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IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF PLUMAS

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

BRANDON LANCE RINEHART,

Defendant.

Case No. M12-00659

**DEFENDANT'S REPLY IN SUPPORT OF DEMURRER**

**Hearing**
Date: December 18, 2012
Time: 10:30 a.m.

**Summary of Argument**

It is well established in California law that a criminal defendant may raise a preemption issue by reference to the allegations of the accusatory pleadings as supplemented by facts as to which judicial notice can be taken. That is precisely what defendant is trying to do, and the State's claim that there exist factual issues which require trial is wasteful and unreasonable. The fact that the conduct at issue was alleged to have taken place on defendant's duly-registered federal mining claim on federal land cannot reasonably be questioned; the fact that the State changed its longstanding program and refused to issue any permits cannot reasonably be questioned; and the fact that such refusal materially interferes with mining on the claim cannot reasonably be questioned. Holding a trial to explore the arcane questions posed by the State is neither necessary nor useful.

## Argument

### RESPONSE TO POINT I: THE DEMURRER HAS A STATUTORY BASIS.

The State recognizes that the fundamental claim of the demurrer is that the crime charged has been preempted by federal law. This is simply another way of saying that the court "has no jurisdiction of the offense charged herein" (Penal Code § 1004(1)), because federal jurisdiction, not state jurisdiction, is controlling here.[1] Alternatively, questions of preemption have sometimes been regarded as falling within § 1004(4): whether the allegations "constitute a public offense". *E.g., People v. Gerado* (App. Dep't Super. Ct. Los Angeles 1985) 174 Cal. App.3d Supp. 1, 3 (whether state law preempted local ordinance was an issue under § 1004(4)). Regardless of which subsection of § 1004 is required as covering these circumstances, the question raised is a fundamentally legal defect properly raised by demurrer. *See also People v. Todd Shipyards Corp.* (App. Dep't Super. Ct. Los Angeles 1987) 192 Cal. App. 3d. Supp. 20, 35-40 (federal preemption issue resolved by demurrer without specifying the subsection of § 1004 involved). If the State's overly-literal interpretation of § 1004 were correct, each and every issue as to the constitutionality of a statute could be raised only at trial, not by demurrer, and that is manifestly not the case.

The only case cited by the State is *People v. McAllister* (1929) 99 Cal. App. 37. In this unusual case, the Court of Appeals reversed, 3-2, a Superior Court's granting of a demurrer in a case where the defendant was charged with five counts of improperly influencing people "about to be called as witnesses". *Id.* at 39. The Court of Appeals did remark that the demurrer "attempts to present points which could not be raised by demurrer, but the only example provided is that the demurrer recites: "the offense charged against the defendant is not shown by the evidence taken at the preliminary examination". *Id*. at 40.

[1] The Court may also wish to take judicial notice of the ticket issued to defendant as an "accusatory pleading" within the meaning of § 1004. It contains the precise geographic location alleged concerning the conduct charged. (*See also* Rinehart Decl. ¶ 4.) It should be noted that § 1004 was amended to remove the words like "indictment", "information", or "complaint", to give fullest effect to the salutary purpose of the demurrer: saving the time and resources of the State and the defendant where, as here, facts pleaded that are not reasonably subject to dispute confirm that the alleged crime cannot lawfully be prosecuted.

The actual ground of decision in *McAllister* was to address the defendant's contention that there was "no action or proceeding pending which might be affected by any misconduct of the defendant" (*id.*), and while the case was not clear on this, is appears that judicial notice was taken that the proceeding was not in fact pending. The core of the case concerns the holding that no action need be pending for the charge to stand. *See id.* at 40-41.

**RESPONSE TO POINT II: THE DEMURRER DOES NOT REQUIRE FINDINGS OF FACT BEYOND THOSE PROPERLY ALLOWED THROUGH JUDICIAL NOTICE.**

Defendant may properly ask the Court to take judicial notice of facts sufficient, when read with the allegations in the complaint, to lead to its dismissal under § 1004. *People v. Tolbert* (1986) 176 Cal. App.3d 685; *see also* Penal Code § 961 ("Neither presumptions of law, nor matters of which judicial notice is authorized or required to be taken, need be stated in an accusatory pleading."). As the *Tolbert* court correctly summarized the law:

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

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

The case cited by the State is not to the contrary. *People v. Williams* (1979) 97 Cal. App. 3d 382, involved a defendant who sought to resolve evidentiary questions by demurrer. Most significant was the question whether concealment of a conspiracy constituted a continuing crime: "The question of whether the defendants did purposely conceal the Hartford file, and if so, for how long, is one of fact not law and therefore should be decided by a jury, unless the evidence is insufficient to support such a finding. A demurrer however, is not a proper means to test the sufficiency of evidence." *Id.* at 391.

