I.B.L.A. 39, 48-54 (July 13, 1989) (reviewing legislative history of the Multiple Use Act; agency regulation cannot impair the miner's "first and full right to use the surface and surface resources") (copy submitted herewith as R-RJN Ex. 1.)

In sum, whether characterized as a requirement to avoid "material interference," of "reasonability," or to avoid regulation "prohibitory in character," federal law limits environmental regulation on mining to prevent frustration of the "all-pervading purpose of the mining laws . . . to further the speedy and orderly development of the mineral resources of our country," *United States v. Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968). A standard of "reasonability" allows ample scope for appropriate environmentally-based restrictions on mining activity where particular activities are "unreasonably destructive of surface resources and damaging to the environment". *United States v. Richardson*, 599 F.3d 290, 295 (9th

Cir. 1979). In *Richardson*, miners were not permitted to utilize bulldozers and dynamite to dig enormous holes for the asserted purpose of exploring the scope of the "low grade copper deposit" involved, as core drilling with significantly less environmental damage was "the only" means of assessing the scope of the deposit. *Id.* at 290-91.

2. Congress provided an express and limited role for state law.

While 30 U.S.C. § 612(b) does not expressly state that state law management of the "surface uses" is preempted, Congress could scarcely be expected to form an intent in 1955 with respect to generally-nonexistent state schemes of direct federal regulation of mining on federal mining claims on federal land. Congress declared in 1976 that federal agencies, not states, were to manage federal lands for mineral production (*e.g.*, 43 U.S.C. § 1701(a)(12)), and it was only in 1987 that *Granite Rock* rejected field preemption by a 4-3 vote, ratifying state permitting schemes.

In § 612(b), Congress directly considered management of other surface uses, and carved out a role only for state law "relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim". Section 612(b) and the other provisions of the mining law addressing a state's role (*e.g.*, 30 U.S.C. § 26) represent Congressional intent with respect to the role of state law on

federal mining claims, an intent that plainly conflicts with general prohibitions such as Fish and Game Code § 5653.

The People note that prior preemption holdings have not relied, and indeed barely mentioned, 30 U.S.C. § 612(b). (People's Br. 20.) *Granite Rock* concerned field preemption, and the remaining cases involved less subtle state schemes that flatly forbid permit issuance on their face. To the extent the People distinguish those cases by arguing a moratorium here—an argument that fails given § 5653.1's insistence upon compliance with factually and legally impossible conditions—the federal policy set forth in 30 U.S.C. § 612(b) confirms material interference short of outright prohibition stands as an obstacle to the full accomplishment of federal purposes too. This Court could simply follow all the other reported cases to find preemption here based on the 1872 Mining Act alone, but § 612(b) makes Congress' intent even clearer.

E. The People's Imaginative Re-interpretation of the 1872 Mining Act Must Be Rejected.

The People reach back to what they call "decisions close in time to the enactment of the Mining Act of 1872" to argue that all the foregoing courts, and scores of other decisions cited therein, have the statutory purpose all wrong, and that the sole purpose of federal mining law was to "give permission for citizens to enter those lands and take valuable minerals without prosecution for trespass or theft". (People's Br. 13.) This is

sophistry, as demonstrated by the very title of the 1872 Mining Act: "to promote the development of the mining resources of the United States" (14 Stat. 91; *see also* People's Request for Judicial Notice ("P-RJN"), Ex. I, at 532 (Congressional Globe shows bill reported "to promote the mineral development of the mining resources of the United States"). And Congress has continued to expand and refine that policy ever since 1872 in numerous statutes. *See infra* Point II(H).

The People also argue that Congress' reference to mining proceeding "under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts" (30 U.S.C. § 22) "indicates an understanding that state authority will be preserved". (People's Br. 14.) But there is now express reference to State law, the People cropped the quote. It continues: "so far as the same are applicable and not inconsistent with the laws of the United States". 30 U.S.C. § 22.

