

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the matter of:)
Riverbed Mineral Lease Application)
No. E500017) **FINAL ORDER**
Donald Smith,)
Applicant.)

I. NATURE OF PROCEEDINGS/ISSUES

The Idaho Department of Lands (IDL) through the State Board of Land Commissioners (Board) is authorized to lease the beds of navigable rivers of the state of Idaho between the high water marks for mining purposes pursuant to Idaho Code §§ 58-104(9) and 47-714, and the corresponding administrative rules promulgated by the Board, IDAPA 20.03.05 *Riverbed Mineral Leasing in Idaho*.

Mr. Donald Smith submitted an application for a riverbed mineral lease, on the Salmon River, on or about February 27, 2014. On June 24, 2014, after receiving a copy of the Idaho Department of Water Resources (IDWR) Recreational Mining Permit that was issued to Mr. Smith, IDL found Mr. Smith's lease application to be complete. IDL provided notice of the application and sought input from various state and federal agencies on July 17, 2014. In addition, IDL deemed that holding a public hearing would be in the best interest of the public and on July 23 and 30, 2014, IDL published a notice of application and hearing, in *Idaho County Free Press*, in which public comments were solicited. A public hearing was held on September 3, 2014, at the IDL Payette Lakes Supervisory Area Office in McCall, Idaho.

The Hearing Officer prepared and submitted a memo on this matter to IDL on January 13, 2015. The Hearing Officer recommended approving the lease with a condition that would require Mr. Smith to comply with all of the conditions of his IDWR Recreational Mining

Permit, which prohibits the use of suction dredges with nozzle diameters greater than five inches.

On February 17, 2015, this matter was brought before the Land Board where Mr. Smith provided oral and written testimony. In his testimony, Mr. Smith requested that the recommended condition requiring compliance with the IDWR permit be removed. He stated that the IDWR permit he received authorized the use of a five inch dredge. It did not authorize the use of an eight inch dredge or two five inch dredges in tandem, as he requested in his application. At this meeting, the Board voted to table a decision on the matter to allow IDL the opportunity to review the transcript and documents submitted into the record.

On March 26, 2015, Mr. Smith emailed IDL to provide clarification regarding the testimony he gave at the February Land Board Meeting. In his email, Mr. Smith reiterated that he applied to use either an eight inch dredge or a pair of five inch dredges in tandem, but received authorization to use only one five inch dredge. He stated, "I have determined that a 5-inch dredge will be wholly inadequate for most of the lease area."

This matter was brought to the Land Board again on April 21, 2015. At this meeting, the Board voted to deny Mr. Smith's riverbed mineral lease application on the basis that the Board cannot issue a lease that would exceed parameters set by IDWR. This denial allows Mr. Smith the opportunity to obtain authorization from IDWR to use the desired equipment prior to making application for a riverbed mineral lease.

II. FINAL ORDER

On the basis of the record, it is my order that Riverbed Mineral Lease application number E500017 be denied by IDL. This is a final order of the agency. Any party may file a motion for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt,

or the petition will be considered denied by operation of law. Idaho Code § 67-5246(4).

Pursuant to Sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which: the hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is attached. An appeal must be filed within twenty-eight (28) days of the service date of this final order, of an order denying petition for reconsideration, or the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

DATED this 5th day of May, 2015



Thomas M. Schultz, Jr.
Director, Idaho Department of Lands

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2015, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

Donald Smith
PO Box 144
Riggins ID 83549

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile:
- Email:

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile:
- Email:

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile:
- Email:

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile:
- Email:



Renee Miller
Idaho Department of Lands

MEMORANDUM

DATE: January 13, 2015

TO: Tom Schultz
Director, Idaho Department of Lands

FROM: Brandon Lamb
Resource Protection and Assistance Bureau Chief
Idaho Department of Lands

SUBJECT: Findings of Fact, Conclusions of Law and Recommended Order, Donald Smith
Riverbed Mineral Lease Application, E500017

I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following a public hearing conducted by the Idaho Department of Lands (IDL) in conjunction with processing an application for a State of Idaho Riverbed Mineral Lease on a portion of the Salmon River, a navigable river in Idaho. Jurisdiction in this matter rests with IDL pursuant to Idaho Code §§ 58-104(9) and 47-714, and IDAPA 20.03.05, *Riverbed Mineral Leasing in Idaho (Leasing Rules)*. All documents referenced herein are hereby incorporated into the record of this matter by reference.

The matter before the Hearing Coordinator is limited to whether or not IDL should issue a mineral lease for a one-mile stretch of the Salmon River to the Applicant Donald Smith (Applicant). The question of whether or not to issue a recreational suction dredge mining permit is not before IDL for consideration. As discussed in more detail, *infra*, a permit for recreational suction dredge mining, valid through September 30, 2015, has already been issued to the Applicant.

II. FINDINGS OF FACT

1. The Applicant filed a Riverbed Exploration Location Notice Certificate with IDL on or about January 3, 2012, Certificate No. L500008, for a one-half (1/2) mile stretch of the Salmon River in Section 10, T24 North, R1 East, adjacent to Lots 1, 2 and 6, in Idaho County.
2. On or about February 14, 2014, the Applicant submitted a Joint Application for Permits from the U.S. Army Corps of Engineers, IDL and the Idaho Department of Water Resources (IDWR) (Dredge Application) for a permit to suction dredge an approximately one (1) mile portion of the Salmon River about one (1) mile north of Riggins, Idaho, between mile

markers 196 and 198. This application describes the proposed operation with narrative and diagrams.

3. The Applicant proposed as follows:

I plan to suction dredge mine that portion of the bed of the Salmon River which is in the 1 mile lease that I am making application for and is underwater. I plan to use either an 8" dredge nozzle size or two 5" dredge nozzle size in tandem. I also plan to incorporate a floating electric winch for safety in dealing with rock and boulders that are too heavy to lift or move any distance by hand. I will not be using any special equipment for construction or erosion, sediment and turbidity controls and do not anticipate causing any hydrological changes. . . . Due to the fact that my proposed method of mining this lease is the most efficient, the most economical and the most environmentally friendly, I do not anticipate any borrow sources, disposal locations and reclamation bonding to be an issue due to spring flooding reclaiming all mined areas year over year.

