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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNADINO

BEN KIMBLE, RONALD HANSEN, RON KLIEWER, ERIC RASBOLD, TERRY STAPP, DELORES STAPP, GARY GOLDBERG, GERALD HOBBS, PUBLIC LANDS FOR THE PEOPLE, INC. a 501 C-3 non-profit corporation, PATRICK KEENE, KEENE ENGINEERING COMPANY, INC., a California corporation, and WALT WEGNER. Plaintiffs, v. KAMALA HARRIS, Attorney General of the State of California; CHARLTON H. BONHAM, Director of the California Department of Fish and Game; CALIFORNIA DEPARTMENT OF FISH & GAME, and DOES 1-20, inclusive. Defendants	CASE NO. CIVDS 1012922 **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; DECLARATIONS OF GERALD E. HOBBS, PATRICK KEENE, TERRY STAPP, DELORES STAPP, GARY GOLDBERG (Exhibits 1-5); and EXHIBITS (A-V)** **Hearing Date:** January 18, 2012 **Time:** 8:30 a.m. **Department:** S32 **Judge:** Hon. Donald Alvarez **Trial Date:** None Set Unlimited Civil Case

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MEMORANDUM IN SUPPORT

I.

INTRODUCTION

Plaintiffs have set forth in their Reply to Defendants' Status Report, filed on September 7, 2011, and in their First Amended Complaint ("FAC"), filed concurrently with this Motion, both incorporated herein by reference, the history and procedural development of SB 670, enacted August 6, 2009, as amended by AB 120, enacted July 26, 2011. Both bills are now set forth and combined in California Fish and Game Code §5653.1("CFGC §5653.1"). CFGC §5653.1 prohibits suction dredge prospecting and mining in all waterways in the State of California, including waterways on Federal lands, and prohibits Federal prospectors and miners who hold Federal mining claims and mineral estates from engaging in suction dredge mining.

AB 120 requires that "any new regulations fully mitigate all identified significant environmental impacts," a standard with which the Department of Fish and Game ("DF&G") has stated it cannot possibly comply, and is therefore infeasible. See e-mail of Mark Stopher, Environmental Project Manager of DF&G, attached hereto as "Exhibit A." For example, the Department can never "fully mitigate" with regulations the listed significant and unavoidable environmental effects set forth in the Environmental Impact Report ("EIR"). *See Santa Clarita Organization for Planning the Environment v. City of Santa Clarita (Henry Mayo Newhall Memorial Hospital)*197 Cal. App. 4th 1042, (2nd App. Dist., Div. 2, 2011); See also 2011 DJDAR 11239. Certified for publication. What the legislature has done through AB 120 is to prohibit any suction dredge prospecting or mining in California, in violation of the Federal mining laws, and the Supremacy and Property clauses of the United States Constitution. What Congress has granted, no state can prohibit temporarily or permanently. *Ventura County v. Gulf Oil Corp.* 601 F.2d 1080 (9th Cir.1979); *South Dakota Mining Ass'n v. Lawrence County* 55 F.3d 1005 (8th Cir.1998); *Brubaker v. El Paso County* 652 P.2d 1050 (Colo. 1982); *California Coastal Commission v. Granite Rock Co.,* 480 U.S. 572, 107 S.Ct, 1419 (1987).

AB 120 further requires that "a fee structure is in place that will fully recover all costs to the department related to the administration of the program." DF&G has stated that setting a

fee structure is beyond its jurisdiction and capacity. Only the legislature can do this subject to the Governor's veto. E-mail of Mark Stopher, Exhibit A. This is a guarantee of further delay. DF&G has also stated that due to the enactment of AB 120, it will not be able to have either a Final EIR, or final regulations allowing suction dredge mining, prepared in 2011. E-mail of Mark Stopher, Exhibit A.

Mr. Stopher's e-mail points out that one of the anomalies of the enactment of AB 120 is that AB 120 is in direct conflict with the California Environmental Quality Act, *Public Resources Code §21000*, et seq. ("CEQA"), in that AB 120's "fully mitigate" standard and requirement, cannot be met in any regulation enacted by the Department pursuant to CEQA, since CEQA contains no "fully mitigate" language or standard that would legally justify any such regulation. This places the Department in violation of the Court Order as set forth in *Karuk Tribe, et al. v. California Department of Fish and Game, et al.*, Alameda County Superior Court, Case No. RG 05211597.

