Placer Mining on Oregon Scenic Waterways

Contributed by ScottC
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This response letter was written by Tom Kitchar of Waldo Mining Districk, to the Attorney Generals Office for the state of Oregon. He explains in detail the US Mining Law and how it applies in situations where State laws try to prohibit Mining on Federal Lands.

This letter is a great example of how State lawmakers are misunderstanding and misinterpreting US Mining Law. In this letter Tom sets the record strait of how the Mining law need to be understood.

This letter was taken from the Public Lands for the People website.

Read Letter

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January 20, 2010

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Sent via Certified Mail / Return Receipt

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RE: Placer mining on scenic waterways

DOJ File No. 141-031-GN0454-09

Dear Senior Assistant Attorney General Cook;

I am writing to you today on behalf of the Waldo Mining District (WMD) and its members, the thousands of non-WMD prospectors and miners in Oregon, and specifically, WMD member Mr. Jerry DeLoach in regards to your letter dated November 4, 2009 to Mr. James R. Dole, attorney for Mr. DeLoach; which was in response to a letter sent by Mr. Dole on August 3, 2009 to Eric Metz (DSL) and Jan Houck (Parks & Recreation).

Although I am not privy to Mr. Dole’s letter of August 3, I am aware of Mr. DeLoach’s situation and from your response of November 4, it appears as though there is great confusion on the part of the state in regards to the United States General Mining Law of 1872, the state’s authority over mining on federal lands open to mining under the U.S. Mining Law, and Mr. DeLoach’s (and others) rights as granted by the U.S. Mining Law.

I will explain how the state’s position (as stated in your letter of Nov. 4), not only denies the property rights granted by the U.S. Mining Law to Mr. DeLoach, but also how the complete ban on placer mining by the state’s Scenic Waterway Act, when applied to federal public domain lands (i.e.; lands open to locatable mineral exploration and mining under the U.S. Mining Law), usurps congressional authority granted to Congress by the U.S. Constitution by creating a de facto mineral withdrawal on those federal public lands designated by the state as Scenic; and in doing so, Oregon’s Scenic Waterway Act violates the both the Supremacy Clause and the Property Clause of the United States Constitution, along with the U.S. Mining Laws, other congressional acts, rules and regulations.

I. BACKGROUND FACTS:

1. Mr. DeLoach and partners (hereafter the “DeLoach’s”), own several unpatented placer mining claims on the Middle Fork of the John Day River. The claims were located on public lands within the Malheur National Forest pursuant to the Acts of 1866, 1870, and the General Mining Law of 1872 , ; and are considered under both state and federal law to be “real property” with certain associated rights, including the right to mine.

2. ORS 196.810 (1)(a) requires a permit from DSL for the removal or alteration of any material from the beds or banks or the filling of any waters of this state (with limited exemptions which depend on whether the stream or waterway is designated as Essential Salmon Habitat, Scenic, or some other special designation, and the amount (i.e.; cubic yardage) of material moved).

3. All or part of the Middle Fork of the John Day River is designated by the state as a “State Scenic Waterway”. Under the Scenic Waterway Act (SWA), “placer mining” is prohibited within a scenic waterway (including within the approximate one-quarter mile wide corridor on either side of the waterway) . The 1994 Attorney General ruling (Number 8282) found that the SWA was a “complete ban on all placer mining” within a scenic waterway, and there are “no exceptions”.

(NOTE: Your letter of Nov. 4, 2009 states that all placer mining within a scenic waterway is banned with the limited exception of certain forms or levels of (so-called) “recreational prospecting”).

The Deloach’s claims are located within the John Day River scenic waterway.

4. The SWA’s complete ban or prohibition on placer mining, when applied to the public domain lands open to locatable mineral entry under the U.S. Mining Law, violates the supremacy clause of the Constitution.

5. “As of December 31, 2005, DSL is no longer authorized, by operation of law, to issue permits for “… dredging for the purpose of recreational placer mining within scenic waterways.”” (Cook letter, 11/04/09)

6. Although they have applied to DSL for a permit on several occasions, as of January 1, 2006, the DeLoach’s can not obtain the DSL permit, nor will DSL issue such a permit for fill or remove actvities required under ORS 196.810 to operate a suction dredge within the Middle Fork John Day River (or within any other scenic waterway).

7. By requiring a permit, and then prohibiting the issuance of that permit, the state has for all intents and purposes banned or prohibited any and all placer mining within a scenic waterway & corridor. This ban or prohibition destroys any and all practical use or enjoyment of the rights granted by the U.S. Mining Law on federal public domain lands designated by the state as a scenic waterway to the DeLoach’s, and to all others.

8. “Placer mining”, is one of two forms of mining (the other being “lode mining”), and, pursuant to the U.S. Mining Law and both BLM and Forest Service regulations , and the courts; includes (but is not limited to) all prospecting or exploration (e.g.; from picking up gold nuggets or other valuable minerals with your fingers to metal detecting, panning, sluicing, dredging, excavating, drilling, etc.), all mining, road construction, ground clearing, occupancy, milling, and all other activities reasonably incident to mining (are considered “mining”).

9. Under the U.S. Mining Law, there is no such thing, term, or phrase as “recreational prospecting” or “recreational mining”. The term is a total fabrication of and by the State of Oregon.

10. A “mining claim” properly located under the U.S. Mining Law is a grant of certain unique and exclusive rights of property to citizen prospectors and miners. These rights include, but are not limited to; the exclusive ownership

of all the valuable minerals within the lines of location and the right to mine or extract those minerals. Unpatented mining claims (such as those owned by the DeLoach’s) are considered “private property” even though the title to the land itself is being held “in trust” for the claim owner by the United States.

11. Under the U.S. Mining Law, there is no such thing, term, or phrase as a “recreational mining claim”.

II. THE CONFLICT:

The question at hand is whether the State of Oregon, through use of the Scenic Waterway Act or any other act, law, rule, or regulation can deny, ban, or prohibit mining activities on federal public lands which are not only allowed as a granted property right under federal law, but also encouraged by Congressional Acts. In order to help understand this conflict, it is necessary to understand the rights granted by the U.S. Mining Law. An examination of portions of that law may provide clarification:

In the Mining Acts of 1866, 1870, and 1872, Congress declared:

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens . . . (R.S. Sec. 2319; 30 USC, Sec. 22) (emphasis added)

Furthermore, Congress reiterated its intent in regard to mining and minerals with the Mineral Policy Act of 1970:

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 . . . (Pub. L. 91-631, title I, Sec. 101; 30 USC, Chpt. 2, Sec. 21a) (emphasis added)

Congress has declared these lands to be “free and open”. The State of Oregon does not have the authority to close lands that belong to the United States to mining activities not only allowed, but “fostered and encouraged” under federal law.

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On page 1 of your letter dated Nov. 4, 2009, you quoted from Mr. Dole’s letter of Aug. 3, 2009, which apparently stated (in part) the DeLoach’s concerns as:

“In particular, it appears to us that courts facing the question uniformily hold that the kind of environmental regulations which would ostensibly prohibit his mining with a mechanical suction dredge are preempted by the General Mining Law of 1872.”

