

FOR THE RECORD ON SENATE BILL 3A ENGROSSED

To: House Committee on Energy & Environment

Dear Representatives & Committee Members;

Since before passage of SB 838 in 2013, I (for myself and for the Waldo Mining District) have written and submitted well over 100 pages of comments against SB 838, SB 3, and SB 3A - all of which have apparently been ignored. Apparently (with bills such as these), Oregon believes it can dictate "how" miners may mine on lands of the United States open to mining under the 1872 Mining Law... and has decided to prohibit the use of all in-stream motorized placer mining equipment in stream segments designated as Essential Salmon Habitat (ESH), including stream segments flowing through lands owned by the United States open to mining.

Quite frankly, this is absurd. In *GRANITE ROCK v CALIFORNIA COASTAL COMMISSION*, the U.S. Supreme Court in a 5-4 decision ruled that states could regulate mining to protect the environment on federal lands as long as the regulations were reasonable, necessary, and standards based. The court also said any such regulation could not be part of Land Use Planning.

Prohibiting motorized equipment is not a "standard", it's a Land Use. There is no measurable limit that can't be exceeded (such as so-many NTUs of turbidity)... there is no science. In prohibiting ALL motorized equipment, Oregon is saying that none of this equipment can safely be used in ESH (regardless of the size of the equipment or the size of the stream)... and yet Oregon allows all other non-motorized mining. Oregon is banning the use of "spoon-fed" battery powered mini-concentrators and yet will allow shovel-fed in-stream sluice boxes. Worse, Oregon prohibits use of motorized suction dredges, and yet SB 3A Engrossed allows non-motorized suction dredges which for all practical purposes create the exact same effects, or worse, as the motorized dredges.

Oregon "may" have the authority to regulate mining on federal lands open to mining in order to protect the environment from unreasonable and unnecessary harm. Both BLM and US Forest Service mining regulations require miners to adhere to state "air and water quality standards", but that's all. With in-stream placer mining, water quality is the concern. Miners are only allowed to get the water "so dirty". HOW they do it is none of Oregon's business as long as the miner does not exceed the limit.

ANALOGY: Every day people are killed on the nation's highways by speeders. Using the logic in SB 838 and SB 3A, all motorized vehicles should be prohibited - at least in certain areas.

SB 838 did a lot of things, including repealing part of the Legislative Findings in ORS 517.123 (3), which stated:
... that prospecting, small scale mining and recreational mining:

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

By repealing (3), the Legislature is saying that prospecting, small-scale mining and recreational mining can NEVER be conducted in a manner that is not harmful and might actually be beneficial to fish, etc.. *Do you know how crazy that is?*

I could go on-and-on but time is short. What Oregon is doing to mining is criminal. Not only is there no studies showing a significant harm, DEQ has admitted under oath that they NEVER considered that there could possibly be beneficial effects (even though many studies identify many beneficial effects - some even long-term, have been sent to DEQ). This raises the question:

Q: HOW DO YOU DETERMINE THE "NET" EFFECT IF YOU DON'T CONSIDER THE GOOD AND THE BAD?

Q: HOW MANY OF YOU LEGISLATORS HAVE EVEN SEEN A SUCTION DREDGE? HOW MANY OF YOU KNOW ANYTHING ABOUT MINING?

Q: HOW MANY OF YOU KNOW ANYTHING ABOUT THE U.S. MINING LAW OF 1872 (and the rights it grants)?

No proof of harm; and yet Oregon is planning to further rob miners of their CONGRESSIONALLY GRANTED STATUTORY RIGHTS.

For further comment, please find attached as Comments from the Waldo Mining District a copy of the District's April 2017 Newsletter commenting on SB 3A Engrossed.

I URGE THIS COMMITTEE TO AMEND SB 3A ENGROSSED BY REMOVING EVERYTHING - AND REPLACING IT WITH LANGUAGE TOTALLY REPEALING ALL EFFECTS OF SB 838 (which would return to us to pre-2013 statutes).

Respectfully submitted by;

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



WALDO MINING DISTRICT

...TO PRESERVE, PROTECT, & PROMOTE MINING

Post Office Box 1574
Cave Junction, Oregon 97523
On the web at: www.waldominingdistrict.org

**IF IT CAN'T BE GROWN
IT MUST BE MINED!**

FILE # WMDNEWS 04-17

← PRES.: TOM KITCHAR ← VICE PRES.: DON YOUNG ← TREASURER: MARK WAGNELL ← SECRETARY: SARAH BOHMKER ←

★ APRIL 2017 WMD NEWSLETTER ★

GENERAL MEETINGS

Until further notice, the Waldo Mining District and the Galice Mining District will be holding monthly *Joint General Meetings*.

WHEN: 1ST FRIDAY OF THE MONTH, 6-9PM

**WHERE: "REDWOOD" GRANGE HALL
1830 REDWOOD AVE., G. PASS**

**Meetings start at 6pm
with a Pot Luck Dinner.**

DIRECTIONS - From CJ: On 199 turn L onto Dowel Rd (Farmers Bldg. Ct.) to Redwood Ave.. Turn R onto Redwood Ave., go about 2-3 blocks, the Grange Hall is to the left (north) set back from road. Look for the single huge steel power pole.

