No. 314090

COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON

BRUCE M. BEATTY,

Appellant,

v.

WASHINGTON FISH & WILDLIFE COMMISSION, *et al.*,

Respondents,

BRUCE M. BEATTY'S REPLY BRIEF

James L. Buchal, WSB #31369
MURPHY & BUCHAL LLP
3425 S.E. Yamhill Street, Suite 100
Portland, OR 97214
Tel: 503-227-1011
Fax: 503-573-1939
Attorney for Appellant

July 3, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Federal Regulations

State Statutes

Other Authorities

Summary of Argument

This appeal raises both factual and legal issues of tremendous importance to the natural resources community of the State. With regard to factual issues, what is at stake is whether the regulated community still enjoys the protection of what can fairly be called the rule of law, or whether any expression of opinion on the part of regulators is sufficient to trump detailed, specific expert evidence.

Profound issues of state law are raised as well. Is the hydraulic code so elastic as to permit regulatory interpretation into an endangered species act for common trout? Can the Department comply with law requiring permit conditions to be commensurate with impacts while refusing even to estimate those impacts? Can the Department evade rulemaking procedures with a Policy that purports to require this result? Isn't the Department required to consider commonly-available and less restrictive alternatives in this unique legal context?

And if Washington State law really permits the Department to restrict the exercise of federal rights in a federal mining claim on federal land, hasn't the State materially interfered with the mining in a fashion prohibited by the Supremacy Clause? And doesn't the Constitution protect against the evolution of a governmental structure that permits such staggeringly arbitrary powers to officials without accountability?

Beneath all these issues is a simple truth: appellant angered the Department's representatives by the vigorous exercise of vital Constitutional rights to participate in rulemaking, then found his Creek subject to extraordinary restrictions, and then found his permit to vary those restrictions denied on extraordinary grounds. There is no higher purpose for the courts of Washington than to provide justice in cases such as this one.

Argument

I. THE DEPARTMENT (AND BOARD'S) INTERPRETATION OF THE HYDRAULIC CODE SHOULD BE REVERSED (Issue No. 1).

The Department does not dispute that the hydraulic permitting statute should be construed in *pari materia* with the other mandates of the Department, and admits that the statute is "intended to protect the fish 'resource,' not every egg". (Resp. Br. 35.) This concession alone requires that the PCHB's decision be reversed, because the Department's biologists failed entirely to apply the statute on that basis. The lead official, Mr. Harvester, frankly admitted this on cross-examination before the PCHB:

> "Q: So the department's position is that because there are so many things going on, we cannot have any quantitative evaluation of risk, and we must protect every single egg; is that the gist of what you're saying here?"
>
> "A: Yes. There's a lot of variety out there."

(CP390: Tr. 314:15-20[1] (Mr. Harvester).) So too did the permit reviewer, Mr. Meyer:

> "Q: . . . you have told me a few minutes ago that it doesn't matter whether there's a population effect; a few eggs, got to protect those whether there's a population effect or not, right?
>
> "A: I think it's common sense not to dig up the eggs of fish that have been laid when they suffer extreme damage when they are dug up. That seems like a reasonable regulation to me."

(CP245-46: Tr. 169:21-170:4 (Mr. Meyer).) The "reasonable regulation" is, of course, in the Gold and Fish Pamphlet: if a miner encounters redds or actively spawning fish, he must stop mining and move. Appellant is not seeking permission to dig up eggs, but to engage in activities that have no appreciable risk of digging up eggs.

The Department now cites testimony where Mr. Meyer equivocated, stating that if perhaps, it were only a few eggs an "entire system," maybe it wouldn't matter. (Resp. Br. 33 (citing CP258-59: Tr. 182:20-183:4).) But pressed further, he immediately returned to his position that "my first priority, is to not kill any eggs". (CP259: Tr. 183:23-24.) The Department also cites earlier testimony by Mr. Harvester concerning the development of the rule which is not pertinent. (Resp. Br. 33.) But when push comes to shove, the Department's brief defends the position that

[1] This quote was erroneously cited as CP15-20 at page 26 of the opening brief.

permits may only be issued "when the Department could be relative certain that eggs *would not be impacted*" (Resp. Br. 38)—an absolute and unattainable standard somehow uniquely applicable to appellant.

