No. 23-949

In the Supreme Court of the United States

IN RE DAVID ERLANSON, SR.,

Petitioner.

On Petition for an Extraordinary Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit

PETITION FOR AN EXTRAORDINARY WRIT OF MANDAMUS

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QUESTION PRESENTED

Can the 9th Circuit Court of Appeals indefinitely prolong or avoid its judicial duty when a judicial process in the lower district court resulted obviously in a criminal penalty being assessed within a civil proceeding, whereby the citizens private rights would normally act as a restriction upon the government in order to affect the timely resolution of the matter before them?

PARTIES TO THE PETITION

Petitioner and Appellant below

David Erlanson, Sr.

Party to Whom Mandamus is Sought

United States Court of Appeals for the Ninth Circuit

Real Party in Interest and Appellee below

United States Environmental Protection Agency

LIST OF PROCEEDINGS

United States District Court for the District of Idaho

No. 4:22-cv-00091-DCN

David Erlanson, *Plaintiff*, v. United States Environmental Protection Agency, *Defendant*.

Date of Final Judgment: October 14, 2022

Environmental Appeals Board, United States Environmental Protection Agency

CWA Appeal No. 20-23

In re: Dave Erlanson, Sr.

Date of Final Order: March 5, 2021

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PETITION FOR EXTAORDINARY WRIT OF MANDAMUS

OPINIONS BELOW

The EPA entered an Initial agency decision on October 7, 2020. (App.41a). The EPA Appeals Board entered its order of dismissal of March 5, 2021. (App.14a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a).

RULE 20 STATEMENT

A. Parties to Whom the Mandamus Should Be Issued

The United States Court of Appeals for the Ninth Circuit.

B. Specific Relief Requested

Plaintiff asserts that his motion for default judgment against the U.S.E.P.A., which was properly executed within the U.S. District Court of Idaho, be

granted with additional monetary relief due plaintiff for additional costs incurred from the time motion was made in the amount of $20,000.00. If this be not the outcome, plaintiff respectfully asks to be heard by SCOTUS to effectuate a justifiable outcome as numerous constitutional safeguards were not afforded plaintiff since the onset of the administrative process by the USEPA as well as the judiciary.

C. Why Relief Sought is Not Available in Any Other Court

All lower court procedures having been exhausted, the Petitioner has no further alternatives in order to seek a justifiable outcome. The case was filed 16 months ago in the Ninth Circuit and has taken no action.

STATEMENT OF THE CASE

A. Historical Background

This case was initiated by the Environmental Protection Agency in an administrative action with their ALJ, working within the special mission section of that agency alleging that petitioner had added/ introduced pollutants into WOTUS without a 402 NPDES General Permit [see fed register, 20316, doc #2013-7752], 33 U.S.C. § 1311[a] for an incident on July 22, 2015, never deciding on the specific pollutant but using rock, sand, suspended solids, and turbidity interchangeably without any measurement/monitoring device. On this exact day, 34 other miners were engaged in the same activity, none having an CWA 402 NPDES permit, as there was no permit available. This was also the case for 2013, 2014, no one being cited in 3

years, but for my partner and I; selective and malicious prosecution. In the Federal Register notice there is no mention of the South Fork Clearwater River in Idaho, not being eligible for such coverage. IDEQ Integrated Water Report 2016 lists it as a polluted river of which SCOTUS has opined on in the South Florida and Los Angeles cases, not requiring a 402 permit. No permit was available within the time frame allowed for permitting (April 1 to July 15th), thus this violates 5 U.S.C. § 552 [a], [1]. Process was improperly served upon the petitioner sometime in June of 2016 when he was not home, finding the document under his porch several months later in late August. EPA'S ALJ rendered a guilty verdict in an accelerated decision on Sept 27th, 2018, even though the petitioner made a constitutional deprivation claim regarding private property and due process [federal mining claims]. The EPA appeals board did not entertain an appeal, after the petitioner challenged their jurisdiction, citing a process error, case being returned to the ALJ for final disposition.

