Case No. S222620

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent,

v.

BRANDON LANCE RINEHART,
Appellant

On review of a decision by the
Court of Appeal, Third Appellate District, Case No. C074662
Plumas County Superior Court, Case No. M1200659
Hon. Ira Kaufman

APPLICATION OF THE UNITED STATES FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT AND PROPOSED BRIEF OF THE UNITED STATES

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APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The United States respectfully makes this application to file the accompanying brief in this case pursuant to California Rule of Court 8.520.

This case presents a question of federal preemption, requiring this Court to ascertain the Congressional purpose underlying federal legislation and its relationship to regulation of related activities by the State of California. The United States is best suited to explain that purpose and believes that providing its position will aid this Court in interpreting federal law. Furthermore, the underlying criminal action in this case took place on federal lands, and the United States Departments of Agriculture and the Interior have a vested interest in laws regulating conduct on the federal lands they manage. The primary federal land-management agencies, the Bureau of Land Management and the Forest Service of the United States Department of Agriculture, manage over 65 million acres of federal lands within the boundaries of the State of California, and BLM also manages approximately 47 million acres of subsurface mineral estate. These federal agencies also administer the federal mining laws at issue in this case, and their views on the question presented will benefit this Court in answering that question.

No party nor any counsel for a party in this matter authored the proposed *amicus* brief in whole or in part. California Rule of Court 8.520(f)(4)(A)(i). No entity other than the United States made a monetary contribution intended to fund the

preparation or submission of this brief. California Rule of Court 8.520(f)(4)(A)(ii).

PROPOSED *AMICUS* BRIEF OF THE UNITED STATES

BACKGROUND

I. Federal mining law

The primary federal law at issue in this case is the General Mining Law of 1872, which was enacted as "An Act to promote the development of the mining Resources of the United States." Act of May 10, 1872, ch. 152, 17 Stat. 91. The relevant section now reads:

> 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.

30 U.S.C. § 22.

The United States Department of the Interior administers the federal mining laws related to location, recordation, maintenance, and patenting of mining claims on lands of the United States. That is true even on National Forest System lands, like the Plumas National Forest where the underlying crime in this case occurred. The Department of the Interior also

administers mining operations under the Mining Law on the lands it manages and certain other lands.

The United States Department of Agriculture similarly administers mining operations under the Mining Law on the lands it manages. Specifically, pursuant to the Transfer Act of 1905, administrative authority over the federal forest reserves (now the National Forests) was transferred to the Secretary of Agriculture, but that transfer specifically excepted the mining laws. 16 U.S.C. § 472. The Secretary of Agriculture (and the Forest Service of the United States Department of Agriculture, by delegation) has the authority conferred by the Organic Administration Act to regulate, *id.* § 551, but not prohibit, *id.* § 478, mining activities on the National Forests. Thus mining operators like Rinehart who conduct mining operations under the Mining Law within the boundaries of the National Forests must comply with the Forest Service's surface-management regulations, found at 36 C.F.R. Part 228A, that impose restrictions to protect the Forest's surface resources, and that require full compliance with state environmental laws. *Id.* § 228.8(a)-(c).

California has had laws in place governing mining activities since at least 1893, when the Legislature enacted a law prohibiting hydraulic mining unless it could be "carried on without material injury to navigable streams or the lands adjacent thereto." Cal Stats. 1893, ch. 223, p. 337 § 1. The State of California has had laws in place regulating suction-dredge mining specifically since 1961, when it first enacted a permitting

program. Cal. Stats. 1961, ch. 1816, p. 3864 § 1. A suction dredge is a motorized device used to vacuum materials from a streambed in order to extract mineral deposits (most commonly, gold). California requires a permit for all suction dredging activity, Cal. Fish & Game Code § 5653(a). Permits have been administered by the California Department of Fish and Game, now called the California Department of Fish and Wildlife. If the State agency determines that a mining "operation will not be deleterious to fish," then it "shall issue a permit to the applicant." *Id.* § 5653(b).

The Karuk Tribe of Northern California challenged this regulatory program in state court in 2005, obtaining a consent decree requiring the Department of Fish and Wildlife to conduct further environmental review of its suction-dredge permitting program under the California Environmental Quality Act. After this consent decree was entered in 2009, the Legislature enacted a temporary moratorium on issuing suction-dredge permits until the environmental review was complete, at which time the moratorium would expire. Cal. Stats. 2009, ch. 62. But in 2011, the Legislature amended the moratorium to end at the earlier of two times: either on June 30, 2016, or with the promulgation of new regulations that "fully mitigate all identified significant environmental impacts" of suction dredging and create a permit "fee structure . . . that will fully cover all costs." Cal. Stats. 2011, ch. 133, § 6.

In early 2012, the Department of Fish and Wildlife completed its Environmental Impact Report and adopted new regulations. The Department of Fish and Wildlife recommended

additional legislation that the agency believed was necessary before it could fulfill the requirement to "fully mitigate all identified significant environmental impacts." The California Legislature has not yet acted on these recommendations, but it did amend the law again to remove the 2016 sunset provision, so the prohibition on suction-dredge permits currently has no end date, other than the date on which the state promulgates new regulations that "fully mitigate all identified significant environmental impacts" of suction dredging and creates a permit "fee structure . . . that will fully cover all costs." Cal. Fish and Game Code § 5653.1(b)(4)-(5) (2012).

