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14 Attorneys for Plaintiffs Karuk Tribe of California,  
15 and Leaf Hillman

16 SUPERIOR COURT OF CALIFORNIA  
17 COUNTY OF ALAMEDA

18 Karuk Tribe of California; )  
19 and Leaf Hillman, ) Case No.:  
20 )  
21 Plaintiffs, )  
22 )  
23 vs. ) COMPLAINT FOR DECLARATORY AND  
24 ) INJUNCTIVE RELIEF  
25 California Department of Fish )  
26 and Game; and Ryan Broddrick, )  
27 Director, California Department of )  
28 Fish and Game, )  
29 Defendants. )

30 INTRODUCTION

31 1. Plaintiffs Karuk Tribe of California (“Tribe”) and Leaf Hillman, Vice-Chairman of the  
32 Tribe, bring this action for declaratory and injunctive relief to challenge the pattern and practice  
33 of the California Department of Fish and Game (“Fish and Game”), and Ryan Broddrick,  
34 Director, California Department of Fish and Game in issuing permits for suction dredge mining  
35 that imperil a state and federally listed threatened species, the Coho salmon, and other species

1 listed by Fish and Game as species of special concern<sup>1</sup> in their habitat in the Salmon, Scott, and  
2 Klamath Rivers, and their tributaries in Northern California. Over a decade ago, Fish and Game  
3 determined in an Environmental Impact Report (“EIR”) that rivers inhabited by species of  
4 special concern or threatened or endangered species (hereinafter “special status species”) must be  
5 closed to suction dredge mining to prevent significant impacts to the species. Despite the listing  
6 of the Coho salmon and other species as special status species shortly thereafter, Defendants  
7 have continued annually to issue suction dredge mining permits without closing the rivers  
8 inhabited by the Coho and other species of special concern to this mining and without  
9 conducting any analysis of the impacts on the Coho and other species of special concern under  
10 the California Environmental Quality Act (“CEQA”), Cal. Pub. Res. Code §§ 12000 *et seq.*

11 2. Plaintiffs seek declaratory relief that this pattern and practice is a violation of CEQA and  
12 a violation of the mandate in Fish and Game Code § 5653(b) that suction dredge permits issued  
13 by Defendants not be “deleterious to fish.” Plaintiffs also seek injunctive relief requiring  
14 Defendants to apply to the Coho salmon and other species of special concern the mitigation  
15 measure Fish and Game previously concluded was necessary under CEQA to prevent significant  
16 impact to special status species – i.e., closure of the rivers inhabited by such species.  
17 Alternatively, Plaintiffs seek an injunction against the issuance of suction dredge mining permits  
18 until Defendants comply with CEQA’s requirement that Defendants first evaluate and mitigate  
19 their impacts on Coho salmon as a threatened species and other species of special concern. These  
20 injunctions are also sought to restrain violations of Fish and Game Code § 5663(b), as alleged  
21 above.

## 22 PARTIES

23 3. Plaintiff Karuk Tribe of California is a federally-recognized Indian Tribe. The Tribe’s  
24 headquarters is located in Happy Camp in Siskiyou County, California, in the vicinity of the  
25 Klamath, Scott, and Salmon Rivers. The Tribe’s Natural Resources Department is located in  
26 Orleans, near the convergence of the Salmon and Klamath Rivers. The Tribe has lived in  
27 \_\_\_\_\_

28 <sup>1</sup> Any reference in this Complaint to “species of special concern” refers to the Pink salmon, Chum salmon, Green sturgeon, Klamath River lamprey, and River lamprey.

1 northern California since time immemorial. The stated mission of the Karuk Tribe is to promote  
2 the general welfare of all Karuk people, establish equality and justice for the Tribe, restore and  
3 preserve Tribal traditions, customs, language, and ancestral rights, and secure for themselves and  
4 their descendants the power to exercise the inherit rights of self-governance. Among the many  
5 goals of the Tribe is the protection and restoration of native fish and wildlife species that the  
6 Tribe has depended upon for traditional cultural, religious, and subsistence uses. The Center of  
7 the Karuk world is Katimin, where Masuhsva (the Salmon River) meets Ishkeesh (the Klamath  
8 River).

