No. 16-35262

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

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF WESTERN PUBLIC LAND LAW PROFESSORS JOHN D. LESHY ET AL. IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Western Public Land Law Professors John D. Leshy et al. respectfully move for leave to file before the Court the accompanying brief as amici curiae in this case pursuant to Federal Rules of Appellate Procedure 29(b), in support of the State of Oregon et al. and Rogue Riverkeeper et al., and in support of affirmance of the decision below. Amici are professors from Western states (California, Colorado, Oregon, Utah, and Wyoming) engaged in the study and teaching of the laws and policies relating to federal public lands and natural resources. At issue in this case is the relationship between the Mining Law of 1872, one of the foundational federal laws governing the management and use of public lands, and state environmental protection laws. As experts in the history and present application of public lands law, amici have an interest in ensuring that the Court properly interprets the federal-state relationship between the Mining Law and state laws.

As provided in Federal Rules of Appellate Procedure 29(a) and Circuit Rule 29-3, amici endeavored to obtain consent of all parties in this case to file this brief. The State of Oregon and the Defendants-Intervenors-Appellees Rogue Riverkeeper et al. consent to filing the brief, but counsel for Appellants Bohmker et al. communicated that Appellants did not consent.

Below is further description of the expertise of four amici in this area of law, as examples, and as context for their interest and ability to assist the Court in deciding this matter. Affiliations of amici are provided for informational purposes only; the views in the proposed brief are those of amici as individuals and do not reflect the position of their respective institutions.

Amicus John Leshy is the Harry D. Sunderland Distinguished Professor of Law Emeritus at U.C. Hastings College of the Law. He has long been engaged on issues involving the Mining Law of 1872, and state authority under it. He has authored a comprehensive history of the Mining Law, The Mining Law: A Study in Perpetual Motion (Johns Hopkins Press, 1987); co-edited the standard text, Federal Public Land and Resources Law, now in its seventh edition (Foundation Press, 2014); authored an amicus brief filed on behalf of nineteen states in *California Coastal Commission v. Granite Rock Co*., 480 U.S. 572 (1987); and written law review articles discussing that case and, more generally, administration of the Mining Law. Professor Leshy also served as Solicitor (General Counsel) of the U.S. Department of Interior from 1993 to 2001.

Amicus Eric Biber is a Professor of Law at the University of California, Berkeley. He practices, teaches, and writes extensively in the areas of natural resources law, public lands law, and biodiversity law. His articles in these areas have been published in leading law reviews (UCLA Law Review, University of

Chicago Law Review, University of Colorado Law Review, Harvard Environmental Law Review, and Environmental Law) and in leading peer-reviewed scientific publications (Science, Frontiers in Ecology and Environment, Society and Natural Resources, and Ecology and Society). Prior to arriving at Berkeley, he worked as a litigator on public lands and endangered species issues for the Denver office of Earthjustice, one of the leading environmental public interest law organizations.

Amicus Sean B. Hecht, the Evan Frankel Professor of Policy and Practice and co-Executive Director of the Emmett Institute on Climate Change and the Environment at UCLA School of Law, is engaged in issues involving the Mining Law's interaction with state regulatory authority. He has taught Public Natural Resources Law, including material relating to *Granite Rock* and its application at the state level in the context of the Mining Law, since 2004. As a Deputy Attorney General for the State of California prior to his appointment at UCLA in 2003, he worked on matters relating to the interaction of federal mining laws, including the Mining Law and the Stock-Raising Homestead Act, with state and local regulation of the environmental impacts of mining.

Amicus Charles Wilkinson is Distinguished Professor and Moses Lasky Professor of Law at the University of Colorado Law School. His primary specialties are federal public land law and Indian law. In addition to his many

articles in law reviews, popular journals, and newspapers, his fourteen books include the standard law texts on public land law and on Indian law. He also served as managing editor of Felix S. Cohen's Handbook of Federal Indian Law, the leading treatise on Indian law. The Universities of Colorado and Oregon have given him their highest awards for leadership, scholarship, and teaching. He has also won acclamation from non-academic organizations. The National Wildlife Federation presented him with its National Conservation Award, and in its 10-year anniversary issue, *Outside Magazine* named him one of 15 "People to Watch," calling him "the West's leading authority on natural resources law." He has served on several boards, including The Wilderness Society, the Grand Canyon Trust, and the Center of the American West at the University of Colorado. Over the years, Professor Wilkinson has taken on many special assignments for the Departments of Interior, Agriculture, and Justice. For example, he served as special counsel to the Interior Department for the drafting of the 1996 Presidential Proclamation establishing the Grand Staircase-Escalante National Monument in Utah. In December 1997, Agriculture Secretary Glickman appointed him a member of the Committee of Scientists, charged with reviewing the Forest Service planning regulations.

The remaining amici are, likewise, scholars and teachers of federal natural resources law and are recognized as experts in this area; the amici include authors

of leading casebooks on natural resources law in the United States and of numerous other articles and texts on the subject.

In the proposed brief, amici discuss the history and structure of mining and environmental law on federal public lands, demonstrating that state law can and does coexist with the federal Mining Law. Decisions from the Supreme Court, this Court, and other federal and state courts recognize the role of states in regulating environmental protection on federal lands. In addition to the case law, the brief gives particular attention to federal agency regulations. U.S. Forest Service and Bureau of Land Management regulations consistently and uniformly show an intent to accommodate, rather than preempt, state regulations affecting mining claims on federal land. This review of the Mining Law, related federal laws and regulations, and their interactions with state law, may assist the Court in addressing the key issues underlying the claims made in this case.

