No. S222620

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

BRANDON LANCE RINEHART,

Defendant and Appellant.

Third Appellate District, Case No. C074662
Plumas County Superior Court, Case No. M1200659
Honorable Ira Kaufman, Judge

DEFENDANT AND APPELLANT BRANDON RINEHART'S PETITION FOR REHEARING

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September 6, 2016

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This Court's August 22, 2016 opinion does not address numerous provisions of federal law necessary to evaluate whether California's prohibition of motorized mining on federal land "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. 572,581 (1987) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). It also overlooks important aspects of the history of hydraulic mining in California that the Court draws from extra-record sources.

As a result, the Court oversimplifies Congressional intent to conclude, erroneously, that states may invoke imagined environmental interests to flatly prohibit mining on federal lands and mining claims without any regard to the reasonableness or necessity for such restrictions, or their relation to any cognizable environmental standards. A more complete understanding of the statutory and regulatory structure and relevant history properly confines the State to operating reasonable, permit-based schemes for regulating mining.

That is because through multiple statutes, including several not addressed in the opinion, Congress carefully considered the balance between mineral development and environmental protection. Congress, unlike the Legislative Assembly, recognizes a national imperative to develop minerals where they are found, subject to the avoidance of

unnecessary environmental damage in doing so. This careful balance allows the "reasonable environmental regulation" the State sought and obtained in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), where the State "consistently maintained that it does not seek to prohibit mining of the unpatented claim on national forest land". *Granite Rock*, 480 U.S. at 593, 586. This Court's opinion authorizing the State to do what all then understood was unconstitutional destroys that balance. The Nation's mineral resources obviously cannot be discovered and developed without the use of motorized equipment, and this Court need not extend the power to regulate to the power to prohibit in order to give effect to California's environmental interests.

Argument

I. THIS COURT SHOULD GRANT THE PETITION FOR REHEARING.

A. This Court Oversimplifies the 1872 Mining Law.

It is remarkable that the Court reframes a law entitled "An Act to promote the Development of the mining Resources of the United States" (State's Request for Judicial Notice, Mar. 23, 2015, Exhibit B), a purpose of which is unquestionably frustrated by a state law ban, as primarily protecting "miners' real property interests". (Opinion at 2.) The Court reaches this conclusion by downplaying the general object of federal

legislation in favor of its details, and then by overlooking the statutory details inconsistent with its conclusion.

In particular, the "miners' real property interests" at issue here were not, under the 1872 Mining Act, any ordinary species of property. First, the property only arises at all if a valuable discovery of minerals is made, which likely cannot occur at all without the use of the motorized equipment California now bans. Then, the property can only be held so long as the primary statutory purpose, mineral development, is advanced. Specifically, Congress required "work necessary to hold possession of a mining claim" (30 U.S.C. § 28)—that is, the work of developing the mineral resources. And Congress set the floor for that amount of work at $100 worth of labor or improvements a year. As the U.S. Supreme Court has explained, "work on the claim for its development as a condition of continued ownership" was an "essential feature" of the statutory design. *See Jackson v. Roby*, 109 U.S. 440, 442 (1883).

Section 28 does not, as the Opinion suggests, relate merely to the "marking and recording of claims" (Op. at 9; *see also id.* at 10), but fashions a special species of property imbued with the overriding purpose of mineral development. It is not accurate to identify the Congressional purpose to develop minerals as a mere "general, overarching goals" that might quickly be supplanted by other interests this Court considers

"compelling". (Op. at 22.) Congress created a regime in which the specific piece of land on which Rinehart was operating is suffused with specific rights, duties and protections against other interests.

Neither the text nor longstanding interpretations of the 1872 Mining Law support the Court's statement that "the one area where the law does intend to displace state law is with respect to laws governing title" and that in all other areas, "state and local law are granted free reign". (Op. at 10.) The statute "committing miners to continued compliance with state and local laws" (Op. at 22-23) manifestly concerns laws "governing possessory title" (30 U.S.C. § 26), and has nothing to do with allowing states to prohibit mining on federal land. *See also* 30 U.S.C. § 22 (referring to "local customs or rules of miners in the several mining districts"). These statutes have always been interpreted to relate to the means by which miners acquire possession and title to mineral resources, not as conferring any general regulatory authority upon the states. *See, e.g., Union Oil Co. v. Smith*, 249 U.S. 337, 348 (1919) (noting "authority of the mining States to regulate the possession of the public lands in the interest of peace and good order"); *Butte City Water Co. v. Baker*, 196 U.S. 119, 123 (1905) ("Congress, having regard to the interests of this owner, shall, after prescribing the main and substantial conditions of disposal, [could] believe that those interests will be subserved if minor and subordinate regulations are entrusted to the

inhabitants of the mining district or State in which the particular lands are situated"); *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 66 (1898) (federal mining law allows title disputes, "except in cases affected by local customs and rules of miners, [to] be subject to the ordinary rules of the common law").

