Before the EPA, an Administrative Agency with Territorial Jurisdiction

In the matter of:	**)**	
Dave Erlanson Sr.	**)**	
	)	**Docket No. CWA-10-2016-0109**
Respondent.		

Table of contents

Table of Authorities

Introduction

1. Article 3 of The Constitution of the United States

Statement of the Case

2. EPA filed its Complaint in this matter on June 20, 2016 (CWA-10-2017-0109, Docket No. 1).
3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a)
4. Pre-hearing Timeline; Counsel was secured by Respondent September 23, 2016; EPA began a Pre-hearing exchange April 7, 2017; Respondent filed their Pre-hearing exchange on May 8, 2017; Rebuttal of Pre-hearing exchange began by the EPA on June 5, 2017: EPA proposed a penalty of $6,600.00.
5. Subsequent Timeline; EPA filed motion for accelerated decision on June 5 2017, Court granted motion based upon ‘un-questioned material facts’/document was denied by the Judge at trial to place on the record as undisputed. Remaining question was one of penalty amount, court determines fraudulent document-respondent counsel withdrew from the case on December 18, 2018 citing health issues, no fact pattern exists that is undisputed, Respondent will simply assume the position that the material facts once relied on to determine the Respondents culpability now lie in ruin, then Respondent will argue his case without this restriction.

1. Regulatory and Territorial Background

6. Northwest Ordinance (NWO) __ 1787; process for converting Territories into States.
7. Reports on the law of civil government in Territories under occupation by the military forces of the United States.
8. Downes v. Bidwell SCOTUS doctrine.
9. The Organic Administration Act 1897.

10. Organic Acts for the Territories.

11. Administrative Procedures Act; Constitution: Article 1, Section 8, Clause 14, Article 1, Section 8, Clause 17, and Article 4, Section 3, Clause 2.

12. Downes v. Bidwell, Point 6.

13. Article 6 of The Constitution: see Marbury v. Madison

Argument and Cause of Action

14. CWA section 301(a), October 18, 1972. The authority of federal courts over navigable waterways / 1821, CWA did not exist.

15. 1825, *The Thomas Jefferson* case confined Admiralty Jurisdiction.

16. Waring v. Clarke; admiralty jurisdiction was once again extended the reach of an act of Congress in 1845.

17. Un-interrupted flow of water, (see Organic Act 1897) and SCOTUS Kansas v. Colorado, 1907, and Submerged Land Act 1953.

18. Cause of Action definition, 'causation' see Merriam Webster Dictionary.

19. *American Insurance v. Canter 1 Pet. 511, 545 (1828).*

20. SCOTUS i.e., 9th Circuit on writ of cert.

21. Legislative courts: *American Insurance v. Canter 1 Pet. 511,546 (1828), Romeu v Todd 206 US 358,368 (1907), United States v McMillan 165 US 504,510 (1897), McAllister v United States 141 US 174,180 (1891).*

22. Barron v Mayor of Baltimore, 32 US 243 (1833).

Argument

23. ***Fifth Amendment of The Constitution***
24. National Pollutant Discharge Elimination System permit, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).
25. NPDES permitting scheme, 402 permit.
26. Stream Channel Protection Act.
27. IDWR Recreational Dredge Mining Permit (does not require a national Pollution discharge elimination system (NPDES) permit.)
28. ***Rybachek US EPA 904 F2d 1276, 1285 9th Circuit 1990.***
29. **Discharge Pollutants** (see Clean Water Act, Section 502, General Definitions; (11) The term "effluent limitation" (restriction of pollutant), (12) 'discharge of a pollutant' and the term 'discharge of pollutants (A) any addition of any pollutant… (16) The term "discharge" (addition of pollutants), (14) The term "point source" .
30. Established limitation on the amount of pollutants that can be **put into** waters of the US'__TMDL's__Clean Water Act.
31. 303(d) impaired river due to natural causes, from historical mining, i.e., David Arthaud testimony (EPA).
32. I.C. Title 39-3611(3).
33. Legacy mining" (trial record page 424, lines 9-25).
34. Trial record, 'source point', (page 425 lines 1-5)
35. I.C. 39-3611(3) becomes controlling law.
36. CFR's 40 CFR 122.2 ; *Pollutant*
37. Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*)

EPA's Claim of Environmental Harm

38. CFR 122.2., term 'employed'.

39. *National Mining Association et al v. US Army Corp of Engineers (1998):* terminologies.

