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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SAN BERNARDINO  
12

13 Coordination Proceeding  
Special Title (Rule 1550(b))  
14 **SUCTION DREDGE MINING CASES**  
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21 **Included Actions:**  
22 Karuk Tribe of California, *et al.* v. California  
Department of Fish and Game  
23  
24 Hillman, *et al.* v. California Department of Fish  
and Game  
25  
26 Karuk Tribe of California, *et al.* v. California  
Department of Fish and Game  
27  
28 Kimble, *et al.* v. Harris *et al.*

Judicial Council Proceeding No. JCPDS 4720

**MINERS' JOINT MEMORANDUM IN  
SUPPORT OF MOTION FOR  
INJUNCTION**

Judge: Hon. Gilbert G. Ochoa  
Dept.: S36  
Date: June 23, 2015  
Time: 8:30 a.m.

RG 05211597 – Alameda County

RG 09434444 – Alameda County

RG 12623796 – Alameda County

CIVDS 1012922 – San Bernardino County

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Public Lands for the People, Inc. *et al.* v.  
California Department of Fish and Game  
  
The New 49ers *et al.* v. California Department  
of Fish and Game, *et al.*  
  
Walker v. Harris, *et al.*  
  
Foley *et al.* v California Department of Fish and  
Game, *et al.*

CIVDS 1203849 – San Bernardino County  
  
SCCVCV 1200482 – Siskiyou County  
  
34-2013-80001439 – Sacramento County  
  
SCCVCV-13-00804 – Siskiyou County

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**Preliminary Statement**

This Court has sorted through and ruled upon six Motions for Summary Adjudication on the issue of Federal preemption. On January 12, 2015, this Court issued its Ruling on these assorted motions. On May 1, 2015, this Court filed its Order (*nunc pro tunc*) granting the *Kimble* Plaintiffs' summary adjudication as a matter of law on its first cause of action for Federal preemption; granting *Public Lands for the People* ("PLP") Plaintiffs/Petitioners Summary Adjudication as a matter of law on its fourth cause of action for Federal preemption; and granting *The New 49'ers* Plaintiffs' summary adjudication on its second cause of action for Federal preemption. Further, the Court's Order denied the California Department of Fish & Wildlife's (the "Department") motions for summary adjudication as to *Kimble*, *PLP*, and *The New 49'ers* (collectively the "Miners").

The end result of the Court's Ruling and Order is that California Fish & Game Code § 5653.1, and the 2012 Suction Dredge Mining Regulations promulgated thereunder by the Department, are declared unconstitutional, as being preempted by the Federal mining law. As this Court explained,

". . . the State's extraordinary scheme of requiring permits and then refusing to issue them whether and/or being unable to issue permits for years, stands "as an obstacle to the accomplishment of the full purposes and objectives of Congress" under *Granite Rock and a de facto ban*."

(1/12/15 Ruling at 19.) This Court recognized that those purposes required rejection of a "fundamentally unfair" (*id.* at 17) prohibition that forbid them from developing the minerals on federal mining claims.

What the Miners now seek is the practical mechanism by which this Court's Ruling and Order is implemented in reality, so that the purpose and objectives of the Federal mining laws can again become a living and practical presence in their lives. Specifically, the Miners ask this Court for the customary remedy in such circumstances: an injunction that is in substance permanent until it might be modified by the Court when and if the Department devises a lawful and functioning permitting program.



1 This is not a motion for a preliminary injunction. A preliminary injunction is one entered  
2 *pendent lite* to preserve the status quo pending resolution of the merits of the dispute presented.  
3 This Court's ruling completely disposed of the Federal preemption causes of action before the  
4 Court, which are now "deemed to be established". Code of Civil Procedure § 437c(n)(1); *see*  
5 *also id.* § 437c(f)(1) & § 437c(k). As the Court of Appeals has explained,

6 "A permanent injunction is very different from a *pendente lite* injunction.  
7 A permanent injunction is an equitable remedy for certain torts or wrongful acts of  
8 a defendant where a damage remedy is inadequate. A permanent injunction is a  
9 determination on the merits that a plaintiff has prevailed on a cause of action for  
tort or other wrongful act against a defendant and that equitable relief is  
appropriate."

10 *Art Movers, Inc. v. Ni W., Inc.*, 3 Cal. App. 4th 640, 646 (1992)

11 To qualify for a permanent injunction, the plaintiff must prove (1) the elements of a cause  
12 of action involving the wrongful act sought to be enjoined and (2) the grounds for equitable relief,  
13 such as, inadequacy of the remedy at law. 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading,  
14 § 774, p. 218; *see also City of S. Pasadena v. Dep't of Transp.*, 29 Cal. App. 4th 1280, 1293  
15 (1994) (citing Witkin). Here the first requirement has already been met through this Court's  
16 ruling on the motions for summary adjudication. As set forth below, the Miners easily  
17 demonstrate grounds of equitable relief, for there is no adequate remedy at law.

18 **I. AN INJUNCTION SHOULD ISSUE BECAUSE THE DEPARTMENT IS**  
19 **VIOLATING THE RIGHTS OF THE MINERS AND MAKING THIS COURT'S**  
20 **GRANT OF SUMMARY ADJUDICATION INEFFECTUAL.**

21 This motion presents grounds for relief that fall squarely within multiple and independent  
22 statutory grounds for an injunction listed in Code of Civil Procedure § 526(a). First and foremost,  
23 the Department is acting "in violation of the rights of another party to the action respecting the  
subject of the action, and tending to render [this Court's] judgment ineffectual". *Id.* § 526(a)(3).

