UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

March 8, 2018, Argued and Submitted, Portland, Oregon; September 12, 2018, Filed

No. 16-35262

JOSHUA CALEB BOHMKER; LARRY COON; WALTER R. EVENS; GALICE MINING DISTRICT; JASON GILL; MICHAEL HUNTER; MICHAEL P. LOVETT; JOEL GROTHE; MILLENNIUM DIGGERS; WILLAMETTE VALLEY MINERS; DON VAN ORMAN; J.O.G. MINING LLC,
Plaintiffs-Appellants,
v.
STATE OF OREGON; ELLEN ROSENBLUM, in her official capacity as the Attorney General of the State of Oregon; MARY ABRAMS, in her official capacity as the Director of the Oregon Department of State Lands,
Defendants-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-Defendants-Appellees.

Before: Raymond C. Fisher, N. Randy Smith and Andrew D. Hurwitz, Circuit Judges. Opinion by Judge Fisher; N.R. SMITH, Circuit Judge, dissenting.
Opinion by: Raymond C. Fisher

Opinion

FISHER, Circuit Judge:

To protect threatened fish populations, Oregon prohibits the use of motorized mining equipment in rivers and streams containing essential salmon habitat. The restrictions, adopted into law as Senate Bill 3, apply throughout the state, including on rivers and streams located on federal lands. The district court concluded the restrictions are not preempted by federal law, and we agree. Assuming without deciding that federal law preempts the extension of state land use plans onto unpatented mining claims on federal lands, Senate Bill 3 is not preempted, because it constitutes an environmental regulation, not a state land use planning law. Senate Bill 3, moreover, does not stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. As the United States points out in its amicus brief opposing the plaintiffs' preemption challenge, reasonable environmental restrictions such as those found in Senate Bill are consistent with, rather than at odds with, the purposes of federal mining and land use laws. *See Cal. Coastal Comm'n v.*

Granite Rock Co., 480 U.S. 572, 588-89, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987) (rejecting the proposition that federal law preempts the application of reasonable state environmental regulations to the operation of unpatented mining claims on federal lands).

BACKGROUND

The Oregon legislature adopted Senate Bill 838 in 2013. The Bill's legislative findings recognize both the state's rich tradition of small scale prospecting and mining and its environmental interest in protecting water quality and fish habitat. The findings state:

> (1) Prospecting, small scale mining and recreational mining are part of the unique heritage of the State of Oregon.
>
> (2) Prospecting, small scale mining and recreational mining provide economic benefits to the State of Oregon and local communities and support tourism, small businesses and recreational opportunities, all of which are economic drivers in Oregon's rural communities.
>
> (3) Exploration of potential mine sites is necessary to discover the minerals that underlie the surface and inherently involves natural resource disturbance.

> (4) Mining that uses motorized equipment in the beds and banks of the rivers of Oregon can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments of this state in habitat enhancement and areas of cultural significance to Indian tribes.
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> (5) Between 2007 and 2013, mining that uses motorized equipment in the beds and banks of the rivers of Oregon increased significantly, raising concerns about the cumulative environmental impacts.
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> (6) The regulatory system related to mining that uses motorized equipment in the beds and banks of the rivers of Oregon should be efficient and structured to best protect environmental values.

2013 Or. Laws ch. 783, § 1.

Consistent with these findings, the law imposed a five-year moratorium, beginning in 2016, on motorized mining techniques in areas designated as essential fish habit:

> A moratorium is imposed until January 2, 2021, on mining that uses any form of motorized equipment for the purpose of extracting gold, silver or any other precious metal from placer deposits of the beds or banks of the waters of this state, as defined in ORS 196.800, or from other placer deposits,

> that results in the removal or disturbance of streamside vegetation in a manner that may impact water quality. The moratorium applies up to the line of ordinary high water, as defined in ORS 274.005, and 100 yards upland perpendicular to the line of ordinary high water that is located above the lowest extent of the spawning habitat in any river and tributary thereof in this state containing essential indigenous anadromous salmonid habitat, as defined in ORS 196.810, or naturally reproducing populations of bull trout, except in areas that do not support populations of anadromous salmonids or natural reproducing populations of bull trout due to a naturally occurring or lawfully placed physical barrier to fish passage.

Id. § 2(1). "'Essential indigenous anadromous salmonid habitat' means the habitat that is necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing." Or. Rev. Stat. § 196.810(1)(g)(B).

The plaintiffs filed this action in October 2015, three months before the moratorium was to take effect. The 12 plaintiffs have mining claims on federal lands in Oregon and use a form of motorized mining known as suction dredge mining to search for and extract

gold deposits from rivers and streams.[1] The plaintiffs alleged that many of their mining claims were located in "essential indigenous anadromous salmonid habitat" and that the moratorium on motorized mining imposed by Senate Bill 838 would prevent them from mining these claims. They argued that Senate Bill 838 was preempted by federal law because it "interfere[d] with the federal purpose of fostering and encouraging mineral development on federal property, and st[ood] as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." Compl. ¶ 49. The plaintiffs sought an injunction restraining the state from enforcing Senate Bill 838 and a declaration that the Bill was preempted by federal law. Compl. 14.

The district court granted the state's motion for summary judgment, ruling that, because Senate Bill 838 was a reasonable environmental regulation, it was not preempted. After the court

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[1] Suction dredging is

> a technique used by miners to remove matter from the bottom of waterways, extract minerals, and return the residue to the water. A high-powered suction hose vacuums loose material from the bottom of a streambed. Heavier matter, including gold, is separated at the surface by passage through a floating sluice box, and the excess water, sand, and gravel is discharged back into the waterway.

People v. Rinehart, 1 Cal. 5th 652, 206 Cal. Rptr. 3d 571, 377 P.3d 818, 820 (Cal. 2016).

entered judgment in favor of the state, the plaintiffs timely appealed.

After briefing in this court was completed, the Oregon legislature adopted Senate Bill 3. Senate Bill 3 repealed the moratorium imposed by Senate Bill 838 and imposed a permanent restriction on the use of motorized mining equipment in waters designated as essential indigenous anadromous salmonid habitat. It states:

> In order to protect indigenous anadromous salmonids and habitat essential to the recovery and conservation of Pacific lamprey, motorized in-stream placer mining may not be permitted to occur up to the line of ordinary high water in any river in this state containing essential indigenous anadromous salmonid habitat, from the lowest extent of essential indigenous anadromous salmonid habitat to the highest extent of essential indigenous anadromous salmonid habitat.

2017 Or. Laws ch. 300, § 4(2). Although the restrictions imposed by Senate Bill 3 differ in some respects from those in Senate Bill 838, both laws prohibit motorized mining in rivers and streams

designated as essential salmon habitat.[2] The parties therefore agree that the adoption of Senate Bill 3 does not moot this appeal. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.,* 508 U.S. 656, 662, 113 S. Ct. 2297, 124 L. Ed. 2d 586 & n.3 (1993) (holding that the repeal of a challenged ordinance and its replacement with a different ordinance did not render the plaintiff's claims moot where the ordinance had not been "sufficiently altered so as to present a substantially different controversy from the one the District Court originally decided" and the two ordinances "disadvantage[d] [the plaintiff] in the same fundamental way"). The parties also agree that we should treat this appeal as a challenge to Senate Bill 3. We now proceed to do so.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. Because at least some of the plaintiffs have standing to pursue this appeal, we need not address the standing of additional plaintiffs. *See Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 523 (9th Cir. 2009) ("As a general rule, in an

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[2] Unlike Senate Bill 838, for example, Senate Bill 3 does not prohibit motorized mining in bull trout habitat. In addition, although the moratorium imposed by Senate Bill 838 extended to mining in areas up to 100 yards from waterways, the restrictions on motorized mining in Senate Bill 3 apply only within rivers and streams themselves.

injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has standing.")[3] Our review is de novo. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 777 (9th Cir. 2014) (en banc) (grant or denial of summary judgment); *Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003) (federal preemption).

DISCUSSION

A. Background Legal Principles

1. Federal Laws Governing Mining on Federal Lands

We begin with an overview of the federal laws respecting mining on federal lands. We consider only those laws the parties have identified as relevant to the preemption issues presented in this appeal.

"Historically, the Federal mining law has been designed to encourage individual prospecting, exploration, and development of the public domain." H.R. Rep. No. 84-730 (1955), *as*

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[3] We therefore need not address whether plaintiffs Galice Mining District, Millennium Diggers and Willamette Valley Miners have established standing, either in their own right or on behalf of their members. *See Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.,* 713 F.3d 1187, 1194 (9th Cir. 2013) (explaining that, to establish associational standing, a plaintiff must provide specific allegations showing that at least one identified member has suffered or would suffer harm).

reprinted in 1955 U.S.C.C.A.N. 2474, 2476. "Under these laws, prospectors may go out on the public domain not otherwise withdrawn, locate a mining claim, search out its mineral wealth and, if discovery of mineral is made, can then obtain a patent." *Id.*

The Mining Act of 1872, 17 Stat. 91, for example, provides that:

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

30 U.S.C. § 22 (emphasis added). Under this Act, prospectors could acquire unpatented mining claims by discovering valuable mineral resources on federal lands, marking the location of their claims and recording their claims in accordance with state law:

> Rights to mineral lands, owned by the United States, are initiated by prospecting, that is, searching for minerals thereon, and, upon the

> discovery of mineral, by locating the lands upon which such discovery has been made, or lands which the prospector believes to be valuable for minerals. A location is made by staking the corners of the claim, posting a notice of location thereon, and complying with the State laws regarding the recording of the location in the county recorder's office, discovery work, etc.

H.R. Rep. No. 84-730, 1955 U.S.C.C.A.N. at 2477.

Once the prospector staked out a claim, "the locator, without further requirement under Federal law, as of that moment, acquire[d] the immediate right to exclusive possession, control, and use of the land within the corners of his location stakes." *Id.* at 2478. As the Mining Act explains:

> The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict [**13] with the laws of the United States governing their possessory title, *shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations*, and of all veins, lodes, and ledges throughout their entire depth . . . .

30 U.S.C. § 26 (emphasis added). To protect this right to exclusive possession, a locator annually must perform $100 worth of labor or carry out improvements worth $100 in value. *See id.* § 28.

The locator of an unpatented mining claim either "may remove the minerals from the land without first proceeding to patent," H.R. Rep. No. 84-730, 1955 U.S.C.C.A.N. at 2478, or may obtain a patent by, inter alia, filing an application under oath, showing that $500 worth of labor has been expended or improvements made with respect to the claim and making a payment to the proper officer of $5 per acre, see 30 U.S.C. § 29. Although "[a]n 'unpatented' claim is a possessory interest in a particular area solely for the purpose of mining," the owner of a patented claim "gets a fee simple interest from the United States." *Clouser v. Espy*, 42 F.3d 1522, 1525 n.2 (9th Cir. 1994). The mining claims at issue in this case are unpatented.

By 1955, Congress had become increasingly aware of "abuses under the general mining laws by those persons who locate[d] mining claims on public lands for purposes other than that of legitimate mining activity." H.R. Rep. No. 84-730, 1955 U.S.C.C.A.N. at 2478. Sham claims, for example, "could be used for selling timber from national forests, or obtaining free residential or agricultural land." *United States v. Shumway*, 199 F.3d 1093, 1101 (9th Cir. 1999) (citing *United States v. Curtis Nev. Mines, Inc.*, 611 F.2d 1277, 1282 (9th Cir. 1980)). Congress was also

concerned that according the holders of unpatented mining claims exclusive surface rights prevented the "efficient management and administration of the surface resources of the public lands." H.R. Rep. No. 84-730, 1955 U.S.C.C.A.N. at 2474. Mining locations made under existing law, for example,

> frequently block[ed] access: to water needed in grazing use of the national forests or other public lands; to valuable recreational areas; to agents of the Federal Government desiring to reach adjacent lands for purposes of managing wild-game habitat or improving fishing streams so as to thwart the public harvest and proper management of fish and game resources on the public lands generally, both on the located lands and on adjacent lands.

Id. at 2478-79.

To address these concerns, Congress adopted the Surface Resources and Multiple Use Act of 1955, Pub. L. No. 84-167, 69 Stat. 367 (1955). This law prohibits the location of any mining claim for purposes other than mining, *see* 30 U.S.C. § 612(a), and reserves in the United States - rather than granting to locators - the right to manage the surface resources of unpatented mining claims located after 1955, subject to the important proviso that "any use of the surface of any such mining claim by the United States, its permittees [*1036] or licensees, shall be such as not to endanger or materially interfere with

prospecting, mining or processing operations or uses reasonably incident thereto," *id.* § 612(b). The law states:

> Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, *That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto*: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the

> disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further, *That nothing in this subchapter and sections 601 and 603 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.*

Id. § 612(b) (emphasis added). The legislation sought to "encourage mining activity on . . . public lands compatible with utilization, management, and conservation of surface resources such as water, soil, grass, timber, parks, monuments, recreation areas, fish, wildlife, and waterfowl." H.R. Rep. No. 84-730, 1955 U.S.C.C.A.N. at 2475.

In 1970, Congress adopted the Mining and Minerals Policy Act of 1970, Pub. L. No. 91-631, 84 Stat. 1876 (1970). This law declares it the policy of the United States to foster the development of an "economically sound and stable domestic mining" industry, but subject to "environmental needs," 30 U.S.C. § 21a, making clear that "Congress did not, and does not, intend

mining to be pursued at all costs," *Rinehart*, 377 P.3d at 825. It states:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals *to help assure satisfaction* of industrial, security and *environmental needs*, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the *study and development of methods* for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, *so as to lessen any adverse impact of mineral extraction and processing upon the physical environment* that may result from mining or mineral activities.

30 U.S.C. § 21a (emphasis added).[4]

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[4] In 1977, Congress adopted the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (1977). In relevant part, this law allows the governor of a state to ask the Secretary of the Interior to designate lands as unsuitable for mining on the ground that "mining operations would have an adverse impact on lands used primarily for residential or related purposes." 30 U.S.C. §

2. Federal Laws Governing National Forests

The Organic Administration Act, 30 Stat. 11, 35-36 (1897), provides that nothing in 16 U.S.C. §§ 473-82 and 551 "shall . . . prohibit any person from entering upon . . . national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." 16 U.S.C. § 478. It also provides, however, that "[s]uch persons must comply with the rules and regulations covering such national forests." *Id.* The Organic Act, moreover, requires the Secretary of Agriculture to "make provisions for the protection against destruction by fire and depredations upon the public forests and national forests," and it authorizes the Secretary to "make such rules and regulations" regarding "occupancy and use" as may be necessary "to preserve the forests thereon from destruction." *Id.* § 551.

Under this rulemaking authority, the U.S. Forest Service has promulgated rules regulating mining on national forest lands. These regulations require mining operators to comply with applicable federal and state air quality standards, water quality standards and standards for the disposal and treatment of solid wastes. *See* 36 C.F.R. § 228.8(a)-(c).

1281(a)-(b). The plaintiffs do not suggest this provision presented an option for Oregon here.

The Multiple-Use and Sustained-Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (1960), directs the Secretary of Agriculture "to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield." 16 U.S.C. § 529. After declaring it "the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes," the Act states that "[n]othing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests." *Id.* § 528. It further states that "[n]othing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests." *Id.*

The National Forest Management Act of 1976 (NFMA), Pub. L. No. 94-588, 90 Stat. 2949 (1976), requires the Secretary of Agriculture to "develop . . . land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies." 16 U.S.C. § 1604(a). In developing such plans, the Secretary shall assure that they "provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960." *Id.* § 1604(e)(1).

In addition, federal lands, including those falling outside national forests, are governed by the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743 (1976). FLPMA requires the Secretary of the Interior to develop land use plans for public lands, *see* 43 U.S.C. § 1712(a), and to "manage the public lands under principles of multiple use and sustained yield," *id.* § 1732(a). FLPMA directs that, "[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." *Id.* § 1732(b). This "unnecessary or undue degradation" mandate applies not only to land use generally but also to the regulation of mining operations in particular. *See id.* (providing that nothing in FLPMA, other than the provision establishing the "unnecessary or undue degradation" standard, "shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress"). FLPMA further provides that "nothing in this Act shall be construed as . . . enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife." *Id.*

Under FLPMA, the Bureau of Land Management (BLM) has issued regulations requiring mining operators to "comply with applicable Federal and state" air quality standards, water quality standards and standards for the disposal and treatment of solid wastes. 43

C.F.R. § 3809.420(b)(4)-(6). Another BLM regulation requires mining operators to comply with state environmental regulations that do not conflict with federal law: "If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart." *Id.* § 3809.3.

