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; ELLEN ROSENBLUM, in her official capacity as the Attorney General of the State of Oregon, et al,

Defendants-Appellees,

and

ROGUE RIVERKEEPER, et al,

Intervenor-Defendants-Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

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APPELLEES' BRIEF

JURISDICTIONAL STATEMENT

The State of Oregon (defendant-appellee) agrees with plaintiffs-appellants' jurisdictional statement.

ISSUE PRESENTED FOR REVIEW

1. Senate Bill 838 established a five year moratorium on using motorized equipment to mine in spawning habitat for imperiled fish species. Is Senate Bill 838 preempted by federal mining law or by federal law governing land-use planning?

2. Did the district court err in determining that no issues of material fact barred Oregon's motion for summary judgment?

STATEMENT OF FACTS

Plaintiffs are miners, mining associations, and businesses related to the mining industry. Plaintiffs assert rights under federal law to mine certain claims on federal land that is managed by the United States Forest Service ("USFS") or the United States Bureau of Land Management ("BLM"). (ER 102, Van Orman Dec., ¶2; ER 134, Grothe Dec., ¶ 5; ER 138, Gill Dec., ¶ 3; ER 150, Coon Dec., ¶ 2). Plaintiffs work their claims using suction dredges. (ER 129, Hunter Dec., ¶ 5; ER 134; ER 138, Gill Dec., ¶ 5;ER 142, ER 150, Coon Dec., ¶ 3). Suction dredge mining is a motorized method of mining in a stream

that uses "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 of California v. U.S. Forest Service*, 681 F.3d 1006, 1012 (9th Cir. 2012). Plaintiffs filed this action challenging Senate Bill 838, which imposes a five-year moratorium on using motorized methods of placer mining—including suction dredges—in and near certain sensitive fish habitat. Plaintiffs own mining claims within the moratorium area.

As discussed in the argument below, Oregon disagrees plaintiffs' characterization of Senate Bill 838. By its terms, Senate Bill 838 is an environmental regulation intended to protect water quality and fish habitat by prohibiting certain methods of mining that are harmful. Oregon also disagrees with plaintiffs' assertions that Senate Bill 838 "destroys" their ability to work their claims. (App. Br. 6). Under Senate Bill 838, plaintiffs can continue to mine with non-motorized means and work upland portions of their claims if doing so does not impact water quality. As discussed below, the trial court properly resolved plaintiffs' challenge to Senate Bill 838 in the state's favor; any underlying dispute about the impacts of Senate Bill 838 on an individual miner's ability to work a mining claim does not preclude summary judgment

for the state. Plaintiffs also included facts to show that they have standing. On appeal, Oregon does not disagree with the district court's ruling that plaintiffs have standing.

SUMMARY OF ARGUMENT

Oregon has a sovereign interest in maintaining the quality of its waters and in protecting populations of imperiled fish. In 2013, the Legislative Assembly passed Senate Bill 838, which imposed a five-year moratorium on using motorized equipment to mine in and around streams that are sensitive habitat for protected salmonids and bull trout. In doing so, the legislature recognized that motorized methods of mining posed dangers to water quality and fish. The moratorium, which went into effect on January 2, 2016, is intended to give Oregon regulators time to develop a new system for managing motorized placer mining in Oregon's waterways.

Plaintiffs, individuals and organizations with interests in unpatented mining claims on federal lands, contend that Senate Bill 838 conflicts with federal law and is therefore preempted. They are wrong. As the district court properly held, Senate Bill 838 is a lawful exercise of Oregon's police power to protect water quality and fish. That law is an environmental regulation that targets specific harms from motorized mining in sensitive fish habitat; it is not a prohibition on mining on federal land. As the United States Supreme Court has

recognized, the federal mining laws make no attempt to bar environmental regulation of mining by a state. To the contrary, where the federal mining laws mention state regulation of the environment, the federal laws require compliance with state law. Properly construed, the purpose of the federal mining laws is to provide a mechanism through which miners could acquire property rights to minerals on federal land. Senate Bill 838 is not an obstacle to that purpose.

Nor does Senate Bill 838 conflict with the statutes governing land-use planning by the Forest Service and the Bureau of Land Management. Those statutes give the federal agencies control over land-use planning for public lands. Senate Bill 838 does not attempt to dictate what land uses are appropriate. Rather, the bill seeks to regulate the environmental harms that flow from motorized mining in specific fish habitat.

The district court correctly concluded that federal law does not preempt Senate Bill 838. The court was also correct that there were no disputed issues of fact that precluded summary judgment. Plaintiffs' argument that the district court was required to assess whether federal law was preempted based on the facts of each individual miner's claim is both inconsistent with how courts have addressed preemption as a legal question and is not supported by this court's cases.

STANDARD OF REVIEW

The state agrees with defendant's description of the standard of review.

ARGUMENT

A. Senate Bill 838 is an environmental regulation intended to preserve water quality in habitat for protected fish species.

