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 REPLY BRIEF

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Summary of Argument

The State cites no case in which state prohibitions on mineral development on federal lands have survived pre-emption. Appellant cites four cases striking down such restrictions. Lacking any authority for its position, the State resorts to deconstructing preemption law into little blocks of words taken from one case or another and snippets of ancient legislative history that are utterly inapposite to the question before the Court. In the mining context, it is simply not true that Appellant must demonstrate some sort of specific Congressional intent to preempt or overcome an imagined presumption against pre-emption.

Federal preemption in this context is required because where the federal government grants Appellant property with a right, if not affirmative duty,[1] to mine it, and enacts a federal statute barring material interference with mining operations, the State's refusal to continue issuing him permits manifestly stands as an obstacle to the accomplishment of the federal policies. That the state purports to act from motives of environmental protection does not matter: Congress has struck the balance in favor of mineral extraction, and the state's role is confined to reasonably minimizing environmental damage associated with that process *while still allowing the mining to occur.* A blanket prohibition on permits is not a

[1] The State correctly notes that Congress has recently through amendments to 30 U.S.C. § 28f permitted miners to pay fees in lieu of having to perform claim-related work. (State Br. 16-17.) These are temporary provisions contained in appropriation bills (*e.g.*, Pub. L. 112-74, 125 Stat. 1047 (Dec. 23, 2011)), which may not be re-enacted. These temporary provisions further support the intent to assure mineral development by assuring a miner can keep his claim notwithstanding interruptions in development.

reasonable environmental restriction on Appellant's activities or upon suction dredge mining in California generally.

Argument

I. FEDERAL MINING LAW AND POLICY PREEMPT THE STATE'S REFUSAL TO ISSUE MINING PERMITS.

Controlling authority declares that a state regulation affecting mining on federal lands must fall if it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress". *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 592 (1980). Controlling authority makes it clear that those purposes and objective extend very broadly to "all valuable minerals in lands belonging to the United States" (30 U.S.C. § 22), and to restraining regulators from "materially interfer[ing] with extracting such minerals (30 U.S.C. § 612(b)). It is obvious that the State's demand that Appellant obtain a permit it then categorically refuses to issue stands as an obstacle to Congressional purposes and objectives. Thus the State makes a remarkable attempt to undermine both the mining laws and the doctrine of federal pre-emption, which this Court should reject.

A. The State Misconstrues Mining Law.

Citing no authority, the State denies entirely that 30 U.S.C. § 612(b) forbids substantive regulation that materially interferes with mining, saying that the statute only addresses physical "uses" of the land by the United States. (State Br. 18.) This ignores the controlling authority to the contrary presented in our opening

brief. *United States v. Backlund*, 689 F.3d 986, 997 (9th Cir. 2012) (regulatory authority is "cabined" by § 612(b)).[2] Congress demanded that minerals on federal land be developed notwithstanding necessary impacts on trees, fish, recreation and other uses, and expressly forbade the agencies it expected to be regulating federal lands (*e.g.*, the U.S. Forest Service and the U.S. Bureau of Land Management) from taking such action.

The State thus argues, in substance, that Congress would consider it just fine for states to do precisely what it had forbidden the federal agencies from doing, and would consider it just fine for the states to simply prohibit mining. According to the State, Appellant must demonstrate "clear and manifest intent" of a specific Congressional intent to pre-empt State law. Such a requirement applies only in areas of "traditional state regulation,"[3] and has never been imposed where Congress is legislating under the Property Clause, including mining cases. *See also infra* Point I(B)(1) (no presumption against pre-emption in this context). Federal pre-emption has long been recognized as an essential principle with regard to federal lands because "[a] different rule would place the public domain of the

[2] The State argues that the general Congressional purpose to encourage mineral development is tempered by a companion policy to "lessen any adverse impact of mineral extraction". (State Br. 6-7 (discussing 30 U.S.C. 21a).) The key word is "lessen". Appellant does not dispute the dual nature of Congressional concerns, and the State remains free to "lessen" such impact under the pre-emption principles argued herein. But with respect to federal mining claims, the State cannot undo the precise balance set forth in § 612(b) by prohibiting the mining to remove all impacts.

[3] *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). The same is true of the State's reliance upon a suggestion that the Court has a duty to "disfavor" preemption, *id.*, a point of view that applies only in contexts other than this one.

United States completely at the mercy of state legislation." *Kleppe*, 426 U.S. at 543 (quoting *Camfield v. United States*, 167 U.S. 518, 526 (1897)).

