IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

No. C074662

THE PEOPLE,

Plaintiffs and Respondents,

v.

BRANDON LANCE RINEHART,
Defendant and Appellant.

On Appeal from the Superior Court of Plumas County
(Case No. M1200659, Honorable Ira Kaufman, Judge)

APPLICATION OF PACIFIC LEGAL FOUNDATION AND THE WESTERN MINING ALLIANCE TO APPEAR AS AMICI CURIAE IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, Third **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number: C074662
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APPELLANT/PETITIONER: The People RESPONDENT/REAL PARTY IN INTEREST: Brandon Lance Rinehart	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Amici Curiae Pacific Legal Foundation, et al.

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 20, 2013

Jonathan Wood
(TYPE OR PRINT NAME)

▶ Jonathan Wood
(SIGNATURE OF PARTY OR ATTORNEY)

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Pursuant to California Rules of Court, Rule 8.200(c) and for the reasons set forth in this application, Pacific Legal Foundation and the Western Mining Alliance respectfully request permission to file the accompanying brief in support of Appellant Brandon Lance Rinehart for reversal of the lower court decision.[1]

IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under California law for the purpose of litigating matters affecting the public interest. PLF's work is supported by the contributions of individuals who want to ensure strong protections for private property rights and a balanced approach to environmental regulation. Since its founding in 1973, PLF has been a leading voice on these issues, and has participated in numerous cases in the California courts and the United States Supreme Court. *E.g.*, *Metro. Water Dist. v. Campus Crusade for Christ, Inc.*, 41 Cal. 4th 954 (2007); *Mt. San Jacinto Cmty. College Dist. v. Superior Court*, 40 Cal. 4th 648 (2007); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Sackett v. EPA*, 132 S. Ct. 1367 (2012). Its environmental practice focuses on keeping the administration of environmental law within statutory and

[1] In accordance with California Rule of Court 8.200(c)(3), Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

constitutional bounds. *E.g.*, *Sackett*, 132 S. Ct. 1367; *California Association for Recreational Fishing v. California Department of Fish and Game*, No. C072790 (Cal. Ct. App. briefing completed Sept. 6, 2013).

Western Mining Alliance was formed in 2011 in response to the proposed suction-dredge moratorium at issue here. It was organized to represent the interests of independent miners throughout the West on moratoria such as this one and other environmental regulations frustrating their ability to work their claims. It promotes a more even-handed approach to environmental regulation which pursues the goals of environmental protection while being attentive to the costs on the individual. Toward that end, it engages in public information campaigns, political advocacy, and litigation.

PLF's and Western Mining Alliance's experience will provide the Court a useful perspective on one of the central issues in this case: whether California's ban on the use of suction-dredge equipment is preempted by federal law, which encourages the exploitation of mining claims on federal property. As set forth in their brief, Amici believe that federal law does preempt the suction-dredge mining ban.

For these reasons, PLF and Western Mining Alliance respectfully request the Court to grant their application to file the accompanying brief amicus curiae.

INTRODUCTION

The Mining Act of 1872, as well as subsequent federal statutes regulating mining, encourage the discovery and exploitation of mineral deposits on federal lands. *See* Mining Act, 30 U.S.C. §§ 22-42; *United States v. Coleman*, 390 U.S. 599, 602 (1968). State laws that render the extraction of these resources commercially infeasible frustrate the federal goal and are, for that reason, preempted. *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987). California's suction-dredge mining moratorium has precisely this effect—it prohibits the profitable extraction of gold from streambeds on federal land. Therefore, California's moratorium is preempted, and Brandon Rinehart's conviction must be overturned.

ARGUMENT

I

CONGRESS ADOPTED THE MINING ACT TO ENCOURAGE THE EXPLORATION AND DEVELOPMENT OF MINERAL DEPOSITS ON FEDERAL LANDS

Mining on federal lands takes place pursuant to a complex web of federal statutes and under the supervision of multiple federal agencies. Adrianne DelCotto, *Suction Dredge Mining: The United States Forest Service Hands Miners the Golden Ticket*, 40 Envtl. L. 1021, 1030-31 (2010). The primary source of federal mining law is the Mining Act of 1872. 30 U.S.C. §§ 22-42. This straightforward piece of legislation was enacted at a time when

