

No. S222620

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

BRANDON LANCE RINEHART,

Defendant and Appellant.

SUPREME COURT  
**FILED**

MAY - 3 2016

Frank A. McGuire Clerk

Deputy

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Third Appellate District, Case No. C074662  
Plumas County Superior Court, Case No. M1200659  
Honorable Ira Kaufman, Judge

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**DEFENDANT AND APPELLANT'S THIRD  
SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE**

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James L. Buchal, SBN 258128  
Murphy & Buchal LLP  
3425 SE Yamhill Street, Ste. 100  
Portland, OR 97214  
Tel: 503-227-1011  
Fax: 503-573-1939  
*Attorney for Defendant and Appellant*

May 2, 2016

Appellant hereby moves, pursuant to Evidence Code §§ 452 & 459, and California Rules of Court 8.252(a) and 8.520(g), for judicial notice of the documents indexed below, relevant to this Court’s consideration of the case of *Bohmker v. Oregon*, 2016 WL 1248729, No. 1:15-CV-01975-CL (D. Or. March 25, 2016), *appeal docketed*, No. 16-35262 (9th Cir. April 5, 2016), a decision occurring after the judgment that is the subject of the appeal. None of this material was presented to the trial court, which refused to allow the presentation of evidence pertinent to the preemption issue before this Court.

Exhibits 16-19 are federal court filings in the *Bohmker* case, and thus “records of . . . any court of record of the United States” within the meaning of Evidence Code § 452(d). They consist of testimony presented by plaintiffs. Appellant regards the interference in Congressional mining objectives arising from a ban on motorized mining, confirmed by the testimony, as facts of “common knowledge” and “not reasonably subject to dispute”. *Id.* §§ 452(g)-(h)).

Without regard to whether this Court can take judicial notice of the truth of the testimony, the People ask this Court to rely upon *Bohmker*, and it is relevant in assessing the persuasiveness of this case for the Court to understand the degree to which the magistrate’s factfinding on summary judgment was contrary to the evidence before him.

Exhibit 20 is simply a copy of the Oregon Senate Bill at issue in *Bohmker*, of which this Court may take judicial notice as an official act of the Oregon legislature. *See* Evidence Code §§ 452(a)-(c).

### **Index to Exhibits**

Exhibit 16 is a true copy of the Declaration of Tom Kitchar in Support of Plaintiffs' Motion for Summary Judgment in the *Bohmker* case;

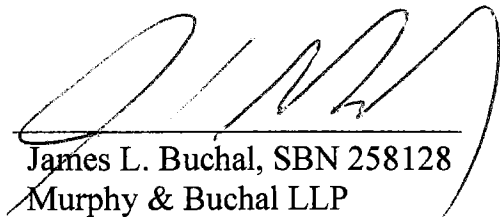
Exhibit 17 is a true copy of the Declaration of McCracken in Support of Plaintiffs' Motion for Summary Judgment in the *Bohmker* case;

Exhibit 18 is a true copy of the Declaration of Evens in Support of Plaintiffs' Motion for Summary Judgment in the *Bohmker* case;

Exhibit 19 is a true copy of the Declaration of Joel Grothe in Support of Plaintiffs' Motion for Summary Judgment in the *Bohmker* case; and

Exhibit 20 is a true copy of the 77th Oregon Legislative Assembly Senate Bill 838.

Dated: May 2, 2016.



James L. Buchal, SBN 258128  
Murphy & Buchal LLP  
3425 SE Yamhill Street, Ste. 100  
Portland, OR 97214  
Tel: 503-227-1011  
Fax: 503-573-1939  
*Attorney for Defendant and Appellant*

**CERTIFICATE OF SERVICE**

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On May 2, 2016, I served the following document:

DEFENDANT AND APPELLANT’S THIRD SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE

on the parties in said action as follows:

(X) (First Class US Mail) by placing a true copy thereof enclosed in a sealed envelope, addressed as shown below:

Matthew K. Carr  
Deputy District Attorney  
Plumas County District Attorney’s Office  
c/o California District Attorneys  
Association  
921 11<sup>th</sup> Street, Suite 300  
Sacramento, CA 95814

Marc N. Melnick  
Deputy District Attorney  
Office of the Attorney General  
1515 Clay Street, Suite 2000  
Oakland, CA 94612

Clerk of the Court  
Plumas County Superior Court  
520 Main Street, Room 104  
Quincy, CA 95971

Jonathan Evans  
Center for Biological Diversity  
351 California Street, Suite 600  
San Francisco, CA 94104

Clerk of the Court  
Court of Appeal of the State of California  
Third Appellate District  
914 Capitol Mall, 4<sup>th</sup> Floor  
Sacramento, CA 95814

James S. Burling  
Jonathan Wood  
Pacific Legal Foundation  
930 G Street  
Sacramento, CA 95814

Lynne Saxton  
Saxton & Associates  
912 Cole Street, Suite 140  
San Francisco, CA 94117

Michael Lauffer  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Nathaniel H. Kane  
Environmental Law Foundation  
1736 Franklin St., 9<sup>th</sup> Fl.  
Oakland, CA 94612

Aaron Avila  
Lane McFadden  
United States Department of Justice  
P.O. Box 7415, Ben Franklin Station  
Washington, DC 20044

Steven J. Lechner  
Jeffrey W. McCoy  
Mountain States Legal Foundation  
2596 South Lewis Way  
Lakewood, CO 80227

John Leshy  
U.C. Hastings College of Law  
200 McAllister Street  
San Francisco, CA 94102

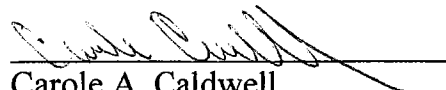
Sean B. Hecht  
UCLA School of Law  
405 Hilgard Avenue  
Los Angeles, CA 90095

Mark Nechodom  
Department of Conservation 801 K.  
St., MS 24-01  
Sacramento, CA 95814

John Mattox  
Department of Fish & Wildlife  
1416 Ninth St., 12<sup>th</sup> Fl.  
Sacramento, CA 95814

Brook B. Bond  
L. Michael Bogert  
Parsons Behle & Latimer  
800 W. Main Street, Suite 1300  
Boise, ID 83702

Eric Biber  
U.C. Berkeley School of Law  
689 Simon Hall  
Berkeley, CA 94720

  
Carole A. Caldwell  
Declarant

No. S222620

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THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

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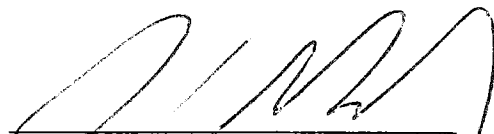
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Dated: May 2, 2016.