24 As the Court is well aware, the purposes of the federal mining laws are to foster and  
25 encourage mining on Federal lands. *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir.1981); *see*  
26  
27  
28

1 also *United States v. Goldfield Deep Mines Co.*, 644 F.2d 1307, 1309 (9th Cir.1981), *cert. denied*,  
2 455 U.S. 907 (1982).<sup>1</sup> As this Court explained in its Ruling:

3 “To further these vital public policies the 1872 Mining Act declares: “...all  
4 valuable mineral deposits in lands belonging to the United States both surveyed  
5 and unsurveyed, shall be free and open to exploration and purchase, and the lands  
6 in which they are found to occupation and purchase, by citizens of the United  
7 States...” 30 U.S.C. § 22.” (Ruling at 19)

8 Moreover, the locator of a mining claim has a possessory title thereto and the right to the  
9 exclusive possession and enjoyment. This includes the right to work the claim, to extract the  
10 minerals, the right to the exclusive property in such minerals, the right to use all the resources  
11 within the boundaries of the claims, as well as the right to defend his possession. (30 U.S.C.  
12 §§ 22 & 26). Unpatented mining claims are “property in the fullest sense of that term”. *Wilbur v.*  
13 *U.S.*, 280 U.S. 306, 316 (1930).

14 In short, the Miners have rights of mineral development on federal lands under federal  
15 law, including property rights. (*See also* Declarations of McCracken, Cutler, Stanford,  
16 Sonnenburg, Mueller & Kleszyk (describing claim holdings and Department’s interference  
17 therewith).) Yet the Department boldly claims that the “current status” of the law is:

18 “The use of any motorized vacuum or suction dredge equipment as part of a mining  
19 operation in any river, stream, or lake is currently prohibited in California and any such  
20 activity would be unlawful.

21 “The California Department of Fish and Wildlife is also currently prohibited from issuing  
22 suction dredge permits under the Fish and Game Code.”

23 (Buchal Decl. Ex. 9 (Department’s website).) Worse still, the Department is actively attacking  
24 miners who attempt to exercise their federal rights. (*Id.* ¶¶ 2-3 & Exs. 1-8.)

25 Through its statements and conduct, the Department is “tending to render [this Court’s]  
26 judgment ineffectual” within the meaning of § 526(a)(3) of the Code of Civil Procedure. Indeed,  
27

28 <sup>1</sup> Federal mining law and policy is contained in a long list of statutes, including but not limited to  
30 U.S.C. § 21a (mining policy); 30 U.S.C. § 22 (1872 Mining Law); 30 U.S.C. §§ 26 & 35  
(property rights of mining claim holders); 30 U.S.C. § 28 (requiring development of mining  
claims); 30 U.S.C. § 1281 (procedures to deem federal land unsuitable for mining); 30 U.S.C.  
§ 612(b) (limiting regulatory restrictions on mining claims); 43 U.S.C. § 1701(a)(12) (mining  
policy); 43 U.S.C. § 1712(e)(3) (withdrawing federal lands from mineral entry); 43 U.S.C. § 1714  
(same).

1 one can scarcely imagine a course of conduct more designed to render this Court's judgment  
2 ineffectual than sending out squads of wardens to harass miners, seize their equipment, threaten  
3 them with arrest, and arrest them and cause them to be jailed for exercising the very rights this  
4 Court's ruling confirmed.

5 **II. AN INJUNCTION SHOULD ISSUE BECAUSE THE MINERS ARE SUFFERING**  
6 **IRREPARABLE INJURY.**

7 Section 526(a) of the Code of Civil Procedure contains several subparts relating to  
8 irreparable injury. Section 526(a)(2) makes an injunction appropriate when "the commission or  
9 continuance of some act during the litigation would produce . . . great or irreparable injury".  
10 Section 526(a)(4) provides for an injunction "[w]hen pecuniary compensation would not afford  
11 adequate relief". And § 526(a)(5) provides for an injunction "[w]here it would be extremely  
12 difficult to ascertain the amount of compensation which would afford adequate relief". State  
13 officials enforcing unconstitutional demands upon citizens raise all of these concerns.

14 It should therefore come as no surprise that the California Supreme Court has repeatedly  
15 held that "where a penal statute causes irreparable damage to property rights, the injured party  
16 may attack its constitutionality by an action to enjoin its enforcement". *Jones v. Los Angeles*,  
17 (1930) 211 Cal. 304, 306; *see also Conover v. Hall* (1974) 11 Cal.3d 842, 850; *Brock v. Superior*  
18 *Court of Los Angeles County*, (1939) 12 Cal.2d 605, 609; *Bueneman v. Santa Barbara*, (1937) 8  
19 Cal.2d 405, 407; *see also Rutter, Civil Procedure Before Trial*, Injunctions, § 9:508 (citing *Novar*  
20 *Corp. v. Bureau of Collection & Investigative Services* (1984) 160 Cal.App.3d 1, 5).

21 **A. Arrests, Threats of Arrest and Jail Time Constitute Irreparable Injury.**

22 As set forth in the Buchal Declaration (¶¶ 2-3 & Exs. 1-8), suction dredge miners  
23 throughout the State, including members of plaintiffs The New 49'ers, Inc. and PLP, have had  
24 their equipment seized, have been threatened with arrest, arrested, and even jailed for want of the  
25 permits the Department unlawfully refuses to issue. The threats of arrest plainly constitute  
26 irreparable injury, for threatened criminal prosecution and the associated loss of liberty is obvious  
27 irreparable injury. *McKay Jewelers, Inc. v. Bowron* (1942) 19 Cal.3d 595, 598; *Ebel v. City of*  
28 *Garden Grove* (1981) 120 Cal.App.3d 399, 410 ("threatened arrest by the authorities or

1 discontinuance of the method of conducting a business because of fear of arrest and prosecution is  
2 sufficient to show 'irreparable injury'); *see also Novar Corp. v. Bureau of Collection &*  
3 *Investigative Services* (1984) 160 Cal. App. 3d 1; *Barajas v. Anaheim* (1993) 15 Cal.App.4th  
4 1808, 1813 (reversing superior court denial of injunction based on supremacy issue).

