

ENDORSED  
FILED  
ALAMEDA COUNTY

FEB 6 2008

CLERK OF THE SUPERIOR COURT

By E. BAKER Deputy

1 James R. Wheaton (State Bar No. 115230)  
2 Lynne R. Saxton (State Bar No. 226210)  
3 ENVIRONMENTAL LAW FOUNDATION  
4 1736 Franklin Street, 9<sup>th</sup> Floor  
5 Oakland, CA 94612  
6 Tel: (510) 208-4555  
7 Fax: (510) 208-4562

8 Attorneys for Plaintiffs Leon Hillman, Craig Tucker and David Bitts

9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 IN AND FOR THE COUNTY OF ALAMEDA

11 LEEON HILLMAN; CRAIG TUCKER;  
12 DAVID BITTS, and DOES 1-100,

13 Plaintiffs,

14 vs.

15 CALIFORNIA DEPARTMENT OF FISH  
16 AND GAME; DONALD KOCH and DOES 1-  
17 100, inclusive,

18 Defendants.

) Case No. 09434444

) **COMPLAINT FOR EQUITABLE AND  
INJUNCTIVE RELIEF BASED UPON:**

) Violations of California Code of Civil  
Procedure §526a

1 Plaintiffs, by their attorneys, bring this action on their own behalf and behalf of the  
2 general public on information and belief, except those allegations which pertain to the named  
3 plaintiffs or to their attorneys (which are alleged on personal knowledge), and hereby allege as  
4 follows:

5 **INTRODUCTION**

6 1. Under California's Code of Civil Procedure Section 526a, a state agency cannot  
7 spend public funds to support activities or programs that violate the law. This action is brought  
8 by individual taxpayers against the California Department of Fish and Game and Donald Koch,  
9 in his capacity as Director Fish and Game. Plaintiffs seek to enjoin the Department from  
10 continuing to use general fund money to operate its suction dredge mining program under the  
11 Department's current regulations. Suction dredge mining is a type of instream gold mining  
12 conducted as a hobby by recreational gold miners. The Department issues about 3,000 permits  
13 per year.

14 2. Under Fish and Game Code §5653, suction dredge mining is expressly prohibited in  
15 all the rivers and streams of this state. It can be conducted only by a person with a valid permit,  
16 and that permit can only be issued if the Department of Fish and Game (a) has valid regulations  
17 in place defining when and where the mining can take place and (b) it affirmatively finds that the  
18 mining will not harm any fish. The Department does not have valid regulations and has testified  
19 that the mining does harm fish.

20 3. The Department admitted in sworn, expert declarations, submitted to a court in 2006,  
21 that suction dredge mining conducted under its current regulations in fact causes deleterious  
22 impacts on fish, including endangered species such as the Coho salmon. The Department further  
23 admitted that suction dredge mining under its current regulations expressly violates both the  
24 California Environmental Quality Act (Public Resources Code §21000, *et. seq.*) ("CEQA") as  
25 well as Fish and Game Code §§5653 and 5653.9, the very statutes that authorize the Department  
26 to operate a suction dredge mining program.

1 4. In December 2006, the Department was ordered by the court to conduct a CEQA  
2 review of its regulations and to mitigate harms (as necessary) through a formal rulemaking. This  
3 project was required to be completed by June 20, 2008. Two years after entry of the Order, the  
4 Department has *not yet begun* the process. At this late date, the Department will not adopt new  
5 regulations before 2011 or 2012, if at all.

6 5. The Department's explanation for violating the court order is that it lacks the funds to  
7 undertake the rulemaking and review that would bring it into compliance with the Court's Order,  
8 and with CEQA and Fish and Game Code. However, the Department has for the last two years  
9 continued to spend general fund money to continue to operate the program and issue unlawful  
10 permits to suction dredge miners. In short, the Department claims it has not the funds to bring  
11 the program into compliance, but continues to spend money to operate it out of compliance.

12 6. At a time when the State of California is in dire financial straits and important  
13 programs are losing funding, the Department continues to subsidize hobbyist miners for  
14 activities that the Department has determined harms endangered fish species. Plaintiffs seek an  
15 injunction to prevent continued spending of general funds to operate the suction dredge mining  
16 program until the Court's Order is satisfied, the required environmental reviews are completed,  
17 the harms are mitigated through a formal rulemaking, and the new regulations are in effect.

