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THE NEW 49'ERS, INC., a California corporation, and
RAYMOND W. KOONS, an individual

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

LEEON HILLMAN; CRAIG TUCKER; DAVID BITTS; KARUK TRIBE; CENTER FOR BIOLOGICAL DIVERSITY; FRIENDS OF THE RIVER; KLAMATH RIVERKEEPER; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; and DOES 1-100,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF FISH AND GAME and DONALD KOCH, DIRECTOR, CALIFORNIA DEPARTMENT OF FISH AND GAME, and DOES 1-100, inclusive,

Defendants.

Case No. RG09 434444

THE MINERS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMNARY INJUNCTION

Hearing:
Date: June 9, 2009
Time: 11:00 a.m.
Judge: Hon. Frank Roesch
Dept:: 31

Trial Date: None Set
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

Summary of Argument

The New 49'ers, Inc. is a California corporation leasing mining claims in the Klamath National Forest on behalf of its more than 1,000 members; Mr. Koons holds at least one such claim. We call these parties "the Miners," and they and other intervenors who mine are the real parties in interest in this suit. They are the only parties who will suffer any appreciable effects whatsoever from this litigation, which threatens to close an entire industry down for no real benefit to anyone.

This dispute is but the latest round in a constant series of battles that began when the Karuk Tribe faithlessly discarded the product of prolonged negotiations involving the Miners, the Tribe, the Department, the U.S. Forest Service, and other local interests. (*See generally Karuk Tribe v. U.S. Forest Service*, 379 F. Supp.2d 1071, 1082-84 (N.D. Cal. 2005), *appeal pending*; RJN1[1] (McCracken Decl. ¶¶ 11-47); *see also* Effman Decl. ¶ 10.) That product was an extensive series of highly-specific local restrictions embodied into the "Notice of Intent" instrument utilized by the U.S. Forest Service to regulate suction dredge mining in the Klamath National Forest. (RJN1 (McCracken Decl. ¶ 46-47); Buchal Decl. ¶ 10 & Ex. 4 (current Notice of Intent).) In annual "Notice of Intent" filings, the Miners have at all relevant times accommodated every specific concern articulated by the biologists involved, and continued to abide by those restrictions, even though in many cases no evidence whatsoever supported such restrictions. (*Id.*)

Remarkably, neither the Department nor the Tribe has ever been willing or able to provide even a scintilla of evidence of any injury to fish arising by reason of the operations of the Miners. They have at all relevant times—most recently by opposing expedited discovery in this case—sought to conceal such data as they might have. Eschewing all lawful processes for developing governmental regulations in California, the Department instead engaged in private

[1] Inasmuch as this is the third round of litigation between these parties raising almost identical issues, many prior declarations are collected in the Request for Judicial Notice ("RJN") filed herewith, and a special citation form is adopted to quickly refer the Court to the particular RJN exhibit number (*e.g.*, "RJN1"), and the pinpoint citation within that document. By contrast, citations to a "Decl." without an RJN reference refer to Declarations separately and recently filed in this action.

negotiations with the Tribe to reach a Joint Stipulation restricting mining in Case No. RG05 211597. No notice was ever provided to any real parties in interest of the existence of the suit; a miner found out by accident and objected while the Joint Stipulation was sitting on Judge Sabraw's desk for signature.

The Department initially defended the Joint Stipulation on the basis of testimony from a Departmental bureaucrat, Mr. Manji, that it prevented the "potential" for adverse impacts. After this Court was persuaded that the Department was not allowed to shut down mining by secret negotiations with the Tribe, the Department attempted to lose the case on the basis of new, changed testimony from Mr. Manji's testimony claiming "deleterious effects" on coho salmon. Another bureaucrat, Mr. Curtis, echoed Mr. Manji's conclusion. The Miners have moved to strike this testimony in the accompanying Motion to Strike, but whether or not it is to be considered in resolving the injunction request, neither the Tribe nor the Department has ever presented any concrete evidence of any specific harm arising under any particular activity, and in particular *do not offer any factual predicate for interference with permits utilized by the Miners and their members.*

We begin by demonstrating the importance of federal law, because the Miners (and perhaps most other California miners), are operating under federally-protected property rights (mining claims) in the Klamath National Forest, and federal law forbids the State of California from enforcing an outright prohibition on suction dredge mining. While California is not prohibited from operating a reasonable, permit-based scheme for mining notwithstanding parallel federal regulatory efforts, such efforts cannot materially interfere with the mining.

The Miners have no quarrel with current regulations, which in the initial words of Mr. Manji:

> ". . . serve to permit suction dredging activities while, at the same time, providing protection for spawning adult salmonids, including chinook salmon, and the developing eggs and larvae of such species, which remain in the gravel following spawning. The existing regulations provide this protection by establishing watercourse-specific closures and seasonal restrictions on suction dredging activities." (RJN7 (Manji Decl. ¶ 3).)

