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November 17, 2014

The Honorable Tani Gorre Cantil-Sakauye
Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: **Request for Depublication of *People v. Rinehart* (Third Appellate District, Case No. C074662)**

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

The People of the State of California respectfully request that the opinion in *People v. Rinehart* (Third Dist. Ct. App., case no. C074662) be ordered not published in the Official Reports. The opinion was filed on September 23, 2014, as an unpublished decision. On October 8, 2014, the Court of Appeal ordered that the opinion be published. On October 10, 2014, the Court of Appeal denied a petition for rehearing which was filed on October 7, 2014. A copy of the opinion and of the order granting publication accompany this letter. The People are simultaneously filing a petition for review.

INTRODUCTION

This case began as a misdemeanor prosecution of an individual, Brandon Lance Rinehart, for violating the Fish and Game Code's moratorium against suction dredge mining while Rinehart was mining a claim on federal land within the Plumas National Forest. The trial court rejected Rinehart's sole defense, that the Fish and Game Code provisions at issue are preempted by federal mining laws, and sentenced him to probation and a small fine. The Court of Appeal, however, held that when determining whether federal mining laws preempt state laws, the trial court must make a factual inquiry into whether the challenged state law makes mining "commercially impracticable" on a particular mining claim. Because that Court of Appeal decision is published, it may be construed to require an expensive site-specific inquiry into the economics of *every* California mining site on federal land, to decide which state and local laws apply to that site. That consequence is anomalous since federal mining regulations explicitly require miners to comply with a wide variety of state and local laws, a point which led the U.S. Supreme Court to conclude in *California Coastal Commission v. Granite Rock Co.* (1987) 480 U.S. 572 that the state permitting law challenged there was not preempted by federal mining

laws. Because of the confusion, expense, and unnecessary litigation that this opinion would generate, the People respectfully request that the Court order this opinion not to be published in the Official Reports.

BACKGROUND

Suction dredge mining is one method of mining from the bed of a water body. (*People v. Osborn* (2004) 116 Cal.App.4th 764, 768.) This method typically involves inserting a four- to eight-inch wide motorized vacuum into the bottom of a stream and sucking gravel and other material to the surface, where it can be processed to separate any gold that might be present. (*Ibid.*; *Karuk Tribe v. U.S. Forest Serv.* (9th Cir. 2012) 681 F.3d 1006, 1012; see also Cal. Code Regs., tit. 14, § 228, subd. (a).) Suction dredge mining is a way to recover gold that was placed in waterways by the 19th Century's now-antiquated and highly destructive practice of hydraulic mining. (*Karuk Tribe*, *supra*, 681 F.3d at p. 1011.) Since 1961, the California Department of Fish and Wildlife (Department) has administered a permit program for suction dredge mining. (*Osborn*, *supra*, 116 Cal.App.4th at p. 768; Fish & G. Code, § 5653.)

In 2006, in a case alleging that the Department's then-existing suction dredge mining permitting program violated the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA) because of (in part) "deleterious effects on Coho salmon," the Alameda County Superior Court approved a consent decree requiring the Department to "conduct a further environmental review pursuant to CEQA of its suction dredge mining regulations." (Order and Consent Judgment, *Karuk Tribe v. Calif. Dept. of Fish & Game* (Super. Ct. Alameda County Dec. 20, 2006).) In 2009, the Legislature enacted a temporary moratorium on all suction dredge mining pending that environmental review. (Stats.2009, ch. 62.) The Legislature found this moratorium necessary because "suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state." (Stats.2009, ch. 62, § 2.) The moratorium, by its own terms, does not affect "nonmotorized recreational mining activities, including panning for gold" or mining outside the water. (Fish & G. Code, § 5653.1, subd. (c); see also Cal. Code Regs., tit. 14, § 228, subd. (a) [definition of suction dredge mining].) The moratorium originally required that the Department complete its further environmental review and issue any new necessary regulations before suction dredge mining would be allowed. (Stats.2009, ch. 62.) In 2011, the Legislature amended the terms of the moratorium. The amendment allowed mining to resume once the Department's new regulations "fully mitigate all identified significant environmental impacts" of suction dredge mining and a permit "fee structure [is] in place that will fully cover all costs," and placed a June 30, 2016, end date for the moratorium in all events. (Stats.2011, ch. 133, § 6.) In 2012, the Legislature again amended the moratorium, eliminating the 2016 end date. (Stats.2012, ch. 39, § 7; see Fish & G. Code, § 5653.1, subd. (b).)

