Service for: Evidences in support of motion to dismiss, brief entered under 309(g) 4 (B) evidences deemed exculpatory

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In front of the EPA, an administrative agency with Territorial jurisdiction

In the matter of: Evidences in support of motion
Dave Erlanson sr, to dismiss, a brief under 309(g)
(4)(b) evidences deemed
exculpatory
Respondent

Due process, and Territorial management and regulation jurisdiction

In 1897 the Organic administration act extended private rights and privileges and immunities of state citizens into the National Forests.

> "The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State".

It is the duty of the citizen to recognize the laws of the federal government and the protections it has given each party to whom legislation and the Constitution apply. In the case of Territories the doctrine in *Downes v Bidwell* is the controlling law and we consult it to determine how the SCOTUS will rule on a Territorial matter;

> *1. That the District of Columbia and the territories are not states within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states;*
> *2. That territories are not states within the meaning of Rev.Stat. sec. 709, permitting writs of error from this Court in cases where the validity of a state statute is drawn in question;*

3. That the District of Columbia and the territories are states as that word is used in treaties with foreign powers with respect to the ownership, disposition, and inheritance of property;

4. That the territories are not within the clause of the Constitution providing for the creation of a supreme court and such inferior courts as Congress may see fit to establish;

5. That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully

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provide for such trials before consular tribunals, without the intervention of a grand or petit jury;

6. That where the Constitution has been once formally extended by Congress to territories,neither Congress nor the territorial legislature can enact laws inconsistent therewith.

We are currently concerned with the 6th point of the doctrine where a provision has been extended and cannot be withdrawn, in this case private rights and privileges and immunities. And so apparently it falls to the citizen to draw those lines of distinction and jurisdiction that allows this doctrine to accomplish the task to which it was initiated by the honorable court in the Downes case as it seems the lower courts have forgotten that a Territorial jurisdiction resides side by side with an Article 3 jurisdiction, or have they?

[we refer the court to FRCP Rule 1: Scope portion of the rules (2) 2. The expression "district courts of the United States" appearing in the statute authorizing the Supreme Court of the United States to promulgate rules of civil procedure does not include the district courts held in the Territories and insular possessions. See *Mookini et al. v. United States*, 303 U.S. 201, 58 S.Ct. 543, 82 L.Ed. 748 (1938)]

So if we are to understand our situation better we would need to find out whether or how due process of law operates in said Territory (South fork of the Clearwater river on federally managed ground). It has become apparent that agencies of the Federal government have been operating under the assumption that the Constitution (for all intents and purposes) does not apply, under the Downes doctrine, to Territories. As we can see that is an erroneous assumption based upon point 6 of the doctrine and the Organic administration act, what WE are here to discuss is what is the EXTENT to which private rights and due process are operable and under what conditions does a violation occur leaving an agency vulnerable to tort or a citizen to punishment under the law?

The arguments relied upon by the EPA amount to an opinion that the language regarding dredge spoil, pollution, point source, discharge into etc are all settled

matters of law, we believe this paper we have submitted which demonstrates the ever changing and morphing meaning of these words allows for a predatory use of the Chevron doctrine and that this scheme is at its heart a willful and blatant attempt to violate the citizenry's due process, after all if the citizen cannot rely upon standard meanings of legislative terms employed in the law how can the citizen then be expected to obey the law? We will show that this matter and many others like it create a compelling national interest falling well within a 'federal question' mandate.

So we must ask, "Does the Federal governments rights override the citizens rights in the matter at hand"? We are of the opinion that the rights of each party are well documented and also well represented by the United States Supreme Court. Lets list the citizens rights;

- Amendments 1-9
- Legislative rights ie, mining, fishing, hunting, logging, ranching etc
- Due process of the above rights

The Organic administration act sets the foundation for the future association between the citizens, the state and the federal government within forested reserves and also stipulates the intent of Congress as to appropriation and land use designation.

"No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing ***'favorable conditions of water flows'[Kansas v Colorado 206 US 46, 87, 89 (1907)]****, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes".*

We believe there is a body of case law which deals with the designation of lands and the maintaining of that designation until the land can no longer be used for the designated purpose which we will not include here as the matter here is of a different character.

And so we can condense these objects for further clarity;

- The federal government maintains jurisdiction of all (public lands hereafter Territories) Territories and with regard to forest reserves and has extended private rights and privileges and immunities into them which cannot be revoked. This means the due process rights of citizens is also extended and cannot be repealed.

