**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

---

No. 16-35262

---

JOSHUA CALEB BOHMKER; LARRY COON; WALTER R. EVENS; GALICE MINING DISTRICT; JASON GILL; JOEL GROTHE; J.O.G. MINING LLC; MICHAEL HUNTER; MICHAEL P. LOVETT; MILLENNIUM DIGGERS; WILLAMETTE VALLEY MINERS; DON VAN ORMAN,

Plaintiffs – Appellants,

v.

STATE OF OREGON, ELLEN ROSENBLUM, in her official capacity as the Attorney General of the State of Oregon; and MARY ABRAMS, in her official capacity as the Director of the Oregon Department of State Lands,

Defendant – Appellees,

ROGUE RIVERKEEPER; PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; OREGON COAST ALLIANCE; CASCADIA WILDLANDS; NATIVE FISH SOCIETY; CENTER FOR BIOLOGICAL DIVERSITY,

Intervenor – Appellees.

---

Appeal from the United States District Court for the District of Oregon
Honorable Magistrate Judge Mark D. Clarke

---

# OPENING BRIEF OF PLAINTIFFS - APPELLANTS

---

James L. Buchal, OSB No. 921618
Murphy & Buchal LLP
3425 SE Yamhill Street, Suite 100
Portland, OR 97214
Telephone: 503-227-1011
E-mail: jbuchal@mbllp.com

July 14, 2016

## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellant J.O.G. Mining LLC is an Oregon limited liability company owned by Appellant Joel Grothe. Appellant Willamette Valley Miners is an Oregon nonprofit corporation and membership association in which individual members share the right to utilize mining claims. Appellant Millennium Diggers is a non-corporate membership association in which individual members share the right to utilize mining claims. Appellant Galice Mining District is a non-corporate local governing body for Oregon miners within the District. The remaining Appellants are all individuals. No Appellant has any parent corporation, and no publicly-held corporation owns any portion of any Appellant.

I certify under penalty of perjury that the foregoing is true and correct.

Dated: July 14, 2016.

*s/ James L. Buchal*
James L. Buchal, OSB No. 921618
Counsel for Plaintiffs - Appellants

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Rules and Regulations**

**Other Authorities**

## Jurisdictional Statement

The Honorable Magistrate Judge John D. Clarke, trying the case by consent, had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because this case concerns the State of Oregon's attempt to outlaw mining on federal land, raising federal questions. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 as an appeal from the Magistrate Judge's Final Judgment of March 29, 2016 (ER6), because appellants (hereafter, the "Miners") timely filed their Notice of Appeal on April 5, 2016 (Excerpts of Record of Plaintiff-Appellants, at 1 ("ER1").

## Statement of the Issues Presented for Review

1. Do Miners have standing to challenge Oregon Senate Bill 838 ("SB 838"), a law banning mining? (Point I)

2. Did the Magistrate Judge err in declining to hold that SB 838 was preempted by federal law as an obstacle to the accomplishment of the full purposes and objectives of Congress? (Point II(B))

3. Did the Magistrate Judge err in refusing to hold that SB 838 was a land use restriction preempted by federal law because Congress occupied the field of land use planning for federal land? (Point II(D)

4. Did the Magistrate Judge err in finding no genuine issue of material fact concerning the question whether SB 838 stood as an obstacle to the accomplishment of the full purposes and objectives of Congress? (Point III)

## Statement of the Case

### A. Statement of Facts.

The multiple statutes through which Congress has articulated a national imperative to develop mineral resources on federal lands free of undue restrictions, and carefully confined any state role in federal land use planning, are addressed in Point II *infra*. The State of Oregon, in disregard of federal law and policy, simply outlawed all motorized mining in zones throughout Oregon that included federal lands and federal mining claims granted to the Miners and others under federal law.

#### 1. SB 838's Ban on Mining.

SB 838 is styled as a moratorium on mining, a classic land use control device. The first sentence of § 2(1) of the Bill declares that

> "[A] moratorium is imposed until January 2, 2021, on mining that uses any form of motorized equipment for the purpose of extracting gold, silver or any precious metal from placer deposits of the beds or banks of waters of this state, as defined in ORS 196.800, or from other placer deposits, that results in the removal or disturbance of streamside vegetation that may impact water quality." (ER159.)

"Waters of this state" is defined in ORS 196.800 to include essentially all water bodies in the State, without regard to federal lands. "Beds or banks" are not defined by statute, but the rules of the Oregon Division of State Lands provide an

expansive definition:

> "'Beds or Banks' means the physical container of the waters of this state, bounded on freshwater bodies by the ordinary high water line or bankfull stage, and in tidal bays and estuaries by the limits of the highest measured tide. The 'bed' is typically the horizontal section and includes non-vegetated gravel bars. The 'bank' is typically the vertical portion."

OAR 141-085-0510(9); *see also* OAR 141-085-0510(8) (defining "beds").

The second sentence of § 2(1) of the Bill declares that:

> "The moratorium applies up to the line of ordinary high water, as defined in ORS 274.005, and 100 yards upland perpendicular to the line of ordinary high water that is located above the lowest extent of the spawning habitat in any river and tributary thereof in this state containing essential indigenous anadromous salmon habitat, as defined in ORS 196.810, or naturally reproducing populations of bull trout, except in areas that do not support populations of anadromous salmonids or naturally reproducing populations of bull trout due to a naturally occurring or lawfully placed physical barrier to fish passage." (ER159.)

In short, the ban covers not only the "beds" and "banks" of water bodies throughout the State, but also 100 yards upland of many areas.[1] We define the areas where motorized mining is prohibited as the "Prohibited Zones".

[1] The record reflects that vast areas of the state have been classified as so-called "essential indigenous anadromous salmon habitat," but many of the areas so designated are not anadromous salmon habitat at all, much less "essential". (*E.g.*, ER116-117: Kitchar Decl. ¶¶ 9-10.) Section 2(4) of SB 838 protects and promotes such errors by providing that "[a]ny maps developed by the State Department of Fish and Wildlife, or any other state agency, that delineate the area of the moratorium established by subsection (1) of this section are not subject to the rulemaking requirements of ORS chapter 183." (ER160.)

To the extent that there may be areas within Oregon where placer deposits of precious metals are present which are not in Prohibited Zones, § 2(3) of the Bill further establishes a "limit [on] individual permits issued under ORS 196.810 and the general authorizations issued under ORS 196.850 to not more than 850 permits and authorizations for mining . . . at any time during the moratorium period".[2] (ER160.) This provision creates, in substance, a lottery to authorize the exercise of federal mining rights anywhere within the State.

The Bill became operative on January 2, 2016 (*id.* § 3), and miners daring to exercise the federal statutory rights described herein thereafter risk prosecution for a Class A misdemeanor under Oregon law (*id.* § 5). Conviction of a Class A misdemeanor subjects a miner to up to one year of imprisonment (ORS 161.615), and a fine of up to $6,250 or double the value of precious metals recovered through unlawful mining (*see* ORS 161.635).

[2] A handful of very large-scale mines are permitted under other provisions of Oregon law (*see* ER97: Riggs Decl. ¶ 5) and exempted from the moratorium. (*See* ER160: § 2(2) of SB 838.) The Magistrate Judge properly held that this "permitting scheme is not at issue in this litigation". (ER12: Op. at 6 n.1.) All of the Miners are engaged in small-scale operations as to which this permitting scheme is inapplicable. (ER102: Van Orman Decl. ¶ 5; ER138: Gill Decl. ¶ 5; ER129: Hunter Decl. ¶ 6; ER150: Coon Decl. ¶ 6; ER135: Grothe Decl. ¶ 8; ER143: Evens Decl. ¶ 7; ER217: Bohmker Decl. ¶ 7; ER111: Lovett Decl. ¶ 5.)

The State of Oregon asserts that SB 838 was enacted to protect the natural environment pending review of the State's regulatory regimes. Section 8 of the Bill called for the Governor's office, in consultation with other agencies and "affected stakeholders" to "propose a revised state regulatory framework". However, a report concerning that framework was completed in November 2014 (ER164: Buchal Decl. Ex. 2), and no action was ever taken to implement the proposals in it and lift the moratorium (ER153: *id.* ¶ 3).

**2. The Miners and Their Interests.**

The Miners are prospectors and miners seeking to exercise their federally-granted statutory rights to develop the mineral resources on public lands. Most own federal mining claims on federal land located in Oregon. (ER102: Van Orman Decl. ¶ 2; ER138: Gill Decl. ¶ 2; ER129: Hunter Decl. ¶ 4; ER150: Coon Decl. ¶ 2; ER134: Grothe Decl. ¶ 5; *see also* ER142: Evens Decl. ¶ 5 (agreement to purchase such a claim).) These claims are registered with the U.S. Bureau of Land Management, and under Oregon law "are real estate," such that "[t]he owner of the possessory right thereto has a legal estate therein within the meaning of ORS 105.005". ORS 517.080. As set forth below, SB 838 attempts to limit the mining use of such private property within Oregon, operating as a land use restriction on federal and other lands within Oregon.

The Miners all own motorized equipment they use in recovering gold from their claims. (ER102: Van Orman Decl. ¶ 3; ER138: Gill Decl. ¶ 5; ER129: Hunter Decl. ¶ 2; ER150: Coon Decl. ¶ 3; ER134: Grothe Decl. ¶ 6; ER142: Evens Decl. ¶ 4; ER216: Bohmker Decl. ¶ 3.) Many of the Miners own suction dredges, Forest Service regulation of which has been previously reviewed by this Court. *See, e.g.*, *Siskiyou Regional Education Project v. U.S. Forest Service*, 565 F.3d 545, 549 (9th Cir. 2009) ("gold miners work the streams and rivers within the forest with 'suction dredges,' machines that separate gold from streambed material using a gasoline-powered motor that draws streambed material up through a flexible, two-to-four-inch intake hose and then discharges the material back into the stream"). However, other forms of motorized equipment are involved as well.

All the Miners require the use of motorized equipment to recover more than trace quantities of gold from their claims (and while prospecting). (ER102: Van Orman Decl. ¶ 3; ER138: Gill Decl. ¶ 4; ER129: Hunter Decl. ¶ 5; ER150: Coon Decl. ¶ 4; ER134-135: Grothe Decl. ¶¶ 6-7; ER143: Evens Decl. ¶ 6; ER216: Bohmker Decl. ¶ 5.) SB 838 thus destroys the ability of the Miners to continue their mining operations, and deprives them of the income and wealth they would otherwise obtain by such mining. (ER102: Van Orman Decl. ¶ 4; ER129: Hunter Decl. ¶ 5; ER150: Coon Decl. ¶ 5; ER134-135: Grothe Decl. ¶¶ 6-7; ER143: Evens Decl. ¶ 6; ER217: Bohmker Decl. ¶ 6; ER111: Lovett Decl. ¶ 4.) SB 838

also destroys the value of the equipment and the federal mining claims themselves. (ER125: Kitchar Decl. ¶¶ 34-35; ER107: McCracken Decl. ¶ 11; ER138: Gill Decl. ¶ 4.) Because of old age, some miners are likely to die or lose the physical ability to mine during the term of the prohibition (*see* ER150: Coon Decl. ¶ 5)—even assuming it is not indefinitely extended as was the case in California (*see* ER153: Buchal Decl. ¶ 4).

Two of the Miners are in the business of selling motorized and other mining equipment, which is utilized in the mining operations prohibited by SB 838. (ER134: Grothe Decl. ¶ 2; ER142: Evens Decl. ¶ 2.) They were already suffering lost sales even before SB 838's prohibitions on the use of the equipment become effective. (ER134: Grothe Decl. ¶ 2; ER142: Evens Decl. ¶ 2.) One of these plaintiffs suffers disabling conditions that also makes motorized use of equipment essential. (ER143: Evens Decl. ¶ 6.)

Two of the Miners are associations, which represent the interests of their members in small-scale mining. (ER130: Hunter Decl. ¶ 7; ER146: Darnell Decl. ¶ 2.) Not only are the activities of their members threatened, but Senate Bill 838 threatens the continued existence of the associations as well, for there is no use in mining associations when what their members do has been banned. (ER130: Hunter Decl. ¶ 10; ER145-146: Darnell Decl. ¶ 5.) One Miner is a mining district, a self-regulatory organization whose rules are given effect pursuant to 30 U.S.C.

§ 22, which approves "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". (ER220: Barclay Decl. ¶ 2.)

One Miner does not hold mining claims, but exercises rights under federal mining law to prospect for such claims upon public lands which are, pursuant to 30 U.S.C. § 22, "free and open" for such mining. (ER215-216: Bohmker Decl. ¶ 1-2.)

