UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35262

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

Plaintiffs – Appellants,

v.

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

Defendant – Appellees,

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

Intervenor – Appellees.

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

REPLY BRIEF OF PLAINTIFFS - APPELLANTS

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

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Summary of Argument

Oregon and its allies attempt to mischaracterize federal mining law as merely a "mechanism through which miners could acquire property rights to minerals on federal lands". (Oregon Br. 4.) This Court, however, has recognized Congress' "all-pervading purpose of the mining laws is to further the speedy and orderly development of the mineral resources of our country."[1] As a direct prohibition on any and all motorized mining on vast swathes of federal land within Oregon, Senate Bill 838 unmistakably frustrates the accomplishment of Congress' all-pervading purpose, and it is plainly unconstitutional based on a large body of state and federal precedent Oregon and its allies cannot meaningfully distinguish.

The early mining laws provided an express state role in supplementing of federal procedures relating to property rights in mines, but there was plainly no intent to authorize states to prohibit mining, and there is no tradition of state-law prohibitions which might militate against a finding of federal preemption. And insofar as Oregon purports to interfere with the Congressional determination that the highest and best use of mining claims is mineral development, and bars the mining use in favor of a dedication of the land to fish habitat, Senate Bill 838 is plainly preempted as a forbidden land use restriction.

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[1] *United States v. Nogueria*, 403 F.2d 816, 823 (1968) (quoting *Bagg v. N.J. Loan Co.*, 88 Ariz. 182, 354 P.2d 40, 45 (1960)).

Even if Senate Bill 838 were construed not to be categorically-preempted "land use" regulation, multiple statutes enacted after the 1872 Mining Law confirm that states may only reasonably apply environmental *standards* to prevent undue or unreasonable harm from mineral extraction. Congress specified a precise and limited role for state environmental regulation because Congress knew and insisted that some level of environmental impact could not be avoided in mineral development. Oregon's prohibition, enacted without regard to the presence or absence of environmental impacts from any particular mining operation, or even from motorized mining in general, is not an environmental standard in the sense authorized by Congress, but a forbidden land use prohibition.

Appellants have contended that no genuine issue of material fact bars a summary finding of frustration of the relevant Congressional purposes. Oregon cannot both dispute Appellants' testimony that the ban destroys their ability to extract the mineral deposits from Appellants' mining claims (State Br. 2), and argue that no account need be taken of the "facts of each individual miner's claim" (*id.* at 4). With Appellants' testimony establishing they cannot develop their mining claims at all, or even locate a mining claim (in the case of Appellant Bohmker), summary judgment cannot be granted finding Senate Bill 838 no obstacle to federal policy.

Reply to the Opponents' Assertions of Facts

A. This Case Is Not About any Environmental Impact of Regulatory Significance.

Over and over again, the opposing parties assert that the Oregon Legislature acted to prevent positive environmental harm, going so far as to assert that Senate Bill 838 "targets specific harms from motorized mining in sensitive fish habitat". (State Br. 3; *see also id.* at 2 ("Senate Bill 838 is an environmental regulation intended to protect water quality and fish habitat by prohibiting certain methods of mining that *are harmful"*; emphasis added).) The United States, as *amicus curiae*, even asserts that that the Oregon Legislature "specifically found" the mining harmful. (U.S. Br. at 8.)

The Legislature did no such thing. Far from claiming specific or actual harm, the Legislature made only reference to the abstract prospect that, in theory, motorized mining could pose *risks* of environmental harm. *E.g.*, § 1(4) (mining "can pose significant risks"); § 1(5) (mining was "raising concerns about the cumulative environmental impacts"). A law arbitrarily banning federally-authorized activity that had proceeded under federal and state environmental regulatory systems for years for unspecified "risks" or "concerns" cannot remotely be said to be "carefully-tailored" (U.S. Br. at 8).

Lacking any evidence of environmental impact specific to the activities of Appellants, the opposing parties cite extra-record materials that do not relate to this case at all. Throughout the world, overfishing is recognized in the decline of salmon populations, but the hapless agency charged to promote commercial salmon harvest (*see* 16 U.S.C. § 1801(b)(3)) finds that "mining" is one of eleven different "major activities responsible for the decline of coho salmon in Oregon and California", without mentioning overfishing at all (Intervenor Br. 2 (citing 62 Fed. Reg. at 24,592)). Worse still, the "mining" to which the agency referred in the coho listing was large-scale gravel mining (*see* 62 Fed. Reg. at 24,602, 24,606), not the tiny activities of these Appellants.

There is no dispute that the motorized mining prohibited by Senate Bill 838 can continue without jeopardizing the continued existence of coho salmon protected under the federal Endangered Species Act. (*See*, *e.g.*, Supplemental Excerpts of Record of the Plaintiffs-Appellants, filed herewith, at 1-8.[2]) *Amici* California and Washington, without admitting that Washington has not prohibited the mining despite extensive environmental review (*see generally* WAC 22-660-

[2] Cited hereafter as Miners' Supplemental Excerpts of Record ("MSER").

300), refer the Court to a California environmental impact report, without reporting its conclusion: the effect of mining on fish are "less than significant".[3]

Intervenors point to references in a federal Coho Recovery Plan to "develop[ing] suction dredging regulations that minimize or prevent impacts to coho salmon" including "special closed areas, closed seasons, and restrictions on methods and operations" (Intervenor SER54-55), but the Plan acknowledges extensive regulations are already in place "to protect and preserve fish and wildlife species inhabiting the waterways of the state of Oregon" and proposes no new ones.[4] The Intervenors also emphasize designation of so-called "essential indigenous anadromous salmonid habitat" (ESH), but do not and cannot make any showing that Appellants' activities adversely affect this habitat.

The only real environmental risk identified from small-scale motorized mining underwater was that miners might disturb fish eggs in river gravels, a risk

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[3] *See, e.g.*, Draft Subsequent Environmental Impact Report at 4.3-24 (available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27399&inline=1 (accessed 11/7/16). California's invocation of a mercury issue from the Report is the product of carefully-plotted and egregious misrepresentations far beyond the scope of this memorandum to address—the miners don't use mercury and in fact remove it from the natural environment. California has successfully delayed judicial review of this and other unlawful features of the Report for many years; it remains *sub judice* in the *Suction Dredge Mining Cases*, Judicial Council Proceeding No. JCCP4720 (San Bernardino Cty.).