The State has no more authority to prohibit federally-authorizing mining claim holders from mining federal mining claims than it does to prevent Forest Rangers from driving around in National Forests. The Forest Rangers may have to obey reasonable speed limits, but we can be entirely sure that barring them from the roads, or even limiting them to 20 m.p.h., would run afoul of federal pre-emption principles. No one would search for a "clear and manifest intent" of Congress in that context either.

B. The State Does Not and Cannot Distinguish Every Other Case Finding Preemption in this Context.

In our opening brief, we cited five cases, the only cases before this Court containing holdings on federal mining law and policy and their pre-emptive effects on state laws. Four of these cases preempted the state regulatory regimes involved: *South Dakota Mining Ass'n v. Lawrence*, 155 F.3d 1005 (8th Cir. 1998); *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050 (Colo. 1982); *Elliot v. Oregon International Mining Co.*, 654 P.2d663 (Or. App. 1982); and *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979). Each of these cases involves restrictions on some form of mining either by closing particular areas to

such mining, or refusing to issue a permit.[4] And each found the State restriction pre-empted.

The fifth case, the United State Supreme Court case of *Granite Rock*, while outlining the principles here to be applied, did not find preemption because there was no specific regulatory action before it, merely the State's request that it be permitted to propose permit conditions *that did not operate to prohibit mining*. *See id.* at 586 ("the California Coastal Commission has consistently represented that it does not seek to prohibit mining of the unpatented claim on national forest land"). While only *Granite Rock* represents controlling precedent for this Court, all of these cases are well-reasoned, persuasive, and should compel this Court to conclude that the State's peculiar scheme of requiring permits and then refusing to issue them is pre-empted under federal law. The State's attempts to distinguish these cases are not persuasive.

1. There is no presumption against pre-emption in this context.

The State's first objection to application of these cases is that they "[f]ail[] to apply the presumption against preemption". (State Br. 23.) That accusation has

[4] The State attempts to distinguish *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), because its holding is broader, and pre-empted the entire permitting regime. *See id.* at 1086 (driller should be "responsible to a single master rather than conflicting authority"). *Granite Rock* permitted dual regulatory regimes, but *Ventura County* is still properly cited for the lesser and continuing proposition that *refusal* to issue permits is preempted, even if the permitting regime itself is not preempted. *Ventura County*, 601 F.2d at 1084 ("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.").

no force because *there is no such presumption against preemption in this context*, and the best evidence of which is no presumption against pre-emption is even mentioned in *Granite Rock*.

More generally, the presumption the State is attempting to invoke "disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time". *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 n.3 (6th Cir. 2005), *aff'd*, 550 U.S. 1 (2007); *see generally United States v. Locke*, 529 U.S. 89, 108 (2000) (an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence").

The State isolates language in a Supreme Court opinion to the effect that a presumption against pre-emption applies in "all" cases. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). This is simply not true; presumption language is only contained in Supreme Court opinions addressing Congressional invasions of "historic police powers of the States". *Id.* Wherever Congress is exercising its express Constitutional powers in a matter of traditional federal concern, such as this one, *one will find no mention of any presumption against pre-emption whatsoever in the majority opinions finding preemption*. *E.g., Arizona v. United States*, 132 S. Ct. 2492 (2012) (no mention of presumption against preemption in immigration context); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (no mention in mining context); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (no

mention in national energy policy context); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983) (same); *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (no mention in Property Clause context).

The federal mining laws cannot reasonably be characterized as invading any historic police powers of the states, and so it is no surprise that there is no mention of any presumption against preemption in *Granite Rock*. The State argues that protection of fish and wildlife is a historic police power. But those powers only exist "in so far as [their] exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the Constitution". *Kleppe*, 426 U.S. at 545 (quoting *Geer v. Connecticut*, 161 U.S. 519, 528 (1896)). Where Congress has declared that the use of sites of valuable minerals on federal land is mineral extraction, the State may not impose as a higher use protection of fish and wildlife prohibiting the Congressional use.