Several of these amici previously filed a brief in a similar case before the California Supreme Court, *People v. Rinehart*, 1 Cal. 5th 652, 377 P.3d 818 (2016), which addressed similar issues of whether the federal Mining Law preempts state environmental regulation.

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As amici will be affected by this Court's decision and may assist the Court through their unique perspectives on the relationship between federal and state law in this area, amici respectfully move for leave to file this brief before the Court.

Dated: October 20, 2016

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Mary Christina Wood, Philip H. Knight Professor, Faculty Director, Environmental and Natural Resources Law Center, University of Oregon School of Law

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 20, 2016.

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.

Dated: October 20, 2016

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PROPOSED BRIEF AMICUS CURIAE OF WESTERN PUBLIC LAND LAW PROFESSORS JOHN D. LESHY ET AL. IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE

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AMICI CURIAE BRIEF

I. Identity and Interests of Amici Curiae

Amici curiae are professors engaged in the study and teaching of the laws and policies relating to federal public lands and natural resources.[1] They include professors who have considerable experience working in state and federal government agencies.

For example, Professor John Leshy, the Harry D. Sunderland Distinguished Professor of Law Emeritus at U.C. Hastings College of the Law, has long been engaged on issues involving the Mining Law of 1872, and state authority under it. He has written a comprehensive history of the Mining Law, The Mining Law: A Study in Perpetual Motion (Johns Hopkins Press, 1987); co-edited the standard text, Federal Public Land and Resources Law, now in its seventh edition (Foundation Press, 2014); authored an amicus brief filed on behalf of nineteen states in *California Coastal Commission v. Granite Rock Co*., 480 U.S. 572 (1987); and written law review articles discussing that case and administration of the

[1] This proposed brief is submitted under Federal Rules of Appellate Procedure 29(a)-(b), with a motion for leave of the Court to file the brief. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than amici curiae and their counsel, made a monetary contribution to the preparation and submission of this brief.

Mining Law generally. He served as Solicitor (General Counsel) of the U.S. Department of Interior from 1993 to 2001.

Amici professors have an interest in ensuring that the Court properly interprets the relationship between the Mining Law and state environmental protection laws. They believe that their perspective, informed by their academic knowledge and insight and their other experience in public lands and natural resources law, can assist the Court with this matter. Amici submit this brief in their individual capacities, and institutional affiliations are given for informational purposes only.

II. Introduction

States in the West have long played a leading role in both mining and environmental protection—the two areas of law at issue in this case. Contrary to the assertions of Appellants Bohmker et al. ("Bohmker"), there is no need for this Court to forbid Oregon from protecting the environment in the context of mining. State environmental protections, such as Oregon's in this case, can comfortably coexist with federal authority over mining activities on federal lands. This coexistence has been recognized by many court decisions over more than a century, and is consistent with the longstanding practice of the federal agencies

that manage and regulate mining on the federal lands. The Court should affirm the judgment of the District Court.

III. The History and Structure of Mining and Environmental Law on Federal Lands Demonstrate that State and Federal Law Coexist

The Mining Law of 1872 and state environmental laws have coexisted for over a century, and federal law has always contemplated state regulation of mining claims and mining activities. The enactment of the Multiple Use Mining Act and other statutes has not changed the states' role in regulating mining activities to minimize harm to the environment. Bohmker's case rests on judicial language taken out of context and a misreading of the statutory and regulatory schemes.

A. State environmental law has applied to mining activities on federal lands for well over a century

The federal Mining Law of 1872 is, in many ways, the product of the gold rush in the American West that began in California. The Law was an effort by Congress to manage the tremendous growth in mining activities in Western states and territories. John Leshy, The Mining Law: A Study in Perpetual Motion (Johns Hopkins Press, 1987). But as the U.S. Supreme Court has noted, the Mining Law does not speak to issues of environmental protection. *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 582 (1987).

Thus, it is no surprise that when the devastating environmental impacts of gold mining became clear, state law intervened to manage those impacts. A

primary method of gold mining in the West in the mid-nineteenth century was hydraulic mining. Using high-pressure hoses to wash down entire mountainsides to unearth gold deposits, these operations caused substantial environmental degradation. In the early 1880s, the State of California enacted a statute that codified the common law of nuisance to enjoin hydraulic mining. Both federal and state courts upheld this statute. In the federal decision, *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753, 771 (C.C.D. Cal. 1884), the court found that "the acts complained of clearly constitute a public and private nuisance, both at common law and within the express language of the Civil Code of California." *See also People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 151-52 (1884).

Woodruff is a foundational case for environmental law and federal mining law, and is especially instructive for this case. The defendant mining operations in *Woodruff* argued, as Bohmker does here, that the Mining Act of 1872 authorized their actions, making them exempt from state nuisance law. *See Woodruff*, 18 F. at 773-78. The court specifically rejected those claims, confirming the principle that federal mining law does not provide blanket authorization for environmentally destructive practices.

Now, more than a century later, the mining industry once again seeks to shield its activities from states' legitimate attempts to protect the environment. In so doing, it asks this Court to ignore the venerable precedent of the hydraulic

mining cases. And as demonstrated below, it also asks this Court to ignore the structure of federal mining and land-management laws, relevant U.S. Supreme Court precedent, case law from other federal and state courts, and the adjudicatory decisions and regulations of the federal agencies that manage federal lands.

