Date: March 30, 2017

To: Senate Environment and Natural Resources Committee
senr.exhibits@oregonlegislature.gov

From: Barbara Ullian

Re: Concerns with SB 644

Dear Senate Environment and Natural Resources Committee:

Thank you for the opportunity to submit the following concerns regarding SB 644. As a resident of Southwest Oregon since 1947, I've witnessed and studied the impacts of both surface and in-stream mining. I'm also familiar with the mining laws of the United States and am writing in opposition to SB 644. It's basically a mining industry wish list and is unnecessary and will be harmful to the State of Oregon and its residents.

SB 644 is also not the vehicle for reform of regulations for instream mining in Oregon. It's measures will not protect the fresh water habitat of Oregon's native salmon, steelhead and cutthroat trout populations and other sensitives species such as the Pacific lamprey and foothill yellow-legged frogs.

Specifically, SB 644/HB 2106 would continue to allow federal mining claimants to mine in ESH. This wrongly implies that those holding federal mining claims have some special right that exempts them from the regulation of destructive mining practices. This is not true.

Further the in-stream provisions of SB 644 apply to a much smaller area than the preferable SB 3-8. Specifically, under SB 644/HB 2106. Specifically it wrongly exempts mining operations on federal mining claims from the prohibition of suction dredge mining in the beds or banks of waters of the state that: 1) are indigenous anadromous salmonid habitat; or 2) are essential to the recovery or conservation of Pacific Lamprey (Section 18)

By this exception, the bills authors appear not to understand current federal law regarding federal mining claims and the authority of the State of Oregon to regulate activities on these claims. A federal mining claim is a special form of property. It primarily protects the claim holder from someone else taking

the minerals found on the claim. The federal government maintains full ownership of the surface rights and the authority to regulate activity on a federal mining claim. In Oregon, a federal mining claims is not even taxable property.

Further, in a seminal 9th Circuit case, *Clouser v. Espy*, the court affirmed "that USFS had the power to regulate mining even if regulations meant that mining operations would be made unprofitable:" This authority extends to the states and both the federal government and the state of California are basically making this argument in the *People of California v. Rinehart* case.

There's good solid case law on this so why is the Oregon State legislature proposing to exempt, a form of mining that's destructive to salmonid habitat simply because its happening on a federal mining claim?

The right of the state to regulate mining and the rights of those holding federal mining claims is best explained in the attached letter from John D. Leshy to the Supreme Court of California dated January 7, 2015. It's also explained by the California Supreme Court in *The People v. Rinehart* and by the United States District Court of Oregon in *Bohmker v. State of Oregon*.[1]

Surface mining is one of, if not the most destructive and polluting activity there is. Metal mining produces more toxic pollution than any other industry in the United States. This is according to what's called the Toxic Release Inventory and based on data supplied by each facility which emits toxic releases to the USEPA. Recent reporting years for the Toxic Release Inventory show that just 88 metal mining facilities (out of approximately 21,000 total reporting facilities) produce between 47 and 37 percent of all toxic releases to the environment.

Oregon's only mining facility in recent years that produced trackable amounts of minerals (and pollution), was Glenbrook Nickel Smelter and its Nickel Mountain Mine near Riddle, Oregon. Both closed permanently in 1998. When operating, the Glenbrook facility was near the top of the most toxic polluters in Oregon. In 1998, citizens in Coos Bay, Oregon that lived around it's import

[1] Respectively - http://law.justia.com/cases/california/supreme-court/2016/s222620.html and http://www.leagle.com/decision/In%20FDCO%2020160330B63/BOHMKER%20v.%20STATE

facility were forced to file a class action lawsuit against Glenbrook Nickel because of the health effects they were suffering from the fugitive dust the import facility was generating.[2]

Further, in 1998, the USEPA issued draft Hazardous Air Pollution regulations specific to Glenbrook Nickel smelter facility at Riddle and for one manganese producing facility. While the rules were never finalized, they offer a glimpse into the impacts of metal mining and processing.[3]