Another provision of the 1872 Act related to mineral development, § 3, now codified at 30 U.S.C. § 26, sharpens Congressional intent. This section gave the locators of mining claims "the exclusive right of possession and enjoyment of all the surface" provided that they "comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States *governing their possessory title*" (emphasis added). In short, Congress did not intend to

empower states to regulate mining itself on federal claims, but only to supplement the title-related procedures for disposing of the public lands, and only to the extent not in conflict with federal law. *See also* 30 U.S.C. § 38 (giving effect to state limitations periods); *see generally* 1 C. Lindley, *American Law Relating to Mines and Mineral Lands* § 76, at 117 (3d ed. 1914) (federal laws "circumscribe the field within which states may legitimately act").

The People claim in a footnote that these provisions "codify" their newly-minted "impossibility" theory (People's Br. 15 n.7), but this interpretation has been authoritatively rejected by the Supreme Court:

> "State and territorial legislation, therefore, must be entirely consistent with the Federal laws, otherwise it is of no effect. The 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."

Butte City Water Co. v. Baker, 196 U.S. 119, 125 (1905); *see generally* 1 C. Lindley, § 249, at 542-46. The State's flat refusal to issue suction dredging permits is manifestly "repugnant to the liberal spirit" of federal laws promoting mining. Congress' command that state law not conflict with federal law is, in substance, a command that obstacles to the accomplishment of the full purposes and objectives of federal mining law may not stand.

The People highlight statements by a virulent opponent of the § 22 language (as it first appeared in an amendment to House Bill 365 (*see* P-RJN, Ex. F, § 1), and then in § 1 of the 1866 Act (14 Stat. 251; P-RJN Ex. A, § 1), who would have preferred to sell off the public lands at auction (House Bill 322, P-RJN Ex. C). He, like the People here, gave no weight to the cropped portion of the language subordinating all other law "in conflict with the laws of the United States". *Butte City* and other cases prove his fears of any "abandoning by the nation of its authority" (People's Br. 16) to be groundless. Again, the dispute concerned the role of local or state law in establishing possessory rights, not in general regulation of mining.

F. Early Law Concerning Debris Disposal Does Not Support a General Refusal to Issue Permits.

The People attempt to portray the regulation of mineral development on federal mining claims as "a field which the States have traditionally occupied," by identifying early California efforts to control mining impacts. But none of this early authority addressed any attempt by the state to issue permits for mining on federal claims. Rather, the questions presented concerned narrower questions of the lawfulness of disposing mining debris on the land of others.

Specifically, the People cite the exercise of traditional common law remedies addressing damage to downstream interests from miners *on privately held land.* The leading case of *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.

Woodruff reports claims by the miners "that both congress and the legislature of California have authorized the use of the navigable waters . . . for the flow and deposit of mining *debris,*" but "this authority is sought to be inferred from the legislation . . . recognizing mining as a proper and lawful employment and encouraging this industry". (*Id.* at 770.) In fact, the case did not involve federal mining claims or federal land itself at all, and the *Woodruff* Court sensibly observed that "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 federal statutory authorization for such purchasers to use "adjacent lands for the purpose of depositing therein or thereon their mining debris". *Id.*[11] Hence the miners were enjoined from

[11]This Court's decisions in *County of Yuba v. Kate Hayes Mining Co.*, 141 Cal. 360 (1903) and *People v. Gold Run Ditch and Mining Co.,* 66 Cal. 138 (1884), are similarly inapposite. Both were actions for injunction for nuisance like *Woodruff*, and as far as the cases disclose, no federal mining claims were involved and no question of preemption considered. *See, e.g., Gold Run*, 66 Cal. at 151 (asserted right to dispose of debris "from custom" and "by prescription and the statute of limitations").

"discharging their mining *debris* into the affluents of the Yuba River" (*id.* at 753), but no decree was rendered halting the mining itself (*see id.* at 813).