- The parameters of due process are matters of settled law; notice and opportunity to be heard, process of service, substantive due process including protection against predatory practices and arbitrary actions of government employees and procedural due process (different for Administrative courts).

This citizen will not bother taking up the rights of the agency and the federal government as we believe the government is well represented and can do so itself, we are concerned with the legal boundaries between the parties so that we can determine if any of the parties crossed a legal boundary creating a violation of either law (citizen) or a violation of due process (EPA).

Legislative rights

"In the Territories Congress has the entire dominion and sovereignty, national and local, and has full legislative power over all subjects upon which a state legislature might act". Constitution (encyclopedia) of the United States of America revised and annotated, 1952.

When a citizen enters onto the public lands he enters into a Territory and the rules suddenly change. The citizen does not know the rules suddenly change and has never been notified DIRECTLY of such and so he/she believes that while such legislation such as the CWA, Organic administration act, etc, go hand in hand with the normal rights that the person expects to have at their disposal the truth of the matter is that the agencies administering to the acts of congress in the Territories believe the opposite and are acting in an opposite manner. The result has been death, confiscation of property, law suits, and imprisonment, and so for the citizen engaging in activities in such areas it is no different from the Territorial days before admission into statehood.

The citizen of the western US has grown up with these areas (60+% of the state of Idaho being Territorial) and the wild west mentality the governance of these areas fosters. Case in point: The Hammonds, the Bundy's, Ruby Ridge, Claude Dallas, et al. The western citizen has learned, if we are to enter onto the public lands in the Territorial west, it can be construed by the sovereign as an act of war. We in the west who are raised here, and the other large swaths of the Idaho population that rely upon these lands for sustenance to one degree or another such as hunting, fishing, camping, logging, all of which are legislative rights, meaning they are purchased from the sovereign much like a license to do something that would otherwise be illegal, the main difference between these is mining. With the adoption of the 1872 mining act state citizens were allowed to purchase a property right that came with property ownership privileges.

At that moment this suited the sovereign and played to its manifest destiny mantra of the time. Fast forward to 2018 where the President of the United States has identified 23 critical minerals by executive order with the intent for the citizen of the Western United States to play a key role. But the Presidents agenda is not shared by the agencies under his command and the words of justice Harlan Marshall can be heard in the background loud and clear, **"These are words of weighty import. They involve consequences of the most momentous character. I take leave to say that if the principles thus announced should ever receive the sanction of a majority of this court, a radical and mischievous change in our system of government will be the result. We will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism".** *Downes v Bidwell 182 U.S. 244 (1901)*

So to what extent will we allow this legislative absolutism to continue depriving citizens of rights they have under the Constitution or have purchased from the sovereign? The US courts know full well that the citizens only real legal protections against Government abuses can be found in private rights and due process, the case law is over 180 years old and very well settled.

Linking legislative rights with due process

The problem of Legislative absolutism and US citizen abuse isn't new in the western United States where the citizens must have the courage to enter onto the public lands to take advantage of programs initiated by the Federal Government, even though some are left wondering what is the use of offering a Legislative right when the agencies seem to be working to remove human activity from certain areas? There is a rule making and oversight process which was recently ruled on in *Tugaw Ranches LLC v United States of America case number 4:18-cv-00159-DCN* in which the governments attempt to dismiss under Rule 12(b)(1) was shot down. The explanation by the court being that the court DOES have the power of review with regard to the CRA (Congressional review act) and this citizen is left wondering whether or not policies have been implemented here that have not passed Congressional review?

The merits leading to due process violations and malicious prosecution

The arguments presented by the EPA are confusing and encompass a circular quasi-logic that can only be described as an application of 'color of law' in order to

get a prosecution for the sole purpose of revenue generation. We have pulled the following from the EPA's accelerated decision;

1. In 2015, we received a total of 2 NOIs requesting coverage under the GP to suction dredge on the SF Clearwater, from yourself and Ron Miller. We sent you both a second certified letter, dated August 7, 2015, explaining that a small suction dredge operation on the SF Clearwater was not eligible for coverage under the GP at the time because the SF Clearwater River had been designated as critical habitat for species protected under the ESA, and the GP prohibits suction dredging in areas designated as ESA critical habitat unless an ESA determination has been made (e.g., through another process such as U.S. Forest Service Plan of Operations) and the decision is provided with the NOI for coverage under the GP. You signed for the letter on August 14, 2015. Mr. Miller signed for his letter on August 17, 2015. The letter offered the choice of applying for an Individual NPDES 402 Permit instead of the GP, but neither you nor Mr. Miller did. You also requested permit coverage to operate a 5-inch dredge on McCoy Creek and Jackknife Creek, which we authorized via certified letter on July 31, 2015. You signed for the letters of authorization on August 11, 2015.

