From: Guy Michael
Sent: Monday, April 08, 2013 2:53 PM
To: Sen Dingfelder; Sen Olsen; Sen Bates; Sen Hansell; Sen Hass
Cc: Reiley Beth; Sen Ferrioli; Rep Bentz
Subject: Senate bills 401 and 838

Dear Legislators:

These comments will explain why I am opposed to SB 401 and SB 838. These Bills will hurt Oregon and the general welfare of a significant portion of citizens, who own property in the new designations for Scenic waterways (SB 401), and those who own property or mine on designated public lands. The moratorium for motorized placer mining will hurt the welfare of citizens in Oregon deeper than would be normally realized. I urge you to vote no on these two Bill.

Thank you for your time, and please add these comments to the record.

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Comments on SB 838

Dear Senators April 2, 2013

The writers of this Bill are basing their conclusions on unfounded reasons for requiring no motorized placer mining in Oregon. There are no scientific studies that show this extreme point of view. Also, the State does not have the authority to prohibit mining at all. The Supreme Court of the United States has only stated that reasonable environmental regulation that did not interfere with the federal scheme could be allowed.

First, the beds and banks of those non navigable streams that cross the public lands of the United States are not owned by the State of Oregon. (43 USC 1301 (f), which states: *The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States*…)

Secondly, those beds and banks are part of the public lands that are open to mineral entry have been granted to citizens of the United States; it states that those lands "shall be free and open" to explore, purchase and occupation of the land with the "valuable mineral deposit"; (30 USC 22). This statute is derived from the General Mining law of 1872, which reveals the intended purpose for lands that have not been withdrawn under Congressional enactments.

SB 838 then is "prohibitory, not regulatory, in its fundamental character" and constitutes a de facto ban on placer mining in Oregon. See *South Dakota Mining Ass'n. v. Lawrence county,* 155 F.3d 1005 (8th Cir. 1998); see also, *Ventura County v. Gulf Oil Corp.,* 601 F.2d 1080 (9th cir. 1979) ("The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress")

SB 838 claims that the State of Oregon has investments in "habitat enhancement" in Oregon's natural resources for fish and other wildlife that is supposedly at "significant risks" from motorized placer

mining. But does not consider its jurisdictional authority does not extend beyond reasonable environmental regulation to land use regulation.
The *Granite Rock* case drew a distinction that state land use plans could not operate at all on federal land, while permitting schemes would have to be evaluated for their reasonableness. A flat revocation based on the permitting scheme or enacting legislation for no placer mining that is motorized state wide as a prohibition is unreasonable and without authority. *California Costal Comm'n. v. Granite Rock Co.,* 480 U.S. 572, 592 (1980) ("where the state law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress," it is preempted; *Perez v. Campbell,* 402 U.S. 637 (1971) ("any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause" regardless of the underlying purpose of its enactors)

Therefore, SB 838 is already invalid from the start and is considered void. The U.S. Supreme Court noted that "one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable" (*id.* at 587), but declared that "[i]n the present posture of this litigation, the Coastal Commission's identification of possible set of permit conditions not pre-empted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement" (*id.* at 589). Through this language, it is obvious that the Court was referring to regulations, or a law as in the case of SB 838, which did not require a blanket prohibition on mining.

SB 838 also violates the "hereby granted" right to citizens engaged in mining: "the use the waters of lakes and running streams of the state of Oregon for the purpose of developing the mineral resources of the state…is declared to be a public and beneficial use and a public necessity, and the right to divert unappropriated waters of any such lakes or streams for such public and beneficial uses is hereby granted." (Section 1 of Act of 1899 and partly codified in ORS 541.110)

Section 2 of the Act grants:

> "All persons… having title or possessory rights to any mineral or other land, shall be entitled to the use and enjoyment of the water of any lake or running stream within the state for mining and other purposes in the development of the mineral resources of the state…and such waters may be made available to the full extent of capacity thereof without regard to deterioration in quality or diminution in quantity, so that such use of the same does not materially affect or impair the rights of prior appropriations."

Whether mining is in the stream or outside the stream, placer mining does not harm the environment. There are dozens of government studies that show suction dredge activity even helps the environment for the fish and the biota. Here are a couple of studies in particular note:

> Forty Mile River…Final Report (1999) paid for by EPA, which studied the use of an 8-inch and a 10-inch suction dredge: "One year after dredging at both sites showed recovery of Macroinvertibrate diversity appeared to be substantial…the study found that there was an increase in macroinvertibrate density in mined area…"
>
> "If there were a cumulative effect of dredging, an increasing number of taxa should have declined in abundance after June at downstream stations." Harvey (1986)

I am asking a no vote on any moratorium for motorized placer mining. Miners are willing to come to the table to discuss just what reasonable environmental regulation would be; whatever it is, it cannot include an across the board prohibition. That violates Oregon's supreme law and the United States supreme law for protecting the rights to property and grants long established.

