No. 16-35262

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA CALEB BOHMKER et al.,
Plaintiffs-Appellants,

v.

STATE OF OREGON et al.,
Defendants-Appellees, and

ROGUE RIVERKEEPER et al.,
Defendants-Intervenors-Appellees.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON, HON. MARK D. CLARKE

DEFENDANTS-INTERVENORS-APPELLEES' ANSWERING BRIEF

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Corporate Disclosure Statement.

Defendant-Intervenors-Appellees Rogue Riverkeeper et al. ("Riverkeeper") have no parent corporations and are not publicly-held corporations that issue stock.

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Statement of Issues Presented for Review.

A. Is Oregon Senate Bill 838 ("SB 838"), which regulates permissible types of motorized mining in some fish spawning habitat in Oregon, a "land use plan," and thus preempted by federal law?

B. If not a land use plan, is SB 838 a state environmental regulation intended to protect water quality and imperiled fish in some spawning habitat in Oregon, and thus not preempted by federal law?

C. Was the District Court correct to deny Plaintiffs-Appellants Joshua Bohmker *et al*. ("the Miners'") motion for summary judgment, and grant the motion for summary judgment of Defendants-Appellees State of Oregon *et al*. ("Oregon")?

Statement of the Case.

A. Salmon and Steelhead and Bull Trout in Oregon.

In 1991, the American Fisheries Society issued a peer-reviewed report on the status of anadromous fish in California, Oregon, Idaho, and Washington. Riverkeeper Supplemental Excerpts of Record ("SER") 1-18. The report documented an extraordinary decline from historic estimates of runs of salmon and steelhead trout throughout the region. *Id*. Subsequently, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service listed certain populations of anadromous salmon and steelhead trout in the region, as well as resident bull trout, as threatened with extinction under the Endangered Species Act ("ESA").

See, *e.g.*, 62 Fed. Reg. 24,588 (May 6, 1997) (listing of coho salmon in southern Oregon and northern California); 50 C.F.R. § 17.44(w) (listing of bull trout in Oregon). The National Marine Fisheries Service determined that mining is one of the "major activities responsible for the decline of coho salmon in Oregon and California." *Id*. at 24,592.[1]

Oregon has long recognized the importance of salmon, steelhead trout, and bull trout to the people of the state, and has acted to address the species' seriously depressed state. As far back as 1935, Oregon state law prohibited pollution of public waters of the state in ways that were "destructive of fish life." *Columbia River Fishermen's Protective Union v. City of St. Helens*, 160 Or. 654, 663, 87 P.2d 195, 198 (Or. 1939) (citing OR. CODE SUPP. § 39–603). The Oregon Supreme Court noted that "[t]he regulatory power of a state extends not only to the taking of its fish, but also over the waters inhabited by the fish. Its care of the fish would be of no avail if it had no power to protect the waters from pollution." *Id*.

In 1993, Oregon adopted protective laws to regulate activities in "essential indigenous anadromous salmonid habitat" ("ESH") in its rivers and creeks. OR.

[1] Jim Lichatowich, a co-author of the fisheries report, has written that salmon "are like silver threads woven deep into the fabric of the Northwest Ecosystem. The decline of salmon to the brink of extinction is a clear sign of serious problems. The beautiful tapestry that the Northwesterners call home is unravelling; its silver threads are frayed and broken." Lichatowich, J. 1999. SALMON WITHOUT RIVERS: A HISTORY OF THE PACIFIC SALMON CRISIS. p. 6. Island Press.

REV. STAT. § 196.810(1)(b). ESH means the parts of waters "that fill all or part of the basic or indispensable spawning and rearing needs of indigenous anadromous salmonids," and are necessary to prevent their depletion. OR. ADMIN. R. § 141-102-0020(1).[2] "[I]ndigenous anadromous salmonids" means "chum, sockeye, Chinook and Coho salmon, and steelhead and cutthroat trout" that "are listed as sensitive, threatened or endangered by a state of federal authority." *Id*. § 141-102-0020(2).

Oregon regulates mining in placer deposits in its rivers and creeks primarily through two state agencies. The Oregon Department of Environmental Quality, which has authority to administer the National Pollutant Discharge Elimination System of the Clean Water Act, regulates the discharge into navigable waters of pollutants from mining operations. *See* OR. Rev. Stat. § 468B.035. The agency requires suction dredge miners to either register for a general water quality discharge permit for their operations, or to apply for an individual permit if their

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[2] The Oregon Department of State Lands designates and maps ESH. OR. ADMIN. R. § 141-102-0030. The Department consults annually with the Oregon Department of Fish and Wildlife to ensure its designations are accurate. OR. ADMIN. R § 141-102-0040(1). The Miners cite a declaration from the president of a mining district, and repeat his view that "vast areas of the state have been classified as so-called" ESH, "but many of the areas so designated are not anadromous salmon habitat at all, much less 'essential.'" Opening Br. p. 3 n.1 (citing ER 116-17). If anyone thinks any ESH designation is wrong, he can recommend changes through an established process, which the miner apparently has not done: http://www.oregon.gov/dsl/PERMITS/docs/Moratorium%20FAQ%2012-31-15.pdf (State of Oregon website link to PDF describing ESH revision process); *see Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 727 (9th Cir. 2015), *cert. denied* 136 S. Ct. 823 (2016) (taking judicial notice of agency information posted on its website).

operations would exceed general permit conditions. *See* Or. Admin. R. § 340-045-0030. In turn, the Oregon Department of State Lands regulates fill-and-removal activities in rivers and creeks in the state, including in ESH. OR. REV. STAT. § 196.810(1); OR. ADMIN. R. §§ 141-102-0010(2)(c), 141-085. The agency has issued a "general authorization" that suction dredge miners can register for, if they meet specified conditions. OR. REV. STAT. § 196.795-990.

Between 2009 and 2012, there was a significant increase in suction dredge mining operations in rivers and creeks in Oregon. In 2009, 934 suction dredge miners registered for Oregon's general water quality discharge permit. In 2012, 1,941 miners registered for the permit, an increase of 108% in these operations.[3]

This surge in mining raised public concerns about impacts on water quality and imperiled fish and prompted the Oregon legislature to pass SB 838, which was signed on August 14, 2013 by Governor John Kitzhaber. Addendum ("AD") 1-5. SB 838 was designed to give Oregon time to reform its regulatory processes to address harm to water quality and fish from motorized mining. AD 3, §8(1).