B. Environmental protection is an integral element of federal mining law

Over the past century and more, Congress has developed a structure for federal mining law that includes an integral role for environmental protection and regulation by both federal *and* state agencies. The original Mining Law of 1872 is a product of an earlier era, when the federal government sought to dispose of its land in the West to private parties as quickly as possible. The law authorizes entry onto public lands for "exploration and purchase" for mining purposes, including to locate mining claims. 30 U.S.C. § 22.

Upon discovery, a mining claim gives the claim holder the "exclusive right of possession and enjoyment" of the claim for mining purposes. 30 U.S.C. §§ 23, 26. Discovery requires that a claim holder establish that the mineral can be "extracted, removed, and marketed at a profit." *United States v. Coleman*, 390 U.S. 599, 600 (1968). Other miners cannot enter onto a mining claim and conduct their own explorations or mining activities. However, the federal government and

the public at large retain the ability to use and enjoy the surface area of a mining claim. 30 U.S.C. § 612(b).

From the very beginning, the Mining Law provided a central role for states and local governments to manage mining activities. Section 26 of the Mining Law—which gives the right of possession and enjoyment to mining claims—states that the claim exists so long as the holders "comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title[.]" 30 U.S.C. § 26. Likewise, Section 28 of the Mining Law allows mining districts to establish regulations governing mining activities, so long as they are not "in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated." 30 U.S.C. § 28.

In the late nineteenth century, federal public land policy began to shift, from disposal to retention. Congress over time provided that more of the public lands would be retained in federal ownership, managed by federal agencies for a wide range of purposes, including protection of the environment.

An important step in that process was the establishment of the National Forests. In the 1897 Organic Act specifying how National Forests would be managed, Congress stated that the management agency "shall make provisions for the protection against destruction by fire and depradation upon the . . . national

forests" and the agency "may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction[.]" 16 U.S.C. § 551. This was paired with a requirement that the agency could not "prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." 16 U.S.C. § 478. However, "[s]uch persons must comply with the rules and regulations covering such national forests." *Id*.

The move towards retention of the federal lands concluded in 1976 with the enactment of the Federal Land Policy and Management Act (FLPMA) (43 U.S.C. § 1701 *et seq*.), which covered all the public lands that had not before been set aside as National Forests, National Parks, National Monuments, National Wildlife Refuges, or other special units. FLPMA provided, for the first time, a comprehensive structure for the Bureau of Land Management (BLM) to manage the remaining public lands. 43 U.S.C. § 1701. As federal courts have noted, "[t]he heart of FLPMA amends and supersedes the Mining Law." *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 33 (D.D.C. 2003). Specifically, FLPMA instructs BLM that it "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b). Congress left no doubt that it intended to subject all activities under the Mining

Law to the "unnecessary or undue degradation" (UUD) standard. Section 1732(b) specifies four places where FLPMA "amend[s] the Mining Law of 1872" and affects "the rights of . . . locators or claims" under it; one of these places listed is the "last sentence of this paragraph," referring to the UUD standard. *Id.*

Viewing together the structure of the Mining Act, the 1897 Organic Act, and the relevant provisions of FLPMA, it is clear that the federal laws governing mining contemplate environmental considerations. These laws give both the Forest Service and the BLM management authority over millions of acres of public lands. Congress has delegated to them the power to regulate activities on those lands to minimize and protect against environmental harms from mining; indeed, they have been given a mandate to protect against those harms. As described in Section V, infra, both the Forest Service and BLM have used their authority to manage the environmental impacts of mining on federal lands, in particular by ensuring that mining activities comply with state environmental laws.

Bohmker relies heavily on the 1955 Multiple Use Mining Act (MUMA), 30 U.S.C. § 612(b), to argue that federal mining law does not include environmental protection. Specifically, Bohmker claims that federal land-management agencies—and by implication states as well—can only regulate mining claims so long as those regulations do not "materially interfere" with mining operations. Opening Brief of Plaintiffs-Appellants ["Bohmker Br."] 29-32. However,

Bohmker's interpretation ignores the text of Section 612(b) itself, relevant case law, and MUMA's legislative history, which makes clear that the law's purpose was to clarify the public's right to use the surface of mining claims without interference by claim holders. The legislative history refers specifically to concerns about claim holders excluding the public in order to obtain exclusive access to prime fishing spots or camping sites, rather than for mining activities. *See United States v. Curtis-Nevada Mines*, 611 F.2d 1277, 1280 (9th Cir. 1980) (noting that the law was intended to "alleviate abuses that had occurred under the mining laws"). Thus, Congress's intent in passing the law was to clarify the scope of miners' rights to use the surface of their claims, and not to constrain the pre-existing authority of federal agencies or states to regulate the environmental harms of mining claims.

Bohmker's claim that states lack authority to regulate mining misinterprets the scope of federal regulatory authority over mining claims. This Court has definitively ruled, under the Organic Act and MUMA, that USFS has broad authority to regulate mining on national forest lands, even when this regulation affects the financial viability of the mining operation. *See Clouser v. Espy*, 42 F.3d 1522, 1529–30 (9th Cir. 1994). In *Clouser*, the plaintiff mining claimholders challenged USFS's requirement that they access their claims by pack animal instead of motor vehicle. *Id.* at 1524. The court concluded that USFS had the

statutory authority to regulate mining for the purposes of preserving the national forests, citing 16 U.S.C. §§ 478, 551 (discussed *supra*), even if regulations meant that mining operations would be made unprofitable:

> Virtually all forms of Forest Service regulation of mining claims—for instance, *limiting the permissible methods of mining and prospecting* in order to reduce incidental environmental damage—will result in increased operating costs, and thereby will affect claim validity . . . [h]owever . . . such matters may be regulated by the Forest Service.

