UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35262

JOSHUA CALEB BOHMKER, ET AL.,

Plaintiffs – Appellants,

v.

STATE OF OREGON, ET AL.,

Defendants – Appellees,

ROGUE RIVERKEEPER, ET AL.,

Intervenors – Appellees.

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

AMICUS CURIAE BRIEF OF AMERICAN EXPLORATION & MINING ASSOCIATION IN SUPPORT OF APPELLANTS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(c)(1), the undersigned certifies that American Exploration & Mining Association ("AEMA") has no parent corporations and, because it has never issued any stock, there is no publicly held corporation that owns any stock of AEMA.

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AMICUS CURIAE BRIEF OF AMERICAN EXPLORATION & MINING ASSOCIATION

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, AEMA respectfully submits this amicus curiae brief with the consent of all parties.[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than AEMA, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

AEMA (f/k/a Northwest Mining Association) is a nonprofit, nonpartisan, national trade association incorporated under the laws of the State of Washington. AEMA represents over 2,100 members of the hardrock mining industry located in in 41 states and 10 other countries. AEMA is the leading voice in support of exploration, the junior mining sector, and maintaining access to federal lands. AEMA also represents and informs its members on legislative, regulatory, safety, technical, and environmental issues; educates policy-makers and agency representatives; and promotes economic opportunity and environmentally responsible mining.

[1] Intervenor-Appellees Rogue Riverkeeper *et al.* consented on the condition that AEMA's brief "will address different issues from issues raised in [Pacific Legal Foundation]'s amicus brief." Counsel for AEMA and Pacific Legal Foundation conferred and AEMA believes that its amicus curiae brief addresses different issues and represents different interests than that of Pacific Legal Foundation.

Central to AEMA's mission is advocating for and advancing the mineral resource and mining related interests of its members. AEMA has participated in litigation seeking to protect the use of public lands for hardrock mining and to promote commonsense, non-burdensome agency regulations governing those lands. *See, e.g.*, *Chevron Mining Inc. v. United States*, No. 15-2209 (10th Cir.) (amicus curiae); *Am. Exploration & Mining Ass'n v. EPA*, No. 15-4305 (6th Cir.) (petitioner); *Yount v. Jewell*, No. 14-17352 (9th Cir.) (plaintiff); *People of the State of California v. Rinehart*, S222620 (Ca. 2015) (amicus curiae); *Wyoming v. U.S. Dept. of Agric.*, 661 F.3d 1209 (10th Cir. 2011) (amicus curiae); *Topaz Beryllium Co. v. United States*, 649 F.2d 775 (10th Cir. 1981) (intervenor); *Earthworks v. U.S. Dept. of the Interior*, 279 F.R.D. 180 (D.D.C. 2012) (intervenor); *Northwest Min. Ass'n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998) (plaintiff). AEMA has a substantial interest in ensuring that, to the maximum extent possible, mineral entry and location remain feasible on all federal lands. To this end, AEMA seeks to ensure that regulatory measures are not so burdensome as to prevent exploration and mineral development. AEMA respectfully submits this amicus curiae brief in support of Appellants to provide this Court with the relevant context and purpose of the longstanding federal laws governing mining on federal lands.

SUMMARY OF ARGUMENT

There are few federal policies that have withstood political whim and caprice for 150 years, but Congress's encouragement and facilitation of the development of the Nation's mineral resources on federal lands is one of them. In passing the 1872 Mining Law ("Mining Law"), 30 U.S.C. § 22 *et seq.*, Congress extended a unilateral offer that grants all U.S. citizens and those who declare an intent to become a citizen a statutory right to enter upon federal lands in order to explore for and develop valuable mineral deposits. *Id.* § 22. In subsequent lawmaking, although Congress has seen fit to develop procedures and standards for location, exploration, development, and reclamation of mining claims on federal lands, it has continued its policy of encouraging the development of the Nation's mineral resources through private enterprise. By enacting Oregon Senate Bill 838 ("SB838"), which bans all mining using motorized equipment in the beds and banks of state rivers, the State of Oregon has completely frustrated Congress's purpose in authorizing mineral development on federal lands. *See* Appellants' Excerpts of Record ("ER") at 159–63. Therefore, under established precedent, SB838 is preempted by federal law.

