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4 JOSEPH HARDESTY and YVETTE HARDESTY

5 UNITED STATES DISTRICT COURT

6 EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION

7 JOSEPH HARDESTY, an individual; and
8 YVETTE HARDESTY, an individual,

9 Plaintiffs,

10 v.

11 SACRAMENTO METROPOLITAN AIR
QUALITY MANAGEMENT DISTRICT, a
12 municipal entity and political subdivision of the
state of California; DAVID GROSS, in his
13 official and individual capacity as an employee
of Sacramento Metropolitan Air Quality
14 Management District; JAMES GOLDSTENE,
Executive Officer of California Air Resources
15 Board, in his official and individual capacity;
OFFICE OF MINE RECLAMATION, a
16 political subdivision of the state of California;
DENNIS O'BRYANT, in his official and
17 individual capacity as an employee of the
Office of Mine Reclamation; GAY NORRIS, in
18 her official and individual capacity as an
employee of the Office of Mine Reclamation;
19 CALIFORNIA STATE MINING AND
GEOLOGY BOARD, a political subdivision of
20 the state of California; STEVE TESTA, in his
official and individual capacity as an employee
21 of the California State Mining and Geology
Board; ZACHARY SIMMONS, an individual;
22 CALIFORNIA DEPARTMENT OF FISH
AND GAME, a political subdivision of the
23 State of California; LIZ GREGORY, in her
official and individual capacity as an employee
24 of the Department of Fish and Game;
SACRAMENTO COUNTY, a political
25 subdivision of the state of California;
RICHARD SHERRY, Director of Sacramento
26 Department of Planning and Community
Development, in his official and individual
27 capacity; AND DOES 1 through 10, inclusive,

28 Defendants.

CASE NO.:

**COMPLAINT FOR VIOLATIONS OF THE
CLEAN AIR ACT; THE CIVIL RIGHTS
ACT OF 1871, 42 U.S.C. § 1983, BIVENS
ACTION, THE SUPREMACY CLAUSE,
THE FOURTH AMENDMENT TO THE
UNITED STATES CONSTITUTION, THE
FIFTH AMENDMENT TO THE UNITED
STATES CONSTITUTION, AND THE
FOURTEENTH AMENDMENT TO THE
UNITED STATES CONSTITUTION**

DEMAND FOR JURY TRIAL

1 Plaintiffs Joseph Hardesty and Yvette Hardesty (collectively "Hardesty"), allege as
2 follows:

3 **JURISDICTION UNDER CIVIL RIGHTS ACT**

4 1. This action is based on, and seeks to redress violations of, the Clean Air Act, Civil
5 Rights Act of 1871, 42 U.S.C. § 1983, the Supremacy Clause, the Fourth Amendment to the United
6 States Constitution, the Fifth Amendment to the United States Constitution, and the Fourteenth
7 Amendment to the United States Constitution. Accordingly, this Court has jurisdiction over this
8 action pursuant to 28 U.S.C. §1331 & 1343, in that this action arises under the Constitution and
9 laws of the United States.

10 **JURISDICTION UNDER A BIVENS ACTION**

11 2. This action is also based on, and seeks to redress violations and denial of
12 Constitutional rights by federal officers acting under federal law under *Bivens v. Six Unknown*
13 *Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Accordingly, this Court has
14 jurisdiction over this action pursuant to 28 U.S.C. § 1331 & 1343, in that this action arises under the
15 Constitution and the laws of the United States.

16 **VENUE**

17 3. Venue lies in this district pursuant to 28 U.S.C. § 1391(b)(1) and because Plaintiffs
18 and at least one of the Defendants reside in this District and the events giving rise to Plaintiffs'
19 claims occurred in this District.

20 **INTRODUCTION**

21 4. This action centers on Plaintiffs' small rock aggregate business and one of their
22 competitors, A. Teichert & Son, Inc. ("Teichert"), a very large rock aggregate company who has
23 employed tactics reminiscent of Rockefeller or Standard Oil to drive Plaintiffs out of business. This
24 strategy began with using their lobbyist, who is the brother of a Congressman, the Congressman
25 himself and a state Senator, as well as Teichert employees to engage in a relentless campaign to
26 contact federal and state agencies in an effort to generate warrantless searches in violation of state
27 and Federal law and trumped up "violations" that have no merit. All of this unlawful conduct is
28 designed with the sole purpose to drive Plaintiffs out of business.

1 5. The conduct alleged in the complaint below consists of state, county, federal
2 agencies and individuals acting on their own and their official capacity, to violate state and federal
3 law, including the Fourth Amendment, the Fifth Amendment, the Fourteenth Amendment, the
4 Equal Protection Clause and the Supremacy Clause of the Constitution by, among other things,
5 impeding commerce, instructing customers not to purchase from Plaintiffs, conducting warrantless
6 searches and inspections, usurping Federal law by violating the Clean Air Act, precluding Plaintiffs
7 from selling aggregate to public agencies, and attempting to hold hearings on vested rights that were
8 conclusively determined more than a decade ago, as the vested right to mine has continued for over
9 100 years on this historic property. Defendants and each of them acting under Federal law and the
10 color of state law are attempting to completely shut down Plaintiffs rock plant regardless of Federal
11 and state law. As will be shown, these actions by Defendants have repeatedly violated the
12 Constitutional rights of Plaintiffs and continue to cause great harm and financial detriment and
13 damage to Plaintiffs.

14 **THE PARTIES**

15 6. At all times mentioned herein, Plaintiff Joseph Hardesty is an individual residing in
16 Sacramento County, and is the owner of Hardesty Sand and Gravel.

17 7. At all times mentioned herein, Plaintiff Yvette Hardesty is an individual residing in
18 Sacramento County, and is the owner of Hardesty Sand and Gravel.

19 8. At all times mentioned herein, Defendant SACRAMENTO METROPOLITAN AIR
20 QUALITY MANAGEMENT DISTRICT (“SMAQMD”) is the local agency designated to regulate
21 air emission in Sacramento County, California, a unit of local government, duly formed and
22 authorized under the laws of the State of California. Upon information and belief, SMAQMD as
23 part of its duties, regulates and provides supervision of all persons employed by SMAQMD and is
24 responsible for its ordinances, resolutions, customs, and usage of regulations. Upon information
25 and belief, SMAQMD's responsibility is to provide redress to plaintiffs and to supervise its
26 employees. SMAQMD is being sued as a person.

27 9. At all times mentioned herein, Defendant DAVID GROSS is a public officer who is
28 employed by SMAQMD, and the County of Sacramento, for the purposes of enforcing State and

1 Federal laws under the Clean Air Act. Defendant Gross is enriched, rewarded, and compensated for
2 his official duties and carries out discretionary functions while in his official capacity as a unit of
3 local government, duly formed and authorized under the laws of the State of California. Defendant
4 Gross is being sued individually and in his official capacity. Plaintiffs are informed and believe that
5 each of the defendants is liable for the damage to Plaintiffs in some manner.

