JAMES L. BUCHAL (SBN 258128)
MURPHY & BUCHAL LLP
3425 SE Yamhill Street, Suite 100
Portland, OR 97214
Telephone: (503) 227-1011
Fax: (503) 573-1939
E-mail: jbuchal@mbllp.com
Attorney for Plaintiffs and Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

Coordination Proceeding Special Title (Rule 1550(b)) **SUCTION DREDGE MINING CASES** **Included Actions:**	**Case No. JCPDS4720** **PLAINTIFFS' OBJECTION TO PROPOSED ORDER DISMISSING PLAINTIFFS' TAKINGS CLAIMS** (FILED BY FAX)
Kimble, *et al*. v. Harris *et al*.	CIVDS 1012922 – San Bernardino County
Public Lands for the People, Inc. *et al.* v. California Department of Fish and Wildlife	CIVDS 1203849 – San Bernardino County
The New 49ers *et al*. v. California Department of Fish and Wildlife, *et al.*	SCCVCV 1200482 – Siskiyou County
Walker v. Harris, *et al.*	34-2013-80001439 – Sacramento County
Foley *et al*. v California Department of Fish and Wildlife, *et al.*	SCCVCV-13-00804 – Siskiyou County
Eimer *et al.* v. California Department of Fish and Wildlife, *et al*.	CIVDS 1509427 – San Bernardino County

Statement

Pursuant to the schedule set during the January 10, 2018 telephonic status conference in this case, plaintiffs object to the [Proposed] Order Dismissing Plaintiffs' Takings Claims issued by defendants on January 11, 2018. The Order is supposed to implement this Court's December 18th opinion, but instead reaches out and adds additional factual findings and conclusions of law that were never made by the Court, or for that matter, even briefed to the Court in connection with the motions resolved by the Court.

Plaintiffs understands, based on comments during the January 10th conference, that this Court regards the passage of SB 637 as impairing the ability of the plaintiffs to recover on their takings claim. No such claim was briefed to the Court, and we demonstrated below in Point I that this is not the case. Nothing about the passage of SB 637, six years after plaintiffs' property was essentially sequestered for the asserted benefit to fish, has any impact on a takings challenge based on that sequestration.

In Point II, we suggest that if the Court is determined to issue an order dismissing the takings claim on the basis of SB 637, that the Court simply state its intention, and strike everything in the proposed order filed by defendant after line 17 on the first page through line 5 on page 3. The portion up to line 17 appears to capture the Court's remarks on January 10th, but the additional material is riddled with gross factual and legal error serious enough to raise questions of professional responsibility for the attorneys who wrote it. Because the issues were not briefed to the Court, demonstrating the gross factual and legal errors requires a number of pages, and we are also filing a supplemental affidavit to respond to the factual errors.

In Point III, we suggest that Code of Civil Procedure § 438(b)(2) does not permit a court to take a motion for judgment on the pleadings made in one case and expand the issues in the fashion proposed by defendants. To do so would, among other things, violate due process of law.

For all these reasons, plaintiffs object to the proposed order lodged with the Court by defendants (and hence to the judgment based upon it as well).

I. NOTHING ABOUT SB 637 BARS A TAKINGS CLAIM.

There is no dispute (at least for purposes of a motion for judgment on the pleadings) that

the plaintiffs were barred from mining by SB 670 and its successors, and also by the 2012 regulations issued by the Department of Fish and Wildlife that closed certain areas to mining, including all or portions of plaintiffs' mining claims. The regulations never went into effect because AB 120 and SB 1018 required that the Department certify full mitigation of all asserted environmental impacts, *but even if the regulations had gone into effect, plaintiffs would still not be allowed to mine.*

SB 637 created a second layer of regulation for the miners, and a new barrier to mining. It did so by requiring that in order for miners to get a suction dredging permit from the Department, they must also include "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."

SB 637, § 2 (Fish and Wildlife Code § 5653(b)(1)(A)-(C)).