In October 2020, five years after the incident, which cannot be construed as remedial in nature but penal, Erlanson, was assessed a penalty amount of 6,600, this being withdrawn monthly from his SSI with interest. Neither the EPA's ALJ, nor its appeals board, being a true United States court, petitioner believes he was denied procedural and substantive due process of law; no trial was held to establish guilt in the matter. Guilt was determined by "unquestioned material fact", a paper without my signature, later to be thrown out in the penalty phase of trial, May 2019, after guilt was already determined. This action was then appealed to the U.S. District Court in Idaho, on February 20,

2022, to address the enforcement application of the Clean Water's Acts guiding "intelligible principle" the WOTUS rule, the Clean Water Rule, and 42 U.S.C. § 1983 for deprivations. This resulted in an action against petitioner in a manner that deprived petitioner of several private rights and a state legislated privilege and immunity, which petitioner asserts should be covered under the 9th Amendment of the United States Constitution as the 51st Congress, guaranteed to Idaho, upon attaining statehood [July 3, 1890], a sovereign form of government [equal footing doctrine]. This P&I is written in the Idaho South Fork Basin Plan in 2005, pp22, and was approved by the legislature and is still in effect today.

The case was decided in favor of the USEPA, defendant, in the district court on grounds inconsistent with the rules of civil procedure as well as the 9th Circuit rules which will be discussed later. I then appealed the case which now sits at the 9th Circuit court of appeals awaiting decision. The appeal was filed on November 8, 2022 before the 9th Circuit Court of Appeals and as of the writing of this mandamus there has been no movement whatsoever. This then begs the question; Can the 9th Circuit hold a case in excess of the time frame allowed by the Constitution by converting a criminal matter [see penalty transcript EPA enforcement officer, stating that this type violation has a base starting point of 2,500.00, 33 U.S.C. § 1319(c), into a civil matter merely to avoid such entanglements?

B. Problem Number 1

There was no CWA 402 NPDES General Permit available as erroneously stated in Federal Register in 2013 until 2016 regulating suction dredging within the

South Fork of the Clearwater River in Idaho County, Idaho by the US EPA. Petitioner did however apply for the General Permit in May of 2015, as instructed, to be in compliance with the Idaho Dept. of Water Resource Permit: [season for dredging SFCR was July 15 to August 15, 2015].Petitioner did receive an Idaho letter authorization permit to suction dredge the SFCR until August 15, 2015. The EPA did not answer until August 14th, 2015, almost 4 months later, to respondent stating they denied the permit, as no General Permit was available. In this letter they stated I could now apply for an individual 402 permit with one day left to legally pursue the activity. The EPA did not mention it takes a lead time of 6 months to obtain this coverage at the minimum. In the interim, July 22, petitioner was cited for discharging a pollutant into a polluted waterbody without a 402 NPDES permit contrary to Circuit Court and SCOTUS decisions. The US EPA failed to provide remedy and it is petitioner's opinion that Idaho has the dominant position, 10th amendment, to bind its citizens, and to offer privilege and immunity if it so chooses absent a federal standing on the matter. EPA cited a need for a biological evaluation requirement by the US Fish and Wildlife and the National Marine Fisheries Service. This procedure was completed prior to the US EPA commandeering the already existing Idaho regulatory program, in Idaho as of April 4th, 2013 as stated [*see* fed register vol 78, no 65, 20316 [frl-9798-1] and [*see New York v. U.S.*, 505 U.S., 1992]without Idaho legislative approval. Further, the State of Idaho in 2005 had passed through its legislature, a water plan for the SFCR in which on page 22 it stated a legislated privilege and immunity for all dredgers within the state engaging in the mining activity referred to, as recreational

