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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

Coordination Proceeding Special Title (Rule 1550(b) **SUCTION DREDGE MINING CASES**	Coordinated Case No. JCCP4720 Re: Included Case No. SCCVCV120048 **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION (2ND CAUSE OF ACTION: FEDERAL PREEMPTION) IN *THE NEW 49ERS V. STATE OF CALIFORNIA*** Date: May 1, 2014 Time: 8:30 a.m. Dept: R8 Judge: Honorable Gilbert Ochoa Trial Date: None Set Action Filed: April 13, 2012
Included Actions:	
Karuk Tribe of California, et al. v. California Department of Fish and Game	RG 05211597 - Alameda County
Hillman, et al. v. California Department of Fish and Game	RG 09434444 - Alameda County
Karuk Tribe of California, et al. v. California Department of Fish and Game	RG 12623796 - Alameda County
Kimble, et al. v. Kamala Harris, Attorney General of California, et al.	CIVDS 1012922 - San Bernardino County

Public Lands for the People, et al. v. California Department of Fish and Game	CIVDS 1203849 - San Bernardino County
The New 49er's, et al. v. State of California, California Department of Fish and Game, et al.	SCCVCV120048 - Siskiyou County
Walker v. Harris, et al.	34-2013-80001439 - Sacramento County
Foley et al. v. California Department of Fish and Wildlife, et al.	SCCVCV1300804 - Siskiyou County

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INTRODUCTION

"In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting *the federal statute at issue*." (*Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85, 95, emphasis added.) Thus, in every preemption case, "the pivotal question is not the nature of the state regulation, but the language and congressional intent of the *specific* federal statute." (*City of Auburn v. U.S.* (9th Cir. 1998) 154 F.3d 1025, 1031, emphasis added.) In all preemption cases there is a presumption against preemption, and the party asserting preemption has the burden to overcome that presumption and prove the requisite congressional intent. (*Wyeth v. Levine* (2009) 555 U.S. 555, 565; *Viva! Intern. Voice for Animals v. Adidas Promotional Retail Ops., Inc.* (2007) 41 Cal.4th 929, 936.) Defendants are entitled to summary adjudication on Plaintiffs' 2nd Cause of Action (Federal Preemption) because plaintiffs (the "Miners") cannot satisfy their heavy burden. The Miners cannot show that any federal law reflects the clear and manifest intent of Congress to preempt the state laws at issue here. To the contrary, to the extent federal mining law shows any congressional intent regarding state law, federal law consistently shows an intent to preserve state law, not to preempt it.

STATEMENT OF FACTS AND LEGAL BACKGROUND

Suction dredge mining entails the use of a vacuum or suction system to remove material at the bottom of a river, stream, or lake for the extraction of minerals. (*People v. Osborn* (2004) 116 Cal.App.4th 764, 768; Cal. Code Regs., tit. 14, § 228, subd. (a).) Under state law, in effect since 1995, the use of any vacuum or suction dredge equipment for instream mining is prohibited, except as authorized by permit issued by the California Department of Fish and Game (now known as the California Department of Fish and Wildlife). (Fish & G. Code, § 5653; Stats. 1994, ch. 775, § 1, amending former Fish & G. Code, 5653.) Additionally, as a result of the enactment of Fish and Game Code section 5653.1 in 2009, and its subsequent amendments in 2011 and 2012, the use of any vacuum or suction dredge equipment for instream mining purposes is prohibited throughout the State until the Department's Director certifies that (1) the Department has completed environmental review of its suction dredge regulations pursuant to the California Environmental Quality Act (CEQA, Pub. Resources Code, § 21000 et seq.); (2) the Department

promulgates new regulations, as necessary, based on that environmental review; (3) the new regulations are operative; (4) the new regulations "fully mitigate all identified significant environmental effects"; and (5) a "fee structure is in place that will fully cover all costs to the Department" related to administration of its suction dredge program. (Fish & G. Code, § 5653.1, subd. (b).) The Legislature found this moratorium necessary because "suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state." (Stats. 2009, ch. 62, § 2.)

In March 2012, the Department issued new regulations pertaining to the use of suction dredge equipment for mining. (Complaint, ¶¶ 27-31; Separate Statement of Undisputed Facts ("SS") ¶ 1.) These new regulations close certain water bodies to suction dredge mining altogether, and impose various time/place/manner restrictions on suction dredge mining in other areas. (See Cal. Code Regs., tit. 14, §§ 228, 228.5.) But the Department has not certified the five things required by section 5653.1, and thus the statutory moratorium remains in effect. (Complaint, ¶ 35; SS ¶ 2.)

In this action, the Miners contend that both the new regulations and section 5653.1 (hereinafter, "the state laws at issue") are preempted by federal law. (Complaint, ¶ 63; SS ¶ 3.)

STANDARD FOR SUMMARY ADJUDICATION

The standard for summary adjudication is as follows:

> "A party may move for summary adjudication as to one or more causes of action within an action ..., if that party contends that the cause of action has no merit." (Code Civ. Proc., § 437c, subd. (f)(1).) On a summary adjudication, a defendant "meets its 'burden of showing that a cause of action has no merit if [it] has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action....' " (*Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1057, 134 Cal.Rptr.2d 358.) If the defendant meets its initial burden, the burden shifts to the plaintiff to "set forth the specific facts showing that a triable issue of material fact exists." (Code Civ. Proc., § 437c, subd. (p)(2).)

