No. S222620

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.

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

DEFENDANT AND APPELLANT BRANDON RINEHART'S ANSWER TO THE PEOPLE'S SUPPLEMENTAL BRIEF REGARDING *BOHMKER V. OREGON*

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I. THE ORIGIN AND NATURE OF THE *BOHMKER* OPINION.

Defendant and Appellant Brandon Rinehart submits this supplemental brief regarding the case of *Bohmker v. Oregon*, 2016 WL 1248729, No. 1:15-CV-01975-CL (D. Or. March 25, 2016). The People omit to disclose that the case had been appealed as of April 5, 2016 (Docket No. 16-35262 (9th Cir.)), and pursuant to the Ninth Circuit's order of April 7, 2016, appellant's opening brief is to be filed by July 14, 2016. Inasmuch as the Ninth Circuit has previously found *more* preemptive force in the mining laws than the Supreme Court did (in *California Coast Comm'n. v. Granite Rock Co.*, 768 F.2d 1077 (9th Cir. 1985), *rev'd*, 480 U.S. 572 (1987)), reliance upon this opinion giving substantially *less* preemptive force than *Granite Rock* is not warranted.

The opinion was decided by a magistrate, not a federal district court judge; plaintiffs consented to his determination of the case in order to avoid delays and costs from second layer of review by a district court judge given an inevitable Ninth Circuit appeal no matter how the magistrate ruled. The opinion of the magistrate deferred to the prior, unpublished judgment of a district court judge in *Pringle v. Oregon*, No. 2:13-CV-00309-SU, 2014 WL 795328 (D. Or. Feb. 25, 2014), citing it, together with *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), as the principal

decisional authority for its decision. *Bohmker* at *2.

The opinion is clearly erroneous. The opinion's errors begin with the notion that the plaintiffs relied "in large part on the Mining Act of 1872". *Id.* at *5. By focusing the analysis, in substance, to whether federal lands were still "open" to mining within the meaning of 30 U.S.C. § 22, the magistrate disregarded a whole host of Congressional statutes and associated purposes briefed at length before it, and before this Court. The superficial rationale of the decision is captured in its final sentence:

> "Senate Bill 838 does not . . . stand as an obstacle to the accomplishment of the full purposes and objectives of federal law because, under the law, the 'valuable mineral deposits in lands belonging to the United States in Oregon' remain 'free and open' to mineral exploration and development by means other than the use of motorized equipment."

Bohmker at *9.

The *Bohmker* opinion fails entirely even to mention, much less seriously consider, multiple Congressional purposes set forth in the complex web of statutes and regulations placed before the Court *beyond* keeping federal lands "free and open" for mineral development (30 U.S.C. § 22): (1) to grant property rights and require development of the minerals *on specific parcels* (30 U.S.C. §§ 26, 28 & 35), (2) to substantively restrict regulation that interferes with mining (30 U.S.C. § 612(b)), (3) to provide specific *federal* statutory mechanisms for states to limit mining on federal

lands (*e.g.*, 30 U.S.C. § 1281), (4) to give primacy to federal land use planning (*id.* § 1712(c)(9)), and, (5) most generally, to foster "sound and stable domestic mining . . . industries" (30 U.S.C. § 21a). The factual conclusion that mandating work by hand is no obstacle to the accomplishment of all these statutory objectives is absurd.

Only by ignoring fundamental procedural rules barring summary judgment when issues of fact are disputed (Fed. R. Civ. P. 56) could such factfinding occur. The State of Oregon, like the People here, asked the Court to find no interference with the objectives of federal mining law notwithstanding sworn testimony that miners could not possibly extract their mineral deposits on their mining claims without motorized equipment (one cannot even work by hand underwater without motorized equipment to supply air), and that private property and free enterprise-based mineral development industries cannot be "sound and stable" if subject to being shut down for years on end.[1]

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[1] *See* Exhibit 16 to Appellant's Third Supplemental Request for Judicial Notice ("3d Supp. RJN"), filed herewith (Kitchar Decl. ¶¶ 31-36); *see also id.* Ex. 17 (McCracken Decl. ¶ 12), Ex. 18 (Evens Decl. ¶ 6), Ex. 19 (Grothe Decl. ¶ 6).

