Feds to Imprison Idaho Man for Protecting Homes From Flooding

When Mr. Moses began to develop a subdivision along Teton Creek in 1980, Teton County required him to implement an engineer's plan to modify the Teton Creek stream bed to prevent the flooding of subdivision property, caused by the buildup of gravel bars and downed trees, during high water flows in the spring.

In fact, the county would not allow him even to record the plat for the subdivision until the modification work had been done, and only allowed the development after requiring the homeowner's association to maintain the flood control channel year after year.

Teton Creek used to be a flowing stream, but irrigation diversion over 100 years ago dewatered the Creek and left the stream bed dry for all but two months a year at the most. Water only fills the stream bed when irrigators have more water than they can use. (Note: this means there is no "aquatic environment" here, nor any "wetland.")

Officials from the U.S. Army Corps of Engineers were invited to a planning meeting with the county and Mr. Moses in 1980, but they soon left the meeting after informing county officials that they had "classified the stream as intermittent and therefore outside their jurisdiction."

So working on plans developed by an engineer and approved — in fact, required — by the county, Mr. Moses got to work and cleared the channel of gravel bars and downed cottonwood trees to ensure that the channel would serve as a flood control structure.

For years he has walked the entire length of the creek to evaluate conditions and then remove gravel bars, sand, logs and debris as necessary to keep the channel clear and satisfy the subdivision's obligation to the county.

When Driggs flooded in the spring of 1981 — due to a clogged culvert under a county road — the county approached the Corps a second time, asking for funding and help to replace the culvert with a bridge to prevent future flooding. Once again, the Corps said, Nope, not our problem, not our fault, not our responsibility to fix, we don't have jurisdiction.

Why? Because, they repeated again, Teton Creek is an intermittent stream and we have no jurisdiction unless there is water in the stream bed at least three months out of the year. Thus twice the federal government pointedly and definitively washed its hands of the whole thing.

Since 1982, all Mr. Moses has done is to provide the necessary maintenance to ensure that the stream bed does not get clogged with gravel, sediment, fallen trees, and other debris so that the stream bed can continue to siphon flood water away from homes and the city of Driggs.

He did his work when the stream bed was dry, of course, and never put anything into the stream bed, only took “pollutants” (sedimentation, sand, gravel, etc.) out.

Tellingly, in 1984, when the Forest Service needed to build a road, they came to this same stretch of Teton Creek and — without any kind of permit — contracted with Mr. Moses to excavate between 5,000 and 6,000 cubic yards of gravel from the bed, all of which was inspected by government officials.

Every four or five years, when new staff would replace the old, and a generation would arise “who knew not Joseph,” Mr. Moses would receive a letter from the Corps of Engineers, insisting that he needed to get a permit from them for his maintenance work. He’d write them back, informing him that, according to the Corps itself, they had no jurisdiction over intermittent streams. That would be that.

He’d hear nothing for another four to five years, after which another staff rotation led to another letter from the Corps and to a similar reply from Mr. Moses. And so it went for over 20 years.

An aggressive Corps staffer tried to convince the U.S. Attorney to prosecute Mr. Moses in 1995, and the U.S. Attorney told him to take a hike since the Corps had no jurisdictional authority to initiate legal action.

According to former state legislator Lee Gagner, the Corps “discussed his process many times with him, but could not show where they had jurisdiction on the seasonal, intermittent stream.” Gagner adds, “[T]o this day they do not have written rules indicating this to be true.”

As far as Gagner knows, the Corps never completed what is called a “Jurisdictional Determination” that their own rules even gave them any authority over this particular intermittent stream. (Jurisdiction is determined on a case-by-case basis with intermittent streams.)

At this point, the Environmental Protection Agency (EPA), emboldened by newly granted bureaucratic authority, jumped in and went right after Mr. Moses, indicting and prosecuting him for violating the Clean Water Act in the years 2002, 2003 and 2004 for doing nothing more than the routine maintenance on the channel he had been doing for 20 years, under requirements imposed by local government.

Presiding federal judge Lynn Winmill, who has a well-deserved reputation for judicial activism, refused to allow Teton County commissioners to testify to the original agreement, nor would he allow the aggressive Corps staffer to testify about the refusal of the U.S. Attorney to prosecute in the mid-90s.