40. Letter addressed to Mr Erlanson from ACE in 2007.

41. Page 6 of the EPA's post trial brief; EPA.
42. Idaho/implemented/plan/mechanism, 'Total maximum daily load' (TMDL), as per 1992 CWA.

43. Clean Water Act permit, "only needed if these waters are going to be polluted or destroyed" (see EPA website/archive).

44. EPA post trial brief , i.e., TMDL .

45. Definition, discharge, permitting process i.e., 'sediment', 'suspended solids', 'dissolved solids', 'toxic suspended solids'; difference between/ can they be filtered out of the solute/ with a 40 micron filter, anything that passes through the filter is thought to be dissolved (see post-trial brief).

46. The EPA's position/at trial/no discussion i.e. particle size, (see trial transcript).

47. EPA Counsel Moore post trial brief, pg. 6, Section A.

48. Harvey, B.C., K. McCleneghan, JD Linn, CL Langley 1982 study/ sediment falls to background ambient levels after 197 feet [Thomas: 36 feet 1985] from the end of a dredge which is well within the 500' mixing zone in effect in 2015. US ACE 1994 Study, determination show no actual effect on environment by suction dredging. (Huber, C. D. Blanchet, 1992). 'Suction dredging showed no noticeable impact to water quality', conclusion of study.

49. EPA Study 2013, 'sediment settling' (see: 'Connectivity of Streams and Wetlands to Downstream Water').

The South Fork Clearwater River Status

50. IDEQ Integrated Report, 2016, Appendix K, page 389.
51. South Fork Clearwater River is listed on pages 396-397 (encompassing Respondent's mining claim), IDEQ Integrated Report, 2016, under Cat. 4-C, 'as a polluted stream'.
52. South Florida Water Management District v. Miccosukee Tribe of Indians, 2004. Los Angeles County Flood Control Dist v. Natural Resources Defense Council Inc., case original ruling 9th Circuit, over-turned by SCOTUS.
53. Category 4a section, of the report, page 23, South Fork Clearwater listed as 'impaired water body due to pollutants - Sedimentation, siltation, and water temperature/river segment is ID 17060305cl030_ 02 - Crooked River to Ten Mile Creek - 28.41 miles long, also encompassing Respondent's mining claim.

Non-disputed Facts at Trial

54. Mr. Erlanson's opening statement, pgs. 36-37, lines 1-21, 13-25/ (special note: Individual NPDES Permit – timeframe; associated costs: affirmed by Martich testimony in trial).
55. Clint Hughes testimony.
56. EPA counsel/Exhibit CX08.
57. To date/EPA has produced no proof of any pollutant, changed the terms from rock and sand to 'suspended solids' to 'sediment'/case on process pg.134, 20-, pg.135, 1-
58. EPA expert witness Tara Martich testified, pg. 160, 1-25, pg. 161, 1-25.
59. 2015 Idaho recreational Mining Authorization.
60. Mr. Erlanson showed compliance/applying for a 'general' permit / required by the IDWR permitting process/applied for general permit May 17, 2015 as

instructed/finding that no permit was available/the EPA allowed 15 dredgers/South Fork in 2013-2015/ all without an available NPDES permitting process.

61. Cindy Godsey testified that the EPA hadn't done an ESA study in order to issue the permit.
62. 33 USC 1319(a)(b)/ EPA procedure/citizen receiving EPA violation.
63. Martich testimony pg.170, 1-15/ section of the CWA 33 USC 1319(a)(b) only applied after the case had been well developed, and we see the exact text of 33 USC 1319(a)(b) states something entirely different.
64. Judge Coughlin's statements on pg. 175, 15-25/ imposition of settlement amounts/transcription of the oral arguments show inability on behalf of the EPA to defend position of 'willful violation"/variety of different topics/evaluating a fine based upon the testimony presented, a reasonable person would conclude/no fine can be assessed/case dismissed.
65. Martich testified TMDL's on the South Fork/evaluated under 3 different aspects; sediment, excessive temperature, and habitat alteration/stream is a polluted waterway under 'habitat alteration'/CWA has no authority to operate/EPA lacks authority to issue permits (2012 integrated report category 4c: Waters impaired by pollution not a pollutant). Pg.188, 9-16.
66. Submitted paper by Mark Pollot/utilized by the court as an incriminating document/testimony discovered document was unsigned by Mr. Erlanson/Mr. Erlanson knew nothing about document drafted/ therefore took no part in it/document was summarily ordered to be left out of evidences submitted for the record/pg. 185, 1-25.

