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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.**	Case No.

Third Appellate District, Case No. C074662
Plumas County Superior Court, Case No. M1200659
The Honorable Ira Kaufman, Judge

PETITION FOR REVIEW

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TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The People of the State of California respectfully petition for review of a published decision of the California Court of Appeal, Third Appellate District. In the opinion at issue, the Court of Appeal reversed the Plumas County Superior Court on the issue of whether the California Legislature's moratorium on a particularly environmentally sensitive form of mining – suction dredge mining – could be preempted by the federal Mining Act's general encouragement of mining. The opinion was filed on September 23, 2014 as an unpublished decision. On October 8, 2014, the Court of Appeal ordered the opinion to be published. The opinion and order granting publication are bound at the back of this petition.

The People are simultaneously requesting depublication, by separate letter.

ISSUE PRESENTED

This case involves an important legal question arising out of the enforcement of Fish and Game Code section 5653.1. That statutory provision imposes a moratorium on suction dredge mining pending the development of a permit program that fully mitigates significant environmental effects and pays for itself. The specific issue presented here is:

> Is a state environmental law that makes a particular mining claim on federal land commercially impracticable preempted by the federal mining laws?

INTRODUCTION

At issue here is the ability of California to exercise its police power to protect the environment, even on federal land. As noted below, the U.S. Supreme Court has emphasized that "a State undoubtedly retains

jurisdiction over federal lands." The published opinion by the Court of Appeal here raises doubts about the enforceability of state environmental laws on federal land if those state laws will compromise the profitability of mining, without regard for the environmental consequences. Since federal land comprises 45% of all land in California, and there are thousands of mining claims on federal land in California, this issue is very significant.

The published opinion here improperly applies the law of preemption, and calls out for review. It fully adopts the reasoning of a nonbinding Eighth Circuit case, without independently evaluating the issues or analyzing the federal statute's text or legislative history. Both the Court of Appeal's decision and the Eighth Circuit case it relied on ignore the most directly applicable U.S. Supreme Court precedent, *California Coastal Commission v. Granite Rock Co.* (1987) 480 U.S. 572, 582-84. And the Court of Appeal's decision ignores federal agencies' more recent view on this federal preemption issue, to which the courts should defer. The People respectfully request that the Court grant review so that these errors can be rectified and so that California's air, water, fish and wildlife, and people will continue to enjoy the protections of California's laws.

STATEMENT

Suction dredge mining is a method for mining from the bed of a water body. (*People v. Osborn* (2004) 116 Cal.App.4th 764, 768.) 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. (*Ibid.*; *Karuk Tribe v. U.S. Forest Serv.* (9th Cir. 2012) 681 F.3d 1006, 1012; see also Cal. Code Regs., tit. 14, § 228, subd. (a).) 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.

(*Karuk Tribe*, *supra*, 681 F.3d at p. 1011.) Since 1961, the California Department of Fish and Wildlife (Department) has administered a permit program for suction dredge mining. (*Osborn*, *supra*, 116 Cal.App.4th at p. 768; Fish & G. Code, § 5653.)

In resolving a 2006 lawsuit that challenged the Department's suction dredge mining permitting program under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) because of (in part) "deleterious effects on Coho salmon," the Alameda County Superior Court approved a consent decree requiring the Department to "conduct a further environmental review . . . of its suction dredge mining regulations." (Order and Consent Judgment, *Karuk Tribe v. Calif. Dept. of Fish & Game* (Super. Ct. Alameda County Dec. 20, 2006).) After the entry of the consent decree, in 2009, the Legislature enacted a temporary moratorium on all suction dredge mining pending that environmental review. (Stats.2009, ch. 62.) The moratorium applies only to motorized suction dredge mining, and does not affect "nonmotorized recreational mining activities, including panning for gold" or mining outside the water. (Fish & G. Code, § 5653.1, subd. (c); see also Cal. Code Regs., tit. 14, § 228, subd. (a) [definition of suction dredge mining].)

There have been several versions of the moratorium. The original moratorium provided for a prohibition on suction dredge mining until such time as the Department completed its environmental review and issued any new necessary regulations. (Stats.2009, ch. 62.) In 2011, the Legislature amended the terms of the moratorium to require that the new regulations ending the moratorium must "fully mitigate all identified significant environmental impacts" of suction dredge mining and to require that a permit "fee structure [be] in place that will fully cover all costs"; however, the 2011 amendment specified a June 30, 2016 end date for the moratorium. (Stats.2011, ch. 133, § 6.) In 2012, the Legislature again amended the

terms of the moratorium, eliminating the 2016 end date. (Stats.2012, ch. 39, § 7; see Fish & G. Code, § 5653.1, subd. (b).) The 2009 enactment made clear that the Legislature found this moratorium necessary because "suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state." (Stats.2009, ch. 62, § 2.)

Brandon Lance Rinehart is a partial owner of a federal mining claim located within the Plumas National Forest. (Slip Op., p. 3.) On June 16, 2012, before the 2012 amendment to the moratorium, Rinehart was cited for suction dredge mining on his claim. (*Id.*, pp. 2-3.) The Plumas County District Attorney charged Rinehart with two misdemeanors, for suction dredge mining without a permit and within 100 yards of a closed area, in violation of Fish and Game Code section 5653, subdivisions (a) and (d). (*Id.*, p. 2.) Rinehart's sole contention was that Fish and Game Code section 5653.1, imposing the moratorium on suction dredge mining permits, was preempted by federal law. (*Id.*, pp. 3-11.) In support of that argument, Rinehart proferred proposed testimony that he said would establish suction dredge mining was the only commercially profitable method of mining for his claim. (*Id.*, pp. 3-10.) The trial court ruled that there was no preemption, and excluded Rinehart's proposed testimony on that issue. (*Id.*, p. 10.) After a bench trial on stipulated facts, including Rinehart's admission that he had committed the offenses with which he was charged, he was convicted. (*Id.*, pp. 2-10.)

The Court of Appeal reversed. Although the preemption claim was premised primarily on the Mining Act of 1872, including 30 U.S.C. § 22 (Slip Op., pp. 12-13), the Court of Appeal did not analyze those provisions' text or legislative history. (*Id.*, pp. 12-13, 16.) Instead, the Court of Appeal relied on *South Dakota Mining Association v. Lawrence County* (8th Cir. 1998) 155 F.3d 1005. (Slip Op., pp. 16-19.) *South Dakota Mining* had

found a South Dakota county's initiative banning surface mining in a particular area preempted. (155 F.3d at p. 1011.) In light of the parties' stipulation that surface mining was the only practical means of mining in that area, *South Dakota Mining* found the initiative preempted because it interfered with federal mining law's policy of encouraging of mining on federal land. (*Id.*, at pp. 1007-08, 1011.) Applying *South Dakota Mining* to Rinehart's claim, the Court of Appeal held that if state laws make mining "commercially impracticable" on a given mining claim, the application of the state law is preempted. (Slip Op., p. 19.) After declaring that rule of law, the Court of Appeal remanded to the trial court to answer (1) whether the Fish and Game Code provisions prohibit the issuance of permits; and (2) if so, whether that prohibition "rendered commercially impracticable the exercise of defendant's mining rights." (*Ibid.*)

The Court of Appeal's decision was unpublished when issued on September 23, 2014. On October 8, 2014, the Court of Appeal ordered the decision to be published after receiving form letters from miners requesting publication. The People's petition for rehearing, filed on October 7, 2014, was denied by the Court of Appeal on October 10, 2014.

ARGUMENT

This Court should grant review for two reasons. First, California's ability to apply environmental regulations, including the temporary moratorium on suction dredge mining pending proper environmental regulation, is "an important question of law" that this Court should "settle." (Cal. Rules of Court, rule 8.500(b)(1).) Second, it is a question of law that the Court of Appeal answered wrongly and incompletely, thus undermining the Legislature's ability to protect Californians' health and safety and California's environment, and introducing confusion into the law of preemption.

I. THIS PREEMPTION QUESTION POSES AN IMPORTANT ISSUE THAT WILL AFFECT CRITICAL LAWS IN A LARGE PORTION OF CALIFORNIA LAND

At its narrowest, this case concerns whether California may prohibit the suction dredge mining technique while necessary environment-protecting regulations are developed and adopted. More broadly, this case concerns the extent to which miners operating on federal land in California must comply with state and local laws in general. Viewed either way, the case concerns important questions of law. At issue is the validity of the exercise of California's police power to protect its citizens and environment.

Although the Property Clause and Supremacy Clause give Congress ultimate authority over federally owned land (*Kleppe v. New Mexico* (1976) 426 U.S. 529, 540-41), Congress generally has chosen not to displace state law. Thus, "a State undoubtedly retains jurisdiction over federal lands within its territory," and "is free to enforce its criminal and civil laws on those lands." (*Id.* at p. 543.) States also "unquestionably . . . have broad trustee and police powers over wild animals within their jurisdictions." (*Id.* at p. 545.) Although Congress can override those state laws by enacting federal legislation which preempts state laws (e.g., *id.* at p. 543), the general plan is for state law to have effect on federal land – recognizing both that Congress legislates only interstitially and that States have compelling interests in preventing harmful conduct on federal lands within their borders.

