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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

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

Plaintiffs,

v.

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

Defendants.

No. 1:15-CV-01975-CL

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

ORAL ARGUMENT REQUESTED

EXPEDITED HEARING REQUESTED

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1, the undersigned attorney hereby certifies that the parties made a good faith effort through telephone conferences and e-mail to resolve the issues raised by this motion, and plaintiffs' request for expedition. The other parties oppose relief on the merits and plaintiffs' request for an expedited hearing.

MOTION

Plaintiffs hereby move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment declaring Oregon Senate Bill 838 unconstitutional insofar as it places a moratorium on mining with motorized equipment on federal land.

Because the moratorium takes effect January 2, 2016, plaintiffs seek an expedited hearing on this motion. In discussing this request with defendants, plaintiffs represented that they did not seek to shorten defendants' time to respond, but rather to ensure that a hearing is held in January on the motion. Defendants indicated that January was too soon, hence the disagreement as to expedition.

Plaintiffs believe that the motion raises what are fundamentally legal issues, and that there should be no genuine dispute as to the nature of their federal mining claims and related interests. However, to the extent the Court determines that genuine issues of material fact bar summary judgment, plaintiffs will then be required to seek a preliminary injunction to prevent mass arrests as the mining season gets underway, and an expedited resolution of this motion will be helpful in such scheduling.

This motion is supported by the accompanying Declarations of Rick Barclay, James L. Buchal, Joshua Bohmker, Larry Coon, Karen Darnell, Walter Evens, Joel

Grothe, Jason Gill, Michael Hunter, Tom Kitchar, Michael Lovett, David McCracken, and Don Van Orman, and the pleadings herein.

MEMORANDUM OF POINTS AND AUTHORITIES

Preliminary Statement

On January 2, 2016, through Senate Bill 838, the State of Oregon will make it illegal to engage in any and all small-scale placer mining for gold and other precious metals that utilizes any motorized equipment in a prohibited zone (and one hundred yards to either side) consisting of nearly all gold-bearing streams in the State, wiping out an entire industry, the pioneer cultural heritage of many rural areas in Oregon, and the rights of thousands of citizen prospectors, miners and mining claim owners. This is not a policy choice Oregon is empowered to make, for Oregon may not unlawfully frustrate the will of Congress with respect to the development of mineral resources on federal land and on federal mining claims in particular.

Federal land management statutes forbid the State from exercising what is in substance a quintessential land use power: forbidding particular uses of land pending further regulatory developments. There is authority permitting the State to impose reasonable environmental restrictions on mining operations, even on federal land, but those restrictions must be consistent with the overriding purposes of federal mining law, and may not stand "as an obstacle to the accomplishment of the full purposes and objectives of Congress". *California Coastal Comm'n v. Granite Rock Co*, 480 U.S. 572, 581 (1987).

In particular, federal mining law gives great weight to an overriding national interest in developing the Nation's mineral resources where they are found, such that only

environmental restrictions limiting unnecessary or unreasonable impacts may be imposed. Numerous reported cases confirm that the states may not simply prohibit mining as a substitute for reasoned environmental regulation giving weight to federal policies for mineral development.

Plaintiffs represent a full range of Oregon miners who stand to be put out of business by Senate Bill 838. Most hold federally-registered mining claims now rendered essentially valueless, as motorized equipment is essential to recover more than trace amounts of gold such as one might recover by hand panning. Some sell equipment the use of which is to be banned. Some are prospectors denied the opportunity to utilize equipment essential to explore federal land for mineral deposits. All seek to engage in conduct which the federal government has expressly authorized, whether by statutory and regulatory declarations that small-scale operations may proceed without advance approval by the U.S. Forest Service or Bureau of Land Management, or by specific approvals of specific operations. All of them fall below the threshold above which certain large-scale operations might still be permitted, Senate Bill 838 notwithstanding.

Statement of Facts

1. Senate Bill 838's Ban on Mining.

The first sentence of § 2(1) of the Bill declares that

> "[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."

"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 an expansive definition.

> "'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."

OAR 141-085-0510(9). For purposes of general permits issued by DSL, "bed" includes the land within the wet perimeter and any adjacent non-vegetated dry gravel bar". *See* OAR 141-085-0510(8).

The second sentence of § 2(2) of the Bill declares that:

> "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."

No definitive construction has yet been placed upon the statute by the courts of Oregon concerning the relationship between the first and second sentences, but it is irrelevant for purposes of this motion because the movants generally own or utilize mining claims within so-called "essential indigenous anadromous salmon habitat".[1] However, the statute can be interpreted to shut down precious metals mining up to the high water mark nearly everywhere, and then 300 feet further beyond that line in areas of so-called

[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)(f)(B).) While not pertinent to this motion, the general practice of the State's biologists has been to designate any and all habitat as "essential".

"essential indigenous anadromous salmon habitat". For purposes of this litigation, the areas where motorized mining are prohibited will be identified as the "Prohibited Zones".

If there were any areas within Oregon where placer deposits of precious metals are present which are not closed by the Bill, in such cases DSL is commanded in § 2(3) of the Bill to "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 . . . at any time during the moratorium period". This provision creates, in substance, a lottery for the exercise of federal mining rights. Section 2(4) of the bill removes important procedural protections in describing the boundaries of Prohibited Zones by providing that "[a]ny maps developed by the State Department of Fish and Wildlife, or any other state agency, that delineate the area of the moratorium established by subsection (1) of this section are not subject to the rulemaking requirements of ORS chapter 183."

The Bill becomes operative on January 2, 2016 (*id.* § 3), and miners daring to exercise the federal statutory rights described herein thereafter risk prosecution for a Class A misdemeanor under Oregon law (*id.* § 5). Conviction of a Class A misdemeanor subjects a miner to up to one year of imprisonment (ORS 161.615), and a fine of up to $6,250 or double the value of precious metals recovered through unlawful mining (*see* ORS 161.635).