Congress encouraged westward expansion. *See* Robbie D. Harrington, South Dakota Mining Association v. Lawrence County*:* Kleppe *and* Granite Rock *Collide*, 3 Great Plains Nat. Resources J. 87, 89-90 (1998). Anyone who discovers mineral deposits receives a statutory right to extract and sell these minerals. *See* 30 U.S.C. § 22; *United States v. Locke*, 471 U.S. 84, 86 (1985). The law makes federal lands "free and open to exploration." 30 U.S.C. § 22. Congress' intent in opening public lands to exploration was to reward and encourage the discovery of economically valuable minerals. *Coleman*, 390 U.S. at 602; *S. Dakota Min. Ass'n Inc. v. Lawrence Cnty.*, 155 F.3d 1005, 1010 (8th Cir. 1998).

In subsequent legislation, Congress expounded on the federal policy promoted by the Act, declaring an "economically sound and stable domestic mining . . . industr[y]" important to the economy and national security. *See* Mining and Minerals Policy Act of 1970, § 2, 30 U.S.C. § 21a. Congress' purposes are complex, including the development of domestic mining industries; the economic exploitation of mineral resources on federal lands; encouraging research into the use of scraps to promote the efficient use of these resources; and the development of methods to lessen adverse environmental impacts from mining. *See* Matt A. Crapo, *Regulating Hardrock Mining: To What Extent Can the States Regulate Mining on Federal Lands?*, 19 J. Land Resources & Envtl. L. 249, 259 (1999). Federal law also regulates the environmental consequences of the mining it authorizes on federal lands.

For example, the Forest Service has promulgated regulations requiring mining to minimize adverse environmental impacts. *See Manning v. United States*, 146 F.3d 808, 814 (10th Cir. 1998); *see also, e.g.*, 36 C.F.R. § 228.1. Nevertheless, the chief purpose of federal mining law remains to encourage the development of mineral resources located on federal land. *See* Crapo, *supra*, at 259.

II

CALIFORNIA'S MORATORIUM PREVENTS COST-EFFECTIVE MINING ON FEDERAL LANDS

In 2009, California adopted a temporary moratorium on suction-dredge mining. DelCotto, *supra*, at 1031. California Senate Bill 670 banned the use of motorized suction-dredge mining until the California Department of Fish and Wildlife completed an overhaul of regulations governing the activities. *Id*. at 1032. While originally conceived as a temporary moratorium that would give state agencies time to adopt regulations for suction-dredge mining, California's ban on this mining method has become permanent. Fish & Game Code § 5653.1(e); *see Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1019 (9th Cir. 2012). This is because the Department concluded that there are significant and unavoidable environmental effects from suction dredging that it lacks the legal authority to fully mitigate. *See* Department of Fish and Wildlife, *California Department of Fish and Wildlife Report to the*

Legislature Regarding Instream Suction Dredge Mining Under the Fish and Game Code, 3 (Apr. 1, 2013).[2]

By making the mining of streambeds on federal land cost-prohibitive, the moratorium limits mining in these areas to recreational panning for gold and other methods that do not permit the profitable development of these resources. *See* DelCotto, *supra*, at 1034 (explaining that banning suction-dredge mining allows recreational gold-panning to continue); Cal. Code Regs., tit. 14, § 228(a) (providing that nonmotorized *recreational* mining activities, including panning, are not subject to the moratorium); *Gold non-Rush: California bans dredge mining*, Associated Press, Aug. 8, 2009[3] (explaining that, because of the moratorium, miners will have to work their claims "the old-fashioned way . . . with shovels and pans").

As a result of the ban, the owners of mining claims on federal lands, including many members of the Western Mining Alliance, are unable to make a living from their claims. *See* Michelle Macaluso, *Gold-sucking technique dredges up California controversy*, FoxNews.com, Apr. 14, 2013[4] (explaining that the suction-dredge moratorium deprives miners of an efficient method of extracting gold from streambeds that previously enabled them to earn a living

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[2] *Available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=63843.

[3] *Available at* http://www.nbcnews.com/id/32343434/#.Uq8oQieFdF9.