ARGUMENT

I. THE MINING LAW PROMOTES THE DEVELOPMENT OF MINERAL RESOURCES BY OPENING FEDERAL LANDS TO EXPLORATION AND DEVELOPMENT AND CONFERRING SIGNIFICANT PROPERTY RIGHTS ON MINING CLAIMANTS.

For over 150 years, the United States has had an official policy of encouraging and facilitating the exploration for, and development of, the nation's mineral resources on federal lands. This policy was first reflected in the Lode Law of 1866 and the Placer Act of 1870, which provided for the location of lode and placer claims on the federal lands and provided the reward of fee simple title to those who were willing to risk to their labor and capital in developing the Nation's minerals. 14 Stat. 261 (July 26, 1866) ("Lode Law"); 16 Stat. 217 (July 9, 1870) ("Placer Act"). In 1872, Congress reaffirmed this policy when it passed the Mining Law. Cong. Globe, 42d Cong., 2d Sess. 534 (1872) (statement of Sen. Aaron A. Sargent); *see also* H.R. Rep. No. 84-730 at 3, *reprinted in* 1955 U.S.C.C.A.N. 2474, 2476 ("Historically, the Federal mining law has been designed to encourage individual prospecting, exploration, and development of the public domain. The incentive for such activity has been the assurance of ultimate private ownership of the minerals and lands so developed."). Nearly 100 years later, Congress reaffirmed the policy reflected in the Mining Law when it passed the Mining and Minerals Policy Act of 1970 ("MMPA"):

> [I]t 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 …, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products ….

30 U.S.C. § 21a.[2]

The Mining Law grants all citizens a statutory right to enter upon unappropriated federal lands for the purpose of exploring for and developing "valuable mineral deposits." 30 U.S.C. § 22; *Union Oil Co. of California v. Smith*, 249 U.S. 337, 346 (1919) ("[The Mining Law] extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits …."). In addition, a person who satisfies the procedures for "locating" a claim becomes the owner of a mining claim. 30 U.S.C. §§ 22, 23, 26. A mining claim "is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States."

[2] As one commentator has observed, this codified policy towards mining clearly indicates that "the study and development of methods to control mineral waste products and reclamation of mined land are the methods by which Congress chose to deal with the environmental problems created by mining." Matt A. Crapo, *Regulating Hardrock Mining: To What Extent Can the States Regulate Mining on Federal Lands?*, 19 J. Land Resources & Envtl. L. 249, 259 (1999) ("Note that Congress could have chosen to ban mining methods that pose significant or substantial threats to the environment but declined to do so.").

Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 317–18 (1930). A mining claim grants the owner the exclusive right to extract all the locatable minerals embraced within the boundaries of the claim. *Union Oil*, 249 U.S. at 348–49 (An owner of a mining claim has "the right to extract the minerals, even to exhaustion …."); *United States v. Shumway*, 199 F.3d 1093, 1098–99 (9th Cir. 1999) (The right of an owner of a mining claim "to all the minerals he extracts, has been a powerful engine driving exploration and extraction of valuable minerals, and has been the law of the United States since 1866."). More importantly, the right to mine may not be eliminated at the whim of any government. *Id.* at 1103; *see Forbes v. Gracey*, 94 U.S. 762, 766–67 (1876) (The right "to develop and work the mines, is property in the miner, and property of great value."). Thus, even when a mining claim is unperfected—i.e., where a claimant has located a claim but not yet discovered a valuable mineral deposit—the Mining Law confers substantial rights to the claimant.[3] *Union Oil*, 249 U.S. at 347.

The legislative history of the Lode Law, the Placer Act, and the Mining Law collectively demonstrates Congress's intent to facilitate development of the

[3] Once a claimant has perfected a mining claim by discovery of a valuable mineral deposit, the claim becomes "property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States." *Wilbur*, 280 U.S. at 316–17; *Union Oil*, 249 U.S. at 349 ("[E]ven without patent, the possessory right of a qualified locator after discovery of minerals upon the claim is a property right in the full sense, unaffected by the fact that the paramount title to the land is in the United States ….").