This case also involves the exercise of state power far beyond any traditional protection of fish and wildlife. Under *Granite Rock*, the State can, in the service of traditional fish and wildlife protection, require Appellant to get a permit before mining so as to lessen impacts to the extent feasible. However, in its recent rulemaking, the Department of Fish and Wildlife crafted rules "to protect fish from adverse impacts [assertedly] caused by suction dredge mining" and "in adopting its updated regulations in 2012, *determined that no such impacts would*

occur". (4/1/13 Report to Legislature, at 3.[5]) The Department did speculate that miners might disturb birds (*id*. at 3 n.4), but there is no evidence any such birds are anywhere near Appellant's mining claim. To prohibit underwater activities Statewide because someone, somewhere might somehow disturb birds that might nest on nearby land is hardly the exercise of a traditional police power of the State. The State's asserted concerns could manifestly be addressed through permit-specific provisions to protect birds; a blanket prohibition on permits is simply not reasonable environmental regulation permitted under *Granite Rock.*

To make matters worse, the statute singles out and discriminates against suction dredging for valuable minerals in two ways: (1) expressly permitting suction dredging for all other purposes (§ 5653.1(d) and (2) imposing unique "mitigation" requirements on suction dredge mining (§ 5653.1(b)(4)).[6]

2. There is nothing in the text or legislative history of the Mining Acts of 1866 and 1872 undermining the conclusion of federal preemption.

The State's next attack upon all the cases finding preemption is that they do not construe early mining laws and their legislative history in the peculiar way the State interprets this material. (State Br. 24.) Here the State emphasizes that in

[5] This document alone refutes the State's claim that Appellant provided "no factual foundation" for arguments that conditioning permits was a "less restrictive alternative". (State Br. 26.) The rules set forth at 14 Cal. Code Regs. § 228 *et seq*. are riddled with conditions to protect fish and wildlife, and constitute a less restrictive alternative to a general refusal to issue permits.

[6] The State's claim that Appellant did not explain the discriminatory impact on federal mining to the trial court (State Br. 25-26) is utterly false. *See, e.g.*, Clerk's Transcript at 91.

these very early laws, Congress sought "to preserve local authority," but misunderstands the nature of what Congress sought. (State Br. 11-13.[7]) As explained in detail in *Jennison v. Kirk*, 98 U.S. 453 (1878), what Congress recognized and approved was "the law governing property in mines and in water on the public mineral lands". *Id.* at 458. Today 30 U.S.C. § 26 continues to grant effectiveness to "State, territorial, and local regulations not in conflict with the laws of the United States governing [a miner's] possessory title".

Even this express power has long been limited by principles of federal pre-emption in the mining context. As the Supreme Court explained in *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905), 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." *Id*. at 125. The State's brief ignores this case entirely.

Congress knew, when legislating in the mining context, how to carve out limited areas for the operation of state rules. It did so in 30 U.S.C. § 26, it did so

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[7] Remarks by individual legislators to the effect that Congress merely wanted to legalize trespasses (State Br. 10) do not reflect the intent of the early mining law:

> "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."

Wilbur v. United States, 280 U.S. 306, 316-17 (1930) (emphasis added).

in 30 U.S.C. § 51 (discussed *infra* Point I(B)(3)), and it also did so in 30 U.S.C. § 612(b) with respect to state water law:

> "Provided further, That nothing in this subchapter and sections 601 and 603 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim."

Thus through the very statute forbidding material interference in mining, Congress addressed a state's role, and limited it to traditional state regulation of water rights. It is therefore misleading to suggest, as does the State, that the legislative history of § 612(b) "is devoid of any mention or concern about state regulation" (State Br. 18); the text of the statute itself carves out a specific and limited role for the state.

Expressio unius ist exclusio alterius.[8] Because Congress carefully considered and granted limited roles for states with respect to mining on federal land, it necessarily excluded any general regulatory power unconstrained by Congressional objectives favoring mineral development. In particular, no reasonable approach to statutory construction can result in a determination that Congress authorized the States to both require mining permits on federal land and then categorically refuse to issue them.

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[8] A doctrine of statutory construction which "means that 'the expression of certain things in a statute necessarily involves exclusion of other things not expressed . . . .'" *Dyna-Med, Inc. v. Fair Employment and Housing Comm'n*, 43 Cal.3d 1379, 1391 n.13 (1987).

It is vital to recognize that federal preemption does not depend upon any express Congressional recognition of a preemption issue at all. As the Supreme Court has explained, "[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply . . .". *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000). *The law of implied preemption in the mining context is precisely such well-settled law*, a fact that fully accounts for and distinguishes every preemption case upon which the State relies.

