Before the EPA appeals board

Motion to add:
Respondent's
Exhibits
ERX-1 thru ERX-15

In the matter of

Dane Erfjansen Sr.

Docket # CWA-10-2016-0109 (Motion to add)

Respondent

Purpose of exhibits is to lend credence and to "show cause" to Respondents case in his favor.

EAB-1

ERX=1

WHY CLEAN WATER IS IMPORTANT

Clean water is vital to our health, communities, and economy. We need clean water upstream to have healthy communities downstream. The health of rivers, lakes, bays, and coastal waters depend on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities by trapping floodwaters, recharging groundwater supplies, filtering pollution, and providing habitat for fish and wildlife. People depend on clean water for their health: About 117 million Americans -- one in three people – get drinking water from streams that were vulnerable to pollution before the Clean Water Rule. Our cherished way of life depends on clean water: healthy ecosystems provide wildlife habitat and places to fish, paddle, surf, and swim. Our economy depends on clean water: manufacturing, farming, tourism, recreation, energy production, and other economic sectors need clean water to function and flourish.

WHAT IS THE CLEAN WATER RULE

Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. The Clean Water Rule protects streams and wetlands that are scientifically shown to have the greatest impact on downstream water quality and form the foundation of our nation's water resources. EPA and the U.S. Army are ensuring that waters protected under the Clean Water Act are more precisely defined, more predictable, easier for businesses and industry to understand, and consistent with the law and the latest science. The Clean Water Rule:

> The Clean Water Act protects the nation's waters. A Clean Water Act permit is only needed if these waters are going to be polluted or destroyed.

- **Clearly defines and protects tributaries that impact the health of downstream waters**. The Clean Water Act protects navigable waterways and their tributaries. The rule says that a tributary must show physical features of flowing water – a bed, bank, and ordinary high water mark – to warrant protection. The rule provides protection for headwaters that have these features and science shows can have a significant connection to downstream waters.
- **Provides certainty in how far safeguards extend to nearby waters.** The rule protects waters that are next to rivers and lakes and their tributaries because science shows that they impact downstream waters. The rule sets boundaries on covering nearby waters for the first time that are physical and measurable.
- **Protects the nation's regional water treasures.** Science shows that specific water features can function like a system and impact the health of downstream waters. The rule protects prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands when they impact downstream waters.
- **Focuses on streams, not ditches.** The rule limits protection to ditches that are constructed out of streams or function like streams and can carry pollution downstream. So ditches that are not constructed in streams and that flow only when it rains are not covered.
- **Maintains the status of waters within Municipal Separate Storm Sewer Systems.** The rule does not change how those waters are treated and encourages the use of green infrastructure.

5th Amendment EAB-2

EAX=2

https://www.britannica.com/topic/Fifth-Amendment

Due Process

The fourth section is commonly referred to as the "due process" clause. It protects life, liberty, and property from impairment by the federal government. (The Fourteenth Amendment, ratified in 1868, protects the same rights from infringement by the states.) Chiefly concerned with fairness and justice, the due process clause seeks to preserve and protect fundamental rights and ensure that any deprivation of life, liberty, or property occurs in accordance with procedural safeguards. As such, there are both substantive and procedural considerations associated with the due process clause, and this has influenced the development of two separate tracks of due process jurisprudence: procedural and substantive. Procedural due process pertains to the rules, elements, or methods of enforcement—that is, its procedural aspects. Consider the elements of a fair trial and related Sixth Amendment protections. As long as all relevant rights of the accused are adequately protected—as long as the rules of the game, so to speak, are followed—then the government may, in fact, deprive a person of his life, liberty, or property. But what if the rules are not fair? What if the law itself—regardless of how it is enforced—seemingly deprives rights? This raises the controversial spectre of substantive due process rights. It is not inconceivable that the content of the law, regardless of how it is enforced, is itself repugnant to the Constitution because it violates fundamental rights. Over time, the Supreme Court has had an on-again, off-again relationship with liberty-based due process challenges, but it has generally abided by the principle that certain rights are "implicit in the concept of ordered liberty" (*Palko* v. *Connecticut* [1937]), and as such they are afforded constitutional protection. This, in turn, has led to the expansion of the meaning of the term *liberty*. What arguably began as "freedom from restraint" has transformed into a virtual cornucopia of rights reasonably related to enumerated rights, without which neither liberty nor justice would exist. For example, the right to an abortion, established in *Roe* v. *Wade* (1973), grew from privacy rights, which emerged from the penumbras of the constitution.

The CWA – Youre guilty unless you prove yourself innocent (Keene CWA paper)

Takings

The Fifth Amendment mentions property twice— once in the due process clause and again as the amendment's entire final clause, commonly known as the "takings clause." The common denominator of property rights is

the concept of fairness that applies to the authority of the federal government to acquire private property. At the time of ratification, property determined wealth and status. It entitled a person to participate in politics and government. It was cherished and keenly protected. Despite this, it was understood that individual rights must sometimes yield to societal rights and that representative governments must accordingly provide the greatest good for the greatest number. The growth and development of the United States ultimately would bring challenges to existing property lines, and it was necessary for an amendment to provide rules governing the acquisition of property. As such, the takings clause empowers the government to exercise eminent domain in order to take private property; however, such takings must be for public use and provide adequate compensation to landowners. Throughout most of American history this balance of individual and societal rights hinged on the government's fidelity to the cornerstone principles of public use and just compensation, and in many respects it still does. However, in 2005 *Kelo* v. *City of New London* brought a new twist to takings clause jurisprudence. Whereas prior to the *Kelo* ruling, the government would acquire property for public use directly, in the *Kelo* case the Supreme Court upheld the use of eminent domain to take private property for commercial development that was assumed to indirectly provide a positive impact for the public.

The full text of the amendment is:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Mitigations and Terms and Conditions for South Fork Clearwater River

1. The relevant Forest/BLM Field Office will require each operator to sign a written statement listing and accepting all mitigation and terms and conditions as part of their NOI/POO prior to acknowledging/ approving implementation of their placer mining operation. The operator would also be required to provide the Forest and BLM a description of the specific location(s) of the operation within the delineated operating reach, the surface areas and estimated volume of substrate dredged/disturbed, the number of days/hours per day operated, length/breadth of maximum turbidity plume each day, any sightings of ESA-listed species, and descriptions of unusual events. Field forms will be provided to each operator to facilitate recording of this information

2. Suction dredging operations will occur only within the wetted perimeter below the ordinary high water line during an IDWR dredge season, and activities which would expand the wetted perimeter (such as streambank alteration) would not be permitted.

3. Prior to dredging or other "may affect" activities, operators must meet with the relevant FS/BLM unit fisheries biologist and/or other relevant staff who will inspect the proposed operation sites. No dredging or other movement or modification of substrate will be allowed in localized areas where ESA-listed salmonids are known to spawn or otherwise concentrate or in likely spawning/early rearing habitat. Miners will also be required to avoid known localized, preferred, and uncommon habitat of salmonid fry, Pacific lamprey larvae, and western pearlshell mussel, including low-velocity backwaters, alcoves, and side channels (as indicated by clay, silt, or sand substrate). The areas that would be required to be avoided during dredging reach delineation would be specific locations within the proposed operation areas rather than extensive stream reaches.

4. Suction dredges will have a nozzle diameter of 5 inches or less and a horsepower rating of 15 horsepower or less.

5. Pump intakes (but not dredge nozzles) must be covered with 3/32" mesh screen or other appropriate size.

6. Dredging operations and other instream activities must take place only during daylight hours.

7. Any cobble or small boulders moved from their initial location in the channel (in order to reach bedrock) would be repositioned into its approximate original configuration in elevation and stream channel morphology and all dredge or other spoil piles must be dispersed by the end of the dredging season. In particular, the operator will not move cobbles or small boulders in the stream course to the extent that substantial alterations of the deepest and fastest portion of the stream channel (i.e., the thalweg) persist beyond the end of the dredging season.

8. Operations must not constrict or dam the stream channel or otherwise cause a potential structural barrier to upstream or downstream fish movement; any such substrate arrangements must be dispersed on a daily basis. Dredged or other excavated holes must be backfilled before any new dredge holes are excavated.

Dredging would be excluded from mainstem SFCR areas within 15 feet laterally and 30 feet downstream of fish-bearing tributary mouths, and daily operations would not be permitted to hinder fish access to fish-bearing tributary mouths through disturbance, turbidity, or modifications of channel depth or substrate arrangement.

For the five SFCR tributaries known or thought to currently support bull trout spawning/rearing (Johns Creek, Tenmile Creek, Newsome Creek, Crooked River, and Red River) and for American River,

dredging would be excluded within 50 feet laterally (up to half the width of the SFCR), and 50 feet upstream and 150 feet downstream of the tributary mouths.