In response to the DeLoach’s concerns, you stated the state’s legal position as:

“There is no federal preemption issue, because Oregon’s Scenic Waterway Act does not prohibit Mr. DeLoach from maintaining his federal mining claim. Rather, the Act merely prohibits one method of mining (the use of suction dredges).” (emphasis added)

I would call attention to your statement that the Scenic Waterway Act (SWA) does not prohibit the “maintaining” of his “federal mining claim.” Taken by itself, this statement is partially correct, i.e.; in that the DeLoach’s are not totally prohibited from “maintaining” their claims (however, the total ban or prohibition on placer mining within a scenic waterway does jeopardize the ability of the DeLoach’s to perform required annual assessment work, which will be explained later).

I do however take issue with the term “federal mining claim”. The “mining claim” does not belong to, nor is it the property of, the federal government. Indeed, the claim(s) are the very real property, in the highest sense of such terms, of Mr. DeLoach and his partners pursuant to both federal and state law, and the courts (including the U.S. 9th Circuit Court of Appeals and the U.S. Supreme Court). A more correct phrase would be “a mining claim on federal lands”. Referring to the DeLoach’s property as a “federal mining claim” infers that the DeLoach’s are some form of “guest” being allowed to perform certain activities (i.e.; mining) on government land at the whim of the government. Nothing could be further from the truth:

MINING CLAIMS ARE PROPERTY:

30 USC Sec. 26 addresses “Locators’ rights of possession and enjoyment”, and reads in part:

“The locators of all mining locations… …shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations…” (emphasis added)

This is backed up by Oregon revised statutes:

517.080 Mining claims as realty. All mining claims, whether quartz or placer, are real estate. The owner of the possessory right thereto has a legal estate therein within the meaning of ORS 105.005.

And more recently by the U.S. 9th Circuit Court of Appeals in:

USA v SHUMWAY (9616480), Dec. 28, 1999:

Mining claims and mill site claims, in mining law terminology, are vested possessory rights which are recognized as

interests in real property; they are not merely assertions of rights, as claims are in the more common sense of the word.

. . . In ordinary English, a “claim” is merely a demand for something, or an assertion of a right where the right has not been established. The phrase “mining claim” therefore probably connotes to most laymen an unsupported assertion or demand from which no legal rights can be inferred. But that is emphatically not so. In law, the word “claim” in connection with the phrase “mining claim” represents a federally recognized right in real property. The Supreme Court has established that a mining “claim” is not a claim in the ordinary sense of the word_ a mere assertion of a right_but rather is a property interest, which is itself real property in every sense, and not merely an assertion of a right to property.

. . . The Court held that the unpatented “title of a locator” is “property in the fullest sense of the word,” [quoting Bradford v. Morrison 1909] This case [Bradford v. Morrison] establishes that the government cannot reserve its own land from an unpatented mining claim without paying the owner the value of the claim, because an unpatented mining claim is property.

. . . Mining claims located after the effective date of the 1955 [Multiple Use] Act are subject, prior to issuance of patent, to a right of the United States to manage surface resources and for the government and whomever it permits to do so to use the surface, so long as they do not endanger or materially interfere with prospecting, mining, or processing. (See 30 U.S.C. 612(b).) (emphasis added)

There can be no doubt: unpatented placer mining claims located pursuant to the General Mining Law of 1872 and (generally) ORS 517.044 are the real property of the locators or owners of the claim/s.

It should also be noted that even the federal Multiple Use Sustained Yield Act of 1955 (30 USC Sec. 21a) recognized and protects the property rights of miners (including the right to develop and mine the claim) by limiting the activities of the federal land management agencies so that they (the activities of the federal agencies) “…do not endanger or materially interfere with prospecting, mining, or processing.” This raises the obvious question:

If the federal agencies themselves may not endanger or materially interfere with prospecting, mining, and processing; then it makes no sense whatsoever that the state can endanger or materially interfere with prospecting, mining, or processing.

Prohibiting “mining” and only allowing severely restricted and highly limited so-called “recreational mining” (and non-motorized at that) is endangering and materially interfering with prospecting, mining, and/or processing (i.e.; the exclusive rights of possession and enjoyment of the claim owners).

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Being able to “maintain” a mining claim is only a portion of the rights granted to a claim owner. For the claim to be of any value, the owner must be allowed to extract the minerals. In your letter, you stated that,

“…the Act merely prohibits one method of mining (the use of suction dredges).”

This is not correct. The Act prohibits all forms of placer mining (see footnote #6). This includes (but is not limited to) all placer prospecting and mining operations within the scenic waterway itself, and within a corridor approximately one-quarter mile wide on either side of the waterway. The Act does not “…merely prohibit one method of mining (the use of suction dredges).” as you suggest. Rather, taken together with the Fill & Remove rules, all motorized mining is prohibited. This rules out nearly all typical methods of placer mining, such as the use of bull-dozers, backhoes, excavators, etc., besides the use of suction dredges. It rules out the use of any kind of water pump or diversion of water (essential for placer mining), which makes any form of mining outside of the water itself impossible. If that wasn’t enough, with the restriction on yardage amounts (that can be moved or processed), the miner/prospector is basically only allowed to work a few days a year. (NOTE: Even if the miner only moved or processed 0.5 cu. yards per day with just a gold pan (as you suggest is allowed as “recreational prospecting or mining”),

the miner would reach the one cubic yard limit on the second day. The miner would reach the five cubic yard cumulative limit on the tenth day. You stated that the Act only prohibits “one method of mining (the use of suction dredges).” I ask you, what other methods are allowed other than the so-called non-motorized “recreational prospecting” or “recreational mining”?)

The SWA prohibits mining. It does not matter if the material is moved by hand (i.e.; pick & shovel), or with the use of a suction dredge, back-hoe, bull-dozer, excavator, or any other method of mining. Nor does it matter if the placer deposits are located underwater within the river itself, or on shore hundreds of feet away. The Act is prohibitive in nature, not merely restrictive.

I would point out that pursuant to 30 USC Sec. 26, the locator has “…the exclusive right of possession and enjoyment of all the surface…”; which the courts have held time and again that this includes the right to mine the claim.

In your letter (Nov. 4) you state that there is no federal preemption as “…other methods of mining (i.e.; other than suction dredge mining) are still open to Mr. DeLoach:”

“… that the law continues to allow certain other methods of placer mining within scenic waterways: “Recreational prospecting”; and “Recreational placer mining.”” (Pg. 2) (emphasis added)

. . . And there’s the problem (use of the word “recreational”). Under federal law, there is no such thing as “recreational” prospecting or mining. Under federal law, prospecting is mining and mining is mining; whether it’s done in one afternoon with a gold pan or annually employs hundreds of miners working 24/7. Under the General Mining Law of 1872, mining is mining. This was backed up as recently as January 9, 2009, when the U.S. District Court, District of Montana, Missoula Division, over-turned a lower court and ruled that: “Panning for gold is quintessentially a mining operation.”