II. The prosecution of Brandon Rinehart

Defendant-Appellant Brandon Rinehart owns a percentage of a 120-acre unpatented federal mining claim located within the Plumas National Forest in northeastern California. On June 16, 2012, a game warden employed by the State of California found Rinehart suction dredging on his claim without a permit from the California Department of Fish and Game. At the time, the State was not issuing any permits for suction dredging. Rinehart was charged with two misdemeanors: suction-dredge mining without a permit in a closed area, in violation of Fish and Game Code § 5653(a), and possessing suction-dredge mining equipment within 100 yards of a closed area, in violation of Fish and Game Code § 5653(d). In a trial on stipulated facts, Rinehart admitted to this conduct. His sole defense was that Fish and Game Code § 5653.1 (imposing the moratorium on permits) was preempted by federal law.

The Superior Court held that the state law was not preempted. Although Rinehart proffered testimony that suction dredging was the only economically feasible means of extracting the gold on his claim, the court did not admit this evidence. Rinehart was convicted and sentenced to three years of probation.

The Court of Appeal, Third Appellate District, reversed. The court held that the two sections of the Fish and Game Code were potentially preempted by the Mining Law of 1872. Citing the United States Supreme Court decision in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 587 (1987), the Court of Appeal opined that the State could only regulate mining activity on federal lands "so long as those statutes and regulations do not rise to the level of impermissible state land use regulations." Slip op. at 13. Applying language used by the United States Supreme Court in describing a hypothetical scenario in which state regulations might be preempted by federal land-use statutes, the Court of Appeal held that the California moratorium on suction-dredge permits was potentially preempted by federal law if it rendered development of Rinehart's mining claim "commercially impracticable." Slip op. at 19.

The Court of Appeal remanded to the trial court to answer two questions: "(1) Does section 5653.1, as currently applied, operate as a practical matter to prohibit the issuance of permits required by section 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?" Slip op. at 19. This Court agreed to review the Court of Appeal's decision.

SUMMARY OF ARGUMENT

The Mining Law of 1872 does not expressly preempt state environmental regulation of mining activities on federal lands, and Congress has never intended for all such regulation to be preempted. In concluding that California Fish & Game Code § 5653.1 was potentially preempted by the federal mining laws because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," slip op. at 16, the Court of Appeal committed several errors.

The purpose of the federal mining laws is to encourage development of the Nation's domestic mining industry consistent with other state and local laws and customs, including those designed to protect the environment. The Mining Law of 1872 expressly requires compliance with all state and local laws that do not conflict with federal law. 30 U.S.C. §§ 22, 26. And more recently, Congressional statements of national mining policy make clear that meeting the Nation's environmental needs is one of the critical purposes of federal mining law. 30 U.S.C. § 21a. A state law that is clearly intended to protect the natural environment by prohibiting the use of particular mining methods or equipment is not so at odds with Congress's purposes that it is preempted by federal law.

The Third Appellate District erred in holding that a state law prohibiting the use of a particular mining method could be

preempted as applied to an individual miner if it happens that mining using other methods is "commercially impracticable" for that miner on that claim at a particular date. The lawfulness of a state environmental regulation cannot turn on the particular economic situation of a particular miner on any given day. The Court of Appeal's holding to the contrary relies incorrectly on *dicta* from *Granite Rock* that addresses the preemptive effect of federal land-use statutes that are not at issue in this case.

As both the Forest Service and the Bureau of Land Management (BLM) have indicated in their duly promulgated mining regulations, state regulation of mining activity to protect the natural environment is consistent with the Mining Law unless it directly conflicts with federal law. Rinehart has demonstrated no such conflict here. The vast majority of mining under the Mining Law on federal lands is unaffected by this California law. Rinehart may still extract gold from his mining claim and may still maintain his possessory rights, so compliance with the State's law is not impossible. Nor is the fact that mining his claim may now be more difficult or costly a basis for holding that the State's law is so contrary to Congressional mining policies that it is preempted. California Fish & Game Code § 5653.1 is not preempted by federal law, and the Court of Appeal's judgment should be reversed.

ARGUMENT

"There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an

express preemption provision." *Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012). But the federal mining laws contain no such provision.

Even without an express preemption provision in a federal law, state law may still be preempted in two specific circumstances. *Id.* at 2501. "First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id.* (citing *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 115 (1992)). This is frequently referred to as "field preemption." As explained further below, Congress has never expressed a "federal interest" in mining on federal lands "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Rinehart has not argued that field preemption applies in this case, nor did the Court of Appeal rely on it.

This case turns instead on a second form of implied preemption, which occurs when state laws "conflict with federal law." *Id.* (citing *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000)). "Conflict preemption" applies in "cases where 'compliance with both federal and state regulations is a physical impossibility.'" *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)). Conflict preemption may also apply in "instances where the challenged state law 'stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

California's current prohibition on suction-dredge permits does not conflict with federal law in such a way that it is preempted. It is not "a physical impossibility" for Rinehart to comply with both state and federal law. *Arizona*, 132 S.Ct. at 2501 (citation omitted). And although the Court of Appeal concluded that state law posed such an "obstacle" to fulfilling Congress's intent that it was preempted by federal law, that conclusion was erroneous. California Fish and Game Code § 5653.1 is not preempted by federal law, and the decision of the Court of Appeal should be reversed.

