IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON LANCE RINEHART,

Defendant and Appellant.

Appellate No. C074662
Appeal from a Judgment of the Superior Court
of the County of Plumas, No. M1200659
Hon. Ira Kaufman

APPELLANT'S OPENING BRIEF

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Nature of the Action

Defendant and Appellant ("Appellant") owns a federally-registered mining claim on land owned by the United States, held in trust for him as a mining claim holder. He is entitled under federal law to mine the claim, and indeed required to do so to maintain his rights. Until 2009, he applied for and obtained annual permits for his mining from the California Department of Fish and Wildlife (the "Department"), but in 2009, the Legislature forbade the Department from issuing further permits.

This case presents the question whether a legislative termination of a long-standing permit program is a material interference with mining which is prohibited under federal mining law, as applied to the State of California by the Supremacy Clause of the U.S. Constitution.

In an act the Superior Court Judge called "civil disobedience" (Tr. 38 & 52[1]), Appellant proceeded to mine without a permit, and was charged with two misdemeanor counts: suction dredge mining without a permit (Fish and Game Code § 5653(a)) and unlawful possession of a suction dredge near a waterway (*id.* § 5653(d)). Appellant demurred to the Criminal Complaint on the ground of federal preemption, but the Superior Court denied the demurrer. There followed a bench trial, in which the Court ruled that no preemption defense could be made as a matter of law, and refused to permit any and all evidence concerning the defense.

[1] All "Tr." references are to the reporter's transcript of the bench trial, held May 15, 2013.

Appellant was convicted and sentenced, and asks this Court to set aside his conviction.

Statement of Facts and Procedural History

A. The Legal Context: California State Regulation of Suction Dredging.

Prior to 1961, no permit was required at all to operate a suction dredge in California. In 1961, California Fish and Game Code § 5653 was enacted, on the theory that activities should be limited in "sensitive areas" and should be pursued "during times of the year when damage would be minimal". (Trial Exhibit A ("Ex. A"),[2] at 5 n.8 (quoting legislative history).) Specifically, § 5653.9 permitted the Department to develop regulations, pursuant to which the Department generally limited suction dredging to times of the year when fish eggs would not be present in the gravel disturbed by suction dredgers. The Department could also close sensitive bodies of water to suction dredging, and § 5653(d) provides that it is unlawful to possess a suction dredge within 100 yards of waters that are closed.

The current version of these regulations is set forth at 14 Cal. Code Regs. § 228 *et seq.*, classifying the sensitivity of various areas and limiting mining times. But no permits may be issued, because the legislature overrode the regulations through a series of statutes forbidding the Department from issuing any permits for suction dredging. Specifically, on August 9, 2009, the Governor signed Senate

[2] Exhibit A is a report to the Legislature by the California Department of Fish and Wildlife dated April 1, 2013, which was admitted into evidence at trial (Tr. 49), but unaccountably omitted from the record. It is submitted herewith as Exhibit A to the accompanying unopposed motion to correct the record.

Bill No. 670, which established a state-wide moratorium on suction dredging, and provided:

> "Notwithstanding Section 5653, the use of any vacuum or suction dredge equipment in any river, stream, or lake of this state is prohibited until the director certifies to the Secretary of State that all of the following have occurred:
>
> "(1) The department has completed the environmental review of its existing suction dredge mining regulations, as ordered by the court in the case of Karuk Tribe of California et al. v. California Department of Fish and Game et al., Alameda County Superior Court Case No. RG 05211597.
>
> "(2) The department has transmitted for filing with the Secretary of State pursuant to Section 11343 of the Government Code, a certified copy of new regulations adopted, as necessary, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> "(3) The new regulations described in paragraph (2) are operative.

By its terms, this moratorium was of indefinite duration, but would have expired upon issuance of new regulations. The process of developing new regulations proceeded.

On July 26, 2011, the Governor signed Assembly Bill No. 120, which amended Fish and Game Code § 5653.1 and stated:

> "Notwithstanding Section 5653, the use of any vacuum or suction dredge equipment in any river, stream, or lake of this state is prohibited until June 30, 2016, or until the director certifies to the Secretary of State that all of the following have occurred, whichever is earlier:
>
> "(1) The department has completed the environmental review of its existing suction dredge mining regulations, as ordered by the court in the case of Karuk Tribe of California et al. v. California

> Department of Fish and Game et al., Alameda County Superior Court Case No. RG 05211597.
>
> "(2) The department has transmitted for filing with the Secretary of State pursuant to Section 11343 of the Government Code, a certified copy of new regulations adopted, as necessary, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> "(3) The new regulations described in paragraph (2) are operative.
>
> "(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."

This statutory language was crafted to create the appearance of a mere temporary suspension in the issuance of further permits until June 30, 2016. However, the statute requires the Director of the Department to make certain certifications that the Legislature knew to be impossible, specifically those set forth in subsections (4) and (5).