nation's mineral resources.[4] Cong. Globe, 42nd Cong., 2nd Sess. at 534 (1872) (California Representative Sargent, member of the Committee on Mines and Mining, stating that the Mining Law was intended to "provide[] extra incentive" for miners to "go down deeper in the earth, to dig further into the hills, and in every way to improve their own condition …."). Indeed, "security of title was integral to and paramount in the passage of the mining laws." *High Country Citizens Alliance*, 454 F.3d at 1183 ("'Men will not lend their capital to mining projects where the title to the soil is in the Government, and cannot be pledged as security.'" (quoting Cong. Globe, 38th Cong., 2d Sess. 686 (1865))); Cong. Globe, 38th Cong., 1st Sess. 2557 (1864) (Purpose of the Lode Law was to provide mining claimants the ability "to acquire a right to the lands."); Cong. Globe, 39th Cong., 1st Sess. 3227 (1866) (Purpose of the Lode Law was for "the Government to give title, so important for permanent prosperity" which was prompted by "the absolute necessity of some system guarantying to capitalists security for their investment."); *id.* at 3228 ("The feeling of security and independence produced by the right of property in the soil is the real foundation of our stability …."); Cong. Globe, 42nd Cong., 2d Sess. 532–34 (1872) (In passing the Mining Law, Congress intended to "induc[e] miners to purchase their claims …."). Congress's policy was

[4] Because the Mining Law "essentially served to combine and fine tune [the Lode Law and the Placer Act] …, it is necessary to review the history of that legislation as well." *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1183 (10th Cir. 2006).

clearly to provide mining claimants with certainty of title sufficient to induce development of the nation's mineral resources.

A "mining claim" is "not a claim in the ordinary sense of the word—a mere assertion of a right—but rather is a property interest, which is itself real property in every sense …." *Shumway*, 199 F.3d at 1099–1100 ("In ordinary English, a 'claim' is merely a demand for something …. The phrase 'mining claim' therefore probably connotes to most layman an unsupported assertion or demand from which no legal rights can be inferred. But that is emphatically not so."). A "mining claim" is a significant property right protected by the Fifth Amendment of the U.S. Constitution. *See United States v. North Amer. Transp. & Trading Co.*, 253 U.S. 330, 331–34 (1920) (The United States must pay just compensation when it occupies a mining claim).[5] The Supreme Court and this Court have interpreted the

[5] Although this is not a takings case, if SB838 is allowed to stand, it would result in numerous takings claims and significant expense to Oregon taxpayers because the essential stick in the bundle of rights making up a mining claim is the right to mine. *Union Oil*, 249 U.S. at 348–49 (An owner of a mining claim has "an exclusive right of possession to the extent of his claim as located, with the right to extract the minerals, even to exhaustion, without paying any royalty to the United States …."); *Skaw v. United States*, 740 F.2d 932, 935–36 (Fed. Cir. 1984) ("After discovery of a valuable mineral deposit … the possessory right of the locator is a property right …. *A fortiori* it is a property right which is within the protection of the Fifth Amendment's prohibition against the taking of private property for public use without just compensation." (internal quotation omitted)); *Forbes*, 94 U.S. at 766–67 (the right to mine is "property of great value"); *see also* Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 Ecology L. Q. 57, 77 (1997) ("[A]gency regulation that renders an unpatented mining operation unprofitable could be ruled a taking under [*Lucas v. South*

Mining Law as conferring rights that are "unassailable." *Smelting Co. v. Kemp*, 104 U.S. 636, 640–41 (1881); *Shumway*, 199 F.3d at 1096. Such interpretations reinforce Congress's intent to adopt "a just, liberal, and definite policy … toward the miners." Cong. Globe., 39th Cong., 1st Sess. at 3228 (1866). Thus, when considering whether a state law is preempted by the federal mining laws, courts should consider whether the state law frustrates Congress's clear purpose to grant unassailable property rights and certainty of title to mining claimants.

The magistrate in the case at bar erred by treating Appellants' property rights as merely one of several competing interests, all of which the magistrate believed were entitled to equal weight. *Bohmker v. State*, ___ F. Supp. 3d ___, 2016 WL 1248729, at *2 (D. Or. Mar. 25, 2016) (Magistrate describing these other "interests" as "groups and individual citizens who are understandably increasingly concerned about the impact that mining activities have on the natural environment."). The magistrate's approach directly conflicts with both previous interpretations and the legislative history of the Mining Law. *See High Country Citizens Alliance*, 454 F.3d at 1185 (rejecting plaintiffs' claims that their "recreational and environmental" interests should be considered in deciding whether to issue a patent under the Mining Law because "[those] two interests … were not paramount at the time Congress sought to develop the economy through

