No. 23-1372

In the Supreme Court of the United States

DAVID ERLANSON, SR.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 27, 2024
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QUESTIONS PRESENTED

1. Can 42 U.S.C. § 1983 be considered a tort claim action?

2. Can 42 U.S.C. § 1983 be considered a cause of action to sue the U.S. Environmental Protection Agency?

3. In consideration of the Ninth Amendment of the United States Constitution, can the U.S. EPA be held liable, under § 1983, for its enforcement actions, which deprived this citizen from availing himself of a privilege and immunity granted by the State of Idaho?

4. Can the U.S. EPA be held liable for suit under § 1983, because of its enforcement actions, which deprive this citizen of his substantive private rights written within the Bill of Rights?

5. Can the U.S. EPA be held liable for suit under § 1983 for violating and disregarding acts of Congress, which confer public rights upon this citizen's use of water on his Federal mining claim?

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 22-35894

Dave Wayne Erlanson, Sr., *Plaintiff-Appellant,* v. U.S. Environmental Protection Agency, *Defendant-Appellee.*

Memorandum Opinion: April 30, 2024

United States District Court for the District of Idaho

No. 4:22-cv-00091-DCN

David Erlanson, *Plaintiff,* v. U.S. Environmental Protection Agency, *Defendant.*

Memorandum Decision: October 14, 2022

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OPINIONS BELOW

The U.S. Court of Appeals for the Ninth Circuit issued its Memorandum Opinion on April 30, 2024. (App.1a). The U.S. District Court of the District of Idaho issued its Memorandum Decision and Order on October 14, 2022. (App.3a). The U.S. EPA issued its Final Written Decision on March 5, 2021. (App.16a).

JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit issued its Memorandum Opinion on April 30, 2024. (App.1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF FACTS — HISTORICAL BACKGROUND

On July 22nd, 2015 petitioner was extracting minerals from his Federal mining claim on the submerged lands of the South Fork of the Clearwater River, Idaho County, Idaho. Petitioner was using an engineered device commonly referred to as a suction dredge of a recreational capacity (5-inch nozzle size or less), being recognized in Idaho as a legal apparatus. A suction dredge is considered the best management practice to extract gold from the bed of the river. Petitioner had in his hand an Idaho Department of

Water Resources Letter Authorization Permit, which allowed him to use his suction dredge from July 15th, 2015 to August 15th, 2015 on the SFCR. The United States Environmental Protection Agency subsequently cited petitioner in June of 2016 for discharge of a pollutant into WOTUS (33 U.S.C. § 1311(a)) for the July 22nd, 2015 incident, the SFCR being an already polluted stream (*see* Idaho DEQ, INTEGRATED WATER REPORT 2016). This led to a guilty verdict by the EPA's administrative law judge on September 27th, 2018.

Petitioner was not afforded a hearing before the EPA's appeals board. Petitioner then appealed to the U.S. District Court of Idaho and decision was rendered against the plaintiff in the case at bar. Petitioner then appealed to the 9th Circuit Court of Appeals and after submitting a Writ of Mandamus to SCOTUS (docket #23-949) the 9th Circuit affirmed the lower court's decision, on April 30th, 2024, stating that 42 U.S.C. § 1983 does not waive sovereign immunity for United States agencies. The 9th Circuit agreed with the lower court's decision holding that § 1983 imposes liability upon persons and a federal agency is not a person. Further, the district court states "This alone bars Erlanson's suit." Petitioner adamantly disagrees and so petitions the Supreme Court of the United States on this Writ of Certiorari to consider the 9th Circuit's position, as well as the district court's position regarding the use of 42 U.S.C. § 1983 to file suit against the United States Environmental Protection Agency.