3. There is nothing in the ancient cases cited by the State undermining the conclusion of federal preemption.

Against settled law of mining preemption, and against the 5-4 *Granite Rock* majority that eventually did permit a limited scope for state regulation of mining on federal land, the State offers *Woodruff v. North Bloomfield Gravel Mining Co*., 18 F. 753 (C.C.D. Cal. 1884). It is certainly not true that this was "the only case to analyze carefully the text and history of the Mining Acts in the context of a claim that they preempt state law". (State Br. 24.) *Woodruff* was the appeal of a bill in equity to restrain hydraulic mining which was "overflowing and covering the neighboring lands [—non-federal private property—] with debris". *Id.* at 756. Simply put, "[t]his irruption from the mountains has *destroyed thousands of acres of alluvial land*." *Id.* at 759 (emphasis in original). These included "some of the finest farms, orchards and vineyards in the State". *Id.* at 760.

The *Woodruff* case proceeded under false premise that "the only interest of the United States in the public lands was that of a proprietor, like that of any other proprietor". *Id.* at 772; *see also id.* at 785 (distinguishing proprietary and governmental interests). While at one time it was the design of Congress that the public lands should eventually be sold to the People, that vision has long given way to a scheme of control that brooks no limitations on Congressional authority.

The *Woodruff* Court focused its review upon a very early 1866 mining law which, according to the Court, only "purport[ed] to allow the 'exploration' and occupation of the public mineral lands and to provide for their sale under certain circumstances . . .". *Id.* at 810. The Court then concluded that "the sale by the United States to a purchaser did not prevent the State from exercising whatever police power it may of right have over the subject". *Id.* For this reason, *the case should not be considered to have involved mining claims on federal land at all*; it apparently involved land that had been sold (or patented) by the United States to miners (title to the land now being held by the miners, not the United States).[9]

The Court correctly observed that there was no statutory authorization for such purchasers to use "adjacent lands for the purpose of depositing therein or

[9] The State makes the same error in citing *Seven Up Pete Venture v. Montana*, 114 P.3d 1009 (Mt. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this case, the Supreme Court of Montana upheld a state law prohibiting "open-pit mining for gold or silver using heap leaching or vat leaching with cyanide," but exempting then-operating mines. *Id.* at 1013. The plaintiff had leased *state* lands, but had not yet obtained a permit for such mining, and so its claim for a "taking" was denied. *Id.* at 1016-18. No federal lands were involved and no question of federal preemption arose.

thereon their mining debris". *Id.* at 810-11.[10] To the contrary, the 1866 statute expressly provided if operations would "injure or damage the possession of any settler on the public domain, the party committing such damage shall be liable to the party injured for such injury or damage". *Id.* at 774 (quoting § 9 of the 1866 Act).

This law remains in effect (30 U.S.C. § 51), and again underscores Congress' intention to get minerals on federal land developed, even to the extent of causing damage to neighboring settlers, provided that such damages are compensated. More importantly, while it is perhaps correct to say that the 1872 mining law "expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation" (State Br. 9 (quoting *Granite Rock*, 480 U.S. at 582), Congress had already addressed the subject in 1866 and made it quite clear: mining was to proceed, with damages paid to neighboring landowners.

The State also claims that the California Supreme Court's decisions in *People v. Gold Run Ditch and Mining Co.*, 66 Cal. 138 (1884), and *County of Sutter v. Nicols*, 152 Cal. 688 (1908), "are controlling here". (State Br. 28.) *Gold Run Ditch* was an action for injunction for nuisance like *Woodruff*. *Id.* at 146. The defendant was "in possession of five hundred acres of mineral land," and it is not clear whether it was federal or non-federal. *Id.* at 144. It too was engaged in the process of dumping millions of cubic yards of material into a river "to cause

[10] The Court gave only cursory treatment to the 1872 mining law, finding that too did not "indicate a purpose to authorize the injuries complained of". *Id.* at 775.

much further and greater injury in the future to large tracts of [private] land—probably rendering them, within a few years, unfit for cultivation and inhabitancy". *Id.* at 145. No question of federal pre-emption arose at all in the Court's opinion. The opinion addresses claims that defendant acquired right to dispose of debris "from custom" and "by prescription and the statute of limitations". *Id.* at 151. Silence on the question of federal preemption suggests that these were not federal lands, but in any event that case cannot possibly control this one.