SB 838 contains six legislative findings. First: "Prospecting, small scale mining, and recreational mining" are part of Oregon's heritage. *Id*. §1(1). Second: "Prospecting, small scale mining and recreational mining provide economic

[3] *See* http://www.deq.state.or.us/wq/wqpermit/docs/General/npdes700pm/700PMEvalReport.pdf.

benefits" to Oregon and its "rural communities." *Id*. §1(2). Third: "Exploration of potential mine sites is necessary to discover the minerals that underlie the surface and inherently involves natural resource disturbance." *Id*. §1(3). Fourth: "Mining that uses motorized equipment in the beds and banks of the rivers of Oregon can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments of this state in habitat enhancement and areas of cultural significance to Indian tribes." *Id*. §1(4). Fifth: "Between 2007 and 2013, mining that uses motorized equipment" in rivers in Oregon "increased significantly, raising concerns about the cumulative environmental impacts." *Id*. §1(6). Sixth: "The regulatory system related to mining that uses motorized equipment" in rivers in Oregon "should be efficient and structured to best protect environmental values." *Id*. §1(7).

Based on these findings, SB 838 provides: "A moratorium is imposed until January 2, 2021, on mining that uses any form of motorized equipment for the purposes of extracting gold, silver, or any other precious metals from placer deposits of the beds or banks of the 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 in a matter that may impact water quality." *Id.* § 2.(1). "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 salmonid 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." *Id*.

SB 838 is a statute with a particular and well-defined purpose: it is designed to protect water quality and fish by limiting types of motorized mining operations that may affect certain designated waters. SB 838 does not apply to non-motorized means of mining, such as non-motorized sluicing or hand panning. *Id*.[4] It does not apply to motorized mining of placer deposits more than 100 yards back from the ordinary high water mark of streams designated as ESH. *Id*. It does not prohibit motorized mining of placer deposits within 100 yards of the ordinary high water mark of such streams that is authorized by a permit from the Oregon Department of Geology and Mineral Industries, or that does not remove or disturb streamside

[4] There are industry-accepted methods for mining placer deposits that do not involve motorized operations. For example, the Eastern Oregon Miners Association has issued a guide to placer mining that discusses various forms of placer mining such as panning that SB 838 does not address. SER 19.

vegetation in a manner that may impact water quality. *Id*. § 2(2).[5]

In shorthand, SB 838 places a temporary moratorium on motorized mining in the beds and banks of rivers and creeks designated as ESH in Oregon, and prohibits motorized mining in placer deposits within 100 yards upland from the high water mark of ESH-designated streams, unless mining is authorized by a state water quality permit, or will not remove or disturb streamside vegetation in a manner that may impact water quality.

SB 838 restricts mining in ways the National Marine Fisheries Service anticipated in order to recover ESA-listed fish. In its 2014 Recovery Plan for coho salmon in southern Oregon and northern California, the Service recommended that steps be taken to "[a]ssess the impacts of suction dredging and develop suction dredging regulations that minimize or prevent impacts to coho salmon. Consider special closed areas, closed seasons, and restrictions on methods and operations." SER 51. Similarly, in *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1012 (9th Cir. 2012) (en banc), this Court noted that the Forest Service closed to suction dredge mining "cold water refugia" within 500 feet of the mouths of 22 creeks in the Klamath River basin in California, to protect ESA-listed coho.

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[5] The Oregon Department of Geology and Mineral Industries issues a general Water Pollution Control Facilities 600 permit covers sources of small-scale mining operations and non-chemical ore-processing methods http://www.deq.state.or.us/wq/wqpermit/mining.htm.

B. The Miners' Claims and Mining Operations.

The Miners assert they own, seek to own, or would profit from mining on certain unpatented placer mining claims in Oregon, all of which include parts of rivers or creeks designated as ESH.[6] Federal placer claims are typically 20 acres in size, corresponding to the "legal subdivisions of the public lands," 30 U.S.C. § 35, but they can range up to 120 acres in size. *See*, *e.g.*, SER 30-32 (120-acre placer claim). For all of the placer claims in this appeal, the areas where SB 838 applies are relatively small in the context of the overall claim. *See*, *e.g.*, SER 33 (map of Golden 35 claim showing areas open to mining).

Nonetheless, the Miners who hold claims through which ESH-designated rivers or creeks flow fail to establish that they cannot mine parts of their claims where SB 838 does not apply. Their declarations indicate they *prefer* to mine from the beds of rivers or creeks. For example, Don Van Orman declares that he is a part owner of five placer claims along Althouse Creek in the Siskiyou National Forest, but he declared nothing about exploring or mining in the parts of his claims where SB 383 does not apply. ER 101-02 (Van Orman Decl. ¶¶ 1-5). Mr. Ortman

[6] Notably, all of the claims include rivers or creeks that are also designated as "critical habitat" for ESA-listed salmon or trout, except for one miner who owns placer claims on Dads Creek in the South Umpqua River basin. SER 25 & 29. Even though those parts of Dads Creek are not critical habitat for ESA-listed fish, they are ESH, because they provide habitat for winter steelhead trout, which Oregon has designated as a "sensitive" species. SER 29.

declares only that in his view, "the best deposits left are most likely to be located underwater." ER 102 (Van Orman Decl. ¶ 3). Similarly, Larry Coon declares that he owns one placer mining claim along the Calapooia River and one along Vincent Creek, which are both on Forest Service lands. ER 150 (Coon Decl. ¶ 2). Mr. Coon declares that only part of Vincent Creek within his placer claim is designated as ESH. *Id*. He declares nothing about mining the part of the creek that is not ESH, nor of any of the other upland areas where SB 838 does not apply. ER 149-50 (Coon Decl. ¶¶ 1-6). The same is true with other of the Miners' declarations. *Cf*. ER 141-43 (Evens Decl. ¶¶ 1-7), ER 101-02 (Van Orman Decl. ¶¶ 1-5), ER 215-17 (Bohmker Decl. ¶¶ 1-7).

