Fact Sheet

June 9, 2013

Specific Suction Dredging Conclusions

1. The environment is not being harmed by the operation of small scale suction dredges;
2. The science clearly shows, for the scale of the activity, there is no lasting harm and suction dredging can create a net benefit for fish habitat;
3. Oregon Department of State Lands annual reports show no real harm to essential salmon habitat;
4. An Oregon State Parks stakeholder report showed no real harm by placer mining in Oregon Scenic Waters;
5. Stakeholders which own the property rights and grants on federal lands, that land use plans seek to control, require reasonable scientifically based environmental regulation;
6. According to the U.S. Supreme Court a National Pollution Discharge Elimination System (NPDES) permit is not the correct permit for in-water work. There should be a State permit based on reasonable environmental regulation;
7. A Blue Ribbon Committee's report dated August 10, 2004, recommended that DEQ: *"Eliminate the wastewater permit requirement for suction dredge operations.";*
8. The State has authority to issue a State permit instead of a USEPA NPDES Clean Water Act permit;
9. Clean Water Act regulation is too costly for the state as litigation will continue to rise surrounding this activity based on procedural failure issues from environmental organizations and from miners for not providing reasonable environmental regulation;
10. A State permit will eliminate frivolous third party lawsuits; and,
11. Small-scale and recreational gold mining contributes $20+ million dollars annually to the Oregon economy, creating jobs and putting food on the table;

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Issues Regarding Small Scale Placer Mining

Background:

The high price of gold and the increased interest in small scale mining on one side of the issue and the perceived environmental effects on the other has resulted in a growing controversy. This controversy has placed multiple state regulatory agencies in the middle between two diametrically opposed factions, with all parties locked in seemingly endless litigation. Miners argue that they have rights and are being unreasonably, unnecessarily, and wrongfully regulated, while others push for more and more restrictions.

Indeed, the situation has risen to the point that the state is considering an outright prohibition on this level of mining that has been on-going in Oregon since at least 1852 and is practiced today by thousands of Oregonians.

The purpose of this sheet is to present factual information pertaining to small scale placer mining, especially "in-stream mining", in support of a new simplified alternative to state water quality permit requirements in Oregon.

Proposed State Permit for Small Scale In-Steam Mining:

Before a new simplified state permit can be considered for small scale in-stream mining, all parties should be familiar with, several key elements;

A. Federal and state mining laws and the very real and unique rights granted to citizen miners in the United States.

Under the U.S. Mining Law all citizens have been granted a statutory right to freely enter the public domain to search for, claim, and extract valuable locatable mineral deposits. Only Congress has the authority to prohibit such exploration and mining on federal lands. Mining claims are considered "real property" under both federal and state laws, and cannot be taken without just compensation.

B. Court decisions upholding the rights of citizen miners.

The courts have uniformly ruled that states and other local governments cannot prohibit mining, either temporarily or permanently, on public lands open to mining (See page 4 on Relevant Court Cases, State Statutes, and the Role of the State.)

C. The state's role in regulating mining is limited.

In the controlling 1980 U.S. Supreme Court decision (California Coastal Comm'n. v. Granite Rock, see page 4), the high court ruled that states have the authority to reasonably regulate mining in order to mitigate specific environmental concerns through the use of regulations and permits but not through the use of land use plans. At the time, complete prohibitions on mining by states or other local governments were not considered. (Note: in all such cases that have gone to court, the prohibitions failed. The current moratorium on suction dredge mining by the State of California is currently being decided.)

D. Scientific studies have identified both detrimental and beneficial effects from this level of mining.

Dozens of studies on the environmental effects from small scale mining, and in particular "in-stream suction dredge placer mining", have been performed by various agencies since the 1980's, including the U.S. Environmental Protection

Agency, U.S. Army Corp of Engineers, U.S. Geological Survey, and other federal and state agencies and universities at the cost of millions of dollars. To date, other than a few short-term and highly localized detrimental effects that are already mitigated to the point of being "less than significant"; the only other effects studies identified were beneficial to fish, the aquatic habitat, and the economy.