So-called Congressional "acquiescence" in "*Woodruff's* construction of the Mining Acts" (People's Br. 18) reflected only a continued willingness to let traditional state tort law remedies address the question of downstream damage. This intent had been in the mining law since 1866. *See* 30 U.S.C. § 51. By contrast, the State now seeks directly to regulate mining on federal land notwithstanding specific federal statutes authorizing and directing mining use for specific federal property, where preemption is at a zenith because Congress is exercising Property Clause power.

Congress did eventually create the Debris Commission to attempt to ameliorate the effects of mining by direct federal regulation of the mining itself. The People's suggestion that some adverse inference should be drawn from Congress' failure to simply "declare hydraulic mining legal" is absurd, for that would have done nothing to address the problem of limiting downstream damage. As this Court observed in *County of Sutter v. Nicols*, 152 Cal. 688 (1908), "no power [wa]s given to the commission to redress private injuries" (*id.* at 696), such that state tort law might continue to operate in the limited role of preventing downstream injuries notwithstanding the federal connection. Again, the State was not regulating

mining operations on federal land, but enjoining the dumping of debris. *See id.* at 691.

Continuing Congressional intent to allow traditional state law tort remedies for damage to downstream property owners does not show any intent that states might generally interfere with free and open mineral development on federal lands themselves through devices like § 5653.1. A requirement that miners compensate for common law damages need not frustrate mineral development at all, but refusing to issue permits plainly does. Moreover, the 1955 passage of 30 U.S.C. § 612(b), limiting material interference with mineral development and clarifying the role of state law, provides far more precise intent as to the limited role for operation of state law on the mining claims themselves.

In sum, the very limited history involving tort law restrictions on hydraulic mining amply distinguishes this case from cases like *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943 (2004), wherein this Court carefully analyzed the extensive history of wine labelling regulation. Striking down § 5653.1 and Rinehart's conviction allows ample room for California to craft permit provisions protective of state interests while not overriding goals of federal law, just as allowing California's wine labels did not frustrate the federal goal of consumer protection.

While the People suggest invoking preemption would show lack of "respect for the states as 'independent sovereigns in our federal system'" (People's Br. at 21 (quoting *Wyeth*, 555 U.S. at 565 n.3), failure to invoke it would show the lack of respect for the sovereignty of the United States under the Property Clause of the Constitution.

G. Federal Agency Determinations Are Not Useful Here.

The *Wyeth* case provides the appropriate and well-considered approach to reviewing agency determinations on federal preemption, in contrast to the People's oversimplifications:

> In prior cases, we have given "some weight" to an agency's views about the impact of tort law on federal objectives when "the subject matter is technica[l] and the relevant history and background are complex and extensive." *Geier*, 529 U.S., at 883. *Even in such cases, however, we have not deferred to an agency's conclusion that state law is pre-empted.* Rather, we have attended to an agency's explanation of how state law affects the regulatory scheme. While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S, at 67; *see Geier*, 529 U.S., at 883; *Lohr*, 518 U.S., at 495-496. The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 234-235 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Wyeth, 555 U.S. at 576-77 (parallel citations omitted). In short, because agencies have no particular expertise in construing the Supremacy Clause, the only thing that should inform this Court is the persuasiveness of a

particular agency determination that a particular state regulatory scheme may or may not stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress".

1. The regulations cited by the People prove nothing.

The People advance no such determinations. Instead, the People cite a U.S. Bureau of Land Management ("BLM") regulation, 43 C.F.R. § 3809.3, purporting to allow state law to impose "a higher standard of protection for public lands," but like all the other regulations in Subpart 3800 cited by the People, it has no application to Rinehart's claim in the Plumas National Forest (CT72). 43 U.S.C. § 3809.2(b) ("This subpart does not apply to lands in the . . . National Forest System"). As a general matter, BLM's regulations are intended to prevent "*unnecessary* or *undue* degradation of public lands" (43 C.F.R. § 3809.1(a)(emphasis added)), consistent with the Congressional recognition that mineral development may make some degradation reasonably necessary.