County of Sutter v. Nicols, 152 Cal. 688 (1908), did address questions of federal law, but not the federal law upon which Appellant relies. Rather, the case concerned the question of whether a federal permit issued by the California Debris Commission (created by Act of Congress approved March 1, 1893) barred actions for damages when, notwithstanding apparent compliance with the permit, injury to other private interests arose. The Court determined that the specific statutory provisions at issue "were designed to enable the commission to obtain all aid which it could derive from the suggestions of all interested persons" and "not intended to conclude and estop the owners of lands below with respect to subsequent injuries. *Id.* at 696. That, of course, was entirely consistent with § 9 of the 1866 Act (now 30 U.S.C. § 51), which continued to authorize damage claims.

What emerges from very early mining law and cases is confirmation that Congress took every available step to encourage mineral development on federal

lands, while allowing state law remedies to compensate affected property owners for damages constituting a nuisance. But there is no evidence that Appellant working of his mining claim might be considered a "nuisance" or indeed affect any other owner of private property. Appellant asks only that this Court determine he may not be punished as a criminal for failure to have a permit the State requires but refuses to issue. The State would retain whatever authority it may have to abate any nuisances he might cause.

4. The State's "general purpose" argument and resort to other imagined principles of law do not undermine the cases and law cited by Appellant.

The State next urges this Court to reject all the prior cases finding pre-emption for "[i]gnoring the admonitions of the Supreme Court that a purpose to encourage an activity is not on its own sufficient to support a claim of preemption". (State Br. 24.) Once again, the State is taking snippets of case law out of context. The principal case upon which the State relies, *Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981), held that *"[i]n cases such as this*, it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict". *Id.* at 634 (emphasis added).

That case required examination of specific statutes because pre-emption proponents advanced "federal statutes encouraging the use of coal" (*id.* at 633) against a Montana severance tax on coal mined in the state (*id.* at 612). Not only were taxes an indirect obstacle at best to coal production, but the pre-emption

argument was frivolous in that Congress had expressly authorized state severance taxes. *Id.* at 635. Had Montana declared that all coal must now be dug out by hand, an entirely different preemption case, akin to this one, would have been presented, and no resort to specific statutes would be required to show the Montana law an obstacle to federal purposes.

Appellant does *not* contend that "each and every state regulation that affected mining in any way would be preempted". (State Br. 7) This Court can and should distinguish state action such as levying taxes, or reasonable permit conditions, from direct and indeed discriminatory attacks prohibiting a federally-protected activity. Nor does Appellant suggest that "the Property Clause . . . somehow preempts all state regulation, including mining regulation, on federal land". (State Br. 8.) The significance of the Property Clause is that when Congress acts pursuant to that Clause, as in other fundamentally federal fields, no presumption against pre-emption applies and state initiatives must be evaluated for the impact upon the Congressional objectives properly established in Property Clause legislation. *Kleppe*, 426 U.S. at 545-46.

Nor does the imagined principle that the state is free to enforce its "criminal and civil laws on federal lands" save § 5653.1. (*See* State Br. 19 (citing *Kleppe*).) This principle is tempered by the fact that "Congress surely retains the power to enact legislation respecting those lands pursuant to the Property Clause," *Kleppe*, 426 U.S. at 543. And once such legislation is enacted, state laws simply cannot

stand as an obstacle to the achievement of the federal objectives. *Kleppe*, 426 U.S. at 543.

5. Federal regulations do not undermine pre-emption.

The State suggests that all prior cases have failed to give adequate weight to certain federal regulations and federal agency interpretations concerning federal preemption. (State Br. 24.) At the outset, we are filing herewith a Motion for Judicial Notice of the only federal agency action of which we are aware which addresses the impact of § 5653.1, and undermines entirely the notion that federal agencies have somehow approved of the State's refusal to issue permits.

With respect to the general regulations cited by the State, *Granite Rock* considered these regulations and still warned that state permits could not provide an undue burden on mining. These regulations are also not properly the subject of deference under the standards set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

First, the rule of *Chevron* has been substantially modified. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Supreme Court made what the author of Chevron characterized as an "avulsive[11] change in judicial review of agency action", *Chevron*, 533 U.S. at 239 (Scalia, J., dissenting). The *Mead* case resurrected the earlier Supreme Court precedent of *Skidmore v. Swift & Co.*, 323

[11] *See* Black's Law Dictionary 125 (5th ed. 1979) (defining "avulsion" as a "sudden and perceptible loss").

