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Supervising Deputy Attorney General  
3 BRADLEY SOLOMON, State Bar No. 140625  
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8 *Attorneys for Defendants State of California,*  
*Governor Arnold Schwarzenegger, California*  
9 *Department of Fish & Game, and Donald Koch*

10  
11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE EASTERN DISTRICT OF CALIFORNIA  
13  
14

15 **PUBLIC LANDS FOR THE PEOPLE,**  
16 **INC., et al.,**

17 Plaintiffs,

18 v.

19 **STATE OF CALIFORNIA, ARNOLD**  
20 **SCHWARZENEGGER, in his official**  
21 **capacity as Governor of the State of**  
22 **California; CALIFORNIA DEPARTMENT**  
23 **OF FISH & GAME, and DONALD KOCH,**  
24 **in his official capacity as Director,**  
25 **California Department of Fish & Game; and**  
26 **Does 1-20,**

27 Defendants.  
28

2:09-CV-02566-MCE-EFB

**REQUEST FOR JUDICIAL NOTICE IN  
SUPPORT OF DEFENDANTS' MOTION  
TO DISMISS (FRCP 12(b)(1), 12(b)(6),  
Eleventh Amendment, and *Younger v.*  
*Harris*), and/or TO STRIKE (FRCP 12(f)),  
and/or FOR A MORE DEFINITE  
STATEMENT (FRCP 12(e))**

**AND**

**DECLARATION OF MICHAEL M.  
EDSON**

Date: February 25, 2009  
Time: 2:00 p.m.  
Judge: Hon. Morrison C. England  
Trial Date: n/a  
Action Filed: September 14, 2009

1 **REQUEST FOR JUDICIAL NOTICE**

2 Defendants hereby request that the Court take judicial notice, pursuant to Rule 201 of the  
3 Federal Rules of Evidence, of Exhibits 1-6 to the Declaration of Michael M. Edson in Support of  
4 Defendants’ Motion to Dismiss (“Edson Dec.”), below. A federal court must take judicial notice  
5 of facts “if requested by a party and supplied with the necessary information.” Fed. R. Evid.  
6 201(d). Each of the documents attached to the Edson Dec. is in the record of the Superior Court  
7 of Alameda County, California, filed in *Karuk Tribe of California, et al. v. California*  
8 *Department of Fish and Game, et al.*, No. RG 05211597 (Alameda Sup. Ct.), or in *Hillman et al.*  
9 *v. California Department of Fish and Game*. No, RG 09434444 (Alameda Sup. Ct.). “Federal  
10 courts may ‘take notice of proceedings in other courts, both within and without the federal  
11 judicial system, if those proceedings have a direct relation to the matters at issue.’” *Cactus*  
12 *Corner, LLC v. U.S. Dept. of Agric.*, 346 F.Supp.2d 1075, 1092 (E.D. Cal.2004) (quoting *United*  
13 *States ex rel Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th  
14 Cir.1992)).

15 Dated: November 24, 2009

Respectfully Submitted,

16 EDMUND G. BROWN JR.  
17 Attorney General of California  
18 ROBERT W. BYRNE  
19 Supervising Deputy Attorney General  
20 BRADLEY SOLOMON, State Bar No. 140625  
21 BARBARA SPIEGEL, State Bar No. 144896  
22 MICHAEL M. EDSON, State Bar No. 177858  
23 ALLISON GOLDSMITH, State Bar No. 238263  
24 Deputy Attorneys General

25 \_\_\_\_\_  
26 /s/ MICHAEL M. EDSON  
27 MICHAEL M. EDSON  
28 Deputy Attorney General  
*Attorneys for Defendants State of California,  
Governor Arnold Schwarzenegger,  
California Department of Fish & Game, and  
Donald Koch*

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**DECLARATION OF MICHAEL M. EDSON**

I, MICHAEL M. EDSON, declare:

1. I am a Deputy Attorney General for California Attorney General Edmund G. Brown Jr., and am assigned to represent Defendants in the above-captioned action. I make this Declaration in support of Defendants' Motion to Dismiss, etc., filed herewith. The facts set forth below are within my personal knowledge, except as otherwise indicated.

2. The documents attached as Exhibits 1-6 hereto, as listed below, are true and correct copies of documents filed in the action *Karuk Tribe of California, et al. v. California Department of Fish and Game, et al.*, No. RG05211597 (Alameda Sup. Ct.), or in *Hillman et al. v. California Department of Fish and Game*. No. RG09434444 (Alameda Sup. Ct.).

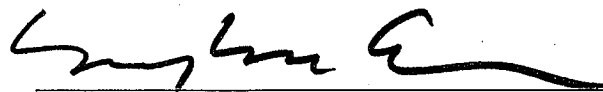
**Document**

**Exhibit**

Order Granting Motion to Intervene ( <i>Karuk</i> ) (dated March 23, 2006).....	A
Order and Consent Judgment ( <i>Karuk</i> ) (filed Dec. 20, 2006).....	B
Order Granting Intervention ( <i>Hillman</i> ) (filed April 27, 2009) .....	C
PLP/Hobbes Complaint in Intervention and Answer ( <i>Hillman</i> ) (filed June 2, 2009) .....	D
Order Granting Plaintiffs' Motion for Preliminary Injunction ( <i>Hillman</i> ) (filed June 10, 2009) .....	E
Memorandum of Public Lands for the People, Inc. and Gerald E. Hobbs in Opposition to Plaintiffs' Motion for Preliminary Injunction ( <i>Hillman</i> ) (filed May 18, 2009) .....	F

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 24, 2009, at San Francisco, California.



MICHAEL M. EDSON

**Exhibit A**

**EXHIBIT A**

**EXHIBIT A**



**Superior Court of California, County of Alameda  
Hayward Hall of Justice**

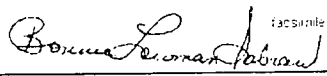
Karuk Tribe of California Plaintiff/Petitioner(s)	No. <u>RG05211597</u>
VS.	Order
California Department of Fish a Defendant/Respondent(s) (Abbreviated Title)	Motion to Intervene Granted

The Motion to Intervene was set for hearing on 03/23/2006 at 09:00 AM in Department 512 before the Honorable Bonnie Lewman Sabraw. The Tentative Ruling was published and has not been contested.

**IT IS HEREBY ORDERED THAT:**

The tentative ruling is affirmed as follows: The Motion of Gerald Hobbs for Leave to Intervene is **GRANTED**, pursuant to Code of Civil Procedure Section 387(a). The intervention is limited to the issues raised in the original complaint in this action. A Verified Complaint in Intervention is to be filed by April 7, 2006, limited to such issues.

Dated: 03/23/2006


  
 Judge Bonnie Lewman Sabraw

**Exhibit B**

**EXHIBIT B**

**EXHIBIT B**



\*4625283\*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

KARUK TRIBE OF CALIFORNIA, and  
LEAF HILLMAN,

Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF FISH  
AND GAME, et al.

Defendants.

THE NEW 49ERS, et al., and GERALD  
HOBBS,

Intervenors.

No. RG05 211597

ORDER AND  
CONSENT JUDGMENT

**FILED**  
ALAMEDA COUNTY

DEC 20 2006

CLERK OF THE SUPERIOR COURT  
By *Anna Dalko*  
Deputy

In this action, Plaintiffs Karuk Tribe of California and Leaf Hillman ("Plaintiffs") filed a Complaint For Declaratory Relief against Defendants California Department of Fish and Game and Ryan Broddrick, its Director (jointly "Department"), alleging that Department had violated the California Environmental Quality Act ("CEQA"), Public Resources Code §21000 et seq., and Fish & Game Code §5653(b) in issuing permits for suction dredge mining in certain parts of the Klamath, Scott and Salmon River watersheds, and sought declaratory and injunctive relief. Department initially denied these allegations, but

later filed declarations with the Court stating that, in the opinion of the Department at this time, suction dredge mining in those watersheds is resulting in deleterious effects on the Coho salmon, as alleged in the Complaint. Intervenors New 49ers, Inc. and Raymond W. Koons ("Intervenor Miners") and Intervenor Gerald Hobbs ("Intervenor Hobbs") deny that the suction dredge mining is in any way deleterious to Coho salmon, and deny that the Department's issuance of the permits is or was wrongful.

The Court, having been advised that the parties have consented to entry of order and judgment by the Court, and good cause existing, hereby issues the following order and judgment with the consent of the parties:

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that

1. New information has become available relating to the effect of suction dredge mining on Coho Salmon, which was not reasonably available to Department at the time it completed the 1994 EIR on the suction dredge mining regulations under which permits are currently issued ("1994 EIR").