I. The federal mining laws have never precluded state regulation of mining activity on federal lands.

Since at least the late nineteenth century, mining on federal lands has operated under the concurrent authority of both the federal and state governments. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581-82 (1987). Congress has never established "a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it.'" *Arizona*, 132 S. Ct. at 2501 (quoting *Rice*, 331 U.S. at 230). Quite the opposite is true: The federal mining laws and their implementing regulations expressly contemplate regulation by the States, and require compliance with those regulations.

States may impose permit requirements on mining activity that occurs on federal lands. Although "the Property Clause gives

Congress plenary power to legislate the use of the federal land on which [a party] holds its unpatented mining claim," the Property Clause does not prohibit additional permitting requirements by a state. *Granite Rock*, 480 U.S. at 581.

A. The Mining Law of 1872 expressly requires compliance with state laws not inconsistent with federal law.

Nor did Congress statutorily prohibit state permitting requirements when it enacted the Mining Law of 1872. The right of a citizen to locate a mining claim upon "discovery of a valuable mineral deposit," *Chrisman v. Miller*, 197 U.S. 313, 320-21 (1905), was authorized under the Mining Law of 1872 "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. The requirement that miners operate "under regulations prescribed by law," *id.*, expressly acknowledges that at the time of the statute's enactment, mining was already governed by a significant amount of state and local law and custom. *See United States v. Shumway*, 199 F.3d 1093, 1097-98 (9th Cir. 1999). Rather than supplant those laws, Congress preserved them, so long as they were "not inconsistent with the laws of the United States." 30 U.S.C. § 22.

There is no doubt that the Mining Law of 1872 requires compliance with regulations promulgated by state governments. The statute's requirement that miners operate "under regulations prescribed by law" is not limited to "law" of the United States.

See O'Donnell v. Glenn, 19 P. 302, 306 (Mont. 1888) ("The expression, 'under regulations prescribed by law,' is ample enough to embrace, not only the laws of congress, but also those of the territory."). Congress refers later in the same statutory provision to "laws of the United States," 30 U.S.C. § 22, and Congress's omission of the words "of the United States" from its earlier reference to "regulations prescribed by law" must be presumed to be intentional. *See Corley v. United States*, 556 U.S. 303, 315 (2009) (ascribing intent to Congress's use of two different terms in the same section of a statute); *Russello v. United States*, 464 U.S. 16, 23 (1983) (evaluating inclusion of language in one section and omission of same language in another section and "generally" presuming "that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). Thus the Mining Law of 1872 expressly left in place, and required compliance with, all state and local laws and regulations governing mining not in conflict with the laws of the United States.

B. Federal regulations implementing the Mining Law of 1872 expressly require compliance with state environmental regulations.

The federal lands on which mining under the Mining Law occurs are managed primarily by BLM or the Forest Service. Both agencies have promulgated regulations governing mining operations, and both agencies' regulations expressly anticipate that miners will comply with both federal regulations and

concurrent state regulations. These regulations are further evidence of the purpose and objectives of the federal mining laws that they implement, and those regulations anticipate concurrent state regulation of mining activity to protect the environment.

The Forest Service, authorized by Congress to make "rules and regulations" governing the national forests to "regulate their occupancy and use," 16 U.S.C. § 551, has promulgated regulations so that "use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws (30 U.S.C. §§ 21-54) shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R. § 228.1. These regulations explicitly require "timely compliance with the requirements of Federal *and* State laws," *id.* § 228.5(b) (emphasis added), including: "State air quality standards," *id.* § 228.8(a); "State water quality standards," *id.* § 228.8(b); and "State standards for the disposal and treatment of solid wastes," *id.* § 228.8(c).

Regulations promulgated by BLM similarly anticipate and require compliance with state environmental laws. Those regulations state that, in BLM's view, a state environmental law or regulation must be complied with unless it directly conflicts with federal law. "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. The preamble for this regulation explains that "[u]nder the final rule,

States may apply their laws to operations on public lands," and "no conflict exists if the State regulation requires a higher level of environmental protection." *Final Rule, Mining Claims Under the General Mining Laws; Surface Management,* 65 Fed. Reg. 69,998, 70,008 (Nov. 21, 2000).

Thus, neither Congress in the Mining Law nor the federal agencies charged with implementing that law have expressed any intent to fully preempt state regulation of mining activity on federal land. The federal government expects that states may impose restrictions on mining activity that are designed to protect the environment, and federal law requires miners to comply with those restrictions unless they directly conflict with federal law.

II. The California laws at issue here do not pose an "obstacle" to the purpose of the Mining Law that requires a finding of preemption.

The federal mining laws generally favor the reasonable development of the mineral resources of the United States. But the purpose of the mining laws has never been to encourage that development without limitation. Even if it was, such a broad statement of purpose would be insufficient to preempt all state regulations affecting the fulfillment of that purpose. The United States Supreme Court has repeatedly rejected similar arguments. *See, e.g.*, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 221 (1983) (rejecting argument that Atomic Energy Act's statement that all

state regulation limiting use of atomic energy is preempted by a federal law "encourag[ing] widespread participation in the development and utilization of atomic energy"); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132-34 (1978) (rejecting argument that because "basic national policy" favored free competition as reflected in the Sherman Act, state law regulating retail distribution of gasoline was preempted).

The United States Supreme Court's case of *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), is particularly analogous to this case. The State of Montana levied a tax on coal extracted from federal lands (and elsewhere), and several mining companies sued alleging that the tax was preempted by federal statutes establishing a national policy "to encourage and foster the greater use of coal." *Id.* at 633-34. There was no dispute that encouraging the use of coal was, generally, the policy of the United States. *Id.* at 633. But the United States Supreme Court did not "accept appellants' implicit suggestion that these general statements demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal." *Id.* "Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Id.* at 634 (quoting *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981)) (other citations omitted).