U.S. 134 (1944); *see Mead*, 533 U.S. at 239 (Scalia, J., dissenting)). Under this earlier rule, agency interpretations of law are not binding, but merely

> "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of [an agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

Second, the entire premise of deference to agency decisionmaking is lacking in the context of federal pre-emption. Deference arises because federal agencies interpreting their own regulations have special expertise giving agency interpretations extra weight. But federal agencies have no particular expertise concerning issues of federalism and state autonomy. *See generally* N. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737 (2003-2004). The proper approach to consideration of an agency position on the preemptive effect of a statute is no more than considering its persuasiveness, as set forth in *Skidmore v. Swift*. *See* N. Mendelson, at 742

Third, and most importantly, even if this Court were required to defer to agency interpretations that were reasonable under *Chevron* or otherwise, what the State now offers as federal agency interpretations are not reasonable in pertinent part. It is certainly true that § 612(b) itself gives weight to state water law, so that agency recommendations that miners comply with state water law are well founded. And it is certainly true that some states exercise delegated federal power under the federal Clean Water Act and Clean Air Act, and issues of federal

preemption do not arise in the context of implementing federal law. These simple rules explain most of the federal regulations cited by the State.

The cornerstone of the State's case, however, is a regulation of the U.S. Bureau of Land Management (BLM) which, based on a flatly-erroneous view of pre-emption law, boldly declares that "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. As the State candidly acknowledges, BLM's position, set forth in the Federal Register, is that pre-emption doctrine only applies when it is "impossible to comply with both Federal and State law at the same time". (State's Brief at 22; quoting 65 Fed. Reg. 69,998, at 70,009 (Nov. 21, 2000).) BLM has no charge from Congress to promulgate its own peculiar views of preemption law; BLM must take that law from the Supreme Court.

BLM, however, has rejected the entire concept of "obstacle" preemption and precise holdings of *Granite Rock*. This is plainly wrong. The Supreme Court rule is that "*both forms of conflicting state law are 'nullified' by the Supremacy Clause*": (1) conflicts "that prevent or frustrate the accomplishment of a federal objective" *and* (2) conflicts "that make it 'impossible' for private parties to comply with both state and federal law". *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000). In attempting to render opinions on preemption doctrine, a subject on which it has no expertise whatsoever, BLM has simply erred, and it is axiomatic that an agency interpretation cannot stand if the agency "has misconceived the law". *SEC v. Chenery*, 318 U.S. 80, 94 (1943).

Quite apart from its failure to understand and apply pre-emption law, the BLM regulation is also flatly inconsistent with 30 U.S.C. § 612(b). BLM is without delegated power to declare that "protection for public lands" may ever trump protection of mineral development. BLM's authority comes only from Congress, and Congress cannot possibly have authorized BLM to authorize the State to do what BLM itself could not do.

C. This Is Not a Temporary Prohibition.

The State wishes to induce this Court to characterize the continuing prohibition since 2009 of suction dredge mining as a mere temporary moratorium on issuing permits. That is sophistry. Section 5653.1 flatly forbids the Department from issuing permits unless and until particular certifications can be made. *No such certifications can be made unless and until the Legislature makes new law*. This is not just a matter of abiding delay for a regulatory agency to consider "possible approaches" for new regulations (State Br. 27); the Department's recommendations to the Legislature acknowledge that "statutory changes or authorizations [are] *necessary* for the Department to promulgate regulations" (*See* Exhibit A to Motion to Augment the Record, at 1 (emphasis added).) Simply put, the Department cannot issue permits unless and until the law is changed.

Section 5653.1's prohibition on issuing permits is thus as permanent as any of the other state-law based mining prohibitions struck down by every court to have considered them, for the issuing entity could always change its mind and

make new law. If the State's rule of law prevailed, there would be no such thing as federal preemption because the State might always be characterized as on the verge of modifying the obstacle. In any event, the State cannot prohibit the mining, "either temporarily or permanently". *Ventura*, 601 F.2d at 1084.

II. NO REMAND IS NECESSARY TO VACATE APPELLANT'S CONVICTION.

The State argues both that "material facts are undisputed" (State Br. 3) and that a remand would be required to show that the State's refusal to issue Appellant a permit "materially interfered" with his mining operation (State Br. 28). No remand is necessary. Where, as here, the State operates a permit regime and then arbitrarily terminates it, continuing to require permits but refusing to issue them, no reasonable trier of fact could fail to find obstacle preemption.

Conclusion

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

James L. Buchal
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5,598 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: December 6, 2013

James L. Buchal
Counsel for Appellant

DECLARATION OF SERVICE

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On December 6, 2013, I served APPELLANT'S REPLY BRIEF on the parties in said action as follows:

(X) (First Class US Mail) by placing a true copy thereof enclosed in a sealed envelope, addressed as shown below:

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