#### 18 PARTIES

19 7. Plaintiff LEEON HILLMAN is a citizen and resident of California and has paid and  
20 is liable for the payment of taxes to the State of California. This action is brought on Mr.  
21 Hillman's behalf in his capacity as a taxpayer pursuant to Cal. Code Civ. Proc. §526a.

22 8. Plaintiff CRAIG TUCKER is a citizen of California and has paid and is liable for the  
23 payment of taxes to the State of California. This action is brought on his behalf and in his  
24 capacity as a taxpayer pursuant to Cal. Code Civ. Proc. §526a.

25 9. Plaintiff DAVID BITTS is a citizen of California and has paid and is liable for the  
26 payment of taxes to the State of California. This action is brought on Mr. Bitts' behalf and in his  
27

1 capacity as a taxpayer pursuant to Cal. Code of Civ. Proc. §526a.

2 10. The true names and capacities of DOE plaintiffs 1 through 100, inclusive, are  
3 presently unknown to plaintiffs, who therefore refer to these plaintiffs by such fictitious names.  
4 Plaintiffs will seek to amend this Complaint and include these DOE plaintiffs' true names and  
5 capacities when they are ascertained. Each fictitiously named plaintiff is a citizen of California  
6 and has paid and is liable for the payment of taxes to the State of California. Each fictitiously  
7 named plaintiff sues on his behalf and in his capacity as a taxpayer pursuant to Cal. Code of Civ.  
8 Proc. §526a.

9 11. Plaintiffs Leon Hillman, Craig Tucker, David Bitts, and DOE plaintiffs are  
10 collectively referred to herein as "Plaintiffs".

11 12. Defendant California Department of Fish and Game ("Fish and Game") is an agency  
12 of the State of California charged by the Legislature with the regulation of suction dredge mining  
13 under California Fish and Game Code §§ 5653 and 5653.9. Among other things, Fish and Game  
14 is required to promulgate regulations under CEQA and the Administrative Procedures Act  
15 (Government Code §11340, *et. seq.*) ("APA") to operate its suction dredge mining program,  
16 designate waters or areas closed to suction dredging as necessary to protect fish species and their  
17 habitat, and issue permits for such dredging if it determines that "the operation will not be  
18 deleterious to fish." Fish and Game expends general funds to issue permits and operate its  
19 suction dredge mining program.

20 13. Defendant DONALD KOCH is the Director of the Department of Fish and Game.  
21 KOCH was appointed to the position by the Governor of California and is tasked with providing  
22 leadership over Fish and Game as they continue their role as stewards of California's fish and  
23 wildlife resources. The Director is made a party to this action in his official capacity only.

24 14. The true names and capacities of DOE defendants 1 through 100, inclusive, are  
25 presently unknown to Plaintiffs, who therefore sue these defendants by such fictitious names.  
26 Plaintiffs will seek to amend this Complaint and include these DOE defendants' true names and  
27

1 capacities once they are ascertained. Each of the fictitiously named defendants is responsible for  
2 the conduct alleged herein and for the injuries suffered by Plaintiffs.

3 15. California Department of Fish and Game, Donald Koch, and DOE defendants are  
4 herein referred to as "Department" or "Defendant".

5 **JURISDICTION AND VENUE**

6 16. This Court has jurisdiction over all causes of action asserted herein pursuant to the  
7 California Constitution, Article VI, Section 10, because this case is a cause not given by statute  
8 to other trial courts.

9 17. This Court has jurisdiction over Defendant because it is a California agency which  
10 issues permits and operates a program that authorizes suction dredge mining in rivers throughout  
11 California. Defendant's headquarters in Sacramento, California.

12 18. Venue is proper in the Superior Court for the County of Alameda under Code of Civil  
13 Procedure § 401(1), because Fish and Game is a state agency, Director Koch is an officer of Fish  
14 and Game, and the California Attorney General has an office in Oakland, California.