Rinehart dismisses these cases, stating that they involve only "vague and general statutory purpose clauses." Answering Br. at 31. But the Mining Law of 1872 contained no statutory purpose clause *at all*, save its vague and general title: "An Act to promote the Development of the mineral Resources of the United States." Rinehart's own brief states the purpose of Congress in vague and general fashion when alleging that "the overriding purpose of Congress, expressed throughout the mining laws, is to get the minerals out of the ground." Answering Br. at 30. The Court of Appeal's opinion in this case also relied on a vague and general statement of Congressional purpose in an opinion of the United States Supreme Court. Slip op. at 13 (citing *Coleman*, 390 U.S. at 602). There, the United States Supreme Court stated that the intent of Congress in enacting the mining laws "was to reward and encourage the discovery of minerals that are valuable in an economic sense." *Coleman*, 390 U.S. at 602. But these general statements of Congressional purpose are too broad for purposes of determining whether a specific state law conflicts with federal law and is preempted.

A. The general purpose of the Mining Law was more clearly articulated by Congress in 1970.

For a clearer statement of Congressional purpose, this Court should look to the Mining and Minerals Policy Act of 1970, codifying the federal government's policy toward mining:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to

> foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.

30 U.S.C. § 21a. Rinehart makes reference to a 1968 opinion of the Ninth Circuit stating that the "all-pervading purpose of the mining laws" is "to further the speedy and orderly development of the mineral resources of our country." Answering Br. at 34 (quoting *United States v. Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968)). But both *Nogueira* and *Coleman* predate the Mining and Minerals Policy Act of 1970, which refined Congressional mining policy. And *Nogueira* in particular addressed abuses of the Mining Law, which the 1970 Act was enacted to help rein in.

As explained by the 1970 Act, mineral development is still encouraged as part of the United States' national mining policy, but in a more specific way. The goal of the Mining Law is an "economically sound and stable" mining industry, with the aim of assuring "satisfaction of industrial, security and environmental needs." 30 U.S.C. § 21a. The suction-dredge equipment limited by

the California laws at issue here is most commonly used by individuals or small groups on a smaller number of mining claims. There is no reason to believe that limitations on the use of suction dredges by these individuals will impede the development of industrial mining operations in California. Even if evidence were presented to the contrary, such limitations are designed to "help assure satisfaction" of "environmental needs" and are therefore consistent with the express purposes of Congress as reflected in the Mining Law and the Mining and Minerals Policy Act of 1970. 30 U.S.C. § 21a. No evidence was presented that Rinehart's small mining operation will further the national interest in satisfying its "industrial" or "security" needs. *Id.* The Court of Appeal was therefore incorrect that the challenged state laws posed an "obstacle" to the purposes and objectives of Congress that demanded preemption by federal law.

B. The 1955 Surface Resources and Multiple Use Act does not apply, and Rinehart's selective quotation from that statute does not accurately reflect national mining policy.

In describing what Rinehart alleges to be the "purposes and objectives of Congress in the Federal mining law," Answering Br. at 3, Rinehart declares that "Congress has struck the balance between protecting the natural environment and extracting the minerals in favor of extracting the minerals — subject to reasonable environmental protection that do[es] not 'materially interfere' with the mining." *Id.* at 3-4 (citing *United States v.*

Backlund, 689 F.3d 986, 997 (9th Cir. 2012)). But Congress has never described "material interference" with mining as the standard by which to determine whether state regulation of mining is preempted. This phrase comes from a statutory provision with no application in this context.

This statute, the Surface Resources and Multiple Use Act of 1955, governs federal activities on lands containing unpatented mining claims like Rinehart's. 30 U.S.C. § 612(b). While the holder of an unpatented mining claim has rights to mine that site, the United States retains title to the land and the right to manage the surface resources. *Id.* §§ 26, 612. But "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." *Id.* § 612 (emphasis added). The statute's prohibition on actions that "endanger or materially interfere" with mining is a limitation on the *United States*' activities (or authorization of activities) conducted under laws other than the Mining Law.

"Congress did not intend to change the basic principles of the mining laws when it enacted the Multiple Use Act." *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1280 (9th Cir. 1980) (referring to the Surface Resources and Multiple Use Act of 1955 and citing *Converse v. Udall*, 399 F.2d 616, 617 (9th Cir. 1968)). Rather, the Act was intended as "corrective legislation, which attempted to clarify the law and alleviate abuses that had occurred under the mining laws." *Id.* The Surface Resources and Multiple Use Act of 1955 was enacted in part to

ensure that mining-claim holders could not use their claims to exclude others from accessing the public lands so that the lands could be used exclusively by the claim holder for non-mining purposes (like fishing or camping). It provides for "multiple uses" of the land on which unpatented mining claims were located, and prohibits the use of any unpatented mining claim located after its enactment "for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." 30 U.S.C. § 612(a).

Congress enacted the Surface Resources and Multiple Use Act to ensure that the United States, and therefore the public, could continue to make use of the federal lands on which someone had located, but not patented, a mining claim. At the same time, Congress ensured the scales did not tip too far twoard non-mining uses, by prohibiting the United States from uses or authorization of uses that "endanger or materially interfere with prospecting, mining, or processing operations or uses reasonably incident thereto." 30 U.S.C. § 612(b). Thus Rinehart draws the wrong conclusion from this provision when he asserts that a *state's* "regulation to protect other interests, including environmental interests, may not materially interfere with mineral development." Answering Br. at 33. That has never been the law.