9 4. Plaintiff Leaf Hillman is a member and Vice-Chairman of the Tribe. He resides in  
10 Orleans, California, near the convergence of the Salmon and Klamath Rivers. He is a citizen of  
11 California and has paid and is liable for the payment of income taxes to the State of California,  
12 and this action is brought on his behalf and in his capacity as a taxpayer under Cal. Civ. Proc.  
13 Code § 526a in order to enjoin the illegal disbursement of funds, other waste of public funds, and  
14 actions of Defendants in violation of CEQA and the Fish and Game Code.

15 5. Plaintiffs work to protect the wild salmon, steelhead, and other fish species, their habitats,  
16 and the water quality of the streams and rivers used by the Tribe, including the Salmon, Scott,  
17 and Klamath Rivers, and their tributaries. Salmon, including the Coho, are central to the Karuk  
18 culture. The Tribe's religion dictates the management (and timing) of harvest of salmon for  
19 traditional tribal subsistence. The Tribe's first religious ceremony of the Karuk year is also the  
20 first salmon ceremony of the year. The Tribe's Natural Resources Department works to preserve  
21 and promote the cultural/natural resources and ecological processes upon which the Karuk  
22 people depend. As a part of this effort, the Tribe is a member of the Klamath River Intertribal  
23 Fish and Water Commission, which promotes and protects the interests of the various Native  
24 American Tribes in northern California and southern Oregon in the management and use of the  
25 Salmon, Scott, and Klamath Rivers, and their tributaries.

26 6. Plaintiffs bring this action on their own behalf and on behalf of the Tribe's members who  
27 are adversely affected by the actions of Defendants that are the subject of this action. The Tribe  
28 has approximately 3,200 members. These members of the Tribe, including Plaintiff Hillman,  
have traditionally fished for Coho salmon and other species of special concern, and are

1 dependent on the recovery of the Coho for their religious practices and subsistence. Individual  
2 families of members of the Tribe have particular areas in these rivers and tributaries where they  
3 have traditionally fished for salmon, including the Coho, and have personal religious ceremonies  
4 relating to this fishing.

5 7. The suction dredge mining operations in and along these rivers and their tributaries cause  
6 permanent and/or long-lasting impacts to wildlife, fisheries, water quality, recreation, and visual  
7 resources, as well as an adverse impact on the Tribe's and its members' ability to enjoy the  
8 spiritual, religious, subsistence, recreational, wildlife, and aesthetic qualities of the areas affected  
9 by the mining operations. Defendants' pattern and practice of permitting suction dredging in the  
10 habitat of the Coho salmon and other species of special concern directly and adversely harms the  
11 Tribe and its members by, among other things, threatening and causing injury to and death of the  
12 Coho and other species of special concern, as well as degrading the habitat of these species.

13 8. Defendant California Department of Fish and Game is an agency of the State of  
14 California charged by the Legislature with the regulation of suction dredge mining under  
15 California Fish and Game Code § 5653. Among other things, Fish and Game is required by  
16 Section 5653 to designate waters or areas closed to suction dredging as necessary to protect fish  
17 species and their habitat, and may issue permits for such dredging in other waters and areas only  
18 if it determines that "the operation will not be deleterious to fish."

19 9. Defendant Ryan Broddrick is the Director of the California Department of Fish and  
20 Game, who is made a party to this action in his official capacity only.

21 10. Fish and Game is also the principle state agency with responsibility for ensuring the  
22 protection of threatened or endangered species under the California Endangered Species Act  
23 ("CESA"), Cal. Fish and Game Code §§ 2025 *et seq.* Section 2051 of the Fish and Game Code  
24 declares that these species "are of ecological, educational, historical, recreational, esthetic,  
25 economic, and scientific value to the people of this state, and the conservation, protection, and  
26 enhancement of these species and their habitat is of statewide concern." Section 2053 declares  
27 that "it is the policy of the state that state agencies should not approve projects as proposed  
28 which would jeopardize the continued existence of any endangered species or threatened species  
or result in the destruction or adverse modification of habitat essential to the continued existence

1 of those species, if there are reasonable and prudent alternatives available consistent with  
2 conserving the species or its habitat which would prevent jeopardy.” Under Section 2055,  
3 agencies must use their authority to conserve endangered and threatened species in implementing  
4 projects.