5 In *Hillman v. Britton* (1980) 111 Cal.App.3d 810, members of a church who were  
6 threatened with prosecution or arrest if they engaged in charitable solicitation without obtaining a  
7 permit from the City of Fresno, suffered irreparable injury, and were entitled to an injunction,  
8 when the standards for obtaining the permit were unconstitutional, even though they had never  
9 applied for a permit and had never been arrested.

10 What particularly offended the Court was the open-ended procedure, of indefinite  
11 duration, as to whether or not a permit would ever be issued. The Court stated:

12 "The ordinance sets no time limit within which the licensor must grant or deny the  
13 permit. It contains no procedures requiring the licensor to institute judicial  
14 proceedings to establish that the proposed solicitation is unprotected, and there is  
no assurance of prompt judicial determination on the merits.

15 Without calculating the open-ended time frame which the ordinance allows for the  
16 initial decision to grant or deny a permit, the applicant faces a delay of from 21 to  
40 of those days."

17 *Hillman*, 111 Cal.App.3d at 819. This Court has already declared that permits may not "be issued  
18 in the near or far future for years if ever" (Ruling at 16). This fundamental unfairness plainly  
19 requires an injunction.

20 **B. Business Losses from Unconstitutional Enforcement Constitute Irreparable**  
21 **Injury.**

22 The Miners are in the business of recovering gold from federal mining claims, or in  
23 related businesses. The loss of the opportunity to recover gold is irreparable injury, for it would  
24 be "extremely difficult to ascertain the amount" (Code of Civil Procedure § 526(a)(5)) of gold  
25 that miners would have recovered, and the money they would have realized from selling such  
26 gold. The Miners have already lost six mining seasons because of the Department's  
27 unconstitutional conduct, and the Department is doing everything within its power to destroy a  
28 seventh season.

1 Granting an injunction to prevent such losses is a classic exercise of equity jurisdiction.  
2 California courts have from earliest times granted injunctions where there “are allegations of facts  
3 from which damages, the amount of which cannot be ascertained, must necessarily follow.”  
4 *Zierath v. McCann* (1912) 20 Cal.App.561, 563; *Thayer Plymouth Center Motors Corp.* (1967)  
5 255 Cal.App.2d 300, 306 (extremely difficult to ascertain the amount of damages); *accord Pacific*  
6 *Decision Sciences Corporation et al. v. Superior Court* (2004) 12 Cal.App.4th 1100, 1110. The  
7 federal courts also hold that money damages are not adequate if they are difficult to calculate with  
8 any certainty, such that an injunction is appropriate. *Philip Morris v. Pittsburgh Penguins, Inc.*  
9 (W.D. Pa. 1983) 589 F.Supp. 912, 920; *Multi-Channel TV Cable Co. v. Charlottesville Quality*  
10 *Cable Operating Co.* (4th Cir. 1994) 22 F.3d 546, 551-52.

11 The broader economic damages to the small-scale gold mining industry and the  
12 communities relying upon suction dredgers are even more difficult to establish. Through a  
13 separately-filed Request for Judicial Notice, we ask this Court to take notice of numerous  
14 declarations and exhibits previously filed in these coordinated cases which set forth a sad litany of  
15 irreparable harm beyond the loss of opportunity to recover gold, including:

- 16 • devastating economic impact on manufacturers, merchants, dealers, and other sellers of  
17 suction dredge mining equipment;
- 18 • severe economic harm to other businesses that depend for their economic viability on  
19 suction dredge miners or the gold such miners retrieve, such as R.V. Parks; gas stations,  
20 grocery stores and other impacts on local economies (total damages are not easily  
21 quantifiable, but believed to amount to more than sixty million dollars per year);
- 22 • substantial losses to local economies from lack of suction dredge miners, and others  
23 associated with suction dredge mining, who use their trips as vacations, and infuse badly  
24 needed money into economically distressed rural local economies (*e.g.*, King Decl. ¶ 10  
25 (“For the love of God, please, just give us a season to get back on our feet”));
- 26 • the severe economic effect on suction dredge miners who rely, for their income, on gold  
27 retrieved by such mining in order to support themselves and their families, pay the  
28 mortgage on their homes, buy food, clothing, medical insurance and pharmaceuticals

1           necessary to treat life threatening medical conditions or illnesses for themselves and/or  
2           family members, and otherwise attempt to sustain a reasonable standard of living; and  
3           • substantial losses involved in the now worthless investments in suction dredge mining  
4           equipment, mining claims and permits from the Department to suction dredge mine.

5           With respects to plaintiffs not directly mining gold, including but not limited to plaintiff  
6           The New 49'ers, Inc., the California courts have long recognized that businesses suffering  
7           economic loss may sue "to enjoin the enforcement of an unconstitutional or void statute or  
8           ordinance which deprives him of effective access to his customers or which otherwise causes  
9           irreparable injury". *Crittenden v. Superior Court of Mendocino County*, 61 Cal.2d 565, 568  
10          (1964) (collecting cases; citations omitted).

11           In the *Crittenden* case, a truck stop owner sought an injunction against state troopers  
12          issuing parking citations against his customers. *Id.* at 566. The Supreme Court held that this was  
13          a proper use of the injunctive power, but declined to issue an injunction because the enforcement  
14          was not unlawful. Here the enforcement is plainly unlawful, for the State of California has no  
15          power to impose unreasonable prohibitions on the development of minerals on federal lands.

16           The general right to injunctive relief to protect a lawful business was also recognized in  
17          *Uptown Enterprises. v. Strand* (1961)195 Cal. App. 2d 45, in which a drive-in theater owner  
18          sought injunctive relief against sheriff's deputies engaged in:

19                   "a course of conduct upon and about the premises of plaintiff for the purpose of  
20                   harassing the plaintiff in the operation of its theater, causing its patrons to believe  
21                   that its theater was a place where criminals and persons of bad repute congregated,  
22                   and to compel the plaintiff to change its policies with respect to the length of the  
                    program, the price charged for admission, and the type of motion pictures shown."  
                    *Id.* at 50.