II. BOTH OREGON AND CALIFORNIA'S MINING USE MORATORIUMS ARE FORBIDDEN LAND USE RESTRICTIONS.

While the challenged Oregon statute was even more clearly a land use restriction than the California statute, because it creates specific zones where motorized mining is prohibited like garden-variety zoning ordinances, the opinion's discussion is relevant here. The magistrate quoted *Granite Rock*'s characterization that "[l]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". *Bohmker* at *6. The magistrate distinguished the case by sophistry, observing that Oregon's law did not "mandate particular uses of the land" (*id.*), but the point of the Supreme Court's dichotomy is that land use planning *chooses* land uses—it doesn't *mandate* them. The prohibition of a particular use—motorized mining—*is* choosing uses for land.

And neither statute attempts to keep environment impact "within prescribed limits" as contemplated by *Granite Rock*; rather, zero-risk tolerance is used to justify prohibition such that no environmental impact can occur at all. This is not a substantive policy choice Oregon and California can make with respect to mining on federal land. In reaching out to impose so-called "temporary" prohibitions, the states choosing to shut

down mining in a way that evades the entire Congressional design for state involvement in federal land use decisionmaking.

The magistrate also disparaged *Granite Rock*'s conclusion about preemption of contrary state land use plans as "speculation" (*Bohmker* at *6), prompting the People now to argue that *Granite Rock* was wrong. The People now claim that because federal land use plans are to be consistent with state land use plans "to the maximum extent [the Secretary] finds consistent with Federal law and he purposes of the Act" (People's Supp. Br. at 2 n.1 (quoting treatise citing 43 U.S.C. § 1712(c)(9))), there can be no preemption.

The People are wrong, not *Granite Rock*. The Conference Report on the cited provision "mak[es it] clear that the ultimate decision as to determining the extent of feasible consistency between BLM plans and such other plans rests with the Secretary of Interior" so as to "maintain the integrity of *governing Federal laws*". H. Conf. Rep. No. 94-1724, 94th Cong., 2d Sess. 58 (1976) (emphasis added).

Those governing federal laws include, of course, 30 U.S.C. § 612(b)'s restriction of material interference in mining operations, all the other mining law, and a general command to prevent only "*unnecessary* or *undue* degradation of public lands". 43 U.S.C. § 1732(b) (emphasis added); *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 . . ."). It is obvious that *Granite Rock* and federal law forbid Oregon and California from establishing "no motorized mining zones" on federal land, notwithstanding the magistrate's view.

III. AN ASSERTED ENVIRONMENTAL MOTIVE DOES NOT TRUMP PREEMPTION.

Rather than focus upon the actual operation and prohibitory character of the law, the magistrate focused on legislative findings referencing asserted "risks" of environmental impacts, wholly ignoring the fact that the Oregon legislature candidly acknowledged an intent to impose a moratorium to develop a regulatory system which would "[a]ddress *social considerations*, including concerns related to safety, noise, navigation, cultural resources and other uses of waterways". Senate Bill 838, § 8(1)(d)(B) (emphasis added).[2] As in California, the entire attack on small-scale mining is in fact driven by the social preferences of other waterway users who, unlike the miners, have no statutory rights whatsoever to be on these federal lands.

Each and every moratorium on the use and development of land can be characterized as motivated by a desire to avoid the "risk" of environmental harm, but a motive-based analysis would wipe out any and

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[2] A copy of Senate Bill 838 is filed herewith as Exhibit 20 to Appellant's 3d Supp. RJN.

all federal law at will. Under the reasoning of the magistrate, Arizona's recent attempts to supplement federal immigration law enforcement would be sustained without regard to impacts on federal immigration policy, so long as the legislature made findings that the actions would avoid environmental risks. *Cf. Arizona v. United States*, 132 S. Ct. 2492 (2012).

