IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **BRANDON LANCE RINEHART,** Defendant and Appellant.	Case No. C074662

Plumas County Superior Court, Case No. M1200659
The Honorable Ira Kaufman, Judge

RESPONDENT'S BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

"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.)

Here, appellant Brandon Lance Rinehart was convicted of violating two Fish and Game Code provisions related to suction dredge mining. He appeals not on the ground that he did not violate those provisions, but on the ground that Fish and Game Code section 5653.1 – the Legislature's current moratorium on suction dredge mining – is preempted by federal law. In his brief, appellant identifies four federal laws that he contends preempt that state law moratorium: the Property Clause of the U.S. Constitution, the Mining Act of 1872, 30 U.S.C. § 28, and 30 U.S.C. § 612(b). But, as demonstrated below:

- The U.S. Supreme Court has expressly held that the Property Clause itself does not preempt any state laws;
- The text of the Mining Act of 1872, its legislative history, and case law interpreting it all show a purpose to let miners mine for free rather than paying the United States and an intent to preserve state law, rather than preempt it;
- 30 U.S.C. § 28 and related statutes and regulations do not require miners to mine, as appellant contends; and
- 30 U.S.C. § 612(b) is directed solely at resolving conflicts between the rights to the use of surface resources as between the United States and miners, and neither its text nor its history

show any concern for state law, much less an intent to preempt state law.

Moreover, there are numerous other federal mining rules that show an intent to preserve, not preempt, state law of all kinds, and the relevant federal agencies agree there is no preemption.

Accordingly, this Court should affirm the trial court ruling and uphold appellant's conviction.

STATEMENT OF FACTS

Suction dredge mining is one method for extracting gravel from the bed of a water body, which later is processed to separate any gold that might be present. (*People v. Osborn* (2004) 116 Cal.App.4th 764, 768; see also Cal. Code Regs., tit. 14, § 228, subd. (a).) Suction dredge mining is prohibited in California except as authorized by a permit issued by the Department of Fish and Game (now called the Department of Fish and Wildlife). (Fish & G. Code, § 5653, subd. (a).) Possession of a vacuum or suction dredge also is prohibited within 100 yards of any waters that are closed to the use of such equipment. (*Id.*, § 5653, subd. (d).)

Since 2009, the Legislature has imposed a moratorium on all suction dredge mining, effectively closing all areas in the state to such mining, until, among other things, the Department issues regulations "that fully mitigate all identified significant environmental impacts" of suction dredge mining. (Fish & G. Code, § 5653.1, subd. (b); see also Appellant's Unopposed Motion to Correct the Record [dated October 23, 2013], Exhibit A [report to Legislature on status of moratorium].) 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 August 2012, the Plumas County District Attorney charged appellant with suction dredge mining without a permit and within 100 yards of a closed area, in violation of Fish and Game Code section 5653, subdivisions (a) and (d). (CT 1-2.) After a trial on stipulated facts, including appellant's stipulation that he had committed the offenses with which he was charged, appellant was convicted. (CT 68-69 [stipulated facts]; RT 42 [court ruling there was no preemption]; RT 43 [court rejecting additional offer of proof as irrelevant]; CT 377, 378 [guilty finding, judgment].) Appellant was sentenced to three years of summary probation and fined $150 (plus penalty assessments and court fees), the monetary amount being stayed pending successful completion of probation. (CT 376-78.)

STANDARD OF REVIEW, BURDEN OF PROOF, AND PRESUMPTIONS

Where, as here, the material facts are undisputed, federal preemption is a pure question of law that this Court decides de novo. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10; *People v. Cotter & Co.* (1997) 53 Cal.App.4th 1373, 1380.) "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! Intern. Voice for Animals v. Adidas Promotional Retail Ops.*, Inc. (2007) 41 Cal.4th 929, 96.) This is a high standard to satisfy, 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 v.*

Levine (2009) 555 U.S. 555, 565, emphasis added, internal quotation marks 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.) These same rules apply to claims of preemption of state mining regulation on federal land. (See, e.g., *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])

Here, the heightened presumption against preemption of laws pertaining to state police powers applies. The purpose of the section 5653.1 moratorium is environmental protection, and in particular the protection of fish: "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." (Stats. 2009, ch. 62, § 2.) "Protection of the wildlife 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, such as the suction dredge mining at issue here. (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, 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.)