From G. Pass: Going south exit 199 just past Fairgrounds onto Redwood Ave.. Grange hall is about 1/4 mile before Dowel Rd. on the right (north). Look for the single huge rusty steel power pole.

All meetings are open to the public

NEWSLETTERS & DUES

The last WMD News was sent out August, 2016. This is the first WMD News in 2017. Hopefully, we will publish at least 2-3 more this year.

DUES: Look at the Address Label on the envelope this News came in. To the right of your name is a date (Mo/Yr). This is the date your dues are due. (If it says "01/17" then your dues were due last January). You will receive a warning with the next News (probably this summer) if dues have not been paid.

PLEASE SUPPORT OUR EFFORTS

ENTER TO WIN

1/2 POUND OF GOLD

... and many other Great Prizes!

Fighting against the unlawful DEQ permit and SB 838 costs thousands of dollars, and is only possible with the financial support of our members and the mining community. A \$-raising Drawing to help pay the expenses **WILL BE HELD ON JUNE 2, 2017**, at the June 2 meeting of the Waldo & Galice MDs in G.Pass. (NEED NOT BE PRESENT TO WIN)

SEE PAGE 8 FOR MORE INFO ON HOW TO WIN

EOMA/WMD v DEQ



HEARING SCHEDULED



MAY 4, 2017

At 9am, Thursday, May 4, 2017, a Hearing will be held in the Oregon Court of Appeals, Oregon Supreme Court Building, 1163 State Street, Salem, OR 97301 regarding the EOMA/WMD v. DEQ suit against the unlawfully issued NPDES 700PM permits issued by DEQ for suction dredge mining.

After being declared moot twice, and since Dec. 2009, we have been fighting to get our case, on appeal, into a court high enough to overturn the bad decision by the Oregon Court of Appeals in 2009. And now, after 12 years of litigation, we finally get our chance.

On July 14, 2016, the Oregon Supreme Court ruled that the Miner's case against the now expired 2010 permit was moot, BUT, the underlying issues (i.e.; NPDES) were indeed "likely to evade review" and remanded the case back to the Oregon Court of Appeals.

Briefs were filed last fall, and last February the Court of Appeals scheduled an Oral Hearing beginning at 9am, Thurs. May 4, 2017.

THE ISSUES: DEQ issues the 700PM dredge permit under the authority of State law, and under Section 402 of the federal Clean Water Act (CWA) as a National Pollutant Discharge Elimination System (NPDES) permit (in agreement with and for the US-EPA).

NPDES permits are required for the discharge of pollutants, *as an addition*, into waters of the United States. ANYONE that knows anything about suction dredge mining knows that NOTHING IS ADDED (in fact, there is a small net loss). Under NPDES, we are subject to a host of overly restricted regulations, monitoring, and fines. Typically, NPDES permits are required for the discharge from municipal sewage treatment plants and other onshore facilities that discharge *into* waters. Also, as a provision of the NPDES program, new permits can never be less restrictive than previous permits. This means that whenever DEQ adds restrictions to the 700 permits, those restrictions can never go away - even if proved to be not needed, unscientific, or stupid!. (See Page 2 for more on the Permit & Litigation)

U.S. 9TH CIRCUIT -- SB 838 LITIGATION

In 2015, the Waldo & Galice Mining Districts in Josephine Co. retained attorney James Buchal to file suit in Federal Court against the State of Oregon and SB 838. Round 1 of BOHMKER et al. V. OREGON was lost in the District Court (Medford) in March of 2016. WMD/GMD filed an appeal in the U.S. 9th Circuit, and as of Nov. '16, all briefs, responses and replies have been filed.

At this point, we are waiting for the Court to schedule a hearing, hopefully by this coming summer. In the meantime, the Oregon Legislature has been busy with a new, possibly more restrictive bill: **SB 3** (Continued on Page 3)

EOMA/WMD v DEQ LITIGATION

(Continued from Page 1)

WHAT'S WRONG WITH THIS PICTURE: In 1986, the 700-J suction dredge mining permit was all of three (3) pages, covered all suction dredges up to 8" and 40hp, and free for dredges with hoses 4" and smaller. Besides being required to follow the In Water Work Period set by ODFW, about the only restriction in the permit was for turbidity, where DEQ stated on page 2:

3. Dredging activities shall be conducted in such a way that will minimize the increase in stream turbidity and keep it localized to the general area of the dredging activity. If complaints are received from downstream users or other beneficial uses of the streams are impaired, the dredging activities may have to be curtailed.

In comparison, the current permit 700-PM, issued in 2015, has grown to fifteen (15) pages, and costs at least \$25 per year regardless of dredge size (but only covers up to 6" dredges); and, the is loaded with pages of restrictions and fines. Some of the more onerous restrictions include the requirement of submitting GPS coordinates for every dredge site (on Application for permit); monitoring, keeping a daily log, and submitting end of the year report; no visible turbidity beyond 300 feet below the dredge and at no time can the turbidity extend bank-to-bank (good luck in a small narrow stream); woody debris may not be moved; boulders are defined as rocks 12" or more in diameter - and can only be moved by hand by one person with "no tools" (i.e.; no winch, com-along, or even crowbar), and if moved must be put back; DEQ Permit Numbers must be displayed on the dredge; all dredges/equipment that is moved from one stream to another must first be decontaminated & certified at one of the (few) state run Inspection Stations; among other things.