6 10. At all times mentioned herein, Defendant JAMES GOLDSTENE, is a public officer
7 who is employed by the California Air Resources Board ("CARB"), a state agency, and is enriched,
8 rewarded, and compensated for his official duties and carries out discretionary functions while in
9 his official capacity as a unit of State government, duly formed and authorized under the laws of the
10 State of California. Defendant Goldstene is being sued individually and in his official capacity.
11 Plaintiffs are informed and believe that each of the defendants is liable for the damage to Plaintiffs
12 in some manner.

13 11. At all times mentioned herein, Defendant OFFICE OF MINE RECLAMATION
14 ("OMR") a state agency, a unit of local government, duly formed and authorized under the laws of
15 the State of California. OMR is the division of the California Department of Conservation
16 designated to track regulatory compliance with the Surface Mining and Reclamation Act of 1975.
17 Upon information and belief, OMR as part of its duties, regulates and provides supervision of all
18 persons employed and is responsible for its ordinances, resolutions, customs and usage of
19 regulations. Upon information and belief, OMR is responsible for providing redress to Plaintiffs
20 and for supervising its employees. OMR is being sued as a person.

21 12. At all times mentioned herein, Defendant DENNIS O'BRYANT is a public officer
22 who is employed by OMR. Defendant O'Bryant is enriched, rewarded, and compensated for his
23 official duties and carries out discretionary functions while in his official capacity as a unit of State
24 government, duly formed and authorized under the laws of the State of California. Defendant
25 O'Bryant is being sued individually and in his official capacity. Plaintiffs are informed and believe
26 that each of the defendants is liable for the damage to Plaintiffs in some manner.

27 13. At all times mentioned herein, Defendant GAY NORRIS is a public officer who is
28 employed by OMR. Defendant Norris is enriched, rewarded, and compensated for her official

1 duties and carries out discretionary functions while in her official capacity as a unit of State
2 government, duly formed and authorized under the laws of the State of California. Defendant
3 Norris is being sued individually and in her official capacity. Plaintiffs are informed and believe
4 that each of the defendants is liable for the damage to Plaintiffs in some manner.

5 14. At all times mentioned herein, Defendant CALIFORNIA STATE MINING AND
6 GEOLOGY BOARD (“SMGB”) is the division of the California Department of Conservation that
7 serves, in part, as a policy-making and appeals board with authority to accept certain appeals and
8 petitions and grant certain exemptions pursuant to the Surface Mining and Reclamation Act of
9 1975, including appeals of orders to comply, designation appeals, administrative penalty appeals,
10 financial assurance appeals, low gross exemption appeals, reclamation plan appeals and failure of
11 lead agency to act appeals. Upon information and belief, SMGB as part of its duties, regulates and
12 provides supervision of all persons employed and is responsible for its ordinances, resolutions,
13 customs and usage of regulations. Upon information and belief, SMGB is responsible for providing
14 redress to Plaintiffs and for supervising its employees. SMGB is being sued as a person.

15 15. At all times mentioned herein, Defendant STEVE TESTA is a public officer who is
16 employed by the SMGB. Defendant Testa is enriched, rewarded, and compensated for his official
17 duties and carries out discretionary functions while in his official capacity as a unit of State
18 government, duly formed and authorized under the laws of the State of California. Defendant Testa
19 is being sued individually and in his official capacity. Plaintiffs are informed and believe that each
20 of the defendants is liable for the damage to Plaintiffs in some manner.

21 16. At all times mentioned herein, Defendant ZACHARY SIMMONS is a public officer
22 who is employed by the USACE. Defendant Simmons is enriched, rewarded, and compensated for
23 his official duties and carries out discretionary functions while in his official capacity as a unit of
24 State government, duly formed and authorized under the laws of the State of California. Defendant
25 Simmons is being sued in his individually capacity. Plaintiffs are informed and believe that each of
26 the defendants is liable for the damage to Plaintiffs in some manner.

27 17. At all times mentioned herein, Defendant CALIFORNIA DEPARTMENT OF FISH
28 AND GAME (“DFG”) is a state agency, a unit of local government, duly formed and authorized

1 under the laws of the State of California. DFG is the department of the California Natural
2 Resources Agency designated to manage and protect California's fish, wildlife, plant resources, and
3 native habitats. Upon information and belief, DFG as part of its duties, regulates and provides
4 supervision of all persons employed and is responsible for its ordinances, resolutions, customs and
5 usage of regulations. Upon information and belief, DFG is responsible for providing redress to
6 Plaintiffs and for supervising its employees. DFG is being sued as a person.

7 18. At all times mentioned herein, Defendant LIZ GREGORY is a public officer who is
8 employed by the DFG. Defendant Gregory is enriched, rewarded, and compensated for her official
9 duties and carries out discretionary functions while in her official capacity as a unit of State
10 government, duly formed and authorized under the laws of the State of California. Defendant
11 Gregory is being sued individually and in her official capacity. Plaintiffs are informed and believe
12 that each of the defendants is liable for the damage to Plaintiffs in some manner.

13 19. At all times mentioned herein, Defendant SACRAMENTO COUNTY is a unit of
14 local government, duly formed and authorized under the laws of the State of California. Upon
15 information and belief, Sacramento County as part of its duties, regulates and provides supervision
16 of all persons employed and is responsible for its ordinances, resolutions, customs and usage of
17 regulations. Upon information and belief, Sacramento County is responsible for providing redress
18 to Plaintiffs and for supervising its employees. Sacramento County is being sued as a person.

19 20. At all times mentioned herein, Defendant ROBERT SHERRY is a public officer and
20 the Director Sacramento Department of Planning and Community Development. Defendant Sherry
21 is enriched, rewarded, and compensated for his official duties and carries out discretionary functions
22 while in his official capacity as a unit of State government, duly formed and authorized under the
23 laws of the State of California. Defendant Sherry is being sued individually and in his official
24 capacity. Plaintiffs are informed and believe that each of the defendants is liable for the damage to
25 Plaintiffs in some manner.

26 21. At all times mentioned herein, Plaintiffs do not know the true names or capacities,
27 whether individual, corporate, and associate or otherwise, of Defendants Does 1 through 10,
28

1 inclusive, and therefore sue said Defendants under fictitious names. Plaintiffs will amend this
2 Complaint to show their true names and capacities when and if the same have been ascertained.

3 **GENERAL ALLEGATIONS**

4 22. Hardesty owns and operates Hardesty Sand and Gravel, a sand and gravel operation
5 in Sacramento County. The Schneider Historic Mine (the Mine) in eastern Sacramento County, has
6 been in operation on the Schneider Family Ranch since at least the early 1900's. The Mine is
7 currently owned by Jay Schneider and family. Hardesty Sand and Gravel is authorized to operate
8 on, and purchase material from the Schneider Historic Mine. In response to evidence submitted by
9 Mr. Schneider, the County of Sacramento wrote a letter in 1994 confirming historical grandfathered
10 vested rights to mine the Property absent the need for future surface mining and/or conditional use
11 permits required under the California Surface Mining and Reclamation Act ("SMARA"), and
12 specifically acknowledging that this evidence "has been accepted as evidence of vested interest and
13 therefore, we are not requiring a use permit for the mining operation." This confirmation was
14 reaffirmed in many subsequent communications with the County of Sacramento.