Conclusion

Respondent was given an exemption from the State of Idaho for his recreational activities.

Introduction

This case revolves around (in this citizen's opinion) a fatal flaw in the United States justice system that has permeated the entire system. It is my opinion (on behalf of The People/Citizens) that this flaw must be examined in it's entirety by the AG of the United States. It is in the best interest of the entire country that this citizen detail what he knows

(or thinks he knows) about this flaw at least to the extent that more brilliant minds can begin a forensic analysis with the intent to move the Congress into acting on this matter before the Constitutional System is destroyed by it, or the SCOTUS, using it's Article 3 Powers (1) to close the legal loopholes that allow it.

Statement of the case

The EPA filed it's Complaint in this matter on June 20, 2016 (CWA-10-2017-0109, Docket No. 1). (2) In it's Complaint, the EPA alleged that Respondent violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a) (3) and claims that respondent 'discharged a pollutant into' 'discharging suspended solids into' and 'discharged sediment into' each of these terms being used by the EPA in this case.

Counsel was secured by Respondent and appeared in this matter September 23, 2016. The EPA began a Pre-hearing exchange on April 7, 2017 and counsel for Respondent filed their Pre-hearing exchange on May 8, 2017. Rebuttal of Pre-hearing exchange began by the EPA on June 5, 2017 in which the EPA proposed a penalty of $6,600.00 using incoherent and confusing explanations as to how a penalty could be offered without first finding a determination of guilt. (Pre-hearing Timeline). (4)

The EPA then filed a motion for accelerated decision on June 5 2017. This court granted that motion based upon what it considered 'un- questioned material facts' seemingly contained in a document that was denied by the Judge at trial to place on the record as undisputed. The EPA may not engage in terms like 'nefarious' to describe its actions but Respondent is a private citizen and has no such barrier in citing his opinion, and indeed has now done so.

The court then found that the only remaining question was one of penalty amount. Since the underlying material fact has been discovered as sourced from a 'fraudulent document' there are officially NO material facts left in this matter unless this court is going to proceed to base its material fact pattern upon the document in question, we shall soon find out. Counsel for the Respondent drafted the document in question 'without' the knowledge of Respondent and without consent, moreover a signature appeared on the document that was obviously NOT the Respondents. The trial judge did not allow the document to be put on the record as an 'agreed upon material fact' in the case, denying the EPA's adamant request to do so.

Counsel for the Respondent subsequently withdrew from the case on December 18, 2018 citing health issues. As the Judge noted at trial, these above stated facts are 'very

serious' and indeed the activity surrounding this matter requires our full attention as the OPTICS of the situation are potentially quite damaging and already in an environment when the DOJ has lost an incredible amount of credibility in the eyes of the American Public, it appears the EPA may need to be looked at as well.

Since no fact pattern now exists that is undisputed, or rather that the Respondent will simply assume the position that the material facts once relied on to determine the Respondents culpability now lie in ruin, then Respondent will argue his case without this restriction. (5)

Regulatory and Territorial background

How did we get here? The US government has 2 jurisdictions, Territorial and Constitutional. The US Constitution sets the authorized duties of the branches of government and limits their scope to enumerated clauses. The Constitutional jurisdiction applies to those enumerated subjects upon which the US legislature is authorized to act. In this matter the Territorial jurisdiction of the government is the overriding jurisdiction. Here's how we understand it worked;

1. The Confederate Congress passed the Northwest Ordinance (NWO) in 1787 to dispose of the lands it acquired from England. Thomas Jefferson wrote the first piece of legislation which was denied, the second drafting subsequently passed and became law. The NWO created a process for converting Territories into States (since the Constitution was moot on the subject BECAUSE the NWO had been adopted before the Constitution was drafted to deal with that subject matter). The NWO was then subsequently used for all the Territories in the contiguous US. (6)
2. The created Territories were governed by the NWO and Congress in debating the matter over the Louisiana Purchase decided the Constitution did NOT follow the flag (reports on the law of civil government in Territories under occupation by the military forces of the United States). (7)
3. Once the requirements of the NWO were met for statehood of a Territory, the Territory could apply to Congress for statehood. Congress would create enabling legislation and if it passed

Congress then an admission act was drafted and passed thus including into the union the new state.