5 11. In addition, Defendants have responsibilities under CEQA to evaluate and mitigate the  
6 impacts to threatened or endangered species. CEQA was itself enacted to “[p]revent the  
7 elimination of fish or wildlife species due to man’s activities, insure that fish and wildlife  
8 populations do not drop below self-perpetuating levels, and preserve for future generations  
9 representations of all plant and animal communities and examples of the major periods of  
10 California history.” Pub. Res. Code § 21001(c).

11  
12 **JURISDICTION AND VENUE**

13 12. This action is brought pursuant to Code of Civil Procedure § 1060. Plaintiffs have  
14 performed all conditions precedent to filing suit and/or are excused from such conditions.

15 13. On May 5, 2005, prior to commencement of this action, Plaintiffs served written notice of  
16 commencement of this action on Defendants pursuant to the requirements of Pub. Res. Code §  
17 21167.5. A true and correct copy of this notice is attached hereto as Exhibit A. On May 5, 2005,  
18 Plaintiffs gave notice to the Attorney General of the State of California of the filing of this  
19 complaint and furnished him with a copy thereof pursuant to Pub. Res. Code § 21167.7. A true  
20 and correct copy of this notice is attached hereto as Exhibit B. Plaintiffs further have complied  
21 with Pub. Res. Code § 21167.6(a) by filing, concurrently with the filing of this Complaint a  
22 written request to Defendants for preparation of the record.

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

1 **FACTUAL AND LEGAL SETTING**

2 15. Suction dredges are in widespread use for recreational gold mining in rivers in the  
3 Western Sierras and in Northwest California, including the Klamath, Scott and Salmon Rivers  
4 and their tributaries. Introduced in the 1950's, suction dredges operate like underwater vacuum  
5 cleaners, drawing sand, gravel, and sediment from a river bottom through an intake nozzle, up a  
6 suction hose, through a gold recovery system, and out the rear of the dredge as "tailings," back  
7 into the river. Because they are portable and relatively inexpensive, suction dredges have become  
8 popular to use.

9 16. Suction dredge mining in these rivers causes significant impacts to special status species  
10 such as the Coho, and their habitat. These impacts include disturbance of the fish and fish eggs  
11 and fry and the invertebrate communities that fish rely upon for food. The dredging also has  
12 adverse impacts on other aquatic or riparian dependent plant and animal species; channel  
13 morphology which includes the bed, bank, channel and flow of streams and rivers; water quality  
14 and quantity; and riparian habitat adjacent to streams and rivers.

15 17. Dredging also leaves unstable tailing piles; fish spawning on these unstable piles may  
16 suffer egg and fry mortalities when the piles are dispersed by higher flows. In addition, the  
17 developing eggs of salmonids are significantly adversely affected by entrainment through suction  
18 dredges. Dredging on fish eggs and yolk sac fry can cause up to 100 percent mortality if sucked  
19 through a dredge of any size or covered with sediment produced by suction dredge mining  
20 equipment. Nearly all eggs and sac fry that survive entrainment would be eaten by fish and other  
21 predators. They would become available prey as a consequence of their being taken out of their  
22 protective in-gravel environment by suction dredging. As they are highly desirable food items, it  
23 is doubtful that many of them would survive to the swim-up stage. Those that could escape  
24 immediate predation might find temporary refuge in substrate interstices. However, it is likely  
25 that most would ultimately fall prey to predatory aquatic insects, fish, amphibians and birds as a  
26 consequence of being displaced by suction dredging.