15 23. Hardesty Sand and Gravel, owned and operated by Plaintiffs, has been the principal
16 operator at the Mine, without any notable complaints or findings of violations, since the early
17 1980's. The Mine is operated pursuant to the aforementioned vested legal non-conforming use and
18 a Reclamation Plan, which was approved by Sacramento County on November 8, 2002. In
19 addition, representatives of Sacramento County performed its required annual site inspection of the
20 Mine in December 2008, and concluded that the Mine was operating in accordance with the
21 Reclamation Plan and in accordance with applicable SMARA requirements.

22 24. One of Hardesty's main competitors is A. Teichert & Son, Inc. ("Teichert"), which is
23 a large construction materials and contracting company doing business in Sacramento and other
24 northern California counties. Teichert, which is known to be very politically active in Sacramento
25 County, operates a competing aggregate mining operation near the Mine. Customers often choose
26 to buy from Hardesty rather than Teichert because Hardesty's prices for aggregate products often
27 are much lower. Such lower prices are based upon lower costs, in part due to the fact that Hardesty
28 is a "hands on" sole proprietor who works on the mine from 6:00 in the morning until 4:30 in the

1 evening six days a week. Hardesty functions as the owner, manager, operator, mechanic, and
2 whatever other role needs to be fulfilled in order to keep the mine functioning. Thus, his payroll,
3 one of a company's main expenses, is lower than that of a "Teichert" or similar sized company.
4 Further, due to the "mom and pop" nature of Hardesty's business, the overhead costs in other areas
5 as well are much lower than compared to larger companies. The vested right to mine, which is a
6 legal non-conforming use on the Schneider property, is not the only reason Hardesty can sell his
7 aggregate for less money. Although this vested legal non-conforming use enables Hardesty to mine
8 and conduct related aggregate production operations without obtaining a land use permit, he is still
9 obligated to comply with most of the same laws, including environmental and health and safety
10 laws, as Teichert and other companies in the business.

11 25. Teichert bought the mining rights on the Pelican Ranch, which is an aggregate mine
12 immediately to the south of the Mine and uses the same county road for access to the highways and
13 freeways as Hardesty's operation. Pelican Ranch was permitted for approximately 50 loads a day.
14 However, Teichert is attempting to increase that to 400 loads a day. Considering Hardesty
15 transports 150 to 300 loads per day from its Mine, Teichert's proposed increase would cause
16 significant impacts on the county roads used by both mines. These impacts on the roads would
17 cause Teichert to implement mitigation measures that Hardesty's operation would not be required to
18 do because of the vested legal non-conforming use on the Mine. Thus, it is clear, that the Hardesty
19 operation poses a severe competitive threat to Teichert both from its cost competitive advantage and
20 its ability to avoid any additional costs associated with maintaining the county roads if Hardesty
21 were not operating.

22 26. In or about March 2007, Becky Wood and John Lane, employees of Teichert, began
23 to contact various state and federal agencies, including at least SMAQMD, the Central Valley
24 Regional Water Quality Control Board, US Fish and Wildlife Services, and the USACE, requesting
25 that these agencies investigate Hardesty's mining operation. Thereafter, Teichert's employees
26 facilitated, and continue to facilitate, a coordinated investigation of the Mine by sending
27 photographs of, and information regarding, the alleged violations on the Mine, updating these
28

1 agencies on the actions of other agencies and politicians, and requesting that these agencies take
2 action.

3 27. On information and belief, Teichert also contacted several politicians to discuss the
4 Hardesty operation. However, Teichert failed to give these politicians all the facts including that
5 the Mine had vested rights to mine legally granted by the lead agency, Sacramento County.
6 Coincidentally, Teichert employs the brother of a Congressman as a lobbyist.

7 28. In or about September 2008 a Congressman's representative contacted the USACE to
8 discuss an investigation of the Mine. The USACE had already investigated Hardesty at Teichert's
9 request, but assured the Congressman that they would continue their efforts and coordinate with
10 various state agencies including the DFG. In or about February 2010, the Congressman's office
11 began contacting the USACE, DFG, and the U.S. Fish and Wildlife Services to coordinate further
12 efforts and "pick [the investigation] up again."

13 29. On or about October 3, 2008, a State Senator sent a letter to the Secretary of the
14 California Resources Agency. In this letter, the Senator requested that the Resources Agency
15 coordinate departmental actions with the Agency including the Department of Conservation
16 ("DOC"), SMGB, and the DFG review Hardesty's mining operations for potential legal violations,
17 including specifically reviewing whether Hardesty could be removed from the AB 3098 List. The
18 AB 3098 List is a list of approved aggregate operations where the state can purchase material.
19 According to Surface Mine and Reclamation Act ("SMARA"), OMR must put any mine that has a
20 reclamation plan, financial assurances, and an annual mining inspection on the AB 3098 List.
21 Dennis O'Bryant of OMR removed Hardesty from the AB 3098 List. Hardesty requested an appeal
22 of his removal from the list from the SMGB, their reply was that no such appeal was available, and
23 no procedure for the appeal had been adopted.

24 30. Thus, Hardesty believed for all these years he was on the list and was selling to
25 government agencies legally since he met all the requirements. Further, a copy of the letter was
26 also sent to the Director of Caltrans causing Hardesty lost jobs.

27 31. As a result, of this political involvement, the Defendants either began or renewed
28 investigations and continued to arbitrarily and improperly investigate and regulate Hardesty.

1 Accordingly, Plaintiffs have been deprived of their civil rights under the Supremacy Clause,
2 Fourth Amendment, Fifth Amendment, and Fourteenth Amendment.

3 **Army Corp of Engineering Improper Cease & Desist Letter**

4 32. In or about May 2008, Hardesty received a phone call from Zachary Simmons'
5 office, a representative of the USACE. Mr. Simmons requested a site inspection of the Mine,
6 contending that Hardesty's operations were improperly impacting wetlands. Hardesty asked Mr.
7 Simmons to place his request in writing and to identify the Army's specific concerns with the Mine
8 in order to evaluate his request for an inspection.

9 33. Without any notice or any type of a hearing, on June 2, 2008, the USACE sent a
10 letter to Hardesty ordering Hardesty to cease and desist all operations at the Mine, claiming that the
11 USACE had determined that Hardesty was discharging dredged or fill material into creeks and
12 wetlands without a USACE permit.

13 34. Hardesty informed Mr. Simmons that his information was incorrect, and offered to
14 allow Mr. Simmons to inspect the Mine. Hardesty arranged for the USACE to inspect several
15 designated areas of the Mine. However, at the site inspection, the USACE demanded that it be able
16 to inspect the Mine outside of the designated areas. Hardesty initially permitted a search of the
17 additional areas but soon realized the search was a "witch hunt." Because USACE was not
18 inspecting the Mine to make an objective determination of any alleged improprieties, Hardesty
19 called off the site inspection and requested the USACE to leave. To date, the USACE has not
20 retracted its cease and desist letter, and has afforded Hardesty no opportunity to appeal the decision.