2. The new information provides evidence, and the Court so finds, that the pattern and practice of issuing suction dredge mining permits under the current regulations could result in environmental effects different or more severe than the environmental impact considered in the 1994 EIR on the Coho salmon, and/or



other fish listed as endangered or threatened after the completion of the 1994 EIR.  
(See Public Resources Code § 21166; 14 Cal. Code Regs. §§ 15162-15164.)

3. THEREFORE, the Department is hereby ORDERED to conduct a further environmental review pursuant to CEQA of its suction dredge mining regulations and to implement, if necessary, via rulemaking, mitigation measures to protect the Coho salmon and/or other special status fish species in the watershed of the Klamath, Scott, and Salmon Rivers, listed as threatened or endangered after the 1994 EIR.

4. Said review and rulemaking is to be completed within 18 months following the date of entry of this Order and Judgment.

5. Plaintiffs' Second Cause of Action, alleging violation of Fish and Game Code §5653, is dismissed without prejudice.

6. Plaintiffs' request for temporary injunctive relief pending further environmental review is withdrawn without prejudice.

7. The Court shall retain jurisdiction of the matter.


12/20/06  
Date

Bonnie Sabraw  
Honorable Bonnie L. Sabraw  
Judge of the Superior Court

ACCEPTED AND CONSENTED BY:

  
\_\_\_\_\_  
Attorneys for Plaintiff, Karuk Tribe of California  
and Leaf Hillman

12/18/06  
Date

  
\_\_\_\_\_  
Authorized Representative, Karuk Tribe of California  
and Leaf Hillman

12/12/06  
Date

\_\_\_\_\_  
Attorneys for Defendants, California Department of  
Fish and Game and Ryan Broddrick, Director

\_\_\_\_\_  
Date

\_\_\_\_\_  
Authorized Representative, California Department of  
Fish and Game and Ryan Broddrick, Director

\_\_\_\_\_  
Date

\_\_\_\_\_  
Attorney for Interveners, The New 49'ERS and  
Raymond W. Koons

\_\_\_\_\_  
Date

\_\_\_\_\_  
Authorized Representative, The New 49'ERS and  
Raymond W. Koons

\_\_\_\_\_  
Date

\_\_\_\_\_  
Attorney for Intervener, Gerald Hobbs

\_\_\_\_\_  
Date

\_\_\_\_\_  
Intervener Gerald Hobbs

\_\_\_\_\_  
Date

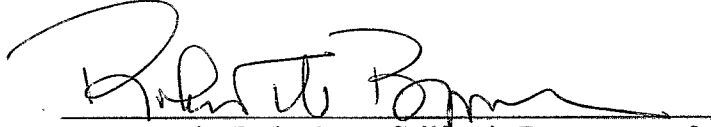
ACCEPTED AND CONSENTED BY:

\_\_\_\_\_  
Attorneys for Plaintiff, Karuk Tribe of California  
and Leaf Hillman

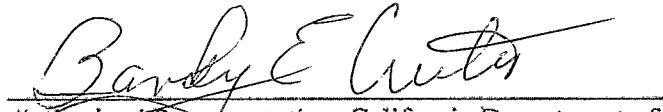
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\_\_\_\_\_  
Authorized Representative, Karuk Tribe of California  
and Leaf Hillman

\_\_\_\_\_  
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\_\_\_\_\_  
Attorneys for Defendants, California Department of  
Fish and Game and Ryan Brodrick, Director

\_\_\_\_\_  
Date 12/15/06

  
\_\_\_\_\_  
Authorized Representative, California Department of  
Fish and Game and Ryan Brodrick, Director

\_\_\_\_\_  
Date Dec 9, 2006

\_\_\_\_\_  
Attorney for Interveners, The New 49'ERS and  
Raymond W. Koons

\_\_\_\_\_  
Date

\_\_\_\_\_  
Authorized Representative, The New 49'ERS and  
Raymond W. Koons

\_\_\_\_\_  
Date

\_\_\_\_\_  
Attorney for Intervener, Gerald Hobbs

\_\_\_\_\_  
Date

\_\_\_\_\_  
Intervener Gerald Hobbs

\_\_\_\_\_  
Date

ACCEPTED AND CONSENTED BY:

\_\_\_\_\_  
Attorneys for Plaintiff, Karuk Tribe of California  
and Leaf Hillman

\_\_\_\_\_  
Date

\_\_\_\_\_  
Authorized Representative, Karuk Tribe of California  
and Leaf Hillman

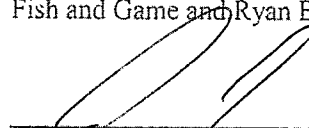
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\_\_\_\_\_  
Attorneys for Defendants, California Department of  
Fish and Game and Ryan Brodrick, Director

\_\_\_\_\_  
Date

\_\_\_\_\_  
Authorized Representative, California Department of  
Fish and Game and Ryan Brodrick, Director

\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Attorney for Interveners, The New 49'ERS and  
Raymond W. Koons

12/12/06  
\_\_\_\_\_  
Date

\_\_\_\_\_  
Authorized Representative, The New 49'ERS and  
Raymond W. Koons

\_\_\_\_\_  
Date

\_\_\_\_\_  
Attorney for Intervener, Gerald Hobbs

\_\_\_\_\_  
Date

\_\_\_\_\_  
Intervener Gerald Hobbs

\_\_\_\_\_  
Date

ACCEPTED AND CONSENTED BY:

\_\_\_\_\_  
Attorneys for Plaintiff, Karuk Tribe of California  
and Leaf Hillman

\_\_\_\_\_  
Date

\_\_\_\_\_  
Authorized Representative, Karuk Tribe of California  
and Leaf Hillman

\_\_\_\_\_  
Date

\_\_\_\_\_  
Attorneys for Defendants, California Department of  
Fish and Game and Ryan Broddrick, Director

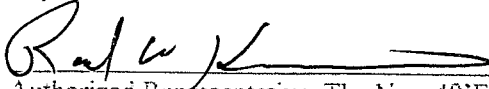
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\_\_\_\_\_  
Authorized Representative, California Department of  
Fish and Game and Ryan Broddrick, Director

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Date

\_\_\_\_\_  
Attorney for Interveners, The New 49<sup>ERS</sup> and  
Raymond W. Koons

\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Authorized Representative, The New 49<sup>ERS</sup> and  
Raymond W. Koons

12-12-06  
Date

\_\_\_\_\_  
Attorney for intervener, Gerald Hobbs

\_\_\_\_\_  
Date

\_\_\_\_\_  
Intervener Gerald Hobbs

\_\_\_\_\_  
Date

ACCEPTED AND CONSENTED BY:

\_\_\_\_\_  
Attorneys for Plaintiff, Karuk Tribe of California  
and Leaf Hillman

\_\_\_\_\_  
Date

\_\_\_\_\_  
Authorized Representative, Karuk Tribe of California  
and Leaf Hillman

\_\_\_\_\_  
Date

\_\_\_\_\_  
Attorneys for Defendants, California Department of  
Fish and Game and Ryan Broddrick, Director

\_\_\_\_\_  
Date

\_\_\_\_\_  
Authorized Representative, California Department of  
Fish and Game and Ryan Broddrick, Director

\_\_\_\_\_  
Date

\_\_\_\_\_  
Attorney for Interveners, The New 49'ERS and  
Raymond W. Koons

\_\_\_\_\_  
Date

\_\_\_\_\_  
Authorized Representative, The New 49'ERS and  
Raymond W. Koons

\_\_\_\_\_  
Date

David Young  
Attorney for Intervener, Gerald Hobbs

12/11/06

\_\_\_\_\_  
Date

Gerald E Hobbs  
Intervener Gerald Hobbs

12-9-06

\_\_\_\_\_  
Date

**Exhibit C**

**EXHIBIT C**

**EXHIBIT C**



FILED  
ALAMEDA COUNTY

APR 27 2009

CLERK OF THE SUPERIOR COURT

By Charge Clerk  
Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

10	LEEON HILLMAN; CRAIG TUCKER; DAVID	)	Case No.: RG 09434444
11	BITTS, KARUK TRIBE; CENTER FOR	)	<del>PROPOSED</del> ORDER GRANTING
12	BIOLOGICAL DIVERSITY; FRIENDS OF THE	)	PLAINTIFFS' EX PARTE
13	RIVER; KLAMATH RIVERKEEPER, PACIFIC	)	APPLICATION TO ENTER THE
14	COAST FEDERATION OF FISHERMEN'S	)	[PROPOSED] ORDER AND
15	ASSOCIATIONS; INSTITUTE FOR FISHERIES	)	STIPULATION FOR
16	RESOURCES; CALIFORNIA SPORTFISHING	)	INTERVENTION AND TO ENTER
17	PROTECTION ALLIANCE; and DOES 1-100,	)	THE [PROPOSED] ORDER AND
18		)	STIPULATION FOR BRIEFING
19	Plaintiffs,	)	SCHEDULE AND PAGE LIMIT ON
20	vs.	)	PLAINTIFFS' PRELIMINARY
21		)	INJUNCTION MOTION
22	CALIFORNIA DEPARTMENT OF FISH AND	)	
23	GAME; DONALD KOCH and DOES 1-100,	)	Dept.: 31
24	inclusive,	)	Judge: Hon. Frank Roesch
25	Defendants.	)	
26		)	Complaint filed February 5, 2009

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On April 27, 2009, Plaintiffs Leon Hillman, Craig Tucker, David Bitts, Karuk Tribe, Center for Biological Diversity, Friends of the River, Klamath Riverkeeper, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, and California Sportfishing Protection Alliance (collectively, "Plaintiffs"), sought an ex parte application to enter the [Proposed] Order and Stipulation for Intervention of the New 49'ers and Raymond W. Koons, and Gerald E. Hobbs and Public Lands for the people, Inc. and the [Proposed] Order and Stipulation for Briefing Schedule and Page Limit for Plaintiffs' Motion For A Preliminary Injunction.