4. The new state would then be granted land for the establishment of its political subdivisions but under the restrictions laid out in the admission act. Whatever land was not granted to the state in the admission act remained Territorial, and still remains Territorial governed only by acts of Congress (see Downes v Bidwell SCOTUS doctrine). (8)
5. Private rights were moved into the Territories (and then subsequently due process of same) through subsequent acts of Congress now allowing Constitutional protections for US citizens who lived or worked in the Territorial possessions of the United States. (The Organic Administration Act 1897). (9)
6. In the United States Organic Acts are Territorial acts (see Organic Acts for the Territories). (10)
7. In 1946 Congress passed the Administrative Procedures Act giving Administrative agencies a process for implementing its rule making and regulatory duties under the Constitution Article 1 section 8 clause 14, Article 1 section 8 clause 17, and Article 4 section 3 clause 2. Since Congress owns the Territories it was natural to move this act into the same. (11)
8. Naturally a problem arose after Congress began implementing the APA in the Territories, it clashed with Congresses movement of private rights into these areas and under the doctrine of Downes v Bidwell point 6 we see: *6. That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.* (12)
9. Private rights and due process are being ignored because the Administrative process is the process being used which constitutes a systematic deprivation of rights in these areas. While most of the rights held by citizens in these areas are legislative rights and do not rise to the character of those enumerated in the Constitution, the citizen still was extended due process as a function of private rights being extended and THAT process is completely ignored by the administrative/Territorial system. Every US citizen operating in the Territories has due process of rights even if they cannot assert a private right violation. Congress should have thought it through before extending these protections into these areas if they wanted to deal with citizens in these areas in an alternate manner but the intention of Congress was to extend those protections even though the rules of the Territorial system were extra-Constitutional. Thus making private rights and due

process SUPERIOR to the rules and regulatory system (Article 6: see Marbury v Madison). (13)

This 9 point breakdown reveals the Regulatory/Constitutional anomaly in these areas, and this citizen believes this anomaly will be found in almost every high profile case arising out of the Territories since their acquisition, so if we are attempting to assert a 'cases and controversies' standing certainly we have just done so.

Argument and Cause of Action

The Regulation being used against the Respondent is the CWA section 301(a). The authority of federal courts over navigable waterways began as early as 1821 out of a Kentucky federal court (14), but in 1825 *The Thomas Jefferson* case confined Admiralty Jurisdiction (15) back to the high seas and only included rivers where the ebb and flow of tide was evident. 22 years later in Waring v Clarke admiralty jurisdiction was once again extended the reach of an act of Congress in 1845 (16) giving admiralty jurisdiction over the great lakes AND connecting waters, which had the effect of extending admiralty jurisdiction over ALL navigable waters in the US.

The power of Congress over navigable waters is its commerce power, but the power conferred on the EPA is NOT out of Congress's commercial power as no power exists to justify their existence, which is why they were created by executive order. The EPA seems to be operating as if the grant of power is a general grant under Congress's power over the Territories. The South Fork of the Clearwater River, at the area where the Respondent holds his mining claim, is NOT approachable by water navigation UNLESS a major undertaking clears the boulders out of the river for miles, thus allowing commercial activity to be conducted on the river. However, the state owns the ground/riverbed, and thus the boulders in the river, and the Federal government's power is only limited to the un- interrupted flow of water, (see Organic Act 1897) and SCOTUS Kansas v. Colorado, 1907, and Submerged Land Act 1953. The Federal Government's power over the water, are restricted to jurisdiction concerning the un-interrupted flow. (17)

In order for there to be a cause of action that 'triggers' any law, whether federal or state, the intent of the statute has to be broken. In order to ascertain whether a law has been broken we must determine through the meaning of the language of the law, if it applies to the matter at hand, an accusation is not enough in the American system, even

administratively, since innocence is assumed and guilt must be proven. If the Territorial system functions on guilt first and then innocence needing to be proven, then it is a simple matter for the court of pointing to where and when this change took place, and what act of Congress altered the original system? 'causation' see Merriam Webster Dictionary. (18)

