Murphy & Buchal LLP

3425 SE Yamhill Street, Suite 100
Portland, Oregon 97214

James L. Buchal

telephone: 503-227-1011
fax: 503-573-1939
e-mail: jbuchal@mbllp.com

November 26, 2014

BY FEDERAL EXPRESS

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

Re: *People v. Rinehart*, Third Appellate District, Case No. C074662
Response to the People's Request for Depublication

To the Honorable Tani Goree Cantil-Sakauye, Chief Justice of California, and to the Honorable Associate Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.1125(b), defendant and appellant Brandon Rinehart writes to request that the Court deny the People's request to depublish the opinion issued in *People v. Rinehart*, Third Appellate District Case No. C074662, 230 Cal. App.4th 419 (September 23, 2014). This request should be rejected because the opinion provides the very important guidance for related proceedings which the State expressly sought, because the State sought to create the case-by-case approach to federal preemption about which it now complains, and because the Court of Appeal decision is correct.

I. DEPUBLICATION WOULD BE UNJUST AND UNCONSTITUTIONAL

The State ought by all rights to be judicially estopped from seeking depublication. Before the Court of Appeal, the State moved and obtained calendar preference,[1] stating in that motion that:

> ". . . a total of eleven civil lawsuits have been filed against the California Department of Fish and Wildlife concerning its suction dredge permitting program since the moratorium was initially enacted. Currently, eight civil lawsuits are pending before

[1] Motion docketed December 16, 2013, granted by order of December 19, 2013.

> the San Bernardino Superior Court in a coordinated proceeding ordered by the Judicial Council of California. (Suction Dredge Mining Cases, Judicial Council Proceeding No. 4720.) While the civil cases raise many issues, the central, pivotal issue is the question of whether federal mining laws preempt state laws prohibiting and regulating suction dredge mining – the same issue raised by Appellant. . . .
>
> "Because the instant case provides an efficient vehicle to answer the preemption question, it would provide important guidance to the Superior Court in the coordinated proceedings."

(Joint Motion for Calendar Preference, Dec. 9, 2013, at 1-2; *see also id.* at 2 ("that court would benefit from a decision from this Court").)

Now, having sought and obtained relief from the Court of Appeal to provide guidance to the Superior Court of San Bernardino, the State has reversed position and wants the guidance depublished so that defendant and all others similarly situated are forbidden from even citing it. This is a quintessential case for application of the doctrine of judicial estoppel, to "prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process . . .". *Jackson v. County of Los Angeles*, 60 Cal. App.4th 171, 181 (2d Dist. 1997) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).

The Court of Appeal decision was intended to and does provide valuable guidance to the San Bernardino County Superior Court presiding over the eight civil cases. The San Bernardino County Judge is presently in the process of overseeing comprehensive settlement negotiations, which, if successful, would result in a resumption of the permit program and an end to further civil and criminal litigation. Depublishing the opinion would merely embolden the elements that seek to ban the mining, which is not a Constitutionally-permissible choice for reasons explained below in Point IV.

More generally, the mining community, including defendant, has been struggling since 2009 to get any judicial ruling on the lawfulness of the permit ban first set forth in SB 670 (Stats. 2009, ch. 62), then AB 1020 (Stats. 2011, ch. 133, § 6), then SB 1018 (Stats. 2012, ch. 39, § 7). Citation of the Court of Appeal opinion to these courts and future courts is an important right "to petition the government for a redress of grievances" provided by the First Amendment to the U.S. Constitution. *See also* Cal. Const. Art. 1, § 3(a).

As a content-based prior restraint on speech in ongoing and future judicial proceedings, depublication and the resulting restrictions on citation must be given "strict scrutiny" and cannot be sustained unless "narrowly drawn" to serve a "compelling interest".

Cf., e.g., Fashion Valley Mall LLC v. NLRB, 42 Cal.4th 850, 865-67 (2007). The federal judiciary has revised its Rule 32.1 of the Federal Rules of Appellate Procedure to affirm that a federal court "may not prohibit or restrict the citation" of unpublished opinions, and this Court should follow suit. There is no compelling interest in depublication of this case.

