

5<sup>th</sup> Amendment

6

ERX = 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 — You're guilty unless you prove yourself innocent (from CWA paper)

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.

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.
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.
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.
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.