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THE PEOPLE OF THE STATE OF CALIFORNIA

SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLUMAS

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. BRANDON LANCE RINEHART, Defendant.	Case No.: M12-00659 PEOPLE'S OPPOSITION TO DEMURRER; POINTS AND AUTHORITIES Date: December 18, 2012 Time: 10:30 a.m.

Plaintiff, the People of the State of California, hereby opposes the demurrer filed by Defendant in this matter, Brandon Lance Rinehart. This opposition is supported by the Points and Authorities contained herein and any argument that occurs at the hearing set for this matter.

1. DEFENDANT'S DEMURRER IS NOT BASED ON ONE OF THE FIVE GROUNDS UPON WHICH A DEMURRER MUST BE BASED

For a demurrer to be sustained by the court, it must be based on one of the five enumerated bases for such demurrer as set forth in Penal Code section 1004. (Pen. Code, § 1004; *People v. McAllister* (1929) 99 Cal.App. 37, 44.) The instant demurrer is not, and accordingly, the court should deny the demurrer on that basis.

Penal Code section 1004 provides as follows:

> The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either:
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> **1.** If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if any information or complaint that the court has no jurisdiction of the offense charged therein;
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> **2.** That it does not substantially conform to the provisions of Sections 950 and 952, and also Section 951 in case of an indictment or information;
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> **3.** That more than one offense is charged, except as provided in Section 954;
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> **4.** That the facts stated do not constitute a public offense;
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> **5.** That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

(Pen. Code, § 1004.) Nowhere in Defendant's demurrer is there mention of any of the aforementioned five bases on which a demurrer must be based. The closest that Defendant seems to get to asserting a statutory basis for his demurrer is in the introductory paragraph to the same, in which defendant asserts that he demurrers "on the ground that § 5653 of the California Fish and Game Code is pre-empted by federal law." (Def. Demurrer at 1.) Federal pre-emption is not listed in Section 1004 of the Penal Code as a proper basis for a demurrer. Rather, to the extent the arguments on preemption in the demurrer have merit, they seem to be better argued as an affirmative defense, as discussed below, largely due to the disputed factual predicates on which they rely.

Since defendant's demurrer does not have a statutory basis, it should be overruled. (See Pen. Code, § 1004; *People v. McAllister* (1929) 99 Cal.App. 37, 44.)

2. DEFENDANT'S DEMURRER IS NOT BASED ON DEFECTS ON THE FACE OF THE COMPLAINT AND INSTEAD REQUIRES THE COURT TO MAKE FINDINGS OF FACT, IN VIOLATION OF PENAL CODE SECTION 1004

Assuming *arguendo* that the court rejects the People's contention that Defendant's demurrer is without a statutory basis, the court, in evaluating the demurrer, should disregard all evidence submitted in support of the same by Defendant, as such evidence is improper to consider when evaluating the merits of a demurrer.

For at least 120 years, it has been the law in California that defects alleged in a demurrer must exist on the face of the pleading to which the demurrer is directed. (See *People v. McConnell* (1890) 82 Cal. 620 ("In order to sustain a demurrer to the information on the ground that the trial court is without jurisdiction of the offense charged therein, the want of such jurisdiction must appear from the face of the information.").) In other words,

> a demurrer is a legal objection to the sufficiency of a pleading, attacking what appears on the face of the document. As is said in … Witkin, California Criminal Procedure: 'A demurrer is a pleading which raises an *issue of law* as to the sufficiency of the accusatory pleading. It lies only for defects appearing on the *face of the accusatory pleading*.'

(*People v. Hale* (1965) 232 Cal.App.2d 112, 120 (internal citations omitted).)

This principle was elaborated on in *People v. Williams* (1979) 97 Cal.App.3d 382. In *Williams*, Defendants were charged with conspiring to steal and conceal stolen property. Several overt acts were alleged as part of the conspiracy, and in relevant part, the appeal concerned whether Defendant's demurrer to some of the overt acts was properly sustained by the trial court. (*Id.* at p. 387.) Defendants argued first that the conspiracy ended before the alleged overt acts in question were alleged to have occurred. (*Id.* at p. 388.) While the court indulged in an analysis of when a conspiracy terminates pursuant to the case of *People v. Zamora*, it concluded its analysis by noting and concluding that

> In applying *Zamora* to the present case, it must be remembered that we are reviewing the granting of a demurrer and are therefore limited to examining defects on the face of the complaint. (Pen. Code, § 1004.) Here, the substantive crime underlying the alleged conspiracy is concealment of stolen property. Thus, unless it is apparent on the face of the complaint that the crime of concealment terminated before the alleged overt acts in question occurred, defendants' argument must fail. Such defect was *not* apparent on the face of the complaint.