The Supremacy Clause of the U.S. Constitution "vests Congress with the power to preempt state law." (*Viva! Intern. Voice For Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935.) There are four kinds of preemption: express, field, conflict, and obstacle. (*Ibid.*) In this case, there is no express preemption provision, nor is there

field preemption. Nor did the Court of Appeal find that conflict preemption existed, which would require that "simultaneous compliance with both state and federal directives is impossible." (*Id.* at p. 936.) The only issue here is obstacle preemption, which "arises when under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Ibid.* [internal quotation marks and brackets omitted, citing various cases].)

Because preempting state laws is not something that Congress does lightly, "[c]ourts are reluctant to infer preemption." (*Viva!*, *supra*, 41 Cal.4th at p. 936 [internal quotation marks and brackets omitted, citing several prior California Supreme Court decisions].) In "all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1060 [quoting *Wyeth v. Levine* (2009) 555 U.S. 555, 565; internal quotation marks, ellipses, and citations omitted].) This high standard is imposed due to "respect for the states as independent sovereigns in our federal system," (*Wyeth*, *supra*, 555 U.S. at p. 565 n.3), and "'provides assurance that "the federal-state balance," . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts'" (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 957 [quoting *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525]).

Mining on federal land is widespread in California. The federal government owns almost *half* (45.3%) of all land in California.[1] On that federal land, there are over 20,000 mining claims, including almost 10,000 active placer mining claims.[2] Before the Legislature adopted its moratorium, every year over 3,000 people obtained annual state-wide permits for suction dredge mining.[3]

Suction dredge mining activities occur largely in the Sierra Nevadas, the Trinity Alps, and other mountainous regions – sensitive places where people hike, camp, fish, and otherwise enjoy the natural world.[4] The activities occur in rivers and streams where endangered and threatened fish, amphibians, birds, and other species seek refuge.[5]

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[1] (U.S. General Services Administration Office of Governmentwide Policy, Federal Real Property Profile, p. 18 (Sept. 30, 2004) [*available at* http://www.gsa.gov/realproperty/profile (last visited Nov. 14, 2014)].)

[2] These statistics on the number of mining claims were obtained through an inquiry to the California State Office of the U.S. Bureau of Land Management (with which all mining claims must be registered).

A "placer" mining claim (as opposed to a "lode" or "vein" mining claim) is "'a gravelly place where gold is found, especially by the side of a river, or in the bed of a mountain torrent.'" (*Hansen Bros. Enterprises, Inc. v. Bd. of Supervisors* (1996) 12 Cal.4th 533, 567 fn.25, quoting *Gregory v. Pershbaker* (1887) 73 Cal. 109, 114.)

[3] (California Department of Fish and Wildlife Report to the Legislature Regarding Instream Suction Dredge Mining Under the Fish and Game Code, p. 8 (Apr. 1, 2013) [part of the record below and *available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=63843&inline=1 (last visited Nov. 14, 2014)].)

[4] (California Dept. of Fish & Game, Suction Dredge Permitting Program Draft Subsequent Environmental Impact Report, Figures 3-4, 3-5, and 3-6 (Feb. 2011) [*available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27392&inline=1 (last visited Nov. 14, 2014)]; e.g., *Karuk Tribe*, *supra*, 681 F.3d at pp. 1011-12.)

[5] (California Dept. of Fish & Game, Suction Dredge Permitting Program Draft Subsequent Environmental Impact Report, Chapter 4-3 and Appendix J (Feb. 2011) [available at https://nrm.dfg.ca.gov/

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Sucking rocks and gravel out of a streambed not only risks killing the fish and amphibians in the streambed, but can also destroy the habitats that those animals and others use to find food, evade predators, and reproduce. Suction dredge mining can also increase exposure to toxic chemicals in the stream – something that may cause downstream consequences extending well beyond the borders of federal land or any particular mining claim. For instance, suction dredge mining can stir up mercury contamination long buried from Nineteenth Century gold mining activities, exposing fish, birds, and people to that toxic chemical.[6]

To ameliorate and control those harms, California has long had a permit system for suction dredge mining. The legislative command for a temporary moratorium pending a thorough study and additional regulation was in response to a lawsuit exposing inadequacies in California's previous regulations on the matter. The Court of Appeal's reasoning here would apply not just to the temporary moratorium, but also to any eventually enacted environmental regulations requiring modifications that may make exploitation of Rinehart's or others' claims "commercially impracticable." Indeed, the Court of Appeal's reasoning would apply without regard to the seriousness of the environmental effects targeted by the regulations. That,

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FileHandler.ashx?DocumentID=27399&inline=1 (last visited Nov. 14, 2014) and https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27423&inline=1 (last visited Nov. 14, 2014)]; *Karuk Tribe*, *supra*, 681 F.3d at p. 1029.)

[6] The Department's environmental impact report catalogues these significant environmental effects, and attempts to propose ways to mitigate most of those effects by regulatory restrictions. (See generally http://dfg.ca.gov/suctiondredge/ (last visited Nov. 14, 2014) [providing links to Department's 2012 environmental impact report on suction dredge mining and other information]; see also *Karuk Tribe*, *supra*, 681 F.3d at p. 1029 [summarizing harms to salmon].)

in itself, is an important question both for the approximately 3,000 suction dredge miners but also for all Californians.

But this case also raises broader questions. There are a wide variety of state laws that miners using various techniques could claim are preempted under the Court of Appeal's formulation. The Court of Appeal's decision, if allowed to stand, will lead to challenges to laws regulating diverse subjects, including:

- water quality, such as protections against pollution by mercury and other toxic chemicals, sediment, and turbidity (e.g., Water Code, §§ 13370-89);
- air quality, such as limitations on emissions from generators and other equipment (e.g., Cal. Code Regs., tit. 13, §§ 2450-65);
- fuel, including penalties for discharging oil and gasoline (e.g., Fish & G. Code, §§ 5650-56; Water Code, § 13272);
- explosives, including limitations on the use of dynamite (Health & Safety Code, §§ 12000-401);
- endangered species (Fish & G. Code, §§ 2080-89.26);
- streambed protections (Fish & G. Code, §§ 1600-16);
- coastal zone protections (Pub. Resources Code, §§ 30000-900);
- nuisance (Civil Code, §§ 3479-96); and
- noise, including local noise ordinances (e.g., Plumas County Code of Ordinances, § 9-2.413).

Indeed, the Court of Appeal's reasoning calls into question one of California's most venerable restrictions on highly destructive mining. For over one hundred years state and federal courts alike have applied the common law nuisance doctrine to prohibit the practice of hydraulic mining in California, a practice "by which a bank of gold-bearing earth and rock is excavated by a jet of water, discharged through the converging nozzle of a

pipe, under great pressure, the earth and debris being carried away by the same water, through sluices, and discharged on lower levels into the natural streams and water-courses below." (*Woodruff v. North Bloomfield Gravel Mining Co.* (C.C.D. Cal. 1884) 18 F. 753, 756; see also *County of Sutter v. Nicols* (1908) 152 Cal. 688; *People v. Gold Run Ditch & Mining Co.* (1884) 66 Cal. 138.) The harms of this technique were significant:

> [T]he unlawful filling up of the channel of a river, above the level of its banks and of the surrounding country, and burying with sand and gravel, and utterly destroying all the farms of the riparian owners on either side, over a space two miles wide and twelve miles long, along its entire course through the Sacramento valley, and across nearly an entire country; [] the sand and gravel so sent down is, also, only restrained from working similar destruction to a large extent of farming country other than that already buried and destroyed, and from, in like manner, destroying or injuring, or contributing to destroy or injure, a city of several thousand inhabitants, by means of levees erected at great expense by the land and other property owners of the county, and the inhabitants of the city, such levees continually and yearly requiring to be enlarged and strengthened to keep pace with the augmentation of the mass of debris sent down, at a great annually recurring expense; and [] the filling and narrowing, by similar means, of the channels of the largest and principal waters of the state, navigable for large vessels to the ocean, for a distance of 150 miles or more, to the injury of their navigation and danger of the riparian owners of the property

(*Woodruff, supra*, 18 F. at p. 769.) The *Woodruff* court held that federal mining laws did not prevent California from enforcing its public nuisance statutes to prevent these harms. (18 F. at pp. 770-72.) More recently, under California's Surface Mining and Reclamation Act of 1975, large scale mining operations, including open pit mines and large mountain mines, are required to have approved reclamation plans as well as financial assurances guaranteeing that those plans can be implemented. (Pub. Resources Code, § 2770, subd. (a); Cal. Code Regs., tit. 14, §§ 3500-4000.)

There may conceivably be claims that could be commercially practicable to mine only by means of highly destructive hydraulic mining, or only by open pit mines without the added expense of reclamation plans. Ironically, the Court of Appeal's decision would privilege the least efficacious and commercially practicable mining sites, forcing the State to selectively desist from enforcing important laws. A Court of Appeal decision that casually threatens such important and longstanding laws should not be allowed to stand without Supreme Court review.