These requirements were new to state law, and until passage of SB 637, none of the above permits, certifications or requirements were required in order to lawfully suction dredge in California. As demonstrated in Point II, defendants' claim that federal law had required "suction dredgers [to] obtain a permit under the Clean Water Act" since 1990 (p. 1, ll. 22-23) is utterly false. Had any water quality permits, state or federal, been required in California, the environmentalists would not have brought suit under CESA and then resorted to legislative action to stop the mining; they would have brought suit under the Clean Water Act. Miners were working freely under Departmental permits until the 2009 shutdown, and defendants should not

be permitted to re-write history and claim this mining was all illegal.

In addition to restricting the Department's issuance of permits, SB 637 also empowered the state water board or regional boards to create a new water-quality-related program to regulate suction dredges under state law or even to prohibit their use outright. Based on comments during the SEIR process, plaintiffs anticipate either continued inaction by the water boards (*de facto* prohibition) or a decision to formally outlaw their use. (*See* Kleszyk Decl. Ex. 2, filed herewith.)

In short, plaintiffs cannot mine their claims, and have no reasonable prospect of ever being allowed to do so again on account of policy decisions of the State of California. That is why they seek damages from the State of California for the dedication of those mining claims to public use. It is hard to imagine a more straightforward case for a regulatory taking.

The Court suggested at the January 10th conference that the miners may have failed to exhaust their remedies. It is true that the miners have not lodged a challenge to SB 637, but any challenge would be regarded as unripe as the Water Boards is still formulating its policies and rules, and the miners obviously cannot challenge any permit which has yet to issue. As this Court correctly explained in the December 18th opinion, all that is required for a regulatory taking is a regulation that "goes too far". (Opinion at 23 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).) What matters for takings law is that the State has, by its regulatory action, prevented the miners from mining. Plaintiffs are ready, willing and able to demonstrate at trial that this is the kind of regulation that goes "too far".

No matter what happens in the water boards, the Department is not issuing suction dredge permits, and will never issue them for the areas that are closed by the 2012 regulations (absent some sort of change in the law of federal preemption). (*See also* Gilliland Declaration, Jan. 13, 2015, ¶ 3.) Plaintiffs can pursue remedies against SB 637 until the cows come home, but that does not open the closed areas, and their attempts to open those areas were exhausted by this Court's ruling dismissing all their challenges to the 2012 regulations.

In their proposed order, defendants offer a new theory neither briefed nor argued to the Court. Proceeding from the false premise that Clean Water Act permits have been required since 1990, defendants ask this Court to include language in the Proposed Order stating that plaintiff

never made a challenge that "the Clean Water Act, the cases interpreting it, Senate Bill 637, or any enforcement of any of those requirements are invalid or are a regulatory taking". That is because none of these things were what stopped plaintiffs from mining. It was the State, acting through amendments to the Fish and Wildlife Code.

Defendants cite no case, and plaintiffs are aware of none, stating that if the State engages in a regulatory taking and then, six or more years later,[1] passes another law also prohibiting the conduct, that plaintiffs must start all over and attack the second law. That would mean the State would never be liable for any taking, because it could avoid liability forever by simply passing further takings. To the contrary, as this Court correctly held on December 18th,

> "'[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.)

(Opinion at 30.) Unless and until the Department rescinds the 2012 regulations or amends them to remove the closed areas, mining has been shut down by the exercise of police power challenged by plaintiffs, and assuming a taking is found in the first place, damages must accrue. That the State created a second, independent barrier to mining adds nothing to, and takes nothing away from, plaintiffs' claim. The damages are measured by the taking of the mining claims, and the second taking adds no additional damages; it would be a waste of time to adjudicate it.

Even if defendants are not prepared to admit that the taking is permanent, as this Court also properly held in the December 18th opinion, even "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". (Opinion at 32.) Again, no matter what laws might have passed six years later, plaintiffs have stated at least a claim for a temporary taking. They are entitled to a trial to establish their *Penn Central* "investment-backed expectations" (Opinion at 26) by showing the tens of thousands of dollars paid for some of these mining claims and how the State

[1] SB 637 was signed by the Governor on October 9, 2015.

went "too far" in crushing those expectations. They are also entitled to show, based on evidence at trial, that the taking is more probably than not permanent.