[4] 2014 Recovery Plan, at 3-65 to 3-66 (available at http://www.nmfs.noaa.gov/pr/recovery/plans/cohosalmon_soncc.pdf (accessed 10/24/16)).

that was eliminated decades ago by regulation limiting operating times until those eggs hatched out (ER122-23)—an example of "environmental regulation" as distinguished from a prohibitory use restriction. Expert testimony before the District Court confirmed that all traces of the activity are washed away in winter flows (ER122), and that tiny plumes of turbidity produced are "utterly insignificant in relation to natural stream sediment loads" (ER123).[5]

The Intervenors' attempt to import facts from another case concerning alleged impacts of suction dredge mining (Intervenor Br. 11), developed without hearing evidence from the miners, is inappropriate. *See Karuk Tribe v. U.S. Forest Service*, 379 F. Supp.2d 1071, 1089 (N.D. Cal. 2005) (acknowledging inappropriateness of citing factual findings in *Siskiyou Regional Education Project*

[5] Were the case to proceed to trial, Appellants could further prove that (1) underwater miners typically have their heads inches from the nozzle of suction dredges to observe and prevent jams and can easily stop if fish eggs are encountered (and were once engaged by fish and wildlife agencies to rescue salmon redds naturally buried by moving river sediments); (2) miners typically explore in areas not utilized for fish spawning; (3) positive effects on habitat, including eliminating embeddedness, removing toxic materials, and oxygenation arise from mining activities; (4) the scale of mining and scale of spawning in relationship to fish habitat is such that any effects are so tiny as to not be of regulatory significance in any science-based regulatory system; and (5) careful analytical studies have confirmed no relationship between fish populations and the motorized mining activity conducted by Appellants.

v. Rose, 87 F. Supp.2d 1074 (D. Or. 1999)), *rev'd on other grounds*, 681 F.3d 1006 (2012), *cert. denied*, 133 S. Ct. 1579 (2013).

B. This Court Should Not Regard Senate Bill 838 as Temporary.

Oregon argues that Senate Bill 838 was enacted "to give regulators the time to craft a new regulatory system". (State Br. 5.) We demonstrated in our opening brief (at 22) that Oregon allows its local governments only 120 days for such a purpose to avoid prohibitory impacts, and Oregon offers no response. The regulatory process contemplated in § 8 of Senate Bill 838 was completed in November 2014, and two years later, the only legislative initiatives (*see* Oregon Br. 9 & nn. 4-5) have been to *expand* the moratorium to "declare nearly the entire State a Prohibited Zone for placer mining in or near rivers".[6] The opponents' repeated assertions that the ban should be considered geographically narrow fail entirely to appreciate what is at stake in this Court's ruling.

Oregon puts forth a California decision that confirms that a similar "moratorium" has already been underway since 2009 in that state; California insists, contrary to Congressional intent, that mining (unlike all other regulated

[6] ER26 (details of 2015 bill); *see also* ER25, ER29-42. Section 2 of Senate Bill 1530 (2016) left the moratorium in place, removing what Oregon claims is an exclusion. *See* https://olis.leg.state.or.us/liz/2016R1/Downloads/MeasureDocument/SB1530/A-Engrossed (accessed 10/25/16).

activities in California) cannot be permitted unless it can be conducted without *any* environmental impacts. *See* Cal. Fish & Game Code § 5653.1(b)(4).[7] The insistence of states that mining cannot occur unless and until it can proceed without *any* environmental impacts confirms that the "moratorium" device is a subterfuge to camouflage a permanent ban.

A five-year "moratorium" is an amount of time threatening to exterminate an industry that lacks political favor, rather than time necessary to review and revise an existing regulatory system. The powers in the Oregon Legislature opposed to mining will continue to prohibit it unless and until this Court gives effect to Congressional policy and the Supremacy Clause.

Argument

I. SENATE BILL 838 IS PREEMPTED BY FEDERAL LAW.

Appellants agree with the Intervenors that "both National and State Governments have elements of sovereignty the other is bound to respect". (Intervenor Br. 21 (citing *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012).)

[7] This statute's reference to "fully mitigate[ing] all identified significant environmental impacts" is a cross-reference to "significant" impacts under the California Environmental Quality Act, under which any "potentially substantial" change in physical conditions is a "significant effect on the environment". 14 Cal. Code Regs. § 15382. Implementing this approach, California has wrongfully determined that mining underwater may affect birds hundreds of miles away.

Where, as here, Congress has directed the development of federal mining claims on federal land, Oregon's decision to shut down standards-based environmental regulation in favor of an arbitrary ban on mining offers no respect whatsoever to federal sovereignty. That the Executive Branch of United States now offers a striking and unsupportable reinterpretation of a law of Congressional intent, in dramatic contradiction to the interpretations the Solicitor General previously advanced in *California Coastal Comm'n v. Granite Rock Co*., 480 U.S. 572 (1987), demonstrates only changing political winds. The statutes remain identical, as does Congressional intent.

The opposing parties simply ignore the critical and conflicting Congressional goal that mining is to proceed on federal land, subject to mitigating only undue and unreasonable environmental impacts. General prohibitions of mining without any permitting system to regulate actual impacts frustrate multiple Congressional objectives. Careful review of the statutory evolution confirms that Congress specifically intended to allow application of state environmental standards operating through permitting processes, but to forbid state-law bans like Senate Bill 838.

A. The Opposing Interests' Attempts to Distinguish Case Law on Preemption and Mining Are Unpersuasive.

Oregon suggests that Senate Bill 838 is "reasonable environmental regulation" contemplated by *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), but does not and cannot explain why Senate Bill 838 is reasonable as a prohibition on top of compliance with all applicable environmental standards. It was because motorized mining could proceed in accordance with those standards that opposing user groups insisted that Oregon assert the right to elevate their uses above mining without regard to the actual level of mining impacts or available mitigation thereof. (*See* ER131.)

Senate Bill 838 thus approached the mining in a way "prohibitory, not regulatory, in its fundamental character," *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998) (striking down ban on new or amended surface mining permits in the Spearfish Canyon Area). To characterize the Lawrence County's local ban as "much broader" than Senate Bill 838 (U.S. Br. 23) is simply inaccurate. Nor can that ban be distinguished because it restricted "the only mining method that can actually be used to extract these minerals" (Oregon Br. 25 (quoting *Lawrence County*, 155 F.3d at 1007). The same

is the case here, because the minerals are underwater and cannot be extracted without motorized equipment. *See generally infra* Point II. Appellants admitted they might still "pick[ ] up an exposed gold nugget that may be visible" (Oregon Supp. ER17), but for the United States to characterize this as "other non-motorized means of mining which remain available to the Miners and could conceivably result in profitable mineral extraction" (U.S. Br. at 24) is sophistry. California and Washington, for their part, claim that Senate Bill 838 "just prohibits the use of motorized suction dredges" and "allows mining under reasonable conditions". (CA/WA Br. 23.) They are wrong; the whole point of the Bill is to bar all motorized mining in and near streams (not just the use of suction dredges) without regard to the availability of reasonable mitigation conditions.

