COURT'S TENTATIVE RULING-

IN RE SUCTION DREDGE MINING CASES

Included Actions:[1]

- *Kimble, et al. v. Harris, et al.,* Case No. CIVDS1012922, San Bernardino County, Filed September 15, 2010 ("*Kimble*");
- *Karuk Tribe, et al. v. Calif. Dept. of Fish & Game,*[2] *et al.*, Case No. RG12623796, Alameda County, filed April 2, 2012 ("*Karuk II*");
- *Public Lands for the People, et al. v. State of Calif., et al.*, Case No. CIVDS1203849, San Bernardino County, filed April 12, 2012 ("*PLP*")
- *The New 49'ers, Inc., et al. v. Calif. Dept. of Fish & Game, et al.*, Case No. SCCVCV1200482, Siskiyou County, filed April 13, 2012 ("*New 49'ers*");
- *Walker v. Kamala Harris, et al.*, Case No. 34-2013-80001439, Sacramento County, filed March 14, 2013 ("*Walker*");
- *Foley v. Calif. Dept. of Fish & Wildlife, et al.*, Case No. SCCVCV1300804, Siskiyou County, filed July 1, 2013 ("*Foley*"); and
- *Eimer, et al. v. Calif. Dept. of Fish & Wildlife, et al.*, Case No. CIVDS1509427, San Bernardino County, filed July 6, 2015 ("*Eimer*")

(1) **Motion:** **Motion for Judgment on the Pleadings (Takings)** **(see pg. 2)**

Movant: **Defendants California Dept. of Fish & Game, et al.**

Respondent: **Plaintiffs The New 49'ers, Inc., et al.**

[1] Per Stipulation and Order filed January 13, 2014, *Karuk Tribe of California, et al. v. Calif. Dept. of Fish & Game, et al.,* Case No. RG5211597, Alameda County, filed May 6, 2005 ("*Karuk I*") no longer needs to be listed in the caption of the coordinated cases since the continuing jurisdiction of the Court to enforce the December 20, 2006 Consent Order in *Karuk I* is terminated and nothing remains to be resolved in the case.

Per Stipulation and Order, *Hillman, et al. v. Calif. Dept. of Fish & Game, et al.,* Case No. RG09434444, Alameda County, filed February 5, 2009 ("*Hillman*") was dismissed per Judgment filed January 13, 2014.

[2] The California Department of Fish & Game (CDFG) changed its name to California Department of Fish and Wildlife (CDFW) on January 1, 2013.

(2) **Motion:** **Motion for Summary Judgment (Single Subject) (see pg. 39)**

Movant: **Plaintiffs/Petitioners Derek Eimer, Stephen Jones, David Guidero, Marvin Lampshire II, and Dyton Gilliland**

Respondent: **Defendant/Respondent California Department of Fish & Wildlife**

(3) **Motion:** **Motion for Judgment on the Pleadings (SB 637) (see pg. 49)**

Movant: **Defendant/Respondent California Department of Fish & Wildlife**

Respondent: **Plaintiffs/Petitioners Derek Eimer, Stephen Jones, David Guidero, Marvin Lampshire II, and Dyton Gilliland**

Motion for Judgment on the Pleadings (Takings)

I. Factual Background

Suction dredge mining entails the use of a vacuum or suction system to remove and return material at the bottom of a river, stream, or lake for the extraction of minerals, primarily gold. [AR A005617-34.] (See also, *People v. Osborn* (2004) 116 Cal.App.4th 764, 768; 14 Cal. Code Regs. (CCR), § 228(a).) "In suction dredge mining, the gravel within the active stream channel is suctioned from the bottom of the stream and processed over a sluice on a floating platform. A gasoline powered motor and pump are mounted on the floating platform for powering the suction apparatus and for driving the air pump which supplies air to the persons working underwater. The size of dredges used in California ranges from 2-inches to up to 10-inches or more." (*Karuk Tribe of Cal. v. U.S. Forest Service* (N.D. Cal. 2005) 379 F.Supp.2d 1071, 1080, fn. 5, citations, quotation marks, and brackets omitted, *rev'd on other grounds* (9th Cir. 2012) 681 F.3d 1006.)

CDFW serves as California's trustee agency for the State's fish and wildlife. The department is responsible for managing diverse fish, wildlife, and plant resources, and their

respective habitats, as well as the ecological value of these resources and their use/enjoyment by the public. (*F&G Code*, §§ 711.7, subd. (a), 1802.)

Generally, in 1961, CDFW was first given the statutory authority to regulate suction dredging, and the use of any related equipment. (Stats. 1961, ch. 1816.) [AR A005523.] In 1994, CDFW promulgated suction dredge mining regulations, and prepared and certified a related environmental impact report ("EIR") under CEQA (hereinafter, "1994 EIR"). [AR A060020-196.] The 1994 EIR was not challenged. [AR A049319.] Since 1995, pursuant to California Fish & Game Code section 5653, the use of any vacuum or suction dredge equipment by any person in any river, stream or lake in California has been prohibited, unless authorized under a permit issued by CDFW. (*F&G Code*, § 5653, subd. (a).)

Until December 31, 2015, F & G Code § 5653 stated as follows:[3]

> (a) The use of any vacuum or suction dredge equipment by any person in any river, stream, or lake of this state is prohibited, except as authorized under a permit issued to that person by the department in compliance with the regulations adopted pursuant to Section 5653.9. Before any person uses any vacuum or suction dredge equipment in any river, stream, or lake of this state, that person shall submit an application for a permit for a vacuum or suction dredge to the department, specifying the type and size of equipment to be used and other information as the department may require.
> (b) Under the regulations adopted pursuant to Section 5653.9, the department shall designate waters or areas wherein vacuum or suction dredges may be used pursuant to a permit, waters or areas closed to those dredges, the maximum size of those dredges that may be used, and the time of year when those dredges may be used. If the department determines, pursuant to the regulations adopted pursuant to Section 5653.9, that the operation will not be deleterious to fish, it shall issue a permit to the applicant. If any person operates any equipment other than that authorized by the permit or conducts the operation in any waters or area or at any time that is not authorized by the permit, or if any person conducts the operation without securing the permit, that person is guilty of a misdemeanor.
> (c) The department shall issue a permit upon the payment, in the case of a resident, of a base fee of twenty-five dollars ($25), as adjusted under

[3] As discussed further below, Section 5653 was amended as of January 1, 2016.

> Section 713, when an onsite investigation of the project size is not deemed necessary by the department, and a base fee of one hundred thirty dollars ($130), as adjusted under Section 713, when the department deems that an onsite investigation is necessary. In the case of a nonresident, the base fee shall be one hundred dollars ($100), as adjusted under Section 713, when an onsite investigation is not deemed necessary, and a base fee of two hundred twenty dollars ($220), as adjusted under Section 713, when an onsite investigation is deemed necessary.
> (d) It is unlawful to possess a vacuum or suction dredge in areas, or in or within 100 yards of waters, that are closed to the use of vacuum or suction dredges.
> [Added Stats 1986 ch. 1368 § 23. Amended Stats 1988 ch. 1037 § 1; Stats 1994 ch. 775 § 1 (AB 1688); Stats 2006 ch. 538 § 185 (SB 1852), effective January 1, 2007.]

Pursuant to SB 670 (effective 8/6/09), AB 120 (effective 7/26/11), SB 1018 (effective 6/27/12), and F & G Code § 5653.1, a conditional proscription against vacuum and suction dredging activities was enacted. Section 5653.1 currently states:

> (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.

> (4) The new regulations described in paragraph (2) fully mitigate all identified significant environmental impacts.
> (5) A fee structure is in place that will fully cover all costs to the department related to the administration of the program.
> (c) (1) To facilitate its compliance with subdivision (b), the department shall consult with other agencies as it determines to be necessary, including, but not limited to, the State Water Resources Control Board, the State Department of Public Health, and the Native American Heritage Commission, and, on or before April 1, 2013, shall prepare and submit to the Legislature a report with recommendations on statutory changes or authorizations that, in the determination of the department, are necessary to develop the suction dredge regulations required by paragraph (2) of subdivision (b), including, but not limited to, recommendations relating to the mitigation of all identified significant environmental impacts and a fee structure that will fully cover all program costs.
> (2) The requirement for submitting a report imposed under this subdivision is inoperative on January 1, 2017, pursuant to Section 10231.5 of the Government Code.
> (3) The report submitted to the Legislature pursuant to this subdivision shall be submitted in accordance with Section 9795 of the Government Code.
> (d) 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.
> (e) This section does not prohibit or restrict nonmotorized recreational mining activities, including panning for gold.

Therefore F & G Code § 5653.1, effectively prohibited suction dredge mining throughout the State **until** the Director of the CDFW certified that: (1) the Department has completed environmental review of its suction dredge regulations pursuant to CEQA; (2) CDFW promulgated new regulations, as necessary, based on that environmental review; (3) the new regulations were operative; (4) the new regulations "fully mitigate all identified significant environmental effects"; and (5) a "fee structure is in place that will fully cover all costs to the Department" related to administration of its suction dredge permit program. (*F & G Code*, §5653.1, subd. (b).) The Legislature found this moratorium necessary because "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." (Stats. 2009, ch. 62, § 2.)

II. Procedural Background

In May 2005, the Karuk Tribe of California filed a lawsuit against CDFW (hereinafter, "*Karuk I*") alleging that the then-existing suction dredge permit program was deleterious to fish, and violated both CEQA and the Fish & Game Code. [AR A005524.] In 2006, The New 49'ers and others intervened in the *Karuk I* action. [AR A005524.] In December 2006, an Order and Consent Judgment ("Consent Order") was entered in *Karuk I* wherein the Alameda County Superior Court directed CDFW to "conduct further environmental review pursuant to CEQA of its suction dredge mining regulations and to implement, if necessary, via rulemaking, mitigation measure to protect Coho salmon and/or other special status fish species in the watershed of the Klamath, Scott, and Salmon Rivers, listed as threatened or endangered after the 1994 EIR." [AR A049200-11.] The Karuk Tribe, CDFW, Leaf Hillman, The New 49'ers, Raymond Koons, and Gerald Hobbs, and their respective counsel stipulated to this Consent Order.[4] [AR A049203-07.]

Subsequently, CDFW took steps to prepare for the ordered environmental review, and obtained funding from the Legislature to do so. [AR 049339.] However, on July 9, 2009, the Alameda Superior Court issued a preliminary injunction in the *Hillman* case,[5] enjoining CDFW "from expending any funds obtained by them from the State of California General Fund to issue suction dredge permits pursuant to Fish and Game Code section 5653 and 14 CCR § 228 and §228.5." [AR 049331.] The Alameda Court found: (1) "issuance of a suction dredge permit

[4] As noted above, per Stipulation and Order filed January 13, 2014, *Karuk I* was dismissed because the continuing jurisdiction of the Alameda Superior Court to enforce the December 2006 Consent Order was terminated, and nothing remained to be resolved in the case.