II. THE DEPARTMENT CANNOT REFUSE TO ESTIMATE IMPACTS, OR INVOKE INSUFFICIENT INFORMATION TO DO SO (Issue Nos. 4 & 10).

The Department eventually retreats to a position that having adopted the general rules set forth in the Gold and Fish Pamphlet, it was no longer bound to follow the law requiring that permit conditions be commensurate with project impact. (*See* Resp. Br. 34.) The Department cites no authority for such a proposition, which is obviously meritless as a matter of law. The Department's officials failed entirely to apply a resource-based standard, and instead—and by all appearances in this context alone—adopted an "egg by egg approach".

The Department attempts to disguise the lack of legal merit in this argument by arguing that appellant did not supply enough information to invoke the permitting law. From the very first page of its brief, the Department urges that this appeal "ultimately turns on" whether an applicant "must provide information necessary for the Department to evaluate the potential impacts of

extending the work window". (Resp. Br. 1-2.[2])

The factual question before this Court is not what amount of information appellant must provide. The question is whether the information here—the record developed before the PCHB—supports the Department's extraordinary and discriminatory restriction on operations to two weeks a year: August 1st through 15th. The Department will never have perfect knowledge about any activities within its jurisdiction, and can always argue it needs more information. Where, as here, the activity obviously poses no appreciable risk to fish populations, the Department's cry for more information is merely an attempt to distract the Court.

In substance the Department's response is an attempt to shirk responsibility for making the assessment of the impact of the mining. The Department even argues: "Mr. Beatty argues that the Department bears the responsibility for calculating the risk of harm" and states that the PCHB "rejected this theory". (Resp. Br. at 2.) As appellant demonstrated before the PCHB, responsible resource agencies make detailed and quanti-

[2] Significantly, it was not until after the permit denial, and appellant asked for an explanation of the Department's extraordinary decision, that the biologist first asserted that more site specific information might have enabled it to extend the work window. (R6.) Had the Department actually believed there was insufficient information to process the permit, the Department would have simply declined to issue it at all. *See* RCW 77.44.021(7)(b) (department may extend 45-day period to act on application if more information is needed).

tative assessments of the impact of activities such as appellant's. (*See, e.g.,* A37 (National Marine Fishery Service opinion).)

The entire premise of the Legislature's statutory grant of power to the Department is that it can and should make such risk assessments, and then "may not impose conditions that attempt to optimize conditions for fish life that are out of proportion *to the impact of the proposed project".* RCW 77.55.231(1) (emphasis added). The Department's own Mitigation Policy also makes it abundantly clear that the Department is bound to "determine the project impact, significance of impact, amount of mitigation required and amount of mitigation achieved *based on the best available information*". (A36, at 4; emphasis added.) The requirement that the Department make its determinations "based on the best available information" makes it clear beyond doubt that the Department must analyze a situation based on the information that it has, and cannot simply refuse to undertake an analysis because it believes that more information would be useful, or even necessary.

In practice, the Department's permit writer Mr. Meyer simply avoided entirely the problem of setting mitigation commensurate with impact by relying upon the illegal (*see infra* Point VI) Policy:

> "Q Why didn't you estimate the impact and significance of impact?"

"A No. 2:

> (READING) WDFW uses the following definition of mitigation: Avoiding impact is the highest mitigation priority. *My job isn't to estimate how many eggs that Mr. Beatty can kill. My job is to avoid the impact as its highest priority* according to my own policy."

(CP251: Tr. 175:13-21 (emphasis added.)) It was simply unlawful for the Department to evade entirely the Legislature's command by establishing a first priority of avoiding any and all impacts. It was only by obeying the Legislature's command that the Department might understand that the risks posed by appellant were, in terms of lost adult fish, immeasurably small and utterly insignificant.