James L. Buchal, SBN 258128  
Murphy & Buchal LLP

3425 SE Yamhill Street, Ste. 100

Portland, OR 97214

Tel: 503-227-1011

Fax: 503-573-1939

*Attorney for Defendant and Appellant*





James L. Buchal, OSB No. 921618  
MURPHY & BUCHAL LLP  
3425 SE Yamhill Street, Suite 100  
Portland, OR 97214  
Tel: 503-227-1011  
Fax: 503-573-1939  
E-mail: jbuchal@mbllp.com  
*Attorneys for Plaintiffs*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
MEDFORD DIVISION

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

Plaintiffs,

v.

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

Defendants.

No. 1:15-CV-01975-CL

**DECLARATION OF TOM KITCHAR  
IN SUPPORT OF PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT**

Tom Kitchar declares:

1. I am an Oregon resident and make this Declaration in support of plaintiffs' motion for summary judgment seeking a declaration that federal mining and land

management laws preempt Senate Bill 838's limitations and prohibitions on small-scale motorized placer mining in the State of Oregon.

**Background and Qualifications.**

2. I have been employed in the field of gold mining as my primary source of income since December of 1979, when I was employed by the Homestake Mining Company (HMC) in Lead, S.D. for nearly four years at depths of over 6800 feet as a hard-rock underground gold miner. During that period, I rose through the ranks gaining MSHA certification as an Underground Miner 1st Class, Motorman 1st Class, LHD Operator 1st Class, and Cager 2nd Class. While working for the HMC, in my spare time, I taught myself the practices of the placer gold miner, the nature of placer gold deposits, located claims of my own, and became familiar with the regulatory systems governing placer mining.

3. In the fall of 1984, I ceased working for HMC, and by the fall of 1985 had outfitted myself with small-scale placer mining equipment (motorized and non-motorized) and moved to SW Oregon with the intent of locating valuable placer gold mining claims and then working them full-time as my means of support.

4. After several years of prospecting and searching for ground rich enough to claim and work, by 1987 I had located placer claims along a historically-rich creek which I have continued to work for the last 28 years. In the course of my mining work, I have become knowledgeable in the practice of mining techniques employed by plaintiffs and other small scale miners.

5. In response to baseless environmentalist attacks upon suction dredge mining, in or about the year 2000, I joined and got involved with the Waldo Mining

District (WMD) to help fight against these threats. In June of 2001, I was elected president of the WMD, and continue to hold that office to this day. WMD was established through self-initiation on April 4, 1852, and later pursuant to provisions of the U.S. Mining Law of 1872, is a federally recognized mining district with certain governmental authority over mining within the boundaries of the District. The purpose of the WMD is to preserve, protect, and promote mining within the District and elsewhere. Both as a miner and as president of the WMD, I have become familiar with and participated in the county, state and federal promulgation of regulatory provisions concerning all aspects of small-scale placer gold mining, and in particular suction dredge mining.

6. In 2001, I was appointed to represent Mineral & Energy interests on the Siskiyou National Forest Resource Advisory Committee (SNFRAC) under the Secure Rural Schools Act (P.L. 106-393), and held that seat for at least twelve years. In 2012, I was appointed to the Josephine County Board of Commissioner's Mineral Advisory Committee, where I continue to serve to this day. In the spring of 2014, I was appointed to the Governor's Study Group as called for in SB 838, Sec. 8; and attended and participated at every meeting. And during the last 15 years I have testified in numerous judicial and regulatory proceedings concerning suction dredge mining.

**Review Concerning Plaintiffs' Mining Claims.**

7. I am skilled in the procedure required to research, locate and document federal mining claims, and have published a book on the subject entitled "The Gold Prospector's Guide to Researching and Locating Mining Claims."

8. I obtained copies of the location notices for mining claims owned by the plaintiffs in this action, and compared the geographic boundaries of the claims with the Department of State Lands (DSL) online maps<sup>1</sup> identifying so-called “essential indigenous anadromous salmon habitat” (ESH). I have verified that the following claims are located in areas designated as ESH:

- Claims ORMC165697 and ORMC167940, owned by plaintiff Joel Grothe;
- Claims ORMC171775 (partly ESH), ORMC159208, ORMC161030, ORMC161031, and ORMC168629, owned or controlled by the Willamette Valley Miners;
- Claims ORMC161726 and ORMC166648, owned by Jason Gill;
- Claims ORMC155353, ORMC155354, ORMC155355, ORMC97766 and ORMC97767, 50% interest owned by Don Van Orman;
- Claims ORMC163149 and ORMC171775, owned by Larry Coon;
- Claims ORMC170102 and ORMC170044, owned by Douglas County Prospectors under contract of sale to Walter Evens;
- Claim ORMC171095, owned by Michael Hunter; and
- Claim ORMC171208, owned by Millennium Diggers.

9. I used the phrase so-called “essential indigenous anadromous salmon habitat” because I am very familiar with the habitat around Althouse Creek, a tributary of the Illinois River, a tributary of the Rogue River, which has been so designated. The last couple of miles of this Creek go dry from roughly July through November, with the only

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<sup>1</sup><http://geo.maps.arcgis.com/apps/webappviewer/index.html?id=b9850ba265e546c8b528e9900e9300de>

remaining flow proceeding underground through streambed gravels, such that the upper reaches are utterly inaccessible to anadromous fish during those times. In the winter, the Creek is often subject to enormous scouring flows that substantially re-arrange the Creek bed and would almost certainly destroy any salmon redds. Even when the Creek is flowing, much of it is behind a first set of waterfalls made up of gigantic boulders plugging the Creek channel, which appear to provide no means for anadromous fish to pass upstream. Below is a photograph I took of those falls:



10. It is not surprising that while I have prospected this Creek for years, as it contains rich gold deposits, I have never seen any spawning salmon or redds upstream of these falls. It is surprising that this habitat is deemed “essential,” much less habitat at all.

**SB 838 Essentially Bans All Small-Scale Placer Mining.**

11. There are two basic types of mineral deposits: *lode*, and *placer*. A *lode* deposit can be defined as “A mineral deposit in solid rock” (lode mining usually entails sinking shafts and tunnels, drilling & blasting, crushing ore, and some sort of treatment to recover the valuable mineral(s) from the solid rock). *Placer* deposits have been defined as “including all forms of deposit, excepting veins of quartz, or other rock in place.”<sup>2</sup> In the case of gold, as soon as an ore vein is exposed to the surface and erodes, the gold becomes placer gold. Placer mining usually entails the excavation of streambed material (in or out of the present day stream) which is passed through a simple gravity separation process to recover the heavy minerals such as gold.

