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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND 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,

vs.

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

Defendants.

Case No.: RG 09434444

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AGAINST DEFENDANTS' CALIFORNIA DEPT. OF FISH AND GAME AND DONALD KOCH, DIRECTOR

[CCP §526]

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

Original Complaint filed: February 5, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA STATUTES

CALIFONIA CODE OF REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

Under California's Fish and Game Code §5653, suction dredge mining (a form of instream gold mining) is prohibited on all California's rivers, *unless* certain conditions are met to ensure the protection of fish and their habitat. These conditions require the Department of Fish and Game (the agency responsible for issuing suction dredge mining permits) to adopt regulations that are in compliance with the California Environmental Quality Act (Public Resources Code §21000, *et. seq.*) ("CEQA") and make a determination that the mining will not cause deleterious impacts on fish. If the Department has not satisfied these two requirements, then it does not have authority to issue permits under the very laws that govern its suction dredge mining program. (Fish and Game Code §§5653 and 5653.9.)

On October 2, 2006, the Department expressly admitted to the Court[1], supported by sworn declarations, that these two conditions have not been met. The Department offered its determination, as lead agency under CEQA, that suction dredge mining under its current regulations causes deleterious impacts on Coho salmon, a state-listed threatened fish. The Department admitted that these impacts constitute a substantial change in the program and its regulations require further environmental review in order to comply with CEQA. In addition, the Department expressly admitted that suction dredging under its current regulations violates Fish and Game Code §§5653 and 5653.9. Lastly, the Department requested the Court to accept its admission of liability on grounds that it is rationally based upon, and supported by, a substantial body of evidence and, therefore, its opinion is neither arbitrary nor capricious.

Shortly after this admission, the Court entered an Order and Consent Judgment requiring the Department to perform a review of its regulations under CEQA and, based on its findings, conduct a formal rulemaking to mitigate impacts on endangered fish species. The Department was required to complete both the review and rulemaking by June 20, 2008. It is now nearly a

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[1] This admission was presented in *Karuk Tribe of California v. California Department of Fish and Game*, Alameda County Superior Court, Case No. RG 05211597 ("CEQA Action"). Plaintiffs Karuk Tribe brought the CEQA Action to challenge the Department's suction dredge mining program, as explained in more detail below. Both the CEQA Action and the present action are singly assigned to Department 31,

year past its deadline and the Department has not yet begun, which is a violation of the plain terms of the Order. New regulations will not likely be operative for three years.

Yet – regardless of the Department's admission that it is violating the law to the detriment of endangered fish – it continues to issue permits to recreational gold miners for suction dredge mining. Moreover, the statutorily set permit fees fall substantially short of covering the costs of the program. Therefore, the Department subsidizes the activities of these hobbyist miners with revenue from the General Fund, even when critical programs are being cut statewide due to the dire economic condition of the State.

While the Department used General Fund subsidies and continued to operate its admittedly unlawful program, it put the commencement of the Court ordered CEQA review on hold for two and a half years in order to get a specific Legislative appropriation to fund it. In the interim, the Karuk repeatedly called the Department back into court to protest the delays. The Department's unwavering response was, "[i]f it's not happening fast enough for the Karuk, there is injunctive relief that's available... ***That is, you are enjoined until you get your house in order.***" (See Declaration of Lynne R. Saxton ISO Plaintiffs' Motion for Preliminary Injunction ("Saxt.Dec"), Exhibit ("Exh.") A, p.8:14-17.) It is just such an injunction which Plaintiffs seek.

As the 2009 suction dredging season is quickly approaching, Plaintiffs make this timely request for a preliminary injunction to stop the Department from spending General Fund money to issue permits or perform any activities that allow suction dredge mining to occur under the Department's current regulations. Due to the Department's own sworn admissions, Plaintiffs can establish a uniquely high probability of success on the merits. In addition, the harm caused to the endangered species from suction dredge mining and to the public fund by subsidizing the program far outweigh any potential harm to the Department from temporarily stopping this admittedly unlawful and financially burdensome program. Moreover, the injunction only concerns the funding of activities that allow suction dredging under the current regulations and, therefore, will not impede the Department from performing the CEQA review and rulemaking,

as required under Court Order. Nor will the injunction prevent the Department from any other acts to improve the program or protect the State's fisheries.