The State will doubtless assert that Senate Bill 838 was enacted to protect the natural environment. Section 8 of the Bill called for the Governor's office, in consultation with other agencies and "affected stakeholders" to "propose a revised state regulatory framework". However that report and its proposals were completed in

November 2014 (Buchal Decl. Ex. 2), and no action was ever taken to implement them and lift the moratorium (*id*. ¶ 3).

2. The DOGAMI Exemption.

Section 2(2) of Senate Bill 838 provides that "[t]he moratorium does not apply to any mining for which the State Department of Geology and Mineral Industries [DOGAMI] issues an operating permit under ORS 517.702 to 517.989". Operating permits are required for certain large-scale activities by ORS 517.790(1), which provides that "[a] landowner or operator may not allow or engage in surface mining on land not surface mined on July 1, 1972, without holding a valid operating permit from" DOGAMI.

"Surface mining" generally means

> "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).[2]

None of the plaintiffs have operations of this scale. They are not eligible for operating permits, being exempt from the regulatory scheme by this statute and by administrative rule (OAR 632-030-0016). Presumably, in requiring the issuance of an "operating permit" to avoid the ban of Senate Bill 838, the Legislature specifically disallowed the presentation of "exemption certificate" available under OAR 632-030-0016.

3. Plaintiffs and Their Interests.

Plaintiffs are prospectors and miners seeking to exercise their federally-granted statutory rights to develop the mineral resources on public lands. Most own federal mining claims on federal land located in Oregon. (Van Orman Decl. ¶ 2; Gill Decl. ¶ 2;

[2] ORS 517.750(15)(B) also clarifies that "surface mining" does not include "[r]emoval of rock, gravel, sand, silt or other similar substances removed from the beds or banks of any waters of this state pursuant to a permit issued under ORS 196.800 to 196.900".

Hunter Decl. ¶ 4; Coon Decl. ¶ 2; Grothe Decl. ¶ 5; *see also* Evens Decl. ¶ 5 (agreement to purchase such a claim).) These claims are registered with the U.S. Bureau of Land Management, which assigns unique identification numbers and maintains public records, available on the Internet, concerning claim status.[3] Under Oregon law, these claims "are real estate," and "[t]he owner of the possessory right thereto has a legal estate therein within the meaning of ORS 105.005". ORS 517.080. Senate Bill 838 attempts to control the use of such private property within Oregon, operating as a land use restriction on federal and other lands within Oregon.

Plaintiffs all own motorized equipment they use in recovering gold from their claims. (Van Orman Decl. ¶ 3; Gill Decl. ¶ 5; Hunter Decl. ¶ 2; Coon Decl. ¶ 3; Grothe Decl. ¶ 6; Evens Decl. ¶ 4; Bohmker Decl. ¶ 3.) Plaintiffs all require the use of motorized equipment to recover more than trace quantities of gold from them. (Van Orman Decl. ¶ 3; Gill Decl. ¶ 4; Hunter Decl. ¶ 5; Coon Decl. ¶ 4; Grothe Decl. ¶¶ 6-7; Evens Decl. ¶ 6; Bohmker Decl. ¶ 5.)

Senate Bill 838 destroys the ability of these plaintiffs to continue their mining operations, and deprives them of the income and wealth they would otherwise obtain by such mining. (Van Orman Decl. ¶ 4; Hunter Decl. ¶ 5; Coon Decl. ¶ 5; Grothe Decl. ¶¶ 6-7; Evens Decl. ¶ 6; Bohmker Decl. ¶ 6; Lovett Decl. ¶ 4.) Senate Bill 838 also destroys the value of the equipment and the federal mining claims themselves. (Kitchar Decl. ¶¶ 34-35; McCracken Decl. ¶ 11; Gill Decl. ¶ 4.) Because of old age, some miners are likely to die or lose the physical ability to mine during the term of the prohibition (*see*

[3] The records are available through the LR2000 system maintained by BLM. *See* http://www.blm.gov/landandresourcesreports/rptapp/menu.cfm?appCd=2 (accessed 11/19/15).

Coon Decl. ¶ 5)—even assuming it is not extended as was the case in California (*see* Buchal Decl. ¶ 4).

Two plaintiffs are in the business of selling motorized and other mining equipment, which is utilized in the mining operations prohibited by Senate Bill 838. (Grothe Decl. ¶ 2; Evens Decl. ¶ 2.) They are already suffering lost sales even before Senate Bill 838's prohibitions on the use of the equipment become effective. (Grothe Decl. ¶ 2; Evens Decl. ¶ 2.) One of these plaintiffs suffers disabling conditions that also makes motorized use of equipment essential. (Evens Decl. ¶ 6.)

Two plaintiffs are associations, which represent the interests of their members in small-scale mining. (Hunter Decl. ¶ 7; Darnell Decl. ¶ 2.) Not only are the activities of their members threatened, but Senate Bill 838 threatens their own continued existence as well, for there is no use in mining associations when what their members do has been banned. (Hunter Decl. ¶ 10; Darnell Decl. ¶ 5.) One is a mining district, a self-regulatory organization whose rules are given effect pursuant to 30 U.S.C. § 22, which makes "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".[4] (Barclay Decl. ¶ 2.)

One plaintiff does not hold mining claims, but exercises rights under federal mining law to prospect for such claims upon public lands which are, pursuant to 30 U.S.C. § 22, "free and open" for such mining. (Bohmker Decl. ¶ 1-2.)

[4] The case of *United States v. Shumway*, 199 F.3d 1093 (9th Cir. 1999), contains a useful review of the of how "the federal statutory law of mining 'received' customary law in much the same way that the states had received the common law". *Id.* at 1098.