In 2013, the Oregon Legislative Assembly enacted Senate Bill 838[1] in an effort to curtail the harmful effects of motorized mining on protected fish species and to give regulators the time to craft a new permitting system. The bill declared a five-year moratorium on motorized mining activities in or near watercourses that contain essential indigenous anadromous salmonid habitat ("ESH") or contain populations of bull trout. ESH is defined by statute as "the habitat that is necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing." Or. Rev. Stat. § 196.810(1)(g)(B). Indigenous anadromous salmonid species includes native species of salmon, steelhead, and cutthroat trout that are "listed as sensitive, threatened or endangered by a state or federal authority." Oregon's population of bull trout is listed as threatened under the federal Endangered Species Act. 50 C.F.R. § 17.44(w). The extent of ESH is established by administrative rule by the Oregon Department of State Lands in consultation

[1] The relevant portions of Senate Bill 838 are set out in the addendum attached to this brief.

with the Oregon Department of Fish and Wildlife. Or. Admin. R. 141-102-0010, 141-102-0030.

The moratorium, however, does not apply to all ESH or bull trout habitat. Rather, the moratorium applies only to mining activities that occur "above the lowest extent of the spawning habitat in any river and tributary thereof in this state" containing ESH or "naturally reproducing populations of bull trout." (SB 838, § 2(1).) The moratorium does not apply to watercourses that do not support populations of protected salmonids or bull trout due to "a naturally occurring or lawfully placed physical barrier to fish passage." (SB 838, § 2(1).)

The legislature[2] found Senate Bill 838 to be necessary because, among other things,

- "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."

- "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."

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[2] Plaintiffs assert that the legislature's intent in passing Senate Bill 838 is either irrelevant or a disputed issue of fact. (App. Br. 42). They are wrong on both counts. Senate Bill 838 plainly lays out the concerns the Oregon legislature hoped to accomplish by passing the bill. That legislative intent is not a factual issue open to dispute by plaintiffs.

- "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."

(SB 838, § 1(4)-(6).) The moratorium went into effect on January 2, 2016, and will sunset on January 2, 2021.

The following activities, and no others, are restricted under the moratorium:

- "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;" or

- Mining "from other placer deposits" located within "100 yards upland perpendicular to the line of ordinary high water" "that results in the removal or disturbance of streamside vegetation in a manner that may impact water quality."

(SB 838, § 2(1).) Senate Bill 838 also limits the Oregon Department of State Lands to issuing no more than 850 removal-fill permits for motorized mining for precious metals in essential salmonid habitat that is not subject to the moratorium, i.e., stream reaches that are not spawning habitat. (SB 838, § 2(3).) The limitation on permits only lasts during the moratorium period. (SB 838, § 2(3).)

Senate Bill 838 does not apply to all motorized placer mining in Oregon. First, the moratorium does not apply to areas that are not salmonid or bull trout

habitat.[3] Second, it does not apply to any areas that are more than 100 yards from the ordinary high water mark of watercourses that are covered. Third, even in salmon and bull trout areas, it does not apply to areas within 100 yards of the high water mark if the mining is authorized by a permit from Oregon Department of Geology and Mineral Industries ("DOGAMI"). (SB 838, § 2(2).) Fourth, the moratorium does not apply to areas within 100 yards of the high water mark if the mining does not impair water quality. (SB 838, § 2(1).) Fifth, even in areas with salmon and bull trout habitat, it does not prohibit non-motorized mining.

Because the moratorium in Senate Bill 838 was intended to give the state time to develop a new regulatory regime, the bill created a study group to "propose a revised state regulatory framework." (SB 838, § 8(1)). Based on the work of the SB 838 study group, the Governor's office issued a report and recommendations to the legislature in November 2014. (ER 165, *Governor's Office Report*). The report proposed wide-ranging, substantive revisions to the

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[3] Plaintiffs contend that some areas of their claims that are covered by the moratorium are not habitat for salmonids or bull trout. (App. Br. 3 n 1). If that is the case, then their claims are outside of the moratorium and may be mined. (SB 838, § 2(1).) Additionally, if plaintiffs believe that the ESH maps are not accurate, plaintiffs may petition the Department of State Lands to revise the ESH designation. Or. Admin. R. 141-102-0040. Plaintiffs may also request that the Oregon Department of Fish and Wildlife revise the moratorium maps created pursuant to Section 2(4).

permitting process for motorized mining. The new regulatory framework recommended in the report would require new legislation. (ER 174, *Report* at 9). State legislators introduced bills in 2015 and 2016 legislative sessions to codify certain recommendations from the Governor's Report, but the bills were not enacted. (ER 29, SB 1530 (2016)[4]; SB 830 (2015)[5]).

B. Senate Bill 838 is an exercise of Oregon's police power; federal preemption is disfavored.

Senate Bill 838 is a classic exercise of the state's police power. The bill imposes a temporary moratorium on motorized methods of mining in sensitive fish habitat. As such, the bill does not conflict with federal mining law—which concerns the manner in which individuals acquire mineral rights on federal land—nor does it attempt to regulate the uses of federal land, which is the domain of the federal land management agencies.

1. Preemption Standards

The Supreme Court has recognized three types of preemption: express preemption, field preemption, and conflict preemption. *Oxygenated Fuels*

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[4] The measure's text and history are available at the legislature's website. *Available at* https://olis.leg.state.or.us/liz/2016R1/Measures/Overview/SB1530 (last accessed, May 9, 2016).

[5] The measure's text and history are available at the legislature's website. https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/SB830 (last accessed, May 9, 2016).

Ass'n, Inc. v. Davise, 331 F.3d 665, 667 (9th Cir. 2003). For every type of preemption, it is a "cornerstone[] of [the Supreme Court's] preemption jurisprudence" that the "purpose of Congress" controls. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Plaintiffs assert that conflict preemption and field preemption apply to Senate Bill 838.

