PUBLIC LANDS FOR THE PEOPLE

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A 501(c)(3) Non-Profit Corporation

PLP exists to "Represent and assist outdoor user groups and individuals interested in keeping public and private lands open to prospecting, mining and outdoor recreation through education, scientific data and legal means."

May 2023

The Poe Variable on Suction Dredge Research

PLP feels a responsibility to the Mining Community to report on the potential ramifications of ICL v Poe in the 9th Circuit Court of Appeals.

The Idaho Conservation League (ICL) filed a lawsuit against Shannon Poe five years ago under the citizen suit provision of the Clean Water Act. On June 4th, 2021 Idaho district court magistrate Justice Bush ruled that defendant Shannon Poe had violated 42 counts of the Clean Water Act while suction dredging in Idaho in 2014, 2015 and 2018. At the end of September 2022, the district court handed Mr. Poe a fine of $150,000 for his 42 violation counts that were in violation of the Clean Water Act. The judge noted that the American Mining Rights Association's (AMRA) online fundraising goal was $150,000, but did not go so far as to entertain ICL's more expansive assertions of the influence of Mr. Poe's self-dealing position on the fundraising capabilities of AMRA.

One piece of evidence established or admitted in the case which led the judge to his decision was:

**"Defendant Poe establishes that suction dredge mining in general and, certainly recreational suction dredge mining, is a "discharge of dredge or fill material."* See: Defendant Shannon Poe's Motion for Summary Judgement Page 2 ¶ 3
https://www.publiclandsforthepeople.org/wp-content/uploads/2023/05/poe-motion-summary-judgement.pdf

Defendant Poe waived his right to trial and chose the path called motioning for summary judgement. This path is common when both sides of a lawsuit agree to the facts of a case, but dispute how the law is

interpreted or enforced. This shortcut is generally favored as a cost savings measure to litigate a controversy. In our opinion, waiving trial in favor of summary judgement was not a wise choice by defendant Poe. *To his own detriment and our astonishment, defendant Poe established in his own motion for summary judgement that he is (in fact) a discharger of pollutants that concurs with ICL's position. Both 40 CFR 232.2 (EPA) and 33 CFR 323.2 (Army Corps) jointly share the same definition of **the term "discharge" of material defined as the *addition* of such materials to the waters of the U.S.** That is why Justice Bush noted in his decision that: "Neither ICL nor Poe disputes that the material passing through Mr. Poe's suction dredge and into the South Fork Clearwater River falls within the definition of a pollutant under the CWA". Mr. Poe, to this very day, claims to have made a no addition argument, but, actually canceled it out by setting forth that he is in fact a discharger. It has been PLP's assertion that had defendant Poe not waived his right to trial, but instead gone to trial like the PLP assisted line of cases (Godfrey and Osterbrink), and thereby shifting the burden of proving discharge to the ICL or government; the outcome should have been favorable to defendant Poe. Unfortunately, that did not happen because Mr. Poe did not wish to go to trial and dispute the fact that he was or was not a discharger.

So why is PLP bringing this up again after warning about this in our August of 2021 PLP Newsletter?

https://www.publiclandsforthepeople.org/august-2021-newsletter/

Unlike other mining rights groups, since the 1990's, PLP warned its members not to admit to the 402 or 404 permit system if you are sluicing or dredging. In a 2019 newsletter we said: "Some miners are sending a mixed message: I don't pollute but please give me my pollution discharge permit" that stemmed from AMRA's action rally at the CA State capital in 2019. PLP kept its members in a safe legal position on this issue all the way back to the 1990's over the litigation in Tulloch 1 and Tulloch 2 decisions. Mr. Poe, not heeding PLP's numerous warnings placed the AMRA membership and others into a precarious legal situation for which he is now facing a court ordered fine of $150,000 plus over $196,000 in attorney fees to the ICL environmentalists (Fine and attorney fees stayed pending appeal outcome). And yes, the Poe and AMRA funding for this bad precedent will go directly into the U.S. Treasury and ICL coffers to put more miners out of business.

To our surprise, the Pacific Legal Foundation (PLF), is taking up Mr. Poe's appeal to the 9th Circuit Court where their opinion will affect the action of miners in the entire western U.S. PLP's fear has now been confirmed in a news report quoting ICL's attorney and made public with their intention to use Mr. Poe's own admissions against him.
See: https://www.yahoo.com/news/miner-appeals-clean-water-act-132500685.html?guccounter=1

PLF has refused to return PLP's phone calls and emails after we warned them of Poe's own admissions of discharge and how that has been shown by caselaw to negate the no addition argument. **In sum, it has**

been PLP research and experience that one cannot set forth you are a discharger for the purposes of the Army Corp. 404 permit and still make a no addition argument at the same time. Doing so only shows the court you are talking out of both sides of your mouth and is generally treated as being disingenuous. An objective observer has noted the unpleasant fact that no one forced Mr. Poe to admit to being a discharger.

The outcome of ICL v. Poe may have a direct effect upon PLP's research for a pathway forward for suction dredgers – not only in Oregon, but Washington and Idaho as well. It is PLP's opinion that the 9th Circuit is highly unlikely to overturn the ruling against Poe based upon the facts established by Mr. Poe and the ICL in the lower court. PLP still believes we have a solution and path forward for dredgers in Oregon, but now with the 9th Circuit Court taking Poe's case places a wildcard in the mix. In a worst-case scenario would the 9th say that mining and all forms of suction dredging require an NPDES 402 permit? We really do not know where this case will land and how it could affect the solution forward for suction dredgers at this time. Hopefully the 9th will decide the case before the Spring of 2024 so that we can provide a clear path for the suction dredgers in Oregon, Washington, and Idaho. PLP's goal was to conclude a path forward for the dredgers in Oregon by the Summer of 2023. Now, in considering the pending ICL v. Poe litigation in the 9th Circuit, we cannot conclude a path forward until around the summer of 2024 once the 9th Circuit case has been decided. It would not be prudent to ignore the potential ramifications of a 9th Circuit case such as this and its bearing on a legal path forward for suction dredgers. We wish Mr. Poe and the PLF the best, but based upon the record we must anticipate the strong likelihood of more negative case law for the suction dredger. Our research will continue, and as always, your input is greatly appreciated.

Supporting PLP's Annual Grand Raffle also helps us continue to fight for your rights!
A book of 12 tickets is only $10. We have a lot of great high value prizes, and a list of those prizes is in the latest ICMJ Prospecting & Mining Journal. You can't win if you don't enter! Tickets are available NOW to purchase by phone for the August 13th, 2023, Grand Raffle Drawing. (Moved forward from July 13th) You can call our toll-free number (844)-PLP-1990 which is (844) 757-1990 by August 9th deadline or Mail a Check by the August 1st deadline (to the address below) and specify the number of ticket books you wish to have mailed to you.

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