Oregon attempts to distinguish this Court's decision in *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), on the ground that it involved mineral leasing, but the same federal policy of mineral development is involved, whether a lease or grant of mining claim is involved. *Granite Rock* may have overturned *dicta* in *Ventura County* disapproving even reasonable environmental

permitting conditions, but the unconstitutionality of a flat ban remains clear.[8]

This should not be a controversial proposition, and even the prohibition of specific drilling activities (rather than all mining) has been struck down. *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050, 1079 (Colo. 1982). One cannot fault all the precedent for "fail[ing] to address the states' police powers to issue environmental regulations" (Oregon Br. 24), because all the cases correctly identified the offending laws as prohibitions, not reasonable environmental regulation. The Supreme Court of Idaho also recognized this distinction, albeit in *dictum*, in *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969, 974 (1976), reinforcing the Federal Circuit's conclusions in *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984).

[8] The treatise attack on the precedential value of *Ventura County* and other pre-*Granite Rock* cases cited by the Law Professors is in a portion of the treatise which merely "speculates about future preemption law". 1 G. Scoggins & R. Glickman, *Public Natural Resources Law* § 5:28, at 5-45 (2d ed. 2007 & 2016 Supp). Significantly, even this treatise acknowledges that state law "tantamount to an outright prohibition is still susceptible to preemption". *Id.* at 5-51. Other treatises acknowledge that *Ventura County*'s "rationale arguably applies to mining locations under the Mining Law of 1872" and continues to have precedential force against "state law requirements prohibiting a federally authorized activity on federal land". *E.g.*, 5 Rocky Mountain Mineral Law Foundation, *American Law of Mining* § 174.04, at 174-9 & 174-12 (2d ed. 2013).

The only cases advanced by the mining opponents are readily distinguishable or plainly wrong. *Beatty v. Washington Fish & Wildlife Commission*, 341 P.3d 291 (Wash. Ct. App.), *rev. denied* (Wash. 2015), concerned a state rule limiting suction dredging to two weeks a year during the summer on a particular stream—not a prohibition. It is additionally distinguished by a single controlling circumstance: the agency "informed Mr. Beatty that his request to operate a suction dredge outside the work window could still be granted if he provided site-specific information that allowed the [agency] to assess the impact to fish life. Mr. Beatty refused. . .". *Id.* at 297.

In other words, Mr. Beatty took, in substance, the same position as the Granite Rock Company in making a facial challenge to the restriction, which failed for the same reason: because he had yet to make the case for a relaxation of the two-week limit at his mining site, no federal preemption could be inferred. *See id.* at 307 ("the mining regulations and the modifiable condition on the permit do not stand as an obstacle to Mr. Beatty's right to mine").

The case of *Pringle v. Oregon*, No. 2:13-cv-309-SU, 2014 WL 795328 (D. Or. Feb. 25, 2014) is not persuasive because it upheld Oregon's prohibition of placer mining on federal lands after the Oregon legislature "declared that the highest and best uses of the waters within scenic waterways are recreation, fish and

wildlife uses". ORS 390.835(1). While the *pro se* litigant did manage to cite the *Lawrence County* case, he did not present a coherent land use-based preemption argument.

The United States concedes that a complete prohibition of "all mining activity" on federal lands would be preempted (U.S. Br. 21), but federal preemption law does not require total destruction of each and every Congressional purpose. To the contrary, federal preemption law requires "accomplishment of the *full* purposes and objectives of Congress" (*Granite Rock*, 480 U.S. at 581 (emphasis added)), not admitting an argument that Oregon may prohibit so long as some sliver of accomplishment of Congressional purposes remains. Determining the existence of such impairment is no more "unworkable" (U.S. Br. 22) here than in any other federal preemption case.

B. There Is No Presumption Against Preemption in this Context.

There is no presumption against preemption in the context of assessing state regulation of a mining use authorized, encouraged, and indeed (on mining claims) demanded under federal law. Had there been any such presumption, the Supreme Court would have at least mentioned it in the *Granite Rock* case.

The opposing interests ignore the "settled character of implied preemption doctrine that courts will dependably apply" (*Crosby v. Nat'l Foreign Trade*

Council, 530 U.S. 363, 387-88 (2000)) in areas of "significant federal presence" (*United States v. Locke*, 529 U.S. 89, 108 (2000)), instead invoking precedent where Congress invades traditional state police powers.

For any presumption to apply, the question is not whether an exercise of police power is involved, but whether Congressional power was exercised in "areas traditionally regulated by states".[9] (Oregon Br. 11 (quoting *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 668 (9th Cir. 2003).) There is no "historic presence of state law" regulating the operation of mines on federal lands, *cf. Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009), much less any historic prohibitions of mining. It is a thoroughly modernist innovation and conception of the "police power" to punish mining as a crime based on "concerns about the cumulative environmental impacts"—without any actual consideration of such impacts.

In short, identifying no-mining zones on federal land, for whatever reasons, is not an exercise of traditional police powers, and Oregon did not "'legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons'" as the police power is traditionally understood. *Exxon-Mobile Corp. v. U.S. EPA*, 217

[9] Under the Supremacy Clause, "federal legislation enacted pursuant to constitutionally derived federal authority trumps a conflicting state law, even if the state law furthers a core police power interest". *United States v. Washington*, 887 F. Supp. 2d 1077, 1100 (D. Mont. 2012).

F.3d 1246, 1255 (9th Cir. 2000) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)).

Senate Bill 838 is also not a traditional "fish and game" regulation of the sort identified by Oregon, and Congress has specifically addressed the state/federal balance with respect to traditional fish and wildlife regulation. 43 U.S.C. § 1732(b).

Nor is Senate Bill 838 traditional environmental regulation. Oregon had and has such regulation, including water quality standards it can lawfully apply. Rather, Senate Bill 838 abrogates all environmental standards in favor of a categorically-preempted land use-based prohibition of mining uses on federal lands, because Oregon was aiming well beyond environmental interests.

Section 8(1)(d)(B) of the Bill, devising a new regulatory system that would "address social considerations, including considerations related to safety, noise, navigation, cultural resources, and other uses of waterways," confirms that Oregon simply sought to elevate the interests of some users of federal land (with no federal rights) over others (with specific federal rights). That is precisely the sort of withdrawal of mineral lands Congress unmistakably confided to federal agencies and denied to the states. *E.g.*, 43 U.S.C. § 1714 ("withdrawals of lands").