Dredge Application, Paragraph 16. The horsepower of the dredges was not specified. The Applicant proposes processing about 49 cubic yards of dredged material annually. *Id.*, Paragraph 19. As to water quality, the Applicant stated that he did "not anticipate having any impacts on water or water quality. All changes to the stream channel will be temporary and will not harm the environment." *Id.*, Paragraph 17. The Applicant had obtained recreational suction dredge mining permits from between 2000 and 2013 on this stretch of the Salmon River, utilizing a 5" dredge nozzle with a 15 horsepower rating. *Id.*, Paragraphs 21 and 22. The Applicant proposed no use of chemicals or locatable minerals in his operation. *Id.*, Paragraph 26b.

4. Numerous diagrams accompany the Dredge Application. In summary, the dredge will suction stream gravels until bedrock is reached, and discharge dredge spoils (tailings) downstream of the dredge platform. The winch will be used to move large boulders or rocks to access suitably-sized substrate for dredging. The handling of substrates of a size larger than gravels and smaller than boulders is not specified, but it appears that smaller rocks and cobbles will be moved by hand and sidecast into piles. A 30-foot working width is planned for excavation of about eight (8) feet of gravel. Dredge Application, page 7. On the diagram on page 8 of the Application, the Applicant proposed working in the river annually from March 1 through November 30.

5. On or about February 27, 2014, the Applicant submitted an Application for the Use of State Lands for a mineral lease (E500017) to IDL's Payette Lakes Area Office. The Applicant requested a mineral lease for exclusive use of a stretch of the Salmon River to suction dredge for gold in the area identified in Paragraph 2 of this Memorandum, *supra*.

6. On or about March 13, 2014, IDL notified the Applicant that mineral lease application E500017 would be deemed incomplete until the Dredge Application was approved.

IDL also advised the Applicant that a revised legal description was needed to change the request from one-half (1/2) mile of river to one (1) mile of river.

7. On or about April 1, 2014, Dave Cadwallader, Regional Supervisor for the Idaho Department of Fish and Game (IDFG), submitted comments (IDFG Comments) on the Dredge Application to Aaron Golart of IDWR.¹ IDFG's comments can be summarized as follows:

As described in the [Dredge] Application, Smith's mining activities would irreversibly alter the Salmon River morphology within and, potentially, outside of the defined project reach (lease area). Water quality within and outside the project area would also be affected, primarily from discharge of sediments. Finally, the project will have direct and indirect impacts on fish, including several fish species listed by the State as species of greatest conservation need (SGCN) and under the federal Endangered Species Act as either threatened or endangered. The Salmon River is also ESA-listed critical habitat for five of those fish species. The project could have short-and long-term adverse effects on channel gradient and stability; substrates; cover and habitat complexity; salmonid access and passage; and potential habitat connectivity. The application completely discounts the possibility of adverse impacts from the proposed activity and, thus, identifies no Best Management Practices (BMPs) to mitigate for potential impacts.

IDFG Comments at p. 2. IDFG thus recommended not permitting the proposed suction dredging activity until a satisfactory analysis of the potential impacts of the project on stream morphology and fisheries is conducted, and BMPs to mitigate impacts are identified. *Id.* IDFG also provided a detailed analysis of the potential impacts on fisheries and stream morphology. No documentation was submitted in support of the IDFG comments.

8. IDFG recommended in their Comments the following conditions for any permit that is issued: (a) A work window of July 1 to August 14; (b) a survey of the lease area for salmon or steelhead redds or spawning activity; (c) identified salmonid spawning areas should be mapped by a certified fishery biologist and identified as non-suitable for mining; (d) staging and refueling should be at least 300 feet from the high water mark of the Salmon River, and stream bank disturbance should be minimized; and (e) dredging operations should not interfere with angler access, sport fishing or boating because the area is popular for angling.

9. On or about April 7, 2014, IDFG submitted supplemental comments (IDFG Supplement) to address the potential impacts on the Pacific lamprey, a species identified as critically imperiled in Idaho's Wildlife Action Plan and that is present in the Salmon River. IDFG briefly explained the life cycle of the Pacific lamprey and concluded by advising that a certified biologist should be required to determine the presence or absence of lamprey ammocoetes in suitable substrates, and prohibit dredge mining in those areas where ammocoetes

¹ The IDFG Comments were submitted into the record of this matter by the Idaho Conservation League.

are present. IDFG recommended such a survey as a condition of the permit, as well as a prohibition of dredge mining in areas where ammocoetes are located. No documentation was submitted in support of the IDFG Supplement.²

10. On or about June 23, 2014, the Applicant submitted an Application for Use of State Lands (Lease Application) for suction dredge mining in the same area as identified in Paragraph 2 of this Memorandum, *supra*, E500017.

11. On or about June 24, 2014, the Applicant was granted a Stream Alteration Permit in response to the Dredge Application. IDL received a copy of the Permit on this date. The Permit contained 6 special conditions, including the following: (a) Applicant must comply with the procedure in the approved application and IDWR's Recreational Mining Activities Program Instructions; (b) suction dredging could only be conducted between May 25 and September 30; (c) IDWR must be contacted no less than five (5) days before in-water work; (d) activities must be conducted so as to minimize turbidity and comply with Idaho water quality standards; (e) fuel, oil and other hazardous material must be stored and used so that a spill will not enter the waterway; and (f) expiration date of September 30, 2015. Several general conditions were also incorporated, including a disclaimer that other approvals for the activity may be required by other levels of government, and that the permit does not authorize trespass on private property. Additionally, this approval includes issuance of "Stream Channel Alteration by Recreational Mining Activities IDWR Program Instructions (as updated by IDWR annually)." These instructions contain 24 pages of information for suction dredgers, including instructions to avoid operating near a stream bank, effects of recreational suction dredge mining on fish (Attachment A), how to recognize and avoid spawning areas (Attachment B), the Endangered Species Act (Attachment C), listings of streams that are open and closed to suction dredging, and prevention of the spread of aquatic invasive species.

12. On or about July 17, 2014, IDL notified several agencies of the Lease Application, including IDFG, the Idaho Department of Environmental Quality (IDEQ), IDWR, the BLM and the Corps of Engineers, and requested review and submittal of comments to IDL. A copy of the Lease Application and the stream alteration permit issued by IDWR were included in this notice.

13. On or about July 30, 2014, IDEQ submitted a letter to IDL in response to the July 17, 2014, Notice from IDL. IDEQ advised IDL that the section of the Salmon River in question is protected for cold water aquatic life, primary contact recreation and domestic water supply. The Salmon River is listed in Category 3 of the Idaho 2012 Integrated Report "as the support status of the designated beneficial uses is not assessed." IDEQ further advised IDL that "[r]eclamation of disturbances resulting from the lease will need to be documented. Documentation should address pre-leasing conditions in comparison to post lease conditions focusing on the disturbed area instream and any associated riparian area."