Prior to the involvement of the Attorney General through Case No. RG05 211597, the Department consistently insisted that "[a]ny changes to the suction dredging regulations will have to be supported by data that clearly confirm that the current regulations result in negative impacts to fish, and that the changes would decrease those impacts". (*E.g.*, RJN4 (2d McCracken Decl. Ex. 4 [Director's letter of Feb. 24, 2005]).) The Department knew, as its extraordinarily-experienced local biologist testified:

> "In all my years of experience, I have never seen evidence of a single fish killed by suction dredge mining, even juvenile fish, because the Department has restricted such activity in the only period when mining is likely to cause actual injury by digging into fish redds or areas where alevins (sac-fry) would be present. To the extent that otherwise lawful activities are to be restricted because of *potential* impacts to fish, a very great number of activities, including boating on the Klamath River, swimming in the Klamath River, any disturbance of earth near the Klamath River, and fishing while wading in the Klamath River could all be restricted with equal biological justification." (RJN8 (2d Maria Decl. ¶ 6).)

We demonstrate below that there are no impacts beyond potential impacts avoided by reason of the present regulations, and that all pertinent provisions of California law refute the notion that such potential impacts may serve as the basis for restrictions on suction dredge mining.

Beyond the lack of factual support for restrictions on the Miners, or California miners generally, plaintiffs' motion suffers from serious threshold legal defects. Many of the plaintiffs, as tax-exempt entities, manifestly lack standing. And the plain language of the statute does not permit suits against state officials—though it has been so applied in the past.

Finally, application of the doctrine of "unclean hands" bars equitable relief for the Tribe and its agents, for this suit is not motivated by any desire to protect the environment, but rather to eliminate impediments to illegal activities perceived to be threatened by the Miners' presence.

Given the lack of any harm to plaintiffs, and massive harm to the Miners, miners across California, and the remote rural communities that depend on them, circumstances do not support the extraordinary remedy of an injunction.

Argument

To obtain a preliminary injunction in the lower court, a plaintiff must prove: (1) a reasonable probability the plaintiff would prevail on the merits; (2) the harm to the plaintiff from denying the preliminary injunction outweighed the harm to the defendants from imposing the preliminary injunction; and (3) the plaintiff would suffer irreparable harm if the preliminary injunction were not granted. *Trader Joe's Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal. App.4th 425, 429.

Plaintiffs cite *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63 for the proposition that as "public enforcers" they are entitled to a rebuttable presumption that harm to the public outweighs harm to the defendant. While the Miners amply dispel any such presumption, the *IT* case, refers to circumstances "when *a governmental entity* seeks to enjoin an alleged violation of a zoning ordinance which specifically provides for injunctive relief". *Id.* at 69 (emphasis added); *see also id.* at 72.[2] Plaintiffs' citation of *IT* for the proposition that the taxpayer statute alone indicates "significant public harm" (Pltfs' Mem. 17) is misleading, insofar as the IT case did not involve § 526a of the Code of Civil Procedure.

A more general flaw with application of plaintiffs' environmental injunction caselaw is that most environmental law cases involve the construction of projects that are (1) permanent; and (2) lack demonstrable *positive* effects on the environment. Plaintiffs' authority notes the explicit reliance on the predicate that "environmental injury . . . is often permanent or at least of long duration". (Plfts. Mem. 18 (citation omitted).) Here, however, the asserted negative impacts of creating small holes, mainly by hand, in the bottom of rivers are well-understood to be localized and temporary; as the Department found in the 1994 EIR: "In almost all cases, gravel piles left by suction dredging are erased by annual winter/spring flows". (Attachment to Request for Judicial Notice Ex. 3, at 5.) And the positive effects, which include both the removal of toxic material and creation of superior spawning habitat (and temporary thermal refugia) are long term. (*See infra* Point IV(c)(4).)

[2] While the Karuk Tribe might be characterized as "governmental entity," it has no jurisdiction over the suction dredge mining issue.

As the *IT* case explains, the "ultimate goal of any test used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause". *Id.* at 73. On the very limited record that can be assembled on the schedule demanded by plaintiffs, in a context of provable environmental benefits and imaginary environmental harm, the only real harm in this case is the potential destruction of an entire small-scale gold industry in which thousands of Californian engage. It is well-established that the court must deny the preliminary injunction if there is a substantial conflict in the evidence presented by the opposing parties, *London v. Marco* (1951) 103 Cal. App.2d 450, 452-53, and this case cries out for application of that rule.

I. THE MINERS OPERATE UNDER SUBSTANTIALLY MORE RESTRICTIVE CONDITIONS THAN THE DEPARTMENT'S REGULATIONS

The previous case of *Karuk Tribe v. U.S. Forest Service*, *supra,* in which the Miners first defeated the baseless claims of the Karuk Tribe, explains in considerable detail a separate, federal regulatory regime applicable to the Miners. Specifically, under the applicable federal regulations, a "Notice of Intent" is provided by the Miners, and the local District Ranger determines whether "such operations will likely cause significant disturbance of surface resources"; if not, the Notice of Intent is accepted. *Id.* at 1078-79, 1081-82. At all relevant times, the Forest Service has accepted the Miners' notices of intent. (Buchal Decl. ¶ 10.)