Moreover, even in some of the areas of the Miners' placer claims where SB 838 applies, the record proves that SB 838 does not prohibit all motorized mining. One of the Miners in this case—Jason Gill—has an approved a plan of operations from the Forest Service allowing him to conduct motorized mining on the Governor Davis claim in the Siskiyou National Forest. ER 138 (Gill Decl. ¶ 3); *see* SER 36-47 (Forest Service approval documents). Josephine Creek, which is designated as ESH, flows through a part of the claim. ER 138 (Gill Decl. ¶ 3). Mr. Gill declares that his operations "involve mining a bench deposit ranging as close as 50 to 100 feet from the [*sic*] Josephine Creek." *Id*. Mr. Gill's mining operations are within the 100-yard setback above the ordinary high water mark, so SB 838

applies.[7] However, when the Forest Service approved of his mining operations, it established conditions to protect water quality, including (1) prohibiting removal of timber within 100 yards of the creek, (2) prohibiting removal of vegetation within 50 feet of the stream channel, (3) lining processing ponds to prevent sediment from seeping into the creek, (4) monitoring mining operations, and (5) ceasing operations if sediment enters the creek, or if there is increased turbidity. SER 38.

By its terms, SB 838 does not prohibit motorized mining operations on these parts of Mr. Gill's placer claim, because it does not prohibit mining of placer deposits above the ordinary high water mark that does not "result in the removal or disturbance of streamside vegetation in a matter that may impact water quality." SB 838 § 2.(1). Mr. Gill's contention that SB 838 "purports to make my operations within 300 feet of the highwater mark of the Creek, specifically approved by the federal government, illegal as a matter of state law" is patently incorrect. ER 138 (Gill Decl. ¶ 4). As long as Mr. Gill complies with the conditions of the Forest Service's approval of his mining operations, SB 838 does not prohibit them.

In sum, the record confirms two important facts: First, SB 838 does not apply to all areas within the Miners' unpatented placer claims. Second, even where

[7] The placer *deposit* on Mr. Gill's claim may range as close as 50 feet from the creek, but the map he submitted to the Forest Service when he applied to mine the Governor Davis claim states that his *operations* will be at least 180 feet from the creek. SER 49. This difference is immaterial, however, because SB 838 applies to the areas where Mr. Gill has approval to mine.

SB 838 applies, motorized mining may still occur in some areas, under reasonable conditions. The Miners acknowledge as much: they now take the position that they "need not demonstrate that SB 838 makes it impossible to conduct any and all mining; they merely need to demonstrate the obvious proposition that banning motorized equipment is an obstacle to the full and complete accomplishment of Congressional objectives." Opening Br. p. 18.

In fact, this case is not about a ban on all motorized mining equipment, instead, as is evident from the Miners' declarations, this case centers on whether SB 838 is preempted because it prohibits one *type* of motorized mining, and in discrete areas: suction dredging of streambeds in ESH. *See*, *e.g.*, ER 111 (Lovett Decl. ¶ 2); ER 142 Evens Decl. ¶ 5); ER 216 (Bohmker Decl. ¶ 3); ER 102 (Van Orman Decl. ¶ 3); ER 150 (Coon Decl. ¶ 3). As this Court has noted, suction dredge "miners use gasoline-powered engines to suck streambed material up through flexible intake hoses that are typically four or five inches in diameter. The streambed material is deposited into a floating sluice box, and the excess is discharged in a tailings pile in or beside the stream." *Karuk Tribe*, 681 F.3d at 1012. Suction dredge mining operations often occur in the parts of streambeds where salmon, steelhead trout, and bull trout create their nests (called redds), and seek to spawn and rear. *Siskiyou Regional Educ. Project v. Rose*, 87 F. Supp. 2d 1074, 1102-03 (D. Or. 1999) (discussing impacts on coho salmon of suction dredge

mining in the bed of Silver Creek, a tributary to the Illinois River in Oregon).

C. The District Court Proceeding.

On October 20, 2015, the Miners filed suit in the U.S. District Court for the District of Oregon, alleging that SB 838 is preempted by federal mining laws. ER 228. The case was assigned to Magistrate Judge Mark E. Clarke in Medford, and the parties consented to his issuance of a final order under the district court's local rules. *Id*. The Miners and Oregon filed cross-motions for summary judgment. ER 229-31; ER 233.[8] On March 25, 2016, the district court ruled that SB 838 is not preempted by federal law because it is an environmental regulation, and Oregon has authority to protect water quality and fish by prohibiting types of mining in parts of unpatented placer claims through which ESH-designated rivers or creeks flow. ER 7-23. The district court denied the Miners' motion for summary judgment and granted Oregon's cross-motion for summary judgment. ER 23.

Standard of Review.

This Court reviews *de novo* a district court's order on summary judgment. *Karuk Tribe*, 681 F.3d at 1017 (citation omitted). Summary judgment is

[8] Riverkeeper did not file a cross-motion for summary judgment, but instead opposed the Miners' motion, on the ground that an issue of material fact existed, because the Miners failed to prove they could not mine by motorized means in some areas of their placer claims. ER 233. As noted above, however, the Miners take the position they need not prove they cannot mine anywhere on their claims to succeed on their legal theory; they must prove only that SB 838 is an "obstacle" to the kind of mining they want to conduct on certain parts of their claims.

appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Summary of Argument.

Instream motorized mining operations in spawning and rearing habitat for salmon, steelhead trout, and bull trout degrade water quality and harm fish. After a multi-year surge in suction dredge mining operations in its rivers and creeks, Oregon enacted SB 838 to protect water quality and fish in certain waters. SB 838 limits types of motorized mining operations that can degrade water quality and harm fish. SB 838 is well within Oregon's authority to enact environmental regulations that limit types of mining operations in some areas within federal placer mining claims, in order to protect public resources. The Miners' preemption argument overstates the reach and effects of SB 838, and fails to acknowledge that even where SB 838 applies, some types of motorized mining can still occur. Their basic argument—which is incorrect—is that federal law broadly gives them the right to mine where and how they want. Even the federal agencies that administer federal lands disagree, and affirm that states can adopt regulations such as SB 838 that require a higher level of environmental protection than federal mining laws.

Argument.

A. Laws Applicable to the Miners' Claims.

1. Federal Regulation of Mining.

Under the 1872 Mining Act, "a private citizen may enter public lands for the purposes of mining." *Karuk Tribe*, 681 F.3d at 1012 (citing 30 U.S.C. § 22). An individual may register an unpatented mining claim, which is a "possessory interest in a particular area solely for the purposes of mining." *Clouser v. Espy*, 42 F.3d 1522, 1525 n.2 (9th Cir. 1994). But as the Supreme Court has noted, unpatented mining "[c]laimants . . . take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests." *United States v. Locke*, 471 U.S. 84, 105 (1985). Here, the Miners' unpatented claims are all on lands administered by either the Forest Service or the Bureau of Land Management ("BLM"). SER 25.

a. Mining on Forest Service Lands.