(*Williams,* at p. 390.)

Defendants also argued that the concealment of their alleged crime ended prior to the overt acts dismissed in the demurrer, and that accordingly, the demurrer was properly sustained. The court declined to address the factual issue of whether the crime ended in 1974, as Defendants alleged, or in 1975, as alleged in the indictment. (*Williams,* at p. 391.) Said the court:

> Defendants now seek to have this court resolve [the question of when the concealment offense terminated] as a matter of law. We decline to do so. … We are now reviewing the

> sustaining of the defendants' demurrer. As previously stated, a demurrer tests only defects existing on the face of the indictment. The indictment under scrutiny clearly alleges that defendants conspired to conceal the stolen [property] and that such conspiracy continued until on or about February 4, 1975. We believe that these allegations are sufficient. … The question of whether the defendants did purposely conceal the [stolen property], and if so, for how long, is one of fact not law and therefore should be decided by a jury, unless the evidence is insufficient to support such a finding. A demurrer however, is not a proper means to test the sufficiency of evidence. (*People* v. *McAllister* (1929) 99 Cal.App.37, 40, 44 [277 P. 1082].) We therefore conclude that the indictment adequately alleges that overt acts 11 through 14 occured [sic] during the pendency of the conspiracy.

(*Williams*, at p. 391.)

In the instant demurrer, Defendant asks this court to conduct an extensive review of facts in support of his demurrer, to wit: a declaration with numerous exhibits and five items of which Defendant asks the court to take judicial notice.[1] Defendant's argument, as explained below, is predicated on the establishment of certain disputed facts regarding how much of an "obstacle" the temporary ban is to his mining of his claim. In particular, Defendant's argument relies on the following facts, and perhaps others, which do not exist on the face of the complaint:

- Whether he has a federal unpatented mining claim at the location of the offense;
- Whether his unpatented mining claim is properly registered with the federal government;
- Whether his federal unpatented mining claim is "valid" – that is, there is a "valuable mineral deposit" that would justify a "further expenditure of his labor and means, with a reasonable prospect of success" – allowing him to assert he even has a property right;
- Whether suction-dredge mining is the only way to mine his claim;
- Whether suction-dredge mining constitutes the only economically-viable way to mine his claim; and
- Whether his mining activity constitutes a nuisance, eliminating any preemption (see below).

In essence, Defendant is asking this court to act as a trier of fact and to make findings of fact as to his demurrer. Pursuant to the foregoing authority, the court should decline to review the evidence offered

[1] The People object to Defendant's request for judicial notice. Aside from the fact that the California Department of Fish and Game has made certain findings, none of those facts are subject to judicial notice.

in support of the instant demurrer, and should instead seek only to determine whether a defect occurs on the face of the complaint filed in this matter.

3. THE ENFORCEMENT OF FISH AND GAME CODE SECTION 5653 DOES NOT CONSTITUTE AN OBSTACLE TO THE ACCOMPLISHMENT OF FEDERAL OBJECTIVES SUCH THAT SAID LAW SHOULD BE CONSIDERED PREEMPTED

The particular species of preemption relied on by Defendant is "obstacle preemption." (Def. Demurrer at 10.) Defendant's argument can be distilled to the following question: does the suction-dredge mining "ban" as set forth in Fish and Game Code section 5653 ("Section 5653") and as applied to this case constitute an "obstacle" to federal objectives such that this court should rule that Section 5653 is constructively pre-empted? The answer, as explained below, is no.