In this case, the restrictions embodied in the Notices of Intent under which the Miners operate were the product of extensive negotiations involving the Tribe, the Miners, biologists from the Department and the U.S. Forest Service, and other local environmentalists. *Karuk Tribe*, 379 F. Supp.2d at 1082-84; RJN1 (McCracken Decl. ¶¶ 29-47). The Miners have operated under these restrictions ever since, notwithstanding the Tribe's faithless repudiation of its agreement to them. (*See* Buchal Decl. ¶ 10.)

The Departmental regulations prohibit a number of mining techniques (*see generally* Saxton Decl. Ex. P, at 6) and establish extremely detailed, river reach by river reach timing

restrictions limiting operations at times when fish may be present during sensitive periods of their lifecycles (*id.* at 6-13). The Notice of Intent restrictions go far, far beyond these restrictions, constituting a good faith attempt by the Miners to address virtually every conceivable objection put forth by the Tribe and others. In particular, the Miners and their members:

- Avoid eleven so-called "thermal refugia" (and any others that may be identified (Buchal Decl. Ex. 4, at 3)—even though detailed measurements suggest that they are vastly overstated (RJN5 (2d Greene Decl. ¶ 6));
- Restrict the density of miners (Buchal Decl. Ex. 4, at 3), even though such density has no documented averse effects; and
- Impose numerous, specific additional operational restrictions relating to use of fuel, river access, camping and other issues (*id.* at 5-10.)

Properly understood, the Miners themselves form an extra-regulatory body supplementing the efforts of federal and state regulators. (*See id.* at 1.)

The scale of the Miners' operations for this summer involves "a daily average of 12 active suction dredges out of approximately 45 dredges disbursed throughout 39 miles of stream course during the dredging season". (*Id.* at 2.) On average, each of these dredges will move only about ¼ cubic yard of material.[3] (*Id.*) These activities are manifestly tiny in a comparison to a single commercial gravel mine of the sort commonly conducted on river bars in California.

The record is devoid of any evidence that any of the Miners (or their members) have ever injured so much as a single fish,[4] notwithstanding repeated inspections by the Tribe and Forest Service (RJN1 (McCracken Decl. ¶ 48).) Even if the Court were to consider the conclusory suggestions of the Department that somewhere, somehow, someone's operations under a permit

[3] By contrast, California's surface mining law exempts operations moving less than *1,000 yards* of material from any permitting requirement. Public Resources Code § 2714(d).

[4] Plaintiffs did obtain an e-mail, which the Miners have moved to strike, which claims that "dredging [in the Eldorado National Forest] dislodged a[frog] egg mass and had strewn sand in the location of tadpoles". (Saxton Decl. Ex. J.) This is the closest thing to any actual harm that plaintiffs have come up with in nearly five years of litigation, yet no evidence is provided as to whether the eggs were injured in any way, or whether the dredging was done under a permit and in compliance with the regulations. The Miners are prepared to prove, if need be, that the highest populations of this type of frog in California are found in an area popular for mining, perhaps because the mining provides superior habitat for the frogs, too.

are "deleterious to fish", there is no basis for restraining the activities of the Miners and their members.

II. FEDERAL LAW DOES NOT PERMIT THE STATE OF CALIFORNIA TO *PROHIBIT* THE MINERS' EXERCISE OF FEDERAL RIGHTS ON FEDERAL LAND.

The Miners operate within the Klamath National Forest, using federally-protected mining rights (claims) subject to strong federal policies promoting mining. The Miners conduct their activities on federal land, under the jurisdiction of the United States Forest Service, hence the Tribe's initial, unsuccessful attempt to shut down the Miners in federal court. *See generally Karuk Tribe of California v. U.S. Forest Service, supra*. That case reviews the extensive federal statutory and regulatory scheme involved; "[n]o citation of authority is needed to support the statement that the all-pervading purpose of the mining laws is to further the speedy and orderly development of the mineral resources of our country". *United States v. Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968).

Federal statutes declare that federal public lands "shall be free and open" for mining (30 U.S.C. § 22), and that regulations cannot unreasonably interfere with mining activities, *see generally Clouser v. Espy*, 42 F.3d 1522, 1529-30 (9th Cir. 1994), *cert. denied*, 515 U.S. 1141 (1995); 30 U.S.C. § 612(b); *see also* 16 U.S.C. § 478. To promote mineral development, the federal government has granted the Miners and others throughout California federally-established rights in their mining claims, which constitute private "property in the fullest sense of the word". *Bradford v. Morrison*, 212 U.S. 389, 395 (1909); *see also United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999) (discussing scope of legal interests represented in mining claims); *United States v. Rizzinelli*, 182 F. 675, 681 (1910) (miners hold a "distinct but qualified property right" with "possessory title").

In this legal context, as the Attorney General has previously acknowledged, an attempt by California to outlaw suction dredge mining outright would be preempted under the Supremacy clause. *See Granite Rock Co. v. California Coastal Comm'n*, 768 F.2d 1077, 1080 (9th Cir. 1985), *rev'd sub nom California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 586 (1987) ("the Coastal Commission has consistently maintained that it does not seek to prohibit

mining of the unpatented claim on federal land"); *see also State ex rel. Andrus v. Click*, 554 P.2d 969, 975 (Idaho 1976) ("provisions of Idaho Act would be unenforceable to the extent they rendered it impossible to mine").) Thus the federal courts have not hesitated to strike down non-federal restrictions prohibiting mining. *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998) (setting aside prohibition on "issuance of any new or amended permits for surface metal mining within the Spearfish Canyon Area").