Similarly, just because section 5653.1 is directed at methods used by a specific industry does not convert it from an exercise of police power to plain industrial regulation. (See, e.g., *Huron Portland Cement Co. v. Detroit* (1960) 362 U.S. 440, 442 [ordinance regulating cement plant emissions to protect air quality "clearly falls within the exercise of even the most traditional concept of . . . the police power"].)

In short, appellant "has the burden of overcoming [the] presumption [against preemption], and establishing that Congress in fact intended to invalidate" the state law at issue here. (*Jankey v. Song Koo Lee* (2012) 55 Cal.4th 1038, 1048.) As detailed below, even without any presumption against preemption, appellant cannot carry that burden here, and cannot show *any* congressional intent to preempt.

ARGUMENT

I. THE TRIAL COURT PROPERLY REJECTED APPELLANT'S PREEMPTION DEFENSE

Federal law can preempt state law in four ways. (See generally *Viva!*, *supra*, 41 Cal.4th at pp. 935-36; *Calif. Federal Sav. & Loan Assn. v. Guerra* (1987) 479 U.S. 272, 280-81.) **(1)** Congress can "pre-empt state law by so stating in express terms." (*Guerra, supra,* 479 U.S. at p. 280.) **(2)** In so-called 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." (*Id.* at pp. 280-81, citation and quotation omitted.) Finally, federal law may conflict with state law either **(3)** "because compliance with both federal and state regulations is a physical impossibility" (*id.* at p. 281), or **(4)** if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Ibid.*)

Here, appellant relies solely on the fourth type of preemption, arguing that the section 5653.1 moratorium stands as an obstacle to the accomplishment of the purposes and objectives of federal mining law. Appellant points to the Property Clause of the U.S. Constitution as well as three federal statutes: the Mining Act of 1872, 30 U.S.C. § 28, and 30 U.S.C. § 612(b).

As shown below, none of these statutes reflects the "clear and manifest" intent of Congress required before a court can hold state law preempted. The purpose of these statutes, as reflected in their text, history, and the case law interpreting them, does not conflict with section 5653.1. 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. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Com.* (1983) 461 U.S. 190, 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].)

Appellant's arguments thus fail.

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

A purpose of the federal mining laws is to encourage mining on federal land. (See, e.g., 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 competing goal "to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities."

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, 633-34.) Thus, for example, 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. (*Pacific Gas & Elec.*, *supra*, 461 U.S. at pp. 221-23.)

There should be nothing surprising about that principle. Here, for example, if all that were required to preempt state law were a conflict with the general congressional intent to encourage mining, each and 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, as prior decisions reflect, that is not the case. (See, e.g., *Calif. Coastal Com. v. Granite Rock Co.* (1987) 480 U.S. 572, 584 [Mining Act of 1872 does not preempt all state environmental regulation]; *Forbes v. Gracey* (1876) 94 U.S. 762 [approving state tax on unpatented mining claims]; 36 C.F.R. § 228.8(a)-(b) [requiring miners to comply with state air

and water quality standards, with no exception for when such compliance might impair mining].)

Because the general purpose of the federal mining laws to encourage mining is insufficient to support appellant's preemption claim, "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 law at issue here, would there be an actual conflict supporting appellant's preemption claim. (Cf. *ibid.*) As explained below, there is no conflict between the purposes of these federal statutes and section 5653.1.

