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IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF PLUMAS

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

BRANDON LANCE RINEHART,

Defendant.

Case No. M12-00659

DEFENDANT'S DEMURRER AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing
Date: November 13, 2012
Time: 10:30 a.m.

DEMURRER

Defendant hereby demurs, pursuant to Penal Code § 1004, to the accusatory pleading in this action on the ground that § 5653 of the California Fish and Game Code is pre-empted by federal law. This Demurrer is supported by the accompanying Points and Authorities and the Declaration of Brandon Rinehart, filed herewith.

POINTS AND AUTHORITIES

Defendant is charged with unlawfully using a suction dredge in an area closed to suction dredging, and possessing a dredge within 100 yards of such area, pursuant to § 5653 of the Fish and Game Code, which generally prohibits suction dredge mining without a permit. However, since 2009, § 5653.1 of the Code has provided, in substance, that no permits may be issued, such

that defendant is in substance charged with a failure to perform an impossible act.

The Criminal Complaint does not identify the area with precision, but the citation notice contains GPS coordinates. The location is a material element of the crime that should have been pled unless the citation information can be considered part of the Criminal Complaint; in any event we understand that the District Attorney will not contest the location. This Court can also take judicial notice, based upon the application for same filed herewith, that the location is within a federally-registered mining claim, owned in part by defendant, located within the Plumas National Forest.

Congress has made the strong federal policy in favor of mineral development of federal lands abundantly clear through a century of statutes, and courts have repeatedly held that states cannot materially interfere with these objectives. We present this body of law in detail below, but it boils down to the following: the State of California may regulate mining on federal land, but it may not prohibit it outright. The State has purported to do so through § 5653 of the California Fish and Game Code, as modified by § 5653.1, a series of escalating statutory moratoriums on the issuance of suction dredge permits. The State's attempt to criminalize defendant's mining on his own federal mining claim is therefore barred as unduly interfering with federal mining policy.

Argument

I. THE OPERATION OF FISH AND GAME CODE §§ 5653 and 5653.1.

Defendant stands charged with one count of violating § 5653(a) of the California Fish and Game Code, and one count of violating § 5653(d). Section 5653(a) provides that it is unlawful to suction dredge without a permit, and § 5653(d) provides that it is unlawful to possess a suction dredge within 100 yards of waters that are closed to the use of suction dredges. The legal problem arises because the State of California has indefinitely suspended the issuance of all permits for suction dredging, closing all waters of the State to suction dredging.

On August 9, 2009, the Governor signed Senate Bill No. 670, which established a state-wide moratorium on suction dredging, and provided:

> "Notwithstanding Section 5653, the use of any vacuum or suction dredge equipment in any river, stream, or lake of this state is prohibited until the director certifies to the Secretary of State that all of the following have occurred:
>
> "(1) The department has completed the environmental review of its existing suction dredge mining regulations, as ordered by the court in the case of *Karuk Tribe of California et al. v. California Department of Fish and Game et al.,* Alameda County Superior Court Case No. RG 05211597.
>
> "(2) The department has transmitted for filing with the Secretary of State pursuant to Section 11343 of the Government Code, a certified copy of new regulations adopted, as necessary, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> "(3) The new regulations described in paragraph (2) are operative.

By its terms, this moratorium was of indefinite duration, but would have expired upon issuance of new regulations. The process of developing new regulations proceeded slowly.

On July 26, 2011, the Governor signed Assembly Bill No. 120, which amended Fish and Game Code § 5653.1 and stated:

> "Notwithstanding Section 5653, the use of any vacuum or suction dredge equipment in any river, stream, or lake of this state is prohibited until June 30, 2016, or until the director certifies to the Secretary of State that all of the following have occurred, whichever is earlier:
>
> "(1) The department has completed the environmental review of its existing suction dredge mining regulations, as ordered by the court in the case of *Karuk Tribe of California et al. v. California Department of Fish and Game et al.,* Alameda County Superior Court Case No. RG 05211597.
>
> "(2) The department has transmitted for filing with the Secretary of State pursuant to Section 11343 of the Government Code, a certified copy of new regulations adopted, as necessary, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> "(3) The new regulations described in paragraph (2) are operative.

> "(4) The new regulations described in paragraph (2) fully mitigate all identified significant environmental impacts.
>
> "(5) A fee structure is in place that will fully cover all costs to the department related to the administration of the program.

