The California Supreme Court recently accepted a case that may make it more difficult for the state to protect the environment from the damaging impacts of mining. At issue is the state's ban on suction-dredge mining in streambeds. Californians engaged in suction-dredge mining have vigorously fought against the state's ban, and a panel of the Court of Appeal recently agreed with the miners' argument that the state ban violates federal law that generally allows mining on federal lands. The state petitioned the California Supreme Court for review, and the Court accepted the case just a couple of weeks ago. If the Court of Appeal decision stands, our rivers and streams will continue to be disturbed by this particularly damaging form of mining.

Some background: The General Mining Law of 1872 allows U.S. citizens to explore for, discover, and mine "valuable minerals" from most federal lands without paying the government for the minerals. (Today, the Mining Law applies to "hard rock" minerals such as metals, but does not apply either to fuel minerals such as coal, oil and gas, or to "common varieties" including, for example, sand and gravel for use in construction.) The Mining Law facilitated rapid development of parts of the American West by encouraging mining on federal lands, with consequences for the future health of those lands.

Over time, Congress has modernized our nation's approach to federal land management, enacting statutes such as FLPMA and NFMA that – in general – require careful balancing of multiple uses before committing to allow particular activities. But the Mining Law has been left unchanged; its broad policy of allowing hard rock mining on federal lands can impede agencies' ability to balance mining with other values. And while the federal government can impose various restrictions on mining activity to ensure that there is no unnecessary or undue degradation of the land and its resources, including requiring a Plan of Operations, small-scale "recreational" mining is typically allowed without any special federal permit or plan approval.

The Mining Law does, however, leave room for state and local governments to regulate mining activity, even on federal lands. It is well-established that state environmental regulatory laws can apply on federal lands where those laws are not in conflict with federal laws. State laws often, for example, require mitigation of the environmental impacts of mining activity, as well as reclamation (restoring the landscape after mining activities are completed). California has many laws that regulate mining in the state, including on federal lands. For example, since 1961, the state has required anyone engaging in suction-dredge mining to obtain a permit and to comply with permit conditions.

According to the State of California's petition for review in this case:

> Suction dredge mining is a method for mining from the bed of a water body. This method typically uses a four- to eight-inch wide motorized vacuum, though sometimes a larger vacuum is used; the vacuum is inserted into the bottom of a stream and sucks gravel and other material to the surface, where it can be processed to separate any gold that might be present. Suction dredge mining is a way to recover gold that was placed in waterways by the Nineteenth Century's now-antiquated and highly destructive practice of hydraulic mining.

Unfortunately, suction dredge mining can negatively affect stream and river ecosystems, both because the dredging vacuums pollute the air, and because their operation creates serious disturbances in the water and the riverbed.

In 2006, a Native American tribe sued the state Department of Fish and Wildlife, claiming that the state's suction dredge mining permit program was not environmentally-protective enough and needed to undergo environmental review for potential revision. The case was resolved through a consent decree; the Department promised to perform environmental review. The state Legislature enacted a moratorium on new permits in 2009, until the completion of the environmental review. The moratorium law has been since amended to eliminate the ending date, based on a legislative finding that such mining causes adverse impacts. And the Department of Fish and Wildlife enacted regulations that confirm the ban. Suction-dredge mining is nonetheless still apparently common.

The miner in this case, Brandon Rinehart, holds a mining claim within the Plumas National Forest in northern California. He was cited, and charged with two misdemeanors, for suction-dredge mining in a streambed in violation of state law. He claims in his defense that the state law is preempted by federal law and thus invalid. He contends that by outlawing suction-dredge mining, the state is effectively prohibiting all profitable mining on his claim because suction-dredge mining is only mining method that would allow him to make a profit. He further contends that federal law requires that the state not eliminate his ability to make money from mining the claim.

The legal context for this case arises from a U.S. Supreme Court case, California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987). In that case, the Supreme Court rejected a facial challenge to a California Coastal Commission requirement that a miner obtain a state permit before mining on federal land. The Court in Granite Rock found that Congress did not intend to preempt state regulatory laws when it enacted the Mining Law. The Court assumed that NFMA and FLPMA would preempt state statutes determining the land use for a particular area of federal land; it held nonetheless that held that state laws

that impose reasonable environmental regulations are not preempted by those federal laws, because Congress did not enact the Mining Law with the expectation that it would prevent state and local regulation of mining practices.

In the Rinehart case, the trial court sided with the state, finding that the state law is not preempted. Mr. Rinehart appealed, and the Court of Appeal reversed the trial court decision. The Court of Appeal held that if application of state law makes a mining claim "commercially impracticable," the Mining Law trumps state law and a state may not apply its law. In the Court of Appeal's view, the state is, in effect, making a land-use determination to ban all mining by preventing commercially-impracticable mining, frustrating the intent of the Mining Law. (The Court of Appeal's order would have remanded the case to the trial court to determine whether the state in this case has, in fact, made mining commercially impracticable for Mr. Rinehart.)

The state petitioned for California Supreme Court review. Hastings law professor (and former Solicitor, or chief counsel, for the U.S. Department of Interior) John Leshy and I submitted a letter to the court in support of review. In the letter, we argue that the state's ban on suction-dredge mining is within its authority and not preempted. As we point out in the letter, the ban is only on a particularly destructive mining method, and does not prevent less-intrusive mining methods. Granite Rock does not prevent states from regulating to prevent harmful mining methods. On the contrary, federal administrative and court decisions, as well as federal administrative guidelines and policies, support the idea that both federal and state agencies can regulate mining practices, irrespective of the impact of the regulation on the profitability of mining claims. Mr. Rinehart, of course, disagrees.

The Court accepted the case for review. The state's opening brief is due in a few weeks. It will be interesting to see how this case progresses over the coming months.