B. The Property Clause Does Not Preempt State Law

Appellant suggests, in just three sentences, that the Property Clause (U.S. Const., Art. IV, § 3, cl. 2) somehow preempts all state regulation, including mining regulation, on federal land, citing to *Kleppe*, *supra*, 426 U.S. at pp. 540-41. (App.Brf., p. 15.) Appellant's claim has no basis. As to the preemptive effect of the Property Clause, *Kleppe* actually held the opposite: that "[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands," and that any suggestion that the Property Clause on its own preempts state law is "totally unfounded." (*Kleppe*, *supra*, 426 U.S. at p. 543.) *Kleppe* held that federal preemption must arise, if at all, not from the Property Clause but from a specific federal statute. (*Ibid.*) In the case of the state laws at issue there, *Kleppe* found such preemption in the federal Wild Free-Roaming Horses and Burros Act. (*Id.* at p. 531.) As discussed below, appellant cannot identify any such specific federal mining law that shows Congress' clear and manifest intent to preempt section 5653.1.

C. The Mining Act of 1872 Demonstrates No Intent to Preempt

Nearly 30 years ago, the Supreme Court stated 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 – appellant persists in contending that the state laws at issue here are preempted because they thwart the purposes and objectives of the Mining Act of 1872. Neither the text of the Act, the case law, nor its history supports appellant's 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, c. 152, 17 Stat. 91 [codified at 30 U.S.C. § 22].) That provision derives materially unchanged from section 1 of the Mining Act of 1866 (Act Cong. July 26, 1866, 14 Stat. 251, c. 262, § 1), and continues materially unchanged today in 30 U.S.C. § 22.

Appellant argues that any state law that restricts mining on any area of federal land conflicts with the "free and open" provision cited above.[1]

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[1] The remaining provisions of the Act set forth various requirements for locating a mining claim and for obtaining a patent to it (a grant in fee simple from the United States to the miner of the land on which the claim is located). (See Respondent's Request for Judicial Notice, Exh. B [1872 Act].) None of these provisions even hints at an intent to preempt state law. (See, e, g., *Woodruff, supra*, 18 F. at pp. 770-77.) Indeed, federal regulations 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"].)

However, even if appellant's argument is 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, as explained below.

Courts, including the U.S. Supreme Court, have held that the purpose of this "free and open" provision was to do no more than legalize 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 . . . ."]; *Cattle Co., Inc. v. United States* (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 certain forms of mining (such as the laws at issue here). Instead, the intent was only to declare that the United States – the landowner – gave its permission for citizens to enter federal 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 construction of the meaning of the "free and open" provision in *Jennison* 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 text and *Jennison* left some ambiguity in the meaning of the statute, that

ambiguity itself would be conclusive against preemption, even 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 this provision confirms there was no congressional 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. 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. (See Respondent's Request for Judicial Notice ("RJN"), Exhs. C [H.R. No. 322 – failed proposal to sell land], F [H.R. No. 365 as amended, July 19, 1866 – bill that was enacted with "free and open" clause], A [H.R. No. 365 as enacted as Act Cong. July 26, 1866, 14 Stat. 251, c. 262], E [Cong. Globe, July 23, 1866, p. 4049 remarks of Rep. Julian, proposing to amend H.R. No. 365 by striking section 1 (with the "free and open" clause, and adding a provision that stated, "the lands of the United States containing gold, silver, and other valuable minerals . . . shall be sold at public auction, to the highest bidder")].) As the author of the bill that was 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. E [Cong. Globe, July 23, 1866, p. 4054; remarks of Rep. Higby, author of bill and chairman of Committee on Mines and Mining, emphasis added]; see also RJN, Exh. N [1848 report by U.S. Army on mining in California, raising question of "how I could secure to the Government certain rents or fees" or whether to "permit all to work freely"].)

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. E [Cong. Globe, July 23, 1866, p. 4053, remarks of Rep. Ashley, emphasis added].)

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. D [Cong. Globe, July 21, 1866, p. 4022, remarks of Rep. Julian].)