3. Overview of Applicable Federal Laws

The foregoing laws, in the aggregate, reflect Congress' intent to foster a productive mining industry but also its intent to protect the environment. These laws declare many federal lands "free and open" to exploration, 30 U.S.C. § 22, preclude the United States from using the surface area of certain mining claims in a manner that would "endanger or materially interfere" with the underlying mining claims, *id.* § 612(b), declare it to be the policy of the United States to foster "the development of economically sound and stable domestic mining . . . industries," *id.* § 21a, and preserve a role for prospecting and mining in national forests, see 16 U.S.C. §§ 478, 528. At the same time, these laws require miners to comply with state laws, see 30 U.S.C. § 22, including state environmental laws, see, e.g., 36 C.F.R. § 228.8; 43 C.F.R. §§ 3809.3, 3809.420(b), declare it the policy of the United States to assure that mining satisfies the nation's "environmental needs," 30 U.S.C. § 21a, require the Secretary of

Agriculture to protect national forests from "depredations" and "destruction," 16 U.S.C. § 551, require the Secretary of the Interior to protect public lands from "unnecessary or undue degradation," 43 U.S.C. § 1732(b), and recognize the states' broad authority to manage fish and wildlife, see 16 U.S.C. § 528; 43 U.S.C. § 1732(b). In light of these provisions, it is common ground among the parties that the holders of unpatented mining claims do not have an "unfettered" right to explore and mine federal lands, unencumbered by federal and state environmental regulation. Nor does anyone argue that states' environmental regulatory authority in this area is unbounded. Congress plainly intended to draw a line between these two extremes.

4. The *Granite Rock* Decision

The Supreme Court addressed this line drawing in *California* Coastal *Commission v. Granite Rock Co.*, 480 U.S. 572, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987). After the Granite Rock Company secured unpatented mining claims on national forest land and the Forest Service approved the company's plan of operations for the removal of limestone, the California Coastal Commission instructed the company to apply for a permit under the California Coastal Act, which prohibits any development, including mining, in the state's coastal zone without a permit. *See id.* at 575-76. The company sued to enjoin the enforcement of the permit requirement, arguing federal preemption. *See id.* at 577.

The Supreme Court rejected the company's claims. The Court began by observing that

> [S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Id. at 581 (alteration in original) (citations omitted) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984)).
The Court next summarily rejected the proposition that the Mining Act of 1872 demonstrates an intent to preempt any state environmental regulation on federal lands. As the Court explained, "Granite Rock concedes that the Mining Act of 1872, as originally passed, expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." *Id.* at 582.

Next, the Court rejected Granite Rock's argument that "the Federal Government's environmental regulation of unpatented mining

claims in national forests demonstrates an intent to pre-empt any state regulation." *Id.* at 581-82. The Court concluded that

> the Forest Service regulations that Granite Rock alleges pre-empt any state permit requirement not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations will comply with state laws. . . . It is impossible to divine from these regulations, which *expressly contemplate coincident compliance with state law as well as with federal law*, an intention to pre-empt all state regulation of unpatented mining claims in national forests.

Id. at 583-84 (emphasis added) (citing 36 C.F.R. §§ 228.5(b), 228.8(a)-(c), (h)). The Court added that "[n]either Granite Rock nor the United States contends that these Forest Service regulations are inconsistent with their authorizing statutes." *Id.* at 584.

The Court then turned to Granite Rock's argument that "federal land management statutes demonstrate a legislative intent to limit States to a purely advisory role in federal land management decisions, and that the Coastal Commission permit requirement is therefore pre-empted as an impermissible state land use regulation." *Id.* The Court assumed arguendo that "the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans

onto unpatented mining claims in national forest lands." *Id.* at 585. But even under this assumption, the Court held that only "state land use plans" would be preempted, not state "environmental regulation." *Id.* at 585-86.

The Court did not define the terms "land use planning" and "environmental regulation," but it offered some guidance as to the distinction between the two:

> The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities.

Id. at 587.

The Court suggested that a state's decision to "prohibit" or "ban" mining would constitute land use planning, and hence would be preempted. See id. at 586-87. It further intimated that a law

would be preempted if, although couched as environmental regulation, its "true purpose" was to prohibit mining. *Id.* at 588. At bottom, however, the Court made clear that "reasonable state environmental regulation is not pre-empted." *Id.* at 589; *see also id.* at 593.

B. The Plaintiffs' Arguments

The plaintiffs argue: (1) Senate Bill 3 is field preempted because it constitutes state "land use planning" under *Granite Rock*; (2) Senate Bill 3 is conflict preempted because it is "prohibitory, not regulatory, in its fundamental character," *S.D. Mining Ass'n v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998); (3) Senate Bill 3 is conflict preempted because it does not constitute "reasonable state environmental regulation"; and (4) genuine issues of material fact preclude the entry of summary judgment in favor of the state. We address these arguments in turn.

1. Field Preemption: The Plaintiffs' Argument That Senate Bill 3 Constitutes State Land Use Planning

Granite Rock assumed without deciding that "the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands." 480 U.S. at 585. We make the same

assumption here.[5] But like the Supreme Court in *Granite Rock*, we reject the plaintiffs' preemption claim. Senate Bill 3 is an environmental regulation rather than a land use planning law. It does not choose or mandate land uses, has an express environmental purpose of protecting sensitive fish habitat, is not part of Oregon's land use system and is carefully and reasonably tailored to achieve its environmental purpose without unduly interfering with mining operations. Senate Bill 3 is precisely the kind of reasonable state environmental regulation that the Supreme Court recognized in *Granite Rock* properly supplements rather than displaces federal land use planning decisions. To be sure, by restricting motorized suction dredge mining in rivers and streams designated as essential habitat for threatened salmonids, Senate Bill 3 will adversely impact the ability of some miners to extract gold deposits from their mining claims. But these impacts are the unavoidable consequences of a federal scheme that seeks to foster both the development of valuable mineral resources and proper stewardship and protection of the nation's natural resources.

The plaintiffs do not argue that Senate Bill 3 becomes a land use law under *Granite Rock* simply because it may render some of their

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[5] We view the application of this assumption, as do the parties, as a question of field preemption rather than conflict preemption. But, even if we were to view it as a question of conflict preemption, we would find no conflict, because Senate Bill 3 is not a land use law.

mining claims commercially impracticable.[6] We agree with the United States that the preemption inquiry does not turn on profitability:

> To be sure, there will be miners (including some Plaintiffs) who cannot profitably extract certain minerals from their mining claims without the use of motorized equipment in the water. But . . . specific limitations on specific mining methods or activities have long been part of the business of mining. A State law cannot be deemed preempted solely on the basis that the cost of mining in compliance with the law makes a particular miner unable to profit from a particular mining claim.

Brief of the United States as Amicus Curiae 26-27. Because "[v]irtually all forms of . . . regulation

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[6] The dissent contends the plaintiffs have made a commercial impracticability argument. Dissent 68. We have, however, carefully reviewed their opening and reply briefs on appeal, and no such argument exists there. The plaintiffs argue Senate Bill 3 is preempted because it prohibits mining, not because it renders their claims unprofitable. As the plaintiffs make clear, "[t]his appeal is not about profitability, but about prohibition." Reply Br. 41. The plaintiffs have therefore waived the argument. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e will not consider any claims that were not actually argued in appellant's opening brief."); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]rguments not raised by a party in its opening brief are deemed waived."); *Greenwood v. Fed. Aviation Admin.,* 28 F.3d 971, 977 (9th Cir. 1994) ("We will not manufacture arguments for an appellant . . . ."). This rule applies with particular force where, as here, the plaintiffs have expressly disclaimed the argument in question.

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," *Clouser*, 42 F.3d at 1530, virtually every environmental regulation will render at least some mining claims commercially impracticable, and virtually every environmental regulation would therefore be preempted under a commercial impracticability test, a proposition that is impossible to reconcile with *Granite Rock's* central holding that "reasonable state environmental regulation is not pre-empted," *Granite Rock*, 480 U.S. at 589 (emphasis added). A commercial impracticability theory, moreover, would require the preemption analysis to turn on each miner's individual financial circumstances: the law would be preempted as to some miners but not as to others. Indeed, a commercial impracticability test would give the greatest protection to the least profitable mining operations, and it would handcuff regulators from restricting even the most environmentally destructive mining methods. So long as a particularly destructive method of mining — such as blasting — presented the only commercially practicable means of extracting minerals, regulators would be barred from restricting that practice. We do not read *Granite Rock* as supporting that result. As the California Supreme Court has explained, federal law does not show that Congress "viewed mining as the highest and best use of federal land wherever minerals were found." *Rinehart*, 377 P.3d at 830.

Rather, the plaintiffs contend that Senate Bill 3 constitutes a state land use planning law because it "prohibits" a particular "use" of the land (motorized mining methods) in particular "zones" (rivers and streams designated as essential salmonid habitat). The plaintiffs base this argument on language in *Granite Rock* explaining that

> the core activity described by [environmental regulation and land use planning] is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.

480 U.S. at 587. The plaintiffs argue Senate Bill 3 is state land use planning under this language because (1) it chooses particular uses of the land and (2) does not prescribe limits on environmental damage by, for example, promulgating a pollution standard.

We disagree. First, Senate Bill 3 does not "choose[]" or "mandate particular uses of the land." *Id.* It simply restricts one method of mining.[7]

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[7] Like the permit requirement in *Granite Rock*, moreover, Senate Bill 3 is not a "ban" or "prohibition" on mining. See

Second, Senate Bill 3 does not constitute land use planning simply because it prohibits a particular mining method rather than "prescrib[ing] limits" on environmental damage by adopting a pollution standard. *Granite Rock*

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480 U.S. at 586-87. Senate Bill 3 does not prohibit the plaintiffs' mining operations. Many of the plaintiffs engage in upland mining, mine in rivers and streams that are not designated as essential habitat or use non-motorized mining methods such as gold panning. Plaintiff Larry Coon, for example, did not testify that all of his mining claims are located in essential salmon habitat, and he contends only that the legislation will significantly limit his mining operations, not eliminate them. Coon decl. ¶¶ 2, 5. Only half of plaintiff Millennium Diggers' mining claims are located within essential salmon habitat. Darnell decl. ¶ 4. Some of its members, moreover, "utilize non-motorized techniques, such as gold panning." *Id.* ¶ 3. Plaintiff Jason Gill's mining operations occur between 50 and 300 feet from a creek. Gill decl. ¶¶ 3-4. These operations would not be affected by Senate Bill 3, which applies solely to in-stream mining. The deposits associated with plaintiff Joel Grothe's claim fall not only within the creek bottom but also within 100 yards of the creek. Grothe decl. ¶ 7. Only some of plaintiff Willamette Valley Miners' mining claims are located in essential salmon habitat. Hunter decl. ¶ 9. Its members' mining, moreover, includes "non-motorized techniques, such as gold panning." *Id.* ¶ 8. Plaintiff Michael Lovett testified that Senate Bill 3 would significantly limit his mining operations, but not that it would eliminate them. Lovett decl. ¶ 4. We take seriously the plaintiffs' contentions that Senate Bill 3 will seriously impact their mining operations with respect to at least some of their mining claims. But the plaintiffs' own declarations make clear that Senate Bill 3 is not a ban on mining.

does not hold that only standards, not restrictions on activities, are permissible environmental regulation. On the contrary, *Granite Rock* says only that "environmental regulation, *at its core*, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." 480 U.S. at 587 (emphasis added).[8] It does not purport to define the entire universe of environmental regulation as consisting solely of limit-prescribing standards. That formalistic approach ignores the practical reality that environmental regulation may take several forms, and it would make no sense, given that regulations imposing pollution standards can impact mining operations every bit or even more than regulations restricting particular mining methods. The plaintiffs concede, for example, that "Oregon's water quality standard for turbidity" constitutes a permissible, non-preempted "environmental regulation" under Granite Rock.

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[8] The dissenting opinion characterizes us as treating this language as "non-binding dicta (Dissent 58 n.2)," but that is not the case. In addition, the dissent's theory that a distinction between regulations dictating "uses" and regulations dictating "standards" would provide a "clear line between land use planning and environmental regulation" (Dissent 58) eludes us. Would a regulation limiting the size of suction dredge hoses prohibit a "use" (of larger hoses) or prescribe a "standard" (on the size of the hose and, consequently, the volume of material to be dredged)? Would a regulation limiting the size of the vehicles miners could use to reach their claims prohibit a "use" (of heavy vehicles) or prescribe a "standard" (on the weight of vehicles and the resulting damage to the surface of the forest)?

A stringent turbidity standard, however, might have a greater adverse impact on the plaintiffs' mining operations than Senate Bill 3's targeted restrictions on motorized mining.

Senate Bill 3 also is not part of Oregon's extensive and distinct land use system. That system requires the development of comprehensive plans by local governments, implemented through zoning, and reviewed by the Oregon Land Conservation and Development Commission. Those decisions, in turn, are reviewed by a State Land Use Board of Appeals, which has developed significant land use case law. *See generally* Or. Rev. Stat. §§ 197.005-197.860, 215.010-215.990. Senate Bill 3 stands apart from that regime.

The plaintiffs' argument, moreover, overlooks Senate Bill 3's obvious and important environmental purpose.[9] The Oregon legislature adopted Senate Bill 3's restrictions on motorized mining "[i]n order to protect indigenous

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[9] Although the plaintiffs contend Oregon's purpose in adopting Senate Bill 3 is irrelevant to the preemption analysis, our case law is to the contrary. See Puente Ariz. v. Arpaio, 821 F.3d 1098, 1106 n.8 (9th Cir. 2016) (rejecting the proposition "that the state's purpose in passing a statute is not relevant to our preemption analysis, as both this court and the Supreme Court have analyzed purpose in preemption cases"). In *Granite Rock*, moreover, the Supreme Court expressly considered whether the state's "true purpose in enforcing a permit requirement [was] to prohibit [the plaintiff's] mining entirely." *Granite Rock*, 480 U.S. at 588.

anadromous salmonids and habitat essential to the recovery and conservation of Pacific lamprey." 2017 Or. Laws ch. 300, § 4(2). "'Essential indigenous anadromous salmonid habitat' means the habitat that is necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing." Or. Rev. Stat. § 196.810(1)(g)(B). "'Indigenous anadromous salmonid' means chum, sockeye, Chinook and Coho salmon, and steelhead and cutthroat trout, that are members of the family Salmonidae and are listed as sensitive, threatened or endangered by a state or federal authority." *Id.* § 196.810(1)(g)(C).

Similarly, in Senate Bill 838, the legislature found that "[m]ining that uses motorized equipment in the beds and banks of the rivers of Oregon can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments of this state in habitat enhancement and areas of cultural significance to Indian tribes." 2013 Or. Laws ch. 783, § 1(4). The legislature found that, "[b]etween 2007 and 2013, mining that uses motorized equipment in the beds and banks of the rivers of Oregon increased significantly, raising concerns about the cumulative environmental impacts." *Id.* § 1(5). It found that "[t]he regulatory system related to mining that uses motorized equipment in the beds and banks of the rivers of Oregon should be

efficient and structured to best protect environmental values." *Id.* § 1(6).

The plaintiffs' attempts to cast doubt on Senate Bill 3's environmental purpose are unconvincing. They contend that Senate Bill 3's restrictions were not "required to advance any bona fide environmental interest of the State of Oregon" and instead were "primarily motivated by objections from other users of the waterways." Their evidence, however, fails to substantiate these broad claims.