REASONS FOR GRANTING THE PETITION

I. 42 U.S.C. § 1983

The Ninth Circuit dismissed Erlanson's action for lack of subject matter jurisdiction, because Erlanson failed to establish that the United States waived its sovereign immunity, affirming the district court's position that the EPA is not a person and therefore cannot be sued using § 1983. Ninth Circuit uses *Jachetta v. United States*, 653 F.3d 898 (9th Cir. 2011) as applicable case law. Petitioner disagrees and will now endeavor to explain why. Let's begin with the language within § 1983; 'every person'. The Clearfield Doctrine says the following "Governments descend to the level of a mere private corporation and take on the characteristics of a private citizen." In the Federal Power Act, as amended public law 115-325 enacted December 18th, 2018, the definition of person is instructive, the term person means an individual or corporation. Corporation is further defined as a group of persons, whether incorporated or not. It is understood that the U.S. EPA gets its authority from the Commerce Clause of the Constitution, Article I, Section 8, Clause 3. Within *United States v. Burr*, 309 U.S. 242 (1940), resides the following declaration "When governments enter the world of commerce they are subject to the same burdens as any private firm or corporation."

To further this analysis, petitioner offers *Gibbons v. Ogden*, 22 U.S. (9 wheat.) 1 (1824) p. 22 U.S. 194. Here we find that commerce, which is completely internal or between a man and another in a state

which does not extend or affect other states, cannot be subject to any enforcement under the guise of commercial power. The U.S. EPA is a corporation (*See* 5 U.S.C. § 105 executive agency) and gains authority from the Commerce Clause. The EPA allows suit and waives immunity (see CWA 505 a, 2), if it has any immunity as a corporation, and enforces agency policies where those policies do not have a constitutional basis to be exercised. Petitioner has stated throughout this litigation process that the United States Environmental Protection Agency is the lawbreaker, not petitioner. Another determinative factor is that the EPA allows citizen suits (3rd party) on their behalf and as such cannot be covered under any form of immunity under 1983 as 'every person' is in the verbiage of the statute. Petitioner, at this stage, does not want to delve into case law accepting this one quote out of the recent decision by this Court in June 2023, "there is no doubt that the cause of action created by § 1983 IS, and WAS always regarded as a tort claim", Justice Brown citing Scalia (*Monterey v. Del Monte Dunes*, 526 U.S. 687, 727 (1999)); Brown (*Health and Hospital Corp. of Marion Co. v. Talevski*, 599 U.S. ___ (2023)).

Within the language of § 1983, it further states any State or territory or District of Columbia. Here there is an obvious demarcation between two governmental institutions, one being the State and the other being the Federal Government. In 1871, when § 1983 was promulgated there were over a dozen territorial entities which had not yet attained statehood. Like the District of Columbia, the territorial properties of the United States were under the exclusive control of Congress, *i.e.* the Federal Government.

Therefore it is an erroneous position to consider § 1983 as only applicable to State law impairments and deprivations. The Ninth Circuit ruled in favor of the district court, both agreeing that § 1983 did not waive sovereign immunity. The fact that both federal 'exclusive' control as well as State is within the statute, § 1983 cannot be applicable to one and excluded from the other. The Federal Claims Tort Act of 1946 waived sovereign immunity so that citizens could address a grievance against the government (U.S. Const., amend. I). In *Health and Hospital Corporation of Marion County v. Taleveski*, 599 U.S. ___ (2023), decided June 8th, 2023, by the Supreme Court aides petitioner's assertion that § 1983 is the proper remedy by petitioner for suit against the U.S. EPA. Justice Brown in giving the opinion of the court stated "There is no doubt § 1983 'is and was always' regarded as a tort claim" referring to Scalia in *Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). Petitioner, in mentioning this quote twice, believes the preceding evidence is sufficient grounds to warrant reversal of the 9th Circuit, as well as, the district court decisions. Petitioner will endeavor to aid the Court by pointing specifically to deprivations by the U.S. EPA of petitioners constitutional (private) rights as well as the laws of Congress (public rights) conferred upon this citizen, in as brief of manner as possible.

