No. 16-35262

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA CALEB BOHMKER, *et al.*,
Plaintiffs-Appellants

v.

STATE OF OREGON, *et al.*,
Defendant-Appellees

&

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

On appeal from the United States District Court
For the District of Oregon

AMICUS CURIAE BRIEF OF THE UNITED STATES IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

State Statutes

Rules

Regulations

Other Authorities

STATEMENT OF INTEREST OF THE UNITED STATES

The United States submits this brief in support of Defendant-Appellee State of Oregon pursuant to 9th Cir. R. 29(a).

This case presents a question of federal preemption, requiring this Court to ascertain the Congressional purpose underlying federal legislation and its relationship to regulation of related activities by the State of Oregon. The United States is best suited to explain that purpose and believes that providing its position will aid this Court in interpreting federal law. Furthermore, the Plaintiffs-Appellants challenge a law that regulates some mining activity on federally-managed lands, and the United States Departments of Agriculture and the Interior have a vested interest in laws regulating conduct on the federal lands they manage. The primary federal land-management agencies, the Bureau of Land Management and the Forest Service, manage millions of acres of federal lands within the boundaries of the State of Oregon, and BLM also manages significant amounts of subsurface mineral estate. These federal agencies regulate mining operations under the federal mining laws implicated by this case.

SUMMARY OF ARGUMENT

The Mining Law of 1872 does not expressly preempt state environmental regulation of mining operations on federal lands, and Congress has never intended for all such regulation to be preempted. The challenged provision of SB 838 does not conflict with federal law. This provision is not a broad, statewide ban on mining. It is a five-year moratorium on motorized precious-metal mining from placer deposits, which typically consist of minerals in loose alluvial material (like sand or gravel) and often found in and around riverbeds. The challenged provision applies only in specifically-designated areas chosen for their environmental sensitivity. The challenged provision of SB 838 does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And compliance with both state and federal laws is possible.

The purpose of the federal mining laws is to encourage development of the Nation's domestic mining industry consistent with other state and local laws and customs, including those designed to protect the environment. The Mining Law of 1872 expressly requires compliance with all laws that do not conflict with federal law. 30 U.S.C. §§ 22, 26. And more recently, Congressional statements of national mining policy make clear that meeting the Nation's environmental needs is one of the critical purposes of federal mining law. 30 U.S.C. § 21a. A state law such as SB 838 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.

The judgment of the district court should be affirmed.

ARGUMENT

I. Congress did not so "occupy the field" of regulating mining activity on federal lands that SB 838's moratorium on motorized mining from placer deposits is preempted.

A. Federal mining laws do not preclude simultaneous state regulation of mining activity on federal lands.

The Miners suggest, Op. Br. at 10, that SB 838 is subject to "field preemption," which results from "a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). But the Supreme Court made quite clear in *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), that federal mining laws do not preclude all state regulation of mining on federal lands. There, the Supreme Court determined that the Property Clause did not prohibit a state government from requiring a permit to engage in mining on federal lands. 480 U.S. at 581. Nor did

the Mining Law of 1872, which "expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." *Id.* at 582.

The Miners nevertheless suggest that field preemption should be inferred from that statutory silence, stating that the Mining Law of 1872 provides only a very limited role for states in "establishing and determining ownership of interests in the public lands." (Op. Br. at 28.) They point to 30 U.S.C. § 26, which grants locators of mining claims "the exclusive right of possession and enjoyment of all the surface" provided that 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."[1] (Op. Br. at 26.) Similarly, the Miners single out 30 U.S.C. § 38, which gives effect to state statutes of limitations for establishing title. *Id.*

As the California Supreme Court has noted, while multiple provisions of the Mining Law of 1872 speak to state authority, those provisions are focused narrowly on "the delineation of the real property interests of the miners vis-à-vis each other and the federal government." *People v. Rinehart*, 377 P.3d 818, 824 (Cal. 2016). From this, one may infer that "the act as a whole is devoted entirely to the allocation of real property interests among those who would exploit the mineral

[1] Mining claims located after passage of the Surface Resources and Multiple Use Act of 1955 no longer grant miners "exclusive" rights to the surface and surface resources. 30 U.S.C. § 612.

wealth of the nation's lands, not regulation of the process of exploitation – the mining – itself." *Id.* But as to regulation of the mining activity itself – whether through permitting or environmental regulations – the statute is simply silent. *Granite Rock*, 480 U.S. at 582. There is no reason to infer from this silence that state authority to regulate for protection of the environment is preempted.