The very real rights that the DeLoach’s (and others like them) enjoy and operate under were granted by the United States Congress as early as 1866 & 1870, and totally re-affirmed in the General Mining law of 1872. Again, I remind you of:

30 USC Sec. 26: “The locators of all mining locations… …shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations…”

Although the Scenic Waterways Act does not necessarily prohibit the DeLoach’s (and others) from possessing (i.e.; maintaining) their claim/s), it does prohibit their exclusive right to the enjoyment of all the surface including most especially their exclusive right to mine the minerals found on the claim/s. The level of activities you suggest the Act allows (i.e.; so-called “recreational” activities that do not require a permit from DSL (i.e.; non-motorized activities such as panning and sluicing that move no more than one (1) cubic yard per site or five (5) cubic yards cumulatively per stream, per year)) indeed are and may rightly be construed as “mining”; but when you take into consideration the one (1) and five (5) cubic yard limits, per year, and that only materials within the “wetted perimeter” are allowed to be disturbed, what appears to you to be nothing more than a minor restriction becomes in reality a very real prohibition on the DeLoach’s “exclusive right” to the enjoyment of their claim/s; that is, the right to mine and recover the valuable minerals therefrom.

Indeed, by your own admission (and according to the Scenic Waterways Act), “mining” is prohibited in such waters (and adjacent lands) leaving only highly limited “non-motorized” methods of so-called “recreational mining”. By this logic, “recreational mining” is not “mining”, as all “mining” is prohibited in such waters . . . and yet, under federal law (and all rules of logic and court decisions), even gold panning is “mining” (see footnote #7).

You state that there is no preemption because the DeLoach’s may “maintain” their claim/s; and indeed have for several years by performing limited amounts of gold panning and sluicing (which according to the SWA is prohibited, i.e.; the Act bans all

placer mining with no exceptions). Regardless, the DeLoach’s are prohibited from their “exclusive rights” to fully enjoy (i.e.; mine) their possession, i.e.; they are prohibited from all but the most miniscule levels of enjoyment of their claims. This is the same as if Ford Motor Co. was granted the right to manufacture automobiles – but only three per year and only so big; or that farmers could plant corn on their lands – but only five plants per year and they must be within a four square yard area.

The whole idea behind the Mining Laws, and the continuing intent of Congress, is to foster and encourage the exploration for and the development of valuable mineral resources. The whole (and only) purpose of a mining claim is to actually mine it, not just maintain it as you suggest. It’s like saying you can own a house . . . but you can’t live in it except for one day a year.

III. “RECREATIONAL MINING” vs. “MINING”

A. RECREATIONAL MINING: As I have previously mentioned, under the General Mining Law of 1872, there is no such thing as “recreational” prospecting or mining. Therefore, any and all prospecting or mining operations being performed on public lands is, by law, being performed as a right granted by Congress and is defined as “mining” or “incident to mining”. Whether it is done part-time, as a hobby, or for “fun” has nothing to do with it. Locatable mineral prospecting, mining, and related activities being performed under the U.S. Mining Laws is mining.

However, in 1999, the Oregon Legislature defined “Recreational mining” as:

ORS 517.120(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. (emphasis added)

There is a major flaw in ORS 517.120(4) in that “…public lands set aside or withdrawn from mineral entry…” are, by legal definition, no longer “public lands”. Public land is described as:

Public land. The general public domain; unappropriated lands, lands belonging to the United States and which are subject to sale or other disposal under general laws, and not reserved or held back for any special governmental or public purpose. Newhall v. Sanger, 92 U.S. 761, 763, 23 L.Ed. 769. (Black’s Law Dictionary, 5th Edition, 1979) (emphasis added)

By definition, once the lands have been set aside or withdrawn from mineral entry, they are “reserved” or “held back for any special governmental or public purpose.” . . . and as such, any mining performed on such lands is done as a mere privilege, that-is, under the permission of the land owner and managing agency (note that the opposite is true; i.e.; mining performed on public lands under the General Mining Law of 1872 is performed as an “exclusive right” and can not be prohibited by the federal government or the state. Furthermore, once a valid “discovery” has been made and the location perfected (but not necessarily patented), the lands thus claimed are no longer considered “public lands” but are instead, for all practical purposes “private property” so long as the locator or owner of the claim properly maintains the claim according to law.

Be-that-as-it-may, the intent of ORS 517.120(4) is clear, that is; “recreational mining”, as defined by the state, means mining in a manner that is consistent with a hobby or casual use on lands not open to mining under the Mining Law of 1872. This would include federal lands withdrawn from the Mining Law, or all state, county or even private lands. By definition, so-called “recreational mining” can never be performed on federal “public lands” open to mining under the Mining Law.

And there’s the rub. All through your letter of Nov. 4, 2009, you use the words or term “recreational mining” . . . and yet, on federal lands open to the Mining Law (or more specifically, locatable mineral mining on public lands open to mining under the Mining Law of 1872), there is no such thing as “recreational mining”. You stated in your letter that there is no preemption of federal law as:

“… if one carefully parses the Scenic Waterway Act, it is clear that the law continues to allow certain other methods of placer mining within scenic waterways: “recreational prospecting”; and “recreational placer mining.” (Cook letter, 11/04/09, Page 2)

And yet, no such level of mining (i.e.; “recreational”) exists in federal law. It is indeed interesting to note here that the State is prohibiting an activity on public lands expressly allowed as a congressionally granted statutory right (i.e.; “mining”), but is allowing an activity on those same public lands (i.e.; “recreational

mining”) that is no part of any federal law.

In summary, I repeat: “recreational mining” can never take place, or be performed, on federal public lands (as defined above and in footnote #18) which are, by definition and act of Congress, “free and open” to mining (and all related incident uses) under the U.S. Mining Laws. For far too many years, the State of Oregon and it’s various regulatory agencies have continuously ignored the fact that locatable mineral mining activities being performed on the public lands of the United States pursuant to the U.S. Mining Laws is taking place as a congressionally “granted right” in real property, including the right to mine. Oregon’s so-called “recreational mining”, by law and by definition, can only occur on lands not open to mining under the U.S. Mining Laws; and is therefore practiced as a mere privilege and can be denied.

And yet, Oregon law and agencies treat both types of mining as one-in-the-same (i.e.; Oregon regulates (or prohibits) a “granted right” as though it were a mere “privilege”).

Therefore, as the Scenic Waterways Act prohibits “all placer mining” within a scenic waterway, and as there is no such thing in federal law as “recreational mining”; the SWA does indeed prohibit “all mining” on federal public lands open to mining and designated by the state as scenic; and is therefore contrary to the laws of the United States, as explained below.

B. MINING: Common to almost all of American society, including (and even possibly especially) most government agencies, legislators, and employees; is the total mis-conception of the United States Mining Laws (see footnotes #s 2-4); especially in regards to the absolute exclusive property rights granted therein. This ignorance of the laws is probably due to the uniqueness of the Mining Laws themselves, and the growing belief that the sociological concepts behind those laws are antiquated or old-fashioned. Regardless, until Congress amends the Mining Law, it is still the law.