E. Federal Clean Water Act NPDES permitting is wrong for in-stream mining discharges.

Currently, DEQ issues the 700 PM permit jointly under ORS 468B and Section 402 of the federal Clean Water Act (CWA) as a National Pollutant Discharge Elimination System (NPDES) permit required for all in-stream mining in Oregon. NPDES permits are required for "the ***addition*** of pollutants (**from on-shore facilities**) into the waters of the United States." Numerous court decisions have clearly shown that in-stream mining adds nothing to the waters, and thus there is no "addition of a pollutant"; making NPDES permitting unnecessary, improper, and wrong.

The improper requirement for NPDES permitting has placed unnecessary and highly restrictive regulations on mining, and has triggered numerous court cases against DEQ by both the mining community and environmentalist organizations.

Federal and State Mining Laws:

U.S. Constitution: The Congress of the United States has the exclusive power "*…to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;"* (Article IV).

U.S. Mining Law: In 1866, 1870, and 1872, Congress declared: "…***the mineral lands of the public domain***, both surveyed and unsurveyed, ***are hereby declared to be free and open to exploration and occupation by all citizens***…" (H.B. 365, 39TH CONGRESS, IN THE SENATE OF THE UNITED STATES, JULY 19, 1866, Sec. 1). (Emphasis added)

Congressionally granted rights are protected by numerous federal laws including the U.S. Constitution, the U.S. Mining Law of 1872, and the Mineral Policy Act (1970).

On federal lands open to mining, mining is considered the highest use of the land. Even the U.S. Forest Service, U.S. Bureau of Land Management, and their licensees and permittees (recreationalist and other users) are not allowed to "endanger or materially interfere" with mining.[i]

Un-patented mining claims are, "real property" (ORS 517.080) under state and federal law[ii]. Once the public land is appropriated by the location of a mining claim, the land is no longer "public land"[iii]. The owner of the claim has a possessory right to the land and minerals[iv], and the United States holds the title "in trust" for the owner until the claim is patented.

Small Scale Mining vs. Recreational Mining:

The mining methods used are often identical but there is a huge legal difference between these two types of mining that must be considered. *Small scale mining* occurs on lands of the

United States open to mining under the U.S. Mining Law as a congressionally granted possessory right; or on privately held lands. *Recreational mining* occurs on lands otherwise closed to mining under the U.S. Mining Law as a privileged activity. Under the U.S. Mining Law, there is no such thing as "recreational mining" (i.e.; simple gold panning is "mining").

Relevant Court Cases, State Statutes, and the Role of the State:

The state of Oregon cannot prohibit mining on federal lands.[v] The lands are "free and open to exploration, occupation, and purchase…" (30 USC 22).

The State cannot regulate mining through use of land use plans (see California Coastal 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…" Presently, the Department of State Lands (DSL) restricts mining in Essential Salmon Habitat (ESH) streams and the Department of Parks & Recreation flatly prohibits all placer mining in State Scenic Waterways (SSW). The ESH and SSW Acts are land use plans. The U.S. Supreme Court in Granite Rock 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.

The ESH designation restricts suction dredge use to dredges four inches or smaller even if they could meet water quality standards. Under the land use plan for State Scenic Waters "all placer mining is prohibited" within the stream and 1/4 mile to either side "with no exceptions".[vi]

> **ORS 541.110 provides,** "the use of water of lakes and running streams of Oregon for the purpose of developing the mineral resources is declared to be **a public and beneficial use and a public necessity**." And, (Emphasis added)
>
> **ORS 517.123 Legislative findings:** The Legislative Assembly finds that prospecting, small scale mining and recreational mining:
>
> **(1)** Are important parts of the heritage of the State of Oregon;
> **(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. [1999 c.354 §2]

Oregon Dept. of Parks and Recreation Stakeholder Report:

At the direction of the 72nd Legislative Assembly, Oregon Dept. of Parks and Recreation prepared a report on the effects of small scale placer mining within State Scenic Waters (SSW). Results of the study determined that no real harm was caused by placer mining in Oregon Scenic Waters *and recommended that the activity be allowed*. The Oregon Parks and Recreation Commission approved this concept on April 15, 2004, and submitted it to the Governor's Office for review and pre-session filing for the 73rd Legislative Assembly. The report was not released to the legislature.