Here, there is "no way to mine for gold in the river and streambeds at issue in this litigation other than by using suction dredge mining techniques". (RJN4 (2d McCracken Decl. ¶ 7).[5]) While the impact of the federal policy favoring development of mineral resources on federal land on the scope of state regulation is a complex issue that merits further briefing, federal statutes (particularly 30 U.S.C. § 612(b)) and associated case law will not permit the State of California to halt suction dredge mining—at least in the National Forests where the Miners operate. Rather, to the extent it wishes to engage in duplicative regulation, the State must offer a permitting program with restrictions on the activity commensurate with preventing real, measurable, adverse effects, while permitting an opportunity to mitigate any such real effects.

Fortunately, as demonstrated in Point IV(c)(3), this is entirely consistent with California law, and § 5653 of the Fish and Game Code, which cannot be construed to prohibit suction dredging on the basis of potential or insubstantial harm. And the Miners have always stood ready, willing, and able to mitigate real harms, if any, through an orderly public CEQA and regulatory process which would by now be complete but for the Department and Tribe's continuing, faithless efforts to sidestep that process.

III. THRESHOLD LEGAL AND FACTUAL BARRIERS PREVENT PLAINTIFFS FROM INVOKING § 526a OF THE CODE OF CIVIL PROCEDURE AT ALL.

An essential element of plaintiffs' case, as to which no evidence is presented whatsoever, is that plaintiff taxpayers are actually before the Court. This deficiency alone merits denial of the application for an injunction. Worse still, most of the plaintiffs are tax-exempt entities, and

[5] Plaintiffs' counsel's unsworn speculation to the contrary (Pltf. Mem. 19), made in the service of the frivolous argument that harm to the Miners cannot be considered, must be disregarded.

their inclusion as plaintiff "taxpayers" speaks volumes as to the credibility of plaintiffs' case generally. (*See* Buchal Decl. ¶¶ 15-20.)

And even assuming that the Court were disposed to permit plaintiffs to cure their evidentiary deficiencies—and it should not—the plain, unambiguous and repeated language of the statute refers to financial injury to "a county, town, city or city and county of the state", and does not embrace financial injury to the State as a whole. While the Miners are aware of Supreme Court *dicta* to the contrary, [6] no authoritative interpretation of the statute expanding its utterly plain, unambiguous and limited language to *state* officials and agencies has been rendered, and the statute cannot be fairly construed to offer such relief.

A final threshold legal deficiency, adequately briefed by the other mining intervenors, is that the limited standing conferred on genuine taxpayers under § 526a of the Code of Civil Procedure is not regarded as sufficient for preliminary injunctive relief, only permanent relief.[7]

IV. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON CLAIMS THAT ISSUING PERMITS IS ILLEGAL WITHIN THE MEANING OF § 526a.

Even if § 526a were in theory available for these plaintiffs, against these defendants, in this procedural context, there is no "illegal expenditure of funds" to enjoin. Plaintiffs offer three theories of unlawfulness, all of which lack merit. First, the Department's contempt for this Court's Order and Judgment does not make permit issuance illegal, because the Order and Consent Judgment does not forbid the Department from issuing permits. Second, the Department's lack of compliance with its CEQA obligations, as set forth in the Court's Order and Judgment, does not make permit issuance illegal either. Third, no violation of § 5653 of the Fish and Game Code is, or could be, shown.

[6] The Supreme Court has noted the holdings of the lower appellate courts at least three times without ever reaching the issue. *Stanson v. Mott*, 17 Cal.3d 206, 223 (1976); *Adams v. Department of Motor Vehicles*, 11 Cal.3d 146, 148 (1974); *Blair v. Pitchess*, 5 Cal.3d 258, 268 (1971); *Serrano v. Priest*, 5 Cal.3d 584, 626 n.38 (1971).

[7] Plaintiffs also suggest in a footnote that they are entitled to use § 526a to require the Department to *spend* money "revoking permits", which is at odds with the purpose of § 526a.

A. The Department's Issuance of Permits Does Not Violate This Court's Order and Consent Judgment.

Manifestly, no provision of the Order and Consent Judgment prohibits the Department from issuing permits; plaintiffs' request for any such relief was withdrawn without prejudice.

B. The Department's Noncompliance with CEQA Will Not Support Relief under §526a.

CEQA by its own terms refutes the notion that noncompliance is "illegal" in the ordinary sense of being *prohibited* by law. Section 21005 of the Public Resources Code provides:

> "(a) The Legislature finds and declares that it is the policy of the state that noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, *may constitute a prejudicial abuse of discretion* within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.
>
> "(b) It is the intent of the Legislature that, in undertaking judicial review pursuant to Sections 21168 and 21168.5, *courts shall continue to follow the established principle that there is no presumption that error is prejudicial.*" (Emphasis added.)