III. LACK OF GROUNDS TO INVOKE PERMIT RESTRICTIONS CANNOT BE EXCUSED BY REQUIRING A RULE CHALLENGE (Issue No. 2(f)).

The Department now argues that appellant had a special burden to demonstrate "a unique situation to warrant deviating from the established work windows". (Resp. Br. 34.) This burden is unknown in law. It is true that the Department adopted a general rule for Fortune Creek, in a context where it has essentially no data directly concerning Fortune Creek—not even temperature data. But the Department also adopted WAC 220-110-200(2), which simply states that a miner may follow the Gold and Fish rules or "[a]lternatively, you may request exceptions to the Gold and Fish pamphlet by applying for an individual written HPA as in-

dicated in WAC 220-110-031." There is no special burden imposed under this rule, and had there been, the rule would have been illegal because the Department lacks power to evade the Legislature's general command to limit conditions on hydraulic permits to those commensurate with impact.

The Department attempts to evade the force of this reasoning with an extended solliquy concerning speed limits, fire codes and other regulatory contexts in which restrictions are imposed even though risks may be small. (Resp. Br. 37.) The problem is that the analogy is defective, for in none of these circumstances has the Legislature been required to provide statutory guidance for the agency not to "impose conditions that attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project". RCW 77.55.231. If the Department had *carte blanche* to deny permits based on any assessment of risk, the statute would be manifestly unconstitutional. *See infra* Point IX.

IV. THE PCHB'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The fundamental factual issue posed by this appeal is whether general assertions like "we know that suction dredging has a very significant effect on fish life" (Resp. Br. at 16) are sufficient to provide "substantial evidence" outweighing detailed, highly-specific expert testimony concerning the impact of the activities for which appellant sought the permit.

Building roads, bridges and other activities can manifestly have a very significant effect on fish too, but the Department does not single them out for the extraordinary restrictions here. (*E.g.*, CP247-48: Tr. 171:15 to 172:7; *see also* A72 & CP264-65: Tr. 188:6 to 189:15 (permits to dump rip rap).)

A. The Core Issue of Risk Posed by Appellant (Issues 2(b), 2(c) & 2(d)).

The Department emphasizes general studies concerning "*potential* impacts from suction dredging". (Resp. Br. 14 (emphasis added).) There is no dispute that if a biologist takes a suction dredge and sticks it into a redd, some of the eggs will die. If it happens to be within a day or so of their deposit into the redd, nearly all of them will die, but after that, they harden up and whether they die or not depends on where they land when they come out of the dredge.

Appellant is not, of course, seeking a permit to dig into redds. The relevant question is the risk that he will do so, and associated resource impact. Here Department offers little evidence. The Department disparages the expert testimony offered by appellant on the ground that Dr. Crittenden made only one visit to the Creek and did not get underwater. (Resp. Br. 17.) But the Department does not and cannot explain why such information would be at all relevant to his analysis, and Dr. Crittenden re-

viewed the detailed habitat and fish survey information available. (CP309; CP322: Tr. 233:25; Tr. 246:9-13.) The PCHB disparaged his analysis as representing a "back of the envelope" calculation, but where it is obvious that the overall risk is utterly insignificant, precise as to each parameter included is not important. In substance, the Department offered and offers no substantive response to Dr. Crittenden's detailed risk assessment.

The Department does offer a lengthy defense of a red herring: "Mr. Beatty is not skilled in detecting redds" (Resp. Br. 18), ignoring the undisputed fact that "if they're young [like imagined August redds] . . . they really stand out" (CP318: Tr. 242:15-16.) When it comes to the independent means of avoiding risk—whether Mr. Beatty can stop in time when he hits one—the Department offers no evidence at all. The Department makes no attempt to refute the detailed evidence before the PCHB. (*See* Opening Br. 8-11.)

