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**Order DISMISSING PLAINTIFFS' TAKINGS CLAIM  
filed**



NEW FILE

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**FILED**  
 SUPERIOR COURT OF CALIFORNIA  
 COUNTY OF SAN BERNARDINO  
 SAN BERNARDINO DISTRICT

FEB 26 2018

BY *Kimberly Reynolds*  
 KIMBERLY REYNOLDS, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

11 Coordination Proceeding Special Title (Rule 12 1550(b) 13 <b>SUCTION DREDGE MINING CASES</b>	Coordinated Case No. JCCP4720 <b>[PROPOSED] ORDER DISMISSING          PLAINTIFFS' TAKINGS CLAIMS</b> Dept: S33 Judge: Honorable Gilbert Ochoa Trial Date: September 24, 2018 Action Filed: Various
<b>Included Actions:</b> 16 Kimble, et al. v. Kamala Harris, Attorney 17 General of California, et al. 18 Public Lands for the People, et al. v. California 19 Department of Fish and Game 20 The New 49er's, et al. v. State of California, California Department of Fish and Game, et al. 21 Walker v. Harris, et al. 22 Foley et al. v. California Department of Fish 23 and Wildlife, et al. 24 Eimer et al. v. California Department of Fish and Wildlife, et al.	CIVDS 1012922 - San Bernardino County CIVDS 1203849 - San Bernardino County SCCVCV120048 - Siskiyou County 34-2013-80001439 - Sacramento County SCCVCV1300804 - Siskiyou County CIVDS 1509427 - San Bernardino County

1 On October 17, 2017, the Court heard several matters. One of those was a hearing on  
2 Defendants' motion for judgment on the pleadings on the takings claims found in the first cause  
3 of action in the *The New 49'ers* case. There are not any other takings claims in these coordinated  
4 actions. James L. Buchal appeared for Plaintiffs. Deputy Attorneys General Bradley Solomon  
5 and Marc N. Melnick appeared for Defendants. The Court took the matter under submission.  
6 The Court filed a minute order and a ruling on these matters on December 20, 2017. While the  
7 Court's ruling was not entirely based on the reasoning advanced by Defendants in their motion,  
8 the Court did grant judgment on the pleadings on this cause of action, both in response to  
9 Defendants' motion and on its own motion. (See Code Civ. Proc., § 438, subd. (b)(2) ["The court  
10 may upon its own motion grant a motion for judgment on the pleadings."].)

11 Plaintiffs' takings claims are moot given Senate Bill 637's requirement that suction dredge  
12 miners obtain permits under the Clean Water Act. Plaintiffs have not demonstrated that they have  
13 applied for such a permit, and a statewide general permit issued by the State Water Resources  
14 Control Board appears to be far in the future. As explained in a separate order, this argument  
15 justified granting Defendants' motion for judgment on the pleadings as to Plaintiffs' single-  
16 subject claims in the *Eimer* case, and is fully applicable to Plaintiffs' takings claims in the *The*  
17 *New 49'ers* case.

18 A regulatory takings claim is a claim that property has been diminished in value somehow.  
19 Here, the property at interest is a federal unpatented mining claim, and thus the value comes from  
20 mining. Plaintiffs have alleged that the only effective way to mine their claims is by suction  
21 dredge mining.

22 Since at least 1990 the U.S. Court of Appeals for the Ninth Circuit has required that suction  
23 dredge miners obtain a permit under the Clean Water Act. (See *Rybachek v. EPA* (9th Cir. 1990)  
24 904 F.2d 1276, 1285-86 [Clean Water Act requires permits for suction dredge mining because  
25 "even if the material discharged originally comes from the streambed itself, such resuspension  
26 may be interpreted to be an addition of a pollutant under the Act"]; *United States v. Moses* (9th  
27 Cir. 2007) 496 F.3d 984, 991 ["simply dredging up and redepositing what was already there is  
28 sufficient to run afoul of the [Clean Water Act]"]; see also *Northwest Env'tl Defense Ctr. v.*