A. Preemption is Disfavored and Should be Avoided.

At the outset, it is crucial to note that application of the preemption doctrine is disfavored, and this court has a duty given two plausible interpretations of statutes at issue in a preemption argument to "accept the reading that disfavors pre-emption." (See *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 449 [pesticide law pre-emption].) The United States Supreme Court, after reviewing this canon of statutory interpretation confirmed that

> because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'

(*Bates v. Dow Agrosciences LLC*, *supra*, 544 U.S. at p. 449 (internal quotation marks and citations omitted); see also *Wyeth v. Levine* (2009) 555 U.S. 555, 565 ("In all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (internal citations, brackets, and quotation marks omitted).) Like the Supreme Court, this court should apply the canon of statutory construction that disfavors federal preemption. This is particularly the case in areas, such as the regulation of fish and game and their habitat such as waters of the state, which have long if not

always been an area of traditional state regulation. (See, e.g., Fish & G. Code, § 5650 (concerning water pollution, enacted in 1875 as former Pen. Code, § 635); *People v. Truckee Lumber Co.* (1897) 116 Cal. 397, 399 ("The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state, as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union." (internal citations omitted).)

Moreover, a general federal purpose to encourage a particular activity is not sufficient on its own to preempt state regulations that have the opposite effect. (See *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609, 633-634 ("We do not . . . accept appellants' implicit suggestion that these general statements [in statutes of a Congressional intent to encourage use of coal] demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal"); see also, e.g., *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission* (1983) 461 U.S. 190, 220-222.)

Given these overarching principles, Defendant must show Congress had a clear and manifest intent to prohibit a state environmental law such as Section 5653, which currently prohibits the issuance of permits for suction-dredge mining in order to protect fish.

B. <u>Defendant Fails to Provide Authority for Preemption.</u>

1. <u>No Statutory Provision in Federal Mining Law Reflects a Congressional Intent to Preempt State Laws</u>.

Defendant does not squarely argue in his demurrer which federal law or laws he believes preempts Section 5653. While he begins Section III of his demurrer citing to the 1872 Mining Act, he claims the "starting point" to be the "Multiple Use Act." (Def. Demurrer at 7-8.) Defendant fails to explain why this is the case, however, since the two cases he cites to after his quote of said "Multiple Use Act" concern the power of *federal* agencies to regulate certain things associated with particular mining claims. The case here concerns *state* power to regulate federal mining claims. Accordingly, Defendant has failed to explain to this court why the "Multiple Use Act" preempts Section 5653. Since

preemption is disfavored as explained above, the court should accordingly reject the argument that these federal mining laws preempt Section 5653.

No one disputes, as the demurrer asserts, that the general purpose of the federal mining law is to encourage mining. Indeed, that is the title of the Mining Act of 1872: "An Act to Promote the Development of the Mining Resources of the United States." (Act of May 10, 1872, ch. 152, 17 Stat. 91, codified at 30 U.S.C. § 22 *et seq.*) But nothing in that general purpose even suggests, much less makes "clear and manifest," that Congress' intent was to allow mining on every single parcel of federal land, at all costs, no matter what the consequences, much less an intent to preempt all state law that, as the demurrer puts it, might "materially interfere" with mining. (See, e.g., *California Coastal Comm'n v. Granite Rock Co.* (1987) 480 U.S. 572, 582 ["the Mining Act of 1872, as originally passed, expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation"].) Indeed, as noted above, a statement of general purpose in a statute does not "demonstrate a congressional intent to preempt all state legislation that might have an adverse effect" on achieving that purpose." (*Commonwealth Edison Co. v. Montana*, *supra*, 453 U.S. at pp. 633-634.) Moreover, if all that were required to preempt state mining regulations is a conflict with the Congressional intent to encourage mining, every state regulation would be preempted, because any state regulation inevitably places a burden on mining that would not otherwise exist. But that clearly is not the case. (See *California Coastal Comm'n v. Granite Rock Co.*, *supra*, 480 U.S. at p. 589 [Mining Act does not preempt all state environmental regulation].) Congress's encouragement of mining simply does not mean that states cannot use their judgment, under the police power, regulate the manner of that mining, and prevent adverse environmental consequences. There is no inherent inconsistency between a general federal policy to encourage mining and state regulations that bar certain forms of mining in certain areas to protect the environment any more than there would be an inherent inconsistency with a public policy to encourage non-motorized transportation and laws prohibiting pedestrians and bicyclists on freeways.