In *California Coastal Commission v. Granite Rock Co.* (1987) 480 U.S. 572, the U.S. Supreme Court left undisturbed the California Coastal Commission's authority to require a miner to obtain a state permit to mine on federal land. Since then, some cases such as *South Dakota Mining* have held various state laws limiting mining on federal land preempted, while others such as *Pringle v. Oregon* (D.Or. Feb. 25, 2014, No. 2:13-cv-00309-SU) 2014 WL 795328 have found no preemption. To our knowledge, no California court before this case has addressed this issue in a published decision. Given the potential impact on miners and on the environment, this issue deserves the Court's attention.

II. THE COURT OF APPEAL ERRED IN DECIDING THE PREEMPTION QUESTION

A. California Courts Should Not Follow *South Dakota Mining* Because That Case Is Wrongly Decided

Rather than engage with the text and history of the federal and state statutes at issue and the U.S. Supreme Court's preemption doctrine, the Court of Appeal simply applied the Eighth Circuit's decision in *South Dakota Mining*. (Slip Op., pp. 16-19.) But the holding in *South Dakota Mining*, of course, is not binding on California courts. (*Yee v. City of Escondido* (1990) 224 Cal.App.3d 1349, 1351.) Nor should this Court allow *South Dakota Mining*'s holding to be imported into California's case

law without further review. For at least the four reasons explained below, *South Dakota Mining* is both wrong and out-of-date, and should not have been followed.

1. *South Dakota Mining* Ignored *Granite Rock*'s Holding That the Federal Mining Laws Do Not Preempt State Law

In following *South Dakota Mining*, the Court of Appeal based its decision on an opinion that fundamentally misapplied the U.S. Supreme Court's seminal case, *Granite Rock.*

In *Granite Rock*, the plaintiff, Granite Rock Company, owned unpatented mining claims in the Los Padres National Forest, and had a plan of operations approved by the U.S. Forest Service. (480 U.S. at p. 576.) After the California Coastal Commission instructed the company to apply for a coastal development permit for its mining activities, the company sued, claiming that the California Coastal Act's permit requirement was preempted. (*Id.* at pp. 576-77.) The U.S. Supreme Court separately examined preemption under three sets of laws: (1) federal mining laws, including the Mining Act of 1872 (30 U.S.C. § 22 et seq.) and the Multiple Use Mining Act of 1955 (30 U.S.C. § 601 et seq.); (2) two federal land use statutes (the National Forest Management Act (16 U.S.C. § 1600 et seq.) (NFMA) and the Federal Land Policy and Management Act (43 U.S.C. § 1701 et seq.) (FLPMA)); and (3) the Coastal Zone Management Act (16 U.S.C. § 1450 et seq.) (CZMA). (480 U.S. 572, 580.) With respect to the federal mining laws, the U.S. Supreme Court found no intent to preempt state laws, either in those statutes or their implementing regulations. (*Id.* at pp. 582-84.) With respect to NFMA and FLPMA, the U.S. Supreme Court distinguished between state land use statutes and state environmental regulations. (*Id.* at p. 587.) Although "[t]he line between environmental regulation and land use planning will not always be bright," the Court

found that "the core activity described by each phrase is undoubtedly different." (*Ibid.*) Although the Court *assumed* that NFMA and FLPMA would preempt state land use statutes, the Court found that the state permitting requirement at issue was, instead, an environmental regulation, which was not preempted. (*Id.* at pp. 584-89.) With respect to CZMA, the U.S. Supreme Court found that Congress did not intend to diminish state regulatory authority. (*Id.* at pp. 589-93.)

South Dakota Mining's first mistake was applying Granite Rock's discussion of NFMA and FLPMA (two federal land use statutes) to a case which, like this one, involved preemption under a different law, the Mining Act of 1872. (155 F.3d at pp. 1006, 1009-10 [citing to *Granite Rock*, *supra*, 480 U.S. at pp. 586-89].)

South Dakota Mining – and the Court of Appeal here – ignored *Granite Rock*'s separate analysis of the federal statute on which the claim of preemption here is based, the Mining Act of 1872. (*Compare* 480 U.S. at pp. 582-84 [discussing the Mining Act]). In fact, with respect to the Mining Act of 1872, *Granite Rock* noted the mining company's "conce[ssion] that the Mining Act of 1872, as originally passed, expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." (480 U.S. at p. 582.) While the U.S. Supreme Court mentioned the more contemporary enactment of 30 U.S.C. § 612(b) in 1955, it did not analyze that provision or any other statutory provision. (480 U.S. at p. 582.) Instead, the U.S. Supreme Court looked at the federal regulations promulgated to implement that later provision. (*Ibid.*) The Court found it telling that those regulations did not apparently seek to hinder state environmental laws: "If . . . it is the federal intent that [miners] conduct [their] mining unhindered by any state environmental regulation, one would expect to find the expression of this intent in these Forest Service regulations." (*Id.* at pp. 582-83; see also *id.* at p. 583 ["it is

appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity"].) Preemption was inappropriate, the Court found, because "the Forest Service regulations . . . not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations [to mine on federal land] will comply with state laws." (*Ibid.*) Those federal regulations are still in place. (See 36 C.F.R. §§ 228.5, 228.8 [cited in *Granite Rock, supra*, 480 U.S. at p. 583-84]; see also 43 C.F.R. §§ 3715.5(b), 3802.3-2, 3809.3 [also requiring compliance with state laws].) Just as *Granite Rock* found no preemption (480 U.S. at pp. 582-84) by the Mining Act of 1872, *South Dakota Mining* and the Court of Appeal here should have found no preemption. The decision below, which effectively imports into California law *South Dakota Mining*'s mistake of looking at the wrong part of *Granite Rock*, will mislead other courts on this important question, and deserves review.

2. *South Dakota Mining* and the Court of Appeal Contravened Supreme Court Precedent by Assuming That Congress Intended Singlemindedly to Encourage Mining at the Expense of Other Interests

South Dakota Mining reasoned that Congress's purpose in enacting mining laws was to encourage mining, and that state laws making some mines commercially impractical necessarily frustrate Congress's intent. (155 F.3d at p. 1011 [finding the local ordinance to be an obstacle to the congressional objectives of "encourag[ing] exploration and mining of valuable mineral deposits located on federal land and has grant[ing] certain rights to those who discover such minerals"]; see also Slip Op., pp. 17-18.)

But the U.S. Supreme Court has cautioned that a congressional purpose to encourage an activity does not necessarily preempt state law. (*Pacific Gas & Elec. Co. v. State Energy Resources Conservation &*

Development Com. (1983) 461 U.S. 190, 221-23; *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609, 633-34.) Courts must "look beyond general expressions of 'national policy.'" (*Commonwealth Edison, supra,* 453 U.S. at p. 634.) "[N]o legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." (*Rodriguez v. United States* (1987) 480 U.S. 522, 525-26, emphasis in original.) Thus, "pre-emption analysis is not [a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict." (*Viva!, supra,* 41 Cal.4th at pp. 939-40 [internal quotation marks and citations omitted].) The task is to examine the "specific federal statutes with which the state law is claimed to conflict." (*Commonwealth Edison, supra,* 453 U.S. at p. 634.) In following *South Dakota Mining* based on a simplistically assumed congressional purpose, the Court of Appeal here was blind to the possibility that Congress wanted to encourage mining *without compromising the enforcement of vital state laws.*

Granite Rock shows that Congress can indeed legislate with such intent. The *Granite Rock* Court upheld a state permitting regime that allowed "state regulators, whose views on environmental and mineral policy may conflict with the views of the Forest Service," to "forbid activity expressly authorized by the Forest Service" on federal land. (*Granite Rock, supra,* 480 U.S. at p. 606 (Powell, J., dissenting.) Although the *Granite Rock* dissenters (like the Court of Appeal here) found that mandated a finding of preemption, the *Granite Rock* majority held otherwise. (480 U.S. at pp. 582-84.)

California's temporary moratorium certainly does not make compliance with federal law impossible. As this Court has observed, "there is a difference between (1) not making an activity unlawful, and (2) making

that activity lawful." (*Viva!*, *supra*, 41 Cal.4th at p. 952, internal quotation marks and ellipses omitted and quoting *Bronco Wine*, *supra*, 33 Cal.4th at p. 992 [which quoted *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 183].) Properly characterized, the California statute at issue here is one that simply "prohibit[s] what the federal regulation *does not prohibit*" (*ibid.*, emphasis in original) – not one that prohibits what federal law requires. So characterized, this case resembles *Viva!* and *Bronco Wine* – cases where this Court found no preemption.

3. Federal Agencies' Regulations and Interpretative Statements Confirm That State Bans on One Form of Mining Do Not Conflict With the Federal Mining Laws

Since *South Dakota Mining* was decided in 1998, the federal agencies that implement the federal mining laws have stated their views on preemption.