(*Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 363.)

SUMMARY OF ARGUMENT

Because the state laws at issue here are an exercise of the state's traditional police power, a heightened presumption against preemption applies. The Miners have the burden to identify a specific federal statute or statutes that demonstrate Congress' "clear and manifest" intent to

preempt the state laws at issue. If there is any ambiguity, the Court has a duty to find against preemption.

Here, no federal statute shows such a clear and manifest intent to preempt under any of the four possible ways federal law can preempt state law; to the extent that any arguably shows such an intent, this motion still should be granted because the Court has a duty to accept a reading that disfavors preemption. In fact, however, many federal laws show an intent to preserve, not to preempt, state law, affirmatively requiring miners to comply with state law, regardless of the effect of such compliance on the ability to mine. Moreover, authoritative agency interpretations of the federal mining laws, to which state courts must defer, directly undermine the Miners' preemption claims here.

Although there are a few cases from other jurisdictions that have held that certain state or local laws that prohibit mining were preempted, those decisions have numerous fatal flaws, including their failure to apply the Supreme Court's limitations on when a court may find preemption, and their failure to address the legislative history and cases interpreting the statutes on which they based their preemption finding.

ARGUMENT

I. STANDARDS FOR ANALYZING PREEMPTION, AND THE MINERS' BURDEN

"The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." (*Louisiana Public Service Com. v. F.C.C.* (1986) 476 U.S. 355, 369.) "Courts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it." (*Viva, supra*, 41 Cal.4th at p. 936.) This is a high standard, because "in *all* pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [courts must] 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." (*Wyeth, supra,* 555 U.S. at p. 565, emphasis added, internal quotations omitted.) Thus, if two readings of a statute are plausible, courts "have a duty to accept the reading that disfavors pre-emption." (*Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 449.)

Here, the heightened presumption against preemption of laws pertaining to state police powers applies. The purpose of section 5653.1 is environmental protection, and in particular the protection of fish. (Stats. 2009, ch. 62, § 2 ["The Legislature finds that suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state"].) "Protection of the wild life of the State is peculiarly within the police power . . . ." (*Lacoste v. Dept. of Conservation* (1924) 263 U.S, 545, 551; see also *Viva, supra,* 41 Cal.4th at p. 937, fn. 4 [collecting cases].) Moreover, California has a long tradition of protecting the environment from the adverse effects of mining. (See, e.g., *Woodruff v. North Bloomfield Gravel Mining Co.* (C.C.D. Cal. 1884) 18 F. 753 [upholding injunction under California law against hydraulic mining on federal land due to its environmental effects]; *County of Sutter v. Nicols* (1908) 152 Cal. 688 [same]; Pub. Resources Code, § 3981 [originally enacted by Stats. 1893, ch. 223, p. 337 § 1, regulating hydraulic mining].)

The fact that the state laws at issue here pertain to the protection of fish and wildlife not just on state land, but also on federal land, does not alter the conclusion that they are squarely within the State's traditional police power: "[D]espite the existence of constitutional power respecting fish and wildlife on Federally owned lands [the Property Clause], Congress has, in fact, reaffirmed the basic responsibility and authority of the States to manage fish and resident wildlife on Federal lands." (43 C.F.R. § 24.3(b).) Thus, "[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands," and "States have broad trustee and police powers over wild animals within their jurisdictions." (*Kleppe v. New Mexico* (1976) 426 U.S. 529, 543, 545.) Accordingly, the heightened presumption against preemption that applies in areas of traditional state regulation applies. Thus, contrary to what some Miners suggested in opposition to the previous demurrers, the same rules and presumptions apply to claims of preemption of state regulation on federal land. (See, e.g., *Wyoming v. U.S.* (10th Cir. 2002) 279 F.3d 1214, 1230-1231 [applying presumption against preemption in case involving state protection of wildlife on federal land]; *U.S. v. Calif. State Wat. Res. Control Bd.* (9th Cir. 1982) 694 F.2d 1171, 1176 [applying presumption in case involving state regulation of federal reclamation project].)

II. TYPES OF PREEMPTION

Federal law can preempt state law in four ways: express, field, conflict, and obstacle. (*Viva*, *supra*, 41 Cal.4th at pp. 935-936.) **(1)** In express preemption, Congress can "pre-empt state law by so stating in express terms"; **(2)** in field-preemption, "congressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation"; **(3)** conflict preemption occurs when "compliance with both federal and state regulations is a physical impossibility"; and **(4)** obstacle preemption happens when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*California Federal Sav. & Loan Assn. v. Guerra* (1987) 479 U.S. 272, 280-281, citations and quotations omitted.).

III. THERE IS NO EXPRESS, FIELD, OR CONFLICT PREEMPTION HERE

In opposition to demurrers, the Miners did not argue that any of the first three types of preemption apply. Nor could they have. No federal statute expressly preempts state laws such as those at issue here. Similarly, the United States Supreme Court already has held that federal law does not occupy the field of mining regulation. (See *Calif. Coastal Com. v. Granite Rock Co.* (1980) 480 U.S. 572, 584 ["It is impossible to divine . . . an intention to pre-empt all state regulation of unpatented mining claims"].) Finally, any attempt to argue that the laws at issue are preempted by federal law because it is physically impossible to comply with both also is doomed to failure. That argument would only apply if there were a federal law that required the miners to suction dredge mine in California, at a time/place/manner prohibited by state law. There is no such federal law.