They rely, first, on two Oregon statutes, but neither one undermines the Oregon legislature's determination that restrictions on motorized mining are necessary to protect fish habitat. The first of these statutes, former Or. Rev. Stat. § 517.123(3), adopted in 1999, simply found that "prospecting, small scale mining and recreational mining . . . [c]an be conducted in a manner that is not harmful and may be beneficial to fish habitat and fish propagation." 1999 Or. Laws ch. 354, § 2(3). There is, of course, no inconsistency between the general finding that small scale mining can be conducted in a non-harmful manner and Senate Bill 3's conclusion that it was necessary, "[i]n order to protect indigenous anadromous salmonids and habitat essential to the recovery and conservation of Pacific lamprey," to restrict one particular type of small scale mining - "motorized in-stream placer mining" - in certain environmentally sensitive areas. 2017 Or. Laws ch. 300, § 4(2). In any event, the Oregon

legislature repealed the 1999 finding in 2013, noting a "significant[]" increase in motorized mining between 2007 and 2013 that "pose[d] significant risks to Oregon's natural resources, including fish and other wildlife." 2013 Or. Laws ch. 783, §§ 1(4)-(5), 10. The 1999 finding, therefore, does nothing to undermine Senate Bill 3's avowed and self-evident environmental purpose.

The second statute upon which the plaintiffs rely, Or. Rev. Stat. § 517.005, says only that

> Technological advances in the mining industry, coupled with reclamation efforts, have greatly reduced the environmental impacts of mining operations. The size and scope of modern operations is such that the operations do not cause interference with other natural resource uses, particularly in an area as vast as eastern Oregon.

Or. Rev. Stat. § 517.005(4). Because this provision pertains to mining generally, and not to the particular environmental concerns addressed by Senate Bill 3, it too does nothing to undermine the validity of Senate Bill 3's stated environmental purpose.

Beyond these two statutes, the plaintiffs' evidence regarding Senate Bill 3's purpose consists solely of a single statement in the record by plaintiff Michael Hunter. Hunter testified that, "[i]n [the Willamette Valley Miners'] experience,

the State of Oregon regulates in utter disregard to the National interest in mineral development, instead seeking to placate other user groups who resent, and desire to eliminate the presence of miners on public lands." Hunter decl. ¶ 12. Even granting this statement may reflect Hunter's sincere personal opinion, it is wholly lacking in the specific factual support that would be needed to create a genuine issue of material fact [**37] as to Senate Bill 3's purpose. *See FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) (as amended) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.").

In sum, because Senate Bill 3 has a clear environmental purpose, is tailored to that purpose, and does not prohibit mining, choose land uses or fall within Oregon's distinct land use planning system, we hold that it is an environmental regulation rather than a state land use planning law. Thus, even assuming for purposes of our analysis that federal law preempts the extension of state land use plans on federal lands, Senate Bill 3 is not preempted.

Our dissenting colleague takes the view that any state environmental regulation — whether in the form of a "use" restriction or a "standard" - constitutes a "de facto land use regulation preempted by federal law" whenever it renders regulated mining claims commercially impracticable. Dissent 70-71. Where a conflict

exists between regulated mining claims and a need to protect the environment, the mining claims must always take precedence.

The dissent assures us that a commercial practicability test would not undermine environmental protection because it would affect only state regulation, not federal regulation. Dissent 69 ("Even if federal law preempts Oregon's attempt to apply Senate Bill 3 to federal lands, the miners must still comply with all environmental laws and standards imposed expressly by federal statutes and regulations."). But this is not how environmental protection on federal lands is achieved. As *Granite Rock* recognizes, the federal scheme relies on the states to provide environmental regulation of mining claims on federal lands. Because federal law "expressly contemplate[s] coincident compliance with state as well as with federal law," *Granite Rock*, 480 U.S. at 584, "reasonable state environmental regulation is not pre-empted," *id.* at 589. That is why the U.S. Departments of Agriculture and the Interior, which are the federal agencies charged with management and environmental protection of the federal lands impacted by Senate Bill 3, have joined this case on the side of Oregon, urging us to uphold Senate Bill 3 against the plaintiffs' preemption challenge.

Under the dissent's commercial impracticability test, even a patently destructive method of mining would be permitted as long as it represented the only commercially viable means

of extracting minerals from the ground, irrespective of the havoc it would wreak on wildlife and habitat. This is the mining "at all costs" approach that the plaintiffs expressly disclaim. Reply Br. 29. We can find no support for that approach in federal mining law or case law. On the contrary, federal mining law, *see, e.g.,* 30 U.S.C. § 21a, the Supreme Court and the United States as amicus curiae all agree that mining must be pursued consistent with environmental needs, not irrespective of environmental cost. That is why "reasonable state environmental regulation is not pre-empted." *Granite Rock*, 480 U.S. at 589. We respectfully decline the dissent's suggestion to hold that reasonable state environmental regulation is preempted merely because it renders regulated mining claims unprofitable. That approach cannot be reconciled with the balance Congress has sought to achieve.

2. Conflict Preemption: The Plaintiffs' Argument That Senate Bill 3 Is Preempted Because It Is "Prohibitory" Rather Than "Regulatory"

We next consider the plaintiffs' contention that Senate Bill 3 is conflict preempted because it is "prohibitory" rather than "regulatory" in its fundamental character. There is, of course, some overlap between this argument and the field preemption argument we have just addressed. In both instances, the plaintiffs contend Senate Bill 3 is preempted because it *prohibits* a particular mining method rather than merely subjecting

that mining method to an environmental standard. Despite these similarities, however, we treat the two arguments as distinct. The plaintiffs' field preemption argument is based on *Granite Rock's* distinction between land use planning on the one hand and environmental regulation on the other. By contrast, their current argument — finding a distinction between "prohibitory" and "regulatory" state environmental regulation and deeming the former conflict preempted — is largely based on *South Dakota Mining Association v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998).

In *South Dakota* Mining, county voters approved an ordinance that amended the county's zoning laws to prohibit the issuance of new or amended permits for surface metal mining in the 40,000-acre Spearfish Canyon Area, 90 percent of which fell within a national forest. *See id.* at 1006-07. The plaintiffs argued the ordinance was preempted because it stood as an obstacle to the accomplishment of the full purposes and objectives of Congress embodied in the Mining Act of 1872. *See id.* at 1009.

"To determine the purposes and objectives that are embodied in the Mining Act," the Eighth Circuit considered the language of the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a, and the Mining Act itself, 30 U.S.C. § 22. As noted, § 21a states:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.

30 U.S.C. § 21a. The Mining Act, in turn, states:

> Except as otherwise provided, all valuable mineral deposits in [**42] lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention

> to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Id. § 22. In light of these statutes, the Eighth Circuit concluded the Mining Act embodies several congressional purposes, including

> the encouragement of exploration for and mining of valuable minerals located on federal lands, providing federal regulation of mining to protect the physical environment while allowing the efficient and economical extraction and use of minerals, and allowing state and local regulation of mining so long as such regulation is consistent with federal mining law.

South Dakota Mining, 155 F.3d at 1010.

The Eighth Circuit next considered whether the challenged ordinance stood as an obstacle to these purposes and objectives. At the outset, the court observed that, because surface metal mining was the only practical way to "actually mine the valuable mineral deposits located on federal land in the area," the ordinance was "a de facto ban on mining in the area." *Id.* at 1011. The court then held that, as a de facto ban on mining, the ordinance was preempted:

> The ordinance's de facto ban on mining on federal land acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act. Congress has encouraged exploration and mining of valuable mineral deposits located on federal land and has granted certain rights to those who discover such minerals. Federal law also encourages the economical extraction and use of these minerals. The Lawrence County ordinance completely frustrates the accomplishment of these federally encouraged activities. A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution. *The ordinance is prohibitory, not regulatory, in its fundamental character*. The district court correctly ruled that the ordinance was preempted.

Id. (emphasis added).

The plaintiffs discern from *South Dakota Mining*, and from federal statutes governing mining, a general principle that state environmental regulations are preempted, categorically, whenever they are "prohibitory" rather than "regulatory" in their "fundamental character." "Even prohibitions on the use of particular mining methods," they say, "create an

obstacle to the full accomplishment of Congressional purposes." We disagree.

Like the United States, "[w]e would agree that were a state to completely prohibit all mining activity on federal lands, federal mining law would preempt the ban." Brief of the United States as Amicus Curiae 21. We cannot agree with the plaintiffs, however, that conflict preemption in this area turns on whether a state environmental regulation could be viewed as "prohibitory" or "regulatory" in its "fundamental character." For one thing, as the government explains, the distinction likely would be unworkable:

> It is unclear how this Court would determine whether [Senate Bill 3] is "prohibitory . . . in its fundamental character." *South Dakota Mining*, 155 F.3d at 1005. Certainly it prohibits some very specific types of mining activity in very specific places . . . , but in the process of identifying where its prohibitions apply it seems "regulatory" in nature. In a sense, [Senate Bill 3] is both regulatory and prohibitory, but whether that makes it preempted is a question to be answered by long-established preemption law. Regardless of whether a state regulatory prohibition is considered "prohibitory" or "regulatory," it is permissible so long as it does not pose an obstacle to Congressional purposes or make compliance with federal law physically impossible.

Id. at 22.[10]

We are not persuaded, moreover, that federal statutes governing mining evince a congressional purpose to preempt, categorically, state environmental regulations that are "prohibitory" in their "fundamental character."[11] The Mining Act of 1872, upon which the plaintiffs heavily rely, states only that "all valuable mineral deposits in lands belonging to the United States. . . shall be free and open to exploration and purchase." 30 U.S.C. § 22. The plaintiffs contend that this statute's "free and open" language "create[s] a Congressional mining objective inconsistent with state-law based prohibitions of mining activity." But the Mining Act expressly incorporates state regulation of mining activity, stating that exploration authorized by the statute must occur "under regulations prescribed by

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[10] We have drawn a distinction between "regulatory" and "prohibitory" laws in other contexts, but those analyses are not helpful here. *E.g., United States v. Dotson*, 615 F.3d 1162, 1168 (9th Cir. 2010) (Assimilative Crimes Act).

[11] This conclusion is a consistent with a leading treatise on mining law. See 5 American Law of Mining § 174.04[2][c] (2d ed. 2018) (noting that "state law requirements prohibiting a federally authorized activity on federal land are less likely to be upheld," but" the *Granite Rock* decision indicates that state law requirements that can be harmonized with federal regulations may be enforceable").

law." *Id.*[12] Nothing in the Mining Act suggests a categorical distinction between "prohibitory" and "regulatory" state laws.

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[12] Although the phrase "under regulations prescribed by law" applies to state as well as federal law — a conclusion that follows from § 22's later reference to "laws of the United States," see *Corley v. United States*, 556 U.S. 303, 315, 129 S. Ct. 1558, 173 L. Ed. 2d 443 (2009) - the plaintiffs suggest it incorporates only state property law, not state environmental law, pointing out that a separate provision of the Mining Act incorporates state law only with respect to possessory title. See 30 U.S.C. § 26 (granting rights of possession and enjoyment to locators who "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*" (emphasis added)). But there is nothing surprising in the fact that § 26, a provision addressing possessory title, refers only to state laws respecting title. This tells us nothing about the scope of the state law incorporated by § 22, which deals with the much broader subject of making federal lands free and open to exploration. Indeed, that § 26 expressly limits the incorporation of state law to laws respecting "possessory title," and § 22 does not, supports the conclusion that the scope of state laws incorporated by § 22 is not limited to those respecting title. *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))); *see also Rinehart*, 377 P.3d at 824 (explaining that § 22's "express acknowledgement[] of the application of state and local law to federal mining claims suggest[s] an apparent willingness on the part of Congress to let federal and state regulation broadly coexist").

We likewise find no support for the plaintiffs' position in the Surface Resources and Multiple Use Act of 1955. This law gives the United States the right to manage surface resources on unpatented mining claims, subject to the important proviso that "any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to *endanger or materially interfere* with prospecting, mining or processing operations or uses reasonably incident thereto." 30 U.S.C. § 612(b) (emphasis added). As with the Mining Act of 1872, nothing in this law suggests Congress intended to draw a distinction between "prohibitory" and "regulatory" measures. We have, moreover, already held that this law permits environmental regulations, such as Senate Bill 3, that prohibit the use of particular mining methods. *See United States v. Richardson*, 599 F.2d 290, 291, 295 (9th Cir. 1979) (holding the Forest Service could, without running afoul of § 612(b), require the locators of unpatented

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The plaintiffs' reliance on 30 U.S.C. § 28 is similarly unpersuasive. That provision requires locators to perform annual work on their unpatented claims to maintain their exclusive rights. *See* 30 U.S.C. § 28. Nothing in Senate Bill 3 precludes miners from performing work on or making improvements to their claims, and to the extent miners elect not to perform work because state environmental regulation makes working or improving their claims unprofitable, that scenario is as likely to arise from a "regulatory" measure as it is from a "prohibitory" one.

mining claims on national forest lands to use nondestructive methods of prospecting, where the locators' utilization of blasting and bulldozing was destructive to the surface resources).[13]

The plaintiffs' argument similarly finds no support in the Mining and Minerals Policy Act of 1970. Under this law:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and *environmental needs*, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of

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[13] We also find nothing in the 1955 law to suggest Congress intended to limit state environmental regulation. On its face, § 612(b) imposes limits on only the federal government, not states, and it expressly preserves state water quality controls:

> [N]othing in this subchapter . . . shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.
> 30 U.S.C. § 612(b).

> our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to *lessen any adverse impact of mineral extraction and processing upon the physical environment* that may result from mining or mineral activities.

30 U.S.C. § 21a (emphasis added).

The plaintiffs read this statutory language to suggest that Congress intended to meet the nation's environmental needs solely through the process of reclamation, not through regulation of mining itself. This reading, however, lacks any basis in the statutory text or in case law. The plaintiffs alternatively look to the statute's reference to "lessen[ing]" adverse environmental impacts. They contend "[l]essening impact is a regulatory action," distinct from prohibiting mining activities. We again disagree. The statute's reference to lessening impacts relates solely to reclamation. In any event, regulators can lessen impacts through either "prohibitory" or "regulatory" action. *E.g., Richardson*, 599 F.2d at 295.

The plaintiffs' reliance on the Surface Mining Control and Reclamation Act of 1977 is equally flawed. This law allows a state to ask the Secretary of the Interior to declare residential areas unsuitable for mining. *See* 30 U.S.C. § 1281. The plaintiffs contend that "Congress' provision of this and other federal processes for resolving

state/federal conflict over mining on federal land is utterly inconsistent with any Congressional intent to allow states to simply prohibit the mining themselves." We agree, of course, that states cannot simply prohibit mining on federal lands. But nothing in § 1281 suggests Congress intended to preempt environmental regulations prohibiting particular mining methods in specified, environmentally sensitive areas.

The plaintiffs' reliance on federal land management statutes suffers from similar problems. The Supreme Court has examined these statutes and concluded that Congress did not intend by these laws to preempt reasonable state environmental regulation. *See Granite Rock*, 480 U.S. at 582-93. Nothing in these statutes, moreover, suggests a distinction between "prohibitory" and "regulatory" state environmental regulation.