Sincerely, Guy E. Michael

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Reference Document Against SB 401

By Guy Michael, January 29, 2013

Dear Legislators:

The State of Oregon does not have the authority to take private property for public use; Article I, Section 18 Oregon Constitution ("Private property shall not be taken for public use…without such compensation first assessed and tendered").

Section 18 also provides that "the use of all roads, ways and waterways necessary to promote the transportation of raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use."

SB 401 wrongfully restricts or takes private property in two ways. In most of those lands the minerals are owned by someone other than the State; whether patented lands and unpatented mining claims on federally managed lands not withdrawn from mineral entry, the owners have the statutory right to mine the minerals in those lands. They cannot be prohibited from the future use of mining, which is lawfully granted under the General Mining Law of 1872.

The second wrongful restriction is that new roads needed to transport raw products of "mine or farm or forest or water…drainage" is declared in the Oregon Constitution a public use specifically for the development and welfare of the state within waterways. SB 401 will eventually, systematically lock up or heavily restrict so severely private development of those resources that it will add to the economic disaster that Oregon already teeters on. This will dramatically hurt the welfare of the State.

This affect is currently happening in Oregon under the States scenic waterway statutes, and is currently part of litigation (*Oregon Mining Association. et al. v. OR DEQ*, Marion County Case No. 10C24263), which is supported by 14 mining organizations. SB 401 adds thousands of miles of waterway control and injurious legislation on top of litigation that will likely negate the intentions of this Bill. Why should the State of Oregon spend tax dollars on litigation?

Concerning the public lands under the Supremacy Clause, any state law that conflicts with a federal law is preempted. *Gibbons v. Ogden*, 22 U.S. 1 (1824). Any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause, regardless of the underlying purpose of its enactors, *Perez v. Campbell*, 402 U.S. 637, 651-52, 91 S.Ct. 1704 20 L. Ed.2d 233 (1971).

The Division of State Lands and Oregon statutes have been claiming all of the beds and banks of streams that are not navigable a removal or fill activity authority. In response to the numerous Federal Court decisions which affirmed the state's sovereignty over beds of navigable waters, the U.S. Congress enacted the Submerged Lands Act (1953) (43 USC 1301 *et seq.*) Section 1301 (a) - (f) defines the "lands beneath navigable waters", at (f) it states:

> (f) The term "lands beneath navigable waters" **does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States**…

Under certain conditions non-navigable bodies of water may be meandered, and of course, title to the beds of such lakes or rivers vests in the United States until sold; *US v. Oregon*, 295 US 1 (1935). Under Federal common law, the bed of a non-navigable lake belongs to the shore owners in a pie-shaped fashion to the center of the lake; *Bourgeois v. US*, 545 F. 2d 727, 730 (Ct. Cl. 1976).

The State of Oregon has "hereby granted" the right to, "the use the waters of lakes and running streams of the state of Oregon for the purpose of developing the mineral resources of the state…is declared to be a public and beneficial use and a public necessity, and the right to divert unappropriated waters of any such lakes or streams for such public and beneficial uses is hereby granted." (Section 1 of Act of 1899 and partly codified in ORS 541.110)
Section 2 of the Act grants:

> "All persons… having title or possessory rights to any mineral or other land, shall be entitled to the use and enjoyment of the water of any lake or running stream within the state for mining and other purposes in the development of the mineral resources of the state…and such waters may be made available to the full extent of capacity thereof without regard to deterioration in quality or diminution in quantity, so that such use of the same does not materially affect or impair the rights of prior appropriations."

Therefore, any new restriction for the "beneficial use" and "public necessity" violates the contract with citizens engaged in or future engagements of mining in those scenic waterways on lands not owned by the State.

There is no emergency, what we have here is essentially a special interest group of citizens and state agencies trying to impose a conservation belief for a scenic view shed easement on citizens who actually own the property and as a back door approach to end suction dredging. SB 401 violates the quiet control and enjoyment of the property by the real owners in the waterways. It also compounds the problems of current scenic waterways statute and adds injurious legislation on top of litigation already in the works. I oppose SB 401, please add to the record. Please vote no on SB 401, thank you.

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