15 **FACTUAL AND LEGAL BACKGROUND**

16 19. A suction dredge is powered by a diesel engine and uses a hose and nozzle to suction  
17 up the bottom of a riverbed. The river material is run over a sluice, which separates any present  
18 gold fragments from the river material. The remaining material ("tailings") – consisting of  
19 rocks, gravel, silt, plants, invertebrates and fish – is then discharged back into the river in large  
20 piles of debris. Permits for suction dredge mining are primarily requested by recreational or  
21 hobbyist gold miners. For a nominal fee, the Department issues an annual permit that allows the  
22 miner to suction dredge in any California river, as allowed under the Department's regulations.

23 20. The Department originally promulgated regulations for its suction dredging program  
24 in 1994. The 1994 Environmental Impact Report concluded that rivers inhabited by threatened  
25 or endangered species and Species of Special Concern (hereinafter "Endangered Species") must  
26 be closed to suction dredge mining to prevent significant impacts to these species. The report  
27

1 stated that the Department's regulations would need to be reviewed periodically to account for  
2 future listings of Endangered Species.

3 21. The Department has never reviewed its suction dredge mining regulations to  
4 determine the impacts to fish or other animal species listed as threatened or endangered since the  
5 1994 regulations were promulgated.

6 22. In May of 2005, the Karuk Tribe of California and Leaf Hillman sued the Department  
7 under CEQA to challenge the Department's failure to review and update its regulations. (*Karuk*  
8 *Tribe of California v. California Department of Fish and Game*, Alameda County Superior  
9 Court, Case No. RG 05211597.)

10 23. During the course of litigation, the Department submitted sworn declarations to the  
11 Court admitting that their suction dredging program violates CEQA and Fish and Game Code  
12 §§5653 and 5653.9. The Department's admission is based on its determination that suction  
13 dredge mining under its current regulations causes deleterious effects on Coho salmon in the  
14 Klamath, Scott and Salmon Rivers.

15 24. On December 20, 2006, the court entered an Order and Consent Judgment requiring  
16 the Department to conduct a CEQA review of its regulations as to the impacts of suction  
17 dredging on Endangered Species in the Klamath, Scott and Salmon watersheds. The Department  
18 was further ordered to promulgate any necessary regulations to mitigate harmful impacts. The  
19 CEQA review and the regulations were to be completed in 18 months, which expired on June 20,  
20 2008.

21 25. More than two years have passed since entry of the Order and the Department has not  
22 even started the review. Due to California's current budgetary issues, it is not currently known  
23 when the review will actually begin, but it will not likely be completed before the 2011 or 2012  
24 suction dredge mining seasons.

25 26. The Department's rationale for failure to comply with the court Order is that it has  
26 insufficient funds to conduct a statewide environmental review of its suction dredge mining  
27  
28

1 program. However, the Department still issues permits to miners (approximately 3,000 permits  
2 per year) and pays for much of the program through its General Fund.

3 27. In other words, the Department uses taxpayer funds to operate a program that it  
4 determined causes harm to fish – even endangered fish like the Coho salmon, and refuses to the  
5 program because it claims it does not have enough money. While the recreational gold mining  
6 community continues to be subsidized, the harm to California’s rivers and fish species continues  
7 - with no end date known.

8 **CALIFORNIA CODE OF CIVIL PROCEDURE §526a**

9 28. Under Cal. Code Civ. Proc. §526a, a taxpayer can bring an action to enjoin a  
10 government actor from the illegal expenditure of funds. To prevail, a taxpayer plaintiff must  
11 show an “expenditure” that is “unlawful”, such as funding a program that violates a statute or  
12 other proscription of law.

13 29. The Department’s suction dredge mining program violates the prior Order and  
14 Consent Judgment, as the Department failed to complete the required CEQA review and (if  
15 determined necessary) a rulemaking within 18 months of entry of the Order. The compliance  
16 deadline was June 20, 2008.

17 30. The Department’s suction dredge mining program also violates CEQA (Public  
18 Resources Code §21166; 14 CCR §§15162-15164) because there is sufficient information, not  
19 previously known by the Department, which demonstrates that suction dredge mining will have  
20 new significant effects or substantially more severe effects than was shown in the 1994 EIR and  
21 the Department failed to conduct a supplemental or subsequent EIR. In fact, the Department has  
22 admitted that its regulations violate CEQA and a court made the finding that sufficient  
23 information exists and ordered further environmental review under CEQA.

