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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

PUBLIC LANDS FOR THE PEOPLE, INC., et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; CALIFORNIA DEPARTMENT OF FISH AND GAME, and DONALD KOCH, in his official capacity as Director, California Department of Fish & Game; and Does 1-20,

Defendants.

2:09-CV-02566-MCE-EFB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS (FRCP 8, 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))

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

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INTRODUCTION, FACTS, AND SUMMARY OF ARGUMENT

Plaintiffs are Public Lands for the People, a self-described nationwide association of miners, and several individuals who claim to be prospectors and miners (collectively "PLP" or "Plaintiffs." (*See* Compl. ¶¶ 60, 61, 71-73, 76-81.) In this action Plaintiffs seek to invalidate a state statute – SB 670, codified at California Fish & Game Code § 5653.1 (*see* Appendix, attached, for uncodified version), that imposes a temporary moratorium on instream suction dredge mining[1] in California until the California Department of Fish and Game ("DFG")[2] completes required environmental review and promulgates new regulations, if necessary, governing its existing permitting program for such mining.

I. PRIOR AND PENDING STATE COURT ACTIONS

In 2005, the Karuk Tribe of California sued DFG in the Superior Court of Alameda County. *See Karuk Tribe of California, et al. v. California Department of Fish and Game, et al.,* No. RG 05211597 (Alameda Sup. Ct.). (Compl. ¶ 13.) The 2005 lawsuit sought to enjoin suction dredge mining in the Klamath, Scott and Salmon Rivers based on alleged violations of the California Fish and Game Code, and the need to conduct updated environmental review of its permitting program. (Compl. ¶ 13.) Gerald Hobbs, founder and President of PLP, intervened. (Defs.' Req. for Judicial Notice ("RJN") Ex. A (*Karuk* order granting intervention; Compl. ¶ 16).) On December 20, 2006, an Order and Consent Judgment was entered, whereby DFG agreed, among other things, to conduct updated environmental review pursuant to the California Environmental Quality Act ("CEQA"), Cal. Resources Code § 21000 *et seq*. (Compl. ¶ 21; RJN Ex. B (consent order).) As part of the settlement and based upon their belief the environmental review could be completed in 18 months, the Karuk Tribe agreed to dismiss its claim for injunctive relief.

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[1] Suction dredge mining is a process whereby miners "vacuum[] silt, sand and small gravels from the streambed, pass[] the gravel and other materials through a dredge machine in order to filter out the gold, and then discharge[] gravel, sand and silt back into the river." *Hells Canyon Preservation Council v. Haines*, No. CV 05-1057, 2006 WL 2252554, at *2 (D. Or. Aug 4, 2006); *see also* Cal. Code Regs., tit. 14, § 228 (DFG regulation defining "suction dredging").

[2] DFG regulates suction dredge mining in California pursuant to section 5653 *et seq.* of the California Fish and Game Code.

Consequently, suction dredge mining continued throughout California as authorized under DFG's existing permitting program. (*Id.*) The superior court maintains continuing jurisdiction. (*Id.*)

When it became clear DFG could not obtain an appropriation to complete its environmental review on time, three members and officials of the Karuk Tribe filed a new tax-payer action in Alameda County Superior Court in February 2009, seeking to stop public funding of DFG's suction dredge permitting program statewide. *See Hillman et al. v. California Department of Fish and Game.* No. RG09434444 (Alameda Sup. Ct.); Compl. ¶ 32. PLP and other miners intervened. (*See* RJN Exs. C & D (*Hillman* order granting intervention; complaint in intervention).) On July 10, 2009, the *Hillman* court issued a preliminary injunction prohibiting DFG from spending any money from the state's General Fund that would support its issuance of suction dredge permits until DFG completed the CEQA review ordered in the *Karuk* case. (Compl. ¶ 36; RJN Ex. E (state court injunction).) The state court injunction is on appeal brought by PLP and its president, Gerald Hobbs. (Compl. ¶ 36.)

II. THE PRESENT ACTION

The proceedings in the *Hillman* action leading to the state court injunction unfolded at the same time the California Legislature was considering SB 670, legislation proposing to establish a temporary moratorium in California on instream suction dredge mining until DFG completed environmental review and any related regulatory amendments became operative. (Compl. ¶ 37.) Governor Schwarzenegger signed SB 670 into law on August 5, 2009, and the bill took effect as an urgency measure the very next day. (Compl. ¶ 37, 38.) This action quickly followed.

Before this Court, Plaintiffs sue the State of California and DFG, as well as Governor Schwarzenegger and Donald Koch, the former Director of DFG, in their official capacities. The Complaint, organized loosely into eleven "counts" (some of which are mislabeled prayers for relief, *see, e.g.,* Counts X & XII, ¶¶ 132-36), seeks among other things a declaration that SB 670 is invalid, an injunction against its enforcement, and damages. Plaintiffs claim SB 670's violates the Equal Protection, Due Process, and Takings Clauses of the United States and California Constitutions, the Interstate and Foreign Commerce Clauses, and, remarkably, that it either violates or is preempted by literally hundreds of statutory sections and regulations, including:

> [W]ithout limitation, the Mining Acts of 1866 and 1870, the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a.; the Federal Mining Law of 1872, as amended (30 U.S.C. § 21 et seq.); 16 U.S.C. § 481, (Use of Waters); the Stock Raising Homestead Act of 1916 (Ch. 9, 39 Stat. 862, codified at 43 U.S.C. § (1976); the Federal Land Policy and Management Act of 1976 ("FLPMA") 43 U.S.C. § 1701 et seq., including without limitation §§ 1732(b), 1761 and 1769; the National Forest Management Act ("NFMA"); 16 U.S.C. § 1600 et seq. (1976); Multiple Surface Use Sustained Yield Act ("MUSYA"); 16 U.S.C. § 528 et seq. (1960); Multiple Surface Use Act, 30 U.S.C. §§ 612, 613, 615; Americans with Disabilities Act, 42 U.S.C. § 12132; 5 U.S.C. §§ 601, 602, 603(b), Regulatory Flexibility Act As Amended By The Small Business Regulatory Enforcement Fairness Act of 1996; 5 U.S.C. §§ 801-808) [sic] [SBREFA]; the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.); and numerous sections of the Code of Regulations ("CFR"), including without limitation, 36 CFR 228 et seq.; 36 CFR 261 et seq.; 43 CFR § 3800; 43 CFR § 3809.1 et seq., including without limitation, 43 CFR § 3809.3.

(Compl. ¶ 91; *see also id.* ¶ 8 (alleging violation of these and other laws).)

III. SUMMARY OF ARGUMENT

This action must be dismissed in whole or in part for a variety of reasons, including:

- The Eleventh Amendment bars all of PLP's claims against the State and DFG, bars all of PLP's state law claims against all defendants, and bars all of PLP's claims for damages (including those for taking of private property).
- This Court lacks jurisdiction over all of PLP's claims: PLP lacks standing to bring them because its claimed injuries are not redressable by this Court because, regardless of SB 670, the state court injunction in *Hillman* prohibits DFG from issuing any new suction dredge permits under its existing regulations.
- Even without the Eleventh Amendment and jurisdictional bars, the Court must abstain pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), due to the interference this action will cause to pending state proceedings in *Hillman*.
- Each of PLP's claims fails to state a claim for which relief may be granted (*see* Fed. R. Civ. Proc. 12(b)(6)), or in the alternative, should be dismissed requiring PLP to make a more definite statement of its claims (*see* Fed. R. Civ. P. 12(e)).

ARGUMENT

I. THE ELEVENTH AMENDMENT BARS ALL CLAIMS IN THIS ACTION EXCEPT THOSE SEEKING PROSPECTIVE INJUNCTIVE AND DECLARATORY RELIEF AGAINST THE GOVERNOR AND DIRECTOR KOCH

The Eleventh Amendment bars all suits in federal court, in law and equity, against states, their agencies, and state officials in their official capacities. *See Seven Up Pete Venture v. Schweitzer,* 523 F.3d 948, 952 (9th Cir. 2008) (states); *University of Calif. v. Doe,* 519 U.S. 425, 429 (1997) (state agencies); *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007) (state officials). The only exception to that rule, under *Ex parte Young*, 209 U.S. 123 (1908), is that state officials

may be sued in federal court in their official capacities for prospective or injunctive relief to prevent an ongoing violation of *federal* law. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997). This exception applies only to violations of *federal* law; claims alleging violation of state law may not be asserted in federal court against a state. *See Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 121 (1984).