In sum, the plaintiffs' proposed distinction between regulations that are "prohibitory" or "regulatory" in their "fundamental character" is neither workable nor grounded in the federal statutes upon which the plaintiffs rely. We find in these statutes no indication that Congress intended to preempt state environmental regulation merely because it might be viewed as "prohibitory." We therefore reject the plaintiffs' contention that Senate Bill 3 stands as an obstacle to the accomplishment of the full purposes and objectives of Congress merely because it "prohibits" a particular method of

mining in the portions of rivers and streams containing essential habitat for threatened and endangered salmonids.[14]

This conclusion does not place us at odds with *South Dakota Mining*. Although the Eighth Circuit drew a distinction between "prohibitory" and "regulatory" measures, it did so in the context of a county ordinance amounting to a "de facto ban on mining" that applied broadly and indiscriminately to federal lands within the county. 155 F.3d at 1011. The ordinance at issue effectively prohibited mining, covered 40,000 acres, targeted federal lands (90 percent of the land affected by the ban was in a national forest), lacked any environmental purpose and was part of the county's zoning law. Senate Bill 3, by contrast, is not part of Oregon's zoning law, is not a de facto ban on mining, has an express environmental purpose, does not single out federal land and carefully targets only designated essential salmonid habitat. Whereas the ordinance in *South Dakota Mining* was an attempt by county voters to overrule federal land

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[14] This conclusion is consistent with the California Supreme Court's recent decision in *Rinehart*, 1 Cal. 5th 652, 206 Cal. Rptr. 3d 571, 377 P.3d 818, *cert. denied sub nom. Rinehart v. California*, 138 S. Ct. 635, 199 L. Ed. 2d 525 (2018). In rejecting a conflict preemption challenge to a California law prohibiting suction dredge mining in order to protect endangered coho salmon habitats, *Rinehart* concluded that "[t]he federal statutory scheme does not prevent states from restricting the use of particular mining techniques based on their assessment of the collateral consequences for other resources." *Id.* at 829.

use decisions, Senate Bill 3 complements those decisions by playing the traditional role served by state environmental regulation. *See, e.g.*, 36 C.F.R. § 228.8(a)-(c); 43 C.F.R. §§ 3809.3, 3809.420(b)(4)-(6). Were Senate Bill 3 an encroachment on federal land use decisions, we would expect the United States to say so. The United States, however, takes the position that Senate Bill 3 "is not preempted by federal law." Brief of the United States as Amicus Curiae 28.[15]

The plaintiffs' reliance on *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984), *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *Brubaker v. Board of County Commissioners, El Paso County*, 652 P.2d 1050 (Colo. 1982), *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969 (Idaho 1976), and *Elliott v. Oregon International Mining Co.*, 60 Ore. App. 474, 654 P.2d 663 (Or. Ct. App. 1982), does not require a different conclusion. Each case predates the Supreme Court's holding in *Granite Rock* that reasonable state environmental regulation is not preempted by federal law. *See Granite Rock*, 480 U.S. at 589; Rinehart, 377 P.3d at 829. Similar to *South Dakota Mining*, moreover, most of these cases involved improper attempts by local governments to displace, rather than supplement, federal land use decisions. *See Ventura County*, 601 F.2d at 1084-85 (precluding the county from

[15] The United States' amicus brief is filed on behalf of the U.S. Department of the Interior, the U.S. Department of Agriculture and the U.S. Department of Justice's Environment and Natural Resources Division.

applying "land use planning controls" "in an attempt to substitute its judgment for that of Congress"); *Brubaker*, 652 P.2d at 1059 ("This is not denial of a permit because of failure to comply with reasonable regulations supplementing the federal mining laws, but reflects simply a policy judgment as to the appropriate use of the land."); *Elliott*, 654 P.2d at 665, 668 (barring the application of county zoning laws prohibiting mining because they did "not simply supplement federal mining law"). In addition, *Ventura County* involved the Mineral Lands Leasing Act of 1920, not the laws at issue here, and, in contrast to the case before us, the drilling operations at issue in *Ventura County* were subject to "detailed [federal] supervision" and an "extensive federal scheme reflecting concern for the local environment." 601 F.2d at 1084.

3. Conflict Preemption: The Plaintiffs' Argument That Senate Bill 3 Does Not Constitute Reasonable Environmental Regulation

We have consistently held that Congress intended to permit reasonable environmental regulation of mining claims on federal lands. In *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981), for example, after considering the purposes underlying the Mining Act of 1872 and the Organic Act of 1897, including 16 U.S.C. §§ 475, 478 and 551, we concluded:

> The Secretary of Agriculture has been given the responsibility and the power to maintain

> and protect our national forests and the lands therein. While prospecting, locating, and developing of mineral resources in the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition, the Secretary may adopt reasonable rules and regulations which do not impermissibly encroach upon the right to the use and enjoyment of placer claims for mining purposes.

642 F.2d at 299. In *United States v. Shumway*, 199 F.3d 1093 (9th Cir. 1999), where we considered not only the Mining Act and the Organic Act but also the "endanger or materially interfere" standard embodied in 30 U.S.C. § 612(b), we once again held that "the Forest Service may regulate use of National Forest lands by holders of unpatented mining claims . . . to the extent that the regulations are 'reasonable' and do not impermissibly encroach on legitimate uses incident to mining and mill site claims." 199 F.3d at 1107.

Congress, moreover, clearly intended reasonable state environmental regulation to govern mining on federal lands. In *Granite Rock*, the Supreme Court held that "reasonable state environmental regulation is not pre-empted." 480 U.S. at 589; *see also id.* at 593. The plaintiffs do not dispute that a reasonableness standard applies here, but they argue that Senate Bill 3 is preempted because it constitutes an *unreasonable* environmental regulation.

The plaintiffs' arguments regarding unreasonableness echo those we have already considered. They contend Senate Bill 3 is an unreasonable regulation because it *prohibits* a particular method of mining in designated habitat, rather than subjecting that mining to a "prescribed limit" or pollution standard, and because it allegedly was "enacted for reasons expressly beyond protection of the environment." We have already addressed these arguments. The preemption analysis does not turn on a formalistic distinction between "prohibitory" and "regulatory" measures, and the plaintiffs' evidence does not create a genuine dispute as to Senate Bill 3's important environmental purpose. We recognize that unreasonable, excessive or pretextual state environmental regulation that unnecessarily interferes with development of mineral resources on federal land may stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. We agree with the United States, however, that in this case that line has not been crossed. As the government explains, "[a] state law such as [Senate Bill 3] that is clearly intended to protect the natural environment by prohibiting the use of particular mining methods or equipment in carefully[] designated locations is not so at odds with Congress's purposes that it is preempted by federal law." Brief of the United States as Amicus Curiae 2-3.

4. The Plaintiffs' Argument That Genuine Issues of Material Fact Preclude Summary Judgment

The plaintiffs argue that genuine issues of material fact preclude summary judgment in favor of the state. For purposes of our de novo review of the summary judgment record, however, we have viewed the evidence in the light most favorable to the plaintiffs, and we have assumed — solely for purposes of determining whether Oregon is entitled to judgment as a matter of law — that Senate Bill 3 will have a significant adverse impact on the mining operations of the plaintiffs, making it effectively impossible for at least some of them to recover the valuable mineral deposits present on their claims. The only material dispute is whether, assuming these facts, Senate Bill 3 is preempted. Because that issue is one of law, summary judgment is appropriate. *See Inland Empire Chapter of Associated Gen. Contractors of Am. v. Dear*, 77 F.3d 296, 299 (9th Cir. 1996) (holding a "finding of no preemption is a legal question").[16]

CONCLUSION

The district court properly rejected the plaintiffs' preemption claims. We hold that Senate Bill 3 is not preempted by federal law. The

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[16] Contrary to the dissent, we do not today question the validity of as-applied preemption challenges. Dissent 66 & n.7.

judgment of the district court is therefore affirmed.

AFFIRMED.

N.R. SMITH, Circuit Judge, dissenting:

The National Forest Management Act of 1976 (NFMA), Pub. L. No. 94-588, 90 Stat. 2949 (1976), and the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743 (1976), occupy the field of land use planning regulation on federal lands. Because the permanent ban on motorized mining in Oregon Senate Bill 3 does not identify an environmental standard to be achieved but instead restricts a particular use of federal land, it must be deemed a land use regulation preempted by federal law. *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 586-88, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987). Therefore, I must dissent.

I.

Although technically an open question, there is little dispute that Congress has occupied the field of land use planning on federal lands through its enactment of NFMA and FLPMA.[1] *See id.* at 585 ("For purposes of this discussion and without deciding this issue, we may assume

[1] The majority (like the court in *Granite Rock*) assumes this point without deciding it. I address the merits of the issue because it is necessary to my determination that federal law preempts Senate Bill 3.

that the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands."); *id.* at 612-13 (Scalia, J., dissenting) ("The Court is willing to assume that California lacks such authority on account of [NFMA] and [FLPMA]. I believe that assumption is correct.").

Field preemption arises when "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Nat'l Fedn. of the Blind v. United Airlines*, Inc., 813 F.3d 718, 733 (9th Cir. 2016) (internal quotation marks omitted) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)). "The essential field preemption inquiry is whether the density and detail of federal regulation merits the inference that any state regulation within the same field will necessarily interfere with the federal regulatory scheme." *Id.* at 734. To make this determination, our cases require first "delineat[ing] the pertinent regulatory field." *Id.* We have "emphasized the importance of delineating the pertinent area of regulation with specificity before proceeding with the field preemption inquiry." *Id.* Here the pertinent field involves any land use regulation of federal lands.

The next step in our analysis requires us to "survey the scope of the federal regulation within th[is] field." *Id.* Here, the relevant statutes are NFMA and FLPMA. Taken together, these

statutes establish a comprehensive regulatory regime for land use planning on federal lands, including the role of states in the planning process. First, NFMA vests the authority to enact federal land use plans with respect to forest service lands in the Secretary of Agriculture, and FLPMA vests the authority to enact federal land use plans with respect to all other federal land in the Secretary of the Interior. 16 U.S.C. § 1604(a) ("[T]he Secretary [of Agriculture] shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System . . . ."); 43 U.S.C. § 1712(a) ("The Secretary [of the Interior] shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.").

Second, NFMA and FLPMA expressly designate the level of state participation contemplated by federal law. *See* 16 U.S.C. § 1604(a); 43 U.S.C. § 1712(c)(9). NFMA requires "coordin[ation] with the land and resource management planning processes of State and local governments and other Federal agencies." 16 U.S.C. § 1604(a). FLPMA requires similar coordination with states, but the requirement is limited "to the extent consistent with the laws

governing the administration of public lands." 43 U.S.C. § 1712(c)(9). Moreover, FLPMA directs that the Secretary of the Interior

> shall, *to the extent he finds practical*, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands.

Id. (emphasis added). As Justice Scalia noted in *Granite Rock*, agreeing (in his dissent) with the majority's assumption of preemption, these "requirements would be superfluous, and the limitation upon federal accommodation meaningless, if the States were meant to have independent land use authority over federal lands." 480 U.S. at 613 (Scalia, J., dissenting).

Thus, the combination of NFMA and FLPMA occupy the field of land use regulation on federal lands. Accordingly, federal law preempts the extension of any state land use planning

regulation or ordinance onto federal lands. *Arizona v. United States*, 567 U.S. 387, 401, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012) ("Where Congress occupies an entire field . . . even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.").

II.

Assuming that NFMA and FLPMA occupied the field of federal land use regulation, *Granite Rock* identified the legal framework for determining whether state environmental regulation impermissibly enters the congressionally occupied field of federal land use planning. First, the Court identified the dividing line between environmental regulation and land use planning. "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." Granite Rock, 480 U.S. at 587. The Court also made clear that the inquiry requires examination not simply of the text of the law, but of its practical effect. "The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable." *Id.*

The plaintiff miners and mining organizations (collectively "the miners") challenge Senate Bill 3 on both grounds. They assert that Senate Bill 3 impermissibly (A) identifies a particular use of the land that is prohibited without reference to an identifiable environmental standard and (B) renders mining within the identified zones impracticable. Both arguments have merit.

A.

Granite Rock instructs that "environmental regulation, at its core, . . . requires only that, *however the land is used*, damage to the environment is *kept within prescribed limits*." *Id.* (emphasis added) By contrast land use regulation identifies or restricts "particular uses" of land. *Id.*

A brief *review* of the text of Senate Bill 3 reveals its true character as a land use regulation. The operative language reads "motorized in-stream placer mining may not be permitted to occur up to the line of ordinary high water in any river in this state containing essential indigenous anadromous salmonid habitat, from the lowest extent of essential indigenous anadromous salmonid habitat to the highest extent of essential indigenous anadromous salmonid habitat." 2017 Or. Laws ch. 300, § 4(2). The operative language identifies particular tracts of land and prohibits a particular use of these lands. The operative language does not identify a "prescribed limit[]"

on "damage to the environment" that must be avoided "however the land is used." *Granite Rock*, 480 U.S. at 587. Accordingly, federal law preempts Senate Bill 3 as an improper attempt to extend a state land use regulation onto federal land.

The majority disagrees for four reasons: (1) Senate Bill 3 permits non-motorized mining, (2) it is not located in the land use section of the Oregon state code, (3) it has an environmental purpose, and (4) it is reasonably tailored to accomplish the environmental purpose without unduly interfering with mining operations. The majority's arguments lack merit for the reasons set forth below.

1.

The majority first asserts (without any citation or authority) that, because Senate Bill 3 restricts only one type of mining, it is not a land use planning regulation. The majority's analysis not only conflicts with Supreme Court precedent in *Granite Rock*, but it also erases any clear line between land use planning and environmental regulation.

The majority criticizes the *Granite Rock* principle that environmental regulation "at its core" "prescribe[s] limits" on "damage to the environment" ("however the land is used").

Granite Rock, 480 U.S. at 587.[2] To the majority, this distinction is "formalistic" and "make[s] no sense." Maj. at 31. Yet, a line must be drawn, because "Congress has indicated its understanding of land use planning and

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[2] The majority goes so far as to assert that the *Granite Rock* standard is somehow non-binding dicta. *See* Maj. at 31 ("*Granite Rock* does not hold that only standards, not restrictions on activities, are permissible environmental regulation."). *Granite Rock* fully analyzed the distinction between environmental regulation and land use planning, and the framework it announced was necessary to its holding. 480 U.S. at 585-89. Because the court assumed that land use planning regulation was preempted, it was necessary to decide whether California's permitting system was a land use planning regulation or an environmental regulation. *Id.* at 586. The Court applied the *Granite Rock* framework and determined that California's permit system was a means of identifying environmental standards to be applied to the mining operation, not an attempt to regulate particular uses of the land at issue. *See id.* at 586 ("While the [California law] gives land use as well as environmental regulatory authority to the Coastal Commission, *the state statute also gives the Coastal Commission the ability to limit the requirements it will place on the permit* . . . . Since the state statute does not detail exactly what *state standards* will and will not apply in connection with various federal activities, the statute must be understood to allow the Coastal Commission *to limit the regulations* it will impose in those circumstances." (emphasis added)). This is plainly sufficient to bind our decision here. *Cf. Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." (citation omitted)).

environmental regulation as distinct activities." *Granite Rock*, 480 U.S. at 587.

Far from being nonsense, the formalism of the *Granite Rock* line makes it clear and easy to apply in deciding facial challenges to state environmental laws.[3] Moreover, the majority offers no alternative standard for drawing a line between environmental regulation (not ordinarily preempted) and land use regulation (always preempted). Without a standard, the majority has no basis to reject the miners' challenge.

Specifically, the majority's suggestion that the law is permissible because it regulates only one means of mining begs the question of the appropriate level of generality at which a law must prohibit a particular use to be deemed a land use planning regulation. Does land use planning involve only broad categories of uses, for example commercial versus noncommercial uses? Or can land use planning also include dividing tracts for commercial fishing from those for commercial mining? Would a law prohibiting the use of any mining tools (motorized or not) within identified zones amount to environmental regulation or land use planning? What if the law also required miners to tie one hand behind their backs? The majority's bare assertion that

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[3] The suction hose size and vehicle weight hypotheticals raised by the majority are not difficult cases under the clear line drawn in *Granite Rock*. Neither regulation identifies an *environmental* standard to be achieved.

prohibiting a type of mining does not amount to regulating "particular uses for the land" fails to articulate a meaningful standard and flies in the face of framework set forth in *Granite Rock*. 480 U.S. at 587.[4]

The premise of the majority's insistence that the *Granite Rock* line is nonsense also lacks merit. *See* Maj. at 31. In addition to being clear, the line drawn in *Granite Rock* serves important functions. For example, standards identify an environmental end to be achieved and offer a means of measuring the degree to which a particular use conflicts with an environmental objective. They are also facially neutral towards varying uses of the land. The majority is right that environmental regulations certainly *can* impact mining practicability. But the Supreme Court made clear that this impact matters only in

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[4] The majority notes that many of the miners are still able to mine other portions of their claims or are still permitted to mine by hand in the zones covered by the law. I know of no authority for the proposition that a law ceases to be a land use plan simply because it governs only a subset of land, and not all land. Indeed, most land use plans divide land into different zones prescribing a different set of permissible uses for each zone. Accordingly, the fact that some miners have in-stream as well as out-of-stream operations (or operations inside and outside of essential salmonid habitat) matters not at all in our determination of whether Senate Bill 3 is a land use regulation. Likewise, the fact that the law permits mining by hand does not mean its prohibition on motorized mining is not a land use ordinance. Land use plans regulate particular uses all the time. For example, a land use plan might specify that within a residential neighborhood in-home businesses are permitted, but office buildings are not.

the exceptional circumstance where an environmental standard is "so severe" as to render any mining within an identified zone "commercially impracticable." *See Granite Rock*, 480 U.S. at 587. The possibility of a narrow exception, does not eliminate the value of the general rule. I address this narrow exception in greater detail in Part II.B.

