

December 5, 2017

To: The Honorable Members of the Idaho Water Resource Board,

Mat Weaver, Deputy Director, Idaho Department of Water Resources

Thank you for the opportunity to offer comments here today in the interest of permitting suction dredge mining on the South Fork Clearwater River.

- 1) Permit conditions and language modifications
- 2) TMDL
- 3) All applied science

In the memo that was developed for this meeting, the authority for the permitting process that is employed on the South Fork Clearwater River by IDWR is listed as IDAPA 37.03.07 part .030.04.

The key word or phrase is "applicable rules." What rules are applicable? Is the 15 dredge permit limit an applicable rule?

Idaho Statutes 42-1734(F), 42-1734(A), the State Water Plan, the Comprehensive Basin Plan, federal statute 30 U.S.C. section 612 and the Idaho State Constitution all say that federal unpatented mining claims are not to be limited in this way.

There is case law and an exhaustive study of legislative intent concerning the passage of federal statute 30 U.S.C. section 612. In this statute the administrative agencies and the general public must not "*endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto...*" on federal unpatented mining claims and lands open to location and mineral entry.

The first word of 30 U.S.C. section 612(b) is "*Rights...*" Idaho Statutes 42-1738 reads in part; "*The board shall have no power or authority to do, and shall be and is prohibited from doing, any thing or act which would modify, set aside or alter any existing right or rights to the use of water...*" This statute is not a perfect statute for this conversation, except that it reiterates the language found in section 42-1734(a)(1) that the right to use the water for mining is a relative priority of Article XV section 3 of the Idaho Constitution and that right "*shall be protected and preserved...*"

In the Shoemaker case, cite; GFS (MIN) 82(1989), 110 IBLA 39, the Federal Board of Appeals looked at legislative intent to determine whether the Bureau of Land Management's use of the surface resources had as the effect to "*endanger or materially interfere,*" with Robert Shoemaker's mining activities on the Treetopper 1 Claim. The court looked at the meaning of "*endanger or materially interfere,*" as found in 30 U.S.C. 612(b). This is what is recorded at, H.R.Rep. No. 730, 84th Cong., 1st Sess. 10, reprinted in 1955 U.S.Code Cong. & Admin.News 2474, 2483; S.Rep. No. 554, 84th Cong., 1st Sess. 8-9

This language, carefully developed, emphasizes the committee's insistence that this legislation not have the effect of modifying longstanding essential rights springing from location of a mining claim. Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator; the United States would be authorized to manage and dispose of surface resources, or to use the surface for access to adjacent lands, so long as and to the extent that these activities do not endanger or materially interfere with mining, or related operations or activities on the mining claim.

[Emphasis added. AnH.R.Rep. No. 730, 84th Cong., 1st Sess. 10, reprinted in 1955 U.S.Code Cong. & Admin.News 2474, 2483; S.Rep. No. 554, 84th Cong. 1st Sess. 9.

Senator Anderson of New Mexico, who introduced the Senate version of the bill, made similar comments on the Senate floor. First, in responding to criticism of the legislation he stated: "On a claim located after enactment, the locator would have full right to all surface resources of the claim which may be needed for carrying on mining activities." 101 Cong.Rec. 9334 (June 28, 1955). He went on to describe subsection 4(c) as recognizing "that a mining claimant has the first right, the first call on any and all surface resources of his claim which he needs for carrying on activities related to mining."

Fish and fish habitat are now considered, "other surface resources." A proper approach to their management would necessitate that the management agencies "'must yield to mining as the 'dominant and primary use,' the mineral locator having a first and full right to use the surface and surface resources.'" As a matter of law! As such, the miners should be encouraged to employ the remedial action of the suction dredge to eliminate "embedded or cemented cobbles and compacted streambed materials." Reclamation suction dredge mining would improve fish propagation, at least in the short term.

The 1872 Mining Act fosters and encourages the economically sound and stable mining and minerals production in the hands of private enterprise. The location of minerals and the mining that is necessary to bring these minerals into production is labor and capital intensive. As such, it has been long recognized that the best way to ensure that these mineral deposits are employed in the strengthening of our Nation, be left to the miners. The individual miners could be handsomely rewarded, should they be successful with locating and bringing mineral lands into production. It has been long understood, on at least two continents that government could never accomplish anything like the free market principles employed in minerals production because of gross inefficiency.