21 **Army Corp of Engineering & Department of Fish and Game Warrantless Search**

22 35. Subsequently, in or around September of 2008 Zachary Simmons and a DFG officer,
23 Liz Gregory, were discovered conducting an unlawful search of the Mine without a warrant. They
24 were immediately asked to leave.

25 **Improper Removal from AB 3098 List**

26 36. Upon receiving the Senator's October 3, 2008 letter, the Resources Agency
27 contacted the DOC, the SMGB, and the DFG and began a collective investigation of the operations
28 at the Mine. By late October, emails from individuals at the Resources Agency indicate that

1 wardens from the DFG had visited the Mine, but found no potential violations which warranted
2 additional investigation. Nevertheless, OMR, a sub-agency of the DOC, continued its own
3 investigation, which included pursuing an administrative search warrant in order to conduct an
4 on-site inspection of the Mine. On or about December 23, 2008, several representatives of OMR
5 performed an inspection of the Mine. On or about February 27, 2009, OMR completed an
6 inspection report which identified ten alleged violations of SMARA and other statutory
7 requirements. Eight of the purported violations are:

- 8 (a) OMR alleged that the pits are located less than ten feet from the bankfull level of an
9 adjacent river, and are below the current low flow level of the river. OMR went on
10 to state that the depth of the pit, unconsolidated alluvial material separating the pit
11 from the Consumnes River and the unengineered levee created by the mining
12 operation caused staff geologists to believe that the potential for pit capture "is
13 imminent and substantial."
14
15 (b) OMR alleged that the water level in the pits was 4' to 5' deeper than the water level
16 in the adjoining Consumnes River, which created a positive groundwater gradient
17 allowing seepage from the river to the pit and thereby increasing the probability of
18 pit capture.
19
20 (c) OMR alleged that the pit depth in the Mine's approved reclamation plan is 30 feet,
21 but the current pit depth was 50-60 feet.
22
23 (d) OMR alleged that the pit slopes are required to be reshaped to a maximum slope of
24 2:1 and reseeded at the end of each mining session pursuant to the reclamation plan,
25 but that numerous pit slopes were found to be steeper than this requirement and had
26 not been reseeded.
27
28 (e) OMR alleged that the existing financial assurance mechanism of \$94,888.34 was not
adequate. Specifically, OMR claimed that the cost estimates supporting this amount
addressed reclamation of 40 acres, but that the site had a total disturbance of
approximately 180 acres.
(f) OMR alleged that its inspection revealed gold mining equipment and that Hardesty's
consultant stated during the inspection that significant amounts of gold were
currently being produced from the Mine, yet Hardesty allegedly failed to report
collection of gold since fees on gold and silver took effect on January 1, 2004.
(g) OMR alleged that the sedimentation pond adjacent to the main plant area showed
signs of recent failure and overtopping.
(h) OMR alleged that the topsoil and growth media stockpiles were not marked and
lacked effective erosion control measures.

1 37. On or about March 3, 2009, OMR issued a memo to the Natural Resources Agency,
2 in which OMR summarized the findings in its February 27, 2009 report as well as three additional
3 allegations, including that:

- 4 (i) Hardesty was unable to produce a Storm Water Pollution Protection Plan for the
5 Mine or plant site.
- 6 (j) Hardesty was improperly selling material to the East Bay Municipal Utility District,
7 as Hardesty was not on the "AB 3098 List" of mines eligible to sell materials to local
8 agencies.
- 9 (k) The mining site was covered under one or more Williamson Act contracts, but that
10 the Mine does not qualify as a compatible use under these contracts because the
11 reclamation plan does not address mandatory reclamation standards, and the duration
12 of the mine is listed as approximately 100 years.

11 38. Each of OMR's allegations is in error. Following along with the outline of
12 allegations above, briefly, here are the reasons why:

- 13 (a) There is no factual basis for OMR's allegation that pit capture is "imminent."
14 Among other things, the water line for the Consumnes River over 80-100 feet from
15 the top of the slope of the open pit and an additional 30 feet to the toe of the cut
16 slope in the pit. Furthermore, the river level was approximately 25-30 feet from the
17 top of the bank adjacent to the open pit, while the river itself was only 2-3 feet in
18 depth. The combination of the significant distance of the river water line away from
19 the pit wall and the low level of the river make the scenario of an imminent slope
20 failure resulting in pit capture remote. Furthermore, the riverbank on the opposite
21 north side of the river is well documented to be lower than the south riverbank
22 adjacent to the open pit, meaning that if the river overflowed it would do so away
23 from the open pit. The possibility of a rainfall event that would cause overtopping of
24 the river to the north is also extremely remote, and would require rain on the order of
25 a 500-year event. Furthermore, even though only a remote possibility, if pit capture
26 occurred, any breach of the river would be localized and would not impact
27 downstream property and the environmental impact would be minimal and
28 temporary.
- (b) The water observed in the pits was runoff from rain, not seepage from the river.
 Furthermore, even if there was minor seepage from the river, it would be insufficient
 to cause pit recapture during mining, and reclamation material will increase the
 elevation of the pit water and cease any potential seepage from the river to the pit.
- (c) OMR's claim that the pits are currently 50-60 feet deep is false. The pits are 35 feet
 deep or less, and in fact, during the inspection OMR's employee measured the depth
 at 29 feet. More importantly, the reclamation plan does not limit the depth of the pits
 during mining, only the depth at the conclusion of the reclamation efforts, which
 have not yet begun.

- 1 (d) Likewise, OMR incorrectly claims that the pit slopes must be maintained at a slope
2 of 2:1 and reseeded at the end of each mining session. In fact, the approved
3 reclamation plan only requires a 2:1 slope and reseeded at the conclusion of the
4 reclamation efforts.
- 5 (e) OMR's claim that the current financial assurance mechanism is inadequate is
6 incorrect. OMR's claim that assurances must cover 180 acres of disturbance
7 improperly includes portions of the mining site which have already been reclaimed.
8 Furthermore, financial assurances were recently increased by the lead agency and
9 cost analyses establish that the current bond amount will be sufficient to cover the
10 reclamation.
- 11 (f) Contrary to OMR's aspersions, Hardesty is not mining gold or silver at the Mine.
12 The equipment cited by OMR is not used for gold or silver mining. Furthermore, the
13 comments cited by OMR in its report and allegedly made by a Hardesty
14 representative were relating to gold mined at a different site and/or gold which was
15 mined in the 1930's in the surrounding area.
- 16 (g) The sedimentation pond adjacent to the main plant area did not recently fail or
17 overtop. OMR's observations were merely the result of an excavator cleaning out the
18 wash material to be sold in the course of Hardesty's operations.
- 19 (h) The topsoil and growth media stockpiles do not require erosion controls because
20 material from the stockpiles is regularly sold, and therefore does not remain in place
21 long enough to require erosion control practices or have any effect on the topography
22 of the land.
- 23 (i) Hardesty is not required to hold a storm water permit because the Mine does not
24 have any storm water discharge to receiving waters of the United States. Water is
25 100% contained in process on the site.
- 26 (j) Because Hardesty complied with the AB 3098 requirements, it should have been
27 listed and therefore eligible to sell material to local agencies at the time of the
28 inspection in December 2008. Therefore, Hardesty did not violate any regulation or
statute by selling material to the East Bay Municipal District. To the extent Hardesty
was not on the AB 3098 List at that time, it was an error by OMR, which is
responsible for maintaining the list.
- (k) The Mine is permitted to operate under the applicable Williamson Act contracts
pursuant to a 1968 contract.

