Tom Kitchar - President
Waldo Mining District
P.O. Box 1574
Cave Junction, OR 97523

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Senate Environment and Natural Resources Committee

Sen.JackieDingfelder@state.or.us

Sen.AlanOlsen@state.or.us

Beth.Reiley@state.or.us

RE: SB 401 & SB 838 PROHIBITIONS ON MINING

Dear Chairwoman Dingfelder and Committee Members;

Please accept these last minute comments regarding the illegal prohibitions on mining contained in SB 401 and SB 838. Although some of this was touched upon at the hearing on 4/15, time did not allow any in depth review of the pertinent statutes – something I will attempt to do here.

There are (for these purposes) two (2) basic types of mining:

1. Mining pursuant to the U.S. Mining Law (1872); or mining on patented, or private lands, and

2. All other mining (i.e.; "recreational mining")

The main difference between these two types of mining is that mining under the federal mining law is a congressionally granted statutory right, to property and the right to mine the minerals whereas "recreational mining" (under state law) is a mere privilege (i.e.; no rights attached).

Nowthen, the state may, any time they want and any way they want restrict and even prohibit "recreational mining", just as the state can restrict or prohibit other recreational activities such as hunting or fishing.

However, and most importantly, states and other local governments can not prohibit mining on lands of the United States open to mining under the U.S.Mining Laws. The courts have consistently upheld this opinion.

For example:

In Brubaker v. Board of County Com'rs, El Paso County, Colo. (1982), the Supreme Court of Colorado (En Banc) ruled: (Emphasis added to the below)

> **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.
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> **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.
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> National Environmental Policy Act was not intended to repeal by implication any other statute and **where there is unavoidable conflict between NEPA and other federal authority, it is the NEPA that must give way.** National Environmental Policy Act of 1969, § 102(2)(C) as amended 42 U.S.C.A. § 4332.
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> **The 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."** *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23, 73 (1824)
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> Except as otherwise provided, **all valuable mineral deposits in lands belonging to the United States ... shall be free and open to exploration and purchase....** 30 U.S.C. § 22 (1976).
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> 30 U.S.C. § 22 provides that **"all valuable mineral deposits in lands belonging to the United States ... shall be free and open to *exploration* and purchase ..."**. Thus, if the appellants' activities properly can be characterized as "exploration," those activities fall within the express scope of the federal statutes. Indeed, by **denying** the appellants **the right** to accomplish the desired core drilling and so **to determine the validity of their claims,** the Board **is attempting to frustrate implementation of the very scheme of disposition of federal mineral lands that is at the core of 30 U.S.C. § 22.**
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> 30 U.S.C. § 26 provides in pertinent part:
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> **The locators of all mining locations** made on any mineral vein, lode, or ledge, situated **on the public domain,** their heirs and assigns, ... **so long as they comply with the laws** of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States **governing their possessory title, shall have the exclusive right of possession and enjoyment of**

all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth…

State and territorial legislation, therefore, 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.

In *Kleppe v. New Mexico*, 426 U.S. 529, 543, 96 S.Ct. 2285, 2293, 49 L.Ed.2d 34, 45 (1976), the United States Supreme Court stated:

Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. [Citations omitted.] And when Congress so acts, the **federal legislation necessarily overrides conflicting state laws** under the Supremacy Clause. [Citations omitted.] As we said in *Camfield v. United States*, 167 U.S. [518] at 526 [17 S.Ct., [864] at 867], in response to a somewhat different claim: **"A different rule would place the public domain of the United States completely at the mercy of state legislation."**

The Court later continued:

The Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands. But **where those state laws conflict with ... legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede.** [Citation omitted.]

In the present case, the Board has applied its zoning regulations so as to prohibit a use of federal lands authorized by federal legislation. That action conflicts with the objectives and purposes of Congress reflected in the federal mining laws, and, as stated by the United States Supreme Court, "The State laws must recede." ***Id.***

In the above case(s) it is clear that courts as high as the Supreme Court of Colorado and the U.S. Supreme Court have ruled consistently that in regards to mining pursuant to the U.S. Mining Law the federal law cannot be denied or frustrated.

SB 838, by calling for a moratorium (regardless of length) on mining on lands of the United States open to mining, the State of Oregon would be in violation of the federal laws and court decisions causing a taking of real property (in the highest sense under both state and federal law) – leaving the State of Oregon liable for $Millions if not $Billions taking suits.

SB 401, by designating waters and lands of the public domain State Scenic Waters (SSW), and as the SSW prohibits "all placer mining", and as the stated goal of SB 401 is to "prohibit mining", the State of Oregon would be in violation of the federal

laws and court decisions causing a taking of real property (in the highest sense under both state and federal law) – leaving the State of Oregon liable for $Millions if not $Billions taking suits.