IV. THERE IS NO OBSTACLE PREEMPTION

A. The General Federal Purpose to Encourage Mining is Insufficient to Preempt State Law

One purpose of the federal mining laws certainly is to encourage mining, as the Miners have contended. That purpose is reflected, for example, in 30 U.S.C. § 21a: "[It] is the continuing policy of the Federal Government . . . to foster and encourage . . . the development of

economically sound and stable domestic mining . . . industries." But that purpose – to encourage mining – is not the same as a purpose to encourage mining in every possible location, by any method, and at all costs, so as to conflict with and preempt the state laws at issue here, which prohibit one form of mining as to time, place, or manner. Indeed, 30 U.S.C. § 21a itself recognizes not just the goal to encourage mining, but the concurrent goal "to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities." (30 U.S.C. § 21a.)

The U.S. Supreme Court, moreover, has held that such a general purpose does ***not*** "demonstrate a congressional intent to preempt all state legislation that might have an adverse impact" on achieving that purpose. (*Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609, 633-634.) Thus for example, the Court has held that although the "primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power," that general purpose is insufficient to preempt state laws that may prevent the construction of nuclear power plants whenever and wherever a proponent desires. (*Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Develop. Com.* (1983) 461 U.S. 190, 221-223.)

There should be nothing surprising about that principle. If all that were required to preempt state law were a conflict with a general congressional intent to encourage mining, every state regulation that affected mining in any way would be preempted, because all regulation inevitably places a burden on mining that would not otherwise exist. But that clearly is not the case. (See, e.g., *Granite Rock, supra,* 480 U.S. at p. 584 [Mining Act does not preempt all state environmental regulation]; Section IV.B.4, below [listing federal regulations requiring miners to comply with state law without exceptions for the burden they impose].)

Because the general purpose of the federal mining laws to encourage mining is insufficient to support the Miners' preemption claims, "it is necessary to look beyond general expressions of 'national policy' *to specific federal statutes* with which the state law is claimed to conflict." (*Commonwealth Edison, supra,* 453 U.S. at p. 634, emphasis added.) Only if those specific statutes reflect not just a general purpose to encourage mining, but a purpose to allow mining in

every possible location, by any method, and at all costs, so as to conflict with the state laws at issue here, might there be an actual conflict supporting the Miners' preemption claim. (Cf. *ibid.*)

As explained below, an examination of federal laws relating to mining reveals no such intent. Indeed, to the extent that federal law reveals any intent regarding state law, it is not an intent to preempt it, but an intent to preserve it. (Cf., *PG&E, supra,* 461 U.S. at p. 222 [noting that "continued preservation of state regulation in traditional areas" belied claim that Atomic Energy Act's purpose to encourage nuclear power preempted state laws that prohibited construction of nuclear power plants].)

B. No Federal Law Exhibits a Clear and Manifest Intent of Congress to Preempt

1. The Mining Acts of 1866 and 1872 show no intent to preempt; they show an intent to preserve state and local law

Nearly 30 years ago, the Supreme Court held that "the Mining Act of 1872 . . . expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." (*Granite Rock, supra,* 480 U.S. at p. 582.) Despite this statement – never overruled – the Miners persist in contending that the state laws at issue here are preempted because they thwart the purposes and objectives of that Act and its predecessor 1866 Act. Neither the text of the Acts, case law, nor their history, however, supports the Miners' position.

Section 1 of the Mining Act of 1872 provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase . . . , by citizens of the United States . . . subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

(Act. Cong. May 10, 1872, 17 Stat. 91, c. 152, § 1; Request for Judicial Notice [filed herewith] ("RJN") Exh. A.) The Miners have argued that any state law that restricts mining in any area of federal land conflicts with the "free and open" provision quoted above.[1] As explained below,

[1] The remaining provisions of the Act, and its predecessor 1866 Act set forth various requirements for locating a mining claim and for obtaining a patent to it (a grant from the United States to the miner of the land on which the claim is located in fee simple). (See RJN Exh A [1872 Act]; Exh. B [1866 Act].) None of these provisions even hints at an intent to preempt state law. (See, e, g., *Woodruff v. North Bloomfield Gravel Mining Co.* (C.C.D. Cal. 1884) 18 F. 753, (continued...)

however, even if that were one plausible interpretation of the "free and open clause," it is not the only one. (See *Bates, supra,* 544 U.S. at p. 449 [if statute is subject to more than one reading, court is obligated to accept reading that disfavors preemption].) Nor is it the correct interpretation.