39. On March 18, 2009, OMR sent a letter to Hardesty summarizing its incorrect
allegations, and informing Hardesty that due to these false violations Hardesty was being removed
from the AB 3098 List effective as of that date. OMR provided no prior notice that it was
considering removing Hardesty from this list, and providing no hearing or other procedure by which
Hardesty could challenge the findings of the report before being removed from the AB 3098 List.

1 40. Hardesty's counsel immediately sent a letter to OMR requesting an appeal of OMR's
2 decision under the Public Resources Code. That request was denied in a letter by OMR, stating that
3 just as it does not provide any mechanism for a hearing prior to rendering its decision, OMR also
4 does not provide any administrative procedure for appealing its decision relating to the AB 3098
5 List. OMR continues to refuse to put Hardesty back on the AB 3098 List.

6 41. Similarly, Hardesty requested an appeal of OMR's decision from the SMGB. This
7 request was also denied. OMR and SMGB continue to keep Hardesty off the AB 3098 List. As a
8 result, Hardesty cannot sell mined materials to state or local agencies, a significant portion of his
9 customer base, which has a significant financial impact on the business.

10 **Improper Instructions Not to Buy from Hardesty**

11 42. On July 21, 2010, a USACE Official instructed Mike Caster, a trucker and a
12 contractor, not to buy "Joe's rock" for a job on which they were working.

13 43. On or about October or November 2008 Gay Norris, an OMR agent, stopped several
14 contractors and instructed them not to buy from Hardesty. Ms. Norris warned the contractors, that
15 if they were to buy from Hardesty, OMR would sue them.

16 **SMAQMD's Improper Order of Abatement**

17 44. In April of 2009, SMAQMD improperly issued a petition alleging that Hardesty
18 Sand and Gravel ("HSG") was operating equipment in violation of SMAQMD Rule 201. The
19 petition listed several pieces of equipment including (1) a generator that was used as a non-
20 stationary Central Plant Engine, and (2) several additional engines and equipment under 175
21 horsepower.

22 45. Regulation of the non-stationary Central Plant Engine is expressly prohibited by
23 California State Law. In California, CARB has the primary responsibility for control of air
24 pollution from vehicular and non-stationary nonroad engines, whereas local and regional
25 authorities, such as SMAQMD, have control over air pollution from stationary engines. The
26 California Legislature enacted statutory provisions governing the registration of portable equipment
27 ("PERP"). Health & Saf. Code § 41750, *et seq.* If an engine has a PERP permit, it does not need to
28 obtain a permit from the local air district. Health & Saf. Code § 41753(b). In order to obtain a

1 PERP permit, an engine must not remain at a “fixed location” for more than twelve consecutive
2 months. Health & Saf. Code § 41751. The Legislature has defined a “fixed location” to be any
3 “single site at a building, structure, facility, or installation.” Health & Saf. Code § 41751(b)(1).

4 46. In addition, regulation of the non-stationary Central Plant engine and other engines
5 and equipment **under 175 horsepower** is expressly preempted by federal law. Under the federal
6 Clean Air Act, 42 U.S.C. sections 7401, *et seq.*, (“CAA”) the federal government has authority to
7 promulgate regulations containing standards applicable to new nonroad engines and vehicles. The
8 CAA, under § 7543(e)(1)(A) expressly prohibits states and local governments from adopting or
9 enforcing “any standard or other requirement relating to the control of emissions from . . . nonroad
10 engines . . . smaller than 175 horsepower.” 42 U.S.C. § 7543(e)(1)(A). For those vehicles
11 175 horsepower or more, the CAA, under § 7543(e)(2)(A), allows California to “adopt and enforce
12 standards and other requirements relating to the control of emissions” only after obtaining a waiver
13 from the Administrator of the Environmental Protection Agency. The CAA distinguishes between
14 “standards” and very minimal “in-use requirements,” such as carpool lanes, restrictions on car use,
15 and controls over extended engine idling. The latter are not preempted.

16 47. SMAQMD Rule 201 is in direct violation of the CAA because it requires a permit to
17 operate any nonroad engine over **50 horsepower** which emits 2 lbs of pollutant or more per hour
18 without the benefit of air pollution control devices. SMAQMD Rule 201.

19 48. Similarly, SMAQMD Rule 201 is in direct violation of the CAA because it attempts
20 to regulate engines outside the scope of its waiver. CARB has obtained a waiver from the EPA to
21 regulate emission standards of **stationary** nonroad engines. However, SMAQMD has enforced
22 Rule 201 against Hardesty's **non-stationary** nonroad engine. A stationary engine is one that
23 remains at a “fixed location” for more than twelve consecutive months. Although SMAQMD has
24 not defined “fixed location,” CARB has defined a “fixed location” is a “single site at a building,
25 structure, facility, or installation.” The Mine is not a “fixed location” pursuant to CARB’s
26 definition because it is a massive 3800 acre property. Hardesty’s engine is not a stationary engine
27 because in addition to travelling to three other sites from Placerville to Nevada, it travels around the
28 entire 3800 acres of the Mine. Nevertheless, SMAQMD has attempted to classify the Mine as a

1 “fixed location,” taking advantage of the fact that, unlike CARB, SMAQMD has not actually
2 defined “fixed location.” This is an improper attempt at an underground regulation. The waiver
3 obtained by CARB only allows the regulation of those nonroad engines that do not remain at a
4 “single site at a building, structure, facility, or installation.” SMAQMD has improperly regulated
5 Hardesty’s engine outside the scope of the waiver.

6 49. Despite this clear law and a multi-day evidentiary hearing, SMAQMD Board issued
7 an Order of Abatement determining that Hardesty was operating its equipment in violation of Rule
8 201. At the Order of Abatement hearing in 2009, under penalty of perjury, members of SMAQMD
9 and CARB testified to differing definitions of a "single or fixed location." SMAQMD ordered
10 Hardesty to cease and desist operations of all specified unpermitted and unregistered engines
11 pending compliance with SMAQMD Rule 201. However, SMAQMD stayed the abatement order
12 pending timely application for and issuance of the specified permits.

13 50. On April 23, 2010 Hardesty petitioned the Superior Court of California, under
14 California Code of Civil Procedure § 1094.5 for a Writ of Mandate arguing, in part, that (1) CARB's
15 rules and regulations as set forth in the PERP program preempt SMAQMD from enforcing the
16 PERP program and regulations under State law; (2) CARB’s PERP regulations preempt Rule 201;
17 (3) regulation of the Central Plant Engine is based upon an improper underground regulation; and
18 (4) SMAQMD’s attempts to regulate the Hardesty mining operations interferes with Schneider’s
19 vested legal non-conforming use. CARB intervened in the action opposing Hardesty’s Writ of
20 Mandate. CARB argued against Hardesty’s preemption argument as well as his vested legal non-
21 conforming use argument. On June 24, 2010, the Superior Court of California denied Hardesty’s
22 application and upheld the Abatement Order.