II. THE STATE'S CASE-BY-CASE BURDEN ON REMAND IS ITS OWN FAULT, AND NOT UNREASONABLE.

The State's primary argument for seeking depublication, the asserted burden of having to make a factual investigation into the circumstances of defendant's mining claim and operations, is in fact *a remedy sought by the State*. As we will demonstrate below, every published decision prior to this one had concluded that federal laws preempt state-law-based mining bans on federal land. The Court of Appeal decision is simply a straightforward application of the U.S. Supreme Court case of *California Coastal Commission v. Granite Rock Co*., 480 U.S. 572 (1980), in the context of a hyper-aggressive State litigation position.

Specifically, in none of the other federal supremacy cases was the state involved so brazen as to contend that permitting continued "nonmotorized recreational mining activities, [such as] panning for gold" (Fish & Wildlife Code § 5653.1(e)) adequately vindicated the federal government's purposes in granting mining claims on federal land. From defendant's perspective, the State's litigation position was undertaken as part and parcel of a "scorched earth" litigation strategy that has embroiled the suction dredge mining community in many years of litigation before the question of federal preemption could be reached. (The question remains *sub judice* in multiple cases pending in San Bernardino County, years after the requests for a preliminary injunction against the permit shutdown.)

The State now complains, in substance, that it has scorched itself, but the scorching is minimal. The notion that the State might now be required to engage in "an expensive site-specific inquiry into the economics of every California mining site in federal land" is unfounded. The Court of Appeal asked the Superior Court of Plumas County to resolve two questions: "(1) Does § 5653.1, as currently applied, operate as a practical matter to prohibit the issuance of permits required by § 5653; and (2) if so, has this de facto ban on suction dredging permits rendered commercially impracticable the exercise of defendant's mining rights granted to him by the federal government?" (Slip op. at 19.)

Defendant is confident that § 5653.1 will be construed to prohibit the issuance of permits, as the State has already admitted this in its April 1, 2013 formal report to the Legislature. The remaining question, with its reference to commercial practicability, is in substance the question of whether or not limiting mining to gold panning by hand unreasonably frustrates the federal design to promote commercial development of mineral deposits on federal land.

Forbidding motorized mining of underwater placer deposits plainly renders their development "commercially impracticable" without regard to the profitability of particular claims. Even if some fantastic gold price made panning by hand a profitable commercial venture, deposits under several feet of stream gravels cannot be exploited without motorized suction devices. Accomplishment of the "*full* purposes and objectives of Congress" (*Granite Rock*, 480 U.S. 581; emphasis added) is plainly frustrated by arbitrarily putting out of reach all mineral deposits that cannot be dug by hand.

The State can certainly waste the taxpayers' money with an "independent expert" in a doomed attempt to prove that outlawing motorized mining does not interfere with federal policy, but it is the sheer impracticality, if not outright foolishness, of the State's litigation plan that causes the problem here—not the Court of Appeal's ruling. For all the State's imagined problems of judicial administration under the Court of Appeal's decision, it is worth noting that suction dredge mining proceeded under a regulatory regime in California for more than fifty years without any challenges to the regulation and permitting scheme as being preempted by federal law. It was only the extraordinary series of statutes since 2009 that drew such litigation, because they flatly prohibited any permits at all from being issued. When and if future other challenges are made to permit conditions or other restrictions in other cases on the ground that they unreasonably interfere with mining, those cases can weigh the reasonableness of the restrictions.[2]

It is also worth noting that notwithstanding the State's specter of challenges to the Surface Mining and Reclamation Act (SMARA) or other statutes, the Fifth Appellate District has already analyzed *Granite Rock* in detail and upheld application of the California Environmental Quality Act (CEQA) to a SMARA reclamation plan. *Nelson v. County of Kern*, 190 Cal. App.4th 252, 280-82 (2010). The Courts of Appeal are fully capable of distinguishing between reasonable environmental regulations and arbitrary prohibitions that plainly frustrate the application of federal law. Federal law cases assessing the reasonableness of particular federal agency restrictions on mining is available for further guidance. *See infra* Point IV(A).