Subsection (4) requires the Director to certify that "[t]he new regulations described in paragraph (2) fully mitigate all identified significant environmental impacts". During the CEQA process,[3] the Department concluded that "suction dredging consistent with [the Department's] updated regulations would . . . result in significant environmental effects unrelated to fish, and, except in one instance,

[3] As explained in detail in Exhibit A, the Department had issued formal findings in March 2012 that the "full mitigation" requirement of subsection (4) could not be met because the Department lacked necessary substantive legal authority. *See* Ex. A, at 11.

unrelated to fish and wildlife generally (*e.g.*, water quality, cultural resources, and noise)". (*See* Ex. A, at 3.) The Department took the position that it lacked authority to mitigate these fundamentally minimal impacts (*e.g.*, the risk of digging up an artifact in a remotely-located streambed and the sound of small internal combustion engines no one but the operator could likely hear). (*See id.*)

Subsection (5) requires the Director to certify that "[a] fee structure is in place that will fully cover all costs to the department related to the administration of the program". Until January 1, 2013, however, the Department was forbidden from changing suction dredge fees set in Fish and Game Code § 5653(e), and the Department acknowledged that there was no authority "to increase the fees as necessary to 'fully cover all program costs'". (*See* Ex. A, at 13.) It was thus impossible for the Department to issue the required certification; no such fee structure is yet in place and no such certification has yet issued. (*See id.* at 13-14.)

On June 27, 2012, the Governor signed SB 1018, which repealed the June 20, 2016 date by which the moratorium might have expired even absent the required certifications, leaving mining flatly prohibited until further legislation could be enacted. As the Department later explained, SB 1018 also directed it

> "to provide recommendations to the Legislature concerning *statutory changes or authorizations necessary* for the Department to promulgate regulations to implement Fish and Game Code § 5653 which will fully mitigate all identified significant environmental effects and include a fee structure that will fully cover Department costs to administer its related permit program".

(Ex. A, at 1.) Simply put, it was impossible for Appellant to obtain a permit for suction dredging at the time he was cited, June 16, 2012, because "instream suction dredge mining is currently prohibited by statute in California [and] . . . has been since August 2009," and it remains impossible to obtain a permit. (Ex. A, at 1a.)

B. The Charges Against Appellant.

Appellant, having made a discovery of a valuable gold deposit "locatable" under federal mining law, took the legally required steps to obtain a federally-registered placer mining claim on National Forest Land and did obtain such a claim. (*See* CT71-72.)[4] Up until 2009, he would obtain a permit issued by the Department to operate a suction dredge on his claim, and he held a permit which was invalidated by operation of SB 670 in 2009. (*See* Tr. 47.) The parties have stipulated that but for the continuing statutory prohibition on issuing permits, he would have continued to apply for permits. (*Id.*) Issuance of permits would be, but for the statutory prohibition, a ministerial act. *See generally* 14 Cal. Code Regs. § 228.

Following the passage of SB 670, mining associations attempted to seek a judicial declaration that the statute (and its successors) were invalid in federal court, but the State procured a dismissal of the case on abstention grounds. *Public Lands for the People, Inc. v. California*, 2010 U.S. Dist. LEXIS 24531, No. 09-2566 (E.D. Cal. Mar. 16, 2010). Numerous civil actions were filed as well in state

[4] All "CT" references are to the Clerk's transcript of the record.

court. In his letter brief to this Court of September 25, 2013, counsel for the People correctly states:

> "Since the moratorium was initially enacted, a total of eleven civil lawsuits have been filed against the Department concerning its suction dredge permitting program. Currently, eight civil lawsuits are pending before the San Bernardino Superior Court in a coordinated proceeding ordered by the Judicial Council of California. (*Suction Dredge Mining Cases*, Judicial Council Proceeding No. 4720.) Those coordinated civil cases originated throughout the State, in Alameda, Sacramento, San Bernardino, and Siskiyou counties (with other, now-dismissed civil cases also in El Dorado and Los Angeles counties). While the civil cases raise many issues, the central, pivotal issue is the question of whether federal mining laws preempt state laws prohibiting and regulating suction dredge mining – the same issue raised by Mr. Rinehart in this appeal. The coordinated civil cases are about to begin the discovery stage of the proceedings. The instant case provides an efficient vehicle to answer the preemption question."

(Letter Brief at 2, Sept. 25, 2013.) As of this date, *more than four years after suction dredge mining across the State was shut down* in what numerous litigants contend was an unconstitutional deprivation of their federal rights, no court has been ready, willing or able to issue any ruling resolving the fundamental question presented in this appeal.

Appellant determined to test the validity of the statute by engaging in the prohibited activity, and was cited for doing so on June 16, 2012. The two-count complaint, charging violations of Fish and Game Code §§ 5653(a) & (d), was filed on August 30, 2012. (CT1-2.) On October 30, 2012, Appellant filed a demurrer, arguing that given facts of which the Court could take judicial notice, including the fact that Appellant was operating on his own federal mining claim on federal

land and that the State refused to issue mining permits, the prosecution could not be maintained under the Supremacy Clause. (CT5-34.) The People responded by arguing, among other things, that Appellant's constitutional challenge could not be determined by demurrer (CT35-36), that factual issues barred resolution of the question of federal preemption (CT36-39), and that there was no federal preemption (CT39-47).