The Department also asserts that the Creek is a "delicate system". It is true that the Creek is poor fish habitat and has few fish, but the Department affords it no special regulatory consideration whatsoever, and fishermen can catch and kill trout in it essentially at will. And killing a pair of trout is, of course, equivalent to wiping out some fraction of a redd

(one spawning pair will typically produce more than one redd), since in the long run, a stable population will reproduce itself.

The Department's regulatory approach is fundamentally irrational: the poorer the fish habitat, and the less actual risk that anyone might encounter a redd, the more stringent the protections must be.[3] This sort of testimony is best explained as the product of unconstitutional bias and prejudice against an appellant rather than *bona fide* resource management policy.

B. The Issue of Bull Trout (Issue 2(a)).

The Department gamely claims that "Fortune Creek is home to several fish populations," including protected bull trout. (Resp. Br. 3 (citing CP455: Tr. 379:12-16.) It is worth reprinting the cited testimony in full:

> "Q. Now I'd like to just switch to your personal knowledge of what fish are in Fortune Creek. Can you just tell the Board what you have come to experience."
>
> "A So when we snorkled, there's a number of species, as we mentioned. We've been breaking them into the early spring spawners, which would be your cutthroat trout and your rainbow trout. Then you have your fall spawning fish, brook trout and bull trout, mountain whitefish. There's another native species called the skulpin. It's a spring spawn-

[3] The Department repeatedly asserts that dredging in redds could be "catastrophic" (Resp. Br. 39 n.19), based upon the notion that the redds might somehow represent the last fish on earth. This highlights the irrationality of the agency, and if uniformly applied, would prohibit all in-water work in the State of Washington.

ing fish that's very small as well. *But the fish of main concern in terms of the regulatory capacity was those, you know, food and game fish, you know, the trout and the whitefish."*

"Q Bill, would you bring up Exhibit 16. Now, this is something the Board saw yesterday, but can you just review again what it is."

"A So this is a night snorkel form from July 27th, 2000, and it records Fortune Creek. You can see night snorkeling up here at the top. Then it goes over here for the different species. RB is a rainbow trout. This is a brook trout. I'm going to get on my glasses for the rest of these unless -- oh, there we go."

So the brook trout, the notes with it has vermiculations on top, which is one of the identifying features of a brook trout versus a bull trout. Vermiculations is kind of like a wormy mark pattern on top. Bull trout don't have those, so they're just making a remark about that to confirm it was a brook trout rather than a bull trout. It's got this white-tipped tail. And then over here you've got the size classes and the numbers of fish that they've seen, you know."

"Q Were there other fish identified other than the rainbow and the brook?"

"A I'm going to have to get out my –"

"Q Bill, would you flip through the others. Here's page 2."

"A So here you've got rainbow trout again and a brook trout. Almost certainly on these surveys they would have picked up a cutthroat trout if we went through more of them. There's rainbow and brook trout. Now, here's one that's got rainbow, cutthroat and there's an unknown, so it looks like there's five unknowns. The last one didn't actually show a mark over here. Here's rainbow, cutthroat, bull trout and then tailed frog. So here they've got -- we also keep track of these tailed frogs, which are an indicator of cold, clear

water, lots of oxygen, that sort of thing. It's another biological indicator for us."

"Q *And so I think I heard you testify just a little earlier that you have personally seen bull trout in Fortune Creek?"*

"A *I have not personally seen bull trout*, but I've seen the other several species: whitefish, skulpins, rainbow, cutthroat, brook trout."

(CP455-57: Tr. 379:8-381:15, emphasis added.)

Two things clearly emerge from the testimony. First, the Department's witness, familiar with Fortune Creek, had never even seen a bull trout in it, though it is imagined to support "populations" of them.[4] Second, the witness makes it clear that the focus of the Department's regulatory concern—at least until the permit decision was appealed, and the Department cast about for arguments to support it—was "food and game fish"—not bull trout.