Id. at 1530 (emphasis added). This Court should decline Bohmker's invitation to reinterpret clearly-established principles of federal law, or to rule longstanding federal regulations "substantively unlawful." Bohmker Br. 50.

IV. Under *Granite Rock*, the Mining Law Does Not Limit Environmental Regulation of Mining, Even if That Regulation Results in Prohibition of Certain Mining Activities

California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987), and subsequent cases make clear that the Mining Law allows room for state environmental regulation of mining activities on federal claims. Bohmker's argument that Oregon's statute conflicts with congressional objectives therefore fails. First, *Granite Rock* held that the Mining Law and the federal framework surrounding it have no preemptive effect on state environmental regulation. Second, *Granite Rock* suggested that federal land-use planning laws, including FLPMA and National Forest Management Act (NFMA), would generally not preempt state laws to protect the environment, even if they might preempt state

land-use regulations. In the nearly 30 years since *Granite Rock* was decided, only one court has held that the Mining Law preempts state regulation of any sort. In that case, the Eighth Circuit struck down a county zoning ordinance prohibiting any new surface metal mining projects in a specified area as "a de facto ban on mining in the area" because it banned "the only mining method that can actually be used to extract [the] minerals" found there. *South Dakota Mining Co. v. Lawrence County*, 155 F.3d 1005, 1007 (8th Cir. 1998) ["*South Dakota Mining*"]. As discussed below, Oregon's statute in this case is distinguishable from the zoning ordinance in *South Dakota Mining* because it is designed to protect the environmental quality of ecologically sensitive areas in the state, and does not prohibit all forms of mining in the areas subject to the statute.

Although the Mining Law holding of *Granite Rock* should be dispositive here, both that holding and the case's discussion of the preemptive scope of federal land-use planning laws demonstrate that state environmental laws regulating mining do not impermissibly conflict with federal law.

A. *Granite Rock* confirms that the Mining Law and federal regulations under it are intended to accommodate, not preempt, state environmental regulations

The Court in *Granite Rock* recognized that states can regulate unpatented mining claims under the Mining Law and subsequent federal laws. The Court began by noting that the Mining Law itself "expressed no intent on the as yet rarely

contemplated subject of environmental regulation." *Granite Rock*, 480 U.S. at 582. The Court found this lack of intent dispositive, rejecting any argument that the Mining Law's purposes could result in preemption of state environmental laws. *Id.* Accordingly, the Court rejected the company's argument that the federal government's regulation of unpatented mining claims shows an intent to preempt all state regulation of those claims. *Id.* at 581–85.

The *Granite Rock* Court also held that MUMA did not preempt the state's environmental protection efforts. The Court reasoned that, if the federal government intended that the company not be hindered by state regulations, the Forest Service regulations implementing MUMA would show such an intent. *Id.* at 582–83. But instead, the Court found, "[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.[2] The regulations expressly indicated that the Mining Law's federal framework allows states to regulate mining claims. The Court found it persuasive that the federal agency that approved the company's plan of operation "expected compliance with state as well as federal law." *Id.* at 584. Thus, the Court gave great weight to the Forest Service's interpretations of the preemptive reach of both the Mining Law and MUMA.

[2] Among the agency regulations cited by the Court was 36 C.F.R. § 228.8, discussed in detail *infra* in Section V.B. *See Granite Rock*, 480 U.S. at 584.

Having rejected the company's Mining Law preemption claims, the Court moved on to reject the company's argument that federal land-use statutes prohibit state regulation of the environmental impacts of activities on federal lands. This discussion was explicitly dicta, as the Court only assumed, "[f]or purposes of this discussion and without deciding," that federal land-use statutes (FLPMA and NFMA) would preempt an incompatible state land-use regulation. *Id.* at 585.

Even under that assumption, the Court found, those statutes still would not preempt a state regulation to protect the environment. The Court contrasted state environmental protection with state land-use planning, noting federal land-use statutes would likely preempt the latter on federal lands, in the event of a conflict. *Id.* at 587. The "core activity" of each is different, as the Court explained: environmental regulation does not require a particular use of land but "requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.*

As cases dating back to *Woodruff* show, permissible environmental regulation includes limitations on, or even prohibition of, the use of particular mining methods and equipment on federal lands. Put differently, although public lands are generally open to mining under NFMA and FLPMA unless otherwise prohibited, federal law has never authorized all methods of mining, or the use of all mining equipment, everywhere. Instead, a state prohibition of specific mining

techniques is a permissible form of environmental regulation under the Mining Law framework. *Granite Rock* indicates that preemption occurs only where the state "chooses particular uses for the land," as opposed to regulating particular mining methods so that "damage to the environment is kept within prescribed limits." *See Granite Rock* at 587. Therefore, the District Court here properly interpreted Oregon's statute, which provides for a limited temporary ban on certain mining techniques, as a "reasonable environmental regulation" within the application of *Granite Rock*. *Bohmker v. Oregon*, No. 1:15-cv-01975-CL, ___ F. Supp. 3d ___, 2016 WL 1248729, at *6 (D. Or. Mar. 25, 2016).