Accordingly, PLP's claims against the State of California and against DFG must be dismissed in their entirety. All claims seeking damages, and all claims alleging violation of state law, must be dismissed as to the Governor and Director Koch as well.[3]

II. PLP LACKS STANDING BECAUSE ITS ALLEGED INJURIES ARE NOT REDRESSABLE

This Court lacks jurisdiction over PLP's claims unless PLP can demonstrate it has standing with respect to each claim. *See Lujan v. Defenders of Wildlife,* 504 US 555, 560-61 (1992). At an "irreducible constitutional minimum," PLP must show, among other things, that "it must be likely, as opposed to merely speculative, that [its] injury will be redressed by a favorable decision." *Id.* (enumerating three constitutional requirements for standing). Here, all of the injuries of which PLP complains stem from SB 670's temporary moratorium on suction dredge mining, and its requirement that DFG issue no permits for that activity until DFG has completed necessary environmental review under CEQA. (*See, e.g.,* Compl. ¶ 43.)

The problem is, even if PLP were to obtain all the relief it seeks, its injury still will not be redressed. Independent of any prohibitions imposed by SB 670, a state court has enjoined DFG's issuance of new permits in order to compel DFG's compliance with a state law not at issue here: CEQA. (*See* Compl. ¶¶ 25-36; RJN Ex. E (state injunction).) As PLP itself admits, the state court injunction prohibits "the California Department of Fish and Game from issuing any permits

[3] In the alternative, the claims for damages should be stricken. A motion to strike under Federal Rule 12(e) is proper to eliminate claims for relief that cannot be recovered as a matter of law. *See Tapley v. Lockwood Green Engineers, Inc.,* 502 F.2d 559, 560 (8th Cir. 1974); *Bureerong v. Uvawas,* 922 F.Supp. 1450, 1479, n.34 (C.D. Cal. 1996); *Wilkerson v. Butler*, 229 FRD 166, 172 (E.D. Cal. 2005). Accordingly, Count XI, and Prayer for Relief ¶ 5 should be stricken.

for suction dredge mining in every river, stream, and waterway throughout California." (Compl. ¶ 36.)

In this circumstance, where the State, and DFG specifically, would be independently barred by the state court injunction from giving PLP the relief it seeks – permission to suction dredge mine – PLP necessarily lacks standing in this Court. *See, e.g., Nuclear Information and Resource Service v. Nuclear Regulatory Com'n.,* 457 F.3d 941, 955 (9th Cir. 2006) (plaintiff lacked standing to challenge Nuclear Regulatory Comm'n regulation because even if it were found invalid, relief still would be barred by independent Department of Transportation regulation); *Plumas County Bd. of Sup'rs v. Califano*, 594 F.2d 756, 759-60 (9th Cir. 1979) (Since state law imposed an obligation to pay AFDC benefits to pregnant women independent of federal law, a county lacked standing to assert the invalidity of federal regulations providing partial reimbursement for such benefits).

III. THE COURT MUST ABSTAIN UNDER YOUNGER

Even if Plaintiffs' injuries were redressable, the Court still should abstain pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention arises from a strong concern for comity, and cautions "federal court restraint in the face of ongoing state judicial proceedings." *Gilbertson v. Albright*, 381 F.3d 965, 975 (9th Cir. 2004) (en banc). Under *Younger*, a federal court must abstain, and dismiss a federal action, when four criteria are satisfied: (1) there must be ongoing state proceedings; (2) that implicate important state interests; (3) where the federal plaintiff is not barred from litigating federal constitutional issues in those state proceedings; and (4) the federal action would interfere with the state action "in a way that *Younger* disapproves." *Gilbertson*, 381 F.3d at 978. If these four criteria are satisfied, a court has no discretion to refuse to abstain. *See Green v. City of Tucson*, 255 F.3d 1086, 1093 (9th Cir. 2001) (en banc), *overruled in other part by Gilbertson,* 381 F.3d at 982.

All four criteria are met here. The state court *Hillman* action, where an injunction against issuing new suction dredge mining permits was issued, is ongoing, and indeed on appeal. *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 602 (1975) (pending appeal means state proceedings still are pending); *Beltran v. California,* 871 F.2d 777, 782 (9th Cir. 1988) (as long as state

proceedings were pending at the time federal action was initiated, *Younger* applies). Enforcement of California's environmental laws is an important state interest for the purpose of applying *Younger*. *See Carter v. City of Richmond,* No. C-96-1066, 1997 WL 397761, at *4 (N.D. Cal. July 9, 1997); *Harper v. Public Service Comm'n of West Va.,* 396 F3d 348, 352-353 (4th Cir. 2005) (collecting cases). PLP is a plaintiff-intervenor in the state *Hillman* action, and thus is not barred from litigating the federal constitutional issues it raises here. (RJN Exh. C (order granting intervention).) Indeed, in the pending *Hillman* action, PLP has asserted many of the same claims asserted here, claiming that any interference with suction dredge mining by DFG or the State of California violates federal law. (*See* RJN Exh. F at 7-8 (PLP Mem. In Opp. to Prelim. Inj.).)

Finally, it is clear that although PLP has not asked this Court directly for an injunction against the state court injunction, the declaratory relief it seeks here would have the same effect. In fact, as demonstrated above in connection with the discussion of standing and redressability, these federal proceedings have no purpose unless they interfere with the state court injunction currently in place. That connection is more than sufficient to satisfy the last prong of the *Younger* test. *See, e.g., General Steel Domestic Sales, LLC v. Suthers,* No. CIV. S-06-411, 2007 WL 704477, at *11-12 (E.D. Cal. March 2, 2007) (*Younger* satisfied as long as there is some "rational connection" between the state and federal suits so that they are not "wholly unrelated"); *Lake Luciana, LLC v. County of Napa*, No. C 09-04131, 2009 WL 3707110, at *3 (N.D. Cal. Nov. 4, 2009).

IV. PLP'S CONSTITUTIONAL CLAIMS (COUNTS II, III, IV, & IX) FAIL UNDER RULE 12(B)(6)

Setting aside other bars to this action, the Complaint also fails to state any claim for violation of the Constitution for which relief may be granted. *See* Fed. Rule Civ. P. 12(b)(6).

A. Count IV (Taking of Property Without Compensation) Must be Dismissed

1. The Eleventh Amendment Bars PLP's Takings Claims under Both State and Federal Law

The Eleventh Amendment's bar against claims in federal court for damages against the State, its agencies, or officials, includes claims for takings. *See Seven Up*, 523 F.3d at 956. Moreover, as discussed above, PLP's claim for a taking under the State Constitution is barred by

the Eleventh Amendment's prohibition against asserting violations of state law against the state in federal court. *See Pennhurst,* 465 U.S. at 95-96.

2. PLP's Takings Claim Based on Federal Law is not Ripe

Besides being barred by the Eleventh Amendment, PLP's takings claim based violation of the United States Constitution is unripe. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985). This includes claims for injunctive or declaratory relief. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016, (1984) ("[e]quitable relief is not available to enjoin an alleged taking of private property ... when a suit for compensation can be brought"). California provides constitutionally adequate procedures for seeking and obtaining compensation for regulatory takings via, for example, a petition for a writ of mandate from the Superior Court. *See Equity Lifestyle Properties, Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1191 (9th Cir. 2008); *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 826-30 (9th Cir. 2004). Yet PLP fails even to allege that it has sought and been denied compensation using the procedures available under state law. Instead, PLP asserts only two things. First, it asserts that "SB 670 contains no provision for compensating the Plaintiffs for the substantial property deprivations they have suffered." (Compl. ¶ 106.) The fact that SB 670 contains no compensation provision does not deprive PLP of its rights to seek compensation in state court under the usual procedures. Second, PLP asserts that "Defendants have made clear that they do not intend to offer any such compensation." (Compl. ¶ 106.) Again, even if that is true, it is irrelevant to the question of whether PLP has availed itself of state court remedies, a mandatory requirement before any takings claim is ripe.

B. Count II (Due Process) Must be Dismissed

PLP claims that SB 670 violates its substantive and procedural due process rights. PLP's due process claims under Article I section 7(a) of the California State Constitution are barred by the Eleventh Amendment, as noted above. PLP's similar claims under the United States Constitution should be dismissed as set forth below.

1. Procedural Due Process

Plaintiffs contend SB 670 deprives them of some unspecified "property rights and mineral estates," and that the related temporary moratorium took effect without constitutionally required pre- or post- deprivation process. (Compl. ¶¶ 97-98.) Generally, however, "if the action complained of is legislative in nature, due process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed by law." *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 969 (9th Cir. 2003) (citation and quotation omitted). SB 670 indisputably is legislation.[4]

2. Substantive Due Process

PLP also contends that SB 670 violates its right to substantive due process, asserting a variety of grounds. (*See* Compl. ¶ 99.) An environmental regulation like SB 670 (and even if it is a land-use regulation – as PLP contends), however, survives a substantive due process challenge as long as it has any conceivable legitimate government purpose. The alleged motives PLP attributes to the Legislature in enacting the statute (*see* Compl. ¶ 99(b)) are irrelevant:

> [W]e do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did . . . .
>
> Thus, in choosing to base their claim for compensation on an alleged violation of substantive due process, . . . plaintiffs shoulder a heavy burden. . . . [P]laintiffs must demonstrate the irrational nature of the County's actions by showing that the County *could* have had no legitimate reason for its decision. If it is "at least fairly debatable" that the County's conduct is rationally related to a legitimate governmental interest, there has been no violation of substantive due process.