The cases on which Rinehart relies for his "material interference" preemption standard clearly address limits on the *federal government's* ability to regulate mining, not a state's. Answering Br. at 33-34 (citing *United States v. Backlund*, 689

F.3d 986 (9th Cir. 2012); *United States v. Shumway*, 199 F.3d 1093 (9th Cir. 1999)). With respect to state regulation, the Surface Resources and Multiple Use Act's only mention of state law is to preserve it. The statute may not "be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States" governing ground or surface waters within mining claims. 30 U.S.C. § 612(b). Given that provision, the statute's silence as to other forms of state regulation may not plausibly be read as implicitly casting them aside, as Rinehart does.

Similarly, Rinehart points to 30 U.S.C. § 26, which requires full compliance by miners with "State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title," as a provision that "sharpens Congressional intent." Answering Br. at 37. But assuming *arguendo* that Rinehart properly reads this provision to mean that state laws governing possessory title may not conflict with laws of the United States, *id.*, Rinehart's suggestion that no other form of state regulation is contemplated does not follow. To the contrary — *all* state laws governing mining operation must be complied with so long as they are not "inconsistent with the laws of the United States." 30 U.S.C. § 22. Whether they are "inconsistent" with federal law is determined by whether or not they conflict with federal law. Otherwise, they are not preempted, and the Mining Law of 1872 requires that miners comply with them fully.

III. The Court of Appeal incorrectly applied the law of "obstacle preemption."

Rinehart's answering brief concedes that the State may impose some reasonable restrictions on his mining activity to protect the environment, but suggests that California Fish and Game Code § 5653.1 is preempted because it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Answering Br. at 17 (quoting *Granite Rock*, 480 U.S. at 581). It does not. As seen above, the restrictions are not inconsistent with federal law, and Rinehart's general conception of federal mining policy is overly broad. Furthermore, the Court of Appeal's application of the law of "obstacle preemption" was incorrect and should be reversed.

A. The Eighth Circuit's opinion in *South Dakota Mining* does not support Rinehart's position here.

In applying the law of "obstacle" preemption, the California Court of Appeal relied primarily on the Eighth Circuit's opinion in *South Dakota Mining Association, Inc. v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998). But that case is distinguishable. In *South Dakota Mining*, the Eighth Circuit considered whether the federal mining laws preempted a county zoning law that prohibited new or amended permits for "surface metal mining extractive industry projects" in a section of the county that was 90% federal land. *Id.* at 1007. The United States was not a party to this case and did not participate as *amicus*. Although the county government was a defendant, by the time the case reached

the Eighth Circuit the county had changed its position and supported the plaintiffs' arguments that the zoning rule was preempted. The county filed a stipulation with the court stating that surface mining was the only practical means of mining in that area. *Id.* at 1007-08 & n.3. Although *Granite Rock* and *South Dakota Mining* both presented facial challenges to a local permit law, the Eighth Circuit distinguished *Granite Rock* on the basis that the county law before it was "a *de facto* ban on mining in the area," and there was no possibility that some mining operations might be permitted under the county law. *Id.* at 1011. The Eighth Circuit held that the county zoning ordinance was preempted. *Id.*

The Eighth Circuit found that the ordinance was "prohibitory, not regulatory, in its fundamental character." *Id.* at 1011. What the court meant by this statement was that the ordinance had the practical effect of banning all mineral extraction on the federal land in that county and thus "*completely* frustrates the accomplishment of . . . federally encouraged activities." *Id.* (emphasis added). Although the Eighth Circuit's opinion calls this "obstacle preemption," the more accurate characterization of the case is one of "conflict preemption," because (as an undisputed factual matter) all mining on those lands was made impossible by the ordinance. That is a different situation from the current case, in which the challenged California law does not prohibit all mining on federal lands in the state. *Cf.* Answering Br. at 2 (alleging that California has "shut down mining on federal mining claims").

Furthermore, the Eighth Circuit's application of *Granite Rock* does not support Rinehart in this case. In *Granite Rock*, the United States Supreme Court considered whether the state permitting scheme at issue was preempted by the federal mining laws, and concluded it was not. 480 U.S. at 583-85. But the Eighth Circuit does not rely on this portion of the Supreme Court's opinion, instead relying on a later section addressing preemption by two federal land-management statutes: the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701, and the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600. *Granite Rock*, 480 U.S. at 584-86. The Supreme Court found that an outright prohibition on mining on federal land would be preempted by these federal land-management statutes, but that an environmental regulation limiting damage to those lands would not be. *Id.* at 587. In the case now before this Court, however, the State's prohibition on suction-dredging activities is clearly an environmental regulation, rather than an attempt to dictate the use of federal lands. Under the California law, the "valuable mineral deposits in lands belonging to the United States" in California remain "free and open" to mineral exploration and development by means other than the use of a suction dredge. 30 U.S.C. § 22. For Rinehart to avoid conviction, he must demonstrate that the state laws he was convicted of violating are preempted by the federal mining laws, and neither *South Dakota Mining* nor *Granite Rock* supports such a conclusion.

B. The Court of Appeal erred in determining that preemption in this case is determined by the "commercial impracticability" of Rinehart's mining claim.