14. IDL determined that, because of the general public interest in the Salmon River, it would hold a public hearing on the Lease Application. On July 23 and 30, 2014, IDL caused to

² The IDFG Supplement comments were submitted into the record of this matter by the Idaho Conservation League.

be published in the Idaho County Free Press a "Notice of Riverbed Lease Application," describing the Lease Application, the date of the public hearing, and a request for submittal of written comments.

15. On or about August 4, 2014, the Idaho Conservation League (ICL) submitted written comments in opposition to the proposed Lease. ICL's comments are summarized as follows: (a) the public benefit of the proposed gold mining proposal is far outweighed by the public benefits associated with clean water, recreation, fisheries, aesthetics and other core Idaho values; (b) suction dredge operations overlap with steelhead habitat; (c) suction dredge operations have negatively affected steelhead holding water, even several years after dredging has concluded; (d) suction dredge operators create dredged "holes," which threaten the safety of wading fishermen; (e) steelhead, chinook salmon, bull trout habitat, and popular fishing locations are present in the proposed lease area; and (f) suction dredge operations have impacted the economic interests of ICL members and supporters, who seek to attract critical recreation dollars.

16. ICL also identified other agency concerns and requested that the April 1 and 7, 2014, comments from IDFG be incorporated into the instant record. ICL discussed biological concerns, such as increases in turbidity and suspended sediments, and unstable spawning areas below mining areas. In support of this allegation, ICL submitted a photograph of a suction dredge operation on the Salmon River near Slate Creek that shows a sediment plume, as well as a photograph of a sediment plume on the South Fork of the Payette River. ICL identified critical habitat designations for the lease area and specific impacts on fall Chinook, as well as other species such as salmon, steelhead and bull trout. ICL also identified that the lands in question are identified by IDL as "public lands," and that they are subject to the public trust doctrine. Finally, ICL asserted that the Idaho Dredge and Placer Mining Act, Idaho Code title 47, chapter 13, applies to the Applicant's proposed lease activities, and requires reclamation of disturbed areas. ICL included with its comments data on redd counts in various Idaho rivers over the years, including the Salmon River, as well as a "references" page in support of their opposition to the lease. Copies of the studies referenced by ICL in "references," however, were not submitted into the record.

17. IDL received a total of 212 written comments on the proposed Dredge Lease, 211 of which were in opposition. These letters were mostly nearly identical, and objected to the lease for the following reasons: (a) the Salmon River is designated as a Special Resource Water and is eligible as a Wild and Scenic River; (b) the Salmon River provides critical habitat for steelhead, salmon, trout and lamprey; (c) the value of a naturally-flowing and un-mined Salmon River far exceeds any revenue from a gold mining operation in the river; (d) the risks of hazardous material spills, damage to the river bed, disruption to boating, fishing and other public uses far outweigh the benefit to the State or the public from the proposed use; (e) public trust lands should be managed for the protection of fish, wildlife, water quality and recreation instead of promoting mining; (f) mining has lasting impacts on water quality, riparian vegetation and aquatic habitat; (g) millions of dollars have been spent to restore aquatic species in the Salmon River; (h) approving an industrial gold mining operation is irresponsible due to the limited royalties paid to the State; (i) IDL should consult with federal agencies to implement conservation measures for endangered species; and (j) the subject lease would present specific harm to lawful users of the Salmon River.

18. On September 3, 2014, at 6:00 p.m. at IDL's Payette Lakes Office in McCall, IDL held a public hearing on this matter. Brandon Lamb of IDL served as the Hearing Coordinator. In attendance for IDL were Diane Green, IDL Minerals Resource Specialist; Andrew Smyth, IDL Public Trust Program Manager; and Steven J. Schuster, Deputy Attorney General assigned to represent IDL. Twenty-four (24) members of the public attended, and ten (10) testified. The hearing was digitally recorded and subsequently transcribed.

19. The Applicant spoke first at the hearing. In summary, he discussed the Endangered Species Act and Art. IV, Sec. 4 of the U.S Constitution. He testified that he paid his application fee, and will pay pre-paid royalties to IDL. He stated that there is no science to justify concerns for endangered species, or other adverse impacts on fish, wildlife or water quality, and that issuance of the lease would be in the best interest of the State. He also testified that IDL is the easiest regulatory agency to work with, and that other agencies need to revamp their rules to fit what is actually going on in the water. He concluded by saying that he does not intend to apply for an NPDES individual permit. Finally, the Applicant also submitted into the record his "talking points," summarizing his concerns about the Endangered Species Act (ESA), and that comments opposing suction dredge mining are baseless.

20. At the hearing, the Applicant or other commentators also submitted into the record a number of studies/papers concerning small-scale suction dredge mining:

a. "Suction Dredge Mining, Sluicing and Panning Activities on the Salmon-Challis National Forest." This is a one-page informational document from the U.S. Forest Service, which summarizes the requirements for permits required for suction dredge operations in Idaho, including the fact that the U.S. Environmental Protection Agency (EPA) considers suction dredging as a point source discharge, and that the window for working in many streams in the Forest is limited due to the presence of endangered species under the ESA.

b. A February 3, 2014, memorandum from Joe Greene, a retired EPA research biologist, environmentalist and small-scale suction dredger, to the Idaho Legislature. Mr. Greene's credentials are not presented, other than a "courtesy faculty appointment at Oregon State University in the Department of Civil, Construction and Environmental Engineering" as an adjunct professor. The 3-page document appears to be missing a page or pages. The paper summarized findings in California in 1994 as to the negligible impact from small-scale suction dredge mining. It also asserts that suction dredge holes are safe for fish, suction dredging breaks up compacted stream beds, dredge tailings protect existing redds by offering additional spawning substrate, and improves water quality by removing garbage from the river, such as lead fishing weights, plastic water bottles, nails, cars parts, etc. Mr. Greene also points out the relatively small sale of suction dredge mining generally, and that it thus has a *de minimus* impact on the environment.

c. Commentor Ron Miller submitted a copy of a study, Bret C. Harvey and Thomas E. Lisle, "Scour of Chinook Salmon Redds on Suction Dredge Tailings," *North*

American Journal of Fisheries Management, 19:613-671 (1999).³ The study was made on tributaries to the Klamath River in northern California. The authors, employees at the U.S. Forest Service Pacific Southwest Research Station, concluded as follows:

Our results show that fisheries managers should consider the potential negative effects of dredge tailings on the spawning success of fall-spawning fish, such as chinook salmon and coho salmon. Streams with a shortage of natural substrate appropriate for spawning, a high potential for scour, and a low number of spawners deserve special attention. Where managers determine that unstable dredge tailings may lead to unacceptable effects on spawning success, these effects could be reduced or eliminated through regulations that require that tailings piles be redistributed to restore the original bed topography and particle size distribution.