suction dredging [those dredges with a nozzle size 5" and under], including the Southfork of the Clearwater River (the location of the incident) to Idaho citizens. The P&I unambiguously declared that no 402 NPDES permit was needed to exercise this activity, on Idaho waters open under the existing plan. This P&I was very specific to the Idaho waters open under Idaho's regulatory program and to the activities covered upon such waters. Petitioner availed himself of the P&I during his administrative proceeding and his contractual obligations to extract minerals located within his Federal Mining Claim [opening statement, Erlanson, penalty phase [May 2019]. The EPA won an accelerated decision against petitioner on Sept 27th, 2018, 7 months previous, on 'unquestioned material fact' and after the accelerated decision had been won, the defendant's attorney promptly vacated the case, citing health issues. It wasn't until 3 months after the decision that petitioner learned of his guilt determination, so now in a rough spot, was forced to seek paralegal assistance from the mining district. The Ten Mile Mining District paralegal reviewed the case and made the determination that petitioner had lost and that his only strategy was to load the record, seek an appeal, and then sue the EPA in an Article 3 proceeding concerning deprivations. Petitioner lost any chance of appeal, because the US EPA Appeals Board dismissed the appeal after questioning their jurisdiction in the matter citing a process error. Administrative remedies being completed, petitioner then submitted a civil suit against the EPA under title 42 U.S.C. § 1983 for 'deprivation of rights' citing the privilege and immunity from the Idaho legislature and standing on his 9th Amendment as well as other constitutional rights. The administrative proceeding created a situation where

(in petitioner's opinion) there was an article 3/article 1 controversy of a serious constitutional magnitude compelling him to seek a remedy.

C. Problem Number 2: The Controversy

The entire administrative proceeding was predicated upon an authority of the EPA to cite petitioner for the violation of the CWA (clean water act) under the idea that the government's rights are superior to his own property and private rights and that of the state of Idaho, issuance of a privilege and immunity, in the area where the citation occurred [*see* the 1962 GSA Federal Report on Jurisdiction over Federal Areas; also the 'Department of Interior Public Lands Statistics Book', where from 1951 to 2013 the DOI erroneously informed Congress that they, in fact, had exclusive jurisdiction over all federal properties]. The agency actions of the EPA and Army Corps resulted in a definition concerning a Major Rules Doctrine with national implications in 1972 under the CWA using WOTUS as its "intelligible principle". Justice Kennedy said this *"I think underlying Justice Kagan's question is that the CWA is unique in being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it put into practice"* {article by D. Fisher, Forbes, 2016}. Petitioner believes a violation exists regarding the nondelegation doctrine and as a result of enforcement of this vague definition, or as Justice Alito stated in *Sackett*, 566 U.S. at 133 "hopelessly indeterminate", petitioner was denied his guaranteed constitutional rights. The WOTUS definition has been changed dozens of times by administrative agencies, SCOTUS interpretations, but sadly not by elected officials. This violates the delegation of authority as espoused by

SCOTUS in the J.R. Hampton case in 1928 with adherence to a guiding 'intelligible principle' concept 'boundaries test' When petitioner looked into this situation he was unable to locate where or when this [10th amendment] encroachment upon state authority had occurred considering 43 U.S.C. §§ 1301, 1311, 1313, 1314 and the July 23rd, 1955 Multiple Use Act, the McCarran amendment [43 U.S.C. § 666], 43 U.S.C. § 1251 and the Inventory Report on the Jurisdictional Status over Federal Areas as of June 1962. Within the inventory report it states that the federal government has no legislative jurisdiction over its land [proprietary designation]. In acknowledgment of the Winters Doctrine, which includes a minimum flow of water necessary to fulfill the purpose of said reservations, water must be included in this report. This begs the question under what constitutional authority does an agency, in this case the EPA, impair and /or deprive a state of its rights to control its navigable and non-navigable waters as a sovereign entity when water is never mentioned in the constitution, but is within the Northwest Ordinance, being free to the inhabitants to use; SCOTUS cases,; *Pollards lessee v. Hagan*, 44 U.S. 212, 1845, *Caha v. U.S.*, 211, 1894, *Kansas v. Colorado*, 206 U.S. 1907, to name a few, which all point to State authority over the water and not Federal. It took a historical accounting of the situation to arrive at some idea as to how the government's rights were allegedly dominant over State and private rights within federal reservations considering the adopted "Proprietary ownership status" with the exception of D.C. and federal enclaves. The EPA then used curious language in its motion to dismiss at the lower District Court level [FRCP, 12[B][1]] which petitioner seized upon in answer challenging the use of the 'exclusive'

