

October 16, 2015

To the Honorable Members of the 2015 Natural Resources Interim Committee:

Small Scale Suction Dredge Mining in Idaho is outside the scope of the Clean Water Act. "Incidental Fallback" represents a net withdrawal, not an addition of material. Incidental Fallback cannot be a discharge within the meaning of any State or Federal Clean Water Acts (CWA) as the CWA only permits and regulates additions. All gold mining suction dredges are designed to withdraw heavy metal (based on specific gravity) from gravels and soils, it cannot be said that suction dredges add anything within the meaning of the CWA. It is simple math, the difference between addition and subtraction. Those activities that add can require a 401, 402, or 404 permit, those that subtract do not require a permit at all. (See *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998)).

To determine whether Congress has spoken to the precise question at issue, we must look to the particular statutory language at issue, as well as the language and design of the statute as a whole, and we must employ the traditional tools of statutory construction, including where appropriate, legislative history.

When we present this information to our Congressional Delegation, they get it. They agree with us that the Clean Water Act does not apply to small scale suction dredge mining. The Good Senator Jim Risch has said "I have never suggested permits be required for an activity I believe is legitimate, harmless and an entertaining production."

In an opinion from the Office of the Attorney General, dated February 9, 2015 and addressing House Bill 51, the attorney stated; "The Environmental Protection Agency (EPA) has issued a NPDES general permit for small scale suction dredges (intake nozzle of 5 inches diameter or less) in Idaho. 78 Fed. Reg. 20,316 (April 4, 2013). The EPA acted pursuant the Clean Water Act. 33 U.S.C. Section 1342."

33 U.S.C. Section 1342 (a) is for the permitting of discharge of pollutants.

Many hours of research and legal procedures went into the lawsuits that we rely on as case law. That case law is simply being ignored in favor of a default position. Our Constitution's Supremacy Clause somehow delegates the authority of The Congress of the United States to the US EPA to make law. This is in direct contradiction of Article 1. Section 1. Of The Constitution For The United States. This must be resolved.

The Director of the Land Board asked me to prove that I don't need a NPDES permit to complete a 5 year riverbed mineral lease. I have done so and the Director met with EPA personnel to ascertain how I would actually get the permit, if it were necessary. Director Schultz told me that the EPA personnel could not tell him how this permit process could work. For over an hour the EPA could provide no answer to the question.

A lot of information has been uncovered through diligent research. Idaho Statute 47-1313 (e) says that an 8-inch suction dredge is not defined as "motorized earth moving equipment." That means that I can have an 8-inch suction dredge by Idaho law. This is very valuable to the mining claim owner on a mining claim filed under the 1872 Mining Act. According to definitions in the Idaho Dept. of Water Resources, mining claim owners have a vested right. Vested Rights-those rights that are fixed and not contingent upon any future actions, for example water right licenses and decrees or mining claims. A protected river designation cannot interfere with vested property rights existing on the date a waterway is designated.

One other piece of information that this committee needs to be aware of, concerns a June 4, 2015 court case from The Eastern District of California. This Court is a Federal Court. In United States v. Godfrey a miner was charged with 5 different offences on a Federal Mining Claim in California. One of the offences was placing "pollutants" into a creek. The court rejected the argument made by the US Forest Service and reversed an earlier conviction because; "the entire mining operation occurred beneath the high water mark of Poorman Creek," and, "there is no evidence that any foreign substance (such as a chemical) was introduced to Poorman Creek."

The defendant was not charged with violating the Clean Water Act. However, this case was decided in a Federal Court and instructs us that the law doesn't support re-interpreting words to make new law.

Each one of you has a book titled "The Great Salmon Hoax," written by Atty. James Buchal. The most important feature of this well-researched book is that we have problems with our Idaho salmon because of over-harvesting in both the Pacific Ocean and the Columbia River. This illuminates the second fact that we in no way follow the Endangered Species Act where salmon are concerned. Resource extraction industries continue to suffer here in Idaho for the only endangered species that may be killed, stuffed in a can, and placed on store shelves. We are forgoing Idaho jobs and economic security for downriver fishing interests. This needs to be addressed.

While spending most of my adult life in the resource extraction industries, my family has been impacted significantly by over-regulation.

I am the applicant for the riverbed mineral lease E500022. I have to have a joint-application in place to be eligible for the 1 mile lease. If I don't have the joint-application, I have to be limited to ½ mile of riverbed. If this is the case and I have the "letter permit," then I won't get authorization by The Idaho Dept. of Lands to start my operations because of the EPA NPDES language that has been added to the cover letter that accompanies the "letter permit."

While all of this sounds un-necessarily complicated, it gets worse. When I file the Joint-Application with the Idaho Dept. of Water Resources, I am limited to the restrictions that are already present in the "letter permit." Both of these permits are for Stream Channel Alterations, which is something that I don't plan to do nor am I capable of with a suction dredge.

I am now in the process of filing a new Joint-Application with the IDWR at the behest of the Land Board. I have already had to file a new lease application because I will not agree to use smaller equipment than Idaho Law allows and I wish to work in an expanded season. I also want to use a floating winch to deal with boulders that are too big to move by hand for any appreciable distance.

I am convinced that this is the best equipment to use for my particular deposit. I am paying royalties to the State of Idaho for all of the gold that I recover and therefor it is in the State's best interest that I be able to work efficiently to recover more gold to make the most of this deposit for all Idahoans.

I will need to help of the legislature and the Governor to make this a success. Idaho Dept. of Water Resources appears to have no (Governmental) oversight whatsoever when it comes to suction dredge mining. The only reasonable recourse to IDWR over-regulation seems to be changing the laws to make permitting suction dredge mining less complicated. No documented harm has been shown as a result of suction dredge mining in Idaho.

Governor Butch Otter has said, "Closing waters based on a lack of consultations is inappropriate; regulatory actions should be based on actual considerations of science and facts, not presumptions." This of course was in a letter to the EPA and that is not all that the Governor has said about this subject.

I stand with The Good Senator Risch and The Honorable Governor Butch Otter in stating that the harmless activity of suction dredge mining should go forward. I also concur that the laws promulgated by The State of Idaho should be grounded in fact and guided by science. Laws that are passed because Idaho Dept. of Water Resources personnel feel this way or that way about the issue are not good laws and should be reviewed.

I have more information about suction dredge mining in Idaho and look forward to any questions that might arise from this committee.

Don Smith

P.O. Box 144

Riggins, Idaho 83549

208-628-2718

Prove356@frontiernet.net