Id. at 617. The authors also noted that suction dredge mining impacts on fish spawning had not, at the time, been extensively studied because dredging rarely overlaps in time with spawning by species of special concern, and in many unregulated streams, most fish spawn in the spring after dredge tailings from the previous summer and fall are redistributed by high winter flows. *Id.* at 613. The authors also noted that there was considerable variability in changes in redds due high winter flows, in part because of the variation in annual river discharge. *Id.* at 614-616. Finally, the authors observed that “[t]he significance of dredge tailings to salmon populations may vary even among streams with similar patterns of scour.” *Id.* at 616.

d. Commentor Jim Chmelik submitted a study published by the Washington State Department of Ecology entitled “Effects of Small-Scale Gold Dredging on Arsenic, Copper, Lead and Zinc Concentrations in the Similkameen River,” Publication No. 05-03-007 (2005). It is not clear if this is a peer-reviewed study. The authors from the Washington State Department of Ecology concluded in the study abstract that concentrations of arsenic, copper, lead and zinc discharged from suction dredge operations are not a significant toxicity concern for aquatic life in the Similkameen River. The authors also conclude that the results of this study may not apply to sediments behind the Enloe dam. *Id.* at Conclusions.

e. The Applicant submitted a document entitled a “Fact Sheet” (June 9, 2013) with specific suction dredging conclusions. The paper was prepared by Claudia Wise, a physical scientist and miner retired from the EPA, Joseph Green referenced in Paragraph 20.b., *supra*, Guy Michael, a miner, and Tom Kitchar, President of the Waldo Mining District. The authors concluded that small-scale suction dredge mining does not harm the environment and that such activity can be an overall benefit to fish habitat. Numerous studies are referred to and summarized in this paper, but the studies themselves were not submitted to the record. This article was oriented toward activities in Oregon on federal lands, and contains a discussion of the law related to mining on federal land, and the NPDES permit requirements.

³ It is not stated on the paper, but it appears that the *North American Journal of Fisheries Management* is a peer-reviewed journal of the American Fisheries Society.

f. The Applicant also submitted a 13-page collection of photographs with captions, prepared by J&K Greene Environmental Services of Philomath Oregon (2014), entitled “Small-Scale Gold Suction Dredging is Compatible With Nature” that depict numerous suction dredge mining operations. Many of these photographs depict the type of sediment plume generated by small suction dredges, as well as the type of garbage, such as lead fishing tackle, removed from a river by a suction dredge operator.

g. Finally, a document entitled “More Pertinent Information for Suction Dredge Mining,” which is a synopsis of a prepared statement by Paul Badali for a suction dredge seminar held by IDWR in 1988, was submitted into the record by commentor Jim Chmelik. This paper, which contains no citations or qualification of the author, discusses issues such as the process of dredge mining, the effects on plants and water temperature, frightening of fish, cobble and tailing piles, stream turbidity and impacts on invertebrates. The author concludes that small-scale suction dredge mining has little, if any, adverse environmental impact and should be encouraged by fisheries agencies to enhance fisheries.

21. In addition to the Applicant, Don Munz, Doug Dennis, Paul Shepherd, Jim Chmelik, Lisa Smith, Wes Olson, David Sayer, Idaho County Sheriff Giddings and Ron Miller testified at the hearing on behalf of the Applicant. These members of the public testified to the negligible impact of Mr. Smith’s operations, past and future, and recommended issuance of the subject lease.

22. An acre contains 43,560 square feet.

III. CONCLUSIONS OF LAW

A. Legal Authorities Of The Board And IDL With Respect To The Subject Lease Application.

1. The Idaho State Board of Land Commissioners (Board) is required by Idaho Code § 58-104(9) “[t]o regulate and control the use or disposition of lands in the beds of navigable lakes, rivers and streams, to the natural or ordinary high water mark [OHWM] thereof, so as to provide for their commercial, navigational, recreational or other public use;”

2. Pursuant to Idaho Code § 47-714, the Board is “authorized to lease for mining purposes the beds of navigable rivers of the state of Idaho between the high water marks thereof, said leases to be given under the terms and provisions of this chapter and the rules and regulations heretofore or hereafter adopted by said board.”

3. Pursuant to Idaho Code §§ 58-104(9) and 47-714, the Board has promulgated *Leasing Rules* to specify the procedure to be used in leasing the beds of navigable rivers in Idaho, IDAPA 20.03.05.

4. IDL is the administrative instrumentality of the Board. Idaho Code § 58-101.

5. The Salmon River is a navigable river and the bed of the Salmon River to the OHWM in the location in question is owned by the State of Idaho. *Heckman Ranches, Inc. v. State*, 99 Idaho 793, 796, 589 P.2d 540, 543 (1979).

6. Title to the beds of navigable rivers to the OHWM in Idaho is held by the State in trust for the benefit of the people of the State of Idaho for the purpose of commerce, navigation, fisheries, recreation, and other trust purposes such as water quality and aesthetics. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 625, 671 P.2d 1085, 1088 (1983) (*KEA*). The “central substantive thought” in public trust litigation can be articulated as follows:

[w]hen a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to relocate the resource to more restricted uses *or* to subject public uses to the self-interest of private parties.

In Re Sanders Beach, 143 Idaho 443, 453, 147 P.3d 75, 85 (2006) (emphasis in original), citing *State ex rel Haman v. Fox*, 100 Idaho 140, 149, 594 P.2d 1093, 1102 (1979).

7. The public trust doctrine is also codified at Idaho Code title 58, chapter 12. Pursuant to Idaho Code § 58-12-3(1), the Board’s authority is as follows:

The public trust doctrine as it is applied in the state of Idaho is solely a limitation on the power of the state to alienate or encumber the title to beds of navigable waters as defined in this chapter. The state board of land commissioners may approve, modify or reject all activities involving the alienation or encumbrance of the beds of navigable waters in accordance with the public trust doctrine.