II. Statement of Facts and Proceeding Litigation

A. Plaintiffs

In the present action, Plaintiff Karuk Tribe is joined with a consortium of individuals and non-profit organizations that, collectively, represent the many ways a river's resources can be used – and in a manner that is inclusive of other uses. For example, the Klamath River and its tributaries are the center of the Karuk's culture, history and religion. Plaintiff Leeon Hillman, a Karuk Tribal Councilmember, has lived on the Klamath his entire life, as has his Karuk ancestors before him going back to time immemorial. Plaintiffs Center for Biological Diversity, Klamath Riverkeeper, and Plaintiff Friends of the River are nonprofit organizations committed to protecting endangered species, our State's fisheries and the vitality of California's rivers. Plaintiff Craig Tucker is a boater, Board Member of Plaintiff Klamath Riverkeeper, the Karuk's Campaign Coordinator and resident of a small California town whose local economy is dependent on commercial salmon fishing. Plaintiff Dave Bitts, President of Plaintiff Pacific Coast Federation of Fishermen's Associations ("PCFFA"), is a commercial fisherman whose personal livelihood is dependent on healthy salmon fisheries. Plaintiffs PCFFA, Institute of Fisheries Resources, and California Sportfishing Protection Alliance represent commercial fishermen and sport fishermen, respectively, and work to rebuild California's fisheries and correct water pollution in our rivers. Collectively, Plaintiffs work to protect California's rivers and to restore our State's fisheries for their own benefit and for the benefit of future generations.

B. Impacts of Mining; Legacy Impacts from 1850 Gold Rush and California's New Gold Rush

While Plaintiffs represent the manner in which a river's resources can be used inclusively of other uses, suction dredge mining demonstrates the manner a river is used to the exclusion of others. Suction dredges are powerful vacuums with nozzles of up to 8". They are powered by diesel engines and mounted on floating pontoons. The miner dives to the bottom of the river and vacuums the sand and gravel (sediment), causing sediment plumes both up and downstream of

the dredge. (Saxt.Dec, Exh.B) The material passes through a sluice box where heavier gold particles can settle into a series of riffles. The remaining river material is then discharged out of a tailpipe as "tailings" and deposited back into the river in piles of debris. Suction dredges are used for recreational gold mining throughout California, but primarily in the rivers of the Western Sierras and in Northwestern California where historical gold mining occurred.

The State Water Resources Control Board ("State Board") concludes that suction dredge mining contributes to both mercury and sediment impairments of California's rivers. (Saxt.Dec, Exh.C, p. 1) Approximately 6,900 of California's stream miles are listed as impaired under the Clean Water Act for both of these toxins. (*Ibid.*) Dredging removes stream gravel, which eliminates spawning habitat and can destroy juvenile fish or eggs within the gravels. (*Id.*, p. 2) The Department[2], focusing on Coho salmon[3], determined that suction dredge mining impacts Coho at all life stages. (Saxt.Dec, Exh.D, inclusive Declaration of Neil Manji at Exhibit 1 ("Manji Dec."), p.2-6.) Other State and Federal agencies also conclude that suction dredge mining causes negative impacts on the environment and harms spawning habitat, causes turbidity, and harms anadromous lamprey, freshwater mussels and various amphibians that are on state and federal Endangered species lists. (Saxt.Dec, Exhs.E-J.)

Suction dredging also introduces methylmercury into rivers. (Saxt.Dec, Exh.C, p.2.)

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[2] Neil Manji, the Fisheries Branch Chief of the Department, submitted a sworn declaration to the Court in the CEQA Action providing the scientific basis for the Department's determination that it is in violation of Fish and Game Code §§5653 and 5653.9. The declaration was submitted in support of the admission, as discussed in more detail below. (Saxt.Dec, Exh.D, Manji Dec.)

[3] The scope of the Department's determination and supporting declaration is limited to the Coho salmon in the Klamath, Scott and Salmon rivers because the allegations in Plaintiffs complaint in the CEQA Action were limited to endangered, threatened and special status fish in these three rivers. Particular mention was made of the Coho. However, the fact that the Department limited the scope of its declaration to the Coho should not be read that it has made a determination that only this species in these three rivers are impacted by suction dredge mining. As Department's Senior Staff Counsel, John Mattox, stated at a Case Management Conference on August 22, 2007, "if the door is open in terms of alleged significant new information that would create a legal trigger for [the Department] to prepare a subsequent EIR or a supplement to the original EIR, if that door swings open CEQA-wise, as we believe that it has... as a legal matter there's no way for [the Department] under CEQA to limit the scope of our look to only the Klamath, Scott and Salmon rivers." (Saxt.Dec, Exh.K, p. 20:15-21:6.) In other words, the Department focused on the Coho in the Klamath, Scott and Salmon for purposes of the court order, but contemplated the review to be statewide. (*Id.*; p. 8:1-3.)

During the historic gold rush, millions of gallons of mercury were used in various gold mining practices because the mercury binds with gold and aided in extraction. (Saxt.Dec, Exh.L, p.1 (excerpt).) Today, a substantial amount of that mercury is currently buried in riverbeds. When suction dredge miners dig up the mercury, a process known as "flouring" occurs, in which bacteria in the rivers and streams convert the benign elemental mercury into toxic methylmercury. (Saxt.Dec, Exh.C, p.2.) The methylmercury is then carried downstream and enters the food chain, beginning with bottom dwellers and eventually affecting fish that are consumed by humans. (*Ibid.*)

The Department issues approximately 3,000 suction dredge mining permits every year. (Saxt.Dec, Exh.M, p.2.) Comparatively, it issues approximately 2.2 million fishing licenses. The State's economy receives roughly $2 billion annually from recreational sport fishing and approximately $255 million from commercial fishing, which together support about 23,000 jobs. Considering the harm suction dredging causes on fisheries (Saxt.Dec, Exhs.C, D), the result is that the actions of a few miners damage the opportunities and livelihoods of many.