BLM's rulemaking made no effort to evaluate the degree to which Fish and Game Code § 5653.1 stood as an obstacle to the purposes of federal mining law, so there was no specific administrative determination to which this Court might defer. Moreover, § 3809.3 is substantively unlawful. BLM has no authority from Congress to baldly assert that some inchoate policy of "protection for public lands" always trumps the federal

mining law's express protection of mineral development, particularly on those lands on which federal mining claims have been granted.

This is not "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute[s]". *ALCOA v. BPA*, 903 F.2d 585, 598 (9th Cir. 1989), *cert. denied*, 498 U.S. 1024 (1991). Congress required federal agencies to balance the conflicting policies of environmental protection and mineral development by allowing only reasonable environmental regulation that does not materially interfere with development, and Congress cannot possibly have intended for BLM to empower the states to overturn that carefully-crafted balance.

BLM's position is also explicitly premised on the flatly-erroneous view of federal preemption law championed by the People. The Federal Register notice of adoption claims 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). Congress never empowered BLM to wipe out two of the three branches of

implied preemption law.[12]

BLM's gross errors distinguish this case from *RCJ Med. Servs., Inc. v. Bonta*, 91 Cal. App.4th 986 (2001), where neither party contended that the federal regulation was "an impermissible construction of the federal statut[e]". *Id.* at 1004. For all these reasons, the Court of Appeal properly declined to defer to BLM's regulation on preemption.

As for the agency with regulatory authority over the land on which Rinehart's mining claim is located, the People note a Forest Service Federal Register Notice that says "State regulation of suction dredge mining operations . . . is preempted when it conflicts with Federal law". (People's Br. 24.) That statement provides no guidance for the Court, and in any event does not specifically address § 5653.1.

There are Forest Service decisions of which this Court can take judicial notice that are at least relevant, though this Court need not rely upon agency interpretations. For example, R-RJN Ex. 2 is a high-level

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[12] The People state that BLM made special note of a Montana case and statute (People's Br. 24), but BLM misread that case as well. In *Seven Up Pete Venture v. Montana*, 114 P.3d 1009 (Mont. 2005), *cert. denied,* 546 U.S. 1170 (2006), the Supreme Court of Montana upheld a state law prohibiting "heap leaching or vat leaching with cyanide," but exempting then-operating mines. *Id.* at 1013. The plaintiff had leased *state lands*, but had not yet obtained a State permit, and so its claim for a "taking" was denied. *Id.* at 1016-18. The process does not relate to the extraction of ore but the processing thereof, no federal lands were involved, and no question of federal preemption arose.

administrative appeal from an adverse decision by the Tahoe National Forest Supervisor to the Deputy Regional Forester. A key issue in the appeal concerned the State's refusal to issue the appellant a suction dredging permit. The District Ranger had initially insisted that the Plan of Operations include a statement that: "A valid California Fish and Game dredge permit is required for all nozzle operators." The appellant objected that the requirement was impossible to comply with, inasmuch as the State has refused to issue any further permits. *Both the Forest Supervisor and the Regional Forester agreed that the requirement of State permit was inappropriate, and the requirement was removed from the Plan of Operations.* (*See* R-RJN Ex. 1, at 2.[13])

2. *Granite Rock* Does Not Support the People's Position.

The People note (People's Br. 27) that the *Granite Rock* court cited Forest Service regulations which state that "[a]ll operations shall be conducted, *where feasible*, to minimize adverse environmental impacts on National Forest surface resources, including the following requirements . . .". 36 C.F.R. § 228.8 (emphasis added). There follows a list including state air and water quality standards. The "where feasible"

[13]The Court of Appeals denied Rinehart's request for judicial notice of these and other federal regulatory materials because they had not been presented to the trial court (Order filed Sept. 16, 2014), but as demonstrated in the accompanying motion, the materials qualify for judicial notice pursuant to Evidence Code § 452(c).

limitation echoes the general Congressional judgment that some environmental impacts may be unavoidable to get minerals extracted.