27 18. In April 1994, Fish and Game issued a Final Environmental Impact Report under CEQA  
28 on the Adoption of Regulations for Suction Dredge Mining (hereinafter "the 1994 EIR"). The  
purpose of the 1994 EIR was to evaluate the environmental impacts of suction dredge mining

1 and to mitigate those impacts through regulations adopted under Fish and Game Code §§ 5653-  
2 5653.9, providing, *inter alia*, for the issuance of annual permits for such suction dredging and the  
3 closure of rivers and other water bodies unsuitable for such dredging. The 1994 EIR was a  
4 program EIR, which was intended not only to provide the basis for adoption of the regulations  
5 but also apparently to serve as compliance with CEQA for the issuance of suction dredge mining  
6 permits thereafter under those regulations.

7 19. In the 1994 EIR, Fish and Game acknowledged that suction dredge mining, as described  
8 above, has significant impacts on special status fish species. Fish and Game relied on a  
9 Biological Opinion prepared by it under CESA to determine whether suction dredging would  
10 jeopardize the continued existence of any threatened or endangered species, or species of special  
11 concern. The Biological Opinion recommended that Fish and Game close all waters inhabited  
12 by threatened or endangered species (listed on either the State or federal Endangered Species  
13 Acts), including also species of special concern, for the entire year or for specified periods in  
14 which the waters were inhabited by the species, to avoid impacts to these species.

15 20. In the 1994 EIR, Fish and Game adopted as a mitigation measure the Biological  
16 Opinion's recommendation that all rivers and other areas where these species existed be closed  
17 to suction dredging. After certifying the 1994 EIR, Fish and Game adopted the proposed  
18 regulations, set forth at 14 Cal. Code Regs. § 228 *et seq.* The only exception to the prohibition of  
19 suction dredging in these closed areas was the proviso for a special permit if Fish and Game  
20 determined (based potentially on a site specific Biological Assessment) that the proposed site  
21 specific suction dredging would not result in a "take" of the listed species.

22 21. Because the Coho salmon was not then listed as a state or federal threatened or  
23 endangered species or a species of special concern, the regulations adopted pursuant to the 1994  
24 EIR permitted dredging in the Salmon, Scott, and Klamath Rivers and their tributaries. Similarly,  
25 the Pink salmon, Chum salmon, Green sturgeon, Klamath River lamprey, and River lamprey  
26 were not listed as species of special concern at this time. As a result, the regulations provided  
27 that (a) the Klamath River from the Salmon River upstream to 500 feet downstream of the Scott  
28 River is open to dredging all year; (b) the Scott River and its tributaries are open to dredging  
from the fourth Saturday in May through September 30; and (c) the main stem North Fork

1 Salmon River from the South Fork Salmon River upstream to the Marble Mountain Wilderness,  
2 and the main stem South Fork Salmon River from the North Fork Salmon River upstream to the  
3 Trinity Alps Wilderness boundary are open to dredging from July 1 through September 15. The  
4 Coho salmon, Pink salmon, Chum salmon, Green sturgeon, Klamath River lamprey, and River  
5 lamprey are present in these rivers during these time periods.

6 22. Since the certification of the 1994 EIR and the adoption of the suction dredge mining  
7 regulations, the population of the Coho salmon in Southern Oregon and Northern California has  
8 continued to decline. As a result, in 1995, Fish and Game listed the Coho salmon as a fish  
9 species of special concern in California. In 1997, the National Marine Fisheries Services listed  
10 the Southern Oregon/Northern California Coast Evolutionarily Significant unit of the Coho  
11 salmon as a “threatened” species under the federal ESA. In August 2002, the California Fish and  
12 Game Commission (“Commission”) issued a finding that Coho salmon warranted listing as a  
13 “threatened” species in the Southern Oregon/Northern California Coast Evolutionarily  
14 Significant Unit. Effective March 30, 2005, the Coho is now officially listed as a “threatened”  
15 species under CESA. All of these listings included the Coho salmon that inhabits the Klamath,  
16 Scott and Salmon Rivers.