The U.S. Bureau of Land Management (BLM) has formally promulgated a regulation about preemption on public lands: "If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. *However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart.*" (43 C.F.R. § 3809.3, emphasis added.)[7] In issuing this rule, BLM explicitly discussed the issue

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[7] Similarly, the preamble to the U.S. Forest Service's mining regulations states that "both the Forest Service and a State can permissibly regulate suction dredge mining operations for locatable minerals occurring on [Forest Service] lands," though "[s]tate regulation of suction dredge mining operations . . . is pre-empted when it conflicts with Federal law." (70 Fed.Reg. 32713, 32722 (June 6, 2005).) As discussed in Section II.A.1. *supra*, the Forest Service regulations in fact require compliance with a wide (continued...)

of preemption. (See 65 Fed.Reg. 69998, 70008-09 (Nov. 21, 2000).) BLM did this because of *Granite Rock*'s suggestion that agencies address preemption in their regulations. (64 Fed.Reg. 6422, 6427 (Feb. 9, 1999) [proposed rule].) BLM explained that "*no conflict exists if the State regulation requires a higher level of environmental protection*" and that "*States may apply their laws to operations on public lands.*" (65 Fed.Reg., at p. 70008, emphasis added.) BLM further explained that "the State law or regulation is preempted only to the extent that it specifically conflicts with Federal law," which occurs "*only* when it is impossible to comply with both Federal and State law at the same time." (*Id.*, at pp. 70008-09, emphasis added.) This has been BLM's view for more than thirty years. (See 64 Fed.Reg., at p. 6427, quoting preamble to 1980 regulations.) As noted above, California law does not make it impossible to apply with any federal mandate; as a result, BLM regulations confirm that the state statute here is not preempted.

Importantly, in addressing preemption, BLM made special note of a Montana statute. (65 Fed.Reg., at p. 70009.) Arguably similar to what occurred here, that Montana statute banned one form of mining – cyanide leaching-based operations – which miners had argued was the only economical way to mine. (See *Seven Up Pete Venture v. Montana* (Mont. 2005) 114 P.3d 1009, 1014, 1016.) Applying the principles noted above, BLM found that the Montana statute "provide[d] a higher standard of protection" and was not preempted: "In this situation, the State law or regulation will operate on public lands. BLM believes that this is consistent with FLPMA, the mining laws, and the decision in the Granite

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(...continued)
variety of state laws. (See 36 C.F.R. §§ 228.5, 228.8 [discussed in *Granite Rock*, *supra*, 480 U.S. at p. 583-84].)

Rock case." (65 Fed.Reg., at p. 70009.) Under BLM's interpretation of the federal mining laws, in other words, state environmental laws may permissibly prohibit a form of mining without running afoul of federal law.[8] (See also *Pringle*, *supra*, 2014 WL 795328, at p. *8 [holding that Oregon's ban on suction dredge mining is not preempted].)

BLM's interpretations add great strength to the argument that California's suction dredge mining moratorium is not preempted. Courts "must defer" to federal agency interpretations of federal law preemption. (*RCJ Med. Servs., Inc. v. Bonta* (2001) 91 Cal.App.4th 986, 1005-11; see also *Assn. of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.* (9th Cir. 2010) 622 F.3d 1094, 1097 [applying rule of deference to preemption question]; *Chae v. SLM Corp.* (9th Cir. 2010) 593 F.3d 936, 949-50 [same].) (Indeed, since this case concerns only a temporary moratorium the principle BLM announced with respect to Montana's mining regulation presumably applies even more strongly here.) Yet the Court of Appeal ignored BLM's views entirely, relying instead on a case (*South Dakota Mining*) that preceded those administrative interpretations. This was error. Because of the error's far-reaching effects, this case deserves review.

4. The Court of Appeal, Relying on *South Dakota Mining*, Misinterpreted the Federal Statute and Failed to Apply the Presumption Against Preemption

The U.S. Supreme Court has held that "in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [courts] start with the assumption that the historic police powers of the States were not to be superseded by the

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[8] BLM's interpretation would allow for conflict preemption, where it is impossible to comply with both federal regulations and state law, but there is no such conflict claimed here.

Federal Act unless that was the *clear and manifest* purpose of Congress." (*Wyeth*, *supra*, 555 U.S. at p. 565, emphasis added and internal quotation marks, ellipses, and citations omitted.) This high standard is imposed due to "respect for the states as independent sovereigns in our federal system." (*Id.*, at p. 565 fn. 3.) As Supreme Court cases after *South Dakota Mining* make clear, if two readings of a statute are plausible, courts "have a duty to accept the reading that disfavors pre-emption." (*Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 449; see also *Brown*, *supra*, 51 Cal.4th at p. 1064 [applying *Bates*].)

Both the Court of Appeal here and the *South Dakota Mining* case on which it relied ignored the importance of the "presumption against preemption." Indeed, neither the Court of Appeal nor *South Dakota Mining* even mentioned that presumption.

The fact that Congress has passed federal laws on mining does not make the presumption inapplicable. As the U.S. Supreme Court recently explained, the presumption depends upon the "historic presence of state law," not "the absence of federal regulation." (*Wyeth*, *supra*, 555 U.S. at p. 565 fn. 3.) Thus, the Ninth Circuit has more recently held that the presumption applied when California labor law affected securities operations and when California air quality regulations affected maritime commerce. (*McDaniel v. Wells Fargo Investments, LLC* (9th Cir. 2013) 717 F.3d 668, 675; *Pac. Merch. Shipping Assn. v. Goldstene* (9th Cir. 2011) 639 F.3d 1154, 1166-67.)

Here, the purpose of Fish and Game Code section 5653.1 is environmental protection, including the protection of wildlife, water, and human health. (Stats.2009, ch. 62, § 2 ["The Legislature finds that suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state."]) Such concerns are within the State's historic police

power. (*Lacoste v. Dept. of Conservation* (1924) 263 U.S. 545, 551 ["Protection of the wildlife of the State is peculiarly within the police power . . . ."]; see also *Viva!*, *supra*, 41 Cal.4th at p. 937, fn. 4 [collecting cases].) California also has a long tradition of protecting the environment from the adverse effects of mining. (See, e.g., *Woodruff*, *supra*, 18 F. 753 [upholding injunction under California law against hydraulic mining on federal land due to its environmental effects]; *County of Sutter*, *supra*, 152 Cal. 688 [same]; Pub. Resources Code, § 3981 [originally enacted by Stats.1893, ch. 223, p. 337 § 1, regulating hydraulic mining].) Before ruling that the Legislature's exercise of these core police powers was preempted, the Court of Appeal should have at least considered the presumption against such preemption. Its failure to do so was error.

When the presumption against preemption is in fact applied to the federal statute at issue here, it becomes clear why any finding of preemption would be erroneous. The main statute at issue (see Slip Op., p. 12) is 30 U.S.C. § 22, which states:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Preemption is fundamentally a question of congressional intent, focused on interpreting the language of a statute. (*Viva!*, *supra*, 41 Cal.4th at p. 939.) The question is whether Congress expressed a sufficiently clear intention to make some set of state laws unenforceable. (*Wyeth*, *supra*, 555 U.S. at p. 565; *Viva!*, *supra*, 41 Cal.4th at pp. 939, 944-45.) Here, in place of clarity, the federal statute offers a host of ambiguities:

- The statute says that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase." Rinehart argues that this language means that there should be no obstacles of any kind to mining. But as was explained in detail below, the cases and the legislative history indicate that it means something different: that the land (or minerals) shall be "free" and miners do not need to pay the federal government for them. The primary purpose of the federal Mining Act of 1872 was simply to give miners permission to access federal land without having to pay for that access.
- The statute says that that exploration and purchase shall be "under regulations prescribed by law." "[R]egulations prescribed by law" could mean that miners are subject to just federal regulations, or it could mean that miners are subject to both federal and state regulations. The statutory language does not answer that question, although the existence of a contrasting reference to "laws of the United States" in nearby text implies that here, the more general statutory term "regulations prescribed by law" includes both federal and state regulations.
- The statute also says that exploration and purchase shall be "according to the local customs and rules of miners in the several mining districts." This could mean just the ad hoc associations formed privately by miners, or it could indicate an intent by Congress to preserve local regulations adopted under state law (by local associations, local governments, or states themselves).

The U.S. Supreme Court has said that courts have a duty to resolve all ambiguities on questions of preemption in favor of the validity of state law.

(*Bates*, *supra*, 544 U.S. at p. 449.) The multiple ambiguities in 30 U.S.C. § 22 mean that that statute should not have been construed as preempting Fish and Game Code section 5653.1. Review is therefore appropriate.