Conflict preemption may arise in two circumstances: "where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oxygenated Fuels*, 331 F.3d at 667 (*quoting English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (additional citations omitted)). Here, plaintiffs argue Senate Bill 838 stands as an obstacle to the federal mining laws.

Under field preemption principles, the States cannot regulate in a "field" that Congress has determined must be regulated exclusively by the federal government. *See Arizona v. U.S.*, 132 S. Ct. 2492, 2501 (2012) (*citing Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 115 (1992)). Congressional intent to "displace state law altogether" can be inferred if the federal regulatory framework is pervasive, that is, federal regulation extends to every part of the field. *Arizona v. U.S.*, 132 S. Ct. at 2501 (*citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))). Congressional intent to secure

the field to solely federal authority also can be inferred if the federal interest is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice*, 311 U.S. at 230). Plaintiffs also argue that Senate Bill 838 is a land use law and is preempted because federal law occupies the field of land use planning on Forest Service and BLM land.

Neither conflict preemption nor field preemption principles require the court to invalidate Senate Bill 838.

2. The presumption against preemption applies to Senate Bill 838.

Federal preemption is never presumed. Rather, "there is a general presumption against preemption in areas traditionally regulated by states. '[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress.'" *Oxygenated Fuels*, 331 F.3d at 668 (quoting *Rice*, 331 U.S. at 230) (emphasis added). Courts apply the "clear and manifest purpose of Congress" standard to all preemption claims. *Wyeth*, 555 U.S. at 565 (stating that presumption applies in "'all preemption cases, and particularly those in which Congress has 'legislated * * * in a field which the States have traditionally occupied'"); *Oxygenated Fuels*, 331 F.3d at 668, 673 (requiring "clear evidence" that Congress intended to preempt). Consequently, federal courts apply a "strong presumption" against concluding a state law is pre-

empted, particularly in connection with state laws exercising the police power. *Law v. General Motors Corp*., 114 F.3d 908, 909-10 (9th Cir. 1997).

Plaintiffs argue that the presumption against pre-emption does not apply because mining on federal land implicates the Property Clause and because there has been "a history of significant federal presence" in the regulation of mining claims. (App. Br. 18). Plaintiffs are wrong.

Senate Bill 838 is an exercise of Oregon's police powers. Oregon has always had the ability to regulate activities that impact the waters and wildlife within the state. *See Union Fishermen's Co. v. Shoemaker*, 98 Or. 659, 660, 193 P. 476, 481 (1920) ("The preservation of fish and game has always been considered to be within the proper domain of the police power"). Oregon's public policy is to"[t]o protect, maintain and improve the quality of the waters of the state for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, municipal, recreational and other legitimate beneficial uses." Or. Rev. Stat. § 468B.015(2). Environmental regulations—such as those protecting water quality and wildlife—"traditionally ha[ve] been a matter of state authority." *Exxon Mobil Corp. v. U.S. E.P.A.*, 217 F.3d 1246, 1255 (9th Cir. 2000). Where water quality is at stake, Congress has expressly recognized the states' *primary* responsibility and rights "to prevent, reduce, and eliminate pollution, to plan the development

and use (including restoration, preservation, and enhancement) of land and water resources * * *." 33 U.S.C. § 1251 (b); 33 U.S.C. § 1370.

The state's ability to protect fish and wildlife and water quality extends to regulating activities on federal land. *See Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (noting that "a State undoubtedly retains jurisdiction over federal lands within its territory"); 16 U.S.C. § 528 ("Nothing herein [Multiple Use Sustained Yield Act] shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests."). In fact, the leading case on preemption as it relates to the federal mining laws, *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), expressly rejected an argument that preemption analysis is somehow different when the federal law is an exercise of the Property Clause power. In *Granite Rock*, the Court noted that Congress has plenary power to "legislate the use of federal land" under the Property Clause, but went on to explain that the relevant question for preemption is whether Congress has enacted legislation that overrides state law. *Id*. at 581. To answer that question, the Court followed its usual preemption methodology. *Id*. Moreover, a similar argument to the one that plaintiffs raise here—that the Property Clause and federal mining laws demonstrate a history of significant federal presence in the regulation of mining such that the presumption against preemption should not

apply—was raised by Justice Powell in his dissenting opinion in *Granite Rock* and rejected by the majority. Justice Powell argued that the majority disregarded that Granite Rock's mining claim was on federal land subject to the Property Clause and asserted "that the location of the mine in a national forest should make us less reluctant to find pre-emption than we are in other contexts." *Id*. at 604 (Powell, J., dissenting).

This court, like the majority in *Granite Rock*, should follow the usually preemption methodology. Under that methodology, Senate Bill 838 is not preempted, absent "clear and manifest" intent on part of Congress to displace state law.

C. The federal mining laws do not preempt Senate Bill 838.

The first question in any preemption analysis is what Congress intended to accomplish through the federal statutes at issue. The federal mining laws, most importantly the General Mining Act of 1872, as amended, show Congress's intent to encourage the development of mining claims in a way that is consistent with state environmental regulation. The mining laws provide a mechanism whereby miners could acquire property rights to minerals on federal land. In granting miners property rights, Congress manifested no intent to displace state environmental regulation that protects water quality and fish from the deleterious effects of particular methods of mining.