23          It is important to note that "the interference objected to may be unlawful because the means used  
24          are unlawful, such as where it occurs through the use of force, violence, coercion, or intimidation,  
25          or it may be unlawful regardless of the means used because it is unjustifiable." *Id.* at 51  
26          (emphasis added). "In either event the threat of future interference is a proper subject for  
27          injunctive action." *Id.* While a case can be made that the Department is engaged in improper  
28          coercion and intimidation against the Miners (*see* McCracken Decl. ¶¶ 19-22), an injunction is

1 proper against continuing and future unconstitutional interference without regard to the way the  
2 Department is enforcing Fish and Game Code § 5653. Any attempt to enforce an unconstitutional  
3 permit demand is appropriately enjoined, and that the Miners seek an appropriate injunction.

4 **III. AN INJUNCTION SHOULD ISSUE TO PREVENT A MULTIPLICITY OF**  
5 **ACTIONS.**

6 Section 526(a)(6) makes an injunction appropriate “[w]here the restraint is necessary to  
7 prevent a multiplicity of judicial proceedings”. The Department is presently initiating cases  
8 against suction dredge miners throughout California, wasting untold quantities of judicial and  
9 prosecutorial resources. (Buchal Decl. ¶¶ 2-3 & Exs. 1-8.) What makes such litigation  
10 particularly inappropriate is that the Department is, in substance, engaged in vexatious suits upon  
11 causes of action that have been settled by former adjudication. *Cf. Bartholomew v. Bartholomew*  
12 (1942) 56 Cal. App. 2d 216, 225 (1942).

13 **IV. NATURE OF THE INJUNCTION SOUGHT.**

14 The Miners do seek an injunction directing the Department to develop lawful regulations  
15 and issue permits (Proposed Order ¶ 2), but this is a mandatory injunction that would be  
16 automatically stayed on appeal. Moreover, it would provide no relief because experience  
17 demonstrates that many Miners will die waiting for administrative action from the Department.  
18 The last time a court ordered the Department take such action, in the December 20, 2006 Consent  
19 Decree, the Department took nearly six years to produce regulations that were dead on arrival. At  
20 least one plaintiff in these cases, Mr. Hobbs, has already died awaiting relief, and more will die  
21 before being able to enjoy their federal rights if prohibitory relief is not granted. (*See also* Buchal  
22 Decl. Ex. 13, at 2 (Keith Walker testifies concerning death of his dredging partner).)

23 The prohibitory relief the Miners seek (Proposed Order ¶ 1) is to restrain the Department  
24 from enforcing its permit demands when it unlawfully refuses to issue the permits. It is plainly  
25 unconstitutional for the Department to insist upon the permits, and to insist upon punishing  
26 miners as criminals for want of permits, so long as it refuses to issue any permits. Section 5653  
27 of the Fish and Game Code, providing that the Department “shall issue” permits to dredge in  
28 accordance with regulations, is merely a means of implementing a reasonable scheme of

1 environmentally-based regulations. The Department's invocation of § 5653 throughout the State  
2 is unconstitutional as applied in the present circumstances to suction dredge miners operating on  
3 federal land to whom the Department will not issue permits.

4 The Miners do not ask the Court to expand its summary adjudication ruling and provide  
5 that suction dredging may proceed without regulatory constraint. Rather, because the Department  
6 has refused since January to even attempt to develop a lawful permit program,<sup>2</sup> instead sending its  
7 agents out to prohibit all suction dredging through blanket application of § 5653, the appropriate  
8 remedy is an injunction limiting the Department's enforcement powers to miners operating  
9 outside the regulations prevailing when the Department ceased issuing permits.

10 Those regulations, initially promulgated in 1994, were effective in 2009 when the  
11 Department ceased issuing permits. Miners operated for decades under these and prior  
12 regulations with no appreciable environmental issues arising. (See Greene Decl. ¶¶ 37-41; see  
13 also Maksymyk Decl. ¶¶ 14, 45, 64.) The relief sought here will permit the Department to  
14 continue to cite and prosecute any miners operating outside of those well-established regulations.

15 While there does not appear to be any California authority directly on point, the rule in the  
16 federal courts is that where, as here, a court has struck down agency regulations, the prior  
17 regulations are reinstated as a matter of law. *Abington Memorial Hospital v. Heckler* (3d Cir.  
18 1984) 750 F.2d 242, 244 (“until rendered invalid by a court decision or replaced by a valid new  
19 regulation, the prior method of reimbursement remains operative”); *Action on Smoking and*  
20 *Health v. Civil Aeronautics Board* (D.C. Cir. 1983) 713 F.2d 794 (“by vacating or rescinding the  
21 recissions proposed by ER-1245, the judgment of this court had the effect of reinstating the rules  
22 previously in force”); *United States v. Sunny Cove Citrus Ass'n* (E.D. Cal. 1994) 854 F. Supp.  
23 669 (“Generally, unless the prior regulations are found invalid, vacating or rescinding invalidly  
24 promulgated regulations has the effect of reinstating the prior regulations”). From that  
25

26  
27 <sup>2</sup> The Department can, when it wishes, issue suction dredge regulations at the drop of a hat, such  
28 as the emergency regulations challenged in the coordinated case *Foley v. Dep't*, Case No. SC SC  
13-00804 (Siskiyou Cty.).



1 perspective, the Department's citations of miners on the Klamath River (*see* Buchal Decl. ¶¶ 1-4)  
2 for conduct plainly authorized under those prior regulations<sup>3</sup> is especially unlawful.

3 Since the Department is not recognizing or implementing the reinstatement of the prior  
4 regulations, the Miners ask this Court to provide guidance for the Department in the Proposed  
5 Order, which would simply bar enforcement efforts against those miners operating in compliance  
6 with the former regulations. This would afford the Miners a bare minimum of effective relief for  
7 the Department's refusal to issue permits by restoring the *status quo ante*—before the  
8 Department's unlawful conduct. The relief need only continue until the Department has  
9 developed a lawful permitting scheme and regulations. *Cf. Wyoming v. United States Department*  
10 *of Interior* (10th Cir. 2009) 587 F.3d 1245, 1252 (2004 rule reinstated only “until such time as it  
11 can promulgate an acceptable rule to take its place”).