The Supreme Court meaningfully considered the difficult issue of how to discern land use regulations from environmental ones. The majority errs in failing to follow its instruction. Applying the *Granite Rock* framework here, Senate Bill 3 is a land use regulation that is preempted as applied to federal lands.

2.

The majority next asserts that Senate Bill 3 is not a land use regulation, because it is codified outside the sections of the Oregon Code governing land use planning. However, I know of no canon of construction (and the majority cites none) that suggests that a law's placement within the code can override the substantive import of its text. Further, there are other Oregon land use statutes outside the code sections the majority identifies. *See, e.g.*, Or. Rev. Stat. § 390.250 (authorizing land use planning "to promote the public scenic, park and recreational use of lands along Bear Creek"); Or. Rev. Stat.§ 390.308 (authorizing land use planning to complete the "Oregon Coast Trail"); Or. Rev. Stat. § 390.112 ("The State Parks

and Recreation Department shall propose to the State Parks and Recreation Commission additional criteria for the acquisition and development of new historic sites, parks and recreation areas.").

3.

The majority next asserts that Senate Bill 3 is an environmental regulation because of its "obvious and important environmental purpose." Maj. at 32. To be sure, the prefatory language in Senate Bill 3 identifies an environmental purpose "to protect indigenous anadromous salmonids and habitat essential to the recovery and conservation of Pacific lamprey." 2017 Or. Laws ch. 300, § 4(2).[5] But many land use plans have

[5] The majority also cites legislative findings that "[m]ining that uses motorized equipment in the beds and banks of the rivers of Oregon can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments of this state in habitat enhancement and areas of cultural significance to Indian tribes." 2013 Or. Laws ch. 783, § 1(4). Maj. at 33. Yet there is little substance to this finding. The legislature identified only the possibility of environmental harm because it used the language "*can* pose significant risks." *Id.* (emphasis added). Almost anything "can pose significant risks" to the environment. Nothing in these findings suggests that any form of motorized mining *necessarily* causes an adverse effect on wildlife resources. Like the prefatory language in Senate Bill 3, this language does not purport to identify an environmental standard to be achieved. The same is true for the majority's other citations to Oregon law. *See* Maj. at 32.

environmental purposes as well.[6] Systems of national parks, state parks, and designated wilderness areas are prime examples of land use planning aimed at accomplishing obvious and important environmental purposes.

Here, the means of accomplishing the environmental purpose undisputedly prohibit a particular use of the land, without reference to an environmental standard to be achieved. Unlike the permit system in *Granite Rock*, this law does not involve a flexible regime that "must be understood to allow [Oregon] to limit the regulations it will impose" in a manner consistent with allowing permissible federal mining to continue. *See Granite Rock*, 480 U.S. at 586.

In contrast to Senate Bill 3, the federal regulations governing mining on public lands cited by the majority are good examples of standards based environmental regulation. Maj. at 22. Each identifies environmental standards to be achieved, rather than particular uses to be prohibited. *See, e.g.*, 36 C.F.R. § 228.8 (identifying federal and state air, water, and solid waste standards that must be complied with and requiring operators to "take all *practicable* measures to maintain and protect fisheries and wildlife habitat which may be affected by the

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[6] As the majority notes, purpose is certainly relevant to our preemption analysis. *See* Maj. at 32 n.9. But nothing in our cases suggests that a genuine purpose can innoculate a law that substantively intrudes on a field preempted by Congress. The majority's emphasis on purpose proves too little.

operations" (emphasis added)); 43 C.F.R. § 3809.3 (requiring operators to follow "a higher *standard*" under state law if one has been enacted (emphasis added)); 43 C.F.R. § 3809.420(b) (identifying federal and state air, water, and solid waste standards that must be complied with and requiring operators to "take such action *as may be needed to prevent adverse impacts* to threatened or endangered species, and their habitat which may be affected by operations" (emphasis added)).

Simply, the environmental purpose behind Senate Bill 3 does not identify an environmental standard. Indeed, nothing in the law's text (or the record in this case) indicates that motorized mining—in any form or at any scale—necessarily causes harm to indigenous anadromous salmonids or Pacific lamprey. On its face, Senate Bill 3 would prohibit a motorized mining operation irrespective of the miner's compliance with all state and federal environmental standards, including the federal Endangered Species Act, National Environmental Policy Act, and Clean Water Act. This remains true, even if federal (or state) environmental review determines that the net effect of a motorized-mining operation is positive for anadromous salmonids and Pacific lamprey. Senate Bill 3 simply mandates that—irrespective of the actual environmental impact—motorized mining is a prohibited use of land in the identified zones. Congress has preempted this type of intrusion into the field of federal land use planning.

4.

Lastly, the majority persistently makes the bare assertion that federal law does not preempt Senate Bill 3, because it is "tailored to" its environmental purpose. *See Maj.* at 27 (asserting (without elaboration) that the law is "tailored to achieve its environmental purpose without unduly interfering with mining operations"); Maj. at 35 (concluding that Senate Bill 3 "is tailored" to its environmental purpose). The majority cites no legal authority (and I am aware of none) for the proposition that federal preemption analysis includes an assessment of the fit between the substance of a state law and its stated purpose.

Further, the majority fails to explain how it reaches its reasonably tailored conclusion. As to the merits of the majority's conclusion that the law is reasonably tailored, I have my doubts. First, the parties have not argued the issue one way or the other.

Second, the tailoring issue necessarily turns on facts that are disputed or not in evidence, including the extent to which motorized mining negatively impacts fish habitat and whether there are some means of motorized mining that would not adversely impact fish habitat. A tailoring analysis would involve actually assessing the degree to which a law advances its stated purpose (i.e. the state's interest). *Cf., e.g.*, *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1178 (9th Cir. 2018) (discussing narrow tailoring as an analysis

focused on the degree of fit between ends and means). Yet, the majority appears to use the laws' stated purpose as the premise for its reasonable tailoring conclusion. Good intentions are never enough to establish that a law is properly tailored. *Cf. id.* (striking down a commercial speech restriction because there were alternatives that "would restrict less speech and would more directly advance California's asserted interest in preventing consumer deception").

It remains unclear to me how a tailoring analysis aids us in deciding the preemption question. But to the extent the inquiry is relevant, the obvious and less restrictive regulation here would be to simply require that mining activity in essential habitat areas be conducted in a manner that does not adversely affect fish habitat—thus prohibiting non-motorized mining adverse to fish populations and permitting motorized mining that can be conducted consistent with requirement to preserve essential habitat.

B.

Federal law not only preempts Senate Bill 3 on its face, but the miners also identified disputed issues of material fact precluding summary judgment on their *Granite Rock* as-applied preemption challenge. Contrary to the majority's suggestion, Maj. at 50, the law recognizes as-applied preemption challenges that turn on the effect in operation of the allegedly preempted

state law. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) ("Although 'part of the pre-empted field is defined by reference to the purpose of the state law in question, . . . another part of the field is defined by the state law's actual effect.'" (alterations in original) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 84, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990))); *id.* ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law.").[7]

Granite Rock expressly recognized this possibility in the context of state environmental regulation versus land use planning. 480 U.S. at

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[7] Many other cases recognize as-applied preemption challenges. *See, e.g.*, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943-45, 194 L. Ed. 2d 20 (2016) (identifying factual issues like the "'acute, albeit indirect, economic effects' of [a] state law" as one mechanism for showing a state law is preempted by ERISA (citation omitted)); *Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 540 (6th Cir. 2008) (identifying circumstances for proving a law is "preempted *as applied*" and "requir[ing] a factual assessment" (emphasis in original, internal quotation marks and citations omitted)); *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008) (same). *Compare Puente Arizona v. Arpaio*, 821 F.3d 1098, 1110 (9th Cir. 2016) (remanding a case for consideration of the as-applied preemption challenge), *with Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2016 U.S. Dist. LEXIS 162990, 2016 WL 6873294, at *7-13 (D. Ariz. Nov. 22, 2016) (conducting an as-applied preemption analysis and concluding that the law was field preempted as applied to a narrow set of prohibited conduct).

587. As the court noted, "[t]he line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable." *Id.* The Court went on to endorse "*reasonable* state environmental regulation" as not preempted by federal law. *Id.* at 589. Whether dicta or holding, these statements by the Supreme Court reach the correct conclusion. Because Congress has occupied the field of land use planning, federal law preempts any environmental regulation that (when applied to federal land) has the effect of prohibiting (for all practical purposes) a particular land use in the regulated zone. To hold otherwise would allow an end-run around federal preemption.

Here, the miners contend that mining without motors is (if not impossible) entirely impracticable within the in-stream zones governed by Senate Bill 3. Thus, they argue the law has the effect of prohibiting mining within the regulated area. At oral argument, the State essentially conceded this fact. United States Court of Appeals for the Ninth Circuit, 16-35262 *Joshua Bohmker v. State of Oregon*, YouTube (Mar. 8, 2018), https://youtu.be/IrC_pz9CNh4 , at 21:09 to 21:15, 24:00 to 25:00 (acknowledging that Senate Bill 3 effectively prohibits mining in the in-stream areas governed by the law). Thus, the miners argue that entry of summary judgment is inappropriate.

The majority suggests that the miners waived this challenge because they "do not argue that Senate Bill 3 is preempted simply because it may render some of their mining claims commercially impracticable." Maj. at 27-28. Come on. That cannot be the basis for our decision. The record amply establishes that the miners have consistently raised both a facial and as-applied challenge to Senate Bill 3 before the district court and on appeal. Excerpts of R. at 102, 106-07, 118, 121, 124, 130, 135, 143, 150 (identifying declaration testimony by the miners regarding the impact of the law on practicability of mining in the zones governed by Senate Bill 3 that was provided to the district court in opposition to summary judgment); Excerpts of R. at 21-23 (identifying the district court's rejection of the miners' *Granite Rock* commercial impracticability standard); Appellants' Opening Br. at 45-48 (identifying *Granite Rock* commercial impracticability standard and asserting the Oregon law is not a reasonable environmental regulation); Appellants' Opening Br. at 52-57 (identifying the record evidence establishing disputed issues of material fact regarding the impact of the Oregon law on the practicability of mining in the regulated zones); United States Court of Appeals for the Ninth Circuit, 16-35262 *Joshua Bohmker v. State of Oregon*, YouTube (Mar. 8, 2018), https://youtu.be/IrC_pz9CNh4, at 8:30 to 17:30 (identifying the argument by the miners' counsel that the practicability of mining is an alternative basis for the court to conclude

under *Granite Rock* that federal law preempts Senate Bill 3).[8]

The majority next rejects the merits of an as-applied theory of preemption, asserting that considerations of commercial practicability would endanger every environmental regulation. Not so.

We are presented with a narrow but important issue of preemption. Even if federal law preempts Oregon's attempt to apply Senate Bill 3 to federal lands, the miners must still comply with all environmental laws and standards imposed expressly by federal statutes and regulations. The *Granite Rock* practicability exception does not apply to federal regulation. *Cf., e.g., Clouser v. Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994) (affirming forest service access regulation that diminished value of mining claims). Moreover, Oregon remains free to coordinate its land use

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[8] The majority doubles down on its erroneous conclusion that the miners have waived an as-applied challenge to Senate Bill 3. In support of its conclusion, the majority cites a single line in the miners' reply stating that "[t]his appeal is not about profitability, but about prohibition." Maj. at 28 n.6 (citing Reply Br. at 41). Nothing in the quoted language forecloses the argument that Senate Bill 3 *effectively* functions as a prohibition in the regulated zones. Waiver requires an "intentional relinquishment of a known right." *E.g.*, *Oelbermann v. Toyo Kisen Kabushiki Kaisha*, 3 F.2d 5, 5 (9th Cir. 1925) (citation omitted). The miners have consistently argued that Senate Bill 3 makes it effectively impossible to remove minerals from their claims. In concluding that the issue is waived, the majority simply ignores the substantial briefing and argument cited above.

plans with the relevant federal agencies in seeking an outright federal prohibition on mining within essential habitat on federal lands. Oregon may also amend its statute to incorporate an environmental standard to require mining activity in essential habitat be conducted in a manner that avoids damage to fish habitat. In short, a win for the miners is not likely to lead to environmental disaster as the majority portends.

Second, commercial practicability is a judicially manageable standard. "[V]irtually every environmental regulation" is not at risk. *See* Maj. at 28-29. Contrary to the majority's assertion, nothing in *Granite Rock* suggests a case-by-case, miner-by-miner assessment of commercial practicability. Rather, *Granite Rock* suggests an approach focused on the overall effect of the state regulation on mining practicability. *See Granite Rock*, 480 U.S. at 586-89.

The exception applies only where the regulation's effect is "so severe" that it renders mining on the regulated lands "commercially impracticable" as a general matter. The finances or circumstances of individual miners are not relevant to the analysis. A court simply examines the effect of the regulation on the scope of commercial mining operations that could permissibly be employed in the absence of the regulation. Where a state environmental regulation eliminates all previously permissible means of commercial mining on federal land, it runs afoul of the *Granite Rock* exception. If viable

means of commercial mining remain available in most (if not all) tracts of land governed by the regulation, it falls within the general rule that "reasonable state environmental regulation is not pre-empted . . . ." *Id.* at 589.

Here, the miners identified sufficient factual support for the proposition that Senate Bill 3 renders mining commercially impracticable within the areas regulated by the statute. I cannot agree with the majority's assertion that Senate Bill 3 is not a de facto ban on mining because it allows non-motorized mining (i.e. panning for gold by hand). This would be similar to saying to a man that he is not prohibited from building a house on his property, he is only prohibited from using any power tools, trucks, or other motorized equipment in doing so. In an imaginary world, it is certainly still possible that over the course of his life he could dig the foundation, mix the concrete, haul the lumber, and construct a house eventually. Nonetheless, such a law would render the man's right to build a house a nullity. If the miners proved impracticability on remand, I would conclude that the Oregon law is a de facto land use regulation preempted by federal law.

III.

In short, there are two alternative grounds to reverse the district court. First, the miners are entitled to summary judgment because federal law preempts Oregon's impermissible attempt to

regulate particular uses of federal land under Senate Bill 3. Alternatively, I would recognize the as-applied theory for establishing preemption outlined in *Granite Rock*. Federal law preempts environmental regulation that is so severe that it operates as a de facto land use plan by rendering a particular use of the regulated land utterly impracticable. The miners put on sufficient evidence to establish at least a genuine issue for trial on this theory. Accordingly, I respectfully dissent from the majority's decision to affirm summary judgment in favor of the State of Oregon.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

October 3, 2018, Filed

No. 16-35262

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

v.

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

Judges: Before: FISHER, N.R. SMITH and HURWITZ, Circuit Judges.

ORDER

The court *sua sponte* grants appellants leave to file a late petition for rehearing en banc. The petition (Dkt. 91) has been filed.

The motion to strike the petition, filed October 3, 2018 (Dkt. 94), is denied as moot.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

October 25, 2018, Filed

No. 16-35262

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

v.

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

Judges: Before: FISHER, N.R. SMITH and HURWITZ, Circuit Judges.

Order

Judge Hurwitz has voted to deny the petition for rehearing en banc, and Judge Fisher has so recommended. Judge N.R. Smith has recommended granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for rehearing en banc, filed September 27, 2018 (Dkt. 91), is denied.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, MEDFORD DIVISION

March 25, 2016, Decided; March 25, 2016, Filed

Case No. 1:15-cv-01975-CL

JOSHUA CALEB BOHMKER, *et al*,
Plaintiffs,

v.

STATE OF OREGON, et al,
Defendants,

ROGUE RIVERKEEPER, *et al*,
Intervenor-defendants.

Judge: MARK D. CLARKE, United States Magistrate Judge.