Plaintiffs argue that the overlapping federal laws that govern mining claims on federal land show that Congress intended to encourage the development of mining claims and that Congress intended to limit state regulation of mining. In plaintiffs' view, Senate Bill 838 stands as an obstacle to that purpose because the bill prohibits the only effective way of mining placer deposits of gold—the suction dredge—and is therefore a de facto ban on mining.

Plaintiffs' argument fails for three reasons. First, plaintiffs apply the wrong preemption standard. Plaintiffs repeatedly flip preemption analysis upside down and argue that Senate Bill 838 is preempted because Congress did not intend to authorize or empower the state to regulate mining. The question, however, is not whether Congress "authorized" state regulation. The state retains authority to enforce its laws on federal land "so long as those laws do not conflict with federal law." *Granite Rock*, 480 U.S. at 580 (citing *Kleppe*, 426 U.S. at 543).

Second, plaintiffs misconstrue the purpose of the federal mining laws. Whether looked at individually or collectively, those laws express a congressional intent to give miners certain property rights related to mining on federal land. Under the General Mining Act of 1872, as amended, Congress created a method by which miners could gain a property right to extract

valuable minerals. Later enacted mining laws, the Multiple Use Act of 1955 and the Mineral Policy Act of 1970, retain that same focus. None of those laws give miners an unfettered right to mine free from state regulation. None of those laws give miners a right to mine by any particular method. Rather, those laws consistently show that Congress intended for miners to comply with state and local laws in exercising their rights under federal law.

Third, plaintiffs are wrong about the effects of Senate Bill 838. The bill does not ban mining on federal lands. By its terms, law prohibits certain methods of mining—motorized mining of placer deposits—in specific areas of sensitive fish habitat. Mining that is conducted by non-motorized means is not prohibited. Within ESH and bull trout habitat, mining is permitted on the uplands within 100 yards of a watercourse if will not have an adverse impact on water quality or if the miner receives a permit from DOGAMI. Although a DOGAMI permit is not required under the statutes and rules, it is available to enable upland mining under Senate Bill 838. (SB 838, § 2(2).); *see also* (ER 95-96 (describing process for miner to obtain DOGAMI permit). In short, Senate Bill 838 is an environmental regulation designed to protect water quality and fish. It achieves that goal by prohibiting the use of motorized equipment to mine in sensitive fish habitat.

1. General Mining Act of 1872

Plaintiffs' primary argument is that Senate Bill 838 is preempted by the General Mining Act of 1872. That law provides:

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

30 U.S.C. § 22.

As noted, the Supreme Court considered the preemptive effect of the Mining Act in *Granite Rock*. The Court concluded, based on Granite Rock's concession, "that the Mining Act of 1872, as originally passed, expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." *Granite Rock,* 480 U.S. at 582. That conclusion is consistent with the plain text of the Mining Act, which on its face, provides for mineral "exploration and purchase" as well as land "occupation and purchase * * * *under regulations prescribed by law*** *so far at the same are applicable and not inconsistent with the laws of the United States." 30 U.S.C. § 22 (emphasis added). That clause is an express recognition that Congress intended for state

and local law to play a role in the regulation of mining, provided that those laws do not conflict with federal law.

The California Supreme Court recently reviewed the Mining Law of 1872 in detail, including the law's historical context and legislative history, and upheld California's moratorium on suction dredge mining. *See People v. Rinehart*, 377 P.3d 818, 824, 206 Cal. Rptr. 3d 571 (Cal. 2016) (concluding that "the purposes and objectives underlying the 1872 law do not require displacement of the challenged state laws"). The court concluded that the text and legislative history of the Mining Law of 1872 demonstrated that Congress intended the law to address "the allocation of real property interests among those who would exploit the mineral wealth of the nation's lands, not regulation of the process of exploitation—the mining—itself." *Id*. at 824.

The *Rinehart* opinion also noted that California had a long history of regulating specific methods of mining and that Congress had acquiesced to 19th century court orders that banned harmful methods of mining. *Rinehart*, 377 P.3d at 827-29. Specifically, the court pointed to *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 F. 753, 773 (C.C.D.Cal. 1884), in which the federal Circuit Court of California entered a permanent injunction against several companies

that prohibited hydraulic mining[6] activities because that method of mining constituted a public nuisance. The mining companies defended their use of hydraulic mining on the ground that their actions were expressly permitted by Congress and by custom; the court rejected that argument, holding that the hydraulic mining has "not been legalized by reason of any congressional action." *Id*. at 779. That same year, the California Supreme Court entered a permanent injunction against other mining companies engaged in hydraulic mining. *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 P. 1152 (1884).

At the time, Congress was aware of the prohibition on hydraulic mining. *See Rinehart*, 377 P3d at 327-28 (describing legislative history concerning Congressional response to hydraulic mining injunctions in the late 19th century). But rather than expressing disapproval, Congress "acquiesced in hydraulic mining's discontinuation, allocating money to prosecute miners instead of taking action to assert federal supremacy, protect any supposed federal right to mine, and ensure the continued availability of federal lands for hydraulic mining notwithstanding contrary state law." *Id*. at 328 (citation omitted).

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[6] Hydraulic mining was a process by which miners blasted a hillside with high pressure water and sometimes powder, causing the entire hillside to wash away, and, evidently, allowing for the gold in the hillside to be collected. *See Woodruff*, 18 F. at 756-57.