See also id. § 21167.3 (referring to possibility of injunctions or no injunctions). Put another way, the absence of CEQA documentation does not make a project or program illegal, it merely empowers the Court to review the discretion of public officials in determining to go forward with the project notwithstanding noncompliance.

Section 526a, by contrast, "means something more than an alleged mistake by public officials in matters involving the exercise of judgment or discretion". *Sagaser v. McCarthy* (1986) 176 Cal. App.3d 288, 310.[8] In *Sagaser*, similar claims were rejected:

> "Appellants repeat the same arguments they used to challenge the adequacy of the EIR—failure to consider alternative sites, potential cancer risks in using swamp coolers, and inadequate water supplies. A cause of action for waste of public funds cannot prevail if based on innuendo and legal conclusions." *Id.*

[8] *See also Humane Society v. State Bd. of Equalization* (2007) 152 Cal. App.4th 349, 356; *Silver v. Watson* (1972) 26 Cal. App.3d 905, 909 (same).

As set forth below, "innuendo and legal conclusions" are all that support this action.

Put another way, defendants have exercised their discretion to continue issuing permits notwithstanding noncompliance with CEQA, and plaintiffs did not ask the Court to consider whether such constitutes prejudicial error. When and if they plead a CEQA claim, they can make such a request, but § 526a of the Code of Civil Procedure cannot be employed in this context. *Cf. Waste Management of Alameda County v. County of Alameda* (2000) 79 Cal. App.4th 1223, 1239-40 (plaintiff not permitted to bring CEQA-related taxpayer action).

And when and if plaintiffs pursue a CEQA claim, the Court would have to find that the Miners' activities "prejudice the consideration or implementation of particular mitigation measures" (Public Resources Code § 21168.9(a)(2)), a finding which is impossible given the fact that the Miners *have already adopted* all relevant mitigation measures. This case constitutes an attempt to make an end run around the entire CEQA process, and immediately impose the most restrictive of all available remedies, all without any evidence of any harm caused by any actual permit holder.

C. Plaintiffs Do Not Demonstrate that Defendants Are Violating §§ 5653 and 5653.9 of the Fish and Game Code.

Claims of violations of §§ 5653 and 5653.9 were dismissed without prejudice in RG05211597 (Saxton Decl. Ex. Q, ¶ 5), *constituting a holding by this Court that no violation of those provisions was found in that action.* In this action, plaintiffs plead no cause of action for violations of the Fish and Game Code, but instead propose to prove them as an element of a § 526a claim by "admission" of the Department, consisting of statements in pleadings filed by the Department in RG05 211597. The "admission" is false, and even if given some weight, falls far short of the proof required for injunctive relief. As set forth in the accompanying Motion to Strike, the Department's witnesses are best understood as testifying to a conclusion of law, which testimony is not sufficiently grounded in fact to support entry of an injunction. Nor can this Court defer to the Department's evolving litigation position—as contrasted to its official acts of continuing to issue the permits.

1. It is unfair to permit the Tribe and Department to hide the facts and rely on conclusory opinions.

Where, as here, the Miners have for several years attempted to secure the data assertedly held by the Tribe and Department relevant to plaintiffs' claims (Buchal Decl. ¶¶ 2-4), it is manifestly unfair to permit the Tribe to advance conclusions supposedly based on that data to threaten the livelihoods of the Miners and miners all over California. It also frustrates all relevant CEQA policies of providing a fair and open process for the development and evolution of regulations which govern commercial activity in California. This injures not only the Miners, but other important interests, including local governments, that wish to be heard. (See RJN5A (Armstrong Decl. ¶ 8).)

2. The Department's conclusory opinions and statements do not bind the Court.

The Department's statement consists of "the opinion that suction dredge mining in the Klamath, Scott and Salmon River watersheds under the existing regulations is resulting in deleterious effects on Coho salmon as alleged in Plaintiffs' complaint" and that the Department "stipulates to entry of judgment" finding the Department in violation of the Fish and Game Code. *But this Court rejected the Department's offer*, instead making it clear to the Department and Tribe that the Court would not be bound by any stipulation of the Department; rather the Miners would be permitted to conduct discovery and prove their case that the Department's opinion was wrong. So the case settled. As plaintiffs' counsel later explained: "We decided not to go forward with a full-fledged evidentiary hearing for the injunction in order to get the rule-making started because that was going to include a lot of time, a lot of resources, a lot of money." (Tr., 8/22/07, at 9.)

Properly understood, this entire action constitutes an attempt to evade that "law of the case", and try *again* to bind the Miners by agreement of the Tribe and Department. It cannot be the law that two parties can get together and agree to a state of facts destroying the rights of a third party, yet the third party is not permitted to contest those facts, and the Miners are aware of no case advancing such a shockingly unfair rule of law. The sole analogous California authority the Miners have found, albeit with somewhat murky facts, is *Shively v. Eureka T.G.M. Co.*, 129

Cal. 293 (1900). In that case, a corporation owed money to plaintiff, and assigned several claims to plaintiff, filing an answer that contained judicial admissions as to the validity of the claims. *See id.* at 294-95. An intervenor contested the admissions, taking the position that the corporation's admission of the claims was not in good faith, and the Supreme Court declined to give conclusive effect to the admissions and reversed the trial court. *See id.* at 295-96.