In March 2012, the Department completed its further environmental review and adopted new regulations. (See https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=63843&inline=1 [report to the Legislature, which is part of the record below] (last visited Nov. 14, 2014).) The moratorium remains in place today because the Department does not currently have the legal authority to fully mitigate all of the significant environmental effects and because the

Department has not yet updated its permit fee structure so that the program pays for itself. (*Ibid.*) Coordinated civil proceedings against the Department are pending in the San Bernardino Superior Court, challenging the moratorium, the Department's environmental documentation, and the new 2012 regulations on a variety of grounds (including preemption). (*Suction Dredge Mining Cases*, No. JCCP4720.) One set of plaintiffs' motion for preliminary injunction on the issue of preemption was denied on the grounds of there being no irreparable harm; the ruling on that motion is currently on appeal in the Fourth Appellate District. (*Suction Dredge Mining Cases* (EO59864, app. pending).)

Appellant Brandon Lance Rinehart is a partial owner of a federal mining claim located in the Plumas National Forest. (Slip Op., p. 3.) In June 2012, Rinehart was cited for violating the then-controlling 2011 version of the moratorium. (*Id.*, pp. 2-3.) The Plumas County District Attorney charged Rinehart with suction dredge mining without a permit and within 100 yards of a closed area, in violation of Fish and Game Code section 5653, subdivisions (a) and (d). (*Id.*, p. 2.) Rinehart's sole contention was that the moratorium on suction dredge mining permits was preempted by federal law. (*Id.*, pp. 3-11.) In support of that argument, Rinehart proffered proposed testimony purportedly establishing that suction dredge mining was the only commercially profitable method of mining his claim. (*Id.*, pp. 3-10.) The trial court ruled there was no preemption, and excluded Rinehart's proposed testimony. (*Id.*, p. 10.) After a bench trial on stipulated facts, including Rinehart's admission that he had committed the offenses with which he was charged, he was convicted. (*Id.*, pp. 2-10.)

The Third Appellate District reversed, in an opinion by Justice Hull. Although the preemption claim was premised primarily on the Mining Law of 1872, including 30 U.S.C. § 22, the Court of Appeal did not analyze those provisions' text or legislative history. (Slip Op., pp. 12-13, 16.) Instead, it relied on *South Dakota Mining Association v. Lawrence County* (8th Cir. 1998) 155 F.3d 1005. (Slip Op., pp. 16-19.) *South Dakota Mining* had found preempted a South Dakota county's initiative banning surface mining in a particular area. Noting the parties' stipulation that the banned form of mining was the only practical means of mining in that area, *South Dakota Mining* found the initiative interfered with federal mining law's policy of encouraging of mining on federal land. (*Id.*, p. 18.) Here, applying *South Dakota Mining* to Rinehart's case, the Court of Appeal held that if state laws make mining "commercially impracticable" on a given mining claim, then the application of the state law is preempted. (*Id.*, p. 19.) After declaring that rule of law, the Court of Appeal remanded to the trial court to answer (1) whether the Fish and Game Code provisions prohibit the issuance of permits; and (2) if so, whether that prohibition "rendered commercially impracticable the exercise of defendant's mining rights." (*Ibid.*)

The opinion was originally filed on September 23, 2014, as unpublished. After receiving form letters from miners (but before receiving any response from the People), the Court of Appeal ordered the opinion published on October 8, 2014. On October 10, 2014, the Court of Appeal denied the People's petition for review, which had been filed on October 7, 2014.

ARGUMENT

The Court of Appeal opinion should be ordered depublished for two reasons. The opinion's establishment of a "commercial impracticability" standard for determining if state environmental laws are preempted by federal mining law will create confusion and unnecessary litigation. Moreover, the opinion is erroneous in several respects and is contrary to U.S. Supreme Court precedent.