All of the plaintiffs are engaged in small-scale operations as to which no operating permit is available from the State of Oregon that would permit mining notwithstanding Senate Bill 838. (Van Orman Decl. ¶ 5; Gill Decl. ¶ 5; Hunter Decl. ¶ 6; Coon Decl. ¶ 6; Grothe Decl. ¶ 8; Evens Decl. ¶ 7; Bohmker Decl. ¶ 7; Lovett Decl. ¶ 5.)

Argument

I. PERTINENT FEDERAL LAWS CONCERNING MINING AND FEDERAL LAND MANAGEMENT.

Congress, through the Property Clause of the U.S. Constitution, "exercises the powers both of a proprietor and legislator over the public domain". *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). It has "power over the public lands 'to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them'". *Id*. (quoting *Utah Power & Light v. United States*, 243 U.S. 389, 406 (1917)). The Supreme Court has repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations". *Id*. at 539 (quoting *United States v. San Francisco*, 310 U.S. 16 (1940) at 29). The history of such Property Clause legislation demonstrates that Congress has protected the mineral rights on public land from regulatory initiatives that would materially interfere with mineral development, and indeed occupied the field of land use regulation, such that Senate Bill 838 is obviously unconstitutional.

A. The 1872 Mining Law, As Amended.

The 1872 Mining Law, 30 U.S.C. § 22, provides:

> ". . . 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 . . ."

As set forth in the accompanying declarations, free and open exploration for placer deposits of precious metal requires, as a practical matter, the use of motorized equipment. A rule that categorically closes federal lands to the tools needed to explore for valuable deposits is prohibitory and in obvious conflict with 30 U.S.C. § 22. As the Supreme Court of Colorado explained in *Brubaker v. Board of County Commissioners*, 652 F.2d 1050 (Colo. 1982), when a county sought to prohibit core drilling to determine the validity of a claim,

> "the attempt by the Board to prohibit the appellants' drilling operations because they are inconsistent with the long-range plan of the County and with existing, surrounding uses reflects an attempt by the County to substitute its judgment for that of Congress concerning the appropriate use of these lands. Such a veto power does not relate to a matter of peripheral concern to federal law, but strikes at the central purpose and objectives of the applicable federal law. The core drilling program is directed to obtaining information vital to a determination of the validity of the appellants' mining claims. Recognition of a power in the Board to prohibit that activity would contravene the Congressional determination that the lands are 'free and open to exploration and purchase,' 30 U.S.C. § 22, and so would 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' under the mining laws."

Brubaker, 652 P.2d at 1056-57.

Congress had an even more specific purpose than 30 U.S.C. § 22's general purposes with respect to "all valuable mineral deposits in lands belonging to the United States". Congress determined to grant specific property rights to specific parcels for mineral development. *See* 30 U.S.C. §§ 26, 35. As the U.S. Supreme Court explained in *Wilbur v. United States*, 280 U.S. 306, 316-17 (1930):

> "The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is

> 'real property' subject to the lien of a judgment recovered against the owner in a state or territorial court."

As set forth in the Declarations of plaintiffs filed herewith, nearly all are searching for, own, or have rights to utilize such mining claims.

Congress has required that these property rights be exercised for mineral development, initially concerning itself with the "amount of work necessary to hold possession of a mining claim". 30 U.S.C. § 28. Indeed, miners are threatened with the loss of rights if they fail to utilize the property for mineral development. *See* 30 U.S.C. § 28; *see also* 43 U.S.C. § 1744(a). Senate Bill 838's restrictions on mining operations on federal claims is in direct conflict with the Congressional policies requiring such claims to be developed.

B. The Multiple Use Act of 1955.

Concerns over miners who merely pretended to mine in order to obtain other resources in the National Forests led to the passage of the Multiple Use Act of 1955. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1281 (9th Cir. 1980) (quoting H. Rep. No. 730, 84th Cong. 1st Sess.). This Act 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 (except mineral deposits subject to location under the mining laws of the United States)". 30 U.S.C. § 612(b). However, the 1955 Act also reflected Congress'

> "insistence that this legislation not have the effect of modifying long-standing essential rights springing from location of a mining claim. Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator [*i.e.*, claimholders]."

Id. (quoting H. Rep. No. 730, 84th Cong., 1st Sess., at 10 (1955)).)

Thus Congress commanded that the management actions of the United States be limited to actions which would not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto". 30 U.S.C. § 612(b). Congress knew that mineral development required express protection from competing interests because, unlike other human activities, mining cannot simply be moved elsewhere; some disturbance to surface resources cannot be avoided while still extracting minerals where they are found.

As the Ninth Circuit has explained, this statute serves as a substantive limitation on regulation of mineral development, holding recently that the regulatory authority of the Forest Service "is cabined by Congress' instruction that regulation not 'endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.'" *United States v. Backlund*, 689 F.3d 986, 997 (9th Cir. 2012) (quoting 30 U.S.C. § 612(b)). Another leading case is *United States v. Shumway*, 199 F.3d 1093 (9th Cir. 1999), which confirmed that mining use may be regulated, "but only to the extent that the regulations are 'reasonable' and do not impermissibly encroach on legitimate uses incident to mining and mill site claims". *Id*. at 1107. As set forth in the Declarations filed herewith, a prohibition on the use of motorized equipment in the Prohibited Zones is a material and unreasonable interference with prospecting, mining and processing operations.

Congress manifestly never intended to authorize the States to restrict mining in ways forbidden to the federal agencies. To the contrary, Congress provided a very limited role for state law in § 612(b), stating that the limitations on mining regulation should not 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 claims."

