In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **BRANDON LANCE RINEHART,** **Defendant and Appellant.**	Case No. S222620

Third Appellate District, Case No. C074662
Plumas County Superior Court, Case No. M1200659
The Honorable Ira Kaufman, Judge

PEOPLE'S OPENING BRIEF ON THE MERITS

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ISSUE FOR REVIEW

Is a state environmental law that makes a particular mining claim on federal land commercially impracticable preempted by the federal mining laws?

INTRODUCTION

California's Legislature has determined that suction dredge mining – the use of motorized vacuums to remove material from the bottom of riverbeds in the hope of finding gold – has the potential to harm fish, water quality, and other resources in California. To avoid these harms, the Legislature has adopted a temporary moratorium on the issuance of permits for suction dredge mining, designed to allow the California Department of Fish and Wildlife to adopt regulations addressing the practice's adverse environmental effects. Defendant-Appellant Brandon Lance Rinehart, who was convicted of suction dredge mining without a permit, claims the moratorium is invalid because it prevented him from receiving a permit to use a suction dredge on his mining claim on federal land. The Court of Appeal held that Rinehart should be allowed to prove whether the moratorium makes mining his claim "commercially impracticable," and that if it does, then his conviction must be overturned as preempted by federal law.

That conclusion was wrong. States generally have jurisdiction to enforce state law on federal land. The federal mining statutes and their legislative history show no intent to preempt state environmental regulation. They certainly do not overcome the rule of construction under which Congress is presumed not to have intended to supplant state law unless it speaks clearly to the issue. Moreover, the relevant federal agencies administering the federal statutes have interpreted those statutes as preempting state law only where compliance with both federal and state law

would be actually impossible – something which is not the case here. That interpretation deserves deference, both under general principles of administrative law and under the leading U.S. Supreme Court case on mining law preemption, *California Coastal Commission v. Granite Rock Co.* (1987) 480 U.S. 572. *Granite Rock*'s review of federal mining regulations concluded that they "not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume" that miners "will comply with state laws" (*id.* at p. 583) – something equally true here.

The Court of Appeal's contrary opinion neglected to analyze the statutory text and history, did not discuss federal agency views, and failed to mention the presumption against preemption. Instead, the Court of Appeal, relying on a misreading of *Granite Rock* and on an unpersuasive Eighth Circuit opinion, instituted a novel and unadministrable case-by-case test for preemption. This Court should reject that approach.

BACKGROUND

A. Federal Mining Law

The federal Mining Act of 1872 was passed to "promote the [d]evelopment of the mining [r]esources of the United States." (Act Cong. May 10, 1872, ch. 152, 17 Stat. 91 [title of act].) As currently codified, its core provision states:

> 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, and the lands in which they are found to occupation and purchase, by citizens of the United States and those that have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

(30 U.S.C. § 22.)

In order to secure a valid mining claim at a "location" on federal land, a claimant may enter federal land, but must discover a "valuable mineral deposit," mark the location on-site, and record the claim at the local recorder's office. (30 U.S.C. §§ 22, 28; 43 C.F.R. § 3833.11(a); *Granite Rock*, *supra*, 480 U.S. at p. 575.) The term "valuable" is a term of art, requiring both that the "deposits must be of such a character that 'a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success'" and that the minerals "can be extracted and marketed at a profit." (*United States v. Coleman* (1968) 390 U.S. 599, 602; *Hjelvik v. Babbitt* (9th Cir. 1999) 198 F.3d 1072, 1074.) Although a person with a valid "unpatented" mining claim obtains exclusive rights to the subsurface and surface area within that site for mining purposes, the United States retains title to the land and the right to manage the surface resources. (30 U.S.C. §§ 26, 612; *Granite Rock*, *supra*, 480 U.S. at p. 575.)[1]

"'[N]o right arises from an invalid claim.'" (*United States v. Locke* (1985) 471 U.S. 84, 105.) A valid federal mining claim, in contrast, is a "'unique form of property'" that provides a "possessory interest[]" in land, but not title. (*Id.* at pp. 86, 104-05.) To maintain his exclusive right to mine the location, the claimant must pay a small annual fee to the federal government or perform labor of that value at the site. (30 U.S.C. §§ 28, 28f(a).) "[L]egal title to the land passes" to the claimholder only if he

[1] Section 612 is part of the Surface Resources and Multiple Use Act of 1955, which clarified and confirmed the federal government's ability to manage a claim's surface resources. (See generally *United States v. Curtis-Nevada Mines, Inc.* (9th Cir. 1980) 611 F.2d 1277.)

thereafter obtains a patent. (*Granite Rock*, *supra*, 480 U.S. at pp. 576; *see* 30 U.S.C. § 29.)[2]

B. California's Regulation of Suction Dredge Mining

California has regulated various forms of mining, by statute and common law, for over a century.[3] In 1961, the Legislature enacted a permit program for suction dredge mining. (Stats. 1961, ch. 1816, § 1, p. 3864 [enacting original version of Fish & Game Code section 5653].) Suction dredge mining is a method for obtaining gold from the bed of a water body. (*People v. Osborn* (2004) 116 Cal.App.4th 764, 768.) Miners typically use a motorized vacuum with a four-inch or wider suction opening. (*Ibid.*; *Karuk Tribe v. U.S. Forest Serv.* (9th Cir. 2012) 681 F.3d 1006, 1012 (en banc) ("*Karuk II*").) The vacuum, inserted into the bottom of a stream, sucks gravel and other material, disturbing the bed of the stream and thus the habitat of anything living there. (*Osborn*, *supra*, 116 Cal.App.4th at pp. 768, 774-75; *Karuk II*, *supra*, 681 F.3d at pp. 1028-29.) The vacuum takes the material to the surface, where it can be processed to separate any gold that might be present. (*Karuk II*, *supra*, 681 F.3d at p. 1012; *Osborn*, *supra*, 116 Cal.App.4th at p. 768.) The remaining sand, gravel, and rocks are dumped back in or beside the water as "tailings." (*Karuk II*, *supra*, 681

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[2] Recent appropriations laws have prohibited the processing of patent applications. (*E.g.*, Consolidated and Further Continuing Appropriations Act, 2015 (Dec. 16, 2014) Pub. L. No. 113-235, § 404, 128 Stat. 2130, 2443-44.)

[3] (See, e.g., Pub. Resources Code, § 3981 [originally enacted by Stats. 1893, ch. 223, p. 337 § 1, permitting hydraulic mining only where it can be "carried on without material injury to navigable streams or the lands adjacent thereto"]; *County of Sutter v. Nicols* (1908) 152 Cal. 688 (1908) [upholding nuisance injunction against hydraulic mining]; *Yuba County v. Kate Hayes Min. Co.* (1903) 141 Cal. 360, 362-63 [upholding nuisance injunction against miners using "the 'ground sluice process'"].)

F.3d at 1012; *Osborn*, *supra*, 116 Cal.App.4th at p. 768.) This mining activity is largely done for recreation. (*Osborn*, *supra*, 116 Cal.App.4th at p. 768.) A federal court has noted "ample evidence" that suction dredge mining may affect critical habitat for endangered species. (*Karuk II*, *supra*, 681 F.3d at p. 1028-29.)

Since 1961, the permit program, which is administered by the California Department of Fish and Wildlife (the "Department"), has been designed to ensure that such mining "operation[s] will not be deleterious to fish." (Fish & G. Code, § 5653, subd. (b).) Using suction dredge mining equipment without a permit is prohibited. (*Id.*, § 5653, subd. (a).) So is using such equipment at places and times "closed" to such equipment by the Department, and possessing such equipment within 100 yards of waters that have been so closed. (*Id.*, § 5653, subds. (b), (d).)