This Court Should Order Depublication Because the Court of Appeal's Adoption of the "Commercially Impracticable" Standard Will Create Confusion and Unnecessary Litigation.

The Court of Appeal's decision to publish its opinion has serious and immediate consequences: absent another Court of Appeal ruling on the issue, it is binding on Superior Courts facing that same issue. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.) If the opinion remains published, therefore, California courts will become mired in complex and confusing litigation.

First, factual inquiries into commercial practicability presumably will occur in the coordinated civil proceedings currently pending in the San Bernardino Superior Court, potentially requiring a bench trial for each mining claim at issue in those proceedings – including a purported class action potentially involving claims for thousands of class members. Similar inquiries will also need to happen in any criminal or civil enforcement proceedings before the San Bernardino cases are resolved.

The Court of Appeal's "commercially impracticable" test will not be simple to administer. According to the Department's independent expert (a now-retired long-time U.S. Bureau of Land Management Certified Mineral Examiner), every placer mining claim is unique. Not surprisingly, each mining claim has a different location, geology, and concentration and purity of minerals – and each miner has different costs and abilities. A determination of whether it is possible to profitably mine valuable minerals by a given method therefore requires a site- and operation-specific examination of each particular mining claim. An expert in valuing mineral deposits would have to collect physiographic and geologic data at each site, and conduct sampling to estimate the amount of valuable minerals available for extraction. According to the Department's independent expert, who has evaluated well over 500 mining claims, miners' reports of past revenues (such as the one in Rinehart's offer of proof at the trial court) are not a good indicator of profitability because of the variation in mineral deposits and also because miners typically do not fully account for all costs and revenue factors. The necessary on-site expert evaluation could cost thousands of dollars for each location. This is not a wise use of resources for a misdemeanor case, or even in the current civil litigation.

Moreover, the results of each inquiry could vary over time. A key factor in the commercial practicability of mining is the price of gold, which has ranged from less than $300 to over $1,800 per ounce during the last thirty years. (See http://research.stlouisfed.org/fredgraph.png?g=qni [U.S. Federal Reserve information] (last visited Nov. 14, 2014).) In just

the last four years, the price of gold roughly doubled between 2010 and 2013, then fell by some 30%. (See http://research.stlouisfed.org/fred2/series/GOLDPMGBD230NLBM [U.S. Federal Reserve information] (last visited Nov. 14, 2014).) Under the Court of Appeal's "commercially impracticable" standard, preemption as to a given mining claim could flip back and forth with the price of gold. A standard so difficult to administer should not be adopted by the California courts – particularly given its irrelevance to what is, in many cases, an activity that miners engage in for recreational, not commercial, reasons.[1]

Second, the Court of Appeal's holding will lead miners to challenge not only the moratorium but also the Department's new 2012 regulations on suction dredge mining. Among other things, those regulations close certain areas to protect endangered or threatened fish and amphibians; limit nozzle size in some circumstances; limit the use of motorized winching; prohibit the disturbance of fish and mussels; and require containment systems for fuel. (Cal. Code Regs., tit. 14, §§ 228, 228.5.) Miners already have complained that it is infeasible for them to comply with rules requiring simple acts such as reporting the dates and locations of their mining each year and limiting operations to 10:00 a.m. to 4:00 p.m. If the Court of Appeal's decision remains published, miners' preemption challenges to each regulation could require applying the expensive, expert-intense, and site- and operation-specific "commercially impracticable" standard.

Moreover, trial courts would need to determine which particular individual restriction makes mining "commercially impracticable." Given multiple regulations, and the variations between mining claims and in a given claim over time, it is not clear which restrictions should be viewed as tipping the balance on commercial practicability. Trial courts would have to decide which restrictions to apply first and last, picking and choosing which restrictions apply and which do not. This is not an appropriate role for the judicial branch.