Over the past few years, there has been a gaining popularity for all forms of prospecting for gold – including panning, non-hydraulic sluice boxes, as well as suction dredge mining. In the last few months, there have been a significant number of state and national news stories about "California's New Gold Rush." (Saxt.Dec, Exhs.N, O.) Each article reports that there is a significant rise in the number of people heading to Northern California's Rivers to prospect for gold. (They've been dubbed the "09'ers".)

The price of gold, which had been rising for years, stayed steady even after the market crashed in October of 2008, so more people are turning to prospecting in the hopes of finding gold. (Saxt.Dec, Exh.O, p.4.) The Sacramento Bee article reports that California's Bureau of Land Management issued 3,413 permits to gold miners in 2008, compared to 1,986 claims in 2006. (*Id.*, p.2.) The Department issued 3,523 suction dredge mining permits in 2008, which is a marked rise from the 3,000 it had steadily issues for the past decade. (Saxt.Dec, Exh.M.)

Based on the rise in permit requests in 2008, it can be predicted that permit requests for

2009 will be as high or higher – particularly with the state and national media attention cast upon it. However, in terms of the present litigation, it is significant that none of the media even mentioned suction dredge mining. This, ultimately, is not that surprising. Compared to panning or using a non-motorized sluice box, suction dredging is loud, cumbersome, expensive, and it turns a clear stream into an ugly brown mess. (Saxt.Dec, Exh.B.) It is simply not the preferred mining method for most people.

Therefore, should the court grant this preliminary injunction and temporarily halt the Department's program[4], there are still viable, popular alternatives to suction dredge mining. People's ability to prospect for gold will not be hampered; suction dredgers will simply have to use a different method for a period of time. As of March 31, 2009, the Department had issued less than 600 dredge mining permits for 2009, compared to the 3,500 it issued in 2008. (Saxt. Dec, Exh.M.) This motion is timely to avert the lion's share of suction dredging permit issuances[5], particularly since the 2009 dredging season begins late May on many rivers and July 1 on others (although some rivers are open year round).

C. Prior Litigation

In May of 2005, the Karuk Tribe and Leaf Hillman, Vice-Chairman of the Tribe, brought the CEQA Action against the Department to challenge its outdated suction dredge mining regulations for not being protective of threatened and endangered fish. (See fn. 1.) The Department adopted its suction dredge mining regulations in 1994. Those regulations included protections for fish that were then listed as endangered, threatened, or Special Status Species (collectively referred to as "Endangered"). The protections included the closing of certain river segments known to be inhabited by Endangered fish. The 1994 Biological Opinion stated that

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[4] Should Plaintiffs win on the merits, the ultimate relief Plaintiffs' seek in this action is temporary and will lift when the Department completes its CEQA review of its regulations and the new regulations are in effect.

[5] The Department's suction dredge instruction document contains a disclaimer that the terms of the permit may change at any time due to litigation over the regulations. Notification has been published since at least 4/08 to permitees that the terms of the permits may change. (Saxt.Dec, Exh.P, p.2.) Therefore, should the Preliminary Injunction be granted, 2009 permits that have already been issued can be revoked

the Department should review its regulations periodically to address future protections required for subsequently listed fish. That never happened[6]. Therefore, the Karuk filed their CEQA Action.

As discussed above, the Department offered a judicial admission that it is out of compliance with CEQA and Fish and Game Code §§5653 and 5653.9. (Saxt.Dec, Exh.D.) This admission was supported by sworn declarations from its Fisheries Branch Chief, Neil Manji, and Deputy Director of Branch Operations, Banky Curtis, as discussed in more detail below. (*Id.*)

Soon thereafter, the parties settled the action. On December 20, 2006, the Court entered the Order and Consent Judgment, requiring the environmental review and rulemaking by June 20, 2008. (Saxt.Dec, Exh.Q, p.2-3.) Plaintiffs understand that the Department is in the process of finalizing contracts with third party consultants hired to conduct the CEQA review. Regardless, it will be years before the amended regulations are operative.

The Department's rationale for failing to comply with the Order is that it has insufficient funds for a statewide review and needed a specific Legislative appropriation. However, the Department continues to issue permits and subsidize the program from the General Fund, losing more money than it collects each year.

I. STATUTORY BACKGROUND

A. PRELIMINARY INJUNCTION

Courts are authorized to preliminarily enjoin challenged activities pending a determination on the merits of a case. (California Code of Civil Procedure ("CCP") §526.) In deciding whether to issue a preliminary injunction, the Court must weigh two "interrelated" factors: (1) the likelihood that Plaintiffs will ultimately prevail on the merits; and (2) the relative interim harm to the Plaintiffs and Defendants from the issuance or non-issuance of the injunction. (*IT Corporation v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.)

