FILED
ALAMEDA COUNTY

JUL 10 2009

CLERK OF THE SUPERIOR COURT
By Vicki Daybell

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 FISHERMAN'S ASSOCIATION; 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.: RG09-434444

ORDER GRANTING PLANTIFFS' MOTION FOR PRELIMINARY INJUNCTION AGAINST DEFENDANTS DEPARTMENT OF FISH AND GAME AND DONALD KOCH, DIRECTOR

Dept.: 31
Judge: Hon. Frank Roesch

Complaint filed February 5, 2009

On June 9, 2009, Plaintiffs Leeon Hillman, Craig Tucker, David Bitts, Karuk Tribe, Center for Biological Diversity, Friends of the River, Klamath Riverkeeper,

Pacific Coast Federation of Fisherman's Associations, Institute for Fisheries Resources, and California Sportfishing Protection Alliance (collectively, "Plaintiffs"), sought a preliminary injunction enjoining the Defendants California Department of Fish and Game and Donald Koch, its Director ("Defendants") from spending any funds allocated from the State of California's General Fund on activities which allow suction dredging to occur under the Department's current regulations (14 California Code of Regulations ("CCR") §§228, 228.5) until the Plaintiffs' case is heard on its merits.

Lynne R. Saxton, Esq. and James R. Wheaton, Esq. of the Environmental Law Foundation appeared for the Plaintiffs; John H. Maddox, Esq. and Deputy Attorney General Bradley Solomon, Esq. appeared on behalf of Defendants Department of Fish and Game and Donald Koch; James L. Buchal, Esq. appeared on behalf of Intervenors the New 49ers and Raymond Koons; and David Young, Esq. appeared for Intervenors Gerald E. Hobbs and Public Lands for the People, Inc.

The matter was argued and submitted.

After consideration of the papers and pleadings filed herein and the arguments of counsel, and good cause appearing therefore, the motion is GRANTED. The reasoning follows.

Factual background.

In 1994, the Department of Fish and Game ("the DFG") conducted a California Environmental Quality Act ("CEQA") process which included the preparation and approval of an Environmental Impact Report. The 1994 EIR was not challenged. Also occurring in 1994 were statutory amendments to Fish and Game Code ("F&G Code") §§5653 and 5653.9 and regulations promulgated pursuant to those amendments.

The 1994 amendments changed subdivisions (a), (b), and (d), which, in 1994, read as follows:

> (a) Before any person uses any vacuum or suction dredge equipment in any river, stream or lake of this state, the person shall submit an application for a permit for a dredge to the department, specifying the type and size of equipment to be used and other information as the department may require.
> (b) The department may designate waters or areas wherein vacuum or suction dredges may be used pursuant to a permit, waters or areas closed to those dredges, the maximum size of those dredges which may be used, and the time of year when those dredges may be used. If the department determines that the operation will not be deleterious to fish, it shall issue a permit to the applicant. If any person operates any equipment other than that authorized by the permit or conducts the operation without securing the permit, the person is guilty of a misdemeanor.
> (d) It is unlawful to possess a vacuum or suction dredge in areas, or in or within 100 yards of water, which are closed to the use of vacuum or suction dredges.

The amended statute reads as follows:

> (a) 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. Before any person uses any vacuum or suction dredge equipment in any river, stream, or lake of this state, that person shall submit an application for a permit for a vacuum or suction dredge to the department, specifying the type and size of equipment to be used and other information as the department may require.
> (b) Under the regulations adopted pursuant to Section 5653.9, the department shall designate waters or areas wherein vacuum or suction dredges may be used pursuant to a permit, waters or areas closed to those dredges, the maximum size of those dredges that may be used, and the time of year when those dredges may be used. If the department determines, pursuant to the regulations adopted pursuant to Section 5653.9, that the operation will not be deleterious to fish, is shall issue a permit to the applicant. If any person operates any equipment other than that authorized by the permit or conducts the operation without securing the permit, that person is guilty of a misdemeanor.