Third, the Court of Appeal's decision may result in challenges to other state and local laws affecting suction dredge mining, including laws related to: water quality, such as protections against pollution by mercury and other toxic chemicals, sediment, and turbidity (e.g., Water Code, §§ 13370-89); air quality, such as limitations on emissions from generators and other equipment (e.g., Cal. Code Regs., tit. 13, §§ 2450-65); fuel, including penalties for discharging oil and gasoline (e.g., Fish & G. Code, §§ 5650-56; Water Code, § 13272); explosives, including limitations on the use of dynamite (Health & Safety Code, §§ 12000-401); endangered species (Fish & G. Code, §§ 2080-89.26); streambed protections (Fish & G. Code, §§ 1600-16); coastal zone protections (Pub. Resources Code, §§ 30000-900); nuisance (Civil Code, §§ 3479-96); and noise (e.g., Plumas County Code of Ordinances, § 9-2.413). Under the Court of Appeal's decision, each restriction might need to be examined in a site-specific,

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[1] The Department's survey of suction dredge miners and their activities reveals that some 80% of California suction dredge miners consider themselves recreational miners rather than commercial operations, and over 80% of all California suction dredge miners obtain less than 5% of their income from suction dredge mining. (See https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27419&inline=1 [summary of survey results] (last visited Nov. 14, 2014).)

operation-specific, and time-specific manner.

Fourth, miners may argue that the opinion applies to laws affecting other kinds of mining, including open pit mines and hydraulic mining. Courts long ago ruled that federal law does not prevent California from prohibiting hydraulic mining, a practice "by which a bank of gold-bearing earth and rock is excavated by a jet of water, discharged through the converging nozzle of a pipe, under great pressure, the earth and debris being carried away . . . through sluices, and discharged on lower levels into the natural streams and water-courses below." (*Woodruff v. North Bloomfield Gravel Mining Co.* (C.C.D. Cal. 1884) 18 F. 753, 756; see also *County of Sutter v. Nicols* (1908) 152 Cal. 688.) And under California's Surface Mining and Reclamation Act of 1975, large scale mining operations, including open pit mines and large mountain mines, are required to have approved reclamation plans, as well as financial assurances guaranteeing that those plans can be implemented. (Pub. Resources Code, § 2770, subd. (a); Cal. Code Regs., tit. 14, §§ 3500-4000.) There may conceivably be claims on federal lands within California that are commercially practicable to mine only by means of highly destructive hydraulic mining, or only by open pit mines without the added expense of reclamation plans. The Court of Appeal's decision would privilege the least efficacious and profitable mining sites, forcing the State to desist from enforcing important laws.

In essence, under the Court of Appeal's standard of "commercially impracticable," each mining location on federal land in California will require an expensive site-specific, operation-specific, and time-specific examination into which laws apply. The decision injects a high degree of uncertainty in the application of state and local law. Since over 45% of the land in California is federal land, and there are already over 20,000 federal mining claims in California, that is an out-of-proportion consequence for this misdemeanor criminal case. This Court should not be indifferent to these practical difficulties. Depublication is appropriate.

The Court Should Order Depublication Because the Court of Appeal Erred.

If the Court of Appeal's holding was based on a solid reading of relevant precedent, statutory language, and legislative history, then one could understand why the court took this problematic approach. But, instead, the Court of Appeal's holding is based on: (1) a passing sentence of dicta in *Granite Rock* that is contradicted by the following sentences in that decision, as well as the remainder of the opinion; and (2) the inapposite *South Dakota Mining* case, which misapplies *Granite Rock* and other precedent and is also out of date in light of subsequent precedent and the relevant federal agency's more recent interpretation of federal mining laws.

The Court of Appeal held that the question of preemption in this case hinges on whether the challenged state law makes an activity "commercially impracticable." (Slip Op., p. 19 [quoting *Granite Rock*].) The use of this "commercially impracticable" phrase is based on a misunderstanding of *Granite Rock*. *Granite Rock* examined preemption separately under three sets of laws: (1) federal mining laws, including the Mining Act of 1872 (30 U.S.C. § 22 et seq.) and the Multiple Use Mining Act of 1955 (30 U.S.C. § 601 et seq.); (2) two federal land use statutes (the National Forest Management Act (16 U.S.C. § 1600 et seq.) (NFMA) and the Federal Land Policy and Management Act (43 U.S.C. § 1701 et seq.) (FLPMA)); and (3) the

