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IN THE SUPERIOR COURT OF CALIFORNIA

IN THE COUNTY SISKIYOU

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

DYTON WILLIAM GILLILAND
DOB: 10/31/1960,

Defendant.

Case No. MCYKCRM 15-1124

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS TO SUPPRESS AND DISMISS EVIDENCE

Hearing Date: November 5, 2015
Time: 8:30 a.m.
Dept.: 4

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TABLE OF AUTHORITIES

Cases

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Constitution and Federal Statutes

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California Fish and Game Code

California Public Resources Code

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California Code of Regulations

California Penal Code

California Evidence Code

Other Authority

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Preliminary Statement

This case arises out of the State of California's abusive and unlawful scheme to ban suction dredging on federal mining claims. Defendant is charged for not having a permit the State categorically refuses to issue. While the State might take such extraordinary action with respect to private property, or its own land, where, as here, Defendant was operating on a federally-registered mining claim on federal land, the State cannot simply prohibit the mining. Its permitting power extends only to imposing such environmental restrictions as are consistent with the detailed Congressional design for mineral development of federal land.

A Coordination Judge assigned to resolve several challenges to the ban has concluded, *as has every other reported case to examine whether states may prohibit mining on federal claims,* that "the State's extraordinary scheme of requiring permits and then refusing to issue them whether and/or being unable to issue permits for years, stands 'as an obstacle to the full purposes and objectives of Congress' under *Granite Rock* and a *de facto* ban". (Buchal Decl. Ex. 1, at 21; *see also id.* at 16 ("this is fundamentally unfair").

The Department of Fish and Wildlife has not only refused to acquiesce in the Coordination Judge's decision, but has continued to harass suction dredge miners in Siskiyou County. Defendant attempted to bring a civil action before this Court to restrain such harassment, and the Department then obtained an extraordinary and unlawful order barring him from filing suit in this County. (Buchal Decl. ¶¶ 5-6). The only available means for Defendant to timely secure judicial review of the Department's extraordinary conduct is in the criminal proceedings before this Court. Defendant simply requests this Court to declare what every court to consider the issue has recognized: that the People may not punish the hardworking miners of Siskiyou County for want of a permit they categorically and unconstitutionally refuse to issue.

Defendant offers two means for the Court to do so. First, because the Constitution does not authorize the State to both require a permit for suction dredge mining, and refuse categorically to issue it, the State's enforcement efforts against hard-working dredgers throughout Siskiyou County

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are themselves an unconstitutional scheme, and the evidence collected pursuant to this unconstitutional scheme must be suppressed pursuant to Penal Code § 1538.5. Second, the criminal provisions under which Defendant is charged, §§ 5653 and/or 5653.1 of the Fish and Wildlife Code, and certain 2012 regulations issued thereunder, are themselves unconstitutional, making the Misdemeanor Complaint subject to demurrer under Penal Code § 1004.

Statement of Facts

A. The Permit Requirement and the Law Forbidding Issuance of Permits.

The charge here is that Defendant violated § 5653(b) of the Fish and Game Code because he:

> ". . . did operate vacuum and suction dredging equipment other than that authorized by a permit issued by the California Department of Fish and Game, and conduct a vacuum and suction dredging operation in any waters and area and at any time that was not authorized by a permit, and did conduct a vacuum and suction dredging operation without a permit."

(Misdemeanor Complaint.) What the People do not explain is that Defendant had no way to get a permit, because the Fish and Game Code both requires the permit (§ 5653) and forbids the issuing agency, the Department of Fish and Wildlife ("Department"), from issuing any permits (§ 5653.1).

Section 5653.1 was passed in 2009, upsetting a longstanding permitting system that had operated since 1961, when § 5653 was passed. Under the longstanding system, § 5653.9 requires regulations, pursuant to which the Department generally limited suction dredging to times of the year when fish eggs would not be present in the gravel, and § 5653(d) provides that it is unlawful to possess a suction dredge within 100 yards of waters that are closed.

The current version of these regulations is set forth at 14 Cal. Code Regs. § 228 *et seq.*, classifying the sensitivity of various areas and limiting mining periods. The Department formally found that the issuance of suction dredging permits under these regulations "will not be deleterious

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to fish".[1] Notwithstanding this conclusion, the Legislature adopted a carefully-crafted scheme to prohibit the mining. The subtleties of the scheme are important to understanding why it cannot pass muster as a mere reasonable environmental regulation consistent with federal law.