C. Senate Bill 838 Is an Obstacle to Congressional Purposes in Multiple Federal Statutes.

Appellants ask this Court to apply the controlling test from *Granite Rock*: whether Senate Bill 838 "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress". *Granite Rock*, 480 U.S. at 581. The Intervenors argue that a "high threshold" must be met to show an obstacle (Intervenor Br. 25 (citing *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011)), but the cited material references Justice's Kennedy's view that obstacle pre-emption "should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress' primary objectives". *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring).

Senate Bill 838 is a "prohibition" which stands in "direct contradiction to Congress' primary objectives" in federal mining and land management law. While early federal law shows little express Congressional intent concerning state regulation of mining operations on federal land (*but cf.* 30 U.S.C. § 51 (operations shall proceed, subject to damage claims)), it does demonstrate the "all pervading purpose . . . to further the speedy and orderly development of the mineral resources". *Nogueria*, 403 F.2d at 823. As regulation of mining operations emerged long after 1872, Congress unmistakably legislated to give a precise and

limited role to state regulation, in a fashion that unmistakably conflicts with Senate Bill 838.

1. The Goal of Federal Mining Law Is Mineral Development.

The opposing parties blithely assert that federal mining law merely "concerns the manner in which individuals acquire mineral rights on federal land" (*E.g.*, Oregon Br. 9). The very title of the 1872 Mining Act is "An Act to promote the Development of the mining Resources of the United States" (17 Stat. 91), an overarching purpose of which is unquestionably frustrated by a state law ban. As proposed *amicus* John Leshy has written, "what is most controversial about the policy of free access is the assumption embedded within it—that mineral development is the highest and best use of any land where valuable minerals may be found and extracted." J. Leshy, *The Mining Law: A Study in Perpetual Motion* 26 (Resources for the Future 1987). For the United States to complain that the Act "contains no explicit statement of purpose" (U.S. Br. 15) is sophistry, and misses the forest for the trees.

a. Federal mining claims are more than a license to mine, they are an imperative to do so.

The "real property interests" at issue are not, under the 1872 Mining Act, any ordinary species of property. The property only arises at all if a valuable discovery of minerals is made, which in many cases cannot occur at all without the

use of motorized equipment. (ER120.) Then, the property can only be held so long as the primary statutory purpose, mineral development, is advanced. Specifically, Congress required "work necessary to hold possession of a mining claim" (30 U.S.C. § 28)—that is, the work of developing the mineral resources. As the U.S. Supreme Court has explained, "work on the claim for its development as a condition of continued ownership" was an "essential feature" of the statutory design. *See Jackson v. Roby*, 109 U.S. 440, 442 (1883).

The grant of this unique species of property right is a far greater authorization to engage in mining activity than the mere grant of permission to engage in mining activity—there is an affirmative duty to develop the minerals.

This Court already concluded in *Ventura County* that mere licenses or leases trump state attempts to prohibit the licensed activity; an additional case is *Young v. Coloma-Agaran*, 340 F.3d 1053 (9th Cir. 2003), where this Court struck down Hawaii's attempt to restrict boat operations in the environmentally-sensitive Hanalei Bay. As this Court explained,

> ". . . the ban completely excludes the plaintiffs from conducting their federally-licensed tour boat businesses in Hanalei Bay. We are sympathetic to the challenges posed by the user conflicts occurring in the bay. We hold, however, that the state's refusal to issue use permits under any conditions has effectively rendered it impossible for the plaintiffs to comply with both federal and state law in order to ply their trade."

Id. at 1057. No federal law required those plaintiffs to operate in Hanalei Bay, or indeed to operate at all, but this Court had no difficulty finding conflict with federal law.

Again and again the state and federal courts have distinguished between a reasonable permitting process and arbitrary state law bans interfering with federally-authorized activity, which is all Appellants ask here. Though he quarreled with this precedent, proposed *amicus* John Leshy correctly summarized the caselaw as holding that "a state may not prohibit activity on a federal claim," though it can require permits and "attach reasonable conditions to those permits in order to protect the environment". *Mining Law* at 214. It is this simple, longstanding rule of law that Appellants seek to uphold on this appeal.

b. References to "regulation" and "laws" in the mining statutes have no reference to state-law bans on mining.

The opposing parties argue that the references in 30 U.S.C. § 22 to "regulation" and "laws"—but not to "states" or "state law"—constitute "an express recognition that Congress intended for state and local law to pay a role in the regulation of mining". (*E.g.*, Oregon Br. 17-18.) Appellants demonstrated in detail in their opening brief (at 25-29) that the "regulation" and "law" there discussed related to laws determining the means by which ownership of mineral

deposits was obtained and held, not regulation in general.[10] As proposed *amicus* John Leshy as acknowledged, pursuant to all these statutes, states "were authorized not to alter, but to put flesh on the bones of the mostly skeletal requirements of federal law". *Mining Law* at 18.

The United States advances the case of *O'Donnell v. Glenn*, 19 P. 302, 8 Mont. 248 (Mont. 1888), but it concerned precisely this sort of state law, a territorial law which required the location notice establishing a mining claim to be "made on oath" when no such oath requirement appeared in federal law. *O'Donnell*, 8 Mont. at 255. The Supreme Court of Montana held that the oath requirement was not inconsistent with federal law, and in so doing, made reference three sections of the United States Revised Statutes: § 2319 (now 30 U.S.C. § 22), § 2322 (now 30 U.S.C. § 26), and § 2324 (now 30 U.S.C. § 28).

Sections §§ 2322 and 2324 are to the point and dispositive of *O'Donnell*, inasmuch as they grant a role for state law "governing possessory title" (§ 2322)

[10] California and Washington advance an additional statute, 30 U.S.C. § 43, which provides that "as a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent". This statute further demonstrates the overriding Congressional imperative of "complete development" and provides no evidence for Congressional intent that states prohibit mining.

and "governing the location, manner of recording, amount of work necessary to hold possession of a mining claim" (§ 2324). To the extent the *O'Donnell* opinion is construed to address state regulatory authority in general based on § 2319, notwithstanding the absence of any specific reference to state law, it is ill-considered *dictum* that never found general acceptance.