We still do not know the full impacts of Glenbrook Nickel and the Nickel Mountain Mine, in part because the State of Oregon has never fully investigated the site of the mine and were able to dismiss a lawsuit brought by a local pipe fitters union against the State's issuances of permits simply due to a lack of standing.[4] A 2016 reply to an EPA memo, reveals that DEQ only conducted investigations of contamination at Glenbrook where there was

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[2] See Honer v. Glenbrrook Nickel - http://www.ssbls.com/case/honer-v-glenbrook-nickel-company and "Residents dread new mining outfit," - http://theworldlink.com/news/local/residents-dread-new-mining-outfit/article_7fc9519f-fbf1-582f-87e3-e7e144bef56e.html

[3] See Federal Register Vol. 63, No. 149, August 1998 - https://www.gpo.gov/fdsys/pkg/FR-1998-08-04/html/98-20511.htm

[4] See Local No. 290 v. Department of Environmental Quality - 919 P.2d 1168 (1996) 323 Or. 559 - http://law.justia.com/cases/oregon/supreme-court/1996/323-or-559.html

See also - an article in the Oregonian Newspaper,, December 9 1998, By Brent Walth, which states in part:

> "The Oregon DEQ triggered the EPA action when it fought a lawsuit brought against it by Local 290 of the Plumbers and Pipefitters Union. The union sought to challenge the DEQ's issuance of an air pollution permit to the Willamette Industries mill in Albany and air and water pollution permits to the Glenbrook Nickel Co. plant in Riddle."

voluntary cleanup program for the area subject to a pending sale of property.[5] Some of the most suspect areas such as the settling ponds where never examined.[6]

Surface mining can have significant impacts on groundwater—both with regard to supply and contamination.[7] This is important because many Oregon counties rely significantly on ground water resources for potable drinking water and for irrigation of agricultural crops. Ground water also is essential for the health of rivers and the salmon and steelhead dependent on our creeks and rivers.

Importantly, SB 644 does not protect small, intermittent and headwater streams from both instream and surface mining. These critically important parts of Oregon's magnificent river system and are also critical for stream segments supporting anadromous salmonid habitat. For this reason, we attach the comments of Jack Williams, Senior Scientist with Trout Unlimited, on SB 3.

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[5] State of Oregon, Department of Environmental Quality Memorandum dates 11/4/2016 from Mallory Ott to Brenda Bachman, EPA, regarding Glenbrook Nickel Smelter, ECSI #2898. In reply to specific questions from EPA, DEQ replied in part:

> 'It does not appear any samples were collected from the settling ponds or marsh area since these areas do not appear to have been part of the property being sold at the time. The pending property transaction is believed to have been the impetus for Glenbrook's participation in the Voluntary Cleanup Program, investigating recognized environmental conditions, and obtaining a no further action determination from DEQ. The setting ponds and marsh area are not included in the NFA issued for the site.'

and,

> "the NFA clearly states that it does not cover the AOC outside the Glenbrook facility boundaries which includes AOC 15, 16, 17, 18, 19, and the Lower Ore Body, or the monitoring of storm water runoff from the ore piles to verify there is no impact from nickel. ... The smelter building was not identified as an AOC during the 2000-2002 assessments and therefore was not sampled."

The reply was generated by the complaint of a former employee of Glenbrook Nickel that knew specifics about the practices of the company. The employee noted that cancer rates in the area were high. The EPA also asked questions about the settling ponds because it was possible that toxic wastes had been disposed of there. DEQ indicated that the ponds were not part of the property and and therefore not been investigated.

[6] *Id.*

[7] See for example the U.S. Forest Service's Technical Guide to Managing Ground Water Resources pages 47 through 59 at - https://www.fs.fed.us/geology/FINAL_Ground%20Water%20Technical%20Guide_FS-881_March2007.pdf

Note this is just one of many sources regarding the effects of surface mining on ground water resources.

We also reference an article in Scientific American that includes a USEPA map that shows a significant percentage of those in Oregon counties get surface drinking water from intermittent, ephemeral, and headwater streams.[8] For some counties in Oregon this amounts to 87 to 100%.