(a) The above statement *"The letter offered the choice of applying for an Individual NPDES Permit instead of the GP, but neither you nor Mr. Miller did"*, amounts to a 'chicken or the egg' game initiated by the FS and the EPA. In other words, there was no NPDES permitting process available by the EPA in 2015 for suction dredging on the river, and the letter being signed by Mr. Erlanson on August 14, 2015 was one day before the end of the season which begs the question, "why would Mr. Erlanson apply for an NPDES permit in 2015 at the end of the dredge season?, and can the EPA use this as a grounds to fine Mr. Erlanson for not complying with the permitting process which didn't even exist?

(b) We see now in *United States of America v Thomas E. Tierney* that due process is not only operable in the Territories but brings up a deprivation out of 18 USC 242 and tort options for the citizen when there is a WILFULL violation of due process or a deprivation under 18 USC 242.

Statutory vagueness

We saw earlier in *United States of America v Thomas E. Tierney* that 'statutory vagueness' is a due process issue. Utilizing the arguments out of the case we see that, "As a matter of due process, a criminal statute that fails to give a person of ordinary intelligence 'fair notice that his contemplated conduct is forbidden by statute' *United States v Harris 347 US 612, 617 (1954)* or is so indefinite that 'it

encourages erratic and arbitrary arrests and convictions' *Papachristou v Jacksonville 405 US 156, 162 (1972)* is void for vagueness."

The argument utilized in Tierney was one of word meanings such as 'significant disturbance' and 'special use authorization' which the courts have been grappling with ad nauseum. We feel it is time to settle the matter between the agencies and the citizens by introducing a list of words and terms the EPA is currently using as an arbitrary tool of vague construction in order to implement 'erratic arrests, (fines) and convictions'.

1. Incidental fallback: (see page 1-2)
2. Point source: Any discernable confined and discrete conveyance where pollutants are discharged (Clean water act section 502).
3. Pollution: Suspended solids (EPA argument in the present case and NOT supported by the list given to Congress in supplement to the CWA)
4. Waters of the us: Jurisdiction on navigable waterways (definition changed by EO)
5. Addition: Something added not originally present ("from the outside world")
6. Discharge: Water flow out of where it has been confined (websters dictionary)
7. Expel: To force out or eject, discharge
8. Dredge spoil: US department of agriculture definition; any unconsolidated randomly mixed sediments composed of rock, gravel, soil, or shell material extracted and deposited during dredging and dumping operations. These lie uncomformly upon natural undisturbed soil.
9. Extraction: The action of taking out something using effort or force (websters)
10. Deposited: To be placed or inserted into.
11. Turbidity: (definition added into evidence)
12. Fill material: Dredge spoils consisting of, overburden, slurry, tailings, and other mine wastes

Timeline of the malleable dredge material, incidental fallback regulations

51 *Fed. Reg.* 51206 (Nov. 13, 1986)-exclusion of incidental fallback (not relevant to this case but shows a malleable terminology use and not a static use)

North Carolina Wildlife Federation v. Tulloch, No. C90-713-CIV-5-BO (stipulated dismissal Mar. 4, 1992)-challenged incidental fallback

58 *Fed. Reg.* 45008 (Aug. 25, 1993).-corp redefines dredge material to include everything passing through a dredge regardless of source.

In *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), the Court found that

> the straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from waters of the United States and a small portion of it happens to fall back. *Id.* at 1404.

64 *Fed. Reg.* 25120 (May 10, 1999)-the agencies responded by modifying the regulatory definition to expressly exclude incidental fallback, but to retain jurisdiction over redeposits that are not incidental fallback.

66 *Fed. Reg.* 4550, 4575-Two years later the agencies further clarified that incidental fallback is;

> the redeposit of small volumes of dredged material that is incidental to excavation activities in waters of the United States when such material falls back to substantially the same place as the initial removal. 66 *Fed. Reg.* 4550, 4575 (Jan. 17, 2001).