1 *Env'tl Quality Comm'n* (Or. Ct. App. 2009) 223 P.3d 1071 [discussing application of Clean  
2 Water Act sections 402 and 404 to small suction dredge operations].) Without such a permit, the  
3 Clean Water Act prohibits the activity. (33 U.S.C. § 1311(a).) In fact, the U.S. Army Corps of  
4 Engineers issued a general permit under the Clean Water Act for suction dredge miners in  
5 California for the period of 1995 to 2000. Plaintiffs have not asserted in their pleadings or in their  
6 briefing that they have ever applied for a Clean Water Act permit since 2000. And even if there  
7 had been some dispute about the requirement to obtain a Clean Water Act permit, Senate Bill 637  
8 has made that conclusive. (Fish & G. Code, § 5653, subd. (b), as amended by Stats. 2015, ch.  
9 680, § 2.) Given Plaintiffs' allegation that suction dredge mining is the only way to effectively  
10 mine their claims, without a Clean Water Act permit to suction dredge, Plaintiffs' mining claims  
11 therefore have no value. If the mining claims have no value, they are not valid and are not  
12 property that is subject to a takings claim. (*Best v. Humboldt Placer Min. Co.* (1963) 371 U.S.  
13 334, 337; *Reoforce v. United States* (Fed.Cl. 2013) 119 Fed.Cl. 1, 5-6; *Holden v. United States*  
14 (Fed.Cl. 1997) 38 Fed.Cl. 732, 735-36; *Payne v. United States* (Fed.Cl. 1994) 31 Fed.Cl. 709,  
15 710-11.)

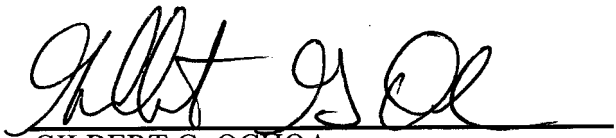
16 In their motion, Defendants made a similar argument, pointing not to the Clean Water Act  
17 and Senate Bill 637 but instead to the Fish and Game Code (and the outcome in the *People v.*  
18 *Rinehart* case). In its December 20, 2017 ruling the Court explained that Defendants "cannot  
19 claim *ex post facto* that the 2009 regulations rendered these mining claims invalid because they  
20 were no longer 'valuable' – i.e., profitable." That is because those regulations were the very ones  
21 being asserted as a regulatory taking in this case. But Plaintiffs have not alleged that the Clean  
22 Water Act, the cases interpreting it, Senate Bill 637, or any enforcement of any of those  
23 requirements are invalid or are a regulatory taking. The Court, therefore, must assume that they  
24 are a valid exercise of the police power and not a taking. (Evid. Code, § 664; see, e.g., *In re Lira*  
25 (2014) 58 Cal.4th 573, 582 ["official duties [are] presumed to be correctly carried out"].) In fact,  
26 it appears quite clear that Plaintiffs cannot yet challenge the State Water Resources Control  
27 Board's terms in its general statewide permit (since those do not exist yet and Plaintiffs need to  
28 exhaust their administrative remedies) and moreover cannot challenge that agency's failure to act

1 so far. (See *Surfrider Found. v. Martins Beach 1, LLC* (2017) 14 Cal.App.5th 238, 256, citing  
2 *Williamson Co. Regional Planning v. Hamilton Bank* (1985) 473 U.S. 172, 186 and other cases.)

3 For these reasons, the Court found that the takings claims are not justiciable, and dismissed  
4 that first cause of action without leave to amend in the *The New 49ers* case. Defendants shall  
5 prepare a proposed judgment in that case.

6 IT IS SO ORDERED.

7 Dated: 2-26-18  
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10 GILBERT G. OCHOA  
11 Judge of the Superior Court  
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