On December 18, 2012, the parties argued the demurrer, which was overruled by the Court. (CT63.) Thereafter the parties entered into a Joint Stipulation of Facts and Procedure, approved by the Court, which established a novel procedure to resolve the defense of federal preemption utilizing an offer of proof. (CT68-70.) In substance, the parties stipulated to the prosecution's case-in-chief:

> "On or about June 16, 2012 Defendant Brandon L. Rinehart did use vacuum and suction dredge equipment in the County of Plumas in a river or stream in the Plumas National Forest in an area closed to suction dredge mining by the State of California, and did not then possess a valid permit issued by the California Department of Fish and Wildlife, then known as the Department of Fish and Game, to use his vacuum and suction dredge equipment."
>
> "On or about June 16, 2012 Defendant Brandon L. Rinehart did possess vacuum and suction dredge equipment in the County of Plumas in the Plumas National Forest, and within 100 yards of an area closed to suction dredge mining by the State of California."
>
> "The conduct identified in Paragraphs 1 and 2 occurred within the boundaries of the "Nugget Alley" placer mining claim owned by Defendant, and registered with the U.S. Bureau of Land Management with Serial Number CAMC0297113."

(CT68-69: Joint Stipulation of Facts and Procedure ¶¶ 1-3.)

Thereafter, a bench trial was held. The foregoing stipulation was introduced into evidence as the prosecution's case-in-chief. (Tr. 6.) The parties then argued at length the question of federal preemption, insofar as the People had reversed their position concerning the demurrer and now contended that the question of federal preemption could be decided as a matter of law. The Superior Court concluded that the State of California had the "right" not to issue permits, and that no preemption claim could be made as a matter of law. (*See* Tr. 42.)

As to the offer of proof, the Court ruled that paragraphs 1-5 of the offer of testimony by Appellant would be admitted (*see* Tr. 43), but ¶¶ 6-9, and all testimony from the two mining experts, would not be admitted as "irrelevant based on my preemption decision" (Tr. 43). The parties then stipulated to the admission of ¶¶ 1-5 (Tr. 45), plus an additional fact: Appellant had a suction dredging permit which was nullified by the Legislature's initial statute forbidding the Department from issuing permits in 2009, and he would have continued to apply for such permits had they been available (Tr. 47.) The parties then stipulated to the admission of certain documents as to which requests for judicial notice had been made, which were then denominated as Defendant's Exhibits A-F. (Tr. 47-50.)

The agreed upon facts thus expanded to include:

> "1. Defendant would testify that he was working in the water within the boundaries of the "Nugget Alley" mining claim, one of two contiguous mining claims owned by he and his father and four other locators. He would testify that he and his father obtained the claims by making a discovery of a valuable locatable mineral, posting a Notice of Location on the claim as required by law, filing the Location Notice with Plumas County and then transmitting a

copy of the file-stamped Location Notice to the U.S. Bureau of Land Management. He would offer as evidence a true copy of the Location Notice (previously filed as Exhibit 1 to the Declaration of Brandon Rinehart, filed on October 30, 2012). He would testify that the Location Notice identifies, and establishes, upon acceptance by BLM, the boundaries of the claim, which are set forth in attached maps. He would offer pictures of the claim, and areas where gold is to be found (copies of which are attached hereto as Exhibit A), together with a picture of substantial quantities of gold recovered from the claim (Exhibit B).

"2. He would testify that BLM accepted the Location Notice and registered the Nugget Alley claim with Serial Number CAMC297113, and offer a true copy of a printout from the BLM LR2000 system (previously filed as Brandon Decl. Ex. 2), showing that this claim (and the adjacent claims) are in good standing with the United States, all required fees having been paid to all governmental entities. He would testify that the Nugget Alley Claim, though located on land to which the federal government has legal title (within the Plumas National Forest), is private property on which he and the other owners pay real estate taxes to Plumas County, and offer a true copy of the most recent tax bill from Plumas County (previously filed as Brandon Decl. Ex. 3).

"3. He would offer a map of the area (previously filed as Brandon Decl. Ex. 4) and testify that at the time he was cited by the game warden, he was at the location marked on Exhibit 4 as "approx. location of our placer workings when cited," within the boundaries the claim.

"4. He would testify that placer claims, by their nature, contain gold deposited by water bodies. He would testify that much of California has already been subject to significant mining activity that has extracted the gold near to, but outside of, flowing waters, and that the Nugget Alley claim has been hydraulically mined in the past to remove such gold.

"5. He would testify that he excavated test pits outside the water-covered areas of the claim to survey for the presence of recoverable gold and found no economically-significant quantity of gold outside the water-covered areas. He would testify that the gold remaining on the claim, and additional gold brought from upstream

> sources, has been concentrated by flowing waters and may be found beneath the waters of the claim.

The record thus contains the Location Notice (CT23-26 (Exhibit C)), a database printout from the U.S. Bureau of Land Management (CT28-29 (Exhibit D)), the tax document (CT31 (Exhibit E), and the topological map of the area (CT33 (Exhibit F)).