III. THE STATE'S FACTUAL MISCHARACTERIZATIONS SHOULD BE REJECTED.

The State includes an extensive "Background" section to its letter that presents numerous facts which are not of record and often not true. The method does not "typically

[2] It is true that complaints have since been raised about such newly-minted restrictions as a categorical ban on running motors in the remote wilderness—which no human other the miner will ordinarily hear—outside 10:00 a.m. to 4:00 p.m. It is not unduly burdensome for the State to appear and explain how such a restriction is a reasonable environmental limitation, and not merely irrational and invidious hostility to the Congressional design for mineral development on federal land.

involve[] inserting a four- to eight-inch wide motorized vacuum into the bottom of a stream" (Letter at 2); the equipment is generally smaller Nor are miners working gold deposits that are merely a product of 19th Century hydraulic mining; erosion of lode deposits created and continue to create placer deposits all over the State.

The suction dredges are typically lawnmower-sized devices which are operated by a single miner holding a hose and nozzle of four inches or less in width, and digging by hand, underwater, with the assistance of the hose. These are tiny operations which under rational environmental regulation were for decades regarded as utterly insignificant—other than to provide timing regulations during those times of year when salmon eggs were present in the gravel.

The 2006 consent decree cited by the State case made no findings of actual adverse environmental impacts, but rather held that "new information ha[d] become available" which provided evidence that suction dredging "could result in environmental impacts different or more severe than the environmental impacts considered in the 1994 EIR . .". *Karuk Tribe v. Department of Fish and Game*, No. RG05 211597, Consent Decree ¶¶ 1-2 (Super. Ct. Alameda Cty. Dec. 20, 2006). That court refused to shut down permit issuance unless and until suction dredging opponents present evidence of harm in an evidentiary hearing; the opponents ultimately resorted to procuring legislative findings of harm that lack any sound foundation in fact.

There is no dispute that the Department of Fish and Wildlife *formally found suction dredging under its new, 2012 regulations would not be deleterious to fish.* The Legislature, however, decreed that alone among all activities in the State of California, the suction dredgers must fully mitigate such things as imagined risks to birds (fanciful), noise (already the subject of noise ordinances), and to cultural artifacts (also subject to numerous other laws). Section 5653.1 of the Fish and Wildlife Code was specifically crafted and repeatedly amended to sabotage the permit process, and to operate as a *de facto* (if not *de jure*) ban on suction dredge mining within the entire State of California.

IV. THE COURT OF APPEALS GOT THE LAW RIGHT.

The State devotes half its letter to arguing that the Court of Appeal failed properly to apply the law of federal preemption. What is really going on is that the Court of Appeal properly rejected the State's mischaracterization of the law of federal preemption. The U.S. Supreme Court has expressly addressed the very question presented by defendant: whether and to what extent the State may regulate mining on an unpatented mining claim on national

forest land. *California Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572 (1980). The Court of Appeal decision properly followed *Granite Rock*. (*See infra* Point IV(B)(2) for a detailed discussion of *Granite Rock*).

A. An Abstract of Federal Mining Law and Policy

There is a large body of law—more than can be briefed in this letter—setting forth "the all pervading purpose of the mining laws . . . to further the speedy and orderly development of the mineral resources of our country". *United States v. Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968) (quoting *Bagg v. N.J. Loan Co.*, 88 Ariz. 182, 354 P.2d 40 (1960)).

Among the 19th Century statutes, 30 U.S.C. § 22 provides that "all valuable mineral deposits in lands belonging to the United States shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase . . .". Congress considered the role for state law, and left only a remedy for damage to neighboring lands in 30 U.S.C. § 51. The State argues that 30 U.S.C. § 22's references to "regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States" leaves some role for state law (Letter at 10), but this language contains no reference to state law at all, and underscores federal supremacy. 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.

