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January 7, 2015

Chief Justice Tani G. Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: Letter in Support of Petition for Review (Rules of Court 8.500(g)):
People v. Brandon Lance Rinehart, 230 Cal.App.4th 419 (Supreme Ct. Case No. S222620)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

We write, in our individual capacity, to support the Attorney General's petition for review in this case. Our interest is as follows: John Leshy 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. Sean 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 also 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; and 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.

The Court of Appeal decision in this case seriously misunderstands the scope of state authority to regulate activities carried out on federal land under the Mining Law of 1872. The decision's narrow construction of that authority is at odds with the federal Mining Law, with authoritative court decisions construing it, with long practice under it, and with the regulations adopted by the federal land management agencies administering it. The decision erroneously seizes on an isolated statement in the Supreme Court's decision in Granite Rock to create a very restrictive test for measuring state authority. This erroneous test will lead to mischievous results and pose an unwarranted obstacle to the ability of the state of California to protect its splendid natural environment. The Court should grant the State's petition and reverse this ruling.

In a very real sense, the issue posed in this case recapitulates an important, though largely forgotten, episode in California's history. Soon after the Gold Rush began in 1848, and several years before Congress adopted what became the Mining Law of 1872, miners began using a destructive technique called hydraulic mining to extract gold out of federal land in the Sierra Nevada mountains. Using high-pressure hoses called monitors to wash down entire mountainsides to unearth gold deposits buried within them, these operations caused substantial environmental degradation. Congress did not specifically address this practice in enacting the Mining Law; indeed, as the Court noted in Granite Rock, Congress there "expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." 480 U.S. at 582.

The Mining Law was also largely silent on the subject of state authority. Eventually, 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 issued decisions applying a California statute codifying the common law of nuisance to enjoin the practice of hydraulic mining. In the federal decision, Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753, 770-71 (C.C.A. 1884), 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"). (Woodruff was authored by Lorenzo Sawyer, who earlier had served as Chief Justice of the California Supreme Court.) 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. 66 Cal. 138, 151-52 (1884). (The most complete account of this episode is Robert L. Kelley's Gold Versus Grain (1959).)

This Court more recently described its Gold Run Ditch decision as an "epochal ... sign post which marked the transition from a mining economy to one predominantly commercial and agricultural," and relied on it to strengthen state regulatory protection for the state's water resources. National Audubon Society v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 720 (1983). The leading authority of the era on the Mining Law, Judge Curtis Lindley, described the hydraulic mining cases as establishing the principle that a mining practice causing such environmental degradation "has neither been authorized by ... national legislation nor legalized by implication." Lindley, Mines, (3d. 3d. 1914), vol. 3, sec. 849, p. 2098.

Now, more than a century later, the mining industry once again seeks to shield its destructive practices from California's regulatory regime. In the modern era, the industry's practice of motorized vacuum or suction dredge mining in streams threatens salmon spawning areas and other fish habitat. Moreover, it stirs up mercury that remains in streambeds, the residue of miners' application of millions of pounds of that toxic substance in the decades following the discovery of gold in 1848 to help tease gold out of the earth. See the CEQA documents and other governmental reports cited in the Brief Amicus Curiae of the Karuk Tribe, et al., filed in the Court of Appeal, at pp. 4-12. If the courts could apply

California statutes and the common law to end the environmentally destructive practice of hydraulic mining one hundred and thirty years ago, this Court can do the same here, by upholding statutes the California legislature has recently adopted calling a halt to the use of a particularly environmentally destructive kind of dredge mining.

Then, as now, California was not seeking to ban all mining on federal land; it was merely seeking to outlaw a particularly destructive mining practice. The state's ban here on motorized vacuum or suction dredging does not preclude other less environmentally destructive means of mining. Cf. Pringle v. Oregon, 2014 WL 795328, at *8 (D. Or. 2014) (holding that Oregon state law banning suction dredge mining in scenic waterways "does not conflict with the General Mining Act of 1872, and therefore is not preempted" because it allows other mining methods and thus is not a ban on all mining in scenic waterways). The limited nature of the State of California's action, merely prohibiting the use of particularly environmental destructive equipment, also distinguishes it from the ordinance adopted by the voters in Spearfish County, South Dakota, which outlawed all "surface metal mining extractive industry projects," and was held pre-empted by federal law in South Dakota Mining Ass'n v. Lawrence County, 155 F.3d 1005 (8th Cir. 1998).

The Court of Appeal decision in this case utterly ignores the rich history of state environmental regulation of gold mining in California, and the limited nature of the state's regulation here. Instead, it focuses on a single phrase in the Supreme Court's Granite Rock decision, to hold that the state may not regulate hardrock mining activities on federal land if that regulation would interfere with the commercial viability of mining enterprises. That is not the law.