Section 1 of the Mining Act of 1872 derives materially unchanged from section 1 of the Mining Act of 1866:

> [T]he mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States. . . , under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

(Act Cong. July 26, 1866, 14 Stat. 251, c. 262, § 1; RJN Exh. B.) Courts, including the U.S. Supreme Court, have held that the meaning of that "free and open" provision – which continues materially unchanged today in 30 U.S.C. § 22 – was to do no more than legalize (make "free and open") what previously had been trespasses on federal land, unsanctioned by Congress. (See *Jennison v. Kirk* (1878) 98 U.S. 453, 457 (1878) [Mining Act gave "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"]; *Woodruff, supra,* 18 F. at p. 774 [Mining Act merely "legalize[d] what were before trespasses upon the public lands, and [made] lawful, as between the occupants and the United States, that which before was unlawful . . . ."]; *Colvin Cattle Co., Inc. v. U.S.* (Ct. Cl. 2005) 67 Fed.Cl. 568, 571 [same].) In other words, the intent of Congress was not to ensure that every square foot of federal land could be mined, and to preempt state laws that might prohibit or interfere with certain forms of mining (as the Miners contend). Instead, the intent was only to declare that the United States – the landowner – gave its

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(...continued)
770-777.) For example, 43 U.S.C. § 661, which codifies section 6 of the 1866 Act, requires miners to obtain water for mining pursuant to state, not federal, law. (*California v. United States* (1978) 438 U.S. 645, 656; see also 16 U.S.C. § 481 [also recognizing that state law controls water rights related to mining].) Indeed, federal regulations implementing the Act require compliance with both state and federal law in order to properly locate a claim (see 43 C.F.R. § 3832.11 ["You must follow both state and Federal law"].)

permission for citizens to enter its lands and mine valuable minerals, without prosecution for trespass or theft, and thus to encourage mining.

The text of the statute and the Supreme Court's binding (and contemporaneous) construction in *Jennison* of the meaning of the "free and open" provision should be conclusive, obviating any need to resort to the legislative history. "[R]esort to legislative history is appropriate only where statutory language is ambiguous." (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc* (2005) 133 Cal.App.4th 26, 29.) Moreover, even if the statutory text and *Jennison* left some ambiguity in the meaning of the statute, that ambiguity itself would be conclusive against preemption, without resort to the legislative history. For, as indicated above, where a statute is ambiguous, courts "have a duty to accept the reading that disfavors pre-emption." (*Bates, supra,* 544 U.S. at p. 449.)

That said, the legislative history of the Mining Acts of 1866 and 1872 also shows no intent to preempt. The "free and open" provision was a response to competing legislation that would have sold all mining land in the West to the highest bidder. Compare the text of section 1 of the failed bill to section 1 of the enacted statute:

Failed bill - H.R. No. 322, § 1	**Mining Act of 1866, § 1**
"[T]he lands of the United States containing gold, silver, and other valuable minerals . . . shall be sold at public auction, to the highest bidder . . . ."	"[T]he mineral lands of the public domain . . . are hereby declared to be free and open to exploration and occupation by all citizens of the United States . . . ."

(RJN, Exh. C [H.R. No. 322 – failed proposal to sell land; RJN Exh. B [Mining Act of 1866].) Those opposing such sales – who ultimately prevailed – believed miners should not be compelled to buy the federal land they had been working on, and that their free occupancy of that land should be formally legalized. As the author of the Mining Act of 1866, as enacted, explained:

> [T]he bill does not contain a single sentence which will compel any miners . . . to purchase one foot of mineral lands. . . . *It is but one proposition, only saying that what the Government has tolerated for fifteen or seventeen years shall now be legalized by the Government.*

(RJN, Exh. D [Cong. Globe, July 23, 1866, p. 4054; remarks of Rep. Higby, author of bill and chairman of Committee on Mines and Mining, emphasis added]; SS ¶ 4; see also [H.R. No. 365 as amended, July 19, 1866 – bill that became 1866 Act; RJN Exh. E].)

In fact, to the extent that congressional debates reflect any concern about the relationship between federal and state/local law, they show an intent to preserve local authority, not to replace it with exclusively federal regulation. For example, Representative Ashley described the Act this way:

> Heretofore the United States has had no system in regard to the mineral lands. Now we propose that the people shall hold these lands *under their local rules*. This is a legalization of the system by the United States, a thing which has never been done except by permission heretofore. We ask that our occupation may be declared legal, simply retaining the right on the part of the United States to dispose ultimately of these lands to the possessors. That is the first section of the bill.

(RJN, Exh. D [Cong. Globe, July 23, 1966, p. 4053, remarks of Rep. Ashley, emphasis added]; SS ¶ 5.)

This recognition of local, not federal, control, and the Act's failure to assert federal control, was in fact of much concern to the Act's opponents:

> "[The Act] "is an outrage, a wholesale abandoning by the nation of its authority and duty respecting its vast mineral domain." (RJN, Exh. M [Cong. Globe, July 21, 1866, p. 4022, remarks of Rep. Julian]; SS ¶ 6.)
>
> "Why do you wish to confer the jurisdiction and settlement of a national question upon a State or territorial tribunal?" (RJN, Exh. D [Cong. Globe, July 23, 1866, p. 4050, remarks of Rep. Julian]; SS ¶ 7.)

In the end it was precisely the bill that these opponents characterized as an "abandoning by the nation of its authority" – the opposite of a bill to preempt state law – that was enacted. (See RJN Exh. F [Cong. Globe, July 24, 1866, p. 4102 (H.R. No. 365 signed and enrolled by House)]; Exh. G [*id.* at p. 4072 (H.R. No. 365 signed by president pro tem of Senate)]; see also Exh. B [Act Cong. July 26, 1866, 14 Stat. 251, c. 262].)