Required DSL reports:

ORS 196.910 Requires Oregon Department of State Land (DSL) Action:

(1) **Monitor removal and fill activities, including but not limited to prospecting and placer mining**, within designated essential indigenous anadromous salmonid habitat areas **to determine the effects of such activities on salmonid spawning and rearing habitat and compile the results in an annual report**. (Emphasis added)

The most recent DSL report states: "…Observations suggest that placer mining activities conducted in the observed stream systems during the 1997 season **did not permanently modify physical habitat characteristics**" and "…data gathered during the 1996, 1997, and 1998 seasons lend credence to our assumption that **no more than minimal adverse effects are resulting from issuing the Placer Mining General Authorization**." (Emphasis added)

ENVIRONMENTAL IMPACTS

Relevant Science showing miniscule effects:

There have been a number of studies on the effects of small scale gold suction dredge mining that have concluded that these operations have impacts on the environment that are temporary, highly localized, and less-than-significant:

- **1994**, The **Alaska District of the U.S. Army Corps of Engineers** issued Special Public Notice 94-10, which concluded that, the effects from small suction dredges and hand operations were de minimus and did not require Army Corp permitting;
- **2004**, The **Alaska District of the Army Corps** issued Special Public Notice 2004-06, which restated that these placer mining activities still have "de minimus impacts" on the aquatic environment;
- **1994**, In an Environmental Impact Report, the **California Department of Fish and Game**, reached the conclusion that suction dredge mining had a less than significant impact on the environment;
- **2012,** The **California Department of Fish and Wildlife**, under a court order, completed another Environmental Impact Report on small-scale gold suction dredging, at a cost to the state of $1.2 to $1.5 million dollars. The overall conclusion was that the environmental impact from operation of these small scale dredges was less-than-significant for 56 of the 60 factors reviewed;[vii]
- **2001**, The **Siskiyou National Forest, Oregon** Draft Environmental Impact Report, Suction Dredging Activities are less-than-significant;
- **2004**, The **Clearwater National Forest, Idaho** completed the draft Environmental Impact Statement for Small-Scale Suction Dredging in Lolo Creek and Moose Creek Clearwater and Idaho Counties. The report stated that "EPA generally supports the terms and conditions for dredging and we believe they are designed to protect fish habitat and seem to minimize the potential to damage stream channels and banks.", which supports a less-than-significant outcome;
- **2012**, **Wallowa-Whitman National Forest, Oregon** FINAL Supplemental Environmental Impact Statement reached the conclusion that suction dredge mining had a less than significant impact on the environment; and,
- **2013, U.S. Environmental Protection Agency** Biological Evaluation Small Suction Dredge Placer Mining in Idaho reached the conclusion that suction dredge mining would have a less than significant impact on the environment.

Controversy over the effects of placer mining on the aquatic environment is not new. Indeed, the era of massive hydraulic mining (1880s – 1930's) triggered numerous studies that continue to this day.

One of the first studies done on the effects of placer mining in 1938 is important as this study looked at the effects of hydraulic mining on the fisheries of the Rogue River (OR):

> **Placer Mining on the Rogue River, Oregon, in its Relation to the Fish and Fishing in that Stream.** Ward, H.B., 1938.[viii] (NOTE: This study was done on the effects of hydraulic mining which were magnitudes higher than the effects from modern day small scale gold **suction dredge** placer mining. (*Hydraulic mining used water canon to blast away mountain sides*).
>
> The essence of Dr. Ward's findings is that the placing of muddy water from placer operations in the Rogue River drainage is not inimical to fish and fish life. The amount of colloidal fines in the Rogue River below placer mines is too small to adversely affect young fish eggs or fish food. Hydraulic **placer mining debris is just more stream sand and gravel. It is typically chemically inert and does not take oxygen from the stream or add toxic agents to the water.** (Emphasis added)
>
> The tank tests at Reed College showed that young fish live well up to thirty days in good water mixed with natural soil materials two to three times as large as the extreme load contributed to the Rogue River by maximum conditions of hydraulic placer mining. The thin intermittent layer of placer mining gritty sediment (less than 1/8 inch) seen along Rogue River would not interfere with oxygen supply to fish eggs.
>
> Stream environments are typically dynamic and variable due to floods, natural inputs of sediment from landslides, and other sources, especially dams. Salmon and steelhead runs were established in past climates much rougher at times than todays, even without mining. That is, in the Ice Age precipitation, landslides and sediment loads were often much greater than today.