B. This Court Should Review the Court of Appeal's Decision That Makes the Commercial Practicability of an Activity the Touchstone of Preemption Analysis

After embracing *South Dakota Mining*, the Court of Appeal held that the question of preemption in this case hinges on whether an activity is "commercially impracticable." (Slip Op., p. 19.) The Court of Appeal instructed the trial court to have a trial on the question of whether this moratorium on one form of mining makes mining on Rinehart's claim "commercially impracticable." The "commercially impracticable" phrase comes from *Granite Rock*, not *South Dakota Mining*, but the Court of Appeal's use of that phrase here is based on a misunderstanding of *Granite Rock*.

Granite Rock employed the term "commercially impracticable" in its discussion of preemption not under federal mining laws but instead under NFMA and FLPMA – and used the phrase not to create any test for preemption, but rather in its ruminations about whether an environmental regulation could hypothetically take on the qualities of a land use regulation that might be preempted by federal land use statutes. (480 U.S. at p. 587.) Because neither NFMA and FLPMA, nor any other land use statutes, are at issue here, the "commercially impracticable" standard does not apply here either.

Moreover, the *Granite Rock* court did not actually rule that NFMA and/or FLPMA preempt state laws that make mining commercially impracticable. Instead, it assumed for the sake of argument, and *without* deciding the issue, that those federal land use statutes preempt state land use regulation. (480 U.S. at p. 585.) It ruled that the state law at issue did

not amount to a land use regulation. (*Id.* at pp. 585-89.) Contrary to the Court of Appeal's reading of *Granite Rock*, the U.S. Supreme Court never ruled affirmatively that state regulation of mining activity depends on whether the regulation makes mining commercially impractical.

Granite Rock's mention of commercial impracticability occurs in a passage distinguishing between environmental regulation and land use regulation. (*Granite Rock, supra*, 480 U.S. at pp. 586-89.) This phrase was used in explaining that *hypothetically* an environmental regulation could appear to be more like a land use regulation. (*Id.*, at p. 587.) Immediately afterwards, however, *Granite Rock* explained that environmental regulation and land use regulation are "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." (*Ibid.*)

The California statute at issue here, Fish and Game Code section 5653.1, is undoubtedly an environmental regulation. It was adopted by the Legislature as such:

> The Legislature finds that suction or vacuum dredge mining results in various *adverse environmental impacts* to protected fish species, the water quality of this state, and the health of the people of this state, and, *in order to protect the environment and the people of California* pending the completion of a court-ordered environmental review by the Department of Fish and Game and the operation of new regulations, as necessary, it is necessary that this act take effect immediately.

(Stats.2009, ch. 62, § 2, emphasis added.) The Legislature regulates one form of mining, suction dredge mining, because of environmental effects of that method. The moratorium on permits lasts only until an environmental review is completed, new regulations "fully mitigate all identified

significant environmental effects," and the program is fully funded by permit fees. (Fish & G. Code, § 5653.1, subd. (b).) These are measures to limit environmental harm. Just as the Legislature could enact an environmental regulation that prohibits the use of dynamite or poisons, it can act to require that if a miner uses a vacuum to mine in a stream he must mitigate all of the significant environmental effects. This is a regulation of the circumstances under which a miner may use a particular type of equipment – not a determination that mining in general is a prohibited use of the land.

Indeed, the Court of Appeal's "commercially impracticable" standard makes no sense when applied to environmental regulation of mining claims. Commercial success depends on the balance between costs and revenues. With mining, the costs include labor and equipment, and revenue is the value of gold recovered. The balance depends on the location of the mining claim and the skill of the miner – both highly case-dependent. It depends tremendously on the price of gold, which has ranged from less than $300 per ounce to over $1,800 per ounce over the last thirty years.[9] Indeed, even in as short a period as 2010 to 2014 – a period including the pendency of this case – there has been a tremendous change in gold prices, with the price of gold essentially doubling between 2010 and 2013, then falling again by some 30%.[10] Under the Court of Appeal's formulation of the preemption standard, a particular environmental regulation might be preempted one month, but not preempted the next — or preempted for one

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[9] (See http://research.stlouisfed.org/fredgraph.png?g=qni [U.S. Federal Reserve information] (last visited Nov. 14, 2014).) As a information issued by a federal agency, this information is subject to judicial notice. (Evid. Code, §§ 452, 459.)

[10] (See http://research.stlouisfed.org/fred2/series/GOLDPMGBD230NLBM [U.S. Federal Reserve information] (last visited Nov. 14, 2014).)

miner on a given claim, but not when she sells the claim to another, more skilled miner. The same uncertainty would attend to the application of other state laws, including laws concerning water quality, air quality, fuel, noise, health and safety, and even taxation. Ironically, it would mean that the least viable mining claims would be subject to the least amount of regulation by states and local communities – resulting in a special preference for the least efficient mines. For many mining claims which are subject to multiple regulations, the Court of Appeal's standard would require the trial court to decide the order in which to apply those regulations and which of those regulations tipped the scales to commercial impracticability. It is bizarre to picture that the civil regulatory regime – as well as criminal trials such as this one – would turn on a case-by-case examination of whether month-to-month fluctuations in gold price render a particular miner's claim momentarily commercially impracticable under various combinations of regulations and mining methods. Such a standard cannot be administered and should not be adopted by the California courts. Consequently, the People respectfully request that this Court review the Court of Appeal's decision.

CONCLUSION

For the foregoing reasons, the People of the State of California respectfully request that the petition for review be granted.

Dated: November 17, 2014 Respectfully submitted,

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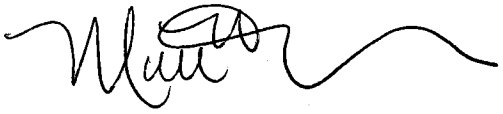

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 7,334 words.

Dated: November 17, 2014

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Filed 9/23/14 Certified for publication 10/8/14 (order attached)

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Plumas)

THE PEOPLE, Plaintiff and Respondent, v. BRANDON LANCE RINEHART, Defendant and Appellant.	C074662 (Super. Ct. No. M1200659)

In this case, we are asked to consider whether provisions of California Fish and Game Code sections 5653 and 5653.1 (unless otherwise stated, statutory references that follow are to the Fish and Game Code), as applied, are preempted by federal law because they "stand[] as an obstacle to the accomplishment [and execution] of the full purposes and objectives of Congress." (*California Coastal Commission et al. v. Granite Rock Co.* (1987) 480 U.S. 572, 581 [94 L.Ed.2d 577, 592] (*Granite Rock*); *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936 (*Viva!*).) On this record, we are unable to make that determination and we remand the matter to the trial court for further proceedings on the issue of federal preemption.

FACTS AND PROCEEDINGS

On August 30, 2012, the District Attorney of Plumas County filed a criminal complaint charging defendant with a violation of section 5653, subdivision (a) in that he used vacuum and suction dredge equipment in a river, stream, or lake without a permit (Count I) and with a violation of section 5653, subdivision (d) in that he possessed a vacuum and suction dredge within an area closed to the use of that equipment and within 100 yards of waters closed to the use of that equipment (Count II).

On October 30, 2012, defendant demurred to the complaint arguing that, in light of section 5653.1 as amended, the state has "indefinitely suspended the issuance of all permits for suction dredging, closing all waters of the state to" that use. On December 18, 2012, the trial court overruled the demurrer.

On May 15, 2013, defendant waived his right to a jury and agreed to a court trial regarding the violations with which he was charged. The parties stipulated to the following facts:

"1. On or about June 16, 2012 Defendant Brandon L. Rinehart did use vacuum and suction dredge equipment in the County of Plumas in a river or stream in the Plumas National Forest in an area closed to suction dredge mining by the State of California, and did not then possess a valid permit issued by the California Department of Fish and Wildlife, then known as the Department of Fish and Game, to use his vacuum and suction dredge equipment.

"2. On or about June 16, 2012 Defendant Brandon L. Rinehart did possess vacuum and suction dredge equipment in the County of Plumas in the Plumas National Forest, and within 100 yards of an area closed to suction dredge mining by the State of California.

"3. The conduct identified in Paragraphs 1 and 2 occurred within the boundaries of the 'Nugget Alley' placer mining claim owned by Defendant, and

registered with the U.S. Bureau of Land Management [(BLM)] with Serial Number CAMC0297113."

The court and the parties next turned to the defendant's assertion of the affirmative defense that section 5653 is unenforceable against him because the statute, as applied, is preempted by federal law.

Defendant made an offer of proof arguing that, if the evidence in the offer of proof was allowed to come before the court, it would establish that section 5653 was unenforceable under the circumstances presented here. The offer of proof was as follows:

1. Defendant would testify that he was working in the water within the boundaries of the "Nugget Alley" mining claim, one of two contiguous mining claims owned by he and his father and four other locators. He would testify that he and his father obtained the claims by making a discovery of a valuable locatable mineral, posting a Notice of Location on the claim as required by law, filing the Location Notice with Plumas County and then transmitting a copy of the file-stamped Location Notice to the U.S. Bureau of Land Management. He would offer as evidence a true copy of the Location Notice. He would testify that the Location Notice identifies, and establishes, upon acceptance by BLM, the boundaries of the claim. He would offer pictures of the claim, and areas where gold is to be found, together with a picture of substantial quantities of gold recovered from the claim.