Plaintiffs acknowledge that the Mining Act's principle effect is to "address[] the means by which ownership of mineral deposits is to be obtained." (App. Br. 25 (discussing 30 U.S.C. § 22)). But plaintiffs go on to argue that state regulation of mining is limited laws that "supplement federal procedures for establishing and determining ownership of interests in federal land." (App. Br. 28). Plaintiffs conclusion is directly contrary to the holding of *Granite Rock* and is inconsistent with the text and history of the Mining Act.

In short, Congress intended the Mining Act of 1872 to encourage mining by creating a mechanism for individuals to gain property rights in minerals that they located on federal land. Congress expressed no intent to exclude mining on federal land from state regulation; rather the Mining Act expressly requires compliance with state laws that are not inconsistent with federal law. The Mining Act does not preempt Senate Bill 838.

2. Multiple Use Act of 1955

Plaintiffs also argue that Senate Bill 838 is preempted by the Multiple Use Act of 1955. *See* 30 U.S.C. § 612(b). That statute, however, is directed at *federal* regulation of use of surface resources. The statute retains surface rights on unpatented mining claims in the federal government, with the proviso that federal agencies cannot materially interfere with mining activities on federal land. *U.S. v. Curtis–Nevada Mines, Inc.* 611 F.2d 1277, 1282 (9th Cir. 1980).

The statute does not purport to limit a state's police power to regulate mining to protect water quality and fish. Moreover, Congress expressly mentioned state law in the Multiple Use Act in order to ensure that state laws governing ground or surface waters within unpatented claims are *preserved*. 30 U.S.C. § 612(b).[7] *See Granite Rock*, 480 U.S. at 582-84 (considering the statute and the implementing regulations and finding no suggestion of intent to preempt state law).

Plaintiffs read the reference to state law in 30 U.S.C § 612(b) as meaning that *only* state laws related to ground and surface waters are preserved while other state laws related to mining are displaced. (App. Br. 31). That reading finds no support in the statute. The fact that Congress clarified that its decision to retain surface rights would not affect state water law does not display any intent to preempt state environmental regulation. *See Rinehart*, 377 P.3d at 831-32 (rejecting similar argument regarding preemption of California moratorium).

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[7] The statute provides that "nothing in this subchapter . . . shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States" governing, among other things, use of water "within any unpatented mining claim." 30 U.S.C. § 612(b).

3. Mineral Policy Act of 1970

The Mineral Policy Act of 1970 also does not preempt state environmental law. To the contrary, it recognizes the importance of environmental protection in the context of mineral extraction. The statute establishes federal policy to encourage mineral development "to help assure satisfaction of industrial, security, and environmental needs." 30 U.S.C. § 21a. It also refers to the "study and development of methods * * * to lessen any adverse impact * * * upon the physical environment that may result from mining." *Id*. Senate Bill 838 is consistent with that policy. *See Rinehart*, 377 P.3d at 825 (noting that 30 U.S.C. § 21a confirms "that Congress did not, and does not, intend mining to be pursued at all costs"). The district court properly concluded that 30 U.S.C. § 21a shows that a state's environmental laws that restrict mining activities—but do "not make all mining impossible"—do not conflict with the federal mining laws. (ER 22, Order at 16 (quoting Brief for the United States as Amicus Curiae Supporting Respondent, *People v. Rinehart*, 82 Cal. Rptr. 3d 275 (August 2015) (No. S222620) 2015 WL 5166997 at 29).

4. The Surface Mining Control and Reclamation Act of 1977

Plaintiffs also argue that the Surface Mining Control and Reclamation Act of 1977 (SMCRA) shows that Senate Bill 838 is preempted. Again, they are wrong. The section of SMCRA that plaintiffs cite, 30 U.S.C. § 1281(b),

establishes a process by which individuals can request that certain federal lands be closed to mining if the federal land is "of a predominantly urban or suburban character, used primarily for residential or related purposes" or if mining operations on federal land "would have an adverse impact on lands used primarily for residential or related purposes." That law says nothing about a state's ability to enact legislation protected water quality and fish. Nor does the fact that an individual can request that federal land be withdrawn from mining when mining would have an "adverse impact" on residential land suggest that a state is prohibited from regulating harms to water quality and fish that result from mining.

5. The case law plaintiffs cite, including *South Dakota Mining*, do not support preemption.

Plaintiffs' preemption argument relies largely on pre-*Granite Rock* cases while simultaneously discounting the impact of *Granite Rock* on the development of the law. As a result of *Granite Rock*, the earlier cases that plaintiffs cite have limited precedential value. Moreover, many are distinguishable on their facts. *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), for example, did not address the mining laws at issue here but instead the Mineral Lands Leasing Act of 1920. *Id.* at 1082-83. And it involved local zoning regulations, not state environmental law, under which the county could prohibit oil drilling altogether. *Id*. at 1084. *Elliott v. Oregon*

International Mining Co., 60 Or. App. 474, 654 P.2d 663 (1982) concerned a county ordinance that "prohibited surface mining" in some areas and "excluded mining as a permissible use of Plaintiffs' property." *Id.* at 476. Similarly, in *Brubaker v. Bd. of Cty. Com'rs, El Paso Cty.*, 652 P.2d 1050, 1059 (Colo. 1982), the county denied the petitioners' permit on the ground that the proposed activities were inconsistent "with the long-range land use plans of El Paso County and with existing, surrounding uses," which the court viewed not as an effort "to regulate but to prohibit the appellants' core drilling activities."

Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984) should also be given little weight. First, the State of Idaho was not a party and therefore was not present to defend the constitutionality of its statute or any permitting decision under the Idaho Dredge and Placer Mining Protection Act. *See State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969, 973-74 (1976) (describing Act and upholding its constitutionality). In fact, the plaintiffs had not sought a state permit and instead pursued a takings claim against the federal government. Second, the court erroneously equated an assumed denial of a permit to suction dredge mine with denying the plaintiffs "the right to mine." Third, and most significantly, it was decided before, and is contrary to, *Granite Rock*. *Skaw* failed to address the states' police powers to issue environmental regulations of mining activity on federal land. For those reasons, *Skaw* has limited value.

Nor is *South Dakota Mining Ass'n, Inc. v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), analogous to this case. There, the county banned mining by the only means available: "[T]he record here discloses that surface metal mining is the only mining method that can actually be used to extract these minerals in the Spearfish Canyon Area." 155 F.3d at 1007. And, as in other cases on which plaintiffs rely, the county's ban was enacted as a zoning ordinance. Senate Bill 838, by contrast, is designed to address specific environmental harms and is not a zoning law, as discussed below. Moreover, the county *joined* the plaintiffs in the 8th Circuit in opposition to the constitutionality of its own the ordinance. 155 F.3d at 1008, n. 3. This case is not like *South Dakota Mining*.

6. Federal regulations support the state's ability to regulate the environmental harms of mining on federal land.

Finally, federal regulations also acknowledge state authority to regulate environmental harms the result from mining on federal land. In *Granite Rock*, the Supreme Court gave weight to federal regulations and federal agency behavior in determining that California's permit requirement was not preempted under federal mining laws. *See Granite Rock*, 480 U.S. at 582-83. The Court not only failed to find any intent to preempt state environmental regulations, but rather found the opposite, concluding that Forest Service regulations required compliance with state environmental laws. *Granite Rock*, 480 U.S. at 583; *see*

36 C.F.R. § 228.5(b); 36 C.F.R. § 228.8(b) (requiring miners on federal Forest Service land to comply with federal and state laws, including state water quality standards).

Other federal regulations are even more direct than the Forest Service regulations mentioned in *Granite Rock*. BLM regulations give states wide latitude to regulate the environmental harms from mining more stringently than the federal government: "If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart." 43 C.F.R. § 3809.3. BLM explained that a conflict occurs only when "it is impossible to comply with both Federal and State law at the same time." 65 Fed. Reg. at 70008-09 (Nov. 21, 2000). Moreover, BLM specifically approved of Montana's ban of cyanide heap-leach mining,[8] citing it as one example of a state requiring a higher level of environmental protection: "In this situation, the State law or regulation will operate on public lands. BLM believes that this is

[8] *See Seven Up Pete Venture v. State*, 327 Mont. 306, 114 P.3d 1009 (2005) (describing mining processes using open pit cyanide heap leaching and the state law banning the practice).

consistent with FLPMA, the mining laws, and the decision in the Granite Rock case." *Id*. at 70009.

D. The federal land use planning laws do not preempt Senate Bill 838.

Plaintiffs also assert that Senate Bill 838 is preempted by the National Forest Management Act (NFMA) and the Federal Land Policy Management Act (FLPMA). The Supreme Court in *Granite Rock* assumed, without deciding, that state land use regulations might be preempted by federal land management statutes. *Granite Rock*, 480 U.S. at 585 (stating that "[f]or purposes of this discussion and without deciding the issue, we may assume that the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands"). But, even assuming state land use plans are preempted on federal mining claims, Senate Bill 838 is not a state land use plan or part of a state land use plan.

Granite Rock distinguished state land use laws from state environmental regulations: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id*. at 587. Under Oregon land use law, local governments, not the state, adopt land use plans and zoning ordinances. Oregon has a unique land use program, a Land Use Board of

Appeals and a well-developed body of land use case law. Under Oregon law, state statutes and administrative rules create statewide planning goals for land conservation and development. *See, e.g.*, Or. Rev. Stat. Chs. 197, 215. Local governments are then required to develop comprehensive plans that meet these statewide planning goals. *See* Or. Rev. Stat. Ch. 197. Local governments implement their comprehensive plans through ordinances including zoning ordinances. Senate Bill 838 is not part of Oregon's land use program and contains no indicia of legislative intent pertaining to land use. Instead, the purpose and focus of Senate Bill 838 is protection of state waters and wildlife, and specifically, the spawning habitat for threatened and endangered anadromous salmonids and bull trout.

Nor does SB 838 prohibit any particular "use" of land, including mining. *Black's Law Dictionary*, Ninth Ed., p. 1681 (2009) defines "use" as "the application or employment of something; *esp*., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional." In the context of state zoning classifications, a land use means just that, employment of land to a purpose such as farm, forest, commercial or residential use. Senate Bill 838 does not prohibit mining as a use of any land within Oregon. Rather, the bill only prohibits certain methods or tools that could result

in environmental harm to fish or water quality. Mining by other means is permitted in all locations where Senate Bill 838 applies.