II. Privileges and Immunities

The 9th amendment concerns itself with other rights not so enumerated within the constitution. Petitioner believes that the above description, hearkening back to the dual federalism model, to be correct as to the rights of States (43 U.S.C. § 1311, a-e). A subordinate question to be raised here is; How does the

EPA circumvent, thus deprive this citizen of his State issued Privilege and Immunity? EPA allegedly gains authority under the Commerce Clause Art 1, Sect. 8, Cl. 3 but this clause is not unlimited. The actual text must be the parameters of jurisdiction. We see this in *Gibbons v. Ogden* as well in Pollard's *Lessee v. Hagan*, 44 U.S. 212 (1845). The shores of navigable waters and the soils under them were 'NOT GRANTED' by the U.S. Constitution to the United States, but to the States respectively' in part (U.S. Const., 10th Amendment). These decisions along with applicable case law on this subject, Submerged Lands Act 1953, led to the more recent SCOTUS rulings in the *Sturgeon v. Frost* (*Sturgeon v. Frost*, 577 U. S. 424 (2016); *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019)) cases resulting in a less than astounding affirmation about running waters documented in the Federal Register, dated April 30, 2020, doc. 85 FR 23935 [1] running waters cannot be owned. [3] federal reserved water rights do not give the Government plenary authority over the waterway. The High Court recognized that a State's title to lands beneath navigable waters brings with it regulatory authority over public uses of those waters (slip. op. 12-13). The July 23, 1955, Multiple Surface Use Act further specifies the States authority and jurisdiction on waters flowing through unpatented federal mining claims, where petitioner's incident occurred in July 2015. The facts speak for themselves.

The EPA has overreached in its mandate to protect WOTUS defining the term interchangeably, a vague and continually evolving definition, with navigable waters to insure their jurisdiction under the commerce clause. In their zeal they have promulgated a definition

that they cannot, by any measure, have authority to make rules and regulations pertaining to WOTUS as its 'guiding intelligible principle' is flawed thereby violating the delegation of authority from Congress (*J.R. Hampton v. United States*, 276 U.S. 394 (1928)). Petitioner is aware that all ground and surface waters as well as non-navigable waters reside under State jurisdiction (*California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 162 (1935)) and that the Constitution did not confer ownership of the navigable waters to the United States.

There is no constitutional authority for the EPA to assert its authority over the nation's waters, like *Roe*, if we are to be consistent with constitutional application, the authority and jurisdiction belongs with the States. On a side note, can the Administrator, one unelected person, assume such authority to mandate regulations that hold 320 million Americans to obligations, and bypass criteria to formulate a Major Rules Doctrine, while simultaneously citing citizens, depriving them of their private as well as public rights, for not obeying such regulations as the EPA deems proper, having exceeded its commercial power to enter into a State and commandeer its regulatory agency under the commerce clause (*Caha v. United States*, 152 U.S. 211 (1894)) (*see New York v. United States*, 505 U.S. 144 (1992)), and penalize States' citizens? For the reasons set forth above, petitioner asserts that the U.S. EPA lacks any constitutional source of authority to deny petitioner the use of an Idaho issued P&I, located in the Idaho State Water Plan (a State legislative action) section, pertaining to the SOUTH FORK CLEARWATER RIVER BASIN PLAN pp. 22 (see appendix), a polluted waterway

(*see*, IDAHO DEQ INTEGRATED WATER REPORT 2016). SCOTUS has opined on the transfer of pollutants in *South Florida Management Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004) and *Los Angeles Flood Control v. Natural Resources Defense Council Inc.*, 568 U.S. 78 (2013).

III. Bill of Rights

Within the Bill of Rights, which acts as a restriction on government action, there is an enumerated list of substantive rights that may not be impaired or deprived by the Federal as well as State Governments. This, of course, is applicable upon any agent or agency under their respective control. The EPA, is guilty of depriving this citizen of many of those rights which are meant to act as a prohibition into EPA'S federal exercise of authority over petitioner and thus is liable for suit under § 1983 by petitioner. The following is a list of constitutional deprivations thrust upon this citizen at the hands of the EPA.