INTENT: The intent of the Mining Laws and the continuing intent of Congress is simple and self-evident:

“The general policy of the mining laws is to promote widespread development of mineral deposits and to afford mining opportunities to as many persons as possible.” (30 USC 22.50) (emphasis added)

and;

“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... For the

purpose of this Act ‘minerals’ shall include all minerals and mineral fuels including oil, gas, coal, oil shale and uranium.” (Mining and Minerals Policy Act of 1970) (emphasis added)

In the Acts of 1866, 1870, and 1872, Congress declared that:

“Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States . . .” (30 U.S.C. § 22). (emphasis added)

The lands of the United States cannot be “free and open” (to exploration, occupation, and purchase) if the historical means of development and utilization by prospectors and miners can be prohibited by the Scenic Waterways Act’s prohibition in an attempt to substitute any other judgment for that of Congress. The Scenic Waterway Act is prohibitive and not merely regulatory.

30 USC § 26 - “Locators' rights of possession and enjoyment: The locators of all mining locations… so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations…” (emphasis added)

In the above (§ 26), it is vital to note that as long as miners (locators) comply with the laws of the United States and with regulations set by the various states, territories, etc. not

in conflict with the laws of the United States “governing their possessory title”, then they shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations…”

This can only mean one (1) thing; the language is simple. The law says “exclusive right of possession and enjoyment”. This right can not be “exclusive” if it is in any way influenced or interfered with by any outside source, such as and including the various land management agencies. Indeed, any such restriction or regulation of bone fide mining operations makes a mockery of the term “exclusive”. How can something be “exclusive” if it is shared or subject to outside control? It can’t. USC § 26 clearly states that the locators shall have the “…exclusive right of possession and enjoyment of all the surface…”.

The Oregon State Scenic Waterway Act prohibits mining on federal lands open to mining if those lands are designated as a State Scenic Waterway. As the right to mine these lands is a congressionally granted “exclusive right”, then any prohibition on mining on these lands is a taking without just compensation. It is absolutely astounding that the State of Oregon has the audacity to claim that there is no taking or preemption due to the fact that certain forms of so-called “recreational mining” can still take place (and even

that has threshold limits limiting production to the nearly non-existent level and is contary to the SWA’s “no exemption” clause).

I am not saying that the state has no authority to regulate locatable mineral mining on federal lands open to the U.S. Mining Laws. Indeed, the state may (or may not) have such authority – but that is not the issue here. However, any regulation or restriction placed on such mining (which is being performed as a “Congressionally granted non-discretionary statutory right” and not as a mere “privilege”) must be “regulatory” in nature, and not “prohibitive”; based on sound proven scientific data with evidence of an actual harm (as opposed to the mere potential for harm) promulgated pursuant to ORS 517.125 and the normal public rule-making process.

IV. “FEDERAL” vs. “STATE”

The United States Mining Law, as Acts of Congress, clearly grant exclusive rights of possession, enjoyment, occupation, and purchase of the public lands which are “free and open” to all who exercise the grant. Furthermore, Congress has clearly expressed its intent with these laws to be “widespread”, “to as many persons as possible” and that it is the continuing policy of the United States to “foster and encourage” the development of mineral resources “in the national interest”.

What Congress giveth, the States can not taketh away.

COURT DECISIONS

In examining the issue of Oregon’s prohibition on mining on federal public lands also designated as State Scenic Waterways, I have found two relevant cases:

1. Brubaker v. Board of County Com'rs, El Paso County, Colo.,1982.

Supreme Court of Colorado, En Banc.

Earl J. BRUBAKER, Rexford L. Mitchell, and Valco, Inc., Plaintiffs-Appellants,

v.

The BOARD OF COUNTY COMMISSIONERS, EL PASO COUNTY, Defendant-Appellee,

And The Springs Area Beautiful Association, Intervenor-Appellee.

No. 81SA186. Sept. 13, 1982.

Where holders of unpatented mining claims located on federal land had received necessary federal approval for core drilling to obtain mineral

samples for purpose of determining whether they had made a qualifying discovery of valuable mineral deposits, the preemption doctrine precluded county zoning officials from denying holders a special use permit to conduct test drilling, notwithstanding that proposed activities were inconsistent with county's long-range land use planning. (emphasis added)

Mining and Minerals Policy Act of 1970, § 2, 30 U.S.C.A. § 21a; 30 U.S.C.A. §§ 22, 26; U.S.C.A. Const. Art. 6, cl. 2…

Underlying rationale of the preemption doctrine is that the supremacy clause invalidates state laws that interfere with, or are contrary to, the laws of Congress. U.S.C.A. Const. Art. 6, cl. 2.

Federal preemption generally is applicable in two situations: first, where congressional legislation either explicitly or implicitly reflects an intent to occupy an entire field, state legislation dealing with that same area is precluded and, second, even if Congress has not completely preempted an area, a particular state statute is void to the extent that it actually conflicts with valid federal law. U.S.C.A. Const. Art. 6, cl. 2

Federal mining law has its foundation in the Mining Law of 1872, and underlying purpose of the Mining Law is to encourage exploration for and development of mineral resources on public lands. 30 U.S.C.A. §§ 22-54; Mining and Minerals Policy Act of 1970, § 2, 30 U.S.C.A. § 21a; Mineral Lands Leasing Act, §§ 1-25, 30 U.S.C.A. §§ 181-263. (emphasis added)

…even “exploration” activities fall within express scope of federal mining laws. 30 U.S.C.A. § 22; U.S.C.A. Const. Art. 6, cl. 2 (emphasis added)

Statute providing for exploration of mineral deposits on federal land provided the explorer complies with applicable state law and statute providing for exclusive right of possession and enjoyment of the surface on compliance with state laws merely recognize a role for nonconforming state and local laws and do not authorize state regulations that would bar the very activities authorized by mining laws. Mining and Minerals Policy Act of 1970, § 2, 30 U.S.C.A. § 21a; 30 U.S.C.A. §§ 22, 26; U.S.C.A. Const. Art. 6, cl. 2; Mineral Lands Leasing Act, §§ 1-25, 30 U.S.C.A. §§ 181-263. (emphasis added)

A zoning authority may not apply its zoning ordinances so as to prohibit activity authorized under federal mining laws. Mining and Minerals Policy Act of 1970, § 2, 30 U.S.C.A. § 21a; 30 U.S.C.A. §§ 22, 26; U.S.C.A. Const. Art. 6, cl. 2; Mineral Lands Leasing Act, §§ 1-25, 30 U.S.C.A. §§ 181-263. (emphasis added)

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2. United States Court of Appeals, Eighth Circuit.

SOUTH DAKOTA MINING ASSOCIATION, INC.; v.

LAWRENCE COUNTY, a Political Subdivision of the State of South Dakota,

No. 97 3861. Submitted April 20, 1998. -- Decided Sept. 16, 1998.

