Case No. S 222620

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.

After a Decision by the Court of Appeal, Third Appellate District
Case No. C074662
Plumas County Superior Court, Case No. M1200659
The Honorable Ira Kaufman

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF THE PEOPLE OF THE STATE OF CALIFORNIA; PROPOSED BRIEF OF LAW PROFESSORS JOHN D. LESHY, ERIC BIBER, ALEJANDRO E. CAMACHO, AND SEAN B. HECHT

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Clouser v. Espy
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Karuk Tribe of California v. U.S. Forest Service
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Mineral Policy Center v. Norton
(D.D.C. 2003) 292 F. Supp. 2d 30 11

National Audubon Society v. Superior Court
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People v. Gold Run Ditch & Mining Co.
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Pringle v. Oregon,
No. 2:13-CV-00309-SU, 2014 L 795328, at *1, 8 (D. Or. Feb. 25, 2014.)
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Skaw v. United States
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South Dakota v. Andrus,
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United States v. Coleman
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United States v. Curtis-Nevada Mines
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United States v. E.K. Lehmann & Assocs. of Mont., Inc.
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United States v. Garcia
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United States v. Kosanke Sand Corp.
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United States v. Pittsburgh Pac. Co.,
(1977) IBLA 388 26

United States v. Shumway
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Ventura Cnty. v. Gulf Oil Corp.
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36 C.F.R. § 228.8(b) 15, 29

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36 C.F.R. § 228.8(h) 15

36 C.F.R. part 228, subpart A 26

Other Authorities

Bruce M. Kramer & Patrick H. Martin, 1 LAW OF POOLING & UNITIZATION § 16.05[1] (3d ed. 2013).....19

George C. Coggins & Robert L. Glicksman, Public Natural Resources Law (2d ed. 2007) 19, 24

John D. Leshy, Granite Rock and the States' Influence over Federal Land Use, 18 ENVTL. L. 99, 102, 117–18 (1987) 19

John Leshy, The Mining Law: A Study in Perpetual Motion (Johns Hopkins Press, 1987).....6

Marilyn Ziebarth, *California's First Environmental Battle* (Aug. 1984) California Lawyer 6

Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 54834–01 (Oct. 30, 2001).....33

Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69998 (Nov. 21, 2000).....33

Plan of Operations for Mining Activities on National Forest System Lands, FS-2800-5, U.S. Forest Service (March 2008) 30

Surface Management of Public Lands Under U.S. Mining Laws, 45 Fed. Reg. 78902 (Nov. 26, 1980).....32

U.S. Bur. of Land Management, Handbook H-3870-1: Adverse Claims, Protests, Contests, and Appeals, ch. IV(A).....25

U.S. Department of Agriculture, Forest Service, Southwestern Region, Draft Record of Decision and Finding of Nonsignificant Forest Plan Amendment for the Rosemont Copper Project, at 10 (December 2013).31

U.S. Department of Energy and Desert Research Institute, Colleen M. Beck, et al., The Off-Site Plowshare and Vela Uniform Programs, at 4-73 to 4-79, DOE/NV/26383-22 (September 2011).....18

U.S. Forest Service, Forest Service Manual (2007) § 2813.2.....29

U.S. Forest Service, Forest Service Manual (2007) § 2814.11.....26

U.S. Forest Service, Forest Service Manual (2007) § 2817.23.....30

U.S. Forest Service, Forest Service Manual (2007) § 2819.1 26

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APPLICATION TO FILE BRIEF OF AMICI CURIAE

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Proposed amici curiae John D. Leshy, Eric Biber, Alejandro E. Camacho, and Sean B. Hecht ("amici") make this application to file the accompanying brief in this case pursuant to California Rules of Court, Rule 8.520, subd. (f). Amici are professors engaged in the study and teaching of the laws and policies relating to federal public lands and natural resources. Their affiliations are described below to provide context for their interest and their ability to assist the Court in deciding this matter.

Amicus John Leshy is the Harry D. Sunderland Distinguished Professor of Law Emeritus at U.C. Hastings College of the Law. He has long been engaged on issues involving the Mining Law of 1872, and state authority under it. He is the author of a comprehensive history of the Mining Law, The Mining Law: A Study in Perpetual Motion (Johns Hopkins Press, 1987); he is co-author of the standard text, Federal Public Land and Resources Law, now in its seventh edition (Foundation Press, 2014); he authored an amicus brief filed on behalf of nineteen states in *California Coastal Commission v. Granite Rock Co*., 480 U.S. 572 (1987); and he has written law review articles discussing that case and more generally, administration of the Mining Law. He was also Solicitor (General Counsel) of the U.S. Department of Interior from 1993 to early

2001. As a California resident and expert in mining and other public lands law, Professor Leshy can assist the Court with this matter, and has an interest in ensuring that the Court properly interprets the relationship between the Mining Law and California's environmental protection laws.

Amicus Eric Biber is a Professor of Law at the University of California, Berkeley. He practices, teaches, and writes extensively in the areas of natural resources law, public lands law, and biodiversity law. His articles in these areas have been published in leading law reviews (UCLA Law Review, University of Chicago Law Review, University of Colorado Law Review, Harvard Environmental Law Review, and Environmental Law) and in leading peer-reviewed scientific publications (Science, Frontiers in Ecology and Environment, Society and Natural Resources, and Ecology and Society). Prior to arriving at Berkeley, he worked as a litigator on public lands and endangered species issues for the Denver office of Earthjustice, one of the leading environmental public interest law organizations. As a California resident who teaches mining and other public lands law and has dedicated his career to scholarship relating to public lands, natural resources, and biodiversity law, Professor Biber can assist the Court with this matter, and has an interest in ensuring that the Court properly interprets the relationship between the Mining Law and California's environmental protection laws.

Amicus Alejandro E. Camacho is a Professor of Law and Faculty Director of the Center for Land, Environment, and Natural Resources at the University of California, Irvine. He practices, teaches, and writes extensively in the areas of environmental, land use, and public natural resources law, as well as administrative regulation more generally. His articles in these areas have been published in leading law reviews (including the Washington University Law Review, Harvard Journal on Legislation, Yale Journal on Regulation, UCLA Law Review, Emory Law Journal, North Carolina Law Review, BYU Law Review, Columbia Journal of Environmental Law, and Stanford Environmental Law Journal) and in leading peer-reviewed scientific publications (including BioScience, the Journal of Applied Ecology, and the Proceedings of the National Academy of Sciences). Prior to academia, he practiced environmental and land use law in the Los Angeles office of Latham &Watkins LLP. As a California resident and expert in environmental, land use, and public natural resources law, Professor Camacho can assist the Court with this matter, and has an interest in ensuring that the Court properly interprets the relationship between the Mining Law and California's environmental protection laws.