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with undue burden on the Department.

[6] Since the 1994 EIR was concluded, approximately 13 species of fish have been listed as endangered or threatened under State or Federal law, including Green Sturgeon; Steelhead; Winter, Spring and Coastal Chinook; and Coho. (Saxt.Dec, Exh.R, p.4-6.)

The Court's "determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt v. State of Cal.* (1992) 4 Cal.4th 668, 677-78.) While Plaintiffs will establish that the balance of harms strongly weighs in favor of granting the injunction, the likelihood of success on the merits is also uniquely high – as it is based on the Department's own admission of liability. Therefore, the injunction should be issued.

B. TAXPAYER STATUTE (CCP §526a)

The Taxpayer Statute allows a taxpayer to bring an action to enjoin a government actor from any illegal expenditure of state funds. CCP § 526a states:

> An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who . . . has paid[] a tax therein.

In order to prevail on the merits, the taxpayer plaintiffs must simply show an "expenditure" that is "unlawful." For example, the expenditure of public funds for activities that violate state statutes and regulations are valid claims under the statute. (*See McKinny v. Oxnard Union High School Dist. Bd. of Trustees* (1982) 31 Cal.3d 79 (allegation that school district violated desegregation procedures set forth in the California Board of Education regulations stated a claim under § 526a); *see also Folsom v. Butte County Assn. of Gov.* (1982) 32 Cal.3d 668 (the dispersal of funds in violation of regulations implementing the Transportation Development Act was a valid claim under §526a).)

The right to seek a preliminary injunction under the CCP §526a flows naturally from its plain language, which enables judgments "restraining and preventing" any illegal expenditure of state funds. (CCP § 526a; *see Wirin,* 85 Cal.App.2d 497 (a successful section 526a claimant is entitled to an injunction against the challenged governmental action).) Courts liberally construe the taxpayer statute in order that it may achieve its remedial purpose. (*Blair,* 5 Cal.3d at 268.)

The Department's use of General Fund revenue to pay for its suction dredge mining

program is an unlawful expenditure under CCP §526a, because the program is in violation of: (1) Fish and Game Code §§5653 and 5653.9, the statutes that authorize its suction dredge mining program, (2) CEQA; and (3) the prior Order and Consent Judgment, as described below.

II. ARGUMENT

A. BASED ON THE DEPARTMENT'S OWN ADMISSIONS OF LIABILITY AND ENTITLEMENT TO JUDICIAL DEFERENCE, THERE IS A UNIQUELY HIGH PROBABILITY THAT PLAINTIFFS WILL PREVAIL ON THE MERITS.

Plaintiffs are in a unique position to establish success on the merits because their evidence is the Department's own judicial admission, supported by sworn declarations. The Department's opinion was reasonably based on a substantial body of scientific evidence, and was therefore neither arbitrary nor capricious. Its opinion is also entitled to judicial deference.

1. The Department's Noncompliance with Fish and Game Code §§5653 and 5653.9; CEQA; and the Prior Court Order Each, Individually, Meet the "Unlawful" Element Under CCP §526a.

While the violation of a single law is sufficient to satisfy the requirements of CCP §526a, Plaintiffs have strong evidence that the Department is in violation of the following three laws: Fish and Game Code §§5653 and 5653.9, CEQA and the Court Order, as described below:

- The Department, as lead agency under CEQA and trustee of the State's fish resources, made a determination that suction dredge mining under its current regulations causes deleterious impacts on Coho salmon, a state listed threatened fish species. This determination was supported by declarations from its Fisheries Branch Chief, Neil Manji, and its (then) Deputy Director of Regional Operations, Banky Curtis. Mr. Manji's declaration described the substantial body of scientific evidence on which the Department based its opinion, and therefore its opinion is neither arbitrary nor capricious. (Saxt.Dec, Exh.D.)

- The Department expressly admitted to the Court that it is in violation of Fish and Game Code §§5653 and 5653.9, the statutes that govern its suction dredge mining program. (Saxt.Dec, Exh.D, p. 2.)

- The Department stated that the impact on Coho salmon constitutes a substantial change in circumstances under which the Department is currently carrying out the suction dredge permitting program under the existing regulations. (Saxt.Dec, Exh. D, p.2.) The declaration submitted by Neil Manji, in support of the Department's admission, also states that its opinion concerning the Coho is based on new information that did not exist when the 1994 environmental impact report was conducted. (Saxt.Dec, Exh.D, Manji Dec, pp.1:24-2:2, 7-9.) Therefore, due to the

substantial change in circumstance and the new information regarding significant impacts to the program, the Department must conduct a subsequent or supplemental environmental impact report before the regulations will be in compliance with CEQA[7].