After consideration of Plaintiffs' Notice and Ex Parte Application, Plaintiffs' Memorandum of Points and Authorities; the Declaration of Lynne R. Saxton; the Proposed Order for the Ex Parte Application, the [Proposed] Order and Stipulation for the Intervention, the [Proposed] Order and Stipulation for the Briefing Schedule, and all other papers and pleadings on file in this action, GOOD CAUSE having been shown, I hereby ORDER:

That Plaintiffs' Ex Parte Application is GRANTED; the ~~[Proposed]~~ Order and Stipulation For Intervention of the New 49'ers, Inc., Raymond W. Koons, Gerald E. Hobbs and Public Lands for the People, Inc. be entered and the ~~[Proposed]~~ Order and Stipulation for Briefing Schedule and Page Limit for Plaintiff's Motion for a Preliminary Injunction be entered.

Dated: 4-27-09

  
The Honorable ~~Frank Roesch~~ **KENNETH BURR**  
Superior Court of California  
County of Alameda

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JS  
JS

**Exhibit D**

**EXHIBIT D**

**EXHIBIT D**



7511154

1 LAW OFFICES OF DAVID YOUNG  
David Young, SBN 55341  
2 11150 Olympic Boulevard, Suite 1050  
Los Angeles, CA 90064  
3 Telephone: (310) 575-0308  
Facsimile No.: (310) 575-0311  
4 Email: dyounglaw@verizon.net

**FILED**  
ALAMEDA COUNTY

JUN - 2 2009

5 Attorney for Interveners  
PUBLIC LANDS FOR THE PEOPLE, INC.,  
6 a California 501 [C](3) nonprofit corporation, and GERALD E. HOBBS,  
7 an individual

By Yaron Aylb

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9  
10 FOR THE COUNTY OF ALAMEDA

12 LEEON HILLMAN; CRAIG TUCKER;  
13 DAVID BITTS; KARUK TRIBE;  
CENTER FOR BIOLOGICAL  
14 DIVERSITY; FRIENDS OF THE  
RIVER; KLAMATH RIVERKEEPER;  
15 PACIFIC COAST FEDERATION OF  
FISHERMEN'S ASSOCIATIONS;  
16 INSTITUTE FOR FISHERIES  
17 RESOURCES; CALIFORNIA  
SPORTFISHING PROTECTION  
18 ALLIANCE; and DOES 1-100,  
19  
20 Plaintiff,

) CASE NO. RG09 434444

)  
)  
) **COMPLAINT IN INTERVENTION AND**  
) **ANSWER OF PUBLIC LANDS FOR THE**  
) **PEOPLE, INC, AND GERALD E. HOBBS**  
) **TO PLAINTIFFS' FIRST AMENDED**  
) **COMPLAINT**

) Judge: Hon. Frank Roesch  
) Dept: 31

) Trial Date: None Set  
) Action Filed: February 5, 2009

21 v.

23 CALIFORNIA DEPARTMENT OF FISH  
24 AND GAME; DONALD KOCH; and  
DOES 1-100, inclusive,  
25  
26 Defendants.

1 Interveners Public Lands for the People, Inc. ("PLP"), a  
2 California 501 [C] (3) nonprofit corporation, and GERALD E.  
3 HOBBS ("Hobbs"), an individual allege:

4 1. By this Complaint in intervention, filed by leave of  
5 Court, Interveners PLP and Hobbs join with the Defendants  
6 California Department of Fish and Game ("DF&G"), Donald Koch,  
7 Director, and Does 1-100, inclusive, assuming the Defendants  
8 will resist the claims of all Plaintiffs and Does 1 through 100,  
9 in resisting Plaintiffs' claims and the demands for relief made  
10 by the Plaintiffs, as set forth in Plaintiffs' First Amended  
11 Complaint for Equitable and Injunctive Relief, all of which is  
12 adverse to both the Defendants and the Interveners.

13 2. On February 5, 2009, certain Plaintiffs commenced this  
14 action against Defendants, seeking to prohibit all suction  
15 dredge mining in the State of California. A First Amended  
16 Complaint was later filed by the original Plaintiffs and  
17 additional Plaintiffs seeking substantially the same relief.

18 3. Pursuant to Code of Civil Procedure Sec. 387 (a) and/or  
19 (b) Interveners claim an interest relating to the subject action  
20 of this litigation in that they hold mining claims in the State  
21 of California, or represent members who are miners holding  
22 mining claims in the State of California, and engage in suction  
23 dredge mining in California. Interveners' interests are so  
24 situated that the disposition of this action may as a practical  
25 matter impair or impede Interveners' ability to protect those  
26 interests unless they are permitted to intervene in this action,  
27 and those interests are not adequately represented by any  
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1 existing Defendant. Permission to intervene has been granted by  
2 the Court.

3 4. Intervener Hobbs is a miner and prospector and has been  
4 a miner and prospector for 30 years. He has mined extensively  
5 throughout the Western United States. He holds mining claims in  
6 California. He engages in suction dredge mining in California,  
7 and has received permits from the Defendant DF&G to engage in  
8 suction dredge mining in California. He expects to apply this  
9 year for a permit from the DF&G to again engage in suction  
10 dredge mining in California. This is exactly the type of mining  
11 that the Plaintiffs seek to enjoin. Hobbs is the President and  
12 founder of PLP, a nationwide organization of small and medium  
13 size miners and prospectors.

14 5. With its constituent members, PLP constitutes  
15 approximately 40,000 people. Large numbers of the membership of  
16 PLP have mining claims in California, and receive yearly permits  
17 from DF&G to engage in suction dredge mining in California,  
18 exactly the type of mining that the Plaintiffs seek to enjoin.  
19 Many PLP members have urged both Hobbs and PLP to intervene in  
20 this litigation in order to protect their interests. Many  
21 members of PLP and the mining community in general, are highly  
22 suspicious of the Defendants and have no confidence that they  
23 will adequately represent the interests of small and medium size  
24 miners to engage in suction dredge mining in California.

25 6. Interveners have prepared a Separate Answer to the First  
26 Amended Complaint filed by the Plaintiffs. The Separate Answer  
27 of the Interveners is herein set forth as follows:  
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FIRST AFFIRMATIVE DEFENSE

10. As a first and separate affirmative defense to each and every cause of action set forth in Plaintiffs' First Amended Complaint, Interveners PLP and Hobbs allege that the Plaintiffs in this litigation are nothing more than alter egos and substitutes for the Plaintiffs Karuk Tribe of California and Leaf Hillman set forth in the litigation presently pending in the Superior Court of California, County of Alameda, entitled: KARUK TRIBE OF CALIFORNIA and LEAF HILLMAN, PLAINTIFFS v. CALIFORNIA DEPARTMENT OF FISH AND GAME, DEFENDANTS, THE NEW 49ERS, INC., a California corporation, and RAYMOND W. KOONS, an individual, and GERALD HOBBS, an individual, INTERVENERS, Case No. RG05 211597, hereinafter referred to as "KARUK I". In addition, the parties in KARUK I and in this litigation are in privity with each other, and the claims and remedies sought in both cases are the same.

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SECOND AFFIRMATIVE DEFENSE

11. As a second and separate affirmative defense to each and every cause of action set forth in Plaintiffs' First Amended Complaint, Interveners PLP and Hobbs allege that the Plaintiffs in this litigation have admitted in statements made to the public, referring to this litigation that, "Earlier this year the Tribe sued Fish and Game again in an effort to force immediate protections for fish."