In short, this Court's opinion points only toward proceeding to trial of the taking claim, not dismissing it. In the January 10th conference, the Court made reference to the takings claim being related to "motion 3". Motion 3 was a motion made in a separate case. The cases are not "consolidated" pursuant to Code of Civil Procedure § 1048 and Rule 3.350, but "coordinated" pursuant Code of Civil Procedure § 404 and Rule 3.400 *et seq*. (*See* Orders filed Oct. 2, 2012 & July 8, 2015.) Absent consolidation, the cases retain their separate character, and that is why the State has presented separate judgments for each case. *See also Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 514, 89 Cal. Rptr. 3d 615, 631 (2009) ("Absent a stipulation to consolidate, a noticed and written motion to consolidate is required").

Moreover, the Court's ruling on Motion 3 did not address the takings claim. Rather, the Court used the ruling to state that "[t]he remaining CEQA and Writ issues in this consolidated action are also mooted by application of SB 637". (Opinion at 51.) That is why, until the January 10th status conference, plaintiffs had no notice from the Court that dismissal of the takings claim was contemplated. The Court should adhere to its initial ruling, and deny dismissal of the takings claim, allowing these plaintiffs to proceed to trial.

II. IF THE COURT ENTERS AN ORDER DISMISSING THE TAKINGS CLAIM ON THE BASIS OF SB 637, THE COURT STILL SHOULD NOT ENTER THE STATE'S PROPOSED ORDER.

It may be that in the above-quoted sentence on page 51, the Court intended to say that "[t]he remaining CEQA and Writ issues [*and the takings claim*] in this consolidated action are also mooted by application of SB 637". While plaintiffs cannot understand how a second takings moots a claim for damages based on the first taking, portions of defendants' proposed order seem to adopt the mootness approach. Specifically, in lines 11-17 of their proposed order, defendants suggest that:

> Plaintiffs' takings claims are moot given Senate Bill 637's requirement that suction dredge miners obtain permits under the Clean Water Act. Plaintiffs have not

> demonstrated that they have applied for such a permit, and a statewide general permit issued by the State Water Resources Control Board appears to be far in the future. As explained in a separate order, this argument justified granting Defendants' motion for judgment on the pleadings as to Plaintiffs' single-subject claims in the *Eimer* case, and is fully applicable to Plaintiffs' takings claims in the *The New 49'ers* case.

If the Court must dismiss the takings claim, it should at least strike the balance of the proposed order, and add the words "or other authority" after "Clean Water Act" (p.1, line 12), since SB 637 contemplates a variety of means for miners to provide evidence of water quality compliance.

We now demonstrate that the balance of the Proposed Order is counterfactual, misinterprets the Clean Water Act, and misrepresents the cases cited in it.

A. What the Court Decided in its December 18th Opinion.

The question of whether and to what extent suction dredging was to be regulated under the federal Clean Water Act was not raised in any way, shape or form in the motions decided by this Court on December 18th. Indeed, the Department only invoked SB 637 to argue that the plaintiffs in the "single subject" case lacked standing. Section IV of 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 (January 6, 2016) was entitled "In Light of the Recent Passage of Senate Bill 637, Plaintiffs Seek an Advisory Opinion in Asking the Court to Rule on Their Motion. The Court specifically referred to this pleading in its December 18th opinion. (Opinion at 49.)

The State simply pointed out that even if the Court granted the "one subject" motion, removing some of the barriers to the Department issuing permits, the plaintiffs had not shown that they would be able to meet the requirements of the new law. Because removing one of the barriers to getting back in the water would not get the miners back in the water, the State characterized the opinion sought as advisory.

The Court's opinion adopted this argument from defendants. (*See* Opinion at 51.) And in the Proposed Order on Single-Subject Claims, defendants included a sentence: "In addition, due to the passage of Senate Bill 637 and the failure of the *Eimer* Plaintiffs to demonstrate that they

have applied for the required permit under the Clean Water Act, the *Eimer* Plaintiffs have not shown a justiciable controversy."