In short, those portions of Appellant's offer of proof which related to the degree of interference that the State's refusal to issue permits posed to mining on his claim, and to mining of placer claims in the State generally, was ruled "irrelevant". This evidence is discussed in greater detail in Point II *infra*.

Once the record was established, the Court found Appellant guilty:

> "I believe that although this is a—although technically a criminal case, this is basically more of an act of civil disobedience where Mr. Rinehart—basically, this is a test case where Mr. Rinehart believes he is being frustrated in his ability to earn a living or to mine, and the State would disagree with that. Perhaps there's a better way to do that, but I think this is a case that needs to be taken up and needs to be resolved." (Tr. 52.)

The Court also expressed disapproval of the State's refusal to issue permits, stating: "I think the State needs to deal with it in an appropriate manner in terms of coming up with regulations . . .". (Tr. 53.) The Court found defendant guilty of both charges (CT377) and sentenced Appellant to three years' probation and $832 in fines and assessments, with the fine stayed pending successful completion of probation. (CT378.) This appeal followed.

Summary of Argument

Appellant, the owner of a federal mining claim, fell victim to a Legislative prohibition barring further annual permits for mining his claim. He continued to mine his claim to test the constitutionality of the State's ban on issuing permits. This is an issue the Superior Court could and should have determined in Appellant's favor as a matter of law. No state law can stand "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress;" it is preempted. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 592 (1980).

Here, the federal government has not merely expressed some general policy in favor of mineral development. It granted Appellant specific property rights in specific, federally-owned ground, and the State's prohibition of mining is simply not permitted under the Supremacy Clause of the U.S. Constitution. Appellant does not dispute the State's right reasonably to regulate his mining activities, but both requiring a permit and then refusing to issue any permits is not reasonable, and not constitutional.

To the extent that the issue could not be resolved as a matter of law, and Appellant was required to show, as a factual matter, the specific degree of interference which the State's refusal to issue a permit posed to his mining, the Superior Court erred in refusing to admit such evidence when proffered by Appellant. Appellant offered to present his own testimony that the suction dredge process constituted the only economically-practicable means of extracting the

valuable gold on Appellant's claim, and that the State's refusal to issue a permit operated, in substance, as a prohibition on mining his claim. (CR73.) He also offered two experts who would corroborate these claims, as well as testifying to the adverse effects of the State's ban on mining the vast majority of federal placer gold claims in California and elsewhere. (CR74-78.)

Appellant carefully explained the substance, purpose and relevance of the evidence through a written offer of proof (CR71-78), supported by two memoranda (CR87-94; CR96-106). Nevertheless, the Superior Court's refused to admit the evidence as "irrelevant" (Tr. 43-45). If a factual showing is required to make out a federal preemption defense in this context, failure to admit the evidence resulted in a miscarriage of justice within the meaning of Evidence Code § 354, and the judgment of conviction should be set aside.

Argument

I. THE TRIAL COURT ERRED IN HOLDING THAT DENYING THE DEFENSE THAT CALIFORNIA'S REFUSAL TO ISSUE SUCTION DREDGING PERMITS FRUSTRATES THE OBJECTIVES OF FEDERAL LAW.

Whether the issue should have been decided on demurrer, or at the bench trial based upon evidence of factual predicates for assertion of the defense,[5] the

[5] Appellant initially contended that the Court could take judicial notice of the elemental facts necessary to invoke the federal preemption defense—Appellant was mining on his federal mining claim—for purposes of ruling on the demurrer. (CT9-10; CT53-55.) While Appellant continues to maintain that the Superior Court erred in overruling the demurrer, the People's stipulation at trial to these same facts (¶¶ 1-5 of the Offer of Proof, CT71-72, *see* Tr. 45) puts the legal question before this Court without regard to the law of demurrers.

Superior Court erred in holding the defense unavailable. The federal government has not merely expressed some general policy in favor of mineral development, it granted Appellant specific property rights in specific, federally-owned ground, and the State's interference with this scheme is simply not permitted under the Supremacy Clause of the U.S. Constitution. Appellant does not dispute the State's right reasonably to regulate his mining activities, but an outright refusal to issue any permit for his mining is not reasonable, and not lawful.

A. The Nature of Rights in Mining Claims under Federal Law and Federal Regulation Thereof.

Congress has declared "the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries". 30 U.S.C. § 21a(1). The United States Court of Appeals for the Ninth Circuit has confirmed the "all-pervading purpose of the mining laws is to further the speedy and orderly development of the mineral resources of our country," *United States v. Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968).

The legislative action constituting the cornerstone of these policies is the 1872 Mining Act, which, as amended, now declares:

> ". . . 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 . . ." 30 U.S.C. § 22 (emphasis added)."

Because the lands where Appellant sought to mine are lands belonging to the United States, there is a general federal mandate for the land on which Appellant was cited to be "free and open" for both "occupation and purchase[ ]". Congress did not merely establish a general policy in favor of mining, but made specific, positive law concerning the status of its own property. As the Supreme Court has explained, under the Property Clause in Article IV, § 3 of the U.S. Constitution,[6] Congress enjoys "complete power" over federal public lands. *Kleppe v. New Mexico* 426 U.S. 529, 540-41 (1976) (overturning State attempt to regulate wildlife on federal land).