[5] *Hillman, et al. v. Calif. Dept. of Fish & Game, et al.*, Case No. RG0943444, Alameda Superior Court, filed February 5, 2009. The *Hillman* case was dismissed pursuant to a Judgment entered on January 13, 2014.

without a discretionary determination that the operation … is not deleterious to fish is a direct violation of the mandatory duty imposed on the [CDFW] by [Section] 5653(b), and is therefore unlawful; and (2) "there is new information that gives rise to a fair argument of environmental impact and that an environmental review is mandated by CEQA prior to the implementation of any further discretionary acts by the [CDFW]." [AR A049327, A049329.] As a result, CDFW stopped issuing suction dredge permits shortly thereafter. [AR A049942.] Subsequently, F & G Code section 5653.1 was enacted, which prohibited suction dredge mining until environmental review was completed, and new regulations put in place. [AR A049937.] (Stats. 2009, ch. 62.)

In October 2009, CDFW released a CEQA Initial Study and Notice of Preparation for public review. [AR A006309-423.] CDFW held public meetings, received hundreds of public comment letters, convened a Public Advisory Committee, and hired an economics firm to evaluate the economic impact of suction dredge mining. [AR A005533-34, A006433-60, A006464-79, A008104-226, A008235-53, A008283-323, A008587-623, A024824-026254.] As a result, CDFW informed the Alameda Court that it intended to prepare a subsequent EIR ("SEIR") to comply with the Court's December 2006 Order.[6] [AR A005495.] In February 2011, CDFW developed and released a draft of proposed regulations and a draft subsequent EIR (hereinafter, "DSEIR"). [AR 005479-006305.] In addition, CDFW issued an initial statement of reasons pursuant to the APA. [AR 009665-74.]

CDFW conducted several public hearings and received hundreds of written comments regarding the DSEIR. In February 2012, after reviewing the public comments, CDFW determined that some changes to the proposed regulations were necessary. [AR A000013, A009678-773.] On March 16, 2012, the CDFW completed the required environmental review,

[6] The Consent Order described CDFW's legal obligations in terms of Public Resources Code § 21166, and Cal. Code Regs., tit. 14, §§ 15162-15164. [AR A049201-02; *see also*, A005523.]

released the final EIR (hereinafter, "FEIR") and the final statement of reasons, and adopted updated regulations, effective April 27, 2013.[7] [AR A000092-686, A009825-942.]

On April 1, 2013, pursuant to Section 5653.1(c), CDFW submitted its required report to the Legislature "on statutory changes or authorizations that, in the determination of the department, are necessary to develop the suction dredge regulations required by paragraph (2) of subdivision (b), including, but not limited to, recommendations relating to the mitigation of all identified significant environmental impacts and a fee structure that will fully cover all program costs." (Stats. 2012, Ch. 39, § 7 [amending F&G Code § 5653.1, subds. (b), (c)(1)]; Stats. 2011, ch. 133, § 6.)

In the interim, while CDFW was preparing and circulating the DSEIR and FSEIR, Plaintiffs filed the various actions that are currently before this Court (*Kimble, Karuk II, PLP, The New 49'ers, Walker*, and *Foley*).

III. Karuk Tribe Dismissal and New Legislation

On November 16, 2015, Karuk filed a Request for Dismissal of its action. A few days later, Karuk filed a Stipulation and Proposed Order Resolving Attorneys' Fees and Costs, wherein it stated that Karuk dismissed their action without prejudice due to the enactment of Senate Bill 637, which was signed into law on October 9, 2015, and became effective as of January 1, 2016. Karuk believed that through this new legislation, they had achieved the primary relief sought in this litigation, and thus, decided not to expend their resources on the remainder of this action.[8]

[7] However, CDFW has not certified completion of all five items required by Section 5653.1(b), and the moratorium remains in effect.

[8] In the Stipulation and Order, Karuk and CDFW agreed that, pursuant to Code of Civil Procedure § 1021.5 under a catalyst theory, CDFW will pay Karuk's counsel $350,000.00 in attorneys' fees. The Court signed this Order on November 19, 2015.

As noted above, after CDFW finalized the 2012 FSEIR, the Legislature required CDFW to submit a report and recommendations regarding statutory changes or authorizations that CDFW thought were necessary to develop the suction dredge regulations. In April 2013, CDFW provided the requisite report and recommendations. In response, the Legislature enacted S.B. No. 637 which, in part, addressed the "significant and unavoidable" environmental effects identified by CDFW. (Stats. 2015, ch. 680.)

S.B. No. 637 amended Section 5653 as follows: [9]

> (a) The use of vacuum or suction dredge equipment by **a** person in **a** river, stream, or lake of this state is prohibited, except as authorized under a permit issued to that person by the department in compliance with the regulations adopted pursuant to Section 5653.9. Before a person uses **[]** vacuum or suction dredge equipment in a river, stream, or lake of this state, that person shall submit an application **to the department** for a permit **to use the** vacuum or suction dredge **equipment**, specifying the type and size of equipment to be used and other information as the department may require **pursuant to regulations adopted by the department to implement this section.**
>
> **(b) (1) The department shall not issue a permit for the use of vacuum or suction dredge equipment until the permit application is deemed complete. A complete permit application shall include any other permit required by the department and one of the following, as applicable:**
> **(A) A copy of waste discharge requirements or a waiver of waste discharge requirements issued by the State Water Resources Control Board or a regional water quality control board in accordance with Division 7 (commencing with Section 13000) of the Water Code.**
> **(B) A copy of a certification issued by the State Water Resources Control Board or a regional water quality control board and a permit issued by the United States Army Corps of Engineers in accordance with Sections 401 and 404 of the Federal Water Pollution Control Act (33 U.S.C. Secs. 1341 and 1344, respectively) to use vacuum or suction dredge equipment.**
> **(C) If the State Water Resources Control Board or the appropriate regional water quality control board determines that waste discharge requirements, a waiver of waste discharge requirements, or a certification in accordance with Section 1341 of Title 33 of the United States Code is not necessary for the applicant to use of vacuum or suction dredge equipment, a letter stating this determination signed by the Executive Director of the State Water Resources Control Board, the executive officer of the appropriate regional water quality control board, or their designee.**

[9] The changes are indicated by **bold** type.

(c) Under the regulations adopted pursuant to Section 5653.9, the department shall designate waters or areas wherein vacuum or suction dredge **equipment** may be used pursuant to a permit, waters or areas closed to **the use of that equipment**, the maximum size of **the vacuum or suction dredge equipment** that may be used, and the time of year when **the equipment** may be used. If the department determines, pursuant to the regulations adopted pursuant to Section 5653.9, that the **use of vacuum or suction dredge equipment does not cause any significant effects to fish and wildlife**, it shall issue a permit to the applicant. If **a** person **uses vacuum or suction dredge** equipment other than **as** authorized by **a** permit **[] issued by the department consistent with regulations implementing this section []**, that person is guilty of a misdemeanor.

(d) **(1) Except as provided in paragraph (2)**, the department shall issue a permit upon the payment, in the case of a resident, of a base fee of twenty-five dollars ($25), as adjusted under Section 713, when an onsite investigation of the project size is not deemed necessary by the department, and a base fee of one hundred thirty dollars ($130), as adjusted under Section 713, when the department deems that an onsite investigation is necessary. **Except as provided in paragraph (2),** in the case of a nonresident, the base fee shall be one hundred dollars ($100), as adjusted under Section 713, when an onsite investigation is not deemed necessary, and a base fee of two hundred twenty dollars ($220), as adjusted under Section 713, when an onsite investigation is deemed necessary.
(2) The department may adjust the base fees for a permit described in this subdivision to an amount sufficient to cover all reasonable costs of the department in regulating suction dredging activities.

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

(f) A permit issued by the department under this section shall not authorize an activity in violation of other applicable requirements, conditions, or prohibitions governing the use of vacuum or suction dredge equipment, including those adopted by the State Water Resources Control Board or a regional water quality control board. The department, the State Water Resources Control Board, and the regional water quality control boards shall make reasonable efforts to share information among the agencies regarding potential violations of requirements, conditions, or prohibitions governing the use of vacuum or suction dredge equipment.

(g) For purposes of this section and Section 5653.1, the use of vacuum or suction dredge equipment, also known as suction dredging, is the use of a mechanized or motorized system for removing or assisting in the removal of, or the processing of, material from the bed, bank, or channel of a river, stream, or lake in order to recover minerals. This section and Section 5653.1

> **do not apply to, prohibit, or otherwise restrict nonmotorized recreational mining activities, including panning for gold.**
>
> (2015 California Senate Bill No. 637, California 2015-2016 Regular Session [emphasis added].)

According to Karuk, the changes to section 5653 adequately addressed water quality impacts, as well as impacts to wildlife and cultural resources. [*See,* 11/19/15 Stip. & Order (copy attached).] As a result, Karuk dismissed their remaining claims because they believe their primary litigation goals – i.e., compelling CDFW to mitigate impacts of suction dredge mining, and to comply with CEQA and the Fish & Game statutes – were addressed by the amendment. [*Id.*]

IV. Issues Currently Before the Court

On May 1, 2014, this Court heard several summary adjudication motions on the issue of federal preemption as it relates to pre-amendment Section 5653, Section 5653.1, and the related CEQA Guidelines. On January 12, 2015, this Court found "as a matter of law and in actual fact, that the State's extraordinary scheme of requiring permits and then refusing to issue them and/or being unable to issue permits for years, stands "as an obstacle to the accomplishment of the full purposes and objectives of Congress".[10]

In May and June 2015, the parties filed their respective Statement of Issues wherein each set forth what they thought remained of the case. The Karuk Coalition, before their voluntary dismissal, asserted that issues pertaining to CEQA, violations of the F & G Code, and Declaratory Relief remained. As for the Miners (PLP, Kimble, and The New 49'ers), they believed the CEQA and APA issues were technically moot due to this Court's January 2015 ruling. CDFW believed the CEQA and APA issues remained.