This language loosely summarized the Court's ruling; plaintiffs do object to the language to the extent that one would draw any interference that a Clean Water Act permit is "*required*" because as set forth above, SB 637 provides that presentation of a Clean Water Act permit or other instruments may suffice. *In light of plaintiffs' January 11th filing, plaintiffs ask this Court to substitute "applied for the required permit under the Clean Water Act" with "applied for the water quality permits or other instruments required by SB 637 in the order on the single subject claims and revoke their approval of the form of that order.*

B. The Proposed Order Misrepresents the Clean Water Act.

Having tried to get its nose under the tent with the word "required," the State now boldly asserts that "since at least 1990, the U.S. Court of Appeals for the Ninth Circuit has required that suction dredgers obtain a permit under the Clean Water Act". This is a total fabrication, in that the question of whether or not suction dredges require a federal Clean Water Act permit has never been presented to the Ninth Circuit. The cases cited by defendants are addressed below, but since the intricacies of the Clean Water Act were never presented to the Court in connection with Motions 1, 2, or 3, we will briefly explain the Act's potential application to suction dredge mining.

The State asks this Court to hold in the Proposed Order: "Without such a [Clean Water Act] permit, the Clean Water Act prohibits the activity. (33 U.S.C. § 1311(a).)" In fact, § 1311(a) provides that: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." Among the complex provisions of the Act, and most relevant to this case, is § 1344. One can only put the cases defendants would have this Court cite in the Proposed Order in context by understanding the relationship between § 1344, § 1342, and yet another unbriefed question the State asks this Court to address in the Proposed Order, concerning "addition of a pollutant under the Act".

Section 1344(a) provides authority for the Secretary of the Army (acting through the U.S.

Army Corps of Engineers) to issue permits "for the discharge of dredged or fill material". The discharge coming from suction dredges manifestly falls squarely within the language of § 1344: it is a "discharge of dredged materials" and a "discharge of fill material". Joint regulations issued by the Corps and EPA command that in-stream suction dredge mining is to be regulated under § 1344 as the "discharge of dredged material," rather than as "discharge of a pollutant".

Specifically, 33 C.F.R. § 323.2(d) and 40 C.F.R. § 232.2 provide:

> "(1) Except as provided below in paragraph (d)(2), the term discharge of dredged material means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:
>
> (i) The addition of dredged material to a specified discharge site located in waters of the United States;
>
> (ii) The runoff or overflow from a contained land or water disposal area; and
>
> (iii) *Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States* which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation."
>
> "(2) The term discharge of dredged material does not include the following:
>
> "(i) Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable State section 404 program.
>
> "(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.
>
> "(iii) Incidental fallback." (Emphasis added.)

It is obvious that what the small-scale dredges are doing is "redepositing dredged material" within the meaning of subsection (1) and therefore fall within the regulatory jurisdiction of the Corps.[2] The regulations carefully distinguish (in subsection 2(i)) between the instream mining at issue here and discharges which might be "resulting from the onshore subsequent

[2] That being said, the Corps has frequently determined that suction dredges of the type used by plaintiffs are so tiny that their redeposits can be regarded as "incidental fallback" and thus too small to be of regulatory significance.

processing" of dredged material.

The material discharged by small-scale suction dredgers also meets the regulatory definition of "fill material," which means "material placed in the waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States". 40 C.F.R. § 232.2. Indeed, "discharge of fill material" includes "placement of overburden, slurry or tailings or similar mining-related materials". *Id.*; *see also* 67 Fed. Reg. 31,135 (May 9, 2002) ("any mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'").

Section 1342, by contrast, provides for the U.S. EPA (or state agencies, acting under delegated authority), to issue permits "for the discharge of any pollutants". In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009), the U.S. Supreme Court found critical limitations to the § 1342 authority of EPA (here delegated to and exercised by the State) embedded within the plain language of § 1342. The Court quoted and emphasized the § 1342 language as follows: "*Except as provided in* . . . [§ 1344], the Administrator may . . . issue a permit for the discharge of any pollutant . . .". *Coeur Alaska*, 557 U.S. at 273 (emphasis in original). This language, said the Court, means that § 1342 itself "forbids the EPA from exercising permitting authority that is 'provided [to the Corps] in' § [1344]". *Id.*[3]

Most importantly, according to the Supreme Court, "if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402". *Id*. at 274; *see also id.* at 275 (*"If the Corps has authority to issue a permit, then the EPA may not do so*;" emphasis added). It is clear beyond doubt that the Corps has authority to issue permits covering suction dredging, and there is no dispute that the Corps has issued such permits.