This cuts to the core of appellant's argument: it was not reasonable for the Department to elevate microscopic risks to common food fish, which might be killed at will in the Creek, to restrict his activities. The

[4] The Department also cites (Resp. Br. at 13) what it calls a 2000 survey by the U.S. Fish and Wildlife Service (Exhibits R-26 and A-27), but fails to acknowledges that this document was marked "draft," and that the definitive federal summary of evidence citing this same survey reported "unknown what species of redd" (A-28). The Department's witness admitted under cross-examination that "we don't really know whether those species [surveyed in 2000] were bull trout or brook trout".) (CP476: Tr. 400:12-17.)

Legislature cannot have intended statutes for a general protection of fishery resources to provide such extraordinary restrictions.

In a footnote, the Department argues that reference to bull trout is "misplaced" because "the hydraulic code provides protection for all fish life". (Resp. Br. 14 n.10.) This confirms that the Department is, in substance, interpreting the 1945 hydraulic act as providing for Endangered Species Act level protection for all food and game fish, an interpretation which is both absurd and not consistently applied by the Department. If the hydraulic act's command for "protection of fish life" is a grant of power to the Department to forbid any and all activities affecting fishing life to any degree, at the whim of the Department, it fails to provide any intelligible standard for regulators, giving risk to the constitutional problems discussed *infra* Point IX.

C. The Issue of Spring Spawning Timing (Issue No. 2(e)).

The Department cites a textbook reporting that spawning of common trout peaks in "mid-April (late March to early May)" and is "earlier at the lower reaches of the [Yakima] river and later at the higher reaches". (Resp. Br. at 3 n.2 (citing R-25, at 15.) The Department also claims, citing a textbook, that cutthroat trout spawn as late as July, but this information is generic to the entire Western United States, and bears no relationship whatsoever to conditions in Fortune Creek. (R-25, at 9.) The Depart-

ment's witnesses claimed that spawning might generally occur in June and July (*e.g.*, CP459: Tr. 383:24-25), but were unable to cite any data for these assertions other than R-13 (cited at CP459: Tr. 383:16).

What the Department's biologists were unwilling or unable to understand is that the tiny population fish emerging that late were doomed, because by the time they hatched out, summer would be over, and there would be no food. Ironically, this point was made in the very exhibit cited by the Department's biologists to support late spawning:

> "The cutthroat trout is the species most often stocked in the coldest high-elevation lakes in western states. In these cold environments, spawning temperatures of about 43 to 46[°F] may not be reached until July, and continuing cold water prolongs incubation and delays emergence time until well into September. By then, winter-like conditions have arrived, and the baby trout do not have the time to feed and accumulate sufficient energy to survive the long period under ice cover. In such situations, even with optimal spawning habitat, the stocked trout may survive for many years but leave no surviving offspring." (R-13]

Appellant's expert confirmed both that such late spawners would likely make no contribution to fish populations, and that elementary evolutionary biology demonstrated that fish had to emerge earlier than imagined by the Department—or there would be no fish at all. (*See* CP286-88: Tr. 210:13-212:9.) The Department's focus on protecting the "trickle" of doomed fish at latest-emerging edge of the distribution is again not a ra-

tional approach to protection of fishery resources. It protects that which cannot contribute to the resource.

V. THE PCHB CANNOT UPHOLD PERMIT DECISIONS BASED ON SPECULATION CONCERNING FUTURE PERMIT APPLICANTS (Issue No. 3).

The Department offers no specific response to the permit writer's irrational view that he could impose permit conditions based on speculation concerning future permit applications wherein "every other miner should be allowed to do the same thing" —which might have an impact. (CP255:17-22.) This irrationality contaminated the risk assessment and alone requires reversal. No matter how much information appellant provides, he can never overcome this hurdle, for an imagined infinite number of future applications can make any infinitesimal impact significant.