In short, the effect of SB 838 is not only to outlaw the federally-authorized mining activities of the Miners (and their members), but also to injure the industry of manufacturing and selling small-scale motorized mining equipment.[3]

**B. Procedural History.**

The Miners filed their action on October 20, 2015, and promptly moved for summary judgment on November 30, 2015. The State sought and obtained an order extending its time to respond to the motion to February 5, 2016 (*see* District Court Docket No. ("Dkt. No.") 39: 12/9/15 Order), which the Magistrate Judge

[3] This Court can take judicial notice of the existence of such an industry as evidenced in numerous manufacturer's websites, including but not limited to, http://jogmining.com (operated by plaintiff J.O.G. Mining LLC); http://www.keeneeng.com; http://hecklerfabrication.com; http://www.angusmackirk.com; http://www.dahlkedredge.com; or http://www.goldcube.net; a simple Google search will find many more.

granted, despite a showing of prejudice to the Miners from delay (*see* Dkt. Nos. 42 & 43: Motion for Reconsideration & supporting declaration). To expedite the case, the Miners consented to the intervention of certain environmental parties (hereafter, "Intervenors"). (*See* Dkt. Nos. 10 & 32.) All parties consented to the Magistrate Judge's presiding over the case to expedite appellate review regarded as inevitable.

On March 25, 2016, the Magistrate Judge issued a written opinion denying the Miners' motion for summary judgment and granting the State's motion. (ER7.) The Magistrate Judge concluded that there was no obstacle to federal mining law and policy because the mineral deposits "remain 'free and open' to mineral development by means other than the use of motorized equipment". (ER23: Op. at 17.) On March 29, 2016, final judgment was entered. (ER6.) The Miners timely filed their Notice of Appeal on April 5, 2016. (ER1.)

## Summary of Argument

A threshold issue raised by the State of Oregon, and properly resolved adversely to it by the Magistrate Judge, is whether the Miners have standing to challenge SB 838's ban on motorized mining. The Miners easily demonstrate such standing.

The Miners also easily demonstrate that a ban on motorized mining that extends to federal lands and federal mining claims is preempted by federal law,

under both "field" preemption and "obstacle" preemption. In evaluating the merits of the Miners' federal preemption claim, it is important to understand that in a context where Congress legislates under the Property Clause, in an area of longstanding federal concern and Congressional activity, there is no presumption against federal preemption.

A large number of cases strike down state-law-based prohibitions on mining on federal lands as obstacles to the early and broad Congressional purpose, set forth in the 1872 Mining Law, as amended, that federal lands should be "free and open" for mining. Review of the whole evolution of these statutes confirms not merely a powerful Congressional policy to promote the development of minerals on federal land, but also to limit regulation based on environmental considerations to the avoidance of *unreasonable* or *unnecessary* impacts.

In substance, Congress has recognized that minerals can only be extracted from where they are found, and that some level of adverse environmental impact is unavoidable, but necessary in the national interest. A state's contrary judgment that mining must simply be prohibited—rather than reasonably regulating impacts—stands as a forbidden obstacle to the accomplishment of Congressional purposes.

A second theme that emerges from a review of the federal statutes is that Congress intends the federal government to have the last word in regulating the use

of federal lands. Congress even provided specific mechanisms by which states might petition federal authorities to ban mining—action patently inconsistent with any Congressional intent that states could lawfully just ban it themselves. These statutes—particularly the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1785, and the series of statutes culminating in the National Forest Management Act (NMFA), 16 U.S.C. § 1600-1614, occupy the field of planning uses for federal land and leave no role for state-law-based land use regulation barring particular uses on federal land.

The Magistrate Judge sidestepped all these Congressional objectives and statutory structures by positing that Congress intended to authorize any and all restrictions on mining that might be characterized as motivated by a desire to protect the environment. The Supreme Court case of *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), does affirm that a state may operate a reasonable, permit-based system to mitigate environmental impacts and enforce general pollution standards. However, SB 838 is not such a permit system; it shut down, among other things, an operational Oregon permit system to enforce state water quality standards, and substituted a flat prohibition. Congressional recognition that states may enforce water quality standards does not permit a state to set aside the very standards under which an activity is permitted, and simply prohibit the activity.

The Magistrate Judge ultimately rejected obstacle preemption by articulating an extraordinarily-limited conception of federal policy merely requiring that federal lands "remain 'free and open' to mineral exploration and development," and then finding, contrary to the sworn testimony in the record, that SB 838 posed no obstacle to this objective because mining might proceed "by means other than the use of motorized equipment". (ER23: Op. at 17.) At the least, the Miners raised genuine issues of material fact sufficient to bar summary judgment for the State through testimony that motorized equipment was essential to extract the minerals on their claims, or even to discover them.

The right result, however, is to enter summary judgment for the Miners. The mere fact that non-motorized techniques of mining exist does not come to grips with the fact that the mineral deposits owned or sought by the Miners were underwater and could only be extracted with modern, motorized equipment. Obstacle preemption does not require an insurmountable obstacle, and the "accomplishment of the full purposes and objectives" of federal law is not satisfied by speculation that some tiny fraction of the Congressional objectives might somehow still be accomplished.

## Standard of Review

This Court reviews a district court's grant of summary judgment *de novo*. *Walls v. Central Costa County Transit Authority*, 653 F.3d 963, 966 (9th Cir.

2011). While the parties cross-moved for summary judgment, this Court must still confirm that "when, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact". *Avery v. First Resolution Mgmt. Corp.*, 568 F.3d 1018, 1021 (9th Cir. 2009).

In the context of reviewing a decision on cross-motions for summary judgment concerning federal preemption, both the "district court's decision regarding preemption" and its "interpretation and construction of a federal statute" are reviewed *de novo*. *Lindsay v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065, 1068 (9th Cir. 1999). So too is the question of standing reviewed *de novo*. *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004).

## Argument

### I. THE MINERS HAVE STANDING TO CHALLENGE LAWS BANNING MINING.

The Miners have all three elements required for standing under Article III: (1) SB 838 caused "injury-in-fact" to a protected interest; (2) the injury was "actual" or "imminent"; and (3) the injury is easily redressed through a declaration that SB 838 is unconstitutional. *See generally National Audubon Society v. Davis*, 307 F.3d 835, 848 (9th Cir. 2002) (trappers had standing to challenge trapping ban). Those Miners representing associations or mining districts also had standing to pursue their members' interests. *Id.* The Magistrate Judge properly found that

the Miners (or at least one Miner) had standing to challenge Oregon's ban on mining. (ER15: Op. at 9.)

The State argued, in substance, that the injury was conjectural because each miner required federal approval before mining, and had not shown such approval. The Magistrate Judge specifically found at least one Miner with specific federal agency approval of his operations, which operations were barred under SB 838. (*Id.*) It is hard to conceive of a more direct conflict between state and federal law.

More generally, however, the activities of most of the Miners are sufficiently small in scale to excuse them from any specific agency authorization—they are authorized by the mining laws themselves. Specifically, with respect to Miners operating on Forest Service land, 36 C.F.R. § 228.4(a)(1)(ii), (v) & (vi) provides that miners need not even provide notice of intent to the Forest Service concerning their operations.[4] The Forest Service has interpreted this rule with respect to the

[4] The Forest Service initially promulgated the Part 228 (then Part 252) Organic Act regulations as a proposed rule in 1973. 38 Fed. Reg. 34,817 (Dec. 19, 1973). This provoked a Congressional oversight hearing during which members of Congress made clear their opposition to Forest Service mining regulations which would entangle small-scale miners in environmental reviews which would interfere with mineral development. *See generally* Proposed Forest Service Mining Regulations: Hearings before the Subcommittee on Public Lands, House Committee on Interior and Insular Affairs, 93rd Cong., 2d Sess. 1-4 (Mar. 7-8, 1974). Testimony before the Subcommittee confirmed that even back in 1974, it would often be impossible to complete environmental review procedures during "length of the field season" (*id.* at 37); the industry noted, however, "no objection to a notification procedure which would alert the Forest Service to the expected activities" (*id.* at 41).

operation of suction dredges, and determined that "the need for the prior submission of a notice of intent to operate . . . must be evaluated on a site-specific basis". 70 Fed. Reg. 32,720 (June 6, 2005).

As to BLM Land, where some Miners hold claims, they can determine that their operations involve activity classified as "casual use" under 43 C.F.R. § 3809.10(a), which requires no notice to BLM, though BLM has demanded "contact" to determine if "notice or a plan" is needed for suction dredge operations (43 C.F.R. § 3809.31(b)(2)). In addition, those Miners selling motorized equipment have standing without regard to approval of the mining itself. *Cf. Davis*, 307 F.3d at 855-56 (economic injuries to trappers supports standing).

The unfounded speculation concerning other possible restrictions on the Miners advanced by the State of Oregon should not distract the Court from the direct conflict and frustration of Congressional objectives SB 838 poses. The

---

The Forest Service initially defended the position that each and every mineral operation would require an approved plan of operations. *See id.* at 10 (Testimony of Forest Service Chief); *see also proposed* 36 C.F.R. § 252.7, 38 Fed. Reg. at 34,818 (with certain exceptions, "[n]o operations shall be conducted unless they are in accordance with an approved plan of operations . . ."). Thereafter, the Forest Service conformed to Congressional intent and amended the proposed regulations to add provisions to provide flexibility for non-significant operations. 39 Fed. Reg. 26,038, 26,039 (July 16, 1974) (proposed 36 C.F.R. § 252.4). The final rule was adopted August 28, 1974. 39 Fed. Reg. 31,317 (Aug. 28, 1974).

Miners easily demonstrate standing. After all, Oregon acted to ban the mining *because the mining was proceeding consistent with federal law*, not as some sort of belt and suspenders operation to halt operations already barred under federal law.

## II. SB 838 IS PRE-EMPTED BY FEDERAL LAW.

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Congress, through the Property Clause of the U.S. Constitution, "exercises the powers both of a proprietor and legislator over the public domain". *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). It has "power over the public lands 'to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them'". *Id.* (quoting *Utah Power & Light v. United States*, 243 U.S. 389, 406 (1917)). The Supreme Court has repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations". *Id*. at 539 (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

The leading case on the preemptive effects of the federal law with regard to the exercise of federal mining rights is *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987). By a 5-4 decision, the Supreme Court permitted the State of California to issue permits for mining on federal land, based on

California's repeated representations that, unlike Oregon, it did not intend to prohibit mining. *See id.* at 586.

The Court began by noting that "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted". *Id.* at 581. The *Granite Rock* Court correctly "assume[d] that the combination of the [National Forest Management Act] NFMA and the [Federal Land Policy and Management Act] FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands" (*id.* at 585), in substance regarding it as obvious that these statutes occupied the field of regulating the use of federal lands. Unlike the California permitting scheme involved in *Granite Rock*, SB 838 is a land use statute zoning out the use "motorized mining" in Prohibited Zones throughout the State.

The *Granite Rock* Court also noted that even where Congress had not occupied the field of regulation, as with land use regulation, "state law is still pre-empted . . . where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress". *Id.* at 581. Inasmuch as the Granite Rock Company refused to apply for a permit at all, the Supreme Court could not assess whether any permit conditions imposed by the State to protect the environment would in fact pose an impermissible obstacle to the objectives of federal mining law. *Id*. at 588-89.

Here, however, the prohibitory nature of Senate Bill 838 is clear. Even if Senate Bill 838 were not categorically preempted as forbidden land use regulation—as it plainly is—SB 838 remains preempted because it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress". *Granite Rock*, 480 U.S. at 581. The Miners need not demonstrate that SB 838 makes it impossible to conduct any and all mining; they merely need demonstrate the obvious proposition that banning motorized equipment is an obstacle to the full and complete accomplishment of Congressional objectives.

### A. In this Context, there Is No Presumption Against Preemption and Congressional Intent to Preempt State Law Need Not Be Explicit.

Supporters of SB 838 have attempted to invoke a presumption against federal preemption, but no such presumption appears in cases involving the Property Clause or generally "when the State regulates in an area where there has been a history of significant federal presence". *United States v. Locke*, 529 U.S. 89, 108 (2000); *see also Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp.*, 642 F.2d 527, 534-35 (D.C. Cir. 1980) ("in cases involving local laws that impact directly on federal operations . . . or on the use of federal property, where considerations of sovereignty come into play[, when state] . . . laws substantially impede federal activities . . . , the Court has treated them as presumptively *invalid* under the Supremacy Clause"; emphasis added).

Thus *Granite Rock* itself makes no reference to any presumption against federal preemption. Nor do *Arizona v. United States*, 132 S. Ct. 2492 (2012) (no mention of presumption in immigration context); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (no mention in national energy policy context); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n,* 461 U.S. 190 (1983) (same); *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (Property Clause); *Sperry v. Florida*, 373 U.S. 379 (1963) (patents).