Amicus Sean B. Hecht, the Evan Frankel Professor of Policy and Practice and co-Executive Director of the Emmett Institute on Climate Change and the Environment at UCLA School of Law, is engaged in issues involving the Mining Law’s interaction with California state regulatory

authority. He has taught Public Natural Resources Law, including material relating to *Granite Rock* and its application in California in the context of the Mining Law, since 2004. As a Deputy Attorney General for the State of California prior to his appointment at UCLA, he worked on matters relating to the interaction of federal mining laws, including the Mining Law and the Stock-Raising Homestead Act, with state and local regulation of the environmental impacts of mining. As a California resident who teaches public lands law and has dedicated his career to environmental law and policy, Professor Hecht can assist the Court with this matter, and has an interest in ensuring that the Court properly interprets the relationship between the Mining Law and California's environmental protection laws.

As amici will be affected by this Court's decision and may assist the Court through their unique perspectives, amici respectfully request the permission of the Honorable Tani Cantil-Sakauye, Chief Justice of the Supreme Court of the State of California, to file this brief. [1]

Dated: July 10, 2015

By: _____
Sean B. Hecht
Eric Biber
Counsel for Amici

[1] U.C. Berkeley law students Hayley Carpenter and Louis Russell contributed to the research and drafting of this brief. No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, and no one other than amici, and their counsel of record, made any monetary contribution intended to fund the preparation or submission of the brief.

AMICI CURIAE BRIEF

I. Introduction

California has a long history and a leadership role in both mining and environmental protection – the two areas of law at issue in this case. Contrary to the assertions of Rinehart in this case, there is no need for the Court to forbid California from protecting the environment in the context of mining. California state environmental protections, including those at issue in this case, can comfortably coexist with federal authority over mining activities on federal lands – as recognized by many court decisions over more than a century, as well as the longstanding practice of the federal agencies that manage and regulate mining on the federal lands. The Court should reverse the judgment of the Court of Appeal.

II. The History and Structure of Mining and Environmental Law on Federal Lands Demonstrate that State and Federal Law Coexist

The Mining Law of 1872 and state environmental laws have coexisted for over a century, and federal law has always contemplated state regulation of mining claims. Notwithstanding Rinehart's characterization to the contrary, states and local governments have always had an important role managing mining activities under the Mining Law. Moreover, the enactment of the Multiple Use Mining Act and other statutes has not

changed the states' role in regulating mining activities to minimize harm to the environment.

A. California Environmental Law Has Applied to Mining Activities on Federal Lands for Well Over a Century

The federal Mining Law of 1872 is, in many ways, the product of the gold rush in California. The Law was an effort by Congress to manage the tremendous growth in mining activities in the Western states and territories, including the crucial gold mines in California. (John Leshy, The Mining Law: A Study in Perpetual Motion (Johns Hopkins Press, 1987).) But as the U.S. Supreme Court has noted, the Mining Law does not speak to issues of environmental protection. (*California Coastal Commission v. Granite Rock Co.* (1987) 480 U.S. 572, 582.)

Thus, it is no surprise that when the devastating environmental impacts of gold mining became clear, state law intervened to manage those impacts. The primary method of gold mining in California in the mid-nineteenth century was hydraulic mining. Using high-pressure hoses to wash down entire mountainsides to unearth gold deposits buried within them, these operations caused substantial environmental degradation. In response in the early 1880s, in what has been called "California's First Environmental Battle" (Marilyn Ziebarth, California Lawyer, August 1984, pp. 56-59), federal and state courts applied a California statute that codified the common law of nuisance to enjoin the practice of hydraulic mining. In

the federal decision, *Woodruff v. North Bloomfield Gravel Mining Co.* (C.C.A. 1884) 18 F. 753, 771, the court found that "the acts complained of clearly constitute a public and private nuisance, both at common law and within the express language of the Civil Code of California." In a parallel decision, this Court rejected the argument that the industry practice was sanctioned by Congress or by custom. (*People v. Gold Run Ditch & Mining Co.* (1884) 66 Cal. 138, 151-52.)

Woodruff and *Gold Run Ditch* are both especially instructive for this case. First, both involved enforcement of public rights based on claims of public nuisance, in part because of the impacts of hydraulic mining on the navigability of downstream rivers. (*Woodruff*, 18 F. at pp. 768-70; *Gold Run Ditch*, 66 Cal. at pp. 144-46.) Navigable waterways are, of course, part of the public trust, and the impacts on state-owned trust resources are a basis for regulation of suction dredge mining here. Second, the defendant mining operations in Woodruff argued, as Rinehart does here, that the Mining Act of 1872 authorized their actions. (See *Woodruff*, 18 F. at pp. 773-78.) The court specifically rejected those claims. *Woodruff*'s statutory analysis is still relevant today.

Woodruff and *Gold Run Ditch* are well-understood as foundational cases for environmental law in California and for federal mining law. This Court has described its *Gold Run Ditch* decision as an "epochal . . . sign post" and relied on it to strengthen state regulatory protection for the state's

water resources. (*National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, 436.) The hydraulic mining cases establish the principle that a mining practice causing such environmental degradation is not authorized under federal law. Now, more than a century later, the mining industry once again seeks to shield its activities from California's attempts to protect the environment. In so doing, it asks this Court to ignore the venerable precedent of the hydraulic mining cases. It also asks this Court to ignore the structure of federal mining and land-management laws, relevant U.S. Supreme Court precedent, case law from other federal and state courts, and the adjudicatory decisions and regulations of the federal agencies that manage federal lands. Rinehart's case rests on judicial language taken out of context, and a misreading of the statutory and regulatory schemes. There is no basis for the claims of preemption in this case.

B. Environmental Protection Is an Integral Element of Federal Mining Law

Over the past century and more, Congress has developed a complex structure for federal mining law that includes an integral role for environmental protection and regulation by both federal *and* state agencies. The original Mining Law of 1872 is a product of an earlier era, when the federal government sought to dispose of as much of its land in the West to private parties as quickly as possible. The law authorizes entry onto public

lands for “exploration and purchase” for mining purposes, including to locate mining claims. (30 U.S.C. § 22.)