B. Courts applying *Granite Rock* have uniformly upheld state regulations designed to protect the environment from mining impacts, even when those state laws prohibit certain mining practices, techniques, or equipment

Bohmker's use of case law is fatally flawed in two ways. First, the cases he relies on are both inapt, and do not reflect the state of the law. His contention that "a large body of precedent strikes down state action prohibitory in character as opposed to regulatory in character," Bohmker Br. 24, misconstrues the purpose and effect of the Oregon statute in an attempt to distinguish it from similar state statutes that courts have upheld, and lacks support in case law since *Granite Rock*. Second, the cases Bohmker relies on are outdated in any event. *Granite Rock* provides a fundamental and definitive means of analyzing state regulation of

mining claims, undermining contrary prior case law analyzing preemption in this context. *See* 1 George Cameron Coggins & Robert L. Glicksman, Public Natural Resources Law §§ 5:26-5:28 (2d ed. 2007); John D. Leshy, Granite Rock and the States' Influence over Federal Land Use, 18 Envtl. L. 99, 102, 117–18 (1987); 1 Bruce M. Kramer & Patrick H. Martin, Law of Pooling & Unitization § 16.05[1] (3d ed. 2013). Despite the importance of *Granite Rock*, Bohmker ignores its impact. With the exception of *South Dakota Mining*, which does not disturb Oregon's regulation here, and a state appellate court opinion in California in *People v. Rinehart*, which has now been reversed by the California Supreme Court, *People v. Rinehart*, 1 Cal. 5th 652, 377 P.3d 818 (2016), Bohmker relies entirely on pre-*Granite Rock* cases.

The Court need not look far for cases rejecting challenges like Bohmker's. In the past two years, federal and state courts have done so with similar laws in Washington, California, and Oregon itself. Those courts all found that state laws severely restricting or effectively prohibiting suction-dredge mining were not preempted because they were not "de facto bans" on mining in general.

None of these cases can be distinguished in any material respect. First, the U.S. District Court for the District of Oregon found in 2014 that an earlier state law was not preempted because it did not prohibit all mining and allowed for continued recreational placer mining and recreational prospecting. *Pringle v. Oregon*, No.

2:13-cv-00309-SU, 2014 WL 795328, at *1, 8 (D. Or. Feb. 25, 2014.) The Oregon statute at issue in *Pringle* prohibited state officers from issuing permits for suction-dredge mining in areas designated by the state as "scenic waterways." *Id.* The plaintiff—like Bohmker—argued "the effect of the [state law] is to prohibit mining altogether" in that it effectively restricted him to using a shovel and gold pan to mine his claim, citing the *South Dakota Mining Co.* decision. *Id.* at *8. The court rejected this argument, holding the law was not preempted because, unlike the ordinance in *South Dakota Mining* but similar to the case here, the statute allowed for continued recreational mining using non-prohibited methods. *Id.* at *8.

The Washington Court of Appeals reached the same conclusion in rejecting another argument by a recreational miner that the Mining Law preempted state restrictions on suction-dredge mining. *Beatty v. Washington Fish & Wildlife Comm'n*, 341 P.3d 291, 307-08 (Wash. Ct. App. 2015), *rev. denied*, 349 P.3d 856 (Wash. 2015). The court found that the state regulations, which effectively prohibited suction-dredge mining for fifty weeks of the year, did not conflict with the Mining Law. The court noted, "[t]he mining restrictions and permit conditions are designed to protect the physical environment for the development of fish life, which is consistent with the [Mining Law]." *Id.*, 341 P.3d at 307. Because the miner could still use other mining methods and equipment, the court held the state regulation was not preempted. *Id.*

Third, in August 2016, the California Supreme Court unanimously upheld a state moratorium on suction dredge mining very similar to the Oregon statute at issue here. *People v. Rinehart*, 1 Cal. 5th 652, 377 P.3d 818 (2016). That court reasoned that the Mining Law of 1872 "did not . . . convey[] a federal right to mine on federal land without regard to any environmental impacts a particular method might have and any interests a state might seek to protect." *Id.*, 1 Cal. 5th at 669. While the defendant in *Rinehart* had argued that the moratorium prohibited the only "practicable" way to mine on his claim, the application of federal mining law does not make mining claims "immunized from exercises of the states' police powers" to regulate environmental impacts of mining. *Id.*, 1 Cal. 5th at 657.

The Oregon law is a reasonable state environmental regulation, just like those properly upheld in *Rinehart*, *Beatty*, *Pringle*, and *Granite Rock* itself. All the factors the courts in *Rinehart*, *Beatty*, and *Pringle* found persuasive are present here: Oregon's regulation aims to protect the environment, not direct land use. *See* Or. Senate Bill 838 § 1(4-5) (2013) (describing the state's findings on environmental impacts of motorized instream mining and detailing the state's "concerns about the cumulative environmental impacts" of increases in mining). It does not bar all mining methods or equipment, but only the use of motorized equipment, Or. Senate Bill 838 § 2(1); further, it bans motorized instream mining only in specific locations to protect salmon and trout populations, leaving

possibilities for motorized equipment use upland or by permit in other waters. *Id.* § 2(1),(3). Bohmker and others, like the plaintiffs in *Rinehart*, *Beatty* and *Pringle*, can still mine their claims using other methods. *See Beatty*, 341 P.3d at 307; *Pringle*, 2014 WL 795328 at *2. This court should similarly find that Bohmker's challenge is meritless.