Granite Rock was a field preemption case, and the Court's discussion of Forest Service regulations was intended to demonstrate only that the agency had no "intention to pre-empt *all* state regulation of unpatented mining claims in national forests". *Id.* at 584 (emphasis added). The Forest Service had not analyzed the effect of any particular permit limitations on Granite Rock's operations, which determinations might be relevant when and if the question of "obstacle" preemption arose with respect to particular regulatory requirements.

The *Granite Rock* Court repeatedly emphasized that Granite Rock refused *even to apply for a permit*, arguing that any set of permit conditions would conflict with federal law. *Id.* at 580. The Coastal Commission, for its part, urged the Supreme Court that there was "no reason to find that the [Coastal Commission] will apply [its] regulations so as to deprive [Granite Rock] of its rights under the Mining Act". *Id.* at 586.

The Court noted that "one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable" (*id.* at 587), suggesting that this would invoke "obstacle" preemption, and declared that "[i]n the present posture of this litigation, 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).

The Court concluded its opinion by emphasizing the narrow nature of its holding:

> ". . . we hold only that the barren record of this facial challenge has not demonstrated any conflict. We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law. Neither do we take the course of condemning the permit requirement on the basis of as yet unidentifiable conflicts with the federal scheme."

Id. at 594. Here, of course, the State flatly refuses to issue any permits, making mining not merely commercially impracticable but impossible, which obviously frustrates the purposes of mineral development.

H. Mischaracterizing § 5653.1 as a "Temporary Moratorium" Does Not Prevent a Finding of Preemption.

Ninth Circuit precedent confirms that even a temporary moratorium frustrating the accomplishment of Congressional objectives under the federal mining laws falls to federal preemption. *Ventura County*, 601 F.2d at 1084 ("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").

But this is no ordinary temporary moratorium pending an agency's completion of some administrative task. As set forth *supra* pp. 7-9, this is a statute carefully crafted to respond to the DSEIR and make it factually and

legally impossible for any permit to ever issue unless and until the Legislature changes the law of California. For this reason, the People's repeated insinuations that the statute's effects are only "temporary" (People's Br. 1, 5, 35) are at best misleading. Nor is there record support for the People's claim that "the Department and the Legislature are still actively working to create a suitable statutory framework within which the Department can fulfill its statutory charge" (People's Br. 32) or that there is "a legislative expectation that permitting for suction dredge mining will resume in due course" (*id.* at 33). These are issues of political fact, consideration of which is plainly inappropriate in evaluating whether state law stands as an obstacle to the development of federal mining claims.[14]

The People's attempt to equate the extraordinary prohibition since 2009 to "ordinary permit delays" (People's Br. 43 (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337 n.31 (2002)) should also be rejected. The *Tahoe* court addressed takings questions, not preemption questions, and carefully distinguished the "extraordinary circumstance" present here "in which the government deprives a property owner of all economic use." *Id.*

[14] If the trial court were charged to investigate "legislative expectations," Rinehart would prove at trial that the Legislature is focused on additional restrictions, not permitting. (*See* R-RJN Ex. 5.)

The federal policies involved here distinguish this from a takings case. 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) (emphasis added); *see also* 43 U.S.C. § 1701(a)(12) (public lands to be managed to implement this statute). Suspending operation of a longstanding permit scheme for years unless and until a future Legislature writes new law fatally undermines the development of any "economically sound and stable" industry. Before the trial court, Rinehart offered expert testimony confirming this, explaining that "the refusal to issue permits for suction dredging makes . . . mining capital worth substantially less" and "materially interferes with the development of California mineral resources on federal lands". (CT75, 78.)

II. THIS COURT SHOULD REVERSE RINEHART'S CONVICTION, OR, IN THE ALTERNATIVE, AFFIRM THE COURT OF APPEALS.

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?" *Rinehart*, 230 Cal. App.4th at 436 (emphasis added). These two questions were designed to accommodate two prongs of the People's attack: (1) that the statute should somehow be viewed as a "temporary" funding problem 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.