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

California law has an extraordinarily low threshold for "significance," where "significant effect on the environment" includes any "*potentially* substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance". 14 Cal. Code Regs. § 15232 (emphasis added). The Department stretched to find "potentially significant" impacts involving birds, noise, possible disturbance of unknown historical or cultural artifacts, and water quality. (Report at 3 n.4.[2])

To the extent it became, evidence at trial would demonstrate that suction dredge miners working underwater have no greater impact on birds, noise, and artifacts than campers or anyone engaged in any motorized activity. Defendant could also demonstrate that water quality impacts are evanescent, and a net benefit, because the miners enhance fish habitat and remove toxic metals that would otherwise continue to leach downstream.

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[1]Buchal Declaration Exhibit 5: California Department of Fish and Wildlife Report to the Legislature Regarding Instream Suction Dredge Mining Under the Fish and Game Code ("Report"), April 1, 2013, at 3.

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

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While such evidence might be relevant for assessing the reasonableness of particular permit-based restrictions on mining, no such permit conditions are before the Court. Rather, the question is whether the categorical refusal under § 5653.1 to provide *any* permit conditions—or any permits—operates as a prohibition preempted by federal law.

The legislative history of § 5653.1 demonstrates that its unique requirement of "full mitigation" of "all identified significant environmental impacts" *was designed as a prohibition carefully crafted to stop permit issuance*. The Legislature derailed the ordinary course of the CEQA and regulatory process that had only required findings, among other things, that permit issuance "not be deleterious to fish".

At the time the Legislature amended § 5653.1 to add the "fully mitigated" language to the initial statute (the amendment effective July 26, 2011), the Department had already released its February 2011 Draft Subsequent Environmental Impact Review (DSEIR) listing the assertedly-"significant and unavoidable impacts" of suction dredge mining. (*See* Buchal Decl. Ex. 5: Report at 4 n.5 & 3 n.4 (final study showed "impacts *remained* significant;" emphasis added); *see also* Buchal Decl. Ex. 6 (excerpts from DSEIR)). The "fully mitigate all identified significant environmental impacts" language was a response to specific findings in the DSEIR, with the purpose and effect of ensuring that "full mitigation" was both factually and legally impossible.

The concept of "full mitigation" had heretofore been employed in the context of compensation for "actual damages to fish, plant, bird, or animal life and habitat". *E.g.,* Fish and Game Code § 10211(a)(2). "Fully mitigating" potential risks of vanishingly small probability is an entirely different matter. Anyone digging anywhere in California might strike an artifact, but it appears the intention was to insist that "fully mitigate" meant not to dig at all, existing protections for artifacts being regarded as insufficient.[3] Anyone running a motor in California may cause noise, but it appears the intent was to "fully mitigate" noise in the wilderness by not allowing any, existing

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

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noise regulations being regarded as insufficient. Anyone hiking anywhere in California might disturb a bird, causing it to fly away from human contact, but it appears the intent was to "fully mitigate" the risk by singling out miners, existing bird protection regimes being regarded as insufficient. (*See also* Buchal Decl. Ex. 6, at ES-14 ("no feasible mitigation is available").)

The statute was designed to ensure not only that the Department could not make the "fully mitigated" finding as a factual matter, but also that it was *legally impossible to do so.* The Legislature responded to the Department's repeated statements in the DSEIR (Buchal Decl. Ex. 6, at ES-12 to -14) that it lacked jurisdictional authority to fully mitigate by *demanding that the Department exercise authority the Legislature knew the Department did not have.*

The Department reiterated this conclusion in its Report to the Legislature: "the FSEIR includes a detailed discussion in Section 4.1, at pages 4-8 through 4-15, of the Department's substantive authority to address significant environmental effects in the regulations it is required to adopt to implement Section 5653. The latter portion of that discussion addresses the full mitigation condition specifically, indicating the "*full mitigation* certification contemplated by Section 5653.1 does not provide the Department with the substantive legal authority necessary to address significant environmental effects beyond the reach of the Department's existing authority." (*Id.*, § 4.1, p. 4-15 (italics in original).) The CEQA Findings adopted by the Department in March 2012 also address AB 120 in a number of places, reiterating the same point." (*See* Buchal Decl. Ex. 5, Report at 11.)

As general matter, under CEQA, "individual projects may be approved in spite of one or more significant effects thereof". Public Resources Code § 21002. There are a myriad of regulatory systems in California that operate to issue permits day in and day out, because agencies can generally exercise administrative discretion to proceed with projects notwithstanding so-called "significant environmental impacts". The requirement for suction dredging permits to "fully mitigate" is unique, and further demonstrates that the State did not seek neutrally-prescribed environmental standards, but to obstruct federal policy. The statute exempts all other "suction

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dredging conducted for regular maintenance of energy or water supply management infrastructure, flood control, or navigational purposes". Fish & Game Code § 5653.1(d).