In 2005, the Karuk Tribe challenged the Department's suction dredge mining permitting program in state court under the California Environmental Quality Act, in part because of "deleterious effects on Coho salmon." (Respondent's Request for Judicial Notice, filed concurrently, ("RJN"), Exh. Q, at pp. 1-2 [Order and Consent Judgment filed Dec. 20, 2006 in *Karuk Tribe v. Calif. Dept. of Fish & Game*, No. RG05 211597 (Super. Ct. Alameda County) ("*Karuk I*")].) The Alameda County Superior Court approved a consent decree requiring the Department to "conduct a further environmental review . . . of its suction dredge mining regulations." (*Id.* at p. 3.)

After the entry of the consent decree, the Legislature, in 2009, enacted a temporary moratorium on all suction dredge mining pending the environmental review required by the *Karuk I* consent decree. (Stats. 2009, ch. 62, enacting Fish & G. Code, § 5653.1.) The moratorium applies only to motorized suction dredge mining. (Fish & G. Code, § 5653.1, subd. (e).) It does not affect any other form of mining, such as "nonmotorized

recreational mining activities, including panning for gold"; nor does it affect mining outside the water. (*Ibid.*; see also Cal. Code Regs., tit. 14, § 228, subd. (a) [definition of suction dredge mining].) 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.)

The Legislature has altered the moratorium twice during the course of the Department's environmental review. The original statute provided that the moratorium would expire once the Department's environmental review was completed and any necessary new regulations were adopted and became operative. (Stats. 2009, ch. 62.) A 2011 amendment – effective July 26, 2011, and operative during the period Rinehart committed his violations in this case – provided that the moratorium would end at the earlier of two times: either with the enactment of new regulations which "fully mitigate all identified significant environmental impacts" of suction dredge mining and create a permit "fee structure ... that will fully cover all costs," or on a date certain – June 30, 2016. (Stats. 2011, ch. 133, § 6.) In a 2012 amendment, which became effective on June 27, 2012, the Legislature eliminated the 2016 sunset, meaning that the moratorium now is set to expire only with the enactment of regulations that fully mitigate impacts and a fee structure covering administrative costs. (Stats. 2012, ch. 39, § 7; see Fish & G. Code, § 5653.1, subd. (b).) The 2012 amendment also required that the Department recommend to the Legislature any "statutory changes or authorizations" needed for the Department to enact regulations satisfying the statutory conditions for ending the moratorium. (Fish & G. Code, § 5653.1, subd. (c)(1).)

Meanwhile, in March 2012, the Department completed its required environmental review and adopted new suction dredge mining regulations.

(See Appellant's Unopposed Motion to Correct the Record, filed in the Court of Appeal on Oct. 24, 2013 and granted on Nov. 1, 2013, Exh. A ("2013 Legislative Report"), p. 1a; see also Cal. Code Regs., tit. 14, §§ 228, 228.5 [regulations]; see generally www.wildlife.ca.gov/Licensing/Suction-Dredge-Permits [website containing links to environmental impact report documents].) In formal rulemaking findings, the Department found that the new regulations – mainly time, place, and manner restrictions – would prevent suction dredge mining from being "deleterious to fish," as required under Fish and Game Code section 5653, subdivision (b). (2013 Legislative Report, p. 3; Cal. Code Regs., tit. 14, §§ 228, 228.5; see specifically Cal. Code Regs., tit. 14, § 228 [opening paragraph, stating "the Department finds that suction dredging subject to and consistent with the requirements of Sections 228 and 228.5 will not be deleterious to fish"].) The 2013 Legislative Report explained, however, that limitations in the Department's regulatory authority under Fish and Game Code section 5653 prevented the Department from adopting additional regulations that would be necessary to avoid other significant environmental effects. (2013 Legislative Report, pp. 3, 14.) Specifically, the Department explained that it lacked authority to enact regulations necessary to prevent the likelihood that suction dredge mining "would resuspend and discharge mercury and other trace minerals, and increase turbidity and discharge of suspended sediment; could impact historical and unique archeological resources; expose the public to noise levels in excess of controlling local standards; and impact special status passerines (nesting birds) associated with riparian habitat, and affect non-fish wildlife species and their habitats." (*Id.*, p. 3 fn. 4.) The 2013 Legislative Report therefore made recommendations for

legislative action intended to permit further administrative regulations that would allow for the lifting of the moratorium. (*Id.*, p. 14.)[4]

C. Rinehart's Case

Rinehart is a partial owner of a 120-acre unpatented federal mining claim located within the Plumas National Forest. (CT 19, 23-26, 28, 69, 71.) His claim is based on a Placer Mining Claim Location Notice filed with the U.S. Bureau of Land Management in August 2010, representing that the owners had erected and posted the required notices and monument in the location in June 2010 (after enactment of the original moratorium). (CT 19, 23-26, 71-72.) On June 16, 2012, which was before the 2012 amendment to the moratorium (see Stats. 2012, ch. 39, § 7 [effective June 27, 2012]), a California state game warden found Rinehart suction dredge mining on his claim without a permit from the Department. (CT 68-69, 72.)

Rinehart was charged with two misdemeanors: suction dredge mining without a permit and in a closed area, in violation of Fish and Game Code section 5653, subdivision (a), and possessing suction dredge mining equipment within 100 yards of a closed area, in violation of Fish and Game Code section 5653, subdivision (d). (CT 1-2.) In a trial on stipulated facts, Rinehart admitted that he committed this conduct. (CT 68, 69.) His sole contention was that Fish and Game Code section 5653.1, which imposed the moratorium on suction dredge mining permits, was preempted by federal law. (CT 87-94; RT 1-51.) In support of that argument, Rinehart proffered testimony purporting to show that suction dredge mining was the only economically feasible method of mining gold from his claim. (CT 71-85.) The trial court ruled that there was no preemption and excluded the

[4] Although the Court of Appeal made reference to funding being an obstacle to lifting the moratorium (Slip Opn., p. 15), the Department has identified newly granted authority to raise permit fees. (See 2013 Legislative Report, p. 13.)

proffered testimony. (RT 42-45.) Rinehart was convicted. (CT 376-77; RT 51.) He was sentenced to three years summary probation, with fines and penalty assessments stayed pending successful completion of probation. (CT 377-78; RT 57.)

The Court of Appeal reversed. The Court did not analyze the text or legislative history of the federal mining statutes. Instead, the Court of Appeal relied on *South Dakota Mining Association v. Lawrence County* (8th Cir. 1998) 155 F.3d 1005 (see Slip Opn., pp. 16-19) – a case in which the Eighth Circuit had held that a county zoning ordinance banning surface mining in a designated zone was preempted because it banned the only effective method for mining federal land within that zone and thus interfered with federal mining law's policy of encouraging mining on federal land. (155 F.3d at p. 1011.) The Court of Appeal held that if California's moratorium makes mining "commercially impracticable" on Rinehart's mining claim, then application of the state law would be preempted as to that claim. (Slip Opn., p. 19.) The Court remanded to the trial court to answer (1) whether the Fish and Game Code provisions prohibit the issuance of permits; and (2) if so, whether that prohibition "rendered commercially impracticable the exercise of defendant's mining rights." (Slip Opn., p. 19.) The People filed a petition for rehearing, which the Court of Appeal denied.

ARGUMENT

Preemption "is a legal issue involving statutory construction and the ascertainment of legislative intent," which this Court reviews *de novo*. (*Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1371, cited in *In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089 fn. 10.) The question is whether Congress expressed a sufficiently clear intention to make some set of state laws unenforceable. (See *Wyeth v. Levine* (2009) 555 U.S. 555, 565; *Viva! Intern. Voice For Animals v. Adidas Promotional*

Retail Operations, Inc. (2007) 41 Cal.4th 929, 938.) "Courts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it." (*Viva!*, *supra*, 41 Cal.4th at p. 936 [internal quotation marks and brackets omitted; citing various cases].)