SB 644 does not adequately safeguard against what DOGAMI calls “naturally occurring hazardous materials.[9] Mining and the surface disturbance associated with it exposes naturally occurring hazardous materials such as asbestos, nickel and talc.

Finally, I’d like to point out that mining in Oregon really does not have a proud history. I would point to the Oregon Blue Book’s section on Oregon History and the Indian Wars.[10] It states in part:

> “Mining debris poured down the Illinois, Rogue, South Coquille and South Umpqua Rivers. The salmon runs diminished; the eels died. Crayfish, fresh water mussels and trout choked on the flood of mud. Starvation threatened....
>
> “The mining districts--whether in the Rogue River country or the Blue Mountains of northeastern Oregon--caused major ecological disruption. The rush for quick wealth through mineral exploitation unraveled nature's ways and long-established human subsistence activities. Then came the "exterminators"--unprincipled men who believed only dead Indians were good Indians. They formed volunteer companies and perpetrated massacres against the Chetco Indians in 1853, the Lower Coquille Indians

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[8] Scientific American article at - https://www.scientificamerican.com/article/trump-rsquo-s-order-may-foul-u-s-drinking-water-supply/ and map showing the percentage of surface drinking water that comes from intermittent, ephemeral, and headwater streams by county across the United States, including Oregon. Map at - https://www.scientificamerican.com/sciam/assets/Image/2009_10_15_wetlands_science_surface_drinking_water_surface_drinking_water_national_counties.jpg

[9] Naturally Occurring Hazardous Materials, Final Report SPR 686 at https://ntl.bts.gov/lib/43000/43400/43432/SPR686_Final2.pdf

[10] Oregon Blue Book, Oregon History: Indian Wars at http://bluebook.state.or.us/cultural/history/history14.htm

in 1854, and in wanton aggression against Takelma Indians camped near the Table Rock Reservation in 1855."

More recent history of mining is also nothing to be proud of. Take for example the USEPA Superfund Site known as the Formosa Mine in Riddle, Oregon. See for example a public health assessment prepared by the Oregon Department of Human Services regarding the Formosa Mine site.[11]

Mining company's make promises to communities about jobs but these rarely materialize. Take for example Oregon Resources Corporations claims about the economic benefits of their chromite mine between Coos Bay and Bandon. In 2010 ORC predicted large, positive economic benefits. The company[12] These never happened and in 2012, the company's chromite operation closed.

Oregon's proud history is found in efforts to preserve its environment, rivers, native salmon and steelhead and public access to its ocean beaches not in the sad history of mining. Thank you again for the opportunity to submit this information and concern regarding SB 644.

Barbara Ullian
Grants Pass, Oregon

Attachments:

- Testimony in Support of Senate Bill 3 before the Senate Committee on Environment and Natural Resources by Dr. Jack E. Williams, Senior Scientist, Trout Unlimited dated Feb. 6, 2017
- Letter to Chief Justice Tani G. Cantil-Sakauye and Associate Justices, Supreme Court of California, from John D. Leshy, Harry D. Sunderland Distinguished Professor of Law, University of California regarding People v. Rinehart, 230 Cal.App.4th 419 (Supreme Ct. Case No. S222620)

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[11] See the Oregon Department of Human Health's report on the abandoned Formosa Superfund Site at - https://www.atsdr.cdc.gov/HAC/pha/FormosaMine/FormosaMineFinalPHA01-07-2010.pdf

[12] *Oregon mining facility boosts jobs* By: Nick Bjork in Construction June 28, 2010 3:32 pm at http://djcoregon.com/news/2010/06/28/oregon-mining-facility-boosts-jobs/

Testimony in Support of Senate Bill 3 before the

Senate Committee on Environment and Natural Resources

Dr. Jack E. Williams, Senior Scientist, Trout Unlimited

February 6, 2017

Thank you for the opportunity to present testimony in support of Senate Bill 3 and an expanded moratorium on suction dredge mining in Oregon streams. I represent Trout Unlimited, a national non-profit organization dedicated to the conservation of coldwater fishes, such as trout and salmon, and their habitats. Trout Unlimited has more than 3,000 active members in Oregon. Our approximately 155,000 national members are divided into local chapters that monitor the quality of their streams, conduct fishing clinics, teach our youth outdoor skills and ecological training, and implement stream restoration projects. In 2016, our members provided approximately 725,000 volunteer hours of community and ecosystem service across the country.