The subsequent 1872 Act provides further evidence of a lack of congressional intent to preempt state law. The 1872 Act did not alter the law as enacted in 1866 in any way material to this case (and, as noted above, left the "free and open" clause materially unchanged). "This bill does not make any important changes in the mining laws as they heretofore existed." (RJN Exh. H [Cong. Globe, Jan. 23, 1872, p. 534, remarks of Rep. Sargent (author)]; SS ¶ 8.) Moreover, the 1872 Act's changes show not only that Congress was aware that it had left authority primarily in the hands of states and localities, but that Congress knew how to assert federal supremacy when it so desired. Specifically, the debates on the 1872 Act show that Congress was concerned that state

courts had not developed sufficiently definite rules regarding the circumstances under which a miner could patent his mining claim (receive it in fee simple from the United States), and when a miner might lose his rights to patent the claim through abandonment. (See, e.g., RJN Exh. H [Cong. Globe, Jan. 23, 1872, p. 534, remarks of Rep. Sargent (author) ("The changes made by the bill are principally those which relate to the . . . application of the law so as to facilitate the miners obtaining their title")]; SS ¶ 9; RJN Exh. I [Cong. Globe, April 16, 1872, p. 2459 remarks of Sen. Stewart (explaining problem)]; SS ¶ 10.)

Any remaining belief in a congressional intent to preempt state laws such as those at issue here was put to rest by the United States Circuit Court shortly after passage of the 1872 Act. At the time, hydraulic mining pervaded California, and, like suction dredge mining, it had adverse environmental effects. (See *Woodruff, supra,* 18 F. 753, 756-763 [describing hydraulic mining and its effects].) In defending against a suit to prohibit hydraulic mining, miners invoked the Mining Acts of 1866 and 1872, arguing – just as the Miners do here – that the Mining Acts preempted any state prohibition on any form of mining. In a decision that never has been overruled, *Woodruff* analyzed the text, history, and purpose of the 1866 and 1872 Acts, concluded that Congress did not intend to give miners an absolute right to mine regardless of the environmental consequences, and issued a permanent injunction against the mining at issue. (*Woodruff, supra,* 18 F. at pp. 770-777, 808-809.) Just months later, the California Supreme Court addressed the same problem and upheld a similar injunction, holding that, "[a]ccompanying the ownership of every species of property is a corresponding duty to so use it as that it shall not abuse the rights of other recognized owners," and that "neither state ***nor federal legislatures***" could authorize such conduct. (*People v. Gold Run Ditch & Min. Co.* (1884) 66 Cal. 138, 151, emphasis added.)

Congress' response to the *Woodruff* decision is still further evidence that the Mining Acts did not preempt the laws at issue here. Congress was acutely aware of the *Woodruff* decision and its effect on mining. (See, e.g., RJN Exh. J [Cong. Rec. (House), July 18, 1892, p. 6344, Remarks of Rep. Cutting ("Some ten years ago, through a decision of the Federal Court, hydraulic mining in California was suppressed; injunctions were issued against the mines, and

one of the largest and most important industries in the State of California was paralyzed")]; SS ¶ 11; see also, e.g., RJN Exh. K [Sen. Rept. No. 1944. July 28, 1888, p. 2]; SS ¶ 12.) If Congress believed that the Mining Acts already preempted state laws that impaired or prohibited mining, it easily could have vitiated *Woodruff* by, for example, expressly declaring that the Mining Acts preempted all state laws that prohibited or interfered with mining, or declaring hydraulic mining legal as a matter of federal law. But it did not. Instead, Congress established a "Debris Commission" to which hydraulic miners would submit plans and apply for a permit, in the hope that this procedure would result in mining plans that did not cause the harms that triggered the *Woodruff* injunction. (See Act Cong. March 1, 1893, c. 183, 27 Stat. 507 [codified at 33 U.S.C. § 661 et seq.]; *Sutter v. Nicols* (1908) 152 Cal. 688, 695.)

Congress' failure to act in the face of *Woodward's* conclusion that the Mining Acts did not preempt state authority to prohibit mining, "while not conclusive, may be presumed to signify [its] legislative acquiescence" to *Woodruff's* construction of the statute. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1156, citation and quotation omitted; see also, e.g., *People v. Williams* (2001) 26 Cal.4th 779, 789 [citing legislative inaction in the face of judicial construction of statute as "indicat[ion] that the Legislature has acquiesced" in that construction].)

Significantly, after the Debris Commission was established, some miners continued to cause environmental damage even with Commission-approved mining plans. (See *Sutter, supra,* 152 Cal. at pp. 691-692.) Suits were brought to enjoin such mining. (*Ibid.*) The miners argued that "the main objects and purposes of the act are to encourage the production of gold," and therefore California had no authority to bar mining done in compliance with the act – just as the Miners do in this case. (*Id.* at pp. 694-695.) The California Supreme Court, however, disagreed, holding that purpose insufficient to show that the Debris Act preempted state rules protecting the environment. (*Id.* at p. 696; see also section IV.A, above, discussing U.S. Supreme Court holdings regarding why a general purpose to encourage mining is insufficient to preempt state laws that may impede mining.)

In short, there is nothing about the Mining Acts of 1866 and 1872 that expresses a "clear and manifest" congressional intent to preempt state laws such as those at issue here. Moreover, to the extent these Acts *might* be interpreted that way, this Court must reject that interpretation: if two readings of a statute are plausible, courts "have a duty to accept the reading that disfavors pre-emption." (*Bates, supra,* 544 U.S. at p. 449.)