language [*see West Virginia v. EPA*, #23-1418 4th Cir. 2024]. When the authorities were chased down, petitioner found that the State owned the ground upon which petitioner was standing when he was cited (Submerged Land Act, 1953, 1955 Multiple Use Act, ref. unpatented federal mining claim). Petitioner was removing precious metals through a suction device and in accordance with Idaho's approval and authority [*i.e.* IDWR Permit for 2015] and congressional contractual obligations under the mining laws. It was incumbent to then address who controls the water.

The State (under *Sturgeon v. Frost*) has the superior position on "navigable in fact" waters with the government's only authority being 'to maintain an uninterrupted flow' (Organic administration act, 1897) [*see Kansas v. Colorado Scotus*, 1906]. The incorporation of the definition of WOTUS to include non navigable waters where no commercial activity can take place is a blatant overreach (*Gibbons v. Ogden*, 22 U.S., 1824), not by elected officials but by administrative agencies, to enlarge federal government control over the inherent rights of states, in violation of the 10th amendment. Remember, I had state authorization to use my suction dredge on open waters for that activity, including a P&I, within Idaho, until the EPA commandeered an already existing Idaho regulatory process, without approval by the Idaho legislature on April 4, 2013. Prior to the Civil War, the SCOTUS was indeterminate as to whether or not to allow the application of the governments 'commercial power' to be used on navigable waters. Just before the Civil War the SCOTUS rendered several decisions which highlight the back and forth over the issue, [*The propeller Genessee Chief et al. v. Fitzhugh et al.* December term

1851] (full published citation lacking) and [*Jackson v. The Magnolia*, 61 U.S. 296 (1857)], in which the court adopted the position that the act in question (1789 judiciary act extending admiralty jurisdiction to the lower District Courts) did not include the commercial power of Congress. During a nationwide declaration of martial law, the high court issued the decision in *Gilman v. Philadelphia*, 70 U.S. 713 (1865) in which the 'navigational servitude' was officially adopted by the court absent legislation for its implementation. This was to continue, and as of 1948 the WOTUS definition has been altered over 30+ times. Looking at the history, petitioner was forced to seek out where the government had legislated the authority for the WOTUS, to not only extend past the ebb and flow of "navigable waters" but what legislated criteria created a 'navigable water' standard? [Northwest Ordinance originally granting the navigable waters to the inhabitants and future citizens to use without any hindrance, 'free', in other words, a grant of use.] This seems to emerge from the federal court beginning in *Gibbons v. Ogden*.

In *Gibbons v. Ogden* the high court decided that the government's commercial power also extended upon the waterways WHEN commerce was being conducted. Petitioner has no issue with this. No American would, but this is not what we have today. A huge overreach into the 10th Amendment power of the States, particularly westward of the 98th meridian in violation of laws passed by congress, our elected officials, has transpired in petitioners opinion. If we are true to the extension of the commercial power as decided in *Gibbons*, upon the waterways of this nation, the commercial power would ONLY apply where

commerce was being conducted within navigable waters and navigable waters could only be defined to mean areas where commerce is taking place. In essence, the regulatory power should apply to the activity and not the area. Due to the extension of the current WOTUS rule, the commercial power has been extended far beyond the high court's pre-civil war concerns as espoused in the *'Genessee Chief'* case which has resulted in a regulatory taking of state authority and control over 'the area', as opposed to a regulation of the activity, most likely due to frustration with the SCOTUS with regard to multiple decisions with different outcomes from cases earlier than *Waring v. Clarke* and extending to *'Genessee Chief'*. This overreach, defining non navigable waters as "navigable in fact" by agency intervention defeats Article 1 of the Constitution.