My testimony addresses the need to increase protection to streams tributary to essential spawning and rearing habitat for salmon, steelhead, Pacific lamprey and bull trout in Oregon. Section 1 of SB 3 provides that tributaries located above the lowest extent of essential habitat would be included within the moratorium. We agree that headwater tributaries of spawning habitat should be afforded the same protection as provided for the spawning areas themselves if we are to conserve these fisheries.

Tributary streams generally are underappreciated for the role in supporting and increasing the productivity of downstream rivers. We note the following values of headwater tributaries that are important to the conservation of downstream spawning and rearing habitat for salmon, lamprey, and bull trout.

1. **Headwater tributaries are the primary connection between larger spawning and rearing streams and the terrestrial environment.** Tributary streams are the primary source areas for downstream sediments, gravels, nutrients, invertebrates, and large woody material that support downstream fish populations (Gomi et al. 2002; Benda et al. 2004).

2. **Tributary streams are primary sources of cold water for trout and salmon bearing streams.** Even ephemeral or intermittent streams can provide important sources of cold, subsurface flows that support spawning areas for coldwater fishes in downstream rivers. One study of northeastern Oregon rivers found cold-water patches at 53% (36 of 68) tributary confluences examined (Ebersole et al. 2015). Of these, 14 tributaries had no flowing surface water with all the coldwater provided by subsurface flows.

3. Tributary streams are primary sources of food for trout and salmon bearing streams. One study in Alaska found that fishless headwater streams produced about half of the aquatic insects consumed in downstream rivers (Meyer et al. 2003). In Washington state, salmon and steelhead in the Methow River were found to be primarily supported by prey items produced in side channel and tributary environments (Bellmore et al. 2013).

4. Tributary streams provide essential ecosystem services to ecosystems and communities. These ecosystem services include sediment storage, pollution control, nutrient recycling, flood control, water storage, and groundwater recharge of aquifers. Tributary streams have been found to store fine sediments for decades and prevent these fine sediments from choking downstream spawning and rearing habitats (Meyer et al. 2003). Headwater tributaries process and retain excess nutrients, such as phosphorus and nitrogen, and help buffer impacts from activities occurring in terrestrial, upslope areas.

5. Headwater streams are important for their sheer quantity. Headwater tributaries are the most numerous component of the stream network. Tributaries are the building blocks for our larger streams and rivers. They literally make the larger rivers. Despite their small size, headwater streams typically drain between 70-80% of the entire watershed area (Meyer et al. 2003).

6. During high runoff years, many typically smaller tributary streams will support limited spawning and rearing habitat for salmon, steelhead, lamprey, and bull trout. For instance, coho salmon often spawn in streams less than 1 meter in width and less than 10 cm deep. Juvenile salmon may utilize low-gradient tributary habitat for rearing even if spawning occurs in larger stream channels. Because of their importance for juvenile coho salmon rearing, small tributary streams are ranked highly as important salmon restoration sites (Beechie et al. 1994).

7. Tributary streams are important sources of biological diversity, especially for salamanders and other amphibians, aquatic insects. These streams can provide from 25-100% of emerging insects consumed by organisms such as bats, birds, and salamanders (Baxter et al. 2005).

The condition of tributary streams determines their ability to provide the services described above. Habitat complexity – especially inchannel complexity provided by large wood, boulders and gravels -- is very important to maintaining values in tributary streams. Connectivity also is important for maintaining downstream values, including connections between streams and riparian habitats, and between streams and their floodplains.

Dredging, channelizing, removing instream structure, introducing pollutants, and loss of riparian vegetation are the most common causes of stream degradation. Restoration actions often focus on increasing the quality and quantity of instream structure, and reconnecting stream and upland areas.