Holders of mining claims brought suit claiming that federal mining laws preempted ordinance prohibiting issuance of any new or amended permits for surface metal mining within area which included federal lands. The Court of Appeals, Hansen, Circuit Judge, held that: (1) preemption claim was ripe, and (2) Federal Mining Act preempted ordinance. (emphasis added)

Affirmed.

If Congress evidences intent to occupy given field, any state law or local ordinance falling within that field is preempted. U.S.C.A. Const. Art. 6, cl. 2. (emphasis added)

If Congress has not entirely displaced state regulation over matter in question, state law is still preempted to extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where state law stands as obstacle to accomplishment of full purposes and objectives of Congress. U.S.C.A. Const. Art. 6, cl. 2. (emphasis added)

Federal Mining Act preempted ordinance prohibiting issuance of any new or amended permits for surface metal mining within area which included federal lands; ordinance stood as obstacle to accomplishment of full purposes and objectives of Congress of encouraging exploration and mining of valuable mineral deposits located on federal land. U.S.C.A. Const. Art. 6, cl. 2; 30 U.S.C.A. §§ 21 26. (emphasis added)

The Lawrence County ordinance is a per se ban on all new or amended permits for surface metal mining within the area. Because the record shows that surface metal mining is the only practical way any of the plaintiffs can actually mine the valuable mineral deposits located on federal land in the area, the ordinance's effect is a de facto ban on mining in the area. Thus, unlike Granite Rock, we are not faced with a local permit law that sets out reasonable environmental regulations governing mining activities on federal lands. (emphasis added)

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. (emphasis added)

DISCUSSION: As can be seen in both of the above cases , local, county, and state laws, rules or ordinances cannot prohibit that which Congress has granted, i.e.; the right to mine on federal lands open to mining. In this instance, the State of Oregon:

1) Enacted the Scenic Waterway Act which prohibits all mining within a scenic waterway and adjacent related lands.

2) Requires a permit for Fill/Remove activities, and

3) Has prohibited the issuance of any such permit for Fill/Remove mining activities within State Scenic Waterways, even when they are found on federally managed lands open to the full effects and jurisdiction of the U.S. Mining Laws.

More importantly, it is the declared intent of Congress to allow, and even “foster and encourage” mineral development on the public lands open to mining. Using the decision given in Lawrence Co., and comparing it to the situation in Oregon, we see that:

And;

“Because the record shows that Because the record shows that

surface metal mining is the only placer mining is the only practical

practical way any of the plaintiffs can way the DeLoach’s can actually mine

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the area, the ordinance's effect is a the Scenic Waterway Act’s effect is a

de facto ban on mining in the area.” de facto ban on mining in the area.

In this instance, the Deloach’s possess unpatented placer mining claims on USFS managed lands open to the U.S. Mining laws, and as the owners of such claims, the Deloach’s have granted rights to mine and or extract the valuable minerals from the claims. The federal law goes so far as to grant to the Deloach’s the right of “exclusive possession and enjoyment”… which begs the question: “If the Deloach’s have the right of “exclusive possession and enjoyment” under federal law, then how can the state interfere at all?” And yet, not only is the state interfering with the Deloach’s federally granted rights, it is out-and-out prohibiting them, and then offers insult to the Deloach’s by stating that there is no preemption as they can still “play” (limited gold panning) on their claims.

V. EXAMINATION OF CASES CITED IN LETTER OF NOV. 4

In your letter of November 4, 2009, beginning on page 4, you cite three court decisions apparently to support the state’s position of no preemption. Upon examination of those cases, it appears as though none of them are relevant or on-topic to the issues at hand and fail to support the state’s position; as explained below:

1. California Coastal Commission v. Granite Rock Co.: It is indeed interesting that under the heading “Federal preemption” you begin by stating:

“In 1994, when the Oregon Scenic Waterway Act banned all placer mining …” (emphasis added)

And then you went on to explain how the Attorney General (in 1994) “…considered whether the Mining Act of 1872 preempted the Oregon act.” “The Attorney General noted California Coastal Commission v. Granite Rock Co., 480 US 572 (1987), which held that the Act did not preempt state regulation of the federal mining claims under the facts of that case…”

So let us look at the Granite Rock decision:

Justice O'CONNOR delivered the opinion of the Court.

“This case presents the question whether Forest Service regulations, federal land use statutes and regulations, or the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1451 et seq. (1982 ed. and Supp. III), pre-empt the California Coastal Commission's imposition of a permit requirement on operation of an unpatented mining claim in a national forest.

In the present case, the Coastal Commission has consistently maintained that it does not seek to prohibit mining of the unpatented claim on national forest land. See 768 F.2d, at 1080 ("The Coastal Commission also argues that the Mining Act does not preempt state environmental regulation of federal land unless the regulation prohibits mining altogether...") (emphasis

supplied); 590 F.Supp., at 1373 ("The [Coastal Commission] seeks not to prohibit

or 'veto,' but to regulate [Granite Rock's] mining activity in accordance with the detailed requirements of the CCA.... There is no reason to find that the [Coastal Commission] will apply the CCA's regulations so as to deprive [Granite Rock] of its rights under the Mining Act"); Defendants' Memorandum of Points *587 and

Authorities in Opposition to Plaintiff's Motion for Summary Judgment in No. C-83-5137 (ND Cal.), pp. 41-42. ("Despite Granite Rock's characterization of Coastal Act regulation as a 'veto' or ban of mining, Granite Rock has not applied for any coastal permit, and the State ... has not indicated that it would in fact ban such activity.... [T]he question presented is merely whether the state can regulate uses rather than prohibit them. Put another way, the state is not seeking to determine basic uses of federal land: rather it is seeking to regulate a given mining use so that it is carried out in a more environmentally sensitive and resource-protective fashion").” (emphasis added)

In Granite Rock, the U.S. Supreme Court, in a very split decision, found that states may require permits to regulate activities (through the use of regulations properly promulgated) even on federal lands/mining claims, but not to the point of a prohibition (especially through the use of land use plans).

As quoted above, you stated:

“In 1994, when the Oregon Scenic Waterway Act banned all placer mining ...” (emphasis added)

Is not “banning” the same as “prohibiting”? You, and the 1994 Attorney General, rely on Granite Rock to support the states position that there is no preemption concerning the Scenic Waterway Act; and yet, the decision in Granite Rock clearly separated “regulating” as opposed to “prohibiting” (i.e.; states may regulate but not prohibit).

If I understand Granite Rock correctly, the court found that states may regulate mining on federal lands through the use of properly promulgated regulations and permit system in order to protect the environment; but may not regulate through the use of Land Use Plans. In no case can the state prohibit mining on federal lands without just compensation. The Scenic Waterway Act is a land use plan. It is not a set of regulations or rules based on verifiable scientific evidence with strict criteria to protect certain aspects of the environment but instead bans certain activities (e.g.; mining) in favor of other uses (mostly recreational in nature).