2. 30 U.S.C. § 612(b) shows no intent to preempt state law

Some miners have argued the state laws at issue here are preempted by 30 U.S.C. § 612(b). That section provides in relevant part:

> Rights under any mining claim hereafter located under the mining laws of the United States shall be subject . . . to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof . . . . Any such mining claim shall also be subject . . . 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), italics in original.) Miners have argued that the last clause, which prohibits the United States from using surface resources in a way that "materially interfere[s]" with mining, shows a Congressional intent to preempt state laws that materially interfere with mining. Once more, the plain text and history of the statute belie the Miner's contentions.

The text of the statue provides only that "any use of the surface of any such mining claim *by the United States* . . . 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), italics added.) That is, the statute refers only to competition between *the United States* and miners; it says nothing about states at all. That Congress may have chosen to make miners' needs dominant when they conflict with the United States' needs for surface resources says nothing about state regulation or state protection of surface resources. Moreover, the federal court in *Woodruff*, and the California Supreme Court in *Gold Run Ditch* and *Sutter*, discussed above, long ago held that miners did not have an absolute right to mine in any manner they desire, regardless of state laws to the contrary. If Congress had intended section 612(b) to override those decisions, and to provide that miners' use of any resource trumped not only the United States' competing use, but

also state law, it easily could have done so in section 612(b). But it did not. (See *Williams, supra,* 26 Cal.4th at p. 789 [re: inferring legislative intent from legislative inaction].)

All section 612(b) did is limit miners' rights, not expand them as the Miners here suggest. (See, e.g., *U.S. v. Curtis-Nevada Mines, Inc.* (9th Cir. 1980) 611 F.2d 1277, 1285 [30 U.S.C. § 612(b) "was designed to open up the public domain to greater, more varied uses"]; *Nevada Pacific Mining Co.* (2005) 164 IBLA 384, 385 [purpose of act was to "modif[y] the 1872 Mining Law to allow for multiple use of the surface estate *by the United States*"] [italics added].)

Moreover, just as the text of the Act is devoid of any mention of state regulation, much less an intent to preempt, so too is its history. The sole intent of section 612(b), as reflected in that history, is to resolve disputes when the United States and miners compete for use of the same surface resources. (See, e.g.,RJN, Exh. L [H. Rept. No. 730, re: bill that became section 616], p. 6 [mining frequently blocks access to "merchantable *Federal* timber," to water for *federally* authorized grazing, and to "agents of the *Federal* Government"]; p. 10 [purpose of subsection (b) is to recognize "the right of the *United States* to manage and dispose of vegetative surface resources . . . and to manage other surface resources," subject to the proviso that in the case of any conflict a miner's use of surface resources reasonably incidental to mining would be the "dominant and primary use" over the *United States'* use of the same resources]; SS ¶¶ 13-14, italics added.) That kind of competition for use or occupancy of the surface is not implicated by California's suction dredge mining moratorium. That Congress chose to make mining uses dominant vis-à-vis the United States' use and occupancy of the surface says nothing about state regulation. Numerous federal laws allow for more stringent state regulation of mining claims than federal agencies are allowed, so there is nothing surprising or anomalous that in section 612(b) Congress chose to focus exclusively on limiting miners' and the United States' rights with respect to each other and to leave state regulation unaffected. (See Section IV.B.4, below.)

Case law similarly shows the lack of merit in the Miners' position. In *Granite Rock,* the U.S. Supreme Court observed, "If . . . it is the federal intent that [miners] conduct [their] mining unhindered [i.e., without material interference] by any state environmental regulation" one would expect to find the expression of this intent in agency regulations, not in the Mining Acts or

section 612(b) itself. (*Granite Rock, supra,* 480 U.S. at pp. 581-582 [referring to Forest Service Regulations found at 36 C.F.R. part 228].) The Court then concluded: "Upon examination, however, the Forest Service regulations . . . not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations [to mine on federal land] will comply with state laws." (*Id.*, at p. 583.) (Section IV.B.4, below, describes these, and other regulations.)

Once more, the statute on which the Miners rely shows no intent to preempt. And even if it did, because that intent is not clear and manifest, this Court has "a duty to accept the reading that disfavors pre-emption." (*Bates, supra,* 544 U.S. at p. 449.)

3. The Property Clause does not preempt state law or alter the preemption analysis

The Miners have raised the Property Clause (U.S. Const., Art. IV, § 3, cl. 2) as a basis for their preemption claims. That clause gives Congress power "without limitations" over federal land. (*Kleppe, supra,* 426 U.S. at p. 539, citation and quotation omitted.) The Miners have argued that such unlimited congressional power over federal land necessarily preempts application on federal land of the state laws at issue here. That argument, however, has long been foreclosed by the U.S. Supreme Court, which has expressly held that the Property Clause itself preempts no state law, and that any suggestion otherwise is "totally unfounded." (*Id.* at p. 543.) Preemption of state law on federal land, if any exists, must derive from specific statutes enacted pursuant to the Property Clause. (*Ibid.*). As discussed above, and below, the Miners cannot identify any such specific federal law.