This tribunal had found the Respondent guilty without a trial, wherein the Constitutional system (Legislative courts function outside of Constitutional law *American Insurance v Canter 1 Pet. 511, 545 (1828)* (19) a pre-trial gives the the citizen the opportunity to face their accuser and argue the merits of their case actively, this is a function of due process and yet another anomaly in the Territorial system. In fact, the federal courts in Idaho and the 9th circuit may still be legislative courts for all we know, it would explain why 80% of the cases reaching the SCOTUS from 9th circuit on writ of cert are overturned by the SCOTUS mostly across Constitutional lines. (20)

Legislative courts: *American Insurance v Canter 1 Pet. 511,546 (1828), Romeu v Todd 206 US 358,368 (1907), United States v McMillan 165 US 504,510 (1897), McAllister v United States 141 US 174,180 (1891).* (21)

We cannot forget and we must return to it often; the movement by Congress of private rights into the Territories cannot be legislated away once extended, which means they must be accounted for, which means that the actions of the federal government are restrained by their existence *Barron v Mayor of Baltimore 32 US 243 (1833) " The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes.* (22) ***If these propositions be correct, the Fifth Amendment of The Constitution must be understood as restraining the power of the General Government, not as applicable to the States.***" (23) **This cannot be stressed enough, the actions of the federal government in the**

Territories are restrained by the existence of private rights. Since no act of Congress can now remove private rights or due process of same once extended, then all acts of Congress that may be in conflict, must be read as being in concert with this set of facts. Territorial Doctrine Point 6, Downs vs. Bidwell, 1901. (reference again already noted)

Argument

There are substantial issues with the EPA's legal position and application of material facts in the case. The EPA's entire case rests upon the idea that a 'violation of CWA section 301(a)' occurred and the Respondent is guilty. In order for due process to be operational in the matter at hand the EPA must PROVE the Respondent is guilty of this violation and it has not even endeavored to do so, instead relying upon what amounts to a 'process win'. These process wins are simply unconstitutional and are one of the FLAWS in the administrative process when dealing with US citizens in these areas.

The EPA's position is that on July 22, 2015 Respondent unlawfully discharged pollutants from a point source into a navigable water without authorization under a National Pollutant Discharge Elimination System permit, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). (24)

The Respondent was operating under a state permit with the states assurance that the state water plan had EXEMPTED dredges 5" and under from the NPDES permitting scheme on all waters in the state that are capable of being dredged under Idaho law. This exemption by the Idaho legislature was NOT foreclosed by the legislature at the time Respondent was cited by the EPA for failure to purchase its 402 permit. (25) The exemption is stated here: "Recreational dredge mining is defined as mining with power sluices small recreational suction dredge with a nozzle 5" inches in diameter or less and equipment rated at a maximum of 15 horsepower. Recreational dredge mining is regulated in Idaho under the Stream Channel Protection Act. (26) This statute requires dredge miners to obtain a permit from IDWR before recreational dredge mining can be started. The states one stop Recreational Dredge Mining Permit **does not require a national Pollution discharge elimination system (NPDES) permit**." (27)

Now that the material facts of this case are in serious dispute we must point out that while the EPA's position seems to be that the basis for it's findings of fact are rooted in 'settled law', the status of that position is also in serious dispute. The existing situation shows a 'revolving' use of terminologies that the EPA relies upon up to the use of

Rybachek US EPA 904 F2d 1276, 1285 9th circuit 1990. (28) Any reliance upon Rybachek as authoritative when the justiciable terminologies presented in argument circulate around the terms, 'addition', addition of a pollutant', etc. would have been fatal to the EPA's case so instead they simply charge that Respondent 'discharged pollutants into waters of the US'.

'Discharge pollutants into'

In defining the meaning of the terms of the act to establish culpability we find that;

> **Discharge Pollutants** (see Clean Water Act, Section 502, General Definitions;
>
> (11) The term "effluent limitation" (restriction of pollutant), (12) 'discharge of a pollutant' and the term 'discharge of pollutants (A) any addition of any pollutant… (16) The term "discharge" (addition of pollutants), (14) The term "point source" .