The most recent National Rivers and Streams Assessment (EPA 2016) reviewed data available from 1.2 million stream miles from smallest headwater streams to largest rivers. EPA (2016) found that 46% of our nation's streams were in poor biological condition, 25% in fair condition, and 28% in good condition. What were major drivers of poor stream condition: >40% of streams had nutrient pollution problems, 24% had poor quality riparian vegetation, 20% had high levels of riparian disturbance, and 15% had

excessive fine stream sediments. These drivers of reduced stream condition are exactly the kinds of problems that can be addressed by protection of our tributary streams.

Suction dredge mining contributes to the drivers of stream degradation by mobilizing fine sediments and sending them downstream, by releasing pollutants to downstream areas, and by removing inchannel structure. These pollutants can include mercury, a neurotoxin that is normally sequestered in deep stream sediments and inaccessible to fishes, but is mobilized and distributed downstream with the fine sediment plume behind suction dredges (Fleck et al. 2001).

What does this mean? It simply means that the condition of our larger rivers is a reflection of the condition of their headwater tributaries. If we do not protect headwater tributary streams, we cannot provide the high quality salmon, lamprey, and bull trout spawning and rearing habitat that is desired. For these reasons, I encourage additional protections from suction dredge mining in upstream tributaries of spawning streams for salmon, lamprey, and bull trout.

References:

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Bellmore, J.R., and colleagues. 2013. The floodplain food web mosaic: a study of its importance to salmon and steelhead with implications for their recovery. Ecological Applications 23:189-207.

Benda, L., and colleagues. 2004. The network dynamic hypothesis: how channel networks structure riverine habitats. BioScience 54:413-427.

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Gomi, T., and colleagues. 2002. Understanding processes and downstream linkages of headwater systems. BioScience 52:905-916.

Meyer, J.L. and colleagues. 2003. Where rivers are born: the scientific imperative for defending small streams and wetlands. Report of American Rivers and the Sierra Club, Washington, D.C.

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January 7, 2015

Chief Justice Tani G. Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: Letter in Support of Petition for Review (Rules of Court 8.500(g)):
People v. Brandon Lance Rinehart, 230 Cal.App.4th 419 (Supreme Ct. Case No. S222620)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

We write, in our individual capacity, to support the Attorney General's petition for review in this case. Our interest is as follows: John Leshy has long been engaged on issues involving the Mining Law of 1872 and state authority under it. He is the author of a comprehensive history of the Mining Law, The Mining Law: A Study in Perpetual Motion (Johns Hopkins Press, 1987); he is co-author of the standard text, Federal Public Land and Resources Law, now in its seventh edition (Foundation Press, 2014); he authored an amicus brief filed on behalf of nineteen states in California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987); and he has written law review articles discussing that case and more generally, administration of the Mining Law. He was also Solicitor (General Counsel) of the U.S. Department of Interior from 1993 to early 2001. Sean Hecht, the Evan Frankel Professor of Policy and Practice and co-Executive Director of the Emmett Institute on Climate Change and the Environment at UCLA School of Law, is also engaged in issues involving the Mining Law's interaction with California state regulatory authority. He has taught Public Natural Resources Law, including material relating to Granite Rock and its application in California in the context of the Mining Law, since 2004; and as a Deputy Attorney General for the State of California prior to his appointment at UCLA, he worked on matters relating to the interaction of federal mining laws, including the Mining Law and the Stock-Raising Homestead Act, with state and local regulation of the environmental impacts of mining.

The Court of Appeal decision in this case seriously misunderstands the scope of state authority to regulate activities carried out on federal land under the Mining Law of 1872. The decision's narrow construction of that authority is at odds with the federal Mining Law, with authoritative court decisions construing it, with long practice under it, and with the regulations adopted by the federal land management agencies administering it. The decision erroneously seizes on an isolated statement in the Supreme Court's decision in Granite Rock to create a very restrictive test for measuring state authority. This erroneous test will lead to mischievous results and pose an unwarranted obstacle to the ability of the state of California to protect its splendid natural environment. The Court should grant the State's petition and reverse this ruling.