The Supreme Court has stated that the 1872 Mining Act "expressed no legislative intent on the as-yet rarely contemplated subject of environmental regulation." *California Coastal Comm. v. Granite Rock Co.*, 480 U.S. 572, 582 (1987). However, from the beginnings of federal land management law, Congress has consistently provided that federal land management agencies have authority to control mining operations to protect the lands and natural resources under their administration. In 1897, Congress enacted the Organic Act, which established the National Forest system and extended the 1872 Mining Law to the system, and authorized the Secretary of Agriculture "to regulate mining activities in the

National Forests to protect the forest lands from destruction and depredation." *Karuk Tribe*, 681 F.3d at 1012 (citing 16 U.S.C. §§ 482, 551). The Organic Act "specified that prospectors and miners entering federal forest lands 'must comply with the rules and regulations covering such national forests.'" *Id.* (citing 16 U.S.C. § 478).

In *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), this Court held that "the Forest Service may require the locator of an unpatented mining claim on national forest lands to use nondestructive methods of prospecting." *Id*. at 291 & 295 (upholding injunction on motorized methods of prospecting). This Court based its decision on the "interrelationship of federal statutes concerning the national forests and mining on public lands, [namely] Rule 5.2, 30 U.S.C. § 26, 30 U.S.C. § 612, 16 U.S.C. § 551, and 16 U.S.C. § 478." *Id*. at 291-92.

In 1974 and in 2005, the Forest Service promulgated regulations that establish procedures for miners to obtain approval to mine in national forests. *See* 70 Fed. Reg. 32,713 (June 6, 2005) (codified at 36 C.F.R. §§ 228.1 *et seq*.). The regulations provide generally that "a notice of intent to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources." 36 C.F.R. § 228.4(a). As this Court recognized in *Karuk Tribe*, the regulations also "provide examples of *de minimis* mining activities—such as gold panning, metal detecting, and mineral sampling—that 'will not cause'

significant disturbance of surface resources and thus require neither a [notice] or a [p]lan." *Id.*, 681 F.3d at 1013 (italics original).

These regulatory procedures exist in part so the Forest Service can fulfill its duties under the Organic Act, which means it "*must* . . . ensure that its approval of a plan or project does not result in the 'destruction' and 'degradation' of the public forest." *Clouser v. Madigan*, Civ. No. 91-3-AS, 1992 WL 694368, at *4 (D. Or. 1992) (emphasis original), *aff'd sub nom*., *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994). Forest Service mining regulations expressly require that all operators comply with state-issued air quality, water quality, and solid waste standards. 36 C.F.R. § 228.8(a), (b), (c). As noted, Mr. Gill submitted a plan of operations pursuant to these procedures, and the Forest Service approved his plan, with conditions to protect water quality and fish in adjacent ESH. ER 138; SER 38.

b. Mining on BLM Lands.

The BLM administers mining on its lands pursuant to the Federal Land Policy & Management Act ("FLPMA"). 43 U.S.C. §§ 1701 *et seq*. FLPMA requires the BLM to "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b).[9] "[U]nnecessary or undue

[9] The duty to prevent undue degradation is the "heart of FLPMA" and "amends and supersedes the Mining Law." *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 33 & 42 (D. D.C. 2003).

degradation" means "conditions, activities, or practices" that fail to comply with, among other things, "state laws related to environmental protection." 43 C.F.R. §§ 3809.5, 3809.415. BLM regulations "[p]rovide for maximum possible coordination with appropriate State agencies," and affirm "there is no conflict" between BLM regulations and state laws "if the State law or regulation requires a higher standard of protection for public lands than this subpart." *Id*., §§ 3809.1(b), 3809.3.[10]

BLM regulations specifically address suction dredges. 43 C.F.R. § 3809.31(b)(1) provides: "If your operations involve the use of a suction dredge, and 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 a notice or plan of operations, unless otherwise provided in the agreement between BLM and the State." Here, there is no agreement between BLM and Oregon related to suction dredges. SER 27. Accordingly, "[f]or 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. 43 C.F.R. §

[10] When it promulgated its regulations, BLM iterated that "neither this final rule nor the 2000 rule was intended to allow operators to operate in a manner out of compliance with … state discharge or other requirements." 66 Fed. Reg. 54834, 54841 (Oct. 30, 2001). BLM also stated that to comply with FLPMA, mining must be "in compliance with all applicable federal and state environmental standards." *Id.* at 54843.

3809.31(b)(2). Further: "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 level of disturbance, you must not begin operations until BLM completes consultation the Endangered Species Act requires." *Id.*

2. State Regulation of Mining on Federal Lands.

In addition to the federal agencies' regulation of mining on lands under their jurisdiction, the Supreme Court has held that a state is "'free to enforce its criminal and civil laws' on federal land as long as those laws do not conflict with federal law." *Granite Rock*, 480 U.S. at 580-81 (citation omitted). In *Granite Rock*, the Supreme Court recognized that states have authority to impose environmental regulations on mining operations on unpatented claims in national forests. *Id*. at 587-89. Indeed, the 1872 Mining Law provides that mining claimants are granted a right of possession "so long as they comply with the laws of the United States, and with State, territorial, and local regulations." 30 U.S.C. § 22. Subsequently, since the earliest days of the gold rush, federal courts have upheld state prohibitions on types of mining on federal lands, such as bans on hydraulic placer mining. *See, e.g., People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 151-52 (1884).

In turn, Oregon has exercised its lawful authority to adopt environmental regulations related to mining on unpatented claims, including in waters of the state.

As noted, pursuant to historic state law and to its authority under the Clean Water Act, the Oregon Department of Environmental Quality requires suction dredge miners to either register for a general water quality discharge permit for their operations, or to apply for an individual permit if their operations would exceed general permit conditions. *See* OR. Rev. Stat. § 468B.050.[11] Similarly, the Oregon Department of State Lands requires suction dredge miners to either register for a general dredge-and-fill authorization for their operations, or to apply for an individual authorization if their operations would exceed general authorization conditions. *See* OR. REV. STAT. § 196.795-990.