[10] As counsel knows, this Court's ruling relied heavily on the appellate decision in *People v. Rinehart* (2014) 230 Cal.App.4th 419. However, the case was depublished shortly after this Court's ruling, and *Rinehart* was reviewed by the California Supreme Court, Case No. S222620. The Supreme Court reversed the lower court decision, as will be discussed in detail *infra.*

On July 6, 2015, The New 49'ers filed a new Complaint and Petition, as Case Number CIVDS1509427, in order to add new individual plaintiffs Derek D. Eimer, Stephen Jones, David Guidero, Marvin Garry Lampshire II, and Dyton W. Gilliland. After consolidation with the current litigation, a First Amended Complaint and Petition was filed in the new action, wherein The New 49'ers and the new individual Plaintiffs alleged causes of action for Federal Preemption and violations of the One Subject Rule.

On November 10, 2015, Plaintiffs/Petitioners Eimer, Jones, Guidero, Lampshire, and Gilliland filed a Motion for Summary Judgment, on the grounds that Assembly Bill 120 and Senate Bill 1018 embrace more than one subject, and thus violate Article IV, § 9 of the California Constitution. The remaining Plaintiffs – Kimble, PLP, and The New 49'ers – concurrently sought adjudication of the remaining CEQA and APA issues in the Writ Petition, pursuant to Public Resources Code sections 21168 and 21168.5, and Code of Civil Procedure sections 1085 and 1094.5. Plaintiffs sought an order setting aside the FSEIR as void, or alternatively, setting aside the 2012 regulations as void, and reinstating the 1994 regulations until such time as CDFW has lawfully promulgated further regulations. However, this Court stayed the action pending the ruling by the California Supreme Court on *People v. Rinehart*.

On August 22, 2016, the Supreme Court issued its *Rinehart* decision wherein it reversed the ruling of the Court of Appeal. Since this Court's January 2015 MSA/MSJ ruling rested largely on the appellate court's then-published opinion, the reversal by the Supreme Court means that the MSA/MSJ ruling has to be vacated. Accordingly, on November 14, 2016, this Court lifted the stay, and set a hearing regarding the effect of the *Rinehart* decision on the issues in the current litigation.

On May 26, 2017, CDFW filed a Motion for Judgment on the Pleadings, as well as a supporting brief on the impact of the *Rinehart* decision. The Miners have responded, and this matter is now before the Court.

DISCUSSION

I. Procedural Issue

CDFW notes that the defendant/appellant in the *Rinehart* case, Mr. Brandon Rinehart, has filed a petition for certiorari with the United States Supreme Court challenging the California Supreme Court's decision. That petition is apparently still pending, and a decision on the petition will likely not be handed down until the upcoming term. However, on May 15, 2017, the U.S. Supreme Court invited the Acting Solicitor General to file a brief discussing the views of the United States on the issues. CDFW notes that the United States filed an amicus curiae brief in the California Supreme Court case wherein a ruling against preemption was advised.

The Miners do not mention this pending cert petition in their brief, and neither party suggests that this matter should be stayed pending a decision from the U.S. Supreme Court as to whether it will hear the case in their papers. This issue was discussed at the last hearing briefly and the Court decided to move forward since both sides have fully briefed the issues arising out of the California Supreme Court's *Rinehart* ruling.

II. *Rinehart* Decision

On August 22, 2016, the California Supreme Court handed down its decision in *People v. Rinehart* (2016) 1 Cal.5th 652. In the underlying case, defendant Brandon Rinehart had been charged by criminal complaint, pursuant to Fish & Game Code section 5653, with possession and unpermitted use of a suction dredge. Rinehart demurred to the complaint, and argued that sections 5653 and 5653.1 effectively banned suction dredging in California, thus preventing him

from using the only commercially practicable method of extracting gold from his unpatented mining claim.[11] Rinehart also argued that under federal mining laws, Congress intended to grant prospectors the right to mine on federal land free from material interference, and as a result, sections 5653 and 5653.1 should be preempted as an obstacle to those federal purposes and objectives. (*Rinehart, supra,* 1 Cal.5th at pp. 658-659.) The trial court overruled the demurrer, thus rejecting Rinehart's preemption defense as a matter of law. The trial court also excluded testimony which would have supported Rinehart's defense. After a bench trial, Rinehart was convicted on both counts and sentenced to three years' probation. (*Id.* at p. 659.)

The Court of Appeal reversed, and agreed with Rinehart that "federal mining law should be interpreted as preempting any state law that unduly hampers mining on federal land." (*Rinehart, supra,* 1 Cal.5th at p. 659.) In addition, the Court of Appeal concluded Rinehart had set forth a colorable argument that: (1) the state regulatory scheme amounted to a de facto ban on suction dredging; and (2) the ban effectively rendered mining "'commercially impracticable.'" (*Id.,* quoting *California Coastal Comm'n v. Granite Rock Co.* (1987) 480 U.S. 572, 587, 107 S.Ct. 1419, 94 L.Ed.2d 577 (*Granite Rock*).) Since the determination of these points rested on disputed issues of fact, and the trial court had refused to admit evidence pertaining to these issues, the Court of Appeal remanded for further proceedings. The State of California then petitioned the California Supreme Court for review.

Rinehart cited to two federal land statutes in defending his criminal convictions: (1) the Mining Law of 1872 (30 U.S.C. § 22 *et seq.*), and (2) the Surface Resources and Multiple Use Act of 1955 (30 U.S.C. § 612). The Supreme Court noted that these statues do not contain any

[11] "An 'unpatented' claim is a possessory interest in a particular area solely for the purpose of mining; it may be contested by the government or a private party. By contrast, if a claim is patented, the claimant gets a fee simple interest from the United States and no contest can be brought against the claim." (*People v. Rinehart* (2016) 1 Cal.5th 652, 659, fn. 2, quoting *Clouser v. Espy* (9th Cir. 1994) 42 F.3d 1522, 1525, fn. 2.)

express preemption provisions, do not occupy a relevant field that would foreclose state regulation, and do not impose obligations that would made it impossible to comply with both state and federal law simultaneously. Instead, Rinehart's preemption argument rested on what is commonly known as "obstacle preemption" – i.e., "the principle that a state may not adopt laws impairing 'the accomplishment and execution of the full purposes and objectives of Congress.'"[12] (*Rinehart, supra,* 1 Cal.5th at p. 660, quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed 581; accord, *Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 312.)

Although the California Supreme Court traditionally applied a "strong presumption against preemption in areas where the state has a firmly established regulatory role," Rinehart contended that no such presumption should arise in this case because the state law was being used to regulate conduct on federal land – an area where congressional power is plenary. (*Rinehart, supra,* 1 Cal.5th at pp. 661-662, citing to U.S. Const., art. IV, § 3, cl. 2.) CDFW, on the other hand, argued that since the challenged state law involved subjects that were traditionally within the state's regulatory purview, preemption was disfavored – even on federal land. The Supreme Court decided it did not need to resolve this dispute, because with or without the presumption, it concluded that Rinehart had not carried his burden of "establishing congressional purposes and objectives that require California's environmental regulations be displaced."[13] (*Id.* at p. 662.)

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[12] The Supreme Court stated: "Obstacle preemption can play an important role in preventing states from creating, inadvertently or otherwise, functional impediments that materially constrain legitimate federal objectives. But it can also lead to the overzealous displacement of state law to a degree never contemplated by Congress. Accordingly, the threshold for establishing obstacle preemption is demanding: 'It requires proof Congress had particular purposes and objectives in mind, a demonstration that leaving state law in place would compromise those objectives, and reason to discount the possibility the Congress that enacted the legislation was aware of the background tapestry of state law and content to let that law remain as it was.' [Citation.]." (*Rinehart, supra,* 1 Cal.5th at p. 661.)

[13] The Court also discussed the seminal case of *Granite Rock*, which is viewed as the leading decision on the preemptive effect of the Mining Law of 1872. Regarding *Granite Rock*, the Court noted that the United States

In discussing the Mining Law of 1872, the Court found that although many of its provisions generally involve mining and discuss the steps a citizen may take to acquire not only possession, but formal title in the form of a patented claim, the focus of the provisions is "considerably more specific – the delineation of the real property interest of miners vis-à-vis each other and the federal government." (*Rinehart, supra,* 1 Cal.5th at p. 663.) "The discovery of a valuable claim is in every instance a condition for thereafter obtaining some possessory or fee simple interest in federal land [citations], but the act as a whole is devoted entirely to the allocation of real property interests among those who would exploit the mineral wealth of the nation's lands, not regulation of the process of exploitation – the mining – itself. [Citations.]." (*Id.*)

The Court also found that the property clause alone does not foreclose states from exercising their ordinary police powers on federal land, but rather, than Congress must act in that regard. In noting California's history of regulating mining within its borders, the Court stated the "1872 law is explicit concerning the effect of such past and future laws: it endorses their continuing vitality and prospectors' ongoing obligations to abide by them. Claimants are granted a right of possession 'so long as they comply with the laws of the United States, and with State, territorial, and local regulations.' [Citation.]." (*Rinehart, supra,* 1 Cal.5th at p. 663.) The Court went on to find that the 1872 law endorses local, rather than federal, control over the mining lands, and that express language in the law suggests "an apparent willingness on the part of Congress to let federal and state regulation broadly coexist, especially insofar as those state laws relate to matters other than a miner's 'possessory title.' [Citation.]." (*Id.* at pp. 663-664.) In

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Supreme Court rejected the argument that the law categorically foreclosed states from imposing permit requirements on federal land. (*Rinehart, supra,* 1 Cal.5th at p. 662, citing to *Granite Rock, supra,* 480 U.S. at pp. 582-584.) However, the Court also noted that the *Granite Rock* decision "left open the possibility of future preemption challenges to specific permit requirements or, as here, refusals to issue a permit." (*Ibid.*)

addition, the Court found that subsequent amendments also acknowledged that mining on federal lands had to be "done in an 'orderly' fashion, and account for 'environmental needs' and 'any adverse impact' on 'the physical environment.' [Citation.]." (*Id.* at p. 664.)

After further examining the legislative history of the relevant federal mining laws, the Court stated:

> From this history, we may infer Congress was concerned principally with removing federal obstacles to mining, and specifically the threat of a property sale, that might deter individual prospectors and mining concerns from investing effort in mineral development. Granted a right to enter federal land, the opportunity to obtain a right of possession, and the opportunity to acquire ownership, miners could pursue mineral discovery and exploitation free from the specter of having the land they worked sold at auction. In contrast, the purpose Rinehart attributes to these laws – an intent to confer a right to mine, immune in whole or in part from curtailment by regulation – is not apparent. The mining laws were neither a guarantee that mining would prove feasible nor a grant of immunity against local regulation, but simply an assurance that the ultimate original landowner, the United States, would not interfere by asserting its own property rights.

(*Rinehart, supra,* 1 Cal.5th at p. 666.)