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) 'discharge of a pollutant' and the term 'discharge of pollutants (A) any addition of any pollutant…

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. (29)

In common language this means, 'an established limitation on the amount of pollutants that can be **put into** waters of the US' which created TMDL's. If we do not add some sort of word denoting an addition (put into, addition etc.) in the sentence, then the meaning of discharge must be altered because nothing then would be added, and so this section of the CWA would not create a legal limitation on human activity, but on natural activity of the watershed cycle. (30)

Meaning, that if we are to remove any term that amounts to an addition, then the law is written to limit a 'redistribution' of pollutants already present, which is again fatal to the case at bar, i.e., the South Fork of the Clearwater River is officially designated a 303(d) impaired river due to natural causes from historical mining, according to David Arthaud in his testimony at trial. (31) Since the waters in Idaho are under the State's authority, and if Idaho accounts for the pollutants in the water body statutorily, then that would be controlling law and we find in I.C. Title 39-3611(3): "For water bodies where an applicable water quality standard has not been attained due to impacts that occurred prior to 1972, no further restrictions under a total maximum daily load process shall be placed on a point source discharge unless the point source **contribution of a pollutant** exceeds twenty-five percent (25%) of the total load for that pollutant. Existing uses shall be maintained on all such water bodies." A contribution IS an addition. (32)
Since Idaho code accounts for the South Fork because of Arthaud's testimony that "legacy mining" (trial record page 424, lines 9-25, (33) page 425 lines 1-5) was the source point (34) of the current sediment load on the river then I.C. 39-3611(3) becomes controlling law. (35)

But we have already established in earlier argument that the Idaho legislature considers dredges 5" and under as **recreational dredges**, then they are not 'point source's under either the CWA OR Idaho law. Moreover in the CFR's 40 CFR 122.2 states; *Pollutant* means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (36) (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. (37)

Obviously in order for the CWA to be used against a dredger then the meaning of the term 'employed' would come from CFR 122.2. These definitions stand unless the federal courts have ruled on these terms in a different manner, which they have as we have pointed out in previous argument. (38) The terms, dredged spoil, rock and sand (among other terminologies) have been ruled on by the federal courts repeatedly and we find in *National Mining Association et al v. US Army Corp of Engineers (1998)* that all of these uses of the terminologies were addressed and that if the agency (or in that case the corp) was going to insist on the use of these terms that a 404 permit would be the appropriate permitting scheme. (39) In 2007, The ACE responded to an inquiry from Respondent, " **Your recreational suction dredging project will not involve a discharge of dredge materials into the 'Waters of the United States".** (Letter

addressed to Mr Erlanson from ACE in 2007). (40) and **still** the EPA continues forcing the 402 permitting scheme.

EPA's Claim of Environmental Harm

In the argument portion of this brief we discussed the South Fork of the Clearwater River's designation as a 303(d) impaired river on the testimony of David Arthaud, and that the impairment was due to 'legacy mining' (trial record page 424, lines 9-25, page 425 lines 1-5). On page 6 of the EPA's post trial brief the EPA argues that, "the evidence presented at hearing demonstrates that Respondent's activity resulted in an un-permitted discharge, that caused serious, long lasting environmental harm". (41)

That is the only theory advanced by the EPA in post argument. The rest of the section of the EPA's brief covers the sensitivity of the environment, and then also admits the water body is a 303(d) impaired waterway. The EPA then goes on say, "Therefore Idaho has implemented a plan and mechanism, known as 'Total maximum daily load' (TMDL) to evaluate specific sources of sediment and temperature on the river, and limit the discharge of THOSE pollutants". (42)

The admission by the EPA that the South Fork of the Clearwater is an impaired river is fatal to the claim that the EPA can regulate dredging on the river with their 402 permitting scheme, since the CWA's stated purpose is that, "A clean water act permit is only needed if these waters are going to be polluted or destroyed". (43) The EPA states in their post trial brief that the TMDL was designed to " evaluate specific sources of sediment and temperature on the river, and limit the discharge of THOSE pollutants". The word we are concerned with here is the word 'THOSE' in which the antecedent is 'sediment and temperature'. (44)

Sediment: Matter that settles to the bottom of a liquid.

Suspended solids: Suspended solids refers to small solid particles which remain in suspension in water as a colloid or due to the motion of the water includes particle sizes that drop out of the water column on their own but are smaller than sediment particles.