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THIRD AFFIRMATIVE DEFENSE

12. As a third and separate affirmative defense to each and every cause of action set forth in Plaintiffs' First Amended Complaint, Interveners PLP and Hobbs allege that the Plaintiffs

1 in this litigation are alter egos and substitutes for the Karuk  
2 Tribe of California and Leaf Hillman, and by and through  
3 subterfuge and deceit are attempting to re-litigate matters  
4 already decided, or that could have been decided in KARUK I, and  
5 therefore are harassing and vexatious litigants at common law  
6 and the laws of the State of California, and cannot proceed with  
7 this litigation without posting a bond as security for costs and  
8 fees, including, without limitation, attorney's fees occurred by  
9 parties to this litigation; and further as harassing and  
10 vexatious litigants, cannot proceed with this litigation without  
11 consent and leave of the Court.

12 FOURTH AFFIRMATIVE DEFENSE

13 13. As a fourth and separate affirmative defense to each  
14 and every cause of action set forth in Plaintiffs' First Amended  
15 Complaint, Interveners PLP and Hobbs allege that Plaintiffs are  
16 in privity or otherwise associated in fact, with the Karuk Tribe  
17 and Leaf Hillman and this litigation represents the  
18 impermissible splitting of a cause of action previously pursued  
19 in KARUK I. Interveners are informed and believe, and thereon  
20 allege that:

21 (a) Plaintiff Leon Hillman is the brother of Leaf  
22 Hillman and treasurer of the Karuk Tribe.

23 (b) Plaintiff Craig Tucker is a spokesman for and a  
24 consultant funded by the Karuk Tribe.

25 (c) Plaintiff David Bitts is the President of the  
26 Pacific Coast Federation of Fishermen's Associations, an  
27 environmentalist group purporting to represent the  
28 interests of fishermen and a close ally of the Karuk Tribe



1 in numerous ventures attacking Klamath Basin property  
2 holders in a long-standing and highly-successful venture to  
3 deflect attention from unregulated fishing efforts inimical  
4 to Klamath Basin fish stocks.

5 FIFTH AFFIRMATIVE DEFENSE

6 14. As a fifth and separate affirmative defense to each  
7 and every cause of action set forth in Plaintiffs' First Amended  
8 Complaint, Interveners PLP and Hobbs allege that all Plaintiffs,  
9 individually and in concert, are involved in the wholesale  
10 slaughter of federally-listed Coho salmon in the Klamath Basin  
11 and other stocks of fish, through the promotion of, and  
12 involvement in, unregulated and inadequately regulated tribal  
13 and other fish harvests. They have unclean hands with respect  
14 to the subject matter of their suit, as their groundless attacks  
15 against other activities that have never killed so much as a  
16 single fish represent a bad-faith attempt to deflect attention  
17 from their own significant and adverse impacts on Klamath Basin  
18 fish stocks.

19 SIXTH AFFIRMATIVE DEFENSE

20 15. As a sixth and separate affirmative defense to each  
21 and every cause of action set forth in Plaintiffs' First Amended  
22 Complaint, Interveners PLP and Hobbs allege that the remedial  
23 authority provided under California Code of Civil Procedure Sec.  
24 526 (a) does not apply to the State of California, or any  
25 officer, agent, official, or department thereof.

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1 deceit, and unlawful collusion have brought this litigation,  
2 hereinafter referred to as KARUK II.

3 TENTH AFFIRMATIVE DEFENSE

4 19. As a tenth and separate affirmative defense to each  
5 and every cause of action set forth in Plaintiffs' First Amended  
6 Complaint, Interveners PLP and Hobbs allege that Plaintiffs'  
7 First Amended Complaint fails to state facts sufficient to  
8 constitute any cause of action.

9 ELEVENTH AFFIRMATIVE DEFENSE

10 20. As an eleventh and separate affirmative defense to  
11 each and every cause of action set forth in Plaintiffs' First  
12 Amended Complaint, Interveners PLP and Hobbs allege that  
13 Plaintiffs' First Amended Complaint, and each cause of action  
14 therein, fails to state a claim against any Defendant on which  
15 relief can be granted.

16 TWELFTH AFFIRMATIVE DEFENSE

17 21. As a twelfth and separate affirmative defense to each  
18 and every cause of action set forth in Plaintiffs' First Amended  
19 Complaint, Interveners PLP and Hobbs allege that Plaintiffs are  
20 barred from recovery under their First Amended Complaint, and  
21 any cause of action contained therein, by operation of the  
22 doctrine of estoppel.

23 THIRTEENTH AFFIRMATIVE DEFENSE

24 22. As a thirteenth separate affirmative defense to each  
25 and every cause of action set forth in Plaintiffs' First Amended  
26 Complaint, Interveners PLP and Hobbs allege that Plaintiffs are  
27 barred from any recovery under their First Amended Complaint,  
28

1 and any cause of action contained therein, by the operation of  
2 the doctrine of waiver.

3 FOURTEENTH AFFIRMATIVE DEFENSE

4 23. As a fourteenth and separate affirmative defense to  
5 each and every cause of action set forth in Plaintiffs' First  
6 Amended Complaint, Interveners PLP and Hobbs allege that  
7 Plaintiffs are barred from any recovery under their First  
8 Amended Complaint, and any cause of action contained therein, by  
9 the operation of the doctrine of unclean hands.

10 FIFTEENTH AFFIRMATIVE DEFENSE

11 24. As a fifteenth and separate affirmative defense to  
12 each and every cause of action set forth in Plaintiffs' First  
13 Amended Complaint, Interveners PLP and Hobbs allege that  
14 Plaintiffs' causes of action, if any, are barred by the  
15 provisions of all the applicable statutes of limitations,  
16 including, but not limited to, Secs. 337, 338, 339, 340, and 343  
17 of the California Code of Civil Procedure.

18 SIXTEENTH AFFIRMATIVE DEFENSE

19 25. As a sixteenth and separate affirmative defense to  
20 each and every cause of action set forth in Plaintiffs' First  
21 Amended Complaint, Interveners PLP and Hobbs allege that  
22 Plaintiffs are barred from any recovery under their First  
23 Amended Complaint, or any cause of action contained therein, by  
24 operation of the doctrine of laches.

25 SEVENTEENTH AFFIRMATIVE DEFENSE

26 26. As a seventeenth and separate affirmative defense to  
27 each and every cause of action set forth in Plaintiffs' First  
28 Amended Complaint, Interveners PLP and Hobbs allege that by the

1 acts and conduct of the Plaintiffs, Plaintiffs have failed to  
2 mitigate any and all alleged losses and damages claimed to be  
3 suffered by the Plaintiffs in this action.

4 EIGHTEENTH AFFIRMATIVE DEFENSE

5 27. As a eighteenth and separate affirmative defense to  
6 each and every cause of action set forth in Plaintiffs' First  
7 Amended Complaint, Interveners PLP and Hobbs allege that  
8 Plaintiffs' own conduct prevents it from recovering on the  
9 allegations of the First Amended Complaint.

10 NINETEENTH AFFIRMATIVE DEFENSE

11 28. As a nineteenth and separate affirmative defense to  
12 each and every cause of action set forth in Plaintiffs' First  
13 Amended Complaint, Interveners PLP and Hobbs allege that  
14 Plaintiffs lack standing to bring their First Amended Complaint,  
15 and any causes of action contained therein, against Defendants  
16 and/or these Interveners.

17 TWENTIETH AFFIRMATIVE DEFENSE

18 29. As a twentieth and separate affirmative defense to  
19 each and every cause of action set forth in Plaintiffs' First  
20 Amended Complaint, Interveners PLP and Hobbs allege that  
21 Plaintiff failed to take reasonable steps to minimize damages,  
22 if any, and therefore are precluded from recovering from any  
23 damages to the extent they could have been avoided if Plaintiffs  
24 had taken such reasonable steps.

25 TWENTY-FIRST AFFIRMATIVE DEFENSE

26 30. As a twenty-first and separate affirmative defense to  
27 each and every cause of action set forth in Plaintiffs' First  
28 Amended Complaint, Interveners PLP and Hobbs allege that

1 Plaintiffs are barred from recovery of any and all alleged sums  
2 due pursuant to a set off in favor of Defendants and  
3 Interveners, the exact amount to be proven at trial.

4 TWENTY-SECOND AFFIRMATIVE DEFENSE

5 31. As a twenty-second and separate affirmative defense to  
6 each and every cause of action set forth in Plaintiffs' First  
7 Amended Complaint, Interveners PLP and Hobbs allege that  
8 Plaintiffs First Amended Complaint is barred under the doctrine  
9 of collateral estoppel.

10 TWENTY-THIRD AFFIRMATIVE DEFENSE

11 32. As a twenty-third and separate affirmative defense to  
12 each and every cause of action set forth in Plaintiffs' First  
13 Amended Complaint, Interveners PLP and Hobbs allege that  
14 Plaintiffs' First Amended Complaint is barred under the doctrine  
15 of illegality.