If miners desire to dredge between 150 and 300 feet downstream of the tributary mouths specifically named above (and on the tributary entrance side of the river), FS/BLM biologists would survey stream habitat quality in these areas prior to delineation of dredging reaches. Based on the combination of tributary "plumes" and high quality stream habitat type (in the form of substantial pools, LWD and boulder cover, etc.) FS/BLM and Level 1 Team biologists would then come to agreement on whether and where additional exclusion areas should be recognized during dredging reach delineation.

Material interference

9. Per IDWR "letter permit" instructions, dredges must not operate in the gravel bar areas at the tails of pools. Dredges or other types of operation cannot be conducted in such a way that fine sediment (sand or silt) covers portions of gravel bars to a depth of more than 0.5 inch, but fine sediment mixed as a minority component with larger substrate is acceptable.

Depr. of use of Depr. of use

10. Dredging or other mining activities will not occur in the wetted channel within 2 feet of stream banks. Operators must prevent the undercutting and destabilization of stream banks and woody debris or boulders that extend from the bank into the channel and may not otherwise disturb streambanks. If streambanks are inadvertently disturbed in any way, they must be restored to the original contour and re-vegetated with native species at the end of the operating season.

11. Dredges and sluices must not operate in such a way that the current or the discharge from the sluice is directed into the bank in a way that causes disturbance to the bank and associated habitat, deposits sediment against the bank, causes erosion or destruction of the natural form of the channel, undercuts the bank, or widens the channel.

Material interference

12. Operators may not remove, relocate, break apart, or lessen the stability of substantial in-channel woody debris or instream boulders (>12 inches median diameter) unless it was determined by the appropriate Forests/BLM minerals and fisheries staff that such wood or substrate particles are common enough that re-arrangement would not affect habitat availability or FS/BLM staff agree that the wood or boulder can be temporarily moved, but re-installed at the same location and elevation by the end of the operating season. The operator will not remove any large down or standing woody debris or trees for firewood within 150 feet of the stream.

13. Operators must visually monitor the stream for 150 feet downstream of the dredging or sluicing operation (this is a condition of the general NPDES permit). If noticeable turbidity is observed downstream, the operation must cease immediately or decrease in intensity until no increase in turbidity is observed 150 feet downstream.

14. No mechanized equipment will be operated below the mean high water mark except for the suction dredge, sluice, or pump itself and any life support system necessary to operate a suction dredge. No mechanized equipment will be used for conducting operations, including, unless specifically acknowledged or approved in an NOI or POO.

denying use of private property and owners ability To conduct ones business! See Hale v Henkel 201 US 43 SCOTUS 1906

15. Operators must maintain a minimum spacing of at least 800 linear feet of stream channel between active mining operations (i.e., any operating within the same year), or the minimum distance between suction dredges required by the relevant NPDES general permit (whichever is greater).

16. To avoid reducing the quality of critical migratory and holding habitat for adult listed salmonids (as determined by the the appropriate Forests/BLM minerals and fisheries staff and discussed with the Level 1 team), operators will be required to avoid operating dredges within 150 linear feet upstream and 50 feet

downstream of the highest quality pool within each ¼ mile of the relevant stream channel so that adult bull trout and other salmonids seeking cover and thermal refuge are not disturbed and so that a turbidity plume produced by the dredge does not reduce water quality or deposit sediment in the pool.

17. The suction dredge and other motorized equipment must be checked for leaks, and all leaks repaired, prior to the start of operations each day. The fuel container used for refueling equipment within the active stream channel must contain less fuel than the amount needed to fill the tank. Unless the dredge or other motorized equipment has a detachable fuel tank, operators may transfer no more than one gallon of fuel at a time during refilling. Operators must use a funnel while pouring, and place an absorbent material such as a towel under the fuel tank to catch any spillage from refueling operations. A spill kit must be available in case of accidental spills. Soil contaminated by spilled petroleum products, must be excavated to the depth of saturation and removed from Federal lands for proper disposal.

18. Except for the 1-gallon or smaller contained used for frequent refueling of the dredge or other equipment, gasoline and other petroleum products must be stored in spill-proof containers at least 100 feet from any stream channel and at a location that minimizes the opportunity for accidental spillage to reach the a stream channel.

19. Operators will not entrain, mobilize, or disperse any mercury discovered during mining operations. Operators must cease operations and notify the FS/BLM if mercury is encountered in dredged material. Operators must not use mercury, cyanide, or any other hazardous or refined substance to recover or concentrate gold.

20. Mining operations must shut down immediately if any sick, injured, or dead specimen of a threatened or endangered species is found within 100 linear stream feet of a dredge operation, and the operator must notify the appropriate Forests/BLM minerals and fisheries staff member within 24 hours of the sighting or discovery of an ESA-listed individual in any condition. The relevant FS/BLM unit would contact the Level 1 Team or FWS Division of Law Enforcement at (208) 378-5333 for the discovery of any dead or moribund individual of an ESA-listed species. Operators and FWS/BLM staff must record the date, time, and location of the sighting or discovery, and, if practical, the cause of fish injury or death. A temporary suspension of operations will allow the FWS/NMFS to investigate whether any take of ESA-listed species is related to suction dredging operations, and whether any modifications of operations is necessary to minimize take.

21. Operators must also comply with all additional conditions or measures stipulated in all necessary permits

22. To prevent the threat of aquatic invasive species, suction dredges, tools used while dredging, and associated equipment must be thoroughly cleaned and dried at least 5 days prior to use on National Forests or BLM-managed land.

A. Mining-Associated Activities

Mining operation sites are typically remote from residential areas, so many operators will need to establish camping and equipment/supply sites in relatively close proximity to the proposed mining site. Camp site, staging areas, and access routes will be proposed by the miner and approved by the the appropriate Forests/BLM minerals and fisheries staff /Level 1 team in order to minimize disturbance, reduce impacts to riparian vegetation, minimize the potential erosion into stream channels, and minimize the potential for toxic or sanitary contamination of operational areas.

EAB-3

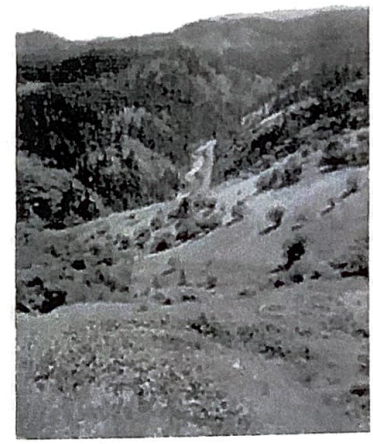
~~ERX-2~~

ERX-3

- ← Idaho Water Resource Board
- ← Water Planning
- ← Comprehensive Basin Planning

South Fork Clearwater River Basin

The South Fork Clearwater River Plan was adopted by the Idaho Water Resource Board in 2004 and approved by the legislature in 2005.



The South Fork Clearwater River basin has two distinct parts. The northwestern portion, the Camas Prairie, is rolling plateaus and prairies, and a major dry land agricultural area of the State of Idaho. It accounts for about 20% of the basin's land area. The eastern portion is forested, mountainous and sparsely populated with about 68% of the land area within the Nez Perce National Forest.

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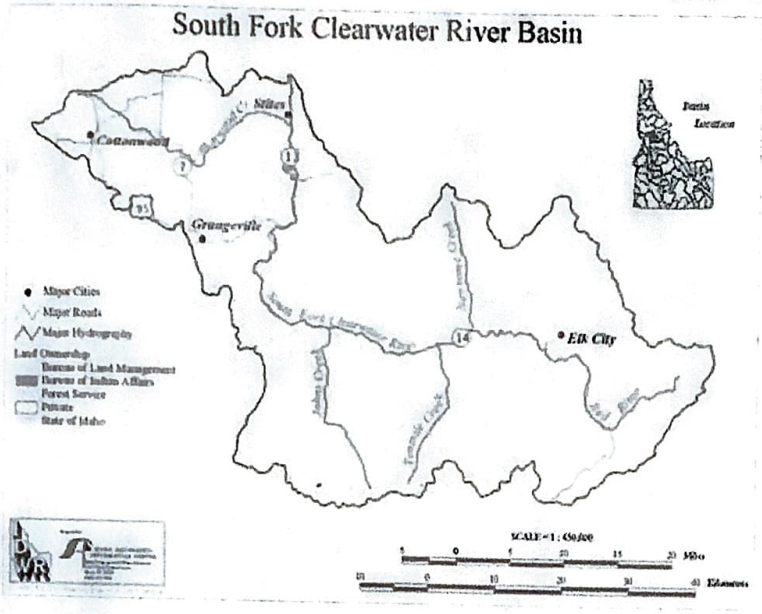
- Chapter V. Basin Description
- Glossary, References, and Appendix A

- South Fork Clearwater River Plan

Privileges & Immunity given to miners using a Recreational size Suction dredge –

(click to enlarge)


South Fork Clearwater River Basin
Basin Location
Cottonwood
Nezperce
Lewiston
Grangeville
Elk City
Major Cities
Major Roads
Major Hydrography
Land Ownership
Bureau of Land Management
Bureau of Indian Affairs
Forest Service
Private
State of Idaho
South Fork Clearwater River
Johns Creek
Meadow Creek
Red River
Newsome Creek
SCALE = 1 : 650,000
Miles
Kilometers

III. Issues, Analysis and Considerations

3.1 ISSUE: Recreational dredge mining

A. Issue Statement: Recreational dredge mining permit/regulation process is adequate in the South Fork Clearwater River basin.