8. Thus, pursuant to its statutory authorities and the public trust doctrine, the Board and IDL have broad discretion to evaluate proposed uses of the beds of the Salmon River, such as the proposed mineral lease, in accordance with the duty to protect the public’s interest in commerce, navigation, fisheries, recreation water quality and aesthetics in the Salmon River under the public trust doctrine. The State, “as administrator of the trust in navigable waters on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties.” *KEA, id.*

B. The Idaho Dredge Mining Act, Idaho Code Title 47, Chapter 15, Does Not Apply To The Applicant’s Activities At This Point In Time.

9. One of the comments provided by ICL states that the Idaho Dredge and Placer Act, Idaho Code title 47, chapter 13 (Dredge Act), requires reclamation of the areas impacted by the Applicant’s operation. ICL determined that an area of over 3.5 acres would be disturbed by creating a 30-foot wide excavation for a linear distance of 1 mile (5,280 feet). This would involve a disturbance of about 158,400 square feet, or 3.5 acres. This, ICL asserts, would exceed

the ½ acre threshold below which no permit is required under the Dredge Act, thus requiring dredge mining permit from IDL, including a bond and a reclamation plan.

10. The proposed operation constitutes “placer or dredge mining” as defined by Idaho Code § 47-1313(k) because the operation involves the extraction of minerals from a placer deposit.⁴ The question is whether it constitutes a “placer or dredge mining operation” as defined by Idaho Code § 58-1313(l), which is a “placer or dredge mining which disturbs in excess of one-half (1/2) acre of land.” A permit is required from IDL for a “placer or dredge mining operation.” Idaho Code § 47-1317(a).

11. Administrative rules have been enacted pursuant to the Dredge Act, IDAPA 20.03.01, *Dredge and Placer Mining Operations in Idaho*. Rule 020.03, states that “[a]ny placer or dredge exploration operation which causes a cumulative surface disturbance in excess of one-half (1/2) acre of land, including roads, shall be considered a placer or dredge mining operation, . . .” and thus subject to reclamation requirements. Similarly, Rule 010.27 defines a placer or dredge mining operation as “placer or dredge mining which disturbs in excess of one-half (1/2) acre of land during the life of the operation.” Rule 012.06 states that “[t]hese rules do not apply to dredging operations in streams or riverbeds using suction dredges with an intake diameter of eight (8) inches or less.” Thus, these definitions do not strictly apply to the operation and proposed lease at hand. Idaho Code § 47-1313(l), however, also establishes the one-half (½) acre limit, and this statute applies to all operations, although the statute does not reference “cumulative” or “life of the operation” requirements. Given that IDL has determined that the one-half (½) limit should be interpreted cumulatively in the Rules, and that this appears to be a reasonable interpretation of the statute, we conclude that the cumulative one-half (1/2) acre limitation applies to the Applicant.

12. The Applicant has not identified how much surface area his operation will disturb, either annually or cumulatively. He stated that he will generate about 49 cubic yards of tailings annually. Dredge Application, Paragraph 19. It is not clear from the record if this will involve a continuous “trench”⁵ the entire length of the lease area, as assumed by ICL, or simply sporadic trenching areas. One-half (1/2) acre comprises approximately 21,780 square feet. It is also not clear from the record when, or if, this 21,780 square foot threshold will be exceeded.

13. A determination of the area of surface disturbance to determine the applicability of the Dredge Act is further complicated by the fact that the disturbance is submerged and subject to the continuous influence of the flow of the Salmon River. The Applicant asserts that the river “reclaims itself” naturally through high flows in the spring. The Applicant has been operating in the area in question since 2000, and there is no evidence of “unreclaimed” river bed in the record. The Harvey and Lisle study also observed that high flows scoured dredge tailings, but noted that there was considerable variability in the extent of scouring due to annual

⁴ A “placer deposit” is defined by Idaho Code § 47-1313(i) as “naturally occurring unconsolidated surficial detritus containing valuable minerals, whether located inside or outside the confines of a natural watercourse.”

⁵ The Applicant’s IDWR application materials at page 7, contain a diagram, a cross-section, showing how the operation will create a “trench” 30 feet wide through the “deep overburden” down to bedrock. Thus, the term “trench” is utilized to describe this excavation.

variations in high flow levels, i.e., low spring flows levels will not redistribute tailings as readily. On the other hand, IDFG has asserted that the proposed operation would irreversibly alter the morphology of the river inside and potentially outside the lease area. There is no evidence in the record or explanation as to how the morphology of the river can be changed outside the lease area, the impact on the “holes” created by suction dredge mining, or how quickly they are “reclaimed” by the river, if at all. IDFG submitted no evidence in support of its assertion of irreversible damage with its Dredge Application comments.

14. Because of the unique nature of recreational suction dredge mining in terms of the limited extent of disturbance, the fact that it appears to be “self-reclaiming,” and the fact that it is recreational, a specific permitting process was considered by IDWR and IDL in the early 1990s to address this activity. The joint permit process for recreational mining on navigable rivers in Idaho, *Leasing Rules*, Rule 015, and IDAPA 37.03.07, IDWR *Stream Channel Alteration Rules*, Rule 064, is the result. The Applicant obtained a recreational suction dredge mining permit from IDWR in June 2014, as discussed in Paragraph 11 of the Findings of Fact, *supra*, and is limited to suction dredges with an intake diameter of 5 inches or less and horsepower of 15 or less.⁶ Possession of such a permit constitutes a waiver by the Board of bonding and written approval for such activities under the Dredge Act. Rule 015.04 and 05, *Leasing Rules*. Thus, IDL has long treated recreational suction dredging as outside the scope of the Dredge Act, and there is no evidence in the record that such operations exceed the one-half (1/2) acre threshold and must obtain a permit from IDL under the Dredge Act.⁷

15. The standard for the reclamation of the bed of a river from dredge mining is the bed “shall be restored to a configuration and pool structure conducive to good fish and wildlife habitat and recreational use.” Idaho Code § 47-1314(a).

16. Given the uncertainty of the annual high flows on the Salmon River reclaiming areas disturbed by suction dredging, and the extent of cumulative disturbance by the Applicant, there is insufficient evidence in the record to show that the Applicant must permit his operation under the Dredge Act, other than by compliance with Rule 015 of the *Leasing Rules*. If the Applicant disturbs in excess of one-half (1/2) acre, cumulatively, pursuant to his operation, a Dredge Permit will be required, and the scope of reclamation required in light of the annual high flows of the river must be evaluated. Whether reclamation is done by the Applicant or the Salmon River, any areas reclaimed so that the river is “restored to a configuration and pool structure conducive to good fish and wildlife habitat and recreational use” should not be counted toward the cumulative disturbance total.