12 **V. NO CONSIDERATIONS OF PUBLIC POLICY PREVENT THIS COURT FROM**  
13 **ISSUING AN INJUNCTION.**

14 Code of Civil Procedure § 526(b)(4) and Civil Code § 3423(d), limiting the Court's power  
15 to grant injunctive relief “to prevent the execution of a public statute, by officers of the law, for  
16 the public benefit,” has no application here. As a leading treatise explains, these provisions “have  
17 been held inapplicable to unconstitutional statutes or ordinances.” 7 Witkin, *Summary of*  
18 *California Law 10th* (2014 supp.) Const. Law, § 98, p.38 (citing *Bueneman v. Santa Barbara*  
19 (1937) 8 Cal.2d 405, 407; *McKay Jewelers v. Bowron* (1942) 19 Cal.2d 595, 599; *Wade v. San*  
20 *Francisco* (1947) 82 Cal.App.2d 337, 341; *People v. Amdur* (1954) 123 Cal.App.2d Supp.951,  
21 968).

22 We anticipate that the Department, Tribe and environmentalists will nonetheless allege  
23 “public benefit” reasons for declining to issue an injunction, particularly asserted environmental  
24 harm. At the outset, it is important to remember that the premise of the federal mining law, and  
25 30 U.S.C. § 612(b) in particular, is that minerals can only be extracted from their locations, and  
26 some amount of environmental impact is both necessary and unavoidable in mineral  
27 development. In substance, the Department and Legislature unlawfully determined that asserted

28 <sup>3</sup> Under the former regulations at 14 Cal. Code Regs. § 228.5(d)(49), these areas were Class H  
 (“Open to dredging throughout the year”).

1 public benefit in prohibiting suction dredging outweighed the public benefit of mining demanded  
2 by Congress. While the Department has power to determine reasonable environmental  
3 regulations, it has not done so, and it thus falls to this Court to assess reasonability as an equity  
4 chancellor, not the Department.

5 It is also important to remember that because the suction dredging relevant to this  
6 injunction occurs on federal land, under federal regulation (*see generally* 36 CFR Part 228), an  
7 injunction limiting enforcement of § 5653 by state officials only limits one of two duplicative  
8 regulatory systems. The existence of the federal regulatory system further obviates any concern  
9 that issuing the injunction might result in appreciable environmental harm.

10 **A. References to the SEIR Do Not Aid the Court in its Equity Determinations.**

11 It is certainly true that the Department has produced a tome concerning a range of  
12 *potential* environmental effects that could theoretically arise from suction dredging. (*See also*  
13 Maksymyk Decl. ¶¶ 11-12 (explaining hypothetical nature of SEIR findings).) Under California  
14 law and other modern environmental statutes, courts are at pains to explain that CEQA  
15 procedures are invoked without regard to the *quantification* of any environmental impact as  
16 significant. EIRs are required when projects “may have” significant effects on the environment  
17 (Public Resources Code § 21083(b)), a requirement further diluted by the statement that mere  
18 “*potential* to degrade the quality of the environment” suffices to require an EIR (*id.*  
19 § 21083(b)(1); emphasis added). And where experts disagree as to “significance,” an EIR is  
20 required (14 C.C.R. § 15064(g)), again without regard to the quantification of any impacts. But  
21 this motion for an injunction has nothing to do with CEQA significance thresholds.

22 This motion invokes this Court’s role as an equity chancellor to consider the equities after  
23 a violation of law has been found. Considering the equities requires consideration of *real*  
24 impacts, not potential or imagined ones. Lord Kelvin, the Scottish scientist for whom the Kelvin  
25 temperature scale is named, famously remarked that:

26 “. . . when you can measure what you are speaking about, and express it in  
27 numbers, you know something about it; but when you cannot express it in  
28 numbers, your knowledge is of a meagre and unsatisfactory kind; it may be the  
beginning of knowledge, but you have scarcely, in your thoughts, advanced to the  
stage of science, whatever the matter may be.”

1 W. Thomson, *1 Popular Lectures* 73 (May 3, 1883). The basic problem with the information  
2 upon which the Department relies is that it involves rank speculation as to possible impacts of  
3 suction dredging without any assessment of the magnitude—some measured value—of the  
4 impact. Yet it is impossible to assess the public interest without such information.

5 The most plausible assertion of environmental harm always related to damage to fish  
6 populations, since suction dredge miners do work in stream beds where fish nests (“redds”) are  
7 occasionally present. As Mr. Joseph Greene emphasizes in his Declaration, one must develop  
8 some sense of real-world scale in assessing potential impacts of suction dredging, and gain some  
9 practical understanding of the actual likelihood that miners will even encounter fish redds, much  
10 less adversely affect them. (Greene Decl. ¶¶ 28-36.) The fraction of streambed habitat disturbed  
11 by suction dredge miners is tiny in the scale of the real world, and for this reason no effects on  
12 fish can even be measured. (*Id.* ¶¶ 34-35 & Ex. 2.)

13 That endangered species may be involved does not eliminate the need for quantification.  
14 Federal agencies have approved suction dredge mining after quantifying estimated losses of  
15 endangered fish. (Buchal Decl. ¶ 4 & Ex. 9.) Unlike the Department, the federal agencies give  
16 weight to the scale of the activity in regard to fish habitat. They conclude that tiny impacts on  
17 even endangered fish are not sufficient to justify a prohibition.

18 By contrast, the Department arbitrarily designated huge swaths of mining claims and river  
19 reaches as “Class A,” based on the mere presence of endangered fish, reflecting an utterly  
20 unreasonable weighing of theoretical risks to fish against actual destruction of mining rights.  
21 This balance cannot be explained as any consistent policy on the part of the Department, for the  
22 Department authorizes the Karuk Tribe and others to kill endangered species for consumption.  
23 (*Id.* ¶ 10 & Exs. 10-11.)