While it appeared that this moratorium could theoretically end before June 30, 2016, the legislation was in fact carefully crafted to ensure that no suction dredging permits would ever issue because the Department of Fish and Game could not make the required certifications.

One reason was that the permit fee structure is set by § 5653(c) of the Fish and Game Code, and was known to be inadequate to cover the costs of the program, which consisted mostly of legal costs arising out of the environmentalists' seriatim attacks on the program.[1] Another reason, which this Court can more easily find in the context of this motion, is that the Department conducted a formal CEQA study in connection with the new regulations, issuing formal Findings of Fact on March 16, 2012, which concluded, among other things:

> "The Department finds, as set forth below, informed by the 2012 EIR and other substantial evidence in its administrative record of proceedings, that suction dredging authorized under the revised regulations will result in significant and unavoidable impacts on water quality, biological resources, cultural resources, noise and cumulative impacts.[2] These significant and unavoidable environmental effects are expected to persist because it is infeasible for the Department to do more in the regulations that it is required to adopt to implement Fish and Game Code section 5653." (*Id.* at 53.)

This Court can take judicial notice of the Department's findings pursuant to § 452 of the Evidence Code, which allows, among other things, judicial notice of "official acts of . . . executive . . . departments . . . of any state of the United States".

The Department's own findings barred it from certifying, as required under AB 120, that "the new regulations . . . fully mitigate all identified significant environmental impacts," and the Department remained forbidden from issuing any permits. The Department's website currently reports: "DFG is not selling suction dredge permits at this time, and cannot predict

[1] Defendant is prepared to make a factual showing on this point, but it should not be necessary if judicial notice is taken of the more formal findings now to be discussed.

[2] Defendant denies that any adverse environmental impacts have occurred, would occur, or will ever occur from his dredging activities. Until the unlawful moratorium, dredging proceeded for years without injuring so much as a single fish in California.

when that might occur."[3] Given the operation of AB 120 on the date defendant was cited, June 16, 2012, it is quite clear that it was impossible for him to obtain any permit for suction dredging.

On June 27, 2012, the Governor signed SB 1018, which repealed the June 20, 2016 date by which the moratorium might have expired even absent the required certifications, leaving mining flatly prohibited until further legislation could be enacted:

> "Notwithstanding Section 5653, the use of any vacuum or suction dredge equipment in any river, stream, or lake of this state is prohibited until the director certifies to the Secretary of State that all of the following have occurred:
>
> "(1) The department has completed the environmental review of its existing suction dredge mining regulations, as ordered by the court in the case of *Karuk Tribe of California et al. v. California Department of Fish and Game et al.*, Alameda County Superior Court Case No. RG 05211597.
>
> "(2) The department has transmitted for filing with the Secretary of State pursuant to Section 11343 of the Government Code, a certified copy of new regulations adopted, as necessary, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> "(3) The new regulations described in paragraph (2) are operative.
>
> "(4) The new regulations described in paragraph (2) fully mitigate all identified significant environmental impacts.
>
> "(5) A fee structure is in place that will fully cover all costs to the department related to the administration of the program."

The new law, though passed shortly after the conduct charged herein, confirms that the Department is generally and permanently forbidden from issuing any permits for suction dredge mining, thereby continuing indefinitely the State's refusal, since the summer of 2009, to issue permits for suction dredge mining.

II. THE LOCATION OF THE ALLEGED CONDUCT WAS WITHIN THE BOUNDARIES OF A FEDERALLY-REGISTERED MINING CLAIM OWNED, IN PART, BY DEFENDANT.

Section 952 of the Penal Code allows a criminal complaint to "be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be

[3] http://www.dfg.ca.gov/suctiondredge/ (accessed 10/29/12).

proved." However, it does require sufficient facts to give notice of the crime, and where, as here, the gist of the charge is that defendant used and possessed a dredge in "an area closed" or "waters closed," due process and fair notice requires that the State specify the location. We presume that the location included in the citation is to be considered part of the charging instruments to which a demurrer is permissible; in any event we believe the District Attorney will not contest the location.

Pursuant to § 452(c) of the California Evidence Code, the Court may take judicial notice of the "official acts of the legislative, executive and judicial departments of the United States . . .". As set forth in the accompanying Declaration of Brandon Rinehart, the United States has permitted him to register and establish with the U.S. Bureau of Land Management a mining claim known as "Nugget Alley," within the boundaries of which the citation was issued and the criminal complaint made therefor.