A. This Court Can and Should Determine that § 5653.1 Frustrates Federal Objectives as a Matter of Law.

Again the Legislative Report's April 1, 2013 admission that further legislation is required before permits can issue is dispositive. (Report at 11.) It is obvious that where a State outlaws the use of particular mining equipment in widespread use, with no ability whatsoever to permit its use in any circumstances, the state law is prohibitory in character, and stands as an obstacle to the accomplishment of the full purposes of federal mining law.

The People omit to disclose (*cf.* People's Br. 33 n.16) that in the *Suction Dredge Mining Cases*, Coordinated Case No. JCCP4720 (San Bernardino County), the Coordination Judge recently issued a comprehensive opinion on cross-motions for summary judgment finding that "the State's extraordinary scheme of requiring permits and then refusing to issue them . . . stands 'as an obstacle to the accomplishment of the full purposes and objectives of Congress' under *Granite Rock*." (R-RJN Ex. 6, at 19, 21.) The Court further noted that "permits will not and cannot,

be issued in the near or far future for years if ever. This is fundamentally unfair and clearly operates as a de facto ban." (*Id.* at 16.) The Coordination Judge distinguished the limited record in the Court of Appeals decision and found the record before him sufficient to reach the appropriate result here: finding federal preemption as a matter of law. (*Id.* at 17.)

While this Court does not have the full record before the Coordination Judge, there is no colorable claim of any reasonable alternative to using a vacuum or suction dredge system to mine underwater placer deposits. Rinehart offered to testify,[15] based on detailed supporting facts, including attempts to mine by other means, that "the only economically-feasible method" for mining the claim was utilizing a suction dredge. (CT73.) This testimony would have been corroborated by two supporting experts, who would also have explained how the State's ban on permits generally interferes with federal policy to develop minerals not merely on Rinehart's mining claim, but throughout California. (CT74-76.)

Where, as here, the state scheme is plainly "prohibitory, not regulatory, in its fundamental character," *Lawrence*, 155 F.3d at 1011, Rinehart should not have to prove that Congressional purposes can be

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[15] An offer of proof was not necessary here because, in substance, "the trial court clearly intimated that it w[ould] receive no evidence of a particular type or class, or upon a particular issue". *Lawless v. Calaway*, 24 Cal.2d 81, 91 (1944).

vindicated by hand panning. Lawrence County could not defend its refusal to issue new or amended permits for surface metal mining in the "Spearfish Canyon Area" by arguing that mining could still persist underground, or in other areas, or that some mining could continue under existing permits. *Lawrence*, 155 F.3d at 1009. Grant County could not defend its ordinances prohibiting "surface mining in certain areas of the county" on the basis that it might proceed underground, or in other areas. *Elliot, supra.* The El Paso County Board of Commissioners could not defend its refusal to issue drilling permits on the basis that the miners there could have tried to dig test holes with shovels. *Brubaker, supra.* And the State of Idaho's ban on suction dredging the St. Joe River was not saved by suggesting that Mr. Skaw could still pan by hand for gold and garnets. *Skaw, supra.*

This Court can and should make the common sense assessment that requiring permits, then flatly refusing to issue them, stands as an obstacle to the accomplishment of the full purposes and objectives of federal mining law, sparing defendant and the taxpayers a great deal of future expense. With Fish and Game Code § 5653.1 declared unconstitutional as a matter of law, permits can once again issue. Further questions of federal preemption that may arise from unduly restrictive permit conditions can be left for another day.

B. If this Court Regards Factual Questions Concerning Suction Dredge Mining as Relevant, It Should Affirm the Court of Appeals' Remand Order.