C. Issuance Of A Lease To The Applicant Is Consistent With The Public Trust Doctrine.

⁶ Although the Applicant applied for a permit for an eight (8) inch suction dredge, or two five (5) inch suction dredges operating in tandem, the permit only authorized a suction dredge nozzle of five (5) inches or less. Such an operation would not qualify for the joint IDWR/IDL permit unless the nozzle is five (5) inches or less. *Leasing Rules*, Rule 015; *Stream Alteration Rules*, IDAPA 37.03.07, Rule 64.

⁷ Pursuant to Idaho Code §§ 47-703A(6)(a) and (b), suction dredging with an intake nozzle of 5 inches or less is considered casual exploration and not motorized exploration, and no bond is required for such activities.

17. The issuance of the proposed lease by the Board constitutes an encumbrance on the State's title to the bed of the Salmon River and is thus subject to the requirements of the public trust doctrine. In *KEA*, the Idaho Supreme Court set forth various standards that the Board should use in its evaluation of whether a proposed project is consistent with its trustee duties under the public trust doctrine. The Idaho Supreme Court, based upon the United States Supreme Court's decision in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110 (1892), first established a two-part test to determine the validity of a grant of public trust property: One, is the grant in aid to navigation, commerce or other trust purposes, and two, does it substantially impair the public's interest in the lands and waters remaining? *KEA*, 105 Idaho at 626, 671 P.2d at 1089.

18. With respect to the first part of this test, the lease would support commercial and recreational purposes. It is hard to characterize the Applicant's proposed activity as either recreational or commercial. The size of the operation is defined by law as "recreational," although the Applicant can realize income from the mining of gold, which relates to commerce since gold is a valuable commodity. Although the "commerce" referred to in judicial articulation of the public trust doctrine probably applies to commerce through shipment of commodities on the surface of the water, *see KEA*, 105 Idaho at 625, 671 P.2d at 1088 (reference to conducting commerce over submerged lands), the activity is recreational to the extent that the amount of commodity sought is limited by the nozzle size of the suction dredge. Thus, the proposed encumbrance satisfies this portion of the test.

19. There are no facts in the record to lead to the conclusion that the issuance of this mineral lease will lead to substantial impairment of the public's interest in the lands and waters remaining. The public has been conducting recreational suction dredge mining operations on Idaho rivers under IDL rules since 1991, and under IDWR rules since 1993. There are obvious short-term and localized impacts from suction dredging, but there is no evidence of substantial impairment. To the contrary, a lease for a one-mile stretch of the river to the Applicant, which grants the Applicant the exclusive right to conduct suction dredge mining operations thereon, could actually reduce suction dredge impacts on that stretch river by limiting such impacts to one operator. It is important to note that the IDFG comments submitted into the record of this matter were directed at the Applicant's 2014 application for a joint IDWR/IDL recreational suction dredge permit, and suction dredge mining in general. The IDFG comments were not originally directed to the instant lease application.

20. The *KEA* Court also stated that "public trust resources may only be alienated or impaired through open and visible actions, where the public is *in fact* informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon." *KEA*, 105 Idaho at 628, 671 P.2d at 1091 (emphasis in original). This standard has been complied with through publication of a notice of the proposed lease in a newspaper of local circulation, an oral public hearing was held, and written comments on the proposal were accepted and are being considered by IDL.

21. The *KEA* Court also set forth the various factors that a Court will take a "close look" at in its review of any State actions pursuant to the public trust doctrine, while not supplanting its judgment for that of the agency:

In making such a determination the court will examine, among other things, such factors as the degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to the full use of the public trust resource, i.e. in this instance the proportion of the lake taken up by docks, moorings or other impediments; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, i.e., commerce, navigation, fishing or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.

KEA, 105 Idaho at 629-30, 671 P.2d at 1092-93. Consideration of these factors should be made by the agency charged in the first instance with making a decision as to whether to encumber the lands or not.

22. With respect to the degree of effect on public trust uses, it is difficult to separate each public trust use from the others. For example, the impact on fisheries can affect recreational fishing and commerce to the extent that local outfitters are paid to guide fishing trips on the Salmon River. There is no evidence that the Applicant, who has operated on these waters since 2000, has had any adverse impact on navigation. The operation occupies a small footprint on the surface of river at any given moment, as shown by photographs in the record.

23. It is more difficult to evaluate the impact on commerce, fisheries and recreation as these are tied together, but the fundamental issue in this matter appears to be the impact on fisheries. There are conflicting comments on that issue in the record. IDFG states that geomorphology, water quality and fisheries will be adversely affected. The Harvey and Lisle study, which is the only peer reviewed⁸ study presented to IDL for the record, concludes that fishery managers “should consider the potential negative effects of dredge tailings on the spawning success of fall-spawning fish, such as chinook salmon and coho salmon,” and cites a number of other studies to support its conclusions. But Harvey and Lisle recognize that annual high flows in a river can scour the riverbed and rearrange gravels, including dredge tailings. This is also the conclusion from the Applicant, his supporting materials and comments in support, although high flows may vary from year to year, allowing geomorphic changes in the riverbed to persist for more than one annual hydrologic cycle.

24. The Applicant’s complete dismissal of impact on fisheries does not stand up in light of the Harvey and Lisle study, or written testimony from IDFG, the agency charged with management of fish and wildlife in Idaho. The IDFG opinion must be given some weight in this consideration; there were no fishery biologists⁹ in support of the Applicant. Photographs

⁸ It is not clear from the record whether the study from the Washington State Department of Ecology is peer reviewed, but this study focus on the release of certain heavy metals, and that has not been raised as an issue of concerning with the Applicant’s operation.

submitted by both ICL and supporters of the Applicant show the kind of plume of sediment created by a small-scale suction dredge operation, so there is no question that there is at least some temporary, local impact on water quality from these operations. The impact on fish from sediment introduced into the water in the period from May 25 through September 30 is not established in the record.