The Magistrate Judge cited a passing observation in *Granite Rock* that the 1872 Mining Act "expressed no legislative intent on the as-yet rarely contemplated subject of environmental regulation" (ER16: Op. at 10 (citing *Granite Rock*, 480 U.S. at 582)),[5] but federal preemption does not depend upon any express Congressional recognition of a preemption issue at all. As the Supreme Court has explained, "[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will

[5] The Supreme Court was incorrect, in the sense that even the original 1866 Act had addressed the most significant environmental consequences of mining: "whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage". 30 U.S.C. § 51. Congress' allowance of actions for off-site injuries to property was consistent with early nuisance claims against hydraulic mining, discussed *infra* n.7.

dependably apply . . .". *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000). The law of preemption in the mining context is precisely such well-settled law.

### B. Congressional Objectives in the Mining Laws, as Amended, and SB 838's Interference with Them.

The Magistrate Judge failed to analyze the entire body of federal law beyond the 1872 Mining Act bearing on the question of preemption. This was clear error in a context where federal preemption "turns on the peculiarities and special features of the federal regulatory scheme in question" (*Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973)) and only full consideration of that scheme, set forth in "an almost impenetrable maze of arguably relevant legislation in no less than a half-dozen statutes, augmented by the regulations of two Departments of the Executive" (*Granite Rock*, 480 U.S. at 606 (Powell, J., dissenting)), can properly resolve the preemption question.

#### 1. The 1872 Mining Law, as amended, and the case law finding preemption based on it.

The 1872 Mining Law, 30 U.S.C. § 22, provides:

> ". . . 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."

Numerous federal and state courts have found 30 U.S.C. § 22's "free and open" language to create a Congressional mining objective inconsistent with state-law based prohibitions of mining activity.

In the leading case of *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), the Eighth Circuit struck down a "county ordinance prohibiting the issuance of any new or amended permits for surface metal mining within the Spearfish Canyon Area". *Lawrence*, 155 F.3d at 1006. As the Eight Circuit explained:

> "The ordinance's *de facto* ban on mining on federal land 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 a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution. *The ordinance is prohibitory, not regulatory, in its fundamental character.* The district court correctly ruled that the ordinance was preempted."

*Id.* at 1011 (emphasis added). So too is SB 838 "prohibitory, not regulatory, in its fundamental character". *Id.*

Consistent with *Lawrence*, states need not prohibit any and all mining to interfere with Congressional objectives. Even prohibitions on the use of particular

mining methods—as opposed to regulation of the use thereof—create an obstacle to the full accomplishment of Congressional purposes. As the Supreme Court of Colorado explained in *Brubaker v. Board of County Commissioners*, 652 F.2d 1050 (Colo. 1982), when a county sought to prohibit core drilling to determine the validity of a claim,

> "the attempt by the Board to prohibit the appellants' drilling operations because they are inconsistent with the long-range plan of the County and with existing, surrounding uses reflects an attempt by the County to substitute its judgment for that of Congress concerning the appropriate use of these lands. Such a veto power does not relate to a matter of peripheral concern to federal law, but strikes at the central purpose and objectives of the applicable federal law. The core drilling program is directed to obtaining information vital to a determination of the validity of the appellants' mining claims. *Recognition of a power in the Board to prohibit that activity would contravene the Congressional determination that the lands are 'free and open to exploration and purchase,' 30 U.S.C. § 22, and so would 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' under the mining laws."*

*Brubaker*, 652 P.2d at 1056-57 (emphasis added). So too is the use of motorized equipment prohibited by SB 838 an unlawful attempt by Oregon to "substitute its judgment for that of Congress" concerning the appropriate use of federal lands.

Over and over, the courts have distinguished between state-law-based *prohibitions* on mining—struck down as preempted by 30 U.S.C. § 22 and other federal law—and specific, permit-based restrictions that are regulatory in character. Thus the Supreme Court of Idaho upheld a general permitting requirement under Idaho law where "[t]he Legislature does not seek to ban dredge

mining but merely to regulate it". *State ex rel. Andrus v. Click*, 97 Idaho 791, 803 554 P.2d 969 (Id. 1976).

Later, the United States Court of Appeals for the Federal Circuit reviewed a more specific subsequent Idaho *prohibition* on suction dredge mining (in a particular area) in *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984). The Federal Circuit had to find the state prohibition preempted to conclude that federal takings compensation might be available, and held:

> "Under the Act of May 1, 1872, plaintiffs had the property right to possess and mine to exhaustion the minerals located on their unpatented claims without payment of royalty. [Citations omitted.] Since it prohibited dredge mining on federal land, compliance with the 1977 Act would have made it impossible for plaintiffs to exercise rights theretofore granted by the mining laws. The Idaho Supreme Court has recognized that federal legislation necessarily overrides such a conflicting state law. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969, 974 (1976) (dictum)."

*Skaw*, 740 F.2d at 940. This property right to possess and mine to exhaustion includes "the right to a flow of income from production of the claim". *United States v. Locke*, 471 U.S. 84, 105 (1984), and the record here demonstrates that SB 838 fully destroys such rights of the Miners.

A pair of Oregon Court of Appeals cases also draw precisely the same distinction between prohibition and regulation. In *State ex rel. Cox v. Hibbard*, 31 Or. App. 269 (1977), the court upheld a permitting requirement, but in *Elliott v. Oregon Int'l Mining Co*., 60 Or. App. 474 (1982), the court struck down

ordinances "prohibiting surface mining in certain areas of the county . . . and which excluded mining as a permissible use". *Id.* at 477. The Court distinguished *Hibbard*, concluding that "Grant County cannot prohibit conduct which Congress has specifically authorized. That is the meaning of the Supremacy Clause." *Id*. at 481; *see also Brubaker*, 652 P.2d at 1056-57.

Most recently, the California Court of Appeal found preemption available as a potential defense against criminal prosecution for violation of a California ban on suction dredge mining, remanding for the development of factual issues. *People v. Rinehart*, 230 Cal. App.4th 419 (2014), *review granted*, 340 P.3d 1055 (Cal. 2015). A Superior Court judge appointed by the Judicial Council of California as Coordination Judge to handle a mass of civil litigation challenging the California ban on suction dredging has issued summary judgment finding the moratorium preempted by federal law as well, *In re Suction Dredge Mining*, No. JCPDS 4720 (San Bernardino Cty. Jan. 12, 2015) (ER193: Buchal Decl. Ex. 3; *see generally* ER153-155: Buchal Decl. ¶¶ 5-9 (outlining history of California litigation).).

In short, a large body of precedent strikes down state action prohibitory in character as opposed to regulatory in character, and compels the conclusion that prohibitions in the nature of SB 838 are preempted by federal law as obstacles to Congressional mining objectives. This Court has drawn the same distinction in a federal preemption case arising under the Mineral Lands Leasing Act: "The

federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress". *Ventura County v. Gulf Oil Corporation*, 601 F.2d 1080, 1084 (9th Cir. 1979).[6]

### i. The role of state law under the 1872 Mining Law, as amended.

Oregon contends that all the foregoing authority is simply wrong because Congress intended to authorize any and all state regulation by reference to mining "under regulations prescribed by law" in 30 U.S.C. § 22. This phrase, which does not refer to state law at all as utilized in § 22, addresses the means by which ownership of mineral deposits is to be obtained, with a primary focus on protecting the "local customs or rules of miners in the several mining districts". *See generally Jackson v. Roby*, 109 U.S. 440, 441-42 (1883) (explaining the origins of the statute and general practices to maintain possession of claims under rules set by miners).

This focus becomes even clearer when one examines other provisions of federal mining law that extend Congressional purposes beyond 30 U.S.C. § 22's command that "all valuable mineral deposits in lands belonging to the United

[6] This Court's *Ventura County* decision arguably goes further than *Granite Rock*, and would impose field preemption in the mineral leasing context, not merely obstacle preemption, but it remains controlling as to the preemption of prohibitory schemes under state law.

States" be "free and open". Congress determined to grant specific property rights to specific parcels for mineral development. *See* 30 U.S.C. §§ 26, 35. These statutes gave the locators of mining claims "the exclusive right of possession and enjoyment of all the surface" provided that they "comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States *governing their possessory title*" (emphasis added).

For as long as there has been federal mining law, courts have been interpreting 30 U.S.C. § 22, 26, & 35 in *pari materia* to evaluate the lawfulness of state statutes governing procedures through which miners may assert and retain property rights in the federal lands. *See, e.g., Union Oil Co. v. Smith*, 249 U.S. 337, 348 (1919) (noting "authority of the mining States to regulate the possession of the public lands in the interest of peace and good order"); *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 66 (1898) (noting that the statute allows title disputes, "except in cases affected by local customs and rules of miners, [to] be subject to the ordinary rules of the common law").

Early cases highlight the very limited purview of state law where mining on

federal land is concerned, and provide no role for states to prohibit mining.[7] In *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905), the Supreme Court, while upholding state and mining district law against challenges to its constitutionality, explained that "Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of" and that "Congress, having regard to the interests of this owner, shall, after prescribing the main and substantial conditions of disposal, [could] believe that those interests will be subserved if *minor and subordinate regulations* are entrusted to the inhabitants of the mining district or State in which the particular lands are situated". *Id.* at 126 (emphasis added).

---

[7] The State of Oregon has cited certain early equity decrees enjoining, as a nuisance, the discharge of massive quantities of hydraulic mining waste that injured downstream properties. *E.g., Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (C.C.D. Cal. 1884); *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884). *Woodruff* did not involve federal land or federal mining claims at all; the Court held that "the sale by the United States to a purchaser did not prevent the State from exercising whatever police power it may of right have over the subject". *Woodruff*, 18 F. at 810. Neither did *Gold Run*. *See Gold Run,* 66 Cal. at 151 (asserted right to dispose of debris "from custom" and "by prescription and the statute of limitations").

No inference can be drawn from these cases that Congress acquiesced to state power to prohibit mining outright on federal lands. To the contrary, Congress responded to these decisions by passing the Caminetti Act of 1893, establishing a California Debris Commission to underscore the degree to which mining should continue under reasonable regulatory conditions.

The Supreme Court explained that the role of the states in this context is to be "construed in subordination to the laws of Congress" with the state statutes being seen as "more in the nature of regulations under these [federal] laws than independent legislation." *Id.* at 125 (quoting 1 C. Lindley, American Law Relating to Mines and Mineral Lands, § 249 (3d ed. 1914)). Because of this,

> "State and territorial legislation, therefore, must be entirely consistent with the Federal laws, otherwise it is of no effect. The right to supplement Federal legislation conceded to the State may not be arbitrarily exercised; nor has the State the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the Congressional laws."

*Id.*[8] In banning any and all motorized mining in the Prohibited Zones, SB 838 is obviously "repugnant to the liberal spirit of the Congressional [mining] laws".

In short, Congress did not intend, through the 1872 Mining Law, as amended, to empower states to regulate mining *itself* on federal claims, but only to supplement federal procedures for establishing and determining ownership of interests in the public lands, and only to the extent not in conflict with federal law. *See also* 30 U.S.C. § 38 (giving effect to state limitations periods); *see generally*

[8] The State's power to regulate the disposal of public lands is also limited under the Oregon Admission Act, which provided that Oregon "shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof . . .". 11 Stat. 383 (1859).

1 Lindley § 76, at 117 (federal laws "circumscribe the field within which states may legitimately act").

#### ii. The general imperative to develop mineral claims.

In granting property rights to facilitate mineral development, Congress has also required that these property rights be exercised for mineral development, initially concerning itself with the "amount of work necessary to hold possession of a mining claim". 30 U.S.C. § 28. Indeed, miners are threatened with the loss of rights if they fail to utilize the property for mineral development. *See* 30 U.S.C. § 28; *see also* 43 U.S.C. § 1744(a). SB 838's restrictions on mining operations on federal claims are in direct conflict with the Congressional policies requiring such claims to be developed. Congress granted the Miners the power to develop the mineral deposits on their mining claims, and it is an elementary principle of federal preemption law that "Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted". *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 33 (1996).

### 2. The Multiple Use Act of 1955.

The Magistrate Judge discounted the Congressional objectives in the 1872 Mining Act, as amended, by reference to subsequent mining statutes such as the Multiple Use Act of 1955, 30 U.S.C. § 611-12. (ER9: Op. at 3.) This Act created a "right of the United States to manage and dispose of the vegetative surface

resources [of post-1955 mining claims] . . . and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States)". 30 U.S.C. § 612(b). However, the 1955 Act also reflected Congress'

> "insistence that this legislation not have the effect of modifying long-standing essential rights springing from location of a mining claim. Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator [*i.e.*, claimholders]."