Broader state legislation than rules governing possession and title to mining claims was not remotely within the contemplation of Congress in 1872. At that time, most of the relevant federal land was not even located within a state. Neither the statutory text nor the surrounding circumstances fairly support an inference that Congress intended in 1872 to grant states "free reign" to prohibit mining on federal mining claims. (*Cf.* Op. at 10.) More importantly, Rinehart need not demonstrate that Congress intended any "grant of immunity against local regulation" (Op. at 15); the test for preemption is not whether Congress expressly considered particular State actions, but whether those actions "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress". *Granite Rock Co.*, 480 U.S. at 581.

It is also error to suggest that the early law did not regulate the "process of exploitation—the mining—itself". (Op. at 9.) Congress unmistakably addressed that process in 1872 by requiring it to continue as a condition of holding the property. And nearly a century later, as "process"

regulation emerged, Congress specifically limited regulatory interference though 30 U.S.C. § 612(b). It is odd indeed to suggest that where Congress expressly restricted federal regulatory interference with mineral development, it intended to authorize state interference.

Decades later, when more modern state legislation expanded its purview to mining on federal land, Congress created additional statutes reaffirming its Congressional intent that mineral development must proceed where minerals are found, subject to the avoidance of unnecessary environmental impact. We turn now to those more modern statutes.

B. This Court Ignores Specific Congressional Intent Concerning Role of State Regulation on Federal Land.

Rinehart does not, as the Court claims, assert that merely "two federal land statutes supply a defense". (Op. at 6.) Rinehart argues that the defense of federal preemption is established by reference to a broad range of federal statutes addressing mining on federal land.[1] This Court cannot fairly ascertain the "full purposes and objectives of Congress" (*Granite Rock*) by putting on blinders limiting its review to two statutes. Indeed, the Court cites several additional statutes imagined to support the opinion.

[1] Given the wealth of material concerning the 1872 Mining Act, as amended, and extensive case law, some of these statutes could only be very briefly presented in Rinehart's Answering Brief (Answering Brief at 31 & n.10; *see also* Rinehart's Answer to the Brief *Amicus Curiae* filed by the Law Professors, at 9; Rinehart's Answer to the Brief *Amicus Curiae* filed by the United States, at 19).

What makes the additional statutes particularly important in inferring Congressional intent is that they were passed long after 1872, when states were exercising greater regulatory controls that might reasonably be expected to be within the cognizance of Congress.

The first statute, the Federal Land Policy and Management Act of 1976 (FLPMA), establishes a federal land use management process for "public lands" (43 U.S.C. § 1702(e)). Section 202(a) of FLPMA authorizes the Secretary of Interior to "develop, maintain, and, when appropriate, revise land use plans which provided by tracts or areas for the use of public lands". 43 U.S.C. § 1712(a).

FLPMA specifically directs the Secretary, in developing federal plans, to coordinate planning with state and local government. 43 U.S.C. § 1712(c)(9). It also provides: "Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and purposes of this Act;" the Secretary must only keep apprised of such plans "to the extent he finds practical". *Id.*

The legislative history leaves no doubt that Congress intended to preserve exclusive federal control over federal land use decisions. The Conference Report explains:

> "The conferees adopted a consolidation of provisions . . . with revisions making clear that the ultimate decision as to determining

> the extent of feasible consistency between BLM plans and such other plans rests with the Secretary of Interior. This affirmed the need to maintain the integrity of governing Federal laws and Congressional policies.

H. Conf. Rep. No. 94-1724, 94th Cong., 2d Sess. 58 (1976); *see also* H. Rep. No. 94-1163, 94th Cong., 2d Sess. 5, 7 (1976); S. Rep. No. 94-583, 94th Cong., 1st Sess. 45 (1975). States can certainly exercise their powers to declare that particular land, even federal land, should be used, or not used, in particular ways, but those declarations are not given automatic effect on federal land. The Secretary must affirmatively determine to do so.

