

FILED
ALAMEDA COUNTY

JUL 10 2009

CLERK OF THE SUPERIOR COURT

By Vicki Daybell

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

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LEEON HILLMAN; CRAIG TUCKER;
DAVID BITTS; KARUK TRIBE; CENTER
FOR BIOLOGICAL DIVERSITY; FRIENDS
OF THE RIVER; KLAMATH
RIVERKEEPER, PACIFIC COAST
FEDERATION OF FISHERMAN'S
ASSOCIATION; INSTITUTE FOR
FISHERIES RESOURCES; CALIFORNIA
SPORTFISHING PROTECTION
ALLIANCE; and DOES 1-100

Plaintiffs,

vs.

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

Defendants.

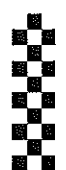
Case No.: RG09-434444

**ORDER GRANTING PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION AGAINST DEFENDANTS
DEPARTMENT OF FISH AND GAME
AND DONALD KOCH, DIRECTOR**

Dept.: 31
Judge: Hon. Frank Roesch

Complaint filed February 5, 2009

On June 9, 2009, Plaintiffs Leon Hillman, Craig Tucker, David Bitts, Karuk
Tribe, Center for Biological Diversity, Friends of the River, Klamath Riverkeeper,



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

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

14 The matter was argued and submitted.

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

18 Factual background.

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

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

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

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

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

18 The amended statute reads as follows:

19 (a) The use of any vacuum or suction dredge equipment by any
20 person in any river, stream, or lake of this state is prohibited,
21 except as authorized under a permit issued to that person by the
22 department in compliance with the regulations adopted pursuant to
23 Section 5653.9. Before any person uses any vacuum or suction
24 dredge equipment in any river, stream, or lake of this state, that
25 person shall submit an application for a permit for a vacuum or
suction dredge to the department, specifying the type and size of
equipment to be used and other information as the department may
require.

(b) Under the regulations adopted pursuant to Section 5653.9, the
department shall designate waters or areas wherein vacuum or
suction dredges may be used pursuant to a permit, waters or areas
closed to those dredges, the maximum size of those dredges that
may be used, and the time of year when those dredges may be
used. If the department determines, pursuant to the regulations
adopted pursuant to Section 5653.9, that the operation will not be
deleterious to fish, 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 without securing the permit, that
person is guilty of a misdemeanor.

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

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

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

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

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

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

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

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

21 The regulations were specifically mandated to comply with the Administrative
22 Procedures Act (APA) and with the CEQA. The requirement of a DFG determination
23 of whether the suction dredge operation proposed by any permit applicant "will not be
24 deleterious to fish" was modified such that the DFG's determination whether the suction
25 dredge operation proposed by any permit applicant "will not be deleterious to fish" is
made "pursuant to the regulations adopted pursuant to Section 5653.9".

In 2005, the Karuk Tribe of California and Leaf Hillman filed Alameda Superior
Court Case Number RG05-211597, an action against the DFG and its then Director
("the 2005 case") asserting causes of action based on the CEQA, and based on the F&G

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

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

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

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

19 Within that factual backdrop, in 2009, came the Plaintiffs herein, the Karuk
20 Tribe, some individual members of the Karuk Tribe, and a number of organizations with
21 an environmental focus, who have filed this action as taxpayers alleging that the DFG
22 and its Director are acting unlawfully when issuing suction dredging permits. They
23 seek, in their First Amended Complaint, an injunction enjoining the DFG from spending
24 taxpayer money to issue those permits or to operate the suction dredge mining program
in a manner that allows suction dredge mining to occur under the current regulations.

25 The matter now before the Court is the motion by Plaintiffs for the provisional
relief of a preliminary injunction to enjoin, *pendente lite*, the DFG from issuing suction

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

3 The Parties' Arguments

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

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

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

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

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

22 The DFG also argues that it has never been found to be in violation of the 2005
23 case Order and Consent Judgment and that its failures with regard to that Judgment
24 cannot render unlawful its acts of issuing suction dredge permits.

25 The DFG further argues that there is no General Fund appropriation separately
designated for the suction dredge mining program and the funds appropriated by the

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

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

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

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

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

24 Standard of Review

25 The motion before the Court is a motion to preliminarily enjoin the expenditure
of public funds to continue unlawful acts. While the Court must use caution in its
consideration of an application for a preliminary injunction in a taxpayer action (*Cohen*
v. Board of Supervisors, 178 Cal. App. 3rd 447; *Fleishman v. Superior Court*, (2002)

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

8 Likelihood of Success

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

14 Unlawful as Violative of a Court Judgment

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

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

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

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

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

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



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

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

13 Unlawful as Violative of CEQA

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

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



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

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

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

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

22 The DFG must exercise its discretion each time it issues a suction dredge permit.
23 This is true both when assessing the written plan submitted to it as required by 14 CCR
24 §228(b) and when assessing an application for a license under 14 CCR §228(a). The
25 DFG may only approve a license following its determination that the suction dredge
operation being licensed is not deleterious to fish. (F&G Code §5653(b) and 14 CCR
§228).

 It is basic CEQA doctrine that a project may not be implemented until the CEQA
process has been satisfied. It follows that, if the DFG makes any discretionary approval

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

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

11 Irreparable Harm

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

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

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

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

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

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

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

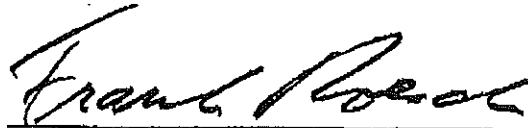
² The court has considered and found no merit in the arguments that Plaintiffs have not demonstrated standing as taxpayers, that federal law proscribes State regulation, that Plaintiffs' unclean hands bars relief, and that the court should exercise "inherent powers" and dismiss the action as harassing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

1 Conclusion

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

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

9 Dated: July 9, 2009

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11 Frank Roesch
12 Judge of the Superior Court
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