Over the years, every time DEQ reissued the permit (usually once every 5 years), they added more and more restrictions based solely on - well, NOTHING... other than complaints by the Green Nazi Orgs. To date, not one study has identified a significant detrimental effect other than dredging where there might be fish eggs in the gravels (but that has been mitigated for years with the ODFW In Water Work Period). It seems amazing that every time DEQ issues a new permit they claim that the new permit is "protective" of the environment... and magically, with no new science or evidence all of a sudden five years later it is no longer "protective" enough and more restrictions must be added.

Making all this even more despicable is the knowledge (based on sworn testimony given under oath during several days of taking Depositions from the DEQ permit writers) that to the best of their knowledge, DEQ never even considered the possibility that there are, could, or even might be beneficial effects. With a totally blind eye to any chance of beneficial effects, DEQ zoomed in on and focused solely on *any* possible detrimental effects, real, imagined, or even just theoretically possible. Regulations & Restrictions based on the mere "potential for harm" - even though no harm has been shown to exist after nearly 40 years of small-scale suction dredge mining and dozens of peer reviewed studies.

... All because the permit is issued, in part, as a NPDES permit under the unlawful authority of Sec. 402 of the CWA. NPDES permits are designed to eventually "Eliminate" (i.e.; the "E" in NPDES) the Discharge System - usually through technological improvements or finding a better cleaner way. NONE of this applies to suction dredge mining. There just plain flat-out is no better, cleaner, more efficient method to mine placer deposits found in the beds of active streams on a small scale. And more important, suction dredges do not "add" anything to the water.

After more than twelve years of fighting this issue, NOW is the time to win this once and for-all! The July, 2016 ruling by the Oregon Supreme Court (that our issues are "likely to evade review") and shall be heard means that we finally get the opportunity to argue in front of the very court that ruled that not only did we need the NPDES permit but we also needed the Army Corps permit "for the discharge of dredged material" -- even though the CWA itself states one or the other permit is needed - never both (for a single discharge). In 2009 the Oregon Court of Appeals got around this by splitting the discharge from a suction dredge into two (2) separate parts: A) The discharge of sand, gravel & rocks required the Army Corps permit; and B) The discharge of "turbid wastewater" required the U.S. EPA's NPDES permit.

Before our appeal to the Oregon Supreme Court was heard, the permit expired, was replaced, and we were declared moot (with no explanation). We had to start all over with a challenge against the permit issued in 2010... and once again, before we could reach a high appeals court, the permit expired and the Court of Appeals declared us moot a 2nd time. We successfully appealed that decision to the Oregon Supreme Court making impossible for us to be declared moot ever again.

We have a Hearing scheduled on May 4, 2017, with the Oregon Court of Appeals. One wonders why Oregon and the courts have done everything they can to keep us out of court... could it be they know they will lose if we ever get heard? We finally get the chance to find out. And, even if we get a bad decision by the Court of Appeals (who after-all would have to over-turn their own earlier decision) we have the right to appeal to the Oregon Supreme Court who just about would have to hear the case.

We, all of us, have invested thousands of dollars into this fight. It's just about over, but a few more thousand will be necessary to see this all important litigation through to the end. Put frankly, if we lose, kiss instream mining more than simple gold-panning goodbye.

PLEASE GIVE US THE AMMUNITION REQUIRED TO FINISH THIS BATTLE

AND TAKE A CHANCE AT WINNING 1/2 POUND OF GOLD (or one of nearly 2 dozen other prizes).

ENTER THE DRAWING to be held June 2, 2017.

(For more on the Drawing see Page 8)

2016-17 WINTER IN WALDO LAND

Except for a few isolated showers, the summer of 2016 was typically hot & dry, up until Oct. 1 when we got our first real rain. On Oct. 2 we got first snow above 4,000 ft. or so. This was followed by some kind of rain or showers almost every day until Nov. 1. According to the G. Pass Courier, Oct. was the 2nd wettest on record since 1898 - we got 12.59" of rain. Nov. thru Dec. was reasonably dry. On January 1, 2017 it started to rain and snow, and then just snow - with more than 1 ft. in Cave Junction on valley floor. Feb. thru March we had 43 days with some amount

of rain or drizzle. The first few days of April have given us 5 whole days in a row without anything more than a few drops and we even saw the sun!

YEAR TO DATE: 23.03" RAIN
AVERAGE TO DATE: 13.25" RAIN
AVERAGE ANNUAL: 32.01" RAIN

Many roads were (and some still are) closed due to a high number of fallen trees due to the ground being saturated and 1-3+ feet of wet snow. For a time there was

a real possibility of some major flooding... had the rain been a little warmer and heavy a little longer up high so it melted more of the snowpack faster - but that didn't quite happen and we never saw any abnormally high water.