Seventeen years after the *O'Donnell* case, the U.S. Supreme Court confirmed in detail that the area of operation for state law was that relating to title as set forth in 30 U.S.C. §§ 26 & 28, with an express "grant of authority" for the state to act contained in § 28. *Butte City Water Co. v. Baker*, 196 U.S. 112, 122 (1905) (referring to United States Revised Statutes § 2324). Even state authority to regulate the acquisition of title did not afford a state "the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the Congressional laws". *Id.* at 125 (quoting 1 *Lindley on Mines*, 2d ed., § 249).

Early cases had no problem holding that requirements such as swearing oaths or describing the dimensions of claims were supplementary to, and not in conflict with, the purposes of federal law. This history does not and cannot support state law banning the development of federal mining claims as "consistent" with federal law—as consistency was understood then or now.

The position of the United States amounts to a declaration that Congress' express grant of *state* authority in 30 U.S.C. §§ 26 and 28 was mere surplusage because Congress had already given free rein to any and all state regulation in § 22 without even using the word "state". (*See* U.S. Br. 5-6.) This is not a reasonable approach to statutory interpretation. Rather, under the doctrine of *noscitur a sociis*, all of these early enactments refer to the same limited role for non-federal rules. The position of the United States is rejected by every case finding preemption, and flatly at odds with the well-reasoned and comprehensive statutory review the Solicitor General of the United States previously presented in the *Granite Rock* case.[11]

The mining opponents stress a recent and erroneous state court decision in a misdemeanor case, *People v. Rinehart*, 377 P.3d 818 (Cal. 2016), which purported to review "a long history of [California's] regulating specific methods of mining" (Oregon Br. 18). Oregon and its allies omit to disclose that *none of that hydraulic*

[11] *See generally* Brief of the United States as *Amicus Curiae* Supporting Appellees, filed Aug. 1, 1986.

mining was occurring on federal lands at all, but rather on private property.[12] Ironically, the leading case of *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (C.C.D. Cal. 1884) had reviewed the very same statutes Oregon and its allies take as an "an express recognition that Congress intended for state and local law to play a role in the regulation of mining" (Oregon Br. 17-18), and concluded they had nothing to do with the regulation of mining and certainly "no relation to [regulation of] lands *owned in fee by private parties*". *Woodruff*, 18 F. at 800 (emphasis added). It is either careless or dishonest to suggest that this decision, founded on common law rules for relations between private property owners, somehow addressed federal preemption. (*Cf.* Proposed Brief *Amicus Curiae* of Western Public Land Law Professors ("Law Professor Br."), at 4.)

[12] The *Rinehart* Court's errors stem in part from assertions about California history nowhere supported in the record before that Court, and not even supported by the Court's repeated references to R.L. Kelly, *Gold vs. Grain: The Hydraulic Mining Controversy in California's Sacramento Valley* (Clark 1959) (hereafter, "*Gold vs. Grain*"). That book confirms that the miners involved "had been given United States patents for their land, which was taken by many as tacit approval of their operations". (*Gold vs. Grain* at 59; *see also id.* at 109.) Federal preemption was not invoked and, indeed, the first significant lawsuit was even remanded from federal court back to state court for want of a federal issue. (*Id.* at 106.)

Similarly, Intervenors cite *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884), as referring to a prohibition of "mining on federal lands" (Intervenor Br. 18), but the case contains no reference to federal land at all; the cited portion of the case concerns rights alleged to derive from "custom, and by prescription and the statute of limitations," not federal mining law. *See id.* at 150-51.

The mining opponents also refer to the history of a Congressional response to California's actions involving hydraulic mining, but like the *Rinehart* opinion, get that history wrong. The *Rinehart* opinion's reference to "hydraulic mining's discontinuation" and Congressional "acquiescence" therein are clearly erroneous. (Oregon Br. 19 (quoting *Rinehart*, 377 P.3d at 328).) Long after the wave of injunctions in the Sacramento Valley, hydraulic mining continued in other areas where "different conditions existed and problems comparable to those in the Sacramento Valley did not appear". (*Gold v. Grain*, at 245.) Hydraulic mining continued in the Sacramento Valley, first consistent with the injunctions, and later under Debris Commission permits, even as late as 1956. (*Id.* at 299). *See also Jacob v. Day*, 111 Cal. 571 (1896) (denying nuisance claim against hydraulic mining "under the rule *de minimis*").

The first State legislative response to mining debris, the Drainage Act of 1880, made no attempt to regulate mines at all, much less mines on federal land. (*Gold v. Grain*, at 150-52.) When the legislature eventually addressed the hydraulic mining process directly in 1893, it did not ban it outright, but rather declared: "The business of hydraulic mining *may be carried on* within the state wherever and whenever it can be carried on without material injury to navigable streams or the lands adjacent thereto." (Public Resources Code § 3981 (emphasis

added); *see also Gold vs. Grain* at 284.) The claim of the law professors that "both federal and state courts upheld this statute" (Law Professor Br. 4) is unsupported and untrue; it was immediately superseded (the same year) by Congressional action.

Congress was faced with extraordinary circumstances in which mines on private property threatened navigation not merely down to Sacramento, but all the way to the Golden Gate. (*Gold vs. Grain* at 69-70, 75, 82, 111, 135; *see also id.* at 160-61, 224 (referring to federal duty to maintain navigation); 297 (effects on Golden Gate bar).) Congress was unwilling to spend the money to improve navigation if the money would be wasted, which had nothing to do with the restriction of federal rights on federal mining claims on federal land.

Thus in 1893, Congress prohibited hydraulic mining in the "Sacramento and San Joaquin River systems" which was "directly or indirectly injuring the navigability of said river systems". 30 U.S.C § 663. Far from acquiescing in any state-law regulation of mining, Congress made federal authority supreme by providing "permit[ing] under the provisions of this chapter". *Id.*; *see also* J. Hagwood, Jr., *The California Debris Commission: A History* 31 (U.S. Army

Corps of Engineers 1981) (Commission "was the supreme authority in all matters relative to the subject").[13]

2. The Overarching Purpose of Federal Law Limits Regulation to Avoid Unnecessary and Unreasonable Impacts.

California and Washington note that "because Congress has spoken explicitly as to the validity of state law, 'the courts' task is an easy one'" (CA/WA Br. 6; citation omitted), but by limiting their focus to the 1872 Mining Act, miss entirely the repeated Congressional specifications of states' roles with respect to mining regulation. The post-1872 statutes leave no doubt that state assertions of power to prohibit mining on federal lands are contrary to the Congressional design and objectives.

a. The Multiple Use Act of 1955.