With the prerequisite of discovery, a mining claim gives the claim holder the “exclusive right of possession and enjoyment” of the claim for mining purpose. (30 U.S.C. §§ 23, 26.) Discovery requires that a claim holder has established that the mineral can be “extracted, removed, and marketed at a profit.” (*United States v. Coleman* (1968) 390 U.S. 599, 600.) The right of possession and enjoyment means that other miners cannot enter into a mining claim and conduct their own explorations or mining activities. However, the federal government and the public at large retain the ability to use and enjoy the surface area of a mining claim. (30 U.S.C. § 612(b).)

Importantly, from the very beginning the Mining Law provided a central role for states and local governments to manage mining activities. Section 26 of the Mining Law – which gives the right of possession and enjoyment to mining claims – states that the claim exists so long as the claim holders “comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title.” (30 U.S.C. § 26). Likewise, Section 28 of the Mining Law allows miners in a mining district to establish regulations governing their activities, so long as they are 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." (30 U.S.C. § 28.)

In the late nineteenth century, federal public land policy began to shift, from disposal to retention. Instead of seeking to give away the public lands as quickly as possible, Congress over time concluded that more and more of the public lands were to be retained in federal ownership, managed by federal agencies for a wide range of purposes, including protection of the environment.

An important step in that process was the establishment of the National Forests. In the 1897 Organic Act specifying how National Forests would be managed, Congress stated that the management agency "shall make provisions for the protection against destruction by fire and depradation upon the . . . national forests" and the agency "may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." (16 U.S.C. § 551.) This was paired with a requirement that the agency could not "prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." (16 U.S.C. § 478.) However, "[s]uch persons must comply with the rules and regulations covering such national forests." (*Ibid*.)

The move towards retention of the federal lands concluded in 1976 with the enactment of the Federal Lands Policy and Management Act (FLPMA) (43 U.S.C. § 1701 *et seq.*), which covered all of the public lands that had not before been set aside as National Forests, National Parks, National Monuments, National Wildlife Refuges, or other special units. FLPMA provided, for the first time, a comprehensive management structure for the Bureau of Land Management (BLM) to exercise authority over the remaining public lands. (43 U.S.C. § 1701.) As federal courts have noted, "[t]he heart of FLPMA amends and supersedes the Mining Law." (*Mineral Policy Center v. Norton* (D.D.C. 2003) 292 F. Supp. 2d 30, 33.) Specifically, FLPMA instructs BLM that it "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the public lands." (43 U.S.C. § 1732(b).)

In light of the structure of the Mining Act combined with the 1897 Organic Act and the relevant provisions of FLPMA, it is clear that environmental considerations are embedded in the federal laws governing mining. Under these laws both the Forest Service and the BLM are given management authority over millions of acres of public lands. They have been given Congressional power to regulate activities on those lands to minimize and protect against environmental harms from mining, and indeed have been given a mandate to protect against those harms. As described in Sections IV and V, infra, both the Forest Service and BLM have used their

powers under these laws to manage the environmental impacts of mining on federal lands, both by ensuring compliance with state environmental laws for mining activities and by setting their own minimum standards for environmental compliance for mining activities on federal lands.

It is therefore no surprise that the Supreme Court, as discussed in Section III, infra, concluded in *Granite Rock* that state environmental laws can coexist with the Mining Act. Nor is it a surprise that BLM, in its implementation of the Mining Act, has regularly considered the impacts of state environmental laws on mining activities, as discussed in Section IV, infra.

Rinehart relies heavily on the 1955 Multiple Use Mining Act (MUMA), 30 U.S.C. § 612(b), to argue that federal mining law does not include environmental protection. Specifically, Rinehart claims that federal land-management agencies – and by implication states as well – can only regulate mining claims so long as those regulations do not "materially interfere" with mining operations, (Answering Brief on the Merits ["Rinehart Br."] at pp. 32-36.) However, MUMA's legislative history makes clear that the law's purpose was to clarify the ability of the public to use the surface of mining claims without interference by the holders of those claims. The legislative history refers specifically to concerns about mining claim holders using their claims to exclude the public so as to get exclusive access to prime fishing spots or for camping sites, rather than for

mining activities. (See *United States v. Curtis-Nevada Mines* (9th Cir. 1980) 611 F.2d 1277, 1280 (noting that the law was intended to "alleviate abuses that had occurred under the mining laws").) Thus, Congress's intent in passing the law was to clarify the scope of miners' rights to use the surface of their claims, and not to constrain the pre-existing authority of federal agencies to regulate the environmental harms of mining claims.

III. Under *Granite Rock*, the Mining Law Does Not Limit Environmental Regulation of Mining, Even if That Regulation Results in Prohibition of Certain Mining Activities.

California Coastal Commission v. Granite Rock Co. does not establish a "commercial impracticability" test for Mining Law preemption, or require that any environmental regulation of mining claims be limited. First, *Granite Rock* held that the Mining Law and the federal framework surrounding it have no preemptive effect on state environmental regulation. Second, *Granite Rock* suggested that federal land-use planning laws, including the Federal Land Policy and Management Act (FLPMA) and National Forest Management Act (NFMA), would generally not preempt state laws to protect the environment, even if they might preempt state land-use regulations. Until this case, only one court since *Granite Rock* was decided has held that the Mining Law preempts state regulation of any sort, and that regulation was a zoning ordinance. The one case in which preemption was found involved a local zoning ordinance that constituted "a

de facto ban on mining in the area" because it banned "the only mining method that can actually be used to extract these minerals." (*South Dakota Mining Co. v. Lawrence County* (8th Cir. 1998) 155 F.3d 1005, 1007.) Although the Mining Law holding of *Granite Rock* should be dispositive here, both that holding and the case's discussion of the preemptive scope of federal land-use planning laws demonstrate that state environmental laws regulating mining do not impermissibly conflict with federal law.

A. *Granite Rock* confirms that the Mining Law and federal regulations under it are intended to accommodate, not preempt, state environmental regulations.