Generally speaking, this was one of the wettest SW OR has seen in years. Those with claims high in the hills on primitive roads should expect more than the normal amount of road clearing & maintenance to get in. Bring a good chainsaw, and maybe a shovel, pick, chain, cable, etc..

SENATE BILL 838 LITIGATION

(Continued from Page 1)

As mentioned on Page 1, our appeal is being conducted in the U.S. 9th Circuit, all briefs have been filed by all parties, and we are just waiting to hear from the court regarding the scheduling of a Hearing. Our main argument is over preemption: Does the State have the authority to prohibit activities on lands of the United States being conducted pursuant to the Congressional Grant of 1872 (i.e.; the Mining Law)? We of course say NO! (Anyone interested in reading the actual briefs can do so by visiting the WMD website at: www.waldominatingdistrict.org).

We filed our Opening Brief in July, and after getting a 60 day extension, the State and the green Intervenors filed their Responses in mid-October. One week later three amicus curie briefs were filed in support of the State's position, and our Reply to all 5 Responses was filed in November.

Our case is in some ways very similar to the miner's litigation in California, with some of the same players. Being quite familiar with the California cases (Rinehart & the Consolidated Cases in San Bern.) and then reading the amicus briefs in our case I noticed that one of the main arguments made in support of the moratoriums in California and in Oregon was the claim that the Mining Law itself gives states authority to regulate mining on federal lands. For instance, according to the U.S. DOJ amicus brief on SB 838: "*The Mining Law of 1872 expressly requires compliance with all laws that do not conflict with federal law. 30 U.S.C. §§ 22, 26.*"; and "*The Mining Law of 1872 anticipates the possibility of state regulation of mining activity on federal lands. Section 2 of the Mining Law of 1872, which requires that federal lands be "free and open" to exploration and mining, also requires that all mining occur "under regulations prescribed by law."* 30 U.S.C. § 22." (emphasis added)

The Miners argue that the phrase "regulations prescribed by law" refers to regulations on how a non-citizen declares intent to become a citizen; or at the most refers to the mineral deposits being free and open to exploration and purchase, and the lands in which they are found to occupation and purchase. DOJ et.al believes that "...regulations prescribed by law" is a broader statement than that, and is more sensibly read to include state laws as well. See *O'Donnell v. Glenn, 19 P. 302, 306 (Mont. 1888)*" In other words, DOJ et.al believes the phrase gives states authority over the subject matter of § 22 – even though the word "state" is never used in § 22! Below is 30 USC § 22:

Lands open to purchase by citizens

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (30 USC §22) (emphasis added)

"**Except as otherwise provided...**" refers to lands that are no longer "public lands" (i.e.; public lands are lands of the United States open to appropriation – such as a location made under the Mining Law, or Homesteading Acts). Wilderness areas, Monuments, administrative sites, other special areas, state, county and private lands are not "public lands".

"**...all valuable mineral deposits in lands belonging to the United States...**" means exactly what it says, "ALL" deposits in the (public/unappropriated) lands of the United States (including those found underwater); and does not mention States (or state land) at all.

"**...shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase,...**" is the Congressional grant of all valuable mineral

deposits in lands belonging to the United States requiring that they be (i.e.; "shall be") "free and open" to exploration, occupation & purchase of those deposits (and lands).

"**...by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law,...**". This speaks to who may exercise the grant, i.e.; all "citizens", and those who have declared intent to gain citizenship, "under regulations prescribed by law". These regulations would deal with how one becomes a U.S. Citizen – which of course would be totally under federal control. With absolutely no mention or even hint of the role of states in § 22 the section closes with:

"...and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

30 USC (United States Code) is a federal law, and § 22 deals with the disposal of valuable mineral deposits in lands belonging to the United States to citizens of the United States (and others), under regulations prescribed by law, and according to customs and rules of the miners themselves. NOWHERE in § 22 are "states" mentioned or even hinted at.

EVEN IF the position of California, Oregon, a bunch of law professors and the U.S. DOJ is correct (and they are not), then the phrase "under regulations prescribed by law" would grant the states authority over everything (all or nothing) in § 22– i.e.; deciding what lands of the United States, and what deposits, might be available; and to whom and under what conditions... besides setting requirements to become a U.S. Citizen. Constitutionally, this is absurd. ONLY Congress has the authority to dispose of the lands of the United States... and ONLY Congress has the authority to close or withdraw lands of the United States to mining (authority is delegated to the Sec. Interior but Congress retains the ultimate authority). AND, ONLY THE UNITED STATES HAS THE AUTHORITY TO REGULATE HOW TO BECOME A U.S. CITIZEN!

I fail to see how 30 USC § 22 gives any authority what-so ever to anyone but the United States, and (in a limited form) the various mining districts. I find it troubling that something that appears to me to be so simple can be misunderstood by so many people much more educated than I; and scary if they are doing this with full knowledge that they are wrong but believe they can win, and should win, at any cost (i.e.; the ends justify the means). Or, I'm an Idiot.