24 The Department has never bothered to advance a shred of evidence as to the quantity of  
25 fish that might be lost by permitting suction dredge mining, a calculation that depends upon  
26 complicated chains of assumptions: (1) a miner must be operating when redds are present; (2) he  
27 must excavate where a redd is present; (3) he must violate rules that require him to stop if he  
28 encounters the redd (miners operate with their heads underwater inches from the nozzle taking

1 great care as to what goes in it to avoid clogs); and (4) the suction dredge must kill the eggs. *In*  
2 *more than a decade of litigation, neither the Department nor any other regulator has been able to*  
3 *produce evidence that so much as a single fish or fish egg has been killed by a suction dredge*  
4 *miner.* (McCracken Decl. ¶ 26; Maksymyk Decl. ¶ 10.)

5 The U.S. Supreme Court has recently cut back on injunctions to further environmental  
6 goals, noting that allegations of environmental harm did not justify interference with other federal  
7 policies in a case where antisubmarine training had “been going on for 40 years with no  
8 documented instance of harm to a marine mammal”. *Winters v. NRDC, Inc.* (2008), 555 U.S. 7,  
9 21 (vacating preliminary injunction). That case concerned an injunction against federal activity  
10 pending further environmental studies; by analogy, federal mining policy and rights merit a  
11 prohibitory injunction in this context, where there is a complete absence of proof of actual harm.

12 The Miners are aware of only one scientific study that has ever *tried* to quantify adverse  
13 effects of suction dredge mining upon fish. Specifically, in response to environmentalist claims  
14 of harm to fish populations from suction dredging in the Siskiyou National Forest, the U.S. Forest  
15 Service engaged a fisheries professor at Oregon State University, who constructed an exhaustive  
16 data set and concluded:

17 “... any effect that may exist could not be detected at the commonly used  
18 Type I error rate of 0.05. . . . the analysis was able to detect a negative effect of  
another mining process, [hydraulic mining,]

19 “... Localized, short-term effects of suction dredge mining have been  
20 documented in a qualitative sense. However, on the scales occupied by fish  
21 populations, such local disturbance would need a strong cumulative intensity of  
22 many operations to have measurable effects. Local information reveals that most  
23 suction dredge miners more or less adhere to guidelines that have recently been  
24 formulated by the Forest Service, but there are individual cases where egregious  
mismanagement of the immediate environment has occurred, particularly with  
respect to damaging river banks in various ways.[<sup>4</sup>] This analysis cannot account  
for individual transgressions, and a study to do so at an appropriate scale would be  
very expensive if feasible.

25 “Given that this analysis could not detect an effect averaged over good and  
26 bad miners and that a more powerful study would be very expensive, it would seem

27 <sup>4</sup> Such damage is prohibited not only by the Forest Service, but also by other California law not  
28 influenced by the injunction sought; § 1602 of the Fish and Game Code prohibits any  
“substantial” alteration of a stream bank.

1           *that public money would be better spent on encouraging compliance with current*  
2           *guidelines than on further study."*

3       P. Bayley, *Response of fish to cumulative impacts of suction dredge and hydraulic mining in the*  
4       *Illinois subbasin, Siskiyou National Forest, Oregon* (April 2003) (copy attached as Greene Decl.  
5       Ex. 2; emphasis added; citations omitted).

6           From this perspective, it should scarcely be surprising that numerous studies, from state  
7       and federal agencies, have found the environmental impacts of suction dredging to be generally  
8       insignificant. (Greene Decl. ¶ 43.) Lacking any evidence of damage to fish, opponents of suction  
9       dredge mining have shifted to a variety of other claims that are even more frivolous.

10           **B.       Allegations of Potential Mercury-Related Effects Are Exaggerated.**

11           Suction dredgers do not use mercury at all, but some hydraulic miners early in California  
12       history did. (McCracken Decl. ¶ 26.) This mercury will eventually move downstream with the  
13       riverbed materials making their way to the ocean. (*Id.* ¶ 30; Maksymyk Decl. ¶ 41.) Mercury  
14       hotspots are not generally prevalent throughout the State, and there is no reason to suspect that  
15       such areas will be dredged. (McCracken Decl. ¶ 27.) Indeed, Mr. McCracken, who has been  
16       dredging since 1979, reports only ever seeing one pool of mercury in California, while working  
17       with State and federal agencies on the South Fork of the Yuba River to use suction dredge mining  
18       technology to recover mercury from such contaminated sites. (*Id.* ¶ 26.)

19           Even if mercury were found, suction dredges safely (and at no cost to the State) recover at  
20       least 98% of the mercury they encounter, thereby providing a very significant net environmental  
21       benefit. (*Id.* ¶ 29; Wise Decl. ¶ 13-14; Seal Decl. ¶ 5.) As for the remaining 2% of mercury that  
22       falls back into the stream, the Department emphasized in the SEIR, that further closures to avoid  
23       or limit such discharges "are not believed to be necessary to avoid deleterious effects to fish, and  
24       are therefore considered infeasible". (Wise Decl. ¶ 7.)

25           As the SEIR confirmed the lack of harm to fish, opponents have raised the specter of  
26       human health effects. While mercury is a potentially toxic element, mercury toxicity to humans  
27       from eating fish is an issue created by misunderstanding and exaggeration, since nearly all fish  
28       contain more selenium than mercury, and selenium destroys the effects of mercury toxicity by

1 binding to the mercury. (Wise Decl. ¶¶ 5-6.) It should thus come as no surprise that no case of  
2 mercury poisoning has ever been reported from eating California sport fish. (Maksymyk ¶ 43.)