There have also been a number of other more recent reports with the same conclusion, starting with:

- Results from the 1992 Chugach National Forest, Alaska Report of Water Quality Cumulative Effects of Placer Mining which stated that, "The results from water quality sampling **do not indicate any strong cumulative effects from multiple placer mining operations** within the sampled drainage" (Huber and Blanchet).
- In 1999 the U.S. Environmental Protection Agency reported the results of a cumulative field study evaluating the performance of 10, 8, and 4 inch gold dredges and concluded environmental impacts from these operations were **less than significant** (Royer et al., 1999).
- Bayley (OSU), 2003, (for Siskiyou N.F., Oregon) Response of fish to cumulative effects of suction dredge and hydraulic mining in the Illinois subbasin concluded, "The statistical analyses did not indicate that suction dredge mining has no effect on the three responses measured, but rather **any effect that may exist could not be detected at the commonly used Type I error rate of 0.05."**

All of these reports agree that the effect of small-scale gold suction dredging on the environment is **less-than-significant**, **minimal, or immeasurable**.

Net Environmental Benefits of Small-scale Suction Dredging:

These important studies of small-scale suction dredge operations show impacts on the environment have a **less-than-significant** footprint. Furthermore, they make note of beneficial factors that create an overall net benefit to some areas. These factors need to be taken into consideration when interpreting suction dredge activities and further incorporated into best management practices agreements.

Experts agree that fish survival improves under moderate turbid conditions (25 NTU):

- Results of the **Gregory 1993** report notes that any reduction in feeding efficiency of fish may be offset by reduced risk of predation at moderate levels of suspended sediment.
- **CH_2M HILL in 2000**, added to that result showing that elevated total suspended solids (TSS) conditions, similar to turbidity plumes created from dredging activity, have been reported to enhance cover conditions, reduce piscivorous fish/bird predation rates, and improve survival.
- **Stern 1988**, stated that, "Pools created by abandoned dredger sites can provide holding and resting areas for juvenile and adult salmonids".
- **Harvey 1991**, studied fish size and habitat depth relationships in headwater streams. During times of low flow in a river or stream, increased water depth can provide a refuge from predation by birds and mammals.
- **Nielsen 1994**, examined excavations from dredging operations finding they can result in temporarily formed pools or deepen existing pools, which may improve fish habitat. Deep scour may intersect subsurface flow creating pockets of cool water during summer, which can provide important habitat for fish
- **2001, Siskiyou National Forest**, found if excavated pools reduce pool temperatures, they could provide important coldwater habitats for salmonids living in streams with elevated temperatures.
- In **1999, the U.S. Environmental Protection Agency** reported the results of a cumulative field study evaluating the performance of 10, 8, and 4-inch gold dredges. The findings showed an increase in macroinvertibrate density and improved diversity in mined areas.
- In **2010, The American River Spawning Gravel Supplemental Environmental Assessment (EA)** points to the benefits of additions of spawning gravels even coming from an outside source. The addition of spawning gravels are to increase and improve Chinook salmon and steelhead spawning and rearing habitat.
- Again in the **2011, American River Spawning Gravel EA**; the supplemental Environmental Assessment Report supported the previous EA reporting benefits of supplementing spawning gravels

Tailings from small-scale suction dredge mining provide excellent spawning gravel. Suction dredging breaks up compacted steam beds; the gravels are dispersed by the high stream flows, making up suitable spawning gravels each year. If insufficient substrate is available Salmonids are left with the choice of spawning over and destroying previously built redds, or using cleaned dredge tailings.