The State suggests points to facts that are not on the face of the complaint, and suggests that the Court can find none of them. The State is wrong. The first two facts, whether defendant owns a federal mining claim and whether it is properly registered with the federal government,[2] have been established by copies of the official records of the U.S. Bureau of Land Management. It has long been recognized that such material is subject to judicial notice. As stated in *Livermore v. Beal* (1937) 18 Cal. App.2d 535, 544:

> ". . . the trial court was bound . . . to take judicial notice of every act of the [federal] commissioner of the general land office having to do with the lands involved in the respective actions, and even though the the amended complaints are absolutely silent as to any of such facts, and the question is presented only upon demurrer, the respective amended complaints must each one be read as though they incorporated everything of which the courts are bound to take judicial knowledge."

The same judicial notice of federal records is, of course, commonplace in criminal actions. *See, e.g., People v. Jacinto* (2010) 49 Cal.4th 263, 272 (judicial notice of federal immigration detainer); *People v. Howard* (1992) 1 Cal.4th 1132, 1160 ("Defendant's motion for judicial notice of the results of the 1980 federal census is granted").

With respect to the third fact posited by the State, whether there is sufficient gold in the claim to make the mining claim valid, this argument is not well enough developed to be understood or considered. The State apparently alludes to the possibility that the federal government might itself challenge the validity of the defendant's mining claim. But the State cites no authority for the proposition that it can make a collateral attack on the federal government's

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[2] It may be that the District Attorney now claims there is an issue as to the location of the conduct charged, rather than whether defendant has a mining claim. (*See* Opposition at 4.) The undersigned counsel had extensive discussions with representatives of the Plumas County District Attorney's office and was informed, in substance, that the State recognized no factual issue as to the location of the alleged conduct. Specifically, we discussed the exact GPS coordinates contained on the ticket issued to defendant, which the District Attorney's office had discussed with the game warden (a copy of which is filed herewith as Exhibit 1 to the Supplemental Request for Judicial Notice), and even provided the District Attorney with copies of the pertinent mapping prior to filing the Demurrer. So as far as we know, no dispute as to the location of the conduct can be raised consistent with the ethical obligations of the State's representatives. In addition, the ticket received by defendant, a Judicial Council of California Form, may be considered an "accusatory pleading" for purposes of § 1004, insofar as it makes an accusation and initiated these proceedings. It precisely identifies the location charged, the sort of fact commonly considered on demurrer, and with the additional materials previously filed, judicial notice can be taken of the undisputable fact that defendant was within the boundaries of his mining claim.

administrative decision to register a federal mining claim in the context of a State misdemeanor prosecution. The Court is to take judicial notice of the federal grant of a claim; if there were proceedings in which the claim had been invalidated, the court might take judicial notice of them as well, but there have been no such proceedings.

The next two facts posited by the State concern the question whether suction dredging is the "only way", or "only economically-viable way" to mine the claim. While this is true, and indeed, "common knowledge within the territorial jurisdiction of th[is] court" (Evidence Code § 452(g)), the Court need not make any such finding to resolve the preemption claim. As set forth in the Demurrer, and as explained further below, federal law forbids a "material interference" with mining. 30 U.S.C. § 612(b). In the context of the State's abrupt termination of a longstanding permit program, judicial notice can properly be taken of the obvious fact that *halting the issuance of mining permits materially interferes with the mining that was permitted by those permits.*

The last fact posited by the State concerns the question whether the mining constituted a common law nuisance. But no such nuisance was alleged by the State; the charge is not one of criminal nuisance (if such a charge even exists), but of operating (and possessing equipment to operate) without a permit. The question of nuisance is simply not relevant at all—and of course there is no nuisance. *See also infra* Response to Point III.

**RESPONSE TO POINT III: THE CRIME CHARGED OBVIOUSLY STANDS AS AN OBSTACLE TO THE ACCOMPLISHMENT OF FEDERAL OBJECTIVES.**

The State's lead case on preemption is *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 449. The *Bates* case does not concern mining, but rather Dow Chemical's attempt to shut down a tort suit by farmers whose crop was damaged by its products, on the ground that federal labeling laws preempted state law claims for damages.

The labeling laws required EPA review of labels, and that the labels be true to avoid "misbranding". The law also said that a "State shall not impose or continue in effect any requirements for labeling or packaging *in addition to or different from* those required under this

Act". 7 U.S.C. § 136v(b) (emphasis added). The preemption argument was that successful damage claims might cause Dow to change its labels.

The Supreme Court easily disposed of this claim on the ground that there was nothing wrong with allowing a state to impose a damage remedy in a context where the state law requirement—that the manufacturer accurately describe the product and its effects—was parallel to the federal requirement. *Bates*, 544 U.S. at 449-54. A court reviewing a preemption argument "should bear in mind the concept of equivalence". *Id.* at 454.