In the 20th Century, Congress has declared "the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries". 30 U.S.C. § 21a(1). Congress had initially granted claim holders such as defendant rights to "the exclusive right of possession and enjoyment of all the surface included within the lines of [Appellant's] locations". *See* 30 U.S.C. §§ 26, 35. As the federal agencies began to assert expanded regulatory powers, this right was limited under the Multiple Use Act of 1955:

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

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

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

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

The 1955 statute also carved out a further, but limited, role for state law, giving effect to "the laws of the States . . . relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim". 30 U.S.C. § 612(b). Significantly, Congress carved out no general role for state environmental laws.

Congress wisely recognized that unlike many other forms of economic activity, mineral development can *only occur where the minerals are located*. Thus 30 U.S.C. § 612(b) imposes unique substantive limitations on environmental regulation: it may be imposed, but only where it is reasonable and does not "materially interfere" with mining. This does not foreclose reasonable regulations. *Cf., e.g., United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979) (approving a Forest Service restriction on dynamite blasting).

B. The Court of Appeal Decision Was a Straightforward Application of Settled Preemption Law.

In light of the unique and powerful federal policies favoring mineral development, it has been easy for multiple courts to determine that various state law-based restrictions on federal mining claims are preempted. Thus in *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), the U.S. Court of Appeals for the Eighth Circuit struck

down a "county ordinance prohibiting the issuance of any new or amended permits for surface metal mining within the Spearfish Canyon Area". *Id.* at 1006. As the Eight Circuit explained:

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

Id. at 1011 (emphasis added). The State's refusal to issue any permits for suction dredge mining in California is manifestly "prohibitory, not regulatory, in its fundamental character" and constitutes a *de facto* ban on mining.

The Supreme Court of Colorado and the Oregon Court of Appeals have reached similar conclusions. *Brubaker v. Board of County Commissioners*, 652 P.2d 1050 (Colo. 1982) (county's refusal to issue drilling permit overturned); *Elliott v. Oregon Int'l Mining Co*., 654 P.2d 663 (Or. Ct. App. 1982) (county ordinances prohibiting surface mining in some areas preempted); *see also Ventura County v. Gulf Oil Corp*., 601 F.2d 1080 (9th Cir. 1979) ("The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress"). Every published case to consider mining bans has found preemption.

Faced with this wealth of contrary authority which easily supports the Court of Appeal's decision, the State takes two tacks: it seeks to reinterpret *Granite Rock*, and it attempts a restatement of the law of entire law of federal preemption. The Court of Appeal properly found these stratagems unpersuasive.

1. The State Misreads *Granite Rock*.

Granite Rock's only holding was that federal mining law and policy did not fully occupy the field of regulation; there remained room for state regulatory systems that did not stand as an obstacle to federal objectives. *Granite Rock* in no sense endorsed any categorical state refusals to issue permits for mining. To the contrary, the State was then at great pains to assure every court involved that it did "not seek to prohibit mining of the unpatented claim on

national forest land". *Granite Rock*, 480 U.S. at 586-87 (citing numerous statements by the State). Having obtained regulatory authority, however, the State now seeks to prohibit the mining of defendant's unpatented claim on national forest land through § 5653.1.

The Supreme Court repeatedly warned in *Granite Rock* that the State lacked such power. While environmental regulation with reasonable permit conditions was not preempted, "land use planning" was:

> "The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is 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. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities.

Id. at 587. Here the challenged statute, declaring that only "nonmotorized recreational mining activities, including panning for gold" may proceed in the waterways of the State (Fish & Game Code § 5653.1(e)), constitutes action "over the line" toward forbidden land use planning—as well as causing "material interference" in violation of 30 U.S.C. § 612(b). It is a categorical ban on a particular use of land, not a reasonable attempt to regulate such use.

Granite Rock repeatedly emphasized that federal pre-emption extended beyond prohibitory enactments such as § 5653.1 to the permit conditions themselves: "We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law." *Id.* at 593. Rather, "the Coastal Commission's identification of a possible set of permit conditions not pre-empted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement." *Id.* at 589; *see also id.* at 593 (noting the "narrow" nature of the Court's holding). This case is akin to *South Dakota Mining*, where, "unlike *Granite Rock,* we are not confronted with uncertainty as to what conditions must be met to obtain a permit . . . the [legislation] is a per se ban on all new or amended permits . . .". *South Dakota Mining*, 155 F.3d at 1011. The Court of Appeal's remand order seeks confirmation of this simple proposition in the face of the State's obfuscation and refusal to permit a factual record to be made in the trial court.

