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MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

To: Dave McCracken, New 49'er Association

From: James L. Buchal

Date: December 10, 2012

Re: LC 2125

You have asked me to review the provisions of a "Committee Legislative Concept," in the form of a draft bill, which unknown parties have placed before the Oregon Senate Interim Committee on Environment and Natural Resources. This has been classed as an "emergency bill," which will allow it to progress on a fast track through the legislative process without the same degree of scrutiny as normal legislation. The bill would, in substance, outlaw all motorized placer mining within the State of Oregon, subject to specific exceptions that would—if they persisted in an adopted version of the bill—permit small-scale suction dredge mining to continue. On its face, the flat ban on placer mining contains three exceptions, linked to specific mining activities described in ORS 390.835, 196.810, and 517.120 to 517.133.

The Scope of the ORS Chapter 517 Exemption

The last reference is most useful insofar as ORS 517.120(3)-(5) provides definitions of "prospecting", "small scale mining" and "recreational mining" all exempt from the LC 2125 ban:

> (3) "Prospecting" means to search or explore, using motorized or nonmotorized methods, for samples of gold, silver or other precious minerals from among small quantities of aggregate or ore.
>
> (4) "Recreational mining" means mining in a manner that is consistent with a hobby or casual use, including use on public lands set aside or withdrawn from mineral entry for the purpose of recreational mining, or using pans, sluices, rocker boxes, other nonmotorized equipment and dredges with motors of 16 horsepower or less and a suction nozzle of four inches or less in diameter.
>
> (5) "Small scale mining" means mining on a valid federal mining claim operating under a notice of intent or plan of operations while using whatever equipment is necessary, as approved by the notice of intent or plan of operations, to locate, remove and improve the claim.

These definitions are broad enough to cover most of the suction dredge mining activities that Oregon mining clubs and visitors engage in at the present time. However, the mining community should keep it in mind that the language allowing these exemptions could certainly be changed as the proposed bill progresses through the emergency legislative process.

The most useful exemptions will be given by ORS 517.120(4) and (5). While it is not useful, as a matter of federal law, for mining to be called "recreational", the subsection (4) exemption as presently drafted will cover most dredges used in Oregon, whether or not the operators give the Forest Service any notice of intent.

Larger operations on federal mining claims will be covered by (5). There has been concern expressed that the reference in (5) to "using whatever equipment as necessary, *as approved by* the notice of intent or plan of operations" (emphasis added), relates to the ongoing dispute whether the Forest Service approves or authorizes operations by virtue of its review of a notice of intent. I do not think that LC 2125 will have any impact on that dispute, or that mining operations that do not receive some sort of approval letter from the Forest Service will fail to qualify for the exemption.

First, the initial language in (5) would exempt "mining on a valid federal mining claim *operating under* a notice of intent or plan of operations" (emphasis added) without regard to any Forest Service action. The "approved" language occurs only in a poorly-worded phrase suggesting that the notice of intent itself "approves" the use of certain equipment. In this context, I think the word "approved" means "set forth" or "disclosed" in the notice of intent. More generally, the (5) language precedes by many years the present dispute, and the Legislature is unlikely to be considered to have demanded by a general reference to portions of ORS Chapter 517 that the Forest Service perform a specific approval the Forest Service says it need not perform under federal law. As a practical matter, I think it unlikely that an Oregon miner would be prosecuted under LC 2125 for operations consistent with activities disclosed in a notice of intent in a context where the Forest Service has not expressly rejected that notice of intent.

Having said that, I would note that the ORS 517.120(5) definitions of "small scale mining" on federal land is inconsistent with federal law. Federal law grants free access to "small-scale miners" for the purposes of prospecting for a discovery even before a "valid mining claim" can be created, and prospecting activity which does not create a substantial surface disturbance does not require any notice of intent to or approval from the federal authorities. It would help avoid expensive litigation and conflict with the mining community if the State of Oregon did not attempt to impose itself upon how the federal government defines and manages mining activity on the public lands. Rather than try and correct the ORS 517.120(5) definition, it would be preferable to simply kill LC 2125.

The primary losers here are larger operators on private land. It may be that the drafters are not even thinking about such people, and intended through the exemptions to allow all mining operating under some sort of regulatory scheme to proceed—though a flat ban is a

poor way to do it. The Oregon Department of Geology and Mineral Industries issues operating permits for any mining that disturbs more than one acre and/or 5,000 cubic yards in any twelve month period, and also provides a process for obtaining a Grant of Total Exemption for smaller operators. Perhaps there should have been an additional exemption for "larger-scale placer miners permitted or exempted by the Oregon Department of Geology and Mineral Industries". This language would, however, require smaller operators to obtain the Grant rather than simply relying upon falling under the statutory threshold for regulation. In any event, the present language does not allow for commercial placer mining on lands that have been patented under the mining laws solely because of their rich mineral deposits. This goes directly against the will of Congress and is likely to end up in costly takings litigation against the State of Oregon.