The Mining Law of 1872 anticipates the possibility of state regulation of mining activity on federal lands. Section 2 of the Mining Law of 1872, which requires that federal lands be "free and open" to exploration and mining, also requires that all mining occur "under regulations prescribed by law." 30 U.S.C. § 22. The Miners incorrectly read this provision to refer only to federal law, as states imposed little or no regulation on mining activity at the time. *See Jackson v. Roby*, 109 U.S. 440 (1883) (describing how mining prior to federal statute proceeded under customs and rules developed by miners themselves). But "regulations prescribed by law" is a broader statement than that, and is more sensibly read to include state laws as well. *See O'Donnell v. Glenn*, 19 P. 302, 306 (Mont. 1888) (reading this provision to require compliance with state law).

A simple textual analysis of the statutory language supports this conclusion. Elsewhere in Section 2, Congress refers expressly to "laws of the United States." 30 U.S.C. § 22. When Congress uses two different phrases in the same section of a statute, this Court must ascribe some intent to that drafting. *Corley v. United States*, 556 U.S. 303, 315 (2009). *See also Russello v. United States*, 464 U.S. 16,

23 (1983) (evaluating inclusion of language in one section and omission of same language in another section and "generally" presuming "that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). Therefore, the Mining Law of 1872's requirement for compliance with "regulations prescribed by law" includes all state laws that are not in conflict with federal law.

Federal regulations promulgated by the Bureau of Land Management ("BLM") and the Forest Service, two of the federal agencies (along with the National Park Service) tasked with administering operations under the federal mining laws on federal lands, further confirm that federal law contemplates concurrent state regulation by requiring compliance with state environmental laws. The Forest Service, authorized by Congress to make "rules and regulations" to "regulate occupancy and use" of the national forests, 16 U.S.C. § 551, has promulgated regulations governing activities under the federal mining laws that explicitly require compliance with relevant state environmental laws. 36 C.F.R. §§ 228.8(a)-(c). BLM regulations similarly anticipate and require compliance with state environmental regulations, expressly stating that all state environmental regulations must be complied with unless that regulation directly conflicts 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." 43 C.F.R. § 3809.3. The

preamble for this regulation explains that "[u]nder the final rule, States may apply their laws to operations on public lands," and "no conflict exists if the State regulation requires a higher level of environmental protection." *Final Rule, Mining Claims Under the General Mining Laws; Surface Management*, 65 Fed. Reg. 69,998, 70,009 (Nov. 21, 2000).

There can be no dispute that federal law anticipates, and in some instances requires, compliance with state environmental laws that may in some ways restrict or limit mining activity. The entire field of regulation of mining activity on federal lands has not been so occupied by federal law that any attempt by a state to impose concurrent restrictions on those activities is automatically preempted.

B. Federal land-use statutes do not preclude all state regulation of mining activity on federal lands for environmental protection.