National Association of Home Builders, et al v. U.S. Army Corps of Engineers, et al, 2007 U.S. Dist. LEXIS 6366 (D.D.C. Jan. 30, 2007).

The Court ruled invalid the agencies' attempt to regulate all mechanized earth-moving activity after the agencies had incorporated rules regulating same.

73 *Fed. Reg.* 79642 (Dec. 30, 2008)-The agencies responded to this latest setback in a new rule promulgated on December 30, 2008, which expressly excluded incidental fallback as a regulated redeposit but did not further define "incidental fallback." Hence, such a determination must now be made on a case-by-case basis in accord with governing case law.

EPA, "Memorandum: Regulation of Certain Activities in Light of American Mining Congress v. Corps of

Engineers," April 11, 1997, incorporated into "Memorandum U.S. Environmental Protection Agency Regional Offices U.S. Army Corps of Engineers Divisions and Districts," May 10, 1999.

Examples of regulated activity include

- ditching activity where an excavated material is side-cast into waters of the United States, and
- temporary or permanent stockpiling or disposal of dredged material in waters of the United States. *Id*

Finally, the 1999
guidance identified activities that could involve either incidental fallback or regulated activity, depending on case specific facts. These include

- mining activities;
- ditching and draining activities;
- maintenance dredging activities and excavation for flood control, irrigation and drainage projects;
- channelization or reconfiguration of streams; and
- "other excavation activities."

"In short, if the above activities and waters of the United States are involved, further evaluation of specific project facts is needed to determine if the activity constitutes incidental fallback or, alternatively, if permitting under Section 402 or Section 404 is necessary".

One cane easily see there are 'issue of a legal and lawful nature' with the ever changing terminologies and the meanings of same from the point of view of the citizen and opined in *United States of America v Thomas E. Tierney.*

The Chevron doctrine

The Chevron doctrine states; Held: The EPA's plant-wide definition is a permissible construction of the statutory term "stationary source." Pp. 842-866.

(a) With regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the **[p838]** agency's answer is based on a permissible construction of the statute. Pp. 842-845.

(b) Examination of the legislation and its history supports the Court of Appeals' conclusion that Congress did not have a specific intention as to the applicability of the "bubble concept" in these cases. Pp. 845-851.

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General arguments regarding serious defects at law in the EPA's claim that:

"The Director of the Office of Compliance and Enforcement at the United States Environmental Protection Agency ("EPA" or "Agency"), Region 10("Complainant"), initiated this proceeding on June 20, 2016, by filing a Complaint against Dave Erlanson, Sr. ("Respondent"), pursuant to Section 309(g)(2)(B) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("Act" or "CWA"), 33 U.S.C. § 1319(g)(2)(B).
The Complaint alleges that on July 22, 2015, Respondent unlawfully discharged pollutants from a point source into a navigable water without authorization under a National Pollutant Discharge Elimination System permit, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). See Compl. ¶¶ 3.1-3.9."

This aspect of the case is fatal to the claim of the EPA as they state that the defendant 'discharged pollutants from a point source'. We have seen this assertion earlier in this paper and we attacked them from a 'statutory vagueness' argument, but we will now attack this from the statutes themselves.

The 2 permitting schemes available are a 404, and 402. The 404 scheme has been decided on in Ceour Alaska v Southeast Alaska Nos. 07–984 and 07–990 SCOTUS as necessary when dredging ""material [that] has the effect of . . . [c]changing the bottom elevation of the stream bed." Standard dredging activity does no such thing. When you suck debris up from the river bed you would in essence lower the river bottom in one spot and then replacing the material would simply cause a heighten bottom elsewhere thereby equilibrating the overall water displacement creating NO displacement or any substantial change in the elevation of the stream bed. In Ceour Alaksa a 404 cannot be upheld so the the EPA turns to 402.

In a 402 permitting scheme the entire scheme for dredging runs on of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). The section is: 33 U.S. Code § 1311.

Effluent limitations. This section states; (a) ILLEGALITY OF POLLUTANT DISCHARGES EXCEPT IN COMPLIANCE WITH LAW.