E. The district court properly concluded that there were no disputes of material fact that precluded summary judgment for the state.

For the reasons outlined above, the district court properly rejected plaintiffs' facial challenge to the statute and granted summary judgment for the state. Nevertheless, plaintiffs contend that, at a minimum, there are disputed issues of fact regarding whether Senate Bill 838 stands as an obstacle to the exercise of their property rights under the federal mining laws and so the trial court erred.[9] (App. Br. 12, 52). Plaintiffs are wrong.

First, accepting plaintiffs' claim as true that some miners will be unable to work their claims without motorized equipment, the fact that environmental regulation makes a particular claim unworkable or unprofitable is not a basis for preemption. Were plaintiffs correct, then miners could evade any state regulation—not just Senate Bill 838—that restricted their ability mine in a particular way. As the district court correctly concluded, the federal mining laws do not "make the cost or practicability of mineral extraction a factor in whether or not a state environmental law is preempted." (ER 22, Order at 16

[9] In the district court, plaintiffs opposed the state's motion for summary judgment but did not assert that disputes of fact precluded summary judgment.

(citing Brief for the United States as Amicus Curiae Supporting Respondent, *People v. Rinehart*, 82 Cal. Rptr. 3d 275 (August 2015) (No. S222620) 2015 WL 5166997 at 29).

Second, plaintiffs' argument amounts to an "as-applied" preemption challenge to Senate Bill 838 based on plaintiffs' individual circumstances. Whether a federal law can ever preempt state law on an "as-applied" basis is an open question. *California Tow Truck Ass'n v City & Cty of San Francisco*, 693 F.3d 847, 865 (9th Cir. 2012). To reverse the trial court, then, this court would have to decide "whether it is proper to find that federal law preempts a state regulatory scheme sometimes but not at other times, or that a federal law can preempt state law when applied to certain parties, but not to others." *Id*.

This court should reject plaintiffs' theory that federal law can preempt state law in such a piecemeal fashion. As discussed above, the touchstone of preemption analysis is what Congress intended the federal law to accomplish. That intent does not vary with the factual circumstances; it is a purely legal question. Similarly, whether a state law conflicts with a federal law is a legal question. To be sure, questions could arise about how a state or federal law operates in the real world. But that question relates back to the legal effect of the respective laws. The legal effects of both federal law and Senate Bill 838 do not depend on plaintiffs' factual circumstances.

In any event, the undisputed facts show that Senate Bill 838 is not a ban on all mining. Plaintiffs can mine using non-motorized mining methods, as they acknowledge. (SER 17; Beatty-Walters Dec., Ex. 103, p. 4.) And several plaintiffs acknowledge mining by non-motorized methods and acknowledge that mining by non-motorized methods is feasible. (ER 146, Darnell Dec., ¶ 3 (some members of plaintiff organization Millennium Diggers use non-motorized techniques to mine); ER 130, Hunter Dec., ¶ 8 (some members of plaintiff organization Willamette Valley Miners use non-motorized techniques to mine); ER 150, Coon Dec., ¶ 4 (noting possibility of working some claims with hand tools.) Plaintiffs acknowledged in their summary judgement briefing that "[h]and panning and other non-motorized methods may still be possible in some areas of some claims." (ECF 59, Plaintiffs' Reply Brief on Summary Judgment, p. 22).

Plaintiffs also can mine using motorized methods on the portions of their mining claims that lie outside the moratorium area. Each mining claim is at least 20 acres, a portion of which, as plaintiffs admit, lies outside of areas affected by SB 838. (SER 12; Beatty-Walters Dec., Ex. 102, p. 4.) Some plaintiffs have upland permits from the Oregon Department of Environmental Quality. (SER 2; Tarnow Dec., ¶ 4.) Plaintiff Jason Gill declares that his upland operation is valuable. (ER 138). To the extent that Gill can mine the

uplands without affecting water quality, mining his claim is not barred by Senate Bill 838. The same holds true for the other plaintiffs with upland mining activities, all of whom contend that "small-scale activities conducted outside the wetted perimeter of Oregon waterways generally have no significant impact on water quality." (SER 19; Beatty-Walters Dec., Ex. 103, p. 6.) To the extent activities in upland areas would be limited by the moratorium due to effects on water quality, plaintiffs have the option of seeking an operating permit from DOGAMI. No plaintiff has pursued this option. Although a DOGAMI permit is not required under the statutes and rules, it is available to enable upland mining under Senate Bill 838. (SB 838, § 2(2).); *see also* (ER 95-97; Riggs Dec. (describing process for miner to obtain DOGAMI permit).

Senate Bill 838 is an environmental regulation designed to protect water quality and imperiled fish species. It is not preempted by federal law.

CONCLUSION

This court should affirm the district court's order granting summary judgment for the state and denying summary judgment for plaintiffs.

Respectfully submitted,

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ADDENDUM

APPELLEES' ADDENDUM

Pursuant to Circuit Rule 28-2.7, appellees submit the following Addendum, as indexed below.

INDEX

STATUORY ADDENDUM

Except for the following, all applicable statutes and rules are contained in the addendum attached to plaintiffs' opening brief.

Senate Bill 838 (2013)

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 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.