Here there is no credible case to be made for any equivalence between the federal regulatory scheme and the state scheme. The State is manifestly acting to shut down suction dredge mining entirely rather than engaging in the sort of parallel or equivalent permitting scheme approved, at least in the abstract, in *California Coastal Comm'n v. Granite Rock Co.* (1980) 480 U.S. 572.

The State argues strenuously that regulation of fish and wildlife is an area of traditional state concern which should militate against federal preemption, but the U.S. Supreme Court has rejected that argument where activities on federal lands are concerned. Specifically, in *Kleppe v. New Mexico* (1976) 426 U.S. 529, the Court rejected New Mexico's attempt to regulate wild burros on federal lands, notwithstanding New Mexico's arguments along the lines of those presented by the State here. As the Court explained in a unanimous opinion, under the U.S. Constitution, and the Property Clause in particular, Congress has "complete power" over public lands which "necessarily includes the power to regulate and protect the wildlife living there". *Id.* at 540. The power to regulation necessarily includes the power to limit regulation in favor of federal objectives.

The State also argues that in the mining laws, Congress has expressed only "a general federal purpose to encourage a particular activity," attempting to draw an analogy to *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609. The analogy is factually and legally defective. It is factually defective because Congress has gone far beyond promoting a general

purpose: it has in fact granted a very specific federally-protected right to defendant. It is legally defective because the *Commonwealth Edison* case was a case concerning Montana's power to impose a severance tax on coal, a tax that had in fact been expressly authorized by Congress. *Id*. at 631.

Defendant is not required to demonstrate that Congress had a clear and express intent to preempt the State's refusal to grant permits. The *Granite Rock* decision only approved by a bare 5-4 majority the notion that the State could demand permits *at all*, warning, in substance, that unreasonable permit conditions would not survive scrutiny. *A fortiori*, the outright revocation of the permitting scheme as a whole cannot possibly be squared with federal law.

The State complains that defendant "does not squarely argue . . . which federal law or laws" cause the preemption, but the relevant laws are set out in detail in the demurrer, and the State appears to concede that federal agencies would be without power to forbid the activities the State as forbidden as "material interference". The State does not explain why it should be allowed to do what federal agencies cannot do.

Instead, the State makes the conclusory argument that:

> "There is no inherent inconsistency between a general federal policy to encourage mining and state regulations that bar certain forms of mining in certain areas to protect the environment any more than there would be an inherent inconsistency with a public policy to encourage non-motorized transportation and laws prohibiting pedestrians and cyclists on freeways."

(Opposition at 7.) The analogy misrepresents both the specific federal policy, and broad nature of the State's flat, statewide ban. The bicycle/freeway analogy is also defective. If the federal policy is to promote bicycles, and that policy is instantiated in a law that says bicycles can be used on federal property, the State simply cannot forbid them on federal land, even if the land does have a freeway running through it.

The State's only response to the large number of cases finding federal preemption in the mining context is that they are not from California or do not concern this exact type of mining. They do, however, actually apply federal preemption principles in a relevant context, unlike the

pesticide labeling or tax cases cited by the State. The State also argues that some of the cases in involved zoning, while the crime here involves an environmental regulation. This is a distinction without a difference, insofar as the whole purpose of forbidding mining in any particular area is manifestly to protect someone's conception of the environment. It is true that *Granite Rock* drew a distinction, but that distinction was only that state land use plans could not operate *at all* on federal land, while permitting schemes would have to be evaluated for their reasonableness. But a flat revocation of the permitting scheme is *unreasonable* as a matter of law.

The State finally retreats to the argument that mining is banned on only some portions of the claim—the underwater areas actually containing the remaining gold. But all of the cases has have involved bans limited to some geographic area. The State's attempts to distinguish these cases are fanciful. For example, the State attempts to distinguish the Supreme Court of Colorado's holding in *Brubaker v. Board of County Comm'rs* (Colo. 1982) 652 P.3d 1050 on the ground that the "miners could not mine the claims in any respect without first conducting test drilling". (Opposition at 11.) But under the State's theory, the Court should have held a trial to determine, for example, whether the test holes might have been dug by hand. The schizophrenic nature of the State's argument becomes clear when it complains at length that the preemption analysis should not depend, for example, upon the economic viability of various means of mining. (Opposition at 11-12.) That being the case, why does the State insist on a trial to determine these facts?

Preemption law does not require such exercises where, as here, the State's action is "prohibitory, not regulatory, in its fundamental character". *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 105, 1011 (8th Cir. 1998). The State's only response here is that the prohibition is only temporary, but that is manifestly untrue. It is permanent unless and until the Legislature acts to change the law, because the Department of Fish and Game cannot issue any permits without a change in law. As explained in our opening memorandum, no permits can issue

until "all of the following have occurred," including:

> "(4) The new regulations described in paragraph (2) fully mitigate all identified significant environmental impacts.
>
> "(5) A fee structure is in place that will fully cover all costs to the department related to the administration of the program."