In attempting to determine the meanings of these words so that we could understand how they are being employed against this respondent, we had to try and make a distinction between 'suspended solids' and 'sediment' since the EPA"s post trial brief has accused the respondent of 'discharging sediment' into waters of the US. The meaning of sediment does not take into account water motion, which would lead one to believe that sediment will fall out of solution on its own without needing to be precipitated out of solution (suspended solids) via one of the many understood methods

for doing so which include but are not limited to; change in temperature, change in PH, change in eh, redox, etc.

When speaking of suspended solids we have 2 categories, suspended solids and dissolved solids. The difference between these is whether or not they can be filtered out of the solute with a 40 micron filter, anything that passes through the filter is thought to be dissolved. If we are talking only about sediment then we are talking about undissolved solids, with a large enough particle size and therefore large enough specific gravity, to be acted upon by gravity pulling them to the bottom of the liquid. (45)

The EPA's position now becomes hard to reconcile when they state, "the evidence presented at hearing demonstrates that Respondent's activity resulted in an un-permitted discharge, **that caused serious, long lasting environmental harm**". There was no discussion at trial regarding particle size, and only the use of the word 'sediment' which means the particles were large enough to fall out of solution on their own and fairly quickly, was when Martich stated, " (pg 183, lines 19-25, suspended solids are the same as sediment'.) (46)

To further address the line of subsequent action, EPA Counsel Moore asserted in post-trail brief that the alleged discharge of sediment produced 'long lasting environmental harm', (pg. 6, Section A.) (47) Therefore; as the EPA has opened the door as to 'long lasting environmental harm' and the Respondent was not allowed to offer both, the multiple studies concerning suction dredging and it's effects on the environment which the judge ruled respondent could not enter when attempt was made during cross examination during penalty phase/trial, and further was not allowed to reference Harvey, B.C., K. McCleneghan, JD Linn, CL Langley 1982 study, we see that sediment falls to background ambient levels after 197 feet [Thomas: 36 feet 1985] from the end of a dredge which is well within the 500' mixing zone in effect in 2015, in answer and defense of the EPA's claim, which I am more than happy to do so now. I would like to thank the EPA for opening this door, as it is paramount to Respondent's case. Further, Respondent would like to add the following biological and scientific evidence in US ACE 1994 Study, determination show no actual effect on environment by suction dredging. (Huber, C. D. Blanchet, 1992. 'Suction dredging showed no noticeable impact to water quality', conclusion of study. (48)

Since sediment settling is a function of time and so is the accusation of 'long lasting environmental harm' as the EPA asserts, then in order for there to be 'long lasting environmental harm' it must occur within 36-197 feet of the discharge of the dredge. We

ask, ‘can long lasting environmental harm occur within the flow of a river in a distance of 36-197 feet’? It would depend upon how we are judging time.

If we assign a time variable to the term ‘long lasting’ we would do so based upon the speed of the flow of the river. If the speed of the flow is 1’ per second are we to believe that the EPA is asserting ‘long lasting environmental harm’ to be 36-197 seconds long? At a slower flow rate of 6” per second we arrive at 72-394 seconds and so on.

The South Fork of the Clearwater flow rate recorded at Sites in September is 158-161 cubic feet per second which is a volume metric not a speed of flow metric. No matter how we look at it or do the math we cannot come to the conclusion that, ‘long lasting environmental harm’ was done by Respondent. EPA Study 2013, ‘Connectivity of Steams and Wetlands to Downstream Water’. (49)

The South Fork Clearwater River Status

David Arthaud testified at trial that the SF Clearwater river is a 303(d) impaired river. The 2016 Integrated IDEQ Report, Appendix K, on page 389 states: Category 4c Waters of the State not impaired by a pollutant, but by pollution. (50) The South Fork Clearwater River is listed on pages 396-397 (encompassing Respondents mining claim) IDEQ Integrated Report, 2016, as a ‘polluted stream’. (51)

The SCOTUS has already determined, in fact, that there is not enforceable action by the CWA on the transfer of material i.e. water suspended solids, etc. within the same waterbody. (South Florida Water Management District v. Miccosukee Tribe of Indians, 2004. Los Angeles County Flood Control Dist v. Natural Resources Defense Council Inc., case original ruling 9th Circuit, over-turned by SCOTUS.) (52)

In the category 4a section of the report on page 23 we find the South Fork Clearwater listed as an ‘impaired water body due to pollutants listed as: Sedimentation, siltation, and water temperature. This river segment is ID 17060305cl030 02, which is a Crooked River to Ten Mile Creek, which is 28.41 miles long, also encompassing Respondent’s mining claim.’ (53)

Non-disputed Facts at Trial

__Mr. Erlanson contends the following to be irrefutable facts that were un-rebutted during trial; and so therefore, are accepted as fact. We will reference the court transcription for expediency.