> "Why do you wish to confer the jurisdiction and settlement of a national question upon a State or territorial tribunal?" (RJN, Exh. E [Cong. Globe, July 23, 1866, p. 4050, remarks of Rep. Julian].)

Ultimately, 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, Exhs. G [Cong. Globe, July 24, 1866, p. 4102 (H.R. No. 365 signed and enrolled by House)], H [Cong. Globe, July 24, 1866, p. 4072 (H.R. No. 365 signed and enrolled by Senate)], A [bill as enacted, 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 all state law. As relevant here, the 1872 Act did not alter the law as enacted in 1866 (and, as noted above, left the "free and open" clause materially unchanged). (See RJN, Exh. I [Cong. Globe, Jan. 23, 1872, p. 535, remarks of Rep. Sargent (author) ("This bill does not make any important changes in the mining laws as they heretofore existed")].) Moreover, the changes the 1872 Act did make 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, and when a miner might through abandonment lose his rights to seek to patent the claim. (See, e.g., RJN, Exhs. I [Cong. Globe, Jan. 23, 1872, p. 535, 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")], J [Cong. Globe, April 16, 1872, p. 2459 remarks of Sen. Stewart (explaining diverging state court opinions regarding claim abandonment)].)

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 in *Woodruff* 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. at pp. 756-63 [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 appellant does 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. (18 F. at pp. 770-77, 808-09.) 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. L [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"]; see also, e.g., RJN, Exh. K [Sen. Rept. No. 1944, July 28, 1888, p. 2].) 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 merely 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.]; *County of Sutter*, *supra*, 152 Cal. at p. 695.)

Congress' failure to act in the face of *Woodruff'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 marks 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 *County of Sutter, supra,* 152 Cal. at pp. 691-92.) 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. 694-95.) The California Supreme Court, however, held that purpose insufficient to show that the Debris Act preempted state rules protecting the environment. (*Id.* at p. 696.)

In short, there is nothing about the Mining Acts of 1866 and 1872 that expresses a "clear and manifest" congressional intent to preempt state law.[2]

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[2] In passing, appellant asserts that section 5653.1 is preempted because the federal government granted appellant a property right. (App.Brf., pp. 12, 14.) It is true a valid federal mining claim is a "unique form of property" that provides a "possessory interest in land." (*U.S. v. Locke* (1985) 471 U.S. 84, 86, 104-05; see *Hjelvik v. Babbitt* (9th Cir. 1999) 198 F.3d 1072, 1074 [explaining the requirement that a "valuable mineral deposit" must be discovered to show a mining claim is valid].) Appellant provides no legal authority that his potential possession of a property right is relevant to preemption, however, thereby waiving the argument. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) In any event, this makes no sense because state police power almost always affects

(continued...)

There is nothing that ensures that every acre of federal land be mined, by every possible method, regardless of the consequences, and regardless of state interests in protecting natural resources. Moreover, to the extent that the 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.)

D. 30 U.S.C. § 28 Does Not Preempt State Law

Appellant contends that 30 U.S.C. § 28 creates a federal "duty" to mine, with which the state laws at issue conflict. (App.Brf., p. 6.) Both the text and history of that federal statute show appellant is wrong.

A full reading of the text of 30 U.S.C. § 28 – rather than just the fragment appellant quotes out of context – shows that the section simply sets forth the requirements for miners if they want to establish and maintain a mining claim, not a federal "duty" to mine. Second, 30 U.S.C. § 28 has been supplemented by statute to allow a miner to pay a fee instead of actually performing any labor. (See 30 U.S.C. § 28f(a) ["Such claim maintenance fee shall be in lieu of the assessment work requirement contained in the Mining Law of 1872 (30 U.S.C. 28 to 28e)"]; see also 43 C.F.R. § 3834.11(a) [same].) Third, 30 U.S.C. § 28 only says that miners must expend "$100 worth of labor." This is not a requirement to mine; it can be satisfied not only by payment of a fee (as noted above), but also by any work relating the claim, including, for example, improving roads to the