Notably, the Court agreed with Rinehart's assertion that the 1872 law conferred specific property rights on him and other miners. "Rinehart has an interest in land, a real property right to possess the area of his claim for particular purposes." (*Rinehart, supra,* 1 Cal.5th at p. 667, citing to *Wilbur v. United States ex rel. Kruchnic* (1930) 280 U.S. 306, 316-317, 50 S.Ct. 103, 74 L.Ed. 445, and *Cole v. Ralph* (1920) 252 U.S. 286, 295, 40 S.Ct. 321, 64 L.Ed. 567.) However, pursuant to the legislative history of the law, the Court reiterated that this grant of a real property interest does not usually carry with it immunity from regulation, or a guarantee that the state's police power will be inoperative with regard to the property interest simply because the source of the real property is federal. (*Id.*) The Court supported this interpretation of the 1872 law by pointing to the fact that in 1884, after the application of California law resulted in a de facto ban placed on a major industrial mining method, Congress expressly approved and helped enforce

that ban. (*Id.*, citing to *People v. Gold Run D. & M. Co.* (1884) 66 Cal. 138, and *North Bloomfield Gravel Min. Co. v. U.S.* (9th Cir. 1898) 88 F. 664.) As a result, the Court found that Congress did not intend the 1872 Mining Law to preempt state laws regarding the use of particular mining methods.

Similarly, the Court found there was no basis for preemption under 30 U.S.C. § 612. (*Rinehart, supra,* 1 Cal.5th at p. 672.) The Court noted the law was enacted in 1955 as part of a "crack-down" on unauthorized uses of unpatented mining claims because Congress was concerned that some claims were being staked out as a pretext for activities unrelated to mineral development. (*Id.*) In addition, the Court found that under the law, Congress withdrew the traditional grant to claimants of exclusive use of the land encompassed by their claims, and replaced it with a right retained by the federal government to use, manage, and dispose of the surface resources. However, this retained right "was subject to the condition that the United States and other uses not 'endanger or materially interfere with' mining operations. [Citation.]." (*Id.* at pp. 672-673.)

The Court then held: "Nothing in California's regulation of suction dredging implicates or interferes with any of the purposes and objectives underlying this congressional reallocation of rights," and that section 612 regulated "the respective property rights of miners with claims on federal land, on the one hand, and the United States and its permittees who may wish to use that same land for other purposes, on the other. It does no more." (*Rinehart, supra,* 1 Cal.5th at p. 673.) Regarding the "materially interfere" standard, the Court found it defined what the federal government could not do on the surface of mining claims, but it did not refer to what states could not do in the exercise of their police powers. (*Id.*)

III. Analysis

A. Arguments of the Parties

In the wake of the *Rinehart* ruling, CDFW brings a motion entitled "Motion for Judgment on the Pleadings." According to CDFW, the *Rinehart* decision has three direct consequences on what remains of these coordinated cases: (1) a reversal by this court on its earlier MSJ/MSA ruling on preemption, (2) the lack of merit for some of the Miners' arguments regarding their record-based claims, and (3) the Miners' takings claims lack merit as a matter of law.

Regarding the first issue, the Miners do not dispute a reversal of this court's MSJ/MSA preemption ruling. As noted by CDFW, with regards to the *Rinehart* case, this court stated: "If the Supreme Court overturns the appellate court's ruling on the federal preemption issue, then this court's MSA/MSJ ruling must similarly be vacated." [Notice of Ruling, filed Jan 26, 2016.]

Regarding the second issue, CDFW contends the Miners' three record-based claims must fail for reasons related to the preemption issue: (a) 30 U.S.C. § 612(b) does not apply to states, and therefore, cannot support the Miners' argument that CDFW's discussion of alternatives is flawed; (b) since sections 5653 and 5653.1 are not preempted, then it cannot be argued that CDFW did not give due consideration to federal law or that federal mining law preempts these 2012 regulations; and (c) since sections 5653 and 5653.1 are not preempted, it cannot be argued that CDFW did not have to complete an environmental review pursuant to the mandate in those statutes.

As for the Miners' takings claim, CDFW argues that since the existence of a valid mining claim depends on compliance with all state laws, including those upheld in *Rinehart*, there cannot be a taking because it was found those state laws were not preempted by the federal

mining law. CDFW contends that the threshold argument in any takings case is whether the plaintiff has established a property interest. (See, e.g., *Colvin Cattle Co. v. United States* (Fed. Cir. 2006) 468 F.3d 803, 806.) CDFW notes that although the federal Constitution does not define property, the courts historically have looked to existing rules and background principles in federal, state, and common law to define the term. However, CDFW also notes that an economic advantage or interest, without right in the law, is not such a property interest that is protected. (See, *Kaiser Aetna v. United States* (1979) 444 U.S. 164, 178; *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 161.)

According to CDFW, the Miners' property interest is not in real property, but rather, in their unpatented mining claims – claims which are a unique form of property that represent a possessory interest in the land, but not title to the land. (See, *Best v. Humboldt Placer Min. Co.* (1963) 371 U.S. 334, 335-336.) CDFW notes that title to the land is still held by the federal government, but that the Miners' property interests derive from 30 U.S.C. § 22 – a statute which provides for rights to exploration, occupation, and purchase of "valuable mineral deposits." However, CDFW contends that these rights are subject to "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, 26.) In pointing to this language, CDFW argues that the "regulations prescribed by law" includes state laws, and therefore, the Miners' must comply with state law in asserting their respective mining claims – including the suction dredge mining laws.

CDFW also contends that in a takings claim regarding a federal mining claim, the plaintiff must prove he or she has a "valuable mineral deposit" – i.e., a "valid" claim. According to CDFW, no rights attach to an invalid claim, and that since unpatented mining claims are more

accurately characterized as "potential property interests," then in order to prove a valid claim, the Miners must establish that they complied with all the procedural requirements for establishing a claim, and they must prove that said mining claim is "valuable." CDFW argues that in determining whether a federal mining claim is "valuable" – i.e., profitable – and therefore "valid," the cost of compliance with all applicable federal and state laws is properly considered, and that compliance cannot be waived simply because said compliance would render the mining claim unprofitable. (See, e.g., *Independence Min. Co. v. Babbitt* (9th Cir. 1997) 105 F.3d 502, 506-507.)

CDFW notes that in this litigation, the Miners claim that compliance with sections 5653 and 5653.1 eliminates "all economically beneficial or productive use" of their mining claims. However, CDFW argues that compliance with the state law is part of the marketability test and prudent person test for determining whether there is a "valuable mineral deposit" on the land, and whether the mining claim is valid. According to CDFW, under the Miners' own theory of the case, they do not have any property interests in the land because their compliance with sections 5653 and 5653.1 renders their mining claims invalid.

In opposition, the Miners contend that CDFW's argument runs afoul of the maxim that a "State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." (*Hughes v. Washington* (1967) 389 U.S. 290, 296-297 (Stewart, J., concurring).) According to the Miners, until CDFW instituted the ban on suction dredging, owners of unpatented mining claims reasonably expected they could extract the valuable minerals on the land through motorized operations mining – a method which supported high prices for their valuable claims.

The Miners argue that since CDFW does not admit it destroyed all economically beneficial uses of their mining claims – an admission which would make CDFW liable *per se* under the holding in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, then CDFW will likely rely on the multi-factor test in *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104. However, according to the Miners, the *Penn Central* analysis is not proper upon judgment on the pleadings it is a factual inquiry designed to allow for examination and weighing of all the relevant circumstances. Moreover, the Miners note that the second factor of the *Penn Central* test – i.e., a consideration of the "extent to which the regulation has interfered with distinct investment-backed expectations" – emphasizes the constitutional protection against retroactive destruction of property rights after the imposition of the challenged regulation. The Miners argue they had legitimate investment-backed expectations with regards to their mining claims, and those expectations were destroyed by arbitrary action by the State.

The Miners further contend all California property owners hold their property "under regulations prescribed by law," and that the purpose of the takings law is to compensate the property holder when the state exercises its regulatory power to destroy the value of certain private property for an asserted public benefit. According to the Miners, CDFW misconstrues takings law in arguing that only persons with valid property interests at the time of taking are entitled to compensation. Instead, the Miners argue that courts have held that after discovery of a valuable mineral deposit upon a properly located unpatented mining claim, the locater has a property right "in the full sense" – a right which is within the protection of the Constitution's prohibition against the taking of private property for public use without just compensation.

Furthermore, the Miners contend CDFW misconstrues federal mining law as well. According to the Miners, 30 U.S.C. § 22 does not make any reference to state law, but rather, in

conjunction with other provisions, refers to particular state rules for obtaining and holding title to a mining claim. In addition, the Miners argue that no state, including California, has attempted to declare that the mining claims "shall be void" based on the degree of compliance with the regulations governing mining claims. The Miners assert that once ownership of a mining claim is perfected, it cannot be destroyed by the state regulation of mining operations. Moreover, the Miners contend only the federal government has standing to initiate validity contests with regards to mining claims. Nevertheless, the Miners argue all that is required in this procedural posture is that they demonstrate they had valuable property until it was taken by CDFW.

B. Merits of the Motion – Takings Cause of Action

Judgment on the Pleadings. As noted above, CDFW purports to present this motion as a judgment on the pleadings. A motion for judgment on the pleadings may be made by any party to the action after the time to demurrer has expired. (*Code Civ. Proc.,* §438(b)(1) and (f); *Evans v. California Trailer Court, Inc.* (1994)28 Cal.App.4th 540, 548.) Essentially a motion for judgment on the pleading performs the same function as a general demurrer, and thus attacks only the defects disclosed on the face of the pleading or by matters that are judicially noticed. (*Cloud v. Northrop Grumman Corp.* (1998)67 Cal.App.4th 995, 999.) As such, the judgment on the pleading admits the truth of all material facts.

The grounds for a motion for judgment on the pleading shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (*Code Civ. Proc.,* §438(d).) A court may also take judicial notice of something that cannot reasonably be controverted, even if it negates an express allegation of the pleading. (*Evans, supra,* 28 Cal.App.4th 540 at 549.)

If the moving party is the defendant, then a motion for judgment on the pleadings is limited to the grounds that the court has no jurisdiction over the subject of the cause of action alleged in the complaint or the complaint does not state facts sufficient to constitute a cause of action against the defendant. (*Code Civ. Proc.*, §438(c)(1)(B).) If the moving party is the plaintiff, then the motion can be made on the ground that the complaint states facts sufficient to constitute a cause of action against the defendant and "the answer does not state facts sufficient to constitute a defense to the complaint." (*Code Civ. Proc.*, §438(c).)

Here, in the current litigation, therefore, this motion only presents the question of whether the Miners have stated sufficient facts to constitute their causes of action.