16 TWENTY-FOURTH AFFIRMATIVE DEFENSE

17 33. As a twenty-fourth and separate affirmative defense to  
18 each and every cause of action set forth in Plaintiffs' First  
19 Amended Complaint, Interveners PLP and Hobbs allege that  
20 Plaintiffs' First Amended Complaint is barred under the doctrine  
21 of res judicata.

22 TWENTY-FIFTH AFFIRMATIVE DEFENSE

23 34. As a twenty-fifth and separate affirmative defense to  
24 each and every cause of action set forth in Plaintiffs' First  
25 Amended Complaint, Interveners PLP and Hobbs allege that  
26 Plaintiffs are barred from recovery for engaging in wrongful  
27 acts and actions amounting to unconscionability.

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**PROOF OF SERVICE**

I, the undersigned, declare that I am, and was at the time of service of the papers herein referred to, over the age of 18 years and not a party to the action. I am employed in the County of Los Angeles, State of California, in which county the within-mentioned mailing occurred. My business address is Law Offices of David Young, 11150 Olympic Blvd., Suite 1050, Los Angeles, California 90064. I am familiar with the regular mail collection and processing practices of the Law Offices of David Young for correspondence deposited for mailing with the United States Postal Service. I served the following document(s):

**COMPLAINT IN INTERVENTION AND ANSWER OF PUBLIC LANDS FOR THE PEOPLE, INC, AND GERALD E. HOBBS TO PLAINTIFFS' FIRST AMENDED COMPLAINT**

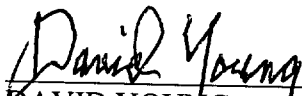
By placing a copy of each document in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

SEE ATTACHED PROOF OF SERVICE LIST

I then sealed the envelope and mailed the foregoing to the addressees on June 1, 2009.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 1, 2009, at Los Angeles, California.

  
\_\_\_\_\_  
DAVID YOUNG



**PROOF OF SERVICE LIST**

1  
2  
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24  
25  
26  
27  
28

**Exhibit E**

**EXHIBIT E**

**EXHIBIT E**



**FILED**  
ALAMEDA COUNTY

JUL 10 2009

CLERK OF THE SUPERIOR COURT

By Vicki Daybell jo

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 PLAINTIFFS'  
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 Leon Hillman, Craig Tucker, David Bitts, Karuk  
Tribe, Center for Biological Diversity, Friends of the River, Klamath Riverkeeper,

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

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

14 The matter was argued and submitted.

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

18 Factual background.

19 In 1994, the Department of Fish and Game ("the DFG") conducted a California  
20 Environmental Quality Act ("CEQA") process which included the preparation and  
21 approval of an Environmental Impact Report. The 1994 EIR was not challenged. Also  
22 occurring in 1994 were statutory amendments to Fish and Game Code ("F&G Code")  
23 §§5653 and 5653.9 and regulations promulgated pursuant to those amendments.

24 The 1994 amendments changed subdivisions (a), (b), and (d), which, in  
25 1994, read as follows:

1 (a) Before any person uses any vacuum or suction dredge  
2 equipment in any river, stream or lake of this state, the person shall  
3 submit an application for a permit for a dredge to the department,  
4 specifying the type and size of equipment to be used and other  
5 information as the department may require.

6 (b) The department may designate waters or areas wherein vacuum  
7 or suction dredges may be used pursuant to a permit, waters or areas  
8 closed to those dredges, the maximum size of those dredges which  
9 may be used, and the time of year when those dredges may be used.  
10 If the department determines that the operation will not be  
11 deleterious to fish, it shall issue a permit to the applicant. If any  
12 person operates any equipment other than that authorized by the  
13 permit or conducts the operation without securing the permit, the  
14 person is guilty of a misdemeanor.

15 (d) It is unlawful to possess a vacuum or suction dredge in areas, or  
16 in or within 100 yards of water, which are closed to the use of  
17 vacuum or suction dredges.

18 The amended statute reads as follows:

19 (a) The use of any vacuum or suction dredge equipment by any  
20 person in any river, stream, or lake of this state is prohibited,  
21 except as authorized under a permit issued to that person by the  
22 department in compliance with the regulations adopted pursuant to  
23 Section 5653.9. Before any person uses any vacuum or suction  
24 dredge equipment in any river, stream, or lake of this state, that  
25 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.

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

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

5 The department may adopt regulations to carry out Sections  
6 5653, 5653.3, 5653.5, and 5653.7.

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

8 The department shall adopt regulations to carry out Section  
9 5653 and may adopt regulations to carry out Sections 5653.9,  
10 5653.5 and 5653.7. The regulations shall be adopted in  
11 accordance with the requirements of Division 13 (commencing  
12 with Section 21000) of the Public Resources Code and Chapter 3.5  
13 (commencing with Section 11340 of Part 1 of Division 3 of Title  
14 of the Government Code.

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

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

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

21 The regulations were specifically mandated to comply with the Administrative  
22 Procedures Act (APA) and with the CEQA. The requirement of a DFG determination  
23 of whether the suction dredge operation proposed by any permit applicant "will not be  
24 deleterious to fish" was modified such that the DFG's determination whether the suction  
25 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

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

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

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

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

19 Within that factual backdrop, in 2009, came the Plaintiffs herein, the Karuk  
20 Tribe, some individual members of the Karuk Tribe, and a number of organizations with  
21 an environmental focus, who have filed this action as taxpayers alleging that the DFG  
22 and its Director are acting unlawfully when issuing suction dredging permits. They  
23 seek, in their First Amended Complaint, an injunction enjoining the DFG from spending  
24 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.

25 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

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

3 The Parties' Arguments

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

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

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

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

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

25 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



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

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

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

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

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

#### 24 Standard of Review

25 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. 3<sup>rd</sup> 447; *Fleishman v. Superior Court*, (2002)

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

8 Likelihood of Success

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

14 Unlawful as Violative of a Court Judgment

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

24 ///

25 ///

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

2           The analysis of the likelihood of success on the merits based on the notion that  
3 the issuance of suction dredge permits by DFG pursuant to the prescriptions of 14 CCR  
4 §228 and §228.5 is an unlawful act in violation of F&G Code 5653 hinges on the court's  
5 determination of whether the regulations applied by the DFG, by themselves, satisfy the  
6 requirement in F&G 5653 to determine if the operation proposed by any license  
7 applicant "will not be deleterious to fish."

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

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

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

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

7 It follows that issuance of a suction dredge permit without a discretionary  
8 determination that the operation proposed by the license applicant is not deleterious to  
9 fish is a direct violation of the mandatory duty imposed on the DFG by F&G Code  
10 5653(b) and is therefore unlawful. Plaintiffs have demonstrated, for the purposes of this  
11 motion, a high likelihood that they will prevail on the merits on the theory related to  
12 violation of the DFG's duty under F&G Code 5653.

#### 13 Unlawful as Violative of CEQA

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

18 CEQA is a statutory scheme imposing a required procedure prior to the  
19 implementation of any agency's discretionary approval of a CEQA "project." Section  
20 21166 of the Public Resources Code requires a new environmental assessment  
21 whenever an agency becomes aware of new information that gives rise to a fair  
22 argument that an ongoing, previously CEQA-approved "project" or program might have  
23 an unstudied or unconsidered environmental impact. The CEQA Guidelines at 14 CCR  
24 §15162 provides temporal boundaries to Public Resources Section 21166, stating in  
25 relevant part:

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

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

9           “(2) substantial changes occur with respect to the  
10 circumstances under which the project is under taken...due to the  
11 involvement of new significant environmental effects or a substantial  
12 increase in the severity of previously identified significant effects; or  
13 (3) new information of substantial importance which was not known  
14 and could not have been known... at the time the previous EIR was  
15 certified...shows any of the following: (A) the project will have one or  
16 more significant effects not discussed in the previous EIR...”

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

22           The DFG must exercise its discretion each time it issues a suction dredge permit.  
23 This is true both when assessing the written plan submitted to it as required by 14 CCR  
24 §228(b) and when assessing an application for a license under 14 CCR §228(a). The  
25 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

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

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

11 Irreparable Harm

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

15 It is uncontroverted that Coho Salmon in the Klamath, Scott & Salmon River  
16 watershed is a species found on the list maintained by the DFG pursuant to F&G Code  
17 2070 et. seq. of endangered, threatened or candidate species. By definition (see F&G  
18 code §2062, §2067, and §2068), any harm to such species or their necessary habitat is  
19 irreparable harm.