Discussion

Recreational dredge mining is defined as mining with power sluices, small recreational suction dredges 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. This statute requires dredge miners to obtain a permit from IDWR before recreational dredge mining can be started. The state's One Stop Recreational Dredge Mining Permit does not require a National Pollution Discharge Elimination System (NPDES) permit. State regulations also specify the streams where recreational dredging is prohibited. Suction dredging that is not considered "recreation" is currently considered a "point source" of pollution requiring a National Pollution Discharge Elimination System permit from the U.S. Environmental protection agency. Recreational dredge mining is only allowed on the mainstem South Fork Clearwater River. Due to budgetary constraints of the Stream Channel Unit of the Resource Protection Bureau at IDWR and to possible dredge mining limitations from the TMDL for the South Fork Clearwater River, current management and regulation of recreation dredge mining on the South Fork Clearwater River may be changing in 2005.

IMMUNITY – Exemption By EPA

See code Idaho 39-3611 at (3)

- The State of Idaho forbids use of recreational dredges within 500 feet of a developed campground, and the USFS prohibits their use in national recreation areas and protected rivers.
- Recreational suction dredges or sluices operated properly in a stream channel do not cause a great deal of environmental damage unless they are used in fish spawning beds (redds) at the wrong time of year. Redds could be damaged or totally destroyed by dredging. Eggs of salmonids prior to the eyed-up stage and sac fry would suffer high mortality if entrained by dredging (Griffith and Andrews 1981).
- Operation of recreational dredges in the South Fork Clearwater River would have some minor impacts on aquatic invertebrates (Griffith and Andrews 1981). Few insects would be killed but some would likely be displaced downstream. Thomas (1985) found lower abundance of aquatic insects in a 35-meter section of dredged stream. Recolonization was complete in a month after dredging.
- The South Fork Clearwater River may be dredged from July 15 to Aug 15 under the Recreational Dredging Permit if request is made on the Special Supplement. The site must also be inspected by IDWR with a fishery biologist. With that authorization, IDWR will issue a letter of approval. The rest of the drainage is closed under the Recreational Dredging Permit, but approval may be granted to dredge in the waters not open under the recreational permit if application is made using form 3804-B (Joint Application for a Permit). The limited season and permits minimize the impacts discussed under the two previous bullets.

Recommendations:

Currently, numerous laws regulate or restrict dredge mining in the mainstem South Fork Clearwater River including the Clean Water Act, the Stream Channel Protection Act, the Endangered Species Act and others. It is unlikely, that a new recreational dredging operation could be conducted in the South Fork Clearwater River without adequate review and environmental safe guards. Therefore, the IWRB does not recommend changing the current recreational dredge mining permit/regulation process.

3.2 ISSUE: Declining ground water on the Camas Prairie

B. Issue Statement: Ground water levels near Grangeville and in the Camas Prairie area of the South Fork Clearwater River basin may be declining.

Discussion

Aquifers, subsurface water-saturated formations of fractured rock or gravel, are encountered in the area around Grangeville. Geologists develop an understanding of aquifers and ground water flow patterns by mapping rock outcroppings, reviewing well logs and measuring the depth to water in wells. Pumping ground water can cause a decline in water level in an aquifer. If aquifer recharge is less than loss from discharge and pumping, then the water level will drop.

Castelin did the first work on ground water supply and availability in the Camas Prairie area and found that intricate geology of the area creates a unique environment for the complex movement of ground water (Castelin 1976).

Ralston et al.(1993) found that water level declines in and around the City of Grangeville ranged up to 21 feet per year. Ground water decline in the area was faster than other parts of Idaho. Ground water withdrawals appear to be exceeding recharge in the Grangeville area. Much of the decline was attributed to poor well construction and penetration of multiple aquifers with deep wells. Many of the deep wells were constructed without casings, likely allowing water from the shallow aquifers to drain to lower zones (Ralston, et al. 1993). To address the declining ground water, it was recommended that several deep wells in the area be reconstructed to prevent commingling. In this case, commingling refers to the upper aquifer draining into the lower aquifer. IDWR has hired a consultant to update the Well Construction Standards Rules and to investigate other related issues. In addition, Ralston also recommend that another deep well be drilled by the city. This has been done and the well contributes significantly to the city water supply.

A water system engineering study was prepared for the City of Grangeville (Entranco 2003). Both the quantity and quality of the source of city water is adequate to meet current and projected demand until 2022. Little or no growth is projected for the city and water demand is flat or declining. However, Entranco also recommended that the City of Grangeville continue to monitor the production capacity of its' three sources from the shallow ground water aquifer.

Although ground water levels have declined in the Grangeville area, it is not a critical issue at this time (Ralston 2003). Sometime in the future (25 to 50 years), ground water supply in the Grangeville area could be a significant issue. Ralston (1993) stated that monitoring ground water levels in the Grangeville area would be prudent and recommended in 1993 that a study of ground water be conducted every 10 years.

roads)

- **Recreational Rivers** may include human development in the waterway or the riparian area.

The IWRB considers the impacts of protected river designations on the social, economic, and environmental well being of the region. A protection designation is made if the IWRB determines the value of preserving the waterway is in the public interest and outweighs development for other beneficial uses (Idaho Code 42-1734A(4)). Under a natural river designation, the following activities are prohibited:

- Construction or expansion of dams or impoundments
- Construction of hydropower projects
- Construction of water diversion works
- Dredge or placer mining
- Alterations of the stream bed
- Mineral or sand and gravel extraction within the streambed

Under a recreational river designation, the IWRB determines which of these activities will be prohibited, and may specify terms and conditions for activities not listed (Idaho Code 42-1734A(5).

Prohibitions do not interfere with activities necessary to maintain and improve *existing* utilities, roadway systems, managed stream access facilities, diversion works, or private property. Natural and recreational designations do not change or infringe upon *existing* water rights or other vested property rights. Existing valid mining claims are property rights and are not obstructed by designations. However, future mining claims that impact the stream channel would be prohibited by a natural designation and could be prohibited by a recreational designation.

As a part of the development of the *South Fork Clearwater River Basin Comprehensive State Water Plan*, streams were identified that will benefit from state protection designation to protect current values for the people of Idaho. Streams that were outstanding in at least two of the three screening categories (biological, recreational, aesthetic) were considered for protection, and were prioritized and selected with significant input from and collaboration with the watershed advisory group, and state and federal agencies.

Potential Effects of Designation

There are potential benefits and costs of designating rivers for protection under state law. Benefits include the maintenance and possible improvement of fish and wildlife habitat, recreational uses, and scenic qualities provided by an intact riverine environment. Economic benefits may come from increased local spending by fishermen, recreationists and other benefits of a healthy river system.

Possible costs, (foregone development), depend on the specific prohibitions and conditions placed on a designated river. On the South Fork Clearwater, this may include foregoing construction of hydropower plants, commercial dredge and placer mining operations, and sand and gravel extraction from the streambed. Timber operations are governed by other state and federal regulations and would not be affected by designation, with the possible exception of some types

of stream crossings. However, designations are not intended to prevent stream crossings for silvacultural or recreational activities that do not harm the stream channel. Dispersed livestock watering would not be affected by designation.

Designated Waters in the South Fork Clearwater River Basin

The IWRB has determined that the value of preserving the designated waterways of the South Fork Clearwater River basin is in the interest of and for the benefit of the state as a whole. All landowners – private, state, and federal – are encouraged to manage their lands consistent with the IWRB's protection designations. The IWRB also encourages federal resource management agencies to work within the comprehensive state water planning process rather than pursuing federal protection of waters within Idaho.

To protect the public interest, current resource use, and the multiple-use character of the basin, the Idaho Water Resource Board designates the following streams and stream segments (approximately 54 miles) as **Natural Rivers** (see Map 3) based upon the analysis from Section IV, Resource Summary and Evaluation. All of the Natural designated rivers in the South Fork Clearwater River Basin are on federal land and most originate in Wilderness areas.