25. Although it appears that the Applicant's activities will have at least some impact on stream geomorphology, water quality and fisheries, we cannot say that such impact has adversely impacted or displaced other public trust uses. All human activities in the Salmon River, including maintenance of the adjacent highway, fishing (particularly wading) and rafting have some impact on the river, as evidenced by the junk removed by dredgers. The Applicant has been operating on the Salmon River since about 2000, and there is no evidence that he has had a significant adverse impact on navigation, fisheries or commerce from the relatively limited period of operations that are allowed on the river. As discussed in Paragraph 19 of these Conclusions of Law, *supra*, if a mineral lease is issued to the Applicant, he would have the right to the exclusive use of a one-mile stretch of the river, thereby precluding the use by potentially many other dredgers. The effect of issuance of a mineral lease to one individual could be to actually decrease the amount of suction dredging in this one-mile stretch.

26. With respect to the impact on the public trust resource from the Applicant's activities, those have been explained *supra*. Most impacts are expected to be local and short term, such as the discharge of sediment into the water plume, and deposition of tailings, which may persist until the next high flow period, or possibly longer. The impacts on "holes" created by suctioning down to bedrock is not clear, and although they may offer some benefit as a refuge for fish, they could also be a hazard to wading fishermen.

27. There is no evidence in the record as to the impact of the proposed lease with other recreational suction dredge mining operations, or other uses, so the cumulative impact of this operation cannot be evaluated. Again, issuance of a mineral lease to the Applicant will limit the impact on a one-mile stretch of river to one suction dredge operator, as compared to possibly several.

28. The Applicant does not need this lease in order to conduct suction dredge mining operations on the Salmon River, as he has been doing so under the permit from IDWR and IDL since 2000. If the Board declines to issue a lease to the Applicant, he still has a permit to suction dredge through 2015, and possibly into the future by renewing the permit. Thus, issuance of a lease may actually help reduce the cumulative impact, and issuance of the lease will not authorize any activity not already authorized by law.

29. It does not appear that other public trust uses are set aside in favor of the Applicant's operation. Recreational suction dredge mining is limited to the period between May 25 and September 30, so there are no such operations on the river for eight (8) months of the

⁹ For example, the qualification of Joseph Greene, who is identified as a retired EPA "research biologist," are not established in the record. Research biology is a broad field, and Mr. Greene's expertise may or may not include expertise in fisheries.

year. The operation creates a very small footprint on the river, and other impacts have been discussed *supra*.

30. Finally, the *KEA* Court explained that any grant or encumbrance of public trust lands remains subject to the trust. *KEA*, 105 Idaho at 631, 671 P.2d at 1094. The Board and IDL are not “precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed on this conveyance.” *Id.* The proposed lease would thus remain subject to the public trust and if it is determined that the operations were detrimental to the resource, the lease could be terminated by IDL.

D. Other Comments Submitted By Objectors Do Not Support Denial Of The Pending Lease Application.

31. Most of the written comments on the proposed lease, submitted prior to the hearing, were in opposition to issuance of the lease and nearly identical in the issues raised. These objections are addressed as follows:

a. **The Salmon River is designated as a Special Resource Water and is eligible for designation as a Wild and Scenic River under federal law.** Idaho Code § 47-1323 prohibits mining on certain portions of Idaho rivers that are designated as “wild and scenic rivers” under federal law. This statute does not prohibit mining on the portion of the Salmon River in question. There is no evidence in the record that issuance of the subject lease will have any impact on the potential for designation of this stretch of river as wild and scenic under federal law. Additionally, “Special Resource Waters” are no longer identified in the Idaho DEQ’s *Water Quality Standards*, IDAPA 58.01.02.

b. **The Salmon River provides critical habitat for steelhead, salmon, trout and lamprey.** The impact of the Applicant’s operations on the Salmon River has been discussed in the Findings of Fact, *supra*. The river does provide important habitat, but there is no evidence in the record that this Applicant is substantially degrading that habitat, or impairing other public trust resources. Issuance of a lease could reduce impacts in the stretch of river in question.¹⁰

c. **The value of a naturally-flowing and un-mined Salmon River far exceeds any revenue from a gold mining operation in the river.** This comment incorporates subjective value judgments of individuals, but there is no evidence in the record concerning relative monetary values. IDL does not doubt that this statement is true for many people. On the other hand, other people value the recreational opportunity presented by suction dredge mining. IDL is attempting to weigh these respective uses, but economics is not the only factor that IDL must consider. *See Brett v. Eleventh Street Dockowner’s Association, Inc.*, 141 Idaho 517, 523, 112 P.3d 805, 811 (2005) (while IDL must weigh economic benefit and detriment of navigational encroachment, it must weigh all other pertinent factors as well).

¹⁰ For example, Rule 064.07 of the *Stream Channel Alteration Rules* require a separation of 100’ of stream channel between operators, whereas the Applicant will have the exclusive lease on a one (1) mile stretch of river.

d. **The risks of hazardous material spills, damage to the river bed, disruption to boating, fishing and other public uses far outweigh the benefits to the State or the public from the proposed use.** As set forth in Paragraph 31.c. of these Conclusions, *supra*, this statement illustrates the balancing required by IDL.

Recreational suction dredge miners have been operating in Idaho for decades. There is no evidence that the Applicant has spilled hazardous materials, and Special Condition 5 of the current permit requires refueling so that any spill does not enter the waterway. There is no evidence that the Applicant's activities have impaired boating or other recreation. Impacts on the river bed have been addressed in the Findings of Fact, *supra*.

e. **Public trust lands should be managed for the protection of fish, wildlife, water quality and recreation instead of promoting mining.** As explained in Paragraph 16 of these Conclusions, *supra*, one of the traditional, protected public trust uses of navigable waterways is commerce. Some commentators may not agree, but many people also consider suction dredge mining to be recreational and thus also a public trust use. Certainly, various uses can conflict with other uses, but navigable rivers have multiple uses. There is no evidence in the record that this Applicant's activities substantially conflict with other public trust uses.

f. **Mining has lasting impacts on water quality, riparian vegetation and aquatic habitat.** There is no evidence in the record to document any lasting impacts from the Applicant's operations, and some evidence suggests that the river does naturally reclaim itself to some degree with spring high flows. The impacts to water quality appear to be local and temporary, and virtually any activity in or near the river can impact water quality. The question is whether the Applicant's lawful activity has unreasonable impacts, and there is no evidence in the record to support such conclusion.

g. **Millions of dollars have been spent to restore aquatic species in the Salmon River.** This may be so, although it is not documented in the record. "The Salmon River" is a large river, and includes much more than the area in question. There is no evidence in the record that this Applicant's activities have had an adverse impact on habitat restoration activities.

h. **Approving an industrial gold mining operation is irresponsible due to the limited royalties paid to the State.** The proposed lease is for a recreational operation, not an "industrial gold mining operation."

i. **IDL should consult with federal agencies to implement conservation measures for endangered species.** Activities by the Applicant are subject to all pertinent federal laws, including the Endangered Species Act. The State is not legally required to consult with federal agencies when it issues mineral leases in rivers, and there is no evidence that such consultation would be useful, particularly when there is no evidence that the Applicant is or will be in violation of the Endangered Species Act.

j. **The subject lease would present specific harm to lawful users of the Salmon River.** The Applicant is also a lawful user of the Salmon River. Additionally,

there is no specific evidence to support this statement. The proposed lease would not authorize suction dredging, it would limit such activity to one party along a one-mile stretch of river. It is difficult to see how issuance of the lease would harm anyone. The public trust doctrine recognizes a variety of uses of navigable waters. Commercial and recreational uses of such rivers have long been important, and protected, uses of waterways.