Takings Clause. The Fifth Amendment of the United States Constitution prohibits the government from taking private property for public use without just compensation. (U.S. Const., 5th Amend.) Specifically, the Fifth Amendment "'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.' [Citation.] In other words, it 'is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'" (*Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 536-537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (*Lingle*).) As a result, the takings clause precludes the "'[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (*Ibid*.)

"'The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.' [Citation.] However, courts have long recognized that 'governmental regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such

"regulatory takings" may be compensable under the Fifth Amendment.' [Citations.]" (*Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 183, quoting *Lingle, supra,* 544 U.S. at p. 537, 125 S.Ct. 2074; see also, *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 773 (*Kavanau*).) The United States Supreme Court confirmed "that a regulation may effect a taking requiring just compensation even if it does not deprive the owner of 'all economically beneficial use' of his or her property, depending on the particular circumstances of the case." (*Lockaway, supra,* 216 Cal.App.4th at pp. 183-184, citing to *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592.) The United States Supreme Court has also held that "a temporary regulatory taking may require payment of just compensation for the period the taking was in effect." (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 321, 107 S.Ct. 2378, 96 L.Ed.2d 250.)

The federal takings clause applies to the states via the Fourteenth Amendment of the Constitution. (*Chicago, Burlington & Q. R'D v. Chicago* (1897) 166 U.S. 226, 234, 17 S.Ct. 581, 41 L.Ed. 979.) Takings, or inverse condemnation, claims also arise under Article I, section 19 of the California Constitution, which provides "[p]rivate property may be taken or damaged for a public use and only when just compensation … has first been paid to … the owner." (Cal. Const., art. I, § 19, subd. (a); see *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 516.) "[R]ead as a whole, the 'just compensation' clause is concerned, most directly, with the state's exercise of its traditional eminent domain power …." (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 376–380.) The takings clause in the California Constitution is "construed congruently with the federal clause." (*Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 183, citing to *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 260.)

Whether the government's actions constitute a taking is a mixed question of law and fact, and as a result, judicial review is neither entirely *de novo* nor entirely limited by the substantial evidence rule. (*Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 183.) "A regulatory takings analysis rests on the foundational principle that 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" (*Lockaway, supra,* 216 Cal.App.4th at p. 184, quoting *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322.)

In determining "how far is 'too far,'" courts should examine three distinct categories of regulatory takings, and the tests for evaluating each category. (*Lockaway, supra,* 216 Cal.App.4th at p. 184, citing to *Lingle, supra,* 544 U.S. at p. 538.) The first category is government action which requires a property owner to "suffer a permanent physical invasion" of his or her property. (*Ibid.*) "The second category includes regulatory conduct that does not result in any physical invasion but deprives the owner of 'all economically beneficial use' of the property. [Citation.] These two 'relatively narrow categories' of regulatory action are subject to a categorical rule and are deemed per se takings for Fifth Amendment purposes. [Citation.]" (*Lockaway, supra,* 216 Cal.App.4th at p. 184.)

As a preliminary matter, it should be noted that regulatory taking cases have not clearly defined "substantially all economic value." However, in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (*Lucas*), the United States Supreme Court alludes to the fact that it is an "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted …," and it is a "relatively rare situation[] where the government has deprived a landowner of all economically beneficial uses." (*Lucas, supra,* 505 U.S. at pp. 1017, 1018.)

Nevertheless, a complete deprivation of all economically beneficial uses is not a prerequisite to a finding of a regulatory taking. Indeed, in *Lucas,* the United States Supreme Court expressly rejected the "assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation."[14] (*Lucas, supra,* 505 U.S. at p. 1019, fn. 8, 112 S.Ct. at p. 2395, fn. 8.) Similarly, in citing to *Lucas,* the California Supreme Court, in dicta, found that "[a] regulation, …, may effect a taking though, …, it does not involve a physical invasion *and leaves the property owner some economically beneficial use of his property*." (*Kavanau v. Santa Monica Rent Control Board* (1998) 16 Cal.4th 761, 774, emphasis in original.) However, the categorical rule in *Lucas* is that compensation is required when a regulation permanently deprives an owner of "all economically beneficial uses" of his land. (*Lucas, supra,* 505 U.S. at p. 1019, 112 S.Ct. 2886; see also, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302, 122 S.Ct. 1465 (*Tahoe-Sierra*) [compensation not owed because temporary moratorium was not a permanent ban on development].)

In *Tahoe-Sierra, supra,* the United States Supreme Court distinguished *Lucas* in its examination of a temporary moratorium on the development of environmentally sensitive lands.

[14] In *Lucas*, the landowner paid $975,000 for two residential beachfront lots on which he intended to build single-family homes. At the time he acquired the lots, there was no legal restraint on the right to build. However, two years later, South Carolina enacted a statute imposing setback requirements that effectively prevented the owner from erecting any permanent habitable structure on the lots. The owner argued that the effect of the statute was to deprive the property of all value, and that this deprivation entitled him to compensation. The trial court agreed with the owner, and awarded compensation. The state supreme court reversed, and ruled that when a regulation regarding the use of property is designed to prevent serious public harm, no compensation is due.

However, the U.S. Supreme Court rejected the state supreme court's approach, and provided guidelines to assist in the application of the rule that compensation is not required if the uses prohibited are also prohibited under nuisance law, or were part of the owner's title or estate. It was found that courts must analyze, among other things, "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's activities, the social value of the claimant's activities and their suitability to the locality in question and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike." (*Lucas, supra,* 505 U.S. at p. 1030.)

After providing two illustrations of the nuisance exception, the Supreme Court then conceded that regulatory action could have the effect of eliminating the land's only economically productive use, and stated that no compensation would be required because the regulation did not prevent a productive use that was previously permissible under property and nuisance principles. Notably, the *Lucas* Court did not determine that the state law deprived the owner of all beneficially economic use of his lots. Instead, both the Supreme Court and the trial court assumed that the lots were rendered valueless by the regulation.

The Court held that under the categorical rule applied in *Lucas*, "a statute that 'wholly eliminated the value' of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" (*Tahoe-Sierra, supra,* 535 U.S. at pp. 330-332, 122 S.Ct. 1465, citing to *Lucas, supra,* 505 U.S. at p. 1017, 112 S.Ct. 2886 [that the 32-month moratorium was not a permanent ban on development, but only a fraction of the useful life of the properties affected].) The *Tahoe-Sierra* Court went on to note that in *Lucas*, they explained "that the categorical rule would not apply if the diminution in value were 95% instead of 100%," and that "[a]nything less than a 'complete elimination of value,' or a 'total loss,' … would require the kind of analysis applied in *Penn Central.*" (*Tahoe-Sierra, supra,* 535 U.S. at p. 330, 122 S.Ct. 1465, quoting *Lucas, supra,* 505 U.S. at pp. 1019-1020, fn. 8, 112 S.Ct. 2886.)

Accordingly, if a regulatory taking does not fall into one of the first two categories, then it is evaluated under a set of standards first articulated by the United States Supreme Court in the seminal case of *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (*Penn Central*). (*Lockaway, supra,* 216 Cal.App.4th at p. 184, citing to *Lingle, supra,* 544 U.S. at p. 538, 125 S.Ct. 2074.)

Under *Penn Central*, the court is to engage is an "ad hoc factual inquiry that weighs 'several factors for evaluating a regulatory taking claim.'" (*Lockaway, supra,* 216 Cal.App.4th at p. 184, citing to *Penn Central, supra,* 438 U.S. at p. 124, 98 S.Ct. 2646; *Lingle, supra,* 544 U.S. at p. 538, 125 S.Ct. 2074.) The inquiry involves three primary factors: "(1) the 'economic impact' of the regulation on the claimant, (2) the extent to which the regulation interfered with 'distinct investment-backed expectations,' and (3) the 'character of the governmental action.'" (*Lockaway, supra,* 216 Cal.App.4th at p. 184, citing to *Shaw v. County of Santa Cruz* (2008) 170

Cal.App.4th 229, 272; see, *Penn Central, supra,* 438 U.S. at p. 124, 98 S.Ct. 2646.) These *Penn Central* factors have been deemed "the principal guidelines" for resolving regulatory takings claims that do not fall under the two narrow categories of *per se* takings claims. (*Lockaway, supra,* 216 Cal.App.4th at p. 184, citing to *Lingle, supra,* 544 U.S. at p. 539, 125 S.Ct. 2074.)

Under the *Penn Central* inquiry, the question is not "whether a regulation of private property is effective in achieving some legitimate public purpose" – i.e., it is not a "means-ends test". (*Lockaway, supra,* 216 Cal.App.4th at p. 185, citing to *Lingle, supra,* 544 U.S. at p. 542, 12 S.Ct. 2074.) "Instead, the goal is to assess the '*magnitude or character of the burden* a particular regulation imposes upon private property rights' in order to determine whether its effects are 'functionally comparable to government appropriation or invasion of private property.'" (*Lockaway, supra,* 216 Cal.App.4th at p. 185 [emphasis in original].)

Reoforce *and Application of* Penn Central *Factors.* The recent case of *Reoforce, Inc. v. United States* (Fed. Cir. 2017) 853 F.3d 1249, is instructive. In *Reoforce,* the owners of unpatented mining claims filed suit alleging that the federal Department of Interior's Bureau of Land Management ("BLM") effected a regulatory taking of their mining claims when BLM entered into a memorandum of understanding ("MOU") regarding the potential transfer to California of federal land encompassing the mining claims until the date that BLM entered a settlement agreement which granted the owners mining rights on three mining claims. The case also was based on the 1972 Mining Law.

In *Reoforce*, the claimant found high quality pumicite deposits in Kern County, California, and in 1983, he located 21 mining claims in his name. Subsequently, after finding two more mining claims, he and his wife did business as Reoforce. For more than two decades, the claimant investigated the material properties of pumicite to find commercial applications, and

he ultimately received several technical studies indicating the promise of various commercial uses of the mineral. In 1987, pursuant to the applicable regulations, the claimant submitted a plan of operations to BLM for his company to mine several thousands of tons of pumicite per year from his mining claims. After further clarification and testing, BLM conditionally approved the plan. The conditional approval included 20 stipulations, including that the pumicite not be subject to location under the General Mining Laws, and that a determination be made at an unspecified time. Although BLM had not yet determined whether the claimant had discovered valuable minerals locatable under the General Mining Law, BLM allowed the claimant to proceed with his mining plans. However, despite assurances by BLM, the claimant decided to postpone the start of his mining operations until after BLM completed its common/uncommon variety determination. Two years later, BLM concluded that pumicite was an uncommon mineral locatable under federal law. A few months later, the company's plan of operations was approved. The claimant began mining operations, but of the 200 tons he mined, only five were sold. (*Reoforce, supra,* 853 F.3d at pp. 1258-1259.)