17 23. Defendants also have recognized the importance to Indian Tribes of the preservation of  
18 the Coho in the Klamath, Scott, and Salmon Rivers. In June 2004, Defendants finalized the  
19 Recovery Strategy for the California Coho salmon. Among its goals, the Recovery Strategy  
20 seeks to achieve harvestable populations of Coho for Tribal Resources. The Recovery Strategy  
21 lists the Salmon, Scott, Middle and Lower Klamath Rivers, and their tributaries as rivers  
22 containing key populations of Coho to maintain or improve.

23 24. Also since the certification of the 1994 EIR and the adoption of the suction dredge  
24 mining regulations, the populations of the Pink salmon, Chum salmon, Green sturgeon, Klamath  
25 River lamprey, and River lamprey have continued to decline. As a result, in 1995, Fish and  
26 Game listed these species as fish species of special concern in California.

27 25. Despite the listing of the Coho salmon as a species of special concern in 1995 and its  
28 subsequent listing as a federal and state threatened species, Defendants have failed and refused to  
apply to the Coho salmon the mitigation measure adopted in its 1994 EIR for protection of



1 special status species – i.e., the closure of rivers inhabited by the species to suction dredge  
2 mining. Defendants also have failed and refused to apply to the aforementioned fish species of  
3 special concern the mitigation measure adopted in its 1994 EIR for the protection of special  
4 status species.

5 26. Furthermore, Defendants have continued the pattern and practice of annually issuing  
6 suction dredge mining permits, many of which are used by permittees to conduct such operations  
7 in the Klamath, Scott and Salmon Rivers while they are inhabited by the Coho salmon and other  
8 fish species of special concern. Defendants have done so, despite the fact that the 1994 EIR did  
9 not review the impacts of suction dredge mining on the Coho or other subsequently listed fish  
10 species of special concern as special status species. Defendants have never prepared a new initial  
11 study under CEQA to determine whether a subsequent EIR or negative declaration would be  
12 required. They have not otherwise sought in any manner to comply with CEQA in issuing  
13 permits that cause significant impacts to this threatened species.

14 27. On July 21, 2004, Plaintiffs’ attorneys, the Environmental Law Foundation, submitted a  
15 Public Records Act request to Fish and Game for all documents generated by it since the 1994  
16 EIR that indicate potential or actual harm to the Coho resulting from dredging activities. On  
17 August 24, 2004, Fish and Game determined that it had no documents responsive to this request.  
18 Thus, there appears to have been no attempt by Defendants to conduct any evaluation of the  
19 impacts of suction dredging on the Coho in the ten years since the Coho became a listed species.

20 28. Plaintiff Leaf Hillman articulated to Defendant Brodrick his and the Tribe’s concerns  
21 over the upcoming season for suction dredge mining. On March 17, 2005, Mr. Hillman sent a  
22 letter to Defendant Brodrick detailing the Tribe’s concerns with suction dredging in the Salmon,  
23 Scott, and Klamath Rivers, and their tributaries. In the letter, Mr. Hillman complained about Fish  
24 and Game’s pattern and practice of issuing permits without either closing river habitats for the  
25 Coho or first conducting further environmental review under CEQA. Mr. Hillman requested that  
26 Defendant Brodrick contact him within 15 days from the date of the letter to see if these  
27 concerns could be addressed without the necessity for litigation. Defendant Brodrick has failed  
28 to respond.

1  
2 **FIRST CAUSE OF ACTION**  
3 **(CEQA/Declaratory Relief)**

4 29. Plaintiffs reallege, as if fully set forth herein, each and every allegation in the preceding  
5 paragraphs of this complaint.

6 30. CEQA requires each state agency to conduct an Initial Study and prepare an EIR when  
7 the agency proposes to approve or carry out a discretionary project that may have a significant  
8 impact on the environment. These “projects” include the issuance of permits; Defendants’  
9 issuance of dredging permits is a “discretionary” act. Many of these permits are used for  
10 dredging in the river habitats for the Coho salmon (and the aforementioned fish species of  
11 special concern), resulting in significant adverse impacts on this threatened species. CEQA  
12 Guideline § 15092(b) requires that Defendants impose all feasible mitigation measures that will  
13 reduce the impact to a level of insignificance.