Recreational Mining is defined in the State of Idaho, Dept. of Lands (IDL), Riverbed mineral leasing rules. Recreational Mining Equipment is defined in the Dept. of Lands, Riverbed mineral leasing rules. The IDL definition of "recreational dredge mining" is close enough to the definition found in the South Fork Clearwater River Comprehensive Basin Plan (SFCWPlan) to see where "recreational dredge mining" originated, as a term. The IDL riverbed mineral leasing rules also have a definition of where the activities that are governed by IDAPA 20.03.05 take place. They are solely on a placer deposit situated in state-owned submerged lands. Therefore it is easy to conclude that the "Recreational dredge mining" as defined, found on page 22 of the SFCWPlan is in reference to suction dredge mining on state-owned submerged lands and not federal unpatented mining claims.

It is interesting to note that in one of the memos that were sent out for this meeting the term "commercial" as it relates to suction dredge mining was defined by word of mouth. There is a clear definition included in the riverbed mineral leasing rules. "04. Commercial. The type of operation that engages in the removal of construction materials or uses suction dredges with an intake diameter larger than five inches (5") or attendant power sources rated at greater than fifteen (15) horsepower and/or other motorized equipment." Was this an attempt to steer the reader away from IDAPA 20.03.05 and away from the only place that "recreational mining," is tied to the definition found in the SFCWPlan?

It is also interesting to note that there is a statement contained in the same memo that says that, "Suction dredge mining, which is considered a point source pollutant for sediment." Please cite the

statute! Not only is this statement absurd, but it is impossible to reach such a conclusion. In the court case 951 F.Supp. 267, the United States District Court, District of Columbia issued a nationwide injunction against both the U.S. Army Corps of Engineers and the United States Environmental Protection Agency. The injunction springs from the agencies insistence that they could define what constitutes a "discharge of pollutants." The Court, the second highest court in the land, looked at congressional intent and decided that Congress had not spoken to the issue directly, therefore the agencies were in effect "making law." In the appeal (Nos. 97-5099, 97-5112.), the same court told the agencies that if they saw the Clean Water Act as an imperfect statute, then they could turn to Congress to fix it. Please take note that only federal agencies and state bureaucrats believe that this form of lawlessness can be perpetrated on the suction dredge miners of Idaho.

How could suction dredge mining in Idaho be considered a point-source discharge of pollutants? The U.S. District Court, District of Columbia, looked at the following statement, "Senate debate on S. 2770, 92d Cong., reprinted in 1972 Leg.Hist. at 1272. Senator Pastore stated": " 'It is necessary to define such materials [as pollutants] so that litigate issues are avoided over the question of whether the addition of a particular material is subject to control requirements.' " Id. at 1265 (quoting the Committee Report at p. 76). In the famous "Silberman Standard," Judge Silberman states, "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."

In light of settled case law, please explain where in this statement is the "addition of pollutants?" "Suction dredge mining, which is considered a point source pollutant for sediment, is assigned a WLA of 314 tons per day between July 15 and August 15." What exactly has been "magically transformed into pollutants once dredged?" And put yet a different way, the Court stated, "Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of dredged material when there is no addition of material." What is being added when the suction dredge miners start their suction dredges on the South Fork Clearwater, Idaho, that is not being added when a suction dredge miner starts his suction dredge elsewhere? If there is no "addition," there is no "discharge." The court findings were dripping with sarcasm and possibly outright scorn for this IDWR position.

It is in our best interests that the right to mine be respected. The problems that we have encountered are all products of the fact that we have allowed the federal agencies and state bureaucrats to disrespect mining rights and mining law. Our national prosperity and our national security are at stake. We must not allow our dependence on other nations for the metals and minerals that we need for military preparedness to weaken our standing on the world stage. This is just a small part, but a necessary part, to finding the solutions that a nation of free people demands.