The Miners also present a narrower version of their field preemption argument, focused on "land-use regulation." (Op. Br. at 17.) In *Granite Rock*, the United States Supreme Court considered whether a state permitting requirement for mining could be preempted by two statutes requiring the development of federal land-use management plans for land managed by the BLM and Forest Service: the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, and the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600. *Granite Rock*, 480 U.S. at 588-89. The Court held 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. Then, in *dicta*, the Court hypothesized that "environmental regulation" by a State might not be preempted by these statutes, although "land use planning" likely would be. *Id.*

The Supreme Court explained its thinking as follows: "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. Relying on this language, the Miners claim that "SB 838 is self-evidently a land use regulation: it identifies particular Prohibited Zones and limits the uses" the miners "may make of the real estate within those Zones." (Op. Br. at 39.) But even if the Supreme Court's distinction between "land use planning" and "environmental regulation" were binding, the provision of SB 838 challenged in this case is not preempted by NFMA and FLPMA.[2] SB 838 is carefully tailored to environmentally-sensitive locations and applies to activities that the Oregon Legislature specifically found were environmentally harmful. For

[2] SB 838 contains other provisions not at issue in this case, including an overall limitation on the number of individual mining permits to be issued in the State for areas not subject to the challenged moratorium. (Appellees' Addendum at 2.) The United States expresses no views here on whether other aspects of SB 838 might be preempted by federal law.

at least five reasons, it is more reasonably understood as "environmental regulation" as described by the Supreme Court in *Granite Rock*.

First, SB 838 is supported by legislative findings indicating that the purpose of the statute is to prevent environmental harm. "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." Or. Rev. Stat. § 517.140 (2016). "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." *Id.* Although the Miners object that the State's purpose in enacting such a statute is irrelevant to the preemption question, Op. Br. at 42, it is relevant to the more limited question of assessing whether a particular state statute is intended to ensure that "damage to the environment is kept within prescribed limits." *Granite Rock*, 480 U.S. at 588. Here, the statute's specific justification for the moratorium on motorized placer mining in certain limited areas at issue is the potential for environmental damage to those areas (and areas of cultural significance to Indian tribes).

Second, although the Miners allege that "the State's real motives" were to privilege other users of the land, Op. Br. at 43, that claim is unsupported by any real evidence. The Miners' brief cites only a statement by a single miner who

acknowledges that this is just his personal opinion. (Op. Br. at 43, citing ER 131.) The Miners also point to a provision of SB 838 requiring the development of a new regulatory framework by a variety of state agencies, as well as the police, the federal government, and other "affected stakeholders." (Appellees' Addendum at 2-3.) This provision requires the development of proposed regulations addressing a non-exhaustive list of considerations including not only several specified environmental concerns, but also "social considerations, including concerns related to safety, noise, navigation, cultural resources and other uses of waterways." (Appellees' Addendum at 3.) What interests the State's future regulatory scheme might address does not answer the preemption question posed by this case. The State is permitted to consider, for the future, regulations of its own waterways for such a broad variety of concerns. The issue presented here is whether the legislation already in effect is an attempt to supplant the land-use policy of the United States. There is no indication that it is.

Third, SB 838 is effective only in areas expressly identified as essential habitat for sensitive species, which is plainly an "environmental" goal. The miners object to the State's method of designating this habitat, alleging that "many of the areas" are not habitat at all. (Op. Br. at 3 n. 1.) The evidence for this claim is a declaration that identifies a single two-mile stretch of Althouse Creek as physically uninhabitable by fish, despite having been designated as essential habitat. (ER 116-117.) Were the Miners correct that some essential salmonid habitat has been

misidentified by the State, however, that is in no way an indication that the statute is an attempt to conduct land-use planning on federal lands. Instead, this is simply a factual objection to the details of its implementation, and the State provides a method of redress if the Miners are correct that certain areas are incorrectly designated. (Br. of Oregon at 8 n.3; Intervenors' Br. at 3 n.2.)

Fourth, as the State has noted, Oregon has a complex and distinct land use system and SB 838 is not part of that legal structure. (Br. of Oregon at 27-28.) The overall land use system in Oregon requires the development of comprehensive plans by local governments, implemented through zoning, and reviewed by the Oregon Land Conservation and Development Commission. Those decisions are reviewed by a State Land Use Board of Appeals that has developed significant land use case law. *See generally* Or. Rev. Stat. Ch. 197. Yet SB 838 makes no reference to this land-use system or to state zoning law, suggesting it was not intended to extend state land-use plans onto federal land in a manner that would be preempted by FLPMA or NFMA. *Granite Rock*, 480 U.S. at 585.