B. Facts Concerning Defendant.

The Declaration of Defendant establishes that he has been attempting to operate a suction dredge under license upon a federally-registered mining claim. Defendant is in the business of mining, and only during part of the year do local conditions and regulatory constraints make it possible to suction dredge mine. As set forth in the Declaration of Defendant, he made every reasonable effort to educate the State as to the unlawfulness of its conduct, attempted to bring a civil action in this Court to stop the harassment, and ultimately the civil justice system failed by declaring that the seizure of his equipment, arrests and confinement, actual and threatened, did not constitute irreparable harm sufficient to support an injunction against criminal prosecution. Thus the matter comes to this Court.

Argument

I. CALIFORNIA'S SCHEME OF PUNISHING MINERS FOR WANT OF A PERMIT THAT THE STATE REFUSES TO ISSUE IS UNCONSTITUTIONAL.

Unlike nearly any other economic activity, mining can only occur at the location where the minerals are found, and one cannot explore for or develop mineral deposits without disturbing the natural environment in ways now commonly regarded as significant. Nonetheless, Congress has struck the balance between protecting the natural environment and extracting the minerals in favor of extracting the minerals—subject to reasonable environmental protection that do not "materially interfere" with the mining. Congress, legislating with plenary authority under the Property Clause, never intended to allow the states to strike an entirely different policy balance effectively prohibiting mining on federal lands, and destroying mining industries deemed vital to the Nation's interests.

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A. The Law of Federal Supremacy.

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Congress may preempt state law under the Supremacy Clause of the United States "by enacting an express preemption provision, or courts may infer preemption under one or more of three implied preemption doctrines: conflict, obstacle, or field preemption". *Brown v. Mortensen*, 51 Cal.4th 1052, 1059 (2011). This case concerns whether the State's refusal to issue permits "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress". *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (quoting *Hines v. Davidowitz*, 312 U.S. 132, 142-43 (1941)). An "obstacle" need not be an insurmountable obstacle, and the "accomplishment of the full purposes and objectives" of federal law is not satisfied by partial accomplishment thereof.

In the federal preemption context, "each case turns on the peculiarities and special features of the federal regulatory scheme in question," *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). In *Granite Rock*, the State of California sought and obtained limited regulatory authority over operations on federal mining claims based on its representation that it would not do what it now seeks to do: prohibit the mining. *Granite Rock*, 480 U.S. at 580; *see also id.* at 580. Following *Granite Rock,* the United States Court of Appeals for the Eighth Circuit in *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), construed precisely the same federal regulatory scheme at issue here to find that a ban on permits was preempted under federal law. *Lawrence County* and other cases discussed below provide the most pertinent guidance for resolving this action. And they underscore that critical to analysis of preemption here is that the federal statutes involve Congressional action under Article IV, § 3 of the U.S. Constitution: the Property Clause.

As the U.S. Supreme Court has explained, under the Property Clause, Congress enjoys "complete power" over federal public lands. *Kleppe v. New Mexico*, 426 U.S. 529, 540-41 (1976)

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(overturning State attempts to regulate wildlife on federal land). State powers over federal lands cannot "extend to any matter that is not consistent with full power in the United States to protect its lands, control their use and to prescribe in what manner others may acquire right in them". *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917).

The People may suggest that there should be a presumption against federal preemption. As the California Supreme Court explained in *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal.4th 929, 938 (2007), "[t]here is a presumption against federal preemption *in those areas traditionally regulated by the states . . .*" (*Id.* at 938; emphasis added (*citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Suggestions of some general presumption against preemption that applies in "all cases" are unsupported *dicta* amply refuted by a legion of presumption cases involving plenary powers of Congress *that make no reference to the alleged presumption whatsoever*.

Most obviously, *Granite Rock* itself makes no reference to any such presumption or deference to historic police powers in this context. Other analogous cases include: *Arizona v. United States*, 132 S. Ct. 2492 (2012) (no mention of presumption in immigration context); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (no mention in national energy policy context); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983) (same); *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (Property Clause); *Sperry v. Florida*, 373 U.S. 379 (patents). This is no accident, for the U.S. Supreme Court has explained that any presumption against preemption is "not triggered when the State regulates in an area where there has been a history of significant federal presence". *United States v. Locke*, 529 U.S. 89, 108 (2000); *see also Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 n.3 (6th Cir. 2005) (presumption "disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time"), *aff'd*, 550 U.S. 1 (2007).