In a very real sense, the issue posed in this case recapitulates an important, though largely forgotten, episode in California's history. Soon after the Gold Rush began in 1848, and several years before Congress adopted what became the Mining Law of 1872, miners began using a destructive technique called hydraulic mining to extract gold out of federal land in the Sierra Nevada mountains. Using high-pressure hoses called monitors to wash down entire mountainsides to unearth gold deposits buried within them, these operations caused substantial environmental degradation. Congress did not specifically address this practice in enacting the Mining Law; indeed, as the Court noted in Granite Rock, Congress there "expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." 480 U.S. at 582.

The Mining Law was also largely silent on the subject of state authority. Eventually, in the early 1880s, in what has been called "California's First Environmental Battle" (Marilyn Ziebarth, California Lawyer, August 1984, pp. 56-59), federal and state courts issued decisions applying a California statute codifying the common law of nuisance to enjoin the practice of hydraulic mining. In the federal decision, Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753, 770-71 (C.C.A. 1884), the court found that "the acts complained of clearly constitute a public and private nuisance, both at common law and within the express language of the Civil Code of California"). (Woodruff was authored by Lorenzo Sawyer, who earlier had served as Chief Justice of the California Supreme Court.) In a parallel decision, this Court rejected the argument that the industry practice was sanctioned by Congress or by custom. People v. Gold Run Ditch & Mining Co. 66 Cal. 138, 151-52 (1884). (The most complete account of this episode is Robert L. Kelley's Gold Versus Grain (1959).)

This Court more recently described its Gold Run Ditch decision as an "epochal ... sign post which marked the transition from a mining economy to one predominantly commercial and agricultural," and relied on it to strengthen state regulatory protection for the state's water resources. National Audubon Society v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 720 (1983). The leading authority of the era on the Mining Law, Judge Curtis Lindley, described the hydraulic mining cases as establishing the principle that a mining practice causing such environmental degradation "has neither been authorized by ... national legislation nor legalized by implication." Lindley, Mines, (3d. 3d. 1914), vol. 3, sec. 849, p. 2098.

Now, more than a century later, the mining industry once again seeks to shield its destructive practices from California's regulatory regime. In the modern era, the industry's practice of motorized vacuum or suction dredge mining in streams threatens salmon spawning areas and other fish habitat. Moreover, it stirs up mercury that remains in streambeds, the residue of miners' application of millions of pounds of that toxic substance in the decades following the discovery of gold in 1848 to help tease gold out of the earth. See the CEQA documents and other governmental reports cited in the Brief Amicus Curiae of the Karuk Tribe, et al., filed in the Court of Appeal, at pp. 4-12. If the courts could apply

California statutes and the common law to end the environmentally destructive practice of hydraulic mining one hundred and thirty years ago, this Court can do the same here, by upholding statutes the California legislature has recently adopted calling a halt to the use of a particularly environmentally destructive kind of dredge mining.

Then, as now, California was not seeking to ban all mining on federal land; it was merely seeking to outlaw a particularly destructive mining practice. The state's ban here on motorized vacuum or suction dredging does not preclude other less environmentally destructive means of mining. Cf. Pringle v. Oregon, 2014 WL 795328, at *8 (D. Or. 2014) (holding that Oregon state law banning suction dredge mining in scenic waterways "does not conflict with the General Mining Act of 1872, and therefore is not preempted" because it allows other mining methods and thus is not a ban on all mining in scenic waterways). The limited nature of the State of California's action, merely prohibiting the use of particularly environmental destructive equipment, also distinguishes it from the ordinance adopted by the voters in Spearfish County, South Dakota, which outlawed all "surface metal mining extractive industry projects," and was held pre-empted by federal law in South Dakota Mining Ass'n v. Lawrence County, 155 F.3d 1005 (8th Cir. 1998).

The Court of Appeal decision in this case utterly ignores the rich history of state environmental regulation of gold mining in California, and the limited nature of the state's regulation here. Instead, it focuses on a single phrase in the Supreme Court's Granite Rock decision, to hold that the state may not regulate hardrock mining activities on federal land if that regulation would interfere with the commercial viability of mining enterprises. That is not the law.

