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MEMORANDUM

DATE: March 19, 2013

TO: Gary Lynch
Assistant Director, Mineral Lands Regulation and Reclamation
Oregon Department of Geology and Mineral Industries

FROM: Larry Knudsen, Senior Assistant Attorney General
Natural Resources Section

SUBJECT: House Bill 2248

You have asked for my review of comments on HB 2248 submitted by Ron Gibson, representing an organization he calls the Jefferson Mining District (JMD) dated February 26, 2013.[1] Mr. Gibson's essential assertion is that the State of Oregon does not have authority to regulate reclamation or other environmental issues relating to mining (except on mineral lands actually owned by the State of Oregon). The crux of his argument is that all environmental regulation of mining is preempted by federal laws. Mr. Gibson relies on a number of federal laws including the 1859 Oregon admission acts[2] and the General Mining Law of 1872.[3] He also argues that DOGAMI does not have authority under state law to regulate mining. Each of these arguments is addressed below.

Federal Preemption

Under federal law, some federal lands (primarily in western states) are open to the discovery, location, and mining of minerals. Under some circumstances, claimants can eventually acquire fee title to such lands by patent. These rights to locate minerals and mine may also exist on lands where the federal government has transferred the surface estate to private individuals but retained mineral rights.[4] Mr. Gibson correctly notes that mining claims are also considered to be an interest in real property.

[1] This document has been prepared for public release.
[2] These can be found at: http://www.leg.state.or.us/ors_archives/1959/VOL%205/Title%20000%20-%20Oregon%20Admission%20Acts%20-%20Chapters%20000%20-%20000/OAA.pdf. While JMD cites to the admission acts, the association's arguments do not appear to be different from those based on the Constitution and mining laws.
[3] 30 USC §§ 22-54 and §§ 611-615.
[4] *See, e.g., Elliot v. Oregon Intern. Mining Co.*, 60 Or. App. 322 (1982).

From these general principles, Mr. Gibson jumps to the incorrect conclusion that state regulation of the environmental impacts of mining is a violation of the Property Clause[5], the Supremacy Clause[6] and the Commerce Clause[7] of the U.S. Constitution. This conclusion is incorrect. Oregon and all of the other western states regulate mining on federal lands to some degree, and, for the most part, state regulations are extensive.[8] These state regulations have sometimes been challenged, but the challenges have not been successful, at least with respect to issues relevant to HB 2248.

The primary precedent on these legal issues is the U.S. Supreme Court's decision in *California Coastal Commission v. Granite Rock Co*., 480 U.S. 572 (1987). There, the Court noted that the Property Clause of the U.S. Constitution does not facially preempt the application of state statutes or rules to federal lands. *Id*. at 580. The Court also reiterated the long standing principle that state regulations are not ordinarily preempted under the Supremacy Clause in the Constitution unless a federal statute expressly precludes state regulation or the federal regulatory system is intended to occupy the regulatory field and, thus leaves no room for state regulation. *Id.* at 581. The Court examined the federal laws governing mining, including the Mining Law of 1872, the Federal Land Policy and Management Act of 1972 (FLPMA),[9] and the National Forest Management Act (NFMA).[10] *Id.* at 582-584. The Supreme Court concluded that these federal statutes do not expressly preempt state environmental regulations. Finally, the Court concluded that none of these statutes, or the federal agency regulations adopted to implement them, facially preempts state environmental regulation of mining activities on federal lands.[11]

State Authority

As I understand Mr. Gibson's comments, he argues that HB 2248 is improper because the regulation of mining is not set out as one of DOGAMI's authorities in ORS chapter 516. This argument is flawed in a number of respects. First of and foremost, any grant of authority in ORS 516 would not limit the Legislative Assembly's authority to grant additional authority to DOGAMI. Moreover, ORS 516.090(1)(a) and (b), by referencing ORS chapter 517, expressly recognizes that DOGAMI responsibilities already extend to the regulation of mining. Under ORS chapter 517, the Legislature has already established a program that regulates surface mining and chemical process mining. ORS 517.750 to 517.992. The proposed amendments in HB 2488 make changes to existing regulatory programs; they do not create new programs.

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[5] United States Constitution, Art. IV, §3, cl. 2.
[6] United States Constitution, Art. I, §8, cl. 3.
[7] United States Constitution, Art. VI, §1, cl. 2
[8] Environmental permitting and reclamation regulations exist to some degree for hardrock mining operations in all of the western "public lands" states. Hardrock Mining on Federal Lands, National Research Council, 2000, at 45. A more detailed survey of state regulatory programs is available in the Congressional Research Service Report: Hardrock Mining: State Regulation, March 14, 2005.
[9] 43 USC §§ 1701 *et.seq.*
[10] 16 USC §§ 1600 to 1614.
[11] The Court acknowledged that FLPMA and NFMA have the potential to preempt state land use planning authority because Congress has delegated the to the federal agencies the authority to determine appropriate types of land uses, but the Court concluded that generally state environmental regulation can be effectively distinguished from land use regulations.

State Duty to Mining Districts

Mr. Gibson appears to argue that the state has some official or fiduciary responsibility to mining districts and, specifically, to the Jefferson Mining District. Mining districts are not creations of state law, and, to the best of my knowledge, they are not recognized by any state statute. I am aware of no provisions of law that create any duty on the part of the Legislative Assembly or state executive agencies to such mining districts.

By way of background, mining districts were associations authorized by an 1875 amendment to the Mining law of 1872. 30 USC § 28. These districts were authorized to establish requirements relating to the location, recording, and maintenance of claims in order to fill a then-existing regulatory gap created by the absence of federal or state law governing these issues. The federal statute is clear, however, that mining districts are not authorized to take any action that would conflict with the laws of the state where the mining was occurring. *Id.* At this point in time, both the State of Oregon[12] and the federal agencies[13] comprehensively regulate the location, recording and maintenance of claims.

Fees

Finally, Mr. Gibson asserts that the fees that DOGAMI imposes for operating permits under ORS chapter 517 are actually property taxes and thus not authorized by law. I was unable to find the 1990 Oregon case that Mr. Gibson cites in his comments. Based on the description of the case, however, it would stands only for the proposition that in some situations Congress has prohibited states from imposing taxes on certain types of operations and in those situations states cannot get around the prohibition by labeling a tax as a fee. In this instance, the fees established by ORS 517.973 are expressly designed to allow DOGAMI (and participating permitting and cooperating agencies) to recover only the actual expenses of issuing the consolidated permit, and these expenses must be "necessary, just, and reasonable." DOGAMI also must provide an applicant with a detailed cost accounting upon request. Thus, such charges are demonstrably fees and not taxes, so the referenced case would not implicate the state's authority to impose them.

Conclusion

For the reasons set out above, it is my view that the legal arguments made by Mr. Gibson on behalf of the Jefferson Mining District against the HB 2244 are not well-founded. Specifically, I am confident that the Legislature has authority to make the proposed amendments to ORS chapter 517.

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[12] ORS 517.010 to 517.330

[13] *See, e.g.,* 40 CFR group 3700 and group 3800.

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