Beyond its general action with respect to federal lands, Congress had more specific purpose to grant rights to these plaintiffs as the locators of mining claims. As the U.S. Supreme Court explained in *Wilbur v. United States*, 280 U.S. 306, 316-17 (1930):

> "The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is "real property" subject to the lien of a judgment recovered against the owner in a state or territorial court. *Belk v. Meagher*, 104 U.S. 279, 283; *Manuel v. Wulff*, 152 U.S. 505, 510-511; *Elder v. Wood*, 208 U.S. 226, 232; *Bradford v. Morrison*, 212 U.S. 389. The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the

[6] The Property Clause specifically grants Congress "Power to dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States." U.S. Const., Art. IV, § 3.

> provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent." (Emphasis added.)

See also United States v. Shumway, 199 F.3d 1093, 1100 (9th Cir. 1999) (discussing scope of legal interests represented in mining claims).

Federal policy imposes not merely a right to mine, but also a duty to do so. Pursuant to 30 U.S.C. § 28, "On each claim located after the 10th day of May 1872, that is granted a waiver under section 28f of this title, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year." There is a limited right to utilize mere "surveys", rather than actual mining, to meet the statutory requirement, but it can only last two years. *Id.* § 28-1(d).

With respect to the specific grants of property in mining claims, the United States initially granted claim holders rights to "the exclusive right of possession and enjoyment of all the surface included within the lines of [Appellant's] locations". *See* 30 U.S.C. §§ 26, 35. As the federal agencies began to assert expanded regulatory powers, this right was limited under the Multiple Use Act of 1955:

> *"Rights under any* mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access

> to adjacent land: Provided, however, That *any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto . . .*" 30 U.S.C. § 612(b) (emphasis added)."

This statute is at the core of Appellant's federal preemption claim, because it confirms the long-standing federal policy of facilitating mining of claimed mineral deposits, and subordinates all other uses, including the protection of other resources such as fish and wildlife, to mining. *See also* H. Rep. No. 730, 84th Cong., 1st Sess. 10, *reprinted in* 2 U.S. Code Cong. & Admin News, at 2483 (1955) (Multiple Use Act does "not have the effect of modifying long-standing essential rights springing from location of a mining claim. Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator . . .")

Under this statute and other authority, the federal courts have repeatedly held that "use of the surface" includes regulation of the mining to protect surface resources, including fish and wildlife, and that although such regulation is permissible, it cannot "materially interfere" with prospecting, mining or processing operations. Most recently, in *United States v. Backlund*, 689 F.3d 986 (9th Cir. 2012), the Ninth Circuit confirmed that the regulatory authority of the Forest Service "is cabined by Congress' instruction that regulation not 'endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.'" *Id.* at 997 (quoting 30 U.S.C. § 612(b)).

In that case, appellant was charged under federal law for the crime of residing on his mining claim year-round notwithstanding the ranger's refusal to grant permission to do so. The affirmative defense, while obviously not one of federal supremacy, in fact relied upon the same body of federal law, urging that 30 U.S.C. § 612(b) and other authority forbid restrictions by the forest ranger that "materially interfered" with mining. The Ninth Circuit overturned appellant's conviction, and remanded for further review of whether the federal regulatory restriction imposed by the ranger materially interfered with mining:

> "Backlund's theory is that withholding authorization for year round residency on the Climax claims amounts to a "material interfer[ence] with . . . mining[,]" 30 U.S.C. § 612(b), because the prohibition makes it financially impossible for him to mine his claims. Backlund argued that the Forest Service's decision "so unreasonably circumscribed" his mining operation "as to amount to a prohibition," and therefore violated the mining laws. *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981). We express no opinion on the merits of Backlund's claim and leave it to the district court to evaluate in the first instance."

An earlier opinion had reached the same result in the civil context: the Forest Service may regulate use of National Forest Lands by holders of unpatented mining claims, like Appellant, but only to the extent that the regulations are "reasonable" and do not impermissibly encroach on legitimate uses incident to mining and mill site claims". *United States v. Shumway*, 199 F.3d 1093, 1107 (9th Cir. 1999).

Whether or not regulatory restrictions "materially interfere" with mining is to be evaluated on the commonsense basis of whether they will "substantially hinder, impede, or clash with appellant's mining operations". *See generally In re Shoemaker*, 110 I.B.L.A. 39, 48-54 (July 13, 1989) (reviewing legislative history of the Multiple Use Act; agency regulation cannot impair the miner's "first and full right to use the surface and surface resources").[7] In short, Congress has given express direction that where, as here, a miner is operating on his mining claim, there can be no substantive regulation that materially interferes with his mining.