VI. THE DEPARTMENT'S MITIGATION POLICY IS AN UNLAWFUL RULE (Issue No. 5).

As set forth above, the entire permit decision was driven by the Policy Mr. Meyer cited when asked to explain it: "My job isn't to estimate how many eggs that Mr. Beatty can kill. My job is to avoid the impact as its highest priority according to my own policy." (CP251: Tr. 175:13-21.) For the Department now to argue that "the Department did not invoke the mitigation policy in this case" (Resp. Br. 46) should cast serious doubt as to all of its assertions concerning the record herein.

The Department defends against the well-established body of law concerning illegal rules by arguing that it is "not a directive; it is a guideline". (Resp. Br. 45.) This is meritless insofar as the Policy is shot through with directive language. (*E.g.,* A36 at 4 ("WDFW shall determine impacts and mitigation"). The Department also suggests that it "does not fit any of the five qualifiers in" in RCW 34.05.010(16). This is equally meritless as the Policy manifestly "alters . . . standards for the issuance . . . of licenses to conduct any commercial activity" and manifestly affects "private rights or procedures available to the public". *Id.*

The notion that permit writers must first denying permission to conduct an activity entirely to avoid all impacts is a general rule of immense importance. It may well be an "interpretive rule" within the meaning of RCW 34.05.328(5)(c)(ii) ("does not subject a person to a penalty or sanction"), but it is a "significant legislative rule" (RCW 34.05.328(5)(c)(iii)) that alters "any qualification or standard for the issuance . . .of a . . . permit". The Department is manifestly evading important procedural rulemaking requirements mandated by the Legislature in employing the Policy for permit issuance.

VII. LESS RESTRICTIVE ALTERNATIVES WERE AVAILABLE AND THE DEPARTMENT WAS LEGALLY REQUIRED TO CONSIDER THEM.

The Department ignores entirely the Legislative command that appellant's activities "shall be regulated in the least burdensome manner that is consistent with the state's fish management objectives and the federal endangered species act". (1991 Wash. Laws Chap. 415, § 1.) We have demonstrated that the state's fish management objectives do not extend to egg-by-egg protection for common trout and federal agencies permit suction dredging with commensurately small impacts on federally-listed listed fish (A37).

We demonstrated that in numerous other cases, the Department relaxed work windows and offered miners less restrictive forms of regulation, such as avoiding "pocket gravel deposits". (*See* Opening Br. at 40-41 (reciting evidence).) In its brief, the Department now acknowledges that spawning is in part a function of stream temperature (*e.g.*, Resp. Br. at 3-4 & nn. 1, 3-5), suggesting yet another less restrictive alternative: cutting off dredging time as a function of temperature. What the Department may not do is pretend, for example, that water temperatures are in the 40s during July, when in fact they are nearly twenty degrees higher. (*See, e.g.*, CP396-98: Tr. 320:19-322:1.)

VIII. THE PERMIT RESTRICTIONS ARE NOT LAWFUL AS INTERFERING WITH FEDERAL MINING LAW (Issue No. 7).

As to preemption, the Department first suggests that a "historic police power" of the state should not be preempted. But regulation of activity on federal land by miners owning federally-issued claims is not a "historic police power".[5] Where Congress acts pursuant to the Property Clause of the Constitution, it is not invading any historic state powers, and the only question is whether the state's refusal to issuing mining permits "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress". *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1985). The *Granite Rock* case is the only preemption case on point, begins with the Property Clause (*id.* at 580), and contains *no reference whatsoever* to any requirement of a "clear and manifest purpose of Congress". (*Cf.* Resp. Br. 24.)