Oregon does not dispute that the Multiple Use Act of 1955 substantially limited federal regulation of mining on federal mining claims to actions that do not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto". 30 U.S.C. § 612(b). The United States does dispute this, but does not and cannot distinguish this Court's cases to the contrary. (U.S. Br. 19.)

[13] Available at http://www.dtic.mil/dtic/tr/fulltext/u2/a436413.pdf (accessed 11/7/16).

The opposing parties also admit that Congress specifically authorized a limited class of state water law to operate with respect to federal mining claims notwithstanding the general substantive restriction on material interference. Oregon claims that the *Granite Rock* case considered this statute and found no "suggestion of intent to preempt state law" (Oregon Br. 21), but the *Granite Rock* opinion makes only a passing reference to 30 U.S.C. § 612(b) *with no reference or analysis whatsoever to critical features limiting regulation and the role of state law*. *See Granite Rock*, 480 U.S. at 582.

A long line of federal authority interprets 30 U.S.C. § 612(b) to only permit "reasonable" restrictions on mining, and *Granite Rock*'s repeated references to "reasonable state environmental regulation" (*Granite Rock*, 480 U.S. at 589, 593) put state and federal regulators on the same footing. No opposing party can explain why Congress could possibly intend, based on the language of § 612(b), to permit state regulators to materially and unreasonably interfere with mining. Legislative history showing Congress' other, anti-fraud purposes in enacting 30 U.S.C. § 612(b) is not to the point.

b. The Mineral Policy Act of 1970.

The mining opponents interpret this statute to recognize the "importance of environmental protection in the context of mineral extraction" (Oregon Br. 22), but

fail entirely to acknowledge that the statute sought to promote environmental values through "reclamation" (30 U.S.C. § 21a), because Congress recognized that minerals cannot be extracted without some level of environmental impact. Appellants have never claimed that mining must "be pursued at all costs" (Oregon Br. 22 (quoting *Rinehart*, 377 P.3d at 825)) or "unfettered by restrictions" (U.S. Br. at 16), but rather that the restrictions must be reasonable and grounded in securing compliance with pollution standards. Arbitrary use restrictions without regard to environmental mitigation, shutting down longstanding permitting systems that implement environmental standards, are not reasonable, but constitute prohibitory action long recognized to be preempted under federal law.

As confirmed by undisputed expert testimony (ER107-08), arbitrary multi-year shutdowns are also utterly incompatible with the Mineral Policy Act's goal for "the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries" (30 U.S.C. § 21a(1)). The suggestion of the United States that Oregon's tolerance of a few "larger-scale operations" might meet "national security" needs (US. Br. 16-17) invents an offensive "big company only" limitation in the statutes that has been repeatedly rejected by Congress.[14] More importantly, it ignores undisputed expert testimony that the "ordinary course

[14] *See, e.g.*, *Mining Law* at 292-93, 299 (noting Congressional rejection of amendments to mining law based on impacts to small prospectors).

of progression" from small-scale to large-scale mining means that "[f]orbidding small-scale motorized development therefore cripples larger-scale development". (ER124.)

Again, federal preemption aims at securing the "accomplishment of the *full* purposes and objectives of Congress." *Granite Rock*, 480 U.S. at 581. The Executive Branch's willingness to wipe out entire mining industries (*see* Oregon Supp. ER18 ("hundreds of sellers of small-scale mining equipment")) because some remaining "industry on a national scale" may persist (U.S. Br. 17) is not an admissible approach to implementing federal preemption.

c. The Surface Mining Control and Reclamation Act of 1977.

Oregon refers to this law, 30 U.S.C. § 1281, as creating a "process by which *individuals* can request that certain federal lands be closed to mining . . .". (Oregon Br. 23; emphasis added.) In fact, the statute provides no rights for "individuals". It declares that "[w]ith respect to Federal lands within any State, the Secretary of Interior may, and if so requested *by the Governor of such State shall*, review any area within such lands to assess whether it may be unsuitable for mining operations . . .". 30 U.S.C. § 1281(a) (emphasis added). It is hard to imagine a more explicit expression of Congressional intent concerning who should make decisions prohibiting mining in areas of federal land than this statute; any state

statute closing lands to mining is obviously "inconsistent with the provisions of this chapter". 30 U.S.C. § 1255(a). The Executive Branch professes to be unable to see any inconsistency (U.S. Br. 20), but the Solicitor General pointed it out in his briefing in *Granite Rock*.[15]

Oregon protests that the statute does not specifically restrict "a state's ability to enact legislation protected [*sic*] water quality and fish". (Oregon Br. 23.) Multiple federal statutes, however, show that Congress intended federal officials, not state officials, to close particular areas to mining. Congressional intent with respect to state legislation to protect water quality and fish is set forth in the next statute to be considered.

d. The Federal Land Policy and Management Act of 1976 (FLPMA) not only preempts use restrictions, but also clarifies congressional intent concerning environmental regulation.

The opposing parties do not seriously dispute that FLPMA and the National Forest Management Act (NFMA) occupy the field of land use planning for federal lands. A state law moratorium on a land use *is* land use planning. Senate Bill 838 "is an attempt to supplant the land-use policy of the United States" (U.S. Br. 10) on two levels. The Bill supplants not only the general policy of opening federal lands

[15] Brief of the United States, *supra n*. 11, at 28-29.

to mineral development, but also the particular land use decision to grant mining claims on particular parcels.

A use restriction of all motorized mining is a use restriction, whether or not it restricts *all* mining. Oregon is doing precisely what *Granite Rock* said it could not do, "choos[ing] particular uses for the land" (480 U.S. at 587); Oregon is declaring, in substance, that the highest and best use of the closed areas is fish production. Oregon attempts to distinguish its more conventional land use law in which local entities prepare plans subject to statutory standards (*id.* at 28), but Senate Bill 838 manifestly restricts a use whether it is inside a particular chapter of the Oregon Revised Statutes or not.

The Intervenors' suggestions that use restrictions are not involved because not all mining is prohibited, or motorized mining might continue in upland areas of the prohibited zones (Intervenor Br. 23) are meritless. Oregon's own land use controls often distinguish between mining activities. For example, the Clackamas County Zoning and Development Ordinance 708.05(G) restricts "drilling and blasting" in particular areas to specified hours. (MSER13.) The Jackson County Land Development Ordinance contains an entire table of permitting mining uses by area (MSER19), as well as extraordinarily-detailed permitting requirements (MSER23-27). Both zoning ordinances are manifestly addressing environmental

concerns. The question is not whether Senate Bill 838 looks like a zoning ordinance; the question is whether it regulates the use of land.