1) **Tenmile Creek** - (10 miles) from headwaters to Wilderness boundary and the following tributary:
   - **Williams Creek** - (5.2 miles): Headwaters to confluence with Tenmile Creek,
2) **Twentymile Creek** – (3 miles): Headwaters to Wilderness boundary,
3) **Johns Creek** - (8 miles): from headwaters to Wilderness boundary, and the following tributaries:
   - **Hagen Creek** - (4.4 miles): Headwaters to confluence with Johns Creek,
   - **Square Mountain Creek** - (5.0 miles) Headwaters to confluence with Moores Creek:
   - **Moores Creek** - (6.4 miles): Headwaters to confluence with Square Mountain Creek,
   - **Gospel Creek** - (6.6 miles): Headwaters to confluence with Johns Creek,
   - **West Fork Gospel Creek** - (5.2 miles): Headwaters to confluence with Gospel Creek,

To protect the public interest, current resource use, and the multiple-use character of the basin, the Idaho Water Resource Board designates the following streams and stream segments (approximately 324 miles) as **Recreational Rivers** (see Map 3) based upon the analysis from Section IV, Resource Summary and Evaluation:

1) **Red River** (27.2 miles) Headwaters to confluence with American River, **and the following tributaries**:
   - **Otterson Creek** - (3.5 miles): Headwaters to confluence with Red River,
   - **South Fork Red River** - (11.7 miles): Headwaters to confluence with Red River,
   - **West Fork Red River** - (4.3 miles): Headwaters to confluence with Middle

EAB = 4
~~RX = 30~~
ERX = 4

State of Idaho
DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMA
Directo

RE: 2015 Idaho Recreational Mining Authorization (LETTER PERMIT)

Dear Recreational Miner:

The Idaho Department of Water Resources (IDWR) hereby issues an expedited LETTER PERMIT. This LETTER PERMIT authorizes the Permit Holder to operate recreational mining equipment to alter a stream channel in accordance with the Stream Channel Alteration Rules (IDAPA 37.03.07 – Rule 64) and the 2015 IDWR Instructions for "Stream Channel Alteration by Recreational Mining Activities" (IDWR Instructions).

This LETTER PERMIT must include information requested on page 2.

Rule 64 (attached), "Standards for Suction Dredges and Non-Powered Sluice Equipment," lists minimum standard conditions fo this LETTER PERMIT. The authorized holder of this LETTER PERMIT may operate recreational mining equipment in stream channel segments of the state designated as "OPEN" in the 2015 IDWR Instructions available at IDWR's website: idwr.idaho.g → Forms → Stream Channel/Recreational Mining Forms. Special Conditions listed below also apply. Failure to adhere to these requirements can result in legal action in accordance with Idaho Code §42-3809 and 42-1701B. The US Environmental Protection Agency (EPA) now requires an NPDES general permit for small scale suction dredging in Idaho. The EPA sho be contacted on their requirements in Idaho (see pg. 1 of the IDWR Instructions for EPA contact information).

Does Not mention an individual permit! Nor does it state that the SFCR is NOT eligible for a general permit or any permit!

I did contact many times

SPECIAL CONDITIONS – IDWR LETTER PERMIT:

1. Permit holder will only work on a stream segment listed as OPEN in the 2015 IDWR Instructions.
2. This permit does not serve in lieu of other permits that may be required by federal or other state government agencies or in a way constitute an exemption of other permit requirements.
3. Permit holder shall obtain authorization from the land owner or land manager to access the property where the mining operation is located and determine if other permits are required. A copy of this Permit should be submitted to the appropriate federal, state or tribal land manager if the mining operation is located on federal, state or tribal land.
4. This permit may be canceled at any time to minimize adverse impact on the stream channel.
5. Each permit holder must have a copy of his/her permit when operating equipment and evidence that the required fee has beer paid. Permit holder shall make this permit, including page 2, available for inspection at all times.
6. This permit does not constitute any of the following:
   a. An easement or right-of-way to trespass or work upon property or mining claims belonging to others.
   b. Responsibility of the IDWR for damage to any properties due to operations of Permit Holder.
7. All fuel, oil, and other hazardous materials shall be stored outside of the stream channel. The Permit holder shall not operate any equipment that leaks fuel, hydraulic fluid, or other pollutants. The Permit Holder shall use a funnel when pouring fuel an place absorbent material, sufficient to absorb a spill, under and around the fuel tank. A petroleum absorbent spill kit shall be onsite in case of accidental spills and no petroleum products shall enter the stream when servicing the equipment.
8. This permit shall expire March 31, 2016.

Sincerely,

Aaron Golart, State Coordinator, Stream Protection Program

Please Print Clearly:

Permit Holder's Name DAVE ERLANSON SR Idaho Resident? Yes X No

Address of Residence 3521 KAINEY CR. City SWAN VALLEY State ID Zip 83449

Email ~~RAINMAKING@MSN.COM~~ Phone 208-483-7343

Signature [signature] Date May 13th, 15

Certification: I certify under the penalty of law that I have read and understand the IDWR document 2015 instructions for "Stream Channel Alteration by Recreational Mining Activities" and will conduct my operations in compliance with these Instructions, all rules, and other requirements. In addition, I certify that I have provided a copy of this LETTER PERMIT with the appropriate fee to IDWR.

OFFICE USE ONLY
$10 Idaho residents/$30 non-Idaho residents

Fee $ 10.00 Receipted by [signature] Date 5-13-2015 Receipt No. E041016 Permit No.

State of Idaho
DEPARTMENT OF WATER RESOURCES
322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web: www.idwr.idaho.gov

BUTCH OTTER
Governor

GARY SPACKMAN
Director

APR 22 2016
DEPARTMENT OF WATER RESOURCES

2016 Idaho Recreational Mining Authorization (LETTER PERMIT)

Dear Recreational Miner:

The Idaho Department of Water Resources (IDWR) hereby issues an expedited LETTER PERMIT. This LETTER PERMIT allows the Permit Holder, indicated below, authorization to operate recreational mining equipment to alter a stream channel in accordance with the Stream Channel Alteration Rules (IDAPA 37.03.07 – Rule 64) and the 2016 IDWR Instructions for "Stream Channel Alteration by Recreational Mining Activities" (IDWR Instructions).

This LETTER PERMIT does not authorize recreational mining on the South Fork Clearwater River (SFCR). To apply for consideration for recreational mining on the SFCR, you must complete an *IDWR Recreational Mining Special Supplement, SFCR*. For all other OPEN locations, this LETTER PERMIT must include information requested on page 2.

Rule 64 (attached), "Standards for Suction Dredges and Non-Powered Sluice Equipment," provides minimum standard conditions for this LETTER PERMIT. The authorized holder of this LETTER PERMIT may operate recreational mining equipment in stream channel segments of the state designated OPEN as described in the 2016 IDWR Instructions referenced above and available at IDWR's website: idwr.idaho.gov → Forms → Stream Channel/Recreational Mining Forms. Special Conditions listed below also apply. Failure to adhere to these requirements can result in legal action as provided for in Idaho Code §42-3809 and 42-1701B. Effective as of 2013, the US Environmental Protection Agency (EPA) requires an NPDES permit for small scale suction dredging in Idaho. The EPA should be contacted on their requirements in Idaho (see pg. 1 of the IDWR Instructions for EPA contact information). no mention of a general permit here!

SPECIAL CONDITIONS – IDWR LETTER PERMIT:

1. Permit holder will only work on a stream segment listed as OPEN in the 2016 IDWR Instructions.
2. This permit does not serve in lieu of other permits that may be required by federal or other state government agencies or in any way constitute an exemption of other permit requirements.
3. Permit holder shall obtain authorization from the land owner or land manager to access the property where the mining operation is located and determine if other permits are required. A copy of this Permit should be submitted to the appropriate federal, state or tribal land manager if the mining operation is located on federal, state or tribal land.
4. This permit may be canceled at any time to minimize adverse impact on the stream channel.
5. Permit Holder must have a copy of their permit indicating them as the Permit Holder when operating equipment and evidence that the required fee has been paid. Permit holder shall make this permit, including page 2, available for inspection at all times.
6. This permit does not constitute any of the following:

a. An easement or right-of-way to trespass or work upon property or mining claims belonging to others.
b. Responsibility of the IDWR for damage to any properties due to operations of Permit Holder.

7. All fuel, oil, and other hazardous materials shall be stored outside of the stream channel. The Permit holder shall not operate any equipment that leaks fuel, hydraulic fluid, or other pollutants. The Permit Holder shall use a funnel when pouring fuel and place absorbent material, sufficient to absorb a spill, under and around the fuel tank. A petroleum absorbent spill kit shall be onsite in case of accidental spills and no petroleum products shall enter the stream when servicing the equipment.
8. This permit shall expire March 31, 2017.

Sincerely,

Aaron Golart, State Coordinator, Stream Protection Program

Please Print Clearly:

Permit Holder's Name Jeffrey Bowman Idaho Resident? Yes ✓ No ___

Mailing Address 5556 W. old Hwy. 91 City Pocatello State Id. Zip 83204

Email jeffandjdbowman@gmail.com Phone 208-244-1917

Signature Jeffy Bowman Date 4-1-16

Certification: I certify under the penalty of law that I have read and understand the IDWR document 2016 instructions for "Stream Channel Alteration by Recreational Mining Activities" and will conduct my operations in compliance with these Instructions, all rules, and other requirements. In addition, I certify that I have provided a copy of this LETTER PERMIT with the appropriate fee to IDWR.