14 31. When an agency has already prepared an EIR on certain activities and has identified  
15 significant impacts to the environment from those actions, CEQA requires that the previously  
16 adopted mitigation measure be applied to these subsequent activities in issuing permits. In this  
17 case, Fish and Game’s 1994 EIR identified impacts to special status fish species from suction  
18 dredging as significant and concluded that the mitigation measure of closure of river habitat for  
19 such species to dredging was required to reduce the impact to a level of insignificance. Yet,  
20 Defendants have failed and refused to apply this mitigation measure to those rivers that are the  
21 habitat for the subsequently listed Coho salmon, despite the resulting significant impacts to this  
22 threatened species, as well as to the aforementioned fish species of special concern.

23 32. Also, when a prior EIR has been prepared, CEQA Guidelines §§ 15162 and 15163 further  
24 require the lead agency to prepare a supplemental or subsequent EIR when new information  
25 becomes available or there is a significant change in circumstances. A subsequent or  
26 supplemental EIR must be prepared if the new information or changed circumstances show that  
27 the project will have a significant effect not discussed in the previous EIR. The listings of the  
28 Coho salmon as a species of special concern and then as a threatened species under both the  
federal and state Endangered Species Acts constitute new information and a significant change in

1 circumstances showing that suction dredging in the Coho's habitat will have a significant effect  
2 on the species that was not discussed in the 1994 EIR. Similarly, the listing of the Pink salmon,  
3 Chum salmon, Green sturgeon, Klamath River lamprey, and River lamprey as species of special  
4 concern constitutes new information and a significant change in circumstances showing that  
5 suction dredging in habitat of these species will have a significant effect on these species that  
6 was not discussed in the 1994 EIR.

7 33. When the prior EIR was a program EIR, as in this case, CEQA Guideline § 15168  
8 contains special requirements applicable to subsequent activities in the program, such as the  
9 issuance of suction dredge permits. They must be examined in light of the program EIR to  
10 determine whether an additional environmental document must be prepared under CEQA. If that  
11 review indicates that a later activity would have effects that were not examined in the program  
12 EIR, a new initial study is required to be prepared leading to either an EIR or a negative  
13 declaration. Under this provision, it is only if the agency finds no new significant effects could  
14 occur or no new mitigation measures would be required, that the agency can approve the activity  
15 as being within the scope of the project covered by the program EIR, and no new environmental  
16 document would be required. The provision requires the agency to incorporate into these  
17 subsequent activities mitigation measures previously adopted in the program EIR. Defendants  
18 have done none of these things.

19 34. Defendants' pattern and practice of issuing suction dredging permits without closing river  
20 habitats for the threatened Coho salmon (and the aforementioned species of special concern) and  
21 without conducting further review of the impacts of such permits on the Coho (and the  
22 aforementioned species of special concern) is a violation of CEQA in the following respects:

- 23 a) Defendants have violated CEQA by failing and refusing to apply to the  
24 Coho (and the aforementioned species of special concern) the mitigation  
25 measure adopted for protection of special status species in its 1994 EIR –  
26 i.e., closing the river habitats of this threatened species.
- 27 b) Defendants have violated CEQA by continuing to issue suction dredging  
28 permits after the Coho (and the aforementioned species of special concern)  
became a special status species without preparing a supplemental or

1 subsequent EIR to consider this new information or change in  
2 circumstances occurring after its 1994 EIR.

- 3 c) Defendants have violated CEQA by failing to examine the impacts of its  
4 continued issuance of suction dredging permits in light of the 1994  
5 Program EIR to determine whether those later activities have effects not  
6 examined in the Program EIR (in this case, the impacts on a subsequently  
7 listed special status species, the Coho salmon, and the aforementioned  
8 species of special concern), by failing to prepare a new Initial Study  
9 leading to either an EIR or a negative declaration to review these impacts,  
10 and by failing to incorporate the mitigation measure of closing river  
11 habitats of the Coho (and the aforementioned species of special concern)  
12 to suction dredging.