[4] Although in rare circumstances an otherwise legislative act can lose its legislative character if only "a relatively small number of persons [are] exceptionally affected on an individual basis," *id.* (citation and quotation omitted), such is not the case here. "Governmental decisions which affect large areas and are not directed at one or a few individuals do not give rise to the constitutional procedural due process requirements of individual notice and hearing; general notice as provided by law is sufficient." *Halverson v. Skagit County*, 42 F.3d 1257, 1260-61 (9th Cir. 1994). Here, SB 670 applies to every river, stream, and lake in the State (SB 670 § 1(b)), and PLP itself alleges that it "not only . . . applies to miners and prospectors, but also all other members of the public who are potential mining claimants, miners and prospectors." (Compl. ¶ 7.) The fact that it does not affect every citizen of California equally is of no consequence. *See, e.g., Hotel & Motel Ass'n*, 344 F.3d at 969 ("the mere fact that [only] a subcategory of hotels motivated the City Council to act does not change the legislative quality of the ordinance").

Halverson v. Skagit County, 42 F.3d 1257, 1262 (9th Cir. 1994) (citations and quotations omitted); *see also North Pacifica LLC v. City of Pacifica,* 526 F.3d 478, 484 (9th Cir. 2008) (noting that this standard is applicable to land use regulations).

Here, SB 670's stated (and hence conceivable) purpose clearly is to promote a legitimate government interest:

> The Legislature finds that suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state, and, in order to protect the environment and the people of California pending the completion of a court-ordered environmental review by the Department of Fish and Game and the operation of new regulations, as necessary, it is necessary that this act take effect immediately.

SB 670 § 2. That is all the law requires.

C. Count III (Equal Protection) Must be Dismissed

PLP's equal protection claims based on the State Constitution are barred by the Eleventh Amendment, as noted above. As to its federal claims, because suction dredge miners are not a suspect or quasi-suspect classification, to prevail PLP must show that (a) similarly situated individuals were intentionally treated differently (b) without a rational relationship to a legitimate state purpose. *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000).

Assuming arguendo that PLP satisfies the first prong of the test, it cannot prevail on the second part. That part of the test is not materially different from the legitimate interest test applied in the context of substantive due process, described above: "Under rational-basis review, . . . the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative ***any reasonably conceivable*** state of facts that could provide a rational basis for the classification." *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 366-67 (2001) (citations and quotations omitted; emphasis added). Moreover, the State has no obligation to produce evidence to support the rationality of the statute, which "may be based on rational speculation unsupported by any evidence or empirical data." *FCC v. Beach Comms., Inc.,* 508 U.S. 307, 315, (1993).

Here, the stated basis for SB 670 is the need to perform environmental review of suction dredge mining in particular, and its potential harm to the environment. *See* SB 670 § 2. The

State's interest in performing environmental review to "compel government at all levels to make decisions with environmental consequences in mind," and in preventing the potential environmental harm is a legitimate basis for SB 670's moratorium. *Preservation Action Council v. City of San Jose,* 141 Cal. App. 4th 1336, 1350 (2006) (describing purpose of CEQA); *see also Citizens of Goleta Valley v. Bd. of Supervisors,* 52 Cal.3d 553, 564 (1990) (CEQA "protects not only the environment but also informed self-government"). And that is all that is required.

D. Count IX (Unlawful Interference with Commerce) Must Be Dismissed Because, as a Matter of Law SB 670 Does not Interfere with Commerce

Plaintiffs assert that SB 670 prevents them from mining gold in an economically viable manner, and thus prevents them from selling gold to buyers in other states and countries. They further allege that SB 670 will adversely affect the sale of suction dredge mining equipment in California. (*See* Compl. ¶¶ 126-27.) Impairing such sales, Plaintiffs argue, violates both the Interstate and Foreign Commerce Clauses of the United States Constitution.[5]

Whether a state law runs afoul of the Commerce Clause is determined by a two-tiered analysis:

> [1] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. [2] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461, 466 (9th Cir. 2001) (citations and quotations omitted). Here, SB 670 is facially neutral, and must be "upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The fatal flaw in PLP's Commerce Clause claim is that not only is SB 670 facially neutral, but PLP cannot establish that a temporary moratorium on suction dredge mining in California has

[5] Claims under the Foreign Commerce Clause generally are analyzed under the same framework as are claims under the Interstate Commerce Clause, unless they "impair uniformity in an area [of foreign commerce] where federal uniformity is essential." *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1014 (9th Cir. 1994) (citation and quotation omitted).

the *effect* of differentially burdening other states. A statute that is both facially neutral and also lacks any such differential effect does not run afoul of the Commerce Clause. "For a state statute to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *National Elec. Mfrs. Ass'n v. Sorrell,* 272 F.3d 104, 109 (2d Cir. 2001*); see also Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3rd Cir. 1994); *National Paint & Coatings Ass'n v. City of Chicago,* 45 F.3d 1124, 1132 (7th Cir. 1995) ("No disparate treatment, no disparate impact, no problem under the dormant commerce clause."); *K-S Pharmacies, Inc. v. American Home Products,* 962 F.2d 728, 731 (7th Cir. 1992) ("Courts demand more than hypothetical rationality of statutes [under *Pike*] only when the laws create a *differential* burden on interstate commerce" (emphasis in original)).

The Ninth Circuit agrees:

> A review of recent Supreme Court cases reveals that certain types of impacts on interstate commerce are of special importance in the balance with the state's putative interest. These impacts include the disruption of travel and shipping due to a lack of uniformity in state laws, *see Raymond Motor*, 434 U.S. at 445, 98 S.Ct. at 796; *Bibb*, 359 U.S. at 526-27, 79 S.Ct. at 966; impacts on commerce beyond the borders of the defendant state, *see Healy v. Beer Institute,* 491 U.S. 324, 337, 109 S.Ct. 2491, 2499, 105 L.Ed.2d 275 (1989); and impacts that fall more heavily on out-of-state interests, *see Clover Leaf Creamery*, 449 U.S. at 473, 101 S.Ct. at 728. Because the purpose of the Commerce Clause is to protect the nation against economic balkanization, *Wardair Canada v. Florida Dep't of Revenue*, 477 U.S. 1, 7, 106 S.Ct. 2369, 2372, 91 L.Ed.2d 1 (1986), **legitimate regulations that have none of these effects arguably are not subject to invalidation under the Commerce Clause.**

Pacific Northwest Venison Producers v. Smitch, 20 F.3d 1008 (9th Cir. 1994) (emphasis added). Put differently, "A facially neutral statute [only] may violate the Commerce Clause if the burdens of the statute so outweigh the putative benefits as to make the statute unreasonable or irrational. A statute is unreasonable or irrational when "the asserted benefits of the statute are in fact illusory or relate to goals that evidence an impermissible favoritism of in-state industry over out-of-state industry." *UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189, 1196 (9th Cir. 2007) (citation and quotation omitted). Here, as demonstrated above, SB 670 promotes the undeniably legitimate benefit of environmental review and protection, and PLP does not even allege that SB 670 favors in-state over out of state industry, either on its face or in its effect.

V. PLP'S NON-CONSTITUTIONAL CLAIMS (COUNTS I, V, VI, VII, AND VIII) SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM, OR IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

As detailed below, each of the remaining counts in the complaint – Counts I, V, VI, VII, and VIII, alleging violation of or preemption by literally hundreds of statutes and regulations – should be dismissed under Rule 12(b)(6) for failure to satisfy the Federal Rules' most basic pleading requirements. Or, in the alternative, these counts should be dismissed under Rule 12(e), requiring PLP to provide a more definite statement.

A. The Clarity and Specificity Requirements of Rules 8, 12(b)(6), and 12(e)

The Supreme Court recently has reaffirmed that Federal Rule of Civil Procedure 8 is requires minimum levels of clarity and specificity, and that a complaint must do more than assert bald legal conclusions or vague ambiguous facts:

> Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the claim is and the grounds upon which it rests, While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235- 236 (3d ed. 2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true . . . .

Bell Atl. Corp. v. Twombly, 550 U.S 544, 555 (2007) (citations and quotations omitted). Consequently, the Court is "not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor may the Court "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). "Detailed factual allegations are not required, but '[t]hreadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice.'" *Pizarro v. Schultz,* No. 1:06-CV-01499, 2009 WL 3246418, at *1 (E.D. Cal. Oct. 6, 2009) (quoting *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009)).

In short, a complaint must give the defendant "fair notice of what the . . . claim is and the grounds upon which it rests," *Twombly,* 550 U.S. at 555, 556 n.3, and should be dismissed under Rule 12(b)(6) when it is "so verbose, confused and redundant that its true substance, if any, is well disguised." *Corcoran v. Yorty,* 347 F.2d 222, 223 (9th Cir. 1965).