The Court in *Granite Rock* recognized that states can regulate unpatented mining claims under the Mining Law and subsequent federal laws. The Court began by noting that the Mining Law itself "expressed no intent on the as yet rarely contemplated subject of environmental regulation." (*California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. at p. 582.) The Court found this lack of intent dispositive, rejecting any argument that the Mining Law's purposes could themselves result in preemption of state environmental laws. (*Id.*). Accordingly, the Court rejected the company's argument that the federal government's regulation of unpatented mining claims shows an intent to preempt all state regulation of those claims. (*Id.* at pp. 581–85.)

The Court also found that MUMA did not preempt the state's environmental protection efforts. The Court reasoned that, if the federal government intended that the company not be hindered by state regulations, the Forest Service regulations implementing MUMA would show such an intent. (*Granite Rock* at pp. 582–83 (citing *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U. S. (1985) 707, 718).) But instead, the Court found, "[i]t is impossible to divine from these regulations . . . an intention to pre-empt all state regulation of unpatented mining claims in national forests." (*Id.* at p. 584.)[2] According to the Court, the regulations expressly indicated that the Mining Law's federal framework allows states to regulate mining claims. The Court found it persuasive that the federal employees who approved the company's plan of operation "expected compliance with state as well as federal law." (*Id.* at p. 584.) Thus, the Court gave great weight to the Forest Service's interpretations of the preemptive reach of both the Mining Law and MUMA.

[2] For instance, the Court noted "[t]he regulations explicitly require all operators within the national forests to comply with state air quality standards, state water quality standards, and state standards for the disposal and treatment of solid wastes." (*Id.* at p. 583 (citing 36 C.F.R. § 228.8(a), (b), (c) (1986)) (internal citations omitted).) In addition, the Court noted that the regulations governing approvals of plans of operation required that those operations comply with state law (36 C.F.R. § 228.5(b)), and another subsection provides that certifications by state agencies are to be considered as showing compliance with environmental protection requirements (36 C.F.R. § 228.8(h)). (*Granite Rock* at p. 584.)

Having rejected the company's Mining Law preemption claims, the Court moved on to also reject the company's argument that federal land-use statutes allow no role for states to regulate the environmental impacts of activities on federal lands. This discussion was explicitly dicta, as the Court only assumed, "[f]or purposes of this discussion and without deciding," that federal land-use statutes (FLPMA and NFMA) would preempt an incompatible state land use regulation. (*Granite Rock* at p. 585.)

Even under that assumption, the Court found, those statutes still would not preempt a state regulation to protect the environment. The Court contrasted state environmental protection with state land-use planning, noting federal land-use statutes would likely preempt the latter on federal lands, in the event of a conflict. (See *Granite Rock* at p. 587.) The "core activity" of each is different, as the Court explained: environmental regulation does not require a particular use of land but "requires only that, however the land is used, damage to the environment is kept within prescribed limits." (*Ibid.*)

As cases dating back to *Woodruff* and *Gold Run Ditch* show, such environmental regulation includes limitations on the use of particular mining methods and equipment on federal lands. Put differently, although NFMA and FLPMA both include mining among the activities to which public lands are open, federal law has never authorized any and all methods

of mining, or the use of all mining equipment, everywhere. Instead, a state prohibition limited to a specific mining technique is a permissible form of environmental regulation under the Mining Law framework. *Granite Rock* indicates that preemption occurs only where the state "chooses particular uses for the land," as opposed to regulating particular mining techniques so that "damage to the environment is kept within prescribed limits." (See *Granite Rock* at p. 587.)

The Court of Appeal in this case improperly embraced the *Granite Rock* Court's suggestion of "a state environmental regulation so severe that a particular land use would become commercially impracticable" as a Mining Law preemption test for state regulations affecting mining. (Slip Opn. p. 13.)

The Court of Appeal's reasoning was erroneous for three reasons. First, it drew a test for Mining Law preemption from a discussion of the federal land-use statutes, FLPMA and NFMA. The Court's Mining Law discussion expressly indicated that the Mining Law framework shows an intent to accommodate state regulations rather than preempting them. As the Court discussed, and as demonstrated in Section IV, the regulations passed by federal agencies under the Mining Law reinforce this understanding of Mining Law accommodation of environmental protection. The persuasiveness of these agency interpretations is reinforced by several decades of consistency and thoroughness. (See *Chae v. SLM Corp.* (9th Cir.

2010) 593 F.3d 936, 949.) Second, as shown in the next section, treating "commercial impracticability" as a test in this context has no support in any subsequent Mining Law decision. Third, as the State has demonstrated, "commercial impracticability" would make little sense as a Mining Law preemption test. Every regulation affects profitability, and thus a commercial impracticability test would, perversely, mean that the least regulation would apply to the least viable claims. (People's Br. at pp. 38-39.) Taken to its logical conclusion, Rinehart's proposed test would thus mean that the most extreme forms of environmentally-damaging mining techniques – such as the use of nuclear explosions to access mining ores, as was proposed in the mid twentieth-century – would be permissible. (See 2 U.S. Department of Energy and Desert Research Institute, Colleen M. Beck, et al., The Off-Site Plowshare and Vela Uniform Programs 4-73 to 4-79, DOE/NV/26383-22 (September 2011).)[3]

B. Courts applying Granite Rock have uniformly upheld state regulations designed to protect the environment from mining impacts.

Rinehart's use of case law is fatally flawed in two ways. First, the cases he relies on are both inapt and incomplete. In particular, his contention that "*[e]very reported case addressing state-law-based refusals to issue permits to mine on federal lands has found preemption*" is, even in

[3] *Available at* http://www.osti.gov/scitech/biblio/1046575 (describing proposals to use nuclear explosions to access low-grade copper ore).

its carefully circumscribed form, demonstrably wrong (Rinehart Br. at p. 22 (emphasis in original).) Second, the cases Rinehart relies on are outdated in any event. *Granite Rock* provides a fundamental and definitive statement in the analysis of state regulation of mining claims, undermining contrary prior case law analyzing preemption in the Mining Law context. (*See* George Cameron Coggins & Robert L. Glicksman, 1 Pub. Nat. Resources L. §§ 5:26-5:28 (2d ed.); John D. Leshy, Granite Rock and the States' Influence over Federal Land Use, 18 ENVTL. L. 99, 102, 117–18 (1987); Bruce M. Kramer & Patrick H. Martin, 1 LAW OF POOLING & UNITIZATION § 16.05[1] (3d ed. 2013).) Despite the importance of *Granite Rock*, Rinehart ignores its impact on the case law. With the exception of *South Dakota Mining* ((8th Cir. 1998) 155 F.3d 1005), which does not disturb California's regulation here, Rinehart relies entirely on pre-*Granite Rock* cases.