*United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1281 (9th Cir. 1980). (quoting H. Rep. No. 730, 84th Cong., 1st Sess., at 10 (1955)).)

Properly understood, this Act *expands* the scope of preemption, for Congress commanded that the management actions of the United States be limited to actions which would not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto". 30 U.S.C. § 612(b). Congress knew that mineral development required express protection from competing interests because, unlike other human activities, mining cannot simply be moved elsewhere; some disturbance to surface resources cannot be avoided while still extracting minerals where they are found.

As this Court has explained, the Act serves as a substantive limitation on regulation of mineral development, holding that the regulatory authority of the Forest Service "is cabined by Congress' instruction that regulation not 'endanger

or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.'" *United States v. Backlund*, 689 F.3d 986, 997 (9th Cir. 2012). Another leading case is *United States v. Shumway*, 199 F.3d 1093 (9th Cir. 1999), which confirmed that mining use may be regulated, "but only to the extent that the regulations are 'reasonable' and do not impermissibly encroach on legitimate uses incident to mining and mill site claims". *Id*. at 1107. In prohibiting all motorized mining, SB 838 is manifestly a material and unreasonable interference with prospecting, mining and processing operations on the federal claims of the Miners and others, contrary to the Congressional imperative in 30 U.S.C. § 612(b).

Congress manifestly never intended to authorize the States to restrict mining in ways expressly forbidden to federal agencies managing federal lands. To the contrary, Congress provided a very limited role for state law in § 612(b), stating that the limitations on mining regulation should not be:

> "construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claims."

30 U.S.C. § 612(b). Quite plainly, the state law that Congress did not expect to be displaced on federal mining claims on federal land was State water law. *Expressio unius est exclusio alterius*; had Congress wanted to confer a general and

unrestricted power on the states to regulate mining operations, Congress could have done so. It did not.

### 3. The Mineral Policy Act of 1970.

The Magistrate Judge also made reference to the Mineral Policy Act of 1970, 30 U.S.C. § 21a. (ER9: Op. at 3.) This Act too supports preemption, for in it Congress reiterated that the goal of environmental protection must be tempered by the simple fact that minerals can only be extracted where they are found, and that adverse impacts on the environment are inevitable in that process. Specifically, the Act established a goal for "orderly and economic development of domestic [i] mineral resources, [ii] reserves, and [iii] reclamation of metals and minerals to help assure satisfaction of [i] industrial, [ii] security and [iii] environmental needs . . .". 30 U.S.C. § 21a(2). The careful tripartite structure of this policy command was no accident. Development of resources was to assure industrial needs, development of reserves was to meet security needs, and development of reclamation was to meet environmental needs.

Congress further explained these policies in § 21a(4), seeking "development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to *lessen* any adverse impact of mineral extraction and processing upon the physical environment . . ." (emphasis added). Congress commanded that the means of "lessen[ing] any adverse [environmental]

impact" was to be "reclamation" and (consistent with 30 U.S.C. § 612(b)), reasonable regulation that did not materially or unreasonably interfere with mining. *Lessening* impact is a regulatory action; eliminating it through prohibition of mining is a forbidden horse of an entirely different color. Congressional objectives have at all times been directly in conflict with mining bans.

Moreover, in the Mineral Policy Act Congress sought "the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries". 30 U.S.C. § 21a(1).[9] Undisputed expert testimony before the Magistrate Judge confirmed that economically sound and stable industries cannot survive lengthy and arbitrary moratoriums on their business. (ER124: Kitchar Decl. ¶ 31; ER107-108: McCracken Decl. ¶ 12.) SB 838's direct attack on the stability of the small-scale motorized mining industry is obviously an obstacle to the Congressional objectives set forth in 30 U.S.C. § 21a(1). *See also Lawrence County*, 155 F.3d at 1010-11 ("Federal law also encourages economical extraction and use of these minerals").

[9] Congress reiterated these goals in 1980, directing the Secretary "to act immediately within the Department's statutory authority to attain the goals contained in section 21a of this title". 30 U.S.C. § 1605(1).

### 4. The Surface Mining Control and Reclamation Act of 1977 (SMCRA).

More recently, Congress specifically considered and addressed a state role in prohibiting mining on federal lands. Section 601 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) authorizes the Secretary of the Interior to review whether an area "may be unsuitable for mining operations" because of "an adverse impact on lands used primarily for residential or related purposes". 30 U.S.C. § 1281(a) & (b)). The Governor of a state or "[a]ny person having an interest which is or may be adversely affected" may initiate the review process (30 U.S.C. § 1281(c)). If the Secretary determines that the benefits resulting from a designation outweigh the benefits of mineral development, he may either withdraw the area from mineral entry or limit mining operations (30 U.S.C. § 1281(f)).

*Congress' provision of this and other federal processes for resolving state/federal conflict over mining on federal land is utterly inconsistent with any Congressional intent to allow states to simply prohibit the mining themselves.* In short, each and every facet of the many laws passed by Congress concerning mineral development on federal lands compels the conclusion that prohibitory restrictions such as SB 838 are preempted as a matter of law.

### C. Congressional Objectives in the General Laws Pertaining to Management of Federal Lands.

#### 1. National Forest Legislation.

Some of the Miners' claims are located on National Forest Lands. The Organic Act permitted the Forest Service to make rules and regulations "for the protection against destruction by fire and depredations upon the public forests and national forests". 16 U.S.C. § 551. But mining itself was not such a "depredation," for Congress also specified in 16 U.S.C. § 478 that:

> "Nothing in sections . . . 551 of this title shall . . . prohibit any person from entering upon such national forests for all proper and lawful purposes, *including that of prospecting, locating, and developing the mineral resources thereof.* Such persons must comply with the rules and regulations covering such national forests". (Emphasis added).

Over and over again, Congress has made it clear that *prohibition* of mining on federal lands is not a permissible policy choice.

Subsequent federal statutes maintained the special protection for mineral uses against the regulators managing federal lands. Congress' first significant foray into forest planning came in the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-532 (MUSYA). In that Act, Congress expressly provided that "[n]othing herein shall be construed so as to affect the *use or administration of the mineral resources* of national forest lands". 16 U.S.C. § 528 (emphasis added). The statutory focus of Forest planning remained on "the various renewable surface

resources of the national forests". 16 U.S.C. § 531 (definition of "multiple use"). Mineral deposits, of course, are not renewable resources.

Next came the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. § 1600-14, which was substantially amended in 1976, Pub. L. 94-588, 90 Stat. 2949, and is now commonly identified as the National Forest Management Act (NFMA). The portion of the NFMA governing forest planning is set forth in 16 U.S.C. § 1604, which begins by declaring that the Secretary shall promulgate "land and resource management plans" "[a]s part of the [Renewable Resource] Program provided for by section 1602 of this title". 16 U.S.C. § 1604(a). Forest Service plans are to "be developed in accordance with the principles set forth in the Multiple-Use Sustained-Yield Act of June 12, 1960 . . .". 16 U.S.C. § 1602. Such principles necessarily include the statutory limitation that none of the resulting plans may "affect the use or administration of the mineral resources of national forest lands". 16 U.S.C. § 528.

The role of states is expressly limited to "adequate notice and an opportunity to comment upon the formulation of standards, criteria and guidelines applicable to Forest Service programs". 16 U.S.C. § 1612(a). These statutes leave no room for state laws purporting to establish controlling criteria for National Forest Land use, much less state-law bans on mining National Forest Lands.

Pursuant to its Organic Act authority, the Forest Service has issued the 36 C.F.R. Part 228 regulations discussed in Point I, *supra*, regulating mining on federal lands. Congress asked the National Research Council to reassess the adequacy of this regulatory framework. With respect to the operation of suction dredges, the most significant form of small-scale mining prohibited by Senate Bill 838 (*see* ER120-121: Kitchar Decl. ¶¶ 19-21), the Committee reported back that "BLM and the Forest Service are appropriately regulating these small suction dredge mining operations under current regulations as casual use or causing no significant impact, respectively". NRC, *Hardrock Mining on Federal Lands* 96 (Nat'l Academy Press 1999). In short, Congress continues to exercise oversight to ensure that regulation of small-scale mining operations avoids material interference with such operations as prohibited by 30 U.S.C. § 612(b).

### 2. The Federal Land Policy and Management Act of 1976 (FLPMA).

Some of the Miners' claims are located on land under the jurisdiction of the BLM, governed by FLPMA, which establishes a federal land use management process for such "public lands" (43 U.S.C. § 1702(e)). Section 202(a) of FLPMA authorizes the Secretary of Interior to "develop, maintain, and, when appropriate, revise land use plans which provided by tracts or areas for the use of public lands". 43 U.S.C. § 1712(a).

FLPMA specifically directs the Secretary, in developing federal plans, to coordinate with planning with state and local government. 43 U.S.C. § 1712(c)(9). It also provides: "Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and purposes of this Act," though the Secretary must only keep apprised of such plans "to the extent he finds practical". *Id.* The legislative history leaves no doubt that Congress intended to preserve exclusive federal control over federal land use decisions. The Conference Report explains:

> "The conferees adopted a consolidation of provisions . . . with revisions making clear that *the ultimate decision as to determining the extent of feasible consistency between BLM plans and such other plans rests with the Secretary of Interior*. This affirmed the need to maintain the integrity of governing Federal laws and Congressional policies.

H. Conf. Rep. No. 94-1724, 94th Cong., 2d Sess. 58 (1976) (emphasis added); *see also* H. Rep. No. 94-1163, 94th Cong., 2d Sess. 5, 7 (1976); S. Rep. No. 94-583, 94th Cong., 1st Sess. 45 (1975).

FLMPA also continues the careful balance struck by Congress in 30 U.S.C. § 612(b) and elsewhere preventing material interference with mining operations. FLMPA reiterates that regulation must only "prevent *unnecessary* or *undue* degradation of public lands". 43 U.S.C. § 1732(b) (emphasis added); *see also id*. § 1701(a)(12) (Secretary must manage federal land "in a manner that recognizes the Nation's need for domestic sources of minerals . . .").

### D. Senate Bill 838 Is Pre-empted as Land Use Regulation.

These federal land management statutes make it clear that the federal government reserves ultimate authority over land use planning, and that states simply cannot enact land use plans controlling uses on federal lands. SB 838 is self-evidently a land use regulation: it identifies particular Prohibited Zones and limits the uses the property owners (the claim owners on federal land) or others (those exercising statutory prospecting rights) may make of the real estate within those Zones.

As the Supreme Court explained in *Granite Rock*, "[l]and use planning in essence chooses particular uses for the land". *Granite Rock*, 480 U.S. at 587. The Prohibited Zones represent Oregon's attempt to choose uses for federal land: huge areas of federal property are zoned for the use of "Specified Biological Resources" (including vast areas far from the water) (ER169: Buchal Decl. Ex. 2, at 5), and zoned to prohibit a particular use: motorized mining.

The Magistrate Judge attempted to distinguish Granite Rock on the ground that "SB 838 does not mandate particular uses of the land" (ER19: Op. at 13), but land use planning does not generally *mandate* uses; it *restricts* them. Indeed, prohibition of specific mining-related activities is a common feature of Oregon land use restrictions. (*See, e.g.*, ER86: 2d Buchal Decl. Ex. 7, at 708-5 (restrictions on "drilling and blasting"); *see also* ER90-93: *id.* Ex. 8, at 66-69.)

SB 838 cannot be fairly distinguished from garden-variety restrictions such as these upon mining activity, but such restrictions must be without force and effect on federal lands.

The Magistrate Judge also relied upon an unpublished decision in *Pringle v. Oregon*, No. 2:13-CV-00309-SU, 2014 WL 795328 (D. Or. Feb. 25, 2014), which upheld restrictions on mining within areas protected under the Oregon Scenic Waterways Act, ORS 390.805 *et seq.* (ER20: Op. at 14.) The case is unpublished for good reason. It represents the District of Oregon's response to a *pro se* litigant engaging in the unauthorized practice of law by obtaining a 1/8 interest in the mining claim and then litigating the case. *See Pringle v. Oregon*, No. 2:13-cv-00309-SU, ECF No. 38, Findings and Recommendation, at 3 (D. Or. Dec. 23, 2013) (noting Pringle's misrepresentation as to when he acquired his interest). Mr. Pringle failed adequately to brief the court on the facts and law concerning federal preemption.