The Court of Appeal viewed California's law as preempted under the principle of "obstacle" preemption.[5] This form of preemption "arises when under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Viva!*, *supra*, 41 Cal.4th at p. 936 [internal quotation marks and brackets omitted, citing various cases].)

Here, the text and history of the federal statutes – reinforced by their interpretation by federal agencies and the presumption against preemption – make plain Congress's intent to allow states to continue regulating mining activity on federal lands so long as following the state regulation would not render compliance with federal law impossible. Because Rinehart can comply with both state and federal law, his claim should fail.

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[5] There are three other forms of preemption: express, field, and conflict. (E.g., *Viva!*, *supra*, 41 Cal.4th at p. 935.) There is no express preemption provision in the federal mining laws, and Rinehart has not contended otherwise. By holding that California can impose permit requirements on mining activities on federal land (see *infra* p. 26), *Granite Rock* stands for the proposition that Congress did not exclusively occupy the field of regulations affecting mining – something Rinehart likewise appears not to contest. Conflict preemption, which occurs when "simultaneous compliance with both state and federal directives is impossible" (*Viva!*, *supra*, 41 Cal.4th at p. 936), is not present here, as discussed below. (See *infra* pp. 28-29.)

I. FEDERAL MINING STATUTES DO NOT PREEMPT STATE ENVIRONMENTAL REGULATION UNLESS THE STATE REGULATIONS MAKE IT IMPOSSIBLE TO COMPLY WITH FEDERAL LAW, WHICH IS NOT THE CASE HERE

A. The Federal Statutes' Text and History Show No Intent To Bar State Environmental Regulation

The Constitution does not "exempt[] federal lands from state regulation." (*Granite Rock, supra*, 480 U.S. at p. 580.) The U.S. Supreme Court has "made clear that 'the State is free to enforce its criminal and civil laws' on federal land so long as those laws do not conflict with federal law." (*Ibid.*, quoting *Kleppe v. New Mexico* (1976) 426 U.S. 529, 543.)

A congressional purpose to encourage an activity does not by itself preempt state law. (*Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609, 633-34; see, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Com.* (1983) 461 U.S. 190, 221-23.) Courts considering preemption thus must "look beyond general expressions of 'national policy.'" (*Commonwealth Edison, supra*, 453 U.S. at p. 634.) "[N]o legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." (*Rodriguez v. United States* (1987) 480 U.S. 522, 525-26, emphasis in original.) Thus, "pre-emption analysis is not [a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict." (*Viva!, supra*, 41 Cal.4th at pp. 939-40 [internal quotation marks and citations omitted].) The starting point in determining Congress's intent to preempt is an examination of statutory text, aided by other signs of Congress's intent (*People* ex rel. *Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 778), including legislative history (*Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1068).

1. 30 U.S.C. § 22

As the Court of Appeal recognized (Slip Opn., p. 12), the key federal statute at issue is 30 U.S.C. § 22:

> 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, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

In *Granite Rock*, the Court observed that the parties there "concede[d] that the Mining Act of 1872, as originally passed, expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." (480 U.S. at p. 582.) Rinehart's contrary view would require showing that the statute's "free and open" language indicates Congress intended miners to be "free" from state regulation, and that the reference to mining "under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts" indicates an intent for state law not to apply to miners. (See Answer to Petition for Review, p. 16.) Neither statutory phrase, however, indicates congressional intent to preempt state law, and the history of later amendments confirms the lack of preemption.

1. Decisions close in time to the enactment of the Mining Act of 1872 and its closely related 1866 predecessor make clear that the purpose of the "free and open" provision was to give the miner possessory rights, thus enabling him to go on federal land without committing what would otherwise be a trespass. (See *Colvin Cattle Co., Inc. v. United States* (Fed.Cl. 2005) 67 Fed.Cl. 568, 571 ["As the Supreme Court recognized in

Jennison v. Kirk [(1878) 98 U.S. 453, 457], the purpose of the [1866 Act] is to 'give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts . . . .'"]; *Woodruff v. North Bloomfield Gravel Mining Co.* (C.C.D. Cal. 1884) 18 F. 753, 774 [the Mining Act of 1866 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"].) In other words, the "free and open" provision encouraged mining not by exempting federal land from state requirements but by declaring that the United States, as the property owner, gave permission for citizens to enter those lands and take valuable minerals without prosecution for trespass or theft.

The legislative history of this provision confirms that there was no congressional intent to preempt. The provision in the 1872 act (and as it now stands) was materially unchanged from section 1 of the Mining Act of 1866. (See RJN, Ex. A [Act Cong. July 26, 1866, ch. 262, § 1, 14 Stat. 251]; see also RJN, Exh. I [Cong. Globe, Jan. 23, 1872, p. 534, remarks of Rep. Sargent (author) ("This bill does not make any important changes in the mining laws as they have heretofore existed")].)[6] The "free and open" provision was a response to competing legislation that would have sold all mining land in the West. (See RJN, Exh. C [H.R. No. 322, 39th Cong., 1st Sess. (1866) – failed proposal to sell land]; RJN, Exh. E [Cong. Globe, July 23, 1866, p. 4049; remarks of Rep. Julian, proposing to amend H.R. No.

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[6] Although *Woodruff* appears to have misquoted the 1866 statute as only making lands "open" to mineral exploration, the text of the 1866 statute in fact used the same "free and open" language as that in the Mining Act of 1872 (now codified at 30 U.S.C. § 22). (Compare *Woodruff*, *supra*, 18 F. at p. 773, with RJN, Exh. A [Act Cong. July 26, 1866, ch. 262, § 1, 14 Stat. 251].)

365 by substituting 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"].) 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 RJN, Exh. F [H.R. No. 365, 39th Cong., 1st Sess., as amended July 19, 1866 – bill that was enacted with "free and open" clause]; RJN, Exh. A [bill as enacted, Act Cong. July 26, 1866, ch. 262, 14 Stat. 251, enacting H.R. No. 365.) As the author of the bill that was enacted explained:

> [T]he bill does not contain a single sentence which will compel any miner . . . 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 (see RJN, Exh. D [Cong. Globe, July 23, 1866, p. 4021]) and a member of the Committee on Mines and Mining]; see also RJN, Exh. N, at p. 3 [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"].)

2. Section 22's specification that a miner's exploration and occupation of federal land shall be "under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts" likewise indicates an understanding that state authority will be preserved.

The term "law" is not limited to federal law. As the Montana Supreme Court long ago explained about this very provision, "[t]he expression, 'under regulations prescribed by law,' is ample enough to embrace, not only the laws of congress, but also those of the territory."

(*O'Donnell v. Glenn* (1888) 8 Mont. 248, 19 P. 302, 306 [discussing Rev. Stat. 2319, which is now codified at 30 U.S.C. § 22].) Indeed, if Congress had wanted to exclude state laws, then it presumably would have specified "laws *of the United States*" in this provision – something Congress not only knew how to do but in fact did when referring to "laws of the United States" at the end of the section. (See *Corley v. United States* (2009) 556 U.S. 303, 315 [where Congress uses two different terms in the same section of a statute, "'[w]e would not presume to ascribe this difference to a simple mistake in draftsmanship'"]; cf. *Russello v. United States* (1983) 464 U.S. 16, 23 ["'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"].) Thus, the statutory language itself contemplates the continued enforcement of state law.[7]

The language "according to the local customs and rules of miners in the several mining districts" also indicates a lack of intent to preempt state law. The local mining districts were voluntary associations of miners in a particular location. (See *Jennison*, *supra*, 98 U.S. at pp. 457-59 [discussing district rules]; *Morton v. Solambo Copper Mining Co.* (1864) 26 Cal. 527, 532-33 [similar].) As unincorporated associations, they were creatures of common law and state law. (Cf. *Carden v. Arkoma Associates* (1990) 494

[7] The point is further clarified by another aspect of the proviso "so far as the same are applicable and not inconsistent with the laws of the United States." This language codifies what is understood now as conflict preemption – which occurs when it is impossible to comply with both federal law and state (or local) law. (*Viva!*, *supra*, 41 Cal.4th at p. 936.) In this section, the entire proviso appears to modify both the "regulations prescribed by law" and "the local customs or rules of miners in the several mining districts." It thus confirms that the term "regulations prescribed by law" includes state and local regulations, because federal regulations are by definition (if properly adopted) consistent with federal law.