Finally, while both FLPMA and NFMA preclude comprehensive land-use planning by the State on federal lands, the statutes preserve the role of the state in exercising its authority to protect wildlife. NFMA requires that lands managed by the Forest Service are planned for in accordance with the Multiple-Use Sustained-Yield Act of 1969. 16 U.S.C. § 1604(e). That statute provides 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." 16 U.S.C. § 528. Similarly, FLPMA 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." 43 U.S.C. § 1732. And the State's power over wild animals is "broad." *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976). In addition to being viewed as an "environmental regulation" permissible under *Granite Rock*, SB 838 may also be seen as a valid exercise of the State's authority over wildlife, which is not preempted by FLPMA and NFMA but instead expressly reserved to the states by those statutes.

The Miners suggest that a "permissible environmental regulation" after *Granite Rock* is one aimed at lessening the environmental impact of an activity as opposed to "eliminating it through prohibition." (Op. Br. at 33.) In support of this theory, the Miners note that the language used by Congress in the Mining and Minerals Policy Act of 1970 to address environmental concerns is that of "reclamation," rather than prevention. *Id.* (citing 30 U.S.C. § 21a(2).) But a view of "environmental regulation" limited exclusively to those that address environmental damage after-the-fact runs counter to a broad body of environmental law, including a great deal of both federal and state environmental

regulation, that is proactive and prohibits certain chemicals, techniques, or activities in order to anticipatorily prevent environmental harm.[3]

SB 838's moratorium on motorized mining of placer deposits in-stream has a clear connection to the prevention or lessening of environmental harm to sensitive fish species. Although the moratorium also applies to mining 100 yards upland, perpendicular to the high water line, that aspect of the law is suitably tailored to address damage to the environment, as it does not prohibit all mining within 100 yards of the high water line or even all placer mining. The moratorium only applies to motorized placer mining out of the water within 100 yards of the high water line if the mining activity will remove or disturb streamside vegetation in a manner that will impact water quality. (Appellees' Addendum at 1-2.) Water quality is a valid subject of a State's regulatory powers, even on a mining claim on federal lands. *See* 36 C.F.R. § 228.8(b) (Forest Service regulation requiring compliance with state water quality standards by any miner on national forest system lands); 43 U.S.C. § 3809.420(b)(5) (BLM regulation requiring miners to comply with state water quality standards on BLM-managed lands).

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[3] As one relevant example, the State of Montana enacted legislation banning the use of a specific mining method (cyanide heap leaching) for gold and silver, which applied even on federally-owned lands. *See Seven-Up Pete Venture v. State*, 114 P. 3d 1009 (Mont. 2005). Even though the banned mining method was "the only economically viable use of mineral extraction" for certain leaseholders, *id.* at 1016, the ban was not, in BLM's view, preempted by federal law. 65 Fed. Reg. at 70,009. It simply imposed "a higher standard of protection" for the environment than that imposed by BLM's mining regulations. *Id.*

Even if the Supreme Court's distinction in *dicta* between "land use planning" and "environmental regulation" controlled here, SB 838 falls within the bounds of "environmental regulation" and is not preempted by FLPMA and NFMA. SB 838 is therefore not field preempted by federal legislation.

II. SB 838 does not so conflict with federal law or the policies of Congress that it is preempted by federal law.

In addition to field preemption, a state law may be subject to "conflict preemption," which comes in two forms. First, a law may be preempted in "cases where 'compliance with both federal and state regulations is a physical impossibility.'" *Arizona*, 132 S. Ct. at 2500-01 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)). Second, the law may be preempted in "instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona*, 132 S. Ct. at 2501 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The Miners raise both forms of conflict preemption in this case, but neither applies.

A. SB 838 does not pose an impermissible obstacle to accomplishing the full purposes of Congress.

1. SB 838 is consistent with federal statements of mining policy, including most recently in the Mining and Minerals Policy Act of 1970.