E. The Issue Before The Hearing Coordinator Is Whether A Mineral Lease Should Be Issued By IDL And The Board, Not Whether A Dredge Mining Permit Should Be Issued.

32. Although most of the comments and evidence introduced for consideration in this matter address the impacts of recreational suction dredge mining, the issue before IDL is issuance of a lease to the Applicant for the exclusive use of a stretch of the Salmon River. The Applicant currently possesses a valid recreational suction dredge mining permit issued through the joint permitting process identified in Paragraph 13 of these Conclusions, *supra*. The IDFG comments were submitted in objection to the Applicant's suction dredge mining permit, not the instant lease application. Regardless of what action the Board takes with respect to the instant lease Application, the Applicant has State authorization to suction dredge in 2015 in the area in question.

33. The issuance of a mineral lease from IDL could reduce suction dredge mining impacts on the stretch of river in question because the Applicant will have a lease and the right to the exclusive use of the river in a one-mile segment for this operation, i.e., there will only be one operator in this stretch moving about 49 cubic yards/year. Without the lease, there could be several operators suction dredging in this stretch of river, *supra* n.10.

F. Conditions Recommended By IDFG Will Not Be Required On A Lease.

34. IDFG recommended that a number of conditions be placed on the Applicant's recreational suction dredge mining permit. IDFG has not commented directly on the instant lease application. The IDFG comments were not incorporated into the permit by IDWR.

35. As set forth in Paragraph 11 of the Findings of Fact, *supra*, IDWR included as a condition of the permit the requirement that all work be conducted in accordance with the descriptions and methods on the attached application, diagrams, and Stream Channel Alteration by Recreational Mining Activities IDWR Program Instructions (as updated by IDWR annually). These Instructions contain information to enable a suction dredger to minimize the impacts on the resources.

36. Given the legal authorizations that exist for recreational suction dredge mining operations, and conditions and information that are part of the approved permit, I conclude that the detailed IDFG conditions are not justified at this time. This type of recreational activity has been conducted by the Applicant since 2000, and there is no evidence that his operation has had an unreasonable impact on the resources or other users. The detailed habitat inventory and

monitoring recommended by IDFG may be appropriate for a larger or a commercial operation, but it is not justified for approval of this lease, which in and of itself does not authorize suction dredge mining.

G. The Applicant Must Comply With All State, Federal And Local Laws.

37. In his written comments to IDL, the Applicant stated that “the Constitution of the State of Idaho is to be considered to be the supreme law within the State of Idaho.” This statement is not supported in law. Pursuant to Art. 6, Sec. 2 of the Constitution of the United States of America, “[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;” This is the so-called “Supremacy Clause” of the U.S. Constitution, and it means that all federal laws apply to the Applicant’s operation, in addition to any other State and local laws that may apply. The Applicant may disagree with various federal laws, but he is required to comply with them, or take appropriate legal action to challenge the applicability of such laws to his operation.

37. On April 4, 2013, Region 10 of the Environmental Protection Agency (EPA) published a “Final Issuance of General NPDES Permit (GP) for Small Suction Dredges in Idaho,” 78 Fed. Reg. 65, 20316 (2013).¹¹ This General Permit authorizes placer mining operations in Idaho for small suction dredges with an intake nozzle size of 5” or less or with equipment rated at 15 horsepower or less. The Applicant is required to comply with the terms and conditions of this General Permit, and to obtain an Individual Permit, or whatever authorization is required by the EPA, if any.

IV. RECOMMENDATION

Based upon the evidence in the record, I recommend that IDL approve Applicant Don Smith’s Mineral Lease Application E500017. In response to concerns raised by IDEQ, IDFG, ICL and the public, the following conditions shall be imposed upon the lease:

1. The Applicant shall comply with all conditions set forth in the June 24, 2014, Letter from IDWR for his recreational suction dredge mining operation, including handling of hazardous material and minimization of turbidity and to comply with Idaho water quality standards. Pursuant to a lease, the Applicant should be specifically prohibited from using an 8” suction dredge or two (2) 5” suction dredges, as he specified that he would use in his Dredge Application.

2. Dredging operations, cables, anchors, lines, etc., must not interfere with angler access, sport fishing or navigation.


¹¹ This General Permit was amended, effective April 14, 2014, to correct a discrepancy with the total maximum daily load that was issued for Mores Creek. 79 Fed. Reg. 50, 14507 (2014). The General Permit now includes the tributaries of Mores, Elk or Grimes Creek in the loading allocations for the total maximum daily load. This amendment, however, does not affect the Salmon River, or the matter before IDL.

3. In order to address the possibility of areas left disturbed by the Applicant unreclaimed by annual flows of the Salmon River, the Applicant may be required to replace and redistribute any excavated, dredged materials or spoils, cobbles, large rocks or boulders to restore the river bed to a configuration and pool structure conducive to good fish and wildlife habitat and recreational use. IDL will notify the Applicant in writing if such restoration is required. Additionally, the Applicant must cooperate with IDL and other regulatory agencies in order to facilitate inspections to verify reclamation of areas disturbed by his suction dredge mining.

4. In order to validate this lease, the Applicant must submit to IDL proof that he has applied for an individual NPDES permit, or submit proof that he is not required to do so and is covered by the General Permit. IDL will not at this time require that he actually have in his possession an NPDES permit prior to issuance of a lease, but he remains subject to all applicable State, local and federal laws, and such compliance should be made a condition of the lease.

5. The lease should include as a specific condition that the Applicant has the exclusive right to conduct recreational suction dredge mining on the stretch or river in question.

DATED this 13th day of January, 2015


Brandon Lamb
Resource Protection and Assistance Bureau Chief