U.S. 185, 197 ["[t]he 50 States have created, and will continue to create, a wide assortment of artificial entities"]; Corp. Code, §§ 18035, 18065 [defining unincorporated associations].) It would be remarkable for Congress to have preserved the authority of these local associations, while displacing all otherwise applicable state laws. And indeed, this Court held long ago that "state statutes are construed to have the same force and effect" as "local mining regulations and customs governing locations." (*Stock v. Plunkett* (1919) 181 Cal. 193, 194.)

Legislative history confirms that Congress intended to preserve local authority, not to replace it with exclusively federal regulation. Representative Ashley described the "first section" of the Mining Act of 1866 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.

(RJN, Exh. E [Cong. Globe, July 23, 1866, p. 4053].)

The recognition of local, not federal, control was of much concern to the Act's opponents. Representative Julian described the Act as "an outrage, a wholesale abandoning by the nation of its authority and duty respecting its vast mineral domain." (RJN, Exh. D [Cong. Globe, July 23, 1866, p. 4022.) He specifically questioned the Act's intent 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].)

Ultimately, it was precisely the bill that these opponents characterized as an "abandoning by the nation of its authority" that Congress enacted. (See RJN, Exh. G [Cong. Globe, July 24, 1866, p. 4102 (H.R. No. 365 signed and enrolled by House)]; RJN, Exh. H [Cong. Globe, July 24, 1866, p. 4072 (H.R. No. 365 signed and enrolled by Senate)]; RJN, Exh. A [bill

as enacted, Act Cong. July 26, 1866, ch. 262, 14 Stat. 251].)[8] That history, which is hard to square with Rinehart's preemption-maximizing view of the statute, makes perfect sense under the People's view: Congress intended to preserve state regulation, subject only to the requirement that the state not prohibit what Congress directly required.

3. Congress's response to events in California shortly after passage of the Mining Act of 1872 further confirms the People's point.

At that time, hydraulic mining in California was causing severe adverse environmental effects. (See *Woodruff, supra,* 18 F. at pp. 756-63 [describing hydraulic mining and its effects].) Farmers bearing the brunt of those effects sued under the state's public nuisance statutes, aiming to stop the mining practice. (*Id.* at pp. 756, 764-65, 770.) Miners defending the lawsuit – much like the Court of Appeal here – claimed that federal mining law authorized these activities and prevented any state law prohibition on any form of mining. (*Id.* at p. 770.) *Woodruff*, a federal decision that has never been overruled, 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 environmental consequences, and issued a permanent injunction against the hydraulic mining at issue. (*Id.* at pp. 770-77, 808-09.) Soon afterwards, this Court, addressing the same

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[8] The Mining Act of 1872 was not intended to alter this balance. Rather, the new legislation was spurred by congressional concern to clarify the circumstances under which a miner could patent his mining claim (that is, take fee title), and when a miner might through abandonment lose his rights to seek to patent the claim. (See, e.g., RJN, Exh. I [Cong. Globe, Jan. 23, 1872, p. 534, remarks of Rep. Sargent (author) ("The changes made by the bill are principally those which relate to the . . . application of the law so as to facilitate the miners obtaining their title")]; RJN, Exh. J [Cong. Globe, April 16, 1872, p. 2459, remarks of Sen. Stewart (explaining litigation caused by unsettled law regarding claim abandonment)].)

problem, upheld a similar injunction. (*People v. Gold Run Ditch & Min. Co.* (1884) 66 Cal. 138, 144-45, 152.)

Congress's response to these decisions confirms the erroneousness of the Court of Appeal's approach here. Congress was acutely aware of the *Woodruff* decision and its effect on mining. (See, e.g., RJN, Exh. K [Sen. Rept. No. 50-1944, July 28, 1888, p. 2]; 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")].) If Congress believed that federal law had been intended to preempt state laws that impaired or prohibited mining, it could have responded by, for example, amending the law to make that clear, or to declare hydraulic mining legal. But it did not. Instead, Congress established a "Debris Commission" to which hydraulic miners would submit plans and apply for a permit, in the hope that this procedure would result in mining plans that did not cause the harms that triggered the *Woodruff* injunction. (See Act Cong. March 1, 1893, ch. 183, 27 Stat. 507 [codified at 33 U.S.C. § 661 et seq.]; *County of Sutter*, *supra*, 152 Cal. at p. 695.)

Congress's decision not to override judicial decisions restricting hydraulic mining, "while not conclusive, may be presumed to signify [its] legislative acquiescence" in *Woodruff's* construction of the Mining Acts (including what is now codified at 30 U.S.C. § 22). (See *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1156, quotation marks omitted; see, e.g., *Wyeth*, *supra*, 555 U.S. at pp. 574-75 [reasoning that Congress's failure to add an express preemption provision to an existing statute, "coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend" to preempt

state tort law: "'The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'"]; *People v. Williams* (2001) 26 Cal.4th 779, 789 [citing legislative inaction in the face of judicial construction of statute as an "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.*) Like Rinehart here, the miners argued that "the main objects and purposes of the act are to encourage the production of gold," and that California had no authority to bar mining done in compliance with the act. (*Id.* at pp. 694-95.) This Court, however, held that purpose insufficient to show that the Debris Act preempted state rules protecting the environment. (*Id.* at p. 696.) The same reasoning defeats Rinehart's claim here.

2. 30 U.S.C. § 612(b)

Rinehart has also argued for preemption under another statute, 30 U.S.C. section 612(b). (Answer to Petition for Review, p. 23.) Rinehart contends that California's permit moratorium is preempted by section 612(b)'s admonition 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." (*Ibid.*)

Rinehart has never cited a case holding that section 612(b) preempts state law (see CT 88-93), and we are unaware of any such case. That is not surprising. By its terms, section 612(b) is focused on the relationship between miners and the federal government, speaking to the "right of the

United States" and "any use of the surface of any such mining claim by the United States, its permittees or licensees." (See also, e.g., RJN, Exh. M [H. Rept. No. 84-730, pp. 3, 6, 10 (June 6, 1955)], *also reprinted in* 1955 U.S.C.C.A.N. 2474.) Section 613, which follows and implements section 612(b) and explains the process for resolving those conflicts, speaks only of federal agencies, making no mention of state or local governments or anyone else.

The irrelevance of section 612(b) is further evidenced by the fact that neither the Court of Appeal decision here, nor the *South Dakota Mining* decision on which it relied, discusses it. In contrast, *Granite Rock* did mention section 612(b) in passing, before the U.S. Supreme Court looked to the relevant agency implementing regulations, which it found "devoid of any expression of intent to preempt state law." (480 U.S. at p. 582, 583; see *infra* pp. 25-28.) If that reasoning led to no preemption in *Granite Rock*, then *a fortiori* there is no preemption here, where the federal regulations at issue specifically countenance state regulation. (See *infra* pp. 23-25.)