<u>Additional benefits of small-scale suction dredge mining include:</u>
Measureable improvement in water quality due to removal of wastes left by other users of the waters or that have eroded into the waterways. 100's of pounds of lead fishing weights, bullets, water bottles, sunglasses, car debris, nails, broken glass, etc. are removed from our waterways and camping and recreational sites by miners every year.

There is also the very real economic benefit to local areas where such mining occurs and at a statewide and even national level to consider. On average, small-scale and recreational miners in Oregon spend an estimated $20+ million annually on equipment,

fuel, maintenance, lodging, etc. while mining, and easily recover another $6-10+ million worth of gold; all-the-while creating and supporting 100's of mining related jobs.

Small scale placer gold mining is also a very important part of the Cultural Heritage of much of Oregon. SW and NE Oregon especially have their roots buried deep in placer gold mining, and thousands of Oregonians have a miner somewhere in their family tree.

There is no evidence that small-scale suction dredge mining has caused any significant harm to the environment. There is ample scientific evidence that demonstrates "convincingly and consistently" that suction dredge mining causes only localized and temporary effects that can produce net beneficial outcomes for the aquatic ecosystem.

STATE PERMIT vs. NPDES PERMIT
FOR SUCTION DREDGE MINING

Since at least 2004, Oregon's mining community has argued that NPDES permitting is wrong for small-scale gold suction dredge mining discharges. Indeed, even DEQ's own Blue Ribbon Committee's "Report on Key Enhancements to the Oregon Wastewater Permitting Program", dated August 10, 2004, recommended that DEQ: *"Eliminate the wastewater permit requirement for suction dredge operations."* (Emphasis added)

Unfortunately, DEQ chose to ignore this recommendation, and continues, in spite of several costly lawsuits beginning in 2005, to issue the 700PM In-Stream Mining Permit in part under the NPDES permit program.

The NPDES permitting system is designed to "eliminate" discharge of a pollutant ***added to***, (33 USC 1362 (12) (A) navigable waters from any point source. However, as the following mentioned U. S. Supreme Court cases concluded; **the transfer of water** from one location in a body to another location **in the same body of water was not an addition of pollutants**.

According to recent Supreme Court decisions, pumping water from one part of a water body to another part of the same body it is not a "discharge of pollutants" under the Clean Water Act and **does not require an NPDES** permit. Since suction dredge mining only moves water from one part of a water body to another part of the same water body it also **does not require an NPDES** permit.[ix]

The State of Oregon has already lost a case to ownership of the beds of **non-navigable** streams and lakes against the United States in the public lands: (*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).

The preponderance of evidence demonstrating that recreational and small scale gold suction dredge mining is not harming the environment is large and growing. *Therefore, one must ask why governing agencies would seek to impose a permitting system that was designed for the elimination of toxic chemicals or wastewater being* ***added to*** *the waterway as a discharge of waste* ***from outside of*** *the river system on in-stream placer mining?*

In-stream placer mining does not "add" anything to the water that is not already in the water. In particular, such mining does not add "pollutants", therefore there is nothing to "eliminate", making NPDES permitting inappropriate.

The Clean Water Act specifically states that "…nothing in this chapter shall (1) preclude or deny the right of any state or political subdivision thereof… to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control, or abatement of pollution…(2) **be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters** (including boundary waters) of such states." (33 USC 1370)

In the CWA, Congress made provisions as its policy to protect the rights of the States as having the primary responsibility (33 USC 1251 (b)).

Based on the minimal effects suction dredging and sluicing have on the environment they should be regulated solely under a State permit.

The Legislative Assembly has provided in 468B.053 a mechanism for "Alternatives to obtaining water quality permit; rules." It requires that the Environmental Quality Commission by rule may: (1) Exempt de minimis discharges from permit requirements and (3) Establish performance-based criteria for exempt operations and discharges.