30 U.S.C. § 612(b). Quite plainly, the only state law that Congress did not expect to be displaced on federal mining claims on federal land was State water law. *Expressio unius est exclusio alterius*; had Congress wanted to confer a general and unrestricted power on the states to regulate mining operations, Congress could have done so. It did not.

C. The Mineral Policy Act of 1970.

In the Mineral Policy Act of 1970,[5] Congress reiterated that the goal of environmental protection must be tempered by the simple fact that minerals can only be extracted where they are found, and that adverse impacts on the environment are inevitable in that process. In 30 U.S.C. § 21a(1), Congress sought "the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries". As set forth in the Declarations of Kitchar and McCracken, economically sound and stable industries cannot survive lengthy and arbitrary moratoriums on their business. (Kitchar Decl. ¶ 31; McCracken Decl. ¶ 12.)

The Act also reaffirmed the need to develop minerals where found, establishing a goal for "orderly and economic development of domestic [i] mineral resources, [ii] reserves, and [iii] reclamation of metals and minerals to help assure satisfaction of [i] industrial, [ii] security and [iii] environmental needs . . .". 30 U.S.C. § 21a(2). The careful tripartite structure of this policy command was no accident. Development of resources was to assure industrial needs, development of reserves was to meet security

[5] Congress reiterated these goals in 1980, directing the Secretary "to act immediately within the Department's statutory authority to attain the goals contained in section 21a of this title". 30 U.S.C. § 1605(1).

needs, and development of reclamation was to meet environmental needs. Indeed, Congress expanded on this idea in subsection (4), seeking "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 . . ." (emphasis added). Congress expected that the primary means of "lessen[ing] any adverse [environmental] impact" was to be reasonable mitigation and "reclamation," not closing lands to mineral extraction.

D. National Forest Legislation.

The Organic Act permitted the Forest Service to make rules and regulations to "for the protection against destruction by fire and depredations upon the public forests and national forests". 16 U.S.C. § 551. But mining itself was not such a "depredation," for Congress also specified in 16 U.S.C. § 478 that:

> "Nothing in sections . . . 551 of this title shall . . . 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". (Emphasis added).

Subsequent statutes maintained the special protection for mineral uses against the regulatory powers of the U.S. Forest Service. Congress' first significant foray into forest planning came in the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-532 (MUSYA). In that Act, Congress expressly provided that "[n]othing herein shall be construed so as to affect the *use or administration of the mineral resources* of national forest lands". 16 U.S.C. § 528 (emphasis added). The statutory focus of Forest planning remained on "the various renewable surface resources of the national forests". 16 U.S.C.

§ 531 (definition of "multiple use"). Mineral deposits, of course, are neither renewable resources, nor surface resources.

Next came the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. § 1600-14, which was substantially amended in 1976, Pub. L. 94-588, 90 Stat. 2949, and is now commonly identified as the National Forest Management Act (NFMA). The portion of the NFMA governing forest planning is set forth in 16 U.S.C. § 1604, which begins by declaring that the Secretary shall promulgate "land and resource management plans" "[a]s part of the Program provided for by section 1602 of this title". 16 U.S.C. § 1604(a). The role of states is expressly limited to "adequate notice and an opportunity to comment upon the formulation of standards, criteria and guidelines applicable to Forest Service programs". 16 U.S.C. § 1612(a). The statute leaves no room for state laws purporting to establish controlling criteria for National Forest Land use.

The Forest Service plans are to "be developed in accordance with the principles set forth in the Multiple-Use Sustained-Yield Act of June 12, 1960 . . .". 16 U.S.C. § 1602. Such principles necessarily include the statutory limitation that none of the resulting plans may "affect the use or administration of the mineral resources of national forest lands". 16 U.S.C. § 528.

Pursuant to its Organic Act authority, the Forest Service has issued regulations at 36 C.F.R. Part 228 that regulate mining on federal lands. Under those regulations, most small-scale mining is generally exempt from any requirement to obtain advance approval or a specific "plan of operations" from the Service. *See generally* 36 C.F.R. § 228.4(a) (significant operations involving "cutting of trees" or use of "bulldozers or backhoes"

may require approval and plan). One plaintiff does hold a Forest Service plan of operations that authorizes the mining the State seeks to shut down. (Gill Decl. ¶ 3.)

The Forest Service initially promulgated the Part 228 (then Part 252) Organic Act regulations as a proposed rule in 1973. 38 Fed. Reg. 34,817 (Dec. 19, 1973). This provoked a Congressional oversight hearing during which members of Congress made clear their opposition to Forest Service mining regulations which would entangle small-scale miners in environmental reviews which would interfere with mineral development. *See generally* Proposed Forest Service Mining Regulations: Hearings before the Subcommittee on Public Lands, House Committee on Interior and Insular Affairs, 93rd Cong., 2d Sess. 1-4 (Mar. 7-8, 1974). Testimony before the Subcommittee confirmed that even back in 1974, it would often be impossible to complete environmental review procedures during "length of the field season" (*id.* at 37); the industry noted, however, "no objection to a notification procedure which would alert the Forest Service to the expected activities" (*id.* at 41).

The Forest Service initially defended the position that each and every mineral operation would require an approved plan of operations. *See id.* at 10 (Testimony of Forest Service Chief); *see also proposed* 36 C.F.R. § 252.7, 38 Fed. Reg. at 34,818 (with certain exceptions, "[n]o operations shall be conducted unless they are in accordance with an approved plan of operations . . ."). Thereafter, the Forest Service conformed to Congressional intent and amended the proposed regulations to add provisions to provide flexibility for non-significant operations. 39 Fed. Reg. 26,038, 26,039 (July 16, 1974) (proposed 36 C.F.R. § 252.4). The final rule was adopted August 28, 1974. 39 Fed. Reg. 31,317 (Aug. 28, 1974).