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(...continued)
property rights. Having a property right does not eliminate the application of state law. (E.g., *Gold Run Ditch*, *supra*, 66 Cal. at p. 151; *Woodruff*, *supra*, 18 F. at pp. 770-77; see also *Granite Rock*, *supra*, 480 U.S. at p. 580 ["'the State is free to enforce its criminal and civil laws' on federal land" despite being owned by the federal government (quoting *Kleppe*, *supra*, 426 U.S. at p. 543].)

mine. (See, e.g., *U.S. v. 9,947.71 Acres of Land* (D. Nev. 1963) 220 F.Supp. 328, 332; see also 43 C.F.R. § 3836.12 [listing examples of kinds of assessment work].) Thus, there is no duty to mine, no conflict between the state laws at issue here and federal law, and no "clear and manifest" intent to preempt state law.

The history of 30 U.S.C. § 28 is consistent with this conclusion. The section derives from sections 2 and 3 of the Mining Act of 1866 (RJN, Exh. A), which set forth similar requirements for establishing a claim, including the expenditure of labor. Congress indicated that the Act created no federal duty to mine, and gave the United States no authority "to . . . oblige the miners to develop the mineral . . . ." (RJN, Exh. D [Cong. Globe, July 21, 1866, p. 4021, remarks of Reps. Kasson and Julian].) The 1872 Act, which did "not make any important changes in the mining laws" (RJN, Exh. I [Cong. Globe, Jan. 23, 1872, p. 534, remarks of Rep. Sargent (author)]), merely revised these requirements, adding the one on which appellant focuses. Its purpose was not to create a duty to mine, but to "make the miners show their good faith," and "to prevent the location of mining claims for speculative purposes," not to create a federal duty to mine. (RJN, Exh. J [Cong. Globe, April 16, 1872, p. 2459, remarks of Sen. Stewart]; *Exxon Mobil Corp. v. Norton* (10th Cir. 2003) 346 F.3d 1244, 1255.)

E. Neither the Text Nor History of 30 U.S.C. § 612(b) Shows an Intent to Preempt State Law

Appellant focuses much attention on 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.) Appellant argues 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.

The plain text of this statute belies appellant's argument. It 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.) The statute refers only to competition over the physical *use* of surface resources – not their protection or regulation. And, more importantly, it refers only to competition between *the United States* and miners. It says nothing about states at all.

This limited intent of Congress is confirmed by the legislative history. The legislative history is devoid of any mention or concern about state regulation. (See, e.g., RJN, Exh. M [H. Rept. 730, re: bill that became section 612(b)].) As to the provision's purpose, all 30 U.S.C. § 612(b) did was limit miners' rights, not expand them as appellant suggests. (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 I.B.L.A. 384, 385 [purpose of act was to modify "the 1872 Mining Law to provide for multiple use of the surface estate *by the United States*" (emphasis added)]; see also RJN, Exh. M [H. Rept. 730], at pp. 3 [re: competing federal and mining uses], 6 [mining frequently blocks access to "merchantable federal

timber," to water for federally authorized grazing, and to "agents of the Federal Government"], 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].) The provision's purpose was to allow and define how the federal government would use the surface.

That Congress may have chosen to make miners' needs dominant when they conflict with the federal government's needs for surface resources says nothing about state regulation or state protection of surface resources. Given the general background principle that a "State is free to enforce its criminal and civil laws on [federal] lands" (*Kleppe*, *supra*, 426 U.S. at p. 543), it would have taken "clear and manifest" action to displace that police power by way of preemption. Moreover, the federal court in *Woodruff*, and the California Supreme Court in *Gold Run Ditch* and *County of 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 30 U.S.C. § 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 all state environmental regulation, it could have done so explicitly in that section. But Congress did not.