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Carolina Coastal Council, 505 U.S. 1003 (1992)'s] holding that the government may not regulate property so as to deny an owner all economic use.").

mining."); *see also Grand Canyon Trust v. Williams*, 98 F. Supp. 3d 1044, 1056–57 (D. Arizona 2015), *appeal filed*, No. 15-15857 (9th Cir. Apr. 28, 2015) (Environmental and tribal plaintiffs "do not fall within the zone of interests protected or regulated by the Mining Law" and thus lack standing to challenge the Forest Service's valid existing rights determination regarding mining claimants). The magistrate was not required to "balance these conflicting interests" under the Mining Law, *Bohmker*, 2016 WL 1248729 at *2, instead; the magistrate was required to determine whether SB838 frustrated Congress's purpose of granting significant property rights to mining claimants and incentivizing development of the Nation's valuable mineral resources.[6] *See High Country Citizens Alliance*, 454 F.3d at 1186 ("'the 1872 Mining Law creates a presumption in favor of mining that is difficult—if not impossible—to overcome … [it] is the Magna Carta of mining on public land; its provisions have a status higher than that of ordinary law'" (quoting Carl J. Mayer, *The 1872 Mining Law: Historical Origins of the Discovery Rule*, 53 U. Chi. L. Rev. 624, 648 (1986))). By failing to give the rights granted under the Mining Law adequate weight, the magistrate erroneously

[6] The magistrate compounded his error by questioning the validity of Appellants' mining claims in an apparent effort to justify the state's infringement on Appellants' right to mine. *Bohmker*, 2016 WL 1248729 at *2 (Asserting that the mining laws are "complex[]" and "it is far from clear from the record before the Court whether most of [Appellants] have in fact complied with federal law."). While the validity of Appellants' claims is not at issue here, all mining claims are presumed valid until proven otherwise. *See Collard v. U.S. Dep't of the Interior*, 154 F.3d 933, 936 (9th Cir. 1998).

determined that SB838's prohibition on Appellants' exercise of those rights was not preempted.

II. SINCE PASSAGE OF THE MINING LAW, CONGRESS HAS REAFFIRMED ITS POLICY OF ENCOURAGING DEVELOPMENT OF THE NATION'S VALUABLE MINERAL DEPOSITS.

The magistrate also attempted to dilute the preemptive effect of the Mining Law by citing subsequent acts of Congress that he believed supported state authority to regulate mining. *Bohmker*, 2016 WL 1248729 at **5–6. First, as demonstrated *infra*, the magistrate conflated permissible state environmental regulations with a *de facto* prohibition on mining. Second, the magistrate completely missed the point that the acts of Congress that followed the Mining Law reinforced Congress's continuing policy of encouraging development of the Nation's valuable mineral deposits.

In 1897, Congress passed the Forest Service Organic Act, 16 U.S.C. § 473 *et seq*., which outlines the U.S. Forest Service's ("Forest Service") authority to regulate mining and provides limitations on that authority, making it clear that "the Forest Service must act consistently with the federal policy of promoting mineral development." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 598 (1987) (Powell, J., concurring in part and dissenting in part); 16 U.S.C. § 478 ("Nor shall anything in [this Act] … 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."). The Forest Service's regulations recognize that, while it may manage mining to protect environmental concerns, it may not "unreasonably restrict[]" the right to mine. 39 Fed. Reg. 31,317 (Aug. 28, 1974) ("[P]rospectors and miners have a statutory right, not mere privilege, under the 1872 mining law and the Act of June 4, 1897, to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production. Exercise of that right may not be *unreasonably restricted*." (emphasis added)); 36 C.F.R. § 228.1 (2013) ("[T]he United States mining laws … confer a statutory right to enter upon the public lands to search for minerals …."). Courts have repeatedly reinforced the statutory limits on the Forest Service's ability to regulate mining. *See, e.g.*, *Skaw*, 740 F.2d at 941 ("[T]here is nothing in the regulations which authorizes the Forest Service to prohibit plaintiffs' right to the possession and enjoyment of their claims, or to encroach impermissibly upon those rights by circumscribing their use in a manner that amounts to a prohibition."); *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981) ("[P]rospecting, locating, and developing of mineral resources in the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition …."). Accordingly, mining operations must "be conducted so as, *where feasible*, to minimize adverse environmental impacts on National Forest surface resources." 36 C.F.R. § 228.8 (emphasis added). The Organic Act

did not address the power of states to regulate mining in National Forests, but it is unlikely Congress intended for states to infringe on the right to mine on federal lands when it expressly forbade a federal land management agency from doing so.