3 Mercury does not form the potentially toxic compound methylmercury in areas of high  
4 dissolved oxygen such as gold-bearing creeks where gold dredging occurs, but more in low-  
5 dissolved oxygen areas such as swamps and deltas. (*Id.* ¶ 11.) It should thus come as no surprise  
6 that actual surveys of California fish show no significant mercury contamination in areas where  
7 suction dredge mining continued for years, and that the fish have more selenium than mercury.  
8 (*Id.* ¶ 7.)

9 Lacking any evidence of concrete harm resulting from mercury and suction dredging, the  
10 Department and its consultants have nonetheless attempted to characterize suction dredge mining  
11 as making an appreciable contribution to the mercury loading of water bodies. Real, repeated  
12 scientific studies, based on real, operating suction dredges, have demonstrated that suction  
13 dredging has no such effect. (Wise Dec. ¶ 23; Maksymyk Decl. ¶ 28; *see also id.* ¶¶ 39-40.)

14 Casting aside real data, the Department's consultant conducted an "experiment" involving  
15 a massively contaminated area and equipment that recirculated mercury-contaminated water and  
16 sediments hundreds of times, unlike suction dredges. (Wise Decl. ¶ 24; Maksymyk Decl. ¶¶ 29-  
17 37.) Ms. Claudia Wise sums it up: "To utilize this setup to infer effects for suction dredging is,  
18 to put it bluntly, the poorest excuse for science that Mr. Greene and I we have observed in our  
19 combined 60+ years of scientific research." (Wise Decl. ¶ 24.<sup>5</sup>) Worse still, as far as the Miners  
20 can tell, the State of California in substance stopped gathering highly-relevant mercury data after  
21 the 2009 ban that its own consultants suggested would be obviously useful in evaluating the  
22 impact of dredging. (Maksymyk Decl. ¶ 41-42; Seal Decl. ¶ 7.) The limited data collected  
23 incident to other activities which the Miners have gathered to date shows no effect on ambient

24  
25 <sup>5</sup> These remarkable circumstances may be associated with the fact that when the U.S. Department  
26 of Interior Inspector General investigating the scientist involved, Dr. Charles Alpers, found that  
27 the California Water Board had limited the research design in service of its goal of banning  
28 suction dredging and selectively used the resulting data in the SEIR. (*See* Maksymyk Decl. ¶ 25-  
26 & Ex. 1.) The Report also found no conflict of interest arising from Dr. Alper's sitting on the  
Board of Advisors for the Sierra Fund, an environmental group leading the crusade against  
suction dredging. (*See id.*)

1 mercury levels arising from the Department's refusal to issue permits; in some cases mercury  
2 levels have *increased*. (Maksymyk Decl. ¶ 24; Seal Decl. ¶ 8.)

3 Ironically, allowing suction dredge mining is the only practical way to catalog mercury  
4 "hotspots" in California rivers for potential remedial action. (See Wise Decl. ¶ 28; *see also*  
5 McCracken Decl. ¶ 26.) Responsible regulators outside California have applauded suction  
6 dredging's effect of generally removing heavy toxic metals, including mercury and lead, from the  
7 riverine environment. (See Wise Decl. ¶¶ 29-30.)

8 **C. Impacts to Cultural, Historic and Archeological Resources.**

9 The Tribe may also be expected to raise concerns relating to the historic, cultural and  
10 archeological resources. In the SEIR, the Department did no more than suggest that such  
11 resources "might be present in areas of suction dredge mining" and "potential damage to or  
12 destruction of such resources is unknown" but "cannot be entirely discounted". (E.g., DSEIR at  
13 4.5-12.) Just as the record is devoid of any evidence that suction dredgers have injured so much  
14 as single fish, the record is devoid of any evidence that suction dredges have injured so much as a  
15 single historic, cultural or archeological resource.<sup>6</sup>

16 There is no evidence of any real likelihood of any "historical resource" within the  
17 meaning of Public Resources Code § 21084.1 or "archaeological resource" within the meaning of  
18 § 21083.2 being located where any suction dredge miners are likely to operate, and every reason  
19 to believe that the risk is imaginary. (See Maksymyk Decl. ¶ 67.) Flowing water rolls boulders  
20 down the stream and fills dredge holes every year; few artifacts could even survive this. (See *id.*)

21 Moreover, the Miners are governed by 36 C.F.R. § 261.9, which requires them to avoid  
22 "digging in, excavating, disturbing, injuring, destroying, or in any way damaging any prehistoric,  
23 historic, or archaeological resource, structure, site, artifact, or property". In addition, federal

24 <sup>6</sup> The notion that the Karuk Tribe has areas that would be impacted by injunctive relief is also  
25 false. *See generally* McCracken Decl ¶ 14; *see also Karuk Tribe of California v. U.S. Forest*  
26 *Service*, 379 F. Supp.2d 1071, 1082 & n.7 (N.D. Cal. 2005) (Forest Service held meetings  
27 between the Tribe and miners resulting in agreements to avoid the Tribal swimming hole and  
28 other areas of *specific* concern for the Tribe), *rev'd*, 681 F.3d 1006 (9th Cir. 2012), *cert. denied*,  
133 S. Ct. 1579 (2013).

1 regulations require immediate reporting of any inadvertent discovery of “human remains,  
2 funerary objects, sacred objects, or objects of cultural patrimony”. 43 C.F.R. § 10.4. In short, the  
3 risk is negligible, and in the extraordinarily unlikely event that a miner encounters such a  
4 resource, he or she is required to cease operations and avoid damage.

5 Here again considerations of environmental impact have become divorced from objective  
6 reality. The Karuk Tribe has concerns, accommodated in the CEQA process, of damage to  
7 “Traditional Cultural Properties” (“TCPs”). But this is now a concept so broad as to be unrelated  
8 to any adverse impact relevant to assessing the grant of an injunction. According to the SEIS,  
9 “one defined TCP is a ‘riverscape,’ or ‘a river and its environs, including their natural and  
10 cultural resources, wildlife, and domestic animals,’” and such TCPs can be determined significant  
11 under CEQA. (DSEIR at 4.5-7.) In substance, the Karuk Tribe now claims that essentially the  
12 entire Klamath riverscape is a TCP, such that any non-Tribal activity is significant.