ORDER

CLARKE, Magistrate Judge

This case comes before the Court on the parties' cross-motions for summary judgment (#18, #52). Plaintiffs are individual miners, mining groups and associations, and businesses related to the mining industry. Collectively, they bring this cause of action against the defendants, the 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, claiming that Oregon Senate Bill 838 (SB 838) is preempted by federal law. SB 838, with some exceptions, temporarily prohibits instream mining that uses any form of motorized equipment within certain limited areas including the beds or banks of the waters of the state containing essential indigenous anadromous salmonid habitat ("ESH"). Plaintiffs request declaratory relief to prevent enforcement of SB 838, which went into effect on January 2, 2016. Intervenor defendants are groups and associations that support SB 838, and they oppose the plaintiffs' motion. For the reasons below, plaintiffs' motion (#18) is DENIED and defendants' motion (#52) is GRANTED.

LEGAL STANDARD

Summary judgment shall be granted when the record shows that there is no genuine dispute as to any material of fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party has the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). The court cannot weigh the evidence or determine the truth but may only determine whether there is a genuine issue of fact. *Playboy Enters., Inc. v. Welles*, 279 F.3d 796,

800 (9th Cir. 2002). An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

When a properly supported motion for summary judgment is made, the burden shifts to the opposing party to set forth specific facts showing that there is a genuine issue for trial. *Id.* at 250. Conclusory allegations, unsupported by factual material, are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposing party must, by affidavit or as otherwise provided by Rule 56, designate specific facts which show there is a genuine issue for trial. *Devereaux*, 263 F.3d at 1076. In assessing whether a party has met its burden, the court views the evidence in the light most favorable to the non-moving party. *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995).

INTRODUCTION

The tradition of small scale prospecting and mining has a rich heritage in this country, dating back to the early days of the American frontier. Early miners developed their own rules and customs, which evolved in the local miners' meetings, and "were used to govern mining camps before any official government existed at these remote locations." *United States v. Shumway*, 199 F.3d 1093, 1097 (9th Cir. 1999). Mining has been particularly important to the history and

economic development of southwest Oregon. Even though most of the gold in the [California gold rush of 1849] and other western gold rushes was found on federal land, the federal government adopted a mining law scheme late, long after the customs of ownership by discovery and extraction had been established. *Id.* at 1098. Plaintiffs, miners and mining associations, who are passionate about both the history and the future of their industry, properly point to significant mining rights granted them by Congress in the Mining Act of 1872, which provides that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase." 30 U.S.C. § 22.

However, the Mining Act must be viewed in the context of the extensive federal and state regulations that have been enacted since 1872 to govern mining and competing interests on federal land, such as the Multiple Use Act, 30 U.S.C. § 611-612, and the Mining and Minerals Policy Act, 30 U.S.C. § 21a. The Court understands that plaintiffs are frustrated by the complexities of the mining regulations, and it is far from clear from the record before the Court whether most of them have in fact complied with federal law.

On the other side of this dispute are the groups and individual citizens who are understandably increasingly concerned about the impact that mining activities have on the natural environment. These concerns have their place in

the law as well, as reflected by the federal and state regulatory schemes that have developed to manage and protect land, surface resources, waterways, and animal habitats. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401 et seq.; Clean Water Act, 33 U.S.C. §§ 1251 et seq.; Nat. Environ, Policy Act, 42 U.S.C. §§ 4321 et seq.; Oregon Air Toxics Program, Oregon Admin. Rules 340-246-0010 et seq.

Both of these groups have important, but conflicting interests. Federal and state laws attempt to balance these conflicting interests, and the task is made more challenging by the interaction between different, complicated regulatory schemes. The basic question in this case, however, is simple: Can a state temporarily ban all motorized forms of instream mining in certain areas, out of concern for the environment, or is such a law preempted by the federal regulations that apply?

SUMMARY

Plaintiffs have standing and this dispute is ripe for adjudication by this court. SB 838 is a temporary ban on instream motorized mining. It does not preclude all forms of mining. The Court finds, consistent with the extensive regulations cited above and case law including *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987), and *Pringle v. Oregon*, No. 2:13-CV-00309-SU, 2013 U.S. Dist. LEXIS 185435, 2014 WL 795328 (D.

Or. Feb. 25, 2014), it is a valid state environmental regulation that is not preempted by federal law.

STATUTORY LANGUAGE OF SENATE BILL 838

On August 14, 2013, Oregon Governor John Kitzhaber signed into law Senate Bill 838. The legislative findings of the bill state:

> 1. Prospecting, small scale mining and recreational mining are part of the unique heritage of the State of Oregon.
>
> 2. Prospecting, small scale mining and recreational mining provide economic benefits to the State of Oregon and local communities and support tourism, small businesses and recreational opportunities, all of which are economic drivers in Oregon's rural communities.
>
> 3. Exploration of potential mine sites is necessary to discover the minerals that underlie the surface and inherently involves natural resource disturbance.
>
> 4. Mining that uses motorized equipment in the beds and banks of the rivers of Oregon can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments

> of this state in habitat enhancement and areas of cultural significance to Indian tribes.
>
> 5. Between 2007 and 2013, mining that uses motorized equipment in the beds and banks of the rivers of Oregon increased significantly, raising concerns about the cumulative environmental impacts.
>
> 6. The regulatory system related to mining that uses motorized equipment in the beds and banks of the rivers of Oregon should be efficient and structured to best protect environmental values.

Oregon Senate Bill 838 § 1(1-6) (2013). Therefore, the first sentence of SB 838 provides:

> A moratorium is imposed until January 2, 2021, on mining that uses any form of motorized equipment for the purpose of extracting gold, silver or any precious metal from placer deposits of the beds or banks of waters of this state, as defined in ORS 196.800, or from other placer deposits, that results in the removal or disturbance of streamside vegetation that may impact water quality.

Id. at § 2(1). "Waters of this state" is defined in ORS 196.800 to include essentially all water bodies in the State. "Beds or banks" are not defined by statute, but the rules of the Division of State Lands provide:

> "Beds or Banks" means the physical container of the waters of this state, bounded on freshwater bodies by the ordinary high water line or bankfull stage, and in tidal bays and estuaries by the limits of the highest measured tide. The "bed" is typically the horizontal section and includes non-vegetated gravel bars. The 'bank' is typically the vertical portion.

The second sentence of SB 838 provides additional parameters for the moratorium:

> The moratorium applies up to the line of ordinary high water, as defined in ORS 274.005, and 100 yards upland perpendicular to the line of ordinary high water that is located above the lowest extent of the spawning habitat in any river and tributary thereof in this state containing essential indigenous anadromous salmon habitat, as defined in ORS 196.810, or naturally reproducing populations of bull trout, except in areas that do not support populations of anadromous salmonids or naturally reproducing populations of bull trout due to a naturally occurring or lawfully placed physical barrier to fish passage.

SB 838 at § 2(1). "'Essential indigenous anadromous salmonid habitat' means the habitat that is necessary to prevent the depletion of indigenous anadromous salmonid species during

their life history stages of spawning and rearing," ORS 196.810(1)(g)(B).

SB 838 also provides for permits to be issued for motorized mining outside of the prohibited areas:

> In areas where the moratorium does not apply as described in subsection (1) of this section, the Department of State Lands shall limit the individual permits issued under ORS 196.810 and the general authorizations issued under ORS 196.850 to not more than 850 permits and authorizations for mining described in this section at any time during the moratorium period. The Department of State Lands shall give priority, to the greatest extent practicable, to persons who held permits or authorizations for the longest period of time before January 1, 2014.

SB 838 § 2(3).[1]

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[1] Section 2(2) of SB 838 provides, "The moratorium does not apply to any mining for which the State Department of Geology and Mineral Industries issues an operating permit under ORS 517.702 to 517.989. This regulatory scheme governs surface mining, defined to include "the process of mining minerals by the removal of overburden and the extraction of natural mineral deposits thereby exposed by any method by which more than 5,000 cubic yards of minerals are extracted or by which at least one acre of land is affected within a period of 12 consecutive calendar months". ORS 517.750(15). None of the plaintiffs have mining operations of this scale, and the permitting scheme

DISCUSSION

I. Plaintiffs have standing, and the case is ripe for adjudication.

"The Article III case or controversy requirement limits federal courts' subject matter jurisdiction by requiring, inter alia, that plaintiffs have standing and that claims be 'ripe' for adjudication." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121 (9th Cir. 2010). "Standing addresses whether the plaintiff is the proper party to bring the matter to the court for adjudication. . . [whereas] ripeness is a means by which federal courts may dispose of matters that are premature for review because the plaintiff's purported injury is too speculative and may never occur." *Id.* at 1122. In addition to the Article III standing and ripeness requirements, federal courts have also imposed additional prudential standing and ripeness requirements that further limit the scope of cases federal courts will entertain. *See City of Los Angeles v. County of Kern*, 581 F.3d 841, 845 (9th Cir. 2009).

Standing requires three elements: (1) injury in fact, (2) the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court, and (3) it must be

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is not at issue in this litigation.

likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 560-561 (internal citations omitted). The court "need only find that one petitioner has standing to allow a case to proceed." *Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1014-15 (9th Cir. 2003) *rev'd on other grounds*, 541 U.S. 752, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004); *see also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S. Ct. 205, 70 L. Ed. 2d 309 (1981) ("Because we find [one plaintiff] has standing, we do not consider the standing of the other plaintiffs"); *Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1331 (9th Cir.1997) (White, Justice, by designation) (evaluation of the standing of a second plaintiff is "unnecessary to resolution of the case").

Defendants assert that the federal environmental and mining regulations prevent the plaintiffs' mining activities unless the plaintiffs have received approval from either the Forest Service or the BLM, depending on the location of their mining claim. Defendants assert that plaintiffs have not proven that they have received this approval, therefore their alleged injuries are not fairly traceable to SB 838, nor can they be redressed by this court. The Court disagrees.

SB 838 prevents all motorized methods of mining:

> A moratorium is imposed until January 2, 2021, on mining that uses any form of motorized equipment for the purpose of extracting gold, silver or any precious metal from placer deposits of the beds or banks of waters of this state, as defined in ORS 196.800, or from other placer deposits, that results in the removal or disturbance of streamside vegetation that may impact water quality.

By contrast, the federal regulations give the Forest Service and the BLM authority to determine on a site-specific basis whether or not a person's particular motorized mining operation is allowed. *E.g.* 36 C.F.R. § 228.4(a)(1)(v). For example, under Forest Service regulations, even when a person submits a notice of intent to operate, the regulations simply require the District Ranger to notify the operator within 15 days if approval of a plan of operations is required before operations begin. 36 C.F.R. § 228.4(a)(1)(vii)(2). If the operator is not contacted, he or she is free to operate without such a plan.

Regulations with such an informal and flexible approval process are very unlikely to completely overlap with a moratorium like SB 838. While defendants would like this Court to find that federal law prevents all of the plaintiffs' mining operations, certainly a set of circumstances must exist in which an individual mining operation

would be allowed under federal law and disallowed under SB 838.

In this case, Plaintiff Jason Gill has asserted facts that give him standing to bring this claim. His declaration states that he owns "the 'Governor Davis' claim, federally registered as ORMC161726, taking in approximately 2,000 feet of Josephine Creek, and the 'Luck' claim, federally registered as ORMC166648, taking in approximately 3,000 feet of Sucker Creek." Dkt. #25, 2. Gill declares that he has "an approved Plan of Operation, granted by Siskiyou National Forest, permitting me to use a motorized excavator and trammel for mining operations on the Governor Davis claim." *Id.* He claims that he has been mining a bench deposit within 50 to 100 feet of Josephine Creek and recovering significant quantities of gold. *Id.* SB 838 will make his operations within 100 feet of the high water mark of the Creek illegal. *Id.*

The Court finds the declaration of Jason Gill sufficient to show an alleged injury, fairly traceable to SB 838, which will be redressed by this Court if it finds that SB 838 is preempted by federal law, as claimed by the plaintiffs. Because the Court finds that one plaintiff has standing, it need not consider the standing of the other plaintiffs. *See Watt*, 454 U.S. at 160.

This case is ripe for review because the SB 838 moratorium has gone into effect, and plaintiffs like Jason Gill claim that it is currently affecting

their mining operations. Similarly, the prudential concerns weigh in favor of the Court exercising jurisdiction over this case to settle the issue of whether or not the state moratorium on motorized instream mining is preempted by federal law because the issue is likely to continue to arise as SB 838 is enforced by state officials.

II. Senate Bill 838 is not preempted by federal law.

There are three circumstances in which state law is preempted by federal law: (1) express preemption, where Congress explicitly defines the extent to which its enactments preempt state law; (2) field preemption, where state law attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy; and (3) conflict preemption, where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. *Indus. Truck Ass'n v. Henry*, 125 F.3d 1305, 1309 (9th Cir.1997) (internal citations omitted).

a. Federal law has not expressly preempted, nor has it occupied the field to preempt, nor do such laws conflict with a state's reasonable environmental regulations, even if the state law restricts mining operations on federal land.

To argue preemption, Plaintiffs rely in large part on the Mining Act of 1872. It provides:

> [A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States . . ..

30 U.S.C. § 22. The Mining Act, as originally passed in 1872, "expressed no legislative intent on the as-yet rarely contemplated subject of environmental regulation." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 582, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987) ("*Granite Rock*").

In 1955, Congress passed the Multiple Use Act, which created a "right of the United States to manage and dispose of the vegetative surface resources [of post-1955 mining claims] . . . and to manage other surface resources thereof." 30 U.S.C. § 612(b). The statute provided that such management was "not to endanger or materially interfere with prospecting, mining, or processing operations or uses reasonably incident thereto." *Id.* The statute also provides that "nothing in this subchapter. . . shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States. . . relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim." *Id.*

The United States Supreme Court has held that federal mining laws and environmental regulations do not preempt reasonable state environmental laws that restrict mining activities on federal land. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987) ("*Granite Rock*"). In *Granite Rock*, the state law at issue was a permitting regulation that required a mining company, which had already submitted an approved 5-year plan of operations to the Forest Service, to secure a permit from the California Coastal Commission before undertaking any development, including mining. *Id.* at 577. The mining company immediately filed an action alleging that the permit requirement was preempted by federal regulations. The Court held the Mining Act of 1872 and other federal Forest Service mining regulations did not intend to preempt the imposition of reasonable state environmental regulations on mining claims. *Id.* at 583. Moreover, the Court found that the regulations "expressly contemplate coincident compliance with state law as well as with federal law." *Id.* at 584.

Support for the conclusion that states have the right to enact environmental regulations can be found in other applicable federal regulations as well. The Clean Water Act expressly recognizes and preserves state authority to regulate water pollution: "It is the policy of the Congress to recognize, preserve, and protect the primary

responsibilities and rights of States to prevent, reduce, and eliminate pollution . . .." 33 U.S.C. § 1251(b). The Clean Water Act also recognizes state authority to adopt pollution controls over and above those required by the Act:

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

33 U.S.C. § 1370 (emphasis added).

In this case, as discussed in the next section, SB 838 is a reasonable environmental regulation that seeks to prevent pollution of the state's waterways. As decided by the Court in *Granite Rock*, federal mining laws and environmental regulations do not preempt this type of state law.

b. Senate Bill 838 is a reasonable environmental regulation, not a land use law.

Plaintiffs contend that *Granite Rock* held that federal law would preempt a state land use law that extended on to federal land to prohibit otherwise lawful mining activity. Indeed, the Court, in dicta, did speculate on a hypothetical situation in which a state law would be preempted by federal regulations:

> For purposes of this discussion and without deciding this issue, we may assume that the combination of the NFMA[2] and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands.

Id. at 585. However, the Court found that land use planning and environmental regulation, while theoretically could overlap in some cases, are distinct activities, capable of differentiation. *Id.* at 588. "Land use planning in essence chooses particular uses for the land; environmental

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[2] Under the Federal Land Policy Management Act of 1976 (FLPMA), the Department of the Interior's Bureau of Land Management is responsible for managing the mineral resources on federal forest lands, 43 U.S.C. § 1701 et seq., and under the National Forest Management Act (NFMA), the Forest Service under the Secretary of Agriculture is responsible for the management of the surface impacts of mining on federal forest lands, 16 U.S.C. §§ 1600 et seq.

regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* Because the Court found that the stated purpose of the California permitting scheme was to regulate environmental effects, not regulate land use, the Court did not reach a decision on the merits of federal land use preemption. *Id.*

Similarly, the stated purpose of SB 838 is to regulate the environmental impacts of the prohibited activity — in this case, motorized instream mining. Specifically, the Oregon legislature made findings that: (1) motorized methods of mining "pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments of this state in habitat enhancement and areas of cultural significance to Indian tribes," and (2) the incidence of motorized instream mining increased significantly between 2007 and 2013, "raising concerns about the cumulative environmental impacts." Oregon Sen. Bill 838 § 1(4-5) (2013).