As with the two other cases cited (and discussed below), there is a fatal flaw in the state’s reasoning that the cited case (Granite Rock) applies to the present conflict, both in the Attorney General’s opinion in 1994, and the opinion now. Granite Rock was all about whether the state had authority to require a permit; whereas the current conflict revolves around the state requiring a permit and then refusing to issue one. There is a huge difference. The DeLoach’s are not claiming that the state has no authority to require a permit; in fact, they have applied for one on numerous occasions and since 2005 have been told DSL is prohibited from issuing them for mining in a scenic waterway.

You end your discussion of Granite Rock with the following:

“That the state law may limit or regulate his mining is not enough: there is no conflict between federal and state law unless the state law prevents him from maintaining his federal claim.” (emphasis added)

USC 30, Sec. 26 states that providing the claim was properly located, the owners: “…shall have the exclusive right of possession…”; which should be taken to mean that state laws can not prevent the owners of such claims from “maintaining” their claims. However, § 26 goes on to include (as part of the exclusive rights granted to the owners of locatable minerals mining claims properly located and maintained), “… enjoyment of all the surface within the lines of their locations…”. Here we see the state recognizing a portion of the United States Codes (right of possession, i.e.; “maintaining”), while blatantly ignoring other portions of those very same codes, i.e.; “…the exclusive right of enjoyment, occupancy, and purchase” (indeed, the state is ignoring portions of the very same sentence).

Being allowed to “maintain” their claims is only a part of the property rights granted the DeLoach’s under federal law; however, by prohibiting the issuance of required permits, the state is denying the whole purpose of “maintaining” the property in the first place. What use is it to the DeLoach’s to “maintain” their property if they are not allowed (through threat of civil and criminal citation) to “enjoy” their possession?

2. State ex rel. Cox v. Hibbard: The crux of this case was that the miner argued that no DSL permit was required. The DeLoach’s are not contending that a DSL permit is not required.

3. State ex rel. Andrus v. Click: Again, as in the Hibbard case, the miner refused to get a permit from the state. We presume such a permit was 1) required, and 2) available. Such is not the case in Oregon, where 3) a permit from DSL is required, but 4) DSL is prohibited from issuing them.

DISCUSSION: In all of the above cases the state relied on, 1) a permit was required under state law, 2) the required permit was available through various state agencies, and 3) in all of the cases, the miner/s refused to apply for and/or obtain the required permit/s. This is a far cry from the issue at hand where Oregon requires a permit and then prohibits issuing them. It is interesting to note that you did not mention or cite the two cases we have supplied , one from 1982 and the other in 1998 (eleven years after Granite Rock), both of which have direct relevance to the issue at hand. Nor did you mention the 1979 Ventura v. Gulf case (which I did not quote) which is also highly relevant and on topic.

Instead, both you and the Attorney General in 1994 rely on three cases that have little or nothing to do with the issue at hand (which is, the uncompensated prohibition on mining within the subject area). That the state would even mention, let alone rely on these cases is astounding. In all three cases, the miner/s refused to obtain the required permits; whereas in this case, the DeLoach’s have, on numerous occasions, attempted to obtain the required permits and were told DSL was prohibited from issuing them. And worse, the prohibition is not based on any special need for the protection of the environment through rules and regulations; no, the prohibition is part of a Land Use Plan based solely on political whim.

Furthermore, at the bottom of page 4 of your letter, you stated:

“The upshot of these cases is that if the state environmental regulation merely regulates how mining can be done (but otherwise allows it to proceed), there is no federal preemption issue and the state law governs the miner’s activities.”

The above is interesting in that you claim there is no preemption because the state is merely “regulating” how mining can be done but is otherwise allowing it to proceed. How can this be when the SWA prohibits “all placer mining”? Is the state really prepared to argue that by only allowing non-motorized so-called “recreational mining or prospecting” (which does not exist under federal law), and only allowing the removal of up to five cubic yards cumulatively and annually along the whole stretch of their claims (two plus miles of river) that the DeLoach’s can still “mine” their claims?

The DeLoach’s are not arguing that the state can not “regulate” how mining can be done. Indeed, the courts have, on numerous occasions, ruled that the states have the authority to regulate mining activities in order to protect the environment; but only when practical, reasonable, necessary, and only when based on verifiable scientific evidence after full public participation and disclosure. However, and of vital importance here, the state is not attempting to regulate, it is instead prohibiting.

VI. EXAMINATION OF INR POLICY PAPER 2003-01

Near the bottom of page 1 of your letter of November 4, 2009, is the following:

Oregon’s Scenic Waterway Act. The 2001 Legislative Assembly enacted a provision that had the effect (in 2006) of banning dredging on scenic waterways

for the purpose of recreational placer mining. Chapter 500, section 4 of Oregon Laws 2001 provided:

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.

Section 3 of that law called on the Parks and Recreation Department to conduct a review of the scenic waterway system, including a review of studies pertaining to the effects of recreational placer mining within scenic waterways. The review was not completed and reported to the Seventy-second Legislative Assembly. Therefore, by operation of law, after December 31, 2005 DSL was no longer authorized to issue permits for dredging for the purpose of recreational placer mining within scenic waterways. (emphasis added)

DISCUSSION: The 2001 provision (section 4) that banned dredging on scenic waterways (starting in 2006) “for recreational purposes” did not address or ban placer mining on those waterways because it (“placer mining”) was already banned.

Section 3 of the 2001 Act called for a review of the scenic waterway system. This review, “RECREATIONAL PLACER MINING IN THE OREGON SCENIC WATERWAYS SYSTEM” (INR Policy Paper 2003-01) was completed January 2003. . . and was sent to the Governor; who did not forward it to the Seventy-second Legislative Assembly.

The January 2003 review contains the following explanation of the history of the Scenic Waterways Act in reference to placer mining:

“The statute authorizing the Oregon Scenic Waterways System in 1970 prohibited placer mining, and made no distinction between large-scale commercial operations and small recreational activities. However, recreational placer mining was an existing use that was tacitly tolerated. In 1982, the Oregon Attorney General’s office ruled that the statute was intended to curb large commercial activities and therefore recreational mining could continue. In 1994 the Attorney General’s office revisited the issue and came to the opposite conclusion.” (emphasis added)

And:

“In 1994, the Oregon Attorney General’s office reviewed the issue of recreational placer mining again in response to queries from DSL. This ruling (number 8282) reversed the opinion issued in 1982, stating that,

“Neither text nor context of the scenic waterway statute allows for any exception to a complete ban on placer mining.”” (emphasis added)

Your letter stated that there was no preemption because there were “certain other methods of placer mining” allowed in scenic waterways . . . and yet, the 1994 AG ruling (#8282) said the scenic waterway statute did not allow for “any exception to a complete ban on placer mining”. The state appears to be saying that although there are no

exceptions to the complete ban on placer mining in scenic waterways, certain other methods of placer mining in scenic waterways is allowed.