If the Court does not dismiss Counts I, V, VI, VII, and VIII under Rule 12(b)(6), it has discretion instead to dismiss for similar defects under Rule 12(e). *See Hearns v. San Bernardino Police Department*, 530 F.3d 1124, 1132 (9th Cir. 2008). In fact, when a complaint is prolix, redundant, confusing, and replete with allegations that consist of little more than conclusory statements of law, such as PLP's complaint in the present action, a "defendant has an ***obligation*** to move for a more definitive statement." *Destfino v. Kennedy*, No. CV-F-08-1269, 2009 WL 63566, at *4 (E.D. Cal. Jan. 8, 2009) (emphasis added). As the Ninth Circuit has admonished:

> [T]he judge may in his discretion, in response to a motion for more definite statement under Federal Rule of Civil Procedure 12(e), require such detail as may be appropriate in the particular case, and may dismiss the complaint if his order is violated. Fed.R.Civ.P. 41(b).
>
> Prolix, confusing complaints . . . impose unfair burdens on litigants and judges. As a practical matter, the judge and opposing counsel, in order to perform their responsibilities, cannot use a complaint such as the one plaintiffs filed, and must prepare outlines to determine who is being sued for what. Defendants are then put at risk that their outline differs from the judge's, that plaintiffs will surprise them with something new at trial which they reasonably did not understand to be in the case at all, and that res judicata effects of settlement or judgment will be different from what they reasonably expected. "[T]he rights of the defendants to be free from costly and harassing litigation must be considered." *Von Poppenheim* at 1054.

McHenry v. Renne, 84 F.3d 1172, 1179-80 (9th Cir. 1996). When a complaint is a sort of "shotgun" or "kitchen sink" affair, such as PLP's:

> it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief. Under the Federal Rules of Civil Procedure, a defendant faced with [such] a complaint . . . is not expected to frame a responsive pleading. Rather, the defendant is expected to move the court, pursuant to Rule 12(e), to require the plaintiff to file a more definite statement. Where, as here, the plaintiff asserts multiple claims for relief, a more definite statement, if properly drawn, will present each claim for relief in a separate count, as required by Rule 10(b), and with such clarity and precision that the defendant will be able to discern what the plaintiff is claiming and to frame a responsive pleading. Moreover, with the shotgun pleading out of the way, the trial judge will be relieved of "the cumbersome task of sifting through myriad claims, many of which [may be] foreclosed by [various] defenses." *Fullman v. Graddick*, 739 F.2d 553, 557 (11th Cir.1984).

Anderson v. District Bd. of Trustees of Cent. Florida Community College, 77 F.3d 364, 366 - 67 (11th Cir. 1996); *see also Mason v. County of Orange*, 251 F.R.D. 562, 563-64 (C.D. Cal. 2008) (citing *Anderson* and condemning shotgun pleading).

B. Defects in the Complaint

Counts I, V, VI, VII, and VIII exhibit all of the defects described above.

1. Count I

Consider, for example, just one paragraph in Count I (Preemption). It provides a literally endless ("without limitation") list of statutes and regulations that SB 670 allegedly violates:

> [W]ithout limitation, the Mining Acts of 1866 and 1870, the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a.; the Federal Mining Law of 1872,[6] as amended (30 U.S.C. § 21 *et seq*.); 16 U.S.C. § 481, (Use of Waters); the Stock Raising Homestead Act of 1916 (Ch. 9, 39 Stat. 862, codified at 43 U.S.C. § (1976); the Federal Land Policy and Management Act of 1976 ("FLPMA") 43 U.S.C. § 1701 et seq., including without limitation §§ 1732(b), 1761 and 1769; the National Forest Management Act ("NFMA"); 16 U.S.C. § 1600 *et seq*. (1976); Multiple Surface Use Sustained Yield Act ("MUSYA"); 16 U.S.C. § 528 *et seq*. (1960); Multiple Surface Use Act, 30 U.S.C. §§ 612, 613, 615; Americans with Disabilities Act, 42 U.S.C. § 12132; 5 U.S.C. §§ 601, 602, 603(b), Regulatory Flexibility Act As Amended By The Small Business Regulatory Enforcement Fairness Act of 1996; 5 U.S.C. §§ 801-808) [SBREFA]; the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq*.); and numerous sections of the Code of Regulations ("CFR"), including without limitation, 36 CFR 228 et seq.; 36 CFR 261 et seq.; 43 CFR § 3800; 43 CFR § 3809.1 et seq., including without limitation, 43 CFR § 3809.3.

(Compl. ¶ 91.) Unpacking the statutes designated by common names or the short-hand "*et seqs*.," this list comprises over 300 separate statutory sections and regulations. And the totality of PLP's allegation about them is, "SB 670's absolute prohibition of vacuum or suction dredge mining in the rivers, streams, lakes, and waterways within those Federal lands violates Plaintiffs' rights pursuant to the aforesaid statutes, rules, and regulations mandated by Congress." (*Id.*) Even if

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[6] Although the Complaint cites the Mining Act of 1872 as "30 U.S.C. § 21 et seq.," that Act in fact is codifed in "scattered sections of 30 U.S.C." *Siskiyou Regional Educ. Project v. U.S. Forest Service*, 565 F.3d 545, 550 (9th Cir. 2009). Specifically, its surviving provisions are at 30 U.S.C. §§ 22-24, 26-28, 29-30, 33-35, 37, 39-42, & 47. *See generally,* 1-30 *American Law of Mining, 2nd Edition* § 30.01 n.3. The Mining Act of 1866, Act of July 26, 1866, ch. 262, 14 Stat. 251, was largely repealed by the section 9 of the Mining Act of 1872 (see Act of May 10, 1872, ch. 152, 17 Stat. 91, § 9 (repealing sections 1, 2, 3, 4, and 6 of the 1866 Act)), and what remains of it is codified at 30 U.S.C. §§ 43, 46, 51 and 43 U.S.C. § 661. *See American Law of Mining* § 30.01 n.1. And the Act of 1870, Act of July 9, 1870, ch. 235, 16 Stat. 217, remains only as codified at 35, 36, 38, 47, 52 and 43 U.S.C. §§ 661, 766. *See id.* n.2.

PLP's mischaracterization of SB 670 were accurate (it is not: SB 670, on its face, is a temporary moratorium only until DFG completes CEQA review, not an "absolute prohibition"), such general allegations are woefully insufficient. To survive a motion to dismiss under Rule 12(b)(6) the Federal Rules require "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly,* 550 U.S. at 555.

To make matters worse, this paragraph, in a Count titled "Preemption," has nothing to do with preemption. It alleges a direct violation of rights allegedly secured by its endless list of statutes ("violates Plaintiffs' rights pursuant to the aforesaid statutes"). *Cf. California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987) (describing forms of preemption); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1060 (9th Cir. 2008) (explaining difference between preemption claim and one asserting direct violation of a federal statute).

Worse still, even a few minutes of research would have revealed to PLP's lawyers that almost all of the statutes listed in paragraph 91 create no enforceable rights at all, much less rights enforceable against a state. For example, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, does not pertain to states, *see Macht v. Skinner,* 916 F.2d 13, 18 (D.C. Cir. 1990), and does not create any enforceable federal right in the first place, *see Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1114 (9th Cir. 2002). Similarly, the "Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. §§ 801-08, as amended by the Regulatory Flexibility Act, 5 U.S.C. §§ 601, 602, 603(b)," applies only to federal agencies, *see Olsen v. Mukasey,* 541 F.3d 827, 830 (8th Cir. 2008), and that Act itself ***precludes judicial review*** of an alleged violation, *see* 5 U.S.C. § 805. *See Kootenai,* 313 F.3d at 1114 (no right of action under NFMA; only recourse is under the APA, which applies only to federal agencies); *Lujan,* 497 U.S. at 882 (no right of action under FLPMA); *California Forestry Ass'n v. Bosworth*, No. 2:05-cv-00905-MCE-GGH, 2008 WL 4370074, at *4 (E.D. Cal. Sept. 24, 2008) (MUSYA is "a general statute that requires the *Forest Service* to consider competing potential uses for forest resources" and "imposes few, if any, judicially reviewable constraints on the *Forest Service's* exercise of its discretion" (emphasis added).

Similarly, on PLP's list is "43 CFR § 3809.1 et seq., including without limitation, 43 CFR § 3809.3." (Compl. ¶ 91.) Here, the "et seq." conceals the fact that 43 C.F.R. part 3809 consists of 16 separate regulations; the reader is at a loss to know which of these regulations allegedly confers an absolute right to suction dredge mine. Even a cursory examination, however, reveals that these sections set forth procedures and regulations for mining on Bureau of Land Management land. Nothing in them guarantees a right to avoid state environmental regulations, and indeed, two sections provide just the opposite. Section 3809.3 (the example used in the complaint) provides, in full: "If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. However, *there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart."* (Emphasis added.) And section 3809.1(b) provides that the purpose of the subpart is to "Provide for maximum possible coordination with appropriate State agencies to avoid duplication and to ensure that operators prevent unnecessary or undue degradation of public lands." Again, the complaint fails to allege any way in which SB 670 violates these provisions.