OFFICE USE ONLY

EAB-5

#The EA notes that reasonable mining plans "must be approved" under Forest Service regulations, but in addition to restricting plans in their specifics, the Forest Service would intensely monitor suction dredging operations. The Forest Service would line out operation areas, photograph and sketch operations, visit dredging sites during the dredging season, and visit each suction dredging site within one month of the end of the end of the season. The Forest Service would also take before-and-after photos to "document any substantial changes in stream channel and riparian conditions…in particular, project area modifications which are likely to persist into the next steelhead spawning season or spring/summer chinook spawning season."

#In addition to federal and state agencies, the proposed monitoring would be reported to the general public.

#In recent years and in forums ranging from the state capitol to the South Fork Clearwater River itself, suction dredgers have publicly argued that suction dredging does not harm rivers or the fish within them. The EA affirms that allowing regulated suction dredging would have no impact on the total amount of sediment in the South Fork Clearwater River – and would have only slight consequences for fish and wildlife, which would be further limited by the shortness of the open season and the smallness of the open area.

Laura A. Smith
Public Affairs Specialist/Web Manager
Forest Service
Nez Perce-Clearwater National Forests
p: 208-983-5143
lasmith02@fs.fed.us
104 Airport Road
Grangeville, ID 83530
www.fs.usda.gov/nezperceclearwater

Caring for the land and serving people

ERX= 6

From: Kenney, Dan -FS
To: Staaf, Norma -FS
Cc: Hughes, Clinton E -FS
Subject: RE: NEPA for suction dredging POOs
Date: Wednesday, February 11, 2015 9:30:51 AM
Attachments: image001.png
image002.png
image003.png
image004.png

Thanks, Norma. I have looked at the Moose/Lolo EIS, and have reproduced the relevant parts of the relevant section below:

1.2 Need for an EIS

The Forest Service has a responsibility to manage surface impacts from mining activities on National Forest System land.

Following the 2001 mining season, the CNF initiated the process of consulting, under Section 7 of the Endangered Species Act, with NOAA and USFWS concerning the effects of small-scale suction dredging on these threatened species in Lolo Creek and Moose Creek. Consultations have been completed, but the Forest has not approved any Plans of Operation for dredging in Lolo Creek or Moose Creek, and no dredging has occurred since the 2001 mining season. Because of the concerns for ESA listed species, the Forest decided to conduct an EIS to assess the impacts to those species.

In a 2008 Biological Assessment (BA), Forest determined that suction dredging was "likely to adversely affect" steelhead trout, but was "not likely to adversely affect" bull trout in Lolo Creek. The Forest determined that suction dredging was "likely to adversely affect bull trout" in Moose Creek. In their respective 2009 and 2008 Biological Opinions, NOAA and USFWS agreed with the Forest Service's determinations. Both agencies concluded that suction dredging would not jeopardize the continued existence of either species. Each agency's Opinion included incidental take statements with non-discretionary reasonable and prudent measures to avoid or minimize take, and mandatory terms and conditions to implement those measures. In Chapter 2 of this EIS each agency's reasonable and prudent measures, terms and conditions, and recommendations discussed in the Forest's 2008 Biological Assessments for Lolo Creek and Moose Creek are consolidated into 30 design features.

The highlighted sentence is the only text in this section which says "because." Assuming there aren't hidden "becauses" then I don't see why we would have to do an EIS for Orogrande/French or the South Fork because: a) we would be completing the same sort of ESA consultation which would both avoid jeopardy to the ESA-listed species and which would include measures to avoid or minimize take, b) we have already done an EIS on suction dredging that demonstrated that effects on both steelhead and bull trout and CH would be minimized and that the expert agencies who administer the ESA agree with us, and c) because we do EAs all the time that include either NLAA or LAA effects on listed fish and CH (recent example: Collette Mine is an LAA for SH and an EA). I would also point out that the Orogrande/French mining is an NLAA, so it might make sense to do separate EAs for O/F and the South Fork.

Thanks for looking into this.

Dan

U.S. v. GODFREY

No. 2:14-cr-00323 JAM.

112 F.Supp.3d 1097 (2015)

The UNITED STATES of America, Plaintiff-Appellee, v. John E. GODFREY, Defendant-Appellant.

United States District Court, E.D. California.

Signed June 4, 2015.

Attorney(s) appearing for the Case

Peter Michael Mularczyk, U.S. Attorney's Office, Sacramento, CA, for Plaintiff-Appellee.

Linda C. Harter, Rachelle Barbour, Federal Public Defender's Office, Sacramento, CA, for Defendant-Appellant.

ORDER AFFIRMING IN PART AND REVERSING IN PART DEFENDANT'S CONVICTIONS

JOHN A. MENDEZ, *District Judge.*

This matter is before the Court on Defendant John Godfrey's ("Defendant") appeal from his conviction on three counts following a trial before Magistrate Judge Kendall Newman (Doc. # 36). With leave of the Court, The New 49'ers Legal Fund ("Amicus") filed an amicus curiae brief (Doc. # 38). Oral argument was held before the Court on June 2, 2015. For the following reasons, Defendant's conviction is affirmed in part, and reversed in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from Defendant's gold mining operation on the Lucky Bob Mining Claim in the Tahoe National Forest. Doc. # 32, Reporter's Transcript, Day 1 ("RT1") at 1-224. The Lucky Bob claim is a placer claim, which means that gold was found within gravels or sedimentary deposits, rather than in hard rock or quartz. RT1 at 1-42. Because the Lucky Bob claim is unpatented, the United States Forest Service retains jurisdiction to manage the non-mineral surface resources on the land. RT1 at 1-42. During the relevant time period, Defendant had received permission from the holder of the Lucky Bob claim to mine the claim. RT1 at 1-224. As detailed below, Defendant took a number of actions to improve land and trails on the claim. RT1 at 1-50-1-

489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of

[112 F.Supp.3d 1104]

the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.").

Defendant argues that "[w]hen the magistrate judge explained his determination that Mr. Godfrey was guilty of Count Three, he concluded that there had been damage to trees and brush, but did not refer to the rocks." Reply at 8-9. This argument is belied by the record. In addressing the evidence "as to each individual count," the Magistrate Judge concluded that significant resource disturbance had occurred, pointing, in part, to "the breaking up of boulders, and using chains and using a drill to do so[.]" RT2 at 2-49. This factual finding was supported by the testimony of Nicholas Shope (RT1 at 1-121). Defendant's conviction on Count 3 is therefore affirmed.

3. *Count 4*

In Count 4, Defendant is alleged to have violated 36 C.F.R. § 261.10, which prohibits "constructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure, communication equipment, significant surface disturbance, or other improvement on National Forest System lands or facilities without a special-use authorization, contract, or approved operating plan when such authorization is required." 36 C.F.R. § 261.10(a). As discussed above, Defendant's mining operation caused significant disturbance of surface resources. Moreover, much of Defendant's activity was in service of creating a "new trail" to access his mining claim. RT1 at 1-54. As Defendant's unauthorized trail work constituted a significant surface disturbance, and he failed to obtain an approved plan of operations, this work was in violation of 36 C.F.R. § 261.10(a). Accordingly, Defendant's conviction on Count 4 is affirmed.

4. *Count 5*

In Count 5, Defendant is alleged to have violated 36 C.F.R. § 261.11, which prohibits "[p]lacing in or near a stream, lake, or other water any substance which does or may pollute a stream, lake, or other water[.]" 36 C.F.R. § 261.11(c). Defendant argues that his conviction on this count must be reversed because "[p]utting materials from the creek back into the creek does not constitute the `placing' of a `pollutant' into the creek." Opening Brief at 17. Defendant cites language from a Supreme Court case concerning the Clean Water Act: "If 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." Opening Brief at 16-17 (citing *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004)). Defendant contends that the evidence offered at trial shows that he "did not introduce pollutants such as chemicals, oils, outside dirt, other liquids, or trash into Poorman Creek." Opening Brief at 17. The Magistrate Judge appeared to acknowledge as much during the second day of trial: "We know he was breaking up rocks. We know he was pouring some chemicals, whether non-toxic or otherwise, but there wasn't any evidence that I'm aware of that any of those broken up rocks or chemicals ended up in the creek." RT2 at 2-44 — 2-45.

At trial, the Government presented the testimony of Jeff Huggins, a water control engineer for the Central Valley Regional Water Quality Control Board in Rancho Cordova. RT1 at 1-161. Huggins was accepted by the Court as an expert witness. RT1 at 1-163. Huggins testified that he personally observed mining wastes in Poorman Creek, downstream of Defendant's mining operation. RT1 at 1-171. When asked to define "mining wastes,"

[112 F.Supp.3d 1105]

Huggins noted that it is "a very wide definition" which includes "the process fluids, the process solids, the overburden... the sand, silts, and clays, gravels, coarser grain fraction, overburden waste rock, processing fluids, processing solution." RT1 at 1-174. However, Huggins did not define any of these terms, and only testified that he personally observed "sands, silts and clays and bottom deposits" in Poorman Creek "downstream of the operation." RT1 at 1-171. Huggins further testified that the location of Defendant's mining operation was "all within the high water mark within the flood plain of Poorman Creek, so the mining activities are being conducted within the normal high water mark of Poorman Creek." RT1 at 1-170. Huggins testified that both "sediment" and "mining waste" are "pollutant[s]." RT1 at 1-173. Of course, this final piece of testimony is a legal conclusion, and does not aid the Court's ultimate analysis.

