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IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

THE NEW 49'ERS, INC., a California corporation, DEREK D. EIMER; STEPHEN JONES; DAVID GUIDERO; MARVIN GARRY LAMPSHIRE II; and DYTON W. GILLILAND, Plaintiffs and Petitioners, v. CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE and CHARLTON H. BONHAM, in his capacity as Director of the California Department of Fish and Wildlife, Defendants and Respondents.	Case No. **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION** Judge: Hon. Gilbert G. Ochoa Dept.: S36 Date: July 9, 2015 Time: 8:30 a.m.

Preliminary Statement

On June 23, 2015, this Court determined that the balance of harms did not favor granting a statewide injunction against Departmental enforcement of a permit requirement for suction dredge mining, particularly given the pendency of appellate review in *Rinehart*. The Court also forbid the undersigned attorney from filing any new cases in Siskiyou County for his Siskiyou County clients concerning suction dredge mining. Unable timely to obtain counsel in Siskiyou County, some of

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these clients and others have therefore come to San Bernardino County to present a new complaint with a narrower request for equitable relief *that does not depend upon the Rinehart ruling at all.*

As the Court may recall, the permitting moratorium proceeded through three statutory iterations, Senate Bill 670, Assembly Bill 120, and Senate Bill 1018, copies of which are attached hereto Exhibits 1-3 to the Plaintiff's Request for Judicial Notice ("RJN") filed herewith. The latter two bills blatantly violated Article IV, § 9 of the California Constitution, which provides that "a statute shall embrace but one subject". A bare glance at the first page of these exhibits shows that the latter two bills amended numerous different California Codes on a dizzying array of subjects from overtime costs at poultry processing plants (RJN Ex. 2, at 18) to transparency in regard to the Western Climate Initiative (RJN Ex. 3, at 23)—subjects that manifestly have nothing to do with suction dredging.

With these two bills recognized to be unconstitutional and void for violating the California Constitution—in addition to violating the U.S. Constitution for reasons this Court has already declared—the operative moratorium bill (but for federal preemption) is Senate Bill 670, which provided that the moratorium only persisted until the department completed the EIR, filed the new regulations, and they became effective. (RJN Ex. 1, at 2.) As a matter of law, the regulations took effect when the Office of Administrative Law issued its Notice of Approval of Regulatory Action so declaring on April 27, 2012. (RJN Ex. 4.) As the Court may recall, suction dredging under those regulations were certified as not deleterious to fish, though the EIR suggested potentially significant effects in other areas already briefed at length before this Court.

In short, plaintiffs herein are certain to succeed on the merits of their claim that even without regard to federal preemption, the Department continues unlawfully to refuse to issue permits. There is no reason in law or policy why the Department should refuse to issue permits under its 2012 regulations. There is no mercury problem on The New 49'ers, Inc. claims at issue on this motion; there is no specific evidence of any substantive interference with cultural resources; harm to birds, or evidence of any noise violation. (*See generally* Declaration of David McCracken.)

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Thus this motion asks the Court to consider balancing an entirely different set of factors, and the grant relief to a community that desperately needs it, a need sufficiently desperate that it has been repeatedly proclaimed by the County of Siskiyou itself. (*See* RJN Exs. 5-6.) Only this Court can provide timely relief to save that community from the Department's blatantly unconstitutional and lawless actions.

Argument

I. ASSEMBLY BILL 120 AND SENATE BILL 1018 ARE OBVIOUSLY UNCONSTITUTIONAL.

Article IV, § 9 of the California Constitution provides:

> "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended."

RJN Exhibit 2 demonstrates that Assembly Bill 120 addresses a variety of subjects contained in the Business and Professions Code, the Fish and Game Code, the Food and Agricultural Code, the Government Code, the Public Resources Code, the Revenue and Taxation Code, and the Water Code. RJN Exhibit 3 demonstrates that Senate Bill 1018 reaches to the Fish and Game Code, the Food and Agricultural Code, the Government Code, the Public Resources Code, the Water Code, the Education Code, the Health and Safety Code, the Vehicle Code, and even certain School Bond Facilities Acts.