Continuing through the litany of statutes PLP alleges SB 670 violates, 36 C.F.R. part 261 (identified in the Complaint as "36 C.F.R. § 261 et seq." in ¶ 91) consists of 45 separate regulations prohibiting various activities on national forest land. E.g., § 261.4 (disorderly conduct); 261.5 (activities that create a fire hazard). The vague assertion that SB 670 somehow violates one of these regulations hardly suffices to survive Rule 12(b)(6). Moreover, there is no allegation in the complaint that SB 670 creates a fire hazard, mandates disorderly conduct, or results in any of the conduct prohibited by these regulations.

The allegation that SB 670 violates the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, is equally frivolous, but for a different reason. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Two of the plaintiffs allegedly are disabled (*see* ¶¶ 72, 77), but the complaint does not allege that either plaintiff, or anyone at all "by reason of [a disability]" is "excluded from participation" in some activity or "subject to

discrimination" by SB 670. Indeed, the complaint repeatedly asserts, in contradiction to the claim here that SB 670 violates the ADA, that SB 670 uniformly affects ***all*** persons because it allegedly deprives everyone equally – disabled or not – of the entire economic value of their mining claims.

The other allegations in this count, and the other counts, fare no better under the Federal Rules. Each recites in one way or another, the allegation that SB prohibits suction dredge mining (rather than the temporary moratorium it is), and then asserts the prohibition violates this or that statute in some unspecified way, or that it conflicts with a statute's purpose in some unspecified way, and so forth. For example, paragraph 93, paraphrasing the Supreme Court's description of conflict preemption in *Guerra*, alleges that SB 670 is preempted by all the laws of the United States, reciting that "SB 670 directly conflicts with Federal law relating to mining, and stands as an obstacle to the accomplishment of the full purposes and objectives of Congress in enacting not only the mining laws but all other laws stated above. All matters dealt with by SB 670 are preempted and fully occupied by the laws of the United States." (Compl. ¶ 93); *cf. Guerra,* 479 U.S. 280-81 (describing preemption in those words). Such allegations are not sufficient to survive a motion to dismiss. *See Twombly,* 550 U.S. at 555 (cautioning that a valid complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action").

Because of the patently frivolous nature of the allegations and their conclusory, confusing, and at times incomprehensible nature, Count I should be dismissed. At the very least, PLP should be required to amend this count, alleging with some clarity the rights allegedly violated by SB 670, the statutory provision creating that right, and how they are violated; or the statutory purposes SB 670 allegedly conflicts with, the statutory provisions(s) showing that purpose, and how SB 670 conflicts with that purpose. *See McHenry,* 84 F.3d at 1179 ("though a complaint is not defective for failure to designate the statute or other provision of law violated, the judge may in his discretion . . . require such detail as may be appropriate in the particular case").

2. Count VI

Count VI, similarly alleges in entirely conclusory terms violation of PLP's rights under the Mining and Mineral Policy Act of 1970. (Compl. ¶¶ 111-14.) Not only does the count fail to

identify the rights PLP thinks the Act confers, or how SB 670 allegedly violates those rights, but the same allegation is made in paragraph 91 under Count I's heading of "Preemption." So the count not only is subject to dismissal under Rule 12(b)(6) by being so conclusory as to fail to give the defendant "fair notice of what the ... claim is and the grounds upon which it rests," *Twombly,* 550 U.S. at 555, 556 n.3, but also is subject to dismissal under Rule 12(e) as it leaves the reader to wonder how, if at all, this count differs from the allegations made about the same Act in Count I.

In any event, to the extent the count is comprehensible, it fails. To confer an enforceable right, a statute must be "phrased in terms of the persons benefited . . . with an unmistakable focus on the benefited class." *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002) (quoting *Cannon v. Univ. of Chicago,* 441 U.S. 677, 691, 692 n. 13). "[S]tatutory language less direct than the individually-focused 'No person shall ...' must be supported by other indicia so unambiguous that we are left without any doubt that Congress intended to create an individual, enforceable right . . . ." *Ball v. Rodgers*, 492 F.3d 1094, 1105-06 (9th Cir. 2007) (emphasis added; citation and quotation omitted). It is not enough that the statute may confer benefits on some individuals, or that it serves to promote their interests. "It is rights, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." *Gonzaga,* 536 U.S. at 282. The Minerals Policy Act, 30 U.S.C. § 21a, fails that test. *See Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55, 66-67 (2004) (§ 21a simply broad statement of policy, and alleged violations of the provision are not subject to judicial review). SB 670 cannot violate rights conferred by that statute, because the statute does not confer any rights.

3. Count VII

Count VII (¶¶ 115-19) alleges "Violation of 30 U.S.C. §§ 21-54 (Mining Act)," which once more is identical to the allegation pertaining to the same Act in paragraph 91 under the heading, "Preemption" (alleging violation of "Plaintiffs' rights pursuant to" numerous statutes, including "30 U.S.C. § 21 *et seq.*"). And once more, the count is entirely conclusory, lacking allegations about exactly what rights the statute allegedly confers or how SB 670 violates those rights. There is no indication of which of the over 20 separate statutory sections the Complaint cites actually contains the "rights-creating" language *Gonzaga* requires. Moreover, even if § 22, the only

section that PLP quotes, arguably contains such rights-creating language, that section plainly pertains only to holding federal land "free and open to exploration and purchase:"

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

30 U.S.C. § 22. No allegation in this count, or anywhere in the Complaint, alleges that SB 670 closes federal land to exploration and purchase.

Compounding these defects is the fact that, although the title of Count VII alleges violation of the statute, the body of the count does not. Instead, it alleges that SB 670 in some unspecified way "violates ***the purpose*** of the aforesaid Act." (Compl. ¶ 118 (emphasis added).) As noted in connection with PLP's equally confused preemption count (Count I), above, violation of the purposes of an act is not a violation of the act itself or rights secured by the act; conflict with an act's purposes may support a preemption claim, but it does not support a claim for violation of a statute. *See Guerra*, 479 U.S. at 280-81 (describing elements of preemption claim); *cf. Shewry*, 543 F.3d at 1060 (explaining difference between preemption claim and one asserting direct violation of a federal statute); *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002) (describing implied rights for statutory violations).

Like the other statutory counts, this count's failure therefore is twofold: It must be dismissed under Rule 12(b)(6) for failure to provide even the minimal specificity required by the federal rules, and it must be dismissed under Rule 12(e) because it is too confusing to respond to. If PLP intends more than just to repeat its preemption claim here, it must specify the rights allegedly violated, and how SB 670 allegedly violates those rights. If all PLP intends by this count is to repeat its claim that SB 670 is preempted by 30 U.S.C. §§ 22-54 because somehow conflicts with the federal statute's purposes, this count should be dismissed as redundant of Count I, to which it adds nothing.

4. Count VIII

Count VIII is no better. It alleges in conclusory terms that SB 670 violates an "implied right to use public lands." Not only is it devoid of any relevant factual allegation, it fails (as do Counts VI and VII) to point to the critical prerequisite of any implied right: a statute that is "'phrased in terms of the persons benefited . . . with an unmistakable focus on the benefited class." *Gonzaga,* 536 U.S. at 284 (citation and quotation omitted). The claim simply alleges that somewhere in some federal statute ("[t]he mining laws, and other statutes enacted by Congress)" there is buried the "rights creating" language that is required for an implied right to exist. (Compl. ¶ 121); *Gonzaga,* 536 U.S. at 284. This does not satisfy Rule 8's pleading standards, and the claim must be dismissed under Rule 12(b)(6), or in the alternative under Rule 12(e).

5. Count V

Finally, Count V baldly alleges violation of 42 U.S.C. § 1983. In view of all the defects noted above, this count should be dismissed too. As an initial matter, PLP alleges as a basis for this count violation of the "*Constitution and laws of the State of California.*" (Compl. ¶ 110, emphasis in original.) Because § 1983 applies only to rights secured by the federal Constitution and federal statutes, this portion of paragraph 110 should be stricken. 42 U.S.C. § 1983. In any event, as demonstrated above, the complaint fails to state a claim for violation of any constitutional or statutory provision.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court:

- Dismiss the entire complaint under Rule 12(b)(1) on the ground that Plaintiffs lack standing;
- Dismiss all claims against the State and DFG, as well as all state law claims, and strike Count XII and Prayer for Relief paragraph 5 (requests for damages), because they are barred by the Eleventh Amendment;
- Dismiss Counts II, III, IV, and XI (Due Process, Equal Protection, Takings, and Commerce Clause) under Rule 12(b)(6); and
- Dismiss Counts I, V, VI, VII, and VII (Preemption, Section 1983, Violation of 30 U.S.C. § 21a, Violation of 30 U.S.C. §§ 22-54, and Violation of an Implied Right to Use Public Land) under Rule 12(b)(6) or under Rule 12(e).