One simple illustration demonstrates this. The Mining Law is not only silent on environmental regulation; it is also silent on taxation. Yet within a decade of its adoption, the U.S. Supreme Court had no difficulty whatsoever in upholding a state's authority to tax a federal mining claimant's possessory interest in its mining claim. Forbes v. Gracey, 94 U.S. 762, 767 (1872); see also Elder v. Wood, 208 U.S. 226 (1908). Any state tax will, perforce, impose costs that can affect the commercial viability of a federal mining claim. That effect did not give the Supreme Court pause in Forbes v. Gracey. That alone illustrates that effect on commercial viability cannot be the standard for measuring state authority over mining activities on federal land. Limiting state regulatory authority to situations where it could not make a difference to commercial viability would lead to the odd result that a state may regulate only clearly profitable mining operations, and not economically marginal ones. That has never been the approach of environmental regulatory regimes, state or federal, for obvious reasons.

The Court of Appeal's adoption of the "commercially impracticable" test is drawn from a single phrase in Justice O'Connor's majority opinion in Granite Rock. That opinion assumed, "[f]or purposes of ... discussion and without deciding the issue," that federal law "pre-empts the extension of state land use plans onto unpatented mining claims

in national forest lands." 480 U.S. at 573. It then went on to conclude that California was not engaging in land use planning, but rather permissible environmental regulation. It then acknowledged that 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." 480 U.S. at 587 (emphasis added).

The entire passage makes clear that the U.S. Supreme Court was not establishing a legal test allowing a state to regulate activities on federal land to protect the environment only if the regulation does not interfere with the "commercial impracticability" of the activity. Rather, the Court was making a core distinction between impermissible land-use planning and permissible environmental regulation. In this case, as in Granite Rock, California is engaging in environmental regulation. The state is not saying there shall be no mining at all on federal land; it is merely outlawing a particularly destructive kind of mining, in the same way this Court and federal courts outlawed hydraulic mining long ago.

The Ninth Circuit has rejected a comparable mining industry argument--that the authority of *federal* agencies to regulate its practices to protect the environment is limited by the effect of the regulation on the economic viability of the mining enterprise being regulated. Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994) ("[v]irtually all forms of [environmental] 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.... [but the law is] clear that such matters may be regulated by the [federal agencies]"). There is no reason to apply a different approach to *state* environmental regulation. Indeed, the federal executive branch has for decades routinely taken into account miners' costs of complying with *state* as well as federal environmental regulatory requirements in determining whether a "valuable mineral deposit" has been discovered within the meaning of the Mining Law. See United States v. Kosanke Sand Corp., 80 I.D. 538, 546, 12 IBLA 282, 298-99 (1973); United States v. Pittsburgh-Pacific, 84 I.D. 282 (1977); United States Steel Corp. 52 IBLA 319 (1981).

This reference to federal agency practice supplies the final reason to review and reverse the Court of Appeal's decision. It totally ignores the pertinent policies of the federal executive branch agencies that manage the land and administer the Mining Law. Those agencies are welcoming, not hostile, to state environmental regulation. Forest Service and BLM policies, discussed in the state petition for review at pp. 17-19, clearly reflect that the federal agencies contemplate exactly the kind of state regulation California is seeking to apply here. If the federal agencies were uncomfortable with state environmental

regulation, they would have adopted regulations to limit state authority in this area.

The Supreme Court in Granite Rock regarded the fact that the federal agencies welcomed state environmental regulation as particularly influential. 480 U.S. at 582-84. The Court of Appeal's disregard of that fact makes its decision in this case even more inexplicable. And this is especially so because the State here is acting to protect one of its most precious natural resources, water, an area of regulation replete with federal deference to state authority, to which the U.S. Supreme Court has repeatedly called attention. California v. United States, 438 U.S. 645, 648-71 (1978); United States v. New Mexico, 438 U.S. 696, 698-702 (1978).

For the reasons stated above, we urge the Court to grant the petition and to review and reverse the Court of Appeal decision.

Sincerely,

Sean B Hecht

for John D. Leshy
Sean B. Hecht

cc: All parties as listed in the attached Proof of Service

SERVICE LIST

People v. Rinehart
California Supreme Court Case No. S222620
Letter in Support of Petition for Review
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DECLARATION OF SERVICE BY U.S. MAIL

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.

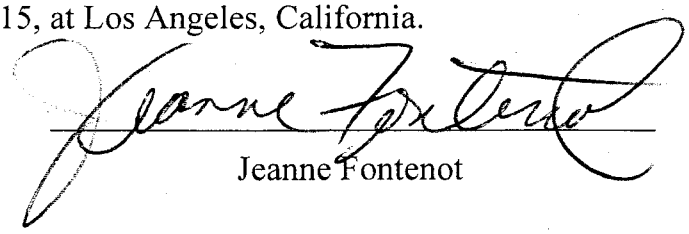
On January 7, 2015, I served the foregoing document described as:

Letter in Support of Petition for Review (Rules of Court 8.500(g)): People v. Brandon Lance Rinehart, 230 Cal.App.4th 419 (Supreme Ct. Case No. S222620)

on the interested parties listed on the attached service list, by U.S. Mail. I am readily familiar with the clinic's practice of collection and processing correspondence for U.S. Mail. It is deposited with the U.S. Mail on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 7, 2015, at Los Angeles, California.



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