Indeed, the Proposed Order asks the Court to hold: "In fact, the U.S. Army Corps of Engineers issued a general permit under the Clean Water Act for suction dredge miners for the

[3] The U.S. Supreme Court's interpretation is grounded not merely in the plain language of § 1342, but also in the controlling federal regulations. EPA's regulations specifically provide that "[t]he following discharges do not require NPDES [§ 1342] permits . . . [d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 [§ 1344] of CWA". 40 C.F.R. § 122.3(b).

period of 1995 to 2000". The Proposed Order then claims, contrary to fact, that "without a Clean Water Act permit to suction dredge, Plaintiff's mining claims have no value". That claim was never presented to the Court directly or by implication in the briefing on the motions decided on December 18th, and is simply false.

The existence of Corps permitting authority does not mean the Corps is required to exercise it. As far as plaintiffs can tell, the Corps has determined not to exercise the § 1344 authority after the year 2000 because, being a responsible regulator, it recognized that small suction dredges generate no effects of regulatory significance. Lest the Court discount this as mere rhetoric, we are filing herewith the Declaration of Steve Kleszyk, who sought and obtained a recent ruling from the U.S. Army Corps of Engineers that they would not require a § 1344 permit for his small dredge for that reason. (Kleszyk Decl. Ex. 1.)

In addition, plaintiffs' activities are so small that the U.S. EPA has exempted them from Clean Water Act regulation applicable to larger placer mining operations. *See* 40 C.F.R. section 440.140(b) (exempting "dredges which process less than 50,000 cu yd of ore per year" from effluent limitations and performance standards). This means that even if the State could exercise authority under § 1341 to certify a Corps § 1344 permit (despite the absence of such a permit) or could exercise delegated authority under § 1342, small suction dredgers are generally in full compliance with the Clean Water Act by virtue of this exemption.

In other words, the factual premise of the findings defendants ask this Court to make—that plaintiffs were always required to get federal Clean Water Act permits—is utterly false. *Until SB 637, no water quality authorizations were required to suction dredge in California, and the SEIR itself provides evidence that dredgers were operating all over the State without interference other than the requirement to get the Departmental permit.* The Court should not enter a Proposed Order contrary to these indisputable facts.

Nor should the Court cite the non-California cases presented by defendants, which are aimed at bolstering their feeble position on a collateral issue that was also never briefed or argued. Miners have argued that not only did Congress distinguish carefully between § 1342 and § 1344 authority as set forth above, it narrowly defined "discharge of a pollutant" as used in

§ 1342 to mean "any *addition* of any pollutant to navigable waters from any point source". 33 U.S.C. § 1362(12) (emphasis added). Because defendant, the State of California wishes to assert, through the Water Board, § 402 authority delegated from the U.S. EPA, defendants seek to create precedent that suction dredges cause the "addition" of pollutants.

Only one case has so held, *Northwest Envt'l Defense Ctr. v. Envt'l Quality Comm'n*, 223 P.3d 1071 (Or. Ct. App. 2009). Defendants omit to disclose that this case had considerable subsequent history, as the Oregon Supreme Court granted review, then dismissed it for mootness when a superseding § 1342 permit was issued. 245 P.3d 130. The new permit was challenged, and the Supreme Court this time denied the mootness claim, and the case is now set for determination on the merits. *Eastern Oregon Mining Ass'n v. Dep't of Envtl. Quality*, 406 P.3d 612 (2017) (granting review). We anticipate the 2009 error will be corrected in that review.

Defendants are even more egregious in their treatment of the next case, *Rybachek v. U.S. EPA*, 904 F.2d 1276, 1285 n.8 (9th Cir. 1990), which cannot remotely be cited for the proposition defendants ask this Court to cite it for: "suction dredge miners obtain a permit under the Clean Water Act". The *holding* in *Rybachek* concerned whether the mining in that case, *which was bank-based placer mining,* would 'add' pollutants to water within the meaning of the Act (*Rybachek*, 904 F.2d at 1285). The Ninth Circuit explained that because "the material discharged is not coming from the streambed itself, but from outside it, this clearly constitutes an 'addition.'" *Id.*[4] *United States v. Moses*, 496 F.3d 984, 991 (9th Cir. 2007), is even more far afield, as it concerns the regulatory treatment of digging on land, though seasonally under water.