The DOJ amicus brief also mentions 30 USC § 26 as giving states authority to regulate mining. To more fully understand how wrong they are, we need to look at 30 USC § 26:

Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations... (30 USC §26) (emphasis added)

At least here (in § 26) "state, territorial, and local regulations" are mentioned... but ONLY those regulations "governing their possessory title" (and as long as they are not in conflict with the laws of the United States). 30 USC § 26 speaks to the "Locators' rights of possession and enjoyment" and says nothing about the regulation of mining. In fact, it says that those (locators) that comply with all the laws and regulations that govern the possessory

title (i.e.; Made a Discovery, Posted the Notice, Staked the claim (marked boundaries if required), and Recorded the claim in the county and with BLM within the prescribed time -- and kept all paperwork and fees up to date as required by both federal and state laws) "shall have" ("shall" means mandatory, no exceptions) "...the exclusive right of possession and enjoyment of all the surface...". By granting "the exclusive right of possession and enjoyment" the Mining Law itself rules out regulation of the mining itself. The rights granted cannot be "exclusive" if they can be whittled away by regulations.

Then there's the Congressional Acts of 1955 which amended the Mining Law giving the federal land agencies the authority to "manage" the non-mineral surface resources found on mining claims, but only with the provision that such management may not materially endanger or interfere with mining or prospecting. It makes no sense that Congress would deny the federal land management agencies authority to endanger or interfere with mining and yet allow the states to do so.

Furthermore, "if" the DOJ (et.al) is correct (in that 30 USC § 22 gives states authority over mining), then 30 USC § 26 would be superfluous as such compliance would already be required. That § 22 fails to even mention "states", and that § 26 exists and requires compliance with (only the) regulations of the states that govern the possessory title, and that such compliance (with all laws and regulations governing the possessory title) grants "exclusive rights" (of possession AND ENJOYMENT) means that Congress had

absolutely no intent to allow states, or anyone else (with the possible exception of the various mining districts), to regulate the mining itself. In the 1870's I would hazard to guess that no one in their right mind, not even Congress, ever dreamed of telling miners how to mine (or with what equipment).

Most, if not all of the other arguments given to support SB 838 are just as much a stretch of the imagination. They claim SB 838 doesn't prohibit mining – people are still free to mine using non-motorized methods. The problem with this is, what if the deposits are ONLY accessible using motorized equipment? (Try shoveling your way to bedrock in 2 ft. of water and 4 ft. of OB to bedrock...)

They claim laws like SB 838 are reasonable environmental regulation, and yet such regulation (as allowed by the U.S. Supreme Court in Granite Rock v California Coastal Commission) is supposed to be reasonable, necessary, and standards based. Flat-out banning all motorized equipment is not "standard based" (setting limits on turbidity would be standard based – prohibiting the activity that creates the turbidity is land use planning, which was denied by the Granite Rock court).

Anyone interested in our many other arguments, and the state's responses can read the Briefs on the Waldo Mining District website at: www.waldominingdistrict.org; along with information on helping us stay in the fight to protect the rights of miners by entering a fund-raising drawing to be held June 2, 2017, where the Grand Prize is 1/2 Pound of Gold. (See Page 8 for more on the Drawing)

2017's OREGON SENATE BILL 3

As if SB 838 wasn't bad enough, and as promised last year; a new anti-mining bill, "Senate Bill 3" (SB 3) was introduced early in this legislative session – sponsored by the President of the Senate, Peter Courtney in the Senate Environmental and Natural Resources Committee.

SB 3 as introduced would have greatly expanded the areas closed to motorized mining to include not just the portions of streams designated as Essential Salmon Habitat (ESH) already closed under SB 838, but would add the whole stream and its tributaries if any portion was ESH. Depending on how this was interpreted, SB 3 would effectively close all streams in SW Oregon that eventually flow to the Rogue River (including tributaries of the Illinois R)... and including upper headwaters that have no fish.

On or about March 21 Sen. Courtney requested the proposed "dash 4" amendments to SB 3 (read as "SB 3-4"); which he followed on or about March 24 with the proposed "dash 8" amendments (SB 3-8), which was accepted and passes by the Senate Environmental & Natural Resources Committee in early April.

On Monday, April 10, the Senate passed SB 3-8, which now goes to the House as "SB 3A Engrossed" where it could be amended (and sent back to the Senate), passed, or killed.

SB 3A Engrossed revokes the temporary 5 year moratorium in SB 838 and replaces it with a permanent ban on all motorized placer mining equipment used between the ordinary highwater marks in all stream segments designated as ESH, or special habitat for lamprey, mollusks, and anything else they can think of. Motorized mining would still be allowed in Non-ESH segments, but all suction dredges must have a 4" suction hose – or smaller. SB 3A also allows the use of non-motorized gravity or syphon dredges within ESH segments (go figure).

SB 3A calls for possible permit fees as high as \$250/year along with an initial Application Fee of an additional \$250 – unless the Environmental Quality Commission sets reduced rates. Violations would be punishable by fines as high as \$2,000. As written, SB 3A removes the restrictions on upland mining (except for hours of operation if within 1,000 ft. of a residence or campground).