It is also important to understand that federal preemption does not depend upon any express Congressional recognition of a preemption issue at all. As the U.S. Supreme Court has explained,

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"[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply . . .". *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000). The law of preemption in the mining context is precisely such well-settled law, a fact that fully accounts for and again distinguishes every preemption case upon which the People rely. Put another way, the question of development of mineral resources on federal land is a field in which the federal interest is sufficiently dominant that courts will easily infer that states may not frustrate that interest. *Cf. Rice*, 331 U.S. at 330.

B. Federal Mining Law.

1. The 1866 and 1872 Mining Laws.

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

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

Free and open exploration for underwater gold placer deposits—where most of the commercially-significant deposits remain in Siskiyou County—requires use of a suction dredge as the gold has the tendency to sink down through the bed materials until it reaches some impervious layer. A rule that categorically closes federal lands to the tools needed to explore for and develop valuable deposits is prohibitory and in obvious conflict with 30 U.S.C. § 22.

As the Supreme Court of Colorado explained in *Brubaker v. Board of County Commissioners*, 652 F.2d 1050 (Colo. 1982), when a county sought to prohibit core drilling to determine the validity of a claim,

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

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> the lands are "free and open to exploration and purchase," 30 U.S.C. § 22, and so would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" under the mining laws.

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

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

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

The conduct here charged as criminal concerns development of federally-registered mining claims which are in good standing with the federal government. (Declaration of Defendant; *see also* McCracken Decl. Exs. 4-6 (federal registration of the claims involved.)

Congress has required that the property rights represented by these mining claims be exercised for mineral development, initially concerning itself with the "amount of work necessary to hold possession of a mining claim". 30 U.S.C. § 28. Section 28 confirms that the overriding purpose of Congress, expressed throughout the mining laws, is to get the minerals out of the ground. A state law that turns mining claims into areas where only gold-panning might be allowed obviously frustrates the primary objective of Congress.

Put another way, even if mining is not required under the statute, the case remains akin to *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25 (1996), where a federal statute authorized, but did not require, banks to sell insurance. A state statute forbidding such sales was preempted under "obstacle" preemption because there was no indication "the federal purpose is to grant the bank only a very limited permission, that is, permission to sell insurance to the extent that state law also

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grants permission to do so." *Id.* at 31. To the contrary, "normally Congress would not want the States to forbid, or to impair significantly, the exercise of a power Congress explicitly granted". *Id.* at 33.

As the Oregon Court of Appeals remarked in striking down restrictions akin to those in the Lawrence case, "Grant County cannot prohibit conduct which Congress has specifically authorized. That is the meaning of the Supremacy Clause." *Elliott v. Oregon Int'l Mining Co.*, 654 P.2d 663, 668 (Or. Ct. App. 1982). As explained below, Congress did provide statutory mechanisms for closing areas to mining, involving consultation with states; inferring state power to close the areas directly conflicts with these statutes as well.

Congress also expressly considered the adverse environmental impacts of mining, then understood to arise from ditches and canals moving water for mining, and specifically declared in 1866 (14 Stat. 253) that if a miner "injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage". 30 U.S.C. § 51. We anticipate the People may cite early cases concerning state actions concerning hydraulic mining in California, but all of this action either did not involve any direct regulation of operations on mining claims, but the application of common law (albeit embodied in the Civil Code) to injuries to downstream properties, consistent with 30 U.S.C. § 51.

2. The 1955 Multiple Use Act.

Numerous statutes since the 1872 Mining Law further document the Congressional purposes involved. Ongoing concerns over "the fraudulent [mine] locator in national forest[s, who] in addition to obstructing orderly management and the competitive sale of timber, obtains for himself high-value, publicly owned surface resources bearing no relationship to legitimate mining activity" ultimately led to the passage of the Multiple Use Act of 1955. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1281 (9th Cir. 1980) (quoting H. Rep. No. 730, 84th Cong. 1st Sess.).

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That being said, the 1955 Act reflected Congress'

> "insistence that this legislation not have the effect of modifying long-standing essential rights springing from location of a mining claim. Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator [i.e., those situated in the position of Defendant]."

Id. (quoting H. Rep. No. 730, 84th Cong., 1st Sess., at 10 (1955)).)

Critically for the present motion, the Multiple Use Act again confirmed the long-standing federal policy of facilitating mining of mineral deposits, subordinating all other uses of the mining claim, including the protection of other resources such as fish and wildlife, to mining:

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

In the italicized portion of this statute, Congress insisted that non-mining uses be limited to actions which would not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto". 30 U.S.C. § 612(b). By "use of the surface," Congress also referred to regulatory uses. *See, e.g., United States v. Backlund*, 689 F.3d 986, 997 (9th Cir. 2012) (regulatory authority "is cabined by Congress' instruction that regulation not 'endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto;'" quoting 30 U.S.C. § 612(b)).