It is especially pernicious to allow pious assertions of motive alone to frustrate Congressional policy where, as here, the motives are untethered to fact. Small-scale motorized mining, including suction dredging, has operated for decades without appreciable environmental harm and the so-called "essential salmon habitat" zones are in many cases not only not essential, but not even salmon habitat.[3]

The magistrate manifestly erred in giving deciding weight to assertions of legislative motive. As this Court has held, "[i]n deciding whether a federal statute expressly preempts a state statute, it is Congress's purpose that matters, not the state Legislature's". *Martinez v. Regents of Univ. of Cal.*, 50 Cal. 4th 1277, 1289 (Cal. 2010) (emphasis in original; citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-485 (1996)). Under *Medtronic*, "Congress' intent, of course, primarily is ascertained from the language of the preemption statute [*i.e.*, those portions of the statute where Congress expressly gives a role to state law] and the "statutory framework"

[3] *See, e.g.*, 3d Supp. RJN Ex. 16 (Kitchar Decl. ¶¶ 9-10).

surrounding it". *Id.* at 485-86. Conspicuously absent from the *Bohmker* opinion is any analysis whatsoever of the "preemption statute"—those portions of the statutory framework where Congress has carved out a specific role for state law. *E.g.*, 30 U.S.C. § 612(b) (role for water law); 30 U.S.C. § 1281 (state role in mineral withdrawals). Indeed, there is no analysis of any Congressional intent beyond the 30 U.S.C. § 22 declaration that federal lands be free and open for mineral development.

Instead of reasoned consideration of the Congressional intent, the magistrate simply invoked *Granite Rock*'s conclusion that there was no field preemption, because one might imagine possible permit restrictions that would not impair Congressional objectives. *See Bohmker* at *6. The magistrate also advanced the novel argument that the Clean Water Act authorizes states to simply prohibit mining whenever the prohibition might be argued as a pollution control. *See Bohmker* at *6 (citing 33 U.S.C. § 1370). But the cited portion of the Clean Water Act addresses the preemptive force of *that Act* ("nothing in this chapter shall . . ."), not the federal mining laws.

As to state water quality law, *Granite Rock* noted that compliance with state water quality *standards* would be appropriate and consistent with federal regulations. *Granite Rock*, 480 U.S. at 583. But the *Bohmker* case, like this case, does not involve the application of *standards* by a permitting

process; they represent a blatant and discriminatory refusal to apply water quality *standards* in favor of *prohibition.*[4]

The magistrate rejected the Eighth Circuit's admonition to find preemption where the challenged scheme is "prohibitory, not regulatory, in its fundamental character". *South Dakota Mining Association v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998). Instead, the magistrate acknowledged the prohibitory character of the scheme, focused on the motives for adopting it, and blithely declared that there was no obstacle to the purposes of Congress because the mineral deposits "remain 'free and open' to mineral exploration and development by means other than the use of motorized equipment". *Bohmker* at *9. This defies common sense, and is akin to declaring that a state might limit federal timber harvesting to the use of axes.

The People, by contrast, now claim that the "relevant factors" for assessing the prohibitory character of the scheme "are that the moratorium affects only suction dredge mining and not other forms of mining and that it is a temporary pause to address environmental concerns". (People's Supp. Br. at 4 n.1.) This is unsound reasoning, for both schemes are *prohibitory in nature* without regard to the precise scope of the prohibition, and

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[4] For example, Oregon has water quality standards for turbidity that expressly exempt "essential dredging", such as mining operations essential by federal law. Oregon Administrative Rule 340-041-0036(2).

factually misleading because the prohibitions now extend to a wide range of motorized mining methods that function in and out of the water.

As to the temporary nature of the restrictions, miners in California will shortly be in the seventh year of the so-called temporary restriction, with no end in sight, and the prohibition in California has evolved into shutting down all motorized mining by redefining "the use of vacuum or suction dredge equipment" to mean any motorized mining-related activities. *See* Fish and Game Code § 5653(g). The Ninth Circuit, in reviewing *Bohmker*, is likely to adhere to its prior, straightforward decision that "[t]he federal Government has authorized a specific use of federal lands, and [the state] cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress". *Ventura County v. Gulf Oil Co.*, 601 F.2d 1080, 1084 (9th Cir. 1979).