REASONS FOR GRANTING THE PETITION

I. PROBLEM NUMBER 3: RULES DISREGARDED AT DISTRICT COURT LEVEL

Following are the rules of the 9th Circuit and of civil procedure that the district court failed to abide by in their opinion and decision, resulting in a dismissal of the appeal from the EMS ALJ decision. First, let me again say that, the district court judge defers to the administrative record without any independent judgment as required under the constitution, independent judiciary, instead deferring to administrative acceptance of the facts. The Justice Department cannot collude with an administrative agency's tribunal decisions as this marries two distinct separate branches of the United States governmental structure which, as we are aware of, is contrary to the specialized authority afforded to each branch under our constitutional framework. The result is a deprivation of procedural as well as substantive due process of law upon petitioner.

Let's take a look at the district court memorandum and opinion and its failure to follow the rules. [1] Let's be clear here, the EPA did not respond to the complaint sent to their official place of business for over 6 months, did not respond or make an appearance to telephonic session by order of court for May 2022. While the district court cites Fed. R. Civ. P. 4 [I][1], [2]] for reason to dismiss without prejudice they fail to mention FRCP rule 4 amendment in 2000 para. 3, this states verbatim that' rule 'is amended to ensure that failure to serve the UNITED STATES in an action

governed by 2[b] does NOT defeat the action'. This protection is adopted because there will be cases in which the plaintiff reasonably fails to appreciate the need to serve the United States. There is no requirement, however, that the plaintiff show that the failure to serve the United States was reasonable. A reasonable time to effect service on the United States, by plaintiff MUST be allowed after the failure is pointed out [the district court did not comply with this, instead choosing to defeat the action without this consideration]. An additional change ensures that if the United States or United States attorney is served in an action governed by 2 [a] additional time is to be allowed even though NO officer agency or corporation of the United States was served. [see appeal from district court to 9th circuit enclosed] [2] District court cites Rule 12[b][6] permitting the court to dismiss action for failure to state a claim, which was done under deprivation of constitutional rights 1983. What greater claim can a citizen have? The court would not acknowledge 1983 stating that the court agrees that the EPA enjoys sovereign immunity. The Clearfield Doctrine clearly disagrees, as does the fact that the EPA is an executive agency and a corporation, therefore corporate personhood is relevant as well, as the EPA'S relies on the commerce clause to assert authority over jurisdiction. How can justice be served upon any agency, if in fact, they operate under a prerogative administrative, judicial, and executive system, contrary to constitutional framework, leaving the citizen unprotected as to his constitutional rights, safeguarded by the Bill of Rights from the federal government. The EPA is the lawbreaker here on numerous counts. [3] District court dismissed this action with prejudice as stated in the order but the court failed to read its own writing

in the opinion concerning the same; *Id.* Finally, if a court declines to extend the time period for service of process it must dismiss the complaint without prejudice. In this case at bar the clerk of court did not send the summons to plaintiff to be completed and returned leaving the plaintiff with the assumption that serving the EPA at their principal address was sufficient service of process in the matter bringing into focus FRCP.60[a], of course none of this being afforded to plaintiff. [4] District court may cite a lack of a cognizant legal theory, [see enclosed brief; petition for appeal] as this writ has word limitations. [5] The district court also cites Fed. R. Civ. P. 12 [B][1] to dismiss. The recent case; *West Virginia v. EPA*, #23-1418, 4th Cir. 2024 disagrees stating not a national but a regional application is valid for district court intervention [there was no class 2 civil penalty, gold is found primarily in the western states and Alaska]. The district court refused to grant a default judgment properly submitted by the petitioner dated May 27, 2022, but again the EPA failed to answer the complaint within the prescribed time limits, taking nearly 150 days to answer from their initial receipt of the complaint. The district court also refused to act on a motion for a summary judgment based upon undisputed points of law, dated June 13, 2022. The United States Environmental Protection Agency was served complaint on February 26, 2022. Petitioner sought and still seeks a default judgment against the defendant, EPA, to provide relief. All facts being considered, the 9th Circuit Court of Appeals has failed to render a judgment in a timely manner, which petitioner sees as obstruction of justice under constitutional parameters, safeguards.