Federal agencies may act to "manage other surface resources" such as fish and wildlife. *In re Shoemaker*, 110 I.B.L.A. 39, 48-50 (July 13, 1989) (reviewing legislative history of the Multiple Use Act). However, even federal regulators may not take action to protect fish and wildlife if such action would materially interfere with mining, with "material interference" having the commonsense, dictionary meaning of the terms. *Shoemaker*, 110 I.B.L.A. at 54 (reviewing

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dictionary meanings and concluding that the question is whether an agency regulation to protect surface resources will "substantially hinder, impede, or clash with appellant's mining operations"); *see also id.* at 50-53 (agency regulation cannot impair the miner's "first and full right to use the surface and surface resources").

Congress knew that mineral development required express protection from competing interests because, unlike other human activities, it cannot be moved or avoided while still extracting the minerals. *See also United States v. Shumway*, 199 F.3d 1093, 1107 (9th Cir. 1999) ("the Forest Service may regulate use of National Forest Lands by holders of unpatented mining claims, like [defendant], but only to the extent that the regulations are "reasonable" and do not impermissibly encroach on legitimate uses incident to mining and mill site claims").

The Multiple Use Act also clarified the role of state law, by providing that nothing in the law should be

> "construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claims."

30 U.S.C. § 612(b). While Congress allowed state water law to operate "within any unpatented mining claims," it allowed no room for any State-law based prohibitions on mining.

3. Federal Land Management Statutes.

Subsequent statutes maintained the special protection for mineral uses against the regulatory authorities. Congress' first significant foray into forest planning came in the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-532 (MUSYA). In that Act, Congress expressly provided that "[n]othing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands". 16 U.S.C. § 528 (emphasis added). The statutory focus of Forest planning remained on "the various renewable surface resources of the national forests". 16 U.S.C. § 531 (definition of "multiple use"). Mineral deposits, of course, are neither renewable resources, nor surface resources.

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Next came the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. § 1600-14, which was substantially amended in 1976, Pub. L. 94-588, 90 Stat. 2949, and is now commonly identified as the National Forest Management Act (NFMA). The portion of the NFMA governing forest planning is set forth in 16 U.S.C. § 1604, which begins by declaring that the Secretary shall promulgate "land and resource management plans" "[a]s part of the Program provided for by section 1602 of this title". 16 U.S.C. § 1604(a). That section, in turn, declares that "[t]he Program shall be developed in accordance with the principles set forth in the Multiple-Use Sustained-Yield Act of June 12, 1960 . . .". 16 U.S.C. § 1602. Such principles necessarily include the statutory limitation that none of the resulting Forest Service plans may "affect the use or administration of the mineral resources of national forest lands". 16 U.S.C. § 528.

4. The Mineral Policy Act of 1970.

In the ongoing evolution of mining statutes, Congress made it even clearer that the goal of environmental protection must be tempered by the simple fact that minerals can only be extracted where they are found, and that adverse impacts on the environment are inevitable in that process. In subsection 2 of 30 U.S.C. § 21a, the Mineral Policy Act in 1970, Congress sought "the orderly and economic development of [i] domestic mineral resources, [ii] reserves, and [iii] reclamation of metals and minerals to help assure satisfaction of [i] industrial, [ii] security and [iii] environmental needs . . ."

This careful tripartite structure of this policy command was no accident. Development of resources was to assure industrial needs; development of reserves was to meet security needs, and development of reclamation was to meet environmental needs. Congress expanded on this idea in subsection 4, seeking:

> "(4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities."

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Again it is clear that the means of "lessening any adverse [environmental] impact" is "reclamation," *not direct regulations forbidding mineral extraction in the first place.*

There is no "reclamation" issue in this case, for California's reclamation law specifically exempts "[p]rospecting for, or the extraction of, minerals for commercial purposes where the removal of overburden or mineral product totals less than 1,000 cubic yards in any one location, and the total surface area disturbed is less than one acre". Public Resources Code § 2714(b)(4). Suction dredging operations never approach this threshold of significance.

The subsequent general command in the Federal Lands Policy and Management Act, 43 U.S.C. § 1701 *et seq.* ("FLPMA"), for the Secretary of the Interior to regulate to "prevent unnecessary or undue degradation of public lands" under the Secretary's jurisdiction (43 U.S.C. § 1732(b)) is consistent with the statutory history. *See also id.* § 1701(a)(12) (Secretary must manage federal land "in a manner that recognizes the Nation's need for domestic sources of minerals . . .").