13 35. There is a present and actual existing controversy between Plaintiffs and Defendants as to  
14 the legality of these practices that are of an on-going nature. Plaintiffs contend that Defendants  
15 are in violation of the law in each of the respects alleged above. Defendants have not responded  
16 to Plaintiffs' attempt to resolve this matter outside of the judicial context. Therefore, Defendants  
17 must contend that their conduct and repeated pattern of conduct is in accord with the law.  
18 Plaintiffs desire a judicial determination of the rights and obligations of the respective parties and  
19 a declaration concerning the allegations of this complaint.

20 36. Such a declaration is necessary and appropriate at this time for Plaintiffs to ascertain the  
21 right to require Defendants to act in accordance with the obligations under CEQA to insure that  
22 suction dredging operations will not be deleterious to fish. Defendants have prejudicially abused  
23 their discretion and not proceeded in a manner required by law in that they have repeatedly and  
24 as a practice and on-going conduct, issued suction dredge permits without conducting CEQA  
25 analysis.

26 37. Plaintiffs have no adequate remedy in the ordinary course of law to obtain relief from the  
27 consequences of Defendants' actions. Plaintiffs lack an adequate remedy at law because  
28 monetary damages cannot be ascertained, and Plaintiffs cannot be compensated for the  
environmental degradation caused by Defendants' continued issuance of suction dredge permits.

1 In addition, since the permits issued by Defendants are not restricted to any particular water  
2 body, Plaintiffs are unable to challenge the individual permits used for suction dredge mining in  
3 the Coho salmon habitats (and the habitats of the aforementioned species of special concern).  
4 Defendants issue thousands of permits each year, and Plaintiffs have no way of determining from  
5 these permits where a particular miner will dredge. It is impractical and a waste of judicial  
6 resources for Plaintiffs to challenge suction dredge mining permits one at a time, rather than with  
7 a single lawsuit. Plaintiffs direct its challenge to the cumulative effects of dredging in the  
8 aforementioned water bodies, not to the effects of any individual dredger.

9  
10 **SECOND CAUSE OF ACTION**  
11 **(Fish and Game Code, Section 5653)**

12 38. Plaintiffs reallege, as if fully set forth herein, each and every allegation in the preceding  
13 paragraphs of this complaint.

14 39. Defendants must designate areas where suction dredging may be permitted, waters or  
15 areas closed to dredging, and the time of year when those dredges may be used. See Fish and  
16 Game Code, Section 5653(b). Defendants' designation is based solely on whether dredging will  
17 be deleterious to fish.

18 40. In this case, Fish and Game conducted its 1994 EIR to determine where and when suction  
19 dredging may be permitted without causing deleterious impacts to special status fish species.  
20 Fish and Game adopted the recommendations of the Biological Opinion through regulation, and  
21 closed river habitat of special status species to dredging to prevent deleterious impacts. Yet,  
22 Defendants have failed and refused to apply this mitigation measure to those rivers that are the  
23 habitat for the subsequently listed Coho salmon (and the aforementioned species of special  
24 concern), despite the resulting deleterious impacts to this threatened species.

25 41. Defendants' pattern and practice of issuing suction dredging permits without closing river  
26 habitats for the threatened Coho salmon (and the aforementioned species of special concern) and  
27 without conducting further review of the impacts of such permits on the Coho (and the  
28 aforementioned species of special concern) is a violation of Section 5653(b)'s mandate to ensure  
that suction dredging "will not be deleterious to fish."

1 42. There is a present and actual existing controversy between Plaintiffs and Defendants as to  
2 the legality of these practices that are of an on-going nature. Plaintiffs contend that Defendants  
3 are in violation of the law in each of the respects alleged above. Defendants have not responded  
4 to Plaintiffs' attempt to resolve this matter outside of the judicial context. Therefore, Defendants  
5 must contend that their conduct and repeated pattern of conduct is in accord with the law.  
6 Plaintiffs desire a judicial determination of the rights and obligations of the respective parties and  
7 a declaration concerning the allegations of this complaint.

