

June 21, 2017

To the Honorable Chairman, Roger Chase,
Deputy Director, IDWR, Mat Weaver,

My perspective of the "special supplement," is that it originated out of some form of an agreement between the IDWR and the Clinton Administration, in the year 2000. The National Marine Fisheries Biologists closed the Salmon River, and obviously the South Fork Clearwater River to suction dredge mining. The IDWR got the rivers opened again, before the summer mining season started. We had to meet with the fisheries biologists and tell them exactly where we intended to suction dredge mine within river reaches that we chose. When we met with the IDWR and the federal fisheries people, they (federal fisheries) told us that they didn't want for us to suction dredge mine in "that eddy." We said something like, "why that eddy," and they responded that the eddy in question would make a good place for the baby salmon to rest in, as they migrated up the river. We told them that the baby salmon don't swim up the rivers, but rather are flushed to the ocean by the high water of spring run-off. They didn't say anything to that observation. The next year was one of the biggest high water events that I can remember and the on day that we met, the Salmon River was at peak flow. We never met with the federal fisheries people after that day. It is my opinion that the "special supplement" was a failure. It was obviously designed on a false premise. The IDWR kept the requirements in part for several more years, but relaxed the standards.

Idaho Code Title 42, Chapter 17, Section 34, Part (F), reads in part, "Rights not affected. (1) No provision of this chapter, or any rules or regulations promulgated pursuant to this chapter, shall in any way limit, restrict, or conflict with approved applications for the appropriation of water or with vested property rights existing on the date a waterway is designated for protected river status or interim protected river status..."

On page 28 of the South Fork Clearwater River Basin Comprehensive State Water Plan we find these words, "...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..."

In the past, the IDWR has stated in its permitting process that the "...the State Board of Land Commissioners has withdrawn from mineral entry and exploration the following navigable rivers..." The citation for this mineral entry withdrawal is Section 58-104(a) and 47-702, Idaho Code. Neither of these statutes answer any questions about how the State of Idaho has legal authority to enforce a mineral entry withdrawal on federal lands that are open to mineral entry and location. That makes the statement from the South Fork Plan, a nonsensical statement because the state lacks authority. Here is the statement as found on page 28, "...future mining claims that impact the stream channel would be prohibited by a natural designation and could be prohibited by a recreational designation..."

We have heard that the South Fork Clearwater River Basin Comprehensive State Water Plan contains a very clear direction in suction dredge mining on the South Fork that must be considered State Law. Beginning on page 22, of the plan, and following the word, "Discussion," is the phrase, "...Recreational dredge mining is defined as mining with power sluices..." I'll just stop right there. The term,

"recreational dredge mining," is not defined anywhere else in Idaho Statutes. The South Fork Clearwater River Basin Comprehensive State Water Plan makes an attempt to define the term, "recreational dredge mining." The problem is that this definition is to be considered state law, but then we see the term, "small recreational suction dredges." This term is not defined in Idaho Statutes and therefore the assumption that the following paragraphs are state law, falls flat on its face. How can it be state law with undefined terms?

The term, "recreational dredge mining," is widely considered to be suction dredge mining operations that are performed on state and private lands. There is no right connected to these operations, in contrast to the statutory rights of the suction dredge mining operations that are performed on unpatented mining claims. Mining on state and private lands can be considered a privilege, but all mining on unpatented mining claims is considered a "for profit," venture. Therefore we must fall back on the fact that unpatented mining claims were considered by the State Water Plan and the attendant right to mine is not to be changed or infringed upon.

The "special supplement" for the South Fork Clearwater River contains "conditions" that are very identifiable as far as who wrote them. Some were clearly written by the EPA and some were either written by the USFS, or at least, they agreed with them enough to adopt them. The USFS has clearly been working closely with the IDWR in coming up with regulations to implement for suction dredge mining on the South Fork Clearwater River. This is unacceptable. It would not bother anyone that the state agencies were working with the federal agencies, if the cause were liberty. When the cause is to take liberties away, it becomes a matter of grave concern.

In *New York v. United States*, 488 U.S. 1041 (1992), we find the words of Supreme Court Justice, Sandra Day O'Connor;

"...The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U. S. ___, ___ (1991) (slip op., at 2) (Blackmun, J., dissenting). "Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U. S., at ___ (1991) (slip op., at 4). See *The Federalist* No. 51, p. 323.

Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials..." "...The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.

State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. Indeed, the facts of this case raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests..." "...States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The

positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart..."

The easiest solution would be to recognize the mining laws of the United States and to respect the "right to mine" as the law of the land. The miners in the several mining districts have historically placed limits upon themselves, and exercised constraints upon themselves. This has built a working relationship with the federal government as evidenced by creation the mining laws, which codified the practices of the miners. The State of Idaho has adopted this concept as evidenced by Section 47-601, Idaho Code. "Mining claim locations authorized. Persons are authorized to locate mining claims upon that public domain in the state of Idaho which is open to location under the mining laws of the United States. The location of a mining claim shall be made by posting notice of location and by marking the boundaries as provided in section 47-602 of this chapter."

Consider if you will, the State Water Plan from 1974. On page 15, we find the objectives to the State Water Plan. The language that follows; "The criteria by which the Board will evaluate water resource projects and programs as to whether they are in compliance with this objective are as follows:"

1. All new water uses, both consumptive and nonconsumptive such as irrigation, municipal, industrial, power, mining, fish and wildlife, recreation, aquatic life, and water quality will be judged to have equal desirability as beneficial uses, except in some cases as may be affected by Article XV, Section 3 of the State Constitution.¹

There is a footnote 1, it states, "The Constitution provides a designation of preference between four uses: domestic, agricultural, manufacturing, and mining."

So what happened? We didn't change the constitution. We drifted away from the State Constitution and the applicable laws. It is our duty to be held accountable and to work together to make mining rights respected once again. I view our ability to work together at this juncture as a win-win situation for all parties involved.

Thank you for this opportunity to share my comments on this important undertaking,

Respectfully submitted,

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