Lacking the ability to put its "admissions" beyond the ability of the Miners to contest, the Tribe quotes at length from a Department pleading and urges "deference" to the pleading. Deference is something courts afford to agency *decisions*, and outside the context of upholding formal agency rules (where deference is at its zenith), such deference "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control". *Yamaha Corp. v. State Bd. of Equalization*, 19 Cal.4th 1, 14-15 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). The agency's decision is here to keep issuing permits, and the agency has, through its Director, explained why in the course of denying plaintiffs' administrative petition to shut down the Miners. (*See generally* RJN11-12.) This decision, taken in January 2009, post-dates all of the statements and testimony upon which plaintiffs rely.

Put another way, "[i]t is presumed that official duty has been regularly performed." Evidence Code § 664. The appropriate deference in this case is to the Department's decision to continue issuing permits, not to the statements of its attorneys and some of its employees. In terms of deference, actions speak louder than words. Indeed, it is well established that the doctrine of deference is at its nadir where, as here, the agency position is "merely its litigating position in this particular matter". *Culligan Water Conditioning of Bellflower, Inc. v. State Bd. of Equalization*, 17 Cal.3d 86, 93 (1976); *see also County of Sutter v. Board of Administration*, 215 Cal. App.3d 1288, 1295 (1989). Defendants' Case Status Statement and supporting Declarations manifestly constitute no more than expedient litigation positions.

3. Even if accepted, the Department's statements and opinions fall far short of the showing required to prove a violation of §§ 5653 and 5653.9.

Inasmuch as the statements of the Department do not bind this Court, plaintiffs must present affirmative proof that issuance of permits to the Miners is, in fact, "deleterious to fish". Fish and Game Code § 5653(b). Before turning to that question, it is appropriate to consider the meaning of that statutory language, beginning with the "'elementary rule' of statutory construction that statutes in *pari materia*—that is, statutes relating to the same subject matter—should be construed together". *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 50. Under that rule, "deleterious to fish," as that term is used in § 5653, must mean more than the possibility of injury to a single fish. Viewed in the context of other provisions of the Fish and Game Code, and the CEQA provisions of the Public Resources Code, it is clear that injury to fish means a substantial adverse injury to the fishery resource.

The prohibition on suction dredge mining is closely related to a broader prohibition set forth in § 1602 of the Fish and Game Code:

> "[a]n entity may not substantially divert or obstruct the natural flow of, *or substantially change or use any material from the bed, channel, or bank of, any river*, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake. . ."

Section 1602 establishes a permitting regime pursuant to which the Department must find either "that the activity *will not substantially adversely affect* an existing fish or wildlife resource" or that the activity "*may substantially adversely affect* an existing fish or wildlife resource *and* issues a final agreement to the entity that includes *reasonable measures necessary to protect the resource*, and the entity conducts the activity in accordance with the agreement" (§ 1602(a)(4)(A) & (B) (emphasis added).)

Section 1602 addresses in-river operations which may be substantially larger than the tiny, hand-dug operations of the Miners, and clarifies that what is important is substantial, adverse impact to the *resource*—not theoretical mechanisms of harm to an occasional individual

fish. This practical approach to assessing impact is not just found in §§ 1602 and 5653 of the Fish and Game Code, but is inherent in other provisions of the Fish and Game Code as well, including the California Endangered Species Act (CESA), and in the CEQA provisions of the Public Resources Code.

CESA specifically provides that agencies shall develop measures that avoid jeopardizing listed species "while at the same time maintaining the project purpose [here suction dredging] to the greatest extent possible" (Fish & Game Code § 2053); where mitigation measures are required of private parties, "the measures or alternatives required shall be roughly proportional in extent to any impact on those species that is caused by that person" (*id.* § 2052.1). The same principles are incorporated into CEQA, and made expressly applicable to judicial relief such as the injunction plaintiffs seek. *See* Public Resources Code § 21168.9(b) (court's orders "shall include only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division"); *e.g., County Sanitation District No. 2 of Los Angeles County v. County of Kern*, 127 Cal. App.4th 1544, 1605 (2005) (existing biosolids standards permitted to continue pending EIR preparation given reliance of regulated interests).

Accordingly, to demonstrate a violation of § 5653, plaintiffs would have to demonstrate a substantial adverse effect on fishery resources which has not been adequately mitigated by actions such as the restrictions under which the Miners operate. No such finding or proof appears in the case: merely the conclusory statement that somehow, somewhere, someone may be mining under a permit in a way that is "deleterious to fish". Even under the Federal Endangered Species Act, courts have not hesitated to set aside agency regulations based on "prospective harm" without actual evidence that the species of concern are present at the particular location concerned *and* will be adversely affected. *See generally Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1246 (9th Cir. 2001) ("`the mere potential for harm, however, is insufficient' . . . [for] imposing conditions on the otherwise lawful use of land"; quoting district court).