Meanwhile, though Bohmker relies heavily on *South Dakota Mining*, that case only emphasizes the reasons Oregon's regulation is not preempted. The *South Dakota Mining* court found that a local zoning ordinance was "a per se ban on all new or amended permits for surface metal mining within the area" described in the ordinance—90 per cent of which was federally-owned land. *South Dakota Mining*, 155 F.3d at 1007, 1011. The court relied on the fact that "the 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." *Id.* at 1007. The zoning law's restriction on the surface uses of land in a particular tract in *South Dakota Mining* stands in stark contrast to Oregon's decision to place a moratorium on the use of particular mining equipment to protect—under the state's police power—water quality, sensitive fish populations, and culturally significant areas. Or. Senate Bill 838 § 1(4). The law in *South Dakota Mining* is also distinguishable because it was an amendment to a local zoning ordinance—exactly the type of law *Granite Rock* suggested would be preempted—and not an environmental

regulation. *South Dakota Mining*, 155 F.3d at 1007. Thus, *South Dakota Mining* only reinforces the differences between Oregon's regulation here and a state or local law that stands as an obstacle to the purposes of federal law. *See id.* at 1011.

Finally, contrary to amici Pacific Legal Foundation et al.'s arguments, no court[3]—including *South Dakota Mining*—has ever applied a "commercial impracticability" test to minerals administered through the Mining Law's location system. *See* Brief Amicus Curiae of Pacific Legal Foundation and Western Mining Alliance 11.

Such a test has no support in any Mining Law decision, and would make little sense as a preemption test. Every regulation affects profitability, and thus a commercial impracticability test would, perversely, mean that the least regulation would apply to the least viable claims.[4] The District Court in this case correctly reasoned that "federal preemption of a state environmental regulation should not turn on the cost to an individual miner[,]" because although "[t]he Mining Act guarantees that federal lands will remain free and open to mineral discovery and

[3] The California Court of Appeal had employed a form of this test in *People v. Rinehart*, but its opinion was reversed by the California Supreme Court.
[4] Taken to its logical conclusion, such a test would mean the most environmentally-damaging mining techniques – like the use of nuclear explosions for mining, as proposed in the mid twentieth-century – would be permissible. *See* 2 U.S. Department of Energy and Desert Research Institute, Colleen M. Beck, et al., The Off-Site Plowshare and Vela Uniform Programs 4-73 to 4-79, DOE/NV/26383-22 (2011), *available at* http://www.osti.gov/scitech/biblio/1046575.

development . . . it does not guarantee that such discovery and development will be profitable or efficient." *Bohmker v. Oregon*, 2016 WL 1248729 at *8-9. While the Court in *Granite Rock* suggested, in dicta, the possibility that a state environmental regulation might be preempted if it were "so severe that a particular land use would become commercially impracticable," *Granite Rock*, 480 U.S. at 587, no court that actually has analyzed the issue has employed that test.

The remaining cases Bohmker relies on are both dated and distinguishable. *Ventura County v. Gulf Oil Corp.*, *Brubaker v. Bd. of County Commissioners*, and *Elliott v. Oregon Int'l Mining Co.* all precede *Granite Rock*, making their value as precedent questionable at best. And, like *South Dakota Mining*, all three deal with flat bans or zoning ordinances, making them distinguishable here. In *Ventura County*, the court concluded Ventura County's permit requirement was the functional equivalent of a prohibition on all mining because it gave the County "veto power." *Ventura Cnty. v. Gulf Oil Corp.*, 601 F.2d 1080, 1084-85 (9th Cir. 1979), *aff'd* 445 U.S. 947 (1980). The court in *Brubaker* found that, in denying a drilling permit to the plaintiffs, the County sought "to prohibit the very activities contemplated and authorized by federal law" based on a "policy judgment as to the appropriate use of the land," and not to "supplement the federal scheme" for environmental protection. *Brubaker v. Bd. of County Commissioners*, 652 P.2d 1050, 1056, 1059 (Colo. 1982). The court in *Elliott* found a county ordinance

preempted because it did "not simply supplement federal mining law" but "completely prohibit[ed] . . . *any surface mining* []." *Elliott v. Oregon Int'l Mining Co.*, 654 P.2d 663, 668 (Or. Ct. App. 1982) (emphasis added). Like *Ventura County* and *Brubaker*, *Elliott* is distinguishable: the regulation here allows surface mining, so long as it does not involve the use of any motorized equipment.

Lastly, Bohmker's reliance on *Skaw v. United States*, another pre-*Granite Rock* decision, is also unavailing. That case's value as precedent is particularly weak. The court need not have reached the preemption issue at all, as its discussion hinged on the outcome of a trial that had not been conducted yet. *Skaw v. United States*, 740 F.2d 932, 940 (Fed. Cir. 1984). It spent only a few sentences on that discussion and did not cite authority to support its conclusion. *See id*. This "arguendo, contingent nature" weakens the case's value as precedent. 1 George Cameron Coggins & Robert L. Glicksman, Public Natural Resources Law § 4:25 (2d ed. 2007).

V. Federal Agencies have Consistently and Uniformly Shown an Intent to Accommodate Rather than Preempt State Regulations Affecting Mining Claims

The agencies that administer the Mining Law and regulate unpatented mining claims on federal lands have explicitly and consistently recognized states' authority to regulate mining on federal lands to protect the environment, even where that regulation may render particular mining activities in specific locations

commercially impracticable. The U.S. Supreme Court noted as much in *Granite Rock.* Especially in light of the weight given to the Forest Service's practices by the U.S. Supreme Court in *Granite Rock*, these agencies' administrative decisions and regulations strongly support Oregon's position that its moratorium on the use of motorized instream mining equipment in the state's waters is valid.