23 51. With no other choice, Hardesty applied to SMAQMD for permits despite the fact
24 that the federal Clean Air Act preempts this permitting requirement. Hardesty spent over \$50,000
25 in applying for the permits. On August 19, 2010, SMAQMD denied Hardesty’s applications
26 advising Hardesty in a letter that:

27 **any type of operation at the facility, including but not limited to operating any**
28 **air pollutant emitting equipment or engines, sand and gravel processing**
equipment, the loading or unloading of trucks, and the movement of aggregate

1 **from the stockpiles, prior to receiving an Authority to Construct/Permit to**
2 **Operate from the District is a violation of the air pollution regulations and is**
3 **subject to civil or criminal penalties prescribed in the California Health and**
4 **Safety Code. Any such activity will also violate the Abatement Order issued by**
5 **the District Hearing Board.**

6 This Letter was overbroad in its application of the ruling made by the SMAQMD Board as the
7 Board stated in its order that Hardesty and his employees were to (1) "cease and desist from
8 operation of any and all unpermitted and unregistered internal combustion engines with a
9 horsepower greater than 50 at any location within the District's boundaries," and (2) "cease and
10 desist from operation of the Central Plant Equipment (or any equipment that replaces or
11 supplements the Central Plant Equipment) unless and until they obtain from the SMAQMD an
12 Authority to Construct and Permit to Operate as required by SMAQMD Rule 201." Further, this
13 letter overreaches SMAQMD's jurisdiction as defined by CARB. CARB's intervening brief
14 submitted in opposition to Hardesty's Petition for Writ of Mandate specifically stated "The State Air
15 Board has exclusive authority over the regulation of mobile sources of air pollution and the fuels
16 they use" and "Local air districts . . . have primary authority of stationary sources." CARB's
17 intervening brief makes no mention of SMAQMD or CARB's authority over "any type of operation
18 at the facility, including . . . the movement of aggregate from the stockpiles." In fact, CARB's brief
19 explicitly stated that "the issue in this action is . . . not whether the Hardestys may continue their
20 mining operations at the Hardesty facility." Despite this, SMAQMD's August 19, 2010 letter
21 attempts to totally restrict the Hardesty mining operations.

22 **Sacramento State Board of Supervisors Review of Vested Legal**

23 **Non-Conforming Use**

24 52. The Hardesty Mine is operated pursuant to a vested legal non-conforming use
25 granted by the County of Sacramento in 1994. However, on April 14, 2010, the owner of the Mine,
26 Jay Schneider received a notice from the County of Sacramento stating that an investigation had
27 revealed that the mining operation had expanded in violation of zoning requirements. Despite
28 Schneider's vested right to mine, the County of Sacramento notified Schneider that he could either
(1) obtain a rezone and a conditional use permit; or (2) cease the mining operation within 90 days.
The County noted that if neither of these courses of action were taken by July 14, 2010 one or more

1 of the following actions would be taken: (1) a hearing before a County appointed Hearing Officer to
2 declare the property a public nuisance, (2) referral of the case to the County Counsel's Office to
3 initiate legal action, (3) a public hearing to revoke any use permit or other discretionary permit,
4 and/or (4) referral of the case to the District Attorney's office for criminal prosecution.

5 53. Schneider appealed the notice of violation citing the vested legal non-conforming
6 use. The appeal was scheduled to be heard on May 23, 2010, but was continued to July 13, 2010.

7 54. On July 6, 2010 Mr. Schneider requested that the hearing be continued to October
8 13, 2010. On July 8, 2010 counsel for Teichert wrote a letter to the County Board of Supervisors
9 requesting that Schneider's appeal be denied.

10 55. The County Board of Supervisors continued the hearing to October 13, 2010.

11 **COUNT ONE**

12 **(Violation of the Clean Air Act Against SMAQMD, Sacramento County,**

13 **David Gross, and James Goldstene)**

14 56. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 55 above, and
15 incorporate those allegations herein by this reference.

16 57. The herein above described actions by Defendants SMAQMD, Sacramento County,
17 David Gross, and James Goldstene, acting under the color of state law, county ordinances,
18 regulations, customs and usage of regulations and authority, individually and in their official
19 capacity, have violated § 7543 of the federal Clean Air Act ("CAA") through their ordinances,
20 resolutions, customs and usage of regulations policy and practice of (1) regulating construction
21 equipment under 175 horsepower; (2) enforcing state law regulating construction equipment under
22 175 horsepower; (3) declaring the entire Mine a single location in violation of 40 CFR 89.2; and
23 (4) issuing an order that Plaintiffs cannot operate any piece of mechanical equipment to load rock at
24 Plaintiffs' plant.

25 58. The herein above described actions by Defendants SMAQMD, Sacramento County,
26 David Gross, and James Goldstene acting under the color of state law, county ordinances,
27 regulations, customs and usage of regulations and authority, individually and in their official
28 capacity, have violated § 7543 of the federal CAA by creating an "emission standard" that prohibits

1 emission levels of PM, NOx, Sox in excess of 2 pounds per day without purchasing a permit. The
2 quantitative level can only be calculated by the use of techniques, controls, and technology.

3 59. As a direct and proximate result of the foregoing, Plaintiffs have incurred substantial
4 costs arising from SMAQMD, Sacramento County, David Gross, and James Goldstene's improper
5 enforcement of Rule 201, including without limitation costs associated with obtaining permits, the
6 loss of Hardesty's business, as well as substantial costs in defending civil and criminal prosecutions,
7 all to the Plaintiffs' damage in an amount according to proof at trial.

8 60. Plaintiffs are further entitled to their attorneys fees pursuant to 42 U.S.C. § 1988.

9 61. Plaintiffs are further entitled to equitable relief, including, without limitation, an
10 injunction requiring SMAQMD, Sacramento County, David Gross, and James Goldstene, to allow
11 Hardesty to operate his mine with the engines in question without obtaining a permit under Rule
12 201; an order enjoining SMAQMD, Sacramento County, David Gross, and James Goldstene from
13 enforcing Rule 201 against those engines under 175 horsepower; an order requiring that SMAQMD,
14 Sacramento County, David Gross, and James Goldstene define "fixed location" as CARB has; and
15 an order enjoining SMAQMD, Sacramento County, David Gross, and James Goldstene from
16 enforcing Rule 201 against non-stationary engines.

17 **COUNT TWO**

18 **(Violation of 42 U.S.C. § 1983 Through Violation of The Due Process Clause of the**
19 **Fourteenth Amendment and the Supremacy Clause Against SMAQMD,**
20 **Sacramento County, David Gross, and James Goldstene)**

21 62. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 61 above, and
22 incorporate those allegations herein by this reference.