B. Congress Is Presumed Not To Have Intended Preemption

Because preempting state laws is not something that Congress does lightly, "[c]ourts are reluctant to infer preemption." (*Viva!*, *supra*, 41 Cal.4th at p. 936 [internal quotation marks and brackets omitted, citing cases].) A "cornerstone[]" in preemption analysis is that in "all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Pac Anchor Transp.*, *supra*, 59 Cal.4th at p. 778 [quoting *Brown*, *supra*, 51 Cal.4th at p. 1060, internal quotation marks and

ellipses omitted]; see also *Wyeth*, *supra*, 555 U.S. at p. 565.) This high standard is imposed due to "respect for the states as 'independent sovereigns in our federal system'" (*Wyeth*, *supra*, 555 U.S. at p. 565 fn. 3) and "provides assurance that the federal-state balance . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts.'" (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 957 [quoting *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525], internal quotation marks omitted.) Thus, if two readings of a federal 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; see also *Brown*, *supra*, 51 Cal.4th at p. 1064 [applying *Bates*].)

Rinehart has argued that this presumption does not apply here because federal mining laws are long-standing. (Answer to Petition for Review, p. 25.) But that does not affect the application of the presumption against preemption. As the U.S. Supreme Court recently explained, the presumption depends upon the "historic presence of state law," not "the absence of federal regulation." (*Wyeth*, *supra*, 555 U.S. at p. 565 fn. 3.) Thus, in *McDaniel v. Wells Fargo Investments, LLC* (9th Cir. 2013) 717 F.3d 668, the Ninth Circuit rejected the argument that Congress's long regulation of securities markets rendered the presumption inapplicable in a suit testing whether those federal laws preempted state labor law. (See *id.*, p. 675 ["[W]hether Congress has regulated the securities industry comprehensively for fifty years or only interstitially for five is irrelevant."].) And in *Pacific Merchant Shipping Association v. Goldstene* (9th Cir. 2011) 639 F.3d 1154, the same court applied the presumption when considering whether state environmental regulations were preempted by federal maritime commerce laws. (*Id.*, p. 1167 [applying presumption because, even though the state regulations "operate in fields historically occupied by the federal government," the state regulations "ultimately implicate the

prevention and control of air pollution" – an area of traditional state concern].)

Here, the purpose of Fish and Game Code section 5653.1 is environmental protection, including the protection of wildlife, water quality, and human health. (Stats. 2009, ch. 62, § 2 ["The Legislature finds that suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state . . . ."]) Such concerns are at the core of the state's historic police power. (*Lacoste v. Dept. of Conservation* (1924) 263 U.S. 545, 551 ["Protection of the wild life of the State is peculiarly within the police power . . . ."]; see also *Viva!*, *supra*, 41 Cal.4th at p. 937, fn. 4 [collecting cases].) More specifically, California has a long tradition of protecting the environment from the adverse effects of mining, as discussed above. (See *supra* pp. 17-19; *Woodruff*, *supra*, 18 F. 753 [upholding injunction under California law against hydraulic mining on federal land due to its environmental effects]; *County of Sutter*, *supra*, 152 Cal. 688 [same]; *Yuba County*, *supra*, 141 Cal. 360 [upholding injunction against ground sluice process mining]; Pub. Resources Code, § 3981 [originally enacted by Stats. 1893, ch. 223, p. 337 § 1, requiring hydraulic mining to be practiced without harm to streams or adjacent lands]; *Granite Rock*, *supra*, 480 U.S., p. 576 [noting application of permit requirements from California Coastal Act of 1976, Pub. Resources Code § 30000 et seq.].)

Because the protection of California's environment, water, and wildlife is a matter of traditional state concern, the presumption applies. And, as shown above (see *supra* pp. 12-20), the federal statutes' text and history can reasonably be interpreted to avoid preemption. Rinehart's preemption claim should fail.

C. This Court Should Defer to the Federal Agencies' View that State Laws Such as California's Are Not Preempted

Courts generally defer to a federal agency's reasonable construction of a federal statute which the agency administers. (*Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.* (1984) 467 U.S. 837, 842-45; *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 139-40; *RCJ Med. Servs., Inc. v. Bonta* (2001) 91 Cal.App.4th 986, 1005-06). This principle extends to federal agencies' views about whether state laws conflict with, or stand as an obstacle to, the federal statutes they administer. (*E.g., Chae v. SLM Corp.* (9th Cir. 2010) 593 F.3d 936, 949-50.) When applied here, it supports the People's view that the federal mining laws preempt only those state laws that would make simultaneous compliance with state and federal requirements impossible.

1. The federal agencies responsible for administering federal mining law have rejected Rinehart's view of preemption. The U.S. Bureau of Land Management ("BLM") has promulgated a formal regulation about preemption on public lands, stating that: "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.*" (43 C.F.R. § 3809.3, emphasis added.)[9] In its notice of proposed rulemaking, BLM noted that the Supreme Court had encouraged federal agencies to address preemption in their regulations. (Mining Claims Under the General Mining Laws; Surface Management, 64 Fed.Reg. 6422, 6427 (Feb. 9, 1999) [discussing *Granite Rock*].) The final

[9] Since this regulation was adopted pursuant to formal notice-and-comment procedures, it has the "force and effect of law." (*Chrysler Corp. v. Brown* (1979) 441 U.S. 281, 301-03.)

rule thus holds that "States may apply their laws to operations on public lands." (See Mining Claims Under the General Mining Laws; Surface Management, 65 Fed.Reg. 69998, 70008-09 (Nov. 21, 2000).) "State law or regulation is preempted only to the extent that it specifically conflicts with Federal law," which occurs "only when it is impossible to comply with both Federal and State law at the same time." (*Ibid.*) "[N]o conflict exists if the State regulation requires a higher level of environmental protection." (*Id.* at p. 70008.) This is consistent with BLM's view for more than thirty years. (See 64 Fed.Reg. at p. 6427, quoting preamble to 1980 regulations.)[10]

In arriving at this formal rule, BLM made special note of a Montana statute. (65 Fed.Reg. at p. 70009.) That statute banned one method of mining – cyanide leaching-based operations – which miners argued was the only economically viable way to mine. (*Ibid*; *Seven Up Pete Venture v. Montana* (2005) 327 Mont. 306, 114 P.3d 1009, 1014, 1016.) Applying the principles noted above, BLM found that the Montana statute "provide[d] a higher standard of protection" and was not preempted: "In this situation, the State law or regulation will operate on public lands. BLM believes that this is consistent with FLPMA [a federal land use law], the mining laws, and the [Supreme Court's] decision in the *Granite Rock* case." (65

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[10] Similarly, the U.S. Forest Service has stated that "[i]t is entirely possible that both the Forest Service and a State can permissibly regulate suction dredge mining operations for locatable minerals occurring on [National Forest Service] lands," though "[s]tate regulation of suction dredge mining operations . . . is pre-empted when it conflicts with Federal law." (Clarification as to When a Notice of Intent To Operate and/or Plan of Operation Is Needed for Locatable Mineral Operations on National Forest System Lands, 70 Fed.Reg. 32713, 32722 (June 6, 2005).) This statement is consistent with BLM's view that in order for preemption to apply there must be a direct conflict, such that one could not comply with federal and state regulation at the same time.

Fed.Reg. at p. 70009, italics added.) In short, under BLM's interpretation, federal mining laws permit states to prohibit one form of mining for environmental reasons, even where it is alleged that the ban renders mining of certain claims impractical. The Court of Appeal, in arriving at its contrary position in this case, neglected even to consider this agency view, despite the People's briefing of the issue.