Defendant quotes the Mining Act of 1872, specifically the portion codified at 30 U.S.C. § 22. (Def. Demurrer at 7.) Although Defendant fails in his demurrer to specifically argue how this provision

preempts Section 5653 and seems to be explaining how property rights in mining claims operate, the People will briefly address the statute. This specific provision actually derives from a materially identical provision in the Mining Act of 1866. (Act of July 26, 1866, 14 Stat. 251, ch. 262, § 1.) The purpose of that provision, as indicated by the title of that Act – "An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes" – was merely to "legalize[] what were before trespasses upon the public lands, and [make] lawful, as between the occupants and the United States, that which before was unlawful . . . ." (*Woodruff v. North Bloomfield Gravel Mining Co.* (C.C.D. Cal. 1884) 18 F. 753, 774; see also *Colvin Cattle Co., Inc. v. United States* (2005) 67 Fed.Cl. 568, 571 ["As the Supreme Court recognized in *Jennison v. Kirk*, 98 U.S. 453, 457 (1878), the purpose of the Mining Act is to 'give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands.'"].) Nothing about the provision "clearly and manifestly" expresses an intent to ensure that every acre of federal land be mined, regardless of the consequences, and regardless of state interests in protecting natural resources.

The only other statute that Defendant directly cites as a source of preemption is 30 U.S.C. § 612. (Def. Demurrer at 8.) That provision, as the text quoted in the demurrer makes perfectly clear, simply restricts "any use of the surface of any . . . mining claim by the United States" so that that use will "not endanger or materially interfere with . . . mining." (30 U.S.C. § 612.) Thus, the statute does no more than restrict the uses the Forest Service can make of the surface where a mining claim is. It says nothing about the Forest Service's right to protect fish and wildlife, much less a state's right to do the same. Because fish and wildlife are public trust resources of the states, not the United States (*Kleppe v. New Mexico* (1976) 426 U.S. 529, 545), even if this provision did express Congress' intent to limit the Forest Service's authority to protect those resources, it is perfectly reasonable to assume that that is because Congress intended the states to protect their own resources. Once again, nothing in the statute on which the demurrer relies comes close to expressing the "clear and manifest" intent of Congress to preempt these state police powers, as the Supreme Court requires before finding

preemption. Further, as set forth below, case law analyzing the "Multiple Use Act" does not support Defendant's argument.

2. The Cases Do Not Support a Finding of Preemption.

Defendant concedes that there are no California cases on-point finding preemption of state laws regarding mining claims on federal land. Thus, he cites to several cases from other jurisdictions in support of his argument that preemption exists in the instant case. Defendant's argument, based on these cases, is apparently that a state regulation that "materially interferes" with mining is preempted. These cases do not support Defendant's preemption contention as applied to this case.

Defendant first cites to *Granite Rock*, for the proposition that "obstacle preemption" can apply in cases such as the instant matter. Of course, in *Granite Rock*, the Supreme Court found no preemption existed preventing California from imposing an environmental permitting requirement on mining operations. Defendant admits that *Granite Rock* "presents an issue not addressed" in this case, and the People agree: *Granite Rock* was a facial challenge, and concerned two particular federal laws, the Federal Land Policy and Management Act ("FLPMA") and the National Forest Management Land Act. There is no explanation in Defendant's demurrer of exactly how these laws preempt Section 5653, save text that remains dicta 32 years after it was written (see Def. Demurrer at 10, FN 7), which suggests that reliance thereon is unwise. Furthermore, the state entity that sought to regulate the mining in *Granite Rock* did "not seek to prohibit mining of the … claim" (*California Coastal Comm'n v. Granite Rock Co.*, *supra*, at p. 595), which is very different than the argument advanced by Defendant in the instant matter.

As for the other cases, there are three overarching reasons why they do not help Defendant here. First, they are not from controlling jurisdictions. Second, like the demurrer, none of those cases acknowledged, much less applied, the Supreme Court's fundamental restrictions on finding preemption, described above. Third, each of those cases involved zoning regulations that prohibited mining. The statute at issue here, however, is patently not a zoning regulation, but is an environmental regulation intended to protect fish. (See Fish & G. Code, §§ 5653, 5653.1).) This distinction is significant because in *Granite Rock* the Supreme Court distinguished environmental regulation from land use

regulation, assuming without deciding that federal law preempts "the extension of state land use plans onto unpatented mining claims in national forest lands," but did not preempt all state environmental regulation. (*California Coastal Comm'n v. Granite Rock Co.*, *supra*, 480 U.S. at p. 585.)