- Fish and Game Code §§5653 and 5653.9 prohibit suction dredge mining on California rivers unless the Department has adopted regulations in compliance with CEQA and made a determination that suction dredge mining will not cause deleterious impacts on fish[8]. (Fish and Game Code §5653(a),(b); §5653.9.) The Department has authority to issue permits only when these two conditions are met. (Fish and Game §5653(b).) As the Department's regulations are not in compliance with CEQA (Saxt.Dec, Exh.D, p.2; Manji Dec, p.1:24-2:2.) and it has affirmatively made the determination that suction dredge mining causes deleterious impacts on Coho salmon – a state listed threatened fish (Saxt.Dec, *e.g.*, Exh.D, p.2) the Department *simply does not have authority to issue permits* under the Fish and Game Code. Therefore, the Department's continuing issuance of permits is in violation of Sections 5653 and 5653.9.

- The Department was ordered to conduct a CEQA review of its regulations and, based on its findings, mitigate impacts to Endangered fish from suction dredge mining through a formal rulemaking. (Saxt.Dec, Exh.Q, p.2.) Both acts were to be completed by June 20, 2008. (*Ibid.*) The Department has not yet started and, therefore, it is in violation of the Court Order and Consent Judgment.

Therefore, the Department's violations of Fish and Game Code §§5653 and 5653.9, CEQA, and the Order and Consent Judgment meet the "unlawful" element of CCP §526a.

2. The Department, as Lead Agency Under CEQA, Should Be Given Judicial Deference As Its Opinion Was Based On Substantial Evidence and Neither Arbitrary nor Capricious.

The Department's judicial admission and supporting declarations were submitted to the

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[7] Under CEQA, an agency is required to conduct a supplemental or subsequent EIR if "the lead agency determines, on the basis of substantial evidence..." that substantial changes have occurred with respect to the circumstances under which the project is being undertaken that involve new significant effects or new information that was not known before and shows the project will have more significant effects not previously discussed or significant effects previously examined that are substantially more severe. (Public Resources Code §21166; 14 CCR 15162-64.)

[8] Fish and Game Code states: "The use of any vacuum or suction dredge equipment by any person in any river, stream, or lake of this state is prohibited, except as authorized under a permit issued to that person by the department in compliance with the regulations adopted pursuant to Section 5653.9." (Fish and Game Code § 5653(a).) "If the department determines, pursuant to the regulations adopted pursuant to Section 5653.9, that the operation will not be deleterious to fish, it shall issue a permit to the applicant." (Fish and Game Code §5653(b).) "The department shall adopt regulations to carry out Section 5653... The regulations shall be adopted in accordance with the requirements of [the California Environmental Quality Act (Public Resources Code §§21000, et. seq.) and the California Administrative Procedures Act

Court in a case status conference report ("Case Status Report"). (Saxt.Dec, Exh.D.) With the admission, the Department recommended that the Court grant judicial deference to its opinion because it was rationally based upon, and supported by, a substantial body of evidence, including peer reviewed scientific evidence and data possessed by the Department, and therefore neither arbitrary nor capricious. (Saxt.Dec, Exh.D, *e.g.,* p.2.) The Department's reasoning in support of judicial deference is exactly aligned with Plaintiffs' position in this motion. ***In fact, the following argument for judicial deference is the Department's own words and quoted entirely from the Department's Case Status Report.*** As Plaintiffs are quoting the Department's own words, the Department cannot argue judicial deference is inappropriate.

> "The Department believes the presentation of its admission in open court and its inclusion in this and the previous Case Management Conference Statement, provide the Court with the legal authority to enter a judgment on the Department's liability." (Saxt.Dec, Exh. D, p.3)
>
> "The Department's judicial admission is conclusive on the issue of the Department's liability and removes the admitted matter from consideration. (See *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local* 1304 (1964) 227 Cal.App.2d 675, 708, fn. 17; 1 Witkin, Cal. Evidence (4th ed.2000) Hearsay, §§92, 97, pp. 796, 799-800.)" (Saxt.Dec, Exh.D, p.3)
>
> "The declarations of Neil Manji and Banky E. Curtis… attest to the substantial evidence that suction dredge mining under the Department's current regulations is having deleterious effects on Coho in the Klamath, Scott, and Salmon Rivers and their tributaries… 'Substantial Evidence' is defined under section 15384 of the CEQA Guidelines (Cal. Code Regs., §§ 15000-15387) to mean, 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached… Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts'." (Saxt.Dec, Exh.D, p.4, fn.2)

(Government Code §§11340, et. seq.)." (Fish and Game Code §5653.9.)

"The factual and scientific evidence leads the Department to reasonably conclude that the existing regulations (Cal. Code Regs., tit.14, §§ 228, 228.5) are not in compliance with Fish and Game Code sections 5653 and 5653.9, and supports the Department's well-considered decision to admit liability." (Saxt.Dec, Exh.D, p.4.)