> (d) It is unlawful to possess a vacuum or suction dredge in areas, or in or within 100 yards of waters that are closed to the use of vacuum or suction dredges.

F&G Code Section 5653.9, prior to the 1994 amendment, reads as follows:

> The department may adopt regulations to carry out Sections 5653, 5653.3, 5653.5, and 5653.7.

The section was rewritten in 1994 (and has not been amended since then) to state:

> The department shall adopt regulations to carry out Section 5653 and may adopt regulations to carry out Sections 5653.9, 5653.5 and 5653.7. The regulations shall be adopted in accordance with the requirements of Division 13 (commencing with Section 21000) of the Public Resources Code and Chapter 3.5 (commencing with Section 11340 of Part 1 of Division 3 of Title of the Government Code.

The 1994 modifications are noteworthy in several regards, those relevant here being:

It was clarified that all suction dredging is prohibited except after a permit for it has been issued.

The DFG was required to adopt regulations to carry out its obligations under F&G Code §§5653 et. seq.

The regulations were specifically mandated to comply with the Administrative Procedures Act (APA) and with the CEQA. The requirement of a DFG determination of whether the suction dredge operation proposed by any permit applicant "will not be deleterious to fish" was modified such that the DFG's determination whether the suction dredge operation proposed by any permit applicant "will not be deleterious to fish" is made "pursuant to the regulations adopted pursuant to Section 5653.9".

In 2005, the Karuk Tribe of California and Leaf Hillman filed Alameda Superior Court Case Number RG05-211597, an action against the DFG and its then Director ("the 2005 case") asserting causes of action based on the CEQA, and based of the F&G

Code Section 5653. Suction dredge mining interests participated in that action, appearing as intervenors.

In December 2006, the Court in the 2005 case entered an Order and Consent Judgment to which the parties, including the intervenors, had stipulated. The Order and Consent Judgment included the agreement of the Plaintiffs/Petitioners and the Respondent Dept. of Fish & Game that, in the opinion of the DFG at that point in time, suction dredge mining results in deleterious effects on fish. It also included that the mining interest intervenors continued to express the contrary opinion. The Judgment reaches no conclusion and makes no finding that, in fact, suction dredge mining is deleterious to fish.

The Judgment does make a finding (and all the parties agreed to it) that there is "new information which was not reasonably available to the Department at the time it completed the 1994 EIR that issuing suction dredge mining permits under the current regulations could result in environmental effects different or more severe than the environmental impacts evaluated in the 1994 EIR...." (Order and Consent Judgment in RG05-211597, p.2, emphasis added)

The Court in the 2005 case then ordered the DFG to conduct a CEQA review and to implement, if necessary, via its rulemaking authority, mitigation measures to protect listed, threatened, or endangered fish. The Court ordered the review and whatever rulemaking might be necessary to be concluded by June 20, 2008.

Within that factual backdrop, in 2009, came the Plaintiffs herein, the Karuk Tribe, some individual members of the Karuk Tribe, and a number of organizations with an environmental focus, who have filed this action as taxpayers alleging that the DFG and its Director are acting unlawfully when issuing suction dredging permits. They seek, in their First Amended Complaint, an injunction enjoining the DFG from spending taxpayer money to issue those permits or to operate the suction dredge mining program in a manner that allows suction dredge mining to occur under the current regulations.

The matter now before the Court is the motion by Plaintiffs for the provisional relief of a preliminary injunction to enjoin, *pendente lite*, the DFG from issuing suction

dredge permits through the mechanism of an order that no State General Fund monies be expended on that allegedly unlawful activity.

The Parties' Arguments

Plaintiffs' motion is based on their assertion that, because of the high likelihood of success on the merits of the case and the irreparable harm to fish prior to any final adjudication of this matter, the Court should preliminarily enjoin the DFG from expending any General Fund money on the processing and granting of suction dredging permits.

Plaintiffs base the assertion of a high likelihood of success on the argument that, based on information that has been accepted as true by all parties, the continued granting of permits by the DFG is an unlawful violation of 1) the CEQA 2) F&G §5653 and 3) the Consent Judgment in RG05-211597.

Plaintiffs base their assertion of irreparable harm on the notion that the potential environmental harm concerns fish species that have been listed as "threatened" or "endangered," and the notion that the balance of harms weighs more heavily towards the impacts to fish than towards impacts to miners.

The DFG defends, asserting that the expenditure of public funds on suction dredge permitting is not an unlawful expenditure, that Plaintiffs have not shown a likelihood that they will prevail on the merits and that Plaintiffs have not established that the balance of relative harms tips in their favor.

The DFG bases its argument on the issue of the likelihood of success on the notion that the department's admissions relating to the need to conclude a new CEQA process are legally insufficient as a basis for rendering the entire current permitting program unlawful.

The DFG also argues that it has never been found to be in violation of the 2005 case Order and Consent Judgment and that its failures with regard to that Judgment cannot render unlawful its acts of issuing suction dredge permits.

The DFG further argues that there is no General Fund appropriation separately designated for the suction dredge mining program and the funds appropriated by the

legislature are for a broad array of Department activities. The DFG argues that, as a consequence, the Plaintiffs have not shown that there is an ongoing unlawful expenditure of public funds.

The overarching principle upon which the DFG defends this motion is that its acts cannot be unlawful because the DFG complied with controlling law at the time it issued its regulations relating to suction dredging and that those regulations provide the legal authority and mandate to issue the permits.

The Intervenors: 1) The New 49ers Inc. and Raymond Koons and 2) Public Lands for the People Inc (PLP, Inc.) and Gerald Hobbs also argue against the motion raising the following issues:

PLP, Inc. and Hobbs argue that the Court should dismiss the action through the use of its inherent power "to protect parties from bad faith actions or tactics that are frivolous, constitute subterfuge, are deceptive, and amount to harassing on vexatious litigation." They further argue that Plaintiffs have no standing to pursue a preliminary injunction, and that the likelihood of success on the merits is poor to none. And finally they argue that the harm to miners engendered by a preliminary injunction would be "immense."

The New 49ers and Koons argue: 1) that federal law prohibits the State of California from any regulation of suction dredge mining; 2) that Plaintiffs have not demonstrated standing as taxpayers; 3) that the activity of issuing permits by the DFG is not unlawful; 4) that non-compliance with CEQA does not render the suction dredging program illegal; 5) that the DFG has not violated F&G Code §5653; and 6) that the Plaintiffs have unclean hands.

Standard of Review

The motion before the Court is a motion to preliminarily enjoin the expenditure of public funds to continue unlawful acts. While the Court must use caution in its consideration of an application for a preliminary injunction in a taxpayer action (*Cohen v. Board of Supervisors*, 178 Cal. App. 3rd 447; *Fleishman v. Superior Court*, (2002)

102 Cal. App. 4th 350), the court must apply the same criteria as in any other application for a preliminary injunction. (CCP §527.) For any party to obtain a preliminary injunction, a party must show: 1) a likelihood of success on the merits, 2) irreparable injury if preliminary relief is not granted, 3) a balance of hardships, if any, favoring the moving party, and 4) in certain cases, the advancement of the public interest. (*Earth Island Institute v. U.S. Forest Service*, (9th Circuit) (2003) 351 F 3rd. 1291; *Mattel v. Greiner & Hausser*, 9th Circuit (2003 Cal) 354 F.3rd 857).

Likelihood of Success

The starting point, then, is an analysis of the issue of likelihood of success on the merits in this case. The likelihood of success hinges on the notion that the current practice of the DFG is to issue suction dredge permits upon application, limited only by the prescriptions in the current regulations found at 14 CCR §228 and §228.5, is an unlawful activity.

Unlawful as Violative of a Court Judgment

The Plaintiffs and the Intervenors devote a considerable amount of their argument to demonstrate that the DFG is not in compliance with the specific Court Order in the 2005 case requiring, *inter alia*, the completion of the CEQA process. However, there has been no authority presented to date to support the notion that a failure to comply with a Judgment, with or without any order arising from any post judgment activity, transmutes a related derivative act into an "unlawful" act and the expenditure of tax monies on it into an unlawful expenditure of public funds. At this stage of this litigation, the court does not find a likelihood of success on the merits in this case based on DFG's failure to comply with the Judgment in the 2005 case.

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Unlawful as Violative of F&G Code §5653 et seq.

The analysis of the likelihood of success on the merits based on the notion that the issuance of suction dredge permits by DFG pursuant to the prescriptions of 14 CCR §228 and §228.5 is an unlawful act in violation of F&G Code 5653 hinges on the court's determination of whether the regulations applied by the DFG, by themselves, satisfy the requirement in F&G 5653 to determine if the operation proposed by any license applicant "will not be deleterious to fish."

Section 5653(b) of the F&G Code mandates that the DFG adopt regulations that "designate waters or areas wherein…suction dredges may be used pursuant to a permit, waters or areas closed to those dredges, the maximum size of those dredges…and the time of year when those dredges may be used." And the DFG did so in 1994, prescribing limits to those categories of where, when, and how much.

Section 5653(b) of the F&G Code goes on to require the department to make a determination whether the operation proposed by the license applicant will not be deleterious to fish. This is not a determination within the confines of the "where, when, and how much" limitations found in the regulations, but rather is an additional determination to be made by the DFG. For the purpose of this motion, the court finds that the regulations do not support a finding that all permits which satisfy the "where, when, and how much" limitations of the regulations also support a determination that such operation is not deleterious to fish.

This construction of the regulations is buttressed by the fact that the regulations themselves (14 CCR §228(b)) provide an exception to the "where, when, and how much," limitations founding the exception on an explicit separate determination of the lack of deleterious impacts on fish. That is, the regulatory scheme makes clear that the DFG applies its discretion to determine if a license applicant's proposed operation is

deleterious to fish and creates an administrative process for a disappointed license applicant to challenge the DFG's quasi-judicial negative determination. This construction of the regulations is further buttressed by the fact that the regulations themselves do not state that the where, when, and how much limitations are, in fact, a determination that operations within those parameters are not, by definition, deleterious to fish.

It follows that issuance of a suction dredge permit without a discretionary determination that the operation proposed by the license applicant is not deleterious to fish is a direct violation of the mandatory duty imposed on the DFG by F&G Code 5653(b) and is therefore unlawful. Plaintiffs have demonstrated, for the purposes of this motion, a high likelihood that they will prevail on the merits on the theory related to violation of the DFG's duty under F&G Code 5653.

Unlawful as Violative of CEQA

The analysis of whether the DFG's issuance of suction dredge permits pursuant to the current regulations and pursuant to the EIR approval of 1994, without conducting a new CEQA review, is unlawful involves an assessment of whether a CEQA triggering event has occurred.

CEQA is a statutory scheme imposing a required procedure prior to the implementation of any agency's discretionary approval of a CEQA "project." Section 21166 of the Public Resources Code requires a new environmental assessment whenever an agency becomes aware of new information that gives rise to a fair argument that an ongoing, previously CEQA-approved "project" or program might have an unstudied or unconsidered environmental impact. The CEQA Guidelines at 14 CCR §15162 provides temporal boundaries to Public Resources Section 21166, stating in relevant part:

> "(c) once a project has been approved, the lead agency's role in project approval is completed unless further discretionary approval on that project is required. Information appearing after that approval does not require reopening of that approval. If after the project is approved, any of the conditions described in subdivision (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any."

The conditions described in 14 CCR §15162(a) include, amongst others,

> "(2) substantial changes occur with respect to the circumstances under which the project is under taken…due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or (3) new information of substantial importance which was not known and could not have been known… at the time the previous EIR was certified…shows any of the following: (A) the project will have one or more significant effects not discussed in the previous EIR…"

Here the DFG admits that further environmental review is required but has taken the position that no "next discretionary approval for the project" has occurred to trigger the mandatory environmental review. The DFG is incorrect in its interpretation of the statute when read together with the suction dredging regulations; each permit granted by the DFG involves a discretionary approval triggering a CEQA review.