In 1995, the claimant was notified that the lands encompassing his mining claims would be transferred to the State of California under the California Desert Protection Act to become part of a state park. The notice explained that some mining claimants may have valid rights that would survive the transfer, but that these rights were predicated on the discovery of a valuable mineral deposit within the claim. This notice was attached to a memorandum of understanding ("MOU") between BLM and the California Parks and Recreation Department, and the purpose of the MOU was to provide for the management and administration of the lands within the state park that were not conveyed to the department because they were encumbered by unpatented mining claims. Specifically, the MOU allowed some mining claimants to continue their

operations while it suspended the operations of other claimants, depending on the claimants' use of the mine before the MOU. BLM explained the ultimate fate of these claims depended on the outcome of a valid existing rights determination, and that unpatented claims ultimately judged invalid would transfer to the State. (*Reoforce, supra*, 853 F.3d at p. 1259.)

Several months later, BLM sent the claimant a letter regarding California's Surface Mining and Reclamation Act ("SMARA"), stating it applied to his mining claims and he had to submit a reclamation plan in compliance with the Act. However, although Reoforce discussed expanding its mining operations, the venture failed due to lack of commercial orders. Six years later, the company was reactivated, and the claimant notified BLM that he intended to resume his mining operations. The following year, the claimant sent BLM a letter stating that Reoforce had satisfied the requirements of SMARA, and that in waiting for the approval, he had been hindered in his mining operations. One year later, BLM initiated a validity determination to consider whether claimant's claims were valid under the mining law, and the investigation concluded two years later with a report finding the claims invalid. (*Reoforce, supra,* 853 F.3d at p. 1260.)

After the Department of Interior initiated a proceeding seeking a declaration that the mining claims were invalid, and that the United States owned the property free of any mining claims, the department ultimately settled the contest with Reoforce. In the settlement agreement, the parties agreed that Reoforce would relinquish its rights in 20 of the 23 disputed mining claims. However, on the three remaining claims, Reoforce was granted rights to mine in accordance with its plan of operations, subject to conditions. The conditions required the company to begin mining operations within 24 months of the settlement agreement, and not to cease operations for any continuous period of 12 months. In 2011, Reoforce filed a complaint in the Court of Federal Claims seeking just compensation for an alleged temporary taking from

1995 to 2008 of the three mining claims it retained. Reoforce alleged that, although it was not engaged in diligent and continuous mining, it had been on the cusp of significant mining operations in 1995, but that the 1995 MOU had forced it to cease operations under the settlement agreement and the close of the validity determination in 2008. Reoforce asserted this cessation of operations was a temporary regulatory taking of its property rights compensable under the Fifth Amendment. The court found Reoforce failed to establish its allegations on three grounds: (1) Reoforce did not have a compensable property right in 1995, (2) even if Reoforce had a property right at the time of the alleged taking, the MOU did not prohibit Reoforce from mining, and (3) even assuming the MOU prohibited Reoforce from mining, Reoforce did not establish that the MOU interfered with its reasonable investment-backed expectations under the *Penn Central* analysis. Reoforce appealed. (*Reoforce, supra,* 853 F.3d at pp. 1261-1262.)

As a preliminary matter, the appellate court found that an unpatented mining claim is a conditional property interest, and that the holders of these claims " 'take their claims with the knowledge that the Government, as owner of the underlying fee title, maintains broad regulatory powers over the use of the public lands on which unpatented mining claims are located.'" (*Reoforce, supra,* 853 F.3d at p. 1256, quoting *Kunkes v. United States* (Fed. Cir. 1996) 78 F.3d 1549, 1553.) Nevertheless, the court found that such unpatented mining claims are property protected by the Fifth Amendment against uncompensated takings. (*Reoforce, supra,* 853 F.3d at p. 1256.)

Next, the appellate court found that the MOU did not, in fact, prevent Reoforce from mining on its claim. Nevertheless, the court stated that even if the MOU prevented Reoforce from mining, Reoforce did not prove that this temporary prohibition on mining constituted a taking under *Penn Central*. (*Reoforce, supra,* 853 F.3d 1266.) On this point, the court held that

deprivation of a property right, even if temporary, may merit just compensation under the takings clause. " '[O]nce a court finds that a police power regulation has effected a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.'" (*Reoforce, supra,* 853 F.3d at p. 1268, quoting *Tahoe-Sierra Pres. Council, Inc., supra,* 535 U.S. at p. 328.)

However, the court noted that temporary interference with a property right may not amount to a taking because a temporary restriction that merely causes a diminution in value is not a taking of the parcel as a whole. (*Reoforce, supra,* 853 F.3d at pp. 1268-1269.) "[T]he answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case." (*Id.*, quoting *Tahoe-Sierra,* 535 U.S. at p. 332.) The court explained that those circumstances must be tested under the *Penn Central* analysis. (*Id.*)

CDFW Motion. As noted above, after the extensive procedurally history of this matter, CDFW has decided to make its post-*Rinehart* arguments under the guise of a motion for judgment on the pleadings. In this procedural posture, CDFW must demonstrate that the Miners have not alleged sufficient facts to constitute their causes of action. However, in their Amended Complaint and Petition for Writ of Mandate, filed March 13, 2013, the Miners set fort the following allegations: (1) the only practicable method of removing present underwater gold deposits is through suction dredge mining [FAC, ¶¶21, 53]; (2) for many years, CDFW issued permits for suction dredging under section 5653 *et seq.* [FAC, ¶23]; (3) CDFW has recently instituted statutory moratoriums and a new set of suction dredging regulations which have banned suction dredge mining in California [FAC, ¶¶24, 25]; (4) the mining claims are located,

in whole or in part, in areas identified as "Closed Areas" where suction dredge mining is prohibited under the new regulations [FAC, ¶¶32, 33]; (5) no suction dredge permits can be issued because CDFW cannot certified the requisite conditions under the law [FAC, ¶35]; (6) the regulations will not permit suction dredge mining on the mining claims and/or will operate to forbid suction dredge mining for those mining claimants who are not able to obtain one of the 1500 annual permits [FAC, ¶36]; (7) the mining claims are private property protected under the Fifth and Fourteenth Amendments to the U.S. Constitution [FAC, ¶52]; (8) the mining claims are not valuable for any other purpose other than mining, and the Miners' property rights are limited to prospecting, mining, or processing operations related to gold mining [FAC, ¶ 54]; (9) the Miners are denied all economically beneficial or productive use of their respective mining claims due to the regulations [FAC, ¶ 55]; and (10) the Miners have not received any compensation for the taking of their mining claims by CDFW [FAC, ¶¶ 56, 57].

CDFW has not demonstrated that these allegations are not sufficient to state the Miners' takings cause of action. Indeed, CDFW seems to primarily rest its argument on the Supreme Court's *Rinehart* decision. However, as discussed thoroughly above, while the *Rinehart* decision clearly stated that sections 5653 and 5653.1 are not federally preempted, the opinion does not address the question of whether the State's statutory scheme amounted to a regulatory taking of the Miners' mining claims. Moreover, as noted in the recent *Reoforce* opinion, whether a temporary moratorium amounts to a taking under the Fifth Amendment is a question that must be viewed through a *Penn Central* analysis – an analysis which is not amenable to the procedural restrictions of a motion for judgment on the pleadings.

In addition, CDFW's argument is based on the question of whether the Miners have a "valid" property interest in their mining claims – a question which is more conducive to a summary judgment or writ hearing, not a motion for judgment on the pleadings. Nevertheless, as noted in *Reoforce*, unpatented mining claims are property protected by the Fifth Amendment against uncompensated takings. (*Reoforce*, *supra*, 853 F.3d at p. 1256.)

Other courts have similarly held that an unpatented mining claim "'is a property right in the full sense, …,' and constitutes a property interest 'which is within the protection of the Fifth Amendment's prohibition against the taking of private property for public use without just compensation.' [Citations.]" (*McKown v. United States* (E.D. Cal. 2012) 908 F.Supp.2d 1122, 1124.) It is well-settled that a mining claim's validity is dependent upon the discovery of a valuable mineral deposit. (See, *id.* at p. 1125, citing to 30 U.S.C. § 22.) "'[T]o qualify as valuable mineral deposits, the discovered deposits must be of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.'" (*Id.*, quoting *United States v. Coleman* (1968) 390 U.S. 599, 602, 88 S.Ct. 1327, 20 L.Ed.2d 170.) In this "prudent man test," profitability of the claim must be considered. (See, *Hjelvik v. Babbitt* (9th Cir. 1999) 198 F.3d 1072, 1074, citing to *Coleman*, *supra*, 390 U.S. at 602, 88 S.Ct. 1327.)

However, when the government contests the validity of a mining claim, the government bears the burden of establishing a *prima facie* case that the claim is invalid. (*McKown*, *supra*, 908 F.Supp.2d at p. 1125, citing to *Hjelvik*, *supra*, 198 F.3d at pp. 1074-1075.) Here, in the current action, CDFW has not met that burden. Indeed, CDFW improperly asserts that the Miners' unpatented mining claims are invalid, in part, because such claims are only possessory interests, and are not title to the land in question. Yet, as discussed in *Reoforce*, while an

unpatented mining claim is a conditional property interest subject to the federal government's ownership of the underlying land, it is nonetheless a compensable property interest under the takings law. (*Reoforce, supra,* 853 F.3d at p. 1256.)

As for whether the mining claims are "valuable," CDFW also seems to rest its analysis on whether the claimant has complied with all state and federal laws. However, as alleged in the operative pleading, suction dredging permits were issued for several years under the previous statutory scheme, and were only prohibited after the statutes were amended in 2009. As a result, to the extent the mining claims at issue were instituted prior to 2009, CDFW cannot claim *ex post facto* that the 2009 regulations rendered those mining claims invalid because they were no longer "valuable" – i.e., profitable.

CDFW has not met its burden with regards to this motion. **Accordingly, the motion for judgment on the pleadings is denied as to the takings cause of action.**

C. CEQA and APA Claims

Neither of the parties adequately addresses the remaining CEQA and APA claims. Indeed, as noted above, after CDFW finalized the 2012 FSEIR, the Legislature required CDFW to submit a report and recommendations regarding statutory changes or authorizations that CDFW thought were necessary to develop the suction dredge regulations. In April 2013, CDFW provided the requisite report and recommendations. In response, the Legislature enacted S.B. No. 637 which, in part, addressed the "significant and unavoidable" environmental effects identified by CDFW. (Stats. 2015, ch. 680.)