The Significance of the Other Exceptions.

The other exceptions in LC 2125 relate to a more complex area of regulation of "essential salmon habitat" and "scenic waterways," regulation that becomes important because many of the gold-bearing bodies of water in Oregon bear these designations. In Oregon, the Department of State Lands (DSL) has state regulatory authority over removal and fill permits, and there have been periodic efforts to have the agency exercise delegated authority from the U.S. Army Corps of Engineers for the same sort of permits under § 404 of the Clean Water Act.

ORS 196.810(1)(a) generally requires a permit from DSL to "remove any material from the beds or banks of any waters of this state or fill any water of this state." There is a 50 cubic yard exemption (ORS 196.800(3) & (12)), but this exemption does not apply in "essential salmon habitat" (ORS 196.810(1)(b)). There, a one- to five- cubic yard exemption available for "prospecting or other nonmotorized activities" (ORS 196.810(1)(c)). But this exemption is only available for "searching or exploring for samples of gold, silver or other precious minerals, using nonmotorized methods, from among small quantities of aggregate". *See* ORS 196.810(1)(f)(D). It is only this narrow sort of mining that is expressly exempted under LC 2125.

At present, DSL has created by administrative rule a general permit (which it calls a General Authorization) for disturbing less than 25 cubic yards per year with four-inch or less dredges in "essential salmon habitat". As long as the language is not changed, I do not see LC 2125 as threatening this process.

The other exemption relates to ORS Chapter 390, which establishes and regulates uses on "scenic waterways" within the State of Oregon. Under this Chapter, "prospecting" meaning "to search or explore for samples of gold, silver or other precious minerals, using nonmotorized methods, from among small quantities of aggregate". ORS 390.835(18)(b). Again this sort of narrow mining would be exempt under LC 2125 as presently drafted.

The primary effect of LC 2125 is to permanently remove any authority from DSL to allow recreational placer mining (defined as in ORS Chapter 517) in scenic waterways. Notwithstanding all of the other problems outlined above, I suggest the proposed bill should

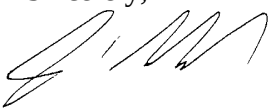
be opposed if only because of this. The statute ostensibly contains such authority (*see* ORS 390.835(2)), but that authority "sunsetted" in 2005. *See* § 4, Chapter 499, Oregon Laws 2001.[1] Although Oregon miners with federal mining claims on such rivers have considered legal action challenging the designation and prohibition, as far as I know no one has ever done so; with the permanent removal of the permitting authority, the time is even more ripe to do so.

Conclusion

The primary impact of LC 2125, if enacted as it is presently written, would be on larger-scale placer miners operating on private property, and upon those small-scale miners who have been hoping for several years to obtain individual permits to operate in "scenic waterways". It is an ill-conceived bill which ought to be attacked as a job killer. In the current economic climate, it is wildly unreasonable to simply ban productive economic activity that is already closely regulated for environmental concerns. This proposal is also wrongly classed as an "emergency." Placer mining activity in Oregon is being carefully regulated by overlapping state and federal authorities. Language "banning all placer mining in Oregon" and enacting large penalties will discourage reasonable future exploration and development of one of Oregon's most valuable resources, and will aslso discourage tourism into the State. The entire proposal goes directly against existing Oregon Law, which states:

> **517.123 Legislative findings.** The Legislative Assembly finds that prospecting, small scale mining and recreational mining:
>
> (1) Are important parts of the heritage of the State of Oregon;
>
> (2) Provide economic benefits to the state and local communities; and
>
> (3) Can be conducted in a manner that is not harmful and may be beneficial to fish habitat and fish propagation. [1999 c.354 §2]

Sincerely,



James L. Buchal

[1] "Notwithstanding ORS 390.835, a permit or temporary permit for dredging issued by the Division of State Lands for the purpose of recreational placer mining within a scenic waterway is not valid after December 31, 2003, if the review described in section 3 of this 2001 Act has been completed and reported to the Seventy-second Legislative Assembly or, if the review has not been completed and reported to the Seventy-second Legislative Assembly, after December 31, 2005." I would conjecture that the Executive Branch, having failed or refused to complete and submit said report, though ostensibly required to do so by the Legislature, is now seeking to remove the permitting authority entirely.