[4] *Available at* http://www.foxnews.com/us/2013/04/14/gold-sucking-dredges-up-california-controversy/.

for their families); Dawn Hodson, *As gold hits $1,700/oz. dredgers lament lost income*, Placerville Mountain Democrat, Feb. 1, 2012, at A1[5] (reporting on two former suction-dredge miners who have lost their livelihoods due to the moratorium, and potentially hundreds of thousands of dollars in gold discoveries). Western Mining Alliance has many members who have lost tens of thousands of dollars in annual income because the moratorium denies them any commercially feasible method to extract gold from their mining claims. Prior to the moratorium, they, like Rinehart, worked their unpatented mining claims with small suction-dredge equipment. Today, the moratorium forces them to forego this work. Instead, miners have been forced to leave the state to ply their trade where mining is commercially feasible. *See* OregonWild.org, *Suction Dredge Mining*, http://www.oregonwild.org/waters/mining/suction-dredge-mining (last visited Dec. 19, 2013).

[5] *Available at* http://www.mtdemocrat.com/news/as-gold-hits-1700oz-dredgers-lament-lost-income/.

III

FEDERAL LAW PREEMPTS STATE REGULATIONS, LIKE CALIFORNIA'S MORATORIUM, THAT MAKE THE EXPLOITATION OF FEDERAL MINING CLAIMS COMMERCIALLY INFEASIBLE

Under the Constitution's Supremacy Clause, federal law trumps inconsistent state laws. *See* U.S. Const. art. VI, cl. 2; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Congress may preempt state laws expressly, or by implication. *State ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1203-04 (1988). There are two types of cases where state laws will be impliedly preempted: where Congress intends to occupy a given field; and where state laws frustrate federal law. *Id* at 1204. If Congress has occupied the field, all state regulation of that field is preempted even if the state law is consistent with the federal purposes. *Id*.

If Congress has not occupied the field (as is the case with mining law), a state law regulating that field is nevertheless preempted if it frustrates congressional purposes, *Granite Rock*, 480 U.S. at 581, such as when a state law requires that which Congress has prohibited. *Cf. Rim of the World Unified Sch. Dist. v. Superior Court*, 104 Cal. App. 4th 1393, 1398-99 (2002) (finding a California law that required school expulsion records to be made public was preempted by a federal law conditioning the receipt of federal funds on these records being kept private). Even absent direct conflict, a state law is

preempted if it "stands as an obstacle to the accomplishment and execution of the *full* purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added); *see Texaco, Inc.*, 46 Cal. 3d at 1204.

The Supreme Court's decision in *California Coastal Comm'n v. Granite Rock Co.* provides the basic framework for determining conflict preemption as applied to mining regulation. 480 U.S. 572. In that case, a company holding a permit to mine on federal land brought a facial challenge to the California Coastal Commission's authority to require an additional state permit for the mining. *Id*. at 575-77; *see* Pattie P. Swift, *Federal Public Lands: The States' Authority to Regulate Activities on Federal Land*—California Coastal Commission v. Granite Rock Co., 19 N.M. L. Rev. 771, 779 (1989). Once it determined that the Mining Act does not occupy the field of mining law, the Supreme Court analyzed whether the Coastal Commission's permitting requirement nevertheless "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." 480 U.S. at 581-83. The Court held that it did not, relying heavily on two factors: the posture of the case—a facial challenge to the permit requirement *per se* rather than an as-applied challenge to particular conditions—and the limited extent to which the Coastal Commission's "environmental" regulation frustrated the Mining Act's policy of promoting resource extraction on federal lands. *Id*. at 588-89. As demonstrated below, consideration of these *Granite*

Rock factors counsels in favor of holding the California moratorium to be preempted.

A. California's Moratorium Leaves No Uncertainty Regarding Its Effect on Mining

The first *Granite Rock* factor is whether the posture of the case leaves the effect of the challenged state law uncertain. California has not imposed a general permitting regime, the effect of which can only be known through its application to individual mining permittees. *Cf. id*. at 589 ("In the present posture of this litigation, 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."). Instead, it adopted a total ban on the use of suction dredges to exploit federal mining claims. Fish & Game Code § 5653.1(e). Because it is a per se ban and not a permit region, no application to individual miners is necessary to decide whether it is preempted. *See id*. Moreover, as an outright ban, the moratorium does not even countenance a process of case-by-case administration and variation, such as was the case in *Granite Rock*. 480 U.S. at 588-89.