23 63. The herein above described actions by Defendants SMAQMD, Sacramento County,
24 David Gross, and James Goldstene, acting under the color of state law, county ordinances,
25 regulations, customs and usage of regulations and authority, individually and in their official
26 capacity, and in violation of 42 U.S.C. § 1983 have deprived Plaintiffs of their rights under the
27 Supremacy Clause, as well as their rights privileges or immunities secured by the Due Process
28 Clause of the Fourteenth Amendment. Specifically Defendants SMAQMD, Sacramento County,

1 David Gross, and James Goldstene have deprived Plaintiffs of their rights under the Supremacy
2 Clause and Due Process Clause through their ordinances, resolutions, customs and usage of
3 regulations policy and practice of (1) regulating construction equipment under 175 horsepower;
4 (2) enforcing state law regulating construction equipment under 175 horsepower; (3) declaring the
5 entire Mine a single location in violation of 40 CFR 89.2; and (4) issuing an order that Plaintiffs
6 cannot operate any piece of mechanical equipment to load rock at Plaintiffs' plant.

7 64. Similarly, Defendants SMAQMD, Sacramento County, David Gross, and James
8 Goldstene have deprived Plaintiffs of their rights under the Supremacy Clause and Due Process
9 Clause through their ordinances, resolutions, customs and usage of regulations policy and practice
10 by creating an "emission standard" that prohibits emission levels of PM, NOx, SOx in excess of
11 2 pounds per day without purchasing a permit. The quantitative level can only be calculated by the
12 use of techniques, controls, and technology.

13 65. As a direct and proximate result of the foregoing, Plaintiffs have incurred substantial
14 costs arising from SMAQMD, Sacramento County, David Gross, and James Goldstene's
15 enforcement of Rule 201 including, without limitation, costs associated with obtaining permits, the
16 loss of Hardesty's business, as well as substantial costs in defending civil and criminal prosecutions,
17 all to the Plaintiffs' damage in an amount according to proof at trial.

18 66. Defendants engaged in such actions maliciously, willfully, and knowingly.
19 Accordingly, Plaintiffs are entitled to punitive damages.

20 67. Plaintiffs are further entitled to their attorneys fees pursuant to 42 U.S.C. § 1988.

21 68. Plaintiffs are further entitled to equitable relief, including, without limitation, an
22 injunction requiring SMAQMD to withdraw its Order of Abatement; an injunction requiring
23 SMAQMD, Sacramento County, David Gross, and James Goldstene to allow Hardesty to operate
24 his mine with the engines in question without obtaining a permit under Rule 201; an order enjoining
25 SMAQMD, Sacramento County, David Gross, and James Goldstene from enforcing Rule 201
26 against those engines under 175 horsepower; an order requiring that SMAQMD define "fixed
27 location" as CARB has; and an order enjoining SMAQMD, Sacramento County, David Gross, and
28 James Goldstene from enforcing Rule 201 against non-stationary engines.

COUNT THREE

**(Violation of 42 U.S.C. § 1983 Through Violation of the Fifth and
Fourteenth Amendments Against OMR, Gay Norris, and Dennis O'Bryant)**

69. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 68 above, and incorporate those allegations herein by this reference.

70. Defendants OMR, Gay Norris, and Dennis O'Bryant, acting under the color of state law, county ordinances, regulations, customs and usage of regulations and authority, individually and in their official capacity, and in violation of 42 U.S.C. § 1983, have deprived Plaintiffs of the rights, privileges or immunities secured by the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments.

71. Defendants OMR, Gay Norris, and Dennis O'Bryant have violated Plaintiffs' rights to procedural due process by removing Plaintiffs' business, HSG, from the AB 3098 List without due process of law after placing HSG on the AB 2098 list for three months.

72. Defendant OMR, Gay Norris, and Dennis O'Bryant have violated Plaintiffs' right to substantive due process by instructing various truckers, under the threat of litigation, not to buy mined materials from Hardesty.

73. Defendants OMR, Gay Norris, and Dennis O'Bryant have violated Plaintiffs' rights to equal protection by intentionally and irrationally singling out Plaintiffs for unwarranted removal from the AB 3098 List.

74. As a direct and proximate result of the foregoing, Plaintiffs have incurred substantial costs arising from Plaintiffs' inability to sell its mined materials to state or local agencies, including, without limitation, lost profits, all to the Plaintiffs' damage in an amount according to proof at trial.

75. Defendants engaged in such actions maliciously, willfully, and knowingly. Accordingly, Plaintiffs are entitled to punitive damages.

76. Plaintiffs are further entitled to their attorneys fees pursuant to 42 U.S.C. § 1988.

77. Plaintiffs are further entitled to equitable relief, including, without limitation, an injunction requiring Defendants OMR, Gay Norris, and Dennis O'Bryant to withdraw OMR's false

1 allegations against Hardesty; and an injunction requiring Defendants OMR, Gay Norris, and Dennis
2 O'Bryant to include Hardesty on the AB 3098 List.

3 **COUNT FOUR**

4 **(Violation of 42 U.S.C. § 1983 Through Violation of The Right to Due Process**
5 **Protected by the Due Process Clause of the Fifth and Fourteenth Amendments**
6 **Against SMGB and Steve Testa)**

7 78. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 77 above, and
8 incorporate those allegations herein by this reference.

9 79. Defendants SMGB and Steve Testa, acting under the color of state law, county
10 ordinances, regulations, customs and usage of regulations and authority, individually and in their
11 official capacity, and in violation of 42 U.S.C. § 1983, have deprived Plaintiffs of the rights,
12 privileges or immunities secured by the Due Process Clause of the Fifth and Fourteenth
13 Amendments.

14 80. Defendant SMGB and Steve Testa have violated Plaintiffs' right to procedural due
15 process by refusing Plaintiffs' request for an appeal of OMR's decision to remove Hardesty from
16 the AB 3098 List.

17 81. As a direct and proximate result of the foregoing, Plaintiffs have incurred substantial
18 costs arising from Plaintiffs' inability to sell its mined materials to state or local agencies, including,
19 without limitation, lost profits, all to the Plaintiffs' damage in an amount according to proof at trial.

20 82. Defendants engaged in such actions maliciously, willfully, and knowingly.
21 Accordingly, Plaintiffs are entitled to punitive damages.

22 83. Plaintiffs are further entitled to their attorneys fees pursuant to 42 U.S.C. § 1988.

23 84. Plaintiffs are further entitled to equitable relief, including, without limitation, an
24 injunction requiring SMGB and Steve Testa to have Hardesty placed back on the AB 3098 List.

COUNT FIVE

(*Bivens* Action for Violation of The Right to Due Process Protected by the Due Process Clause of the Fifth Amendment and the Right to be Free From Unreasonable Searches Under the Fourth Amendment Against Zachary Simmons)

85. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 84 above, and incorporate those allegations herein by this reference.

86. Defendant Zachary Simmons, acting under the color of federal authority, has deprived Plaintiffs of the rights, privileges or immunities secured by the Due Process Clause of the Fifth Amendment and has violated Plaintiffs' rights to be free from unreasonable search and seizure under the Fourth Amendment under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

87. Defendant Zachary Simmons has violated Plaintiffs' right to procedural due process by issuing a cease and desist letter demanding that Hardesty stop all operations at the Mine without any notice, hearing, or opportunity for appeal.