In Ventura County v. Gulf Oil Corp. (1979), the U.S. 9th Circuit ruled:

> In view of extensive regulation of oil exploration and drilling under Mineral Leasing Act, **specific use of federal lands was authorized by federal government, and county could not prohibit that use, either temporarily or permanently, in attempt to substitute its judgment for that of Congress**, and thus could not require oil company to secure open space use permit on conditions determined appropriate by county. Mineral Lands Leasing Act, §§ 1 et seq., 32, 30 U.S.C.A. §§ 181 et seq., 189; U.S.C.A.Const. art. 4, § 3, cl. 2. (Emphasis added).

In the above case, it is clear that not only is the state (or other local government) barred from prohibiting mining on lands of the United States, the state is barred from even temporarily prohibiting mining . . . such as with the proposed moratorium called for in SB 838.

In SOUTH DAKOTA MINING ASSOCIATION, INC. v. LAWRENCE COUNTY, a Political Subdivision of the State of South Dakota, (United States Court of Appeals, Eighth Circuit; Decided Sept. 16, 1998); the court ruled: (Emphasis added)

> 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. Private landowner intervened to defend the ordinance. The United States District Court for the District of South Dakota, Richard H. Battey, Chief Judge, 977 F.Supp. 1396, granted summary judgment for plaintiffs and enjoined the ordinance. Intervenor appealed. The Court of Appeals, Hansen, Circuit Judge, held that: (1) preemption claim was ripe, and (2) Federal Mining Act preempted ordinance.
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> Affirmed.
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> Plaintiff who challenges statute must demonstrate realistic danger of sustaining direct injury as result of statute's operation or enforcement.
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> **Plaintiff does not have to await consummation of threatened injury before bringing declaratory judgment action; instead, action is ripe for adjudication if plaintiff faces injury that is certainly impending.**
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> Claim by holders of mining claims that federal and state mining laws preempted ordinance prohibiting issuance of any new or amended permits for surface metal mining within particular area was ripe, **even though claim holders had not sought such permits; claim holders had realistic danger of sustaining immediate, direct injury as result of operation or enforcement of challenged ordinance, and applying for permit would have been exercise in futility.** U.S.C.A. Const. Art. 6, cl. 2; 30 U.S.C.A. §§ 21-26.

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.

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.

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.

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.

"*…the ordinance's effect is a de facto ban on mining in the area*." SB 838, with its moratorium on all motorized methods of placer mining is a de facto ban on mining. SB 401, with the prohibition on placer mining within a SSW is a de facto ban on mining.

ONLY Congress, or the Secretary of Interior as authorized by Congress can close or withdraw public domain lands from mining – be it for years or mere days.

To add insult to injury, the most recent controlling case, Granite Rock v. Calif. Coastal Commission wherein the court ruled that states had the authority to reasonably regulate mining for specific environmental concerns, the court also stated the states could not prohibit, or use "land use plans" to regulate, restrict or prohibit mining on public lands. Using the SSW Act to prohibit mining is abhorrent to the justice system approaching the level of criminal; and makes a sham out of the purpose for the Oregon Scenic Waters Act.

With the above in mind, I would ask the Committee to consider: SB 838 calls for a five year moratorium on motorized placer mining to give time for the state to "study" the effects of such mining and develop new regulations if found necessary.

The state wrongly believes that just because California successfully placed a moratorium on suction dredge mining that Oregon can follow suit without any liability. Currently, there are 6-7 combined suits against California because of the illegal moratorium. The next hearing (for an injunction) is currently scheduled for sometime in July, 2013.

Considering the risks involved against Oregon if the legislature passes either of these criminal bills, it would seem prudent for Oregon to retain the status quo until the situation in California is resolved.

A few last thoughts:

A proposed amendment to SB 401 calls for Parks to perform a study to see which streams should be included in the SSW system. I remind the Committee that the legislature asked Parks to study the effects of recreational suction dredge mining a few years back….. the study was completed with the recommendation that recreational suction dredge mining in SSW streams should be allowed. Governor Kulongouski, at the request of the League of Women Voters, withheld the report – presumably because the results of the Parks study did not fit the expectations of those wanting to abolish mining in Oregon.

Rather than waste even more of the tax-payers money on more studies, I highly suggest this Committee first look at the Parks study which was hidden from them.

SB 838 also calls for a moratorium and more studies…. I respectfully suggest that this is beyond the realm of ridiculousness. HOW DO YOU STUDY THE EFFECTS OF SOMETHING THAT IS NOT OCCURING? In particular, how do you study the effects of motorized placer mining when there is not motorized placer mining taking place? This is not science. This is not right. This is UnAmerican and flies in the face of all this country holds dear.

I thank the Committee for any consideration of these comments and urge the Committee to really consider the possible outcomes if this legislation is allowed to become law… can the State of Oregon really afford the possible $Millions if not $Billions it stands to lose by wrongfully denying thousands of citizens their Congressionally granted statutory rights?

Respectfully submitted by;
Tom Kitchar – President
Waldo Mining District
P.O. Box 1574
Cave Junction, OR 97523