Dated: November 24, 2009

Respectfully Submitted,

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SA2009404901

STATUTORY APPENDIX

Pursuant to Local Rule 5-133(i), attached are copies of SB 670 and other statues at large cited herein, as indicated below:

Document	**Exhibit**
SB 670, Calif. Stats 2009 ch 62	A
Mining Act of 1866, Act of July 26, 1866, ch. 262, 14 Stat. 251	B
Mining Act of 1870, Act of July 9, 1870, ch. 235, 16 Stat. 217	C
Mining Act of 1872, Act of May 10, 1872, ch. 152, 17 Stat. 91	D

EXHIBIT A

1 of 9 DOCUMENTS

CALIFORNIA ADVANCE LEGISLATIVE SERVICE

2009 REGULAR SESSION
CHAPTER 62 (Senate Bill No. 670)

BILL TRACKING SUMMARY FOR THIS DOCUMENT

2009 Cal ALS 62; 2009 Cal SB 670; Stats 2009 ch 62

Approved by Governor August 5, 2009. Filed with Secretary of State August 6, 2009.

Urgency legislation is effective immediately, Non-urgency legislation will become effective January 1, 2010

DIGEST: SB 670, Wiggins. Vacuum or suction dredge equipment.

Existing law prohibits the use of any vacuum or suction dredge equipment by any person in any river, stream, or lake of this state without a permit issued by the Department of Fish and Game. Under existing law, it is unlawful to possess a vacuum or suction dredge in areas, or in or within 100 yards of waters, that are closed to the use of vacuum or suction dredges. A violation of the permit requirement is a misdemeanor. The department is authorized to close areas otherwise open for dredging and for which permits have been issued if there is an unanticipated water level change and the department determines that closure is necessary to protect fish and wildlife resources. Existing law requires the department to adopt regulations to implement certain of the vacuum or suction dredge equipment requirements and authorizes the department to issue regulations with respect to other requirements. Existing law requires that the regulations be adopted in accordance with the requirements of the California Environmental Quality Act (CEQA).

CEQA requires a lead agency, as defined, to prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on a project, as defined, that it proposes to carry out or approve that may have a significant effect on the environment, or to adopt a negative declaration if it finds that the project will not have that effect. The act exempts from its

provisions, among other things, certain types of ministerial projects proposed to be carried out or approved by public agencies, and emergency repairs to public service facilities necessary to maintain service.

This bill would designate the issuance of permits to operate vacuum or suction dredge equipment to be a project under CEQA, and would suspend the issuance of permits, and mining pursuant to a permit, until the department has completed an environmental impact report for the project as ordered by the court in a specified court action. The bill would prohibit the use of any vacuum or suction dredge equipment in any river, stream, or lake, for instream mining purposes, until the director of the department certifies to the Secretary of State that (1) the department has completed the environmental review of its existing vacuum or suction dredge equipment regulations as ordered by the court, (2) the department has transmitted for filing with the Secretary of State a certified copy of new regulations, as necessary, and (3) the new regulations are operative.

This bill would declare that it is to take effect immediately as an urgency statute.

SYNOPSIS: An act to add Section 5653.1 to the Fish and Game Code, relating to dredging, and declaring the urgency thereof, to take effect immediately.

TEXT: The people of the State of California do enact as follows:

[*1] SECTION 1. Section 5653.1 is added to the Fish and Game Code, to read:

5653.1. (a) The issuance of permits to operate vacuum or suction dredge equipment is a project pursuant to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) and permits may only be issued, and vacuum or suction dredge mining may only occur as authorized by any existing permit, if the department has caused to be prepared, and certified the completion of, an environmental impact report for the project pursuant to the court order and consent judgment entered in the case of Karuk Tribe of California et al. v. California Department of Fish and Game et al., Alameda County Superior Court Case No. RG 05211597.

(b) Notwithstanding Section 5653, the use of any vacuum or suction dredge equipment in any river, stream, or lake of this state is prohibited until the director certifies to the Secretary of State that all of the following have occurred:

(1) The department has completed the environmental review of its existing suction dredge mining regulations, as ordered by the court in the case of Karuk Tribe of California et al. v. California Department of Fish and Game et al., Alameda County Superior Court Case No. RG 05211597.

(2) The department has transmitted for filing with the Secretary of State pursuant to Section 11343 of the Government Code, a certified copy of new regulations adopted, as necessary, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(3) The new regulations described in paragraph (2) are operative.

(c) The Legislature finds and declares that this section, as added during the 2009-10 Regular Session, applies solely to vacuum and suction dredging activities conducted for instream mining purposes. This section does not expand or provide new authority for the department to close or regulate suction dredging conducted for regular maintenance of energy or water supply management infrastructure, flood control, or navigational purposes governed by other state or federal law.

(d) This section does not prohibit or restrict nonmotorized recreational mining activities, including panning for gold.

[*2] SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The Legislature finds that suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state, and, in order to protect the environment and the people of California pending the completion of a court-ordered environmental review by the Department of Fish and Game and the operation of new regulations, as necessary, it is necessary that this act take effect immediately.

EXHIBIT B

CHAP. CCLIII. — *An Act to grade East Capitol Street and establish Lincoln Square.* July 25, 1866.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the commissioner of public buildings be, and he hereby is, authorized and directed, in such manner as he may deem most proper, to cause East Capitol Street to be graded from Third Street east to Eleventh Street east, and to cause the square at the intersection of said street with Massachusetts, North Carolina, Tennessee, and Kentucky avenues, between Eleventh and Thirteenth streets east, to be enclosed with a wooden fence, and the same shall be known as Lincoln Square. And the sum of fifteen thousand dollars is hereby appropriated out of any money in the treasury not otherwise appropriated, to enable the said improvement to be made.

East Capitol Street to be graded and Lincoln Square enclosed.

Appropriation.

APPROVED, July 25, 1866.

CHAP. CCLIV. — *An Act in Relation to the unlawful Tapping of Government Water Pipes.* July 25, 1866.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the unlawful tapping of any water pipe laid down in the District of Columbia by authority of the United States is hereby declared to be a misdemeanor and an indictable offence; and any person who may be indicted for and convicted of such offence in the criminal court of the District of Columbia shall be subject to such fine as the court may think proper to impose, not exceeding five hundred dollars, or to imprisonment for a term not exceeding one year. And it is hereby made the special duty of the commissioner of public buildings to bring to the notice of the attorney of the United States for the District of Columbia, or to the grand jury, any infraction of this law.

Unlawful tapping of government water pipes punishable by fine or imprisonment.

Commissioner of public buildings to prosecute.

APPROVED, July 25, 1866.

CHAP. CCLV. — *An Act to authorize the Entry and Clearance of Vessels at the Port of Calais, Maine.* July 25, 1866.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, from and after the passage of this act, the Secretary of the Treasury may authorize, under such regulations as he shall deem necessary, the deputy collector of customs at the port of Calais, in the State of Maine, to enter and clear vessels, and to perform such other official acts as the said Secretary shall think advisable.

Deputy collector of customs at Calais, Me., may enter and clear vessels, &c.

APPROVED, July 25, 1866.

CHAP. CCLXII. — *An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes.* July 26, 1866

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

Mineral lands declared open to occupation to all citizens, &c. subject to regulations, &c.

SEC. 2. *And be it further enacted*, That whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local custom or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dol-

Persons, &c claiming, without opposition, any vein of quartz-bearing gold, &c. having occupied and made expenditures on the

same, and filing diagram, may enter the tract and receive a patent therefor.

Patent to grant what.

lars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant or association of claimants to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

After filing diagram of tract claimed, what proceedings to be had before patent issues.

Notice to be published.

SEC. 3. *And be it further enacted*, That upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the general land office said plat, survey, and description; and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued.

Survey of plat of premises.

Payment of five dollars per acre, and costs of survey, &c.

Survey, plat, &c. to cover only one vein, to be named in patent.

Proceedings when the location and entry of mine are upon unsurveyed lands.

SEC. 4. *And be it further enacted*, That when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises according to the location and possession and plat aforesaid, and the surveyor-general may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners: *Provided*, That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoveror of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: *And provided further*, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.

Location not to exceed 200 feet along vein, with additional claim for discoverer, and right to follow vein to any depth, &c.

Limit to number and extent of locations.

Further condition of sale, and to be expressed in patent.

SEC. 5. *And be it further enacted*, That as a further condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

Where adverse claimants appear, proceedings stayed until right is settled.

Patent then to issue.

SEC. 6. *And be it further enacted*, That whenever any adverse claimants to any mine located and claimed as aforesaid shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until a final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases.