What we have is an intent to create an act (CWA) which utilizes words and terminologies and specifically the term 'discharging pollutants into' which causes the mind to think in terms of 'addition'. Here we introduce the Silberman standard to wit:

"I join the opinion of the court and write separately only to make explicit what I think implicit in our opinion. We hold that the Corps's interpretation of the phrase "addition of any pollutant to navigable waters" to cover incidental fallback is "unreasonable," which is the formulation we use when we have first determined under Chevron that neither the statutory language nor legislative history reveals a precise intent with respect to the issue presented--in other words, we are at the second step of the now-familiar Chevron Step I and Step II analysis. See, e.g., Whitecliff, Inc. v. Shalala, 20 F.3d 488 (D.C.Cir.1994); Fedway Associates, Inc. v. United States Treasury, 976 F.2d 1416 (D.C.Cir.1992); Abbott Labs. v. Young, 920 F.2d 984 (D.C.Cir.1990); Associated Gas Distribs. v. FERC, 899 F.2d 1250 (D.C.Cir.1990). As our opinion's discussion of prior cases indicates, the word addition carries both a temporal and geographic ambiguity. If the material that would otherwise fall back were moved some distance away and then dropped, it very well might constitute an "addition." Or if it were held for some time and then dropped back in the same spot, it might also constitute an "addition." But the structure of the relevant statutes indicates that it is unreasonable to call incidental fallback an addition. To do so perforce converts all dredging--which is regulated under the Rivers and Harbors Act-- into discharge of dredged material which is regulated under the Clean Water Act.

Moreover, that Congress had in mind either a temporal or geographic separation between excavation and disposal is suggested by its requirement that dredged material be discharged at "specified disposal sites," 33 U.S.C. § 1344 (1994), a term which simply does not fit incidental fallback.

The Corps attempts to avoid these difficulties by asserting that rock and sand are magically transformed into pollutants once dredged, so all dredging necessarily results in an addition of pollutants to navigable waters. But rock and sand only become pollutants, according to the statute, once they are "discharged into water." 33 U.S.C. § 1362(6) (1994). The Corps's approach thus just leads right back to the definition of discharge."

More importantly the EPA fails to provide any evidence of a pollutant out of their list of pollutants they submitted to Congress and fails the 'preponderance of

evidence' test outlined in CFR 40 Chapter:1 subchapter: A, 22.24, ***(a)*** *The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate.* Upon a reading of the list of pollutants one is left with the realization that the EPA's scheme is a 'general accusation' not supported by specific evidence under their permitting scheme which lists specific pollutants they are concerned with. This is very disturbing information.

List of toxic pollutants off the EPA's website

(C)

with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

Here's the list:

The following comprise the list of toxic pollutants designated pursuant to section 307(a)(1) of the Act:

1. Acenaphthene
2. Acrolein
3. Acrylonitrile
4. Aldrin/Dieldrin[1]

[1]Effluent standard promulgated (40 CFR part 129).

5. Antimony and compounds[2]

[2]The term *compounds* shall include organic and inorganic compounds.

6. Arsenic and compounds
7. Asbestos
8. Benzene

9. Benzidine[1]

10. Beryllium and compounds

11. Cadmium and compounds

12. Carbon tetrachloride

13. Chlordane (technical mixture and metabolites)

14. Chlorinated benzenes (other than di-chlorobenzenes)

15. Chlorinated ethanes (including 1,2-di-chloroethane, 1,1,1-trichloroethane, and hexachloroethane)

16. Chloroalkyl ethers (chloroethyl and mixed ethers)

17. Chlorinated naphthalene

18. Chlorinated phenols (other than those listed elsewhere; includes trichlorophenols and chlorinated cresols)

19. Chloroform

20. 2-chlorophenol

21. Chromium and compounds

22. Copper and compounds

23. Cyanides

24. DDT and metabolites[1]

25. Dichlorobenzenes (1,2-, 1,3-, and 1,4-di-chlorobenzenes)

26. Dichlorobenzidine

27. Dichloroethylenes (1,1-, and 1,2-dichloroethylene)

28. 2,4-dichlorophenol

29. Dichloropropane and dichloropropene

30. 2,4-dimethylphenol

31. Dinitrotoluene

32. Diphenylhydrazine

33. Endosulfan and metabolites

34. Endrin and metabolites[1]

35. Ethylbenzene

36. Fluoranthene

37. Haloethers (other than those listed elsewhere; includes chlorophenylphenyl ethers, bromophenylphenyl ether, bis(dichloroisopropyl) ether, bis-(chloroethoxy) methane and polychlorinated diphenyl ethers)