12. Most placer claims are located on mineral deposits found in and under streambeds. The size of a typical placer mining claim is 20 acres, and is described under the Public Land Survey System using legal sub-division. Most 20 acre claims measure 660 feet wide and 1,320 feet long, usually laid out taking in as much of the stream as possible. SB 838’s prohibited zone takes in the full width of the stream to the ordinary high water mark along with an additional 300 feet to either side, virtually covering nearly all the surface of most placer mining claims.

13. While SB 838 prohibits only placer mining that uses “any form of motorized equipment,” and is limited to extracting “gold, silver or any precious metal from placer deposits of the beds and banks”—and even in some cases up to 300 feet away—this is in substance a ban on all meaningful placer mining in the prohibited zones.

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<sup>2</sup> 30 U.S.C. § 35; R.S. 2329; Act of March 3, 1891, 26 Stat. 1097.

14. The limitation to “precious metal” placer deposits is not a meaningful limitation. Other than sand and gravel plants (which are many, many times larger, with greater impact than the operations targeted by SB 838), the only type of mining typically occurring in the beds, banks and upland areas from Oregon waterways is placer mining for precious metals. It is possible that a lode deposit would be located within the prohibited zone, but this is not common, and, as noted below, any such easily-accessible lode deposits have probably already been exploited.

**Concentration of Gold in the Beds and Banks of Oregon Waterways.**

15. The days when mineral deposits were so plentiful in the United States and the State of Oregon that they required little more than miners using picks and shovels to recover them are long gone. As a general matter, the use of human labor alone does not provide sufficient incentive to explore for, discover and develop placer deposits of precious metals. Indeed, many valuable deposits exist to this day only because pure human labor alone was not sufficient to discover the deposits or develop them (such as gold deposits found in underwater streambeds).

16. Much of Oregon has already been subject to significant mining activity that has extracted placer deposits of gold, and early miners tended to mine the banks of rivers and streams, but not underwater deposits, especially those in deep water. In particular, the technique of hydraulic mining (using a high pressure hose to wash soil deposits near rivers and streams into a sluice) removed much of the gold deposited adjacent to water bodies, but much gold was lost in the process, washed into the rivers and streams, and remains there for subsequent miners. In addition, lode and placer



deposits continue to erode and release gold into the rivers and streams, replenishing in-stream deposits.

17. Many placer gold deposits of great value, but of very small size, persist in the State of Oregon to this day. Their recovery is the object of the small-scale mining industry in Oregon, in which individual miners, working with or without partners, operate small motorized equipment in and around streams that move, at best, a few mere yards of material per day, and then process the materials removed with gravity separation techniques involving such equipment as sluices, concentrators and small trommels. This equipment is environmentally-benign, as there is no milling or crushing of rock, and indeed there is no addition of any pollutant in the process.<sup>3</sup>

18. In many Oregon streams, the only practical method to mine the minerals is with highly-portable motorized small scale placer-mining equipment, such as a suction dredge, if for no other reason than the streams are totally inaccessible to larger equipment by reason of the surrounding terrain.

#### **The Importance of Suction Dredges.**

19. The richest deposits of gold likely present in Oregon for the small-scale miner are located deep underwater. These deposits can only be discovered and developed, as a practical matter, through the use of suction dredges, which permit an operator to work under water with a vacuum hose to displace streambed material, excavating small underwater holes down to and in the bedrock.

20. The modern suction dredge is the accepted state-of-the-art equipment used to prospect for and mine placer gold underwater. In most cases, suction dredges are the

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<sup>3</sup> It should be noted that not only do the dredges not add anything to the waters, they in fact commonly remove such pollutants as mercury, lead, iron, and other heavy materials.

*only* type of equipment and method able, as a practical matter, to reach underwater placer deposits. Because they utilize suction to excavate, they are the only viable method for recovering gold (and especially small, or “fine” gold) off the uneven, rough, and often cracked bedrock at the bottom of Oregon streams.

21. Government agencies, such as Certified Mineral Examiners employed by the U.S. Forest Service, have used suction dredges to determine the validity of placer mining claims under federal law, and have frequently opined that such suction dredges are the only practicable means of developing the underwater placer gold deposits.

22. The nature of many underwater gold deposits is that the gold is concentrated in small pockets along a particular path running down the stream. The experienced suction dredge miner can follow the path of gold eliminating the need to work other areas because the miner is underwater scrutinizing the material being sucked up by the dredge and can see pieces of gold when in good ground. This of course requires not only motorized equipment to suck up the gold, but also to provide an continuous air supply so the miner can breathe underwater to depths of 20 feet or more.

23. Prospecting with a suction dredge involves sinking test holes down through the bed material, usually to bedrock, to see if any gold is present. Unless the miner is lucky enough to put down on a rich pocket, sinking one test hole doesn't tell much. The dredge is moved to another likely spot and another hole is sunk to bedrock. Now the miner can compare one hole to the other, paying attention to the different layers of materials found and their properties, and whether there was gold in a particular layer, or in one hole and not the other.

24. Based on the results, the dredger will move to further locations searching for the best ground. This is an iterative process, based on many factors including a miner's experience dredging, knowledge of the area and the nature of mineral deposits, and even intuition and dumb luck. This iterative process cannot effectively occur in connection with permitting processes that require weeks or even months, or on-site inspections of each and every test location sampled by miners. Some suction dredge miners, especially those working part-time, with smaller dredges, search for and work only the most likely richest spots. Full-time dredgers, once pay material is identified, may elect to bring in a larger dredge and start at the low end of the deposit and slowly work upstream until the gold runs out.

25. Suction dredge mining is by far, the most environmentally-friendly method yet devised to prospect for and mine gold and other precious metals from underwater deposits. In particular, it has far less environmental impacts than the larger scale, nonmotorized methods employed in past years because the dredging is confined to the stream itself without such activities as damming or moving the entire stream. Because all disturbances are contained within the stream, all traces of the activity are typically wiped out during the next high flow event, typically during winter high flows. The natural reclamation is so thorough that even experienced suction dredge miners have a hard time determining if an area has already been dredged—and the only way to know for sure is to start dredging.

26. The primary environmental concern involves the risk that miners will dig up pockets of fish eggs (called "redds") in the streambed gravels. This risk was addressed decades ago by the enactment of in-water work periods for fish-bearing

streams, barring operations when the fish redds are present. There are also concerns about the introduction of turbidity into the water, but the plumes of turbidity produced by small scale operations dissipate rapidly, and are utterly insignificant in relation to natural stream sediment loads.

**Effects on the Goals of Federal Mining Law.**

27. I am informed and believe that federal mining law aims to encourage mineral development on federal lands, and indeed grants property rights to miners in their mining claims when they have located valuable deposits of minerals. I am also informed and believe that Congress has enacted unique substantive restrictions on the regulation of mining activities because Congress has recognized that minerals can only be extracted from the location where they are found, and some degree of environmental impact is inevitable in any mineral development process. Therefore, Congress has required that regulatory restriction be limited to those limiting unnecessary or unreasonable adverse impacts.