United States Code

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, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

33 U.S.C. § 1370

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Oregon Revised Statutes

Or. Rev. Stat. § 468B.015

Whereas pollution of the waters of the state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and whereas the problem of water pollution in this state is closely related to the problem of water pollution in adjoining states, it is hereby declared to be the public policy of the state:

(1) To conserve the waters of the state through innovative approaches, including but not limited to the appropriate reuse of water and wastes;

(2) To protect, maintain and improve the quality of the waters of the state for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, municipal, recreational and other legitimate beneficial uses;

(3) To provide that no waste be discharged into any waters of this state without first receiving the necessary treatment or other corrective action to protect the legitimate beneficial uses of such waters;

(4) To provide for the prevention, abatement and control of new or existing water pollution; and

(5) To cooperate with other agencies of the state, agencies of other states and the federal government in carrying out these objectives.

Code of Federal Regulations

36 C.F.R. § 228.5

(a) Operations shall be conducted in accordance with an approved plan of operations, except as provided in paragraph (b) of this section and in § 228.4 (a), (b), and (e). A proposed plan of operation shall be submitted to the District Ranger, who shall promptly acknowledge receipt thereof to the operator. The authorized officer shall, within thirty (30) days of such receipt, analyze the proposal, considering the economics of the operation along with the other factors in

determining the reasonableness of the requirements for surface resource protection, and;

(1) Notify the operator that he has approved the plan of operations; or

(2) Notify the operator that the proposed operations are such as not to require an operating plan; or

(3) Notify the operator of any changes in, or additions to, the plan of operations deemed necessary to meet the purpose of the regulations in this part; or

(4) Notify the operator that the plan is being reviewed, but that more time, not to exceed an additional sixty (60) days, is necessary to complete such review, setting forth the reasons why additional time is needed: *Provided, however*, That days during which the area of operations is inaccessible for inspection shall not be included when computing the sixty (60) day period; or

(5) Notify the operator that the plan cannot be approved until a final environmental statement has been prepared and filed with the Council on Environmental Quality as provided in § 228.4(f).

(b) Pending final approval of the plan of operations, the authorized officer will approve such operations as may be necessary for timely compliance with the requirements of Federal and State laws, so long as such operations are conducted so as to minimize environmental impacts as prescribed by the authorized officer in accordance with the standards contained in § 228.8.

(c) A supplemental plan or plans of operations provided for in § 228.4(d) and a modification of an approved operating plan as provided for in § 228.4(e) shall be subject to approval by the authorized officer in the same manner as the initial plan of operations: *Provided, however*, That a modification of an approved plan of operations under § 228.4(e) shall be subject to approval by the immediate superior of the authorized officer in cases where it has been determined that a modification is required.

(d) In the provisions for review of operating plans, the Forest Service will arrange for consultation with appropriate agencies of the Department of the Interior with respect to significant technical questions concerning the character of unique geologic conditions and special exploration and development systems, techniques, and equipment, and with respect to mineral values, mineral resources, and mineral

reserves. Further, the operator may request the Forest Service to arrange for similar consultations with appropriate agencies of the U.S. Department of the Interior for a review of operating plans.

50 C.F.R. § 17.44(w)

What species are covered by this special rule? Bull trout (Salvelinus confluentus), wherever found in the coterminous lower 48 States, except in the Jarbidge River Basin in Nevada and Idaho (see 50 CFR 17.44(x)).

Oregon Administrative Rules

Or. Admin. R. 141-121-0010

(1) It is the policy of the State of Oregon to protect ESH.

(2) To achieve this policy, the Department shall:

(a) Consult with the Department of Fish and Wildlife (ODFW) concerning the status of Oregon's indigenous anadromous salmonid species;

(b) Identify ESH in consultation with ODFW and the public through rulemaking; and

(c) Review all projects proposed in ESH pursuant to the standards set forth in the state's Removal-Fill Law (ORS 196.600 to 196.990) and rules (OAR 141-085)

Or. Admin R. 141-102-0030

(1) Areas designated as ESH shall include the waters of this state as described in OAR 141-085, including streams and any adjacent off-channel rearing or high-flow refugia habitat with a permanent or seasonal surface water connection to the stream.

(2) The streams and stream segments designated as ESH are shown on maps that are incorporated by reference in this rule.

(3) The Department will make available detailed maps of ESH at cost and the maps are also available for downloading and viewing on the Department's website (http://www.oregon.gov/dsl/PERMITS/Pages/esshabitat.aspx).

Or. Admin. R. 141-102-0040

Revisions, additions to or deletions from the list and maps of ESH shall be made by amendment to these administrative rules according to the following procedure:

(1) The Department will consult annually with ODFW on the accuracy of the ESH designations.

(2) In consultation with ODFW and other affected parties, the Department may revise the maps when new or higher quality data become available and/or when new state or federal listings or delistings occur that would substantially change the extent of designated habitat.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Appellees' Brief is proportionately spaced, has a typeface of 14 points or more and contains 7,303 words.

DATED: October 14, 2016.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA CALEB BOHMKER, et al Plaintiffs-Appellants, v. STATE OF OREGON; ELLEN ROSENBLUM, in her official capacity as the Attorney General of the State of Oregon, et al, Defendants-Appellees, and ROGUE RIVERKEEPER, et al, Intervenor-Defendants-Appellees.	U.S.C.A. No. 16-35262 STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for Appellees,

certifies that he has no knowledge of any related cases pending in this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2016, I directed the Appellees' Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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