Like the permitting scheme in *Granite Rock*, SB 838 does not mandate particular uses of the land, nor does it prohibit all mining altogether. It limits only one form of mining, and only in specific areas. Outside of the prohibited areas, SB 838 allows for permits to be issued for motorized instream mining. *Id.* at § 2(3). Even inside the prohibited areas, motorized mining is allowed 100

yards upland of the high water mark, as long as it does not disturb vegetation to the detriment of water quality. *Id.* at § 2(1-2). Therefore the Court finds that SB 838, like the California permitting scheme, is a reasonable environmental regulation that is not preempted by federal regulations.

c. Senate Bill 838 is not a ban on mining.

Plaintiffs argue that, even as an environmental regulation, SB 838 is distinguishable from the permitting scheme in *Granite Rock* because there are no conditions that would allow them to continue motorized instream mining. According to plaintiffs, SB 838 is a "complete ban," and therefore, unlike *Granite Rock*, it is preempted. However, a court in this district has already addressed this issue and found that a ban on one particular method of mining was not equivalent to a complete ban on mining. *See Pringle v. Oregon*, No. 2:13-CV-00309-SU, 2013 U.S. Dist. LEXIS 185435, 2014 WL 795328 (D. Or. Feb. 25, 2014).

In *Pringle*, an Oregon law was amended to remove authority from the Department of State Lands to issue permits for suction dredge mining within a scenic waterway. 2013 U.S. Dist. LEXIS 185435, [WL] at *2. Recreational placer mining and recreational prospecting were still permitted using non-motorized methods, and motorized methods other than a suction dredge. *Id.* The miner challenging the law argued that the law "completely frustrate[d] the mining and removal

of valuable minerals located in the claim sites," and he asserted that the claims had been "stripped of their entire economic value and it now costs more to maintain the claims than can be recovered by recreational mining." The miner argued that the law was distinguishable from the permitting scheme in *Granite Rock* because the effect was "to prohibit mining altogether." 2013 U.S. Dist. LEXIS 185435, [WL] at *8. The Oregon District Court found that, while the Oregon law was a ban on suction dredge mining, other methods of recreational mining were still allowed, including other types of motorized equipment, non-motorized equipment, and other methods. 2013 U.S. Dist. LEXIS 185435, [WL] at *8. Therefore, the Court held that "[b]ecause [the law] is not a de facto ban on all mining in Oregon scenic waterways, it does not conflict with the General Mining Act of 1972, and therefore is not preempted." *Id.*

Plaintiffs claim that this Court should not consider the *Pringle* decision persuasive because the cause of action was brought by a pro se litigant, who did not make the arguments necessary for the court to grant relief. The Court disagrees. In *Pringle*, the plaintiff asserted that his case was distinguishable from *Granite Rock* because, he claimed, it was more like *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir.1998) (*S. D Mining*). This is the very same argument the plaintiffs make in the case at bar.

In *S.D.* Mining, the defendant Lawrence County adopted an ordinance that was a per se ban on all new or amended permits for all surface metal mining within the area. *S.D. Mining Ass'n*, 155 F.3d at 1011. Because the record showed that surface metal mining was the only way for plaintiffs to mine mineral deposits on federal land in the area, the Eighth Circuit Court of Appeals found the effect of the ordinance was a de facto ban on all mining in the area. *Id.* The Lawrence County ordinance did not set out reasonable environmental regulations governing mining activities on federal lands, nor did it ban one specific method of extraction, rather it resulted in a ban on all mining. *Id.* As such, the Eighth Circuit found the ordinance preempted by the General Mining Act of 1872. *Id.* The *Pringle* court considered this analysis before deciding that an Oregon ban on suction dredge mining was not a de facto ban on all mining in all waterways.

Similarly, in this case, a ban on motorized instream mining in protected areas is not a ban on all mining in all waterways. As discussed above, SB 838 limits only one form of mining, and only in specific areas. Outside of the prohibited areas, SB 838 allows for permits to be issued for motorized instream mining. Even inside the prohibited areas, motorized mining is allowed 100 yards upland of the high water mark, as long as it does not disturb vegetation to the detriment of water quality. Thus, SB 838 is not a ban on mining.

d. Whether or not Senate Bill 838 makes mining "commercially impracticable" does not affect the Court's preemption analysis.

Finally, plaintiffs cite to a recent California case in which a miner challenged a state law banning the use of suction dredge equipment on federal mining claims. *People v. Rinehart*, 230 Cal. App. 4th 419, 178 Cal. Rptr. 3d 550, (2014) *reh'g denied* (Oct. 10, 2014), *review granted and opinion superseded*, 182 Cal. Rptr. 3d 275, 340 P.3d 1044 (Cal. 2015). Applying language used by the *Granite Rock* Court to describe the hypothetical scenario in which state regulations might be preempted by federal land-use statutes, the California Court of Appeal held that a California moratorium on suction-dredge permits was potentially preempted by federal law if it rendered development of a mining claim "commercially impracticable." *Id.* at 436.

Plaintiffs argue that the "commercially impracticable" standard should be imposed by this Court as well. The Court disagrees. First, the Supreme Court of California has vacated the *Rinehart* Court of Appeal opinion pending review. Second, the United States Government has filed an amicus brief in that case that this Court finds persuasive. It argues that federal preemption of a state environmental regulation should not turn on the cost to an individual miner:

> Congress did not intend to preempt all state laws that might raise the cost of extraction. If

> additional expenses are imposed by a State's legitimate attempt to "help assure satisfaction. . . of environmental needs," 30 U.S.C. § 21a, in a manner that does not make all mining impossible, that state law does not directly conflict with the federal Mining Law. The State's prohibition on suction dredging may have made mining considerably more difficult for Rinehart, and may result in Rinehart determining that the deposit in his mining claim "no longer justifie[s] ... the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." *Chrisman v. Miller*, 197 U.S. 313, 322, 25 S. Ct. 468, 49 L. Ed. 770 (1905). That result may have some bearing on whether the deposit is locatable, but it is no basis for finding that the State's law that it is preempted by federal law.

Brief for the United States as Amicus Curie Supporting Respondent, *People v. Rinehart*, 182 Cal. Rptr. 3d 275, 340 P.3d 1044 (August 2015) (No. S222620) 2015 WL 5166997 at 29. Essentially, the Government argues that even if the state law makes it difficult or impossible for a miner to locate the mineral deposit of a claim, such a result is not a basis to find the law preempted. *Id.*

The Court agrees that nothing in the Mining Act or subsequent federal regulations makes the cost or practicability of mineral extraction a factor in whether or not a state environmental law is

preempted. The Mining Act guarantees that federal lands will remain free and open to mineral discovery and development, but it does not guarantee that such discovery and development will be profitable or efficient.

CONCLUSION

The Court agrees with the plaintiffs that the practice of mining has a long and cherished history in the State of Oregon, and a protected place in the law. However, the Court can find no indication that such protection prevents the State of Oregon from temporarily banning the use of motorized instream equipment as a legitimate way to protect water quality and fish habitat. The Mining Act and other federal regulations do not express an intent to preempt state environmental regulations affecting mining claims on federal land. Senate Bill 838 does not directly conflict with federal law, nor does it stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress because, under the law, "the 'valuable mineral deposits in lands belonging to the United States' in Oregon remain 'free and open' to mineral exploration and development by means other than the use of motorized equipment.

ORDER

For the forgoing reasons, the plaintiffs' motion for summary judgment (#18) is DENIED.

Defendants' motion for summary judgment (#52) is GRANTED.

It is so ORDERED and DATED this 25 day of March, 2016.
/s/ Mark D. Clarke
MARK D. CLARKE
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, MEDFORD DIVISION

March 29, 2016, Filed

Case No. 1:15-cv-01975-CL

JOSHUA CALEB BOHMKER, et al,
Plaintiffs,

v.

STATE OF OREGON, et al,
Defendants,

ROGUE RIVERKEEPER, et al,
Intervenor-defendants.

Judge: MARK D. CLARKE, United States Magistrate Judge.

JUDGMENT

Judgment is entered in accordance with the Court's order (#67) in favor of the defendants.

DATED this 29th day of March 2016.

MARK D. CLARKE
United States Magistrate Judge

The Property Clause of the U.S. Constitution (Art. IV, § 3, cl. 2)

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

The Supremacy Clause of the U.S. Constitution (Art. VI, cl. 2)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in Constitution or Laws of any State to the Contrary notwithstanding.

California Admission Act, 9 Stat. 452, ch. 50, § 3 (1850)

That the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and

that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States, and in no case shall non-resident proprietors, who are citizens of the United States, be taxed higher than residents; and that all the navigable waters within the said State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor. *Provided,* That nothing herein contained shall be construed as recognizing or rejecting the propositions tendered by the people of California as articles of compact in the ordinance adopted by the convention which formed the constitution of that State.

Oregon Admission Act, 11 Stat. 383, ch. 33, § 4 (1859)

That the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. Second, That seventy-two sections of land shall be set apart and reserved for the use and support of a State university, to be selected by the governor of said State, subject to the

approval of the Commissioner of the General Land-Office, and to be appropriated and applied in such manner as the legislature of said State may prescribe for the purpose aforesaid, but for no other purpose. Third. That ten entire sections of land, to be selected by the governor of said State, in legal subdivisions, shall be granted to said State for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the legislature thereof. Fourth. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State for its use, the same to be selected by the governor thereof within one year after the admission of said State, and when so selected, to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct: Provided, That no salt spring or land, the right whereof is now vested in any individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said State. Fifth. That five per centum of the net proceeds of sales of all public lands lying within said State which shall be sold by Congress after the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to said State, for the purpose of making public roads and internal improvements, as the legislature shall direct: Provided, That the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide

by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than residents. Sixth. And that the said State shall never tax the lands or the property of the United States in said State: Provided, however, That in case any of the lands herein granted to the State of Oregon have heretofore been confirmed to the Territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act.

16 U.S.C.

§ 472. Laws affecting national forest lands

The Secretary of the Department of Agriculture shall execute or cause to be executed all laws affecting public lands reserved under the provisions of section 471 of this title, or sections supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands.

§ 475. Purposes for which national forests may be established and administered

All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

§ 478. Egress or ingress of actual settlers; prospecting

Nothing in sections 473 to 478, 479 to 482 and 551 of this title shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations

as may be prescribed by the Secretary of Agriculture. Nor shall anything in such sections 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. Such persons must comply with the rules and regulations covering such national forests.

§ 482. Mineral lands; restoration to public domain; location and entry

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any national forest is situated, and near the said national forest, any public lands embraced within the limits of any such forest which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any national forest which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions contained in sections 473 to 478, 479 to 482 and 551 of this title

§ 551. Protection of national forests; rules and regulations

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he 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; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate judge specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401 (b) to (e) of title 18.

§ 1604 National Forest System land and resource management plans

(a) Development, Maintenance, and Revision by Secretary of Agriculture as Part of Program; Coordination

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

(b) Criteria

In the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.

(c) Incorporation of standards and guidelines by Secretary; time of completion; progress reports; existing management plans

The Secretary shall begin to incorporate the standards and guidelines required by this section in plans for units of the National Forest System as soon as practicable after October 22, 1976, and shall attempt to complete such incorporation for all such units by no later than September 30, 1985. The Secretary shall report to the Congress on the progress of such incorporation in the annual report required by section 1606(c) of this title. Until such time as a unit of the National Forest System is managed under plans developed in accordance with this subchapter, the

management of such unit may continue under existing land and resource management plans.

(d) Public participation in management plans; availability of plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

(e) Required assurances In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans—

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528–531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1), the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.

28 U.S.C

§ 1254 Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

§ 1331 - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

30 U.S.C

§ 21a National mining and minerals policy; "minerals" defined; execution of policy under other authorized programs

The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in

(1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries,

(2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs,

(3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and

(4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the

> reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.

For the purpose of this section "minerals" shall include all minerals and mineral fuels including oil, gas, coal, oil shale and uranium.
It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section.

§ 22. Lands open to purchase by citizens

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

§ 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse

claim existed on the 10th day of May 1872 so long as they 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, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

§ 28 Mining district regulations by miners: location, recordation, and amount of work; marking of location on ground; records; annual labor or...delinquency in contributing proportion of expenditures; tunnel as lode expenditure

The miners of each mining district may make regulations 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, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, that is granted a waiver under section 28f of this title, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon

the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12:01 ante meridian on the first day of September succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by this section. On all such valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922.

§ 35 Placer claims; entry and proceedings for patent under provisions applicable to vein or lode claims; conforming entry to legal subdivisions and surveys; limitation of claims; homestead entry of segregated agricultural land

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

And where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party

qualified by law, for homestead purposes.

§ 612(b). Reservations in the United States to use of the surface and surface resources

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is

substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further, That nothing in this subchapter and sections 601 and 603 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

§1281. Designation procedures

(a) Review of Federal land areas for unsuitability for noncoal mining

With 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 for minerals or materials other than coal, pursuant to the criteria and procedures of this section.

(b) Criteria considered in determining designations

An area of Federal land may be designated under this section as unsuitable for mining operations if (1) such area consists of Federal land of a predominantly urban or suburban character, used primarily for residential or related purposes, the

mineral estate of which remains in the public domain, or (2) such area consists of Federal land where mining operations would have an adverse impact on lands used primarily for residential or related purposes.

(c) Petition for exclusion; contents; hearing; temporary land withdrawal

Any person having an interest which is or may be adversely affected shall have the right to petition the Secretary to seek exclusion of an area from mining operations pursuant to this section or the redesignation of an area or part thereof as suitable for such operations. Such petition shall contain allegations of fact with supporting evidence which would tend to substantiate the allegations. The petitioner shall be granted a hearing within a reasonable time and finding with reasons therefor upon the matter of their petition. In any instance where a Governor requests the Secretary to review an area, or where the Secretary finds the national interest so requires, the Secretary may temporarily withdraw the area to be reviewed from mineral entry or leasing pending such review: *Provided, however*, That such temporary withdrawal be ended as promptly as practicable and in no event shall exceed two years.

(d) Limitation on designations; rights preservation; regulations

In no event is a land area to be designated unsuitable for mining operations under this section on which mining operations are being conducted prior to the holding of a hearing on such petition in accordance with subsection (c) hereof. Valid existing rights shall be preserved and not affected by such designation. Designation of an area as unsuitable for mining operations under this section shall not prevent subsequent mineral exploration of such area, except that such exploration shall require the prior written consent of the holder of the surface estate, which consent shall be filed with the Secretary. The Secretary may promulgate, with respect to any designated area, regulations to minimize any adverse effects of such exploration.

(e) Statement

Prior to any designation pursuant to this section, the Secretary shall prepare a detailed statement on (i) the potential mineral resources of the area, (ii) the demand for such mineral resources, and (iii) the impact of such designation or the absence of such designation on the environment, economy, and the supply of such mineral resources.

(f) Area withdrawal

When the Secretary designates an area of Federal lands as unsuitable for all or certain types of mining operations for minerals and materials other than coal pursuant to this section he may withdraw such area from mineral entry or leasing, or condition such entry or leasing so as to limit such mining operations in accordance with his determination, if the Secretary also determines, based on his analysis pursuant to subsection (e), that the benefits resulting from such designation would be greater than the benefits to the regional or national economy which could result from mineral development of such area.

(g) Right to appeal

Any party with a valid legal interest who has appeared in the proceedings in connection with the Secretary's determination pursuant to this section and who is aggrieved by the Secretary's decision (or by his failure to act within a reasonable time) shall have the right of appeal for review by the United States district court for the district in which the pertinent area is located.