Among other things, Pringle failed even to argue that the Oregon Scenic Waterways Act, in declaring that the "highest and best uses of the waters within scenic waterways are recreation, fish and wildlife uses" (ORS 390.835(1)) was manifestly a forbidden land use regulation wholly preempted by the FLPMA and the NFMA. To the extent the *Pringle* opinion is read to authorize state-created

scenic overlays on federal land restricting the uses of federal land, it is plainly wrongly decided.[10]

A moratorium such as SB 838 is a quintessential land use control that is categorically preempted because Congress has occupied the field of land use planning on federal land. Moratoria are, after all, "interim controls on the use of land that seek to maintain the status quo with respect to land development in an area by either 'freezing' existing land uses or by allowing the issuance of building permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change.'" *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting) (quoting 1 E. Ziegler, Rathkopf's *The Law of Zoning and Planning* § 13:3, p. 13-6 (4th ed. 2001)).

[10] The Act declares that "no placer mining shall be permitted on waters within scenic waterways other than recreational placer mining". ORS 390.835(14). Limiting mining to only "recreational" mining manifestly interferes with Congressional objectives to promote mineral industry, and because the only effective tool for reaching underwater deposits, suction dredges, is flatly forbidden (*see* Oregon Laws 2001, § 4), mining is in substance limited to "the fill, removal or other alteration of less than one cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards of material from within the bed or wet perimeter of any single scenic waterway in a single year" (*see* ORS 390.835(15) (limits on mining without permits).

The Magistrate Judge focused on the State's asserted environmental motives for adopting SB 838, but plain language of the Bill belied any exclusive focus on environmental concerns: § 8(1)(d)(B) of the Bill directs preparation of a revised regulatory framework concerning, among other things, "*social considerations*, including concerns related to safety, noise, navigation, cultural resources, *and other uses* of waterways" (emphasis added). Concerns over the other multiple uses of federal land are land use concerns, and the Supremacy Clause does not permit the State's balancing to override Congress' protection of the mineral uses. The Supremacy Clause protects Congress' judgment as to the use of federal lands, and the overriding national importance of mineral development on those lands.

More importantly, the Magistrate Judge's focus on the "stated purpose" of SB 838 (ER19: Op. at 13) was misplaced. Under federal preemption analysis, it is *Congress'* purpose that matters, not the States. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-485 (1996). To the extent the State's motives were relevant at all, they would be disputed issues of fact. The Miners deny any appreciable adverse environmental impacts from the small-scale mining at issue on this motion (*see* ER122-123: Kitchar Decl. ¶¶ 25-26), and in particular deny that a moratorium was required to advance any *bona fide* environmental interest of the State of Oregon.

Prior to SB 838, the Oregon Legislature specifically recognized that prospecting, small-scale mining and recreational mining "may be *beneficial* to fish

habitat and fish propagation" (former ORS 517.123(3) (emphasis added)), referring to well-recognized effects in improving spawning habitat, water quality, and removing toxic materials. *See also* ORS 517.005(4) (State continues to acknowledges minimal environmental impacts from modern, small-scale mining). Were a trial on motive to be held, the Miners believe they would prove SB 838 was primarily motivated by objections from other users of the waterways, not *bona fide* environmental concerns. (ER131: Hunter Decl. ¶ 12.)

Ultimately, factual disputes over alleged environmental impacts or the State's real motives, are not *material* to resolution of this motion. This Court can and should hold, as a matter of law, that a moratorium prohibiting a particular use of land, enacted for any reason whatsoever, is a land use exercise preempted by federal law. This Court's holding striking down SB 838 will not forbid Oregon from enforcing its air or water quality standards (*see also infra* Point II(E)(1)) or even establishing its own regulatory system (entirely duplicative of those embodied in 36 C.F.R. Part 228 and 43 C.F.R. Part 3800) to manage small-scale mining. The Miners are not seeking relief against a regulatory scheme, but against outright prohibition without regard to reasonable environmental mitigation.

The State has urged that SB 838's use restriction will ostensibly continue for only up to five years. (*But see* ER153: Buchal Decl. ¶ 4 (California experience suggests possible extension)). This Court has emphasized that "where the federal

government authorizes a use, a state cannot prohibit that use, either *temporarily* or permanently, in an attempt to substitute its judgment for that of Congress". *Ventura County*, 601 F.2d at 1084 (emphasis added). The Supremacy Clause does not countenance even temporary obstacles to the full accomplishment of Congressional purposes.

The State completed its reconsideration of the regulatory process more than a year and a half ago (ER164: Buchal Decl. Ex. 2), had ample opportunity to enact imagined improvements into law, and has not done so.[11] A five-year moratorium on motorized mining use is categorically unreasonable in these circumstances under Oregon's own law. *See* ORS 197.520(3) (A moratorium not based on a shortage of public facilities . . . may be justified only by a demonstration of compelling need"); ORS 197.520(3)(b) (requiring showing of "irrevocable public harm," proof that alternatives to a moratorium are unsatisfactory); ORS 197.520(4) (only 120 days allowed as a general matter to revise regulatory schemes). Oregon's own law demonstrate that what is going on here is not any reasonable exercise of police power, but prohibited discrimination against a federally-protected use of federal land.

[11] In fact, while the motion was pending before the Magistrate Judge, bills were under consideration to *expand* the nature of the prohibitions, not adopt any functioning regulatory scheme. (ER29-42: 2d Buchal Decl. Exs. 2-3.)

### E. SB 838 Cannot Be Sustained as Reasonable Environmental Regulation.

In *Granite Rock*, the Supreme Court identified certain Forest Service regulations which it declared "do not indicate a federal intent to pre-empt *all* state environmental regulation of unpatented mining claims in national forests". *Granite Rock*, 480 U.S. at 588 (emphasis added). While recognizing that environmental regulation might pose an obstacle to the accomplishment of Congressional objectives, the Court found a potential role for "reasonable state environmental regulation [which] is not pre-empted". *Id.* at 589. Specifically, because the Granite Rock Company had mounted a facial challenge to the statute, to defeat it "the Coastal Commission needed merely to identify a possible set of permit conditions not in conflict with federal law". *Id.* at 593. The State of Oregon has no such easy task to defeat preemption, because no permits are available at all; the prohibition of SB 838 categorically conflicts with federal law.[12]

The Court's discussion of the differences between land use regulation and environmental regulation helps highlight when even state environmental regulation becomes *unreasonable* and pre-empted as, among other things, a material and

[12] The Miners present both facial and as-applied challenges to SB 838, for there is no dispute that the Bill criminalizes the only means of extracting the mineral resources on their mining claims.

unnecessary restriction on mining. The Supreme Court explained that

> "The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.

*Id*. at 587. As set forth above, SB 838 falls on the "land use" side of the line, but even if it does not, it does not constitute the sort of "reasonable environmental regulation" the Supreme Court allowed in *Granite Rock*.

#### 1. Forest Service regulations and Congressional intent to give effect to state water quality standards do not support the lawfulness of SB 838.

The *Granite Rock* court noted that Forest Service regulations required, among other things, that operators comply with "state water quality standards". *Granite Rock*, 480 U.S. at 583 (citing 36 C.F.R. § 228.8(b)). This is also provided by statute (*see* 43 U.S.C. § 1732), but SB 838 is not a water quality standard.

The State of Oregon has water quality standards, and the motorized mining prohibited by SB 838 proceeded for years under the application of those

standards.[13] Acting through its Department of Environmental Quality, Oregon has for more than a decade issued, under the Clean Water Act and Oregon law, a general National Pollutant Discharge Elimination System (NPDES) permit for suction dredging, based on findings that allowing the operation of suction dredges under permit conditions is adequately protective of water quality under established water quality standards.[14] And the State, acting through the Department of State Lands, long exercised authority to provide a General Authorization for disturbance of so-called Essential Salmon Habitat. OAR 141-089-0820. But for SB 838, the

[13] For example, the Miners acknowledge that the operation of suction dredges can sometimes generate temporary turbidity in the water, and Oregon has a water quality standard for turbidity. OAR 340-041-0036. In recognizing a need to accommodate "essential dredging" (*id.*) that may cause temporary turbidity increases, Oregon's turbidity standard can operate consistently with the Congressional mining objectives. The Congressional policy choice Oregon may not obstruct, however, is that development of mineral deposits on federal lands is *essential* to the national interest. Rather than give continuing effect to its own water quality standards that permitted mining, Oregon singled out motorized mining for prohibition in SB 838. This direct prohibition of a use, without regard to environmental standards, cannot be reconciled with Congressional objectives under the Supremacy Clause.

[14] The current permit, issued May 15, 2015, is operative until January 1, 2020. (ER43: 2d Buchal Decl. Ex. 5, at 1.) In issuing the permit, DEQ repeatedly found it adequately protective of water quality. (*See, e.g.,* ER62: 2d Buchal Decl. Ex. 6, at 5 (response to Comment No. 16)).

Miners could operate under these permits, which are issued as a ministerial matter, rather than as a matter of agency discretion.

It was only because opponents of mining *as a use* were dissatisfied with the fact that the Miners' activities could proceed *consistent with all applicable environmental quality standards* that they had to resort to simply banning the mining. (And unlike operations of a reasonable regulatory system, no competent evidence whatsoever was required to ban the mining in the Legislature of Oregon, but rather political power.) Recognition by Congress (and the Forest Service) of a state's ability to insist upon compliance with water quality *standards* does not extend to tolerating *prohibitions* enacted precisely to supersede the application of water quality standards.

In short, SB 838, is not a reasonable environmental law that applies generally to activities disturbing the beds and banks of waterways within Oregon. It is a non-standard and extraordinary prohibition of mining, an activity protected by federal law, enacted for reasons expressly beyond protection of the environment. *Cf. Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1075 (9th Cir. 2012) (striking down state insurance statute which "is not a neutral law of general application").

### 2. The significance of federal agency statements concerning preemption.

Subsequent to *Granite Rock*, the Supreme Court has clarified the role of federal agency regulations bearing on preemption questions:

> "In prior cases, we have given 'some weight' to an agency's views about the impact of tort law on federal objectives when 'the subject matter is technica[l] and the relevant history and background are complex and extensive.' *Geier [v. Am. Honda Motor Co.,* 529 U.S. 861,] 883 [(2000)]. Even in such cases, however, we have not deferred to an agency's conclusion that state law is pre-empted. Rather, *we have attended to an agency's explanation of how state law affects the regulatory scheme*. While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz]*, 312 U.S [52,] 67 [(1941)]; *see Geier*, 529 U.S., at 883; *[Medtronic, Inc. v.] Lohr*, 518 U.S. [470,] 495-496 [(1996)]. The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 234-235 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)."

*Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009) (emphasis added; parallel citations omitted). In short, because agencies have no particular expertise in construing the Supremacy Clause, the only administrative determination that should inform this Court is a *particular* agency determination that a *particular* state regulatory scheme may or may not stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress".

From this perspective, the *Granite Rock* Court's invocation of certain Forest Service regulations to infer Congressional intent concerning preemption has been superseded by further doctrinal development. No federal agency has offered any opinion concerning whether or not SB 838 is preempted by federal law, and there is no administrative determination to which to defer.

**3. BLM regulations cannot support the lawfulness of SB 838.**

Employing the foregoing analytical framework easily dismisses a BLM regulation cited by Oregon, 43 C.F.R. § 3809.3, which purports to allow state law to impose any "higher standard of protection for public lands". BLM's rulemaking made no effort to evaluate the degree to SB 838 stood as an obstacle to the purposes of federal mining law. Under *Wyeth*, there is no specific administrative determination to which this Court might defer, and it is difficult to conceive of a less persuasive articulation of preemption law.

BLM's regulation has no application to those Miners holding claims (or operating) on Forest Service land (43 C.F.R. § 3809.2(b)), but more importantly, § 3809.3 is substantively unlawful. As a general matter, BLM's regulations are intended to prevent "unnecessary or undue degradation of public lands" (43 C.F.R. § 3809.1(a)(emphasis added)), consistent with the Congressional recognition that mineral development may make some degradation reasonably necessary.

BLM has no authority from Congress to baldly assert that some inchoate policy of "protection for public lands" always trumps the federal mining law's express protection of mineral development, particularly on those lands on which federal mining claims have been granted. The regulation is not "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute[s]". *ALCOA v. BPA*, 903 F.2d 585, 598 (9th Cir. 1989), *cert. denied*, 498 U.S. 1024 (1991). Congress required federal agencies to balance the conflicting policies of environmental protection and mineral development by allowing only reasonable environmental regulation that does not materially interfere with development. Congress cannot possibly have intended for BLM to empower the states to overturn that carefully-crafted balance.

