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BY FIRST CLASS MAIL

David Bernhardt
Secretary of the Interior
U.S. Department of Interior
1849 C Street, NW
Washington, D.C. 20240

Sonny Perdue
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, D.C. 20530

Re: *Petition for Rulemaking to Stop State-Law-Based Prohibitions of Mining on Federal Lands*

Dear Secretary Bernhardt and Secretary Purdue:

This petition for rulemaking, pursuant to 5 U.S.C. § 553(e), is presented on behalf of the Waldo Mining District, Galice Mining District, American Exploration & Mining Association, Resources Coalition, Slate Creek Mining District, American Mining Rights Association, The New 49'ers Prospecting Association, Gold Prospectors of America Association, Lost Dutchman Mining Association, Public Lands for the People, Inc., Eastern Oregon Mining Association, and numerous other miners and mining interests expected to offer their support to it.

Two recent decisions of the California Supreme Court and the United States Court of Appeals, *People v. Rinehart*, 1 Cal.5th 652 (2016), *cert. denied*, 138 S. Ct. 635 (2018), and *Bohmker v. Oregon*, 903 F.3d 1029 (2018), *cert. denied*, 139 S. Ct. 1621 (2019), establish that states may unilaterally ban any particular type of mining on federal land in an entire state, or even all motorized mining in particular zones of federal land throughout a state, as "environmental regulation"—all without regard to whether the mining operation can comply with generally-applicable federal and state air and water quality standards. As far as we can tell, holdovers from the prior Administration effectively sabotaged Supreme Court review of these decisions, which are now law of the land, and severely threaten this Administration's goals with respect to mineral and energy development on federal lands.

Each of your agencies has operative regulations which constitute the law of the land that helped generate these decisions: The 43 C.F.R. Part 3809 regulations for Interior, and the 36 C.F.R. Part 228 regulations for Agriculture. *See Bohmker*, 909 F.3d at 1038 (discussing both sets of regulations); *see also California Coastal Commission v.*

Granite Rock Co., 480 U.S. 572 (1987) (discussing Forest Service regulations). We discuss them in detail below, but both sets of regulations were advanced in the last Administration by the United States Justice Department, in support of state prohibitions against the use of federal mining claims, with the Justice Department specifically arguing that your agencies require compliance with all state environmental laws, irrespective of their impact on federal land use objectives.

This is not what Congress intended. Congress expressly considered the role of state environmental laws on federal lands, and made it clear that the Secretary of Interior has the "ultimate decision" concerning uses of federal lands (H.R. Conf. Rep. No. 94-1724, p. 58 (1976)), and that the Secretary *may* require "compliance with [an] applicable State or Federal air or water quality standard or implementation plan" (43 U.S.C. § 1732(c)). The Forest Service's authority is more complex, but no less comprehensive.

It is fundamentally both Departments' duty to avoid "*unnecessary or undue* degradation of federal lands" (43 U.S.C. § 1732(b); emphasis added), while managing federal land "in a manner that recognizes the Nation's need for domestic sources of minerals" (*id.* § 1701(a)(12)). Congress recognized that minerals (or energy resources) must be recovered where they lie, and that some level of environmental impact is necessary. In particular, Congress has forbidden both Agriculture and Interior from issuing federal regulations which would "materially interfere with prospecting, mining or processing operations or uses" of land claimed under the federal mining laws. *United States v. Backlund*, 689 F.3d 986, 996 n.9 (9th Cir. 2012) (interpreting 30 U.S.C. § 612(b)).

Because Agriculture's regulations concerning state law restrictions are more complex, we discuss them first, and provide proposed corrections. We then review the Interior regulation, and propose a somewhat simpler correction.

Existing Forest Service Regulations and the Petitioned-For Change

As noted above, the U.S. Supreme Court reviewed the Forest Service regulations in *Granite Rock,* with a bare majority concluding:

> . . . the Forest Service regulations that Granite Rock alleges pre-empt any state permit requirement not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations will comply with state laws. The regulations explicitly require all operators within the national forests to comply with state air quality standards, 36 CFR § 228.8(a) (1986), state water quality standards, § 228.8(b), and state standards for the disposal and treatment of solid wastes, § 228.8(c). The regulations also provide that, pending final approval of the plan of operations, the Forest Service officer with authority to approve plans of operation "will approve such operations as may be necessary for timely compliance with the requirements of Federal and State

> laws. . . ." § 228.5(b) (emphasis added). Finally, the final subsection of § 228.8, "[r]equirements for environmental protection," provides: "(h) Certification or other approval issued by State agencies or other Federal agencies of compliance with laws and regulations relating to mining operations will [*584] be accepted as compliance with similar or parallel requirements of these regulations" (emphasis added).
>
> It is impossible to divine from these regulations, which expressly contemplate coincident compliance with state law as well as with federal law, an intention to pre-empt all state regulation of unpatented mining claims in national forests.