In finding Defendant guilty of violating 36 C.F.R. § 261.11(c), the Magistrate Judge noted that Defendant's operation presented "something very different" than "removing a ladle of soup and putting it back in the soup pot." RT2 at 2-50. The Magistrate Judge reasoned that it differed from the "one ladle of soup" example:

> not only because of the trench, but again, the government also did present expert testimony in terms of the impact by the defendant here. This is not someone speculating well, you've moved some small amount through your mineral and we think this may be harming. There is a reason why these basins to — water's such a precious resource here, and when it's flowing into other rivers and it's affecting usage for people, farms, agriculture, habitat and while I recognize water flows will vary during high water months and low water, and rain and snow melt, again we've been in a drought here, it is very easy looking at the photographs to realize the significant impact that the defendant had on Poorman's Creek through damming, blocking, altering that creek.
>
> RT2 at 2-52 — 2-53.

Accepting the evidence at trial in the light most favorable to the Government, the Court finds that these factual findings are supported by sufficient evidence. Specifically, Defendant's mining operations resulted in the addition of "sands, silts and clays and bottom deposits" into Poorman Creek downstream of the operation. Additionally, the evidence supports the Magistrate Judge's factual finding that these additions could have a significant effect on larger ecosystems. *See* RT1 at 1-177 (testimony of Jeff Huggins that the "beneficial uses" of Poorman Creek include "domestic and municipal water supply, agricultural water supply, power supply, recreation, esthetics [sic], fish and — fish and wildlife habitat, spawning").

However, the legal issue of whether the release of materials found within the high water mark of Poorman Creek constitutes "placing a pollutant" into the creek remains. As this is an issue of statutory construction, the Court's review is *de novo*. *United States v. Montes-Ruiz*, 745 F.3d 1286, 1289 (9th Cir.2014).

As an initial matter, the structure of 36 C.F.R. § 261.11 is informative. The subsection is labeled "Sanitation" and 36 C.F.R. § 261.11(c) is surrounded by

prohibitions on (1) depositing in a toilet or plumbing fixture a substance which could interfere with its operation; (2) leaving refuse, debris, or litter in an unsanitary condition; (3) failing to properly dispose of all garbage; and (4) improperly dumping refuse, debris, trash, or litter. 36 C.F.R. § 261.11(a)-(e). Thus, the provisions surrounding 36 C.F.R. § 261.11(c) lend support to Defendant's argument that "any substance which does or may pollute" must

[11

be a foreign substance, not a substance which is already found within the high water mark of the river.

Although "pollute" is not defined within Part 261, the dictionary definition of "pollute" is instructive. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1319 (Fed.Cir.2005) (noting that "dictionaries, encyclopedias and treatises are particularly useful resources to assist the court in determining the ordinary and customary meanings of [relevant] terms"). The Merriam-Webster Dictionary offers two definitions of "pollute:" (1) "to make physically impure or unclean;" and (2) "to contaminate (an environment) especially with man-made waste." As with the structure of the regulation, these definitions suggest that "placing any substance which does or may pollute" necessarily entails the introduction of a foreign substance, possibly even a man-made substance.

Returning to the Supreme Court's "one ladle of soup" example, the Court agrees that the present case is not closely analogous. *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004). Defendant did not merely remove water from one location in Poorman Creek and return that same water to another location in Poorman Creek. Rather, he diverted the water through his mining operation, and returned it, along with "sands, silts and clays and bottom deposits" to Poorman Creek, downstream of his operation. However, as noted by the Magistrate Judge and as emphasized now by Defendant, the entire mining operation occurred beneath the high water mark of Poorman Creek. Importantly, there is no evidence that any foreign substance (such as a chemical) was introduced to Poorman Creek. *See* RT2 at 2-44 — 2-45 (the Magistrate Judge, noting that "there wasn't any evidence that I'm aware of that any of those broken up rocks or chemicals ended up in the creek"); *see also* RT1 at 182 (testimony of Huggins, noting that "chemicals getting into the water" was "not the major concern in this case"). In this sense, a more apt analogy may be that of a bowl of cereal. At its low point, Poorman Creek is much like a bowl of Cherrios with very little milk in it, with a number of Cherrios pieces "stranded" up on the sides of the bowl. Filling the bowl with milk releases those "stranded" Cherrios pieces back into the milk, but nothing foreign has been added to the bowl. Similarly, Defendant's operation merely released sediment that was already part of the creek-bed back into the creek. As testified to by Jeff Huggins, this activity may have a caused a significant effect on Poorman Creek and those ecosystems which rely on it. RT1 at 1-177. Indeed, as discussed above, Defendant has been properly convicted of causing an unauthorized significant disturbance to surface resources. However, the Government's evidence was insufficient to sustain Defendant's conviction under 36 C.F.R. § 261.11 for *polluting* the creek. Accordingly, Defendant's conviction on Count 5 is reversed.

as per the 6th + D.C. circuit Dec. re "outside world"

5. *Notice*

The New 49'ers Legal Fund ("Amicus"), as amicus curiae, argues that the Forest Service's failure to give Defendant formal notice of his violations runs afoul of both the regulatory framework of 36 C.F.R. § 228.1 et seq., as well as broader constitutional principles of due process. Amicus Brief at 7, 13. With regard to the regulatory framework, Amicus argues that Part 228 places the burden on the Forest Service to conduct inspections of all mining operations within the National Forest System, and to give formal notice to individuals that their operations are in violation of the regulations. Amicus Brief at 7. Because Defendant never received a formal "notice of noncompliance" under 36 C.F.R.

[112 F.Supp.3d 1107]

§ 228.7, Amicus argues that cannot be prosecuted under Part 261. Amicus Brief at 7. Practically, as the Magistrate Judge observed, this approach would make little sense: miners would essentially be immune from prosecution under Part 261 for any mining-related activity, regardless of its severity, as long as the operations were conducted before a Forest Service officer learned of the violation and gave formal notice. RT1 at 1-191 ("The Court: ... If he went out and clear-cut 20 acres, pushing a backhoe and bulldozer, would your position be that you can't cite him for that, you haven't given him a notice of non-compliance? [Defense Counsel]: Yes"). Such a policy would provide little incentive for prospective miners to submit either a notice of intent to operate or plan for approval of mining operations, as required by 36 C.F.R. § 228.4(a), and would provide a perverse incentive of immunity from prosecution to miners who could avoid detection by the Forest Service.

More importantly, this argument fails because of the structure of 36 C.F.R. § 228.1 et seq. Prior to any mention of notices of noncompliance, 36 C.F.R. § 228.4(a) provides that "a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources" and that "[s]uch notice of intent shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted." In a subsequent subsection, titled "Inspection, noncompliance[,]" the regulations provide that "Forest Officers shall periodically inspect operations to determine if the operator is complying with the regulations in this part *and an approved plan of operations*." 36 C.F.R. § 228.7(a) (emphasis added). The regulations go on to provide that, "[i]f an operator fails to comply with the regulations or *his approved plan of operations* ... the authorized officer shall serve a notice of noncompliance upon the operator[.]" 36 C.F.R. § 228.7(b). Given the structure of Part 228, and the specific references to "an approved plan of operations," this subsection must be read as requiring periodic inspections and notice of noncompliance *subsequent* to the submission of a notice of intent to operate, and the receipt of an approved plan of operations by the miner. As Defendant did not submit the requisite notice of intent to operate, nor did he obtain an approved plan of operations, 36 C.F.R. § 228.7 is not applicable and the Forest Service was not obligated to provide him with a notice of noncompliance prior to citing him for violations of Part 261.

With regard to Amicus' constitutional due process challenge, the Court need not determine whether citing a miner under Part 261 — without giving prior actual notice that he was in danger of violating the regulations — runs afoul of due process. Reply at 13. At trial, David Brown, a minerals administrator with the Forest Service, testified that, on April 2, 2013, he received a phone call from Defendant, during which he informed Defendant that "he would need a plan of operations" because his mining "activities might be causing significant surface disturbance and that would require a plan of operations." RT1 at 1-31. Brown also testified that Defendant had informed him that he would stop work at his mining site until he had contacted the appropriate Forest Service personnel. RT1 at 1-32. While testifying, Defendant himself acknowledged that this phone call occurred, although he did not remember the substance of the conversation. RT1 at 1-249. Thus, even without a formal notice of noncompliance, Defendant was on actual notice that a notice of intent to operate was required, and that continued operations were improper. Amicus proposes an "as applied" constitutional challenge, and the Court need not consider the constitutional implications of a counterfactual case

[112 F.Supp.3d 1108]

in which no notice was provided. *Acosta v. City of Costa Mesa*, 718 F.3d 800, 821-22 (9th Cir.2013).