In 1955, Congress passed the Surface Resources and Multiple Use Act, 30 U.S.C. § 611 *et seq.* ("Surface Resources Act"). That law was directed at ensuring development of mining claims by preventing "sham mining claims used for other purposes." *See Shumway*, 199 F.3d at 1101. The Act thus provides that "[a]ny 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." 30 U.S.C. § 612(a). The Surface Resources Act also allows other surface uses on a mining claim provided that such use "shall be such as *not to endanger or materially interfere with* prospecting, mining, or processing operations or uses reasonably incident thereto …." *Id.* § 612(b) (emphasis added). At the time the Surface Resources Act was passed, the Secretary of the Department of Agriculture wrote to Congress emphasizing that:

> The Department of Agriculture desires to encourage legitimate prospecting, and effective utilization and development of mineral resources of the national forests …. We would not favor legislation which would interfere with such development of minerals nor work hardship on the bona fide prospector or miner.

H.R. Rep. 84-730 at 21, *reprinted in* 1955 U.S.C.C.A.N. 2474, 2493. Congress agreed, recognizing that "continual interference by Federal agencies in an effort to overcome th[e] difficulty [of fraudulent claims] would hamper and discourage the development of our mineral resources, development which has been encouraged and promoted by Federal mining law since shortly after 1800." *Id.* at 6, 1955 U.S.C.C.A.N. at 2479. Thus, the Surface Resources Act permitted the multiple use of the surface resources of the claims, "so long as that use did not materially interfere with prospecting or mining operations." *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1283 (9th Cir. 1980). The Surface Resources Act reaffirmed Congress's policy of incentivizing development of valuable mineral resources and prioritizing that development over other uses:

> The effect of nonmining activity under color of existing mining law should be clear to all: a waste of valuable resources of the surface on lands embraced within claims which might satisfy the basic requirement of mineral discovery, but which were, in fact, made for a purpose other than mining ….

H.R. Rep. 84-730, at 6, 1955 U.S.C.C.A.N. at 2479.

The magistrate cited the Surface Resources Act's provision that multiple-use management was not intended to affect state water laws in support of his finding that federal mining laws do not preempt SB838. *Bohmker*, 2016 WL at *5. This reliance is puzzling, however, considering that Congress was clearly referencing state laws "relating to the ownership, control, appropriation, use, and distribution

of ground or surface waters within any unpatented mining claim." 30 U.S.C. § 612(b). While SB838 applies to all rivers in the state, it is not a run-of-the-mill water law governing the distribution of waters of the state. Such laws are undoubtedly within a state's police power. *See generally Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 529 (1908). Instead, SB838 prohibits motorized mining in the beds and banks of all rivers of the state under the guise of environmental regulation. ER159.

In 1970, Congress passed the MMPA. The MMPA reinforced Congress's "continuing policy … to foster and encourage private enterprise in … the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries …." 30 U.S.C. § 21a. In 1976, Congress incorporated the MMPA into the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* ("FLPMA"), which requires the federal government to manage federal public lands "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 [MMPA] as it pertains to the public lands …." 43 U.S.C. § 1701(a)(12) (emphasis added). Importantly, FLPMA provides that "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." *Id.* § 1732(b).

The federal mining laws thus demonstrate a cohesive policy, stretching back 150 years, of "reward[ing] and encourag[ing] the discovery of minerals that are valuable in an economic sense." *United States v. Coleman*, 390 U.S. 599, 602 (1968); *High Country Citizens Alliance*, 454 F.3d at 1184. It is still "the policy and requirement of law that, except as otherwise provided, all valuable mineral deposits in lands belonging to the United States shall be open to exploration under regulations prescribed by law …." *Ranchers Exploration & Development Co. v. Anaconda Co.*, 248 F. Supp. 708, 714 (D. Utah 1965); Note, *California Coastal Commission v. Granite Rock Company: The States' Voice in Federal Land Policy Gets Louder But Not Much Clearer*, 18 Envtl. L. 181, 185 (1987) ("[T]he hardrock mineral location system was motivated by a desire to encourage mineral exploration and development of public lands. This is still a fundamental national policy, … [although] mining is regulated to mitigate … environmental effects."). The magistrate erred in failing to recognize that the federal laws Congress passed subsequent to the Mining Law reinforced Congress's policy of encouraging development of the Nation's mineral resources.