2. As the U.S. Supreme Court has acknowledged, courts must "attend[] to an agency's explanation of how state law affects the regulatory scheme," because federal agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (*Wyeth*, *supra*, 555 U.S. at p. 577.) A court may decline to give deference if it is unconvinced by the "thoroughness, consistency, and persuasiveness" of the agency's view. (*Ibid.*) As the Ninth Circuit explained in *Chae*, the lack of deference to the agency's preemption views in *Wyeth* resulted from two factors: "all evidence of congressional intent pointed away from" the agency's position, and the agency "had recently, abruptly, and sweepingly changed its view about the preemptive role of its regulations." (593 F.3d at pp. 949-50.) Neither of those factors is present here. Moreover, here, unlike in *Wyeth*, the agency has provided its views on preemption in a formal rule "with the force of law." (*Wyeth*, *supra*, 555 U.S. at p. 576.)

3. In any case, *Granite Rock* has made clear the central role that agency views play in the determination of preemption under the federal mining laws.

In *Granite Rock*, the plaintiff, Granite Rock Company, owned unpatented mining claims in the Los Padres National Forest, and had a plan of operations approved by the U.S. Forest Service. (480 U.S. at p. 576.)

After the California Coastal Commission instructed the company to apply for a coastal development permit for its mining activities, the company sued, claiming that the California Coastal Act's permit requirement was preempted. (*Id.* at pp. 576-77.) The Court rejected that challenge, holding that the existence of the state requirement to apply for a permit did not create a conflict with federal law. (*Id.* at pp. 593-94.)[11]

As relevant here, *Granite Rock* examined preemption under federal mining laws, including the Mining Act of 1872 (30 U.S.C. § 22 et seq.) and the Surface Resources and Multiple Use Mining Act of 1955 (30 U.S.C. § 601 et seq.).[12] (480 U.S. at pp. 582-84.) The Court found no intent to preempt state laws, either in those federal mining statutes or in their implementing regulations. (*Ibid.*)

Noting the mining company's "conce[ssion] that the Mining Act of 1872, as originally passed, expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation," *Granite Rock* looked to the regulations that federal agencies had promulgated. (480 U.S. at p. 582.) The Court reasoned that "[i]f ... 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 [federal agency] regulations." (*Id.* at pp. 582-83.) Indeed, the Court

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[11] The Court of Appeal here acknowledged that the requirement under Fish and Game Code section 5653 that suction dredge miners apply for a permit would not be preempted if permits were available. (Slip Opn., p. 16, citing *Granite Rock.*)

[12] In another portion of the opinion, discussed below (see *infra* pp. 29-30), *Granite Rock* examined preemption under two federal land use statutes, the National Forest Management Act, 16 U.S.C. § 1600 et seq., and the Federal Land Policy and Management Act, 43 U.S.C. § 1701 et seq. (480 U.S. at pp. 584-89.) In a third portion of the opinion, which is not relevant here, *Granite Rock* examined preemption under the Coastal Zone Management Act, 16 U.S.C. § 1451 et seq. (480 U.S. at pp. 589-93.)

thought it would be "appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity." (*Id.* at p. 583.)

The Court found that the federal mining "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." (*Ibid.*) As examples, the Court noted federal regulatory provisions requiring compliance with state air quality, water quality, and solid waste standards, as well as general state environmental protection laws – regulations which remain in place today. (See *id.* at pp. 583-84, citing to 36 C.F.R. §§ 228.5(b) & 228.8(a), (b), (c) & (h).)

The Court also rejected the plaintiff's argument that the state regulations were invalid because they were "duplicative" of federal permitting requirements. (480 U.S. at pp. 593-94.) And it rejected the dissenting opinion's position that federal law could not permit a regime whereby "state regulators, whose views on environmental and mining policy may conflict with the views of the Forest Service, have the power, with respect to federal lands, to forbid activity expressly authorized by the Forest Service." (Compare *id.* at p. 594 with *id.* at p. 606 [conc. & dis. opn. of Powell, J.].)

Granite Rock's reasoning applies directly to this case. The text and history of the Mining Act, which have not changed, support the People's reading, as shown above; and *Granite Rock*'s observation about the lack of intent to preempt state environmental laws remains true and binding. (See *supra* pp. 12-20.) The relevant federal agencies' position on the scope of preemption supports a finding of no preemption here even more strongly than in *Granite Rock*. (See *supra* pp. 23-25 [discussing 43 C.F.R. § 3809.3]; see also 43 C.F.R. §§ 3715.5(b), 3802.3-2(a)-(c) [federal land

regulations requiring miners to comply with state environmental standards, and with state air, water quality, and solid waste disposal standards]; *Great Basin Mine Watch* (Dept. of Int. Mineral Mgmt. Serv. Nov. 9, 1998) 146 IBLA 248, 256 [1998 WL 1060687] [in determining whether a federal mining claim is "valuable" and therefore valid, "the costs of compliance with all applicable Federal and State laws (including environmental laws) are properly considered" and "[u]nder no circumstances can compliance be waived merely because failing to do so would make mining of the claim unprofitable"].) This Court should accept the federal agencies' position that there is no preemption if state law is more protective of public lands, or bans one form of mining, and that preemption only occurs if it is impossible to comply with both federal and state law.

D. It Is Possible To Comply with Both Federal and State Law Here

For the reasons above, Rinehart's only viable defense would be a claim of conflict preemption – the contention that "simultaneous compliance with both state and federal directives is impossible." (*Viva!*, *supra*, 41 Cal.4th at p. 936.)

There is no such impossibility here. Nothing in federal law requires Rinehart to suction dredge his federal mining claim. Rinehart may freely mine his claim using a variety of other methods. Or, in lieu of mining, he may pay a nominal fee or do other kinds of work while the Department and Legislature work on changes that could lift the moratorium, and then mine in a way that complies with state law thereafter.

Contrary to Rinehart's claims below, 30 U.S.C. section 28 does not create a duty to mine. Rather, section 28 requires that "$100 worth of labor shall be performed or improvements made during each year" – a condition that can be satisfied by *any* kind of work relating to the claim. (30 U.S.C. § 28; see, e.g., *United States v. 9,947.71 Acres of Land* (D. Nev. 1963) 220

F.Supp. 328, 332-33 [explaining that road work qualifies]; 43 C.F.R. § 3836.12 [listing other examples of qualifying assessment work].) Miners also have the option to pay a small fee – currently $155 – in lieu of performing that 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) . . . ."]; 43 C.F.R. § 3834.11(a) [similar]; 43 C.F.R. § 3830.21(d) [setting fee amount].) *Wyeth* imposes a "demanding" standard on those claiming that simultaneous compliance with state and federal law would be impossible. (555 U.S. at p. 573 ["Impossibility preemption is a demanding defense."].) Because nothing prevents Rinehart from complying with both state and federal law, there is no conflict preemption.

II. THE COURT OF APPEAL'S OPINION MISREADS *GRANITE ROCK* AND MISAPPLIES *SOUTH DAKOTA MINING*

The Court of Appeal's decision that preemption could occur here rested on a misreading of the Supreme Court's *Granite Rock* decision and a misapplication of the Eighth Circuit's opinion in *South Dakota Mining*.

A. *Granite Rock*'s Discussion of Land Use Statute Preemption Does Not Aid Rinehart's Case

The Court of Appeal focused not on *Granite Rock*'s discussion of preemption under federal mining laws, but rather on a different portion of the opinion considering whether California's regulation of mining was preempted by two federal land use statutes, the National Forest Management Act (16 U.S.C. § 1600 et seq.) ("NFMA") and the Federal Land Policy and Management Act (43 U.S.C. § 1701 et seq.) ("FLPMA"). (See Slip Opn., p. 19; *Granite Rock, supra*, 480 U.S. at pp. 585-89.) A proper reading of *Granite Rock* disproves the Court of Appeal's conclusion,

because under *Granite Rock*'s reasoning the moratorium at issue here is an environmental regulation, not a land use regulation.[13]

In analyzing preemption under these federal land use statutes, *Granite Rock* distinguished between state land use statutes and state environmental regulations. (480 U.S. at p. 587.) The Court assumed – "without deciding" – that the NFMA and FLPMA would preempt state land use statutes. (*Id.* at p. 585.)[14] Regardless, *Granite Rock* held that the state permitting requirement at issue was not a land use regulation but an environmental regulation, and as such it was not preempted by the federal land use laws. (*Id.* at pp. 587-89.) *Granite Rock* explained that:

> The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.