After the passage of SB 670, suction dredge miners, who had hoped that the EIR and regulatory process would soon be completed by DF&G, so that they would be able to quickly resume suction dredge mining, hoped in vain. The DF&G has set deadline after deadline for the enactment of a Final EIR and new regulations, only to abrogate any such deadline. California prospectors and miners, who are primarily low-income citizens, who need suction dredge mining to supplement their income and support their families, will be unable to engage in suction dredge mining in the waters of California for far more than five years.

Courts are authorized to preliminary enjoin the operation of a challenged statute pending a determination on the merits. 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. 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-

II.

ARGUMENT

A. THERE IS A HIGH PROBABILITY THAT PLAINTIFFS WILL PREVAIL ON THE MERITS

1. FEDERAL PRE-EMPTION

SB 670 and AB 120 impermissibly conflict with the 1872 General Mining Law ("GML"), as amended, 30 U.S.C. §§ 22-54.; and the 1976 Federal Land Policy 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 and AB 120, which completely closes Federal lands in California to suction dredge mining. Compliance with Federal mining laws, and SB 670 and AB 120, 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 and AB 120 are totally inconsistent with, and directly conflict 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). Congress's power over Federal land is "without limitations." *Kleppe v. State of New Mexico*, 426 U.S. 529, 539 (1976).

The purpose of the Mining Act is to foster and 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). The general policy of the mining laws is to promote widespread development of mineral deposits and to afford prospecting and mining opportunities to as many persons as possible (HR 365, Mining Act of 1866, 39th Congress Sec. 1; National Mineral Policy Act 30 U.S.C. § 21(a); The Mining Act 30 U.S.C. § 22 *et seq.*; Multiple-Surface Use Act 30 U.S.C. § 612(b) & 615).

The State of California has effectuated an absolute prohibition of suction dredge mining on Federal lands. CFGC §5653.1 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. This 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.

The Supremacy Clause of the United States Constitution Art VI, Cl. 2 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).

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 the 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).

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).

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 a 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. Thus, 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) Montana enacted regulations governing the location of mining claims which supplemented Federal law on the same subject. The Court upheld the validity of the regulations not conflicting with Federal law, stating:

> "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." *Id.* at 412.

Likewise, in *State ex rel. Andrus v. Click*, 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). . . 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 Idaho 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, Skaw v. United States*, 740 F.2d 932, 940 (Fed. Cir.1984).

In *Brubaker v. El Paso County* 652 P.2d 1050 (Colo. 1982), where holders of unpatented mining claims on Federal land sought to conduct mineral exploration, the Supreme Court of Colorado stated:

> "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 Colorado 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.*

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.

CFGC §5653.1 precludes miners and prospectors from conducting surface metal mining operations within Federal lands, contrary to Federal law which encourage and permit such development. Thus, CFGC §5653.1 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) (Resource Conservation and Recovery Act preempted County ordinance which banned the recycling of hazardous waste fuels); *Bateman v. Gardner,* 716 F.Supp.595 (S.D. Fla. 1989) (Magnuson Fishery Conservation and Management Act preempted Florida statute insofar as it prohibited shrimp fishing where Federal regulations allowed it).

CFGC §5653.1 impermissibly conflicts with the 1872 General Mining Law, as amended, 30 U.S.C. §§ 22-54.; 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 CFGC §5653.1, which completely closes Federal lands in California to suction dredge mining. Compliance with both Federal mining laws and CFGC §5653.1 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). 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).

CFGC §5653.1 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. CFGC §5653.1 stands as an obstacle to, and

conflicts with, 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).

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, *supra* 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. 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).

Indeed, 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* 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")."

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.* Importantly, the Eighth Circuit was impressed with 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. [Gerald Hobbs Decl., Exhibit 1; Patrick Keene Decl., Exhibit 2]. Characterized as such, the Eighth

Circuit deemed the County ordinance had the same effect as a "de facto ban on mining in the area." *Id.*

Characterizing the ordinance as "prohibitory," not regulatory, in its fundamental character, *Id.* the Eighth Circuit pointed out that the ordinance "completely frustrates… federally encouraged activities." *Id.* Therefore, the Eighth Circuit affirmed the District Court ruling and held that the ordinance was preempted by Federal law.