BLM's position is also explicitly premised on a flatly-erroneous view of federal preemption law. The Federal Register notice of adoption claims that preemption "occurs only when it is *impossible* to comply with both Federal and State law at the same time". 65 Fed. Reg. 69,998, at 70,008-009 (Nov. 21, 2000) (emphasis added). As the Supreme Court has explained, "both forms of conflicting state law are 'nullified' by the Supremacy Clause": (1) conflicts "that prevent or frustrate the accomplishment of a federal objective" and (2) conflicts "that make it 'impossible' for private parties to comply with both state and federal law". *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000); *see also id.* at 873

("Congress would not want either kind of conflict"). BLM, a creature of statute, has no statutory power conferred by Congress to overturn longstanding preemption law fashioned by the Supreme Court.

## III. AT THE LEAST, GENUINE ISSUES OF MATERIAL FACT BARRED SUMMARY JUDGMENT UPHOLDING THE STATE'S MINING BAN.

Whether or not SB 838 is a land use restriction preempted because Congress has occupied the field of land use planning for federal land is a question of law. But whether, in the alternative, it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," *Granite Rock*, 480 U.S. at 581, involves issues of fact that cannot be fairly resolved *against* the Miners on summary judgment. It is remarkable indeed to see a federal court declaring, without trial, that as a matter of fact there could be no interference with federal mining objectives because miners could still mine by hand.

While we argue above that the prohibitory character of SB 838 making it an obstacle to the accomplishment of Congressional mining objectives is sufficiently obvious to be determined as a matter of law, in the alternative, the Magistrate Judge erred in finding that on the record before him there was no obstacle as a matter of law because federal lands in Oregon "remain 'free and open' to mineral exploration and development by means other than the use of motorized equipment". (ER23: Op. at 17.)

Specifically, the Magistrate Judge reasoned that

> ". . . a ban on motorized instream mining in protected areas is not a ban on all mining in all waterways. As discussed above, SB 838 limits only one form of mining, and only in specific areas. Outside of the prohibited areas, SB 838 allows for permits to be issued for motorized instream mining. Even inside the prohibited areas, motorized mining is allowed 100 yards upland of the high water mark, as long as it does not disturb vegetation to the detriment of water quality. Thus, SB 838 is not a ban on mining." (ER21: Op. at 15.)

There are two problems with this position. First, all of the Magistrate Judge's factual conclusions evade the core of the Miners' position. The mining claims of the Miners *are* in Prohibited Zones, and they *are* prohibited from any ability whatsoever to recover the valuable mineral deposits on their claims.

Undisputed testimony before the Magistrate Judge established that "use of motorized equipment is required to recover the gold" deposited on their mining claims. (ER135: Grothe Decl. ¶ 7; *see also* ER150: Coon Decl. ¶ 4 (claim "cannot be effectively mined without the use of a suction dredge"); ER143: Evens Decl. ¶ 6 ("cannot mine at all without motorized equipment for health reasons"); ER102: Van Orman Decl. ¶ 4 ("The only way to reach these underwater deposits is with the use of motorized mining equipment"); ER106: McCracken Decl. ¶ 8 (underwater deposits cannot, as a practical matter, be reached with hand tools").

Nor was testimony disputed that "all of those who recover significant amounts of gold or other precious metals, use motorized equipment" (ER130:

Hunter Decl. ¶ 8) and that SB 838 is "in substance a ban on all meaningful placer mining in the prohibited zones" (ER118: Kitchar Decl. ¶ 13; *see also* ER107: McCracken Decl. ¶ 11). SB 838 even denies miners working underwater the right to use a motor to pump the air they need to breathe. (ER121: Kitchar Decl. ¶ 22.)

Against all this evidence, the Intervenors offered no more than two articles concerning placer gold recover methods in general, many of which were motorized. (Dkt. Nos. 51-5 & 51-6.) The State for its part noted that sometimes the Prohibited Zones did not cover the entire claims of the Miners, but there was no dispute that the gold on the claims lay within the Prohibited Zones.

Unchallenged expert testimony before the Magistrate Judge also confirmed that limiting the Prohibited Zones to non-motorized uses interferes with the whole ordinary course of development of the mineral deposits therein. Mineral exploration requires small-scale activities at first, as part of the natural process for leading to larger-scale activities. (*See generally* ER124: Kitchar Decl. ¶¶ 31-32.) The Nation's mineral industries are built, by statutory design, on the backs of the small-scale prospectors and miners who discover valuable minerals. (*See* ER125-126: *id*. ¶ 36.)

More specifically, rational mineral development cannot proceed by panning a few flakes of gold and then investing hundreds of thousands of dollars in permitting processes and large scale operations; rather, one starts with "motorized

small-scale equipment to do bulk testing on the order of many cubic yards of material before making further investments". (ER124: Kitchar Decl. ¶ 32.) Outlawing the use of motorized equipment is far more of an obstacle than, for example, merely forbidding core drilling—the state law prohibition struck down by the Colorado Supreme Court in the *Brubaker* case.

The potential availability of very large scale mining permits under Oregon law, does not remove the obstacles posed by SB 838 to the full accomplishment of Congressional objectives. *See also supra* n.2. Very large permits are not sufficient to vindicate the purposes of federal law in a context where Congress has put the public lands open for exploration and development by individual miners, small-scale equipment is required for such exploration and development, and small-scale mineral development is generally a prerequisite to large-scale mineral development.

The second problem with the Magistrate's factual conclusion is that it grossly misconstrues what constitutes an "obstacle" for federal preemption purposes. The Magistrate Judge cited no case, and the Miners are aware of none, where rank interference with Congressional objectives is sanctioned merely because a court can conceive of some conceivable way some tiny portion of the objectives might still be achieved. To the contrary, modern preemption precedent is sensitive to even potential effects on federal objectives.

For example, in *Arizona v. United States*, 132 S. Ct. 2492 (2012), a provision of Arizona law allowed criminal prosecution of aliens who sought employment when not authorized under federal law to do so; federal law penalized only employers. *Id.* at 2503-04. The Supreme Court struck down the law as an obstacle to Congressional objectives because of mere "conflict in the method of enforcement". *Id.* at 2505. The Supreme Court also struck down another provision of Arizona law permitting its peace officers to arrest "a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States". *Id.* (quoting statute). Here the obstacle was potential differences in discretion in implementing "significant complexities involved in enforcing federal immigration law. *Id.* at 2506. In neither case was the statute saved because under some (or even most) circumstances, it might not interfere with Congressional objectives.

The position of the Magistrate Judge that, in substance, only a state law making any and all mining utterly impossible throughout the federal lands in the State of Oregon would be preempted is inconsistent with the entire body of preemption law. That body of law, unlike the State of Oregon and the Magistrate Judge, zealously defends Congressional objectives against encroachment, particularly in a context where Congress is exercising clear Constitutional authority to legislate.

If it is not obvious to this Court that banning motorized mining interferes with the full accomplishment of Congressional objectives as a matter of law, this Court should reverse the Magistrate's grant of summary judgment and remand for further. *Cf., e.g., Association of International Automobile Manufacturers, Inc. v. Abrams*, 84 F.3d 602 (2d Cir. 1996) (reversing district court grant of summary judgment denying federal preemption given "genuine factual issues as to both the claimed burdens and the putative benefits created by the New York bumper statute").

## Conclusion

For the foregoing reasons, the Magistrate Judge's grant of summary judgment to the State of Oregon should be reversed, and summary judgment granted to the Miners, or in the alternative the case remanded for trial.

Dated: July 14, 2016.

*s/ James L. Buchal*
James L. Buchal, OSB No. 921618
Counsel for Plaintiffs - Appellants

## CERTIFICATE OF COMPLIANCE WITH RULE 32

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements and Type Style Limitations

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,733 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Office 2010 in 14 point Times New Roman font.

Dated: July 14, 2016.

*s/ James L. Buchal*
James L. Buchal, OSB No. 92161
Counsel for Plaintiffs - Appellants

## STATEMENT OF RELATED CASES

The undersigned attorney states that there are no cases pending in this Circuit that satisfy the definition of "related case" under Ninth Circuit Rule 28–2.6 that he is aware of.

Dated: July 14, 2016.

*s/ James L. Buchal*
James L. Buchal, OSB No. 921618
Counsel for Plaintiffs - Appellants

# STATUTORY ADDENDUM

## TABLE OF CONTENTS

**Statutes**

**Rules and Regulations**

# STATUTORY ADDENDUM

## Statutes

### United States Code (U.S.C.)

**16 U.S.C.**

**§ 478. Egress or ingress of actual settlers; prospecting**

Nothing in sections 473 to 478, 479 to 482 and 551 of this title shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of Agriculture. Nor shall anything in such sections prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests.

**§ 528. Development and Administration of Renewable surface resources for Multiple Use and Sustained Yield of Products and Services; Congressional Declaration of Policy and Purpose**

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

## § 531. Definitions

As used in sections 528 to 531 of this title the following terms shall have the following meanings:

**(a)** "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

**(b)** "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

## § 551. Protection of national forests; rules and regulations

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 [1] of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate judge specially designated for that purpose by the court by which he was appointed, in the

same manner and subject to the same conditions as provided for in section 3401 (b) to (e) of title 18.

## § 1602. Renewable Resource Program; Preparation by Secretary of Agriculture and Transmittal to President; Purpose and Development of Program; Time of Preparation, Updating and Contents

In order to provide for periodic review of programs for management and administration of the National Forest System, for research, for cooperative State and private Forest Service programs, and for conduct of other Forest Service activities in relation to the findings of the Assessment, the Secretary of Agriculture, utilizing information available to the Forest Service and other agencies within the Department of Agriculture, including data prepared pursuant to section 1010a of title 7, shall prepare and transmit to the President a recommended Renewable Resource Program (hereinafter called the "Program"). The Program transmitted to the President may include alternatives, and shall provide in appropriate detail for protection, management, and development of the National Forest System, including forest development roads and trails; for cooperative Forest Service programs; and for research. The Program shall be developed in accordance with principles set forth in the Multiple-Use Sustained-Yield Act of June 12, 1960 (74 Stat. 215; 16 U.S.C. 528-531), and the National Environmental Policy Act of 1969 (83 Stat. 852) [42 U.S.C. 4321 et seq.]. The Program shall be prepared not later than December 31, 1975, to cover the four-year period beginning October 1, 1976, and at least each of the four fiscal decades next following such period, and shall be updated no later than during the first half of the fiscal year ending September 30, 1980, and the first half of each fifth fiscal year thereafter to cover at least each of the four fiscal decades beginning next after such updating. The Program shall include, but not be limited to - (1) an inventory of specific needs and opportunities for both public and private program investments. The inventory shall differentiate between activities which are of a capital nature and those which are of an operational nature; (2) specific identification of Program outputs, results anticipated, and benefits associated with investments in such a manner that the anticipated costs can be directly compared with the total related benefits and direct and indirect returns to the Federal Government; (3) a discussion of priorities for accomplishment of inventoried Program opportunities, with specified costs, outputs, results, and

benefits; (4) a detailed study of personnel requirements as needed to implement and monitor existing and ongoing programs; and (5) Program recommendations which - (A) evaluate objectives for the major Forest Service programs in order that multiple-use and sustained-yield relationships among and within the renewable resources can be determined; (B) explain the opportunities for owners of forests and rangeland to participate in programs to improve and enhance the condition of the land and the renewable resource products therefrom; (C) recognize the fundamental need to protect and, where appropriate, improve the quality of soil, water, and air resources; (D) state national goals that recognize the interrelationships between and interdependence within the renewable resources; (E) evaluate the impact of the export and import of raw logs upon domestic timber supplies and prices; and (F) account for the effects of global climate change on forest and rangeland conditions, including potential effects on the geographic ranges of species, and on forest and rangeland products.

**§1604. National Forest System land and resource management plans**

**§ 1604(a). Development, maintenance, and revision by Secretary of Agriculture as part of program; coordination**

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

**§ 1612. Public participation**

**§ 1612(a). Adequate Notice and Opportunity to Comment**

In exercising his authorities under this subchapter and other laws applicable to the Forest Service, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs.

**28 U.S.C.**

**§ 1291. Final decisions of district courts**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

**§ 1331. Federal Question**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

**30 U.S.C**

**§ 21a. National mining and minerals policy; "minerals" defined; execution of policy under other authorized programs**

The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in

**(1)** the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries,

**(2)** the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs,

**(3)** mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and

**(4)** the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.

For the purpose of this section "minerals" shall include all minerals and mineral fuels including oil, gas, coal, oil shale and uranium.
It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section.

## § 22. Lands open to purchase by citizens

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.

## § 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as

above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

**§ 28. Mining district regulations by miners: location, recordation, and amount of work; marking of location on ground; records; annual labor or...delinquency in contributing proportion of expenditures; tunnel as lode expenditure**

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, that is granted a waiver under section 28f of this title, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper

published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12:01 ante meridian on the first day of September succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by this section. On all such valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922.