South Dakota Mining Ass'n v. Lawrence County (8th Cir. 1998) 155 F.3d 1005 is easily distinguishable. In *Lawrence*, the county adopted an ordinance that prohibited all surface mining in a particular area of the Black Hills. (*Id.* at pp. 1007-1008.) Applying "obstacle" preemption, the court in *Lawrence* found that the ordinance "completely frustrates the accomplishment of ... federally encouraged [(mining)] activities" and held that the ordinance was preempted. (*Id.* at p. 1011.) In *Lawrence*, however, the record indicated that "surface metal mining is the only mining method that can actually be used to extract these minerals [in the area at issue]. This is because the gold and silver deposits within [the area at issue] are geologically located at the earth's surface." (*Id.* at p. 1007 (citations omitted).) Given this geological reality as supported by citations to the record, the court found that "the ordinance's effect is a de facto ban on mining in the area." (*Id.* at p. 1011.) "Thus, unlike *Granite Rock*, we are not faced with a local permit law that sets out reasonable environmental regulations on federal lands." (*Id.*) Since in this demurrer Defendant cannot demonstrate, based on the face of the complaint, that Section 5653 operates as a de facto mining ban *in the area*, that is, on the entirety of Defendant's claim, *Lawrence* does not support Defendant's preemption argument. Unlike in *Lawrence*, Defendant can mine other areas of his claim,[2] although they may not be the best areas of his claim to mine gold, without subjecting himself to the possibility of violating Section 5653. Section 5653, after all, is not a ban on all forms of mining of a particular claim, but is merely a temporary moratorium on a *particular manner* of mining one's claim for a particular mineral.

[2] Defendant argues in his demurrer that "Lawrence County could not defend its refusal to issue new or amended permits in the [']Spearfish Canyon Area[']' by arguing that there were other areas to mine...." (Def. Demurrer at 12.) This is true, but does not help Defendant, though it may appear to at first blush. In *Lawrence*, the area at issue was the Spearfish Canyon Area, and that entire area was closed to surface mining. (*Lawrence*, *supra*, 153 F.3d at p. 1007.) "Surface metal mining [was] the only mining method that [could] be used to extract these minerals in the Spearfish Canyon Area." (*Id.*) By contrast, in the case at bar, only one area of Defendant's mining claim was affected by operation of Section 5653. Defendant could and can mine non-river-bottom areas of his claim, such as ancient river banks, without running afoul of Section 5653, and though it may not be the most efficient method, can even mine the river bottom without running afoul of Section 5653, so long as he does not use a suction-dredge apparatus to do so. See Fish & G. Code, §§ 5653, 5653.1.

Defendant's citation to *Brubaker v. Bd. of County Commissioners* (Colo. 1982) 652 P.2d 1050, suffers from the same infirmity. In that case, according to the court's summary, several miners "sought to conduct limited test drilling on the site of [the claims at issue] for the purpose of obtaining mineral samples that would be used to determine whether they had made a qualifying discovery of valuable mineral deposits under federal mining law." (*Id.* at p. 1052.) Thus, the miners could not mine the claims at issue *in any respect* without first conducting test drilling. The county denied the miner's request for a permit and the miners appealed. After a discussion of the 1872 Mining Act, as in *Lawrence*, the Supreme Court of Colorado held that the county permit denial was preempted, reasoning in its holding that "the [county] has applied its zoning regulations so as to prohibit a use of federal lands authorized by federal legislation." (*Id.* at p. 1060.) Again, the case at bar is quite different: there is simply no evidence in the record that as to Defendant's mining claim, Section 5653 "prohibit[s] a use of federal lands [that is] authorized by federal legislation." (*Id.*) Further, unlike in *Lawrence* and *Brubaker*, the law at issue here, Section 5653, is an environmental regulation rather than a zoning prohibition.

Defendant's relegation of the other cases he cites in support of his preemption argument to a string-cite reflects the lack of support these cases provide for his argument. In *Elliott v. Oregon Int'l Mining Co.* (1982) 654 P.2d 663, the Oregon Court of Appeals decided that case based on the Stock Raising Homestead Act of 1916; nowhere in his demurrer does Defendant explain how that act applies to the instant case, which has no indicia of homesteading. Similarly, in *Ventura County v. Gulf Oil Corp.* (9th Cir. 1979) 601 F.2d 1080, that court found that a local zoning ordinance was preempted by the Mineral Lands Leasing Act of 1920; again, nowhere in his demurrer does Defendant explain how that act applies to the instant case.[3] As such, *Elliott* and *Ventura County* provide at best dicta that is grounded in analyses not pertinent to the case at bar, and accordingly, should be disregarded by the court.