Although the amendment became effective as of January 1, 2016, and substantially amended section 5653, neither of the parties discusses its effects on the remaining issues in this action. Yet the amendment seems to have lifted the complete moratorium on suction dredge

mining, and has resulted in the following changes to the statutory scheme for the issuance of suction dredge mining permits: [15]

1. Prohibits CDFW from issuing a permit for vacuum or suction dredge mining until the permit application is complete;
2. Expands the definition of suction dredge mining to include other methods of small-scale gold mining, and requires permits issued by CDFW and the State Water Resources Control Board (hereinafter, "Water Board"), a regional board, or the U.S. Army Corps of Engineers for those activities;
3. Requires that the application include copies of all required permits, including permits required under the Federal Water Pollution Control Act, the California Water Code, and any other permit required to fully mitigate all identified significant environmental impacts;
4. Requires, if the Water Board or regional water quality control board determines that no water quality or water rights permit is necessary, that the application include a letter stating that determination;
5. Requires CDFW to issue the permit if it determines that use of a vacuum or suction dredge does not cause any "significant effects to fish and wildlife";
6. Provides that a permit issued by CDFW for suction dredge mining shall not authorize any activity in violation of any other applicable requirements, conditions, or prohibitions governing the use of suction dredge equipment, including those adopted by the Water Board or a regional board;
7. Authorizes the Water Board or a regional board to protect water quality by adopting waste discharge requirements that address the water quality impacts of mercury loading, methylmercury formation, bioaccumulation of mercury in aquatic organisms, and resuspension of metals due to suction dredging; specifying conditions or areas where the discharge of waste or other adverse impacts on the beneficial uses of the waters of the state from suction dredge mining is prohibited; and prohibiting any particular methods of suction dredge mining that exceeds water quality objectives or unreasonably impacts beneficial uses.

(Stats. 2015, ch. 680, § 2 [amending F&G Code § 5653, subds. (b), (c), (d)(2), (g); Stats. 2015, ch. 680, § 4.)

Moreover, as with the takings cause of action, the remaining issues regarding the CEQA and APA claims, the effect of *Rinehart* on these causes of action, and the effect of the amended

[15] It should be noted that Senate Bill No. 637 also added Section 13172.5 to the Water Code, which gives the State Water Resources Control Board and/or regional water boards the power to adopt or waive waste discharge requirements that address the water quality impacts of mercury and other metals. (*Water C.*, § 13172.5 (b)(1).) Notably, the statute also allows the Water Board and/or regional water boards to "[p]rohibit any particular use of, or methods of using, vacuum or suction dredge equipment, …, for the extraction of minerals that the state board or a regional board determines generally cause or contribute to an exceedance of applicable water quality objectives or unreasonably impact beneficial uses." (*Water C.*, § 13172.5 (b)(3).) In addition, the water boards can "[s]pecify certain conditions or areas where the discharge of waste or other adverse impacts on beneficial uses of the waters of the state from the use of vacuum or suction dredge equipment is prohibited …." (*Water C.*, § 13172.5 (b)(2).)

statutes cannot be addressed in a motion for judgment on the pleadings. As discussed above, contrary to the position seemingly taken by CDFW, the *Rinehart* decision, though consequential on the issue of preemption, did not address issues dispositive to the CEQA and APA claims such that they should be dismissed on the pleadings. **Accordingly, the motion is denied as to the CEQA and APA causes of action.**

Rulings

1. **The Court denies the Department of Fish and Wildlife's Motion for Judgment on the Pleadings regarding the Takings Cause of Action, on the ground that CDFW has not met its burden of demonstrating that the cause of action is not adequately alleged, or that the underlying mining claims are invalid.**
2. **The Court denies the Department of Fish and Wildlife's Motion for Judgment on the Pleadings regarding the CEQA and APA causes of action, on the ground that CDFW has not met its burden of demonstrating that these causes of action are not adequately alleged.**
3. **The Court grants the Department of Fish and Wildlife's Motion for Judgment on the Pleadings to the extent it seeks an order vacating this court's earlier MSJ/MSA ruling on the issue of preemption due to the *Rinehart* decision in effect denying the MSJ/MSA brought by Plaintiffs.**

Motion: **Motion for Summary Judgment (Single Subject)**

Movant: **Plaintiffs/Petitioners Derek Eimer, Stephen Jones, David Guidero, Marvin Lampshire II, and Dyton Gilliland**

Respondent: **Defendant/Respondent California Department of Fish & Wildlife**

PROCEDURAL/FACTUAL BACKGROUND

On July 6, 2015, Plaintiffs/Petitioners The New 49'ers, Inc., Derek D. Eimer, Stephen Jones, David Guidero, Marvin Lampshire II, and Dyton Gilliland (collectively, "Eimer Plaintiffs") filed a putative class action Complaint and Petition, Case No. CIVDS 1509427, against Defendants/Respondents California Department of Fish & Wildlife, and Charlton H. Bonham, in his capacity as Director of the Department (collectively, "CDFW"). In the Complaint and Petition, the Eimer Plaintiffs alleged causes of action for Violation of the One Subject Rule, and Federal Preemption. Shortly thereafter, the Eimer litigation was coordinated with the ongoing Suction Dredge Mining Cases, JCPDS 4720.

On August 24, 2015, the Eimer Plaintiffs filed the operative First Amended Complaint and Petition, wherein they set forth class action allegations and a single cause of action for Violation of the One Subject Rule. The Eimer Plaintiffs allege that the legislative predicate to Fish & Game Code sections 5653 and 5653.1 – Senate Bill No. 1018 ("SB 1018") and Assembly Bill No. 120 ("AB 120") – are unconstitutional because they violate Article IV, § 9 of the California Constitution, in that these bills embrace more than one subject. As a result, the Eimer Plaintiffs seek a writ of mandate prohibiting and enjoining CDFW from enforcing SB 1018 and AB 120, and compelling CDFW to resume issuing permits for suction dredge mining. In addition, the Eimer Plaintiffs seek to restrain and enjoin CDFW from citing, arresting, harassing, seizing the equipment of, or otherwise taking any action against those who are suction dredge mining without a permit, but otherwise in compliance with the 2012 regulations.

On November 10, 2015, the Eimer Plaintiffs filed the current Motion for Summary Judgment. Plaintiff Keith Walker has filed a joinder in support. In response, CDFW has filed a singular brief opposing the summary judgment motion, and supporting its cross-motion for Judgment on the Pleadings.[16] To date, the Eimer Plaintiffs have not replied.

DISCUSSION

I. Procedural Issues

On January 6, 2016, CDFW filed a combined brief entitled, "Defendants' Brief on Single Subject Claims in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Judgment on the Pleadings." CDFW also filed the requisite Notice of Motion and Motion for Judgment on the Pleadings, as well as an opposing separate statement with regards to the summary judgment motion, and a combined Request for Judicial Notice for both its opposition to the MSJ and its cross-motion.

Request for Judicial Notice

A. Eimer Plaintiffs' Request

The Eimer Plaintiffs ask this Court to take judicial notice of the following documents pursuant to Evidence Code sections 451 and 452:

1. Exhibit 1 – Senate Bill No. 670, Chapter 62, filed with Secretary of State August 6, 2009;
2. Exhibit 2 – Assembly Bill No. 120, Chapter 133, filed with the Secretary of State July 26, 2011;
3. Exhibit 3 – Senate Bill No. 1018, ;

[16] The parties purportedly stipulated to shorten the notice time so that CDFW's cross-motion could be heard concurrently with the summary judgment motion.

4. Exhibit 4 – CDFW Report to the Legislature Regarding Instream Suction Dredge Mining Under the Fish and Game Code, dated April 1, 2013;
5. Exhibit 5 – Senate Bill No. 637, Chapter 680, filed with Secretary of State October 9, 2015.

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.) A request for judicial notice of published material is unnecessary. Citation to the material is sufficient. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46, fn.9.)

California Evidence Code section 452(c) states that judicial notice may be taken of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Section 453 provides that judicial notice shall be taken of any matter specified in Section 452 if requested, if each adverse party is given sufficient notice of the request, and if the court is given sufficient information to enable it to take judicial notice of the matter.

The Eimer Plaintiffs contend these are official documents and/or memorialize official acts taken by various government entities. **Pursuant to the discussion above, the request is granted as to Exhibits 1 through 5.**

B. CDFW's Request

CDFW asks this Court to take judicial notice of the following, pursuant to Evidence Code sections 451 and 452:

1. Exhibit A – Copy of the decision in *Hillman v. Department of Fish and Game*, 2011 WL 6820380;
2. Exhibit B – Senate Bill 637 (Stat. 2015, ch. 680), as enrolled, which was signed by the Governor on October 9, 2015.

As noted above, California Evidence Code section 452, subdivision (c) allows courts to judicially notice official legislative acts. Subdivision (d), states that judicial notice may be taken of "[r]ecords of (1) any court of this state or (a) any court of record of the United States and of any state of the United States."

In the case of court records, not all matters contained therein (e.g., pleadings, affidavits, etc.) are indisputably true. While the existence of any document in a court file may be judicially noticed, the truth of matters asserted in such documents – including the factual findings of the judge who was sitting as the trier of fact – is not necessarily subject to judicial notice unless the document is an order, statement of decision, or judgment. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-1569.) "It is the consequence of judicial notice that the 'fact' noticed is, in effect, treated as true for purposes of proof." (*Sosinsky, supra*, at p. 1564.) Courts may not take judicial notice of allegations in affidavits or declaration because such matters are reasonably subject to dispute, and therefore require formal proof. (See, e.g., *Magnolia Square Homeowners' Assn. v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1056-1057.)

Pursuant to the above, CDFW's request is granted in its entirety.

II. Undisputed, Disputed, and Additional Material Facts

The Eimer Plaintiffs submitted four material facts in their Separate Statement ("UFs"). In opposition, CDFW disputed the facts proffered by the Eimer Plaintiffs, but did not submit any additional material facts.

The Eimer Plaintiffs state that they are suction dredge miners who are prevented from mining by CDFW's refusal to issue permits. [UF #1.] They go on to state that an important reason CDFW refuses to issue such permits is because CDFW has not certified regulations that fully mitigate all so-called significant adverse impacts, as required by SB 1018 and AB 120, and both bills embraced more than one subject. [UF Nos. 2-4.]

CDFW disputes, and states that the Eimer Plaintiffs' facts are vague and not supported by the cited evidence. CDFW further disputes, and states that since the explicit and single subject of both AB 120 and SB 1018 is "public resources", suction dredge mining, along with the bills' other provisions, is within that subject.