The Court need not look far for cases rejecting challenges like Rinehart's: in the past two years, courts have done so with similar state laws in both our fellow west coast states. Those courts both found that state laws severely restricting or effectively prohibiting suction-dredge mining were not preempted because they were not "de facto bans" on mining in general.

Although Rinehart neglects to mention these cases, neither can be distinguished in any material respect. First, the Federal District Court for

the District of Oregon recently found that a state permit requirement, almost identical to California's in that it effectively prohibited suction-dredge mining, was not preempted because it did not prohibit *all* mining. (*Pringle v. Oregon,* No. 2:13-CV-00309-SU, 2014 L 795328, at *1, 8 (D. Or. Feb. 25, 2014.) The Oregon law prohibited state officers from issuing permits for suction-dredge mining in certain areas. The plaintiff – like Rinehart, a recreational placer miner – argued "the effect of the [state law] is to prohibit mining altogether" in that it effectively restricted him to using a shovel and gold pan to mine his claim. (*Id.* at p. *8.) He cited *South Dakota Mining* to support this claim. (*Ibid.*) The court rejected this argument, holding the law was not preempted because under it, unlike the ordinance in *South Dakota Mining* but similar to the case here, "both recreational placer mining and recreational prospecting are permitted using methods other than a suction dredge." (*Id.* at p. *8.)

The Washington Court of Appeals reached the same conclusion in rejecting another argument by a recreational miner that the Mining Law preempted state restrictions on suction-dredge mining. (*Beatty v. Washington Fish & Wildlife Comm'n* (Wash. Ct. App. 2015) 341 P.3d 291, 307-08.) The court found that the state regulations, which effectively prohibited suction-dredge mining for fifty weeks of the year, did not conflict with the Mining Law. The court noted, "[t]he mining restrictions and permit conditions are designed to protect the physical environment for

the development of fish life, which is consistent with the [Mining Law]." Because the miner could still use other mining methods and equipment, with restrictions to protect the environment, the court held the state regulation was not preempted. (*Ibid.*)

The California regulation here is a reasonable state environmental regulation, just like those properly upheld in *Beatty*, *Pringle*, and *Granite Rock* itself. All the factors the courts in *Beatty* and *Pringle* found persuasive are present here: California's regulation aims to protect the environment, not direct land use. (See Stats. 2009, ch. 62, § 2; at pp. 5-6, 22 ("People's Br.").) It does not bar all mining methods or equipment, but only the use of any motorized vacuum or suction dredge equipment. (Fish & G. Code, § 5653.1, subd. (b), (e).) Rinehart, like the plaintiffs in *Beatty* and *Pringle*, can still mine his claim using other methods and equipment. (See 178 Cal. Rptr. 3d at p. 560; Beatty, 341 P.3d at p. 307; Pringle, 2014 WL 795328 at *2.) This court should similarly find that Rinehart's challenge is meritless.

Meanwhile, though both Rinehart and the Court of Appeal rely heavily on *South Dakota Mining*, that case only emphasizes the reasons California's regulation is not preempted. Strikingly, the commercial impracticability rule the Court of Appeal formulated is nowhere in *South Dakota Mining*, even though that court called the case "nearly directly on point." Instead, the *South Dakota Mining* court found that a local zoning

ordinance was "a per se ban on all new or amended permits for surface metal mining within the area." (*South Dakota Mining*, 155 F.3d at p. 1011.) The court relied on the fact that "the record here discloses that surface metal mining is the only mining method that can actually be used to extract these minerals in the Spearfish Canyon Area." (*Id.* at p.1007.) The zoning law's flat ban in *South Dakota Mining* stands in stark contrast to California's decision to place a moratorium on the use of particular mining equipment to protect water quality, protected fish, and human health. (Stats. 2009 (SB 670), ch. 62, § 2, adding Fish & G. Code, § 5653.1.). The law in *South Dakota Mining* is also distinguishable because it was a local zoning ordinance—exactly the type of law *Granite Rock* suggested would be preempted—and not an environmental regulation. (*Id.* at p. 1007.) Thus, *South Dakota Mining* only reinforces the differences between California's regulation here and a state or local law that stands as an obstacle to the purposes of federal law. (See *id.* at p. 1011.)

Finally, prior to the Court of Appeal's decision in this case, no court – including *South Dakota Mining* – has ever applied a "commercial impracticability" test to minerals administered through the Mining Law's location system. That concept is simply not part of the *South Dakota Mining* court's analysis, despite the Court of Appeal's implication to the contrary; one will search in vain to find that phrase, or any similar phrase or concept, in that opinion.

The remaining cases the Rinehart relies on are both dated and distinguishable. *Ventura County v. Gulf Oil Corp.*, *Brubaker v. Bd. of County Commissioners*, and *Elliott v. Oregon Int'l Mining Co.* all precede *Granite Rock*, making their value as precedent questionable. And, like *South Dakota Mining*, all three deal with flat bans and/or zoning ordinances, making them distinguishable here. In *Ventura County*, the court concluded Ventura County's permit requirement was the functional equivalent of a prohibition on all mining because it gave the County "veto power." (*Ventura Cnty. v. Gulf Oil Corp.* (1979) 601 F.2d 1080, 1084-85 (9th Cir. 1979), *aff'd* 445 U.S. 947 (1980).) The court in *Brubaker* found that, in denying a drilling permit to the plaintiffs, the County sought "to prohibit the very activities contemplated and authorized by federal law" based on a "policy judgment as to the appropriate use of the land," and not to "supplement the federal scheme" for environmental protection. (*Brubaker v. Bd. of County Commissioners* (Colo. 1982) 652 P.2d 1050, 1056, 1059.) The court in *Elliott* found a county ordinance preempted because it did "not simply supplement federal mining law" but "completely prohibit[ed] . . . *any surface mining* []." (*Elliott v. Oregon Int'l Mining Co.* (Or. Ct. App. 1982) 654 P.2d 663, 668 (emphasis added).) Like *Ventura County* and *Brubaker*, *Elliott* is distinguishable: the California regulation here allows surface mining, so long as it does not involve the use of any motorized vacuum or suction dredge equipment.