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

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

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

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

12 ///

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

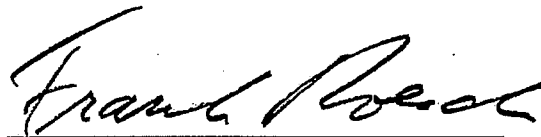
<sup>2</sup> The court has considered and found no merit in the arguments that Plaintiffs have not  
demonstrated standing as taxpayers, that federal law proscribes State regulation, that Plaintiffs'  
unclean hands bars relief, and that the court should exercise "inherent powers" and dismiss the  
action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

1 Conclusion

2 For the reasons stated above, it is ORDERED that the California Department of  
3 Fish and Game and its Director, Donald Koch, immediately cease and desist from  
4 expending any funds obtained by them from the State of California General Fund to  
5 issue suction dredge permits pursuant to Fish and Game Code section 5653 and 14 CCR  
6 §228 and §228.5.

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

9 Dated: July 9, 2009



10  
11 Frank Roesch  
12 Judge of the Superior Court  
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**Exhibit F**

**EXHIBIT F**

**EXHIBIT F**



\*7511254\*

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**FILED**  
ALAMEDA COUNTY

MAY 18 2009

5 Attorney for Interveners  
PUBLIC LANDS FOR THE PEOPLE, INC.,  
6 a California 501 [C](3) nonprofit  
corporation, and GERALD E. HOBBS,  
7 an individual

By Jaroni [Signature]

8  
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF ALAMEDA

12 LEEON HILLMAN; CRAIG TUCKER;  
13 DAVID BITTS; et al.,

14 Plaintiffs,

15 v.

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

19 Defendants.

) CASE NO. RG09 434444  
)  
) MEMORANDUM OF PUBLIC LANDS FOR  
) THE PEOPLE, INC. AND GERALD E.  
) HOBBS IN OPPOSITION TO  
) PLAINTIFFS' MOTION FOR  
) PRELIMINARY INJUNCTION AGAINST  
) CALIFORNIA DEPT. OF FISH AND  
) GAME AND DONALD KOCH, DIRECTOR;  
) WITH SUPPORTING DECLARATIONS  
)  
) Hearing:  
) Date: June 9, 2009  
) Time: 9:00 a.m.  
) Judge: Hon. Frank Roesch  
) Dept: 31  
)  
) Trial Date: None Set  
) Action Filed: February 5, 2009

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INTRODUCTION

The New 49'ers, Raymond W. Koons ("Koons"), Public Lands for the People, Inc. ("PLP"), and Gerald E. Hobbs ("Hobbs") have been granted leave to intervene in this litigation.

This litigation is but the latest salvo, and no doubt not the last one, in a longstanding attempt by the Karuk Tribe of California to stop suction dredge mining in California. Along with The New 49'ers and Koons, intervener Hobbs is already involved in substantial litigation with the Karuk Tribe in *Karuk Tribe of California and Leaf Hillman v. California Department of Fish and Game* ("DF&G"), RG05 211 597. That case is presently pending in the Superior Court of California, County of Alameda, before the Hon. Frank Roesch. That case also seeks to enjoin suction dredge mining in California. Hereafter, the initial litigation before Judge Roesch will be referred to as KARUK I.

Intervener Hobbs is the President and Founder of intervener PLP, a nationwide organization of small and medium size miners and prospectors. With its constituent members, PLP constitutes approximately 40,000 people. Hobbs has been the President of PLP for 7-1/2 years and Vice President for 11-1/2 years. Large numbers of the membership of PLP hold mining claims in California and receive yearly permits from DF&G to engage in suction dredge mining, exactly the type of mining that the plaintiffs seek to enjoin in KARUK I, and in this litigation, which will hereafter be referred to as KARUK II. See Declaration of Gerald E. Hobbs, ¶¶ 1-6.

1 KARUK I was commenced by the Karuk Tribe against DF&G  
2 without any notice to the mining community. Hobbs first learned  
3 of KARUK I when a member of PLP attempted to get a permit for  
4 suction dredge mining from DF&G. He was informed by the DF&G  
5 that because of the KARUK I litigation DF&G had ceased issuing  
6 permits for suction dredge mining in California. He contacted  
7 Hobbs, informed him of the situation, and Hobbs immediately took  
8 steps to intervene in the KARUK I litigation. Hobbs was  
9 eventually granted leave to intervene by Judge Bonnie Sabraw,  
10 and did so. Hobbs Declaration, ¶ 7. When Hobbs first learned  
11 of the KARUK I litigation the Karuk Tribe and DF&G had presented  
12 to Judge Sabraw a stipulation which would have stopped  
13 permitting of suction dredge mining by DF&G. No mining  
14 individuals or groups had previously been aware of the KARUK I  
15 litigation, or the stealth stipulation. The KARUK I litigation  
16 dealt with Coho Salmon in certain limited areas of the Klamath  
17 River basin. Because of Hobbs' intervention, and the  
18 intervention of other miners, Judge Sabraw refused to approve  
19 the stipulation. Hobbs Declaration, ¶ 7.

20 Hobbs and PLP took an active part in opposing the Karuk  
21 Tribe's attempt to circumvent through legislative action  
22 ("AB 1032") the Court's Order and Consent Judgment ("Order")  
23 which Judge Sabraw issued in KARUK I. Judge Sabraw's Order and  
24 Consent Judgment found:

25 "that the pattern and practice of issuing  
26 suction dredge mining permits under the  
27 current regulations could result in  
28 environmental effects different or more  
severe than the environmental impact

1 considered in the 1994 EIR on the Coho  
2 Salmon and/or other fish listed as  
3 endangered or threatened after the  
4 completion of the 1994 EIR. (See Public  
5 Resources Code § 21166; 14 Cal. Code Regs §§  
6 15162-15164.)"

7 It was not known whether there actually was any  
8 "environmental effects different or more severe" than had  
9 previously had been found, or indeed whether there were any  
10 environmental effects whatsoever. Therefore, all parties  
11 consented to Judge Sabraw's Order which permitted suction dredge  
12 mining subject to the completion of a CEQA review, possible new  
13 regulations, and ordered DF&G to conduct the CEQA review.

14 The Karuk Tribe then tried to get through the legislature  
15 what it could not get through litigation in Karuk I. AB 1032  
16 would have nullified Judge Sabraw's Order. Hobbs, as President  
17 of PLP, testified before the State Senate in opposition to  
18 AB 1032, and petitioned the Governor to veto AB 1032. The  
19 Governor vetoed AB 1032. Hobbs Declaration, ¶¶ 7-8.

20 Hobbs, as President of PLP, also successfully opposed the  
21 Karuk Tribe's recent Petition to the DF&G to stop suction dredge  
22 mining throughout the State of California. This is the same  
23 relief that plaintiffs seek from this Court. The Karuk Tribe's  
24 Petition to DF&G mirrored the vetoed AB 1032. DF&G denied the  
25 Karuk Tribe's Petition. Hobbs Declaration, ¶ 9. Since the  
26 plaintiffs in Karuk II assert that this Court should show  
27 deference to the decisions of DF&G, the plaintiffs should have  
28 no objection to this Court finding that the appropriate State



1 agency, who could have stopped suction dredge mining in every  
2 river in California, refused to do so. This should conclude all  
3 issues in plaintiffs' motion for a preliminary injunction. The  
4 plaintiffs are asking for the exact same relief from this Court  
5 that DF&G refused to previously give them.

6 On February 27, 2009, another attempt was made in the  
7 legislature to circumvent Judge Sabraw's Order. SB 670 was  
8 introduced in the California Senate, supported by the Karuk  
9 Tribe. This bill would stand Judge Sabraw's Order on its head  
10 and close all suction dredge mining in California until a CEQA  
11 review had been completed and new regulations were operative.  
12 It is another attempt to pass the vetoed AB 1032. SB 670  
13 specifically references KARUK I as its inspiration. Needless to  
14 say, the Karuk Tribe fully supports SB 670, since SB 670 was  
15 introduced by a supporter of the Karuk Tribe's rejected Petition  
16 to DF&G to close suction dredge mining in California.

17 In their Complaint before this Court in KARUK II the  
18 plaintiffs justify their new action because in KARUK I DF&G  
19 supposedly admitted that suction dredge mining violated both  
20 CEQA and Fish and Game Code §§ 5653 and 5653.9. The two  
21 declarations on which the Karuk Tribe rely deals only with Coho  
22 Salmon, and relates to the limited litigation in Karuk I  
23 regarding certain areas of the Klamath River basin. The two  
24 declarations were part and parcel of DF&G's oft stated desire to  
25 get out of the business of issuing permits for suction dredge  
26 mining in California.