We demonstrated in our opening brief that Congress' objectives extended to promoting prospecting for valuable minerals (*e.g.*, 30 U.S.C. § 22 (federal land to be free and open to exploration) and then granting possessory property rights to develop claims that are found (*e.g.*, *id.* §§ 26, 35), with all of these rights protected against material interference (*id.* § 612(b). We also demonstrated in our opening brief that appellant intended to prospect Fortune Creek using the only practical tool for doing

---

[5] States have not traditionally occupied the field with respect to protection of fish and wildlife *on federal land*, and the U.S. Supreme Court has struck down state attempts to regulate wildlife on federal land, citing the Property Clause. *Kleppe v. New Mexico* (1976) 426 U.S. 529.

so, a suction dredge, and switching to highbanking only if a lode source were discovered. (Opening Br. 50-51 & n.19 (error in cite, should cite CP146: Tr. 70:17-21).) Simply put, the Congressional objectives cannot be implemented unless miners are reasonably free to prospect and develop mineral resources, and allowing prospecting for only two weeks a year utterly frustrates those objectives. (*See* CP119: Tr. 43:10-11.)

The Department's response to Congress' prohibition of "material interference" with mining is the argument that the law "addresses conflicts between two *uses* of federal land," not regulation. (*See* Resp. Br. 28.) The Department is wrong. As the United States Court of Appeals for the Ninth Circuit recently explained in reversing a miner's criminal conviction for violation of a forest service environmental regulation, *United States v. Backlund*, 689 F.3d 986 (9th Cir. 2012), "the agency's authority [the Forest Service] is cabined by Congress' instruction that *regulation* [not merely use of the land] not 'endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.'" *Id.* at 997 (emphasis added; quoting 30 U.S.C. § 612(b)).

The Department argues that § 612(b) is not relevant to preemption analysis, but this makes no sense. The statute shows the objective of Congress to avoid interference by regulation; Congress did not expressly mention restricting *state* regulation is because it was legislating concerning the property of the United States and did not conceive of state regulations effectively prohibiting effective mining on federal land.

Significantly, § 612(b) does contemplate giving a continuing role to state *water* law with respect to "to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim," but defendant is not seeking to preempt the operation of state water law. Defendant is arguing that the mining restrictions of the Department of Fish and Wildlife, which has no authority over water, is preempted. That Congress did grant a limited role for state *water* law to operate within the boundaries of federal mining claims refutes any notion that Congress intended that state regulatory prohibitions materially interfering with mining were permitted as well. *Expressio unius est exclusio alterius.*

For all these reasons, appellant need not prove that the Department banned all mining; he merely needed to prove "material interference," and the Department does not dispute the evidence of material interference. Appellant was singled out for extraordinary restrictions while less restrictive alternatives were routinely employed. *See supra* Point VII. One cannot give full effects to Congress' objective that mining proceed without "material interference" without giving some reasonable meaning to that limitation. Construing the objective to only cover flat prohibitions on any and all mining activity is not reasonable.

In the context of a federal grant of a mining claim to most of the lower portion of Fortune Creek (and rights to prospect above the claim), to argue that limitations to "hand-held equipment" (Resp. Br. at 30) do not interfere with Congressional objectives is unreasonable. It is as if the

State has restricted farmers to plowing by hand, and then argued there was no material interference with farming. Above all else, the presence of numerous reasonable alternatives to the two-week work window shows material interference.

IX. THE PERMITTING SCHEME IS UNCONSTITUTIONAL AS HERE APPLIED, IF NOT ON ITS FACE, OR AT LEAST REQUIRES HEIGHTENED SCRUTINY (Issue Nos. 8 & 9).

It is certainly true that in 1979, the Supreme Court held that the hydraulic code was not an unconstitutional delegation of power. *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894 (1979). We explained in detail in our opening brief why this holding was no longer well founded in light of the extraordinary interpretations of the statute the Department now advances, and the Department offers no response.

We also argued that the standardless nature of the inquiry created a due process and equal protection problem because appellant was singled out for special restrictions as compared to other miners—*even the ones operating immediately downstream from him*—for special restrictions. The Department cannot and does not explain why the permit writer granted the miners immediately downstream a window from July 16th through August 31st for a nonspecific area "beginning ~200 meters below the confluence of the Cle Elum River with Camp Creek and continuing upstream for approximately 1.5 miles to Fortune Creek" (A78). *As far as the record*

shows, only Appellant has suffered Mr. Meyer's hole-by-hole, site-specific and utterly unworkable inspection demands.