28. A prohibition on the use of motorized equipment in the Prohibited Zones is a material interference with prospecting, mining and processing operations. Indeed, without motorized equipment many valuable deposits are for all practical purposes totally inaccessible for the small-scale miner—they might as well be on the Moon.

29. SB 838 does not operate as a regulatory scheme addressing unnecessary or unreasonable adverse effects of placer mining in and around the beds and banks of waterways within the State of Oregon. Rather, it operates to prohibit motorized mining outright.

30. The continued lawfulness of non-motorized techniques is not adequate to vindicate the purposes of federal mining law, and essentially limits mining to activities in which tourists or recreationalists might engage, such as panning for a few flakes of gold.

31. SB 838 also threatens the Congressional goal for the development of sound and stable mining industries, inasmuch as it outlaws the entire industry supplying small-scale miners in Oregon with motorized equipment for small-scale mining. Perhaps more importantly, mineral development tends to follow a natural process beginning with small-scale prospecting and mining operations that will evolve to larger operations as the scope of discoveries permits.

32. While a permit process may still be available under Oregon law for very large operations excavating 5,000 or more cubic yards annually, the prudent miner will not invest hundreds of thousands of dollars' worth of equipment needed for an operation of this scale based on hand-dug or panned samples. Nor will the prudent miner invest the substantial funds required to obtain a permit based on such samples. Rather, the ordinary course of progression will involve using motorized small-scale equipment to do bulk testing on the order of many cubic yards of material before making further investments. Forbidding small-scale motorized operations therefore cripples larger-scale development of placer claims generally, other than pre-existing operations.

33. Miners also have substantial capital invested in their motorized equipment, the value of which is damaged by SB 838. A typical four-inch suction dredge costs approximately \$3,000 or more. Additional support gear, such as a wet-suit, diving gear, weight belts, pry bars, winching gear, chains, tools, and other needed items can cost easily an additional \$1,000 or more. The typical small-scale placer suction dredge miner

has easily \$4-5,000 or more invested in equipment alone. The Oregon mining industry as a whole has substantial investment in equipment for suction dredging.

34. The State's refusal to issue permits for suction dredging and other forms of small-scale mining makes all this mining capital worth substantially less, and materially interferes with the development of mineral resources on federal lands in Oregon and elsewhere. As a general matter, it amounts to a prohibition against the mining of the vast majority of federal placer gold claims in Oregon, including the claims identified by plaintiffs in this action.

35. By prohibiting the use of any or all motorized placer-mining equipment in ESH streams Oregon is placing most if not all valuable placer mineral deposits on thousands of placer claims throughout Oregon off-limits, destroying the not insignificant value of the claims themselves. If a claim cannot be mined, not only is the claim near worthless, it may also be found to be invalid if the minerals cannot be mined at a profit.

36. There are those who say that the Nation's goals of mineral development can be achieved without regard to the participation of the small-scale miner, and that we might look exclusively to large corporations and large operations. This point of view overlooks the fact that the mineral deposits must be discovered in the first place, and Congress made the choice to incentivize individual prospectors to do so. The discovery of gold in SW Oregon in 1851 brought tens of thousands of prospectors and miners, the first settlers in much of rural Oregon, Mining history is rich with the stories of such individual prospectors who have made enormous discoveries that did produce very large operations, of the sort that the State of Oregon might permit under other provisions of Oregon law. Outlawing small-scale operations, however, chills the participation of

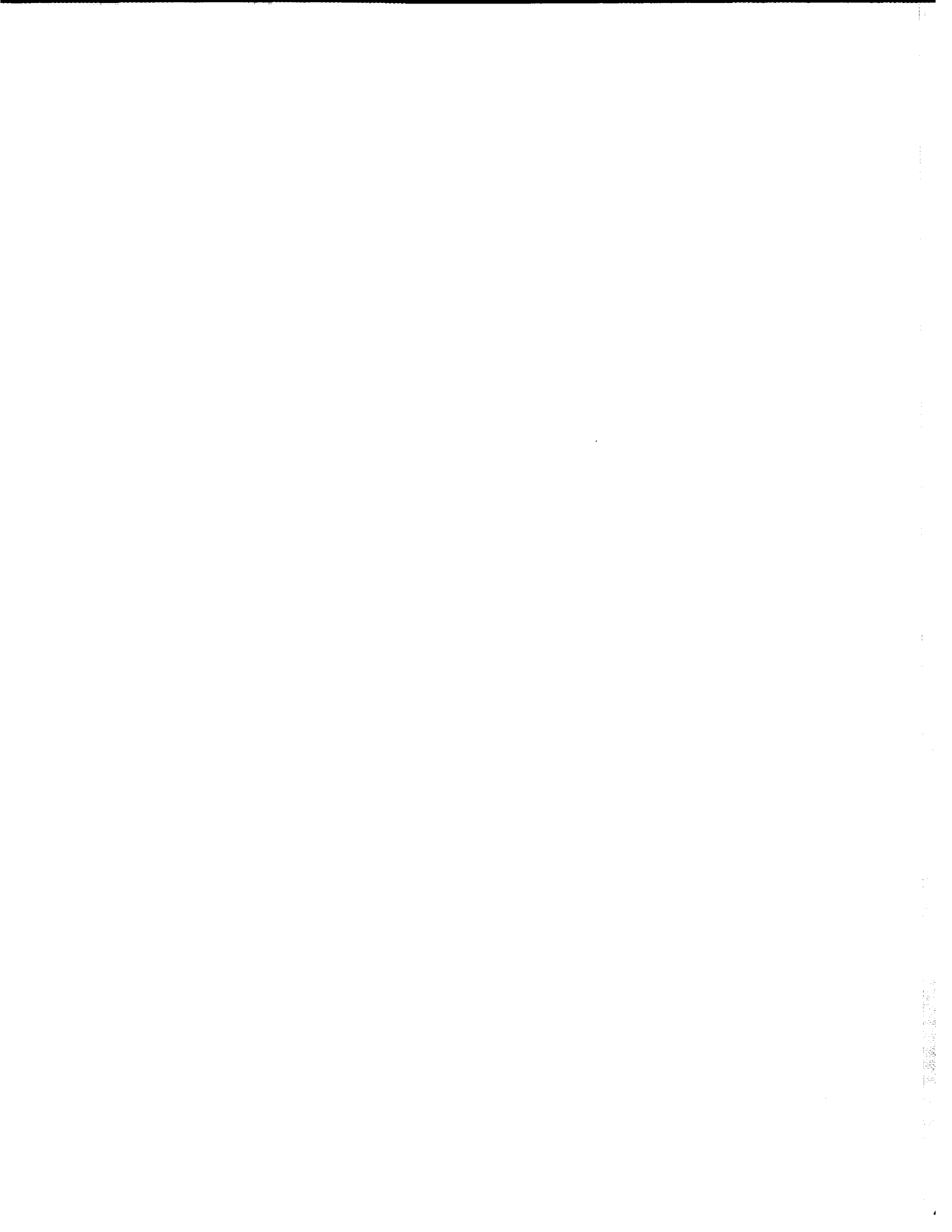
individuals and their constant prospecting activities in a way that is fundamentally inconsistent with the Congressional design, and destroys the living cultural heritage in Oregon of the individual prospector/miner, allowing only the rich to mine.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on November 30, 2015.