The 4th Amendment contains two applicable phrases, 'the right to be secure in their person, property, papers', etc. That only under warrant, subpoena can the government obtain personal data if the citizen refuses to voluntarily submit to such a request, which I did not comply with. After being found guilty, without trial, a penalty phase ensued whereby the EPA counsel continually referenced my refusal as willful and non-cooperative resulting in a higher penalty (*see Hale v. Henkel*, 201 U.S. 43 (1906)). Within the 5th Amendment we have the following applicable phrase; nor be deprived of property without due process of law. First, process was not served upon this citizen properly. The complaint was found a month or so later under my deck by accident. Next,

I was found guilty without trial by an administrative law judge, not a true court of the United States, who works in the special missions section of the EPA who subsequently assessed a penalty in the amount of 6,600.00 plus interest which is still being withdrawn from my monthly SSI by the U.S. Treasury. This monetary fine was assessed 5 years after the incident and as such is not civil in nature as to remediate petitioners activity but penal as to punish this citizen after the fact (*see United States v. LeBeouf Bros. Towing*, 377 F.Supp. 558 (E.D. La. 1974)). The courts test to determine whether legislation is civil or criminal in character is determinate in whether the sanction was to punish the party for engaging in the activity involved or to regulate the activity (*see Telephone News-System v. Illinois Telephone Co.*, 220 F.Supp. 621 (N.D. Ill. 1963)). Petitioner had an Idaho permit to lawfully pursue the activity as well as the P&I previously addressed. Petitioner believes this information is evidence enough that a criminal punishment was imposed upon petitioner in a civil proceeding so that the EPA could circumvent this citizen's private rights found within the 5th, 6th and 14th Amendments (*see United States v. LeBeouf Bros Towing*, 377 F.Supp. 558).

Adherence to the Seventh Amendment was not offered by the EPA's ALJ. Apparently the determination of guilt was an 'unquestioned material fact.' In the Writ of Mandamus #23-949 in the appendix you will see a photograph depicting my dredge and another of my partner. The photograph clearly shows my partner's turbidity plume to be substantially greater than my own. Why then was I assessed a penalty nearly double my partner's? Instructive is the fact

that 34 other miners were engaged in the same activity, on the same day, without any NPDES permit, as was I, as none was available. A failure of the EPA to provide remedy, without informing the public, a violation of the APA. This situation not only manifested itself in 2015, but in 2014 and 2013 as well. During that three year time frame the only citizens cited for not having an NPDES General permit was my partner and myself, while the other 50 or so escaped any EPA enforcement actions, thereby violating the Eighth Amendment and equal justice under law as per the Ninth Amendment which has previously been discussed, so we will not discuss it further. Petitioner's purpose is not to advance any argument on behalf of the State of Idaho 10th Amendment rights, as that would be the AG's position. I would however like to make the following statements. The Federal Register of April 4th, 2013 #20316, Volume 78, #65, fails to give notice that the South Fork of the Clearwater River is inapplicable and therefore cannot be permitted under this notification. The EPA is required to precisely state all permit conditions, rules, regulations and eligibility (5 U.S.C. § 552, D), so that the citizen can understand the parameters of his obligation concerning such permit (*see Appalachian v. Train*, 566 F.2d 451 (4th Cir. 1977)) cur. court no's 76-1474, 76-2057.

The Administrative Procedures Act, 5 U.S.C. § 552, D has been disregarded, in fact violated, by the EPA as to the specificity of the permit conditions, eligibility, etc. Even though the Federal Register made no mention of individual permit availability within the general permit notification, petitioner was subsequently cited and penalized for not obtaining one.

Notification under 1 CFR part 51.6 requires that the language incorporating material referenced to be as complete and concise as possible. Quoting *United States v. Hayes*, 325 F.2d. 307, 309 (4th Cir. 1963), "Indeed that is of such a nature that knowledge of it is needed to keep outside interests informed of the Agency's requirements in respect to any subject within its competence." Notwithstanding the failure of the EPA to notify citizens of an individual permit option within the Federal Register, the lead time necessary to acquire such a permit, 180 days, did not lend itself to a 90 day permitting window structurally in place, therefore no NPDES permit system, be it general or individual, was available in 2015, nor in 2014 or 2013 on the South Fork River. In absence of any Federal permit availability, petitioner believes Idaho's regulatory program has the predominant position under the 10th Amendment, especially in consideration of who really has administrative jurisdiction over the waters, previously noted.