[3] Moreover, because the Ninth Circuit's decision in *Granite Rock* relied on *Ventura County* (see *Granite Rock Co. v. Cal. Coastal Com.* (9th Cir. 1985) 768 F.2d 1077, 1082), and because the Supreme Court *reversed* that decision, holding that state permitting requirements are not preempted (see *Granite Rock, supra*, 480 U.S. at p. 594), there is arguably little vitality left to *Ventura County*, despite the miners' repeated reliance on it.

Defendant's argument, based on these cases, is that this state environmental law prohibition of a particular form of mining is improper because it eliminates the "only" economically feasible means of mining, and thus "materially interferes" with mining. But, assuming the court can reach that issue on demurrer, and finds the argument initially persuasive despite the infirmities with the arguments advanced by Defendant as previously discussed, it is evident that adoption of such a test yields absurd, unacceptable, results. All environmental regulation obviously imposes some costs on mining. Moreover, the economic viability of any mining operation will change over time, depending on the price of gold, fuel, compliance with other environmental regulations, and so forth. So, accepting the demurrer's argument, every environmental regulation, indeed every regulation, including state taxation (which the Supreme Court has expressly approved, see *Forbes v. Gracey* (1876) 94 U.S. 762), would have to be evaluated on a mine by mine basis, and would constantly be open to reevaluation as gasoline prices change, as gold prices change, and so forth. This leads to the absurd result that whether the People can enforce Section 5653 against Defendant depends, among other things, on the price of gold, so that if the price today makes it unprofitable for Defendant to mine his claim by some means other than suction dredging, Section 5353 is preempted; yet if the price were to rise next month allowing Defendant to mine his claim by other means, albeit at a lower profit than suction dredging might provide, Section 5653 suddenly no longer would be preempted. That cannot be the law.

Lastly, Defendant construes Section 5653 as a prohibition, in order for the cases it relies on to apply. But this case is different, because the prohibition here is only temporary. It is not a ban, but a moratorium that is in place only until the Department of Fish and Game promulgates regulations and establishes a program that adequately protects fish. (See Fish & G. Code, § 5653.1.) The Legislature's clear intent is for the State to do this. (*Id.*) The Supreme Court already has held that state environmental regulation of mining is not preempted by federal law, and that a state program requiring permits to mine, as part of such environmental regulation, is not preempted by federal law. (See *California Coastal Comm'n v. Granite Rock Co., supra.*) And numerous courts, both state and federal, have recognized that any permitting program entails delays in approval of the activity being permitted, both for processing an application, and for developing program regulations regarding the issuance of

permits. Such normal delays generally are not an unreasonable exercise of state power and as such do not constitute a taking of property requiring compensation under the federal or state constitutional takings clauses. (See, e.g., *Tahoe-Sierra Preservation Council, Inc. v. Tahoe-Sierra Regional Planning Agency* (2002) 535 U.S. 302, 334-335; *Lowenstein v. City of Lafayette* (2003) 103 Cal.App.4th 718, 733; *People ex rel. State Pub. Wks. Bd. v. Superior Court* (1979) 91 Cal.App.3d 95, 108-09 ["It is well established that a freeze on building permits pending adoption of a zoning ordinance or other comprehensive plan is permissible."]) If such moratoria are reasonable exercises of state police power for takings clause purposes, it is impossible to see why they are not equally reasonable forms of environmental regulation, of the sort that the Supreme Court held are not preempted in *Granite Rock.*

In summary, Defendant has failed to demonstrate that Section 5653 constitutes an "obstacle to the accomplishment of the full purposes and objectives of Congress" with respect to the facts at bar and the federal laws at issue, whatever those may be. Thus, Defendant has failed to present a compelling case in favor of preemption. In light of the modern trend to disfavor preemption, this court should resolve any ambiguity that it sees in favor of rejecting the preemption argument and overruling the demurrer.