43 U.S.C

§ 1701 - Congressional declaration of policy

(a) The Congress declares that it is the policy of the United States that—

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3) public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

(4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress

delineate the extent to which the Executive may withdraw lands without legislative action;

(5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for

outdoor recreation and human occupancy and use;

(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

(10) uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

(13) the Federal Government should, on a basis equitable to both the Federal and

local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

§ 1712 - Land use plans

(c) Criteria for development and revisionIn the development and revision of land use plans, the Secretary shall—

(1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

(2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;

(3) give priority to the designation and protection of areas of critical environmental concern;

(4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;

(5) consider present and potential uses of the public lands;

(6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;

(7) weigh long-term benefits to the public against short-term benefits;

(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under chapter 2003 of title 54, and of or for Indian tribes by, among

other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum

extent he finds consistent with Federal law and the purposes of this Act.

§ 1714 - Withdrawals of lands

(a) Authorization and limitation; delegation of authority

On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.

(b) Application and procedures applicable subsequent to submission of application

(1) Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice. The

segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice.

(2) The publication provisions of this subsection are not applicable to withdrawals under subsection (e) hereof.

(c) Congressional approval procedures applicable to withdrawals aggregating five thousand acres or more

(1) On and after October 21, 1976, a withdrawal aggregating five thousand acres or more may be made (or such a withdrawal or any other withdrawal involving in the aggregate five thousand acres or more which terminates after such date of approval may be extended) only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency head. The Secretary shall notify both Houses of Congress of such a withdrawal no later than its effective date and the withdrawal shall terminate and become ineffective at the end of ninety days (not counting days on which the Senate or the House of Representatives has adjourned for more than three consecutive days) beginning on the day notice of such withdrawal has been

submitted to the Senate and the House of Representatives, if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the Presidential recommendation. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same Presidential recommendation. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter

be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(2) With the notices required by subsection (c)(1) of this section and within three months after filing the notice under subsection (e) of this section, the Secretary shall furnish to the committees—

(1) a clear explanation of the proposed use of the land involved which led to the withdrawal;

(2) an inventory and evaluation of the current natural resource uses and values of the site and adjacent public and nonpublic land and how it appears they will be affected by the proposed use, including particularly aspects of use that might cause degradation of the environment, and also the economic impact of the change in use on individuals, local communities, and the Nation;

(3) an identification of present users of the land involved, and how they will be affected by the proposed use;

(4) an analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an economic analysis of such continuation or termination;

(5) an analysis of the manner in which such lands will be used in relation to the specific requirements for the proposed use;

(6) a statement as to whether any suitable alternative sites are available (including cost estimates) for the proposed use or for uses such a withdrawal would displace;

(7) a statement of the consultation which has been or will be had with other Federal departments and agencies, with regional, State, and local government bodies, and with other appropriate individuals and groups;

(8) a statement indicating the effect of the proposed uses, if any, on State and local

government interests and the regional economy;

(9) a statement of the expected length of time needed for the withdrawal;

(10) the time and place of hearings and of other public involvement concerning such withdrawal;

(11) the place where the records on the withdrawal can be examined by interested parties; and

(12) a report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential, present and potential market demands.

(d) Withdrawals aggregating less than five thousand acres; procedure applicable

A withdrawal aggregating less than five thousand acres may be made under this subsection by the Secretary on his own motion or upon request by a department or an agency head—

(1) for such period of time as he deems desirable for a resource use; or

(2) for a period of not more than twenty years for any other use, including but not limited to use for administrative sites, location of facilities, and other proprietary purposes; or

(3) for a period of not more than five years to preserve such tract for a specific use then under consideration by the Congress.

(e) Emergency withdrawals; procedure applicable; duration

When the Secretary determines, or when the Committee on Natural Resources of the House of Representatives or the Committee on Energy and Natural Resources of the Senate notifies the Secretary, that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary notwithstanding the provisions of subsections (c)(1) and (d) of this section, shall immediately make a withdrawal and file notice of such emergency withdrawal with both of those Committees. Such emergency withdrawal shall be effective when made but shall last only for a period not to exceed three years and may not be extended except under the provisions of subsection (c)(1) or (d), whichever is applicable, and (b)(1) of this section. The information required in subsection (c)(2) of this subsection [1] shall be furnished the within three months after filing such notice.

(f) Review of existing withdrawals and extensions; procedure applicable to extensions; duration

All withdrawals and extensions thereof, whether made prior to or after October 21, 1976, having a specific period shall be reviewed by the Secretary toward the end of the withdrawal period and may be extended or further extended only upon compliance with the provisions of subsection (c)(1) or (d), whichever is applicable, and only if the Secretary determines that the purpose for which the withdrawal was first made requires the extension, and then only for a period no longer than the length of the original withdrawal period. The Secretary shall report on such review and extensions to the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate.

(g) Processing and adjudication of existing applications

All applications for withdrawal pending on October 21, 1976 shall be processed and adjudicated to conclusion within fifteen years of October 21, 1976, in accordance with the provisions of this section. The segregative effect of any application not so processed shall terminate on that date.

(h) Public hearing required for new withdrawals

All new withdrawals made by the Secretary under this section (except an emergency withdrawal made under subsection (e) of this section) shall be promulgated after an opportunity for a public hearing.

(i) Consent for withdrawal of lands under administration of department or agency other than Department of the Interior

In the case of lands under the administration of any department or agency other than the Department of the Interior, the Secretary shall make, modify, and revoke withdrawals only with the consent of the head of the department or agency concerned, except when the provisions of subsection (e) of this section apply.

(j) Applicability of other Federal laws withdrawing lands as limiting authority

The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments under chapter 3203 of title 54; or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. Nothing in this Act is intended

to modify or change any provision of the Act of February 27, 1976 (90 Stat. 199; 16 U.S.C. 668dd(a)).

(k) Authorization of appropriations for processing applications

There is hereby authorized to be appropriated the sum of $10,000,000 for the purpose of processing withdrawal applications pending on the effective date of this Act, to be available until expended.

(l) Review of existing withdrawals in certain States; procedure applicable for determination of future status of lands; authorization of appropriations

(1) The Secretary shall, within fifteen years of October 21, 1976, review withdrawals existing on October 21, 1976, in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming of (1) all Federal lands other than withdrawals of the public lands administered by the Bureau of Land Management and of lands which, on October 21, 1976, were part of Indian reservations and other Indian holdings, the National Forest System, the National Park System, the National Wildlife Refuge System, other lands administered by the Fish and Wildlife Service or the Secretary through the Fish and Wildlife Service, the National Wild and

Scenic Rivers System, and the National System of Trails; and (2) all public lands administered by the Bureau of Land Management and of lands in the National Forest System (except those in wilderness areas, and those areas formally identified as primitive or natural areas or designated as national recreation areas) which closed the lands to appropriation under the Mining Law of 1872 (17 Stat. 91, as amended; 30 U.S.C. 22 et seq.) or to leasing under the Mineral Leasing Act of 1920 (41 Stat. 437, as amended; 30 U.S.C. 181 et seq.).

(2) In the review required by paragraph (1) of this subsection, the Secretary shall determine whether, and for how long, the continuation of the existing withdrawal of the lands would be, in his judgment, consistent with the statutory objectives of the programs for which the lands were dedicated and of the other relevant programs. The Secretary shall report his recommendations to the President, together with statements of concurrence or nonconcurrence submitted by the heads of the departments or agencies which administer the lands. The President shall transmit this report to the President of the Senate and the Speaker of the House of Representatives, together with his recommendations for action by the Secretary, or for legislation. The Secretary

may act to terminate withdrawals other than those made by Act of the Congress in accordance with the recommendations of the President unless before the end of ninety days (not counting days on which the Senate and the House of Representatives has adjourned for more than three consecutive days) beginning on the day the report of the President has been submitted to the Senate and the House of Representatives the Congress has adopted a concurrent resolution indicating otherwise. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the Presidential recommendation. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion

was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same Presidential recommendation. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(3) There are hereby authorized to be appropriated not more than $10,000,000 for the purpose of paragraph (1) of this subsection to be available until expended to the Secretary and to the heads of other departments and agencies which will be involved

§ 1732 - Management of use, occupancy, and development of public lands

(a) Multiple use and sustained yield requirements applicable; exception

The Secretary shall manage the public lands under principles of multiple use and sustained

yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

(b) Easements, permits, etc., for utilization through habitation, cultivation, and development of small trade or manufacturing concerns; applicable statutory requirements

In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns: Provided, That unless otherwise provided for by law, the Secretary may permit Federal departments and agencies to use, occupy, and develop public lands only through rights-of-way under section 1767 of this title, withdrawals under section 1714 of this title, and, where the proposed use and development are similar or closely related to the programs of the Secretary for the public lands involved, cooperative agreements under section 1737(b) of this title: Provided further, That nothing in this Act shall be construed as

authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law. Except in emergencies, any regulations of the Secretary concerned relating to hunting and fishing pursuant to this section shall be put into effect only after consultation with the appropriate State fish and game department. Nothing in this Act shall modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species. Except as provided in section 1744, section 1782, and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

(c) Revocation or suspension provision in instrument authorizing use, occupancy or development; violation of provision; procedure applicable

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: Provided further, That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment: Provided further, That, where other applicable law contains specific provisions for suspension,

revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail.

Oregon Revised Statutes

ORS 196.810(1) Permit required to remove material from bed or banks of waters

(a) Except as otherwise specifically permitted under ORS 196.600 (Definitions for ORS 196.600 to 196.655) to 196.905 (Applicability), a person may not remove any material from the beds or banks of any waters of this state or fill any waters of this state without a permit issued under authority of the Director of the Department of State Lands, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetland conservation plan.

(b) Notwithstanding the permit requirements of this section and notwithstanding the provisions of ORS 196.800 (Definitions for ORS 196.600 to 196.905) (3) and (13), if any removal or fill activity is proposed in essential indigenous anadromous salmonid habitat, except for those activities customarily associated with agriculture, a permit is required.

"Essential indigenous anadromous salmonid habitat" as defined under this section shall be further defined and designated by rule by the Department of State Lands in consultation with the State Department of Fish and Wildlife and in consultation with other affected parties.

(c) A person is not required to obtain a permit under paragraph (b) of this subsection for prospecting or other nonmotorized activities resulting in the removal from or fill of less than one cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards of material within a designated essential indigenous anadromous salmonid habitat segment in a single year. Prospecting or other nonmotorized activities may be conducted only within the bed or wet perimeter of the waterway and may not occur at any site where fish eggs are present. Removal or filling activities customarily associated with mining require a permit under paragraph (b) of this subsection.

(d) A permit is not required under paragraph (b) of this subsection for construction or maintenance of fish passage and fish screening structures that are constructed, operated or maintained under ORS 498.306 (Screening or by-pass devices for water diversions), 498.316 (Exemption from

screening or by-pass devices), 498.326 (Department guidelines for screening and by-pass projects) or 509.600 (Destroying, injuring or taking fish near fishway) to 509.645 (Filing protest with commission).

(e)(A) Notwithstanding the permit requirements of this section and notwithstanding the provisions of ORS 196.800 (Definitions for ORS 196.600 to 196.905) (3) and (13), if any removal or fill activity is proposed in Oregon's territorial sea that is related to an ocean renewable energy facility as defined in ORS 274.870 (Definitions for ORS 274.870 to 274.879), a permit is required.

(B) An application for a permit related to an ocean renewable energy facility in the territorial sea must include all of the information required by that part of the Territorial Sea Plan that addresses the development of ocean renewable energy facilities in the territorial sea.

(C) The Department of State Lands may not issue a removal or fill permit for an ocean renewable energy facility that does not comply with the criteria described in that part of the Territorial Sea Plan that addresses the development of ocean renewable energy facilities in the territorial sea.

(f) Nothing in this section limits or otherwise changes the exemptions under ORS 196.905 (Applicability).

(g) As used in paragraphs (b) and (c) of this subsection:

(A) "Bed" means the land within the wet perimeter and any adjacent nonvegetated dry gravel bar.

(B) "Essential indigenous anadromous salmonid habitat" means the habitat that is necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing.

(C) "Indigenous anadromous salmonid" means chum, sockeye, Chinook and Coho salmon, and steelhead and cutthroat trout, that are members of the family Salmonidae and are listed as sensitive, threatened or endangered by a state or federal authority.

(D) "Prospecting" means searching or exploring for samples of gold, silver or other precious minerals, using nonmotorized methods, from among small quantities of aggregate.

(E) "Wet perimeter" means the area of the stream that is under water or is exposed as a nonvegetated dry gravel bar island surrounded on all sides by actively moving water at the time the activity occurs.

ORS 468B.112 Definitions. As used in ORS 468B.112 to 468B.118:

(1) "Essential indigenous anadromous salmonid habitat" has the meaning given that term in ORS 196.810, as further defined and designated by rule by the Department of State Lands pursuant to ORS 196.810.

(2) "Line of ordinary high water" has the meaning given that term in ORS 274.005.

(3) "Motorized in-stream placer mining" means mining using any form of motorized equipment, including but not limited to the use of a motorized suction dredge, for the purpose of extracting gold, silver or any other precious metals from placer deposits of the beds or banks of the waters of the state.

(4) "Operator" means any person that is engaged in motorized in-stream placer mining operations. [2017 c.300 §3]

ORS 468B.114 Motorized in-stream placer mining; discharge prohibited without permit; other prohibitions.

(1) An operator may not allow a discharge to waters of the state from a motorized in-stream placer mining operation or activity without having an individual permit or being covered by a general permit issued under ORS 468B.050.

(2) In order to protect indigenous anadromous salmonids and habitat essential to the recovery and conservation of Pacific lamprey, motorized in-stream placer mining may not be permitted to occur up to the line of ordinary high water in any river in this state containing essential indigenous anadromous salmonid habitat, from the lowest extent of essential indigenous anadromous salmonid habitat to the highest extent of essential indigenous anadromous salmonid habitat.

(3) The prohibition in subsection (2) of this section does not apply to the use of nonmotorized mining technology, including but not limited to gravity dredges and syphon dredges. [2017 c.300 §4]

36 CFR 228.8 - Requirements for environmental protection.

All operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources, including the following requirements:

(a) Air Quality. Operator shall comply with applicable Federal and State air quality standards, including the requirements of the Clean Air Act, as amended (42 U.S.C. 1857et seq.).

(b) Water Quality. Operator shall comply with applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151et seq.).

(c) Solid Wastes. Operator shall comply with applicable Federal and State standards for the disposal and treatment of solid wastes. All garbage, refuse, or waste, shall either be removed from National Forest lands or disposed of or treated so as to minimize, so far as is practicable, its impact on the environment and the forest surface resources. All tailings, dumpage, deleterious materials, or substances and other waste produced by operations shall be deployed, arranged, disposed of or treated so as to minimize adverse impact upon the environment and forest surface resources.

(d) Scenic Values. Operator shall, to the extent practicable, harmonize operations with scenic values through such measures as the design and location of operating facilities, including roads and other means of access, vegetative screening of operations, and construction of structures and improvements which blend with the landscape.

(e) Fisheries and Wildlife Habitat. In addition to compliance with water quality and solid waste disposal standards required by this section, operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.

(f) Roads. Operator shall construct and maintain all roads so as to assure adequate drainage and to minimize or, where practicable, eliminate damage to soil, water, and other resource values. Unless otherwise approved by the authorized officer, roads no longer needed for operations:

(1) Shall be closed to normal vehicular traffic,

(2) Bridges and culverts shall be removed,

(3) Cross drains, dips, or water bars shall be constructed, and

(4) The road surface shall be shaped to as near a natural contour as practicable and be stabilized.

(g) Reclamation. Upon exhaustion of the mineral deposit or at the earliest practicable time during operations, or within 1 year of the conclusion of operations, unless a longer time is allowed by the authorized officer, operator shall, where practicable, reclaim the surface disturbed in operations by taking such measures as will prevent or control onsite and off-site damage to the environment and forest surface resources including:

(1) Control of erosion and landslides;

(2) Control of water runoff;

(3) Isolation, removal or control of toxic materials;

(4) Reshaping and revegetation of disturbed areas, where reasonably practicable; and

(5) Rehabilitation of fisheries and wildlife habitat.

(h) Certification or other approval issued by State agencies or other Federal agencies of compliance with laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations.

43 CFR 3809.3 - What rules must I follow if State law conflicts with this subpart?

If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart.