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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

PUBLIC LANDS FOR THE PEOPLE, INC., a California 501 C-3, non-profit corporation; GERALD E. HOBBS; PATRICK KEENE; KEENE ENGINEERING CO., INC., a California corporation; ROBERT HAIDUCK; TERRY STAPP; DEE STAPP; DAVID De COSTA; JAMES GREGORY LEE; MIKE HOLT; TODD BRACKEN; SHANNON POE; and DAVID RICHARD, Plaintiffs, v. STATE OF CALIFORNIA; ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF FISH & GAME; and DONALD KOCH, IN HIS OFFICIAL CAPACITY AS DIRECTOR, CALIFORNIA DEPARTMENT OF FISH & GAME; and DOES 1-20, Defendants.	CIVIL ACTION NO.: 2:09-CV-02566-MCE-EFB **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Date: February 25, 2010 Time: 2:00 P.M. Judge: Honorable Morrison C. England, Jr. Courtroom: **7**

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MEMORANDUM IN SUPPORT

I

INTRODUCTION

This case presents a classic conflict between prospectors, miners who hold unpatented or patented mining claims on Federal lands pursuant to the mining laws of the United States, and the State of California, Department of Fish and Game ("DF&G"). Until recently, DF&G issued permits for vacuum and suction dredge prospecting and mining on such claims for rivers, streams, and waterways in the State of California running through such Federal mining claims and estates, and unclaimed Federal lands open to prospecting and mining.

Beginning on August 6, 2009, with the enactment by the State of California of SB 670 [California Fish and Game Code §5653.1] there was no longer suction dredge mining in the waters of the State, including on Federal mining claims. (A copy of SB 670 [California Fish and Game Code §5653.1] is attached hereto as Exhibit "A") This had the effect of prohibiting vacuum and suction dredge mining and prospecting in the State of California on all Federal mining claims and lands, and unclaimed lands open to location and entry under the United States mining laws, and unlawfully prohibited the utilization and development of mining claims and mineral estates in California. This unlawfully affected and unconstitutionally burdened interstate and foreign commerce, since many of the prospectors, and mining claim and mineral estate owners, are non-residents of California who prospect or work their claims and mineral estates in California with vacuum and suction dredges. In addition, gold retrieved by suction dredge mining is made into jewelry, and sold in interstate and foreign commerce [Declaration of Todd Bracken]. This affected not only California residents who are mining claim owners, prospectors and miners, but also non-resident mining claim owners and lessees, prospectors and

miners who purchased non-resident permits from DF&G in order to engage in vacuum and suction dredge mining in the State of California. [Declarations of Jim Aubert and Charles Lassiter] This also had the effect of stopping the sale of equipment and accessories for vacuum and suction dredge mining both within and without the State of California. This placed an unlawful, unconstitutional, and undue burden and restriction on interstate and foreign commerce in the sale of the aforesaid mining equipment and accessories. [Declaration of Patrick Keene]

The California DF&G asserts authorization to issue permits for vacuum and suction dredge mining in the State of California, even when such mining occurs on Federal lands and is pursuant to the mining laws of the United States. California Fish and Game Code § 5653 *et seq.*; California Code of Regulations 14 CCR § 228. Waters within the boundaries of Federal lands, including National Forests and lands within the jurisdiction of the Bureau of Land Management (BLM) may be used for mining. 16 U.S.C. § 481. The refusal of DF&G to issue permits for vacuum and suction dredge mining, pursuant to California legislative mandate, on Federal mining claims, and the cancellation of all such permits previously issued, is but the latest attempt to stop suction dredge mining in California. This long and tangled history has been set forth in Plaintiffs' Complaint.

For Plaintiff Public Lands for the People, Inc. ("PLP"), and its members, as well as all other Plaintiffs, suction dredge prospecting and mining in the rivers, streams, and waterways of California is not recreational. [Declarations of Gerald Hobbs and Patrick Keene] It is an important economic endeavor that has a direct economic impact on family finances, business finances, and in these hard economic times, often is the difference between having to choose whether to put gas in the car, or buy food or medicine for the family. [Declarations of Gerald Hobbs, Patrick Keene and Myrna Karns] For PLP and its members, and all other Plaintiffs,

suction dredge prospecting and mining is not merely a question of having "fun". Prohibiting suction dredge mining to prospectors and miners, who are Federal mineral estate grantees, forces them to face serious economic hardship. With a perilous economy, being able to sell even an ounce of gold for over $1,110.00 per ounce makes a substantial difference as to the economic choices a family has regarding basic necessities. [Declaration of Gerald Hobbs, Jim Aubert, Robert Haiduck, Mike Holt, and Steven Tyler] In addition, prohibition of suction dredge mining has made worthless the substantial sums invested in mining claim equipment in order to engage in suction dredge mining. [*See* Declarations of Jim Aubert, Robert Haiduck, Daniel Lewis, Richard Gierak, Gilbert Blevins and Shannon Poe]

Prospecting, placer mining, suction dredge mining, and granted rights of way associated with mining and prospecting activities, all of which are mining operations pursuant to the mining laws and the *Code of Federal Regulations* ("*CFR*"), and all of which have valid pre-existing rights pursuant to the mining laws and *CFR*s, are traditionally common in the State of California, and done in accordance with the rules and customs of miners. Suction dredge mining is the only reasonable, economical, and environmentally sound method for extracting precious metals in commercially significant amounts from the rivers, streams, lakes, and waterways in California. [*See,* Declaration of Gerald E. Hobbs; Declaration of Patrick Keene]

This has direct and immediate effect upon mining claim owners, prospectors and miners in California, in that they need mechanized methods of mining, including vacuum and suction dredge mining, in the rivers, streams, lakes, and waterways of California in order to make it economically feasible to prospect and mine in those rivers, streams, lakes, and waterways, and to engage in other associated mining activities therein. DF&G asserts that permits are needed in order to engage in vacuum or suction dredge mining anywhere in the State of California,

whether such mining occurs on private, State, or Federal lands. SB 670 prohibits the only reasonable environmentally sound and economic means of obtaining any valuable minerals from the waterways of California.

SB 670 adds to the California Fish and Game Code ("CF&GC") a newly enacted Section 5653.1. CF&GC § 5653 prohibits the use of any vacuum or suction dredge equipment by any person in any river, stream, or lake in California without a permit issued by DF&G. On average, DF&G has issued approximately 3,200 suction dredge mining permits to California residents every year for the last fifteen (15) years [Publication, 8-12-09, DF&G, *Suction Dredge Permitting Program Subsequent Environmental Impact Report (SEIR)*]. It has been estimated that suction dredge miners, resident and non-resident, spend approximately $60,000,000 per year in the rural counties of California on supplies, fuel, food, camping, equipment, hardware, lodging, goods and services. [Declarations of Gerald Hobbs and Patrick Keene]

A violation of the permit requirement is a misdemeanor punishable by a fine of up to $1,000.00 and six months in jail. CF&GC § 5653 *et seq.*; 14 CCR § 228 *et seq*. The Plaintiffs, as well as other miners and prospectors, are concerned that they will be cited for a criminal violation by DF&G should they attempt to engage in vacuum or suction dredge mining, as well as any other motorized mining use. [Declaration of Patrick Keene]

SB 670 designated the issuance of permits to operate vacuum or suction dredge equipment to be a "project" under CEQA. SB 670 suspended the issuance of permits, including permits issued prior to the passage of SB 670, and any mining pursuant to such valid permit, until the DF&G has completed an environmental impact report for the "project" as ordered by the Court in *Karuk Tribe et al. v. California Department of Fish and Game, et al.*, Alameda County Superior Court, Case No. RG 05211597 See §5653.1(b). DF&G has stated that it will

not complete the Court ordered environmental review of its permitting program until, at the earliest, in the late summer of 2011, if then.

SB 670 prohibits the use of any vacuum or suction dredge equipment in any river, stream, or lake, for in-stream mining purposes, until the director of DF&G certifies to the Secretary of State that: 1) The DF&G has completed the environmental review of its existing vacuum or suction dredging regulations as ordered by the Court; 2) DF&G has transmitted for filing with the Secretary of State, a certified copy of new regulations as necessary; and 3) the new regulations are operative. §5653.1(b) Because of expected continued litigation regarding any new regulations, they may not become operative in 2011, or many years thereafter. There is no time frame set for this cascade of contingencies, and there is no realistic expectation that they will ever be completed within the next decade, if then.

In trying to explain why the completion of the environmental impact report will take so long, DF&G [Publication, 8-11-09, DF&G, *Frequently Asked Questions – Existing Suction Dredge Permits*] has stated that:

> "**Q: When will the EIR be completed?** DFG is preparing a Subsequent Environmental Impact Report (EIR) to conduct the court-ordered review. DFG estimates at this point that it will complete and certify the Subsequent EIR (and updates to the existing regulations, if necessary) after a series of public meetings and other opportunities for public comment and review by late summer 2011. The environmental review and regulation processes are governed by the California Environmental Quality Act and the Administrative Procedures Act, respectively. The time line is driven by the requirements of these laws."
>
> "**Q: Why is this process going to take so long?** DFG has already begun the environmental review necessary to analyze the current regulations; this was last done in 1994. The review process will be complex and lengthy given the statewide scope of the analysis and the time that has passed since the last review. In addition to the detailed written analysis prepared by DFG in coordination

> with the State Water Board, the review process will also include several opportunities for public involvement, both via public meetings and through solicitation of written comments and suggestions. Initial public meetings to discuss the scope of the environmental analysis are currently being planned for November 2009 in Fresno, Sacramento and Redding. Additional details, including the time and place of the meetings, will be posted on the DFG Web site, www.dfg.ca.gov, as they become available."

Although the court-ordered review for the EIR is only for the Klamath, Scott, and Salmon Rivers, DF&G stated that they must conduct a statewide review for the EIR. DF&G has stated that:

> "Based on the information DFG collected from interested parties, DFG informed the Alameda County Superior Court in early 2008 that DFG could not proceed with the court-ordered environmental review in reliance on an addendum to the 1994 EIR. DFG informed the court at the same time that more than minor additions or changes to the 1994 EIR would be necessary and that statewide issues would need to be addressed in a subsequent environmental document in order to fulfill DFG's obligations under CEQA. As a result, DFG informed the Alameda County Superior Court that it intended to prepare a subsequent or supplemental environmental impact report that would be statewide in scope to comply with the December 2006 Court Order."

Judge Bonnie Sabraw in the Karuk case, supra, refused to recognize an "urgency" situation, and suspend suction dredge mining prior to the completion of the EIR. SB 670 overturned Judge Sabraw's Order without any basis in fact, except political expediency. SB 670 was declared to be an "urgency statute". This was done without support of any credible evidence whatsoever, and without the completion of any environmental impact report or other scientific reviews:

> "the legislature finds that suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state, and, in order to protect the environment and the

> people of California pending the completion of a court-ordered environmental review by the Department of Fish and Game and the operation of new regulations, as necessary, it is necessary that this act take effect immediately." § 5653.1, Sec. 2.

Thus, the legislative finding is dependent upon the completion of an environmental impact review ("EIR") that is yet to take place, and may never take place. If an EIR ever does take place, it will most likely affirm that not one fish has ever been killed or harmed through present day suction dredge mining; that such mining causes no discernable harm to the natural environment or the water resources of the State of California; and is, in fact, beneficial to the environment and natural resources of the State of California, fish habitat, and other biota. The purported legislative finding is without basis in fact, is a political act, not a scientific conclusion, and is contrary to the scientific evidence that was available to the legislature.

DF&G will not issue refunds for those who have purchased permits prior to the passage of SB 670, since SB 670 does not provide for any such refunds. *See also* [Declarations of Richard Gierak and Rob Goreham]

DF&G has stated that vacuum or suction dredge equipment lawfully placed in the waters of California prior to the passage of SB 670 must be immediately removed pursuant to CF&GC § 5563. No compensation is to be provided by the DF&G or SB 670 to any mining claim owner, miner or prospector for the expense of purchasing such equipment, lawfully placing such equipment in the State's waters, or the cost of having to remove such equipment from the waters, or paying for a permit to suction dredge mine. [Declarations of Richard Gierak, Todd Smith, Shannon Poe, Myrna Karns, Gerald Hobbs, Todd Bracken, and Daniel Lewis] The miners of necessity must pay taxes on their now worthless claims. [Declaration of Richard Gierak]

The suction dredge community supports many other businesses in gold bearing areas which are in danger of economic failure. Many jobs are being lost due to the loss of tourism that the passage of SB 670 has engendered. Many campgrounds are empty along rivers and mining areas across California. Many businesses are seasonal, including campgrounds, hotels, restaurants, service stations, and grocery stores. [Declarations of Gerald Hobbs, Patrick Keene and Myrna Karns] Many of these businesses are located in severely economically depressed areas. These business owners rely on small scale suction dredge miners, prospectors, and tourism in order to survive economically. [Declaration of Gerald Hobbs] Many of the counties in Northern California, in the gold bearing areas, are economically depressed, having very hard economic times, and rely on income from suction dredge miners. [Declaration of Gerald Hobbs] *See* Resolutions of Siskiyou and El Dorado Counties. [Exhibits B and C] [Articles, Siskiyou Daily News, Yreka, CA January 18th and 19th, 2010, Exhibit D] SB 670 is adding to this economic suffering, eliminating jobs, and creating a loss of tax base for these areas and for the State of California. [*See* Declarations of Gerald Hobbs and Patrick Keene]

Californians, and people who come from other states to visit California, spend an average of $3,200.00 per month in local economies as of a study made in 1994. In 2010, because of 15 years of inflation, the amount spent is substantially higher. Californians, and people from other states, purchase special vehicles such as trucks, campers, trailers, quads, and recreational vehicles to prospect and mine for gold in California. [Declarations of Gerald Hobbs and Patrick Keene]

Since the passage of SB 670, many mining claims and mineral estates will lose considerable value because their claim owners cannot mine them effectively, and the counties where they are situated will be compelled to reassess the value of their claims. This will create

a large loss to County and State tax basis, and will ultimately curtail governmental services. [Declarations of Gerald Hobbs and Patrick Keene]

II

ARGUMENT

DF&G claims that miners and prospectors engaged in suction dredge mining in the waterways of California, whether on private, State, County or other local lands, and most important on Federal lands of whatever nature, require a permit which they will issue. Beginning in August 2009, the State of California, as set forth above, placed a total prohibition on suction dredge mining anywhere in California including mining claims on Federal land. DF&G, needless to say, will not issue any permits for suction dredge mining anywhere in California.

Without conceding DF&G's right to issue permits or regulate suction dredge mining on Federal lands, Plaintiffs do not focus in this litigation on the extent of any such regulation, whether by permit or otherwise, for the elemental reason that the State of California, through an open ended "moratorium" has effectuated an absolute prohibition of suction dredge mining on Federal lands. SB 670 provides no exception to the complete ban on suction dredge mining on any lands in California, including mining operations for valid mining claims and mineral estate holders on Federal lands.

SB 670 does not allow DF&G to issue a programmatic use permit for suction dredge mining or prospecting, or in any way grant any variance. This absolute prohibition on suction dredge mining or prospecting anywhere in the State of California, upon any and all lands of whatever nature, creates an irreconcilable conflict with Federal mining law, the rights of

prospectors, and the rights of private property for valid mining claims and mineral estate holders on Federal land.

A. THE FEDERAL MINING LAWS PREEMPT SB 670

The Supremacy Clause of the United States Constitution states that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
> U.S. CONST., Art VI, Cl. 2.

The Supremacy Clause elevates the Federal law above that of the States. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 92-93, 6 L.Ed. 23 (1824); *Jersey Cent. Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1110 (3rd Cir.1985). State law may be preempted by Federal law:

> "If Congress evidences an intent to occupy a given field, any State law falling within that field is preempted. If Congress has not entirely displaced State regulation over the matter in question, State law is still preempted to the extent it actually conflicts with Federal law, that is, when it is impossible to comply with both State and Federal law, or where the State law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."

California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 581, (1987) quoting *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 248 (1984) (citations omitted). *See also*, *Duncan Energy Co. v. U.S. Forest Service*, 50 F.3d 584, 591 (8th Cir.1995).

The standards for determining whether or not a Federal law has pre-emptive effect are well developed. There are three types of pre-emption: (1) express pre-emption; (2) field pre-emption; and (3) conflict pre-emption. *Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir.2003). A

State or local law is expressly pre-empted if "Congress enacts an explicit statutory command that State [or local] law be displaced." *Id.* "Field preemption exists where the scheme of Federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary State [or local] regulation." *Id.* (citations omitted). Finally, "[c]onflict preemption is found where compliance with both Federal and State [or local] regulations is a physical impossibility, . . . , or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citations omitted).

If Congress intends to occupy a given field, any State law that falls within that "field" is preempted. *See, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983). Alternatively, even if Congress has not occupied a given field, State law is still preempted to the extent it actually conflicts with Federal law. *See, Florida Lime and Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). A State law "actually conflicts" with Federal law when it is impossible to comply with both State and Federal law, or when compliance with State law would frustrate the purpose and objectives of Federal law. *See, Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *Gibbons v. Ogden*, 22 U.S. 1 (1824). Any State legislation which frustrates the full effectiveness of Federal law is rendered invalid by Supremacy Clause" regardless of the underlying purpose of its enactors, *Perez v. Campbell*, 402 U.S. 637, 651-52, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971).

In addition, even in the absence of a direct conflict between State or Federal law, a conflict exists if the State law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

B. SB 670 VIOLATES THE PROPERTY CLAUSE OF THE U.S. CONSTITUTION

The Property Clause of the United States Constitution (Article IV, Section 3) provides that Congress has the sole power to dispose of and make regulations respecting properties belonging to the United States. SB 670 operates as a veto of Congressional exercise of that power regarding mineral development on Federal lands. *Ensco Inc. v. Dumas*, 807 F.2d 743 (8th Cir.1986) (Federal Resources Conservation and Recovery Act preempted a County ordinance banning storage or treatment of hazardous wastes).

Under the Constitution's Property Clause, Congress's power over Federal land is "Without limitations." *Kleppe v. State of New Mexico*, 426 U.S. 529, 539 (1976). The Property Clause authorizes an exercise of complete Federal power over Federal land located within the State. *Id.* at 540. Congress has plenary power to regulate Federal land under the Property Clause, and Federal law enacted under the Property Clause overrides conflicting State laws. *See, Kleppe v. New Mexico, Id.* at 541-43 (1976).

Under the Supremacy Clause, Federal law overrides conflicting State law that purports to regulate Federal land. *Id.* at 543. Any other rule would improperly "place the public domain of the United States completely at the mercy of State legislation." *Id.*

Mineral rights are ownership in land. *See, e.g., United States v. ShoshoneTribe of Indians of Wind River Reservation in Wyo.*, 304 U.S. 111, 116, 58 S.Ct. 794, 82 L.Ed. 1213 (1938) (with respect to question of ownership, "[m]inerals . . . are constituent elements of the land itself"); *British-American Oil Producing Co. v. Bd. of Equalization of State of Mont.*, 299 U.S. 159, 164-65, 57 S.Ct. 132, 81 L.Ed. 95 (1936) (finding a mineral estate an estate in land);

Texas Pac. Coal & Oil Co. v. State, 125 Mont. 258, 234 P.2d 452, 453 (1951) ("[l]ands as a word in the law includes minerals").

Federal mining claims constitute "property in the fullest sense of the word." *Bradford v. Morrison*, 212 U.S. 389, 394 (1909) (quoting *Forbes v. Gracey*, 94 U.S. 762, 767 (1877)); *see also, United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir.1999) (discussing scope of legal interests represented in mining claims. Miners hold a "distinct but qualified property right" with "possessory title"). Federal mining claims are "private property". *Freese v. United States*, 639 F.2d 754, 757, 226 Ct.Cl. 252 *cert. denied*, 454 U.S. 827, 102 S.Ct. 119, 70 L.Ed.2d 103 (1981); *Oil Shale Corp. v. Morton*, 370 F.Supp. 108, 124 (D.Colo.1973).

Owners of Federal mining claims are not mere "social guests" who can be "shooed out the door." *United States v. Shumway*, *supra* at 1103. Arbitrary seizure of the mining claims will give rise to very substantial "takings" liability for the State of California, *see, e.g., United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (liability for five-month seizure), if indeed the seizure itself is not invalid for conflict with Federal mining law, *see, e.g., South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998).

The purpose of the Mining Act is to encourage mining on Federal lands. *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir.1981); *see also, United States v. Goldfield Deep Mines Co.*, 644 F.2d 1307, 1309 (9th Cir.1981), *cert. denied*, 455 U.S. 907, 102 S.Ct. 1252, 71 L.Ed 445 (1982). The locator of a mining claim has a possessory title thereto and the right to the exclusive possession and enjoyment. This includes the right to work the claim, to extract the minerals, the right to the exclusive property in such minerals, the right to use all the resources within the boundaries of the claims, as well as the right to defend his possession. (30 U.S.C. §§ 22 and 26). Unpatented mining claims are "property" in the highest sense of such term. (30

U.S.C. §§ 22 and 26). *Wilber v. U.S. ex rel. Krushnic*, 280 U.S. 306 (1930); *U.S. v. Etcheverry*, 20 F.2d, 193 (CA 10th 1956),

HR 365, Mining Act of 1866, 39th Congress Sec. 1 states:

> "That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local custom or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

The Mining Act (30 U.S.C.A. § 22) clearly states:

> "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

National Mineral Policy Act (30 U.S.C.A. § 21(a) states:

> "The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of miner waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities."

Multiple-Surface Use Act (30 U.S.C.A. § 612(b) & 615). Section 612(b) clearly states:

> "Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefore, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefore, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto…"

The intent of the Mining Laws and the continuing intent of Congress is simple and self-evident: The general policy of the mining laws is to promote widespread development of mineral deposits and to afford mining opportunities to as many persons as possible (30 U.S.C. § 21(a))

A State's legislative power is not unfettered. *Vick Wo v. Hopkins*, 118 U.S. 220, 6 S.Ct. 1064 (1986). The *Vick Wo* Court held that such exercise of legislative power must not be in conflict with established Federal law, or basic constitutional rights and privileges, "particularly those having relation to the liberty of the subject or the right of private property." *Id.* at 227

C. STATE PERMIT LAWS CANNOT INVALIDATE FEDERAL MINING RIGHTS

In the land use context, courts have long invalidated State permit regimes that purport to assume control over Federal land because such laws invariably frustrate Federal law. Almost 60 years ago, the Supreme Court rejected Iowa's attempt to impose additional State permit requirements for proposed dam on a Federal riverway that Federal law governed. *See, First*

Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 U.S. 152, 166-67 (1946). The Court found that "[a] dual final authority, with a duplicate system of State permits and Federal licenses required for each project, would be unworkable" and that compliance with these dual requirements "would be nearly as bad." *Id.* at 168. In the land use context, Federal law preempts any State law (or permit regime) that usurps ultimate decision-making authority over Federal land, or that effectively grants the State veto power over how the land may be used.

In *Butte County Water Co. v. Baker*, 196 U.S. 119, 49 L.Ed. 409, 25 S.Ct. 211 (1905), the State of Montana enacted regulations governing the location of mining claims which supplemented Federal law on the same subject. The Court upheld the validity of the state regulations because they did not conflict with the Federal law. In so doing, however, the Court stated:

> "State statutes in reference to mining rights upon the public domain must, therefore, be construed in subordination to the laws of Congress, as they are more in the nature of regulations under these laws than independent legislation. State and territorial legislation, therefore, must be entirely consistent with the Federal laws, otherwise it is of no effect. The right to supplement Federal legislation, conceded to the state, may not be arbitrarily exercised; nor has the state the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the congressional laws." *Id.* at 412.

In *State ex rel. Andrus v. Dick*, 554 P.2d 969 (Idaho 1976) the State Board of Land Commissioners sought to enjoin a mining operation on Federal unpatented claims within a National Forest until a mining company first obtained a State permit. The Court held:

> "Where there is a direct collision between State and Federal legislation our task is simple, the Federal legislation would preempt State legislation by reason of the Supremacy Clause, United States Const. Art. VI, clause 2 (citations omitted).

> However, State regulation which is more stringent than that under the Federal legislation in not the type of conflicting legislation described by this standard. . . . On the other hand, where a right is granted by the Federal legislation, State regulation which rendered it impossible to exercise that right would be in conflict." *Id.* at 974.

The Court noted, however, that the reclamation requirements of the State permit " . . . would be unenforceable to the extent they rendered it impossible to mine the lode deposits." 554 P.2d at 975. *See also, Shaw v. United States,* 740 F.2d 932, 940 (Fed. Cir.1984).

The Court concluded that local regulations which supplement Federal law would not be preempted, but "provisions of the Idaho Act would be unenforceable to the extent they rendered it impossible to mine the lode deposit." *Id.* at 975. The Court concluded by finding there was no taking of private property requiring compensation since, "[t]he legislature does not seek to ban dredge mining but merely to regulate it." *Id.* at 981. *See also, California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 107 S.Ct. 1419 (1987).

In *Brubaker v. El Paso County* 652 P.2d 1050 (Colo. 1982), holders of unpatented mining claims on Federal land sought to conduct mineral exploration. After securing the necessary Federal approvals the claim holders applied for a County special use permit from El Paso County. Following hearings, the County Board denied the permit application. On appeal the County District Court upheld the Board action. The Supreme Court of Colorado reversed:

> "The Board seeks not merely to supplement the Federal scheme, but to prohibit the very activities contemplated and authorized by Federal law. Such a veto power is not consistent with the Supremacy Clause." *Id.* at 1056.

The Court held that the attempt by the Board to "prohibit" the drilling operations,

> ". . . reflect an attempt by that County to substitute its judgment for that of Congress concerning the appropriate use of these lands. Such a veto power does not relate to a matter of peripheral

> concern to Federal law, but strikes at the central purpose and objectives of the applicable Federal law. *Id.*

The Court concluded that the Board's application of the zoning ordinance prohibited a use authorized by Federal law in violation of the Federal preemption doctrine. *Id.* at 1054. See also *Colorado Mining Association V. Board of County Commissioners* 199 P. 3rd 718, 723 (Colorado 2009)

In *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir.1979), Ventura County, California, adopted a zoning ordinance which prohibited oil and gas exploration and development unless a County Open Space Use Permit was obtained. Gulf Oil refused to secure the requisite permit. The County brought a declaratory judgment action seeking to enjoin Gulf's activities. The District Court denied the relief and dismissed the action. On appeal, the Ninth Circuit Court of Appeals affirmed, holding the U.S. Supreme Court's *Kleppe* decision, *supra*, to be dispositive. It held that "in light of *Kleppe*, the renewed attempt to restrict the scope of congressional power under the Property Clause in the present case is legally frivolous." *Id.* at 1083. The Court further stated that ". . . the local ordinances impermissibly conflict with the Mineral Lands Leasing Act of 1920 and on this basis alone they cannot be applied to Gulf." *Id.* (Emphasis added). The Court in *Ventura County* reviewed the extensive environmental regulation of drilling activities required in the Federal permitting process:

> "Despite this extensive Federal scheme reflecting concern for the local environment as well as development of the nation's resources, (Ventura County) demands a right of final approval . . . The Federal Government has authorized a specific use of Federal lands, and Ventura cannot prohibit that use, **either temporarily or permanently**, in an attempt to substitute its judgment for that of Congress." *Id.* at 1084. (Emphasis added).

The Court in *Ventura County* characterized the local ordinance as nothing less than a "power struggle between local and Federal governments" concerning appropriate use of the public lands, and concluded that, ". . . the States and their subdivisions have no right to apply local regulations impermissibly conflicting with achievement of a congressionally approved use of Federal lands . . ." *Id.* at 1084 and 1086.

SB 670 precludes miners and prospectors from conducting surface metal mining operations within Federal lands, contrary to Federal law which encourage and permit such development. On its face SB 670 directly and impermissibly conflicts with Plaintiffs' rights under Federal mining laws by prohibiting the very activities which are permitted by those laws. *See, Blue Circle Cement, Inc. v. Board of County Commissioners,* 917 F.Supp.1514 (N.D. Okl. 1995) (Federal Resource Conservation and Recover Act preempted County ordinance which banned the recycling of hazardous waste fuels); *Bateman v. Gardner,* 716 F.Supp.595 (S.D. Fla. 1989) (Federal Magnuson Fishery Conservation and Management Act preempted Florida statute insofar as it prohibited shrimp fishing where Federal regulations allowed it).

SB 670 impermissibly conflicts with the 1872 General Mining Law ("GML"), as amended, 30 U.S.C. §§ 22-54.; the Stock Raising Homestead Act of 1916, 43 U.S.C. § 291 (1976); and the 1976 Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.* (1976) which provide that all valuable mineral deposits in lands belonging to the United States shall be "free and open" to mineral development. These Federal laws cannot be reconciled with SB 670, which completely closes Federal lands in California to suction dredge mining. Compliance with both Federal mining laws and SB 670 is impossible. *Gade v. National Solid Wastes Mgt. Ass'n.*, 505 U.S. 88, 112 S.Ct. 2374, 2383 (1992). The 1872 General Mining Law recognizes only those local laws that are "not inconsistent" or "not in conflict" with the laws of

the United States (30 U.S.C. § 22 and 26 respectively). SB 670 is totally inconsistent with, and directly conflicts with, the Federal mining laws and regulations which authorize and promote mineral development on Federal lands. Congress did not intend to allow a local ordinance to completely prevent the exercise of Federal rights. *Southeastern Fisheries Ass'n v. Martinez*, 772 F.Supp.1263 (S.D. Fla. 1991).

SB 670 does not merely regulate the means or method of mining on Federal lands, it totally prohibits the extraction of mineral resources from Federal lands by suction dredge mining, in conflict with Federal mining law. SB 670 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as expressed in numerous Federal mining laws. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). SB 670, therefore, impermissibly conflicts with clearly stated Federal policy regarding mining.

Federal lands are subject to the Mining Act of 1872, 30 U.S.C. § 22 *et seq.* Ultimately, this law authorizes the mining of Federal lands upon compliance with certain requirements:

> "Under the Mining Act of 1872 [citations omitted], a private citizen may enter Federal lands to explore for mineral deposits. If a person locates a valuable mineral deposit on Federal land, and perfects the claim by properly staking it and complying with other statutory requirements, the claimant "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, [citations omitted], although the United States retains title to the land."

California Coastal Commission v. Granite Rock, 480 U.S. at 575.

State and local laws which prohibit the mining of Federal lands, rather than reasonably regulate them as is authorized by *California Coastal Commission*, 480 U.S. at 589, thus directly prohibiting an act which Federal law authorizes, are void. It is impossible to exercise the right to mine Federal land as authorized by the Federal law, and at the same time be in compliance

with local laws which prohibit mining. Such laws stand "as an obstacle to the accomplishment of the full purposes and objectives of Congress" established by the Federal mining laws, and are preempted. *Ibid*; *see also, Duncan Energy Co. v. U.S. Forest Service,* 50 F.3d at 584, 591 (8th Cir.1995) (North Dakota law allowing mineral estate owner to have unrestricted access to surface estate after twenty days notice held to be preempted by Federal laws protecting Federal lands).

Local ordinances prohibiting the mining of Federal land have consistently been found to be preempted. *Elliott v. Oregon International Mining Co.*, 654 P.2d 663 (Ore, 1982), involved a County ordinance prohibiting surface mining within certain areas of the County, and another ordinance excluding mining as a permissible use of the property at issue. The Oregon Supreme Court stated:

> "Although we held in *State ex rel. Cox v. Hibbard*, [570 P.2d 1190 (1977)], that Federal mining laws were not intended to preempt State regulation, the Grant County ordinances here at issue do not simply supplement Federal mining law, as did the State regulations in *Hibbard*. Rather, they completely prohibit a mining claimant from conducting any surface mining on patented land . . . Accordingly, Grant County cannot prohibit conduct which Congress has specifically authorized. That is the meaning of the Supremacy Clause."

Elliott, 654 P.2d at 667-668.

In *California Coastal Commission v. Granite Rock, supra,* 480 U.S. at 586-587 the United States Supreme Court stated:

> "In the present case, the Coastal Commission has consistently maintained that it does not seek to prohibit mining of the unpatented claim on national forest land. See 768 F.2d, at 1080 ("The Coastal Commission also argues that the Mining Act does not preempt state environmental regulation of federal land *unless the regulation prohibits mining altogether…*") (emphasis supplied); 590 F.Supp., at 1373 ("The [Coastal Commission]

> seeks not to prohibit or 'veto,' but to regulate [Granite Rock's] mining activity in accordance with the detailed requirements of the CCA…. There is no reason to find that the [Coastal Commission] will apply the CCA's regulations so as to deprive [Granite Rock] of its rights under the Mining Act"); Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment in No. C-83-5137 (ND Cal.), pp. 41-42. ("Despite Granite Rock's characterization of Coastal Act regulation as a 'veto' or ban of mining, Granite Rock has not applied for any coastal permit, and the State … has not indicated that it would in fact ban such activity…. [T]he question presented is merely whether the state can *regulate* uses rather than *prohibit* them." [Emphasis in Original]

In *South Dakota Mining Association v. Lawrence County,* 155 F.3d 1005 (8th Cir.1998), the United States Court of Appeals for the Eighth Circuit held that a County ordinance outlawing "surface metal mining" on Federal public lands was preempted by Federal law. *See, id.* 1011. The Eighth Circuit distinguished Granite Rock on the basis that the County Ordinance involved in *Lawrence County* was a "per se ban on all new or amended permits for surface metal mining within the area," rather than a facial challenge of permit requirements based on unidentified environmental conditions. *Id.* The Eighth Circuit emphasized the fact that "surface metal mining (was) the only practical way (anybody could) . . . actually mine the valuable mineral deposits located on Federal land in the area . . . ." *Id.* Suction dredge mining is the only "practical way" of mining the streams and rivers of California. [Declarations of Gerald Hobbs and Patrick Keene] The Eighth Circuit stated that the County ordinance had the same effect as a "de facto ban on mining in the area." *Id.*

In *Lawrence County*, the County had enacted an amendment to the local zoning laws by way of a ballot initiative. *See Id.* at 1007. The ballot initiative stated: "No new permits or amendments to existing permits may be issued for surface metal mining extractive industry projects in the Spearfish Canyon Area." *Id.* Approximately ninety percent of the land in the

Spearfish Canyon Area is Federal land. *See, Id.* Various mining interests challenged this ban on new or amended permits within the Spearfish Canyon Area on the ground "that Federal and State mining laws preempted the County ordinance banning surface metal mining . . . ." *Id.* at 1008. The County argued that the ordinance was not preempted because "the ordinance is a reasonable environmental regulation of mining on Federal lands", *Id.* at 1009.

The Court recognized that the County ordinance was preempted to the extent that it stood as an obstacle to the accomplishment of congressional purposes or objectives in conflict with Federal law. *See Id.* at 1009. The Court stated that the General Mining Law, "provides for the free and open exploration of (Federal) lands for valuable mineral deposits." *Id.* at 1010. The Court further stated that "the Congressional intent underlying (the GML) is to reward and encourage the discovery of economically valuable minerals located on (Federal) public lands." *Id. (citing, United States v. Coleman*, 390 U.S. 599 602 (1968)). The Court concluded that the purposes and objectives of Congress in enacting the General Mining Law:

> "(i)nclude the encouragement of exploration for the mining of valuable minerals located on Federal lands, providing Federal regulations of mining to protect the physical environment while allowing the efficient and economical extraction and use of minerals, and allowing State and local regulation of mining so long as such regulations are consistent with Federal mining law." *Id.*

The Eighth Circuit stated that the issue in *Granite Rock, supra*, was "relatively narrow: 'whether Congress has enacted legislation respecting this Federal land that would preempt any requirement that (the mining company) obtain a *California Coastal Commission* permit." *Id. (quoting, Granite Rock*, 480 U.S. at 581*)*.

The issue in *Lawrence County* was not as narrow as the issue decided in *Granite Rock*. The Eighth Circuit emphasized that they were not "confronted with uncertainty regarding what conditions must be met to obtain a permit for surface metal mining in the Spearfish Canyon Area," because the County ordinance prohibited the issuance of any new permits. *Id.* at 1011. The Eighth Circuit went on to describe the *Lawrence County* ordinance as "a per se ban on all new or amended permits for surface metal mining within the area." *Id.* The Court pointed out that the effect of the ban "is a de facto ban on mining in the area." *Id.* Crucially, the Court stressed the fact that "surface metal mining is the only practical way any of the plaintiffs can actually mine the valuable mineral deposits located on Federal land in the area." *Id.* This commercial necessity prohibits "a state environmental regulation that is so severe that a particular land use would become commercially impracticable." *Granite Rock*, 480 U.S. at 587. *Lawrence County's* ordinance had the effect of prohibiting the only commercially and economically viable means of mining on Federal land.

The Court stated that *Lawrence County's* ordinance's prohibiting the issuance of any new or amended permits is "a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the (GML)." *Lawrence County*, 155 F.3d at 1011. The Eighth Circuit further explained, "Congress has encouraged exploration and mining of valuable mineral deposits located on Federal land and has granted certain rights to those who discover such mineral. Federal law also encourages the economical extraction and use of these minerals." *Id.* The Court Characterized *Lawrence County's* ordinance as "prohibitory, not regulatory, in its fundamental character," *Id.*, and pointed out that the ordinance "completely frustrates . . . federally encouraged activities." *Id.* The Eighth Circuit stated that to allow a local government to prohibit a lawful use of Federal land that the Federal Government itself

permits and encourages, would "offend both the Property Clause and the Supremacy Clause of the Federal Constitution." *Id.* Therefore, the Eighth Circuit affirmed the District Court ruling and held that the ordinance was preempted by Federal law.

D. SB 670 PLACES AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE

Precious metals taken from the rivers, streams and waterways of California by suction dredge mining are used in interstate and foreign commerce. [See Declarations of Todd Bracken, Charles Lassiter, and Jim Aubert] The equipment sold for suction dredge mining in California have a direct and immediate effect on interstate and foreign commerce. [Declaration of Patrick Keene] Miners from out of state come into California and contribute to, and have a substantial effect, on the local economies, especially in the economically hard pressed rural areas of California. [See Declarations of Charles Lassiter, Jim Aubert, Gilbert Blevins, and Exhibits B, C and D]

SB 670, by its prohibition of suction dredge mining on federal mining claims in California, violates the Commerce Clause of the United States Constitution, Article 1, § 8, Cl. 3. SB 670 places an undue burden on interstate and foreign commerce *Cedric Kushner Promotions, Ltd. V. King*, 533 U.S. 158, 121 S.Ct. 2087, 2092 (2002) [Where some of mine's output was taken out of state, mine was enterprise engaged in interstate commerce.] The burden SB 670 places on miners, suppliers and equipment manufacturers who have to support themselves and their families by suction dredge mining, and the local economies that depend on suction dredge mining, far outweighs any local interest that the alleged protection of fish could possibly justify. This totally unequal burden, and unjustified prohibition of suction dredge mining, constitutes an undue burden on interstate and foreign commerce. *Blue Circle Cement,*

Inc. v. Board of County Commissioners Supra 917 F.Supp. at 1523 (N.D. Okl. 1995). Gerald Hobbs states in his declaration;

> "I have worked on, and am familiar with suction dredge studies. I have read and been familiar with them for many years as a part of my mining experience and education. I collected approximately 25 studies, regarding suction dredging, to provide to The Washington Alliance of Miners and Prospectors for a report they published on excerpts of these studies. (See Excerpts from Suction Dredge Studies, http://akmining.com/mine/excerpts/html, published by The Washington Alliance of Miners and Prospectors with additions by Steve Herschbach). These excerpts of studies do not find suction dredging to be harmful to the environment, fish, other marine life and biota, and in the long-term is beneficial to them."

Absolute prohibitions against the movement of commercial commodities in interstate commerce are disfavored and violative of the commerce clause. *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 202 U.S. 453, 58 S.Ct. 656 (1938).

The Commerce Clause also prohibits a state or local "statute [that] regulates evenhandedly to effectuate a legitimate local public interest if it imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'" *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970). "The extent of the burden on interstate commerce that will be tolerated will depend on the 'nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities" *Pike v. Bruce Church, Inc.*, s*upra*, 397 U.S. at 142, 90 S.Ct. at 847 (1970). The California DF&G already had regulations in place since 1994, which found suction dredge mining not deleterious to fish or other aquatic biota, as long as the regulations were adhered to. Since 1994 there have been no major changes in suction dredge mining or in the environmental conditions. [Declaration of Gerald Hobbs] The DF&G did not propose a ban on suction dredge

mining. SB 670 is totally a political product of the Karuk Tribe of California. The history of SB 670 is set forth in Plaintiffs' Complaint.

SB 670 has no rational basis in fact, and constitutes an impermissible burden on interstate and foreign commerce.

III

SB 670 CAUSES IMMEDIATE, CONTINUING, AND IRREPERABLE HARM

Plaintiffs have demonstrated a strong probability of success on the merits. The primary issue in this case is one of fundamental federal preemption over state statutory law prohibiting mining on federal lands, and involving substantial federal constitutional issues. The State of California challenges Congresses' right to control federal property involving mining on federal lands. SB 670 prohibits such mining on federal lands in the State of California. Such a serious federal constitutional question compels a finding that the potential for irreparable injury exists, and that the balance of hardships tip sharply in plaintiff's favor. *Sammartano v. First Judicial Dist. Court* 202 F3d 959, 973-974 (9th Cir. 2002); *see, e.g., Community House, Inc. v. City of Boise* 468 F3d 1118, 1134 (9th Cir. 2006). SB 670 causes immediate, continuing, and irreparable harm.

If there is a strong likelihood of success on the merits then only a minimal showing of harm is needed to justify a preliminary injunction. S*ee, Kootenai Tribe of Idaho v. Veneman* 313 F.3d 1094 (9th Cir 2002). In this case, however, the harm to victims of SB 670 prohibiting suction dredge mining on federal lands is far from minimal. This harm is quite literally of constitutional dimension.

Plaintiffs have presented to the Court 18 declarations. These declarations set forth a wide variety of present, continuing, and irreparable harm caused by SB 670. When SB 670 was enacted on August 6, 2009 and became immediately effective, a major portion of the 2009 suction dredge mining season was ended [Declaration of Gerald Hobbs]. The major portion of the 2010 suction dredge mining season is approaching (April 1, 2010). Plaintiffs ask this Court to assure that season's continued economic validity and viability. The nature of the harm caused by SB 670 is set forth as follows:

1. Devastating economic impact on manufacturers, merchants, dealers, and other sellers of suction dredge mining equipment. [Declarations of Patrick Keene, Delores Stapp, Rob Goreham, James Madden, and Gilbert Blevins] These declarations show businesses that are either in severe financial distress, or on the verge of failure because of the passage of SB 670.
2. Severe economic harm to other businesses that depend for their economic viability on suction dredge miners or the gold such miners retrieve. These declarations show severe economic losses, in some instances affecting the economic viability of the businesses involved. Businesses include jewelry manufacturing [Declaration of Todd Bracken]; R.V. Parks [Declaration of Roberta Collum]; gas stations, grocery stores and other impacts on local economies [Declarations of Gerald Hobbs and Patrick Keene], the total sums involved are at least sixty million dollars ($60,000,000) per year. [Declaration of Gerald Hobbs]
3. Substantial losses to local economies from elimination of suction dredge mining and miners, and others associated with suction dredge mining, who use their trips as vacations, and infuse badly needed money into economically distressed rural local

economies. [Declarations of Todd Smith, Charles Lassiter, Jim Aubert, Gerald Hobbs, and Patrick Keene]

4. The severe economic affect on suction dredge miners who rely, for their income, on gold retrieved by such mining in order to support themselves and their families, pay the mortgage on their homes, buy food clothing and medicine for themselves and their families, and otherwise attempt to sustain a reasonable standard of living. These miners have made economic commitments for their and their families' future based on the production of gold they were able to retrieve over the past years. The periods range from nine (9) to forty (40) years. These commitments never envisioned an economic scenario where their gold production would be reduced to zero because of legislative action by the State of California. Their future losses, in order to resume production at a level that would at least equal their production when SB 670 went into effect would be substantial. [Declarations of Steve Tyler, Robert Haiduck, Gerald Hobbs, Delores Stapp, Myrna Karns, Todd Bracken, Mike Holt, Charles Lassiter, Daniel Lewis, Gilbert Blevins, Todd Smith, Jim Aubert, and Shannon Poe]

5. Substantial losses involved in the now worthless investments in suction dredge mining equipment, mining claims and permits from DF&G to suction dredge mine. [Declarations of Jim Aubert, Gerald Hobbs, Pat Keene, Robert Haiduck, Richard Gierak, Mike Holt, Delores Stapp, Daniel Lewis, Todd Smith, Roberta Collum, Steve Tyler, Rob Goreham, Shannon Poe, Gilbert Blevins, Myrna Karns, Charles Lassiter, and Todd Bracken] Among many other hardships these miners face, there is now no market for their suction dredge mining equipment that is now useless in California. Because of SB 670, the market is flooded in California and elsewhere with used equipment. In addition,

their mining claims cannot be sold, since the most valuable part of their claims can be accessed only by suction dredge mining.

6. The immense emotional stress on individual miners, and all others who rely on suction dredge mining and miners for their living, and their families, because of the severe loss of income, present and future. [Declarations of Jim Aubert, Gerald Hobbs, Pat Keene, Robert Haiduck, Richard Gierak, Mike Holt, Delores Stapp, Daniel Lewis, Todd Smith, Roberta Collum, Steve Tyler, Rob Goreham, Shannon Poe, Gilbert Blevins, Myrna Karnes, and Charles Lassiter]

The balance of harm is overwhelmingly in favor of suction dredge miners, dealers and suppliers of suction dredge mining equipment, and those hard pressed economic communities who rely on suction dredge mining to sustain their economic viability.

IV

NO BOND SHOULD BE REQUIRED

The Court has wide discretion in setting the amount of a security bond. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125-1126 (9th Cir. 2005). Plaintiffs have shown a very strong likelihood of success on the merits. Such a showing has been relied on to dispense with the requirement of any security. *Scherr v. Volpe,* 466 F.2d 1027, 1035 (7th Cir.1972).

The State of California and its officials suffer no risk of monetary loss by prohibiting the enforcement of a blatantly unconstitutional statute. Under any circumstances there is no risk of monetary loss to the State or its officials if the injunction is granted. The bond amount may be zero if there is no evidence that the party will suffer damages from the injunction. *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003).

Therefore, a bond should not be required. *Jorgensen v. Cassiday,* 320 F.3d 906, 919 (9th Cir. 2003); *Frank's GMC Truck Center, Inc. v. G.M.C.*, 847 F.2d 100, 103 (3rd Cir.1988); *Doctor's Assocs., Inc. v. Stuart,* 85 F.3d 975, 985 (2nd Cir. 1996); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421, (4th Cir. 1999).

In addition, Plaintiffs are of very modest means, [Declaration of Gerald E. Hobbs], and under the circumstances of this case, no security whatsoever should be required. *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351 385 (C.D. CA 1982).

V

CONCLUSION

For the reasons stated above, SB 670 should be declared unconstitutional, and its enforcement enjoined.

Dated: January 20, 2010

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