C. Defendant Cannot Prove, on Demurrer, that His Offense Did Not Constitute a Nuisance.

Shortly after the 19th Century federal mining laws were enacted, the Court in *Woodruff* held that those laws did not reflect any intent to preempt state nuisance laws. (*Woodruff, supra*, 18 F. at pp. 770-80.) That court stated specifically: "It is one of the conditions always implied by the law, that one's rights, whether granted or regulated by the legislature, shall be exercised with due regard to the rights of others[.]" (*Id.* at p. 771.) This appears to still be good law.[4] In terms of federal preemption, there is no logic in distinguishing between state nuisance statutes and statutes like Fish and Game Code section 5653. In both instances, California's Legislature is making a judgment that these injuries are not appropriate. Making such a distinction is especially inappropriate if Defendant's activity would

[4] The *Woodruff* court also effectively held that Congress could not preempt state nuisance laws, given its power to legislate about mining was based on its proprietary role. (18 F. at 770-80.) That separate holding, however, may no longer be good law, because the Supreme Court in *Kleppe* ruled that Congress's power over federal land was broad, both as a proprietor and as a legislature. (426 U.S. at pp. 540, 542-43.)

actually qualify as a nuisance, perhaps due to the water pollution caused by his suction-dredge mining. Whether that activity constitutes a nuisance would be a quintessential factual issue. Defendant cannot prove that on demurrer, and certainly has not done so here.

4. IT IS NOT CLEAR THAT THE RIVERBED ON WHICH DEFENDANT WAS CAUGHT MINING ON HIS MINING CLAIM IS FEDERAL LAND

Defendant claims and his principle argument seems to be predicated on his assertion that "[t]here appears to be no dispute that suction dredging by defendant would constitute the exercise of his own private property rights on a federally-registered mining claim on lands belonging to the United States." (Def. Demurrer at 8.) The People disagree. Rather, it may be that the river bottom is land to which the State of California holds title, due to application of the "equal-footing" doctrine. (See generally, *PPL Montana, LLC v. Montana* (2012) 132 S.Ct. 1215.) This is a question of fact that cannot be assumed. (See *Id.* at pp. 1226-1229.)

5. CONCLUSION

Defendant has failed to provide a clear statutory basis for his demurrer, as required by law. Further, he has attempted to support his argument with numerous documents and a declaration that he inappropriately asks this court to review as a trier of fact. The People thus respectfully request that the court disregard or strike Defendant's supporting pleadings and review the demurrer only on its face and the Points and Authorities submitted therewith.

Regardless, Defendant has failed to demonstrate that the temporary moratorium on suction-dredge mining as set forth in Sections 5653 and 5653.1 constitutes an "obstacle to the accomplishment of the full purposes and objectives of Congress" with respect to the facts at bar and the federal laws at issue, whatever those may be. As set forth above, Defendant can mine his claim in many ways without risking running afoul of Section 5653, and thus Sections 5653 and 5653.1 do not serve as an obstacle to federal statutory prerogatives.

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Accordingly, the court should overrule the Defendant's demurrer.

Respectfully submitted,

DATED: 12/7/12

PLUMAS COUNTY DISTRICT ATTORNEY

By: /M/

MATTHEW K. CARR
Deputy District Attorney

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and am not a party to the within action. My business address is 921 11th Street, Suite 300, Sacramento, California 95814.

On December 10, 2012, I served the following documents: **PEOPLE'S OPPOSITION TO DEMURRER; POINTS AND AUTHORITIES**

[ ] BY PERSONAL SERVICE: I caused a true and correct copy thereof to be hand delivered to the parties at the address(es) shown below.

[ ] BY MAIL on the following party(ies) in accordance with Code of Civil Procedure section 1013, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. In the ordinary course of business, mail placed in that designated area is given sufficient postage and is deposited that same day in a United States Postal Service mailbox in Sacramento, California.

Addressee(s):

[ ] BY FACSIMILE TRANSMISSION on the following party(ies) in accordance with Code of Civil Procedure section 1013, by transmitting a true copy thereof from fax number (916) 443-0540, to a facsimile machine maintained by the person(s) on whom it is served at the facsimile machine telephone number last given by that person(s). In accordance with California Rules of Court, Rule 2.306(h), the document(s) were sent by fax transmission and the transmission was reported as complete and without error. The fax machine printed a record of the transmission, a copy of which is attached hereto.

Name:
Facsimile Number: * (by stipulation and agreement)
Date of transmission: _____. Time of transmission: _____.

[**X**] BY ELECTRONIC SERVICE based on an agreement of the parties to accept service by electronic transmission. I caused the documents to be sent to the person(s) at the electronic notification address(es) listed below;

Name: James Buchal, Attorney for Defendant
Email: jbuchal@mbllp.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 10, 2012, at Sacramento, California.

REGAN M. STEELE