III. SB838 IS PREEMPTED BY THE MINING LAW.

Congress retains the power to enact legislation regarding federal lands pursuant to the Property Clause, U.S. Const., art. IV, § 3, cl. 2. *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976). The Property Clause of the U.S. Constitution

provides that, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., art. IV, § 3, cl. 2. And the Supremacy Clause provides that "[the] Constitution, and the laws of the United States … shall be the supreme Law of the Land …." *Id.* art. VI, cl. 2. When Congress passes laws pursuant to its Property Clause power, "the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause." *Kleppe*, 426 U.S. at 543 ("[W]here those state laws conflict … with other legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede." (citing U.S. Const. art. VI, cl. 2)). Such preemption is necessary to prevent "plac[ing] the public domain of the United States completely at the mercy of state legislation." *Id.*

State law conflicts with federal law when either: (1) it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963); or (2) where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Although each state retains jurisdiction over federal lands in its territory, a state may not supplant Congress's statutory scheme governing federal lands with its own. *Ventura Cnty. v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 (9th Cir. 1979), *aff'd without opinion*, 445 U.S. 947 (1980) ("The federal

Government has authorized a specific use of federal lands, and Ventura [County] cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.").

The only question presented by this case is whether SB838 is a permissible environmental regulation or whether it is preempted because it frustrates Congress's purpose of developing the Nation's valuable mineral deposits. SB838 undisputedly imposes a five-year "moratorium" 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 …." ER159. In determining that SB838 did not constitute a *de facto* ban on mining, the magistrate ignored governing law and dismissed as irrelevant the practical effect of SB838, *i.e.*, that it concededly makes it unprofitable and impracticable to mine Appellants' mining claims across the state. *Bohmker*, 2016 WL 1248729 at **7–9. According to the magistrate, under SB838, "the 'valuable mineral deposits in lands belonging to the United States' in Oregon remain 'free and open' to mineral exploration and development by means other than the use of motorized equipment[,]" so SB838 is not preempted by federal law. *Id.* at *9. However, governing precedent is clear that a state or local law that makes it commercially impracticable to mine is a *de facto* ban that is preempted by the Mining Law.

In *Granite Rock*, the U.S. Supreme Court held that the Mining Law does not deprive states of all authority to regulate the environmental impacts of mining. 480 U.S. at 581–84. While the Court did not reach the question of to what extent a state could infringe on a mining claimant's right to mine under the Mining Law,[7] it did assume—and the state agency conceded—that an outright ban on mining would be preempted. *Id.* at 586–87. Additionally, the Supreme Court emphasized that a state may not use environmental regulations as a pretext to achieve its land use planning objectives on federal lands. *Id.* at 587. Although the Court conceded that some cases may be close, it emphasized that state regulations that make mining "commercially impracticable" clearly fall on the preempted side of the spectrum. *Id.*

Subsequent cases have expounded on *Granite Rock*'s statement that state laws effectively prohibiting mining are preempted. In *South Dakota Mining Association, Inc. v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), the Eighth Circuit considered whether a county ordinance prohibiting issuance of "new permits or amendments to existing permits … for surface metal mining extractive industry projects" in a 40,000 acre area of the county was preempted by the Mining

[7] Because the mining company in *Granite Rock* mounted a facial challenge to a Coastal Commission permit requirement "before discovering what conditions the Coastal Commission would have placed on the permit," the only issue before the Court was whether Congress intended to preempt "*any* state regulation" of mining. 480 U.S. at 581–82, 584, 588–89 (emphasis added). The Court held that it did not. *Id.* at 588–89.

Law. *Id.* at 1007. Emphasizing that the Mining Law "provides for the free and open exploration of public lands for valuable mineral deposits[,]" the court held the county's "de facto ban" on mining posed "a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act." *Id.* at 1011. Importantly, even though the ordinance at issue did not outlaw all forms of mining, the court emphasized that, "[b]ecause surface metal mining *is the only practical way* any of the plaintiffs can actually mine the valuable mineral deposits located on federal land in the area, the ordinance's effect is a de facto ban on mining in the area." *Id.* (emphasis added).