FLMPA also continues the careful balance struck by Congress in 30 U.S.C. § 612(b) and elsewhere preventing material interference with mining operations. FLMPA reiterates that regulation must only "prevent unnecessary or undue degradation of public lands". 43 U.S.C. § 1732(b); *see also id.* § 1701(a)(12) (Secretary must manage federal land "in a manner that recognizes the Nation's need for domestic sources of minerals . . ."). It is this careful balance that is so profoundly disrespected and frustrated by the challenged California statutes.

FLPMA also expressly addresses the operation of state environmental regulation, providing for compliance with state "air or water quality standard[s]," but does so by incorporating them into federal instruments, leaving the ultimate regulatory decision within federal

authority. 43 U.S.C. § 1732(c). Specifically, § 1732(c) provides:

> "*The Secretary shall insert in any instrument* providing for the use, occupancy, or development of the public lands *a provision authorizing revocation or suspension*, after notice and hearing, of such instrument *upon a final administrative finding of a violation of any term or condition of the instrument, including*, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and *compliance with applicable State or Federal air or water quality standard or implementation plan*: Provided, That such violation occurred on public lands covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it: *Provided further, That the Secretary shall terminate any such suspension no later than the date upon which he determines the cause of said violation has been rectified:* Provided further, That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment: Provided further, That, where other applicable law contains specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail." (Emphasis added.)

In short, implementation of state-law based environmental regulation under FLMPA is (1) limited to air and water quality standards" and (2) the ultimate decision as to compliance is left to the Secretary.[2] Congress'

[2] The Forest Service regulations discussed in *Granite Rock* also require operators such as Rinehart to conduct operations, "where feasible," so as to comply with state air and water quality standards. 36 C.F.R. § 228.8. Consistent with FLPMA, however, the Forest Service has retained ultimate authority to determine the applicability of state laws, *and has in fact approved plans for suction dredging notwithstanding the State's ban*. (*See* Defendant and Appellant's Motion for Judicial Notice filed April 22, 2015, Exhibit 2 (a/k/a Exhibit B).) *The Court's opinion may be the first time in American jurisprudence that a court has found no federal preemption problem with a state categorically forbidding conduct that has been expressly authorized by federal officials.*

decision to implement of state concerns through conditions in federal instruments is inconsistent with any general intent to allow states to regulate freely on federal lands. Federal permission is controlling where granted until revoked.

Moreover, FLMPA refers only to "air or water quality standards". The statutes challenged by Rinehart are not *standards* in any sense of the word, but aimed at outlawing a specific use of federal (and other land) that can be and was being conducted in compliance with such standards. A statute shutting down all permitting in particular areas of land is precisely the sort of state law that runs afoul of the *dicta* in *Granite Rock* forbidding land use restrictions covering federal mining claims. *See Granite Rock*, 480 U.S. at 587. It is remarkable that this Court upholds what is in substance a land use restriction that all parties in *Granite Rock* appeared then to understand was preempted: a flat prohibition on a mining use. [3]

Even more significantly, Congress has considered and provided a mechanism for states to *prohibit* mining in § 601 of the Surface Mining

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[3]A "moratorium" is a quintessential land use: an "interim control[] on the use of land that seek to maintain the status quo with respect to land development in an area by either 'freezing' existing land uses or by allowing the issuance of building permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change.'" *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting) (quoting 1 E. Ziegler, Rathkopf's *The Law of Zoning and Planning* § 13:3, p. 13-6 (4th ed. 2001)).

Control and Reclamation Act of 1977 (SMCRA). This authorizes the Secretary of the Interior to review whether an area "may be unsuitable for mining operations". *See* 30 U.S.C. § 1281(a) & (b); *see also* 43 U.S.C. § 1714 (exclusive federal authority for mineral and other "withdrawals"). The Governor of a state or "[a]ny person have an interest which is or may be adversely affected" may initiate the review process (30 U.S.C. § 1281(c)). If the Secretary determines that the benefits resulting from a designation outweigh the benefits of mineral development, he may either withdraw the area from mineral entry or limit mining operations (30 U.S.C. § 1281(f)).

Congress' express creation of a federal process for resolving the conflict between state and federal interests is utterly inconsistent with any Congressional intent to allow state-law-based prohibitions to shut down mining on federal lands. Rather than give automatic effect to state law, Congress empowered federal officials to determine whether and to what extent state-based prohibitions should be given effect.

This Court should consider the most recent and compelling proofs of Congressional intent in its opinion to avoid overreaching and error. Failure to do so will only engender further litigation.