In short, the long and complex history of Congressional pronouncements with respect to mining on federal land leaves no doubt as to the force of the Congressional determination that mineral development is necessary and must proceed, with only unnecessary or undue damage to be avoided through reasonable environmental restrictions that do not materially impede the mineral development. Congress has also sought and obtained scientific guidance concerning regulation of suction dredging and other mining, resulting in a report of the National Research Council (NRC) concluding that "BLM and the Forest Service are appropriately regulating the suction dredge mining operations at issue under current regulations as casual use or causing no significant impact, respectively". NRC, *Hardrock Mining on Federal Lands* 96 (Nat'l Academy Press 1999).

Congress certainly never intended federal agencies to authorize or allow the State of California to do that which they could not do themselves: prohibit the mining. Rather, Congress intended federal regulators to accommodate state concerns within the framework of federal law. Specifically, § 601 of the Surface Mining Control and Reclamation Act authorizes the Secretary of

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the Interior to review whether an area 'may be unsuitable for mining operations' because of 'an adverse impact on lands used primarily for residential or related purposes' (30 U.S.C. 1281(a) and (b)). The Governor of a state or '[a]ny person have an interest which is or may be adversely affected' may initiate the review process (30 U.S.C. 1281(c)). If the Secretary determines that the benefits resulting from a designation outweigh the benefits of mineral development, he may either withdraw the area from mineral entry or limit mining operations (30 U.S.C. § 1281(f)) . . ."

Congress recognized that there may be conflicts between mineral development on federal lands and other activities. Congress, in turn, has provided a federal solution. It frustrates the operation of this mechanism as well to simply permit states to arbitrarily shut down mining in large swathes of federal land through the device of both requiring and denying a permit.

C. The State's Refusal to Issue Permits Is Unconstitutional.

In light of all this authority, it is not surprising that every reported case addressing state-law-based refusals to issue permits to mine on federal lands has found preemption. *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998); *Brubaker v. Board of County Commissioners*, 652 F.2d 1050 (Colo. 1982); *Elliott v. Oregon Int'l Mining Co.*, 654 P.2d 663 (Or. Ct. App. 1982); *see also Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980); *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984).

In the leading case, the U.S. Court of Appeals for the Eighth Circuit struck down a "county ordinance prohibiting the issuance of any new or amended permits for surface metal mining within the Spearfish Canyon Area". *Lawrence*, 155 F.3d at 1006. As the Eight Circuit explained:

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

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> Supremacy Clause of the federal Constitution. The ordinance is prohibitory, not regulatory, in its fundamental character. The district court correctly ruled that the ordinance was preempted."

Id. at 1011 (emphasis added). As the Eight Circuit noted, "unlike *Granite Rock*, we are not confronted with uncertainty as to what conditions must be met to obtain a permit . . . the [legislation] is a per se ban on all new or amended permits . . .". *Lawrence*, 155 F.3d at 1011. While the California Legislature was more subtle in its design than the people of Lawrence County, it is clear that at the time of the conduct charged, no suction dredge permits may ever be issued pending further legislation.

In the *Suction Dredge Mining Cases*, Coordinated Case No. JCCP4720 (San Bernardino County), the Coordination Judge recently issued a comprehensive opinion on cross-motions for summary judgment finding that "the State's extraordinary scheme of requiring permits and then refusing to issue them . . . stands 'as an obstacle to the accomplishment of the full purposes and objectives of Congress' under Granite Rock." (Buchal Decl. Ex. 1, at 19, 21.) The Court further noted that "permits will not and cannot, be issued in the near or far future for years if ever. This is fundamentally unfair and clearly operates as a de facto ban." (*Id.* at 16.)

The People should be collaterally estopped from relitigating this issue. The issue was resolved by summary adjudication on cross motions filed by the mining community and the Department of Fish and Wildlife. As the Court of Appeals has explained,

> "The Restatement Second of Judgments explains the concept of judgment finality for issue preclusion purposes: 'The rules of res judicata are applicable only when a final judgment is rendered. However, *for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.'* (Rest.2d Judgments, § 13, italics added.) This section "makes the general commonsense point that such conclusive carry-over effect should not be accorded a judgment which is considered merely tentative in the very action in which it was rendered. On the contrary, the judgment must ordinarily be a firm and stable one, the 'last word' of the rendering court -- a 'final judgment." (Id., § 13, com. a, italics added.)

Sandoval v. Superior Court, 140 Cal.App.3d 932, 936, 190 Cal. Rptr. 29, 31 (1983).