4. Federal agency interpretation of federal mining law also shows no preemption

California courts "must defer" to the appropriate federal agency's interpretation of a federal statute, pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837. (*RCJ Med. Servs., Inc. v. Bonta* (2001) 91 Cal.App.4th 986, 1004, 1005-11; see also *Pronsolino v. Nastri* (9th Cir. 2002) 291 F.3d 1123, 1131-33.) Under *Chevron*, if "Congress has not directly addressed the precise issue, the question for a state court is whether the federal agency's answer is based on a permissible construction of the statute." (*RCJ Med. Servs., supra,*

91 Cal.App.4th at p. 1008.) If the agency's interpretation is reasonable, it is controlling. (*Id.*, at pp. 1005-06.) "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." (*Id.* at p. 1006, quoting *Chevron, supra,* 467 U.S. at p. 843, fn. 11.)

Here, numerous regulations implementing the federal mining laws, and based on the agencies' interpretation of those laws, recognize the continued vitality of state law, not an attempt to preempt. These agency interpretations are especially important, because, as the Supreme Court in *Granite Rock* held, if there is any preemption under the federal mining laws, one would expect that to be expressed in the federal mining regulations – and "with some specificity." (480 U.S. at pp. 582-584.) But the federal regulations show no intent to preempt.

For example: 43 C.F.R. § 3809.3, pertaining to surface resources and applicable to "Mining Claims Under the General Mining Laws," provides: "If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. However, ***there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart***." (Emphasis added.) In promulgating this rule, the U.S. Bureau of Land Management ("BLM") discussed federal preemption. (See Mining Claims Under the General Mining Laws; Surface Management, 65 Fed.Reg. 69998, 70008-09 (Nov. 21, 2000); SS ¶ 16.)

After reviewing the law of preemption, state jurisdiction over federal lands, and the Supreme Court's decision in *Granite Rock*, BLM noted, as discussed above, that "States may apply their laws to operations on public lands." (65 Fed. Reg., at p. 70008; SS ¶ 18.) More significantly, BLM explained that, with respect to federal mining laws and mining on federal land, "State law or regulation is preempted *only* to the extent that it specifically conflicts with Federal law" and that such "[a] conflict occurs *only* when it is impossible to comply with both Federal and State law at the same time." (*Id.*, at pp. 70008-70009, emphasis added; SS ¶ 19.)

Further emphasizing the lack of federal preemption, BLM made special note of a Montana statute. (See 65 Fed.Reg. 70009 (Nov. 21, 2000); SS ¶ 22.) Similar to the California law the

Miners challenge here, that Montana statute bans one form of mining – mining that uses cyanide leaching – that some Montana miners have argued was the only economically viable way to mine their claims. (See *Seven Up Pete Venture v. Montana* (Mont. 2005) 114 P.3d 1009, 1014, 1016.) BLM explained that this Montana statute, which bars mining in ways federal law does not, is not preempted: "In this situation, the State law or regulation will operate on public lands. BLM believes that this is consistent with FLPMA, the mining laws, and the decision in the Granite Rock case." (65 Fed.Reg. at p. 70009; SS ¶ 22.)

On the basis of BLM's interpretation of the federal mining laws, the Miners' obstacle preemption claim must be rejected. BLM's authoritative construction of federal law admits only of potential impossibility preemption, which as discussed above, does not exist with respect to the state laws at issue here. One commenter on BLM's proposed rule, in fact, made exactly the sort of obstacle preemption argument that the Miners make here, arguing that "any State provision 'that is so stringent that it effectively precludes mining or substantially interferes with mining on the public lands is preempted, because it would run afoul of the provisions of the Mining Law.'" (65 Fed.Reg. at p. 70008; SS ¶ 20.) Consistent with its conclusion that preemption exists only when it is actually impossible to comply with both federal and state law at the same time, BLM rejected that argument. (*Id.* at p. 70009; SS ¶ 21.)

Besides section 3809.3, there are a variety of similar federal mining rules that also require miners to comply with state law – with no exception even if such compliance materially impairs mining or even makes it infeasible to mine:

- 36 C.F.R. § 228.8(a)-(b) [U.S. Forest Service regulations requiring miners to comply with state air and water quality standards].
- 36 C.F.R. § 228.9 [U.S. Forest Service regulations requiring miners to comply with state laws regarding hazardous sites or conditions].
- 43 C.F.R. § 3715.5(b) [BLM regulations requiring miners to "conform to all applicable federal and state environmental standards . . . . This means getting permits and authorizations and meeting standards required by state and federal law"].

- 43 C.F.R. § 3802.3-2(a)-(c) [BLM regulations requiring miners to comply with state air, water quality, and solid waste disposal standards].

In sum, the federal mining regulations make clear that the state laws at issue here not preempted by any federal mining law.

C. That Unpatented Mining Claims Are Property Does Not Alter the Conclusion That There Is No Preemption

The Miners have emphasized that mining claims are a form of property. (Complaint, ¶ 61; SS ¶ 15.) They have argued that the fact that mining claims are a form of property somehow means that state laws such as those at issue here are preempted. This contention, like the rest, is without merit or authority.

It is true that a valid mining claim[2] is a "unique form of property." (*U.S. v. Locke* (1985) 471 U.S. 84, 104, citation and quotation omitted.) It is a "possessory interest in land" that allows a miner to use and occupy the land for mining purposes, provided he complies with state and federal rules for locating and maintaining his claim, but the United States retains fee title to the land itself. (*Id.*, at pp. 86, 104-105; see also Mining Act of 1872, §§ 3, 5 [regarding nature of right and its maintenance], codified as amended at 30 U.S.C. §§ 26, 28; 43 C.F.R. §§ 3832.11 [regulations regarding how to obtain mining claims].)