A. The Department of the Interior factors state regulation into its determinations of the validity of mining claims

The Department of the Interior (DOI) is most directly responsible for implementing the Mining Law. Its agencies have consistently and uniformly shown an intent to accommodate rather than preempt state regulations affecting mining claims. BLM enforces the most important requirement for a valid mining claim, that of a "valuable mineral discovery," *see United States v. Coleman*, 390 U.S. 599, 600 (1968), by adjudicating mineral contests. These are proceedings "brought to determine the validity or use of an unpatented mining claim or site." U.S. Bur. of Land Mgmt., Handbook H-3870-1: Adverse Claims, Protests, Contests, and Appeals, ch. IV(A).[5] Appeals from those decisions are taken by another DOI agency, the Interior Board of Land Appeals (IBLA), which publishes precedential opinions. While the Forest Service is responsible for investigating the

[5] *Available at* http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.79360.File.dat/h3870-1.pdf.

suspected invalidity of mining claims on Forest Service land in the first instance, the adjudication of claim validity rests with DOI. *See* 16 U.S.C. § 551 (2012) (statutory authority); 36 C.F.R. §§ 228.1-228.15 (USFS regulations); Forest Service Manual (FSM) §§ 2814.11, 2819.1, 2819.2(2007) (USFS guidance).[6]

IBLA directly implements the Mining Law's discovery requirement, which requires that mining a claim be commercially practicable to be valid. Since the IBLA adjudicates mining contests, if the federal government understood its powers to preempt state regulations that make mining claims commercially impracticable, one would expect IBLA decisions to reflect that belief. But the opposite is true: IBLA has consistently factored costs of compliance with state environmental regulations into its marketability analysis. *United States v. Garcia*, 161 IBLA 235, 252 (2004) (upholding ALJ's calculation of costs of compliance and consequent finding that evidence did not show discovery of valuable deposits of gold) (subsequent history omitted and not to the contrary).[7] Accordingly, IBLA has

[6] *Available at* http://www.fs.fed.us/im/directives/fsm/2800/2810.doc.
[7] *See also, e.g., Great Basin Mine Watch et al.*, 146 IBLA 248, 256 (1998) (noting costs of compliance as factor in claim validity); *United States v. Pittsburgh Pac. Co.*, 30 IBLA 388, 405 (1977) (remanding in part for determination of expense of complying with state and federal environmental laws), *aff'd sub nom. South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980); *United States v. Kosanke Sand Corp. (On Recons.)*, 12 IBLA 282, 298-99 (1973) (same); *United States v. E.K. Lehmann & Assocs. Of Mont., Inc.*, 161 IBLA 40, 104 n.25 (2004) (rejecting miners' argument that they had marketable claims in light of state-imposed reclamation costs).

invalidated mining claims where the cost of complying with a state permit would make extracting the mineral deposit unprofitable or commercially impracticable. *See, e.g.*, *id.* at 252-58 (considering costs of obtaining state water permit in finding claim invalid because total costs outweighed projected revenues).

To the extent DOI's decisions reflect its views on the preemptive reach of statutes it administers, those views should be accorded deference in proportion with their thoroughness, consistency, reasoning, and persuasiveness. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As the U.S. Supreme Court explained in *Wyeth v. Levine*, agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to" Congress's purposes. *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (internal quotation marks omitted); *Chae v. SLM Corp.*, 593 F.3d 936, 950 (9th Cir. 2010).

In cases spanning five decades, the IBLA has given no indication that federal law would preempt state environmental laws that make mining a claim more expensive, or even impracticable. In contrast to the agency decisions in *Wyeth*, where sharp changes in agency viewpoint regarding preemption rendered the agency's position unworthy of deference, DOI's decisions with respect to the effects of state laws on mining-claim validity have been consistent. The four

factors for agency deference thus weigh heavily in favor of the IBLA's views on this issue.

B. The United States Forest Service and the Bureau of Land Management have consistently shown an intent to accommodate state regulations of mining activities in administering their statutory directives

USFS and BLM each have a role in regulating mining operations on their respective public lands. USFS has the authority to regulate mining to protect the National Forests from unnecessary environmental impacts. 16 U.S.C. §§ 478, 551; 30 U.S.C. § 612. For all other mining claims on federal lands, FLPMA requires BLM to regulate mining operations to prevent unnecessary or undue degradation of public lands. 43 U.S.C. § 1732(b). Under these congressional grants of authority, both agencies have expressly and consistently recognized the authority of states to regulate mining claims to address environmental harms.

1. USFS recognizes the authority of state laws in its mining regulation on national forest lands

In its regulations and guidance documents, USFS recognizes the power of states to regulate mining operations. Taken together, these materials illustrate the agency's acknowledgment of shared authority to protect environmental resources in the context of mining on federal lands.

USFS promulgated 36 C.F.R. § 228.8, which requires that all operations "shall comply" with state air quality standards, state water quality standards, and

state standards for the disposal and treatment of solid wastes. 36 C.F.R. § 228.8(a)–(c). The primary general guidance document on Forest Service policies, the Forest Service Manual (FSM), also acknowledges the application of state law. Generally, the FSM states that "in order to successfully defend rights to occupy and use a claim for prospecting and mining, a claimant must . . . comply with applicable laws and regulations of Federal, State, and local governments." FSM 2813.2. USFS's recognition of state law in the FSM indicates that the agency considers its actions as in tandem with, and complementary to, state law.