**§ 35. Placer claims; entry and proceedings for patent under provisions applicable to vein or lode claims; conforming entry to legal subdivisions and surveys; limitation of claims; homestead entry of segregated agricultural land**

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

And where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any

legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead purposes.

### §38. Evidence of possession and work to establish right to patent

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of title 43, in the absence of any adverse claim; but nothing in such sections shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

### § 51. Water users' vested and accrued rights; enumeration of uses; protection of interest; rights-of-way for canals and ditches; liability for injury or damage to settlers' possession

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

### § 611. Common varieties of sand, stone, gravel, pumice, pumicite, or cinders, and petrified wood

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to

give effective validity to any mining claim hereafter located under such mining laws:

Provided, however, that nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this subchapter and sections 601 and 603 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in this subchapter and sections 601 and 603 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

## § 612. Unpatented mining claims

### (a) Prospecting, mining or processing operations

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

### (b) Reservations in the United States to use of the surface and surface resources

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with

prospecting, mining or processing operations or uses reasonably incident thereto: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further, That nothing in this subchapter and sections 601 and 603 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

## §1281. Designation procedures

### (a) Review of Federal land areas for unsuitability for noncoal mining

With respect to Federal lands within any State, the Secretary of Interior may, and if so requested by the Governor of such State shall, review any area within such lands to assess whether it may be unsuitable for mining operations for minerals or materials other than coal, pursuant to the criteria and procedures of this section.

### (b) Criteria considered in determining designations

An area of Federal land may be designated under this section as unsuitable for mining operations if (1) such area consists of Federal land of a predominantly urban or suburban character, used primarily for residential or related purposes, the mineral estate of which remains in the public domain, or (2) such area consists of Federal land where mining operations would have an adverse impact on lands used primarily for residential or related purposes.

### (c) Petition for exclusion; contents; hearing; temporary land withdrawal

Any person having an interest which is or may be adversely affected shall have the right to petition the Secretary to seek exclusion of an area from mining operations pursuant to this section or the redesignation of an area or part thereof as suitable for such operations. Such petition shall contain allegations of fact with supporting evidence which would tend to

substantiate the allegations. The petitioner shall be granted a hearing within a reasonable time and finding with reasons therefor upon the matter of their petition. In any instance where a Governor requests the Secretary to review an area, or where the Secretary finds the national interest so requires, the Secretary may temporarily withdraw the area to be reviewed from mineral entry or leasing pending such review: *Provided, however*, That such temporary withdrawal be ended as promptly as practicable and in no event shall exceed two years.

**(d) Limitation on designations; rights preservation; regulations**

In no event is a land area to be designated unsuitable for mining operations under this section on which mining operations are being conducted prior to the holding of a hearing on such petition in accordance with subsection (c) hereof. Valid existing rights shall be preserved and not affected by such designation. Designation of an area as unsuitable for mining operations under this section shall not prevent subsequent mineral exploration of such area, except that such exploration shall require the prior written consent of the holder of the surface estate, which consent shall be filed with the Secretary. The Secretary may promulgate, with respect to any designated area, regulations to minimize any adverse effects of such exploration.

**(e) Statement**

Prior to any designation pursuant to this section, the Secretary shall prepare a detailed statement on (i) the potential mineral resources of the area, (ii) the demand for such mineral resources, and (iii) the impact of such designation or the absence of such designation on the environment, economy, and the supply of such mineral resources.

**(f) Area withdrawal**

When the Secretary designates an area of Federal lands as unsuitable for all or certain types of mining operations for minerals and materials other than coal pursuant to this section he may withdraw such area from mineral entry or leasing, or condition such entry or leasing so as to limit such mining operations in accordance with his determination, if the Secretary also determines, based on his analysis pursuant to subsection (e), that the benefits resulting from such designation would be greater than the benefits to the regional or national economy which could result from mineral development of such area.

**(g) Right to appeal**

Any party with a valid legal interest who has appeared in the proceedings in connection with the Secretary's determination pursuant to this section and who is aggrieved by the Secretary's decision (or by his failure to act within a reasonable time) shall have the right of appeal for review by the United States district court for the district in which the pertinent area is located.

## § 1605. Applicability to other statutory national mining and minerals policies

Nothing in this chapter shall be interpreted as changing in any manner or degree the provisions of and requirements of section 21a of this title. For the purposes of achieving the objectives set forth in section 1602 of this title, the Congress declares that the President shall direct

**(1)** the Secretary of the Interior to act immediately within the Department's statutory authority to attain the goals contained in section 21a of this title and

**(2)** the Executive Office of the President to act immediately to promote the goals contained in section 21a of this title among the various departments and agencies.

**43 U.S.C**

## § 1701. Congressional declaration of policy

**(a)** The Congress declares that it is the policy of the United States that—

**(1)** the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

**(2)** the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

**(3)** public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

**(4)** the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

**(5)** in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

**(6)** judicial review of public land adjudication decisions be provided by law;

**(7)** goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

**(8)** the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

**(9)** the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

**(10)** uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and

exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

**(11)** regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

**(12)** the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

**(13)** the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

## § 1702. Definitions

**(e)** The term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except—

**(1)** lands located on the Outer Continental Shelf; and

**(2)** lands held for the benefit of Indians, Aleuts, and Eskimos.

## § 1712. Land use plans

### (a) Development, maintenance, and revision by Secretary

The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been

classified, withdrawn, set aside, or otherwise designated for one or more uses.

**(b) Coordination of plans for National Forest System lands with Indian land use planning and management programs for purposes of development and revision**

In the development and revision of land use plans, the Secretary of Agriculture shall coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian tribes by, among other things, considering the policies of approved tribal land resource management programs.

**(c) Criteria for development and revision**

In the development and revision of land use plans, the Secretary shall—

**(1)** use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

**(2)** use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;

**(3)** give priority to the designation and protection of areas of critical environmental concern;

**(4)** rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;

**(5)** consider present and potential uses of the public lands;

**(6)** consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;

**(7)** weigh long-term benefits to the public against short-term benefits;

**(8)** provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

**(9)** to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under chapter 2003 of title 54, and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

## § 1732. Management of use, occupancy, and development of public lands

### (a) Multiple use and sustained yield requirements applicable; exception

The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him undersection 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

**(b) Easements, permits, etc., for utilization through habitation, cultivation, and development of small trade or manufacturing concerns; applicable statutory requirements**

In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns: *Provided*, That unless otherwise provided for by law, the Secretary may permit Federal departments and agencies to use, occupy, and develop public lands only through rights-of-way undersection 1767 of this title, withdrawals under section 1714 of this title, and, where the proposed use and development are similar or closely related to the programs of the Secretary for the public lands involved, cooperative agreements under section 1737(b) of this title: *Provided further*, That nothing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law. Except in emergencies, any regulations of the Secretary concerned relating to hunting and fishing pursuant to this section shall be put into effect only after consultation with the appropriate State fish and game

department. Nothing in this Act shall modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species. Except as provided in section 1744, section 1782, and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

## § 1744. Recordation of mining claims

### (a) Filing requirements

The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21, 1976 and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after October 21, 1976 shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

**(1)** File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on [1] a detailed report provided by section 28–1 of title 30, relating thereto.

**(2)** File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

## Oregon Revised Statutes (ORS)

### 161.615. Prison terms for misdemeanors

Sentences for misdemeanors shall be for a definite term. The court shall fix the term of imprisonment within the following maximum limitations:

**(1)** For a Class A misdemeanor, 1 year.

**(2)** For a Class B misdemeanor, 6 months.

**(3)** For a Class C misdemeanor, 30 days.

**(4)** For an unclassified misdemeanor, as provided in the statute defining the crime.

### 161.635. Fines for misdemeanors

**(1)** A sentence to pay a fine for a misdemeanor shall be a sentence to pay an amount, fixed by the court, not exceeding:

**(a)** $6,250 for a Class A misdemeanor.

**(b)** $2,500 for a Class B misdemeanor.

**(c)** $1,250 for a Class C misdemeanor.

**(2)** A sentence to pay a fine for an unclassified misdemeanor shall be a sentence to pay an amount, fixed by the court, as provided in the statute defining the crime.

**(3)** If a person has gained money or property through the commission of a misdemeanor, then upon conviction thereof the court, instead of imposing the fine authorized for the offense under this section, may sentence the defendant to pay an amount fixed by the court, not exceeding double the amount of the defendants gain from the

commission of the offense. In that event, ORS 161.625 (Fines for felonies) (4) and

**(4)** This section does not apply to corporations.

**196.810. Permit required to remove material from bed or banks of waters; status of permit; exceptions; rules**

**(1)(a)** Except as otherwise specifically permitted under ORS196.600 (Definitions for ORS 196.600 to 196.655) to 196.905(Applicability), a person may not remove any material from the beds or banks of any waters of this state or fill any waters of this state without a permit issued under authority of the Director of the Department of State Lands, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetland conservation plan.

**(b)** Notwithstanding the permit requirements of this section and notwithstanding the provisions of ORS 196.800 (Definitions for ORS 196.600 to 196.905) (3) and (13), if any removal or fill activity is proposed in essential indigenous anadromous salmonid habitat, except for those activities customarily associated with agriculture, a permit is required. Essential indigenous anadromous salmonid habitat as defined under this section shall be further defined and designated by rule by the Department of State Lands in consultation with the State Department of Fish and Wildlife and in consultation with other affected parties.

**(c)** A person is not required to obtain a permit under paragraph (b) of this subsection for prospecting or other nonmotorized activities resulting in the removal from or fill of less than one cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards of material within a designated essential indigenous anadromous salmonid habitat segment in a single year. Prospecting or other nonmotorized activities may be conducted only within the bed or wet perimeter of the waterway and may not occur at any site where fish eggs are present. Removal or filling activities customarily associated with mining require a permit under paragraph (b) of this subsection.

**(d)** A permit is not required under paragraph (b) of this subsection for construction or maintenance of fish passage and fish screening structures that are constructed, operated or maintained under ORS 498.306 (Screening or by-pass devices for water diversions), 498.316 (Exemption from screening or by-pass devices), 498.326 (Department guidelines for screening and by-pass projects) or509.600 (Destroying, injuring or taking fish near fishway) to 509.645 (Filing protest with commission).

**(e)** Nothing in this section limits or otherwise changes the exemptions under ORS 196.905 (Applicability).

**(f)** As used in paragraphs (b) and (c) of this subsection:

**(A)** Bed means the land within the wet perimeter and any adjacent nonvegetated dry gravel bar.

**(B)** Essential indigenous anadromous salmonid habitat means the habitat that is necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing.

**(C)** Indigenous anadromous salmonid means chum, sockeye, Chinook and Coho salmon, and steelhead and cutthroat trout, that are members of the family Salmonidae and are listed as sensitive, threatened or endangered by a state or federal authority.

**(D)** Prospecting means searching or exploring for samples of gold, silver or other precious minerals, using nonmotorized methods, from among small quantities of aggregate.

**(E)** Wet perimeter means the area of the stream that is under water or is exposed as a nonvegetated dry gravel bar island surrounded on all sides by actively moving water at the time the activity occurs.

**(2)** A public body, as defined in ORS 174.109 (Public body defined), may not issue a lease or permit contrary or in opposition to the conditions set out in the permit issued under ORS 196.600 (Definitions for ORS 196.600 to 196.655) to196.905 (Applicability).

**(3)** Subsection (1) of this section does not apply to removal of material under a contract, permit or lease with any public body, as defined in ORS 174.109 (Public body defined), entered into before September 13, 1967. However, no such contract, permit or lease may be renewed or extended on or after September 13, 1967, unless the person removing the material has obtained a permit under ORS 196.600 (Definitions for ORS 196.600 to 196.655) to 196.905 (Applicability).

**(4)** Notwithstanding subsection (1) of this section, the Department of State Lands may issue, orally or in writing, an emergency authorization to a person for the removal of material from the beds or banks or filling of any waters of this state in an emergency, for the purpose of making repairs or for the purpose of preventing irreparable harm, injury or damage to persons or property. The emergency authorization issued under this subsection:

**(a)** Shall contain conditions of operation that the department determines are necessary to minimize impacts to water resources or adjoining properties.

**(b)** Shall be based, whenever practicable, on the recommendations contained in an on-site evaluation by an employee or representative of the department.

**(c)** If issued orally, shall be confirmed in writing by the department within five days.

**(d)** Does not relieve the person from payment of a fee calculated in the manner provided in ORS 196.815 (Application for permit).