We anticipate that the People will advance the case of *United States v. Richardson*, 599 F.3d 290 (9th Cir. 1979), upholding the Forest Service's restrictions on a miner. There, the miners were utilizing bulldozers and dynamite to dig enormous holes which were utterly unsuited to the asserted purpose of exploring the scope of the "low grade copper deposit" involved; particularly when core drilling without significant environmental damage was "the only" means of assessing the scope of the deposit. *Id.* at 290-91. The case turned upon the finding that the miners' "methods of exploration were unnecessary and were unreasonably destructive of surface resources and damaging to the environment". *Id.* at 295. What cases like *Richardson* show is that a functional permitting regime might be invoked to avoid environmental damage without materially interfering with mining. But here the State forbids the issuance of any permits, which is

[7] Copies of IBLA decisions are available at http://www.oha.doi.gov:8080/index.html. The Court may wish to request a joint appendix of foreign authority pursuant to Rule 3.1113(i)(1).

prohibitory, not regulatory, and materially interferes with mining as a matter of law.

B. The Doctrine of Federal Preemption.

1. Preemption generally.

The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. The Courts have long recognized that the important federal interests in mineral development created by federal law sharply limit the scope of state regulation of mineral development. As the U.S. Supreme Court long ago declared in discussing mining interests, any "right to supplement Federal legislation conceded to the State may not be arbitrarily exercised; nor has the State the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the Congressional laws." *Butte City Water Co. v. Baker*, 196 U.S. 119, 125 (1905). An outright refusal by the State of California to issue suction dredging permits is manifestly "repugnant to the liberal spirit" of federal laws promoting mining.

The Supreme Court has in succeeding decades outlined several species of federal preemption; this case concerns the preemption principle that "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," it is preempted. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 592 (1980); *see also Crosby v. National Foreign Trade*

Council, 530 U.S. 363, 372-74 (2000) (preemption where federal law "provisions be refused their natural effect"; citation omitted); *Perez v. Campbell*, 402 U.S. 637 (1971) ("any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause" regardless of the underlying purpose of its enactors).

Consistent with the Supremacy Clause, the California Supreme Court has very recently reaffirmed that it follows this same principle in determining federal preemption. *Parks v. MBNA America Bank, N.A*, 54 Cal.4th 376 (2012). Striking down a state statute requiring certain bank disclosures on the ground that banks had broad powers granted under federal law, the Supreme Court of California recited the "four species of federal preemption," including that the challenged state action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Id*. at 383 (quoting *Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal.4th 929, 935-36 (2007)). Even more recently, the Court of Appeals applied "obstacle" preemption to strike down California's attempt to invalidate certain consumer waivers as running afoul of federal policy favoring arbitration. *Caron v. Mercedes-Benz Financial Services USA LLC*, 208 Cal. App.4th 7 (2012).

2. Preemption in the mining context.

The law of federal preemption is vast, and the degree of federal preemption is highly dependent upon the specific federal statutes and interests involved. Cases involving traditionally federal functions find preemption without reference

to any presumption favoring the effectiveness of state law. *E.g.*, *Granite Rock, supra*; *Arizona v. United States*, 132 S. Ct. 2492, 2530 (2012) (Alioto, J., dissenting in part and noting absence of presumption). Other cases, where "Congress legislate[s] . . . in a field which the States have traditionally occupied," impose presumptions against preemption, seek a clearer expressions of a Congressional intent to preempt state law. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (2009); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Fortunately, this Court has direct guidance as to the scope of preemption in the federal mining context, where Congress has not acted to displace state from any field they traditionally occupied, but rather exercised its own longstanding authority over federal property. Specifically, in the *Granite Rock* case, the State of California through litigation established the principles of federal preemption in this exact context: state permitting of mining activities on mining claims on federal land managed by the U.S. Forest Service.[8] In *Granite Rock*, the U.S. Supreme Court refused to strike down *on its face* a demand by the State of

[8] The People have at times suggested that Forest Service regulations refute a preemption claim because they make reference to state environmental regulations. But these regulations are covered in *Granite Rock*, and stand merely for the proposition that there is no general Congressional "intention to pre-empt all state regulation of unpatented mining claims in national forests". *Granite Rock*, 480 U.S. at 583 (emphasis added); *see also id.* at 589 (suggesting that "reasonable state environmental regulation is not pre-empted); *id.* at 593. And because Congress has by statute forbidden federal regulators from material interference with mining operations, a federal agency cannot authorize a state to engage in such interference, no matter what its regulations might say.

California that miners obtain a coastal zone development permit. Granite Rock refused even to apply for a permit, arguing that any set of permit conditions would conflict with federal law. *Granite Rock*, 480 U.S. at 580.

The State attempts to limit *Granite Rock* to the proposition that only a flat prohibition on any and all mining whatsoever is preempted under federal law. This is inconsistent not only with the federal mining law discussed above, but also with the plain language of *Granite Rock*, which makes it clear that even if the State were to grant a permit—not the case here—material interference would still run afoul of federal law. The Supreme Court repeatedly emphasized in its opinion that "Granite Rock does not argue that the Coastal Commission has placed any particular conditions on the issuance of a permit that conflict with federal statutes or regulations". *Id.* at 579. The Court noted that "one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable" (*id.* at 587), but declared that "[i]n the present posture of this litigation, the Coastal Commission's identification of a possible set of permit conditions not pre-empted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement" (*id.* at 589). Through this language, it is obvious that the Court was referring to regulations beyond a blanket prohibition on mining.