Lastly, Rinehart's reliance on *Skaw v. United States*, another pre-*Granite Rock* decision, is also unavailing. That case's value as precedent is particularly weak. The court need not have reached the preemption issue at all, as its discussion hinged on the outcome of a trial that had not been conducted yet. (*Skaw v. United States* (Fed. Cir. 1984) 740 F.2d 932, 940.) It then spent only a few sentences on that discussion and did not cite any authority to support its conclusion. (See *id*.) As Professors Coggins and Glicksman have noted, this "arguendo, contingent nature" weakens the case's value as precedent. (1 George Cameron Coggins & Robert L. Glicksman, 1 Pub. Nat. Resources L. § 4:25 (2d ed.).)

IV. Federal agencies have consistently and uniformly shown an intent to accommodate rather than preempt state regulations affecting mining claims.

Rather than rejecting state laws that would make mining claims "commercially impracticable," the agencies responsible for administering the Mining Law and regulating unpatented mining claims on federal lands explicitly recognize the states' authority to regulate mining on federal lands for the protection of the environment, even where that regulation may render particular mining activities in specific locations commercially impracticable. The U.S. Supreme Court noted as much in *Granite Rock.* Especially in light of the weight given to the Forest Service's practices by the U.S. Supreme Court in *Granite Rock*, these agencies' administrative

decisions and regulations strongly support the State's position that its moratorium on the use of any motorized vacuum or suction dredge equipment is valid.

A. The Department of the Interior factors state regulation into its determinations of the validity of mining claims

The Department of the Interior (DOI) is most directly responsible for implementing the Mining Law, and its agencies have consistently and uniformly shown an intent to accommodate rather than preempt state regulations affecting mining claims. DOI's Bureau of Land Management (BLM) enforces the most important requirement for a valid mining claim, that of a "valuable mineral discovery" (see *U.S. v. Coleman* (1968) 390 U.S. 599, 600), by adjudicating mineral contests. These are proceedings "brought to determine the validity or use of an unpatented mining claim or site." (U.S. Bur. of Land Management, Handbook H-3870-1: Adverse Claims, Protests, Contests, and Appeals, ch. IV(A).)[4] Appeals from those decisions are taken by another DOI agency, the Interior Board of Land Appeals (IBLA), which publishes precedential opinions. While the Forest Service is responsible for investigating the suspected invalidity of mining claims on Forest Service land in the first instance, the adjudication of claim validity rests with DOI. (See 16 U.S.C. § 551 (2012) (statutory authority);

[4] *Available at* http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.79360.File.dat/h3870-1.pdf.

36 C.F.R. part 228, subpart A (USFS regulations); Forest Service Manual (FSM) 2814.11, 2819.1, 2819.2 (USFS guidance).)[5]

IBLA directly implements the Mining Law's requirement of discovery of a valuable mineral deposit, which requires that mining a claim be commercially practicable to be valid. Since the IBLA ultimately decides the validity of claims in mining contests, if the federal government understood its powers to preempt state regulations that make mining claims commercially impracticable, one would expect IBLA decisions to reflect that belief. But the opposite is true: IBLA has consistently factored costs of compliance with state environmental regulations into its marketability analysis. (*United States v. Garcia* (2004) 161 IBLA 235, 252 (upholding ALJ's calculation of costs of compliance and consequent finding that evidence did not show discovery of valuable deposits of gold) (subsequent history omitted and not to the contrary).)[6] Accordingly, IBLA has invalidated mining claims where the cost of complying with a state permit would make extracting the mineral deposit unprofitable or commercially

[5] *Available at* http://www.fs.fed.us/im/directives/fsm/2800/2810.doc.

[6] See also *Great Basin Mine Watch et al*. (1998) 146 IBLA 248, 256 (noting costs of compliance as factor in claim validity); *United States v. Pittsburgh Pac. Co.*, (1977) IBLA 388, 405 (remanding in part for determination of expense of complying with state and federal environmental laws), *aff'd sub nom. South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980); *United States v. Kosanke Sand Corp.* (On Recons.) (1973) 12 IBLA 282, 298-99 (same); *United States v. E.K. Lehmann & Assocs. of Mont., Inc.* (2004) 161 IBLA 40, 104 n.25 (rejecting miners' argument that they had marketable claims in part because they presented no evidence they could pay state-imposed reclamation costs and still profit).

impracticable. (See, e.g., *Garcia*, 161 IBLA at pp. 252-58 (considering costs of obtaining state Water Pollution Control Facilities permit and complying with its conditions, $22,800, and finding claim invalid because total costs outweighed projected revenues by $8700).)

To the extent DOI's decisions reflect its views on the preemptive reach of statutes it administers, those views should be accorded deference in proportion with their thoroughness, consistency, reasoning, and persuasiveness. (See *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140.) As the U.S. Supreme Court explained in *Wyeth v. Levine*, agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to" Congress's purposes. (*Wyeth v. Levine* (2009) 555 U.S. 555, 577 (internal quotation marks omitted); *Chae v. SLM Corp*. (9th Cir. 2010) 593 F.3d 936, 950.)

In contrast to the agency decisions in *Wyeth*, where the U.S. Supreme Court held that sharp changes in agency viewpoint regarding preemption rendered the agency's position unworthy of deference, DOI's decisions with respect to the effects of state laws on mining-claim validity have been markedly consistent. And in contrast to the informal opinions introduced by the Rinehart for judicial notice, the IBLA's decisions come in thorough and lengthy judicial opinions that carry the force of law. The four factors for agency deference thus weigh heavily in favor of the IBLA's

views on this issue. In cases spanning five decades, the IBLA has given no indication that federal law would preempt state environmental laws that make mining a claim more expensive, or even impracticable.

B. The United States Forest Service and the Bureau of Land Management have consistently shown an intent to accommodate state regulations of mining activities in administering their statutory directives.

USFS and BLM each have a role in regulating mining operations on their respective public lands. With respect to mining operations on national forest land, USFS has the authority to regulate mining to protect the national forests from unnecessary environmental impacts. (16 U.S.C. §§ 478, 551; 30 U.S.C. § 612.) For mining claims outside of the national forests, BLM is required under FLPMA to regulate mining operations so as to prevent unnecessary or undue degradation of public lands. (43 U.S.C. § 1732(b).) Under these congressional grants of authority, both agencies have expressly and consistently recognized the authority of states to regulate against environmental harms on mining claims.