In his brief, appellant asserts that "under every mining preemption case of which Appellant is aware, all he must show is 'material interference' within the meaning of 30 U.S.C. § 612(b)." (App.Brf., p. 29.) Appellant, however, cites no cases to support this statement, nor could he, because to respondent's knowledge there are *no* cases that have ever held that 30 U.S.C. § 612(b) preempts state laws such as those at issue here.

Appellant does argue that *Granite Rock* stands for this proposition (App.Brf., at pp. 23-25, 30), but that Court's statement that "one may *hypothesize* a state environmental regulation so severe that a particular land use would become commercially impracticable" (480 U.S. at p. 587, emphasis added) is clearly dictum since the case involved a facial challenge where the miner refused to even apply for a permit (*id.*, at p. 594). In fact, in the *Granite Rock* Court seemed to imply the opposite of what appellant contends. In addressing the issue of preemption by federal mining laws, the Court introduced the issue by stating that the Mining Act of 1872 did not express any legislative intent as to environmental regulation. (480 U.S. at p. 582.) The Court then explicitly mentioned the 1955 enactment of 30 U.S.C. § 612(b). (*Ibid.*) *But the Court did not analyze 30 U.S.C. § 612(b).* (*Ibid.*) Instead, it skipped straight to looking at the federal regulations promulgated to implement that section: "If . . . it is the federal intent that [miners] conduct [their] mining unhindered by any state environmental regulation, one would expect to find the expression of this intent in these Forest Service regulations." (*Ibid.*) The Court went on to conclude, however, that "[u]pon 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.)

Simply put, 30 U.S.C. § 612(b) does not show Congress' "clear and manifest" intention to preempt any state laws.

F. Numerous Other Federal Mining Laws Show an Intent to Preserve State Law, Not to Preempt It

California courts must defer to the appropriate federal agency's interpretation of a federal statute under *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, 1005-11; emphasis added; 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 – the court "must defer to it." (*Id.*, at pp. 1005-06; *Barber v. Thomas* (2010) 560 U.S. 474, 130 S.Ct. 2499, 2508 [citing *Chevron*, *supra*, at 467 U.S. at pp. 843-44].)

Here, such agency interpretations are crucial, 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. 582-84.)

But the contrary is true. Numerous federal regulations implementing the Mining Acts and other federal mining laws recognize the continued vitality of state law, not an attempt to preempt.

43 C.F.R. § 3809.3 is a perfect example of this. This provision is applicable to "Mining Claims Under the General Mining Laws," and 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 the issue of preemption. (See 65 Fed.Reg. 69998, 70008-09 (Nov. 21, 2000).) BLM did this because of *Granite Rock*'s suggestion that agencies address preemption in their regulations. (64 Fed.Reg. 6422, 6427 (Feb. 9, 1999) [proposed rule].) BLM explained that "no conflict exists if the State regulation requires a higher level of environmental protection" and that "States may apply their laws to

operations on public lands." (65 Fed.Reg., at p. 70008.) BLM further explained that "the 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. 70008-09, emphasis added.) Thus, there is no "obstacle" preemption, as appellant argues here. This has been BLM's view for more than thirty years. (See 64 Fed.Reg., at p. 6427, quoting preamble to 1980 regulations.) In addressing preemption, BLM made special note of a Montana initiative statute prohibiting cyanide leaching-based operations. (65 Fed.Reg., at p. 70009.) Similar to what appellant contends here, that Montana statute banned one form of mining, which miners had argued was the only economical way to mine. (See *Seven Up Pete Venture v. Montana* (Mont. 2005) 114 P.3d 1009, 1014, 1016.) BLM found this Montana statute to "provide a higher standard of protection," and that there was no preemption: "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.) Thus, it is BLM's interpretation of federal law that it does not matter if a state law "materially interferes" with mining, as appellant argues here. States can provide a higher level of environmental protection, as Montana does and as California does with section 5653.1. This Court "must defer" to this federal agency interpretation.

A variety of other federal mining rules require miners to comply with state law – with no exceptions, even if such compliance "materially interferes" with mining:

- 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 hazardous waste laws];
- 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, as in *Granite Rock*, the federal mining regulations make clear that section 5653.1 is not preempted by any federal mining law.