Pursuant to § 452(h), the Court may also take judicial notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy". The operation of GPS systems, the system of latitude and longitude, and its relationship to local maps fall within this characterization, and we have filed herewith relevant mapping and other information, and understand that the District Attorney will not dispute that the location at which defendant was cited was within the boundaries of the "Nugget Alley" claim. (*See generally* Rinehart Decl. & Exs. 2-4.)

Judicial notice and/or stipulation by the District Attorney thus presents the question whether, as explained further below, Congress has by passage of the 1872 Mining Law and numerous subsequent statutes forbidden the State from closing federal lands to mining, and foreclosed the State's ability to shut down suction dredge mining.

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III. THE STATE OF CALIFORNIA IS WITHOUT POWER TO PROHIBIT DEFENDANT FROM MINING ON HIS OWN MINING CLAIM ON FEDERAL LAND.

A. The Nature of Rights in Mining Claims Under Federal Law and Federal Regulation Thereof.

Congress has declared "the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries". 30 U.S.C. § 21a(1). The United States Court of Appeals for the Ninth Circuit has confirmed the "all-pervading purpose of the mining laws is 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).[4]

The cornerstone of these policies is the 1872 Mining Act, which, as amended, now declares:

> ". . . 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 . . ." 30 U.S.C. § 22 (emphasis added)."

Because the lands where defendant sought to mine are lands belonging to the United States, there is a general federal mandate for this portion of the Creek to be "free and open" for both "occupation and purchase[[5]]".

Based upon these and other statutes, federal courts have recognized that miners such as the defendant hold federally-established rights in their mining claims, which constitute private "property in the fullest sense of the word". *Bradford v. Morrison*, 212 U.S. 389, 395 (1909); *see also United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999) (discussing scope of legal interests represented in mining claims); *United States v. Rizzinelli*, 182 F. 675, 681 (1910)

[4] For the convenience of the Court, we filed herewith an Appendix of Non-California Authority, including all of the federal material cited herein.
[5] Congress has since suspended the right to purchase (patent) mining claims.

(miners hold a "distinct but qualified property right" with "possessory title").[6]

There 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. (*See generally* Rinehart Decl.) The question presented by this demurrer is whether and to what extent the State of California may lawfully regulate defendant's mining on his own property.

The starting point for examining this question is to consider the extent to which the federal government may regulate such use. In 1955, Congress enacted the Multiple Use Act, which again confirmed the long-standing federal policy of facilitating mining of mineral deposits, and subordinated all other uses, including the protection of other resources such as fish and wildlife, to mining:

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

Under this statute, and other authority, the federal courts have repeatedly held that while the U.S. Forest Service may "manage other surface resources" on mining claims, such regulation is flatly prohibited if it "materially interferes" with mining and activities "reasonably incident thereto".

The "other surface resources" that may be the object of federal regulation include fish and wildlife, which are also protected in the California Fish and Game Code. *In re Shoemaker*,

[6] The State's actions here raise due process concerns relating to the protection of established property interests, which due process concerns underscore the interference with federal mining rights.

110 I.B.L.A. 39, 48-50 (July 13, 1989) (reviewing legislative history of the Multiple Use Act). However, even federal regulators may not take action to protect fish and wildlife if such action would materially interfere with mining, with "material interference" having the commonsense, dictionary meaning of the terms. *Shoemaker*, 110 I.B.L.A. at 54 (reviewing dictionary meanings and concluding that the question is whether an agency regulation to protect surface resources will "substantially hinder, impede, or clash with appellant's mining operations"); *see also id*. at 50-53 (agency regulation cannot impair the miner's "first and full right to use the surface and surface resources"). The United States Court of Appeals for the Ninth Circuit has more recently confirmed that "the Forest Service may regulate use of National Forest Lands by holders of unpatented mining claims, like [defendant], 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". *United States v. Shumway*, 199 F.3d 1093, 1107 (9th Cir. 1999).

B. Law Concerning the Scope of Federal Preemption.

The Supremacy Clause provides a clear rule 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. The Courts have long recognized that the important federal interests in mineral development created by federal law sharply limit the scope of state regulation of mineral development. As the U.S. Supreme Court long ago declared in discussing mining interests, any "right to supplement Federal legislation conceded to the State may not be arbitrarily exercised; nor has the State the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the Congressional laws." *Butte City Water Co. v. Baker*, 196 U.S. 119, 125 (1905). A outright refusal by the State of California to issue suction dredging permits is manifestly "repugnant to the liberal spirit" of federal laws promoting mining.