As the Court of Appeals has recently explained, Article IV, § 9

> "essentially requires that a statute have only one subject matter and that the subject be clearly expressed in the statute's title. The rule's primary purpose is to prevent 'log-rolling' in the enactment of laws. This disfavored practice occurs when a provision unrelated to a bill's main subject matter and title is included in it with the hope that the provision will remain unnoticed and unchallenged. By invalidating these unrelated clauses, the single subject rule prevents the passage of laws that otherwise might not have passed had the legislative mind been directed to them."

Homan v. Gomez, 37 Cal. App. 4th 597, 600 (1995). In short, the courts of California do not give effect to enactments such as Assembly Bill 120 and Senate Bill 1018, which obviously represent a

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"log rolling" exercise where various special interests to concatenate their requests to the abuse of honest government. The initial Senate Bill 670 in 2009 merely declared that the Department should finish its EIR and update regulations before issuing permits—manifestly a bill that could secure broader appeal than its more extreme successors. The more noxious requirements of Assembly Bill 120 and Senate Bill 1018, establishing legally and factually impossible requirements for the Department as a *sub rosa* prohibition, had to be glued together with other, unrelated subjects in order to secure passage—precisely what the California Constitution will not permit.

In the *Homan* case, the Legislature placed into a budgetary act a rider which forbid the Department of Corrections from using any funds to support unsupervised visits for certain sex offenders. *Homan*, 37 Cal. App.4th at 599. Even though the Legislature had at least the fig leaf of couching its substantive restrictions in the form of funding restrictions, thus asserting the "one subject" was the budget, the Court had no trouble issuing a peremptory writ so that sex offenders might have visits in prison. *Id.* at 602 ("Let a peremptory writ of mandate issue directing James Gomez, as Director of the Department of Corrections, to refrain from enforcing the unconstitutional provision of the Budget Act of 1994 herein challenged"); *see also Planned Parenthood Affiliates v. Swoap*, 173 Cal. App.3d 1187, 1192 (1985) (enjoining enforcement of bill forbidding family planning funding). Are not the miners entitled to such relief as even sex offenders and abortionists might obtain from the unconstitutional depredations of the Legislature?

The Department may argue that Article IV, § 9 only refers directly to voiding parts of a statute not listed in the title. The Supreme Court has rejected precisely this argument, stating that "the two aspects of section 9 relating to the subject of an act and its title are independent provisions which serve separate purposes". *Harbor v. Deukmejian*, 42 Cal.3d 1078, 1096 (1987). A title that lists the Fish and Game Code among many other Codes simply will not comply. *See id.* at 1097-1102. Rather, all provisions of a challenged bill must be "'functionally related in furtherance of . . .

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a common underlying purpose'". *Id.* at 1098 (quoting *Amador Valley Joint Union High School Dist. v. State Board of Equalization*, 22 Cal.3d 208, 230 (1978) [1]).

Assembly Bill 120 and Senate Bill 1018 do not begin to meet this test. This is as blatant violation of Article IV, § 9 as can be imagined, as there is no sense in which all of these subjects can be viewed as "one subject". The only thing all these subjects have in common is that they are changes in statutes. The Supreme Court of California has long rejected the proposition that "the provision of the constitution in question can be entirely avoided by the simple device of putting into the title of an act words which denote a subject 'broad' enough to cover everything." *Lewis v. Dunne*, 134 Cal. 291, 295 (1901).

Assembly Bill 120 and Senate Bill 1018 are so obviously unconstitutional that plaintiffs have an extraordinarily strong showing of likelihood of success at this point, which means that this Court has "discretion to issue the injunction [even if plaintiffs had an] inability to show that the balance of harms tips in [their] favor". *Common Cause v. Board of Supervisors*, 49 Cal.3d 432, 447 (1989).

II. EQUITY CRIES OUT FOR THE ISSUANCE OF AN INJUNCTION.

In fact, the balance of harms tips overwhelmingly in favor of plaintiffs as well. The Siskiyou County-based plaintiffs have, as alleged below, suffered large and continuing irreparable injury, with the blight caused by the Department's serially unconstitutional conduct radiating into the larger community, to the point where Siskiyou County itself testifies to the damage. The only countervailing harms that have been asserted in these proceedings are environmental impacts, which are all but irrelevant under the very narrow relief sought here.

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[1] The Supreme Court analogized to standards contained in the "one subject" rule commonly applied to strike down initiatives under Article II, § 8(d) of the California Constitution. *See also California Trial Lawyers Assn. v. Eu,* 200 Cal. App. 3d 351 (1988); *Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian,* 227 Cal. App. 3d 663 (1991).