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While the Coordination Court's summary adjudication ruling is not embodied in a final judgment resolving all issues in the case, the remaining issues, such as compliance with the California Environmental Quality Act (CEQA), are analytically distinct. (Buchal Decl. ¶ 4.) The Coordination Judge has unquestionably issued his "last word" on the subject of federal preemption. (*Id.*)

As explained in *Sandoval*, this Court has discretion to invoke the doctrine of "offensive collateral estoppel" unless it is unfair to the State. The State had a full and fair opportunity to litigate this issue, has lost the issue before, as explained in the Coordination Judge's decision, and has never had a final, unappealed ruling in its favor. It is staggeringly unfair for the State to contend, in substance, that an entire mining industry throughout the State must be shut down, and miners deemed criminals, until it has managed to exhaust all appeals in a vain attempt to obtain a ruling that is contrary to all reported precedent on the issue.

II. ALL EVIDENCE OF THE PEOPLE IS THE PRODUCT OF A WARRANTLESS SEARCH OR SEIZURE AND MUST BE SUPPRESSED.

A. Warrantless Searches and Seizures Are Presumed Unconstitutional.

A search conducted without a warrant is *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions. *Katz v. United States,* 389 U.S. 347, 357 (1967). Searches and seizures that violate the U.S. Constitution by seeking to enforce state laws that are unconstitutional are necessarily unreasonable.

As the Court of Appeal recently explained, "the integrity of the judiciary precludes us from permitting introduction of evidence which, but for the existence of a defective ordinance passed by a California legislative body, could not have been properly seized." *Jennings v. Superior Court*, 104 Cal.App.3d 50, 58 (1980); *accord People v. Thayer,* 63 Cal.2d 635, 640 (1965) ("seizures that exceed statutory authority are always unreasonable"). In *Jennings*, the Court of Appeal suppressed heroin found in police car transporting a defendant to jail because the defendant was arrested for

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violation of an unconstitutional loitering ordinance. So too is evidence collected in support of the State's unconstitutional scheme to demand and deny permits subject to suppression.

Because the Department of Fish and Wildlife was party to the Coordinated Proceedings, it was and is well-aware of the constitutional infirmities in its refusal to issue permits for suction dredging, and question of any good faith belief in the lawfulness or reasonableness of the scheme should be permitted to avoid suppression here.

B. The People Have the Burden of Showing the Search and Seizure To Be Constitutional.

"When the question of the legality of a search and seizure is raised . . . , the Defendant makes a prima facie ease when he establishes that it was conducted without a warrant or that private premises were entered or a search was made without a search warrant, and the burden then rests on the prosecution to show proper justification." *Badillo v. Superior Court* (1956) 46 Ca1.2d 269, 272; *Wilder v. Superior Court* (1979) 92 Cal.App.3d 90. "[W]hen the basis of a motion to suppress is a warrantless search or seizure, the requisite specificity is generally satisfied, in the first instance, if defendants simply assert the absence of a warrant and makes a prima facie showing to support that assertion." *People v. Williams* (1999) 20 Ca1.4th 119, 130. As set forth in his Declaration, Defendant denies the existence of any warrant. If the warrantless search is to be upheld, it is the state's burden to show by a preponderance of the evidence that the search and seizure were reasonable. *People v. James* (1977) 19 Cal.3d 106, fn. 4; *People v. Minjares* (1979) 24 Cal.3d 410, 416.

There is no exception to the warrant requirement that applies in this case. The search and seizure was conducted in violation of the U.S. Constitution. While the remedy of suppression pursuant to Penal Code § 1538.5(a)(1)(A) (warrantless searches) typically examines the issue of probable cause, it applies with equal force to Federal Constitutional violations, Penal Code § 1538.5(a)(1)(B)(v) specifies that evidence for warranted searches may be suppressed for "any...

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violation of federal or state constitutional standards." This applies with equal force to warrantless searches.

As set forth above, Fish and Wildlife Code §§ 5653 and 5653.1 are unconstitutional—a prima facie showing for Penal Code § 1538.5 purposes. The observations of the game wardens, Defendant's statements and all evidence that pertains to the possession and use of suction dredging equipment by the Defendant must be suppressed. *Wong Sun v. United States* (1963) 371 U.S. 471; *Mapp v. Ohio* (1961) 367 U.S. 643. *Mapp* dealt with the exclusionary rule of the 4th amendment and was the first of a long line of Supreme Court decisions that made provisions of the U.S. Constitution binding on the states based on the 14th Amendment. The Supremacy and Property Clauses, however, expressly set forth their own authority over the states. All evidence was gathered in violation of these provisions and must be excluded *in toto.*