Not only do defendants misuse these cases, but they omit to disclose that after all these cases, the U.S. Supreme Court settled the "addition" issue adversely to defendants in *L.A. County Flood Control District v. NRDC, Inc.,* 568 U.S. 78 (2013). There, the Court determined that the "addition" language in the statutory definition is to be interpreted in accordance with its plain meaning: "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into

[4] The *Rybachek* opinion went on to offer obiter dictum suggesting that even the resuspension of material from the stream "may be interpreted to be an addition of a pollutant under the Act". *Id.* (emphasis added). Or it may not. The Supreme Court has removed the uncertainty.

the pot, one has not 'added' soup or anything else to the pot". *Id.* at 82-83 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001)). As the Court is well aware, this is what suction dredge miners do: they pull the streambed materials above the stream, and discharge them right back in. In short, the suction dredge miners are not adding pollutants within the meaning of the Clean Water Act, and are not *required* to get permits under § 402 that the Water Board has threatened to issue for years.

For all these reasons, whether or not the Court rejects the Proposed Order entirely—as it should—the Court should not indulge defendants' efforts to misuse the proposed order process to include counterfactual findings and misinterpretations of federal law. Again, this problem that can be avoided by striking the material after line 17 on the first page through line 5 on page 3 in the Proposed Order.

III. IT WOULD VIOLATE DUE PROCESS OF LAW AND PROCEDURAL RULES TO ENTER THE PROPOSED ORDER.

Defendants point out that § 438(b)(2) of the Code of Civil Procedure provides that a court "may upon its own motion grant a motion for judgment on the pleadings". "Obviously, where the court itself initiates a motion to dismiss, due process demands notice to the plaintiff adequate to defend against the charge . . .". *Eliceche v. Fed. Land Bank Ass'n of Yosemite*, 103 Cal. App. 4th 1349, 1366, 128 Cal. Rptr. 2d 200, 214 (2002); *cf. Stern v. Superior Court*, 105 Cal. App. 4th 223, 232, 129 Cal. Rptr. 2d 275, 281-82 (2003) ("Due process requires that such an order [class certification] not be made without a full opportunity for the parties to brief issues and present evidence"). Until the status conference on January 10th, plaintiffs had no formal notice the Court sought, on its own motion, to dismiss the takings claim.[5]

Much more egregiously, until January 11th, plaintiffs had no notice whatsoever that the extensive and complex issues set forth in Point II, *supra*, would be the subject of any ruling by the Court. It was incumbent upon defendants to proceed by noticed motion to inject these

[5] Plaintiffs acknowledge that an e-mail from the Judicial Assistant created uncertainty in an e-mail on December 27th setting up the status conference, and thereafter declined to clarify the issue.

additional issues into the case, and due process of law does not permit them to add material to the Proposed Order by the device of simply presenting it.

Conclusion

The Court should decline the proposed order on the takings claim and the judgment in *The New 49'ers* case, or, in the alternative, enter a very abbreviated form of that order omitting the material after line 17 on the first page through line 5 on page 3.

Dated: January 16, 2018.

James L. Buchal

PROOF OF SERVICE

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On January 16, 2018, I caused the following document to be served:

PLAINTIFFS' OBJECTION TO PROPOSED ORDER DISMISSING PLAINTIFFS' TAKINGS CLAIMS

by transmitting a true copy in the following manner on the parties listed below:

Honorable Gilbert Ochoa
Superior Court of California
County of San Bernardino
San Bernardino Justice Center
247 West 3rd Street
San Bernardino, CA 92415-0210
Via U.S. Mail

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Court Programs and Services Division
(Civil Case Coordination)
455 Golden Gate Avenue
San Francisco, CA 94102
Via U.S. Mail

Bradley Solomon
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
E-mail: Bradley.Solomon@doj.ca.gov
Via E-mail & U.S. Mail

Marc Melnick
Office of the Attorney General
1515 Clay Street, Suite 2000
Oakland, CA 94612
E-mail: Marc.Melnick@doj.ca.gov
Via E-mail & U.S. Mail

John Mattox
Department of Fish & Wildlife
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
E-mail: jmattox@dfg.ca.gov
Via E-mail & U.S. Mail

Keith Robert Walker
9646 Mormon Creek Road
Sonora, CA 95370
Via U.S. Mail & U.S. Mail

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Carole A. Caldwell
Declarant