## **CONSTITUTION OF THE STATE OF IDAHO**

**APPROVED JULY 3, 1890**

### **PREAMBLE**

***We, the people of the State of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution.***

**ARTICLE I**

**DECLARATION OF RIGHTS**

***SECTION 1. INALIENABLE RIGHTS OF MAN. All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.***

***SECTION 2. POLITICAL POWER INHERENT IN THE PEOPLE. All political power is inherent in the people. Government is instituted for their equal protection and benefit...***

IDAPA 37.03.07 030. 04. Stream Channel Alteration Permit. Any applicant proposing to operate a vacuum or suction dredge within or below the mean high water mark of a stream channel shall apply for and obtain a stream channel alteration permit. The vacuum or suction dredge shall only be operated in accordance with the conditions of the permit and with the applicable rules. (7-1-93)

**TITLE 42**

**IRRIGATION AND DRAINAGE — WATER RIGHTS AND RECLAMATION**

**CHAPTER 17**

**DEPARTMENT OF WATER RESOURCES — WATER RESOURCE BOARD**

***42-1734F. 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. For the purpose of this chapter, nonvested rights shall include, but not be limited to, pending applications for state mining permits or mineral leases, and pending applications for the appropriation of water.***

**TITLE 42**

**IRRIGATION AND DRAINAGE — WATER RIGHTS AND RECLAMATION**

**CHAPTER 17**

**DEPARTMENT OF WATER RESOURCES — WATER RESOURCE BOARD**

***42-1734A. Comprehensive state water plan. (1) The board shall, subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest. The comprehensive state water plan shall consist of: Part A — statewide policies, goals and objectives; and Part B — component water plans for individual waterways, river basins, drainage areas, river reaches, ground water aquifers or other geographic designations. As part of Part B of the comprehensive state water plan, the board may designate selected waterways as protected rivers as provided in this chapter. The comprehensive state water plan shall be based upon studies and public hearings in affected areas at which all interested parties shall be given the opportunity to appear, or to present written testimony in response to published***

*proposals for such policy programs and proposed designations. A minimum of sixty (60) days shall be allowed between publication of a proposal and the date on which no further testimony on the proposal will be accepted. All comments in writing shall be preserved as a part of the record of the board. In adopting a comprehensive state water plan the board shall be guided by these criteria:*

*(a) Existing rights, established duties, and the relative priorities of water established in article XV, section 3, of the constitution of the state of Idaho, shall be protected and preserved;*

<http://www.idwr.idaho.gov/files/iwrb/2012/2012-State-Water-Plan.pdf>

page 9.

*Idaho Code § 42-104 provides that an appropriation of water must be for "some useful or beneficial purpose" but does not define beneficial purpose. Except for the constitutionally protected beneficial uses which are domestic, agricultural, manufacturing, and mining, the concept of what constitutes a beneficial use of water has evolved over time based upon societal needs.*

SFCWPlan page 28;

*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.*

30 U.S.C. Section 612

**(b) Reservations in the United States to use of the surface and surface resources**

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however,* That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: *Provided further,* That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: *Provided further,* That nothing in this subchapter and sections 601 and 603 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership,

control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

## CONSTITUTION OF THE STATE OF IDAHO

APPROVED JULY 3, 1890

### ARTICLE XV

#### WATER RIGHTS

**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.

### TITLE 42

#### IRRIGATION AND DRAINAGE — WATER RIGHTS AND RECLAMATION

##### CHAPTER 17

#### DEPARTMENT OF WATER RESOURCES — WATER RESOURCE BOARD

42-1738. Vested water rights protected — Policy of project operation after pay-out defined. The board shall have no power or authority to do, and shall be and is prohibited from doing, any thing or act which would modify, set aside or alter any existing right or rights to the use of water or the priority of such use as established under existing laws except where the board acquires the consent of the owner or exercises the right of eminent domain as herein provided. It is the policy of the legislature to favor those projects with contractual agreements which provide that, upon completion of revenue bond pay-out, the project will revert to the ownership and management of that group or entity, public or private, which has paid for the project.

<http://www.mineralsandminingadvisorycouncil.org/pdf/Shoemaker-Case-Material-Interference.pdf>

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the surface for access to adjacent lands, so long as and to the extent that these activities do not endanger or materially interfere with mining, or related operations or activities on the mining claim.

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<https://adminrules.idaho.gov/rules/2001/20/0305.pdf>

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