1. USFS recognizes the authority of state laws in its mining regulation on national forest lands.

In its regulations and guidance documents, USFS recognizes the power of states to regulate mining operations. On the authority of the 1897 Organic Act and MUMA, USFS promulgated 36 C.F.R. § 228.8, which requires that all operations "shall comply" with state air quality standards,

state water quality standards, and state standards for the disposal and treatment of solid wastes. (36 C.F.R. § 228.8(a)–(c).) Section 228.8 as a whole illustrates the agency's acknowledgement of shared authority over the protection of environmental resources in regards to mining on federal lands.

The primary USFS general guidance document on Forest Service policies, the Forest Service Manual (FSM), acknowledges the application of state law numerous times. Generally, the FSM states that "in order to successfully defend rights to occupy and use a claim for prospecting and mining, a claimant must . . . comply with applicable laws and regulations of Federal, State, and local governments." (FSM 2813.2.) USFS's recognition of state law in the FSM indicates that the agency as a whole considers its actions as in tandem with, and complementary to, state law.

In practice, the Forest Service has incorporated Section 228.8's acknowledgement of state regulation into its Notice of Intent (NOI) and Plan of Operations (PoO) procedures, which are meant to protect the national forests' surface resources. (36 C.F.R. § 228.4.) Approval of an NOI, or alternatively, a PoO,[7] operates as one of the necessary federal approvals of any mining operation that might affect National Forest surface resources. In its responses to NOIs (in the instances where USFS finds that

[7] A PoO is required to be submitted, rather than (or in addition to) an NOI, when the USFS District Ranger concludes that the operation is likely to cause a disturbance of surface resources. (36 C.F.R. § 228.4(a)(3).)

a PoO is not needed), USFS routinely states that the claim holder can begin its operation only after it "obtain[s] all applicable *state* and Federal permits." (*Karuk Tribe of California v. U.S. Forest Service* (9th Cir. 2012) 681 F. 3d 1006, 1022 (emphasis added) (holding that approvals of NOIs constitute a final approval of operations with binding conditions and stating that one of these conditions, in this case, was obtaining relevant state permits); See, e.g., USFS Response Letter to Robert Wierzal's NOI 3 (Sept. 12, 2012), (conditioning the approval of Mr. Wierzal's NOI on his compliance with all state fire and hazardous materials disposal laws)[8].) When a PoO is required to be submitted, the FSM directs the district ranger to approve any action in a PoO "which must be completed in order for the operator to comply with Federal and State laws." (FSM 2817.23.) Additionally, USFS's PoO application materials evidence the agency's policy to require compliance with state laws and regulations.[9] When making a decision on any particular PoO, USFS issues a Rule of Decision

[8] *Available at* http://roadrunnergold.com/wp-content/uploads/2012/10/67-Notice-of-Intent-Map-11-2-sided.pdf.

[9] In a blank PoO form produced by USFS and dated March 2008, the terms and conditions state that "[a]pproval of this plan does not relieve [the applicant] of [its] responsibility to comply with other applicable state or federal laws, rules, or regulations," evidencing USFS's consideration that the state has separate regulatory authority over mining operations. The applicant is also asked to describe on the form how she or he will comply with applicable state and federal water quality standards. (*Plan of Operations for Mining Activities on National Forest System Lands*, FS-2800-5, U.S. Forest Service (March 2008) *available at* http://www.fs.fed.us/geology/fs_2800_5.doc.)

(ROD). Individual RODs have also demonstrated USFS's policy that operators must comply with state regulations.[10] Thus, through its requirement of state law compliance in the NOI and PoO approval processes, USFS has implemented a clear policy that mining operators may not mine unless they comply with state environmental laws, as well as other laws – a policy that is at odds with the idea that the Mining Law preempts such regulation.

2. BLM has consistently acknowledged the authority of state environmental laws in its implementation of the Unnecessary or Undue Degradation Standard.

Under FLPMA, BLM is charged with preventing the unnecessary or undue degradation (UUD) of the public lands it manages. (43 U.S.C. § 1732(b).) Though BLM's interpretation and implementation of the UUD standard have changed a few times over the past thirty-plus years, one element has remained constant: BLM's incorporation of state environmental laws in its UUD analysis.

[10] In the draft ROD for the Rosemont Copper Mine, USFS stated that "[a]lthough a right to conduct mining activities exists, proposals must comply with applicable Federal and State environmental protection laws." (U.S. Department of Agriculture, Forest Service, Southwestern Region, Draft Record of Decision and Finding of Nonsignificant Forest Plan Amendment for the Rosemont Copper Project 10 (December 2013), *available at* http://www.rosemonteis.us/files/final-eis/rosemont-feis-draft-rod.pdf.) Further, the draft ROD created an interagency federal, state, and local task force in order to facilitate future oversight of the company's compliance with regulatory requirements. (*Id.* at p. 33.)

BLM's original interpretation of the UUD standard in 1980 illustrated that the agency believed states had concurrent authority to enforce environmental laws on mining operations. This rulemaking interpreted the UUD standard as the prudent person standard. Under the prudent person standard, UUD was defined as a surface disturbance greater than what would occur as a result of operations carried out by a prudent person. (Surface Management of Public Lands Under U.S. Mining Laws, 45 Fed. Reg. 78902, 78910 (Nov. 26, 1980).) The preamble to the prudent person standard rule stated that it had been the view of DOI that under the Mining Law, states could "assert jurisdiction over mining activities on Federal lands in connection with their own State laws." (45 Fed. Reg. 78902, 78908 (Nov. 26, 1980).) Complying with this view, then, BLM asserted that the rulemaking was "not intended to pre-empt the continued application and enforcement of State law and regulations governing the conduct of activities pursuant to the United States mining laws." (*Ibid.*)

In 2000, DOI reinterpreted the UUD standard to give BLM greater authority to halt harmful mining operations, but the new interpretation continued to acknowledge state environmental laws and regulations. Specifically, the UUD standard was changed from the prudent person standard to a new "irreparable harm standard," under which BLM would prevent any mining operations that resulted in substantial irreparable harm to significant cultural, scientific, or natural resource values of the public

lands. (Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69998, 70115 (Nov. 21, 2000).) In the preamble to the irreparable harm standard rulemaking, BLM opined that more stringent state standards could coexist with the final rule, as it was the view of BLM that coexistence was "consistent with FLPMA, the mining laws, and the decision in the Granite Rock case." (Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69998, 70009 (Nov. 21, 2000).)