In practice, the Forest Service has incorporated Section 228.8's acknowledgement of state regulation into its Notice of Intent (NOI) and Plan of Operations (PoO) procedures, which are meant to protect the National Forests' surface resources. 36 C.F.R. § 228.4. Submission of an NOI, or alternatively, approval of a PoO, operates as one of the necessary steps to initiate any mining operation that might affect National Forest surface resources. In its responses to NOIs (in the instances where USFS finds that a PoO is not needed), USFS routinely states that the claim holder can begin its operation only after it "obtain[s] all applicable *state* and Federal permits." *Karuk Tribe of California v. U.S. Forest Service*, 681 F. 3d 1006, 1022 (9th Cir. 2012) (emphasis added) (holding that approvals of NOIs constitute a final approval of operations with binding conditions and stating that one of these conditions, in this case, was obtaining relevant state

permits). When a PoO is required to be submitted, the FSM directs the district ranger to approve any action in a PoO "which must be completed in order for the operator to comply with Federal and State laws." FSM 2817.23. Thus, USFS has implemented a clear policy that mining operators may not mine unless they comply with state environmental laws, among other laws – a policy that is at odds with the idea that the Mining Law preempts such regulation.

2. BLM has consistently acknowledged the authority of state environmental laws in its implementation of the "unnecessary or undue degradation" standard

Under FLPMA, BLM is charged with preventing the unnecessary or undue degradation (UUD) of the public lands it manages. 43 U.S.C. § 1732(b). Though BLM's interpretation and implementation of the UUD standard have changed a few times over the past thirty-plus years, one element has remained constant: BLM's incorporation of state environmental laws in its UUD analysis.

BLM's original interpretation of the UUD standard in 1980 illustrated that the agency believed states had concurrent authority to enforce environmental laws on mining operations. This rule interpreted the UUD standard as the "prudent person" standard. BLM defined UUD as a surface disturbance greater than what would occur as a result of operations carried out by a prudent person. Surface Management of Public Lands Under U.S. Mining Laws, 45 Fed. Reg. 78902, 78910 (Nov. 26, 1980). DOI's longstanding position was that that under the

Mining Law, states could "assert jurisdiction over mining activities on Federal lands in connection with their own State laws." *Id.* at 78908. Accordingly, BLM asserted that the rulemaking was "not intended to pre-empt the continued application and enforcement of State law and regulations governing the conduct of activities pursuant to the United States mining laws." *Id.*

In 2000, DOI reinterpreted the UUD standard to give BLM greater authority to halt harmful mining operations; the new interpretation continued to acknowledge state environmental laws and regulations. Specifically, the UUD standard was changed from the prudent person standard to a new "irreparable harm" standard, under which BLM would prevent any mining operations that resulted in substantial irreparable harm to significant cultural, scientific, or natural resource values of the public lands. Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69998, 70115 (Nov. 21, 2000). In the preamble to this rule, BLM noted that more stringent state standards could coexist with the final rule, since coexistence was "consistent with FLPMA, the mining laws, and the decision in the Granite Rock case." *Id.* at 70009.

In 2001, BLM, under the direction of a new Presidential administration, changed its UUD interpretation back to the prudent person standard. Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 54834–01 (Oct. 30, 2001). In doing so, BLM was careful to state that "neither [the

2001 new interpretation] final rule nor the 2000 rule was intended to allow operators to operate in a manner out of compliance with EPA and state discharge or other requirements," *id.* at 54841, and that any use of the public lands, under the new rule, still had to be "in compliance with all applicable federal and *state environmental standards*" in order to comply with the UUD standard. *Id.* at 54843 (emphasis added). Thus, it has been the view of BLM, from the very first UUD rulemaking in 1980 to the most recent in 2001, that state environmental regulation more protective than federal standards is not preempted by, but rather incorporated within, federal standards.

As explained above, agencies' interpretations of their organic statutes' preemptive reach are accorded deference commensurate with their consistency, among other factors. Both USFS and BLM have consistently interpreted the land use statutes (NFMA, FLPMA, and the Organic Act) and the Mining Law to coexist with state environmental laws and regulation, and even to encourage these state efforts. This Court should defer to USFS and BLM's longstanding, consistent interpretation.

VI. Conclusion

Examination of the history and structure of federal mining law demonstrates that federal mining law coexists with state laws protecting environmental resources from damage by mining activities. The U.S. Supreme Court's definitive analysis

in *Granite Rock* makes this point clear, as do all relevant state and federal cases and federal agency adjudications, regulations, and policy documents. Bohmker would have this Court upend the basic structure of federal mining law in order to insulate his activities from state environmental regulation. This Court should reject his request and affirm the District Court's holding that federal law does not preempt Oregon's statute.

Dated: October 20, 2016

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CERTIFICATE OF COMPLIANCE

I certify that the total word count of this brief, including headings, footnotes, and quotations, is 6,968 words, as determined by the word count of the Microsoft Word program on which this brief was prepared, and that it uses a proportionally spaced typeface, Times New Roman, 14-point font, in compliance with Federal Rules of Appellate Procedure 29(c), 29(d), and 32(a).

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 20, 2016.

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