More recently, Congress asked the National Research Council to reassess the adequacy of this regulatory framework. With respect to the operation of suction dredges, the most significant form of small-scale mining prohibited by Senate Bill 838 (*see* Kitchar Decl. ¶¶ 19-21), the Committee reported back that "BLM and the Forest Service are appropriately regulating these small suction dredge mining operations under current regulations as casual use or causing no significant impact, respectively". NRC, *Hardrock Mining on Federal Lands* 96 (Nat'l Academy Press 1999). In short, Congress has repeatedly exercised oversight to ensure that regulation of small-scale mining operations continues to avoid material interference with such operations as prohibited by 30 U.S.C. § 612(b).

E. The Federal Land Policy and Management Act of 1976 (FLPMA).

FLPMA also limits the state role in the federal land use planning process. FLMPA establishes a federal land use management process for "public lands" (43 U.S.C. § 1702(e)) under the jurisdiction of the U.S. Bureau of Land Management. Section 202(a) of FLPMA authorizes the Secretary of Interior to "develop, maintain, and, when appropriate, revise land use plans which provided by tracts or areas for the use of public lands". 43 U.S.C. § 1712(a).

FLPMA specifically directs the Secretary, in developing federal plans, to coordinate with planning with state and local government. 43 U.S.C. § 1712(c)(9). It also provides: "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 purposes of this Act," though the Secretary must only keep apprised of such plans "to the extent he finds practical". *Id.* The legislative history leaves no doubt that Congress

intended to preserve exclusive federal control over federal land use decisions, as the Conference Report explains:

> "The conferees adopted a consolidation of provisions . . . with revisions making clear that *the ultimate decision as to determining the extent of feasible consistency between BLM plans and such other plans rests with the Secretary of Interior*. This affirmed the need to maintain the integrity of governing Federal laws and Congressional policies.

H. Conf. Rep. No. 94-1724, 94th Cong., 2d Sess. 58 (1976) (emphasis added); *see also* H. Rep. No. 94-1163, 94th Cong., 2d Sess. 5, 7 (1976); S. Rep. No. 94-583, 94th Cong., 1st Sess. 45 (1975).

FLMPA also continues the careful balance struck by Congress in 30 U.S.C. § 612(b) and elsewhere preventing material interference with mining operations. FLMPA reiterates that regulation must only "prevent unnecessary or undue degradation of public lands". 43 U.S.C. § 1732(b); *see also id*. § 1701(a)(12) (Secretary must manage federal land "in a manner that recognizes the Nation's need for domestic sources of minerals . . .").

F. Other Relevant Statutes.

Numerous statutes provide procedures for closing federal lands to mineral development, in a way that makes it clear that Congress did not authorize states to do so. For example, § 601 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) authorizes the Secretary of the Interior to review whether an area "may be unsuitable for mining operations" because of "an adverse impact on lands used primarily for residential or related purposes". 30 U.S.C. § 1281(a) & (b)). The Governor of a state or "[a]ny person have an interest which is or may be adversely affected" may initiate the review process (30 U.S.C. § 1281(c)). If the Secretary determines that the benefits

resulting from a designation outweigh the benefits of mineral development, he may either withdraw the area from mineral entry or limit mining operations (30 U.S.C. § 1281(f)).

Congress thus recognized potential conflicts between mineral development on federal lands and other activities on non-federal lands, but provided a federal solution. The creation of a federal process for resolving the conflict demonstrates that federal law, rather than state law, controls decisions affecting mining on federal lands.

II. SENATE BILL 838 IS PREEMPTED BY FEDERAL LAW.

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. An important case on the preemptive effects of the body of law set forth above with regard to the exercise of federal mining rights is *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987). By a 5-4 decision, the Supreme Court permitted the State of California to issue permits for mining on federal land, based on California's repeated representations that it did not intend to prohibit mining. *See id.* at 586.

The Court began by noting that "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted". *Id.* at 581. The *Granite Rock* Court "assume[d] 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), in substance regarding it as obvious that these statutes occupied the field of land use planning. Senate Bill 838 is, in substance, a land use planning statute zoning out mining in the Prohibited Zones in riparian areas throughout the State.

The Court also noted that even where Congress had not occupied the field of regulation, "state law is still pre-empted . . . where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress". *Id.* at 581. Inasmuch as the Granite Rock Company refused to apply for a permit, the Supreme Court could not assess whether environment restrictions imposed by the State would in fact pose an impermissible obstacle to the objectives of federal mining law. *Id*. at 588-89.

Here, however, the prohibitory nature of Senate Bill 838 is clear. Even if Senate Bill 838 is regarded as a form of environmental regulation rather than land use restriction—and it should not be—it remains preempted because it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress". *Granite Rock,* 480 U.S. at 581.

A. Federal Law Occupies the Field of Zoning Uses on Federal Land, Such That Oregon's Prohibited Zone Is Preempted By Federal Law.

As set forth above, federal land management statutes, including the most recent statute regarding the federal lands, FLPMA, makes it clear that the federal government reserves ultimate authority over land use planning, and that states simply cannot enact land use plans controlling uses on federal lands. As the Supreme Court explained in *Granite Rock*, "[l]and use planning in essence chooses particular uses for the land". *Granite Rock,* 480 U.S. at 587.

The Prohibited Zones represent precisely such a legislative choice: huge areas of federal property are zoned for the use of "indigenous anadromous salmon" (including vast areas far from the water), and zoned to prohibit a particular use: motorized mining. By contrast, "environmental regulation, at its core, does not mandate particular uses for the land but requires only that, however the land is used, damage to the environment be

kept within prescribed limits". *Id.* Senate Bill 838 prohibits a particular use in the Prohibited Zones without regard to any particular level of environmental impact.