(480 U.S. at p. 587.)

Although the Court of Appeal based its decision here on the first sentence of this passage (Slip Opn., p. 19), that dictum has no application to Rinehart's case, for two reasons. First, *Granite Rock* mentioned this issue only in its analysis of preemption under federal land use laws. Rinehart's

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[13] Rinehart has not argued that any federal land use statute preempts California's law. (CT 88-89.) Instead, he argued for preemption under federal mining laws by using language from the portion of *Granite Rock* that discussed preemption under the federal land use statutes, as explained below. (CT 90.)

[14] We are unaware of any court deciding that these statutes preempt state laws of any kind.

claim about preemption under federal mining law must be resolved using the part of *Granite Rock* analyzing the mining-law preemption question – and that part of *Granite Rock* instructs this Court to defer to federal agency views, as explained above. (See *supra*, pp. 25-28.) Second, the moratorium of Fish and Game Code section 5653.1 is not a land use plan but an environmental regulation, as its legislative findings make clear:

> 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, and, *in order to protect the environment and the people of California* pending the completion of a court-ordered environmental review by the Department of Fish and Game and the operation of new regulations, as necessary, it is necessary that this act take effect immediately.

(Stats. 2009, ch. 62, § 2, emphasis added.)

The moratorium's impact on suction dredge mining is directly tied to that activity's environmental effects. The moratorium lasts only until an "environmental review" is completed, new regulations "fully mitigate all identified significant environmental impacts," and the program is fully funded by permit fees. (Fish & G. Code, § 5653.1, subd. (b).) By imposing these requirements, state law does not "choose[] particular uses for the land." (*Granite Rock*, *supra*, 480 U.S. at p. 587.) Rather, it "requires only that, however the land is used, damage to the environment is kept within prescribed limits." (*Ibid.*)[15] Unlike land use zoning laws, which in California are typically adopted by counties and cities (see Gov. Code, § 65800), the moratorium does not choose particular uses for particular

[15] The requirement that permit fees be adequate is related to the statute's environmental goals. In order for the Department to ensure that the regulations on paper adequately protect the environment, those regulations must be enforced, which in turn requires funding from permit fees.

places. Rather, it applies statewide. What it regulates is not land, but equipment. Mining is allowed – it is "the use of any vacuum or suction dredge equipment" which is restricted. (Fish & G. Code, § 5653.1, subd. (b).) Indeed, the moratorium leaves Rinehart, and other people with mining claims on federal lands, free to mine using other methods.

Nor does the duration of the moratorium transform it from an environmental provision into a land use regulation. The U.S. Supreme Court has observed in another context that a moratorium is best viewed as a delay in the permitting process. (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 337 fn. 31 [noting lack of any "persuasive explanation for why moratoria should be treated differently from ordinary permit delays"].) Moratoria are a "widely used" and "essential" tool, whereby a legislative body or an agency investigates an issue in general and places permit processes on hold while developing a permanent solution. (*Id.* at pp. 337-38 & fns 31-34.) This moratorium can be viewed simply as part of the permitting process, and thus falls squarely within *Granite Rock*'s holding that state permit processes related to mining are not preempted by federal law.

Finally, Rinehart's case is not strengthened by the fact that the Department and the Legislature are still actively working to create a suitable statutory framework within which the Department can fulfill its regulatory charge. Under the law in place on June 16, 2012, when Rinehart conducted the activity for which he was convicted, the moratorium was scheduled to expire in 2016, because the 2012 amendment had not yet gone into effect. (Compare CT 68-69 [stipulating to date of offense], with Stats. 2012, ch. 39, § 7 [signed into law on June 27, 2012].) The Department had finished its environmental review only three months before, and its legislative report was not yet due. (See 2013 Legislative Report, p. 1a; Fish & G. Code, § 5653.1, subd. (c)(1).) That version of the moratorium is what

Rinehart must challenge in appealing his conviction. In any case, even the current status of the moratorium reveals a legislative expectation that permitting for suction dredge mining will resume in due course, subject to appropriate environmental protections. The Legislature has required the Department to report on statutory changes necessary to lift the moratorium. (Fish & G. Code, § 5653.1, subd. (c)(1).) Since the time Rinehart was cited, the Department has provided that report, and its recommendations. (2013 Legislative Report.) And the Legislature has separately granted the Department general authority to revise permit fees. (Stats. 2012, ch. 565, § 5, amending Fish & G. Code, § 1050.) It is unremarkable that the Legislature has not yet finalized a solution on difficult issues related to water quality, cultural resources, birds, and noise, in the two years since the 2013 Legislative Report.[16] Courts applying Fifth Amendment takings law have recognized that permitting delays may last several years without converting the requirement for a permit into a taking. (See, e.g., *Tahoe-Sierra*, *supra*, 535 U.S. at p. 337 n.32 [citing cases]; *Wyatt v. United States* (Fed. Cir. 2001) 271 F.3d 1090, 1097-99 [seven-year delay did not amount to a temporary taking]; *Landgate, Inc. v. California Coastal Comm'n* (1998) 17 Cal.4th 1006, 1025-31 [same for two-year delay].)[17] Given that

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[16] Legal challenges to the Department's environmental review documentation and new regulations have been filed by two groups of miners, the Karuk Tribe, and several environmental groups. (*Suction Dredge Mining Cases*, San Bernardino County Superior Court, Coord. No. JCC4720.) Included in these cases are challenges to the Department's findings of significant and unavoidable environmental effects, as well as to the Department's view that it does not currently have authority to address them under the regulatory authority provided by Fish and Game Code section 5653. A lengthy administrative record has been prepared, and those issues are pending at the trial court.

[17] Under the California Constitution, too, such delays do not amount to a temporary taking. (See, e.g., *Lowenstein v. City of Lafayette* (2002)

(continued...)

the Legislature has amended the moratorium twice within three years, it is reasonable to expect it will act again, and that miners will be able to obtain permits, subject to appropriate time, place, and manner regulations, after the moratorium ends.

B. *South Dakota Mining* Does Not Require a Finding of Preemption Here

Instead of examining the federal statutes' text and history, the Court of Appeal largely relied on the Eighth Circuit's opinion in *South Dakota Mining*. (Slip Opn., pp. 16-19.) *South Dakota Mining* involved a local county initiative that amended the county's zoning laws to ban new or amended permits for "surface metal mining extractive industry projects" in a 40,000 acre portion of the county, of which approximately 90% was federal land. (155 F.3d at p. 1007.) The county stipulated that surface mining was the only practical means of mining in that area, and eventually supported the plaintiffs' attempt to invalidate the initiative. (*Id.*, at pp. 1007-08 & fn. 3.) The Eighth Circuit found the initiative preempted on the ground that it interfered with federal mining law's policy of encouraging mining on federal land. (*Id.*, at p. 1011.)

Even on its own terms, *South Dakota Mining* is distinguishable, because the local law challenged in *South Dakota Mining* is nothing like the California statute at issue here. *South Dakota Mining* concerned an amendment to the local zoning law – an amendment that singled out particular portions of the enacting county's land and prohibited surface mining in those areas. (155 F.3d at p. 1007.) In contrast, the Fish and

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(...continued)
103 Cal.App.4th 718, 733-37; *People* ex rel. *State Pub. Wks. Bd. v. Superior Court* (1979) 91 Cal.App.3d 95, 108-09 [a "freeze on building permits pending adoption of a zoning ordinance or comprehensive plan" is not a taking].)