How can “certain other methods of placer mining” be allowed when the statute does not allow for “any exceptions to the complete ban on placer mining”? What statute or rule, or even AG ruling allows these “certain other methods”? The answer is that there is no law or rule that allows “certain other methods”. Instead, the state appears to be more than bending the law just a little by claiming that the mere existence of an exemption to DSL’s Fill & Remove rules (an exemption on being required to obtain a permit) “allows certain other methods of placer mining within scenic waterways”.

“… if one carefully parses the Scenic Waterway Act, it is clear that the law continues to allow certain other methods of placer mining within scenic waterways: “recreational prospecting”; and “recreational placer mining.” (Cook letter, 11/04/09, Page 2) (emphasis added).

And yet, the Attorney General in 1994 and now current Governor clearly stated:

“Neither text nor context of the scenic waterway statute allows for any exception to a complete ban on placer mining.””

If these “certain other methods” are in reality “methods of placer mining” (and they are), then they are banned or prohibited in scenic waterways, whether the state turns a blind eye to such insignificant placer mining activities is besides the fact. The point here being, the Scenic Waterway Act bans all placer mining within scenic waterways and within the scenic waterway corridor; regardless of whether the state is willing to tacitly allow banned or prohibited activities to occur.

VII. SUMMARY

1. It has been shown how the DeLoach’s possess very real exclusive property rights to not only the possession of their mining claims, but also very real exclusive rights to the complete enjoyment of all the surface within the boundaries

of their claims, and this includes the right to mine (extract) the valuable minerals found on the claims. There can be no doubt of this as it is fundamental to the U.S. Mining Laws. Mining claims are property in the highest sense of such terms, and the purpose of a mining claim is to mine the valuable minerals therefrom.

2. The state’s position appears to be that there is no preemption because A) the DeLoach’s are still allowed to “maintain” their claims, and B) “certain other methods of placer mining are allowed”.

And yet, even though the DeLoach’s have been maintaining their claims, the state’s position puts even doing required annual assessment work in jeopardy as the SWA bans all placer mining in scenic waterways. This forces the DeLoach’s to perform a supposed illegal act in order to “maintain” their possession.

Also, it has been shown how the state’s supposed mere regulation of placer mining in scenic waterways is, in fact, a complete and total prohibition on placer mining in scenic waterways and the surrounding lands. Just because the state “allows” a severely limited form of placer mining (i.e.; so-called “recreational prospecting and mining”), that recreational placer mining is still, under federal law, “mining” -- which is, by statute, in effect, and by definition, prohibited under the SWA.

So, in reality, the state is allowing (by exemption) the DeLoach’s to “maintain” their claims by performing activities that the state has prohibited. These activities are the fabrication of the state, not found in any federal law; and put even the continued maintenance of the DeLoach’s claims in jeopardy.

3. It has been shown how the state’s classification of “certain other methods of placer mining” as “recreational” has no foundation in federal law. Indeed, the courts have ruled that even simple gold panning is “…quintessentially a mining operation”. The states position appears to be a back-handed way for the state to prohibit “mining” in scenic waterways by supposedly not prohibiting certain types of “recreational prospecting and mining” in scenic waterways through the use of made-up definitions and word games in a feeble attempt to claim there is no preemption of the federal rights granted to citizen prospectors, miners, and claim owner/s.

Pursuant to the state’s own definition of “recreational prospecting and mining”, these type of activities can not be performed on federal lands open to the U.S. Mining Law but instead may only be performed on either federal lands closed to mineral entry but held open to recreational activities, or; upon state, county, or private lands. Thus, there is a huge distinction that must be noted between “mining under the U.S. Mining Law” and so-called “recreational prospecting and mining as defined by the state” in that mining under the Mining Law is a congressionally granted right and involves real property, whereas recreational prospecting and mining may be allowed, if at all, by the owner or management agency of the land as a mere privilege not backed up by any property right what-so-ever.

Use of the word or term “recreational” when applied to “mining under the U.S. Mining Law” begs mis-interpretation, mis-recognition, and abuse of the exclusive rights of

miners granted by the U.S. Mining Law, which this case so aptly proves. It is imperative that legislators and agencies

recognize that the situation of the citizen miner on the public

lands is unique to all other uses or users of the public domain in that mining is a statutory right connected with real property and all other uses or users are allowed, if at all, as a mere privilege. There is no “right” to hunt, fish, hike, cut timber, or even hug trees. There is however, a “right to mine” (which this state, in this case (and others), seems to completely forget).

4. I have provided two “on topic” court decisions (and mentioned one other), the most recent being from 1998; regarding the federal supremacy of the U.S. Mining Law vs. prohibitions on mining by states, and other lower governments. In all cases, if the lands are open to mining under the U.S. Mining Law, then states and lower governments can not prohibit mining.

5. I have examined all three of the cases relied on and/or cited by the AG in 1994 and in your letter of Nov. 4, 2009; and found that none of them were relevant or “on topic”, in that in all three cases, a permit was required and available, and the miner/s refused to obtain the required permit (or claimed no permit was required). This is fundamentally different from the current situation where the state requires a permit for the activity, the miner/s attempt to obtain the required permit, and then are told another state statute (SWA) prohibits the activity and the issuance of any such permits.

6. I have examined and compared your letter of Nov. 4, 2009, the INR Policy Paper 2003-01, the AG ruling number 8282, the Scenic Waterway Act, and DSL Fill & Remove Rules, and find them highly confusing, and worse, contradictory. Taken altogether, the state is over-stepping its authority and jurisdiction when it comes to placer mining on federal lands open to locatable mineral mining under the U.S. Mining Law, especially in scenic waterways. Below are a few quotes from the above documents that should clearly make my point:

“That the state law may limit or regulate his mining is not enough: there is no conflict between federal and state law unless the state law prevents him from maintaining his federal claim.” (emphasis added)

“In 1994, when the Oregon Scenic Waterway Act banned all placer mining …” (emphasis added)

“The upshot of these cases is that if the state environmental regulation merely regulates how mining can be done (but otherwise allows it to proceed), there is no federal preemption issue and the state law governs the miner’s activities.”

“In 1994, when the Oregon Scenic Waterway Act banned all placer mining ...” (emphasis added)

“… that the law continues to allow certain other methods of placer mining within scenic waterways: “Recreational prospecting”; and “Recreational placer mining.”” (emphasis added)

“In 1994, when the Oregon Scenic Waterway Act banned all placer mining …” (emphasis added)

“Neither text nor context of the scenic waterway statute allows for any exception to a complete ban on placer mining.”” (emphasis added)

Clearly, there is nothing “clear” in any of the above. You are saying that there is no preemption because the DeLoach’s can still mine their claims, but only at a severely restricted and limited level (i.e.; for non-motorized recreational purposes only), as placer mining itself is prohibited by the Scenic Waterway Act (but so-called non-motorized “recreational prospecting or mining” is allowed through exemption).