II. PROBLEM NUMBER 4 : *CIVIL V. CRIMINAL*

The historical accounting led petitioner to one conclusion and that is, that the suction dredging activity by petitioner cannot meet the requirements for commercial regulation and the void for vagueness WOTUS rule cannot be applied nor are petitioners rights subordinate to the government by virtue of the governments territorial power, commercial power, or any other power on the Southfork of the Clearwater River, Idaho. We need to be clear here regarding what the petitioner is asserting. The history of the 'Waters of the United States' definition emerged from unelected agency interpretations, federal court precedent, while using, agency deference. There is no underlying legislative mandate [Article 1, U.S. Constitutionally enumerated authority] of such a major rule with national implications that clarifies the reach of the WOTUS rule. This has caused both agency and federal court disparate interpretations since its inception. To be frank, the WOTUS rule appears to me to be indeed void for vagueness and as such seemingly violates the delegation of authority doctrine, as the numerous ambiguous interpretations testify too. The enforcement by the USEPA led to a criminal penalty being assessed against petitioner within a civil proceeding upon the following reasons herein set forth: [1] the penalty is being withheld from SSI by the U.S. Treasury, without any due process of law, [2] the sum of 2,500.00 figure, under part [c] at 1319 being used by the EPA enforcement officer, [3] EPA ALJ assessed penalty 5 years after the fact, can only be construed as penal in nature, not remedial, [4] the insistence of EPA counsel of intent and willfulness of Erlanson

cannot be converted to a civil matter just so the government can evade constitutional restrictions imposed by the Bill of Rights [*United States v. LeBeouf Bros. Towing Co., Inc.*, 377 F.Supp. 558 (E.D. La. 1974)]. To complicate matters, as petitioner has pointed out in his previous filings, the Organic Act, 1897, officially extended private rights to National Forests and under point 6 of the *Downes v. Bidwell* territorial doctrine, must be considered as constitutionally restrictive of government action [*Barron v. Mayor of Baltimore*] unless the government has an exclusive right under Article 1 Section 8 Clause 17, which, in turn, violates the proprietary land status in the 1962 U.S. GSA audit. Petitioner believed himself constitutionally entitled to a right to a speedy trial, other constitutional rights, privileges and immunity granted by Idaho as per the 9th Amendment, even though the administrative judiciary as well as the district court deferring to the administrative case record and NOT making an independent judgment, as the constitution requires [separation of powers], would suggest otherwise.

III. Closing Remarks

Petitioner has exhausted all administrative remedies, including at the District Court level and the 9th Circuit Appeals process to no avail. Petitioner acknowledges that in his appeal to the 9th Circuit he asked the court to remand the case back to the district court level with the intention that a default judgment could be obtained, but as this writ of mandamus testifies too, there has been no action since November 8 of 2022 concerning the case at bar. I therefore ask the Supreme Court to issue this Writ of Mandamus to the 9th Circuit Court of Appeals to induce a default

judgment as properly motioned before the U.S. District Court of Idaho or for SCOTUS to directly intervene using its appellate power to settle this case, once and for all. For nine years, petitioner has sought a justifiable outcome. Petitioner believes, as a citizen of Idaho, he did nothing wrong in the slightest degree to warrant such a ruination of his life over 9 years by, what I consider to be a travesty of justice by the USEPA as well as the U.S. District court and the inability, possibly the unwillingness, for the 9th Circuit to render a timely decision. How much is 9 years of a man's life worth, I ask you? Petitioner only seeks justice to clear my name so my family can be proud of me. If not for this reason, I would not continue the fight but this is my last stop to receive justice. To be sure, this case is also not an exception in the EPA'S administrative adjudication process whereby both substantive and procedural due process applications have been violated at nauseum thereby alluding to a justifiable outcome to many citizens. The old adage looms large here "JUSTICE DELAYED IS JUSTICE DENIED". Lastly, I feel compelled to say to SCOTUS that a denial to a pro se litigant to present oral argument is in contrast to section 4 of the first amendment, knowing this has nothing to do with this case. This being a discriminatory practice.

CONCLUSION

Petitioner thanks this honorable court for their precious time while considering this writ. May GOD BLESS AMERICA.

Respectfully submitted,

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February 26, 2024