Federal judges in this circuit have recognized state authority to regulate mining in waters flowing through federal lands in order to protect water quality and fish. For example, in *Hells Canyon Preservation Council v. Haines*, No. CV 05-1057-PK, 2006 WL 2252554 (D. Or. Aug. 4, 2006), the district court ruled that the Forest Service violated Section 401 of the Clean Water Act by authorizing suction dredge mining on unpatented claims overlaying the bed of the North Fork Burnt River in the Wallowa-Whitman National Forest, before the Forest Service first obtained certification from the Oregon Department of Environmental Quality

[11] Before Congress enacted the Clean Water Act, Oregon law declared water pollution as contrary to public policy, and authorized the Department of Environmental Quality to protect, maintain, and improve water quality. *See*, *e.g.*, OR. REV. STAT. §§ 468B.010, 468B.015 and 468B.020.

that the mining operations would comply with state water quality standards, and because mining would violate state standards. *Id*. at **4-5; *see California Trout, Inc. v. FERC*, 313, F.3d 1131, 1138 (9th Cir. 2002), *cert. denied*, 540 U.S. 818 (2003) (discussing state certification requirement).

Moreover, district courts in this circuit have held that the states can lawfully regulate permissible *types* of mining that can occur in state waters. For example, before the district court's ruling in this case, two other district court judges reached the same conclusion based on similar facts. In *Pringle v. Oregon*, No. 2:13-cv-00309-SU, 2014 WL 795328 (D. Or. Feb. 25, 2014), the district court considered that Oregon had enacted a law prohibiting, after 2005, any "[f]illing of the beds or removal from or other alteration of the beds or banks" of waters that are designated as "scenic waterways." Or. Laws 2001, ch. 499, §§3-4, amending OR. REV. STAT. §§ 390.805-390.925. That state law does not prohibit recreational prospecting and mining using non-motorized methods, or motorized methods other than with a suction dredge. OR. REV. STAT. §§ 390.835(14)-(18). A miner who held unpatented claims overlaying the bed of the Middle Fork of the John Day River in the Malheur National Forest, designated as a scenic waterway, sued to challenge the law, alleging that by prohibiting suction dredging, the State "completely frustrated" his ability to mine commercially, and asserting the state law is preempted by the 1872 Mining Act. *Pringle*, 2014 WL 795328, at **2, 7-8. The district court rejected the

miner's preemption claim, ruling that because the state law "is not a de facto ban on all mining in Oregon scenic waterways," it is not preempted. *Id*. at *8.[12]

B. SB 838 is Not Preempted by Federal Law.

1. Legal Standards.

"Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). Federal law preempts state law if (1) Congress explicitly preempts state law, (2) federal law displaces or occupies the field of state regulation, or (3) state law conflicts with federal law, when it is physically impossible to comply with both, or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id*. at 2500-01. "Preemption analysis should take place on a case by case basis." *Adkins v. Mireles*, 526 F.3d 531, 541 (9th Cir. 2008) (citation omitted). "The purpose of Congress is the ultimate

[12] The Miners discount the holding in *Pringle* on the ground that it was litigated by a *pro se* miner who did not assert that the Scenic Waterways Act is "manifestly a forbidden land use regulation wholly preempted" by federal law. Opening Br. p. 40. In fact, Pringle argued the prohibition was preempted under the principles in *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), which concerned a county land use ordinance. *Cf*. *Pringle*, No. 2:13-cv-00309-SU (D. Or), ECF 27 at 10 (filed Aug. 7, 2013). And Pringle's main argument was similar to the Miners' here: federal law preempts the Waterways Act because it made his mining claims "economically unfeasible . . . because it is not profitable to mine these claim[s] using a shovel and gold pan while being limited to moving five (5) yards of material per year." *Id*. at 3.

touchstone." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (quotation omitted).

The Miners offer two different preemption theories. The first is that SB 838 is a "land use plan" and preempted because Congress "occupied the field of land use regulation" on federal lands. Opening Br. pp. 39-44. The second is that SB 838 is an "environmental regulation" and preempted because it is in "direct conflict" with federal mining laws. *Id*. pp. 45-49. Neither theory is correct.

2. SB 838 is Not a Land Use Plan.

SB 838 is not a land use plan. In *Granite Rock*, the Supreme Court noted that the "line between environmental regulation and land use planning will not always be bright," but that "[l]and use planning chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however, that land is used, damage to the environment is kept within prescribed limits." *Id*., 480 U.S. at 587.

Under federal law, the BLM prepares "land use plans" under FLPMA, and the Forest Service adopts "land and resource management plans" under the National Forest Management Act. *Oregon Nat. Desert v. Bureau of Land Mgmt.* 625 F.3d 1092, 1096 (9th Cir. 2010) (BLM land use plans); *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 966 (9th Cir. 2003) (Forest Service plans). These plans choose, zone, map, and state permissible uses of federal lands, such as

logging, recreation, water storage, and mining. *Id*. In *Citizens*, this Court noted: "These plans operate like zoning ordinances, defining broadly the uses allowed in various forest regions, setting goals and limits on various uses (from logging to road construction), but do not directly compel specific actions, such as cutting of trees in a particular area or construction of a specific road." *Id*., 341 F.3d at 966. These federal land use plans generally do not directly compel or authorize anything; that is done, if at all, at the "site-specific" level. *Id*. at 966-968.

The Miners acknowledge that the land use plans adopted by the BLM pursuant to FLPMA and by the Forest Service pursuant to the National Forest Management Act demonstrate that "Congress has occupied the field of land use planning on federal land." Opening Br. p. 41. Nonetheless, they assert that SB 838 is "self-evidently" an impermissible "land use plan," because under it, "huge areas of federal property are zoned for the use of 'Specified Biological Resources' . . . and zoned to prohibit a particular use: motorized mining." *Id*. at 39.[13]

The Miners are wrong factually, because some types of motorized mining can occur in placer claims where SB 838 applies, if they do not remove or disturb streamside vegetation in a manner that may impact water quality, or are of kind authorized by an individual permit. *See supra* pp. 9-10.

[13] SB 838 does not contain the phrase "Specified Biological Resources." *Cf.* AD 1-5.

The Miners are also wrong as to the law. As this Court has recognized, Oregon "maintains a comprehensive system of land use regulation that requires coordination between state and local government agencies." *Dodd v. Hood River County*, 59 F.3d 852, 855 (9th Cir. 1995). Under Oregon's land use system, "[t]he State Land Conservation and Development Commission [] adopts a framework of mandatory state-wide land use planning goals, and reviews for compliance with those goals the comprehensive land use plans of local governments." *Id*.; *see* OR. REV. STAT. CH. 197 (land use system).