2. The State's Reinvention of Preemption Law Must Be Rejected.

The State also attempts to sidestep *Granite Rock* by reference to a plethora of other preemption cases, but *Granite Rock* is controlling. Where the State notes cases involving concurrent authority over federal lands, *Granite Rock* repeatedly emphasized Congress'

"unlimited power . . . over the use of federal lands," *id.* at 591, making the preemption claim a simple one, as correctly stated by the Court of Appeal: whether the State's prohibition on permits "stand[s] as an obstacle to the accomplishment [and execution] of the full purposes and objectives of Congress". Slip op. at 1 (quoting *Granite Rock*, 480 U.S. at 581).

Given the Property Clause, all of the State's cases concerning an alleged presumption against preemption and the historic police powers of the State are utterly inapposite. *Granite Rock* makes no reference to any such presumption or deference to historic police powers, just like numerous other U.S. Supreme Court cases which either ignore this alleged presumption or explain that it is "not triggered when the State regulates in an area where there has been a history of significant federal presence". *United States v. Locke*, 529 U.S. 89, 108 (2000); *see also Arizona v. United States*, 132 S. Ct. 2492 (2012) (no mention of presumption in immigration 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); *accord Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 n.3 (6th Cir. 2005) (presumption "disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time"), *aff'd*, 550 U.S. 1 (2007).

The State advances a U.S. Bureau of Land Management regulation it claims allows any and all restrictions on mining (Letter at 8-9; citing 43 C.F.R. § 3809.3), but that regulation is plainly bad law. It is premised on the erroneous view, set forth in the Federal Register notice of adoption, that preemption "occurs only when it is impossible to comply with both Federal and State law at the same time". 65 Fed. Reg. 69,998, at 70,008-009 (Nov. 21, 2000) (emphasis added). "Impossibility" is a species of preemption, and is arguably true here,[3] but it is not required for "obstacle" preemption. As a matter of law, "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).

Quite apart from its total failure to understand and apply pre-emption law, the BLM regulation is also flatly inconsistent with 30 U.S.C. § 612(b). Neither BLM nor any other

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

federal agency has power to declare that "protection for public lands" trumps § 612(b)'s protection of mineral development on federal mining claims.[4] Agency authority comes only from Congress, and Congress cannot possibly have intended BLM to authorize the State to do that which BLM itself could not do. BLM's gross error distinguishes this case from *RCJ Med. Servs., Inc. v. Bonta*, 91 Cal. App.4th 986 (2001), where neither party contended that the federal regulation was "an impermissible construction of the federal statut[e]". *Id.* at 1004.

Finally, it is important 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.

Conclusion

For the foregoing reasons, and the further, closely-related arguments to be set forth in defendant's Response to the State's Petition for Review, the Court should not depublish the opinion.

Sincerely,

James L. Buchal

[4] The case of *Seven Up Pete Venture v. Montana*, 144 P.3d 1009 (2005), cited by the State and BLM, did not involve any claim of federal preemption.

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 November 26, 2014, I served the foregoing Response to the People's Request for Depublication on the parties addressed as follows:

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

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

Marc N. Melnick
Deputy District Attorney
Office of the Attorney General
1515 Clay Street, Suite 2000
Oakland, CA 94612

Clerk of the Court
Plumas County Superior Court
520 Main Street, Room 104
Quincy, CA 95971

Jonathan Evans
Center for Biological Diversity
351 California Street, Suite 600
San Francisco, CA 94104

Lynne Saxton
Saxton & Associates
912 Cole Street, Suite 140
San Francisco, CA 94117

Damien Schiff
Jonathan Wood
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

Matthew K. Carr
Deputy District Attorney
Plumas County District Attorney
520 Main Street, Room 404
Quincy, CA 95971

_____
Carole A. Caldwell