A handwritten signature in black ink, appearing to read 'Tom Kitchar', written over a horizontal line.

Tom Kitchar  
Declarant





James L. Buchal, OSB No. 921618  
MURPHY & BUCHAL LLP  
3425 SE Yamhill Street, Suite 100  
Portland, OR 97214  
Tel: 503-227-1011  
Fax: 503-573-1939  
E-mail: jbuchal@mblp.com  
*Attorneys for Plaintiffs*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
MEDFORD DIVISION

JOSHUA CALEB BOHMKER, LARRY  
COON, WALTER R. EVENS, GALICE  
MINING DISTRICT, JASON GILL, JOEL  
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WILLAMETTE VALLEY MINERS, DON  
VAN ORMAN,

Plaintiffs,

v.

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

Defendants.

No. 1:15-CV-01975-CL

**DECLARATION OF DAVID  
MCCRACKEN IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

David McCracken declares:

1. I am a California resident and make this Declaration in support of plaintiffs' motion for summary judgment seeking a declaration that federal mining and

land management laws preempt Senate Bill 838's limitations on small-scale motorized mining in the State of Oregon.

2. I am an expert in the field of small-scale mining, and qualified to testify concerning the effects of a ban on the use of motorized equipment on mineral development in the beds and banks of Oregon waterways.

3. Since 1986 I have operated The New 49'ers, Inc., a California corporation that has controled a number of federally-registered mining claims in California and Oregon, and makes them available to members for mining purposes. In the summer months, I generally provide assistance to such members, focusing my efforts along the Klamath River and its tributaries in Northern California.

4. In winter months, I generally focus on managing team-prospecting projects outside of America. I have prospected for gold in South and Central America, Africa, Madagascar, Borneo, West Sumatra, Canada, Viet Nam & Cambodia and other locations in Asia, and am sought by entities operating throughout the world for my expertise in gold recovery techniques.

5. I have written a number of books on mining, including "Gold Mining in the 21st Century," "Gold Dredger's Handbook," and "Advanced Dredging Techniques—Part 1—Finding and Recovery Paystreaks," and "Advanced Dredging Techniques—Part 2—The Right Approach." I have also produced three instructional videos, entitled "Modern Gold Mining Techniques," "Successful Gold Dredging Made Easy," and "Advanced Dredging and Sampling Techniques."

6. I have also been involved for decades in the California regulatory processes concerning small-scale mining, participating extensively in proceedings under

the California Environmental Quality Act (CEQA) culminating in environmental impact reports in 1994 and 2012. I have also worked extensively with representatives of the U.S. Forest Service and their regulations for mineral development under 36 C.F.R. Part 228. All this experience has given me keen insight into the way state regulatory processes can impact mineral development.

7. A great deal of the State of Oregon has already been subject to significant mining activity that has extracted placer deposits of gold. Early miners tended to mine the banks of Oregon rivers and streams, but not underwater deposits. In particular, the technique of hydraulic mining (using a high pressure hose to wash soil deposits near rivers and streams into a sluice) removed much of the gold deposited adjacent to water bodies, but much gold was lost in the process, washed into the rivers and streams, and remains there for subsequent miners. In addition, lode deposits continue to erode and release gold into the rivers and streams, replenishing in-stream deposits.

8. For this reason, some of the most valuable remaining gold deposits are located in the beds of Oregon waterways. These deposits cannot, as a practical matter, be reached effectively through the use of hand tools, because the water current interferes with efforts to shovel away the overburden between the miner and the gold, which being heavier, usually sinks down to the bedrock. The invention of suction dredge technology in the 1950s permitted these deposits to be developed. However, the technology must be motorized, both to supply air to the miner working underwater, and to generate the suction needed to remove the streambed materials, run them through a sluice, and return them to the waterway, less the gold and other heavy materials.

9. Motorized processes are also used to pump water used to sluice streambed or bank materials in processes other than suction dredging, including motorized sluices, concentrators, trommels and other equipment. Senate Bill 838, in prohibiting all motorized equipment, would even bar the use of such equipment as vacuum cleaners and battery-powered dry spiral concentrators.

10. Barring fantastically-rich deposits of a sort no longer available since the Gold Rush, mining with a pick and shovel and hand pans can typically not recover enough gold to create a commercial incentive to develop mineral resources. Motorized equipment is essential in the modern business of small-scale mining. In general, a ban on the use of motorized processes in mining represents a material interference with mining, processing, and the other activities reasonably incident to mining in which miners engage. As a practical matter, Senate Bill 838 will operate as a prohibition against the mining of many federally-registered gold placer gold claims in Oregon

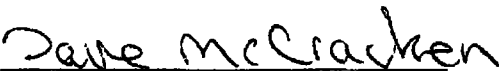
11. The ban on mining in the State of Oregon has the practical effect of substantially lessening the value of mining capital, both in the form of equipment and the mining claims themselves. In the wake of a 2009 statute in California which created a so-called moratorium on issuing permits for suction dredging (which continues to this day), the value of gold placer claims in and around California waterways declined significantly, and many small businesses dependent upon miners as customers suffered substantially.

12. A five-year moratorium on motorized mining also has a substantial and adverse effect on the mining industry generally, for there are many suppliers of the motorized small-scale equipment utilized by plaintiffs and others whose income if not

existence is threatened by the moratorium. These industries can survive with reasonable regulations governing the use of their equipment; they cannot withstand arbitrary multi-year bans on the use of their equipment.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on November 21, 2015.



David McCracken  
Declarant



James L. Buchal, OSB No. 921618  
MURPHY & BUCHAL LLP  
3425 SE Yamhill Street, Suite 100  
Portland, OR 97214  
Tel: 503-227-1011  
Fax: 503-573-1939  
E-mail: jbuchal@mblp.com  
*Attorneys for Plaintiffs*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
MEDFORD DIVISION

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

Plaintiffs,

v.