III. Analysis

As noted above, pursuant to AB 120 (effective 7/26/11), SB 1018 (effective 6/27/12), and F&G Code § 5653.1, a conditional proscription against vacuum and suction dredging activities was enacted. Under section 5653.1, suction dredge mining was prohibited until CDFW certified it had completed environmental review of its regulations, promulgated new regulations that fully mitigated all identified significant environmental effects, made the new regulations operative, and put a fee structure in place to cover the administrative costs of the suction dredge permit program. (*F&G Code*, § 5653.1, subd. (b).)

The Eimer Plaintiffs contend that AB 120 and SB 1018 are unconstitutional, and therefore, Section 5653.1 cannot continue to operate as a barrier to the issuance of suction dredge mining permits by CDFW. According to the Eimer Plaintiffs, AB 120 and SB 1018 violated Article IV, § 9 of the California Constitution, in that these two bills amended several sections of the California Codes on a variety of subjects unrelated to suction dredge mining. [RJN, Exh. 2 at

p. 18; RJN, Exh. 3 at p. 23.] Moreover, the Eimer Plaintiffs assert that AB 120 and SB 1018 cobbled together unrelated subjects so that the unpalatable requirements of the bills – i.e., those provisions which acted as a *de facto* prohibition on suction dredge mining – could secure passage. The Eimer Plaintiffs argue that such an action by the Legislature is unconstitutional because all provisions of a bill must be related and have a common purpose. In support, they point to *Homan v. Gomez* (1995) 37 Cal.App.4th 597, and *Harbor v. Deukmejian* (1987) 42 Cal.3d 1078.

In opposition, CDFW contends both AB 120 and SB 1018 are budget trailer bills – not budget bills – related to public resources. According to CDFW, as long as the bills' provisions are reasonably germane to a common theme, purpose, or subject, then they do not violate the single-subject rule contained in Article IV, § 9. CDFW argues that the subject of the challenged laws is "public resources", and that this topic is not so broad as to violate the single-subject rule.

Article IV, § 9 of the California Constitution provides: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended." (Cal. Const., Art. IV, § 9.)

Courts have recognized that "[t]he single subject clause has as its 'primary and universally recognized purpose' the prevention of log-rolling by the Legislature, i.e., combining several proposals in a single bill so that legislators, by combining their votes, obtain a majority for a measure which would not have been approved if divided into separate bills." (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1096; see also, *City of Cerritos v. State* (2015) 239

Cal.App.4th 1020; *Professional Engineers in Cal. Govt. v. Brown* (2014) 229 Cal.App.4th 861, 868.)

"[T]he single-subject rule 'is to be liberally construed to uphold proper legislation and not used to invalidate legitimate legislation.' [Citations.] The Legislature may combine in a single act numerous provisions '"governing projects so related and interdependent as to constitute a single scheme,"' and provisions auxiliary to the scheme's execution may be adopted as part of that single package. [Citations.] … The constitutional mandate [citation] is satisfied if the provisions themselves are cognate and germane to the subject matter designed by the title, and if the title intelligently refers the reader to the subject to which the act applies, and suggests the field of legislation which the text includes.'" (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 988-989.)

"In short, legislation complies with the single-subject rule 'if its provisions are either functionally related to one another or are reasonably germane to one another or the objects of the enactment." (*Tomra Pacific, Inc. v. Chiang* (2011) 199 Cal.App.4th 463, 482, quoting *Harbor v. Deukmejian, supra,* 43 Cal.3d at p. 1100.) "A legislative provision is 'germane' for purposes of the single-subject rule if it is 'auxiliary to and promotive of the main purpose of the act or had a necessary and natural connection with that purpose….'" (*Tomra Pacific, supra,* 199 Cal.App.4th at p. 484, quoting *Metropolitan Water Dist. v. Marquardt* (1963) 59 Cal.2d 159, 172-173.)

Here, in the current litigation, CDFW contends there is a significant distinction between the budget bill and what are known as "budget trailer bills". According to CDFW, trailer bills are not part of the related budget act, and over the years, the Legislature has passed an increasing number of budget trailer bills with topics ranging from state finance to public safety to taxation. CDFW contends that in this instance, AB 120 and SB 1018 were budget trailer bills related to

"public resources" – a category that is not too broad under the holding of *City of Cerritos v. State* (2015) 239 Cal.App.4th 1020. CDFW asserts that as it relates to "public resources", the terms of a moratorium on suction dredge mining and the related environmental review are "reasonably germane".

In *City of Cerritos v. State* (2015) 239 Cal.App.4th 1020, the court examined an assembly bill which governed the dissolution and wind down of redevelopment agencies. The plaintiffs argued the bill violated the single-subject rule because it contained an appropriation to carry out the act, and substantive changes to the Community Redevelopment Law. (*City of Cerritos, supra,* 239 Cal.App.4th at p. 1048.) The court found that the provisions of the bill were "reasonably germane to one another and to the object or purpose of the act" – noting that the title of the bill stated it was an act to amend certain code sections "relating to development, and making an appropriation therefor, to take effect immediately, bill related to the budget." (*Id.* at p. 1050.) In finding that the bill's specific provisions demonstrated a "functional relationship or germaneness between its parts," the court found that the provisions of the bill all related to the "subject of redevelopment and its impact on available funding sources to combat the declared 2011 fiscal crisis and balance the budget." (*Id.* at p. 1050.) As a result, the court held that the bill did not violate the single-subject rule because, "[r]ather than an amorphous and excessively general purpose such as 'fiscal affairs,'" the bill's main purpose was "a sufficiently narrow single subject." (*Id.* at p. 1051.)

As noted by CDFW, the *City of Cerritos* court also stated that "'[t]railer bills are generally separated by subject area such as education, resources, or health, to minimize possible conflicts with single subject limitations that could occur if a general omnibus trailer bill were to be proposed.'" (*City of Cerritos, supra,* 239 Cal.App.4th at pp. 1051-52, quoting *People v.*

Wallace (2004) 120 Cal.App.4th 867, 873.) "In other words, a trailer bill is not part of the budget act; it is separate and remains subject to veto." (*Professional Engineers in Cal. Govt. v. Schwarzenegger* (2010) 50 Cal.4th 989, 1049.)

Here, in the current litigation, the challenged provision in AB 120 states:

> Existing law designates the issuance by the Department of Fish and Game of permits to operate vacuum or suction dredge equipment to be a project under the California Environmental Quality Act (CEQA), and suspends 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. Existing law prohibits the use of any vacuum or suction dredge equipment in any river, stream, or lake for instream mining purposes, until the Director of Fish and Game certifies to the Secretary of State that (a) the department has completed the environmental review of its existing vacuum or suction dredge equipment regulations as ordered by the court, (b) the department has transmitted for filing with the Secretary of State a certified copy of new regulations, as necessary, and (c) the new regulations are operative. [¶] **This bill would modify that moratorium to prohibit the use of vacuum or suction dredge equipment until June 30, 2016, or until the director's certification to the secretary as described above, whichever is earlier. The bill would additionally require the director to certify that the new regulations fully mitigate all identified significant environmental impacts and that a fee structure is in place that will fully cover all costs to the department related to the administration of the program.**

[Miners' RJN, Exh. 2, pp. 4-5, emphasis added.]

Contrary to the argument of the Eimer Plaintiffs, this provision did not substantively change the obligations of CDFW regarding the suction dredge mining permit program under section 5653.1. Instead, it primarily addressed the extension of the already-existing moratorium, provided a specific sunset clause for the expiration of the moratorium, and reiterated CDFW's obligations to certify new regulations that fully mitigated all significant environmental impacts of the program, and institute a fee structure to cover the administrative costs.

Similarly, SB 1018 also did not substantively change the obligations of CDFW under section 5653.1. As with AB 120, the relevant provision in SB 1018 repealed the sunset

provision, and made "the moratorium operative until the director makes that certification to the secretary." [Miners' RJN, Exh. 3, pp. 2-3.] In addition, SB 1018 provides:

> The bill would, in order to facilitate the making of that certification, require the department to consult with other agencies as it determines to be necessary, and, on or before April 1, 2013, prepare and submit to the Legislature a report with recommendations on statutory changes or authorizations necessary to develop the required suction dredge regulations, including, but not limited to, recommendations relating to the mitigation of all identified significant environmental impacts and a fee structure that will fully cover all program costs.
>
> [Miners' RJN, Exh. 3, p. 3.]

This provision did not substantively amend or change then-existing statutory law. Instead, it merely provided more specific guidelines for CDFW to follow in fulfilling its obligations under section 5653.1

Accordingly, the Eimer Plaintiffs have not demonstrated that as a matter of law, AB 120 and SB 1018 violated the single-subject rule embodied in Article IV, § 9, and thus, they have not met their burden on this issue. The MSJ is denied and AB 120 and SB 1018 are found to be constitutional under California Constitution Article IV, § 9.

Ruling

Accordingly, the MSJ of the Eimer Plaintiffs is denied, and AB 120 and SB 1018 are found to be constitutional under California Constitution Article IV, § 9.

Motion: Motion for Judgment on the Pleadings (SB 637)

Movant: Defendant/Respondent California Department of Fish & Wildlife

Respondent: Plaintiffs/Petitioners Derek Eimer, Stephen Jones, David Guidero, Marvin Lampshire II, and Dyton Gilliland

Motion for Judgment on the Pleadings-

Applicable Law- See discussion on pg. 23 re the law on Judgment on the Pleadings.

As noted above, CDFW termed this an "Opposition to Plaintiffs' Motion for Summary Judgment and … Defendants' Cross-Motion for Judgment on the Pleadings." In this instance, it appears that CDFW's motion for judgment on the pleadings rests on the recent passage of Senate Bill 637, which amended Section 5653 as of January 1, 2016. As discussed above, the newly-enacted amendments to Section 5653 now require suction dredge mining permit applications to include a water quality permit, or letter of waiver, under the Federal Clean Water Act and the state water quality law. According to CDFW, none of the Eimer Plaintiffs have demonstrated that they have applied for such a permit, and they cannot do so because the State Water Resources Control Board has previously indicated that it will take a few years to issue these permits. [*See*, Haven Decl. in Support of Defs. Opp. to Mtn. for Prelim. Inj. in *Kimble v. Harris*, filed May 1, 2013 (CIVDS 1012922).] As a result, CDFW contends that even if the Eimer Plaintiffs were to prevail on their summary judgment motion, they still would not be able to return to suction dredge mining at this time. The Court finds this argument persuasive.

Ruling

The Court grants CDFW's Motion for Judgment on the Pleadings without leave to amend, as the Plaintiffs cannot demonstrate the defect can be cured by amendment.

Defendant DFW to prepare Order and Judgment as necessary.

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Judge of the Superior Court

Gilbert G. Ochoa

October 16, 2017