8 43. Such a declaration is necessary and appropriate at this time for Plaintiffs to ascertain the  
9 right to require Defendants to act in accordance with the obligations under the Fish and Game  
10 Code, Section 5653, to insure that suction dredging operations will not be deleterious to fish.  
11 Defendants have prejudicially abused their discretion and not proceeded in a manner required by  
12 law in that they have repeatedly and as a practice and on-going conduct, issued suction dredge  
13 permits without determining whether dredging in these areas will be "deleterious to fish."  
14

### 15 **THIRD CAUSE OF ACTION**

#### 16 **(Injunctive Relief)**

17 44. Plaintiffs reallege, as if fully set forth herein, each and every allegation in the preceding  
18 paragraphs of this complaint.

19 45. Unless Plaintiffs are granted injunctive relief as set forth herein, they will suffer  
20 irreparable harm in that Defendants' pattern and practice of issuing suction dredge permits every  
21 year without closing the river habitats of the Coho (and the habitats of the aforementioned  
22 species of special concern) to such dredging and without conducting further CEQA analysis of  
23 the impacts of such dredging on the Coho (and the aforementioned species of special concern)  
24 are creating and will continue to create the adverse environmental impacts previously described  
25 herein, to the detriment of Plaintiffs and the public. In particular, the Court should order  
26 Defendants to apply the mitigation measure adopted in its 1994 EIR to close the rivers and  
27 tributaries to suction dredging that constitute the habitat of the Coho (and the habitats of the  
28 aforementioned species of special concern). Alternatively, the Court should enjoin Defendants  
from issuing suction dredging permits to the extent that they allow such operations in the Coho

1 river habitats (and the habitats of the aforementioned species of special concern) unless and until  
2 Defendants have complied with CEQA by the preparation of an environmental document that  
3 evaluates and mitigates the impacts to the Coho (and the aforementioned species of special  
4 concern). The injunctive relief is also necessary to restrain Defendants' violations of Fish and  
5 Game Code § 5653 as alleged above.

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7 **REQUEST FOR RELIEF**

8 Wherefore, Plaintiffs request relief as follows:

- 9 1. A declaratory judgment as to the illegality of the pattern and practice by  
10 Defendants of failing to apply to the Coho salmon (and other species of special  
11 concern) the mitigation measure previously adopted of closing rivers to suction  
12 dredging that are inhabited by special status species and of issuing suction dredge  
13 mining permits without conducting analysis under CEQA of the impacts to the  
14 Coho as a threatened species, as well as to the aforementioned species of special  
15 concern;
- 16 2. A declaratory judgment as to the illegality of the pattern and practice of  
17 Defendants of issuing suction dredge permits without closing river habitats for the  
18 threatened Coho salmon (and other species of special concern) and without  
19 conducting further review of the impacts of such permits to determine whether  
20 dredging in the Coho's habitat, as well as in the habitat of other species of special  
21 concern, will be deleterious to it in violation of Fish and Game Code, Section  
22 5653(b);
- 23 3. An injunction ordering Defendants to close all rivers to suction dredging that  
24 constitute habitat of the Coho (and other species of special concern), or  
25 alternatively, ordering Defendants to cease issuing suction dredging permits to the  
26 extent that they allow such operations in the Coho river habitats (and habitats of  
27 other species of special concern) unless and until Defendants have complied with  
28 CEQA by the preparation of an environmental document that evaluates and  
mitigates the impacts to the Coho (and other species of special concern) and

1 unless and until Defendants have complied with Fish and Game Code § 5653 as  
2 above alleged;

- 3 4. Costs of suit and attorneys fees incurred pursuant to the Code of Civil Procedure §  
4 1021.5, and other provisions of law; and  
5 5. Such other and further relief as the Court may deem proper.  
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9 Dated: May \_\_\_\_\_, 2005

Respectfully submitted,

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13 Joshua J. Borger, Esq.  
14 Attorney for Plaintiffs

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17 Roger Beers, Esq.  
18 Attorney for Plaintiffs  
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