III. THE COMPLAINT SHOULD BE DISMISSED FOR THE SAME CONSTITUTIONAL REASONS.

The federal preemption of the statute under which Defendant is charged is another way of saying that the court "has no jurisdiction of the offense charged herein" (Penal Code § 1004(1)), because federal jurisdiction, not state jurisdiction, is controlling here. Alternatively, questions of preemption have sometimes been regarded as falling within § 1004(4): whether the allegations "constitute a public offense". *E.g., People v. Gerado* (App. Dep't Super. Ct. Los Angeles 1985) 174 Cal.App.3d Supp. 1, 3 (whether state law preempted local ordinance was an issue under § 1004(4)). Regardless of which subsection of § 1004 is required as covering these circumstances, the question raised by this motion is a fundamentally legal defect properly raised by demurrer. *See also People v. Todd Shipyards Corp.* (App. Dep't Super. Ct. Los Angeles 1987) 192 Cal.App.3d. Supp. 20, 35-40 (federal preemption issue resolved by demurrer without specifying the subsection of § 1004 involved).

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As the Court of Appeals explained in *People v. Tolbert*, 176 Cal.App.3d 685 (1986),

> "To sustain a demurrer for want of jurisdiction, the defect must appear on the face of the accusatory pleading. Penal Code section 961 states: "Neither presumptions of law, nor matters of which judicial notice is authorized or required to be taken, need be stated in an accusatory pleading." For purposes of demurrer, therefore, matters which may be judicially noticed may be said to appear constructively on the face of the pleading."

Tolbert, 176 Cal.App.3d at 689 (citations omitted; emphasis added). *See also Todd Shipyards*, 192 Cal.App.3d Supp. at 33 n.7 (taking judicial notice of federal material to resolve preemption claim in demurrer context).

Section 952 of the Penal Code allows a criminal complaint to "be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved." However, it does require sufficient facts to give notice of the crime, and where, as here, the gist of the charge is that defendant operated a suction dredge "in any waters and area and at any time that was not authorized by a permit," due process and fair notice requires that the State specify the location.

We have presented the locations of the conduct charged in the Declaration of Defendant, and hope that the District Attorney will not waste the resources of the Court by requiring a trial on that issue, but rather consult with the wardens, confirm Defendant's testimony, and agree that these motions may be resolved on the basis that Defendant was operating on a federally-registered mining claim. Assuming the District Attorney will not dispute the locations of the alleged crimes, there should be no need for trial in this action. Because the locations were on federally-registered mining claims, the State was without power to criminalize want of a permit it refused to issue.

As set forth in the accompanying Declaration of David McCracken, the locations involved were covered by certain federally-registered mining claims, documented in the records of the U.S. Bureau of Land Management. Pursuant to § 452(c) of the California Evidence Code, the Court may take judicial notice of the "official acts of the legislative, executive and judicial departments of the United States . . .". The registration records constitute such official acts. Pursuant to § 452(h) of the Evidence Code, the Court may also take judicial notice of "facts and propositions

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that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy".

The only other factual matter concerns Defendant's Declaration testimony that use of motorized devices classified by the State of California as "suction dredges" are the only feasible means of exploiting the valuable gold deposits contained on these claims. This is arguably "common knowledge within the territorial jurisdiction of th[is] court" (Evidence Code § 452(g)), the Court need not make any such finding to resolve the preemption claim. As set forth above, federal law forbids a "material interference" with mining. 30 U.S.C. § 612(b). In the context of the State's abrupt termination of a longstanding permit program, judicial notice can properly be taken of the obvious fact that halting the issuance of mining permits materially interferes with the mining that was previously permitted by those permits. Again, there should be no need of trial here.

IV. THE COMPLAINT SHOULD BE DISMISSED IN THE INTERESTS OF JUSTICE.

The California Department of Fish and Wildlife has been on notice since at least January 12, 2015, and indeed months before that, that its insistence upon requiring permits it categorically refused to issue is patently unconstitutional. Rather than devise a constitutional system of suction dredge regulation, the Department has elected to thumb its nose at the judiciary and insist upon unconstitutional searches, seizures and arrests. This course of conduct is fundamentally unjust.

Conclusion

For the foregoing reasons, this Court should terminate these criminal proceedings in favor of Defendant, providing guidance to the Department of Fish and Wildlife to cease harassing hard-working Siskiyou County suction dredge miners.

Dated: October 21, 2015

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CERTIFICATE OF SERVICE

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On October 21, 2015, I caused the following document to be served:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS TO SUPPRESS AND DISMISS EVIDENCE

on the party listed below in the following manner:

(X) (BY FEDERAL EXPRESS)

( ) (BY FIRST CLASS US MAIL)

( ) (BY FAX)

( ) (BY E-MAIL)

J. Kirk Andrus, District Attorney
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