

Murphy & Buchal LLP

3425 SE Yamhill Street, Suite 100
Portland, Oregon 97214

telephone: (503) 227-1011
fax: (503) 573-1939
e-mail: jbuchal@mblp.com

MEMORANDUM

To: Dave McCracken, The New 49'ers Legal Fund
From: James L. Buchal
Date: August 23, 2016
Re: *People v. Rinehart*

Yesterday, while I was out of the office, the California Supreme Court reversed the Court of Appeals decision in *People v. Rinehart*, denying that there was any federal preemption with respect to state regulation of mining. In general, the Court oversimplified *Rinehart*'s position and generally ignored the careful balance Congress had struck which recognizes that some level of environmental impact is necessary and unavoidably associated with mining.

The opinion also ignores several of the relevant federal statutes, and misconstrues the entire body of early state laws concerning mining, which regulated aspects of title to mining claims, consistent with Congressional intent. The Court declared that "the one area where the [federal mining law] does intend to displace state law is with respect to laws governing title" and in all other areas, state law had "free reign". Yet, as a general matter, in the beginning the states only acted with respect to laws governing title.

The one exception proved critical. The Court placed great weight on early California court injunctions against hydraulic mining, finding that Congress acquiesced in this early state "regulation". In particular, the Court noted that Congress had also acted to restrict hydraulic mining in the Sacramento and Feather rivers as "hurtful to navigation". The Court does not explain why Congressional action to strike a balance against hydraulic mining should be supportive of state power to do so.

Footnote 8 is particularly offensive, insofar as the Court, having denied *Rinehart* any opportunity to present any evidence whatsoever, blithely concludes that regulation is justified by *Rinehart*'s asserted (and non-existent) impacts upon "fish, water quality, and the health of the state's inhabitants". In substance, the Supreme Court decision grants the legislature to ban mining on federal land for any reason or no reason.

The opinion's most fundamental failing is failing to distinguish between genuine regulation and flat prohibition. There is a world of difference between early court cases imposing injunctions in particular circumstances, based on particular impacts, and a flat legislative ban of any and all operations, without regard to the impacts of any particular operation.

It is unfortunate that a state court was in the position of balancing competing state and federal interests at all, as opposed to a federal court. But the stage was set when the California federal district court wrongfully refused its duty to decide these federal preemption claims, leaving the state courts as the only forum for review.

Fortunately, the question of federal preemption is presently before the federal Ninth Circuit Court of Appeals, concerning the somewhat broader Oregon ban on motorized mining. I continue to hope that the federal courts may someday correct the California Supreme Court's parochial and unsupportable interpretations of federal law in a future case.

Mr. Rinehart's primary remedy, however, is a petition for discretionary review by the United States Supreme Court, which grants only a small fraction of the petitions presented. Pursuant to U.S. Supreme Court Rule 13(1), such a petition must be filed within 90 days, which would put the filing date after the upcoming election, but well before any replacement justice would be appointed to break the current deadlock.

In my opinion, this election threatens to decide, in substance, whether the Supreme Court continues to exist as an institution with any function of checking governmental power in cases involving economic interests. November is just a short time away, and after the election, we may be better able to predict the eventual outcome of the battles that we and other Americans are fighting.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Buchal', with a stylized, cursive flourish.

James L. Buchal