All matters dealt with by CFGC §5653.1 are preempted and fully occupied by the laws of the United States, including without limitation, its mining laws, its environmental laws, its laws relating to clean water, 33 *U.S.C.* § 1251, *et seq.* (2004), and its laws relating to endangered species, 16 *U.S.C.* §§ 1531, *et seq.* (2004). CFGC §5653.1 directly conflicts with Federal law relating to mining, and obstructs Congress's full purposes and objectives.

2. PROPERTY CLAUSE

CFGC §5653.1 violates the Property Clause of the United States Constitution (Article IV, Section 3) which provides that Congress has the sole power to dispose of and make regulations respecting properties belonging to the United States. CFGC §5653.1 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 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 therefore 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. The 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." *Yick Wo v. Hopkins,* 118 U.S. 356. 371, 6 S.Ct. 1072 (1886).

B. CFGC §5653.1 CAUSES IMMEDIATE, CONTINUING, AND IRREPARABLE HARM.

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.)

Where the party seeking injunction makes a sufficiently strong showing of likelihood of success 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. In this case, however, the harm to victims of CFGC §5653.1 prohibiting suction dredge mining on federal lands is far from minimal.

Plaintiffs have presented to the Court five (5) Declarations (Exhibits 1-5) and 22 additional exhibits (Exhibits A-V). These Declarations and exhibits set forth a wide variety of present, continuing, and irreparable harm caused by CFGC §5653.1. When CFGC §5653.1 was enacted on August 6, 2009 and became immediately effective, a major portion of the 2009 suction dredge mining season was ended. Thereafter, the 2010 and 2011 suction dredge mining seasons were completely scrubbed. Plaintiffs ask this court to assure that the 2012 suction dredge mining season will have continued economic validity. The nature of the harm set forth in the Declarations and Exhibits are:

1. Devastating economic impact on manufacturers, merchants, dealers, and other sellers of suction dredge mining equipment.
2. Severe economic harm to other businesses that depend for their economic viability on suction dredge miners or the gold such miners retrieve, such as R.V. Parks; gas stations,

grocery stores and other impacts on local economies, the total sums involved are at least sixty million dollars ($60,000,000.00) per year.

3. Substantial losses to local economies from lack of suction dredge 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.
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.
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.
6. Severe economic harm to counties in California who depend on suction dredge mining

C. NO BOND SHOULD BE REQUIRED.

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 an 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.

Under any circumstances there is no risk of monetary loss to the State or its officials if the injunction is granted. In addition, Plaintiffs are individuals of very modest means, [Hobbs

Decl. Ex. 1], and under the circumstances of this case, no security whatsoever should be required. *See Mangini v. J.G. Durand* (1994) 31 Cal.App.4th 214, 217.

Concurrently, with this motion, Plaintiffs have filed a First Amended Complaint. The Court did not hold a hearing upon Defendants' demurrer to Plaintiffs' initial Complaint. However, Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Demurrer to the initial Complaint filed Marc 2, 2011, sets forth, on pages 10-11, how CFGC §5653.1 violates the California State Constitution, Article X, § 2, on a miner's right to the use of water. On pages 11-13, Plaintiffs have set forth how CFGC §5653.1 violates § 3 of the Statehood Act, 9 Stat. 452, which prohibits the interference with the disposal of Federal lands in California. In pages 13-14 Plaintiffs set forth how CFGC §5653.1 violates the miners and prospectors' constitutional right to due process; and on pages 14-15, Plaintiffs set forth how CFGC §5653.1 violates the miners and prospectors' constitutional right to equal protection, which also applies to the Environmental Justice claim in the FAC. Plaintiffs' Memorandum in Opposition to Defendants' Demurrer is adopted herein as additional authority for the granting of the preliminary injunction.

III

CONCLUSION

For the foregoing reasons, Plaintiffs' request for a preliminary injunction should be granted.

Date: October 21, 2011 Respectfully Submitted,

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David Young, Attorney for Plaintiffs