The Eighth Circuit applied *Granite Rock* in *South Dakota Mining Association*, in which a county ordinance imposed "a per se ban on all new or amended permits for surface metal mining within the area" that left "no uncertainty regarding what conditions must be met to obtain a permit." 155 F.3d at 1011. The court held that *Granite Rock*'s first factor did not apply. *Id*.

California's moratorium, too, is a per se ban leaving no uncertainty as to its effect on mining.

B. California's Moratorium Renders It Commercially Infeasible to Mine Federal Claims in Streambeds

Granite Rock's second factor, *i.e.*, the extent to which the state regulation frustrates the exploitation of federal resources, also counsels in favor of a finding of preemption. Unlike this case, the state regulation at issue in *Granite Rock* was practically custom-tailored to avoid federal conflict, for the Coastal Commission's permit requirement was expressly cabined by the limits of federal law or regulations. 480 U.S. at 586; *see* Pub. Res. Code § 30004 (providing "maximum state involvement in federal activities allowable under federal law or regulations"); *cf. Ventura Cnty. v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980) ("Ventura seeks to prohibit further [gas drilling] by Gulf until it secures an Open Space Use Permit . . . which may never be issued at all."). Here, the suction-dredge moratorium applies in full force *regardless* of any federal conflict.

Notably, *Granite Rock* distinguished the Coastal Commission's permitting requirement from a state assertion of the authority to prohibit mining on federal land, which the Court implied would be scrutinized much more rigorously. *Granite Rock*, 480 U.S. at 587 (" '[T]he question presented is merely whether the state can *regulate* uses rather than *prohibit* them.' "

(citation omitted)). In fact, the Coastal Commission conceded that a total ban on mining activities would be preempted. *Id*. at 586 ("'The Coastal Commission also argues that the Mining Act does not preempt state environmental regulation of federal land *unless the regulation prohibits mining altogether*.'" (quoting *Granite Rock Co. v. California Coastal Comm'n*, 768 F.2d 1077, 1080 (9th Cir. 1985))).

But the Supreme Court construed the preemptive effect of the Mining Act to encompass more than outright bans. *See* Swift, *supra*, at 792 (explaining the relationship between *Granite Rock*'s concern for the practical frustration of mining on federal lands and the Supreme Court's prior affirmance of *Ventura County*). It hypothesized an environmental regulation "so severe that a particular land use would become commercially impracticable." *Granite Rock*, 480 U.S. at 587. By practically dictating the uses—or non-use—of this land, such a regulation would " '*determine* basic uses of federal land [rather than] *regulat*[ing]'" it, frustrating the Mining Act policy encouraging the extraction of minerals from federal lands. *Id*. (citation omitted); *see also* Daniel I.S.J. Rey-Bear, *The Flathead Water Quality Standards Dispute: Legal Bases for Tribal Regulatory Authority over Non-Indian Reservation Lands*, 20 Am. Indian L. Rev. 151, 209-11 (1996) (arguing that *Granite Rock*'s environmental/land use distinction distinguishes regulations which merely seek to mitigate the consequences of federal lands

being used as authorized by federal law from those which seek to influence or determine what, if any, use is made of those lands).

This Court should adopt the reasoning of *South Dakota Mining Association* which explained that because the county ordinance in that case prohibited a type of mining entirely it was a "de facto ban on mining" that acted "as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act." *S. Dakota Min. Ass'n*, 155 F.3d at 1011. For this reason, the court held: "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." *Id*. The county ordinance at issue in *South Dakota Mining Association* fell on the wrong side of the prohibitory/regulatory line drawn by *Granite Rock*. *Id*.; *cf.* Crapo, *supra*, at 250-51, 265 (applying *South Dakota Mining* to Montana's ban on cyanide leaching—a common method to extract gold—and concluding that it likely is preempted). The same is true here.

California's moratorium is so severe that it is commercially impractical for Western Mining Alliance members to mine their claims. It essentially dictates the use of this property: the federal mining claims will not be exploited. *See* Placerville Mountain Democrat, *supra*. This is precisely the result that *Granite Rock* forbids. By allowing only recreational mining to continue in this area, the moratorium frustrates the value of federal mining

claims, creating a strong disincentive against their discovery and exploitation. *See* DelCotto, *supra*, at 1043. This disincentive directly conflicts with the Mining Law's encouragement of this discovery and exploitation. *See* Crapo, *supra*, at 259.