Game Code provision at issue here is an environmental regulation that applies statewide. (See *supra* pp. 31-32.) The local law in *South Dakota Mining* singled out land that was 90% federally owned (155 F.3d at p. 1007), effectively targeting federal land. California's statute applies throughout the state, including on state-owned and private land. The initiative in *South Dakota Mining* banned surface mining permanently (155 F.3d at pp. 1007-08), whereas California's law is a temporary moratorium that will dissolve once significant environmental effects are eliminated. (See *supra* pp. 5-8, 31-34.) And the *South Dakota Mining* law effectively banned all forms of surface mining. (155 F.3d at p. 1007.) California's moratorium still allows mining in rivers, streams, and lakes; it just restricts the use of motorized suction dredge mining equipment.

In any case, California courts need not follow *South Dakota Mining*. (E.g., *Yee v. City of Escondido* (1990) 224 Cal.App.3d 1349, 1351.) In light of *South Dakota Mining*'s numerous flaws, it should be rejected. *South Dakota Mining* did not analyze the text and legislative history of federal mining laws, including 30 U.S.C. § 22. (See *supra* pp. 12-20.) It viewed the Mining Act's goal of promoting mining as decisive, ignoring the principle that congressional encouragement of an activity by itself does not provide a basis for preemption. (See *supra* p. 11, citing *Commonwealth Edison*, *supra*, 453 U.S. at pp. 633-34, *Pacific Gas & Elec. Co.*, *supra*, 461 U.S. at pp. 221-23, and *Rodriguez*, *supra*, 480 U.S. at pp. 525-26.) It likewise ignored the presumption against preemption, which applies with particular force here given California's longstanding regulation to address the environmental effects of mining and Congress's awareness of that regulation. (See *supra* pp. 20-22.) The *South Dakota Mining* court did not consider the relevant federal agencies' views, which expressly permit state regulation in excess of federal requirements, including state bans on particular forms of mining that miners claim are economically required.

(See *supra* pp. 23-28.) Finally, *South Dakota Mining* ignored *Granite Rock*'s analysis of preemption by the federal mining laws and instead applied *Granite Rock*'s analysis of preemption by federal land use statutes. (See 155 F.3d at p. 1011, citing to *Granite Rock*, *supra*, 480 U.S. at p. 587 [discussing preemption under federal land use statutes].) In view of these flaws, *South Dakota Mining* is not persuasive precedent, and should not be followed.

C. The Court of Appeal's "Commercial Impracticability" Test Has No Foundation and Is Unadministrable

Instead of asking whether California's moratorium renders compliance with federal law impossible, the Court of Appeal held that California's law would be preempted if it made mining "'commercially impracticable'" on a particular miner's land. (Slip Opn., p. 19, quoting *Granite Rock*, *supra*, 480 U.S. at p. 587.) The "commercially impracticable" phrase is based on a misunderstanding of *Granite Rock*, and would prove unadministrable in practice.

Granite Rock employed the term "commercially impracticable" in its discussion of preemption not under federal mining laws but instead under federal land use laws – a discussion that merely assumed, without deciding, that federal land use laws would preempt state land use laws on federal land. (480 U.S. at pp. 585-87.) It discussed commercial impracticability not as part of any test for preemption, but rather in hypothesizing about whether a state environmental regulation could take on the qualities of a land use regulation in conflict with such federal land use statutes. (*Id.* at p. 587 ["one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable"].) Because Rinehart seeks preemption under the mining laws rather than under federal land use law, and because the state statute at issue is an environmental law, the entire discussion is inapposite to this case. (See *ibid.* ["the core

activity" of land use planning and environmental regulation "is undoubtedly different"].) *Granite Rock* thus does not require this Court to adopt the "commercial impracticability" test – and certainly does not require applying that test to an environmental statute such as the one at issue here.

There is good reason for this Court not to adopt such a test. "Commercially impracticability" focuses the preemption question on profitability alone, disregarding all other values. But federal mining law does not enshrine profitability as Congress's sole purpose and goal. (See *Rodriguez*, *supra*, 480 U.S. at pp. 525-26 ["no legislation pursues its purposes at all costs"].)

This "commercially impracticable" standard places at risk a variety of state laws that affect the profitability of mining on federal land. Numerous environmental regulations potentially affect the profitability of mining a given claim, including regulations related to water pollution by mercury and other toxic chemicals (e.g., Water Code, § 13370 et seq.); air quality, such as limitations on emissions from generators and other equipment (e.g., Cal. Code Regs., tit. 13, §§ 2450-65); fuel, including penalties for discharging oil and gasoline (e.g., Fish & G. Code, § 5650(a)(1); Water Code, § 13272); explosives, including limitations on the use of dynamite (Health & Safety Code, § 12000 et seq.); endangered species (Fish & G. Code, § 2080 et seq.); streambed protections (Fish & G. Code, § 1600 et seq.); coastal zone protections (Pub. Resources Code, § 30000 et seq.); and nuisances (Civil Code, § 3479 et seq.). Local regulations could also be affected, including noise ordinances (e.g., Plumas County Code of Ordinances, § 9-2.413). The Court of Appeal's test could even cast doubt upon one of California's most venerable mining regulations – the long-standing restrictions on the highly destructive practice of hydraulic mining.

(See *supra* pp. 17-19 [discussing *Woodruff*, *supra*, 18 F. 753; *County of Sutter*, *supra*, 152 Cal. 688; *Gold Run Ditch*, *supra*, 66 Cal. 138].)

Effects from the Court of Appeal's test could also apply beyond the environmental realm. Other state laws also affect profitability, including wage and hour laws (e.g., Labor Code, §§ 510-556, 750, 1171-1206), and California's statutory and common law governing torts, contracts, and insurance. The fallacy in the Court of Appeal's logic is evident from the fact that it would seem to cast doubt on the enforcement of state tax laws, even though the U.S. Supreme Court long ago (and promptly after the enactment of the Mining Act of 1872) ruled that miners must pay state taxes on federal mining claims. (*Forbes v. Gracey* (1876) 94 U.S. 762, 767.)

The "commercial impracticability" test would also prove unadministrable in practice. In mining, as elsewhere, commercial success depends on the balance between costs and revenues. With mining, the costs include labor and equipment, and revenue is the value of gold recovered. Net profitability depends on case-dependent matters such as the location of the mining claim and the skill of the miner. It also depends on the market price of gold, which has ranged from under $300 per ounce to over $1,800 per ounce over the last thirty years. (RJN, Exh O.)[18] Under the Court of Appeal's "commercial impracticability" standard, an environmental regulation affecting a particular claim might be preempted one month but not the next, based on the changing price of gold. It could be preempted when one miner owns the claim, but not when it is sold to another, more skilled miner. The least viable mining claims would be subject to the least

[18] Indeed, even in as short a period as 2010 to 2014, there has been a tremendous change in gold prices, with the price of gold nearly doubling between 2010 and 2013, then falling again by some 30%. (RJN, Exh. P.)

state and local regulation, resulting in a special preference for less efficient mines.

Moreover, because claims are subject to multiple regulations, the Court of Appeal's standard would require the trial court to decide the order in which to apply those regulations, and which would tip the scales to commercial impracticability. Neither a civil regulatory regime nor a criminal trial should turn on unadministrable standards such as this. Absent clear indication from Congress that the application of preemption should be so variable, this Court should reject the "commercial practicability" standard.

CONCLUSION

This Court should reverse the decision of the Court of Appeal and affirm the trial court's judgment of conviction.

Dated: March 23, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 12,093 words.

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