"The Department's decision to admit liability, supported by a rational reliance upon a substantial body of factual and scientific evidence, is neither arbitrary nor capricious and therefore is entitled to judicial deference. The definition of "substantial evidence" in the CEQA Guidelines makes clear, it is of no consequence that other persons may reach different conclusions. (CEQA Guidelines, § 1538.) As the California Supreme Court has stated, '[a] reviewing court does not superimpose its own policy judgment upon a quasi-legislative agency in the absence of an arbitrary decision; rather the review is limited to an examination of the proceedings to determine whether the action is arbitrary or entirely lacking in evidentiary support...; in these technical matters requiring the assistance of experts and the collection and study of statistical data, courts let administrative boards and officers work out their problems with as little judicial interference as possible.' (*Industrial Welfare Com. V. Superior Court* (1980) 27 Cal.3d 690,702.) Such limited judicial review forecloses inquiry as to the agency's reasons for its actions, so long as a reasonable basis for such action exists, the motivating factors considered in reaching the decision are immaterial and supportive findings are not required. (*Stauffer Chemical Co. v. Air Resources Board* (1982) 128 Cal.App.3d 789, 794-795.) The limited scope of review of quasi-legislative decision making is grounded on the doctrine of separation of powers which (1) sanctions legislative delegation of authority to an appropriate administrative agency and (2) acknowledges the presumed expertise of the agency. (*Id.;* see also *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 211-212.)" (Saxt.Dec, Exh.D, p.5.)

"CEQA sections 21168 and 21168.5 also limit a court's ability to substitute its own judgment for that of a public agency. Both sections agree that in any action or proceeding to attack, review, set aside, void, or annul a determination, finding, or

decision of a public agency, a court's inquiry is limited ultimately to whether the determination or decision is supported by substantial evidence. (See also *National Parks and Conservation Ass'n v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1352.) In applying the substantial evidence standard, the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision. (*Id.*)" (Saxt.Dec, Exh.D, p.5.)

"The Department's admission was made publically, both orally on the record in open court during the last Case Management Conference and in writing in this and its previous Case Management Conference Statements. As such, the Department's judicial admission is factually and legally conclusive on the issue of liability. The Department respectfully requests that the Court accept the admission, which is based upon substantial evidence as attested to in the attached declarations of Neil Manji and Banky E. Curtis, and enter a Case Management Conference Order superseding the pleadings, concluding the issue of liability, and requiring the Department to take necessary steps to comply with CEQA and bring its suction dredge mining regulations into compliance with Fish and Game Code sections 5653 and 5653.9. The Court should not sanction a challenge by the Intervenors or any other party to the Department's administrative decision to judicially admit liability, as that decision is entitled to judicial deference and by allowing a challenge the Court would be placing itself in the position of substituting its judgment for that of the agency that is presumed to have the technical expertise required to carry out its quasi-legislative function..." (Saxt.Dec, Exh.D, p.6.)

Plaintiffs' agree with the Department's position that its opinion should be provided judicial deference because it based on substantial evidence, as described in Mr. Manji's declaration and supporting list of studies. (Saxt.Dec, Exh.D, Manji Dec, p. 7-9.) In respect to the admission, the laws and facts at issue in the CEQA Action and the present action cannot be distinguished. Therefore, Plaintiffs request that the Court take the Department's admission and supporting declarations as conclusive on the Department's liability as to Fish and Game Code §§5653 and 5653.9 and CEQA.

3. The Unlawful Suction Dredge Mining Program Requires An "Expenditure" of Public Funds.

Pursuant to Fish and Game Code §711, nongame fish and wildlife programs are funded through the General Fund, users fees and other sources. The suction dredge mining program (a nongame fish and wildlife program) is funded through permit fees and, Plaintiffs believe based on information gathered to date, the General Fund, and potentially other sources.[9]

Representatives from the Department have stated on numerous occasions that the fees collected for permits do not cover the cost of this program. For example, in context of the Department's efforts to amend legislation to raise the statutorily set permit fee (Assembly Bill 1032 (Wolk)), the Department approximated that it needed $1.26 million annually "to administer and enforce a state-wide suction dredge permit program..." which would "pay for the total costs of the suction dredge program...[and] relieve DFG of the effort to seek other sources of revenue to pay for those costs..." (Saxt.Dec, Exh.S, p.1.) The proposal was to raise the permit fee from $42.50 to $400 for residents and from $167.25 to $500 for nonresidents, with an additional annual increase of $170 per permit for three years to pay for the EIR. (*Ibid.*) While the $1.26 million included funding for 10 new positions for the program (*Ibid.*), the estimated budget still far surpasses what the Department has collected in fees in recent years. For example, the fee revenue in 2005 was $164,878; in 2006 it was $174, 260; in 2007 it was $181, 951; and in 2008 it was $228,442 (there was a marked increase in permit requests last year, presumably because of the high price of gold, as discussed *supra*). (Saxt.Dec, Exh.T.)

The litigation is in its initial stages and discovery has only just commenced. Therefore, Plaintiffs do not know the amount of General Fund money used to pay for the program. While the General Fund uses are likely significant, under the Taxpayer Statute there is no threshold dollar amount required to demonstrate an "expenditure." (*Wirin,* 48 Cal.2d at 894; *Blair,* 5 Cal.3d at 268.) "It is immaterial that the amount of the illegal expenditures is small," (*Wirin,* 48 Cal.2d at 894) and minor, even trivial, expenditures of public funds are sufficient to establish a

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[9] Plaintiffs propounded limited discovery on the Department to confirm the sources of revenue for the suction dredge mining program and will discuss further in their Reply Brief.

valid cause of action. (*Ibid.*; *Blair,* 5 Cal. 3d at 268.)