The DFG must exercise its discretion each time it issues a suction dredge permit. This is true both when assessing the written plan submitted to it as required by 14 CCR §228(b) and when assessing an application for a license under 14 CCR §228(a). The DFG may only approve a license following its determination that the suction dredge operation being licensed is not deleterious to fish. (F&G Code §5653(b) and 14 CCR §228).

It is basic CEQA doctrine that a project may not be implemented until the CEQA process has been satisfied. It follows that, if the DFG makes any discretionary approval

of the suction dredge program without subjecting it to the mandated CEQA process, it is an unlawful act.

Here, while there is vociferous disagreement on the question of whether it is true or false that suction dredging actually has a significant environmental impact, there appears to be agreement (at least amongst the parties who are also parties to the 2005 case Consent Judgment) that there is new information that gives rise to a fair argument of environmental impact and that an environmental review is mandated by CEQA prior to the implementation of any further discretionary acts by the DFG. Thus, Plaintiffs appear, at this point in time, to have a high likelihood of success on the merits based on acts made unlawful by the CEQA.

Irreparable Harm

Having determined that Plaintiffs have demonstrated a strong likelihood of success on the merits, the court must then evaluate whether irreparable harm will occur if a preliminary injunction is not granted.

It is uncontroverted that Coho Salmon in the Klamath, Scott & Salmon River watershed is a species found on the list maintained by the DFG pursuant to F&G Code 2070 et. seq. of endangered, threatened or candidate species. By definition (see F&G code §2062, §2067, and §2068), any harm to such species or their necessary habitat is irreparable harm.

Here there is vociferous and considerable argument that suction dredging is not harmful or deleterious to the Coho Salmon or any other fish. That controversy and its determination is properly made by the DFG after a more thorough process than occurs in this motion for a preliminary injunction. It is the determination of the court, as it pertains to this motion for provisional relief, that the preponderance of evidence supports the notion that suction dredging causes harm (deleterious impacts) to Coho

Salmon. (See e.g., the Oct. 2, 2006 Declaration of Neil Manji, found in Exhibit "D" to Declaration of Lynne R. Saxton, at ¶8.)

Notwithstanding Plaintiffs' high likelihood of success and a clear demonstration of irreparable harm, the facts presented with this motion call for an inquiry into the balance of harms. Intervenors argue forcefully that economic harm will occur to suction dredging permit holders, and that economic harm will occur in the geographic area of Siskiyou County.

While it may be true that there are individuals who will suffer economic hardship if they are not issued a suction dredge permit and are therefore not able to mine for gold at all, there was no evidentiary showing of it.[1] It follows therefrom that the balance of harms tips in favor of the Plaintiffs.[2]

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[1] While some declarants do provide evidence that they spend money mining for gold (See e.g. Page 3 of the Declaration of David DeCosta found in Exhibit "B" to the Memorandum on Opposition filed by Interveners, Gerald Hobbs and Public Lands for the People, Inc.) they present no evidence whatever to demonstrate the amount of money any of the licensees might lose or any evidence of the amounts that might be lost by the declarants who are sellers of equipment to the licensees.

[2] The court has considered and found no merit in the arguments that Plaintiffs have not demonstrated standing as taxpayers, that federal law proscribes State regulation, that Plaintiffs' unclean hands bars relief, and that the court should exercise "inherent powers" and dismiss the action as harassing vexatious litigation.

Conclusion

For the reasons stated above, it is ORDERED that the California Department of Fish and Game and its Director, Donald Koch, immediately cease and desist from expending any funds obtained by them from the State of California General Fund to issue suction dredge permits pursuant to Fish and Game Code section 5653 and 14 CCR §228 and §228.5.

This Preliminary Injunction shall continue so long as this matter is pending or until further order of the Court; bond is waived.

Dated: July 9, 2009

Frank Roesch
Judge of the Superior Court