The People attack most vigorously the Court of Appeals direction that among the issues to be considered on remand is the question whether a statewide ban on suction dredging makes commercial exploitation of Rinehart's mining claim—and by extension all underwater placer claims—"commercially impracticable".[16] The term "commercial impracticability" is best understood as shorthand for applying 30 U.S.C. § 612(b)'s "material inference" in the context of a statute designed to foster a commercial mining industry in the national interest. The trial court had allowed no record concerning the extent to which a ban on suction dredges interfered with mineral development—or the People's excuses for such interference. *See Rinehart*, 230 Cal. App.4th at 435 (remand "fair to defendant and to the People as each party may have evidence beyond the offer of proof and

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[16] The People even hint at a "Catch-22," based on the following false syllogism: (1) only holders of valid mining claims have rights; (2) validity is a function of the economic viability of the mining claim; and (3) economic viability is to be assessed assuming the validity of regulatory restrictions. Thus, insinuate the People, if the State's regulations destroy the commercial practicability of mineral development on federal lands in California, there is no frustration of federal mining law and policy because the mining claims were never valid in the first place. No law holds that any assumption must be made as to the validity of state regulation, and no one but the United States has standing to challenge the validity of claims. (*See supra* n. 9.) The overriding national interest in mineral development on federal lands amply refutes such sophistry.

argument it wishes to offer . . ."). There was no single-minded focus on "profitability alone" (People's Br. 37), but as a matter of federal law the "economics of the operation" would plainly be among the "factors . . . determining the reasonableness" of any permit requirements. *See* 36 C.F.R. § 228.5(a) (Forest Service regulation giving effect to "economics of the operation.

The People argue that consideration of commercial impracticability and other facts concerning interference would be "unadministrable in practice". (People's Br. 36.) No facts of record support this proposition, and numerous federal cases such as *Shumway*, *Richardson*, and others show that the federal government has administered the § 612(b) "material interference" test for decades to assess the reasonability of environmental restrictions.

Other cases demonstrate that the People's assertion of risk to numerous state regulatory regimes is also premature. (*Cf.* People's Br. 37.) 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).

Underwater placer mining does not require "discharging oil and gasoline," and no chemicals whatsoever are used in the process. Future

cases, if any, can address the degree to which California's regulatory restrictions intended to advance environmental values are "unreasonable," "materially interfere," or rendering mining "commercial impracticable." But no such cases may ever arise. Prior to 2009, California suction dredgers operated under reasonable regulations for decades without legal challenges.

The federal preemption issue arises *in this case* because the State of California has declined to assess any environmental impacts of the operations of Rinehart and those similarly situated in any permitting process whatsoever, and simply declared that no one could use a suction dredge on their claim at all. Even California's hydraulic mining statute did not bar the practice outright, but required a showing that it "can be carried on without material injury to navigable streams or lands adjacent thereto". Public Resources Code § 3981. The assessment embedded in § 3981 is no more difficult than the assessment required to determine if particular regulatory restrictions are reasonable.

If this Court is not disposed to reverse the conviction as a matter of law, remand is required because, as the Court of Appeals correctly found, the Superior Court's evidentiary rulings in substance forbid Rinehart from presenting *any* evidence "relevant to the operative issues bearing on defendant's affirmative defense". *Rinehart*, 230 Cal. App.4th at 436. This

ruling created manifest injustice, and is, in the alternative, another reason to set aside Rinehart's conviction. *See* Evidence Code § 354. That is especially true since "before a federal constitutional error can be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt". *Chapman v. California*, 386 U.S. 18, 24 (1967) (evidentiary ruling); *People v. Lucero*, 44 Cal.3d 1006, 1032 (1988).

This Court should determine that requiring permits, and then refusing to issue them, is prohibitory as a matter of law, but that failing, Rinehart was entitled to an opportunity to prove facts supporting the affirmative defense of federal supremacy. *Cf. Lawrence*, 155 F.3d at 1011 ("the record shows that surface metal mining is the only practical way any of the plaintiffs can actually mine the valuable mineral deposits located on federal land in the area").

Conclusion

For the foregoing reasons, this Court should reverse Rinehart's conviction outright, or remand the case for further factual development.

Dated: April 21, 2015.

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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 13,896 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: April 21, 2015.

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