38. Halomethanes (other than those listed elsewhere; includes methylene chloride, methylchloride, methylbromide, bromoform, dichlorobromomethane

39. Heptachlor and metabolites

40. Hexachlorobutadiene

41. Hexachlorocyclohexane

42. Hexachlorocyclopentadiene

43. Isophorone

44. Lead and compounds

45. Mercury and compounds

46. Naphthalene

47. Nickel and compounds

48. Nitrobenzene

49. Nitrophenols (including 2,4-dinitrophenol, dinitrocresol)

50. Nitrosamines

51. Pentachlorophenol

52. Phenol

53. Phthalate esters

54. Polychlorinated biphenyls (PCBs)[1]

55. Polynuclear aromatic hydrocarbons (including benzanthracenes, benzopyrenes, benzofluoranthene, chrysenes, dibenz-anthracenes, and indenopyrenes)

56. Selenium and compounds

57. Silver and compounds

58. 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD)

59. Tetrachloroethylene

60. Thallium and compounds

61. Toluene

62. Toxaphene[1]

63. Trichloroethylene

64. Vinyl chloride

65. Zinc and compounds

[44 FR 44502, July 30, 1979, as amended at 46 FR 2266, Jan. 8, 1981; 46 FR 10724, Feb. 4, 1981]

Even if the EPA, upon finding itself deficient in adhering to the CWA as protecting against the 'addition' of certain pollutants in this case at bar, realizes it needs to NAME a pollutant in order to cure the defect, it lacks any evidence of any pollutant off the list because it did not test for any pollutants (which the methods and authority for doing so is found under CFR 40 136.3) while Mr. Erlanson was dredging. Without the REQUIRED evidence that Mr. Erlanson 'discharged a pollutant into' by having evidence to prove such an activity (by providing the pollutant AND evidence of its presence while he was dredging) then the EPA has no charge (cause of action) with which to proceed and any attempt to do so is prima facie evidence of 'something else' Mr. Erlanson is being prosecuted for which the EPA lacks Congressional authority to act on which may be of grave concern in our Constitutional system AGAIN bringing to mind the words of Justice Harlan Marshall in the Downes decision, **"These are words of weighty import. They involve consequences of the most momentous character. I take leave to say that if the principles thus announced should ever receive the sanction of a majority of this court, a radical and mischievous change in our system of government will be the result. We will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism".** Downes v Bidwell 182 U.S. 244 (1901).

Federal Legislation Jurisdiction

Here we arrive at an issue so disturbing that the citizen has no idea what to make of it. We will just start by giving our forensic analysis of the matter.

We are at a loss to explain how the Federal government can pass legislation that assumes control over state resources and property. If the Federal government can pass legislation that controls water quality for every state in the union without the states consent; where did they acquire that power? The US Constitution does not give that power to ANY branch of government so we have to ask; has the SCOTUS made a decision that acquired that power for Congress? Where is the line in the sand for federal power over state property? The state legislators have said to me personally they are concerned over the diminishing of the 10th amendment status of Idaho and rightly so as the federal government seems intent on going beyond its original boundaries, but we will not take up the Constitutionality of the CWA at this time as we are still conducting a forensic analysis of the the law and its history.

Title 43 USC 29 Subchapter 1 General provisions (1301-1333)

43 USC, 1311:

(a) CONFIRMATION AND ESTABLISHMENT OF TITLE AND OWNERSHIP OF LANDS AND RESOURCES; MANAGEMENT, ADMINISTRATION, LEASING, DEVELOPMENT, AND USE

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the **boundaries** of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

1301 Definitions:

(a) The term "lands beneath navigable waters" means—

(1)

all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

We had to go over this title many times in order to understand the meaning under the Law, and the apparent conflict with that law via policy of the EPA and Forest service. At first glance there appears to be a conflict when we see that title was extinguished to the state of submerged lands under navigable waters within the boundaries of the state UP TO the high water mark. How then can the EPA claim jurisdiction over areas where the federal government owns no title anymore? How can the CWA apply to areas where the state has ownership over the land AND the water? In this case stream and river beds of navigable waters UP TO the high water mark AND the waters therein?