Soon after this rulemaking, BLM, under the direction of a new Presidential administration, changed its UUD interpretation back to the prudent person standard through a rulemaking in 2001. (Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 54834–01 (Oct. 30, 2001).) In doing so, though, BLM was careful to state that "neither [the 2001 new interpretation] final rule nor the 2000 rule was intended to allow operators to operate in a manner out of compliance with EPA and state discharge or other requirements" (*id.* at p. 54841) and that any use of the public lands, under the 2001 rulemaking, had to be "in compliance with all applicable federal and *state environmental standards*" in order to comply with the UUD standard. (*Id.* at p. 54843 (emphasis added).) Thus, it has been the view of BLM, from the very first UUD rulemaking in 1980 to the most recent in 2001, that state environmental

regulation more protective than federal standards is not preempted by, but incorporated within, federal standards.

As explained above, agencies' interpretations of their organic statutes' preemptive reach are due deference commensurate with their consistency, among other factors. Both USFS and BLM have consistently interpreted the land use statutes (NFMA, FLPMA, and the Organic Act) and the Mining Law to leave room for state environmental laws and regulation, and even to encourage these state efforts. For these reasons, the court should defer to USFS and BLM's interpretation of the preemptive reach of federal law to allow state environmental regulation.

V. USFS possesses considerable authority to regulate mining on federal lands.

Finally, Rinehart invites this Court to dramatically reinterpret the limits of federal agency authority over mining regulation, in order to arrive at his preferred legal conclusion regarding state agency authority. Rinehart has argued that federal agencies themselves lack authority to regulate mining, and that this argument supports the idea that states similarly lack regulatory power. (Rinehart Br. at pp. 43-45.) The premise of this argument is erroneous; courts have found that federal agencies do possess considerable authority to regulate mining. Courts have consistently found, under the Organic Act and MUMA, that USFS has broad authority to regulate mining on national forest lands. This Court should decline

Rinehart's invitation to reinterpret clearly-established principles of federal law, and to rule longstanding federal regulations "substantively unlawful." (Rinehart Br. at p. 44.)

The Ninth Circuit strongly affirmed in *Clouser v. Espy* that USFS has significant powers to regulate the surface use of national forests, even when this regulation affects the financial viability of the operation. (*Clouser v. Espy* (9th Cir. 1994) 42 F. 3d 1522, 1529–30.) In *Clouser*, the plaintiff mining claimholders challenged USFS's requirement that they access their claims by pack animal instead of motor vehicle. (*Id.* at p. 1524.) In affirming USFS's decision, the Ninth Circuit held that USFS had statutory authority to regulate mining for the purposes of preserving the national forests, specifically citing 16 U.S.C. § 478, which requires that miners "comply with the rules and regulations covering such national forests," and 16 U.S.C. § 551, which authorizes USFS to promulgate rules and regulations to prevent "destruction and depredation" of the national forests. (*Id.* at p. 1529.) The court concluded that USFS had the power to regulate mining even if regulations meant that mining operations would be made unprofitable:

> Virtually all forms of Forest Service regulation of mining claims—for instance, *limiting the permissible methods of mining and prospecting* in order to reduce incidental environmental damage—will result in increased operating costs, and thereby will affect claim validity . . . [h]owever . . . such matters may be regulated by the Forest Service.

(*Id.* at p. 1530 (emphasis added).) The court in *Clouser* acknowledged that USFS has various sources of statutory authority, including the Organic Act, in regulating mining and that the agency can carry out its statutory environmental protection responsibilities even when they affect the profitability of mining under the Mining Law.

Rinehart argues that MUMA prohibits the Forest Service from promulgating environmental regulations that "materially interfere" with mining activities. (Rinehart Br. at pp. 32-36.) But such a reading is inconsistent with the purpose and legislative history of MUMA, as discussed in Section II.B supra. As noted there, MUMA did not alter federal agency regulatory power over mining claims, and is instead focused on access and use of mining claims by the federal government.

Indeed, neither of the cases cited by Rinehart, *U.S. v. Shumway* or *U.S. v. Backlund*, questions the Forest Service's authority to issue reasonable environmental protection regulations. In *Shumway*, the Forest Service sought to evict a miner and raise his bond because of an accumulation of items on the operator's mining claim. (*U.S. v. Shumway* (9th Cir. 1999) 199 F. 3d 1093, 1106–07.) The relevant questions were whether these items were "incident to mining" under MUMA, and thus could form the basis for eviction, and whether the Forest Service had arbitrarily increased the bond amount. (*Id.* at pp. 1106-07.) In *Backlund*, the Forest Service sought to enforce MUMA's requirement that any uses of

mining claim land be reasonably incident to mining, and the agency's regulation requiring a permit for residing on a mining claim. (*U.S. v. Backlund* (9th Cir. 2012) 689 F.3d 986, 995-96.) The court rejected the miner's argument that as a matter of law he had a right to reside on his claim, and held that the agency's rule was a reasonable regulation of mining activities. (*Id.* at p. 996.)

VI. Conclusion

Examination of the long history and overall structure of federal mining law demonstrates that federal mining law can and does coexist with state laws protecting environmental resources from damage by mining activities. The U.S. Supreme Court's definitive analysis in *Granite Rock* makes this point clear, as do all of the relevant state and federal cases and federal agency adjudications, regulations and policy documents. Rinehart would have this Court upend the basic structure of federal mining law in order to insulate his activities from state environmental regulation. This Court should reject his request.

Dated: July 10, 2015

By: _____
Sean B. Hecht
Eric Biber
Counsel for Amici

CERTIFICATION OF WORD COUNT

I certify that the total word count of this brief, including footnotes, is 7,756 words, as determined by the word count of the Microsoft Word program on which this brief was prepared.

Dated: July 10, 2015

By: _____
Sean B. Hecht
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rinehart**

No.: **S222620**

I declare:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and am not a party to the within action; my business address is 405 Hilgard Avenue, Los Angeles, California 90095.

On July 10, 2015, I served the foregoing document described as:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF THE PEOPLE OF THE STATE OF CALIFORNIA; PROPOSED BRIEF OF LAW PROFESSORS JOHN D. LESHY, ERIC BIBER, ALEJANDRO E. CAMACHO, AND SEAN B. HECHT

on the interested parties in this action, as addressed as follows:

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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 July 10, 2015, at Los Angeles, California.

Declarant	Signature