88. Defendant Zachary Simmons has violated Plaintiffs' right to be free from unreasonable search and seizure under the Fourth Amendment by conducting an unwarranted search of the Mine.

89. As a direct and proximate result of the foregoing, Plaintiffs have been damaged in an amount according to proof at trial.

90. Plaintiffs are further entitled to their attorneys fees pursuant to 42 U.S.C. § 1988.

91. Plaintiffs are further entitled to equitable relief, including, without limitation, an injunction requiring Zachary Simmons to withdraw the USACE cease and desist letter; an injunction requiring Zachary Simmons to cease investigating Hardesty; an order enjoining Zachary Simmons from reentering the Mine without a warrant.

COUNT SIX

**(Violation of 42 U.S.C. § 1983 Through Violation of the Fourth Amendment Protection
Against Unreasonable Search and Seizure Against Liz Gregory and DFG)**

92. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 91 above, and incorporate those allegations herein by this reference.

93. Defendants Liz Gregory and DFG, acting under the color of state law, county ordinances, regulations, customs and usage of regulations and authority, individually and in their official capacity, and in violation of 42 U.S.C. § 1983, have deprived Plaintiffs of the right against unlawful search and seizure provided by the Fourth Amendment.

94. As a direct and proximate result of the foregoing, Plaintiffs have been damaged in an amount according to proof at trial.

95. Defendants engaged in such actions maliciously, willfully, and knowingly. Accordingly Plaintiffs are entitled to punitive damages.

96. Plaintiffs are further entitled to their attorneys fees pursuant to 42 U.S.C. § 1988.

97. Plaintiffs are further entitled to equitable relief, including, without limitation, an injunction requiring Liz Gregory and DFG to cease its investigation of Hardesty; and an order enjoining Liz Gregory and DFG from reentering the Mine without a warrant.

COUNT SEVEN

**(Violation of U.S.C. § 1983 Through Violation of the Due Process Clause of the Fifth and
Fourteenth Amendments Against Sacramento County and Robert Sherry)**

98. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 97 above, and incorporate those allegations herein by this reference.

99. Defendants Sacramento County and Robert Sherry, acting under the color of state law, county ordinances, regulations, customs and usage of regulations and authority, individually and in their official capacity, and in violation of 42 U.S.C. § 1983, have deprived Plaintiffs of the rights, privileges or immunities secured by the Due Process Clause of the Fifth and Fourteenth Amendments by arbitrarily, intentionally and irrationally initiating proceedings to rehear and redetermine whether or not a vested legal non-conforming use exists.

1 100. As a direct and proximate result of the foregoing, Plaintiffs have been damaged in an
2 amount according to proof at trial.

3 101. Defendants engaged in such actions maliciously, willfully, and knowingly.
4 Accordingly Plaintiffs are entitled to punitive damages.

5 102. Plaintiffs are further entitled to their attorneys fees pursuant to 42 U.S.C. § 1988.

6 103. Plaintiffs are further entitled to equitable relief, including, without limitation, an
7 order enjoining Sacramento County and Robert Sherry from redetermining the vested legal non-
8 conforming use; and an order enjoining Sacramento County and Robert Sherry from removing the
9 vested legal non-conforming use.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, the Plaintiffs pray for judgment against the Defendants as follows:

12 1. For damages from Defendants SMAQMD, Sacramento County, David Gross, and
13 James Goldstene in an amount according to proof at trial;

14 2. For equitable relief including, without limitation, an injunction requiring SMAQMD,
15 Sacramento County, David Gross, and James Goldstene to allow Hardesty to operate his mine with
16 the engines in question without obtaining a permit under Rule 201; an order enjoining SMAQMD,
17 Sacramento County, David Gross, and James Goldstene from enforcing Rule 201 against those
18 engines under 175 horsepower; an order requiring that SMAQMD define “fixed location” as CARB
19 has; and an order enjoining SMAQMD, Sacramento County, David Gross, and James Goldstene
20 from enforcing Rule 201 against non-stationary engines;

21 3. For compensatory and punitive damages from Defendants SMAQMD, Sacramento
22 County, David Gross, and James Goldstene in an amount according to proof at trial;

23 4. For equitable relief, including, without limitation, an injunction requiring SMAQMD
24 to withdraw its Order of Abatement; an injunction requiring SMAQMD, Sacramento County, David
25 Gross, and James Goldstene to allow Hardesty to operate his mine with the engines in question
26 without obtaining a permit under Rule 201; an order enjoining SMAQMD, Sacramento County,
27 David Gross, and James Goldstene from enforcing Rule 201 against those engines under 175
28 horsepower; an order requiring that SMAQMD define “fixed location” as CARB has; and an order

1 enjoining SMAQMD, Sacramento County, David Gross, and James Goldstene from enforcing Rule
2 201 against non-stationary engines;

3 5. For compensatory and punitive damages from Defendant OMR, Gay Norris, and
4 Dennis O'Bryant in an amount according to proof at trial;

5 6. For equitable relief, including, without limitation, an injunction requiring OMR, Gay
6 Norris, and Dennis O'Bryant to withdraw OMR's false allegations against Hardesty; and an
7 injunction requiring OMR, Gay Norris, and Dennis O'Bryant to include Hardesty on the AB 3098
8 List;

9 7. For compensatory and punitive damages from Defendant SMGB and Steve Testa in
10 an amount according to proof at trial;

11 8. For equitable relief, including, without limitation, an injunction requiring SMGB and
12 Steve Testa to have Hardesty placed back on the AB 3098 List;

13 9. For damages from Defendant Zachary Simmons in an amount according to proof at
14 trial;

15 10. For equitable relief, including, without limitation, an injunction requiring Zachary
16 Simmons to withdraw its cease and desist letter; an injunction requiring Zachary Simmons to cease
17 investigating Hardesty; an order enjoining Zachary Simmons from reentering the Mine without a
18 warrant;

19 11. For compensatory and punitive damages from Defendant Liz Gregory and DFG in an
20 amount according to proof at trial;

21 12. For equitable relief, including, without limitation, an injunction requiring Liz
22 Gregory and DFG to cease investigating Hardesty; an order enjoining Liz Gregory and DFG from
23 reentering the Mine without a warrant;

24 13. For compensatory and punitive damages from Sacramento County and Robert Sherry
25 in an amount according to proof at trial;

26 14. For equitable relief, including, without limitation, a order enjoining Sacramento
27 County and Robert Sherry from redetermining the vested legal non-conforming use; and an order
28

1 enjoining Sacramento County and Robert Sherry from removing the vested legal non-conforming
2 use;

- 3 15. For attorneys' fees pursuant to 42 U.S.C. § 1988;
4 16. For pre-judgment interest at the appropriate legal rate;
5 17. For the costs of suit incurred herein;
6 18. For such other and further relief as the Court deems just and proper.

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DATED: September 8, 2010

DIANE ANDERSON
Attorney at Law

By: /S/ DIANE ANDERSON
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