4. Plaintiffs cannot prove any real injury, must less a substantial, adverse effect on the resource.

At the outset, it is important to note that neither of the two Declarations from the Department's bureaucrats addresses the additional restrictions imposed under federal law, or even additional restrictions under California state law. For example, the coho salmon, concern over which assertedly formed the basis for this Court's Order and Consent Judgment in Case No. RG05 211597, have additional protections under CESA. The Department, through its Director, has identified "protections afforded by the [CESA] as among the grounds for denying plaintiffs' administrative petition to limit mining. (RJN11 (Director's Letter, Jan. 26, 2009, at 2).[9]) Put another way, testimony that dredging under the extant California regulations may somehow hurt fish is an incomplete hypothetical; the real facts include the additional regulatory protections. This underscores the importance of deferring, if anything, to the Department's actions, not its litigation position of the moment.

More generally, neither Declaration contains evidence of substantial, adverse impacts. Neither Declaration makes any effort to assess the *magnitude* of any impact whatsoever. This is of critical importance when one can theorize both positive and negative impacts from the activity—again a circumstance that distinguishes this case from the run-of-the-mill environmental case.

Here the Department itself recognized after a formal CEQA process that: "suction dredges can actually improve spawning riffles by loosening and clearing spawning gravels or increasing available spawning gravels". (RJN3 (Attachment to Maria Decl., at 5).) The Department also recognized that toxic materials are removed from the environment by suction dredge miners (*id.*), an activity supported by California's Division of Toxic Substance Control. (*See* 3d Greene Decl. ¶ 4.) Properly understood, the Miners perform the same sort of environmental services which have been publicly funded in California: efforts to "clear out

[9] It appears that the effects of suction dredging in the Klamath National Forest have also been considered under the Federal Endangered Species Act, with the National Marine Fisheries Service issuing a "no jeopardy" opinion. (*See* Buchal Decl. Ex. 3, at 1.)

silted in spawning beds". (Buchal Decl. Ex. 8, at 1.) Other publicly-funded efforts dump new, loose gravel over what is described as "armored, pre-dam cobbles and boulders." (*id.* Ex. 9, at 3.)

As to asserted negative effects, what distinguishes science from mere opinion and speculation is, of course, the ability to conduct experiments and *measure* the variables of interest. The Miners are aware of only one study that has even attempted to *measure* the impact on fish populations from suction dredge mining—though biologists willing to *speculate* about possible effects are a dime a dozen. (*See generally* RJN2 (Greene Decl. ¶¶ 3-22) The one quantitative study, conducted by Oregon State University Professor Peter Bayley, concluded:

> Given that this analysis could not detect an effect averaged over good and bad miners, and that a more powerful study would be very expensive, it would seem that public money would be better spent on encouraging compliance with current guidelines than on further study. (Buchal Decl. Ex. 1, at 15.)

It has always been obvious the effects of digging small holes by hand in river bottoms cannot possibly have any substantial adverse impact on fish populations.

Ultimately, salmon declines have nothing to do with suction dredging; if anything, the dredging helps recover impaired streams and restore salmon runs. There are real, important causes of salmon declines; as the Director explained earlier this year in his response to the plaintiffs' administrative petition to restrict mining, "the proposed restrictions [on mining] would do nothing to address ocean conditions, 'suspected as a main causative agent' of the recent (2007/2008) decline in coho salmon returns . . .". (RJN11 (Director's Letter, Jan. 26, 2009, at 3); *see also* RJN2 (Greene Decl. ¶¶ 23-30).) In a historical context where giant canneries destroyed huge runs at the turn of the last century, runs which had thrived for decades after the California Gold Rush swept entire mountainsides into California rivers, it is obvious to unbiased and knowledgeable observers along the Klamath River that banning suction dredging will not improve fishing opportunities one bit. (*See* Effman Decl. ¶¶ 6-7 & Ex. 2).

V. THE DEFENSE OF UNCLEAN HANDS MILITATES AGAINST ANY GRANT OF EQUITABLE RELIEF.

In a sane world, parties concerned with the protection of fishery resources would address

other aspects of State policy, such as the Department's recent statement that it will not even monitor the direct slaughter of the salmon for consumption and sale, lawful and otherwise, in Klamath, Scott and Salmon River area at issue under this Court's Order and Consent Decree. (*See* RJN14 (Fish and Game Commission Statement, at 11).) But this case has never been about the fish, for the Miners gave the Tribe everything it ever asked for, and still the Tribe pressed its litigation on and on and on past the point of vexatiousness. The Miners have long wondered why, and the papers recently filed by a proposed *pro se* intervenor finally hint at an explanation.