Similarly, in *Ventura County*, this Court considered whether Ventura County's attempt to require a permit for oil exploration and extraction pursuant to its zoning ordinances was preempted by federal law. 601 F.2d at 1083. Although the federal statute at issue was the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 181 *et seq*., not the Mining Law, *Ventura County* is instructive.[8] This Court found

[8] In *Brubaker v. Bd. of Cnty. Com'rs, El Paso Cnty.*, 652 P.2d 1050, 1058 (Colo. 1982) (en banc), the Colorado Supreme Court rejected an attempt to distinguish *Ventura County*'s application to the Mining Law on the basis that that the Mineral Lands Leasing Act "is more pervasive than the federal scheme embodied in the Mining Law ….". The court explained that the pervasiveness of a statutory scheme is only relevant to the question of field preemption, and "[e]ven if Congress has not preempted an entire field, specific state or local laws that conflict with the purposes and objectives of Congressional enactments are nevertheless preempted." *Id.* Thus, the court held *Ventura County*'s conflict preemption analysis directly applicable to the question of whether a county ordinance is

that the local ordinance conflicted with an "extensive federal scheme reflecting concern for the local environment as well as development of the nation's resources …." *Ventura Cnty.*, 445 U.S. at 1084. Analogizing to the Supreme Court's decision in *Kleppe*,[9] this Court explained, "that the New Mexico authorities wished to engage in activity that Congress prohibited, while the Ventura authorities wish to regulate conduct which Congress has authorized is a distinction without a difference." *Id.* And this Court emphasized that, "[a]lthough state law may apply where it presents no significant threat to any identifiable federal policy or interest, the states and their subdivisions have no right to apply local regulations impermissibly conflicting with achievement of a congressionally approved use of federal lands …." *Id.* at 1086 (quotation omitted).

In the case at bar, SB838 impermissibly "'stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Hines*, 312 U.S. at 67). By prohibiting the motorized extraction of valuable minerals from placer deposits located in the beds or banks of state waterways, SB838 bans mining activity on federal lands which Congress has

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preempted by the Mining Law because it frustrates the purpose of Congress. *Id.* at 1079–80.

[9] In *Kleppe*, the Supreme Court held that a state livestock board could not enter onto federal lands and round up stray burros and horses pursuant to a state estray law because such action frustrated Congress's purpose of enacting the Wild Free-roaming Horses and Burros Act—to "preserve and protect the wild free-roaming horses and burros *on the public lands of the United States*." 426 U.S. at 536–37 (emphasis added).

expressly approved. SB838 does not constitute a reasonable environmental regulation that would, for example, mitigate "risks to Oregon's natural resources …." *See Bohmker*, 2016 WL 1248729 at *2. Instead, it imposes a "moratorium" that makes it "commercially impracticable" for Appellants to mine their claims. *Id.* at *8, SB838 § 2(1); Appellants' ER at 102, 129, 134, 138, 143, 150, 217. An ordinance that is "prohibitory, not regulatory, in its fundamental character" is unlawful and "offends both the Property Clause and the Supremacy Clause of the federal Constitution." *South Dakota Min. Ass'n*, 155 F.3d at 1011. The federal mining laws set forth a clear congressional objective of encouraging the development of the Nation's mineral resources. By imposing a *de facto* ban on the exploration and development of valuable mineral deposits on Appellants' perfected mining claims under the guise of environmental regulation, Oregon has frustrated that objective.

The magistrate pretended that SB838's moratorium on motorized mining is not a complete ban because it "only" prohibits "one form of mining" and allows motorized mining 100 yards upland of the high water mark.[10] *Bohmker*, 2016 WL

[10] In characterizing SB838 as merely an environmental regulation rather than a moratorium, the magistrate repeatedly emphasized the state's ability to regulate, for example, water pollution under the Clean Water Act, 33 U.S.C. § 1370. *Bohmker*, 2016 WL 1248729 at *6. The magistrate's reliance on the Clean Water Act completely misses the point and begs the question of whether SB838 is in fact a permissible environmental regulation. Indeed, Oregon has in place existing environmental regulations—such as water quality standards for turbidity—which

1248729 at *8. This oversimplification betrays a lack of basic understanding of how underwater deposits of gold and other precious minerals are accessed—and that those deposits constitute the sum total of the value of Appellants' mining claims. Such deposits "cannot, as a practical matter, be reached effectively through the use of hand tools, because the water current interferes with efforts to shovel away the overburden between the miner and the gold, which being heavier, usually sinks down to the bedrock." ER at 106. There is simply no way for Appellants to access the valuable mineral deposits located on their claims without use of motorized equipment in the beds and banks of the rivers.