13 Equity cannot accommodate such amorphous concepts to the detriment of the exercise of  
14 federally-protected rights and policies. The Miners have a right to operate in the gold-bearing  
15 rivers of California, and the Tribe’s unreasonable opposition to sharing those rivers with the  
16 Miners is not grounds to deny an injunction.

17 **D. The Question of Harm to Birds.**

18 Utterly unable to prove any significant adverse impacts to biological species in the water  
19 where suction dredge mining is occurring, the SEIR for the first time developed a theory that the  
20 miners working underwater may somehow impact birds. Thus the SEIR asserted *potential*  
21 “effects on special status passerines associated with riparian habitat”.

22 Specifically, the Department identified certain bird species and concluded that allowing  
23 suction dredging might lead to significant impacts on several of these species. By the Final SEIR,  
24 however, the Department admitted that the “likelihood of disturbance is considered relatively  
25 low . . .”. (Maksymyk Decl. ¶ 65.) There is no reason to believe that the particularly rare birds  
26 are found anywhere near suction dredge mining areas; most of them are native to Southern  
27 California or found in large river deltas hundreds of miles downstream from where mining is  
28 occurring. (*See id.* ¶ 64)



1           The CEQA process did not develop evidence detailing the effects of miners working  
2           underwater on birds in the air, relying instead upon general statements that human presence may  
3           interfere with birds. (*Id.* ¶ 65.) In short, whatever harm is present here is not of such weight as to  
4           militate against the entry of an injunction. The State may not single out and ban suction dredge  
5           mining because of extraordinarily unlikely effects on birds, while permitting every other human  
6           activity out of the water and closer to the birds.

7           **E.     Noise Impacts Are Overblown and Unrelated to this Appeal.**

8           As the SEIR notes, “use of a motor boat, ATVs” and even “ringing telephones” may  
9           violate noise control standards, yet the Department found that “suction dredge activities have  
10          potential to generate noise in excess of local noise standards” and “the impact cannot be  
11          discounted”. (Maksymk Decl. ¶ 72.) Whatever that may mean, the SEIR contains nothing to  
12          suggest any more threat than that posed by a ringing telephone. That opponents of suction dredge  
13          mining are offended at the notion that they may, for example, have to kayak or fish within earshot  
14          of a suction dredge, and are unwilling to share the National Forests with the miners, is not a factor  
15          militating against entry of an injunction. The Miners are exercising federally-protected property  
16          rights and have a right to be on their claims; the opponents have no such rights.

17          **F.     Asserted Environmental Impacts from Suction Dredging Are Not Irreparable  
18          and Are Offset by Benefits.**

19          It is important to understand that suction dredging generally does not involve dredging  
20          pristine habitat, but areas that have been previously mined. (Maksymyk Decl. ¶ 12.) Moreover,  
21          the scope of previous mining was in most cases gigantic, with amounts of material in excess of  
22          one billion yards moved. (*Id.* ¶ 13.) There were in most cases enormous and irreparable changes  
23          to the riverine environment resulting from such activities, but the continued activity of suction  
24          dredging is utterly insignificant by comparison, and generally speaking, all traces of the activity  
25          are washed out (and holes filled in) with high winter flows. (*E.g.*, Kleszyk Decl. ¶ 8; Sonnenburg  
26          Decl. ¶ 6; Stanford Decl. ¶ 6; Cutler Decl. ¶ 6; Mueller Decl. ¶ 5.)

27          Suction dredging also offers benefits for fish by breaking up “armored” stream bottoms in  
28          which fish cannot bury their eggs. (Greene Decl. ¶ 24.) The underwater holes left by dredgers

1 provide valuable cooler-water refugia. (*Id.* ¶¶ 29-30; *see also* Stanford Decl. ¶ 6.) Even the  
2 turbidity provided by dredges may assist juvenile fish in foraging without being consumed by  
3 birds. (Greene Decl. ¶ 21.) Heavy metals and trash are removed from the environment. (*Id.*  
4 ¶ 12.)

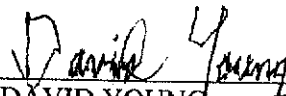
5 While no study has attempted to balance known positive effects against asserted negative  
6 effects, one cannot simply recite “environmental impacts” as a factor militating against granting  
7 an injunction. The bottom line is that entry of the requested injunction will not result in any  
8 appreciable adverse environmental impacts (Seal Decl. ¶ 4), and has the potential to benefit fish  
9 on balance.

10 **Conclusion**

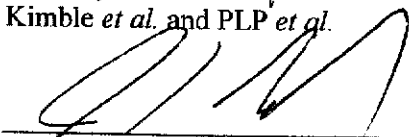
11 For the foregoing reasons, this Court should grant the Miners’ requested injunction.

12 Respectfully submitted,

13  
14 DATED: May 18, 2015

15   
16 \_\_\_\_\_  
17 DAVID YOUNG  
18 Attorney for Plaintiffs/Petitioners  
19 Kimble *et al.* and PLP *et al.*

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28 DATED: May 18, 2015

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30 \_\_\_\_\_  
31 JAMES BUCHAL  
32 Attorney for Plaintiff  
33 The New 49er’s, Inc. *et al.*

1 PROOF OF SERVICE

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

4 I am a citizen of the United States, over the age of 18 years, and not a party to or  
5 interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my  
6 business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

6 On May 18, 2015, I caused the following document to be served:

7 MINERS' JOINT MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTION

8 by transmitting a true copy in the following manner on the parties listed below:

9 Honorable Gilbert Ochoa  
10 Superior Court of California  
11 County of San Bernardino  
12 Rancho Cucamonga District, Civil Division  
13 8303 Haven Avenue  
14 Rancho Cucamonga, CA 91730  
15 *Via U.S. Mail*

Chair, Judicial Council of California  
Administrative Office of the Courts  
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