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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. 3:14-cr-00103-SLG
	)	
Plaintiff,	)	UNITED STATES' RESPONSE TO
	)	DOCKET 226 and REPLY IN SUPPORT
vs.	)	OF MOTION IN LIMINE REGARDING
	)	ENTRAPMENT BY ESTOPPEL
JAMES SLADE	)	DEFENSE
	)	
Defendant.	)	
	)	

NOW COMES the United States and hereby responds to docket 226 filed on Sunday afternoon, and replies in support of its motion *in limine* regarding the entrapment by estoppel defense. The following is filed to assist the Court in evaluating Mr. Slade's most recent arguments and transcript citations.

There are several reasons why Mr. Slade has not shown he can meet the elements of entrapment by estoppel affirmative defense and is not entitled to a jury instruction. A few key points are as follows:

First, Mr. Slade has not pointed to any statement by a government official that the conduct at issue (discharging turbid wastewater into the Platinum Creek and Salmon River at significantly above-permit levels) was permissible. Instead, Mr. Slade argues that no government official told him or XSP to stop mining.

Second, Mr. Foley, the Notice of Violation, the Non-Compliance Order, and all BLM witnesses were very clear that although they did not shut the mine down, the mine was not permitted to continue to violate water quality standards (or the NPDES permit). Moreover, Mr. Foley testified that he did not ever recall meeting Jim Slade (and that his notes showed that Mr. Slade was not present during Foley's visit). Accordingly, Mr. Slade's citation to testimony from Mr. Foley that ADEC did not issue a stop mining order after his visit on August 23-24, 2011 does little to support his request for a entrapment by estoppel instruction. To support such a defense, Mr. Slade would have to show that Mr. Foley told him it was permissible to continue to discharge turbid wastewater in violation of the NPDES permit (and that did not happen).

Third, Mr. Weber, the XSP official who met with Mr. Foley on August 23-24, 2011, testified that XSP was not given permission to continue to violate their permit or the water quality standards. In fact, there is no evidence that Mr. Slade was told by any government regulator, nor by any other XSP official, that they were allowed to continue to discharge turbid water into the Salmon River at any point, much less after the August 23-24, 2011 inspection.

Fourth, Mr. Foley and Mr. Whitlock were not aware of all the relevant historical facts when they spoke to XSP or Mr. Slade. In fact, it is undisputed that Mr. Slade and XSP failed to

provide their water monitoring data for 2011 to any government official until September 2011, and at that time they initially only provided data through August 15, 2011. The evidence presented at trial also showed that Mr. Slade and XSP never provided the 2010 water monitoring data until it was located by federal agents on Mr. Slade's computer in 2013.

Fifth, it is not relevant whether or not Mr. Whitlock complimented the mine or its officers, gave them suggestions related to fish passage or opening Medicine Creek, or indicated in his report that settling ponds were in good condition. None of those things rise to the level of making an affirmative statement that the charged conduct was legally permissible, and they were all made in the absence of relevant information about the mine's ongoing high level of turbid discharges.

Sixth, it is undisputed that the NTU's on the days when Mr. Whitlock inspected the mine were comparatively very low, that Mr. Whitlock did not measure turbidity during his visits, and that Mr. Slade did not tell him what the turbidity levels were.

For all the above reasons, and based on the prior analysis and discussions of this issue, the United States believes that an entrapment by estoppel instruction is not supported by the evidence or the law, and particularly that the trial evidence taken in the light most favorable to the defense does meet the legal standard as presented by United States v. Batterjee, 361 F.3d 1210 (9th Cir. 2004), which requires that there was an

- (1) authorized government official, empowered to render the claimed erroneous advice,
- (2) who had been made aware of all relevant historical facts,
- (3) who affirmatively told defendant the conduct alleged in a specific count in the Superseding Indictment was permissible, and
- (4) that defendant relied on this false information, and
- (5) his reliance was reasonable

RESPECTFULLY SUBMITTED October 5, 2015, in Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2015,
a copy of the foregoing was served
electronically on all counsel of record.

s/ Kevin R. Feldis
Office of the U.S. Attorney