While the use restriction is implemented for an ostensibly limited duration of five years (*but see* Buchal Decl. ¶ 4 (California experience suggests possible extension)), such a moratorium remains a classic land use device. Moratoria are, after all, "interim controls on the use of land that seek to maintain the status quo with respect to land development in an area by either 'freezing' existing land uses or by allowing the issuance of building permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change.'" *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting) (quoting 1 E. Ziegler, Rathkopf's *The Law of Zoning and Planning* § 13:3, p. 13-6 (4th ed. 2001)).

The State may contend that Senate Bill 838 enacts a moratorium for environmental reasons. The plain language of Senate Bill 838 belies any exclusive focus on environmental concerns, for § 8(1)(d)(B) of the Bill directs preparation of a revised regulatory framework concerning, among other things, "*social considerations*, including concerns related to safety, noise, navigation, cultural resources, *and other uses* of waterways" (emphasis added). In fact, plaintiffs believe that Senate Bill 838 is primarily motivated by objections from other users of the waterways (Hunter Decl. ¶ 12), not *bona fide* environmental concerns.

Plaintiffs would deny any appreciable adverse environmental impacts from the small-scale mining at issue on this motion (*see* Kitchar Decl. ¶¶ 25-26), and in particular would deny that a moratorium was required to advance any legitimate interest of the State of Oregon. As noted above, the State completed its reconsideration of the regulatory

process more than a year ago, had ample opportunity to enact imagined improvements into law, and did not do so. A five-year moratorium is unreasonable in these circumstances under Oregon's own law. *See* ORS 197.520(3) (A moratorium not based on a shortage of public facilities . . . may be justified only by a demonstration of compelling need"); ORS 197.520(3)(b) (requiring showing of "irrevocable public harm," proof that alternatives to a moratorium are unsatisfactory); ORS 192.520(4) (only 120 days allowed as a general matter to revise regulatory schemes). Oregon's owns law demonstrate that what is going on here is not the reasonable exercise of police power, but an invidious discrimination against a federally-protected activity.

Factual disputes over alleged environmental impacts or the State's real motives, however, are not *material* to resolution of this motion. What is material is a simple conclusion of law: a moratorium prohibiting a particular use of land, enacted for whatever reason, is a land use planning process preempted by federal law. Federal law may not forbid Oregon from establishing its own environmental standards applicable to small-scale mining, or even its own regulatory system entirely duplicative of those embodied in 36 C.F.R. Part 228 and 43 C.F.R. Part 3800, and the relief sought by plaintiffs against Senate Bill 838 does not represent a ruling against such a scheme. What the State cannot do, however, is simply prohibit motorized mining as a use on federal land.

B. Senate Bill 838 Is Preempted By Federal Law Insofar As It Frustrates the Accomplishment of the Full Purposes of Congress As Set Forth in Federal Mining Law.

Granite Rock held that "*reasonable* state environmental regulation" is not preempted under federal law. *Granite Rock*, 480 U.S. at 589 (emphasis added). In *dicta*,

the Supreme Court discussed when state regulation would be regarded as unreasonable, noting that "one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable"—or amounting to a preempted prohibition of the mining use. *See id.* at 587.

A wealth of lower court precedent, before and after *Granite Rock*, confirms the proposition that state-law based bans on mining, or particular mining activities, are preempted under federal law. A leading case is *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), in which the Eighth Circuit struck down a "county ordinance prohibiting the issuance of any new or amended permits for surface metal mining within the Spearfish Canyon Area". *Lawrence*, 155 F.3d at 1006. As the Eight Circuit explained:

> "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. at 1011 (emphasis added). So too is Senate Bill 838 "prohibitory, not regulatory, in its fundamental character". *Id.* The obvious prohibitory character of Senate Bill 838 requires this Court to dismiss any claims of defendants that issues of material fact concerning details of the Bill's effects on mining bar summary judgment.

In *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980), Gulf obtained a federal mineral lease, establishing rights akin to a

mining claim. Ventura County sought to impose "an Open Space Use Permit which may be issued on whatever conditions Ventura determines appropriate, or may never be issued at all". *Id.* at 1084. While the case preceded *Granite Rock*, such that Gulf would now have to at least apply for the permit, the Ninth Circuit's reasoning remains persuasive: "The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, *either temporarily or permanently*, in an attempt to substitute its judgment for that of Congress." *Id.* (emphasis added).

Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984), addressed whether the State of Idaho could prohibit suction dredging—the most important form of mining barred by Senate Bill 838. The Court had to find a state statute prohibiting dredging preempted to conclude that federal takings compensation might be available, and held:

> "Under the Act of May 1, 1872, plaintiffs had the property right to possess and mine to exhaustion the minerals located on their unpatented claims without payment of royalty. *Belk v. Meagher*, 104 U.S. 279, 26 L. Ed. 735 (1881); *Union Oil Co. of California v. Smith*, *supra*. Since it prohibited dredge mining on federal land, compliance with the 1977 Act would have made it impossible for plaintiffs to exercise rights theretofore granted by the mining laws. The Idaho Supreme Court has recognized that federal legislation necessarily overrides such a conflicting state law. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969, 974 (1976) (dictum)."

Skaw, 740 F.2d at 940.

The Oregon Court of Appeals, in *Elliott v. Oregon Int'l Mining Co.*, 60 Or. App. 474 (1982), struck down Grant County ordinances "prohibiting surface mining in certain areas of the county . . . and which excluded mining as a permissible use". *Id.* at 477. The Court distinguished its earlier holding that Oregon regulation which merely required permits was not preempted, and concluded that "Grant County cannot prohibit conduct

which Congress has specifically authorized. That is the meaning of the Supremacy Clause." *Id*. at 481; *see also Brubaker*, 652 P.2d at 1056-57.