Coastal Zone Management Act (16 U.S.C. § 1450 et seq.) (CZMA). (480 U.S. 572.) The only appearance of the "commercially impracticable" phrase is in *Granite Rock*'s discussion of preemption under NFMA and FLPMA. (480 U.S. at p. 587.) *Granite Rock* never alludes to commercial practicability in the portions of its opinion considering preemption under federal mining laws, including the Mining Act of 1872. (480 U.S. at pp. 582-84; Slip Op., p. 12.)

Moreover, even with respect to NFMA and FLPMA, *Granite Rock* did not say that those statutes preempt any and all state laws that make mining commercially impracticable. Instead, *Granite Rock* assumed for the sake of argument, *without* deciding the issue, that those federal land use statutes would preempt state *land use* regulation (480 U.S. at p. 585), then decided that the state law at issue was not a land use regulation but was instead a non-preempted environmental regulation. (*Id.* at pp. 585-89.) The U.S. Supreme Court explained that environmental regulation and land use regulation are "undoubtedly different": "Land use planning in essence chooses particular uses for the land; environmental regulation, 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." (*Id.* at p. 587.) The language from which the Court of Appeal took its test – that the line between environmental regulation and land use regulation may not always be bright and that "one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable" (*ibid.*) – was only an aside and did not diminish the core point that Congress treats the two types of regulation distinctly and therefore courts must too. In any case, the moratorium here is, on its face, an environmental regulation, enacted to address environmental concerns:

> The Legislature finds that suction or vacuum dredge mining results in various *adverse environmental impacts* to protected fish species, the water quality of this state, and the health of the people of this state, and, *in order to protect the environment and the people of California* pending the completion of a court-ordered environmental review by the Department of Fish and Game and the operation of new regulations, as necessary, it is necessary that this act take effect immediately.

(Stats.2009, ch. 62, § 2, emphasis added.) The Legislature enacted the moratorium because of the environmental effects of this particular type of equipment. The moratorium lasts only until an environmental review is completed, new regulations "fully mitigate all identified significant environmental effects," and the program is fully funded by permit fees. (Fish & G. Code, § 5653.1, subd. (b).) The moratorium makes no effort to stop people from using particular land for mining – it simply specifies that any mining must be done by a method other than the one causing the environmental harm. Thus, this Fish and Game Code provision is not a land use regulation, and is not preempted by NFMA or FLPMA, regardless of its effect on commercial practicability.

The Court of Appeal's erroneous use of the "commercially impracticable" test here stemmed from its reliance on *South Dakota Mining*. (Slip Op., pp. 16-19.) The holding in *South Dakota Mining* is, of course, not binding on California courts. (E.g., *Yee v. City of Escondido* (1990) 224 Cal.App.3d 1349, 1351.) And, respectfully, that holding should not have been followed for at least four reasons.

First, while *South Dakota Mining*, like this case, was a preemption case under the Mining Act of 1872 (155 F.3d at pp. 1006, 1009-10), the court relied on the wrong part of *Granite Rock*. As explained above, the Eighth Circuit used *Granite Rock*'s discussion of a different issue: preemption under federal land use statutes. (155 F.3d at pp. 1010-11 [citing to *Granite Rock*, *supra*, 480 U.S. at pp. 586-89].) But the Eighth Circuit – and the Court of Appeal here – completely ignored *Granite Rock*'s separate analysis of the Mining Act of 1872. (See 480 U.S. at pp. 582-84.) In beginning that analysis, the U.S. Supreme Court noted the parties' agreement that the Mining Act of 1872 did not express any legislative intent as to environmental regulation. (480 U.S. at p. 582.) The U.S. Supreme Court mentioned the later enactment of 30 U.S.C. § 612(b), but it did not analyze that provision or any other statutory provision. (480 U.S. at p. 582.) Instead, it looked directly at the federal regulations promulgated to implement those provisions. (*Ibid.*) *Granite Rock* found that those regulations bolstered the case for no preemption: if there were any "federal intent that [miners] conduct [their] mining unhindered by any state environmental regulation," the Court reasoned, "one would expect to find the expression of this intent in these Forest Service regulations." (*Ibid.*) Instead, the Court found, "the Forest Service regulations . . . not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations [to mine on federal land] will comply with state laws." (*Ibid.*) Instead of using *Granite Rock*'s analysis of non-mining statutes, *South Dakota Mining* should have found no preemption because the same federal mining regulations are still in place, and they still require compliance with various state laws. (See 36 C.F.R. §§ 228.5, 228.8 [cited in *Granite Rock*, *supra*, 480 U.S. at p. 583-84]; see also 43 C.F.R. §§ 3715.5(b), 3802.3-2, 3809.3 [also requiring compliance with state laws].) It was error for the Court of Appeal (and the Eighth Circuit) to fail to apply this holding from *Granite Rock* that is directly on point.