The lands in question are public lands of the United States managed by either the BLM or the U.S. Forest Service and are open to Mineral Entry under the U.S. Mining Law. As such, even gold panning is considered “mining” in every sense. The lands in question also happen to be designated by the State of Oregon as a scenic waterway under the SWA. The SWA prohibits all placer mining with no exceptions . . . and yet, the federal law grants the “right to mine” on these lands. The state then takes a strange and curious position in that it is applying a state definition for “recreational prospecting and small scale mining” (which by definition can not be performed on federal public lands open to location and entry under the U.S. Mining Law), for bona fide “mining”. In other words, “recreational prospecting and mining” according to the State of Oregon is not really “mining”, as if it were, then it (“recreational prospecting and mining”) would be prohibited in scenic waterways just like “real” mining.

7. The state is also forcing the DeLoach’s into a Catch 22 position in that they are required, by both federal and state laws, to perform annual assessment work on or for each of their claims, or risk having their claims be declared null and void. The best form of annual assessment work is mining, followed by work or improvements that lead to mining . . . and yet, the scenic waterway statutes completely ban all placer mining with no exceptions.

In otherwords, the DeLoach’s are required by law to mine their claims, to at least some degree, or risk the total loss of their valuable property. And the state prohibits all placer mining in the area. The state has put the DeLoach’s in a position where they must violate the scenic waterway statutes in order to comply with the federal and state requirements to continue to hold their mining claims.

8. UNAUTHORIZED MINERAL WITHDRAWAL: And finally, and maybe most importantly, the SWA’s total prohibition (with no exceptions) on placer mining within a scenic waterway and adjacent lands has the affect of a Mineral Withdrawal when applied to federal public lands that are “free and open” to mining (including exploration). By prohibiting any and all forms of mining on these lands, the state has wrongfully assumed the authority exclusively granted to Congress in the Constitution. The state’s prohibition on mining denies the granted right to prospect or explore the lands for valuable minerals, denies the prospector the right to make a “discovery” of a valuable mineral, denies the right to locate a mining claim on the lands, and denies the right to mine the lands. This is exactly what a Mineral Withdrawal does, i.e.; it closes the land to locatable mineral mining under the U.S. Mining Law.

Only Congress has the authority to withdraw public lands from mineral entry; and has delegated that authority to the Secretary of the Interior (and not to the State of Oregon). Under the federal regulations, there is a detailed process the Secretary must follow in order to withdraw public lands from mining. Application must be made, notice published in the Federal Register followed by up to a two-year period of “segregation” giving management agencies time to complete analysis of the proposed withdrawal, to allow for public comment, and to give Congress time to decide if a

withdrawal is warranted. The State of Oregon has bypassed this whole process without any authority what-so-ever.

VII. CONCLUSIONS

1. The state’s position affects more than just the DeLoach’s, as it denies the rights of prospectors searching for a discovery of valuable minerals prior to the locating of a mining claim. Since 1870, with the passage of the Placer Act, and then re-verified in the 1872 Mining Law, the public lands have been declared, by Congress, to be “free and open to exploration, location, occupation, and purchase.” As the Scenic Waterway Act completely bans all placer mining within scenic waterways (and within the scenic corridor), the state is declaring these “public lands” to be closed to exploration, location, occupation and purchase by banning all placer mining. The state has no authority to prohibit or ban mining on public domain lands open to mining under the U.S. Mining Law. The SWA is thus, as applied to mining on federal public lands, an unlawful mineral withdrawal in violation of congressional authority and federal regulation, and can not be enforced or tolerated.

2. Even if the state’s position, when applied to mining on federal public lands (i.e.; so-called “recreational prospecting and mining”) was lawful (and it is not), it still prohibits the use of up to 99% (or more) of the available lands on a normal placer mining claim.

The state’s restriction allowing only non-motorized panning or sluicing severely limits the available areas that can be prospected or mined down to a relatively narrow band from the bank of the waterway out until the water is too deep to work in. The only type of excavation allowed would be with a shovel (or bare hands), and the only material that is allowed to be excavated is underwater streambed material (i.e.; the “wetted perimeter”). This bans all prospecting or mining of all materials found beyond the active streambed for approximately one-quarter mile on either side of the stream.

3. The SWA (as stated in the 1994 Attorney General Ruling Number 8282), completely bans, with no exceptions, all placer mining within scenic waterways. This includes the scenic corridor usually about one-quarter of a mile wide on either side of the river. The DeLoach’s immediate problem is that they want to use a suction dredge in the river but DSL is prohibited from issuing the required Fill and Remove permit. However, even if they wanted to, the DeLoach’s (and all other citizen prospectors and miners) are not free to mine out-of-water materials (such as a bench deposit or old channel) within the quarter mile wide corridor because the SWA bans “all” placer mining.

4. The SWA’s complete prohibition on placer mining when applied to federal public lands “free and open” to locatable mineral mining under the U.S. Mining Laws denies the DeLoach’s, and others, their rights as granted by Congress, and is a truly unconstitutional “taking” without just compensation.

VIII. RECOMMENDATIONS

For the reasons stated above, and others, I strongly and respectfully suggest that the State of Oregon immediately act to rectify this unlawful situation by revoking the Scenic Waterway Act or by amending the Scenic Waterway Act to remove the prohibition on locatable mineral mining (of all forms) on federal public lands.

I also suggest that DSL’s Fill and Remove rules be immediately amended so that “if” a permit is required, any such permit must be readily available, and be “regulatory” rather than “prohibitive” for whatever type or form of mining that is proposed based solely on.

Failure, on the part of the State, to follow these recommendations may force the DeLoach’s, individuals and or the mining community as a whole to seek justice in the courts; and as I see it, the State does not have a chance of winning.

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If and when Parks and/or DSL decides to amend their respective rules regulating (instead of prohibiting) mining in state scenic waterways on federal public lands, I respectfully request that the agencies involved follow the directive given in ORS 517.125 by adopting any such new rules in full consultation with the affected parties (i.e.; the small mining community).

I thank you for your immediate attention to this matter. Due to the seriousness of this matter (i.e.; the denial of the DeLoach’s (and others similarly situated) rights), myself, the DeLoach’s, and the Oregon small mining community as a whole would greatly appreciate a response from the State within sixty days of receipt of this letter. Failure to respond within the sixty day timeframe will be taken to mean that the State is not planning any of the recommended actions and plans to continue to unlawfully deny the rights of the DeLoach’s and others in similar circumstances. If this is the case, then the DeLoach’s (and others) may be forced to seek justice in the courts.

Please feel free to contact me if you have any questions or need additional information regarding this matter.

Thank you.

These comments have been respectfully submitted by;

Tom Kitchar

President, Waldo Mining District

P.O. Box 1574

Cave Junction, OR 97523

mythicalmining@cavenet.com

Cc:

Ken Salazar – Secretary of the Interior (via email)

Greg Walden – U.S. Representative (OR) (via email)

Office of the Governor, Citizen’s Representative Office (via email)

Jan Houck – Dept. of Parks and Recreation (via email)

Eric Metz - Dept. of State Lands (via email)

James R. Dole, attorney for Mr. DeLoach