Most recently, the State of California adopted a similar statewide moratorium of one form of placer mining, suction dredging. *See* Cal. Fish & Game Code §§ 5653 & 5653.1. While the issue of federal preemption is now before the Supreme Court of California, the California Court of Appeal held 3-0 that federal preemption could constitute an affirmative defense to criminal charges of illegal suction dredging, *People v. Rinehart*, 230 Cal. App.4th 419 (2014), *petition for review granted*, and a Superior Court appointed by the Judicial Council of California as Coordination Judge to handle a mass of civil litigation challenging the California ban has issued summary judgment finding the moratorium preempted by federal law as well, *In re Suction Dredge Mining*, No. JCPDS 4720 (San Bernardino Cty. Jan. 12, 2015) (Buchal Decl. Ex. 3; *see generally id.* ¶¶ 5-9 (outlining history of California litigation).).

The State may argue that the continuing availability of non-motorized operations, and potentially a permit for very large scale operations, excavating in excess of 5,000 cubic yards of material per year, demonstrates no material interference with mineral development. But permitting non-motorized mining is in substance as much as an interference with federal policy as would be an Oregon statute forbidding federal officials from driving. They might still accomplish federal goals on bicycles, but the interference is plainly material and unreasonable under our Constitutional system.

Very large permits are not sufficient to vindicate the purposes of federal law either, in a context where Congress has put the public lands open for exploration and development As explained in the accompanying declarations, such exploration requires

small-scale activities at first, as part of the natural process for leading to larger-scale activities. Rational mineral development cannot proceed by panning a few flakes of gold and then investing hundreds of thousands of dollars in permitting processes and large scale operations; rather, motorized equipment is required to assess whether to invest such sums, just as motorized drilling was required as part of the federally-designed process in *Brubaker*, *supra*. *See generally* Kitchar Decl. ¶¶ 31-32.)

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

While some cases report a presumption against federal preemption in areas traditionally regulated by the states, no such presumption appears in cases involving the Property Clause or generally "when the State regulates in an area where there has been a history of significant federal presence". *United States v. Locke*, 529 U.S. 89, 108 (2000). Thus *Granite Rock* itself makes no reference to any presumption against federal preemption. Nor do *Arizona v. United States*, 132 S. Ct. 2492 (2012) (no mention of presumption in immigration context); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (no mention in national energy policy context); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n,* 461 U.S. 190 (1983) (same); *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (Property Clause); *Sperry v. Florida*, 373 U.S. 379 (1963) (patents).

It is also important to understand that federal preemption does not depend upon any express Congressional recognition of a preemption issue at all. As the Supreme Court has explained, "[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply . . .". *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88

(2000). The law of preemption in the mining context is precisely such well-settled law. The Supreme Court long ago explained that

> "State and territorial legislation . . . where federal mining law is concerned, must be entirely consistent with the Federal laws, otherwise it is of no effect. The right to supplement Federal legislation conceded to the State may not be arbitrarily exercised; nor has the State the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the Congressional laws."

Butte City Water Co. v. Baker, 196 U.S. 119, 125 (1905).

III. PLAINTIFFS ARE ENTITLED TO A DECLARATION THAT SENATE BILL 838 IS UNCONSTITUTIONAL.

A. Plaintiffs' Claims Are Ripe for Review.

While the mere existence of a statute does not by itself establish standing, the mere existence of Senate Bill 838, even before its moratorium provisions took effect, immediately and adversely affected plaintiffs attempting to sell motorized mining equipment in Oregon. Many plaintiffs obtain economic returns from mining in Prohibited Zones, and they too are entitled to pre-enforcement review of a statute barring them from recovering those returns. Plaintiffs are also entitled to pre-enforcement review because federal law does not require them to suffer criminal prosecution to avoid such review.

The leading Ninth Circuit case confirming that prospective economic loss makes the claims ripe for review is *National Audubon Society v. Davis*, 307 F.3d 835 (9th Cir. 2002). In that case, animal trappers challenged a state law restricting use of certain kinds of traps. *See id.* at 845. The district court dismissed the trappers' claims as lacking ripeness because of the alleged lack of an imminent "threat of prosecution". *Id*. at 846. The district court had relied upon *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d

1134, 1139-41 (9th Cir. 2000) and *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996). *Id.* at 855.[6]

The Ninth Circuit reversed the district court's ripeness-based dismissal, for two reasons, both of which support standing for plaintiffs here. First, the Ninth Circuit held that the trappers clearly had standing to proceed because "the trappers' economic injury is directly traceable to the fact that Proposition 4 explicitly forbids the trapping they would otherwise do.". *Id.* at 856; *see also Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001) (those seeking economic advantage from public domain materials could challenge extension of copyrights), *aff'd sub. nom. Eldred v. Ashcroft*, 537 U.S. 186 (2003). Here the plaintiffs derive economic advantage from recovering gold, and Senate Bill 838 prohibits the mining they would otherwise do.

Second, the Ninth Circuit explained that the standards set forth in *Thomas* and *San Diego* only apply to cases "in which a risk of prosecution is so remote that no 'case or controversy' exists". *Davis*, 207 F.3d at 855. Some miners may not refrain from mining, and as to them, the case is ripe for review because of the imminent risk of criminal prosecution.

[6] A group of unrepresented miners previously challenged Senate Bill 838, filing their complaint prior to its enactment. *Galice Mining District v. Oregon*, 2013 U.S. Dist. LEXIS, No. 6:13-cv-682-TC (D. Or. July 18, 2013). Their *pro se* motion for a preliminary injunction barring the Legislature from enacting the statute was denied on, among other grounds, lack of ripeness. *Id*. at *4 ("While it may be that Senate Bill 838 will be made into law and while such legislation may have an impact on plaintiffs' alleged mining rights, the court cannot step in prior to any application of such law"). To the extent this Court's citation of the *Thomas* case in *Galice* was intended to suggest that pre-enforcement review was unavailable after passage of the statute, such an inference must be rejected in light of *Davis.*

As the Supreme Court has explained, when a

> "plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'"

Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979) (*quoting Doe v. Bolton*, 410 U.S. 179, 188 (1973)); *see also MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 1128-29 (2007) ("where threatened action by the government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis of the threat—for example the constitutionality of a law threatened to be enforced"; citing numerous cases).