The Miners suggest that SB 838 is preempted because it poses an impermissible obstacle to "[t]he Congressional policy choice" that "development of mineral deposits on federal lands is essential to the national interest." (Op. Br. 47 n.13.) Although this statement of Congressional policy is correct on its face, the Miners' implication is that the development of all mineral deposits on all federal lands is essential. This is plainly not true. Congress has long permitted both state and federal regulations that limit or constrain mineral development on federal lands in a variety of ways.

Although the Mining Law of 1872 provides broad authority to explore for and develop minerals on the federal lands, it contains no explicit statement of purpose. Almost one hundred years after its enactment, Congress substantially refined the minerals policy of the United States in the Mining and Minerals Policy Act of 1970. 30 U.S.C. § 21a. That statute provides:

> 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.

Id. In this statute, Congress established that national mining policy is explicitly concerned about "environmental needs" and seeks to "lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities." *Id.* Whether or not the Miners are correct that Congress intended in 1872 for mining to be unfettered by restrictions aimed at reducing environmental damage, the modern Congress views mining differently after 1970.[4]

SB 838 is consistent with this Congressional statement of policy. The statute does not restrict larger-scale mining operations, which operate in Oregon under a different regulatory regime, and which maintain an "economically sound and

[4] Congress articulated its views on regulating mining long before 1970. After early presidential proclamations establishing the first national forests withdrew the forests from mineral entry, Congress enacted the Organic Administration Act in 1897. 16 U.S.C. § 482. That statute provides that lands in the national forests are "subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto." *Id.* But Congress also specified that those rules and regulations include those designed for "the protection against destruction by fire and depredation upon the public forests and national forests . . . [and to] regulate their occupancy and use and to preserve the forests thereon from destruction. . . ." 16 U.S.C. § 551. This Court has held that this language expressly authorizes regulations designed to minimize the adverse environmental impacts of mining operations on the surface resources of national forests. *United States v. Weiss*, 642 F.2d 296, 298 (9th Cir. 1981).

stable" mining industry capable of "satisfaction of industrial, security and environmental needs." 30 U.S.C. § 21a. There is little reason to believe that a five-year curtailment of suction dredging and other small-scale means of motorized precious metal extraction from a certain percentage of placer deposits will impede the development of industrial mining operations in Oregon, or substantially reduce federally-owned mineral reserves to a degree that could affect national security. The Miners object that the statute will "injure the industry of manufacturing and selling small-scale motorized mining equipment," Op. Br. at 8, but (accepting the claim at face value) such injuries are often, if not always, the result of regulation that makes mineral extraction more expensive or difficult. The Mining and Minerals Policy Act of 1970 is clearly aimed at preserving an "economically sound and stable" mining industry on a national scale, and not the business of a specific group of miners in a particular state using particular types of equipment. The limitations imposed by Oregon's moratorium are not so in conflict with Congressional mining policy that the state law is preempted.

2. SB 838 is consistent with other statutes governing mining on federal lands.

The Miners survey other federal laws addressing mining and consistently find what they believe to be a "general imperative" to defend mining against all

other uses. (Op. Br. at 29.) But none of the cited statutory provisions include nearly so broad a statement of Congressional policy.

The miners first rely on provisions of the Mining Law of 1872 that require a miner to continue to perform annual labor on a mining claim, or to pay an annual maintenance fee, to continue to hold the claim. (Op. Br. at 29, citing 30 U.S.C. §§ 28, 28f.) The miners do not actually state what Congressional policy these "maintenance" requirements establish, other than to vaguely suggest that Congress requires mining claims to be developed. But these provisions of the Mining Law of 1872 have nothing at all to do with whether the mining operations conducted on a mining claim may be regulated – they speak only to the continuing obligations required to hold the mining claim, even if no operations are being conducted. Congress incorporated these maintenance requirements because a valid "unpatented" mining claim is a "possessory interest" in land. *United States v. Locke*, 471 U.S. 84, 86 (1985). Such interest is not granted lightly, and the maintenance requirements help prevent abuses of the mining laws by those who would use the federal lands for other purposes under the pretense of mining. *See, e.g.*, *United States v. Nogueira*, 403 F.2d 816, 823-24 (9th Cir. 1968). The statute therefore imposes obligations on miners, as the holders of these property interests, and not States.