SB 838 is unrelated to Oregon's land use system. SB 838 does not involve any state land use standards. No local government has adopted the provisions of SB 838 as a part of its comprehensive plan.[14] By contrast, the primary focus of SB 838 is to regulate types of mining to protect water quality, and habitat for salmon,

[14] When a county-adopted a land use ordinance prohibits all potential mineral activities on federal lands, this Court has ruled that federal law preempts the ordinance. *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1082 (9th Cir. 1979). Similarly, the Eighth Circuit has ruled that a county zoning ordinance prohibiting all potential mining operations on federal land is preempted. *South Dakota*, 155 F.3d at 1010-12. In this case, no county ordinance is at issue, and the district court correctly found that SB 838 does not prohibit all forms of mining in the limited areas to which it applies.

steelhead trout, and bull trout.[15] And even then, SB 838 does not apply to all federal lands and waters, it does not apply to all lands or waters within the Miners' claims and, as proven, it does not even prohibit all motorized mining within those claims. SB 838 is simply not in any respect a "land use plan."

3. SB 838 is Consistent with Congress' Objectives.

The Miners' second theory is that SB 838 is an "environmental regulation" and preempted because it is in "direct conflict" with federal mining laws. Opening Br. pp. 45-57.

The Supreme Court has stated that its "precedents establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (internal quotations omitted). Preemption exists if SB 838 "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona,* 132 S. Ct. 2501.

[15] The Miners assert that Oregon's "stated purpose" in adopting SB 838 does not matter. Opening Br. p. 42. They are incorrect. In *Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n.*, 461 U.S. 190 (1983), the Supreme Court addressed whether a California state law that prohibited construction of new nuclear power plants, unless the state certified that certain means existed to dispose of nuclear waste, was preempted by the Atomic Energy Act. *Id*. at 197-98. The Supreme Court looked in part to California's "avowed . . . purpose" in enacting the law. *Id*. at 213-214. Because California did not intend to regulate nuclear power for safety reasons, which the Atomic Energy Act addresses, but instead for economic considerations about storage capacity the Atomic Energy Act does not address, the Supreme Court held that the California law was not preempted. *Id*. at 216.

As this Court noted in the context of suction dredge mining in the Klamath River in the Klamath National Forest, which provides habitat for ESA-listed coho salmon, "private activities can and do have more than one source of authority, and more than one source of restrictions on that authority." *Karuk Tribe*, 681 F.3d at 1023. The question whether SB 838 stands as an obstacle to the "full purposes and objectives of Congress" embraces not only the general rights of access and use for mining under the 1872 Mining Law, but also the goals and objectives of the Clean Water Act and the ESA, both of which indisputably apply to these mining operations on federal lands.

Congress enacted the Clean Water Act to eliminate the discharge of pollutants in navigable waters. 33 U.S.C. § 1251(a)(1). The Act recognizes and preserves state authority to regulate water pollution in rivers and streams that flow through federal public lands. 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ."). Indeed, the Act preserves state authority to regulate sources of pollution over and above the minimum standards required by the Act. 33 U.S.C. § 1370 ("[N]othing in this chapter shall (1) preclude or deny the right of any State ... to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution" as long as they are not "less stringent than the effluent

limitation … under this chapter . . . .").

Congress enacted the ESA to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "declared it to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. § 1531(c)(1) & (2). As noted, the BLM explicitly incorporates ESA requirements into its regulation of suction dredges, directing miners: "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 level of disturbance, you must not begin operations until BLM completes consultation the Endangered Species Act requires." 43 C.F.R. § 3809.31(b)(2).

SB 838 is consistent with the purposes and objectives of Congress in enacting these laws, as well those of the 1872 Mining Law. SB 838 regulates a source of pollution at a higher level than required by the Clean Water Act. SB 838 helps resolve water resources issue of harm to ESA-listed salmon, steelhead trout, and bull trout, in concert with conserving these species. And SB 838 does so in a discrete manner, prohibiting only one general type of mining permissible under the 1872 Mining Act, and in only certain areas outside of which motorized mining may still occur under reasonable conditions.

b. SB 838 Does Not Conflict with Federal Law.

SB 838 is an environmental regulation that does not impermissibly conflict with federal law. In *Granite Rock*, the Supreme Court rejected the miner's argument that federal regulation of mining on unpatented mining claims preempts state regulation of those claims. *Id.*, 480 U.S. at 581–85. The Supreme Court reasoned that, if the federal government intended that the miner not be hindered by state regulations, Forest Service and BLM mining regulations would evince such intent. *Id.* at 582–83. Instead, the Supreme Court found that "[i]t is impossible to divine from these regulations . . . an intention to pre-empt all state regulation of unpatented mining claims in national forests." *Id.* at 584.

Because the mining operations in *Granite Rock* were proposed to occur on Forest Service lands, the Supreme Court examined that agency's regulations, and noted that they "explicitly require all operators within the national forests to comply with state air quality standards, state water quality standards, and state standards for the disposal and treatment of solid wastes." *Id*. at 583 (citing 36 C.F.R. § 228.8(a), (b), (c)). The Supreme Court also noted that the regulations governing approvals of plans of operation require that those operations comply with state law (36 C.F.R. § 228.5(b)), and noted another regulation that provides that state agency water quality certification is considered compliance with environmental protection requirements (36 C.F.R. § 228.8(h)). *Granite Rock,* 480 U.S. at 584.

Indeed, since *Granite Rock*, the BLM promulgated a regulation making it even clearer that states may adopt environmental regulations requiring a "higher standard of protection" than the BLM requires, and providing that "there is no conflict" between such state regulations and BLM's requirements. 43 C.F.R. § 3809.3. Accordingly, federal regulations are now even more explicit that laws such as SB 838 are not preempted. Recognizing that fact, the Miners contend that the BLM's regulation is "unlawful" too, because the "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 . . . ." Opening Br. pp. 50-51. In fact, when the BLM adopted this regulation, it stated that "[o]ne purpose of subpart 3809 is to establish a *minimum* level of protection for public lands." 69 Fed. Reg. 69,998, 70,008 (Nov. 21, 2000) (emphasis added). The BLM then cited *Granite Rock* for the correct proposition that there is no conflict between the BLM's choice to require merely a "minimum" level of protection related to mining on public lands, and its recognition that a state may adopt environmental regulations that require a "higher level of protection." *Id*.