1 DF&G initially opposed the Karuk Tribe in Karuk I. However,  
2 DF&G has openly admitted that it does not want to be the agency  
3 administering suction dredge mining in California. Seeing an  
4 opportunity to rid itself of issuing permits for suction dredge  
5 mining, DF&G decided to switch horses in mid-stream. Hence, the  
6 two highly suspicious and suspect declarations filed by DF&G in  
7 KARUK I. Needless to say, the miners strongly dispute any such  
8 alleged admissions of DF&G. The mining community in California  
9 views DF&G with the utmost distrust, suspicion, and hostility.  
10 Hobbs Declaration, ¶ 10.

11 No miner in California would ever rely on DF&G to protect  
12 his or her interest. The mining community in California has no  
13 confidence in DF&G to protect their interest in anything  
14 relating to mining. Hobbs, as well as large numbers of PLP  
15 members have mining claims in California, and engage in suction  
16 dredge mining in the State. Hobbs Declaration, ¶¶ 3, 9-10.

17 The initial Complaint the Karuk Tribe filed had only three  
18 plaintiffs: Leon Hillman, Craig Tucker, and David Bitts.  
19 Interveners Hobbs and PLP are informed and believe and thereon  
20 allege that: (1) Hillman is a member of the Karuk Tribe, Tribal  
21 Treasurer, and brother of plaintiff Leaf Hillman in KARUK I;  
22 (2) Tucker is a Tribal Consultant and official spokesman for the  
23 Karuk Tribe; (3) Bitts is an environmental activist, acting in  
24 concert with the Karuk Tribe on numerous Klamath Basin issues.  
25 In fact and in law, the initial plaintiffs in KARUK II are not  
26 outraged taxpayers (indeed there is no evidence produced  
27 whatsoever that any of the initial plaintiffs ever paid one cent  
28

1 of taxes to anyone), but rather the alter ego of the Karuk  
2 Tribe. It is not necessary to speculate on this issue because  
3 Tucker, the official spokesman for the Karuk Tribe, admits this  
4 to be the case.

5 In a Press Release issued on March 3, 2009, on behalf of  
6 the Karuk Tribe, "Craig Tucker, Spokesman, Karuk Tribe, cell  
7 (916) 207-8294" [emphasis in original], after discussing  
8 KARUK I, refers to KARUK II and states: "Earlier this year the  
9 Tribe sued Fish and Game again in an effort to force immediate  
10 protections for fish." [Emphasis added.] See Exhibit A  
11 attached hereto. This burst of truth and candor by alleged  
12 outraged taxpayer plaintiff, and official Spokesman for the  
13 Karuk Tribe, Tucker, shows that initially KARUK I and KARUK II  
14 have the same plaintiffs, the same defendants, and the same  
15 issues. Where in fact and reality plaintiffs are the alter egos  
16 of each other, they are not allowed to play a shell game with  
17 the Court. A corporation has been declared to be a vexatious  
18 litigant when the court determined it was the alter ego of an  
19 attorney who had previously been found to be a vexatious  
20 litigant. *Say & Say, Inc. v. Ebershoff*, 20 Cal.App.4<sup>th</sup> 1759,  
21 1770, 25 Cal.Rptr.2d 703 (1993).

22 Since the same relief could be sought in KARUK I, why bring  
23 KARUK II? The plaintiffs in KARUK II nowhere tell the full  
24 story of KARUK I. What is missing from KARUK I's narrative is  
25 the far from unimportant fact that on June 28, 2007 Judge Sabraw  
26 ordered DF&G to "pay to Plaintiffs' counsel \$230,000 in  
27 attorneys fees and costs." Interveners PLP and Hobbs are  
28

1 informed and believe and thereon allege that as part of the  
2 agreement with DF&G to receive \$230,000 in attorneys fees and  
3 costs, the plaintiffs agreed to seek no further attorneys fees  
4 and costs in KARUK I. Plaintiffs apparently believe no such  
5 limitation would apply to KARUK II, if KARUK II is allowed to go  
6 forward. It appears that although the initial parties, issues,  
7 and potential obtainable relief are the same in KARUK I and  
8 KARUK II, the possibility of obtaining attorneys fees in  
9 KARUK II is the primary motivation for its filing.

10 This inconvenient fact having been brought to the Court's  
11 attention by PLP and Hobbs in their initial Motion to Intervene,  
12 the Karuk Tribe then went out and obtained six additional  
13 plaintiffs, all of whom appear to be tax exempt organizations.  
14 To this date, there has not been presented one iota of evidence  
15 that any of the plaintiffs, including the six new plaintiffs,  
16 ever paid one cent of taxes to anyone. These newly minted  
17 supposed "outraged taxpayers" then filed an amended complaint  
18 seeking taxpayer relief pursuant to CCP § 526(a). This complaint  
19 modestly seeks to stop all suction dredge mining in every river  
20 in California whether or not it has Coho Salmon, no salmon, no  
21 fish, or any living creature.

22 It is quite obvious that the one plaintiff controlling and  
23 providing substance for the litigation in Karuk II is the Karuk  
24 Tribe. All other plaintiffs are alter egos, phantoms, and  
25 shadows of the Karuk Tribe.

ARGUMENT

I. KARUK II SHOULD NOT BE ALLOWED TO GO FORWARD.

The foregoing scenario clearly places in issue whether KARUK II presently before this Court should be allowed to go forward. Although KARUK II involves procedural matters of res judicata and collateral estoppel, KARUK II also involves serious questions of subterfuge, collusion, harassing and vexatious litigation, and litigation for an improper purpose. This Court has the inherent power to deal with these and other fundamental issues at any stage of the litigation. In *Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4<sup>th</sup> 953, 967; 67 Cal.Rptr.2d 16 (1997) the California Supreme Court stated:

"It is well established that courts have the fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them. [Citations omitted.] In addition to their inherent equitable power derived from the historic power of equity courts, all courts have inherent supervisory or administrative powers which enable them to carry out their duties, and which exist apart from any statutory authority.

[Citations omitted.] It is beyond dispute that courts have inherent power -- to adopt any suitable method of practice, both in ordinary actions and special proceedings, if

1 the procedure is not specified by statute or  
2 by rules adopted by the Judicial Council.

3 [Citations omitted.] That inherent power  
4 entitles trial courts to exercise reasonable  
5 control over all proceedings connected with  
6 pending litigation ... in order to insure  
7 the orderly administration of justice.

8 'Courts are not powerless to formulate rules  
9 of procedure where justice demands it.'

10 [Citations omitted.] The Legislature has  
11 also recognized the Code authority of courts  
12 to manage their proceedings and to adopt  
13 suitable methods of practice. (See Civ.  
14 Proc. §§ 128, 187.)" [Citations omitted.]  
15 16 Cal.4<sup>th</sup> at 967.

16 This Court has the inherent and statutory power to protect  
17 parties from bad faith actions or tactics which are frivolous,  
18 constitute subterfuge, are deceptive, and amount to harassing or  
19 vexatious litigation. See also Code of Civil Procedure § 128.5.  
20 KARUK II should not be allowed to go forward.

21 Since attorneys fees appear to be the motivating factor for  
22 plaintiffs filing KARUK II, if the Court allows KARUK II to  
23 proceed, it would be elemental fairness and justice to make  
24 plaintiffs, before proceeding further with this litigation, post  
25 a bond in a sufficient amount to reimburse all interveners'  
26 attorneys, as well as the State's attorneys where appropriate,  
27  
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1 for their attorneys fees and costs should interveners and the  
2 State prevail against the plaintiffs.

3 **II. TAXPAYERS HAVE NO STANDING TO OBTAIN A PRELIMINARY**  
4 **INJUNCTION, ONLY A PERMANENT INJUNCTION**

5 Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial  
6 (The Rutter Group 2008) discussing preliminary injunctions  
7 states in Section 9:526:

8 "Compare-taxpayers' suits: A California taxpayer  
9 has standing to enjoin illegal expenditures of  
10 public funds (see CCP §526a). But this applies to  
11 permanent injunctive relief. A taxpayer's  
12 "pocketbook" is not a substitute for the high  
13 degree of existing or threatened injury required  
14 for *prejudgment* injunctive relief (preliminary  
15 injunctions). [*Cohen v. Board of Supervisors*  
16 (1986) 78 CA3d 447, 454, 225 CR 114, 117]"  
17 [Emphasis in original]

18 Witkin, California Procedure, 5<sup>th</sup> Ed. 2008, Provisional  
19 Remedies, §312 Taxpayer's Action is in accord:

20 "A taxpayer's claim that public funds are being  
21 expended illegally, while sufficient to support  
22 standing to bring a taxpayer's action under  
23 C.C.P. 526a and to obtain a permanent  
24 injunction after a hearing on the merits, is  
25 not ordinarily sufficient to demonstrate the  
26 type of irreparable injury that would justify  
27 the imposition of a preliminary injunction.  
28 (*White v. Davis* (2003) 30 C.4<sup>th</sup> 528, 554, 133  
C.R.2d 648, 68 P.3d 74, *supra*, §293 [citing  
*Cohen v. Board of Supervisors* (1986) 178 C.A.3d  
447, 225 C.R. 114, *infra*, §331; *Leach v. San*  
*Marcos* (1989) 213 C.A.3d 648, 261 C.R. 805, and  
*Loder v. Glendale* (1989) 216 C.A.3d 777, 265  
C.R. 66]."