IV. Applicable Laws

Petitioner has not only private rights, but public rights as well. These public rights are a result of legislation on a national level by the Congress of the United States, specific to the mining communities rights, and passed into law. Any impairment or deprivation of these public rights by an agency, the U.S. EPA, to be exact, a corporation, within the Federal Government is eligible for suit by a citizen under § 1983, as it is plainly stated in the text of 1983 'laws'. I will briefly list laws and statutes that benefit and empower petitioner's ability to extract minerals using water within his Federal mining claim. The Act of July 26th, 1866, 14 Stat. 251, Act Granting

Right of Way to Ditch and Canal Owners Over Public Lands, gives petitioner the right to file a claim and to extract the minerals located therein. This Act gives this citizen the vested right to use the waters for mining purposes. This is a granted right to use the water and as such a citizen is not required to obtain any permission to exercise the grant, as this would reduce a grant to a privilege. A grant cannot be revoked. Within 30 U.S.C. § 612(b), petitioner's right to mine and use the waters cannot be subjected to any material interference by agents or agencies of either State or Federal origins.

The Organic Act of 1897 concerns Forest Service reservations, which applies to petitioner's location of his federal mining claims, that being, the Nez Perce National Forest in Idaho. Within this Act, it is stated "All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the States wherein such forest reservations are situated, 'or' under the laws of the United States and the rules and regulations established there under." The operative word in this Act is the word 'or', therefore the EPA lacks authority if this law is still operable as the States have the predominant position.

The Submerged Land Act of 1953 and the 1955 Multiple Surface Use Act have already been discussed. Suffice to say, if these acts are currently valid, as well as 33 U.S.C. § 1251(b) then the U.S. EPA appears to violate these as well. A quote from BOUVIER'S LAW DICTIONARY, 1914, page 2961, "Those who have the right to do something cannot be licensed for what they already have right to do, as such license would be meaningless." Suit under § 1983 against the EPA

for impairment and deprivation of public rights is warranted in petitioner's view.

CONCLUDING REMARKS

Petitioner understands that under Article I, Section 8, Clause 3, the U.S. EPA retains authority to regulate commerce, however this authority is limited to the unambiguous verbiage within the Clause. Briefly, we will focus our attention on the activity of commerce and the Federal Government's jurisdiction concerning navigational servitude which allows commercial activity to proceed. Notwithstanding the State's authority to control, use, distribute and to administer and manage the waters within their State, we must recognize that the Federal Government did not relinquish all of its rights concerning the water. The United States, as stated above, retains authority to keep channels of navigation open (commerce clause), along with power production and flood control. At this time the question must be asked, does petitioner's activity:

1. Fall within the definition of a commercial activity, when no transfer of goods for any enumeration is done, simply possession of his labor (*see United States v. Lopez*, 514 U.S. 549 (1995))?
2. Does petitioner's activity restrict navigation?
3. Does petitioner's activity impair the government's position to mitigate flood control, or affect power production?

Petitioner has shown the court that there is no Constitutional basis for any Federal agency to control the waters that flow within the geographical boundaries of the States on or westward of the 98th meridian as Congressional laws, still in effect, have relinquished these rights to the States. The petitioner has shown that the enforcement actions of the EPA violates this citizen's private and public rights, and his ability to avail himself of a privilege and immunity granted by Idaho for petitioner's mining activity. For the reasons stated above in this writ, petitioner asks the court to reverse the Ninth Circuit Court of Appeals decision affirming the district court's position on the inapplicability to file suit against the U.S. EPA for deprivations of private rights and those rights secured through congressional actions (U.S. Const., art. I) and allow petitioner use of 42 U.S.C. § 1983, a tort action, thereby awarding petitioner a judgment against the United States Environmental Protection Agency in the amount of one million ($1,000,000) dollars. Lastly, petitioner tried to obtain counsel but was unsuccessful, therefore I must proceed pro se and pray that the Court will not let my status affect their decision to either take or deny this writ.

Respectfully submitted,

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June 27, 2024

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