Senate Bill 838 is not doing what *Granite Rock* characterized as "environmental regulation": "requir[ing] only that, *however the land is used*, damage to the environment is kept within prescribed limits". (480 U.S. at 587; emphasis added.) Unlike environmental quality standards that set limits for environmental impacts, Senate Bill 838 prohibits mining without regard to any particular "prescribed limit" for damage to the environment. To the extent that Oregon may be setting a "prescribed limit" of zero impact, that is a choice that tramples the Congressional recognition that mineral extraction cannot proceed—as it must—without some level of environmental impact.

Congress knew the difference between environmental standards and prohibitions, and authorized only the former. FLPMA provides that:

> "The Secretary shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and *compliance with applicable State or Federal air or water quality standard or implementation plan*: Provided, That such violation occurred on public lands covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it: Provided further, That the Secretary shall terminate any such suspension no later than the date

> upon which he determines the cause of said violation has been rectified . . ."

43 U.S.C. § 1732(c). In short, implementation of state-law based environmental regulation under FLMPA is (1) limited to "air and water quality standards" and (2) the ultimate decision as to compliance is left to the Secretary. Congress' decision to implement state concerns through conditions in federal instruments is inconsistent with any general intent to allow states to regulate freely on federal lands. Federal permission is controlling where granted until revoked.

Moreover, Congress did not authorize any and all species of environmental regulation, but only "air and water quality standards and implementation plans". These are terms of art with respect to environmental regulation. *See, e.g.*, 33 U.S.C § 1313 ("Water quality standards and implementation plans"). For example, Oregon's water quality standard for turbidity, OAR 340-041-0036, is implemented in the 700PM water quality permit for in-stream motorized mining. (ER48-49.)[16] Application of such standards is in perfect congruence with the *Granite Rock* holding: "environmental regulation, at its core, does not mandate particular uses of the land, but only requires that, however the land is used, damage

[16] Intervenor's identification of cases affirming application of state water quality standards under the federal Clean Water Act (Intervenor Br. 19-20) thus has no bearing on this appeal, for there is no dispute that the mining was proceeding under an Oregon Clean Water Act permit.

to the environment is kept within prescribed limits". *Granite Rock*, 480 U.S. at 587.

The Intervenors claim that Senate Bill 838 merely "regulates a source of pollution at a higher level than required by the Clean Water Act". (Intervenor Br. 27.) But quite apart from its failing as a categorically-preempted use ban, overarching Congressional policy does not permit a state to insist upon zero environmental impact from mining. This is a policy goal flatly inconsistent with the extraction of minerals, as even Oregon recognizes. *See* § 1(3) of Senate Bill 838 (mineral exploration "inherently involves natural resource disturbance"); *see also* ORS 517.760(1)(d) ("It is not practical to extract minerals required by our society without disturbing the surface of the earth . . .").

The overriding federal policy—which the Intervenors call the "heart of FLMPA" (Intervenor Br. 16)—is to prevent only "*unnecessary* or *undue* degradation of public lands". 43 U.S.C. § 1732(b) (emphasis added). *See also also id.* § 1701(a)(12) (Secretary must manage federal land "in a manner that recognizes the Nation's need for domestic sources of minerals . . .").[17] Mining

[17] The Clean Water Act's reference to "nothing *in this chapter*" precludes states from "any requirement respecting control or abatement of pollution" (33 U.S.C. § 1370; emphasis added) manifestly has no relevance to whether and to what extent other, specific statutes limit a state regulatory role on federal lands. (*Cf.* Intervenor Br. 26.)

prohibitions without regard to whether the degradation is reasonable or necessary are fatally obstructive of the Congressional policies to get minerals out of the ground with reasonable environmental protections.

The United States points to FLMPA's reservation of state authority for "management of fish and resident wildlife". (U.S. Br. 12 (citing 43 U.S.C. § 1732(b)).) But the statute makes it clear that "management" is referring to hunting and fishing regulations, not the environmental regulation Congress specifically addressed elsewhere in the statute.

In sum, Oregon's water quality standards do not forbid motorized mining, consistent with all the foregoing statutes. Senate Bill 838, however, arbitrarily singles out motorized mining as a use to be banned, a decision that the Supremacy Clause confides to the federal land management agencies. (*E.g.*, 30 U.S.C. § 1281).

3. Federal Regulations Cannot Authorize State-Law-Based Mining Prohibitions.

Congress did not empower federal land management agencies to issue pronouncements on federal supremacy, and this Court owes no deference to such pronouncements. *See generally* N. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737, 742 (2003-2004). While the Supreme Court made reference to

federal regulations in *Granite Rock*, the Supreme Court subsequently refined its position concerning agency determinations on federal preemption:

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

Wyeth, 555 U.S. at 576-77 (emphasis added; parallel citations omitted).

Under the law as it now stands, because agencies have no special expertise in construing the Supremacy Clause, the only thing that should inform this Court is the persuasiveness of a specific agency determination whether a specific state regulatory scheme stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress". No federal agency has explained how Senate Bill 838's mining ban could possibly be consistent with federal law.

The mining opponents highlight Forest Service regulations addressing compliance with state law, but misinterpret them. Section 228.8 of Title 36 of the Code of Regulations begins with the observation that operators "where feasible" should comply with various regulations, including "applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water Pollution Control Act, as amended (33 U.S.C. § 1151 *et seq*.)". 36 C.F.R. § 228.8(b). The "where feasible" reference implements the overarching Congressional goal of avoiding only environmental impacts that are unreasonable or unnecessary to extract the minerals, and the reference to water quality standards, consistent with FLMPA, again has no reference to prohibitions like Senate Bill 838.[18] *See also id.* §§ 228.8(d) & 228.8(e) (operators should take "all *practicable* measures" to protect scenery and fish and wildlife; emphasis added).

In *Granite Rock*, no one "contend[ed] that these Forest Service regulations are inconsistent with the authorizing statutes" (480 U.S. at 584); to the extent that they might be interpreted to require compliance with mining *prohibitions*, they are challenged here as inconsistent with the authorizing statutes that require due attention to promoting mineral development.

[18] Oregon also cites 36 C.F.R. § 228.5(b), which refers to certain interim operations "necessary for timely compliance with the requirements of Federal and State laws; Senate Bill 838 imposes no such requirements.

The mining opponents also push BLM's remarkable regulation purporting to authorize states to provide any "higher standard of protection for public lands". 43 C.F.R. § 3809.3.[19] Oregon acknowledges that BLM promulgated this regulation under a profound misconception of federal supremacy law—that preemption arises "only when 'it is impossible to comply with both Federal and State law at the same time'" (*see* Oregon Br. 26 (quoting 65 Fed. Reg. at 70,008-09).)