C. The Court Errs in Its Historical Review.

This Court, operating without the benefit of any factual record on the preemption question, turns to R.L. Kelly, *Gold vs. Grain: The Hydraulic Mining Controversy in California's Sacramento Valley* (Clark 1959), for facts concerning early restrictions on hydraulic mining. It is inappropriate for the Court to take judicial notice of this and other extra-record material not addressed in the Court's July 15th order. In any event, the book, as its title confirms, primarily addresses legal actions in a single river system, and does not support the propositions for which the Court cites it. The question before the Court is whether Congress intended that states might directly ban mining on federal land and mining claims, and that question was not before Congress in the history recorded in *Gold vs. Grain*.

1. The history sheds no light on the federal preemption defense advanced by Rinehart.

To the contrary, the book confirms that the question of federal preemption based on operations on federal land (or federal mining claims) was never raised or addressed. The miners involved "had been given United States patents for their land, which was taken by many as tacit approval of their operations". (*Gold vs. Grain* at 59; *see also id*. at 109.) Indeed, the first significant lawsuit was even remanded from federal court back to state court for want of a federal issue. (*Id*. at 106.)

It is difficult to understand how this Court could possibly conclude that "in the eyes of the *Woodruff* court . . . a state-law based injunction did not contravene federal rights" now invoked by Rinehart (Op. at 20) when the *Woodruff* Court *did not consider such rights at all.* The argument considered in *Woodruff* was "that the acts of the defendants are authorized by the customs of miners". *Woodruff v. North Bloomfield*, 18 F. 573, 800 (Cir Ct., D. Cal. 1884). Such customs were asserted to have the force of federal law by reason, among other things, of the statute presently set forth in 30 U.S.C. § 28:

> "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim . . ."

Woodruff correctly observed that this and other statutes did not have "any relation at all to the subject matter of this suit". (*Woodruff*, 18 F.573 at 800.) Congress simply never gave legal effect to miners' customs for dumping debris; as explained above, all these statutes related to establishing and maintaining possession and title to mining claims.

The *Woodruff* parties never argued that limitations on debris disposal interfered with the mineral development of federal land or federal mining claims, because the property, like the other mines in the area, had long ago become private property. *Woodruff* quite clearly stated that the statutes

invoked "relate to 'mining claims' alone" and had "no relation to lands owned in fee by private parties". *Id.*

At all relevant times, the early hydraulic mining disputes were primarily framed as relating to the ancient common law principle that no man might use his property to the damage of others. (*E.g. Gold vs. Grain* at 71, 81.) Ancient common law remedies for nuisance based on use of private property are well within the historic police powers of the states. Legislation banning particular uses of federal land has no such precedent or status. Specific injunctive relief against specific mines, or even groups of mines in single watershed, cannot fairly be equated with California's prohibition on motorized mining anywhere near the water.

Congress may well have been aware of the "background tapestry of state law and [been] content to remain as it was" (*Quesada v. Herb Thyme Farms, Inc.*, 62 Cal. 4th 298, 312 (2015)), but the background tapestry in the late 1800s was that of classic common law remedies for nuisance being applied to private property Congress had disposed of decades before. Congress was not faced with legislative attempts directly to outlaw mining operations on federal land without regard to the impacts of any particular operation.

What is more instructive for assessing generally prevailing intent with respect to statutory prohibitions on mining is the statutory history. The

first State legislative response to mining debris, the Drainage Act of 1880, made no attempt to regulate mines at all, much less mines on federal land. (*Gold v. Grain*, at 150-52.) When the legislature eventually addressed the hydraulic mining process directly in 1893, it did not ban it outright, but rather declared: "The business of hydraulic mining *may be carried on within the state* wherever and whenever it can be carried on without material injury to navigable streams or the lands adjacent thereto." (Public Resources Code § 3981; *see also Gold vs. Grain* at 284.) This measured approach, absent from the Court's opinion and the challenged statutes, is consistent with *Granite Rock*. Blanket prohibitions of any and all motorized mining in or near the water are not.

2. There was never a flat ban on hydraulic mining extending to federal land and mining claims.

Contrary to the Court's statement, the State of California never acted to provide a "de facto ban," much less one that forbade the mining "even on federal land," as the Court repeatedly states without any record or other support. (Op. at 17, 19.) Long after the wave of injunctions in the Sacramento Valley, hydraulic mining continued in other areas where "different conditions existed and problems comparable to those in the Sacramento Valley did not appear". (*Gold v. Grain* at 245.) Hydraulic mining continued in the Sacramento Valley, first consistent with the

injunctions, and later under Debris Commission permits, even as late as 1956. (*Id*. at 299).