2. Defendant would testify that BLM accepted the Location Notice and registered the Nugget Alley claim with Serial Number CAMC297113, and offer a true copy of a printout from the BLM LR2000 system, showing that this claim (and the adjacent claims) are in good standing with the United States, all required fees having been paid to all governmental entities. He would testify that the Nugget Alley Claim, though located on land which the federal government has legal title (within the Plumas National Forest), is private property on which he and the other owners pay real estate

taxes to Plumas County, and offer a true copy of the most recent tax bill from Plumas County.

3. He would offer a map of the area and testify that at the time he was cited by the game warden, he was within the boundaries the claim.

4. Defendant would testify that placer claims, by their nature, contain gold deposited by water bodies. He would testify that much of California has already been subject to significant mining activity that has extracted the gold near to, but outside of, flowing waters, and that the Nugget Alley claim has been hydraulically mined in the past to remove such gold.

5. He would testify that he excavated test pits outside the water-covered areas of the claim to survey for the presence of recoverable gold and found no economically-significant quantity of gold outside the water-covered areas. He would testify that the gold remaining on the claim, and additional gold brought from upstream sources, has been concentrated by flowing waters and may be found beneath the waters of the claim.

6. He would testify that the only economically-feasible method by which gold can be extracted from the Nugget Alley claim, and indeed most placer claims in California, is by utilizing a suction dredge to extract the gold-bearing streambed material underwater. He would testify that based on a typical day of five hours/day in the water, he has recovered roughly one-half an ounce of gold per day, roughly $750, but on better days, he would recover an excess of an ounce, and that there is a continuing hope of hitting richer pockets which might lead to recoveries many times that amount.

7. Defendant would testify that he attempted to use hand shovels and buckets to shovel out gravel from under the flowing water, which would then be processed outside the water by another miner using a highbanker to recover the gold. He would testify that this process was very difficult to accomplish because, among other things, the flowing water blew most of the gravel off the shovel, and visibility in the hole he was working would diminish to the point where it became unsafe to work. He attempted one

eight-hour day of this activity, laboriously filling 30 buckets of gravel, and this backbreaking labor produced less than a tenth of an ounce of gold.

8. He would testify that, by contrast, the suction dredge moves and processes the gravel simultaneously without having to lift it out of the water, which is a much faster process in addition to recovering a greater quantity of gold. By way of comparison, it takes two men eight hours each to recover one-tenth an ounce of gold or less by hand, while a single person working the suction dredge for five hours can recover half an ounce or more. For this reason, working by hand may be regarded as at least sixteen times less efficient than using the suction dredge.

9. Defendant would testify that the alternative of digging by hand underwater is not a commercially-viable alternative, insofar as the backbreaking labor cannot be sustained for extended periods and the economic return makes it unprofitable to pursue such an activity. For all these reasons, defendant would opine that the State's refusal to issue a permit to operate his suction dredge is in substance a prohibition on mining his claim, and certainly represents material interference with his mining activities.

10. Gerald Hobbs would offer evidence that he has been a miner and prospector for over thirty years, has mined extensively throughout the Western United States, and holds mining claims in California. He would testify that he has previously testified in litigation as an expert witness regarding suction dredge mining and evaluating stream deposits, and that he has previously taught suction dredge mining techniques and methods not only in California, but in other Western states and abroad.

11. He would testify that he is the President and Founder of Public Lands for the People, Inc. (PLP), a 501(c)(3) nonprofit educational organization of small and medium size miners and prospectors, with constituent members totally roughly 40,000 people. He would testify that as a result of his personal mining experience and role with PLP, he has knowledge of both the methods and economics of small and medium-scale mining, and the regulatory system of the State of California and the federal government.

12. He would testify that much of California has already been subject to significant mining activity that has extracted placer deposits of gold, and that early miners tended to mine the banks of California rivers and streams, but not underwater deposits. In particular, the technique of hydraulic mining (using a high pressure hose to wash soil deposits near rivers and streams into a sluice) removed much of the gold deposited adjacent to water bodies, but much gold was lost in the process, washed into the rivers and streams, and remains there for subsequent miners. In addition, lode deposits continue to erode and release gold into the rivers and streams, replenishing in stream deposits.

13. Hobbs would testify that he has not yet had an opportunity to visit defendant's claim (but intends to do so if the trial is continued beyond and he is permitted to testify at trial), but has examined photographs of the claim and spoken with defendant concerning its nature.

14. He would testify that assuming the truth of defendant's statements, the only commercially-significant deposits of gold likely present on the claim are located underwater, and that the only practical method of recovering those deposits is to vacuum the gravel up with a suction dredge. In particular, he would confirm that suction dredges are much more efficient at removing and processing gold-bearing gravels, and that mining by hand generally will not produce an economic return because, among other things, the richest deposits that could be profitably mined by hand are long gone. He would also testify that theoretical alternatives such as damming and redirecting entire rivers to expose the river bottom for land-based equipment are not economically - or legally - feasible.

15. He would testify that the typical four-inch suction dredge costs approximately $3,000 or more. Additional support gear, such as a wet-suit, diving gear, weight belts, pry bars, winching gear, chains, tools, and other needed items can cost easily an additional $1,000 or more. The typical small scale placer suction dredge miner

has easily $4-5,000 or more invested in equipment alone. The mining industry as a whole has substantial investment in equipment for suction dredging.

16. He would testify that the State's refusal to issue permits for suction dredging makes all this mining capital worth substantially less, and materially interferes with the development of California mineral resources on federal lands and elsewhere as a general matter, and amounts to a prohibition against the mining of the vast majority of federal placer gold claims in Northern California and Southwest Oregon, including defendant's claim.

17. Thomas Kitchar would testify that he has been employed in the field of gold mining as his primary source of income since December of 1979 when he was employed by the Homestake Mining Company (HMC) in Lead, S.D. for nearly four years at depths of over 6800 feet as a hard rock underground gold miner. During that period, he rose through the ranks gaining MSHA certification as an Underground Miner 1st Class, Motorman 1st Class, LHD Operator 1st Class, and Cager 2nd Class. While working for the HMC, in his spare time, he taught himself the practices of the placer gold miner, located claims of his own, and became familiar with, among other things, the U.S. Forest Service mining regulations at 36 C.F.R. 228.

18. He would testify that in the fall of 1984, he ceased working for HMC, and by the fall of 1985 had outfitted himself with small-scale placer mining equipment, including a suction dredge, and moved to SW Oregon with the intent of locating valuable placer gold mining claims and then working them full-time as his sole source of income.

19. He would testify that after several years of prospecting and searching for ground rich enough to work and claim, by 1987 he had located claims along a historically-rich creek near the California border a dozen or so miles from the nearest town. He moved onto one of these claims, and has lived on this claim year-round (26 years) to this day while working this and other nearby and adjacent claims. In the course

of his mining work, he has become knowledgeable in the mining techniques employed by defendants and other small scale miners.

20. Kitchar would testify that in response to baseless environmentalist attacks upon suction dredge mining, in about the year 2000 he joined and got involved with the Waldo Mining District (WMD) to help fight against these threats. In June of 2001, he was elected president of the WMD, and continues to hold that office to this day. WMD was established through self-initiation on April 4, 1852, and later pursuant to provisions of the U.S. Mining Law of 1872, and is a federally recognized mining district with certain governmental authority over mining within the boundaries of the District. The purpose of the WMD is to preserve, protect, and promote mining within the District and elsewhere. The District is based in Cave Junction, Oregon.

21. Both as a miner and as president of the WMD, he has become familiar with the regulatory provisions concerning suction dredge mining. He has published a book entitled "The Gold Prospector's Guide to Researching and Locating Mining Claims," and has testified in numerous judicial and regulatory proceedings concerning suction dredge mining at both the state and federal level.

22. He would testify that much of Southwest Oregon and Northern California has already been subject to significant mining activity that has extracted placer deposits of gold, and that earlier miners tended to mine the banks of rivers and streams, and sometimes even the beds of those streams if they were not too deep, but that they could not mine the deeper underwater deposits. In particular, the technique of hydraulic mining (using a high pressure hose or monitor to wash soil deposits near rivers and streams into a sluice) removed much of the gold deposited adjacent to water bodies, but much of the gold was lost in the process, washed into the rivers and streams with the tailings where it has been reconcentrated and deposited, and remains there for subsequent miners. In addition, upland lode and placer deposits continue to erode and release gold into the rivers and streams, replenishing in-stream deposits.

23. He would testify that gold, because of its high specific gravity, tends to deposit in certain areas of live running streams, and has the tendency to sink down though the bed materials until it reaches some impervious layer, usually the underlying bedrock. In general, the closer the miner gets to the bedrock, more gold will be recovered with the best pay being found on the bedrock or in cracks in the bedrock. The modern suction dredge is the most efficient tool yet devised, and the only practical tool, for recovering gold from underwater bedrock cracks.