This distinction between determining the use of federal land and regulating that use to mitigate the environmental effects can further be demonstrated by comparing California's total ban to the regulations the federal government and other state governments have adopted for suction-dredge mining. Oregon, for example, distinguishes among large-scale dredge mining and the use of small suction dredges, which have a lower environmental impact. *See* Nadia H. Dahab, *Muddying the Waters of Clean Water Act Permitting: NEDC Reconsidered*, 90 Or. L. Rev. 335, 336 (2011). In terms of their environmental impact, small-scale suction dredges are more akin to gold-panning than large-scale placer mining. *Id*. at 339 ("[W]ith small suction dredging, the streambed volume disturbed is relatively limited, as is the ancillary effect on sediment upstream and downstream of the mining location."). These small-scale machines may be used, subject to limitations on the volume of sediment that can be vacuumed up, the diameter of the intake nozzle, the size of the motor, and the time of year. *Id*. The federal government has imposed regulations limiting the time of year that suction dredges may be used to mine claims on federal land. *See, e.g.*, EPA, *Authorization to discharge under the National Pollutant Discharge*

Elimination System, General Permit No. IDG-37-0000 (effective May 6, 2013).[6] It has also restricted how many dredges can be used and the duration of that use to limit any negative environmental consequences. *See id*.

This Court should not expand *Granite Rock* to uphold this moratorium because the Supreme Court's preemption jurisprudence has broadened the preemptive effect of federal law since that case was decided. *United States v. Arizona*, for example, construed federal law as striking a particular balance between competing interests. *See* 132 S. Ct. 2492, 2505 (2012). The Supreme Court held that a state law that pursued one of those interests more aggressively than the federal law was preempted. *See id*. As explained above, federal mining law pursues multiple, sometimes competing, objectives. State laws like this one frustrate the balance struck by Congress by pursuing one interest (environmental protection) at the expense of others (resource extraction). *See* Crapo, *supra*, at 259 (identifying the competing objectives pursued by federal mining law).

CONCLUSION

California's complete prohibition against the use of suction-dredge mining is preempted because it frustrates the full purposes and objectives of Congress. *Cf. Ventura County*, 601 F.2d at 1086 (holding that federal laws promoting oil and gas drilling on federal lands preempt a local veto power over

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[6] *Available at* www.epa.gov/region10/pdf/permits/npdes/id/small_suction_dredge_idg370000_fp.pdf.

those activities); *see also* Joan Newman, Comment, *A Consideration of Federal Preemption in the Context of State and Local Environmental Regulation*, 9 UCLA J. Envtl. L. & Pol'y 97, 100-04 (1990). Congress' purposes in adopting the Mining Act, and subsequent legislation concerning mining on federal lands, are multiple. But chief among them is to encourage the discovery and exploitation of mineral deposits on federal land. *See* Crapo, *supra*, at 259. Many of amicus Western Mining Alliance's members have unpatented claims which they worked with small suction dredges. By prohibiting them from continuing to do so, California's moratorium "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines*, 312 U.S. at 67.

The decision below should be reversed.

DATED: December 20, 2013.

Respectfully submitted,

DAMIEN M. SCHIFF
JONATHAN WOOD

By _____
JONATHAN WOOD

Attorneys for Amici Curiae
Pacific Legal Foundation and
Western Mining Alliance

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION OF PACIFIC LEGAL FOUNDATION AND THE WESTERN MINING ALLIANCE TO APPEAR AS AMICI CURIAE IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL is proportionately spaced, has a typeface of 13 points or more, and contains 3,463 words.

DATED: December 20, 2013.

_____

JONATHAN WOOD

DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On December 20, 2013, true copies of APPLICATION OF PACIFIC LEGAL FOUNDATION AND THE WESTERN MINING ALLIANCE TO APPEAR AS AMICI CURIAE IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

Also, on this date I submitted an electronic copy of the foregoing with the Clerk of the Court for the Supreme Court of California through the appellate e-filing system.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 20th day of December, 2013, at Sacramento, California.

_____

TAWNDA ELLING