It is simply inaccurate to state that specific injunctions, even large numbers of them in a particular area, were "prohibiting a major, widespread mining technique *everywhere*, including on federal land." (Op. at 19; emphasis added.) No evidence supports this proposition, and it is manifestly and easily controverted. *See also Jacob v. Day*, 111 Cal. 571 (1896) (denying nuisance claim against hydraulic mining "under the rule *de minimis*"). No one who actually reads *Gold vs. Grain* can come away with the sense that "for nearly a decade, hydraulic mining "stood in abeyance based solely upon state laws giving priority to other concerns." (Op. at 19.) To the contrary, individualized legal proceedings, akin to a modern administrative permit process, expressly permitted mining to proceed when it could be conducted while containing debris. (*E.g.*, *Gold v. Grain* at 248.)

Nor did Congress "endorse the [non-existent] state law ban". (Op. at 17.) Congress was faced with extraordinary circumstances in which mines on private property threatened navigation not merely down to Sacramento, but all the way to the Golden Gate. (*Gold vs. Grain* at 69-70, 75, 82, 111, 135; *see also id.* at 160-61, 224 (referring to federal duty to maintain navigation); 297 (effects on Golden Gate bar).) Congress was unwilling to spend the money to improve navigation if the money would be

wasted, a point of view that cannot be fairly equated to Congressional consideration of whether federal rights on mining claims "convey[ed] a federal right to mine on federal land without regard to any environmental impacts . . .". (Op. at 19.) That general question simply never arose.

Rather, it was Congress itself, not the State of California, that acted to prohibit hydraulic mining in the Sacramento Valley, indirectly through the appropriations bills and then through creation of the Debris Commission. If relevant at all, *Gold vs. Grain* confirms a Congressional intent for the federal government, not states, to make the ultimate determination whether to *prohibit* mining activities.

D. Due Process of Law Forbids Factfinding Concerning Rinehart's Mining Operation Without an Opportunity to Present Facts.

There is not a shred of evidence before this Court that Rinehart's tiny, remote mining operations have any adverse environmental impacts whatsoever. It denies Rinehart the most fundamental aspects of due process of law for this Court to declare, after upholding the trial court's refusal to permit Rinehart to present any and all evidence, that the effects of *his mining* "are experienced elsewhere than just the federal land on which Rinehart seeks to mine". (Op. at 19 n.8.) There is no evidence to support this proposition and it is incorrect.

If what the Court is saying in its opinion is that the Legislature is entitled to *pretend* that such effects exist in order to support a ban on motorized mining throughout the state, such a holding fails to give comity to the Congressional insistence upon avoiding only unnecessary or unreasonable environmental impacts in the process of mineral extraction. Legislature declarations are not an "air or water quality standard" or a reasonable permit-based condition consistent with federal law.

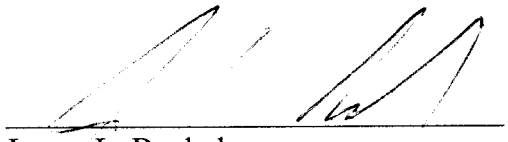
Rinehart does not need to demonstrate the extreme proposition that he has a federal right to mine on federal land without regard to any environmental impacts. He merely needs to demonstrate that the ban on motorized mining stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. It is difficult to conceive of a more direct attack on a Congressional purpose to develop minerals on the claim the federal government granted to Rinehart than a refusal to permit his mining, based on general prejudices against mining rather than any reasoned assessment of the impacts of his operations.

Conclusion

Federal judges are already beginning to warn that judicial hostility toward natural resource development, including small-scale mining, may "undermine public support for the independence of the judiciary, and cause many to despair of the promise of the rule of law". *Karuk Tribe of*

California v. United States Forest Service, 681 F.3d 1006, 1041 (9th Cir. 2012) (en banc) (M. Smith & A. Kozinski, JJ., dissenting), *cert. denied*, 133 S. Ct. 1579 (2013). Absent rehearing, this Court's opinion will undermine support for the judiciary and respect for the rule of law.

Dated: September 6, 2016.



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CERTIFICATE OF COMPLIANCE

I. hereby certify that this brief contains 4,347 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: September 6, 2016.

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CERTIFICATE OF SERVICE

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

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

On September 6, 2016, I served the following document:

DEFENDANT AND APPELLANT BRANDON RINEHART'S PETITION FOR REHEARING

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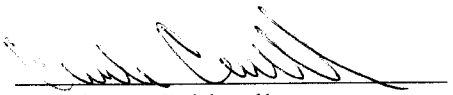

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