President may establish additional land districts, &c for purposes of this act

SEC. 7. *And be it further enacted*, That the President of the United States be, and is hereby, authorized to establish additional land districts and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this act.

See *Post*, p. 470.

Right of way for highways.

SEC. 8. *And be it further enacted*, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Owners of vested rights to use of water for mining, &c. to be protected, and right of way for canals and ditches granted.

SEC. 9. *And be it further enacted*, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Damages.

Owners of homesteads made upon lands designated as mineral, in which no valuable mines of gold, &c. have been found, &c. may pre-empt the same, &c.;

SEC. 10. *And be it further enacted*, That wherever, prior to the passage of this act, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the said settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty-acres; or said parties may avail themselves of the provisions of the act of Congress approved May twenty, eighteen hundred and sixty-two, entitled "An act to secure homesteads to actual settlers on the public domain," and acts amendatory thereof.

or may take them as homesteads. 1862, ch. 75. Vol XII. p. 392.

Upon survey, lands clearly agricultural may be set apart and made subject to pre-emption and sale.

SEC. 11. *And be it further enacted*, That upon the survey of the lands aforesaid, the Secretary of the Interior may designate and set apart such portions of the said lands as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands of the United States, and subject to all the laws and regulations applicable to the same.

APPROVED, July 26, 1866.

July 26, 1866.

CHAP. CCLXIII. — *An Act to authorize "The Chesapeake Bay and Potomac River Tidewater Canal Company" to enter the District of Columbia, and extend their Canal to the Anacostia River at any Point above Benning's Bridge.*

The Chesapeake Bay, &c. Canal Company may extend its canal to Anacostia River,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "The Chesapeake Bay and Potomac River Tide-water Canal Company," incorporated by the general assembly of the State of Maryland, at the January session thereof, eighteen hundred and sixty-six, by an act entitled "An act to incorporate the Chesapeake Bay and Potomac River Tide-water Canal Company," be, and the same are hereby, authorized to extend their canal from the point where it strikes the boundary line of the District of Columbia, thence in and through the said District to the Anacostia River at any point thereon above Benning's bridge.

may take and hold property necessary for proper construction of extension, &c.

SEC. 2. *And be it further enacted*, That the said company are hereby authorized and empowered to take, purchase, and hold, for the purpose[s] of this act, so much real estate and other property as shall be necessarily required for the proper construction of the extension aforesaid, and for the construction of all proper and convenient basins, locks, reservoirs, docks, and wharves, to be connected with said extension. And where the said company shall not be able to procure such real estate by purchase

Proceedings where land can-

EXHIBIT C

August 18, 1856, chapter 169, volume 11, page 138.
February 5, 1859, chapter 22, volume 11, page 380.
February 18, 1861, chapter 37, volume 12, page 130.
March 3, 1865, chapter 126, volume 13, page 540.
February 18, 1867, chapter 43, volume 14, page 395.
APPROVED, July 8, 1870.

July 9, 1870.
1866, ch. 262.
Vol. xiv. p. 251.

CHAP. CCXXXV.—*An Act to amend "An Act granting the Right of Way to Ditch and Canal Owners over the public Lands, and for other Purposes."*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act granting the right of way to ditch and canal owners over the public lands, and for other purposes, approved July twenty-six, eighteen hundred and sixty-six, be, and the same is hereby, amended by adding thereto the following additional sections, numbered twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, respectively, which shall hereafter constitute and form a part of the aforesaid act.

Sections to be added to former act.

Placer claims to be subject to entry and patent.

SEC. 12. *And be it further enacted*, That claims, usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims: *Provided*, That where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands, no further survey or plat in such case being required, and the lands may be paid for at the rate of two dollars and fifty cents per acre: *Provided further*, That legal subdivisions of forty acres may be subdivided into ten-acre tracts; and that two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof: *And provided further*, That no location of a placer claim, hereafter made, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

If lands have been surveyed, entry to conform, &c.

Price of lands.

Ten-acre tracts.

Joint entry of contiguous claims.

Placer claim not to exceed one hundred and sixty acres.

Homestead and pre-emption rights not affected.

What evidence of possession, &c. to establish a right to a patent.

SEC. 13. *And be it further enacted*, That where said person or association, they and their grantors, shall have held and worked their said claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this act, in the absence of any adverse claim: *Provided, however*, That nothing in this act shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

Existing liens not affected.

Ex parte affidavits.

SEC. 14. *And be it further enacted*, That all ex parte affidavits required to be made under this act, or the act of which it is amendatory, may be verified before any officer authorized to administer oaths within the land district where the claims may be situated.

Fees of registers and receivers.

Regulations to carry act into effect.

SEC. 15. *And be it further enacted*, That registers and receivers shall receive the same fees for services under this act as are provided by law for like services under other acts of Congress; and that effect shall be given to the foregoing act according to such regulations as may be prescribed by the commissioner of the general land office.

Part of act 1853, ch. 145, § 3, Vol. x. p. 245, repealed.

SEC. 16. *And be it further enacted*, That so much of the act of March third, eighteen hundred and fifty-three, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption

Public surveys extended over mineral lands.

Surveyed lands how subdivided into lots, &c.

Waste, &c. lands need not be surveyed.

Rights conferred by certain sections of former act extended, &c.

Vested and accrued water rights secured.

Act of 1866, ch. 244, Vol. xiv. p. 242, not affected.

rights, and for other purposes," as provides that none other than township lines shall be surveyed where the lands are mineral, is hereby repealed. And the public surveys are hereby extended over all such lands: *Provided*, That all subdividing of surveyed lands into lots less than one hundred and sixty acres may be done by county and local surveyors at the expense of the claimants: *And provided further*, That nothing herein contained shall require the survey of waste or useless lands.

SEC. 17. *And be it further enacted*, That none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. But nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the "Act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

APPROVED, July 9, 1870.

July 9, 1870.

CHAP. CCXXXVI.—*An Act to grant the Right of Way for the Alameda Road through certain Lands in California.*

Certain land granted to San José, California, for street purposes.

Other land in said city granted to persons in possession.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the portion of the tract of land situated in the county of Santa Clara, and State of California, lying between the Rancho Potrero de Santa Clara and the Rancho de los Coches, which is occupied by Santa Clara Street, according to the map of the city of San José, and the street intersecting Santa Clara Street, is hereby granted to said city for the purpose of streets. And the parcels of said tract of land lying between said ranchos which are included within the corporate limits of said city, and not occupied as streets, are hereby granted to the respective persons in possession thereof, by themselves or their tenants.

Right of way through the portion outside of San José given to the county of Santa Clara.

SEC. 2. *And be it further enacted*, That the right of way through that portion of the tract of land lying between the said ranchos, which is situate without the corporate limits of the said city of San José, is hereby granted to the said county of Santa Clara, for public use, for the highways, roads, and sidewalks running along, upon, or across the said tract of land; and authority is hereby granted to the board of supervisors of said county to regulate and determine the number, position, width, and grade of such highways, roads, and sidewalks.

Land, subject to right of way, granted to persons owning adjoining lands.

Individual grants.

SEC. 3. *And be it further enacted*, That the said tract of land in the second section mentioned, subject to the right of way as therein granted, is hereby granted to the several persons, whether natural or artificial, owning the adjoining lands, the parcel hereby granted to each person being the parcel lying between his or its lands and a line running through the middle of said tract of land.

APPROVED, July 9, 1870.

July 11, 1870.

CHAP. CCXXXVII.—*An Act making Appropriations for the consular and diplomatic Expenses of the Government for the Year ending June thirty, eighteen hundred and seventy-one, and for other Purposes.*

Consular and diplomatic expenses appropriation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, out of any money in the treasury not otherwise appropriated, for the objects hereinafter expressed, for the fiscal

EXHIBIT D

fied person: *Provided*, That all the persons availing themselves of the provisions of this section shall be required to pay, and there shall be collected from them, at the time of making payment for their land, interest on the *total* amounts paid by them, respectively, at the rate of five per centum per annum, from the date at which they would have been required to make payment under the act of July fifteenth, eighteen hundred and seventy, until the date of actual payment: *Provided further*, That the twelfth section of said act of July sixteenth, eighteen hundred and seventy, is hereby so amended that the aggregate amount of the proceeds of sale received prior to the first day of March of each year shall be the amount upon which the payment of interest shall be based.

Five per cent interest to be paid on what sum and for what time.

Settler, transferring claims prior to, &c., not precluded from entering upon another tract, if, &c.

SEC. 3. That the sale or transfer of his or her claim upon any portion of these lands by any settler prior to the issue of the commissioner's instructions of April twenty-sixth, eighteen hundred and seventy-one, shall not operate to preclude the right of entry, under the provisions of this act, upon another tract settled upon subsequent to such sale or transfer: *Provided*, That satisfactory proof of good faith be furnished upon such subsequent settlement: *Provided further*, That the restrictions of the pre-emption laws relating to previous enjoyment of the pre-emption right, to removal from one's own land in the same State, or the ownership of over three hundred and twenty acres, shall not apply to any settler actually residing on his or her claim at the date of the passage of this act.