Although SB 3A is a far cry better than SB 838... it still focuses on (mostly) prohibiting motorized suction dredge mining in ESH segments which we believe is totally unacceptable on lands of the United States open to mining under the 1872 Mining Law.

BELOW IS AN EDITED COPY* OF SB 3A ENGROSSED

* Reformatted to make it easier to read. PDF copies of all bills and amendments are available online on the OLIS system.

79th OREGON LEGISLATIVE ASSEMBLY--
2017 Regular Session

A-Engrossed Senate Bill 3

Ordered by the Senate April 5
Including Senate Amendments dated April 5
Sponsored by Senator COURTNEY; Senator HASS (Pre-session filed.)

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

[Modifies area where moratorium on mining using motorized equipment applies.]

~~[Exempts certain mining operations from exclusion certificate requirements.]~~

~~[Operative January 2, 2019, excludes certain upland placer mining operations from moratorium and requires certain upland placer mining operators to hold operating permit. Requires motorized equipment used for certain upland placer mining operations to be operated only during certain hours. Punishes upland placer mining operation outside certain hours or without permit coverage by maximum of \$2,000 fine.]~~

~~[Establishes permitting requirements for motorized in stream placer mining. Requires Director of Department of State Lands and Director of Department of Environmental Quality to enter memorandum of understanding allowing Department of Environmental Quality to issue certain removal fill permits. Authorizes Department of Environmental Quality to issue consolidated water quality and removal fill permits for motorized in stream placer mining. Places certain restrictions on motorized in stream placer mining.]~~

Repeals moratorium on mining using motorized equipment.

Prohibits motorized in-stream placer mining in certain areas in order to protect indigenous anadromous salmonids and habitat essential to recovery and conservation of Pacific lamprey.

Requires applications for water quality permits to engage in motorized in-stream placer mining to include certain information. Places certain conditions on motorized in-stream placer mining pursuant to water quality permit.

Establishes certain fees for water quality permits for motorized in-stream placer mining.

Punishes motorized in-stream placer mining without permit coverage by maximum of \$2,000 fine.

~~[Requires motorized equipment used for motorized in stream placer mining to be inspected at aquatic invasive species check stations.]~~

~~[Provides that motorized in stream placer mining permitting, use restriction, inspection and penalty provisions become operative January 3, 2021.]~~

~~[Requires consultation to determine whether state and federal mining programs can be better coordinated.]~~

~~[Declares emergency, effective on passage.]~~

A BILL FOR AN ACT

Relating to mining; creating new provisions; and repealing ORS 468B.052 and sections 2, 3, 4, 12 and 13, chapter 783, Oregon Laws 2013.

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

REPEAL OF MORATORIUM ON MINING USING MOTORIZED EQUIPMENT

SECTION 1. Sections 2, 3 and 4, chapter 783, Oregon Laws 2013, are repealed.

PROHIBITION ON CERTAIN PLACER MINING OPERATIONS

SECTION 2. Sections 3 to 6 of this 2017 Act are added to and made a part of ORS chapter 468B.

SECTION 3. As used in sections 3 to 6 of this 2017 Act:

- (1) "Essential indigenous anadromous salmonid habitat" has the meaning given that term in ORS 196.810, as further defined and designated by rule by the Department of State Lands pursuant to ORS 196.810.
- (2) "Line of ordinary high water" has the meaning given that term in ORS 274.005.
- (3) "Motorized in-stream placer mining" means mining using any form of motorized equipment, including but not limited to the use of a motorized suction dredge, for the purpose of extracting gold, silver or any other precious metals from placer deposits of the beds or banks of the waters of the state.
- (4) "Operator" means any person that is engaged in motorized in-stream placer mining operations.

SECTION 4. (1) An operator may not allow a discharge to waters of the state from a motorized in-stream placer mining operation or activity without having an individual permit or being covered by a general permit issued under ORS 468B.050.

- (2) In order to protect indigenous anadromous salmonids and habitat essential to the recovery and conservation of Pacific lamprey, motorized in-stream placer mining may not be permitted to occur up to the line of ordinary high water in any river in this state containing essential indigenous anadromous salmonid habitat, from the lowest extent of essential indigenous anadromous salmonid habitat to the highest extent of essential indigenous anadromous salmonid habitat.

(3) The prohibition in subsection (2) of this section does not apply to the use of nonmotorized mining technology, including but not limited to gravity dredges and syphon dredges.

SECTION 5. (1) An application for a permit under ORS 468B.050 to engage in motorized in-stream placer mining must include:

- (a) The name and address of the operator;
- (b) Information on how the proposed motorized in-stream placer mining location will be accessed by the operator;
- (c) A written affirmation furnished by the operator stating that the operator has reviewed information that is available as part of an application process and that is related to cultural resource preservation and best management practices for motorized in-stream placer mining;
- (d) The geographic coordinates for the proposed motorized in-stream placer mining operation; and
- (e) Any other information required to be included in the application.