The Miners next turn to the Surface Resources and Multiple Use Act of 1955 ("Surface Resources Act"). (Op. Br. at 29.) Unlike mining claims located before

the Surface Resources Act, mining claims located after the Act were not granted exclusive use of the surface, but were subject to the right of the United States to manage and dispose of the surface resources within the boundaries of the mining claim. 30 U.S.C. §§ 26, 612. However, the Surface Resources Act limits the actions of the United States with respect to permitting or licensing those surface resource uses on mining claims to those that will not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." 30 U.S.C. § 612(b). While the Miners are correct that Congress intended to protect mining against competing uses, Op. Br. at 30, that provision addresses only actions by the United States taken pursuant to statutes other than the Mining Law of 1872. 30 U.S.C. § 612(b). The Surface Resources Act nowhere limits the authority of the United States or anyone else to regulate mining operations on mining claims located under the Mining Law of 1872. Moreover, both of the cases cited by the Miners addressed the extent of the United States' authority to regulate operations on mining claims, and not a state's authority. *United States v. Backlund*, 689 F.3d 986, 997 (9th Cir. 2012); *United States v. Shumway*, 199 F.3d 1093 (9th Cir. 1999).

Furthermore, to the extent the Surface Resources Act addresses state laws at all, it preserves them, ensuring that federal mining regulation cannot be "construed as affecting or intended to affect or in any way interfere with or modify" water law in the West. 30 U.S.C. § 612(b). The Miners suggest that because Congress did not

"confer a general and unrestricted power on the states to regulate mining operations," this means that the states lack such a power. (Op. Br. at 31-32.) But that is backwards: the statute does not confer such a power because it was pre-existing, to the extent that state laws are not "inconsistent with the laws of the United States," 30 U.S.C. § 22.

The Miners' reference to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1281, does not support their conclusion either. (Op. Br. at 34.) That statute authorizes the Secretary of the Interior to withdraw certain areas from mineral entry or limit mining operations, and allows a Governor or any interested person to initiate the review process. 30 U.S.C. § 1281. The Miners find this "utterly inconsistent" with the idea that a state might impose restrictions on mining operations under other legal authority, but do not explain how. (Op. Br. at 34.) This statutory provision provides a method for a state to seek to have federal lands withdrawn from some of the mining laws, but leaves the final decision to the federal government. It neither expanded nor restricted a state's authority to regulate activities, including mining, on federal lands.

The Miners also read the Mining and Minerals Policy Act of 1970 as supporting preemption in this case, because it speaks of development of methods for "reclamation" of mined lands, "so as to lessen any adverse impact" of mining on the environment. (Op. Br. at 32, quoting 30 U.S.C. § 21a(2).) But this language does not inevitably lead to the Miners' conclusion that "*[l]essening* impact is a

regulatory action; eliminating it through prohibition of mining is a forbidden horse of an entirely different color." (Op. Br. at 33 (emphasis in original).) While restricting the use of motorized mining equipment in sensitive aquatic regions will lessen the anticipated environmental impact, SB 838 is not a broad prohibition of all mining, and even precious-metal mining may continue in other parts of the State. In reading this statutory provision, the Miners elide the clear statements of Congressional policy in order to shoehorn them into the Miners' theory that "regulating" mining may be permitted but "prohibiting" it is preempted. That theory is incorrect.

B. The Miners' distinction between prohibition and regulation is unsupported by the case law and does not support preemption in this case.