24 31. Lastly, the Department’s suction dredge mining program violates Fish and Game  
25 Code §§5653 and 5653.9. These statutes require the Department to adopt regulations that are in  
26 compliance with CEQA and the APA. They also require the Department to issue permits if it  
27

1 determines that the operation will not have deleterious impacts on fish. The Department violates  
2 these statutes twofold. First, it has not passed regulations that are in compliance with CEQA.  
3 Second, it is continuing to issue permits even though it has expressly made the determination that  
4 the operation will have deleterious impacts on fish, specifically the Coho salmon.

5 32. As the Department is in violation of the above statutes and court order, the  
6 Department's use of money from its General Fund to issue suction dredge mining permits and  
7 operate its program violates Code of Civil Procedure §526a.

8 **FIRST CAUSE OF ACTION**

9 (California Code of Civil Procedure §526a)

10 (By All Plaintiffs Against All Defendants)

11 33. Plaintiffs incorporate by reference all of the above paragraphs as if fully set forth  
12 herein.

13 34. Cal. Code Civ. Proc. § 526a states that California residents who are liable for and  
14 have paid taxes have standing to bring an action enjoining a government actor from illegally  
15 expending funds.

16 35. Defendants California Department of Fish and Game and Donald Koch, in his  
17 capacity as Director of Fish and Game, are government actors.

18 36. The Department spends money from its General Fund to issue permits and operate its  
19 suction dredge mining program.

20 37. The suction dredge mining program violates the following, as described above:

- 21 a. A prior court's entry of an Order and Consent Judgment (*Karuk Tribe of*  
22 *California, et. al. v. California Department of Fish and Game, et. al.*;  
23 Alameda County Superior Court, Case No. RG 05211597; order entered  
24 December 20, 2006);  
25 b. CEQA (Public Resources Code §21166; 14 CCR §§15162-15164); and  
26 c. Fish and Game Code §§ 5653 and 5653.9.



1 38. The Department's expenditure of general funds to issue permits and operate its  
2 suction dredge mining program constitutes an "illegal expenditure" under Cal. Code Civ. Proc. §  
3 526a. Defendants have engaged and continue to engage in conduct that violates Cal. Code Civ.  
4 Proc. § 526a.

5 **THE NEED FOR INJUNCTIVE RELIEF**

6 39. By committing the acts alleged herein, Defendants have caused irreparable harm for  
7 which there is no plain, speedy, or adequate remedy at law. In the absence of equitable relief,  
8 taxpayer funds will continue to be illegally expended to operate a suction dredge mining program  
9 in violation of the law. The court should enjoin Defendants from spending general funds on  
10 activities that allow suction dredge mining to occur under the Department's current regulations.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiffs pray for the following relief:

13 A. A temporary restraining order, preliminary and permanent injunction enjoining  
14 Defendants, their agents, employees, assigns, and all persons acting in concert or participating  
15 with them from expending any general fund money to issue permits or operate the suction  
16 dredging program in such a manner that allows suction dredge mining to occur under the  
17 Department's current regulations (14 CCR §§228 and 228.5);

18 B. The said temporary restraining order, preliminary and permanent injunction will  
19 remain in effect until such time as:

- 20 1. the Department conducts a supplemental or subsequent environmental  
21 review of its suction dredge mining regulations pursuant to CEQA (Public  
22 Resources Code §21000, *et. seq.*);
- 23 2. the Department mitigates negative environmental impacts, as necessary  
24 and as required under law, through a formal rulemaking pursuant to the  
25 Administrative Procedures Act (Government Code §11340, *et. seq.*); and
- 26 3. any challenges to such regulations are resolved and any new regulations  
27

1 adopted through the rulemaking are in effect;

2 B. Reasonable attorneys' fees and costs; and

3 C. Such other and further relief as this court may deem necessary and proper.

4  
5 Respectfully submitted,

6  
7 DATED: February 5, 2009

ENVIRONMENTAL LAW FOUNDATION

8  
9  
10 

11 **LYNNE R. SAXTON**

Attorneys for Plaintiffs

12 Leon Hillman, Craig Tucker, and David Bitts