Permitting procedures and fees for water quality permits are listed in Oregon Administrative Rule (OAR) 340-045. Fees for a water quality permit to operate a suction dredge having a suction hose with an inside diameter of eight inches or less are given in Oregon Revised Statute (ORS) 468B.052.

PERMITTING COSTS:

Under the current DEQ permitting program and because of the NPDES designation, DEQ must look at and renew the permit at least once every five years. According to DEQ, this costs approximately $300,000 per five year cycle ($60,000/year), with 13% of that paid for by the U.S.EPA. To offset these costs, DEQ charges $25 per year for the 700PM permit. With approximately 2,000 permits issued annually, DEQ raises approximately $50,000 per year.

If the NPDES designation were removed, there would be no requirement to look at or reissue the permit every five years, quite possibly saving the state and the miners a considerable sum.

Another reason Oregon should eliminate NPDES permitting for in-stream placer mining is the growing litigation costs which are a drain on the State and therefore need to be looked at before continuing to implement the CWA permit for in-stream placer mining. A review of these costs will show that since 2005, the costs are averaging close to the costs to produce and issue the CWA permit. DEQ has stated that since 2004, there have been five challenges to the permit; two regarding the 2005 permit (from "NEDC" (an environmental group) and from a mining organization). The 2010 permit was challenged by NEDC and two mining organizations. The overall cost to the state for this litigation since 2004 is approximately $180,500[x] (and this does not include staff costs for working on the case from both the DOJ and from DEQ).

Continuing to permit under the CWA results in third party involvement, including the right to sue the administrator for procedural mistakes or other perceived harm. There are many scientific studies relevant to small-scale gold suction dredge mining that demonstrates that the activity lacks harm to the fish and their habitat. Consequently, a permit based on 468B.053 would be less restrictive, more protective, and more appropriate as an alternative to water quality permitting.

Mercury is a valuable locatable mineral:

And as such, citizen miners have a right to claim and recover mercury just like gold, silver, or other locatable mineral. However, unlike miners of old, today's recreational and small scale miners do not use mercury in their sluice boxes for recovery; but instead, the sluice boxes on suction dredges capture any mercury present in the stream bed removing it from the environment at no cost to the taxpayer.

An improvement in the understanding of mercury chemistry and the importance of considering selenium in relation to mercury exposures is changing how we deal with mercury in relation to environmental concerns. In areas where adequate selenium is available to protect fish, wildlife and human consumption from mercury toxicity it is unnecessary and uneconomical to spend funds on remediation efforts.

Actual risks to human consumers tend to be mitigated because we have multiple dietary sources of selenium however; in areas of poor selenium to mercury ratios small scale suction dredgers have been shown to be the most cost effective and efficient means of mercury removal from our waterways. According to a recent report from the California State Water Resources Control Board suction dredges will contain 98% of the mercury located and moved across a sluice box.

Mercury collection sites are available in the state through DEQ and many local household hazardous waste programs. They will accept mercury and mercury-containing devices from Oregon residents free of charge. If miners have collected incidental mercury from mining activities (e.g., suction dredging, off-stream sluicing), they could dispose of it through the free mercury collection program. Mercury is also accepted free of charge from small businesses in Oregon which are conditionally exempt from hazardous waste regulations.

DEQ provides information for local collection facilities and events by county or free home pickup.

> Call (503) 229-5106 or see:
> http://www.deq.state.or.us/lq/mercurycollection.htm
>
> or call toll-free in Oregon at 800-844-8467), or see the Internet page at,
> http://www.deq.state.or.us/wq/onsite/onsite.htm

ENDNOTES

[i] See 30 U.S.C. § 612(b), which grants mining the highest use of mining claims, and subordinates all other uses to those which do not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto . . ."

[ii] ORS 517.080 Mining claims as realty. All mining claims, whether quartz or placer, are real estate. The owner of the possessory right thereto has a legal estate therein within the meaning of ORS 105.005.