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

Defendants.

No. 1:15-CV-01975-CL

**DECLARATION OF WALTER  
EVENS IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

Walter Evens declares:

1. I am a plaintiff in this action residing in Douglas County and I make this

Declaration in support of plaintiffs' motion for summary judgment.

2. I am in the business of selling motorized mining equipment and other prospecting supplies. In the wake of the passage of Senate Bill 838, I have lost sales of such equipment. I know from customer feedback that the passage of Senate Bill 838 is responsible for this drop in sales. Unless this Court grants relief against Senate Bill 838, I expect it to have a serious and adverse effect on my livelihood.

3. I currently hold a WCPF-600 permit issued by the Oregon Department of Environmental Quality, which covers small scale precious metals mining operations that use non-chemical ore or placer processing methods and dispose of wastewater by evaporation or seepage. This is a general permit which expires January 31, 2017.

4. My mining activities have in recent years (since 2011) focused upon various federally-registered mining claims owned by associations of which I am a member, which have enabled me to supplement my income. I have several thousand dollars of motorized mining equipment (not including store inventory) which I have used for this purpose.

5. Prior to Senate Bill 838 coming into effect, I entered an agreement to purchase two forty-acre contiguous federally-registered mining claims on Taylor Creek in Josephine County from the Douglas County Prospectors Association (of which I am a member). I had plans to mine the instream deposits during the summer season with a suction dredge and then in the off-season, to prospect for bank deposits. I had planned not only to mine it myself, but also to make it available to customers of my business to bolster that business. Now I am informed that the ground has been designated as so-called essential indigenous anadromous salmon habitat, and that all motorized mining will be prohibited starting January 2, 2016.

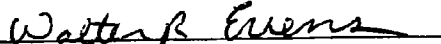


6. I have tendonitis in my shoulders and wrists as well as degenerative arthritis in my wrists. I cannot mine at all without motorized equipment, as I do not even have the capability to hand pan heavy pans of material. Quite apart from my health, one cannot effectively reach underwater deposits at all, which are the richest remaining deposits, without use of motorized equipment. Nor can one make effective use of the on-land deposits, if any, without motorized equipment.

7. My operations have not involved, and my plans did not involve, moving more than 5,000 cubic yards of material or disturbing more than one acre of land within 12 months.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on November 20, 2015.

  
Walter Evens  
Declarant



James L. Buchal, OSB No. 921618  
MURPHY & BUCHAL LLP  
3425 SE Yamhill Street, Suite 100  
Portland, OR 97214  
Tel: 503-227-1011  
Fax: 503-573-1939  
E-mail: jbuchal@mbllp.com  
*Attorneys for Plaintiffs*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
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JOSHUA CALEB BOHMKER, LARRY  
COON, WALTER R. EVENS, GALICE  
MINING DISTRICT, JASON GILL, JOEL  
GROTHE, J.O.G. MINING LLC,  
MICHAEL HUNTER, MICHAEL P.  
LOVETT, MILLENNIUM DIGGERS,  
WILLAMETTE VALLEY MINERS, DON  
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STATE OF OREGON, ELLEN  
ROSENBLUM, in her official capacity as  
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Department of State Lands,

Defendants.

No. 1:15-CV-01975-CL

**DECLARATION OF JOEL GROTHE  
IN SUPPORT OF PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT**

Joel Grothe declares:

1. I am a plaintiff in this action as an individual and also as the owner of J.O.G. Mining LLC, and make this Declaration in support of plaintiffs' motion for summary judgment.

2. J.O.G. Mining LLC is in the business of building motorized equipment for small-scale mining. In the wake of the passage of Senate Bill 838, I have lost sales of such equipment. I know from customer feedback that the passage of Senate Bill 838 is responsible for this drop in sales.

3. I have been mining in Oregon for eight or nine years, and have recovered significant amounts of gold to supplement my income. I have held various permits from the State of Oregon to conduct this activity. I own a suction dredge and gasoline-powered trammel which I use in Oregon mining.

4. I hold a WCPF-600 permit issued by the Oregon Department of Environmental Quality, which covers small scale precious metals mining operations that use non-chemical ore or placer processing methods and dispose of wastewater by evaporation or seepage. This is a general permit which expires January 31, 2017.

5. My activities have in recent years been focused upon my "Golden 35" claim along Middle Creek in Douglas County, which is a federally-registered claim ORMC167940, and "Chunks of Gold" claim along Bull Run Creek in Grant County, which is federally-registered claim ORMC165697. I own these claims, and have owned them for several years prior to Senate Bill 838.

6. To the best of my knowledge, after reasonably diligent exploration, the only gold in the Golden 35 claim is in the creek bottom. It is impossible to get at this gold without motorized mining equipment. I have been mining this claim using such equipment that I own, and it is my best gold producer. Senate Bill 838 will forbid me from recovering further gold from this claim.

7. The Chunks of Gold Claim does have gold outside the creek bottom, but it remains within the beds and banks of the creek, and particularly within 100 yard extension of prohibited area under Senate Bill 838. Again the use of motorized equipment is required to recover the gold. Senate Bill 838 will forbid me from recovering further gold from this claim, except perhaps trace amounts that I could recover through hand panning.

8. My operations do not involve moving more than 5,000 cubic yards of material or disturbing more than one acre of land within 12 months.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on November 19, 2015.

A handwritten signature in black ink, appearing to read "Joel Grothe", written over a horizontal line.

Joel Grothe  
Declarant

**Enrolled  
Senate Bill 838**

Sponsored by COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

CHAPTER .....

AN ACT

Relating to mining; creating new provisions; amending ORS 468B.052 and 517.123; appropriating money; limiting expenditures; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

**SECTION 1.** The Legislative Assembly finds that:

(1) Prospecting, small scale mining and recreational mining are part of the unique heritage of the State of Oregon.

(2) Prospecting, small scale mining and recreational mining provide economic benefits to the State of Oregon and local communities and support tourism, small businesses and recreational opportunities, all of which are economic drivers in Oregon's rural communities.

(3) Exploration of potential mine sites is necessary to discover the minerals that underlie the surface and inherently involves natural resource disturbance.

(4) Mining that uses motorized equipment in the beds and banks of the rivers of Oregon can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments of this state in habitat enhancement and areas of cultural significance to Indian tribes.

(5) Between 2007 and 2013, mining that uses motorized equipment in the beds and banks of the rivers of Oregon increased significantly, raising concerns about the cumulative environmental impacts.

(6) The regulatory system related to mining that uses motorized equipment in the beds and banks of the rivers of Oregon should be efficient and structured to best protect environmental values.