B. THE POTENTIAL HARM FROM THE CONTINUED ISSUANCE OF SUCTION DREDGE PERMITS OUTWEIGHS ANY POTENTIAL HARM TO THE DEPARTMENT FROM ISSUANCE OF A PRELIMINARY INJUNCTION

The Court's consideration of the balance of the relative interim harm from issuance or non-issuance of the preliminary injunction must be weighed in conjunction with its analysis regarding the likelihood of success on the merits. (*IT Corporation*, 35 Cal.3d at 69-70.) The greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt,* 4 Cal.4th at 677-78.) In fact, where the party seeking injunction makes a sufficiently strong showing of likelihood of success on the merits, the trial court may issue the injunction even where the party seeking injunction cannot show that the balance of harms tips in his favor. (*Common Cause of Calif. v. Board of Supervisors* (1989) 49 Cal.3d 432, 447; *Pleasant Hill Bayshore Disposal v. Chip-It Recycling* (2001) 91 Cal.App.4th 678, 696. While Plaintiffs will establish that the balance of relative harms tips strongly in their favor - namely, protecting the Endangered species at issue in the case and public funds, the high probability that Plaintiffs will succeed on the merits demonstrates that the preliminary injunction should issue.

1. The Potential Harm to the Department if Preliminary Injunctive Relief is Granted is Negligible, If At All, as the Department Will Be Relieved of a Financial Burden During Particularly Hard Economic Times.

The costs of the suction dredge mining program are not covered by fee revenue and must be subsidized from the General Fund. The issuance of this preliminary injunction would, in effect, halt suction dredge mining until the merits of the case are decided and, if Plaintiffs ultimately prevail, until the CEQA review is complete and new regulations are in effect. Thus all costs associated with operating the program would cease. Moreover, the preliminary injunction would only encompass activities that allow suction dredging under the current regulations, so funding for any other types of activities - such as the $1 million General Fund appropriation for the CEQA review and rulemaking - would not be impacted. Similarly, the preliminary injunction would not impact the $500,000 that the State Water Board is giving the Department to

augment the CEQA review and include water quality issues. (Saxt.Dec, Exh.U.) Lastly, at a time when the State of California is suffering substantial budget deficits and critical programs are being cut, it is untenable that the Department is subsidizing the activities of hobbyist miners – particularly at the cost of harming Endangered species of fish.

2. Plaintiffs Will Suffer Substantial Interim Harm in the Absence of Preliminary Injunctive Relief.

Where, as here, a statute expressly provides for injunctive relief, less is needed to show that the harm tips in Plaintiffs' favor since the statute has already determined that the public's interest in preventing the violation is stronger than the defendant's interest in continuing its illegal activities. For example, where a public enforcer establishes that it is "reasonably probable that it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant." (*IT Corp.*, 35 Cal.3d at 72) Although Plaintiffs are not a governmental entity, they bring this action in the public interest both to protect the environment and public funds. (*See* CCP §526a.) Since the Taxpayer Statute provides for injunctive relief, it indicates: "(1) that significant public harm will result from the proscribed activity, and (2) that injunctive relief may be the most appropriate way to protect against that harm." (*IT Corp.*, 35 Cal.3d at 70.)

Moreover, when the harm at issue concerns degradation of the environment, it is a matter of "significant public concern" which must be given due consideration in weighing the balance of potential interim harms. (*Tahoe Keys Property Owners' Association v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1472-1473.) That consideration must be given even greater weight in the present action because: (1) the environmental harm concerns fish species that have already been listed as threatened or endangered under State and/or Federal law (Saxt.Dec, Exhs.D, Manji Dec; R, p.4-6); and (2) the Department, the lead agency under CEQA and trustee of the fish resources, has affirmatively made the determination that the activity at issue causes harm to at least one listed species and is under Court Order to review impacts on others. (Saxt.Dec, Exhs.D, Q.) "If denial of an injunction would result in a great harm to the

plaintiff, and the defendants would suffer little harm if it were granted, then it's an abuse of discretion to fail to grant the preliminary injunction." (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205.)

The balance of the harms consideration weighs further towards granting the preliminary injunction in cases where compensation would not afford adequate relief or where a damages remedy is precluded by law. (*Dept. of Fish and Game v. Anderson-Cottonwood Irrigation District* (1992) 8 Cal.App.4th 1554, 1565-66.) In the present action, the Taxpayer Statute does not provide for nor do Plaintiffs seek damages. (CCP §526(a)(4), (5).) Moreover, monetary relief would neither be sufficient nor is it available to compensate Plaintiffs for the harmful impacts that suction dredge mining causes to Coho salmon, as well as the impacts to other Endangered species. Thus, money damages would be inadequate, which favors the granting of equitable relief in the form of a preliminary injunction. (*Dept. of Fish and Game,* 8 Cal.App.4th at 1565.)