One simple illustration demonstrates this. The Mining Law is not only silent on environmental regulation; it is also silent on taxation. Yet within a decade of its adoption, the U.S. Supreme Court had no difficulty whatsoever in upholding a state's authority to tax a federal mining claimant's possessory interest in its mining claim. Forbes v. Gracey, 94 U.S. 762, 767 (1872); see also Elder v. Wood, 208 U.S. 226 (1908). Any state tax will, perforce, impose costs that can affect the commercial viability of a federal mining claim. That effect did not give the Supreme Court pause in Forbes v. Gracey. That alone illustrates that effect on commercial viability cannot be the standard for measuring state authority over mining activities on federal land. Limiting state regulatory authority to situations where it could not make a difference to commercial viability would lead to the odd result that a state may regulate only clearly profitable mining operations, and not economically marginal ones. That has never been the approach of environmental regulatory regimes, state or federal, for obvious reasons.

The Court of Appeal's adoption of the "commercially impracticable" test is drawn from a single phrase in Justice O'Connor's majority opinion in Granite Rock. That opinion assumed, "[f]or purposes of ... discussion and without deciding the issue," that federal law "pre-empts the extension of state land use plans onto unpatented mining claims

in national forest lands." 480 U.S. at 573. It then went on to conclude that California was not engaging in land use planning, but rather permissible environmental regulation. It then acknowledged that the line between environmental regulation and land use planning "will not always be bright; for example, *one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable.* However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." 480 U.S. at 587 (emphasis added).

The entire passage makes clear that the U.S. Supreme Court was not establishing a legal test allowing a state to regulate activities on federal land to protect the environment only if the regulation does not interfere with the "commercial impracticability" of the activity. Rather, the Court was making a core distinction between impermissible land-use planning and permissible environmental regulation. In this case, as in Granite Rock, California is engaging in environmental regulation. The state is not saying there shall be no mining at all on federal land; it is merely outlawing a particularly destructive kind of mining, in the same way this Court and federal courts outlawed hydraulic mining long ago.

The Ninth Circuit has rejected a comparable mining industry argument--that the authority of *federal* agencies to regulate its practices to protect the environment is limited by the effect of the regulation on the economic viability of the mining enterprise being regulated. Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994) ("[v]irtually all forms of [environmental] regulation of mining claims--for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage--will result in increased operating costs, and thereby will affect claim validity.... [but the law is] clear that such matters may be regulated by the [federal agencies]"). There is no reason to apply a different approach to *state* environmental regulation. Indeed, the federal executive branch has for decades routinely taken into account miners' costs of complying with *state* as well as federal environmental regulatory requirements in determining whether a "valuable mineral deposit" has been discovered within the meaning of the Mining Law. See United States v. Kosanke Sand Corp., 80 I.D. 538, 546, 12 IBLA 282, 298-99 (1973); United States v. Pittsburgh-Pacific, 84 I.D. 282 (1977); United States Steel Corp. 52 IBLA 319 (1981).

This reference to federal agency practice supplies the final reason to review and reverse the Court of Appeal's decision. It totally ignores the pertinent policies of the federal executive branch agencies that manage the land and administer the Mining Law. Those agencies are welcoming, not hostile, to state environmental regulation. Forest Service and BLM policies, discussed in the state petition for review at pp. 17-19, clearly reflect that the federal agencies contemplate exactly the kind of state regulation California is seeking to apply here. If the federal agencies were uncomfortable with state environmental

regulation, they would have adopted regulations to limit state authority in this area.

The Supreme Court in Granite Rock regarded the fact that the federal agencies welcomed state environmental regulation as particularly influential. 480 U.S. at 582-84. The Court of Appeal's disregard of that fact makes its decision in this case even more inexplicable. And this is especially so because the State here is acting to protect one of its most precious natural resources, water, an area of regulation replete with federal deference to state authority, to which the U.S. Supreme Court has repeatedly called attention. California v. United States, 438 U.S. 645, 648-71 (1978); United States v. New Mexico, 438 U.S. 696, 698-702 (1978).

For the reasons stated above, we urge the Court to grant the petition and to review and reverse the Court of Appeal decision.

Sincerely,

Sean B Hecht

for John D. Leshy
Sean B. Hecht

cc: All parties as listed in the attached Proof of Service