**SECTION 2.** (1) A moratorium is imposed until January 2, 2021, on mining that uses any form of motorized equipment for the purpose of extracting gold, silver or any other precious metal from placer deposits of the beds or banks of the waters of this state, as defined in ORS 196.800, or from other placer deposits, that results in the removal or disturbance of streamside vegetation in a manner that may impact water quality. The moratorium applies up to the line of ordinary high water, as defined in ORS 274.005, and 100 yards upland perpendicular to the line of ordinary high water that is located above the lowest extent of the spawning habitat in any river and tributary thereof in this state containing essential indigenous anadromous salmonid habitat, as defined in ORS 196.810, or naturally reproducing populations of bull trout, except in areas that do not support populations of anadromous salmonids or natural reproducing populations of bull trout due to a naturally occurring or lawfully placed physical barrier to fish passage.

(2) The moratorium does not apply to any mining for which the State Department of Geology and Mineral Industries issues an operating permit under ORS 517.702 to 517.989.

(3) In areas where the moratorium does not apply as described in subsection (1) of this section, the Department of State Lands shall limit the individual permits issued under ORS 196.810 and the general authorizations issued under ORS 196.850 to not more than 850 permits and authorizations for mining described in this section at any time during the moratorium period. The Department of State Lands shall give priority, to the greatest extent practicable, to persons who held permits or authorizations for the longest period of time before January 1, 2014.

(4) Any maps developed by the State Department of Fish and Wildlife, or any other state agency, that delineate the area of the moratorium established by subsection (1) of this section are not subject to the rulemaking requirements of ORS chapter 183.

(5) Violation of the moratorium established by subsection (1) of this section is a Class A misdemeanor.

**SECTION 3.** Section 2 of this 2013 Act becomes operative on January 2, 2016.

**SECTION 4.** Sections 2 and 3 of this 2013 Act are repealed on January 2, 2021.

**SECTION 5.** (1) On and after January 1, 2014, and before January 2, 2016, mining that uses any form of motorized equipment for the purpose of extracting gold, silver or any other precious metal from placer deposits of the beds or banks of the waters of this state, as defined in ORS 196.800, or from other placer deposits, that results in the removal or disturbance of streamside vegetation in a manner that may impact water quality, is subject to the following:

(a) The motorized dredge equipment must be operated at least 500 feet from other motorized dredge equipment, unless the Department of Environmental Quality determines that another distance is appropriate to protect water quality.

(b) The motorized equipment may not be left unattended within the wetted perimeter of any waters of this state.

(c) The motorized equipment may be operated only between the hours of 9 a.m. and 5 p.m.

(2) The provisions of subsection (1) of this section apply to mining that occurs up to the line of ordinary high water, as defined in ORS 274.005, and 100 yards upland perpendicular to the line of ordinary high water of the full length of any river and tributary thereof in this state, of which any portion contains essential indigenous anadromous salmonid habitat, as defined in ORS 196.810, or naturally reproducing populations of bull trout.

(3) The provisions of subsection (1) of this section do not apply to any mining for which the State Department of Geology and Mineral Industries issues an operating permit under ORS 517.702 to 517.989.

(4) During the period described in this section, the Department of State Lands shall limit the individual permits issued under ORS 196.810 and the general authorizations issued under ORS 196.850 to not more than 850 permits and authorizations for mining described in this section at any time during the period described in this section. The Department of State Lands shall give priority, to the greatest extent practicable, to persons who held permits or authorizations for the longest period of time before January 1, 2014.

(5) Violation of any provision of this section is a Class A violation.

**SECTION 6.** (1) Section 5 of this 2013 Act becomes operative on January 1, 2014.

(2) Section 5 of this 2013 Act applies without regard to whether the permits, licenses, authorizations or other forms of permission required by law for mining were issued before, on or after January 1, 2014.

**SECTION 7.** (1) Sections 5 and 6 of this 2013 Act are repealed on January 2, 2016.

(2) The repeal of sections 5 and 6 of this 2013 Act by subsection (1) of this section does not affect any fine imposed under section 5 of this 2013 Act.

**SECTION 8.** (1) The Governor's office, in consultation with the Department of Environmental Quality, the Department of State Lands, the State Parks and Recreation Department, the State Department of Fish and Wildlife, the State Department of Geology and Mineral Industries, the Oregon State Police and other relevant state agencies, the federal government, the federally recognized Indian tribes in Oregon and affected stakeholders shall study matters related to mining that uses any form of motorized equipment for the purpose of extracting gold, silver or any other precious metal from placer deposits of the beds or banks of the waters of this state, as defined in ORS 196.800, or from other placer deposits, and matters related to the removal or disturbance of streamside vegetation resulting from the mining activities, and shall propose a revised state regulatory framework that includes, but is not limited to:

(a) A consolidated regulatory process for mining described in this section, including a system that:

(A) Involves permits, licenses, authorizations or other forms of permission that must be displayed in plain view and be clearly visible on the motorized equipment in order to aid in the identification of persons carrying out mining activities; and

(B) Considers a single permit or a single point of contact approach to authorization.

(b) Effective compliance, monitoring and enforcement mechanisms related to mining described in this section.

(c) Adequate fee structures to cover administration, compliance, monitoring, enforcement, outreach and education related to any permit, license, authorization or other form of permission required by law from a state agency for mining described in this section or for discharges from mining described in this section, including ways to maximize the efficiency in the use of existing state resources.

(d) Conditions for, and restrictions on, mining described in this section, to the extent allowed by law and based on the best available science and precautionary principles, designed to:

(A) Protect and recover in-stream and riparian habitat that is important to achieve water quality standards and the conservation and recovery of indigenous anadromous salmonids, as defined in ORS 196.810, and naturally reproducing populations of bull trout; and

(B) Address social considerations, including concerns related to safety, noise, navigation, cultural resources and other uses of waterways.

(e) The establishment of a system of management zones, to the extent allowed by law, that:

(A) Limits, either by lottery or by other mechanism, the amount of mining activity that uses motorized equipment in the management zones at specific times and cumulatively over time periods;

(B) Requires the payment of a fee, as part of the fee structures described in paragraph (c) of this subsection, for mining described in this section in the management zones; and

(C) Establishes specific conditions and restrictions, as described in paragraph (d) of this subsection, for the respective management zones.

(f) Prohibitions on mining described in this section in specific areas of this state, to the extent allowed by law, including:

(A) Bodies of water currently listed as water quality impaired under the Federal Water Pollution Control Act for sediment, turbidity, toxics or heavy metals;

(B) Bodies of water within federally designated wilderness areas, national monuments and national botanical areas;

(C) Scenic waterways in this state designated under ORS 390.826 and bodies of water flowing through state parks; and

(D) Habitat that is essential to the recovery and conservation of salmon, steelhead, lamprey, freshwater mollusks or other unique habitat values, unless protection for this habitat may be otherwise achieved pursuant to paragraphs (d) and (e) of this subsection.