In sum, the federal land management agencies that regulate mining recognize and preserve state authority to adopt environmental regulations such as SB 838 that require a "higher level of protection" for water quality and resources such as fisheries than do federal minimum requirements. Under the principles in

Granite Rock, SB 838 is not preempted by federal mining laws.

C. The District Court Did Not Err In Granting Summary Judgment.

As noted, in the district court, the Miners and Oregon filed cross-motions for summary judgment. ER 229-31; ER 233. The Miners never took the position that summary judgment was improper, on any ground; indeed, even in their reply brief, they asserted: "There is no genuine issue of material fact to bar summary judgment." ER 234 (Reply Br. at 1 [ECF No. 59]). Now, on appeal, they maintain that a genuine issue of material fact precludes summary judgment, because the district court cited no case 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." Opening Br. p. 55. The Miners did not preserve this assignment of error and, therefore, waived it. *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998) (stating general rule).

Moreover, even if the Miners preserved this assignment of error, they had the burden in the district court of establishing the factual premises for their legal claims. The record establishes that SB 838 does not prohibit all methods of mining, that motorized mining operations can occur in areas where SB 838 applies, and that the primary effect of SB 838 is to prohibit one type of mining, and in only certain areas. There is no dispute of fact that precludes entry of summary judgment that SB 838 is not preempted by federal laws.

Conclusion.

This Court should affirm the District Court's ruling that federal law does not preempt SB 838.

Date: October 14, 2016.

Respectfully submitted,

/s/ Peter M.K. Frost
Peter M.K. Frost
Roger Flynn
Attorneys for Defendants-Intervenors-Appellees

Statement of Related Cases.

Riverkeeper is unaware of any related case.

Certificate of Compliance.

I certify that Defendants-Intervenors-Appellees' answering brief is proportionally-spaced, has a typeface of 14 points, and contains 7,652 words.

/s/ Peter M.K. Frost
Attorney for Defendants-Intervenors-Appellees

Certificate of Service.

I certify that on October 14, 2016, I electronically filed Defendants-Intervenors-Appellees' Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, by using the appellate CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system. I am unaware of any participants in this case who are not.

/s/ Peter M.K. Frost
Attorney for Defendants-Intervenors-Appellees

ADDENDUM

77th OREGON LEGISLATIVE ASSEMBLY--2013 Regular Session

Enrolled
Senate Bill 838

Sponsored by COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

CHAPTER .....

AN ACT

Relating to mining; creating new provisions; amending ORS 468B.052 and 517.123; appropriating money; limiting expenditures; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. The Legislative Assembly finds that:

(1) Prospecting, small scale mining and recreational mining are part of the unique heritage of the State of Oregon.

(2) Prospecting, small scale mining and recreational mining provide economic benefits to the State of Oregon and local communities and support tourism, small businesses and recreational opportunities, all of which are economic drivers in Oregon's rural communities.

(3) Exploration of potential mine sites is necessary to discover the minerals that underlie the surface and inherently involves natural resource disturbance.

(4) Mining that uses motorized equipment in the beds and banks of the rivers of Oregon can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments of this state in habitat enhancement and areas of cultural significance to Indian tribes.

(5) Between 2007 and 2013, mining that uses motorized equipment in the beds and banks of the rivers of Oregon increased significantly, raising concerns about the cumulative environmental impacts.

(6) The regulatory system related to mining that uses motorized equipment in the beds and banks of the rivers of Oregon should be efficient and structured to best protect environmental values.

SECTION 2. (1) 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 other precious metal from placer deposits of the beds or banks of the 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 in a manner that may impact water quality. 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 salmonid 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 natural reproducing populations of bull trout due to a naturally occurring or lawfully placed physical barrier to fish passage.

(2) The moratorium does not apply to any mining for which the State Department of Geology and Mineral Industries issues an operating permit under ORS 517.702 to 517.989.

(3) In areas where the moratorium does not apply as described in subsection (1) of this section, the Department of State Lands shall limit the 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 described in this section at any time during the moratorium period. The Department of State Lands shall give priority, to the greatest extent practicable, to persons who held permits or authorizations for the longest period of time before January 1, 2014.

(4) Any 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.

(5) Violation of the moratorium established by subsection (1) of this section is a Class A misdemeanor.

SECTION 3. Section 2 of this 2013 Act becomes operative on January 2, 2016.

SECTION 4. Sections 2 and 3 of this 2013 Act are repealed on January 2, 2021.

SECTION 5. (1) On and after January 1, 2014, and before January 2, 2016, mining that uses any form of motorized equipment for the purpose of extracting gold, silver or any other precious metal from placer deposits of the beds or banks of the 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 in a manner that may impact water quality, is subject to the following:

(a) The motorized dredge equipment must be operated at least 500 feet from other motorized dredge equipment, unless the Department of Environmental Quality determines that another distance is appropriate to protect water quality.

(b) The motorized equipment may not be left unattended within the wetted perimeter of any waters of this state.

(c) The motorized equipment may be operated only between the hours of 9 a.m. and 5 p.m.

(2) The provisions of subsection (1) of this section apply to mining that occurs 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 of the full length of any river and tributary thereof in this state, of which any portion contains essential indigenous anadromous salmonid habitat, as defined in ORS 196.810, or naturally reproducing populations of bull trout.

(3) The provisions of subsection (1) of this section do not apply to any mining for which the State Department of Geology and Mineral Industries issues an operating permit under ORS 517.702 to 517.989.

(4) During the period described in this section, the Department of State Lands shall limit the 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 described in this section at any time during the period described in this section. The Department of State Lands shall give priority, to the greatest extent practicable, to persons who held permits or authorizations for the longest period of time before January 1, 2014.

(5) Violation of any provision of this section is a Class A violation.

SECTION 6. (1) Section 5 of this 2013 Act becomes operative on January 1, 2014.

(2) Section 5 of this 2013 Act applies without regard to whether the permits, licenses, authorizations or other forms of permission required by law for mining were issued before, on or after January 1, 2014.

SECTION 7. (1) Sections 5 and 6 of this 2013 Act are repealed on January 2, 2016.

(2) The repeal of sections 5 and 6 of this 2013 Act by subsection (1) of this section does not affect any fine imposed under section 5 of this 2013 Act.