The Miners also advance a theory, based on language found in parentheticals in *Granite Rock* and later employed by the Eighth Circuit, that a state limitation on mining is preempted if it is "prohibitory, not regulatory, in its fundamental character." Op. Br. at 21 (quoting *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998)). We would agree that were a state to completely prohibit all mining activity on federal lands, federal mining law would preempt that ban. But that is not this case. And with the exception of *South Dakota Mining*, discussed further below, no court has applied the distinction that the Miners now ask this Court to adopt.

The Miners' theory is not only unsupported by law, it is also unworkable. It is unclear how this Court would determine whether SB 838 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 for a very specific timeframe, but in the process of identifying where its prohibitions apply it seems "regulatory" in nature. In a sense, SB 838 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. *Supra* at 13.

1. *South Dakota Mining* is distinguishable.

The Eighth Circuit, the only federal appeals court that has relied in part on the vague distinction advanced by the Miners in their brief, did so in a situation where all parties stipulated that all surface mining was prohibited. *South Dakota Mining*, 155 F.3d at 1008. That case is not precedential here, and is also readily distinguishable. In *South Dakota Mining*, the Eighth Circuit considered whether the federal mining laws preempted a county zoning law that prohibited new or amended permits for "surface metal mining extractive industry projects." 155 F.3d at 1007. The section of the county where the law applied was 90% federal land. *Id.*

The United States was not a party to that case and did not participate as *amicus*. Furthermore, by the time the case reached the Eighth Circuit, no party defended the county zoning ordinance. The county had changed its position and informed the court that it believed its own zoning rule was preempted, and also stipulated to the court that surface mining was the only practical means of mineral extraction in that area. *Id.* at 1007-08 & n.3. The Eighth Circuit distinguished *Granite Rock* on the basis that the county law before it "is a de facto ban on mining in the area," and no party discussed whether any other forms of mining might be possible. *Id.* at 1011. The Eighth Circuit found the county law preempted.

The county zoning law at issue in *South Dakota Mining* is distinguishable from SB 838 in several important respects. The ban on surface mining in *South Dakota Mining* was permanent, and was enacted as a zoning ordinance. It may therefore be reasonably described as a "land use policy" extended onto federal lands, and although not specifically discussed in the Eighth Circuit's analysis, preempted by federal land-management statutes. *See supra* at 7-8. Furthermore, the prohibition at issue in *South Dakota Mining* was much broader than that contemplated by SB 838, as it eliminated all available means of mineral extraction and (in the opinion of the Eighth Circuit) "completely frustrates the accomplishment of . . . federally encouraged activities." 155 F.3d at 1011. Thus, *South Dakota Mining* can be viewed as a case involving not only obstacles to

Congressional purpose but also physical impossibility, a different scenario than that now before this Court.

SB 838, conversely, is a temporary moratorium on a highly specific subset of mining activity. Its effect is not universal. Although SB 838 restricts a subset of these Miners' activities, it has no impact on many other mine operators in the State. And even these Miners may still engage in mining operations on other portions of their mining claims or use means not subject to the five-year moratorium. Undisputed evidence in district court showed that each mining claim held by the Plaintiffs in this case contains areas not subject to the moratorium. (Appellees' SER 12.) A declaration in the record states that other non-motorized means of mining remain available to the Miners and could conceivably result in profitable mineral extraction. (Appellees' SER 17.) Plaintiffs contended in the district court that none of their upland mining activities are likely to affect water quality, which, if true, means that SB 838 would place no limits on those activities. At least one Plaintiff declared that his upland operation on his mining claim is currently valuable, ER 138, undercutting the Miners' contention that SB 838 "destroys" all ability to work their claims. (Op. Br. at 6.) And to the extent that upland mining is limited by SB 838, the State has explained that the Miners may seek a permit from the State similar to that required for larger operations. (Br. of Oregon at 16, 32.) This is not a case like *South Dakota Mining* where all mining activity is prohibited.