Certain restrictions of the pre-emption laws not to apply.

APPROVED, May 9, 1872.

CHAP. CLII. — *An Act to promote the Development of the mining Resources of the United States.*

May 10, 1872.

See 1873, ch. 150. *Post*, p. 465.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Valuable mineral deposits in public lands and the lands to be open to citizens, &c.

SEC. 2. That mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the passage of this act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing at the passage of this act shall render such limitation necessary. The end-lines of each claim shall be parallel to each other.

Length of mining-claims upon veins or lodes;

width;

end-lines.

SEC. 3. That the locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists at the passage of this act, so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with said laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which

Locators of mining locations where there is no adverse claim, &c., to have what exclusive rights of possession and enjoyment.

Certain exclusive rights to locators of mining claims.

lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of said surface locations: *Provided*, That their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges: *And provided further*, That nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

Limitations.

Owners of tunnels to have what rights of possession of certain veins or lodes.

SEC. 4. That where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of said tunnel.

What to be deemed an abandonment of right by owners of tunnels.

Miners may make certain rules as to locations, &c., of mining-claims.

SEC. 5. That the miners of each mining district may make rules and regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining-claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the passage of this act, ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein until a patent shall have been issued therefor; but where such claims are held in common such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made: *Provided*, That the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after such failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required by this act, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion to comply with this act his interest in the claim shall become the property of his co-owners who have made the required expenditures.

Requirements as to locations; records;

amount of work necessary to hold possession.

See 1873, ch. 214.

Post, p. 483.

Mine to be open to relocation, if, &c.

Rights of co-owners.

Interest of delinquents after notice, &c., to belong to co-owners.

Patent for land claimed, &c., for valuable deposits, how to be obtained.

SEC. 6. That a patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this act, having claimed and located a piece of land for such purposes, who has, or have,

complied with the terms of this act, may file in the proper land-office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted as aforesaid, and shall file a copy of said notice in such land-office, and shall thereupon be entitled to a patent for said land, in the manner following: The register of the land-office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to said claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during said period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with this act.

Patent for land claimed, &c., for valuable deposits, how to be obtained.

SEC. 7. That where an adverse claim shall be filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land-office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended, or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it shall appear from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall

Proceedings if adverse claim is filed.

Judgment of court to be obtained.

After judgment, patent to issue to party entitled to possession upon, &c.

Where there are several parties entitled to different portions of claim.

certify the proceedings and judgment-roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Proof of citizenship under this act, or the acts of July twenty-sixth, eighteen hundred and sixty-six, and July ninth, eighteen hundred and seventy, in the case of an individual, may consist of his own affidavit thereof, and in case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief, and in case of a corporation organized under the laws of the United States, or of any State or Territory of the United States, by the filing of a certified copy of their charter or certificate of incorporation; and nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining-claim to any person whatever.

Proof of citizenship. 1866, ch. 262. Vol. xiv. p. 251. 1870, ch. 235. Vol. xvi. p. 217.

Alienation of title by patent.

Description of vein claims on surveyed lands how to designate location; on unsurveyed lands.

SEC. 8. That the description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued as aforesaid for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

Repeal of §§ 1, 2, 3, 4 & 6, of act of 1866, ch. 262. Vol xiv. pp. 251, 252.

Existing rights not affected.

Pending applications and patents heretofore issued.

SEC. 9. That sections one, two, three, four, and six of an act entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July twenty-sixth, eighteen hundred and sixty-six, are hereby repealed, but such repeal shall not affect existing rights. Applications for patents for mining-claims now pending may be prosecuted to a final decision in the general land office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act; and all patents for mining-claims heretofore issued under the act of July twenty-sixth, eighteen hundred and sixty-six, shall convey all the rights and privileges conferred by this act where no adverse rights exist at the time of the passage of this act.

Proceedings to obtain patents under act of 1870, chap. 235, vol. xvi. p. 217, to be had according to this act.

SEC. 10. That the act entitled "An act to amend an act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July ninth, eighteen hundred and seventy, shall be and remain in full force, except as to the proceedings to obtain a patent, which shall be similar to the proceedings prescribed by sections six and seven of this act for obtaining patents to vein or lode claims; but where said placer-claims shall be upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining-claims hereafter located shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant, but where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands: *Provided*, That proceedings now pending may be prosecuted to their final determination under existing laws; but the provisions of this act, when not in conflict with existing laws, shall apply to such cases: *And provided also*, That where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, said fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

Placer-claims upon surveyed lands.

Pending proceedings.

Certain agricultural lands may be entered for homestead, &c., purposes.

Proceedings for patent for placer-claim which includes a vein or lode.

SEC. 11. That where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case (subject to the provisions of this act and the act entitled "An act to amend an act granting the right of way to ditch and canal owners over

the public lands, and for other purposes," approved July ninth, eighteen hundred and seventy) a patent shall issue for the placer-claim, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in the second section of this act, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

Effect of patent for placer-claim upon veins, &c., within its boundaries.

SEC. 12. That the surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining-claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The commissioner of the general land office shall also have power to establish the maximum charges for surveys and publication of notices under this act; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining-notices in such district, and fix the rates to be charged by such paper; and, to the end that the commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by said applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land-office, which statement shall be transmitted, with the other papers in the case, to the commissioner of the general land office. The fees of the register and the receiver shall be five dollars each for filing and acting upon each application for patent or adverse claim filed, and they shall be allowed the amount fixed by law for reducing testimony to writing, when done in the land-office, such fees and allowances to be paid by the respective parties; and no other fees shall be charged by them in such cases. Nothing in this act shall be construed to enlarge or affect the rights of either party in regard to any property in controversy at the time of the passage of this act, or of the act entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July twenty-sixth, eighteen hundred and sixty-six, nor shall this act affect any right acquired under said act; and nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the act entitled "An act granting to A. Sutro the right of way, and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

Surveyor-general may appoint in each district competent surveyors of mining-claims.

Expenses of survey, &c., of claims, &c.

Commissioner of land office to establish maximum charges, &c.

Applicant to file sworn statement of fees and charges.

Fees of register and receiver.

Adverse rights not affected by this act.

Provisions of act of 1866, ch. 244, vol. xiv. p. 242, not affected hereby.

SEC. 13. That all affidavits required to be made under this act, or the act of which it is amendatory, may be verified before any officer authorized to administer oaths within the land-district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land-office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on per-

Affidavits under this act &c., may be verified and testimony &c., taken, before whom.

Testimony in contests as to

character of land, how taken.

sonal notice of at least ten days to the opposing party; or if said party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land-office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

Where veins intersect, &c., priority of title to govern. Proviso.

SEC. 14. That where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection: *Provided, however*, That the subsequent location shall have the right of way through said space of intersection for the purposes of the convenient working of the said mine: *And provided also*, That where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

Where veins unite, oldest location to take.

Patents for non-mineral lands, not contiguous to lode, but used by proprietors for mining, &c., purposes. Limit to amount of such land.

SEC. 15. That where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable under this act to veins or lodes: *Provided*, That no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this act for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.

Repealing clause. Existing rights not affected.

SEC. 16. That all acts and parts of acts inconsistent herewith are hereby repealed: *Provided*, That nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws.

APPROVED, May 10, 1872.

May 10, 1872.

CHAP. CLIII.—*An Act authorizing the Secretary of War to correct an Army Officer's Record.*

Preamble.

Whereas in December, eighteen hundred and seventy, Major Samuel Ross, United States army, unassigned, was examined by a retiring board at San Francisco, California, and found disabled for active duty on account of wounds received in battle; and whereas no official action having been taken to retire from active service the said Ross on the proceedings of said retiring board, and the said Ross being a supernumerary officer was honorably mustered out of service as such on or about January second, eighteen hundred and seventy-one; and whereas on or about March second, eighteen hundred and seventy-two, the said Ross was re-appointed an officer of the United States army, as second lieutenant, with a view of being retired from active service on account of said disability: Therefore,

Name of Samuel Ross to be placed on retired list of army officers, &c.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War is hereby authorized to place the name of said Samuel Ross on the list of officers retired from active service, according to the proceedings and report of said retiring board, to take effect for rank and pay from the first day of January, eighteen hundred and seventy-one, and to correct the army records and register so that the name of said Ross will appear as continuously in service; *Provided*, That any and all moneys as pay or emoluments received by said Ross, on account of being declared mustered out as aforesaid, shall be deducted from his pay as such retired officer, accruing from, on, and after the said first day of January, eighteen hundred and seventy-one.

Proviso.

APPROVED, May 10, 1872.