Fish and Game Code § 5653(b)(4)-(5). As explained in subsection (c)(1),

> "the department shall consult with other agencies as it determines to be necessary, including, but not limited to, the State Water Resources Control Board, the State Department of Public Health, and the Native American Heritage Commission, and, on or before April 1, 2013, shall prepare and submit to the Legislature a report with recommendations on statutory changes or authorizations that, in the determination of the department, are necessary to develop the suction dredge regulations required by paragraph (2) of subdivision (b), including, but not limited to, recommendations relating to the mitigation of all identified significant environmental impacts and a fee structure that will fully cover all program costs."

The Department has already determined, in its finding of asserted significant environmental impacts, that there are, showing that further statutory changes are required, and has already stated that it "cannot predict" when, if ever, issuance of permits might resume. (*See generally* Demurrer at 3-4.).

The State cites no case, and defendant is aware of none, that a statutory ban should not be regarded as permanent because the State might someday decide to legalize the activity. Moreover, the State's premise that so-called temporary restrictions on the exercise of property rights are categorically exempt from Constitutional infirmity has been very recently undermined by the U.S. Supreme Court. *Arkansas Game and Fish Comm'n v. United States* (Dec. 4, 2012) No. 11-597, slip op. at 14 ("time is indeed a factor," but there is no "automatic exemption").

The State's final response on preemption is to cite an 1884 case (*Woodruff v. North Bloomfield Gravel Mining Co*. (C.C.D. Cal. 1884) 18 F. 753, 754) for the proposition that mining laws did not evidence an intent to preempt nuisance laws. But no one has determined that activities on defendant's mining claim might be considered a "nuisance;" this is not a criminal case for nuisance, if indeed there is such a thing. This case concerns purely the question whether

defendant may be punished as a criminal for failure to have a permit the State now refuses to issue. The State retains whatever authority it may have to abate nuisances irrespective of its inability to prosecute defendant for the specific crimes charged here.

In fact, the formal findings of the Department of Fish and Game repeatedly confirm that effects on fish and wildlife are "less than significant for purposes of CEQA" (*E.g.*, Findings of Fact at pp. 22-26 (Exhibit 1 to Defendant's Request for Judicial Notice).) Whatever reasons may explain the State's peculiar refusal to issue permits, the State cannot fairly characterize suction dredging as a "nuisance".

**RESPONSE TO POINT 4: THE STATE CANNOT REASONABLY DISPUTE THAT DEFENDANT WAS ON FEDERAL LAND.**

The State cites a case in which the Supreme Court unanimously rejected Montana's claim to own certain riverbeds and charge rent for them, for the proposition that it might somehow own the land on which the federal government has given defendant a mining claim. *PPL Montana, LLC v. Montana* (2012) 132 S. Ct. 1215. Again the State is attempting to create some vast collateral dispute—which may not even really be a dispute—and inject it into a simple misdemeanor case.

The State's argument is frivolous. As explained in the *PPL* case, the issue arises with respect to the bed of certain bodies of water deemed navigable under the rules pertaining at the time the State of California became a state. *Id*. at 1228. "[E]vidence must be confined to that which shows the river could sustain the kinds of commercial use that might, as a realistic matter, have occurred at the time of statute." *Id.* at 1233. This Court could take notice that the rugged terrain and waterfalls here make and made the Feather River unsuitable for commerce at any time.

More importantly, however, as a matter of law the question of title cannot be litigated in this misdemeanor case. Unless and until the State commences action to obtain title in a proper proceeding, title remains in the United States, and the defense of federal preemption continues to operate because there can be no dispute that the United States presently holds title and issued the

mining claim to defendant. And, of course, the United States would be a necessary party to any litigation concerning the title it holds, and there is no procedure of which defendant is aware for forcing the United States to appear in these proceedings.

**Conclusion**

It is certainly true that under *Granite Rock*, "a state program requiring permits to mine . . . is not preempted by federal law" (Opposition at 12), but this case does not concern such a program; it concerns the *abolishment* of such a program and the substitution of a flat ban pending further state legislation, if any (or ever). It is the State's refusal to issue *any* permits that is unreasonably obstructive of federal policy and law as a matter of law, and through judicial notice, this Court can sustain the Demurrer, and put these proceedings at an end.

Dated: December 12, 2012.

James L. Buchal, (SBN 258128)
*Attorney for Defendant Brandon Rinehart*

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 December 12, 2012, I caused the following document to be served:

DEFENDANT'S REPLY IN SUPPORT OF DEMURRER

On the party listed below in the following manner:

( ) (BY FEDERAL EXPRESS)

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