The Godfrey case

We are trying to find clarification for the EPA's assertion of jurisdiction, we would love to settle the matter and defer jurisdiction to the Federal agencies in law proper but to do so we must do an exhaustive analysis of the laws regarding the entire issue because the states and the people are also parties who are mentioned in Article 3 of the US Constitution as being under the jurisdiction of the court but as we see in the Territorial doctrine, as it pertains to the 11 western states that may not be actual states, that the matter may not be that clear and defined and Title 43 does NOT clear up the conflicts it only exacerbates them. Further additions to the problem are found in decisions like US v Godfrey where the 9th circuit ruled that the activities engaged in by Godfrey were below the high water mark of the river bank. The language in Title 43 stating, *"or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark"*, are of special interest here.

There is no difference between a decision taking into account the high water mark on a river or simply up on the bank somewhere, anywhere, for the purpose of a pollutant UNLESS there is a Jurisdiction clarification here because of the existence of Title 43. CFR 261.11 makes no mention of the high water mark bearing any consequence to the case at bar, but the witness for the Government Mr. Huggins made issue with the high water mark in his testimony by stating the defendants excavations were taking place within that area. Clearly the attempt by the witness was to assert jurisdiction which is odd since clearly jurisdiction is had by the fact the mining activities were in a National Forest. (S)state jurisdiction under Title 43 would be from the bottom of the river bed up to the high water mark UNLESS Title 43 intends to cover river and stream submerged lands up to the high water mark WITHIN the political subdivision ONLY? So is Mr. Huggins statement an affirmation that the area is NOT within a state political subdivision and so therefore everything up to the high water mark is under federal jurisdiction?

Between the Godfrey case and Title 43 are we to believe that certain States' boundaries are in actuality JUST the political subdivisions within the (S)state?

Idaho jurisdiction

In an attempt to find evidences that satisfy we turned to the authority of Idaho over waters within the geographic boundaries of the state. The Idaho Constitution states: **SECTION 3.** WATER OF NATURAL STREAM – RIGHT TO APPROPRIATE – STATE'S REGULATORY POWER – PRIORITIES. *The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.*

We have a conflict here. If Idaho has authority to use the waters within the geographic boundaries of the state and has implemented a state water plan with subsequent water quality standards, a river plan, and permitting scheme and Mr. Erlanson complied with all the requirements and had obtained an Idaho permit; how can the EPA claim jurisdiction to prosecute Mr. Erlanson when the state declines to do so? The EPA claims that Mr. Erlanson failed to obtain a NPDES permit when Page 22 of the southfork clearwater basin plan clearly states, *"the states one stop recreational dredge mining permit does not require an NPDES permit (on the southfork of the clearwater river)."* Either Idaho has authority over the water or it doesn't, which is it?

Title 42-101 of the Idaho code declares; "42-101. NATURE OF PROPERTY IN WATER. *Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of*

the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state,"

We are trying hard to determine HOW the EPA can substantiate any claim of jurisdiction over waters controlled by the state and the ONLY way they can make such an argument is IF they are using the term 'boundary of the state' in an alternate manner than commonly understood, which takes us back to a Territorial argument, otherwise we have a conflict of a 10th Amendment nature because of the CWA's legal FORCING mechanism over state water appropriation rights.

The 10th Amendment

We feel we need to attempt to understand the EPA, as it is becoming clear as we maneuver through state and federal jurisdiction relationships, that conflicts are emerging between the EPA and the state's 10th Amendment status. Fleshing this out requires going back to the 10th Amendment and *McCulloch v Maryland.* The 10th Amendment was seen as a *federal expansion limiter* upon specific Constitutional grants of power to the general government against the wishes of the enemies of the Constitution, indeed we see that not much has changed since then as here we are again confronting those same enemies, albeit in different guises. In the case at bar the question must be: 'which Constitutional provision is being relied upon by the EPA to encroach on state EXPRESS authority? Surely the EPA will cite the 'necessary and proper clause' for its authority as did those in *McCulloch v Maryland.*

In determining the validity of such a claim we would seek for a 'compelling national interest' to be able to assert that claim. In a national compelling interest situation we would need an exigency capable of invoking said power, simply crying, "the sky is falling" when the state already has a water quality regulatory body in place and a permitting scheme capable of handling the small amount of dredgers who wish to dredge the southfork of the clearwater river, is no exigency at all, and so therefore lacks the criteria for a 'compelling national interest'. From the civil war forward a constant stream of legislation has sought to chip away at the states' 10th Amendment status via taxation, the commerce clause, the necessary and proper clause, and now simply TAKING ownership of all waters within the US forcing the President to have to re-define waters of the US.