## 197.520. Manner of declaring moratorium

**(1)** No city, county or special district may adopt a moratorium on construction or land development unless it first:

**(a)** Provides written notice to the Department of Land Conservation and Development at least 45 days prior to the final public hearing to be held to consider the adoption of the moratorium;

**(b)** Makes written findings justifying the need for the moratorium in the manner provided for in this section; and

**(c)** Holds a public hearing on the adoption of the moratorium and the findings which support the moratorium.

**(2)** For urban or urbanizable land, a moratorium may be justified by demonstration of a need to prevent a shortage of public facilities which would otherwise occur during the effective period of the moratorium. Such a demonstration shall be based upon reasonably available information, and shall include, but need not be limited to, findings:

**(a)** Showing the extent of need beyond the estimated capacity of existing public facilities expected to result from new land development, including identification of any public facilities currently operating beyond capacity, and the portion of such capacity already committed to development;

**(b)** That the moratorium is reasonably limited to those areas of the city, county or special district where a shortage of key public facilities would otherwise occur; and

**(c)** That the housing and economic development needs of the area affected have been accommodated as much as possible in any program for allocating any remaining public facility capacity.

**(3)** A moratorium not based on a shortage of public facilities under subsection (2) of this section may be justified only by a demonstration of compelling need. Such a demonstration shall be based upon reasonably available information and shall include, but need not be limited to, findings:

**(a)** For urban or urbanizable land:

**(A)** That application of existing development ordinances or regulations and other applicable law is inadequate to prevent irrevocable public harm from development in affected geographical areas;

**(B)** That the moratorium is sufficiently limited to ensure that a needed supply of affected housing types and the supply of commercial and industrial facilities within or in proximity to the city, county or special district are not unreasonably restricted by the adoption of the moratorium;

**(C)** Stating the reasons alternative methods of achieving the objectives of the moratorium are unsatisfactory;

**(D)** That the city, county or special district has determined that the public harm which would be caused by failure to impose a moratorium outweighs the adverse effects on other affected local governments, including shifts in demand for housing or economic development, public facilities and services and buildable lands, and the overall impact of the moratorium on population distribution; and

**(E)** That the city, county or special district proposing the moratorium has determined that sufficient resources are available to complete the development of needed interim or permanent changes in plans, regulations or procedures within the period of effectiveness of the moratorium.

**(b)** For rural land:

**(A)** That application of existing development ordinances or regulations and other applicable law is inadequate to prevent irrevocable public harm from development in affected geographical areas;

**(B)** Stating the reasons alternative methods of achieving the objectives of the moratorium are unsatisfactory;

**(C)** That the moratorium is sufficiently limited to ensure that lots or parcels outside the affected geographical areas are not unreasonably restricted by the adoption of the moratorium; and

**(D)** That the city, county or special district proposing the moratorium has developed a work plan and time schedule for achieving the objectives of the moratorium.

**(4)** No moratorium adopted under subsection (3)(a) of this section shall be effective for a period longer than 120 days, but such a moratorium may be extended provided the city, county or special district adopting the moratorium holds a public hearing on the proposed extension and adopts written findings that:

**(a)** Verify the problem giving rise to the need for a moratorium still exists;

**(b)** Demonstrate that reasonable progress is being made to alleviate the problem giving rise to the moratorium; and

**(c)** Set a specific duration for the renewal of the moratorium. No extension may be for a period longer than six months.

**(5)** Any city, county or special district considering an extension of a moratorium shall give the department at least 14 days notice of the time and date of the public hearing on the extension.

**390.805. Definitions for ORS 390.805 to 390.925**

As used in ORS 390.805 (Definitions for ORS 390.805 to 390.925) to 390.925 (Enforcement), unless the context requires otherwise:

**(1)** Related adjacent land means all land within one-fourth of one mile of the bank on the side of Waldo Lake, or a river or segment of river within a scenic waterway, except land that, in the State Parks and Recreation Departments judgment, does not affect the view from the waters within a scenic waterway.

**(2)** Scenic easement means the right to control the use of related adjacent land, including airspace above such land, for the purpose of protecting the scenic view from waters within a scenic waterway; but such control does not affect, without the owners consent, any regular use exercised prior to the

acquisition of the easement, and the landowner retains the right to uses of the land not specifically restricted by the easement.

**(3)** Scenic waterway means Waldo Lake, or a river or segment of river that has been designated as such in accordance with ORS 390.805 (Definitions for ORS 390.805 to 390.925) to 390.925 (Enforcement) or any subsequent Act, and includes related adjacent land.

**390.835. Highest and best use of waters within scenic waterways; prohibitions; authority of various agencies; water rights; conditions; recreational prospecting; placer mining**

**(1)** It is declared that the highest and best uses of the waters within scenic waterways are recreation, fish and wildlife uses. The free-flowing character of these waters shall be maintained in quantities necessary for recreation, fish and wildlife uses. No dam, or reservoir, or other water impoundment facility shall be constructed on waters within scenic waterways. No water diversion facility shall be constructed or used except by right previously established or as permitted by the Water Resources (Purposes and policies to be considered in formulating state water resources program) (12), and in a manner consistent with the policies set forth under ORS 390.805 (Definitions for ORS 390.805 to 390.925) to 390.925 (Enforcement). The Water Resources Commission shall administer and enforce the provisions of this subsection.

**(14)** No placer mining shall be permitted on waters within scenic waterways other than recreational placer mining.

**(15)** No person shall be required to obtain a permit for recreational prospecting resulting in the fill, removal or other alteration of less than one cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards of material from within the bed or wet perimeter of any single scenic waterway in a single year. Recreational prospecting shall not occur at any site where fish eggs are present.

**517.005. Legislative findings.**

The Legislative Assembly finds and declares that:

**(1)** Mining contributes to the economy and well-being of the people of Oregon. Mining creates high-paying jobs in parts of this state that, due to a lack of infrastructure and development, are less likely to be capable of diversifying beyond a regional economy based on natural resources. Mining creates secondary industries in the surrounding region and attracts numerous providers of goods and services. Mining also generates significant tax revenues for local governments and provides support for civic and educational projects in local communities.

**(2)** The mining of minerals is a natural resource use.

**(3)** In eastern Oregon, including Lake, Harney, Malheur, Baker and Grant Counties, diversifying the types of natural resource uses that contribute to local economies enables those economies to better withstand temporary economic declines that affect specific natural resource uses. In the same way that a diversified economy is good for a large metropolitan area, a diversified natural resource economy is good for eastern Oregon.

**(4)** Technological advances in the mining industry, coupled with reclamation efforts, have greatly reduced the environmental impacts of mining operations. The size and scope of modern operations is such that the operations do not cause interference with other natural resource uses, particularly in an area as vast as eastern Oregon.

**(5)** Mining operations should be encouraged and supported in eastern Oregon as a means for residents and communities to improve their economies and well-being.

**517.080. Mining claims as realty**

All mining claims, whether quartz or placer, are real estate. The owner of the possessory right thereto has a legal estate therein within the meaning of ORS 105.005 (Right of action).

# Rules and Regulations

## Code of Federal Regulations (CFR)

**36 C.F.R.**

**§ 228.4. Plan of operations--notice of intent--requirements.**

**(a)** Except as provided in paragraph (a)(1) of this section, a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources. Such notice of intent to operate shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. Each notice of intent to operate shall provide information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport.

**(1)** A notice of intent to operate is not required for:

**(i)** Operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest System purposes;

**(ii)** Prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study which generally might include searching for and occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools;

**(iii)** Marking and monumenting a mining claim;

**(iv)** Underground operations which will not cause significant surface resource disturbance;

**(v)** Operations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the National Forest System who are not required to obtain a

Forest Service special use authorization, contract, or other written authorization;

**(vi)** Operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources; or

**(vii)** Operations for which a proposed plan of operations is submitted for approval;

**§ 228.8(b). Requirements for environmental protection**.

All operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources, including the following requirements:

**(b) Water Quality.** Operator shall comply with applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151 *et seq.*).

**43 C.F.R.**

**§ 3809.1. What are the purposes of this subpart?**

The purposes of this subpart are to:

**(a)** Prevent unnecessary or undue degradation of public lands by operations authorized by the mining laws. Anyone intending to develop mineral resources on the public lands must prevent unnecessary or undue degradation of the land and reclaim disturbed areas. This subpart establishes procedures and standards to ensure that operators and mining claimants meet this responsibility; and

**§ 3809.2. What is the scope of this subpart?**

**(b)** This subpart does not apply to lands in the National Park System, National Forest System, and the National Wildlife Refuge System; acquired lands; or

lands administered by BLM that are under wilderness review, which are subject to subpart 3802 of this part.

**§ 3809.3. What rules must I follow if State law conflicts with this subpart?**

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.

**§ 3809.10(a). How does BLM classify operations.**

BLM classifies operations as—

**(a)** Casual use, for which an operator need not notify BLM. (You must reclaim any casual-use disturbance that you create. If your operations do not qualify as casual use, you must submit a notice or plan of operations, whichever is applicable. See §§ 3809.11and 3809.21.);

**(b)** Notice-level operations, for which an operator must submit a notice (except for certain suction-dredging operations covered by § 3809.31(b)); and

**(c)** Plan-level operations, for which an operator must submit a plan of operations and obtain BLM's approval.

**§ 3809.31 Are there any special situations that affect what submittals I must make before I conduct operations?**

**(b)** *Suction dredges.*

**(1)** If your operations involve the use of a suction dredge, the State requires an authorization for its use, and BLM and the State have an agreement under §3809.200 addressing suction dredging, then you need not submit to BLM a notice or plan of operations, unless otherwise provided in the agreement between BLM and the State.

**(2)** For all uses of a suction dredge not covered by paragraph (b)(1) of this section, you must contact BLM before beginning such use to determine whether you need to submit a notice or a plan to BLM, or whether your activities constitute casual use. If your proposed suction dredging is

located within any lands or waters known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat, regardless of the level of disturbance, you must not begin operations until BLM completes consultation the Endangered Species Act requires.

## Oregon Administrative Rules (OAR)

**141-085-0510(8)**

"Beds" means:

**(a)** For the purpose of OAR 141-089, the land within the wet perimeter and any adjacent non-vegetated dry gravel bar; and

**(b)** For all other purposes, "beds" means that portion of a waterway that carries water when water is present.

**141-085-0510(9)**

"Beds or Banks" means the physical container of the waters of this state, bounded on freshwater bodies by the ordinary high water line or bankfull stage, and in tidal bays and estuaries by the limits of the highest measured tide. The “bed” is typically the horizontal section and includes non-vegetated gravel bars. The “bank” is typically the vertical portion.

**141-089-0820**

Purpose

**(1)** These rules set forth conditions under which a person may, without an individual removal-fill permit from the Department, fill, remove and move material in waters of this state for the purpose of recreational placer mining within areas designated as Essential Indigenous Anadromous Salmonid Habitat (ESH) that is not designated as State Scenic Waterway (SSW) and that is not subject to a legislatively established moratorium.

**(2)** There is a legislatively established moratorium from January 2, 2016, to January 2, 2021. This moratorium applies for all placer deposits of the beds or banks of all waters of this state, or other placer deposits, up to the line of ordinary high water, and 100 yards upland perpendicular to the line of ordinary high water, that is located above the lowest extent of the spawning habitat in any river and tributary thereof in this state containing either essential indigenous anadromous salmonid habitat or naturally reproducing populations of bull trout, except for the following two areas:

**(a)** Areas that do not support populations of anadromous salmonids or naturally reproducing populations of bull trout due to a naturally occurring or lawfully placed barrier to fish passage.

**(b)** Any area where an operating permit that was issued by the State Department of Geology and Mineral Industries under ORS 517.702 to 517.989 authorizes a person to conduct recreational placer mining.

**340-041-0036**

**Turbidity**

Turbidity (Nephelometric Turbidity Units, NTU): No more than a ten percent cumulative increase in natural stream turbidities may be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. However, limited duration activities necessary to address an emergency or to accommodate essential dredging, construction or other legitimate activities and which cause the standard to be exceeded may be authorized provided all practicable turbidity control techniques have been applied and one of the following has been granted:

**(1)** Emergency activities: Approval coordinated by the Department with the Oregon Department of Fish and Wildlife under conditions they may prescribe to accommodate response to emergencies or to protect public health and welfare;

**(2)** Dredging, Construction or other Legitimate Activities: Permit or certification authorized under terms of section 401 or 404 (Permits and Licenses, Federal Water Pollution Control Act) or OAR 14l-085-0100 et seq. (Removal and Fill

Permits, Division of State Lands), with limitations and conditions governing the activity set forth in the permit or certificate.

## CERTIFICATE OF SERVICE

I certify that on July 14, 2016, I caused to be electronically filed the foregoing Opening Brief of Plaintiffs – Appellants.

I further certify that all participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF System.

Dated: July 14, 2016.

*s/ James L. Buchal*
James L. Buchal, OSB No. 921618
Counsel for Plaintiffs - Appellants