In fact, the federal courts, which apply virtually the same standard for injunctions as state courts (*Earth Island Inst. v. U.S. Forest Service*, (9th Cir. 2003) 351 F.3d 1291, 1298), have held it is undisputed that "environmental injury, by its nature, can seldom be remedied by money damages and is often permanent or at least of long duration, i.e. irreparable." (*Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *People v. Department of Navy* (N.D. Cal. 1977) 431 F. Supp. 1271, aff'd (9th Cir. 1980) 624 F. 2d 885 (pollution which violates environmental law "is, by definition, presumptively significant and irreparably harmful to health and welfare.").) While the *Amoco* court denied the requested preliminary injunction, they did on the grounds that the environmental injury was "not at all probable." (*Amoco,* 480 U.S. at 545.) However, as explained above and confirmed in writing by the Department, environmental injury in this case is certain.

3. Any Potential Harm to Intervernor Miners Should Not Be Considered By the Court, As Plaintiffs Do Not Seek An Injunction to Restrain Them and any Harm Can Be Mitigated Though Employing Alternate Methods to Prospect for Gold.

The requested preliminary injunction does not seek an injunction against the Intervenors and therefore any potential harm to them from the grant of the injunction should not be entertained by the Court. However, should the Court take into consideration their harm, then the Court should still determine that the balance strongly tips in favor of protecting the environment – particularly Endangered species, which the Department has expressly determined experience deleterious impacts from suction dredge mining. When there are viable, non-destructive alternative methods to prospect for gold – such as panning and non-hydraulic sluices - the Court should find that the availability of these methods mitigates any of the miner's harm down to a negligible level. The injunction relief, should Plaintiffs ultimately prevail, is also temporary and only lasts until the Department completes its court ordered CEQA review and more protective regulations are in effect.

III. THE COURT SHOULD WAIVE BOND OR IMPOSE A NOMINAL BOND

Plaintiffs respectfully request that the Court waive the bond requirement or, in the alternative, require a nominal bond. CCP section 529 requires that the party seeking a preliminary injunction provide an undertaking or bond pending a decision on the merits of the case. The purpose of the bond requirement is to protect the defendant from financial loss resulting from the preliminary injunction, in case the injunction is later found to have been granted in error. (*Associates Capital Services Corp. v. Security Pac. Nat. Bank* (1979) 91 Cal.App.3d 819, 824.) The trial court's function in determining the sufficiency of a bond or undertaking "is to estimate the harmful effect that the preliminary injunction is likely to have on the restrained party, and to set the undertaking at that sum." (*Abba Rubber Co. v. Seaquest* (1991) 235 Cal.App.3d 1, 14.)

In the present action, the Department would suffer either no or nominal financial harm should the injunction be granted and, thus, a bond waiver or a nominal bond is warranted. The preliminary injunction sought would enjoin the Department from using General Fund resources to subsidize an admittedly unlawful and environmentally destructive program. The injunction

would not impact lawful activities that are protective of the environment, such as the environmental review and rulemaking that it is currently under Court Order to perform.

In *Mangini v. J.G. Durand*, the court suggested that it may be appropriate to follow federal cases allowing a bond waiver or nominal bond in environmental cases in which a bond would effectively "deny access to judicial review." (*Mangini v. J.G. Durand* (1994) 31 Cal.App.4th 214, 217 citing, *People v. Tahoe Reg. Pl. Agency* (9th Cir. 1985) 766 F.2d 1319, 1325; see also *City of So. Pasadena v. Slater* (C.D.Cal. 1999) 56 F.Supp.2d 1106, 1148 ("courts routinely impose either no bond or a minimal bond in public environmental cases").) The Court found that the "federal rule is based on the perception that the public interest in preserving the environment pending a hearing on the merits is more significant than the defendant's economic interest." (*Mangini,* 31 Cal.App.4th at 218.)

In *Mangini*, the Court denied the waiver because the Plaintiff was a for-profit entity and no appreciable financial hardship would occur should a bond issue. In the present case, however, the Plaintiffs are individual citizens, a Native American Tribe and non-profit organizations. The lawsuit is brought to protect the public fund and the environment. None of the Plaintiffs stand to financially benefit from the action and none have the financial resources for a sizable bond. Therefore, the imposition of a bond would effectively deny access to judicial review of the Department's admittedly unlawful program. Furthermore, Plaintiffs Karuk Tribe, PCFFA and many others have made multiple attempts to address the matters in this injunction in administrative and legislative forums – to no avail. Judicial recourse is clearly the only viable option, and requiring a substantial bond would deny them judicial review and would be unjust.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enjoin the Department from spending any General Fund money on any activity that allows suction dredge mining under the Department's current regulations (14 California Code of Regulations §§228, 228.5) until the case can be heard on its merits.

Respectfully submitted,

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