(2) In addition to any other condition imposed by the permit, motorized in-stream placer mining pursuant to a permit issued under ORS 468B.050 may not:

- (a) Involve the operation of motorized equipment between the hours of the earlier of 8 p.m. or sunset and 8 a.m. within 1,000 feet of a residence or a campground;
- (b) Involve the operation of a motorized suction dredge having a suction hose with an inside diameter exceeding four inches; or
- (c) To the extent feasible and as may be further specified in the permit, involve the operation of motorized equipment in a manner deleterious to freshwater mollusks, essential indigenous anadromous salmonid habitat or habitat essential to the recovery and conservation of Pacific lamprey.

[ED. NOTE: The text in Sec. 5(2)(a) is as written in the bill – whatever it means.]

(3) The condition under subsection (2)(a) of this section may be waived in a permit or permit coverage issued to the owner of a federal mining claim, but only to the extent that the permit or permit coverage applicant demonstrates that the exercise of the prohibition will violate federal law or constitute a regulatory taking requiring compensation under the United States Constitution or the Oregon Constitution. An applicant seeking a waiver must provide substantial evidence specific to the mining claim in question that establishes the potential violation or regulatory taking. The Department of Environmental Quality shall review and make a determination regarding the request for a waiver as part of the permit or permit coverage decision.

FEES

SECTION 6. A person shall pay the following fees to the Department of Environmental Quality for a general permit issued under ORS 468B.050 for motorized in-stream placer mining, unless the Environmental Quality Commission establishes a lower fee amount under ORS 468.065:

- (1) A fee of \$250 for the initial application for or renewal of permit coverage; and
- (2) An annual fee of \$250.

PENALTIES

SECTION 7. Section 8 of this 2017 Act is added to and made a part of ORS 468.922 to 468.956.

SECTION 8. (1) A person commits the offense of unlawful motorized in-stream placer mining if the person knowingly engages in motorized in-stream placer mining, as defined in section 3 of this 2017 Act, without a permit issued under ORS 468B.050 or in violation of any rule, permit, order or any applicable requirement adopted or issued under ORS 468B.050 or sections 3 to 6 of this 2017 Act.

- (2) Subject to ORS 153.022, unlawful motorized in-stream placer mining is a Class A violation.
- (3) Notwithstanding ORS 153.042, an enforcement officer, as defined in ORS 153.005, may issue a citation under subsection (1) of this section when the conduct alleged to constitute a violation has not taken place in the presence of the enforcement officer, if the enforcement officer has reasonable

grounds to believe that the conduct constitutes a violation on the basis of information received from an employee of the Department of Environmental Quality.

SUCTION DREDGE STUDY FUND AND FEES

SECTION 9. ORS 468B.052 and sections 12 and 13, chapter 783, Oregon Laws 2013, are repealed.

SECTION 10. Any moneys remaining in the Suction Dredge Study Fund established by section 13, chapter 783, Oregon Laws 2013, on the effective date of this 2017 Act that are unexpended, unobligated and not subject to any conditions shall be transferred by the State Treasurer to the credit of an account of the Department of Environmental Quality to be used in the same manner as fees collected for permits issued under ORS 468B.050.

CAPTIONS

SECTION 11. The unit captions used in this 2017 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2017 Act.

ANALYSIS OF SB 3A ENGROSSED

In order to help understand what SB 3A (or any other bill) does it helps to start at the beginning and take the bill apart one item at a time. SB 3A starts out with *A BILL FOR AN ACT -- Relating to mining; creating new provisions; and repealing ORS 468B.052 and sections 2, 3, 4, 12 and 13, chapter 783, Oregon Laws 2013.* (emphasis added)

ORS 468B.052 deals with DEQ permit fees (currently set at \$25/yr - they want to raise the fee up to \$250/yr.).

Chapter (ORS) 783 is SB 838. Sec. 2 is the moratorium; Secs. 3 & 4 deal with the operative dates of the moratorium; Sec. 12 called for the \$150 surcharge; and Sec. 13 the Dredge Study Fund. SB 3A would repeal all of those laws dealing with the 5 year moratorium.

Section 3 defines certain terms; Sec. 4(1) requires a DEQ permit for the discharge into waters from motorized placer mining, and Sec. 4(2) says motorized in-stream placer mining may not be permitted in any areas designated as ESH - i.e.; SB 3A gets rid of the 5 year moratorium and replaces it with a permanent prohibition on the use of motorized in-stream mining equipment that requires a DEQ permit in any areas designated as ESH. Sec. 4(3) allows the use of non-motorized gravity or siphon dredges in ESH.

Sec. 5 deals with permit conditions, including setting a size limit of 4" ID suction hose on all dredges (with no option to permit a larger dredge); and Sec. 6 calls for higher fees: \$250 for Initial Application plus \$250/year - unless the EQC sets a lower fee. Secs. 7 & 8 deal with penalties, and make (subject to ORS

153.022), unlawful motorized in-stream placer mining *a Class A violation*, which is punishable with a fine of up to \$2,000 (i.e.; an expensive traffic ticket).

Sec. 9 gets rid of the Dredge Study Fund, and Sec. 10 says any remaining Study Funds can be used by DEQ.