SECTION 8. **(1) The Governor's office, in consultation with the Department of Environmental Quality, the Department of State Lands, the State Parks and Recreation Department, the State Department of Fish and Wildlife, the State Department of Geology and Mineral Industries, the Oregon State Police and other relevant state agencies, the federal government, the federally recognized Indian tribes in Oregon and affected stakeholders shall study matters related to mining that uses any form of motorized equipment for the purpose of extracting gold, silver or any other precious metal from placer deposits of the beds or banks of the waters of this state, as defined in ORS 196.800, or from other placer deposits, and matters related to the removal or disturbance of streamside vegetation resulting from the mining activities, and shall propose a revised state regulatory framework that includes, but is not limited to:**

(a) A consolidated regulatory process for mining described in this section, including a system that:

(A) Involves permits, licenses, authorizations or other forms of permission that must be displayed in plain view and be clearly visible on the motorized equipment in order to aid in the identification of persons carrying out mining activities; and

(B) Considers a single permit or a single point of contact approach to authorization.

(b) Effective compliance, monitoring and enforcement mechanisms related to mining described in this section.

(c) Adequate fee structures to cover administration, compliance, monitoring, enforcement, outreach and education related to any permit, license, authorization or other form of permission required by law from a state agency for mining described in this section or for discharges from mining described in this section, including ways to maximize the efficiency in the use of existing state resources.

(d) Conditions for, and restrictions on, mining described in this section, to the extent allowed by law and based on the best available science and precautionary principles, designed to:

(A) Protect and recover in-stream and riparian habitat that is important to achieve water quality standards and the conservation and recovery of indigenous anadromous salmonids, as defined in ORS 196.810, and naturally reproducing populations of bull trout; and

(B) Address social considerations, including concerns related to safety, noise, navigation, cultural resources and other uses of waterways.

(e) The establishment of a system of management zones, to the extent allowed by law, that:

(A) Limits, either by lottery or by other mechanism, the amount of mining activity that uses motorized equipment in the management zones at specific times and cumulatively over time periods;

(B) Requires the payment of a fee, as part of the fee structures described in paragraph (c) of this subsection, for mining described in this section in the management zones; and

(C) Establishes specific conditions and restrictions, as described in paragraph (d) of this subsection, for the respective management zones.

(f) Prohibitions on mining described in this section in specific areas of this state, to the extent allowed by law, including:

(A) Bodies of water currently listed as water quality impaired under the Federal Water Pollution Control Act for sediment, turbidity, toxics or heavy metals;

(B) Bodies of water within federally designated wilderness areas, national monuments and national botanical areas;

(C) Scenic waterways in this state designated under ORS 390.826 and bodies of water flowing through state parks; and

(D) Habitat that is essential to the recovery and conservation of salmon, steelhead, lamprey, freshwater mollusks or other unique habitat values, unless protection for this habitat may be otherwise achieved pursuant to paragraphs (d) and (e) of this subsection.

(2) The Governor's office shall submit a report with the results of the proposed regulatory framework, and shall include recommendations for any necessary legislation and funding, to the interim committees of the Legislative Assembly related to environment and natural resources or other appropriate legislative committee on or before November 1, 2014. The Governor's office may also include any recommendations for proposed rules related to the revised regulatory framework in the report.

SECTION 9. Section 8 of this 2013 Act is repealed on January 2, 2016.

SECTION 10. ORS 517.123 is amended to read:

517.123. The Legislative Assembly finds that prospecting, small scale mining and recreational mining:

(1) Are important parts of the heritage of the State of Oregon; **and**

(2) Provide economic benefits to the state and local communities**.**[*; and*]

[*(3) Can be conducted in a manner that is not harmful and may be beneficial to fish habitat and fish propagation.*]

SECTION 11. ORS 468B.052 is amended to read:

468B.052. **(1)** [*Notwithstanding the authority of*] **Unless** the Environmental Quality Commission**, as** provided in ORS 468.065 [*to establish a schedule of*]**, establishes different** fees for permits issued under ORS 468B.050 [*and in lieu of any fee established under the schedule of fees*], a person who operates a suction dredge having a suction hose with an inside diameter of eight inches or less shall, upon application for or renewal of a permit issued under 468B.050, pay to the Department of Environmental Quality:

[*(1)*] **(a)** For an individual permit:

[*(a)*] **(A)** A one-time application fee of $300; and

[*(b)*] **(B)** An annual renewal fee of $25.

[*(2)*] **(b)** For a general permit, either:

[*(a)*] **(A)** A $25 annual fee for each year the person registers under the general permit; or

[*(b)*] **(B)** A $100 fee for a five-year registration under the general permit.

(2)(a) In addition to the fees described in subsection (1) of this section, by rule the commission may establish an additional fee for a permit issued under ORS 468B.050 for a person to operate a suction dredge described in this section. The fee must be adequate to cover the costs of administration, compliance, monitoring and enforcement related to the permit.

(b) After a fee is established by the commission pursuant to this subsection, the fee is subject to the limitations on increases imposed by ORS 468B.051.

SECTION 12. In addition to the fees described in ORS 468B.052, from October 1, 2013, to December 31, 2015, a surcharge of $150 is imposed on any permits issued under ORS 468B.050 for a person who operates a suction dredge as described in ORS 468B.052. The surcharge must be used to fund data collection and reporting on suction dredge mining in Oregon by the Department of Environmental Quality. The data referred to in this section includes, but is not limited to, data on the locations and number of suction dredge operations, the types and sizes of suction dredges and the physical impacts from suction dredge mining. Amounts collected as surcharges under this section shall be deposited in the Suction Dredge Study Fund established under section 13 of this 2013 Act.

SECTION 13. The Suction Dredge Study Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the Suction Dredge Study Fund shall be credited to the fund. Moneys in the fund are continuously appropriated to the Department of Environmental Quality to carry out the duties of the department described in section 12 of this 2013 Act.

SECTION 14. Notwithstanding any other law limiting expenditures, the amount of $141,837 is established for the biennium beginning July 1, 2013, as the maximum limit for payment of expenses, from moneys deposited in the Suction Dredge Study Fund, incurred by the Department of Environmental Quality in carrying out the duties of the department described in section 12 of this 2013 Act.

SECTION 15. This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.

Passed by Senate July 3, 2013

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Robert Taylor, Secretary of Senate

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Peter Courtney, President of Senate

Passed by House July 7, 2013

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Tina Kotek, Speaker of House

Received by Governor:

.....M.,....., 2013

Approved:

.....M.,....., 2013

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John Kitzhaber, Governor

Filed in Office of Secretary of State:

.....M.,....., 2013

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Kate Brown, Secretary of State