As demonstrated above, plaintiffs are mining and seek to continue their mining operations on federal land as against an unconstitutional law of the State of Oregon. Under *Davis* and *San Diego*, no more is required for risk of prosecution than what plaintiffs allege here: "they had previously engaged in and would continue to engage in acts regulated under the challenged legislation". *San Diego*, 98 F.3d at 1127 (citing *Babbitt*, 442 U.S. at 303).[7]

The *Thomas* case is distinguished by its facts. There the Ninth Circuit rejected conclusory testimony of past violations and speculation that tenants might emerge whose rejection would involve violations in the future. *Thomas,* 220F.3d at 1139 (asserted violations lacked detail as "when, to whom, where, or under what circumstances"). Here, by contrast, plaintiffs testify that they have conducted mining operations on specific

[7] *San Diego* dismissed a pre-enforcement challenge as speculative where there was no more than an assertion that they "wish and intend to engage in activities prohibited by [the law at issue]". *San Diego*, 98 F.3d at 1127.

mining claims at specific times. If forced to do so, at least some of them will risk criminal prosecution to continue mining. (Barclay Decl. ¶ 6.)

The *Davis* case also demonstrates that these plaintiffs easily overcome the prudential ripeness factors set forth in the seminal case of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), in which the Supreme Court allowed drug companies to seek pre-enforcement review of certain labelling regulations. As the *Davis* Court explained,

> ". . . the first *Abbott Labs* factor--fitness for judicial resolution--favors adjudication now because more specific facts surrounding possible actions to enforce the statute will not aid resolution of the trappers' constitutional and statutory challenges to Proposition 4. The trappers' injury is established, and the legal arguments are as clear as they are likely to become. The second *Abbott Labs* factor--potential hardship to the parties--also favors adjudication. The trappers are refraining from trapping due to Proposition 4, and will continue to do so unless and until it is declared invalid. For so long as they refrain from trapping, they will suffer continuing economic injury. We therefore conclude that the trappers' claims are sufficiently ripe under a prudential ripeness analysis as well."

Davis, 307 F.3d at 857. Individual enforcement actions, which will require no more than a showing that a miner used a motorized device in a prohibited area, will not shed any additional light on the issues in this case. And the hardship to the parties, whose longstanding operations are to be shut down, militates in favor of exercising jurisdiction.

Plaintiffs wish to avoid a repeat of what happened in California, when state courts failed for years to reach the merits of the federal preemption claim, and numerous miners suffered criminal prosecution in attempts to vindicate their federal rights. *See, e.g., People v. Rinehart, supra; see generally* Buchal Decl. ¶¶ 5-9 (explaining California circumstances.) A history of prosecutions in another state supports "the imminence of the threat of prosecution". *See San Diego*, 98 F.3d at 1128 (citing *Sable Communications of Cal., Inc. v. FCC*, 827 F.3d 640, 644 (1987)). The federal courts were created to

prevent such abuses of federal rights, which in this context, unless resolved by this Court, threaten a multiplicity of litigation.

B. The Eleventh Amendment Does Not Bar This Suit.

The Eleventh Amendment bars suits against states in federal court, and thus the State of Oregon is therefore not a proper defendant, and will be dropped as a defendant in this action. However, under the longstanding principles in *Ex Parte Young*, 209 U.S. 123 (1908), the Amendment is no bar to suits for relief against state officials.

Section 2(3) of Senate Bill 838 directly limits the authority of defendant the Director of the Department of State Lands to issue permits, who would otherwise issue permits for the mining activity at issue here under ORS 196.810. The Director is thus an appropriate defendant.

While the statutory authority of Defendant Rosenblum, as the Attorney General of Oregon, does not extend to commencing criminal prosecutions against miners, her office renders opinions in writing as to interpretations of federal law that are, for all practical purposes, binding on state agencies, and her advice to state officials concerning the lawfulness of Senate Bill 838 would be obeyed. *See* ORS 180.060; *see also* Buchal Decl. ¶ 13. Following a ruling from this Court, the Attorney General will explain to Oregon agencies whether they should continue to prosecute miners, and they will follow her advice.

C. Declaratory Relief Should Issue.

As the Supreme Court has explained, the dilemma faced by the miners, namely whether to abandon their rights or risk prosecution, is "a dilemma that it was the very

purpose of the Declaratory Judgment Act to ameliorate". *Abbott Labs*, 387 U.S. at 152. Justice requires a judicial declaration that Senate Bill 838 is void and of no further effect.

Such relief must necessarily extend not just to § 2(1), establishing the moratorium, but also to § 2(3), which declares that in areas not subject to the moratorium, permits will be limited to 850 per year. The federal rights of miners cannot be held hostage to a lottery in which they might or might not get permits for reasons utterly disconnected from the question whether they are causing environmental damage in a fashion unnecessary or unreasonable in the development of mineral resources on federal land.

Conclusion

This federal court should swiftly declare to the State of Oregon and its officials that the current fad of outlawing mining on federal lands is not a choice permitted under the U.S. Constitution. That will leave the State many months to craft a reasonable environmental regulatory system, should it choose to waste its taxpayers' funds on regulation largely duplicative of federal regulation, before most mining gets underway in the spring and summer.

Dated: November 30, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF on the following attorneys on November 30, 2015, by notice of electronic filing using the CM/ECF system:

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