Of course, as the Supreme Court has explained, "both forms of conflicting state law are 'nullified' by the Supremacy Clause": (1) conflicts "that prevent or frustrate the accomplishment of a federal objective" *and* (2) conflicts "that make it 'impossible' for private parties to comply with both state and federal law". *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000); *see also id.* at 873 ("Congress would not want either kind of conflict"). BLM's regulation is the product of its ignorance of preemption law and unlawful disregard of its statutory

[19] California and Washington suggest that BLM's regulation binds this Court, but the very case they cite emphasizes that the "grant of legislative authority to a federal agency by Congress must be specific before regulations issued pursuant to it can be binding on courts". *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979). FLPMA confers no specific grant of legislative authority on BLM to issue preemption proclamations at all, much less a grant of power to override the state/federal design of 43 U.S.C. § 1732(c).

duty to manage federal land "in a manner that recognizes the Nation's need for domestic sources of minerals . . .". 43 U.S.C. § 1701(a)(12).

BLM's interpretation—that states may prohibit mining even though Congress limited BLM regulation to avoid material interference with mining—is simply not "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute". *Chevron, U.S.A. Inc. v. NRDC, Inc.* 467 U.S. 837, 845 (1984). An agency rule "may not stand if the agency has misconceived the law". *SEC v. Chenery*, 318 U.S. 80, 94 (1943).[20]

II. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT TO OREGON WAS IMPROPER.

Because Appellants moved for summary judgment, Oregon claims that Appellants "did not assert that issues of fact precluded summary judgment". (Oregon Br. 29.) But Appellants have waived no rights, as demonstrated in the opening brief (at 13); when parties cross-move for summary judgment, this Court must still confirm the absence of genuine issues of material fact. Appellants believe that summary judgment should have been granted in their favor, but if

[20] The opposing parties also invoke BLM's misconception of a Montana state case, *Seven Up Pete Venture v. State*, 327 Mont. 306, 114 P.3d 1009 (2005). While Montana's statute may have purported to apply to federal lands, the case was a takings case involving a lease of *state* land where the lessee agreed to "fully comply" with all state environmental laws, *id.* at 321, and has no bearing on this appeal.

there are disputes as to the prohibitory character of the law, those disputes cannot be resolved on summary judgment.

Oregon does not seriously dispute the prohibitory character of the law, but argues that even assuming "some miners will be unable to work their claims without motorized equipment," there is no forbidden prohibition. (Oregon Br. 29.) Oregon reaches this startling conclusion by asserting, contrary to fact, that Senate Bill 838's restriction merely "makes a particular claim unworkable or unprofitable to mine". (*Id.*)

This appeal is not about profitability, but about prohibition. Many of these Appellants have valuable mineral deposits which are underwater and "the *only way* to reach these underwater deposits is with the use of motorized mining equipment" (ER102 (emphasis added); *see also* ER129 ("cannot recover more than trace amounts of gold without use of motorized suction equipment"); ER134 ("it is impossible to get at this gold without motorized mining equipment"); ER150 (noting areas which "cannot be developed at all without the suction dredge").) Undisputed expert testimony before the Court confirms that these are the primary deposits of gold in existence in the zones where motorized mining is forbidden, and that *only* motorized equipment can extract them (ER106); undisputed expert

testimony confirms that Senate Bill 838 is "in substance a ban on all meaningful placer mining in the prohibited zones" (ER118).

Ignoring all this sworn testimony, the Intervenors mischaracterize the record as reflecting no more than miners who "*prefer* to mine from the beds of rivers or creeks". (Intervenor Br. 8; emphasis in original.) Some miners may also own claims outside the scope of Senate Bill 838, but those claims are irrelevant to this appeal.

Restricting land uses to "activities in which tourists or recreationalists might engage, such as panning for a few flakes of gold" (ER124) obviously cannot vindicate the purposes of federal law. This is the "mining by non-motorized methods" to which Oregon is really referring (Oregon Br. 31). Arguing that miners can still exploit the portions of their claims outside the moratorium area (*id*.) is also sophistry; the record confirms that this is not where the gold is (*see* Oregon SER12). Obtaining a permit for "activities in upland areas" (Oregon Br. 32) is obviously of no use if there is no gold there.

With respect to Appellant Gill, whose activities are specifically authorized by the Forest Service, the Intervenors claim his operation is legal (Intervenor Br. 9-10), but Oregon asserts that this is true only "to the extent that Gill can now mine the uplands without affecting water quality" (Oregon Br. 32). But the statute

does not require proof of any actual impact on water quality; it is a crime to engage in the "removal or disturbance of streamside vegetation in a manner that *may* impact water quality". (Senate Bill 838, § 2(1); emphasis added). The Supremacy Clause does not require Gill to hazard criminal liability for federally-authorized operations because Oregon's officials may conclude that he trampled grass somewhere near the water.

Finally, the Intervenors suggest that "preemption analysis should take place on a case by case basis" (Intervenor Br. 21), while Oregon states that "whether federal can ever preempt state law on an 'as-applied' basis is an open question" (Oregon Br. 30). This Court should follow the Eighth Circuit's approach of recognizing that a mining ban is "prohibitory, not regulatory, in its fundamental character," *Lawrence County*, 155 F.3d at 1011, and avoid entanglement in factual questions concerning the environmental impact of, and regulatory impact on, any particular mine;[21] such an approach best protects accomplishment of the

[21] The law professors argue that the Interior Board of Land Appeals has "factored costs of compliance with state environmental regulations" in mining claim contests. They omit to disclose that the lead case they cite was vacated. *Garcia v. United States*, 442 Fed. Appx. 745 (4th Cir. Jan. 20, 2010). In any event, the question of federal preemption raised in this appeal was not raised in these cases, for they involved environmental *regulation* consistent with FLPMA's allowance for "applicable State or Federal air or water quality standard or implementation plan". A mining ban is qualitatively different than an operational restriction.

Congressional purposes at stake. In the alternative, this Court should remand the case for trial if further information is needed to confirm the fundamentally prohibitory character of Senate Bill 838.

Conclusion

For the foregoing reasons, and the reasons stated in our opening brief, this Court should hold Senate Bill 838 preempted by federal law.

Dated: November 28, 2016.

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

CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the foregoing REPLY BRIEF OF PLAINTIFFS – APPELLANTS.

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

Dated: November 28, 2016.

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

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Signature of Attorney or Unrepresented Litigant [s/ James L. Buchal] Date [11/28/2016]

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