Granite Rock, 480 U.S. at 583.

The dissenting justices, who paid a little more attention to the details of federal law and the broader statutory structure, concluded:

> The regulations specifically require compliance with only three types of state regulation: air quality, see 36 CFR § 228.8(a) (1986); water quality, see § 228.8(b); and solid waste disposal, see § 228.8(c). But the Court fails to mention that the types of state regulation preserved by § 228.8 already are preserved by specific non-preemption clauses in other federal statutes. See 42 U. S. C. § 7418(a) (Clean Air Act requires federal agencies to comply with analogous state regulations); 33 U. S. C. § 1323(a) (similar provision of the Clean Water Act); 42 U. S. C. § 6961 (similar provision of the Solid Waste Disposal Act). The Forest Service's specific preservation of certain types of state regulation -- already preserved by federal law -- hardly suggests an implicit intent to allow the States to apply other types of regulation to activities on federal lands. Indeed the maxim *expressio unius est exclusio alterius* suggests the contrary.

Id. at 599-600.

We include this extended discussion to highlight the importance the federal courts will place on your Department's views as to the appropriate role of state and federal authority on federal lands. This approach to assessing conflict between federal and state law allows your Departments to exercise considerable influence on the degree to which parochial state interests will be permitted to frustrate federal policies with respect to the development of natural resources on federal land.

With this discussion in mind, we propose the following additions (underlined) to the regulations cited by the Supreme Court:

1. 36 C.F.R. § 228.5(b) ("Plan of operations – approval")

(b) Pending final approval of the plan of operations, the authorized officer will approve such operations as may be necessary for timely compliance with the requirements of Federal law and such State law as is given effect under these regulations, so long as such operations are conducted so as to minimize environmental impacts as prescribed by the authorized officer in accordance with the standards contained in § 228.8.

2. 36 C.F.R. 228.8(h)

(h) Certification or other approval issued by State agencies or other Federal agencies of compliance with the foregoing categories of laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations. Operators are not required to comply with any other state statutes or regulations purporting to control the use of Forest Service land where such regulation would materially and unreasonably interfere with prospecting, mining or processing operations, because state action of this nature interferes with the Congressional objectives confided to Forest Service administration under federal law and are therefore preempted.

These regulatory changes will bring Forest Service regulations into perfect congruence with Congressional intent for the management of federal lands. The regulation will also limit duplicative regulatory bodies.

Existing BLM Regulations and the Petitioned-For Change

The regulation principally relied upon in asserting state power over federal uses of land is a BLM regulation adopted at the close of the Clinton Administration, with the ostensible purposes of (a) "[p]revent[ing] unnecessary or undue degradation of public lands by operations authorized by the mining laws" and (b) "[p]rovid[ing] for maximum possible coordination with appropriate State agencies to avoid duplication". 43 C.F.R. § 3809.1. The problem regulation is:

§ 3809.3 What rules must I follow if State law conflicts with this subpart?

If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart.

In declaring that there is "no conflict" between state restrictions and federal law whenever "a higher standard of protection for public lands" was involved, the Clinton Administration destroyed the fundamental concept that degradation of public lands, with resulting surface impacts, may be necessary in support of federal objectives. It empowered nonfederal decisionmakers to elevate "protection" over all other objectives.

The simplest action would be to repeal the regulation, which is plainly not a reasonable construction of the statutes entrusted to Interior's administration. Because Interior's views are likely to be given deference in future disputes over the limits of state regulation, however, we suggest going further and affirmatively articulating and limiting the role of states in regulation of federal lands as outline above.

Specifically, we seek to replace § 3809.3 with:

> **§ 3809.3 Compliance with State Regulations**
> BLM will not require operations within the scope of this subpart[1] to comply with any state law or regulation which would materially and unreasonably interfere with prospecting, mining or processing operations, as such restrictions interfere with the Congressional objectives confided to agency regulation and are therefore preempted by federal law, with the exception of generally-applicable state air quality, water quality, and solid waste provisions given independent effect under federal law.

The petitioned-for change will restore Congressional objectives in federal land management, confining states to their proper consultative roles under federal law. At the least, Interior should act to preempt categorical mining bans on federal land, such as those involved in *Rinehart* and *Bohmker*.

Conclusion

We urge prompt and focused action to re-draw the legal landscape in the wake of ***Rinehart*** and *Bohmker*, and restore an appropriate role for state involvement in the development of mineral and other natural resources on federal lands, and stand ready to respond to any questions you may have.

Sincerely,

James L. Buchal

[1] *See* 43 C.F.R. § 3809.2.

Copy to President Donald Trump
Dan Jorjani, Principal Deputy Solicitor
Jim Cason, Associate Deputy Secretary
Joe Balash, Assistant Secretary
Joshua Campbell, Counselor to ASLM
Jim Hubbard, Under Secretary
Vicki Christiansen, Interim Chief