IV. PRACTICAL EFFECTS ON MINING ARE RELEVANT IN ASSESSING THE REASONABLENESS OF ENVIRONMENTAL REGULATION.

The core purpose of Congress is to ensure the extraction of mineral resources where they are found, while minimizing, *but not eliminating,* inevitable environmental impacts of actions necessary to extract those minerals. A reasonable question to ask in this context would be whether there is an alternative means of extracting the minerals with less impact. *Cf. United States v. Richardson,* 599 F.2d 290 (9th Cir. 1979). Similarly, it

may be reasonable to consider whether small changes in operations, with minimal impacts on a miner's ability to extract minerals, should be imposed for real and tangible environmental benefits in excess of the costs imposed.

Instead, *Bohmker* takes the most extreme and radical position that the costs and effects of environmental restrictions are wholly irrelevant in assessing whether those restrictions stand as an obstacle to federal objectives. The People applaud this position as a rejection of the reasoning of the Court of Appeal, but the decision below did not turn upon the costs imposed by regulation. The trial court was merely directed to gather evidence as to:

> "(1) Does § 5653.1, as currently applied, operate as a practical matter to prohibit the issuance of permits required by § 5653? and (2) if so, has this de facto ban on suction dredge mining permits rendered commercially impracticable the exercise of defendant's mining rights granted to him by the federal government?"

People v. Rinehart, 230 Cal.App.4th at 436. That the magistrate, like the People, would rush to judgment with no opportunity to present evidence at trial demonstrates the difficulty human beings have in being fair to those with different beliefs and values (miners now constituting, in substance, an unpopular minority group) but is no model for this Court.

The better rule, followed by this Court, would be to recognize that a prohibitory moratorium obviously demonstrates an obstacle to the accomplishment of the full purposes and objectives of Congress. *Cf. Parks*

v. MBNA America Bank, N.A., 54 Cal.4th 376, 386 (2012) ("States are permitted to regulate the activities of national banks where so doing so does not significantly interfere with the national bank's . . . exercise of its powers"), *cert. denied*, 133 S. Ct. 653 (2012); *see also id.* at 393 (rejecting need for further proof of effects; "we know of no case . . . in which the issue of preemption turned on whether a national bank made an adequate factual showing that state law significantly impaired its federally authorized powers"). Freeing Rinehart of the stigma of criminal conviction will leave the State of California free to impose reasonable environmental regulations—but not prohibitory moratoriums.

Conclusion

This Court should reject the radical proposition that state legislatures may simply shut down industries Congress has determined to foster in the national interest while claiming to study possible environmental regulations, manifestly singling out and discriminating against politically-disfavored industries while permitting activities of equal or greater environmental impact to go forward.[5]

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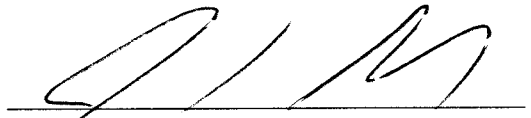
[5] Like the California statute, the Oregon statute shuts down the smallest, most environmentally-benign activities while permitting larger-scale activities to continue. *Compare Bohmker* at *3 n. 1 (noting that large scale mining in the prohibited zones may continue) *and* Fish and Game Code § 5653.1(d) (large scale suction dredging may continue).

Dated: May 2, 2016.



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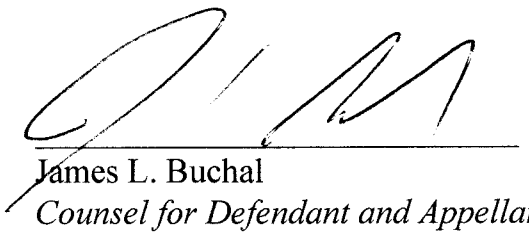
CERTIFICATE OF COMPLIANCE

I. hereby certify that this brief contains 2,723 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: May 2, 2016.



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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 May 2, 2016, I served the following document:

DEFENDANT AND APPELLANT BRANDON RINEHART'S RESPONSE TO THE PEOPLE'S SUPPLEMENTAL BRIEF REGARDING BOHMKER V. OREGON

on the parties in said action as follows:

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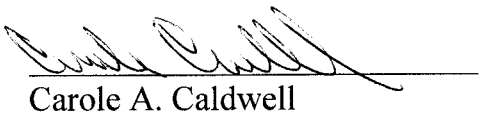

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