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A. Plaintiffs Are Suffering Severe and Continuing Irreparable Injury.

The Department has never disputed the ongoing citations, arrests, and equipment seizures, which as a matter of law represent irreparable injury.[2] The Department has now even escalated to threats to seize vehicles driven by those it accuses of suction dredging to avoid judicial review of its unconstitutional citations. (*See* Declaration of Christopher Darpino (threat to seize truck to get promise to appear on citation).)

Declarations of plaintiffs Derek Eimer, Dyton Gilliland, Gary Lampshire, David Guidero, together with those of Mr. McCracken and other members of The New 49'ers such as Rip Ripple, William Christensen, and Ray Derrick, offer poignant testimony as the very severe and irreparable nature of the harm caused by the Department. Plaintiffs note that

> "The concept of "irreparable injury" which authorizes the interposition of a court of equity by way of injunction does not concern itself entirely with injury beyond the possibility of repair or beyond possible compensation in damages. Rather, by definition, an injunction properly issues in any case where "it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief." Further, the equitable rule as stated by the Supreme Court in *Anderson v. Souza*, 38 Cal.2d 825, at 834, is that: "The term 'irreparable injury' . . . means that species of damages, whether great or small, *that ought not to be submitted to on the one hand or inflicted on the other*."

Wind v. Herbert, 186 Cal.App.3d 276, 285 (1960) (affirming injunction among partners fighting over money; emphasis added; citations omitted). This cases involves the sort of damages that "ought not to be submitted to" or "inflicted," and only equitable relief is sought.

As to the notion that some suction dredge miners may be recreationalists, the loss of an opportunity to recreate *is* irreparable injury. *E.g., Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach*, 846 F. Supp. 986, 992 (S.D. Fla. 1994) ("The elimination of the Dreher Park Center programs creates irreparable harm because these social, athletic, and other leisure

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[2] *McKay Jewelers, Inc. v. Bowron,* 19 Cal.3d 595, 598 (1942); *Ebel v. City of Garden Grove,* 120 Cal.App.3d 399, 410 (1981) ("threatened arrest by the authorities or discontinuance of the method of conducting a business because of fear of arrest and prosecution is sufficient to show 'irreparable injury'"); *see also Novar Corp. v. Bureau of Collection & Investigative Services,* 160 Cal. App. 3d 1 (1984); *Barajas v. Anaheim,* 15 Cal.App.4th 1808, 1813 (1993) (reversing superior court denial of injunction based on supremacy issue); *Hillman v. Britton,* 111 Cal.App.3d 810 (1980),

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programs present opportunities for recreation that are not being otherwise offered.") Damages cannot provide a remedy for the loss of what one miner calls "something close to a religious experience"—"finding Mother Nature's most valuable hidden treasure". (Christensen Decl. ¶ 3.)

Moreover, under the California Constitution, plaintiffs have the "inalienable rights" to "enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy". Cal. Const. Art. 1, § 1. The Department's violation of fundamental state and federal constitutional and statutory rights *itself* gives rise to irreparable injury. *See Ketchens v. Reiner*, 194 Cal. App.3d 470, 480 (1987) (other Article I freedoms).

In fact, plaintiffs and many members of The New 49'ers included are not recreational miners; they are people at the bottom of the socioeconomic ladder, trying to scratch out a living from mining. Many of the Department's victims are elderly retirees hoping to supplement their meager social security income, whose lifelong retirement dreams have been destroyed by the Department. (Derrick Decl. ¶ 6; Christensen Decl.; Ripple Decl. ¶ 13 (75 years old; suction dredging is only available means of support beyond Social Security; "remaining opportunity to dredge for gold will not last much longer" for health reasons).) Those whose equipment has been unconstitutionally seized have even lost the opportunity to suction dredge mine in other states not afflicted with unconstitutional prohibitions. (Gilliland Decl. ¶ 23.) Others have simply been "intimidated by the degree of harassment and abuse" into not mining. (*See* Lampshire Decl.)