G. The Cases on Which Appellant Relies Are Not Controlling and Are Incorrectly Decided

Appellant cites 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 that state prohibitions of a kind of mining are preempted.[3] All of those cases reached their conclusions only by:

- Failing to apply the presumption against preemption, including the duty to choose a reasonable interpretation of the statute that avoids preemption;

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[3] *Lawrence* is of limited persuasive value because the defendant in the case did not even attempt to defend the statute. (*See Lawrence, supra,* 155 F.3d at p. 1008, fn. 3.)

- 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 *County of Sutter v. Nicols*, which are controlling here;
- Ignoring the admonitions of the U.S. Supreme Court that a purpose to encourage an activity is not on its own sufficient to support a claim of preemption;
- Ignoring numerous federal regulations that mandate enforcement of state laws regardless of their consequences to mining operations; and
- Ignoring the federal agencies' interpretation that the federal mining laws do not preempt state laws.

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 appellant cites. 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. Calif. 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.)

This Court should ignore these cases, and examine the text and history of federal statutes as interpreted by the federal agencies (as discussed above).

Appellant also suggests that *Granite Rock* prohibited state land use restrictions on federal mining claims, and that section 5653.1 is such a land use statute. (App.Brf., pp. 27-28.) This is wrong on both counts. The Supreme Court's comments about land use statutes do not even rise to the level of dicta: "For purposes of this discussion *and without deciding this issue*, we may *assume* that the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands." (480 U.S. at p. 585, emphasis added.) No such statute was at issue in *Granite Rock*. Moreover, neither below nor in his opening brief did appellant cite to these two statutes referred to in *Granite Rock*. In any event, section 5653.1 is not a land use statute. As the Legislature explained, it was enacted to prevent "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.) Like any environmental statute, section 5653.1 prohibits certain kinds of activities because of their effects. *Granite Rock* does not help appellant.

H. Appellant's Arguments About Reasonableness are Misplaced

Appellant devotes two paragraphs to asserting that section 5653.1 is "per se unreasonable" because it is a "statewide ban," that it "discriminates against suction dredge mining," and that there are "less restrictive alternative[s]." (App.Brf., pp. 26-27.) But appellant has waived these arguments because he did not make them in the trial court, and he does not explain or cite authority as to how these assertions, even if true, support any defense to his conviction. (See *Stanley*, *supra*, 10 Cal.4th at p. 793 [issues not supported by argument and citation to authority waived]; *Baxter*

Healthcare Corp. v. Denton (2004) 120 Cal.App.4th 333, 371 fn. 8 [points not made in trial court waived on appeal].) In addition, appellant provides no factual foundation for these arguments, especially that there are less restrictive alternatives. (See *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 251 ["preemption is an affirmative defense as to which defendants have the burden of proof"].)

Moreover, these assertions are irrelevant to appellant's theory that any state law that "materially interferes" with mining is preempted. Either section 5653.1 "materially interferes" with mining, or it does not. It does not matter that there might be different ways to protect the environment from the damage caused by suction dredge mining.

In the end, appellant's arguments about "discrimination" and "less restrictive means" and "rational basis" appear to be nothing more than a thinly veiled attempt to make an equal protection argument for the first time on appeal, or to import the standards applicable to equal protection claims into the wholly distinct realm of preemption, where they have no place.