1 Relying on *Cohen v. Board of Supervisors, supra*, and  
2 *Loder v. Glendale, supra*, the California Supreme Court in  
3 *White v. Davis, supra*, quoting *Cohen v. Board of*  
4 *Supervisors*, explained that in a taxpayer action a  
5 taxpayer's "interest appears to be limited to his  
6 taxpayer's pocketbook, an interest which is sufficient to  
7 confer statutory standing to maintain this action and  
8 bring it to final judgment permanently enjoining unlawful  
9 expenditures [citations omitted], but which to our  
10 knowledge has never been held to substitute for the high  
11 degree of existing or threatened injury required for the  
12 pre-judgment injunctive relief sought here'." [Emphasis  
13 in original] 30 C.4<sup>th</sup> at 555.  
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17 In *Loder v. Glendale, supra*, the Court, relying on  
18 *Cohen v. Board of Supervisors*, directly stated: "While  
19 Ms. Loder's alleged taxpayer status is sufficient to  
20 provide her with standing to bring this action, it is not  
21 sufficient to entitle her to a preliminary injunction."  
22 216 C.A.3d at 783.  
23

24 The plaintiffs, suing only as taxpayers, allegedly  
25 to prevent the illegal expenditure of State funds, have  
26 no right to a preliminary injunction.  
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1 III. THE PLAINTIFFS WILL NOT PREVAIL AT TRIAL

2 In *White v. Davis*, supra, the California Supreme Court  
3 stated:

4 "As its name suggests, a preliminary injunction is an order  
5 that is sought by a plaintiff prior to a full adjudication of  
6 the merits of its claim. (See 6 Witkin, Cal. Procedure (4<sup>th</sup> ed.  
7 1997) Provisional Remedies, §287, p.228.)" [Emphasis in  
8 original] 30 C.4<sup>th</sup> at 554. That is exactly the situation faced  
9 by this Court. No discovery has been allowed prior to the  
10 hearing on the preliminary injunction; no EIR pursuant to CEQA  
11 has been made by the State; no admissible evidence has been  
12 presented by the plaintiffs, only hearsay declarations, and  
13 above all, everything that Judge Sabraw decided should be  
14 avoided prior to a full CEQA analysis, and to which all parties  
15 consented, including the Karuk Tribe, is now to be decided on a  
16 truncated motion for a preliminary injunction filed by alter  
17 egos of the Karuk Tribe.

18 Outside of the situation of a taxpayer's action, where  
19 preliminary injunctions are not available, the Court  
20 traditionally has two primary considerations: "Past California  
21 decisions further establish that, as a general matter, the  
22 question whether a preliminary injunction should be granted  
23 involves two interrelated factors: (1) the likelihood that that  
24 the plaintiff will prevail on the merits, and (2) the relative  
25 balance of harms that is likely to result from the granting or  
26 denial of interim injunctive relief." 30 C.4<sup>th</sup> at 554.  
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1 It is highly unlikely that the plaintiffs will prevail at  
2 trial. Suction dredge mining takes place outside of the fish  
3 spawning season, and is specifically regulated so as to cause no  
4 harm to fish. The miners are prepared to present evidence at  
5 trial that suction dredge mining is in no way deleterious to  
6 Coho Salmon, any other fish, the environment, marine life, and  
7 biota. Indeed, the miners are prepared to present evidence that  
8 suction dredge mining benefits fish, marine life, habitat, the  
9 environment, biota, and the rivers and streams of California.  
10 Hobbs Declaration, ¶¶ 12, 13, 14; DeCosta Declaration, ¶¶ 7, 8  
11 and 9; Keene Declaration, ¶¶ 4 and 5; Stapp Declaration, ¶ 7.  
12 Especially significant is the Declaration of Claudia J. Wise,  
13 retired United States Environmental Protection Agency Physical  
14 Scientist/Chemist. Wise Declaration, in its entirety.

15 Further, the harm caused to miners by the granting of the  
16 preliminary injunction would be immense. Most of the miners who  
17 engage in suction dredge mining do so in order to earn a living  
18 and sustain their families. They are the essence of middle  
19 America. Many are Americans who after a hard day's work will  
20 end up with dirt under their fingernails.

21 In today's economy, with so many Americans unemployed, with  
22 gold selling for over \$900 per ounce, an ounce of gold often  
23 spells the difference between having to make a choice between  
24 putting food on the table, paying the mortgage, buying medicine,  
25 or filling the car with a tank of gasoline. The total economic  
26 effect of the prohibition of suction dredge mining in California  
27 could exceed \$60,000,000 annually. Hobbs Declaration, ¶¶ 16-19.  
28

1 DeCosta Declaration, ¶¶ 4, 5, and 6; Keene Declaration, ¶¶ 2 and  
2 3; Stapp Declaration, ¶¶ 1 through 6. See also Exhibit B,  
3 Statement Regarding Testimony of Siskiyou County Supervisor  
4 Marsha Armstrong in Opposition to SB 670.

5 The parties who would be irreparably harmed by any  
6 preliminary injunction banning them from suction dredge mining  
7 in California would be the miners. There is no question that  
8 both PLP members and Hobbs have vital and continuing interests  
9 in the preservation of suction dredge mining in California. See  
10 Hobbs Declaration in its entirety. KARUK II seeks to close down  
11 suction dredge mining in California. Both Hobbs and large  
12 numbers of PLP members have mining claims and mineral estates in  
13 California, and engage in suction dredge mining. Hobbs  
14 Declaration, ¶¶ 5 and 10. Their fundamental property rights and  
15 economic well being would be seriously impacted if the  
16 plaintiffs are successful in KARUK II. Mining claims are  
17 "property in the fullest sense of the word." *Bradford v.*  
18 *Morrison*, 212 U.S. 389, 394 (1909) (quoting *Forbes v. Gracey*, 94  
19 U.S. 762, 767 (1877)); see also *United States v. Shumway*, 199  
20 F.3d 1093, 1100 (9<sup>th</sup> Cir. 1999) (discussing scope of legal  
21 interests represented in mining claims); *United States v.*  
22 *Rizzinelli*, 182 F. 675, 681 (D. Idaho 1910) (Miners hold a  
23 "distinct but qualified property right" with "possessory  
24 title").

25 Remarkably, the plaintiffs seek to cause irreparable harm  
26 to miners, while avoiding any obligation to post a bond pursuant  
27 to CCP § 529 that would realistically compensate the miners for  
28

1 their immense losses were the plaintiffs to lose, as is most  
2 likely, at trial. The real object of the plaintiffs' filing in  
3 KARUK II is not DF&G, but the suction dredge miners in  
4 California. They, the manufacturers and suppliers of suction  
5 dredge mining and equipment, and the communities dependent on  
6 suction dredge mining, are the ones who would be harmed; who  
7 need compensation for their losses; and need an adequate bond to  
8 assure that compensation. "As past cases have explained, 'the  
9 trial court's function is to estimate the harmful effect which  
10 the injunction is likely to have on the restrained party and to  
11 set the undertaking at that sum. (ABBA Rubber Co. v. Seaquist  
12 (1991) 235 Cal.App.3d 1, 14, 286 Cal.Rptr. 518.)'" White v.  
13 Davis, supra, 30 C.4<sup>th</sup> at 667. The real party that will be  
14 restrained by the injunction sought is not DF&G, it is the  
15 miners, and the manufacturers and suppliers of suction dredge  
16 mining and equipment. Should any preliminary injunction be  
17 granted, the plaintiffs should be required to post a bond in an  
18 amount of not less than \$60,000,000. Hobbs Declaration, ¶ 20;  
19 DeCosta Declaration, ¶¶ 4 and 5; Keene Declaration, in its  
20 totality; Stapp Declaration, ¶¶ 2, 4, 5, and 6.

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OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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CONCLUSION

For the foregoing reasons, PLP and Hobbs respectfully request this Court to deny plaintiff's Motion for a Preliminary Injunction.

DATED: May 15, 2009

  
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David Young, Attorney for  
Intervener PUBLIC LANDS FOR THE  
PEOPLE, INC., a California 501  
[C] (3) nonprofit corporation, and  
GERALD E. HOBBS, an individual