The *Granite Rock* Court concluded by emphasizing the narrow nature of its holding:

> ". . . we hold only that the barren record of this facial challenge has not demonstrated any conflict. We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law. Neither do we take the course of condemning the permit requirement on the basis of as yet unidentifiable conflicts with the federal scheme."

(*Id.* at 594.)

In *Granite Rock*, the Attorney General's office, then representing the Coastal Commission, urged the Supreme Court that there was "no reason to find that the [Coastal Commission] will apply [its] regulations so as to deprive [Granite Rock] of its rights under the Mining Act". *Id.* at 586; *see also id.* ("the Coastal Commission has consistently maintained that it does not seek to prohibit mining . . ."). Here, by contrast, there is no question that the State's refusal to issue any permits deprived Appellant of his federal mining rights.

While there appears to be no California state court authority directly on point concerning preemption of mining regulations, the federal courts have repeatedly employed federal preemption doctrines to strike down state regulation that interferes with mining on federal lands. Thus in *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), the U.S. Court of Appeals for the Eighth Circuit struck down a "county ordinance prohibiting the issuance of any new or amended permits for surface metal mining within the Spearfish Canyon Area". *Id.* at 1006. As the Eight Circuit explained:

> "The ordinance's de facto ban on mining on federal land acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act. Congress has encouraged exploration and mining of valuable mineral deposits

> located on federal land and has granted certain rights to those who discover such minerals. Federal law also encourages the economical extraction and use of these minerals. The Lawrence County ordinance completely frustrates the accomplishment of these federally encouraged activities. A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution. The ordinance is prohibitory, not regulatory, in its fundamental character. The district court correctly ruled that the ordinance was preempted."

Id. at 1011 (emphasis added). The State's refusal to issue any permits for suction dredge mining in California is manifestly "prohibitory, not regulatory, in its fundamental character" and constitutes a *de facto* ban on mining. The Supreme Court of Colorado and the Oregon Court of Appeals have reached similar conclusions. *Brubaker v. Board of County Commissioners*, 652 P.2d 1050 (Colo. 1982) (county's refusal to issue drilling permit overturned); *Elliott v. Oregon Int'l Mining Co.*, 654 P.2d 663 (Or. Ct. App. 1982) (county ordinances prohibiting surface mining in some areas preempted); *see also Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979) ("The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress").

C. Why California's Refusal to Issue Permits Is Preempted.

California's decisions to both require a permit and then refuse to issue any permits stand as an obstacle to the federal statutory objectives permitting and indeed requiring claimholders to mine their claims. It is arguably impossible to

both comply with State law prohibiting mining and the provisions requiring annual assessment work, though special application might be made to the Secretary of Interior for an exemption (*see* 30 U.S.C. § 28b). At the least, however, refusal to issue mining permits stands "as an obstacle to the accomplishment of the full purposes and objectives of Congress". *Granite Rock*, 480 U.S. at 592.

The full purposes and objectives of Congress include a substantive limitation on regulation, even environmental regulation, which materially interferes with mining. This is because Congress has repeatedly recognized the common sense proposition that one cannot remove minerals from the natural environment without disturbing and even destroying "surface resources," and Congress has struck the balance between protecting the surface resources and extracting the minerals in favor of extracting the minerals.[9]

At least with respect to federal land and federal mining claims, California is not free to strike a different balance. One can imagine reasonable restrictions that allow the mineral extraction without materially interfering with mining, but a statewide ban on suction dredge mining is unreasonable as a matter of law. The

[9] Congress has repeatedly acted to protect miners from regulation by federal land management agencies. *See, e.g.,* Proposed Forest Service Mining Regulations: Hearings before the Subcommittee on Public Lands, House Committee on Interior and Insular Affairs, 93rd Cong., 2d Sess. (Mar. 7-8, 1974). More recently, Congress asked the National Research Council to reassess the adequacy of this regulatory framework. The National Research Council reported back that "BLM and the Forest Service are appropriately regulating these small suction dredge mining operations under current regulations as casual use or causing no significant impact, respectively". NRC, *Hardrock Mining on Federal Lands* 96 (Nat'l Academy Press 1999).

Superior Court's criticism of the State's failure to issue permits underscores the unreasonability of the State's position. (*See* Tr. 53 ("the State needs to deal with it in an appropriate manner also in terms of coming up with regulations . . .").

Further evidence of the unreasonability of the State's refusal to issue permits is that the State uniquely discriminates against suction dredge mining. Tiny dredges mining for precious metals are the only form of dredging in California waterways for which no permits may be issued. *See* Fish and Game Code § 5356.1(d) (suction dredging for all other purposes may be permitted). The State also insists that suction dredge mining, *unlike any other activity in California*, must "fully mitigate all identified significant environmental impacts". *Id.* § 5653.1(b)(5); *cf.* Public Resources Code § 21002 (mere duty to pursue "feasible mitigation measures available which would substantially lessen the significant environmental effects"). This sort of legal treatment is *per se* unreasonable, and the less restrictive alternative of issuing appropriately-conditioned permits can and should avoid any constitutional issue.