24. He would testify that he has not visited defendant's claim, but has examined photographs of the claim.

25. He would testify that assuming the truth of defendant's statements, the only commercially-significant deposits of gold likely present on the claim are located underwater, and that the only practical method of recovering those deposits is to vacuum the gravel up with a suction dredge. In particular, he would confirm that suction dredges are much more efficient at removing and processing instream gold-bearing gravels, and that mining by hand generally will not produce an economic return because, among other things, the richest deposits that could be profitably mined by hand are long gone or too far underwater. He would also testify that theoretical alternatives such as damming and redirecting entire rivers to expose the river bottom for land-based equipment are not economically - or legally - feasible.

26. He would testify that the typical four-inch suction dredge costs approximately $3,000 or more. Additional support gear, such as a wet-suit, diving gear, weight belts, pry bars, winching gear, chains, tools, and other needed items can cost easily an additional $1,000 or more. The typical small scale placer suction dredge miner has easily $4-5,000 or more invested in equipment alone. The mining industry as a whole has substantial investment in equipment for suction dredging.

27. He would testify that the State's refusal to issue permits for suction dredging makes all this mining capital worth substantially less, and materially interferes

with the development of California mineral resources on federal lands and elsewhere as a general matter, and amounts to a prohibition against the mining of the vast majority of federal placer gold claims in California, including defendant's claim.

The parties stipulated that defendant had permits as required by the law when they were available and would have continued to apply for such permits if permits were being issued. The parties further stipulated that the court could accept into evidence a document entitled "California Department of Fish and Wildlife Report to the Legislature Regarding Instream Suction Dredge Mining Under the Fish and Game Code" dated April 1, 2013.

After extensive argument by both parties and questioning by the court, the trial court held that prosecution of defendant for violations of section 5653, subdivisions (a) and (d) was not barred on the grounds that the provisions of the statute, and therefore its enforcement, are preempted by federal law. The court allowed into evidence defendant's proposed testimony set forth in paragraphs 1 through 5 of the offer of proof, but, based upon the court's ruling on the affirmative defense of preemption, excluded the testimony set forth in paragraphs 6 through 9, and excluded the proposed testimony of Hobbs and Kitchar.

The court found defendant guilty of Count I and Count II of the complaint, suspended imposition of sentence, and ordered that defendant be placed on three years summary probation. The court also ordered defendant to pay certain fines and fees but stayed payment of the fines pending successful completion of probation.

On August 15, 2013, the appellate division of the Superior Court of Plumas County certified this case for transfer to this court pursuant to rule 8.1005, California Rules of Court. On October 4, 2013, this court transferred the matter to this court for purposes of appeal.

On appeal, defendant contends the trial court erred when it rejected his defense that enforcement of the provisions of Fish and Game Code sections 5653 and 5653.1,

operating together, are preempted by federal law. He further contends the trial court erred by excluding evidence that the state's de facto refusal to issue suction dredge mining permits required by section 5653 results in an unconstitutional interference with his federally-protected mining rights. As noted earlier, we will reverse the judgment and remand the matter to the trial court for further proceedings on the issue of federal preemption.

DISCUSSION

I

Fundamental Principles of Federal Preemption

We turn first to certain fundamental principles of the law of federal preemption as they relate to Congress' authority over federal lands.

The Property Clause of the United States Constitution "provides that 'Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' U.S. Const., Art IV, § 3, cl. 2." The United States Supreme Court has " 'repeatedly observed' that ' [the] power over the public land thus entrusted to Congress is without limitations.' " (*Kleppe v. New Mexico* (1976) 426 U.S. 529, 535, 539 [49 L.Ed.2d 34, 41, 43], quoting *United States v. San Francisco* (1940) 310 U.S. 16, 29 [84 L.Ed.1050, 1059-1060].)

Even so, " 'the State is free to enforce its criminal and civil laws' on federal land so long as those laws do not conflict with federal law. [Citation.] The Property Clause itself does not automatically conflict with all state regulation of federal land. Rather, . . . '[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power *to enact legislation* respecting those lands pursuant to the Property Clause. *And when Congress so acts*, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.' [Citation.]" (*California Coastal Comm'n v. Granite Rock* (1987) 480 U.S. 572,

580-581 [94 L.Ed.2d 577, 591] citing *Kleppe v. New Mexico, supra*, at p. 543 (*Granite Rock*; italics added.) Put differently, "[T]he Property Clause gives Congress plenary power over . . . federal land . . .; however, even within the sphere of the Property Clause, state law is pre-empted only when it conflicts with the operation or objectives of federal law . . . [Citation.]" (*Id.* at p. 593 [94 L.Ed.2d at pp. 599-600].)

"[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [Citations.] If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law [citation] or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, [citation]." (*Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, 248 [78 L.Ed.2d 443, 452]; see also, *Viva!, supra,* 41 Cal.4th at pp. 935-936.)

II

Federal Mining Law

The federal government's policy relating to mining and minerals is set forth at Title 30 United States Code section 22. "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States . . . under regulations prescribed by law, and according to the local customs and rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

We deal here mainly with the Mining Act of 1872.

"Under the Mining Act of 1872, 17 Stat. 91, as amended, 30 USC § 22 et seq., a private citizen may enter federal lands to explore for mineral deposits. If a person locates a valuable mineral deposit on federal land, and perfects the claim by properly staking it and complying with other statutory requirements, the claimant 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,' [citation], although the United States retains title to the land. The holder of a perfected mining claim may secure a patent to the land by complying with the requirements of the Mining Act and regulations promulgated thereunder [citation] and, upon issuance of the patent, legal title to the land passes to the patent holder." (*Granite Rock, supra,* at pp. 575- 576 [94 L.Ed.2d at p. 588].)

The United States Supreme Court has recognized that the intent of Congress in passing the mining laws "was to reward and encourage the discovery of minerals that are valuable in an economic sense." (*United States v. Coleman* (1968) 390 U.S. 599, 602 [20 L.Ed.2d 170, 174-175].)

Constitutionally speaking, under most circumstances, the states are free to enact environmental statutes and regulations binding on those holding unpatented mining claims on federal lands so long as those statutes and regulations do not rise to the level of impermissible state land use regulations. (See *Granite Rock, supra,* 480 U.S. 572 [94 L.Ed.2d 577].) "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." (*Id.* at p. 587 [94 L.Ed.2d at pp. 595-596].)

III

California Fish and Game Code Sections 5653 and 5653.1

In 1961, the State of California enacted section 5653 directing the California Department of Fish and Wildlife (formerly known as the Department of Fish and Game) (Department) to issue permits if it determined the particular vacuum or suction dredge mining operation "will not be deleterious to fish." (Stats. 1961, ch. 1816, § 1.) Suction dredging is the use of a suction system to remove and return materials from the bottom of a stream, river or lake for the extraction of minerals. (Cal. Code Regs., tit. 14, § 228.)

In 1988, amendments to the statute made it a misdemeanor to possess a vacuum or suction dredge in or within 100 yards of waters closed to the activity. (Stats. 1988, ch. 1037, § 1.)

In August 2009, the Governor signed Senate Bill No. 670, prohibiting the Department from issuing any new permits under section 5653, and imposing a statewide moratorium on instream suction dredge mining to remain in effect pending completion of the Department's administrative proceedings undertaken pursuant to section 5653.1. (Stats. 2009, ch. 62, § 1, adding former Fish & G. Code, § 5653.1, eff. Aug. 6, 2009.)

In 2011, the Legislature amended section 5653.1 to state that the statutory moratorium would end on the earlier of June 30, 2016, or the Department's certification that the following five conditions had been satisfied:

"(1) The [D]epartment has completed the environmental review of its existing [1994] suction dredge mining regulations. . . .

"(2) The [D]epartment has transmitted for filing with the Secretary of State . . . a certified copy of new regulations adopted, as necessary, pursuant to . . . the Government Code.

"(3) The new regulations described in paragraph (2) are operative.

"(4) The new regulations described in paragraph (2) fully mitigate all identified significant environmental impacts.

"(5) A fee structure is in place that will fully cover all costs to the [D]epartment related to the administration of the program." (See former Fish & G. Code, § 5653.1, subd. (b), later amended by Stats. 2012, ch. 39, § 7, eff. June 27, 2012.)

Section 5653.1 "applies solely to vacuum and suction dredging activities conducted for instream mining purposes," but "does not expand or provide new authority for the [D]epartment to close or regulate suction dredging conducted for regular maintenance of energy or water supply management infrastructure, flood control, or navigational purposes governed by other state or federal law." (§ 5653.1, subd. (d).) Section 5653.1 "does not prohibit or restrict nonmotorized recreational mining activities, including panning for gold." (§ 5653.1, subd. (e).)

A subsequent amendment to the statute repealed the June 30, 2016 date, such that the moratorium now ends when the Department certifies that all five conditions have been satisfied. (Stats. 2012, ch. 39, § 7, eff. June 27, 2012.)