As citizens of the state of Idaho we are hereby declaring that this is our line in the sand, ***'this far and no further'.*** From ***Case v Bowles No.261 (1946)*** onward we have seen in increase in the advancement of the Territorial system to the detriment of the Constitutional system creating Harlan Marshalls ***Legislative***

absolutism, to the wonderment of all. Case law derived out of decisions like *Kansas v Colorado 206 US 46, 87, 89 (1907)* in which the court opined, *" The government of the United States is one of enumerated powers; that it has no inherent powers of sovereignty; that the enumeration of the powers granted is to be found in the Constitution of the United States, and in that alone; that the manifest purpose of the Tenth Amendment to the Constitution is to put beyond dispute the proposition that all powers not granted are reserved to the people, and that if, in the changes of the years, further powers ought to be possessed by Congress, they must be obtained by a new grant from the people. While Congress has general legislative jurisdiction over the territories, and may control the flow of waters in their streams, it has no power to control a like flow within the limits of a state except to preserve or improve the navigability of the stream; that the full control over those waters is, subject to the exception named, vested in the state. Hence, the intervening petition of the United States is dismissed, without prejudice to any action which it may see fit to take in respect to the use of the water for maintaining or improving the navigability of the river."* seem to be ignored now by the Constitutional government seemingly overran with Territorial persons operating in an extra-Constitutional manner.

Summary

The EPA is engaging in a 'statutory vagueness scheme' designed to stop citizens from mining on Territorial land. This scheme attempts to 'seize' prosecutorial authority over citizens in defiance of 16 USC 480 (Organic administration act) which gives the State police power UNLESS a Federal law is broken.
We will explain how this scheme plays out against the unwitting citizen.

The EPA charges the citizen with 'discharging a pollutant into waters of the US'. The EPA does NOT gather evidence a crime has been committed by utilizing the test procedures laid out in CFR title 40 136.3, and cannot name the specific pollutant or offer evidence the pollutant is present, the agency merely charges the citizen with a 'generalization' like 'suspended solids' which gives the impression one or more pollutants from its toxic pollutants list is being discharged into waters of the US. The 'assumption' then is that the river bed is polluted and disturbing the river bed discharges the pollutant with the river bed becoming the 'point source', and all of this is done with no evidence that the river bed is polluted, or that the dredge is discharging any pollution into its plume. In a murder case would you be able to prosecute a citizen with no body and no murder weapon but just the prosecutors word that 'there is a body and there is a murder weapon we just don't believe we need to present them'?

If the EPA has no evidence of the existence of a pollutant, discharged into waters of the US by a point source, then the CWA has NOT been violated and if the CWA has not been violated then the dominant jurisdiction in this matter is the state jurisdiction and not federal (Organic administration act codified at USC title 16) and indeed the states jurisdiction over the unappropriated waters is quite clear. This agency lacks subject matter jurisdiction for failure to state a claim for which relief can be granted but since the FRCP only applies to Constitutional article 3 courts, this citizen lacks access to the appropriate rules that would give him relief under the Law which would be another violation of due process but for the administrative nature of the Territorial court process.

Moreover in a disturbing turn of events, the terminologies utilized by both the federal Government AND the Territorial agencies under Title 43 seem to either be confused as to who owns what or there is an alternate purpose to the whole scheme other than protecting the environment, and if so what is that purpose? Does the US Government still have control over the Territories? What are 'the boundaries' of the states? Is there controlling law elsewhere that 'took back' Title that was extinguished in Title 43 or is the Title a simple understanding of legal construction which revolves around the term 'boundary'? Either way we find this entire scheme of great national interest affecting **in whole** entire political communities in the western united states and thereby having a deleterious impact on the 'equal footing' doctrine, and indeed possibly explaining why the doctrine exists at all.

In an even more disturbing twist we see that the EPA is engaging in a takeover of waters in the US OUTSIDE of its grant of powers utilizing the CWA as its vehicle and forcing states and citizens within those states to adopt the act at the point of a gun in what can only be described as a hostile takeover of property belonging to the several states and subjecting the citizens of those states to loss of property, and sustenance in defiance of SCOTUS precedent that protects the 10th Amendment status of the states from federal encroachment.