Finally, the State's blanket refusal to issue any permits should be viewed as a sort of land use planning that is specifically forbidden under *Granite Rock*. The idea of *Granite Rock* was to allow reasonable "environmental regulation [which], 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". *Granite Rock*, 580 U.S. at 587. "Land use planning in essence chooses particular uses for the land". *Id.* In forbidding suction dredge mining with no

opportunity to obtain permit conditions protective of the environment, as in the case of any other activity regulated under California law, the State is regulating a specific *use* of land in a fashion that is categorically preempted under the Federal Land Policy and Management Act of 1976 and other authority. *See generally id.* at 585-588 (Court will treat environmental regulation as distinct and not completely preempted "until an actual overlap between [environmental regulation and land use planning] is demonstrated in a particular case"). In this case, the State's refusal to issue any permits crosses the line into Constitutionally-prohibited restriction on mining.

II. ASSUMING *ARGUENDO* THAT RESOLUTION OF THE FEDERAL PREEMPTION DEFENSE REQUIRES FACTFINDING, THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE.

As demonstrated above, the State's refusal to issue any permits should be regarded, as a matter of law, as proving an unconstitutional interference with federally-protected mining rights. The People have at times argued that the foregoing cases should be distinguished because Appellant might still have mined by some means other than a suction dredge, but offered no evidence to this effect.

At the outset, it is important to understand that while the Supreme Court has recognized both "impossibility" and "obstacles" as bases for preemption claims, it has affirmed that "Congress would not want either kind of conflict". *Geier v. American Honda Co.,* 529 U.S. 861, 873 (2000). For this reason, the fact that Appellant might still engage in gold panning, or even attempting to lift a shovel of streambed material out of a rushing stream by hand (*cf.* CT73 (Appellant

offers to testify that he tried this, and it did not work)), does not undermine the preemption argument.

The federal preemption precedent in the mining context confirms this. Lawrence County could not defend its refusal to issue new or amended permits for surface metal mining in the "Spearfish Canyon Area" by arguing that mining could still persist underground, or in other areas, or that some mining could continue under existing permits. *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998). Grant County could not defend its ordinances prohibiting "surface mining in certain areas of the county" on the basis that it might proceed underground, or in other areas. *Elliot v. Oregon International Mining Co.*, 654 P.2d 663 (Or. Ct. App. 1982). The El Paso County Board of Commissioners could not defend its refusal to issue drilling permits on the basis that the miners there could have dug test holes with shovels. *Brubaker v. Board of County Commissioners*, 655 P.2d 1050 (Colo. 1982).

In short, under every mining preemption case of which Appellant is aware, all he must show is "material interference" within the meaning of 30 U.S.C. § 612(b), which necessarily arises from refusal to grant a permit for suction dredging. Before the trial court, the People offered no evidence as to how refusal to grant a permit might *not* constitute material interference. Appellant offered evidence to confirm the absence of alternative mining means which might proceed without a permit, but the trial court refused to allow the evidence.

Specifically, Appellant offered to testify, based on detailed supporting facts, including attempts to mine by other means, that "the only economically-feasible method" for mining the claim was utilizing a suction dredge. (CT73.) This testimony would be corroborated by two supporting experts, who would also have explained how the State's ban on permits generally interferes with federal policy to develop minerals not merely on Appellant's mining claim, but throughout California. (CT74-76.) Strictly speaking, an offer of proof was not even necessary because, in substance, "the trial court clearly intimated that it w[ould] receive no evidence of a particular type or class, or upon a particular issue". *Lawless v. Calaway*, 24 Cal.2d 81, 91 (1944).

To the extent that refusal to issue permits is not a *per se* interference with federal mining policy, because of the theoretical possibility of alternative mining methods, such as panning by hand, testimony should have been admitted to demonstrate "material interference". Such testimony is squarely in accord with *Granite Rock*'s warning against "a state environmental regulation so severe that a particular land use would become commercially impracticable". *Granite Rock*, 580 U.S. at 587. The Superior Court's evidentiary rulings in substance forbid Appellant from presenting any evidence concerning the degree of interference with his mining.

This ruling created manifest injustice, and is, in the alternative, another reason to set aside Appellant's conviction. *See* Evidence Code § 354. That is especially true since "before a federal constitutional error can be held harmless the

court must be able to declare a belief that it was harmless beyond a reasonable doubt". *Chapman v. California*, 386 U.S. 18, 24 (1967) (evidentiary ruling); *People v. Lucero*, 44 Cal.3d 1006, 1032 (1988). This Court should determines that requiring permits, and then refusing to issue them, is prohibitory as a matter of law, but that failing, Appellant was entitled to an opportunity to demonstrate unlawful "material interference".

Conclusion

For the foregoing reasons, Appellant's convictions should be set aside.

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 8,420 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: October 23, 2013

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