(2) The Governor's office shall submit a report with the results of the proposed regulatory framework, and shall include recommendations for any necessary legislation and funding, to the interim committees of the Legislative Assembly related to environment and natural resources or other appropriate legislative committee on or before November 1, 2014. The Governor's office may also include any recommendations for proposed rules related to the revised regulatory framework in the report.

**SECTION 9.** Section 8 of this 2013 Act is repealed on January 2, 2016.

**SECTION 10.** ORS 517.123 is amended to read:

517.123. The Legislative Assembly finds that prospecting, small scale mining and recreational mining:

(1) Are important parts of the heritage of the State of Oregon; and

(2) Provide economic benefits to the state and local communities.[: and]

(3) *Can be conducted in a manner that is not harmful and may be beneficial to fish habitat and fish propagation.*

**SECTION 11.** ORS 468B.052 is amended to read:

468B.052. (1) [Notwithstanding the authority of] **Unless** the Environmental Quality Commission, as provided in ORS 468.065 [to establish a schedule of], **establishes different** fees for permits issued under ORS 468B.050 [and in lieu of any fee established under the schedule of fees], a person who operates a suction dredge having a suction hose with an inside diameter of eight inches or less shall, upon application for or renewal of a permit issued under 468B.050, pay to the Department of Environmental Quality:

[(1)] (a) For an individual permit:

[(a)] (A) A one-time application fee of \$300; and

[(b)] (B) An annual renewal fee of \$25.

[(2)] (b) For a general permit, either:

[(a)] (A) A \$25 annual fee for each year the person registers under the general permit; or

[(b)] (B) A \$100 fee for a five-year registration under the general permit.

(2)(a) **In addition to the fees described in subsection (1) of this section, by rule the commission may establish an additional fee for a permit issued under ORS 468B.050 for a person to operate a suction dredge described in this section. The fee must be adequate to cover the costs of administration, compliance, monitoring and enforcement related to the permit.**

(b) **After a fee is established by the commission pursuant to this subsection, the fee is subject to the limitations on increases imposed by ORS 468B.051.**

**SECTION 12.** In addition to the fees described in ORS 468B.052, from October 1, 2013, to December 31, 2015, a surcharge of \$150 is imposed on any permits issued under ORS 468B.050 for a person who operates a suction dredge as described in ORS 468B.052. The surcharge must be used to fund data collection and reporting on suction dredge mining in Oregon by the Department of Environmental Quality. The data referred to in this section includes, but is not limited to, data on the locations and number of suction dredge operations, the types and sizes of suction dredges and the physical impacts from suction dredge mining. Amounts collected as surcharges under this section shall be deposited in the Suction Dredge Study Fund established under section 13 of this 2013 Act.

**SECTION 13.** The Suction Dredge Study Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the Suction Dredge Study Fund shall be credited to the fund. Moneys in the fund are continuously appropriated to the Department of Environmental Quality to carry out the duties of the department described in section 12 of this 2013 Act.

**SECTION 14.** Notwithstanding any other law limiting expenditures, the amount of \$141,837 is established for the biennium beginning July 1, 2013, as the maximum limit for payment of expenses, from moneys deposited in the Suction Dredge Study Fund, incurred by the Department of Environmental Quality in carrying out the duties of the department described in section 12 of this 2013 Act.

**SECTION 15.** This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.

**Passed by Senate July 3, 2013**

.....  
Robert Taylor, Secretary of Senate

.....  
Peter Courtney, President of Senate

**Passed by House July 7, 2013**

.....  
Tina Kotek, Speaker of House

**Received by Governor:**

.....M,....., 2013

**Approved:**

.....M,....., 2013

.....  
John Kitzhaber, Governor

**Filed in Office of Secretary of State:**

.....M,....., 2013

.....  
Kate Brown, Secretary of State

**CERTIFICATE OF SERVICE**

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On May 2, 2016, I served the following document:

DEFENDANT AND APPELLANT’S THIRD SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE

on the parties in said action as follows:

(X) (First Class US Mail) by placing a true copy thereof enclosed in a sealed envelope, addressed as shown below:

Matthew K. Carr  
Deputy District Attorney  
Plumas County District Attorney’s Office  
c/o California District Attorneys  
Association  
921 11<sup>th</sup> Street, Suite 300  
Sacramento, CA 95814

Marc N. Melnick  
Deputy District Attorney  
Office of the Attorney General  
1515 Clay Street, Suite 2000  
Oakland, CA 94612

Clerk of the Court  
Plumas County Superior Court  
520 Main Street, Room 104  
Quincy, CA 95971

Jonathan Evans  
Center for Biological Diversity  
351 California Street, Suite 600  
San Francisco, CA 94104

Clerk of the Court  
Court of Appeal of the State of California  
Third Appellate District  
914 Capitol Mall, 4<sup>th</sup> Floor  
Sacramento, CA 95814

James S. Burling  
Jonathan Wood  
Pacific Legal Foundation  
930 G Street  
Sacramento, CA 95814

Lynne Saxton  
Saxton & Associates  
912 Cole Street, Suite 140  
San Francisco, CA 94117

Sean B. Hecht  
UCLA School of Law  
405 Hilgard Avenue  
Los Angeles, CA 90095

Michael Lauffer  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Mark Nechodom  
Department of Conservation 801 K.  
St., MS 24-01  
Sacramento, CA 95814

Nathaniel H. Kane  
Environmental Law Foundation  
1736 Franklin St., 9<sup>th</sup> Fl.  
Oakland, CA 94612

John Mattox  
Department of Fish & Wildlife  
1416 Ninth St., 12<sup>th</sup> Fl.  
Sacramento, CA 95814

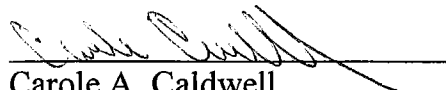
Aaron Avila  
Lane McFadden  
United States Department of Justice  
P.O. Box 7415, Ben Franklin Station  
Washington, DC 20044

Brook B. Bond  
L. Michael Bogert  
Parsons Behle & Latimer  
800 W. Main Street, Suite 1300  
Boise, ID 83702

Steven J. Lechner  
Jeffrey W. McCoy  
Mountain States Legal Foundation  
2596 South Lewis Way  
Lakewood, CO 80227

Eric Biber  
U.C. Berkeley School of Law  
689 Simon Hall  
Berkeley, CA 94720

John Leshy  
U.C. Hastings College of Law  
200 McAllister Street  
San Francisco, CA 94102

  
Carole A. Caldwell  
Declarant