Under California law, misconduct by a litigant which "pertain[s] to the very subject matter involved and affect[s] the equitable relations between the litigants" may constitute "unclean hands" barring equitable relief. *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal. App.4th 658, 680 (quoting *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal. App.2d 625, 678)). While the Miners require discovery to flesh out these issues, it appears based on the information available so far that: (1) the Tribe runs its own mining business without benefit of regulatory compliance (the Miners have propounded discovery requests on this issue); (2) the Tribe has through its own activities dumped more sediment in the Klamath River than decades of mining could accomplish (RJN1 (McCracken Decl. ¶ 9)); (3) the Tribe is engaged in large-scale violations of the Fish and Game Code, including the California Endangered Species Act, involving illegal killing of coho and other fish (Buchal Decl. ¶¶ 11-12 & Ex. 5; *accord* Waddell Decl. ¶¶ 61-69; Effman Decl. ¶ 8); and (4) this action is part and parcel of a larger campaign asserting bogus environmental concerns for the benefit of marijuana growing interests who apparently control and dominate the Tribe, particularly its Department of Natural Resources (*e.g.*, Waddell Decl. ¶¶ 3, 72). The presence of at least some proof for these allegations counsels caution in invoking equity to enter an injunction for the benefit of these interests—perhaps the only parties who may ultimately demonstrate standing.

Facts such as these fall within the scope of the common law "unclean hands" defense to

equitable relief. For example, in *Jicarilla Apache Tribe v. Andrus*, 687 F. 2d 1324 (10th Cir. 1982), where a tribe brought NEPA claims against mineral lessees, the tribe's failure to seek or enforce NEPA compliance with respect to its own, similar ventures was held to constitute "unclean hands" barring equitable relief. *Id.* at 1340 ("the Tribe was not motivated by good faith concerns for the environmental impact of oil and gas development").

Ultimately, the "unclean hands" doctrine protects "the court from having its powers used to bring about an inequitable result in the litigation before it". *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal. App.4th 970, 985. If the foregoing circumstances were not enough for application of the doctrine, plaintiffs' prosecution of this very suit, repudiating its own solemn commitment in the Order and Consent Judgment to go forward with an open, public process to revise suction dredge mining regulations, is itself inequitable conduct. The equitable result in *this* litigation is that plaintiffs be denied injunctive relief in favor of contempt relief in Case No. 05 211597.

VI. A SIXTY MILLION DOLLAR BOND SHOULD BE REQUIRED TO SHUT DOWN AN ENTIRE INDUSTRY ON FACTS AS FLIMSY AS THESE.

Pursuant to § 526(a) of the Code of Civil Procedure , "the court or judge *must require an undertaking* on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction" (emphasis added). Plaintiffs insinuate that requiring them to post a bond would effectively "deny access to judicial review," which is manifestly false since no undertaking would be required for any injunction entered after a full and fair opportunity for consideration of these enormously complex issues. Absent a true "denial of access to judicial review," there can be no grounds for the Court to disobey the plain language of § 526(a).

Plaintiffs also insinuate that none of the plaintiffs has the resources for a sizable bond, but no evidence is presented in support of that proposition. It is false. The financial information available on the websites of plaintiffs (and otherwise) demonstrates total assets of nearly $50

million, and income in excess of $20 million annually—just for those plaintiffs disclosing such information. (Buchal Decl. ¶¶ 14-20; Effman Decl. ¶ 2.) The Tribe alone receives millions annually in shared gambling revenue. (*See id.* at 2.) Plaintiffs include sophisticated entities of national scope and power many times that of defendants, and have no excuse for not posting a bond.

As to the amount of the bond, a Dun and Bradstreet report previously filed by the Department, by contrast, showed that the New 49'ers, Inc. has annual sales of $770,000 (*see* Declaration of Robert W. Byrne, Aug. 15, 2007, filed in Case No. RG05 211597, ¶ 10), all of which is obviously threatened by an injunction (*see also* RJN1 (McCracken Decl. ¶ 47 (detailing wide-ranging impacts of an injunction)). The other mining intervenors are also filing proof of wide-ranging losses threatened by an injunction. Upon review of those pleadings, the Miners suggest that a bond of $60 million might be commensurate with a season's losses throughout California.

Threatened losses extend well beyond immediate loss of income. Underlying property rights of claim holders throughout California's National Forests may be impaired for years; detailed calculations concerning restrictions on mining in just the Klamath, Scott and Salmon Rivers show that $6 million worth of mining claims are involved. (*See generally* RJN7 (4th McCracken Decl. & ¶ 15).)

More broadly, there will be serious and adverse impact to struggling rural economies. Siskiyou County has testified that without the local revenue suction dredge mining brings, "continued residence in the small communities along the Klamath River will become difficult" for local residents (*see* Buchal Decl. Ex. 2 (Testimony of Siskiyou County Supervisor)). By all appearances, that is the ultimate objective of plaintiffs. (*See generally* Waddell Decl.).

Conclusion

For the foregoing reasons, plaintiffs' motion for preliminary injunction should be denied.

Dated: May 18, 2009.

By: _____
James L. Buchal
Attorney for The Miners

PROOF OF SERVICE

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 2000 SW First, Suite 420, Portland, Oregon 97201.

On May 18, 2009, I caused the following document to be served:

THE MINERS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

in the following manner:

(X) (BY FEDERAL EXPRESS)

( ) (BY FIRST CLASS US MAIL)

( ) (BY FAX)

(X) (BY E-MAIL)

See attached service list

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this Declaration was executed at Portland, Oregon on May 18, 2009.

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