ERX = 8

Rebuttal of Initial Decision and Order date 10-7-2020

First ,I would like to make note that in the entire order no cross-examination testimony was presented by the court, even though such testimony would to a large degree exonerate the defendant in this matter. I will attempt to go through the document and I will point out different viewpoints not mentioned.

Under part A the ALJ states in a general permit authorization to discharge require written notice from the EPA. This is a moot point considering Erlanson never received a general permit. Erlanson applied as instructed by the Idaho letter permit(enclosed) on May 17th and was notified approximately three months later on August 14 ,2015. In this letter, it stated that I could apply for an individual permit. **THERE WAS NO PERMIT AVAILABLE FOR SUCTION DREDGING IN 2015 ON THE SOUTH FORK CLEARWATER RIVER IDAHO CONSIDERING THE APRIL 1 APPLICATION DATE FOR SAID PERMIT. REMEMBER ERLANSON, RESPONDENT IS A CITIZEN OF IDAHO AND AS SUCH HAS IDAHO CONSTITUTIONAL RIGHTS. ERLANSON HAD A LEGAL IDAHO PERMIT IN HIS POSSESSION SO WHO HAS THE JURISDICTION HERE?**

Hughes testimony

SEE ERX=11 ATTACHED

Hughes estimated the plume at over 220+ feet;.much discussion about the legality of this distance ensued. The bottom line is that the EPA expert witnesses did not know the legal distance that being 500 feet mixing zone. Mr. Hughes materially interfered with the respondent's business of mineral extraction without written authorization from the Red River district ranger(see F.L.I.P.M.A. 1976) ,clearly a violation of the federal statute. Attorneys for the EPA bring up the fact that Erlanson did not have an individual NPDES permit while withholding the time frame needed and the costs involved to obtain such a permit ,to the court. However, when one looks at the federal register final issuance dated April 4th, 2013 for general NPDES Permits for Small Suction Dredges in Idaho one does not see any mention of a need to obtain an individual permit for the South Fork Clearwater river. Nor in the final modification dated in December of 2013 is there a mention in the federal register of the South Fork of the Clearwater river **NOT** having permit availability !

Daniel Kenny testimony

In the decision, the A.L.J. states that respondents stipulated that he indeed created hole number 5 and number 7 this is a false statement(Erlanson) respondent stated that he BEGAN hole number 5 and tailings number 7 but did not finish. Under cross-examination which A.L.J. failed to mention Mr.Kenny when asked by respondent whether any witness so far in the proceeding had any proof that I finished hole number 5 and tailings number 7 along with any other holes in the area, Mr. Kenny's answer was no! Also under Kenny the EPA's 800 foot rule was mentioned which is an impairment and deprivation of Private property afforded due process protections under the fifth amendment AS A FEDERAL MINING CLAIM IS CONSIDERED TO BE PRIVATE PROPERTY ,THEREFORE A CONSTITUTIONAL ISSUE HERE ![SEE ADAMS V WITMER]

Arthaud testimony

Mr. Arthaud testified that S.F.C.R. has a high sentiment amount which is due to historic mining operations. Any regulatory program such as T.M.D.L. are in direct violation of Idaho code title 39 chapter 3611(3). Mr. Arthaud discussed at length his opinions without scientific proof to substantiate them. When the respondent questioned him to as specific studies that he may or may not have been aware of the respondent was denied(procedural due process concern).

Tara Martich

Of great concern with her testimony was the fact that Ms. Martich did not know the proper enforcement process to be followed by the EPA (see 33 U.S.C. at 1319 section A and B) respondent contends that as a citizen of Idaho Jurisdiction of this matter was to be held in the district court(see 28 U.S.C. at 1331).(Also see Title 16>Chapter 2>Subchapter 1> Section 480)(Also see Idaho statute title 42-3811)[enclosed.] Further in her testimony Ms. Martich was questioned about the degree of willfulness .She stated that she upped the penalty by 20%. I suggest to the court they look at U.S. vs Bishop 346 "If you've relied on prior decisions of the supreme court you have a perfect defense for willfulness" I will mention briefly here the two S.C.O.T.U.S. cases I rely on 1) Los Angeles County Flood Control District v. Natural Resources Defense Council 2013. 2) South Florida water management District v. Miccosukee Tribe of Indians 2004. The take away here is in line with the EPA own Clean Water Rule which states the C.W.A. permit is only needed if W.O.T.U.S. are going to be polluted or destroyed. No NPDES permit, is needed for W.O.T.U.S. as containing pollutants or are polluted waters(see I.D.E.Q. Intergrated water report sections 4a and 4c) these sections unambiguously show the S.F.C.R. as containing pollutants and in fact is a polluted water body. Ms. Martichs testimony also discusses sediment and suspended solids as interchangeable entities this is an erroneous statement. Sediment and suspended solids are not listed in section 502 of the Clean Water Act as source point pollutants conversely both are listed as non-point pollutants not regulable under a 402 N.P.D.E.S. permit. They are under the control of the state therefore this case should be dismissed for not only lack of credibility but of jurisdiction in the matter. As our brief has stated but was ignored by this court. Ms. Martich testimony references a letter dated to respondent in October 2014 but that letter does not state that there will be no general permit available for S.F.C.R. in 2015 Ms. Martich also agreed with the respondent that the I.D.W.R. letter permit for 2015 stated that the EPA required an N.P.D.E.S. general permit by the EPA there was no other language or information to otherwise oblige an Idaho citizen to apply for any other permit in 2015 that he had no knowledge of as per the federal register .

I am also forwarding to the E.A.B. respondents post-trial brief(penalty phase) to further show inconsistencies, irregularities with the A.L.J. decision dated October 7th 2020.

4 copies

ERX=9

Reports consistently find no actual impact of consequence on the environment, and so almost always fall back to the position that the potential for impact exists (USACE, 1994). The majority of dredge operations studied did not work long periods or disturb large areas of the streambed (Hassler, 1986). The unmodified dredge moved about 2% of the manufacturer's maximum rating (Griffith, J.S. and D.A. Andrews,1981). When done properly, legal dredging must be allowed by law and environmental effects are acceptable (USDA, 1997).

Yes, there was No actual impact of consequence to the environment and without regulating the timing of the activity or the dredge nozzle size (section k). The regulations for both should not be changed from the previous 1994 permit regulations. Also in section K you attempt to regulate the storage and use of fuel, oil. These are expensive commodities that a miner would be very careful to conserve and protect. Being required to store them such a long distance away is not only a nuisance to get your work done but unsafe. Having a containment system close at hand in all circumstances would be the best practice. Attaching some type of rig to capture the full capacity of fuel is not even available to my knowledge and is not necessary. A drip pad could easily be rigged up to catch any accidental over flow.

Section (k) implies that silt and clay material should not be disturbed but again there is no evidence that this is a significant problem. Duration, intensity and mixing zone are the primary factors to consider.

DURATION, INTENSITY, and MIXING ZONE

Persistent long term sediment sources have been shown to be the most detrimental to fish and fish habitat with low gradient streams being more vulnerable to irreversible clogging than high gradient streams (Chamberlin 1982). There is evidence suggesting that most western United States salmonids have evolved in systems that periodically experience short-term (days to weeks) elevated TSS/turbidity events (winter runoff, spring storms and floods) and are adapted to periodically elevated TSS exposures without adverse effects. (CH2M Hill 2000). Experiments of Dr. Griffin have shown that young fish live well up to 30 days in good water mixed with an amount of natural soil materials from two to three times as large as the extreme load of the materials contributed to the Rogue River by maximum conditions produced by placer mining (Ward 1938).

Newcombe and Jensen 1996, pointed to several important factors that must be considered when studying the effects of TSS on fish. The frequency and duration of the exposure, not just the TSS concentration, must be considered. They cautioned that adverse effects can become more pronounced with increased TSS concentrations and longer exposure durations in aquatic systems where elevated TSS conditions occur infrequently. In a system where elevated TSS conditions occur more frequently, fish can become acclimated to higher TSS levels and adverse affects can be less pronounced or nullified Newcombe (2003). Moyle's observation in 1982 showed support for this theory indicating that "fish and invertebrates apparently, were not highly sensitive to dredging in general, probably because streams studied naturally have substantial seasonal and annual fluctuations in flow, turbidity, and (on a local scale) substrate."

The California Department of Fish and Game (CDFG) had it right when they presented their findings at the CDFG PAC meetings that the regulation of 6 hours a day does not imply. CDFG regulations should reflect scientific finding in preparing the SEIR., turbidity created from suction dredge operations have insignificant impact on water quality is not a concern as part of the current or proposed permit requirements (Stopher, 2010).