The Court of Appeal remanded Rinehart's conviction to the trial court for factual findings as to whether the state laws at issue here have rendered Rinehart's mining claim "commercially impracticable." Slip op. at 19. That is the incorrect standard to apply. It is derived from a section of the United States Supreme Court's decision in *Granite Rock* described above, which is relevant only to whether federal land-use statutes (FLPMA and NFMA) preempt state regulation of mining activity. *Granite Rock*, 480 U.S. at 587. Furthermore, the United States Supreme Court acknowledged that this section of its opinion was *dictum*. The distinction between "environmental regulation" and "land-use planning" has no bearing on the preemptive effect of the Mining Law.

In the portion of the *Granite Rock* opinion on which the Court of Appeal relied, the United States Supreme Court considered whether the state agency's permitting requirement might be preempted by either FLPMA or NFMA. In so doing, the Court said that "[f]or purposes of this discussion and *without deciding the issue*, we may assume that the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands." 480 U.S. at 585 (emphasis added). In so holding, the Court distinguished between "environmental regulation" — which was

not preempted — and state laws that amounted to improper "land use planning" for federal lands. *Id.* at 586. The Court added that "[t]he 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." *Id.* The Court of Appeal pulled this language out of context when determining whether the challenged state laws in this case were preempted, not by FLPMA and NFMA, but by the federal mining laws. Slip op. at 19.

FLPMA and NFMA are not identified by Rinehart as potential sources of preemption. This case turns on the federal mining laws, and those laws do not preempt the state regulations at issue here. The Court of Appeal's reliance on this language from *Granite Rock* for a determination of conflict preemption here was reversible error. But even if this language did apply to Rinehart's case, the California state law is an "environmental regulation" rather than a form of land-use planning, and therefore is not preempted by federal law.

California Fish and Game Code § 5653.1(b) speaks specifically to "significant environmental impacts" and contains legislative findings that "suction or vacuum dredge mining results in various adverse environmental impacts." Cal. Stats. 2009, ch. 62 § 2. The California Legislature states that the law was enacted "to protect the environment and the people of California." *Id.* It originally provided for a full environmental review and requires the relevant state agency to "fully mitigate

all identified significant environmental impacts." Cal. Fish & Game Code § 5653.1(d). Clearly, the California Legislature intended to limit damage to the environment from a particular activity rather than decide which uses of federal lands are appropriate.

In contrast, a land-use planning statute enacted by a State might be preempted if it were to ban all mining on federal lands, which California has not done here. The state law applies only to "the use of any vacuum or suction dredge equipment" in waters within the State where a State-issued permit is required, and has no application to the wide array of other mining methods used in California. Fish & Game Code § 5653.1(b). Locators of lode-mining claims and placer-mining claims where the deposit is not contained in a streambed are unaffected, and even streambed placer-mining claims containing valuable mineral deposits other than gold are largely unaffected. Placer-mining claims containing gold deposits in a streambed may still be mined by means other than using vacuum or suction dredge equipment, subject to compliance with other applicable laws. In any event, this distinction between environmental regulation and land-use planning is inapposite *dicta*, as the preemptive effects of FLPMA and NFMA are not at issue in this case.

Moreover, California has had a long history of restricting particular methods of mineral extraction, to protect the physical environment. As the State explains in its opening brief, the State restricted the use of hydraulic mining in 1893, which likely had the result of substantially increasing the cost of extracting many

mineral deposits across the State. Yet that law was never held to have been preempted by the federal mining laws, even though it was challenged in court and addressed by Congress. Opening Br. at 17-18. It is difficult to distinguish the State's nineteenth-century prohibition on hydraulic mining from the State's twenty-first-century prohibition on suction-dredge mining. Both reflect an understanding that technology progresses, placer deposits move or are depleted, and the market value of those mineral deposits changes, yet none of these fluctuations results in the state law governing specific mining methods being preempted by federal law.

C. Whether a state environmental regulation is preempted by federal law does not turn solely on the costs imposed on an individual miner.

The Mining Law of 1872 does not grant rights to all miners. It specifically applies to the discoverers of "valuable mineral deposits." 30 U.S.C. § 22. Thus the "obvious intent" of Congress was to provide incentives for the "discovery of minerals that are valuable in an economic sense." *United States v. Coleman*, 390 U.S. 599, 602 (1968). Running throughout both the Court of Appeal's opinion and the Answering Brief is the unspoken assumption that because the mineral at issue here is gold, the mineral deposit by definition is "valuable in an economic sense," automatically giving Rinehart's claim some rights or protections under the Mining Law. That assumption is unwarranted.

The value of a mineral deposit fluctuates, sometimes dramatically. Obviously, a mineral deposit's economic value is affected by its market resale value. But that economic value is also a function of the cost of the mineral's extraction, assuming compliance with all applicable laws. Congress never intended to extend the Mining Law's grant of certain rights and privileges to miners who found only "[m]inerals which no prudent man will extract because there is no demand for them at a price higher than the costs of extraction and transportation." *Coleman*, 390 U.S. at 602. Such minerals "are hardly economically valuable" and thus are not "valuable mineral deposits" to which the rights granted by 30 U.S.C. § 22 apply. *See id.*

The United States Supreme Court long ago upheld consideration of the cost of extraction and removal as part of the determination whether a particular claim contains a "valuable mineral deposit." *Id.* at 600 (internal quotation marks omitted). The cost of mining and removal includes more than just the labor required: It may also include "adequacy and cost of water supply, additional land, financing, labor costs, and expense of compliance with environmental protection laws." *United States v. Pittsburgh Pacific Co.*, 30 IBLA 388, 393 (1977). Thus, "in determining whether a discovery exists, the costs of compliance with all applicable Federal and State laws (including environmental laws) are properly considered in determining whether or not the mineral deposit is presently marketable at a profit, *i.e.*, whether the mineral deposit can be deemed to be [a] valuable mineral

deposit within the meaning of the mining laws." *Great Basin Mine Watch*, 146 IBLA 248, 256 (1999).