The Department now argues that the due process argument is not adequately briefed, but this is as simple as equal protection law gets: there is no explanation whatsoever proffered for the disparate treatment. *Cf. Yick Wo v. Hopkins,* 118 U.S. 356 (1886) (unconstitutional to deny Chinese laundry permits granted to others). Appellant offered evidence of similarly invidious discrimination.

The Department responds that PCHB could rely upon the bosses witness' bland denial that he was unaffected by a prior conflict so severe that it led to his formal reprimand (*see* A17), and did not "process or issue" the permit himself. The Department does not address the circumstantial evidence of bias.

The primary evil here is a permitting scheme so standardless that it permits the Department to impose permit conditions that might kill dozens of endangered fish for favored applicants (*e.g.*, A12-15), yet forbid others from engaging activities that Ph.D. biometricians testify have "negligible" risk of even encountering the redd of a common trout (CP293: TR. 217), much less killing a fish. If that permitting scheme is not invalid, then this Court should apply heightened scrutiny to the Department's actions, including reversing the burden of proof as suggested in *Pentagram Corp. v.*

City of Seattle, 28 Wn. App. 219 (1981). That failing, we no longer have the rule of law; we have the rule of biologists.

Conclusion

For the foregoing reasons, and the reasons stated in our opening brief, the trial court should be reversed, and the Department instructed to allow appellant to work from June through September, because his activities realistically provide no need for "protection of fish life" beyond the extensive protections that are not challenged herein.

DATED: July 3, 2013.

James L. Buchal, WSB #31369
Attorney for Appellant

314090-0-III

COURT OF APPEALS FOR DIVISION III

STATE OF WASHINGTON

BRUCE M. BEATTY,

Appellant,

and

WASHINGTON FISH and WILDLIFE COMMISSION, WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, AND POLLUTION CONTROL HEARINGS BOARD,

Respondents.

.

CERTIFICATE OF SERVICE

Pursuant to RAP 10.5(b), I certify that on the 3rd day of July 2013, I caused to be served a copy of BRUCE M. BEATTY'S REPLY BRIEF on the parties below in the following manner:

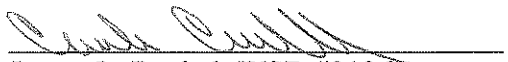
Jessica E. Fogel	( )	(via FEDERAL EXPRESS)
Assistant Attorney General's Office	(X)	(via FIRST CLASS US MAIL)
P.O. Box 40100	( )	(via E-MAIL)
Olympia, WA 98504-0100	( )	(via FAX)
E-Mail: Jessicaf1@atg.wa.gov		
James R. Schwartz	( )	(via FEDERAL EXPRESS)
Assistant Attorney General's Office	(X)	(via FIRST CLASS US MAIL)
P.O. Box 40100	( )	(via E-MAIL)
Olympia, WA 98504-0100	( )	(via FAX)
E-Mail: jims@atg.wa.gov		

James L. Buchal, (WSB 31369)
MURPHY & BUCHAL LLP
3425 SE Yamhill St., Suite 100
Portland, OR 97214
Tel: 503-227-1011
Fax: 503-573-1939

Diane L. McDaniel
Assistant Attorney General's Office
P.O. Box 40110
Olympia, WA 98504-0110
E-Mail: dianem@atg.wa.gov
E-Mail: LALOlyEF@atg.wa.gov

( ) (via FEDERAL EXPRESS)
(X) (via FIRST CLASS US MAIL)
( ) (via E-MAIL)
( ) (via FAX)

DATED: July 3, 2013.



James L. Buchal, WSB #31369
jbuchal@mbllp.com
MURPHY & BUCHAL LLP
3425 SE Yamhill St., Suite 100
Portland, OR 97214
Tel: 503-227-1011
Fax: 503-573-1939
Attorney for Appellant