_Mr. Erlanson’s opening statement, pgs. 36-37, lines 1-21, 13-25/

(special note: individual NPDS Permit - timeframe associated costs: affirmed by Martich testimony in trial). (54)

_Clint Hughes testimony regarding Mr. Erlanson needing an NPDES permit as far back as 2008. It was un-rebutted that an NPDES permit was UNAVAILABLE for Idaho until 2013, pg. 72, 22-25, pg. 73, 1-6. (55)

__EPA counsel brought up exhibit CX08 which gives 'suspended solids' as the pollutant Mr. Erlanson was charged with discharging into a water of the US. (56) There is no classification of 'suspended solids' as a pollutant anywhere, moreover no testing was done to ascertain which pollutant the EPA was concerned with or that Mr. Erlanson had discharged. To date the EPA has produced no proof of any pollutant. They changed the terms from rock and sand to 'suspended solids' to 'sediment' (which are completely different) and are attempting to win this case on process pg. 134, 20-, pg.135, 1-10. (57

_EPA expert witness Tara Martich testified that there was a 180 day minimum lead time for Individual NPDES approvals under questioning by Judge Caughlin, pg. 160, 1-25, pg. 161, 1-25. (58) Mr. Erlanson showed compliance, by applying for a 'general' permit which was required by the IDWR permitting process. Mr. Erlanson applied for a general permit May 17, 2015, as instructed, only to find that no permit was available. Mr. Erlanson was advised on August 14, 2015, that there was no general permit available. This was one day (1) before the expiration of the legal dredge mining season on the South Fork of the Clearwater River for the year 2015. (Source 2015 Idaho recreational Mining Authorization.) (59) The EPA allowed 15 dredgers to dredge the South Fork in 2013-2015 all without an available NPDES permitting process. (60)

_Cindy Godsey testified that the EPA hadn't done an ESA study in order to issue the permit which they hadn't gotten done. In testimony this proves fatal to the EPA because they hadn't completed their necessary process to implement the permitting scheme. (61)

_33 USC 1319(a)(b) gives a procedure for the EPA when a citizen receives a violation from the EPA. (62) In testimony pg.170, 1-15 Martich claimed that the section of the CWA 33 USC 1319(a)(b) only applied after the case had been well developed, and we see the exact text of 33 USC 1319(a)(b) states something entirely different. (63)

_Judge Coughlin's statements on pg. 175, 15-25 concerning the imposition of settlement amounts being case by case are concerning in the matter before the court in that the transcription of the oral arguments show an inability on behalf of the EPA to defend its position of 'willful violation' executed by Mr. Erlanson on a variety of different topics and so in evaluating a fine based upon the testimony presented, a

reasonable person would conclude that no fine can be assessed and the case dismissed. (64)

_Martich testified that the TMDL's on the South Fork were evaluated under 3 different aspects; sediment, excessive temperature, and habitat alteration. Again this is fatal to the EPA in that the stream is a polluted waterway under 'habitat alteration' which means the CWA has no authority to operate and the EPA lacks authority to issue permits (2012 integrated report category 4c: Waters impaired by pollution not a pollutant). Pg.188, 9-16 (65)

_In testimony it was discovered that a paper submitted by Mark Pollot was being utilized by the court as an incriminating document weighing heavily in the courts decisive process. In testimony it was discovered that the document was not only unsigned by Mr. Erlanson but Mr. Erlanson knew nothing about the document ever having been drafted and so therefore took no part in it. The document was summarily ordered to be left out of the evidences submitted for the record. Pg. 185, 1-25. (66)

Economic benefit

Respondent was in the water less than 20 minutes.

Conclusion

The bottom line? Respondent was given an exemption from the State of Idaho for his recreational activities.

The rest of the arguments here are merely responses to the EPA's post trial brief and can be viewed as educational for the EPA and the Administrative system regarding the problems the citizens in the 11 western states are having with the Forest service and the EPA.