Before the jury was dismissed to enter into deliberations at the conclusion of his trial, Judge Lynn Winmill instructed the jury, believe it or not, to disregard every bit of information from 1980 to 2002, including the Corps’ denial of jurisdiction and the mandate from local government for Mr. Moses to maintain the flood channel.

Instructed by this notoriously activist judge to ignore facts, reason and legal history, the jury returned with a guilty verdict, finding Mr. Moses guilty of “discharging” “pollutants” into one of the “waters of the United States.”

His conviction ignores the fact that no evidence was ever presented in court that Mr. Moses “discharged” anything into the stream bed at all. He only removed sand and gravel bars that were already there and which he was contractually obligated to remove. He was extracting material from the

channel, not discharging material into it.

No evidence was presented in court by the EPA that there was any water at all in the stream bed during those years for Mr. Moses to "discharge" anything into. The EPA claims that "fallback" — material from the bank falling back into the stream bed — represents a "discharge," but it offers no objective criteria for deciding how much "fallback" it takes to cross the magic threshold, meaning the EPA used sheer speculation to assert a violation.

Worse, Mr. Moses has been convicted of "pollut(ing) a spawning area for Yellowstone cutthroat trout," despite the fact that there have been no fish in this stream bed for more than 150 years. Mr. Gagner, who has lived near the flood channel for 18 years, says he has never seen fish in this stream bed. And it's not even possible for the stream bed to serve as a spawning ground since it only has water two months out of every year in the first place.

Although the director of the EPA in Idaho, Jim Wernitz, asserts that Mr. Moses had damaged "wetlands" associated with the stream, there are no wetlands there! The very word requires that land be, well, wet, but the stream bed is bone dry for at least 10 months out of every year. Wernitz is apparently ignorant of the fact that the Government had previously stipulated that there are no wetlands surrounding the storm channel, nor any "aquatic environment" that could be damaged.

In the plurality opinion of the U.S. Supreme Court in the 2006 *Rapanos* case, Justice Scalia wrote that the Clean Water Act in fact gives the federal government jurisdiction only over "relatively permanent, standing or continuously flowing bodies of water," and explicitly added, "[T]he 'waters of the United States' does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."

Embarrassingly for Judge Winmill, this ruling was handed down on the very day Mr. Moses was originally sentenced to prison. Eight months later, the Corps of Engineers revised its own rules in a way that makes it abundantly clear that the federal government has no jurisdiction over an intermittent stream like Teton Creek.

No matter. With other notoriously activist federal judges in the 9th Circuit, animated by environmental sympathies and a sympathy for the repressive power of big government, refusing to overturn lower court convictions on appeal, Mr. Moses has been forced to spend almost $400,000 of his own money in a losing effort to defend himself for protecting the city of Driggs from catastrophic flooding.

Mr. Moses' wife died unexpectedly of a heart attack a year and a half ago. Friends tell me the stress of their 25-year battle with the federal government and the stress of the guilty verdict contributed to her early death. Mr. Moses, when I spoke with him this morning, agrees that this is a likely possibility.

The death of his wife has left Mr. Moses to raise his 17-year-old daughter by himself, a daughter who will have to fend for herself once her sole surviving parent is tossed behind bars — in another state no less — for the next 18 months.

His daughter, just now entering her senior year in high school, will be deprived of his comfort and counsel right when she needs it the most. Mr. Moses will miss his daughter's companionship, and miss the joy of her 18th birthday party, her senior prom and her graduation ceremony.

Virtually everything is wrong with this story. It's an egregious violation of the constitutional limitations on federal power, as federal bureaucrats simply dismissed the fact that Mr. Moses was required by local authorities to do exactly what he was doing.

Bureaucratic government agencies, aided and abetted by activist judges, acted as petty tyrants and incarcerated a man not for doing evil but for doing good. A fine man has been chewed up by the grinding maw of a mindless and inhumane federal government, and will spend the next year and a half of his life behind bars, not for endangering the families in his community, but for protecting them.

His attorney calls the whole thing "a travesty," which is just about the mildest thing that can be said about this unconscionable miscarriage of justice.

As Elaine Jones said in a letter published by the *Idaho Press-Tribune*, "A good, honorable widower is leaving his daughter to others to raise, and is going to prison for following the rules, obeying the law and helping his friends stay safe from flooding."

As George Washington is reputed to have said, "Government is not reason; it is not eloquent; it is force. Like fire, it is a dangerous servant and a fearful master." Lynn Moses will tell you that the government's fire can not just singe you but burn you to a crisp.

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