Second, the Court of Appeal should not have followed *South Dakota Mining* because that decision rests on an assumption that any state law that results in mining being commercially impracticable frustrates Congress's purpose of encouraging mining. (155 F.3d at p. 1011; see also Slip Op., pp. 17-18.) But a congressional purpose to encourage an activity, by itself, does not preempt state law. (*Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Com.* (1983) 461 U.S. 190, 221-23; *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609, 633-34.) Neither *South Dakota Mining* nor the Court of Appeal went beyond assumptions of general purpose to analyze the specific statutory provisions' text or legislative history.

Third, subsequent to the *South Dakota Mining* decision, a federal agency that implements the federal mining laws has stated contrary views on preemption. The U.S. Bureau of Land Management (BLM) has promulgated a regulation which states: "If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. *However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart.*" (43 C.F.R. § 3809.3, emphasis added.) In issuing this rule, BLM explicitly discussed the issue of preemption. (See 65 Fed.Reg. 69998, 70008-09 (Nov. 21, 2000).) BLM did this because of *Granite Rock*'s suggestion that agencies address preemption in their regulations. (64 Fed.Reg. 6422, 6427 (Feb. 9, 1999) [proposed rule].) BLM explained that a "State law or regulation is preempted only to the extent

that it specifically conflicts with Federal law" and that such "[a] conflict occurs *only* when it is impossible to comply with both Federal and State law at the same time." (*Id.*, at pp. 70008-09, emphasis added.) In addressing preemption, BLM made special note of a Montana statute. (65 Fed.Reg., at p. 70009.) Arguably similar to what occurred here, that Montana statute banned one form of mining – cyanide leaching-based operations – which miners argued was the only economical way to mine. (See *Seven Up Pete Venture v. Montana* (Mont. 2005) 114 P.3d 1009, 1014, 1016.) Applying its general approach to preemption, BLM found that the Montana statute "provide[d] a higher standard of protection," and was not preempted: "In this situation, the State law or regulation will operate on public lands. BLM believes that this is consistent with FLPMA, the mining laws, and the decision in the Granite Rock case." (65 Fed.Reg. at p. 70009.) Under BLM's interpretation of the federal mining laws, in other words, state environmental laws may permissibly prohibit a form of mining without running afoul of federal law. Courts "must defer" to federal agency interpretations of federal law preemption. (*RCJ Med. Servs., Inc. v. Bonta* (2001) 91 Cal.App.4th 986, 1005-11; see also *Assn. of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.* (9th Cir. 2010) 622 F.3d 1094, 1097 [applying deference on preemption]; *Chae v. SLM Corp.* (9th Cir. 2010) 593 F.3d 936, 949-50 [same].) The Court of Appeal should not have enshrined into California precedent an interpretation of federal law that the federal agency itself disclaims.

Lastly, the U.S. Supreme Court has held that "in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress." (*Wyeth v. Levine* (2009) 555 U.S. 555, 565, emphasis added and internal quotation marks, ellipses, and citations omitted.) Thus, cases postdating *South Dakota Mining* explain that if two readings of a statute are plausible, courts "have a duty to accept the reading that disfavors pre-emption." (*Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 449; see also *Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1064 [applying *Bates*].)