30 USC Sec. 26 and 35 - **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**... (Emphasis added)

[iii] Citing the Congressional Record of October 2000, pages 1885-1886, states: "2. The true nature of ''public lands.'' ''Public Lands'' are ''lands open to sale or other dispositions under general laws, lands to which no claim or rights of others have attached.'' "The United States Supreme Court has stated: **It is well settled that all land to which any claim or rights of others has attached does not fall within the designation of public lands**.'' (Emphasis added)

[iv] "By the terms of this section [30 USC 26, Section 35 and (ORS 517.040)] **the locator of a mining claim has a possessory title thereto** and **the right to the exclusive possession and enjoyment** thereof, and this exclusive possession and enjoyment **includes the right to work the claim, to extract the mineral** there from the right to the exclusive property in such mineral as well as the right to defend his possession." Belk v. Meagher (1878) 3 Mont. 65, 78. See Tibbitts v. Ah Tong (1882) 2 Pac. 759, 4 Mont. 536, 547 (Emphasis added)

[v] "...specific use of federal lands was authorized by federal government, and county **could not prohibit that use, either temporarily or permanently**..." Ventura County v. Gulf Oil Corp. C.A.Cal., 1979. (Emphasis added)

See also Crosby v. National Foreign Trade Council, 530 U.S. 363, 372-74 (2000) (preemption where federal law "provisions be refused their natural effect"; citation omitted); *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). (Emphasis added)

South Dakota Mining Ass'n v. Lawrence County, 155 F.3d 1005, 1006 (8th Cir. 1998). In that case, the Eighth Circuit reached the question on summary judgment because it was the nature of the ordinance was **"prohibitory, not regulatory, in its fundamental character"**. The Eight Circuit did not need to consider whether **the state regulation materially interfered with mining, because it was obvious that a ban on permits did so**. (Emphasis added)

In re Shoemaker, 110 I.B.L.A. 39 (July 13, 1989), the IBLA explained that **an agency regulation to protect surface resources cannot stand if it will "substantially hinder, impede, or clash with appellant's mining operations" or impair the miner's "first and full right to use the surface and surface resources".** (Emphasis added)

[vi] Currently, Oregon claims that the prohibition on all placer mining within a SSW is not a taking as non-motorized gold panning is allowed – but only because no permit is required. The fallacy here is that under the U.S. Mining Law, even gold panning is placer mining, and is thus prohibited by the SSW Act. In other words, the State is saying it is OK to violate the SSW Act as no permit is required!

[vii] Four categories were identified in the 2012 CDFG FEIR as having the possibilities to cause harm. All of these categories were based upon anecdotal information. The categories were:

> Effects of mercury and other trace metals re-suspension; effects on passerines associated with riparian habitat; possibilities of harm to archaeological and historical resources; and, noise levels. Scientifically measured harm has never been documented in any of these cases. All of these issues are quite localized in nature and could be handled at the local level.

[viii] Oregon Dept. of Geology and Mineral Industries Bulletin 10 (1938)

[ix] *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (*"Miccosukee"*). In *Miccosukee*, the U.S. Supreme Court ruled that even active pumping of water from one part of a water body to another part of the same body is not a "discharge of pollutants" under the Clean Water Act, and therefore **did not require an NPDES permit**. **"All sides agreed that movement of pollution within the same body of water does not fall under the Clean Water Act because there is no "addition"** of pollutants. As Justice O'Connor vividly analogized,

> **"[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not added soup or anything else to the pot."**" (Emphasis added)

Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc., No. 11-460 (Jan. 8, 2013) The U. S. Supreme court reversed the decision of the Ninth Circuit. The court stated, "…the transfer of polluted water between two parts of the same water body does not constitute a discharge of pollutants under the CWA. 541 U.S., at 109-112. We derived that determination from the CWA's text, which defines the term discharge of a pollutant to mean **'**any **addition** of any pollutant **to navigable waters** from any point source.' 33 U.S.C. §1362(12). Under a common understanding of the meaning of the word 'add. ' **No pollutants are 'added' to a water body when water is merely transferred between different portions of the water body.** (Emphasis added)

[x] Based on information provided by DEQ/DOJ.