As an equal protection argument, appellant's contentions have no merit, even if they were not waived. Under equal protection analysis, suction dredge mining is not a protected classification. Accordingly, provided there is any "conceivable" rational basis for the state laws at issue, these defenses necessarily fail. (*F.C.C. v. Beach Comm., Inc.* (1993) 508 U.S. 307, 313.) There is nothing *per se* irrational about placing a moratorium on an activity until a new regulatory scheme to adequately protect the environment can be worked out. (See, e.g., *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 335 [in rejecting takings claim for temporary building moratorium while agency developed new regulations]; *First English Evangelical Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 321 [moratoria while governments revise regulatory schemes are

"normal"].) Here, the Legislature found such a rational purpose in the need to protect the environment. (See Stats. 2009, ch. 62, § 2.) There is nothing irrational about insisting on full mitigation of environmental effects before suction dredging can occur, or that the permit fees cover the costs of the program. That conceivable basis is all that is required to survive equal protection scrutiny. (See *Beach Comm.*, *supra*, 508 U.S. at p. 315.) Under the rational basis test, there is no "less restrictive methods" requirement. (See *ibid.*) And that section 5653.1 only addresses suction dredge mining is also irrelevant (See *Ry. Express Agency v. New York* (1949) 336 U.S. 106, 110 [legislature need not treat all problems identically]; *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 482 [Legislature may address problems piecemeal].) Appellant's claims about unreasonableness are both misplaced and wrong.

I. Section 5653.1 Is Only a Temporary Moratorium on Mining

In *Granite Rock*, the Supreme Court held that nothing in federal law, including the Mining Act of 1872, *per se* preempts a state law prohibiting mining without a permit. (480 U.S. at pp. 582, 593.) Here, all that is being enforced against appellant is the same sort of prohibition on mining without a permit. (CT 1-2.) True, in this case there is a temporary moratorium on suction dredge mining until, among other things, the Department devises regulations for its permitting program. (See Appellant's Unopposed Motion to Correct the Record, Exhibit A [report to Legislature recommending possible approaches].) But that is a distinction without a difference. In other contexts, the Supreme Court has held that such temporary delays on a person's ability to engage in a particular activity – whether during the time needed to process an application for a permit, or during the time needed for an agency to develop permitting regulations – are just a normal part of government. (See, e.g., *Tahoe-Sierra, supra,* 535 U.S. at p. 335 [in rejecting takings claim for temporary building

moratorium while agency developed new regulations].) These kinds of regulatory delays have "long been considered permissible exercises of police power." (*Ibid.*) If reasonable environmental regulations and a requirement to obtain a state permit before mining are both *not* preempted, as *Granite Rock* held, certainly the moratorium on mining imposed for the same reasons by section 5653.1 is similarly not preempted.

II. APPELLANT'S OFFER OF PROOF IS IRRELEVANT

Appellant argues at length that he should have been entitled to present evidence to show that the suction dredge mining moratorium amounted to a prohibition of all mining. (App.Brf., at pp. 28-31.) The trial court did not allow any of this evidence, finding it irrelevant. (RT 43.) As explained above, there is no basis for concluding that federal mining law preempts any state environmental law, whether it is a prohibition or a moratorium or whether it was just applied to suction dredge mining or to all mining. Federal mining law simply does not have that purpose to preempt state law. If the Court disagrees, and finds that federal mining law can create preemption if state law "materially interferes" with the use of a mining claim, as appellant argues, then a remand would be appropriate to present appellant's evidence and any competing evidence.

CONCLUSION

For all of the reasons stated above, respondent respectfully requests that the judgment of the trial court be affirmed.

Dated: November 20, 2013 Respectfully submitted,

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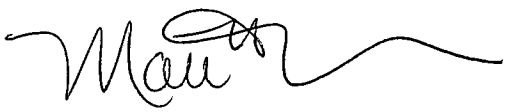

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 8,953 words.

Dated: November 20, 2013

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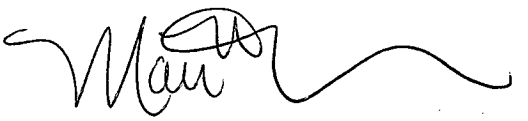

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Brandon Lance Rinehart***

California Court of Appeal, Third Appellate District No.: **C074662**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 21, 2013, I served the attached **Respondent's Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 21, 2013, at Oakland, California.

Cheryl Branin
Declarant

Cheryl Branin
Signature

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