The Supreme Court has in succeeding decades outlined several species of federal

preemption; this case concerns the preemption principle that "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," it is preempted. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 592 (1980);[7] *see also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-74 (2000) (preemption where federal law "provisions be refused their natural effect"; citation omitted); *Perez v. Campbell*, 402 U.S. 637 (1971) ("any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause" regardless of the underlying purpose of its enactors).

Consistent with the Supremacy Clause, the California Supreme Court has very recently reaffirmed that it follows this same principle in determining federal preemption. *Parks v. MBNA America Bank, N.A* (2012) 54 Cal.4th 376. Striking down a state statute requiring certain bank disclosures on the ground that banks had broad powers granted under federal law, the Supreme Court of California recited the "four species of federal preemption," including that the challenged state action "stands as an obstacle to the accomplishment and execution of the

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[7] In interpreting *Granite Rock*, which upheld the authority of the State of California to require permits for federal mining claims, it is important to understand that Supreme Court repeatedly emphasized that "Granite Rock does not argue that the Coastal Commission has placed any particular conditions on the issuance of a permit that conflict with federal statutes or regulations". *Id.* at 579. Rather, 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 Court noted that "one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable" (*id*. at 587), but 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). Through this language, it is obvious that the Court was referring to regulations beyond a blanket prohibition on mining.

The *Granite Rock* Court concluded 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.) This case presents the issue not addressed in *Granite Rock*: whether a specific state regulation, outlawing suction dredge mining, does in fact interfere with the purposes of federal law.

full purposes and objectives of Congress". *Id.* at 383 (quoting *Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935-36). Even more recently, the Court of Appeals applied "obstacle" preemption to strike down California's attempt to invalidate certain consumer waivers as running afoul of federal policy favoring arbitration. *Caron v. Mercedes-Benz Financial Services USA LLC* (2012) 208 Cal. App.4th 7.

While there appears to be no California state court authority directly on point concerning preemption of mining regulations, the federal courts have repeatedly employed federal preemption doctrines to strike down state regulation that interferes with mining on federal lands. Thus in *South Dakota Mining Ass'n v. Lawrence County,* 155 F.3d 1005 (8th Cir. 1998), the U.S. Court of Appeals for the Eighth Circuit struck down a "county ordinance prohibiting the issuance of any new or amended permits for surface metal mining within the Spearfish Canyon Area". *Id.* at 1006.[8] As the Eight Circuit explained:

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

Id. at 1011 (emphasis added). The State's refusal to issue any permits for suction dredge mining in California, discussed in more detail below, is "prohibitory, not regulatory, in its fundamental character" and constitutes a *de facto* ban on mining. The Supreme Court of Colorado and the Oregon Court of Appeals have reached similar conclusions. *Brubaker v. Board of County Commissioners,* 652 P.2d 1050 (Colo. 1982) (county's refusal to issue drilling permit overturned); *Elliott v. Oregon Int'l Mining Co.,* 654 P.2d 663 (1982) (county ordinances

[8] "The Spearfish Canyon Area defined in the ordinance includes approximately 40,000 acres of Lawrence County, encompassing about 10 percent of the total land area of the county". *Id.* at 1007.

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

Simply put, because Congress has forbidden even federal agencies from "materially interfering" with mining on federal mining claims, the State of California cannot materially interfere with mining either. The State may argue that only suction dredging, and not other forms of mining, are prohibited, but there is no other way to mine the deposits on the land in question (Rinehart Declaration ¶ 6), and the precedent does not support such a meagerly view of preemption. 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, or even that some mining could continue under existing permits. *South Dakota Mining Ass'n v. Lawrence County,* 155 F.3d 1005 (8th Cir. 1998). 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 v. Oregon International Mining Co.*, 654 P.2d 663 (Or. 1982).

As set forth above, Fish and Game Code §§ 5653 and 5653.1 operate as a *de facto* ban on mining of placer deposits in rivers throughout the state, and where, as here, the ban purports to operate on a federally-registered mining claim on federal land, it materially interferes with the federal purpose of promoting mineral development of federal land, and the State of California may not interfere with mining on federal mining claims in this manner.

Conclusion

For the foregoing reasons, the Criminal Complaint should be dismissed.

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Dated: October 30, 2012.

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