The Miners, however, never have cited any authority to support their contention that this property interest somehow shows that Congress intended to preempt the state laws at issue. Nor could they. There is no connection between possession of a property right in federal land and the preemption of state law. For example, despite the fact that perfected mining claims are "property," courts have held that federal law does not confer on miners an absolute right to mine in violation of state law and regardless of the consequences. (*Gold Run Ditch, supra,* 66 Cal. at p.

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[2] A mining claim is valid only after the miner "discovers" a "valuable mineral deposit." (*Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel, Mining & Transp. Co.* (1904) 196 U.S. 337, 348; *Hjelvik v. Babbitt* (9th Cir. 1999) 198 F.3d 1072, 1074.) The term "valuable" is a term of art, requiring the miner to demonstrate that (a) he has discovered gold deposits of such a character that "'a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine," and (b) that the gold can be extracted and marketed at a profit. (*U.S. v. Coleman* (1968) 390 U.S. 599, 600-602.)

151 ["Accompanying the ownership of every species of property is a corresponding duty to so use it as that it shall not abuse the rights of other recognized owners"; *Woodruff, supra,* 18 F. at pp. 770-777.) In fact, even the *United States'* ownership of property does not, on its own, preempt state regulation on that property: "'[T]he State is free to enforce its criminal and civil laws' on federal land." (*Granite Rock, supra,* 480 U.S. at p. 580, quoting *Kleppe, supra,* 426 U.S. at p. 543.). Only when Congress enacts specific legislation showing an unmistakable intent to preempt state law is state regulation on federally-owned land preempted. (*Id.* at pp. 580-581.) As explained above, there is no such specific federal legislation.

D. The Cases the Miners Have Relied On Are Fatally Flawed

In earlier papers the Miners have relied on four cases – none from a controlling jurisdiction – that have made a blind leap from the federal purpose to encourage mining to the unjustified conclusion that state laws that prohibit any form of mining are preempted. (See *South Dakota Min. Assn. v. Lawrence* (8th Cir. 1998) 155 F.3d 1005; *Brubaker v. Bd. of County Comrs.* (Colo. 1982) 652 P.2d 1050; *Elliott v. Oregon Internat. Min. Co.* (Or. App. 1982) 654 P.2d 663; *Ventura County v. Gulf Oil Corp.* (9th Cir. 1979) 601 F.2d 1080.) There is no compelling reason why this Court should follow those courts in jumping to the same conclusion. All of those cases reached their conclusions only by:

- Failing to apply the presumption against preemption;
- Failing to consider the text and legislative history of the Mining Acts of 1866 and 1872;
- Ignoring *Woodruff* (the only case to analyze carefully the text and history of the Mining Acts in the context of a claim that they preempt state law);
- Ignoring Congress' inaction following *Woodruff* as an indication of its agreement with *Woodruff*;
- Ignoring the California Supreme Court's decisions in *Gold Run Ditch* and *Sutter*, which are controlling here;
- Ignoring the admonitions of the U.S. and California Supreme Courts that a purpose to encourage an activity is not sufficient to support a claim of preemption; and

- Ignoring numerous federal regulations that mandate enforcement of state laws regardless of their consequences to mining operations.[3]

These cases, accordingly, are unpersuasive and there is no reason to follow them.

CONCLUSION

No federal statute, or even any combination of federal statutes, shows the "clear and manifest" intent of Congress to preempt the state laws at issue here, as the Supreme Court requires. Indeed, federal mining laws are replete with provisions preserving state authority without regard for the burden state regulation may place on mining, and federal agencies charged with administering those laws have interpreted them as preempting state law only when it is impossible to comply with state and federal law at the same time. The only cases that have concluded otherwise are not from controlling jurisdictions, and reached their conclusions only by ignoring, among other things, the principles of preemption that the Supreme Court requires all courts to follow, the Supreme Court's interpretation of the Mining Acts of 1866 and 1872, controlling decisions of the California Supreme Court regarding the ability of the state to prohibit mining, and the legislative histories of the federal statutes they considered.

For these and the other reasons discussed above, Defendants respectfully request that the Court grant Defendants' motion for summary adjudication as to Plaintiffs' 2nd Cause of Action, and enter judgment on that cause of action in favor of Defendants.

[3] *Ventura County* is irrelevant for two additional reasons. First, it concerned preemption by the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-263, not by the Mining Act of 1872, or any other statute the Miners cite. Second, *Ventura County* did not survive the Supreme Court's decision in *Granite Rock.* In the decision reversed by *Granite Rock,* the Ninth Circuit "applied the same reasoning" it applied in *Ventura County* to hold preempted a state law requiring a permit before mining an unpatented mining claim. (*Granite Rock Co. v. Cal. Coastal Com.* (9th Cir. 1985) 768 F.2d 1077, 1082.) That "same reasoning," however, was rejected by the Supreme Court, which held that the Ninth Circuit had erred. (See *Granite Rock, supra,* 480 U.S. 572.)

Similarly, *Lawrence* is of limited value for the additional reason that the defendant in the case did not even attempt to defend the statute. (*See Lawrence, supra,* 155 F.3d at p. 1008, fn. 3.)

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