2. Other cases relied on by the Miners predate *Granite Rock* and are distinguishable as well.

The Miners rely on other opinions published prior to Granite Rock to support their obstacle preemption claim. (Op. Br. at 22-25.) These cases are rooted in a view of federal supremacy on federal lands that was changed by *Granite Rock*, and can largely be distinguished on that basis alone. Additionally, although some cases do discuss the preempted state laws in terms of whether they are prohibitory, the results are best understood in the context of the United States Supreme Court's *dicta* describing a difference between land use regulation and environmental regulation.

For example, the Supreme Court of Colorado found that a county zoning ordinance prohibiting exploratory drilling was preempted by federal mining law. *Brubaker v. Bd. of Cty. Commissioners*, 652 P.2d 1050 (Colo. 1982). Holders of unpatented mining claims on national forest system lands had to apply for a special use permit from the county, which rejected the permit on the basis that drilling was "inconsistent with the long-range plans adopted for El Paso County and were incompatible with the existing and permitted uses on surrounding properties," which were zoned for agriculture. *Id.* at 1053. The court found that the denial of the permit stood as an impermissible obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Mining Law of 1872. *Id.* at 1054 (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978)).

Notably, the Colorado Supreme Court recognized that the federal mining laws did not preempt all state regulations of mining on federal lands. *Id.* at 1056. But it found the case before it similar to that of *Ventura Cty. v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), which also found a zoning ordinance preempted when it prohibited mining activity on federal lands. In both cases, the courts invalidated zoning ordinances that identified specific uses for federal lands and precluded mining.

Similarly, in *Elliott v. Oregon Int'l Mining Co.*, 60 Or. App. 474 (1982), the court struck down a county zoning ordinance that "prohibited surface mining" in some areas and "excluded mining as a permissible use of [P]laintiffs' property." *Id.* at 476. Rather than explaining these cases in terms of distinguishing between "prohibition" and "regulation," the cases are perfectly consistent with the United States Supreme Court's observation that state land use policies may not prohibit mining, but that the state may regulate the environmental impacts of that mining.

C. Compliance with both state and federal regulation is not a physical impossibility.

SB 838 is also not preempted by federal law because simultaneous compliance with both federal and state law is not impossible. 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 as discussed above, 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.

The Mining Law of 1872 only provides rights to discoverers of "valuable mineral deposits," 30 U.S.C. § 22, which means mineral deposits that are profitable to extract once compliance with the law and other factors are taken into account. *United States v. Coleman*, 390 U.S. 599, 602 (1968). Because the profitability of extracting minerals on any mining claim depends on the characteristics of the mineral deposit, and may fluctuate depending on mineral values, costs of extraction, and compliance costs (among other factors), the impossibility standard for preemption analysis cannot be based on whether an individual miner finds it impossible to profitably work their claim.

Compliance with the Mining Law of 1872 (providing that the federal lands will generally be free and open to exploration) and SB 838 (imposing a five-year moratorium on motorized mining of precious metals in placer deposits located in certain designated waters and uplands) is not impossible. Any miner who cannot profitably extract minerals during this five-year moratorium will not lose their mining claim so long as they comply with annual maintenance requirements as described above. 43 C.F.R. § 3834.11(a)(2). As discussed in detail above, *supra* at 23, some Miners may still be able to profit from their claims. Compliance with SB

838 and federal law is still possible, and SB 838 is therefore not preempted by federal law.

CONCLUSION

We ask that this Court affirm the judgment of the district court that the provision of Oregon SB 838 challenged in this case is not preempted by federal law.

Respectfully submitted,

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- I hereby certify that the attached *Amicus Curiae Brief of the United States* complies with the type-volume limitations of Fed. R. App. P. 29(d), because it contains 6,823 words, excluding those portions of the brief identified in Fed. R. App. P. 32(a)(7)(B)(iii).

- I hereby certify that the attached *Amicus Curiae Brief of the United States* complies with the typeface requirements of Fed. R. App. P. 32. It was prepared in 14-point Lynn font using Microsoft Word 2013.

Respectfully submitted,

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9th Circuit Case Number(s) 16-35262

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