Of special interest is that SB 3A does not declare an "Emergency", so even if it passes and becomes law it does not go into effect immediately. SB 3A also removes any SB 838 based restrictions on motorized upland mining. For the most part, SB 3A is aimed at suction dredge mining, but by prohibiting "all" motorized equipment, the law includes even battery powered motors as used with a 12v bilge pump.

Even dumber is that the state claims motorized suction dredging in ESH is so dangerous that no motorized equipment of any kind can be used . . . and then allows non-motorized gravity or siphon dredges - which for the most part create exactly the same effects as a motorized dredge. [Unfortunately, gravity or siphon dredges can only be used in stream segments with considerable drop, and there's still the problem of air for the diver.]

As mentioned, SB 3A Engrossed is now in the House, where anything "could" happen. The House may pass it, amend it (in which case it goes back to the Senate for approval or further amendment), or possibly kill it leaving SB 838 and the 5 year moratorium in place. Only time will tell.

HOW SB 3A ENGROSSED MIGHT EFFECT OUR SUIT AGAINST SB 838

We expect that if SB 3A is signed into law that the State will file a motion in the U.S. 9th Circuit requesting that our case be declared moot on the grounds that SB 838 has been repealed. We hope that the court will see through this ruse and allow us to continue as the only thing that will have really changed is that *instead of a 5 year moratorium* on use of motorized in-stream mining equipment in ESH *a permanent prohibition has been put in place* – if anything, WORSE than the moratorium (“permanent” in that it would take new legislation or a court order to lift the prohibition).

Obviously, the last thing the state(s) (CA, OR & WA) want is a high court ruling that the states cannot regulate the actual mining by prohibiting (or refusing to permit) methods or equipment. At best,

the role of the state is to set and enforce Air & Water Quality Standards. In the case of in-stream mining, such a Standard would that you can get the water “this turbid” and no more. “How” turbidity is created (as long as it is within the (reasonable) limits), is none of the states’ business or authority in regards to mining under the 1872 Mining Law. If we are declared moot, or the State wins, then the state will get away with denying a Congressionally Granted Right (mining), and if they get away with that, then there will be nothing to stop the states from prohibiting virtually anything – for any reason – or no reason at all as they do not need “science” or “proof of harm”. So much for the concept of *Innocent Until Proven Guilty*.

WALDO'S 165TH BIRTHDAY!

OREGON'S FIRST MINING LAW

165 YEARS AGO THIS APRIL, in the spring of 1852 in Oregon Territory, area miners met and for lack of any other form of local government established the Waldo Mining District. Writing in 1895, E.J. Northcutt, one of the co-founders of the

mining town of Althouse in what later became Josephine County, Oregon and an early miner of Southern Oregon, recalled the day that the first mining code in Oregon Territory was laid down. He recalls: "I claim the honor of being one of Oregon's early pioneers, having landed in Portland, Oregon on the 17th day of September, 1851, having made the journey across the plains from Springfield, Illinois, with ox-teams that year. After a rest of four days at the Skidmore house, in company with three others, I started to the gold mines. We went in a boat up the Willamette river, through Umpqua valley to the gold mines of northern California. Met Aaron Rose and stayed with him over night at the first camp that he made where Roseburg now stands. Fell in with a pack train going to the mines, and landed on Josephine Creek the 10th of October, 1851. This was the only mining camp in Oregon Territory at that time, which included all of the country from the southern line of Oregon to the British line and east to the Rocky Mountains, where there are thousands of mining camps today.

I thought perhaps you would be glad to learn where the first written mining law was made in this vast empire. This was on Canyon creek, a tributary of Josephine, on the 1st day of April, 1852, in a camp of forty miners, the meeting being held under a large fir tree. As there has been many laws made since then, I send you a copy of the first mining law that was ever put on paper in this great empire. (To left)

**THE MINING LAW
OF THE MINERS OF
ALTHOUSE AND WALDO
DISTRICTS**

"Know all men by these Presents: That we, the miners of Waldo and Althouse in Oregon Territory, being in convention assembled for the purpose of making rules to regulate our rights as miners, do hereby on the first day of April, A.D. 1852, do ordain and adopt the following rules and regulations to govern this camp.

Resolved, 1st. That 50 cubic yards shall constitute a claim on the bed of the creek extending to high water on each side.

Resolved, 2nd. That forty feet shall constitute a bank or bar claim on the face extending back to the hill or mountain.

Resolved, 3rd. That all claims not worked when workable, after five days, be forfeited or jumpable.

Resolved, 4th. That all disputes arising from mining claims shall be settled by arbitration, and the decision shall be final."

Signed: E.J. Northcutt, Chairman
Attest: Philip Althouse, Clerk
April 1st, 1852



To Left: The town of Waldo as it appeared in the 1930's shortly before it was abandoned.

The name “Waldo” was in honor of Capt. William Waldo who the miners respected as he once led a relief party up into the Sierra Nevada Mts. rescuing a party of miners trapped in the snow. Capt. Waldo later ran for Governor of California, and the family was very active in the early history of Oregon. The Waldo Grade and Waldo Lakes are also named for the family.

"Truth, like gold, is to be obtained not by its growth, but by washing away from it all that is not gold." -- Leo Tolstoy