Neither the Court of Appeal here, nor *South Dakota Mining* on which it relied, considered this "presumption against preemption." (155 F.3d 1005; Slip Op., pp. 11-12.) The fact that Rinehart claims preemption in an area with substantial federal regulation does not make the presumption inapplicable. The presumption depends upon the "historic presence of state law," not "the absence of federal regulation." (*Wyeth, supra*, 555 U.S. at p. 565 n.3.) Thus, recent decisions have found the presumption applicable to California labor laws affecting securities operations, and California air quality regulations affecting maritime commerce. (*McDaniel v. Wells Fargo Investments, LLC* (9th Cir. 2013) 717 F.3d 668, 675; *Pac. Merch. Shipping Assn. v. Goldstene* (9th Cir. 2011) 639 F.3d 1154, 1166-67.) Here, the Legislature was explicit that the purpose of Fish and Game Code section 5653.1 is environmental protection. (See Stats.2009, ch. 62, § 2 [quoted *supra* p. 7].) "Protection of the wildlife of the State is peculiarly within the police power . . . ." (*Lacoste v. Dept. of Conservation* (1924) 263 U.S. 545, 551; see also *Viva!, supra*, 41 Cal.4th at p. 937, fn. 4 [collecting cases].) Moreover, California has a long tradition of protecting the environment from the adverse effects of mining. (See, e.g., *Woodruff, supra*, 18 F. 753 [upholding injunction under California law against hydraulic mining on federal land due to its environmental effects]; *County of Sutter, supra*, 152 Cal. 688 [same]; Pub. Resources Code,

§ 3981 [originally enacted by Stats. 1893, ch. 223, p. 337 § 1, regulating hydraulic mining].) Thus, the presumption applies here. At the very least, the Court of Appeal's decision is incomplete, since it did not even consider the presumption.

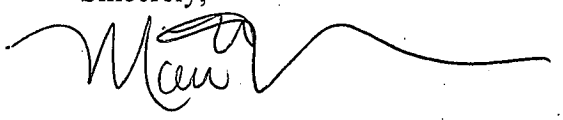
When the main federal statute at issue, 30 U.S.C. § 22 (Slip Op., p. 12), is examined with reference to the presumption, multiple ambiguities are apparent. The statute says that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase." Although Rinehart argues that this language means that there should be no obstacles of any kind to mining, the cases and legislative history indicate (as was explained in detail below) that it means simply that the land (or minerals) are "free" in that miners do not need to pay the federal government for them. The statute says that that exploration and purchase shall be "under regulations prescribed by law." Since California's moratorium is "prescribed by law[s]" validly passed by the Legislature, this passage arguable explicitly recognizes the continuing validity of state regulation. The statute's reference to exploration "according to the local customs and rules of miners in the several mining districts" could be a reference to just the *ad hoc* associations formed privately by miners, or could indicate congressional intent to preserve local regulations adopted under state law by local associations, local governments, or the states themselves. Under *Bates* and *Brown*, all of those ambiguities should be resolved against preemption here – something the Court of Appeal missed.

For these reasons, it is likely that other Court of Appeal panels addressing the issue of preemption by the federal mining laws will come to different conclusions than the Third District Court of Appeal panel did in the case at hand. But by then the parties and the trial courts will have incurred a significant and needless expenditure of time and resources. This Court can eliminate that confusion and waste of resources by granting this request for depublication.

CONCLUSION

For all of the foregoing reasons, the People respectfully request that the Court order the opinion in this matter not be published in the Official Reports.

Sincerely,



MARC N. MELNICK
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

Encl.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rinehart**

No.: **C074662**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550.

On November 17, 2014, I served the attached **Letter Requesting Depublication** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Oakland, California, addressed as follows:

Clerk, Court of Appeal of the State of California
Third Appellate District
Stanley Mosk Library and Courts Building
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Clerk, Plumas County Superior Court
Main Courthouse
520 Main Street, Room 404
Quincy, CA 95971

Matthew K. Carr
Plumas County District Attorney's Office
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 17, 2014, at Oakland, California.

Ida Martinac
Declarant

Signature