Small scale suction dredging effects are less than significant, miners can employ the following three best management practices (BMP) to ensure there is no detrimental effect to fish. This could further aid in reducing any effects and improving water quality.

1) The duration of a turbidity plume within a 24-hour work period (Time in stream);

2) The intensity of the plume or degree of exposure [measured in Turbidity units (NTU)]; and,

3) Short term exceedance of water quality limits created by allowing an adequate mixing zone.

It takes approximately 24-hours, according to the studies cited above, for minor effects in fish to occur at turbidity levels most frequently identified. Mining occurs over short time periods of less than 24 hours (limited duration). Taking into account results of numerous scientific journal articles (which show suction dredging does comply with being below the recognized exposure threshold of 30 NTU at 500 feet), regulating turbidity based simply on duration of an in-stream work period makes sense. As previously stated the easiest approach would be to limit duration of in-stream suction dredging to the 1994 regulations allowing 1/2 hour after sunrise to sunset. The miners would be able to comply and still more than adequately meet water quality criteria not detrimental to fish and regulating compliance would not be cost prohibitive.

PENALTY PHASE

Suction dredging is the Best Management Practice which includes many benefits to the environment and should be allowed without restrictive and unnecessary regulations. Miners I have talked with are open to improving the environments they work in and they do as they remove mercury, lead, and trash from our waterways that no other group of citizens can accomplish. Excavations from dredging operations 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 (Nielsen, 1994), especially in California where cold water refugia is at a premium.

I think that it is always important when defining new regulations that will effect so many to remember the fact that many individuals depend on suction dredge mining as their only income and for many more it is a necessary supplement to their income. According to the bulk of research out there suction dredge mining is insignificant and can produce beneficial results if allowed. Over regulation is not proactive regulation it is just wrong.

Sincerely,

Claudia Wise

U.S.EPA, Retired
Physical Scientist/Chemist

Idaho Dept of Water Resources SFCK Regs: EFX-11

14. There shall be no observable turbidity plume extending beyond 500 linear feet downstream of a suction dredge. This limit applies even where multiple suction dredges are operating at the same time and in the same vicinity; the combined turbidity plume shall not exceed 500 linear feet.

NOT AS STATED BY ALJ in order + dec. October 7, 20.

15. No mechanized equipment shall be operated below the mean high water mark except for the suction dredge and any life support system necessary to operate a suction dredge.

16. All fuel, oil, and other hazardous materials shall be stored outside of the stream channel in containers approved by ANSI or UL for storage of the materials. Equipment that leaks fuel, hydraulic fluid, or other pollutants shall not be operated in the stream channel. A funnel or spill proof spout shall be used when refueling and absorbent material, sufficient to absorb a spill, shall be placed around the fuel tank opening when refueling. Petroleum absorbent spill kits of suitable size to handle combined fuel volume of all fuel storage containers shall be onsite in case of accidental spills and no petroleum products shall enter the stream when servicing the equipment.

17. Hazardous and deleterious materials shall not be stored, disposed of, or accumulated adjacent to or in the immediate vicinity of stream channels unless adequate measures and controls are provided to ensure that those materials will not enter stream channels. Mercury, cyanide, or any other hazardous or refined substance shall not be used to recover or concentrate gold adjacent to or in the immediate vicinity of stream channels.

18. Dredge mining equipment shall not house invasive species. When required, equipment must be decontaminated prior to placement in the stream channel. Decontamination procedures may be found at: http://www.deq.idaho.gov/media/457155-decontamination_procedures.pdf

19. Dredge mining equipment shall not be operated within 500 feet of a developed campground.

20. Dredge platforms, in-stream concentrators, or free standing sluices shall be secured without stringing wire, cable, chain, or ropes across the stream channel.

21. This permit does not constitute:
    a. An easement or right-of-way to trespass or work upon property or mining claims belonging to others; or
    b. Responsibility of IDWR for damage to any properties due to stream channel alterations.

22. This permit may be canceled at any time to minimize adverse impact on the stream channel.

Dredge mining under this permit is limited to those locations delineated on the attached aerial imagery and photographs.

Conditions and construction procedures approved under this permit may not coincide with the proposal as submitted. Failure to adhere to conditions as set forth herein can result in legal action as provided for in Section 42-3809, Idaho Code.

If you object to the decision issuing this permit with the above conditions, you have 15 days in which to notify this office in writing that you request a formal hearing on the matter. If an objection has not been received within 15 days, the decision will be final under the provisions of IDAPA 37.03.07 (Rule 70).

Please contact Aaron Golart 208-287-4941 or aaron.golart@idwr.idaho.gov if you have any questions regarding this matter.

Sincerely,

Aaron Golart
State Coordinator
Stream Protection Program

cc: Jerry Zumalt, Idaho County, Grangeville
John Cardwell, Idaho Department of Environmental Quality, Lewiston
Zach Swearingen, Idaho Department of Fish and Game, Lewiston
Ian Bridges, Idaho Department of Lands, Kamiah
Doug Jones, Idaho Department of Water Resources, Coeur D'Alene
Marty Jones, Nez Perce-Clearwater National Forest, Grangeville
Derrick Bawdon, Nez Perce-Clearwater National Forest, Kamiah
Greg Martinez, US Army Corps of Engineers, Boise
Lisa Kusnierz, US Environmental Protection Agency, Boise
Amanda Rogerson, Nez Perce Tribe
Ken Troyer, NOAA National Marine Fisheries Service
Jonathon Oppenheimer, Idaho Conservation League
Gary McFarlane, Friends of the Clearwater

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Opening Remarks for Hearing EPA Docket CWA-10-2016-2019

1. Foremost I would like to thank the Court for its time and coming to the beautiful state of Idaho!

2. I understand that at this hearing I have the opportunity to present testimony as a witness on my own behalf. That I may call a witness to testify in my defense.

2. Today, I'm not ready to defend myself and will not testify on my behalf nor call any witness for the defense in this matter before the Court!

3. I respect the Courts decision that this hearing ~~deals~~ is to deal solely with the penalty phase as I was found guilty of violating 33 USC § 1311(a) approximately 8 months ago on Sept 27, 2018 by Order

of this Court!

4. For the record, I maintain that on July 22, 2015, I was lawfully engaged in a suction dredge actively on my Federal Mining Claims located on the South Fork Clearwater River, ~~Idaho~~ County, ~~Idaho~~! These claims are named Payday 2 and 3.

~~At~~ that time, I was in possession of an Idaho Dept of Water Resource permit to operate my suction dredge ~~or~~ legally within the waters known as the SFCR.

There was no other permit ~~avail-~~ able to me given the 6 month waiting period ~~for~~ and prohibitive cost of a ~~the~~ federal permit! I did apply, however for a Federal NPDES permit in 2015! and was denied

mentioned in pleadings!

of this very Court!

H. For the record, I maintain that on July 22, 2015 I was lawfully engaged in an activity using a suction dredge which Had a 5" nozzle capacity and considered "recreational" because of the nozzle size. This activity was located on one of my Federal Mining Claims located in Idaho County Idaho on the the South Fork Clearwater River. The claims are named HAYDAY 2 and 3!

At this time, I was in possession of an Idaho Dept. of Water Resource 2015 Idaho Recreational Mining Authorization (Letter Permit which legally allows me to operate a 5" nozzle size dredge or smaller within the inetted perimeter of the South Fork Clearwater River.

Furthermore, because of the excessive wait period and prohibitive cost, 180 days and between $530.00 to several thousand respectively No other permit, namely an Individual Permit was available to me on July 22, 2015 as I had recieved notice on August 14, 2015 that I, in fact, could apply for an Individual NPDES permit As my application for a Gene Permit was denied on that date

the lawful dredging season on the South Fork Clearwater River for the 2015 season was from July 15 to August 15 therefore I was notified one day before the close of the season!

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5. Lastly, Counsel for the EPA Date Sept 27, 2018 has suggested in an Accelerated Motion a penalty in the amount of $600.00 I believe this to be an excessive amount and feel it is only fairness under equal justice that this Court entertain an amount similar to other penalties assessed to anyone of the 2 dozen or dredgers not in possession of an NPDES permit for the SFCR in 2015 (also years 2014, 2013.) Of note (Malecious Prosecution) is the fact that the NPDES permit process of 2013 allowed for 15 suction dredge permits on the SFCR!

Respectfully Submitted I now conclude my opening statement!

God Bless This Court this Country and the principles of Liberty and Justice for All!

DAVE

ERX=15

Blue dredge = ERLANSON / Respondent's

ERX=15

other dredge plume is ROBERT Rice

Amount of fine = 3500.00 for Rice // 6,600.00 for Erlanson

Clearly, a travesty of justice under the 8th Amendment!

No equality under law = 9th Amendment!

Certificate of Service

I certify that the foregoing Respondents Exhibits ERXH-15 were sent to the following parties on Monday November 30 by USPS overnight mail, return receipt!

Dave Evans

1. Mary Angeles, Hearing Clerk
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2. USEPA Appeals Board 'Clerk'
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