Furthermore, even a state law that does not ban *all* forms of mining of *all* minerals on *all* mining claims in the state can frustrate Congress's purpose in passing the federal mining laws. Where a state regulation makes mining a certain type of deposit impracticable, it constitutes a *de facto* ban on mining in that area. *Compare Bohmker*, 2016 WL 1248729 at *8 (reasoning that SB838 is not preempted because it "is not a ban on all mining in all waterways") *with South Dakota Min. Ass'n*, 155 F.3d at 1011 ("Because the record shows that surface metal mining is the only practical way any of the plaintiffs can actually mine the valuable mineral deposits located on federal land in the area, the ordinance's effect

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permissibly regulate Appellants' mining activities and protect the environment. *See* OAR § 340-041-0036. No one disputes the state's power to enact such environmental regulations so long as the statutory right to mine is not thereby infringed.

is a de facto ban on mining in the area."). SB838's ban on motorized mining is similar to the *South Dakota Mining Association* ban on surface metal mining in that it effectively prevents mining of valuable minerals in areas by prohibiting the method which is the only practical way to extract them. Thus, the magistrate's conclusion that even if a state law "makes it difficult or impossible for a miner to locate the mineral deposit of a claim, such a result is not a basis to find the law preempted[]" simply cannot be squared with the Supremacy Clause. *Compare Bohmker*, 2016 WL 1248729 at *9 *with Coleman*, 390 U.S. at 602 ("The obvious intent [of the Mining Law] was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the costs of extraction and transportation are hardly economically valuable."). In short, by making it impracticable and unprofitable to mine placer deposits found in the beds and banks of state rivers, SB838 clearly frustrates Congress's purpose in encouraging the development of the Nation's mineral resources. *See id.* at 602 (The purpose of the Mining Law is to "reward and encourage the discovery of minerals that are valuable *in an economic sense*." (emphasis added)).

The magistrate also erred in finding that SB838 was not an impermissible land use law preempted by federal regulations. *Bohmker*, 2016 WL 1248729 at **6–7 (Citing *Granite Rock*, which provides that federal law "pre-empts the

extension of state land use plans onto unpatented mining claims in national forest lands." 480 U.S. at 585). *Granite Rock* emphasized that a state may not achieve its land use planning objectives on federal lands under the guise of environmental regulations. 480 U.S. at 587. The magistrate attempted to draw a distinction between state land use plans and SB838 based on the fact that SB838's prohibition on motorized mining "does not mandate particular uses of the land …." *Bohmker*, 2016 WL 1248729 at *7. The magistrate's distinction is confusing given that, while "[l]and use planning in essence chooses particular uses for the land[,]" *Granite Rock*, 480 U.S. at 587; "[c]onversely, land use planning would also include the prohibition of particular uses for the land." Crapo, *Regulating Hardrock Mining*, 19 J. Land Resources & Envtl. L. at 260. A prohibition of particular uses can just as easily "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as can a law that compels certain land uses. *Hines*, 312 U.S. at 67. Indeed, where—as here—Congress seeks to incentivize a particular use, prohibition of that use undoubtedly frustrates the Mining Law's aim to "encourage exploration for a development of mineral resources on public lands." *See Brubaker*, 652 P.2d at 1056 ("The [county] seeks not merely to supplement the federal scheme, but to prohibit the very activities contemplated and authorized by federal law. Such a veto power is not consistent with the Supremacy Clause."). And states may not make

unavailable for mining federal lands which Congress has made available. *See Coleman*, 390 U.S. at 602 ("Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits ….").

Accordingly, the magistrate erred by determining that SB838's prohibition on motorized mining is not an impermissible land use regulation.

CONCLUSION

For the foregoing reasons, this Court should hold that SB838 is preempted by the Mining Law and reverse the judgment below.

DATED this 21st day of July 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rules of Appellate Procedure 29(c) and 29(d), the attached Opening Brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,634 words.

/s/ Gina Cannan
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this 21st day of July 2016. I certify that all counsel of record in this case are registered CM/ECF users and that service to the counsel of record will be accomplished by the appellate CM/ECF system.

DATED this 21st day of July 2016.

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