All these people relied upon this Court's ruling and Order finding the Department's refusal to issue permits unconstitutional, and reasonably believe they had a lawful right to dredge. No amount of money can compensate them for the loss of the dredging opportunities. And absent injunctive relief, some in these coordinated cases have already died, and others will die, all with no relief; there are no pockets in a shroud.

The relief sought will also benefit the Siskiyou County community at large, many of whom depend heavily upon suction dredgers. Plaintiffs ask this Court to take judicial notice of the

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Declarations of Roberta Collum, Rita Manley King, and Robert Schmalzbach filed on or about July 1, 2013, in Case No. SCCVCV 1300804 (Siskiyou County) (later coordinated), and provide an updated Declaration of Roberta Collum. Damages cannot compensate these nonparties or even plaintiff The New 49'ers, Inc. for unknown losses; it is well-established in California law that The New 49'ers, Inc. may seek an injunction to prevent to prevent the Department from unconstitutional interference with its customer relationships, and thereby protect the community as a whole.[3]

The harm caused by the Department's unconstitutional conduct is so drastic that the governing body of the County of Siskiyou has long sought to deflect the State's baseless and damaging attack on its local economy, advising the State that "gold mining in the form of suction dredging is vital to the local economy throughout a large portion of the County's land base". (RJN Ex. 5, at 1; *see also id.* at 20 ("when considered in the context of cumulative social and economic impacts to the County and the fragile socio-economic fabric of a distressed area such as the Klamath River, the negative impact is both considerable and alarming"). The County even went so far as to fight attempts by the State and Tribe to depublish the *Rinehart* decision (RJN Exs. 7-8).

These extraordinary actions underscore the degree to which the loss of a dredging season has broad impact. All these people manifestly lack any effective remedy at law. It is hard to imagine a case where the public interest supports issuance of relief as strongly as it does here.

B. Narrow Relief in Siskiyou County Allowing Suction Dredge Mining Under the 2012 Regulations Will Cause No Environmental Harm.

This Court has already found it "obvious" that "harm is occurring" to suction dredge miners. (Transcript of June 23, 2015 hearing in the Coordinated Cases, at 13-14.) The balance of harms raised by this request for injunctive relief is quite different than last time around, because the relief is limited to a single set of claims in Siskiyou County, and to greatly restricted operations in accord with the 2012 regulations. As found in the FSEIR, there is no harm to fish from suction dredging in compliance with the 2012 regulations; there are only possible concerns about mercury, cultural

[3] *Crittenden v. Superior Court of Mendocino County*, 61 Cal.2d 565, 568 (1964) (collecting cases;

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resources, birds and noise. *There is no specific evidence concerning any such problems in Siskiyou County.*

Plaintiffs maintain that the declarations previously filed with the Court demonstrated that *even under the 1994 regulations statewide*, effects were nonexistent. (*See* Declarations cited in RJN ¶¶ 4-5.) The County of Siskiyou, where dredging would take place under the relief sought, has also "document[ed] a consistent finding of *de minimis* environmental impact from suction dredging as previously regulated (RJN Ex. 6, at 1)—referring to the 1994 regulations. Under the 2012 Regulations, with dredging that does not include mercury-laden areas upstream of San Francisco Bay, there is not even a colorable argument of adverse environmental impact sufficient to outweigh the undisputed harm to plaintiffs.

III. SCOPE OF THE INJUNCTION.

The injunction sought would simply forbid the Department from enforcing its permit requirement against members of The New 49'ers who are operating on claims owned or controlled by The New 49'ers in compliance with the 2012 regulations—other than the requirement that they have the permits the Department refuses to issue.

It is appropriate to make this relief available to all New 49'ers members, not just the named individual plaintiffs, for two reasons. First, The New 49'ers is a party and this Court can issue relief restraining the Department from enforcement efforts on the set of federal mining claims owned or controlled by the parties. Second, pursuant § 527(b) of the Code of Civil Procedure,

> "A temporary restraining order or a preliminary injunction, or both, may be granted in a class action, in which one or more of the parties sues or defends for the benefit of numerous parties upon the same grounds as in other actions, whether or not the class has been certified."

The members of The New 49'ers form an obvious and manageable class.

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citations omitted); *Uptown Enterprises. v. Strand,* 195 Cal. App. 2d 45 (1961).

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Conclusion

For the foregoing reasons, the requested temporary restraining order and/or preliminary injunction should issue.

Dated: July 3, 2015.

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