Defendant argues that, because of a lack of funding, the Department is unable for financial reasons to fulfill the conditions set forth in section 5653.1 which results in a continuing, if not permanent, moratorium on suction dredge mining permits. This, he argues, stands as an obstacle to federal Congressional intent. To the argument that such permits may be issued again at some point in the future, defendant responds that, in any event, to accept that argument would be to allow any moratorium to stand on the promise that it would be lifted in the future. Defendant also argues that, where the Government has authorized a specific use of federal lands, a state may not prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.

IV

Resolution of this Appeal

The question presented here is whether sections 5653 and 5653.1 of the Fish and Game Code, as presently applied, stand as an obstacle to the accomplishment of the full purposes and objectives of Congress in passing the federal mining laws.

We first note that section 5653 requiring a permit from the state before persons may conduct suction dredge mining operations does not, standing alone, contravene federal law. (See *Granite Rock, supra,* 480 U.S. 572 [94 L.Ed.2d 57].) *Granite Rock* establishes that the requirement of a state permit to conduct certain activities on federal land is not categorically prohibited. The issue turns instead on the conditions attending the permit.

The question here is whether the requirements of section 5653.1, which requirements, defendant argues, cannot at the present time be met by the state, in fact operate to prohibit the issuance of a permit under section 5653. That is, according to defendant, there is at the current time a de facto ban on suction dredge mining in California imposed by the state through the operation of sections 5653 and 5653.1. Moreover, according to defendant, there is no economically feasible way to extract valuable mineral deposits at the sight of his claim. Put simply, according to defendant, this combination of circumstances has the practical effect of the state taking away from him what the federal government has granted. Therefore, he argues, the state statutes are unenforceable because their operation, as to defendant, is preempted by federal law.

In addressing this question, we find particularly useful the opinion of the United States Court of Appeals for the Eighth Circuit in *South Dakota Mining Ass'n Inc. v. Lawrence County* 155 F.3d 1005 (8th Cir. 1998) (*South Dakota Mining*). Indeed, *South Dakota Mining* is nearly directly on point here.

In *South Dakota Mining*, the voters of Lawrence County, South Dakota enacted an ordinance prohibiting the issuance of new or amended permits for surface metal mining in what was known as the Spearfish Canyon Area. Plaintiffs in the action to permanently enjoin enforcement of the ordinance included mining companies that held federally patented and unpatented mining claims in the area and had conducted surface mining operations consistent with federal law within Lawrence County for the 15 years before the ordinance was enacted. (*Id.* at p. 1007.)

The record in the district court showed that surface metal mining was the only mining method that had been used to mine gold and silver deposits in the area for the previous 20 years. The record also showed that surface metal mining was the only mining method that could extract gold and silver within the Spearfish Canyon area even though, in other parts of South Dakota, underground and other types of gold and silver mining were prevalent. Surface metal mining in the Spearfish Canyon area was the only mining method available, as a practical matter, because the gold and silver deposits in that area were located, geologically, at the earth's surface. The record showed that the mining companies had invested substantial time and money to explore the area for mineral deposits and to develop mining plans that conformed to federal, state, and local permitting laws. (*South Dakota Mining, supra,* at pp. 1007 to 1008.)

The district court permanently enjoined enforcement of the ordinance holding that the Federal Mining Act of 1872 preempted the ordinance. (*South Dakota Mining, supra,* at p. 1008.)

The Eighth Circuit Court of Appeals affirmed the district court's order. The court first found that the purposes and objectives of the Congress in passing the Mining Act of 1872 included "the encouragement of exploration for and mining of valuable minerals located on federal lands, providing federal regulation of mining to protect the physical environment while allowing the efficient and economical extraction and use of minerals,

and allowing state and local regulation of mining so long as such regulation is consistent with federal mining law." (*South Dakota Mining, supra,* at p. 1010.)

The court then found that "[t]he Lawrence County ordinance is a per se ban on all new or amended permits for surface metal mining within the area. Because the record shows that surface metal mining is the only practical way any of the plaintiffs can actually mine the valuable mineral deposits located on federal land in the area, the ordinance's effect is a de facto ban on mining in the area. [¶] . . . [¶]

"The ordinance's de facto ban on mining acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act. Congress has encouraged exploration and mining of valuable mineral deposits located on federal land and has granted certain rights to those who discover such minerals. Federal law also encourages the economical extraction and use of these minerals. The Lawrence County ordinance completely frustrates the accomplishment of these federally encouraged activities. A local government cannot prohibit the lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution. The ordinance is prohibitory, not regulatory, in its fundamental character." (*South Dakota Mining, supra,* at p. 1011.)

The matter before us is distinguishable from *South Dakota Mining* in that sections 5653 and 5653.1 of the Fish and Game Code, read together or alone, do not *expressly* prohibit the issuance of suction dredge mining permits. But in the last analysis, that has no bearing on the result we reach here. While the sections at issue in the Fish and Game Code do not expressly ban suction dredge mining, they do require a state permit for such mining and, arguably, California law as embodied in the words and application of section 5653.1 acts to prevent the issuance of such permits. Defendant argues that, in practical operation, sections 5653 and 5653.1, have, since 2009, banned suction dredge mining in California. Since, according to defendant, there is no commercially viable way to

discover and extract the gold or other minerals lying within defendant's mining claims other than suction dredge mining, the effect of the statutory scheme is to deprive him of rights granted to him under federal law.

Put differently, and in the language of the hypothetical used by the Court in *Granite Rock*, if sections 5653 and 5653.1 are environmental regulations that are "so severe that a particular land use [in this case mining] . . . become[s] commercially impracticable" (*Granite Rock, supra,* at p. 587), then they have become de facto land use planning measures that frustrate rights granted by the federal mining laws and, thus, have become obstacles to the realization of Congress' intent in enacting those laws. If that is the case, as defendant alleges, the Fish and Game Code provisions at issue here are unenforceable as preempted by federal mining law.

While defendant has made a colorable argument to that end, we cannot determine on this record that, as a matter of law, the criminal provisions of section 5653, read in light of the provisions of section 5653.1, are rendered unenforceable because the California statutes have rendered the exercise of rights granted by the federal mining laws "commercially impracticable." (*Granite Rock, supra,* at p. 587.)

The trial court held that the relevant Fish and Game Code sections were not preempted by federal law and disallowed evidence relevant to the question before us. Having no evidence in the record relevant to the operative issues bearing on defendant's affirmative defense, we must return the matter to the trial court for further proceedings on the issue of preemption, admitting whatever evidence, and hearing whatever argument, the trial court, in its discretion, deems relevant and then ruling accordingly. Specifically, the trial court must address at least these two questions: (1) Does section 5653.1, as currently applied, operate as a practical matter to prohibit the issuance of permits required by section 5653; and (2) if so, has this de facto ban on suction dredge mining permits rendered commercially impracticable the exercise of defendant's mining rights granted to him by the federal government?

Remand is not only necessary because these questions cannot be answered by a review of the record of trial we have before us but also because it is fair to the defendant and to the People as each party may have evidence beyond the offer of proof and argument it wishes to offer beyond that which has thus far been offered in the trial court on the issue of federal preemption.

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court for further proceedings.

HULL, Acting P. J.

We concur:

ROBIE, J.

HOCH, J.

Filed 10/8/14

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Plumas)

THE PEOPLE, Plaintiff and Respondent, v. BRANDON LANCE RINEHART, Defendant and Appellant.	C074662 (Super. Ct. No. M1200659) ORDER OF PUBLICATION

APPEAL from a judgment of the Superior court of Plumas County, Ira Kaufman, Judge. Reversed and remanded.

Murphy & Buchal, James L. Buchal for Defendant and Appellant.

Pacific Legal Foundation, Damien M. Schiff and Jonathan Wood for Pacific Legal Foundation and The Western Mining Alliance as Amici Curiae on behalf of Defendant and Appellant.

Kamala D. Harris, Attorney General, Robert W. Byrne, Senior Assistant Attorney General, Gavin G. McCabe, Supervising Deputy Attorney General, Michael M. Edson, Marc N. Melnick and J. Kyle Nast, Deputy Attorneys General for Plaintiff and Respondent.

Center for Biological Diversity, Jonathan Evans and Saxton & Associates, Lynne R. Saxton for Karuk Tribe, Center for Biological Diversity, Friends of the River, Klamath Riverkeeper, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, California Sportfishing Protection Alliance, Foothill Angler's Coalition, North Fork American River Alliance, Upper American River Foundation, and Central Sierra Environmental Resource Center as Amici Curiae on behalf of Plaintiff and Respondent.

THE COURT:

The opinion in the above-entitled matter filed on September 23, 2014, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

HULL, Acting P. J.

ROBIE, J.

HOCH, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rinehart**

No.: **C074662**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550.

On November 17, 2014, I served the attached **Petition for Review** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Oakland, California, addressed as follows:

Clerk, Court of Appeal of the State of California
Third Appellate District
Stanley Mosk Library and Courts Building
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Clerk, Plumas County Superior Court
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520 Main Street, Room 404
Quincy, CA 95971

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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 November 17, 2014, at Oakland, California.

Ida Martinac
Declarant

Signature