As reflected in these decisions, Congress did not intend to preempt all state laws that might raise the cost of extraction. If additional expenses are imposed by a State's legitimate attempt to "help assure satisfaction . . . of environmental needs," 30 U.S.C. § 21a, in a manner that does not make all mining impossible, that state law does not directly conflict with the federal Mining Law. The State's prohibition on suction dredging may have made mining considerably more difficult for Rinehart, and may result in Rinehart determining that the deposit in his mining claim "no longer justifie[s] . . . the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." *Chrisman v. United States*, 197 U.S. 313, 322 (1905). That result may have some bearing on whether the deposit is locatable, but it is no basis for finding that the State's law that it is preempted by federal law.

Rinehart never argues that mining on his claim is impossible without suction dredging. *See*, *e.g.*, Answering Br. at 2 (describing the State's action as "restricting mining for all practical purposes to gold panning by hand"). Without the use of vacuum or suction-dredge equipment, Rinehart may have to engage in traditional placer mining methods that could require diverting and excavating the streambed, or use other methods such as bucket-line dredging, dragline, or floating a backhoe and feeding a sluice. These methods may be more expensive or time consuming, or may not be as effective and may not obtain all of

the mineral resource. But they remain physically possible. *See* slip op. at 4-5 (describing proffered testimony of Rinehart). Furthermore, as the State points out, Opening Br. at 28, should these methods prove unprofitable or overly laborious, Rinehart does not risk losing his mining claim so long as the lands remain open to the operation of the Mining Law and Rinehart either pays an annual maintenance fee or (provided he qualifies for a waiver from that fee) performs the assessment and maintenance work generally required by the Mining Law to preserve his mining claim. 30 U.S.C. § 28f(a); 43 C.F.R. §§ 3830.21(d), 3834.11(a). Doing so would allow him to hold his claim until the California Department of Fish and Wildlife complies with its statutory mandate and the State begins to issue permits for suction dredging, or he adopts another mining method.

Rinehart has failed to demonstrate that the State has made his mining claim impossible to work, and Rinehart's allegations that the State has made mining cost-prohibitive does not mean that the State has posed an obstacle to the purposes and objectives of Congress that is preempted by federal law.

D. State laws that directly conflict with the federal mining laws would still be preempted.

Although the United States agrees with the State of California in this particular case, the State of California may still not enact a law governing mining activity on federal lands that is "inconsistent with the laws of the United States." 30 U.S.C. § 22.

Such a law would "conflict with federal law" and would be preempted. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). That conflict could occur either by making compliance with state and federal laws physically impossible, or by imposing "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 2501.

The sections of the California Fish and Game Code challenged by Rinehart, however, do not pose such a conflict. The State's regulations, aimed at protecting its environmental resources and limiting only a single method of mining, do not prevent the fulfillment of Congress's objectives of developing the Nation's domestic mining industry consistent with environmental needs. Nor do they make compliance with federal law physically impossible, which "is a demanding defense," *Wyeth v. Levine*, 555 U.S. 555, 573 (2009), that Rinehart has failed to demonstrate in this case.

IV. The federal land-management agencies' view that the state laws at issue do not directly conflict with the federal mining laws must be given substantial weight by this Court.

Although Rinehart notes correctly that this Court is not required to defer to a federal agency's determination that a state law is or is not preempted, Answering Br. at 43, the opinions of federal agencies on these matters still carry substantial weight. "While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do 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*, 555 U.S. at 576-77 (citation omitted). In the opinion of the two federal land management agencies most directly affected by mining activity, the state laws at issue here are not preempted by the federal mining laws.

The Forest Service issued specific guidance in 2009 to its employees regarding compliance with California's prohibition on the use of vacuum- or suction-dredge equipment and its refusal to issue permits for their use. Letter from Moore to Forest Supervisors (Aug. 25, 2009).[1] In the Forest Service's view, the State's new moratorium on suction dredging "does not replace or supersede Federal laws and Forest Service regulations." *Id.* At the same time, federal law did not preempt the State's decision not to issue permits for suction dredging. The Forest Service continued to require miners to comply with all applicable state laws, including those challenged here, and it has done so consistently since 2009.

BLM has not issued specific guidance regarding this particular provision of state law. But its mining regulations in general, which govern mining activities on the public lands, 43 U.S.C. § 1702(e), explicitly state that conflict preemption (in the agency's view) is the only intended form of preemption of state

[1] This guidance document is attached as an exhibit to this brief pursuant to California Rule of Court 8.204(d).

law in the mining context. 43 C.F.R. Subpart 3809. "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." *Id.* § 3809.3. *See also* id. § 3809.3-1(a) (1981) (original Part 3809 regulations that stated: "Nothing in this subpart shall be construed to effect a preemption of state law and regulations relating to the conduct of operations or reclamation on Federal lands under the mining laws.") Prohibiting a specific method of mining, or the use of particular equipment, for the purposes of environmental protection, is a "higher standard of protection for public lands" not preempted by BLM's regulations or the federal mining laws.

Rinehart responds that BLM's Subpart 3809 regulations are "substantively unlawful," Answering Br. at 44, but of course the validity of those regulations is not at issue in this case. A federal court previously upheld their validity. *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30 (D.D.C. 2003). For the views of the Forest Service, Rinehart refers to an administrative decision by the Tahoe Forest Supervisor and Regional Forester with regard to a mining operation in the Tahoe National Forest that provides no support for Rinehart's position. Answering Br. at 47 & n.13. While the Forest Service did remove the requirement from that particular plan of operations, issued under 36 C.F.R. Part 228A, that the miner obtain the required state permits, that decision does not reflect a judgment that the State's permitting practices

were preempted by federal law. The decision reflects nothing more than the fact that the United States does not impose the permitting requirement, and a plan of operations may be issued so long as it fully comports with all *federal* regulations.

The views of the federal land-management agencies, which have a "unique understanding" of how best to regulate mining activity on behalf of the federal government and protect the surface resources of the federal lands, deserve careful consideration by this Court. *Wyeth*, 555 U.S. at 576-77. In their view, as reflected by agency guidance and validly promulgated regulations, state environmental laws governing mining activities are not preempted so long as they do not directly conflict with federal law and compliance with both is not impossible. That is the case here, and the decision of the Third Appellate District Court of Appeal should therefore be reversed.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the Court of Appeal's decision.

Respectfully submitted,

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August 2015

DJ # 90-12-14336

CERTIFICATE OF WORD COUNT

I hereby certify that the foregoing Brief of *Amicus Curaie* United States contains 8,387 words, and was prepared in 13-point Century font, with 1.5 line spacing, using Microsoft Word 2013.

_____

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CERTIFICATE OF SERVICE

I, Lane N. McFadden, hereby declare:

I am a citizen of the United States, over the age of 18 years, and am not a party to this action. I am employed by the United States Department of Justice, and my business address is 950 Constitution Avenue NW, Washington, DC, 20530.

On August 28, 2015, I caused to be served the foregoing:

APPLICATION OF THE UNITED STATES FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT AND PROPOSED BRIEF OF THE UNITED STATES

By Mail. I enclosed a copy of the foregoing document in envelopes and placed the envelopes for collection and mailing on the date and at the place shown below, following our ordinary business practices. I am readily familiar with the Department of Justice's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope with postage fully prepaid.

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Exhibit

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File Code: 2810/5300 **Date:** August 25, 2009
Route To:

Subject: Suction Dredging Management on NFS Lands

To: Forest Supervisors

The purpose of this memo is to provide information and guidance to Forest Supervisors and District Rangers for administering suction dredge mineral operations on National Forest System (NFS) lands in California following the passage of SB 670 into state law by the California legislature and the Governor of the State of California. SB 670 added §5653.1 to the California Fish and Game Code and became effective on August 6, 2009. SB 670 places a moratorium on instream suction dredge mining ("suction dredge moratorium") in California until the California Department of Fish and Game (CDFG) completes an environmental review of its suction dredge permitting program and updates, as necessary, existing CDFG regulations governing the program. The moratorium applies regardless of whether the operator has obtained or is in possession of a permit issued by the CDFG. Enclosed for your information are a public notice and a list of frequently asked questions (FAQ's) from the CDFG explaining the scope and effect of the State's suction dredge moratorium.

It is important to keep in mind that SB 670 does not replace or supersede Federal laws and Forest Service regulations. How the Forest Service regulates mining operators on National Forest System lands under the Forest Service's locatable mineral operations regulations at 36 CFR 228 Subpart A remains unchanged. A mining operator conducting or proposing to conduct instream suction dredge operations within National Forest System lands must be in compliance with either a notice of intent or an approved Plan of Operations under the Forest Service's locatable mineral regulations. The operator is responsible for his or her own compliance with all applicable State and Federal laws and regulations. Until further notice, please do the following:

- Provide copies of the attached public notice and FAQ's to suction dredge operators and the public who have questions about the State moratorium. The Department of Fish and Game has posted these bulletins and additional information on its website, www.dfg.ca.gov/licensing/specialpermits/suctiondredge/
- Place a copy of the public notice and FAQ's in the District Ranger's and Forest Supervisor's offices and on the Forest's website for public information.
- Any Forest employee or Law Enforcement Officer who discovers a suction dredging operation on National Forest System lands should provide a copy of the CDFG public notice and FAQ's to the operator(s) present and inform the District Ranger of the activity.

- Develop a list for each District of current suction dredging operations that are being conducted under a notice of intent or an approved plan of operations, to be shared with the unit Patrol Captains.
- Continue to process new notices of intent and plans of operations according to Forest Service regulations in 36 CFRR 228 Subpart A.
- Continue to enforce violations of Federal law and Forest Service regulations in consultation with the Office of the Regional Special Agent in Charge for Law Enforcement and Investigations and the Office of the General Counsel.

You may contact Debra Whitman at (707) 562-8689 for questions regarding implementation of this direction and NFS policies and programs. Please contact Mark Chan at (707) 562-8647 for questions on LEI policies and programs.

/s/ James M. Peña (for)
RANDY MOORE
Regional Forester

/s/ Russ L. Arthur
RUSS L. ARTHUR
Acting Special Agent in Charge

Enclosures

cc: Debra Whitman
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