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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH HARDESTY and YVETTE
HARDESTY,

Plaintiffs,

v.

SACRAMENTO METROPOLITAN AIR
QUALITY MANAGEMENT DISTRICT,
et al.,

Defendants.

No. 2:10-cv-2414-KJM-KJN

JAY SCHNEIDER, et al.,

Plaintiffs,

v.

COUNTY OF SACRAMENTO, et al.,

Defendants.

No. 2:12-cv-2457-KJM-KJN

ORDER

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1 I. INTRODUCTION

2 Between 2008 and 2012, California and Sacramento County regulators
3 investigated reports that the Hardesty and Schneider families were operating a sand and gravel
4 mine illegally on the Schneiders' ranch. As a result, the mining operation was eventually closed.

5 The investigation followed a long period of regulatory disinterest. The Hardestys
6 and Schneiders allege the State and County were spurred into action not by their discovery of any
7 actual legal violations, but by their desire to appease competitors and legislators motivated by
8 campaign contributions. The Hardestys and Schneiders each filed a lawsuit in federal court,
9 claiming the County and State deprived them of constitutional rights under the First, Fourth, and
10 Fourteenth Amendments. The cases were partially consolidated, and are now before the court on
11 the parties' cross motions for summary judgment. The motions are granted and denied in part.

12 II. EVIDENTIARY OBJECTIONS

13 In this order the court does not individually address the hundreds of evidentiary
14 objections listed by the parties in their separate statements of disputed and undisputed facts and
15 elsewhere. Many objections relate to evidence that is not material; these objections are overruled
16 as moot. Other objections are moot because the court does not consider the parties'
17 characterizations of the record, but the record itself. *See, e.g.*, Hardesty Resp. State Defs.' Stmt.
18 Undisp. Mat. Facts (Hardesty UMF) no. 22, ECF No. 233 (objecting to counsel's characterization
19 of evidence as a legal conclusion or argument). Many other objections are unsupported by
20 explanation or argument; the court overrules these objections summarily. *See, e.g., id.* at 68;
21 Hardesty Resp. County Defs.' Stmt. Disp. Facts no. 1, ECF No. 231.

22 To the extent the discussion below relies on evidence the parties object to as
23 hearsay, the court has in most instances interpreted the evidence for its value beyond the truth of
24 the statements in question, for example, as reporting a person's or agency's conclusions rather
25 than the truth of those conclusions. *See, e.g.*, Wesling Decl. ¶¶ 8–9, ECF No. 222-5; *id.* Ex. A,
26 ECF No. 222-6. And in many instances, when the party who objects on the basis of hearsay is the
27 one who moves for summary judgment, the purported hearsay evidence could be presented in
28 admissible form at trial; these objections are overruled. *See, e.g., Fraser v. Goodale*, 342 F.3d

1 1032, 1037 (9th Cir. 2003) (considering hearsay evidence offered by the non-moving party on
2 review of summary judgment when the underlying facts could be presented in admissible form at
3 trial).

4 Finally, many of the defendants' objections concern evidence the Hardestys and
5 Schneiders offer to show regulators were motivated by politics, not violations of the law. *See*,
6 *e.g.*, Gregory Objections, ECF No. 254; State Defs.' Objections, ECF No. 256-3. The court
7 reviews this evidence separately in detail below.

8 III. GENERAL FACTUAL BACKGROUND

9 A. The Mine, Hardesty Sand and Gravel, and the Cosumnes River¹

10 Jay Schneider and his family own the Schneider Historic Mine, "the Mine" for
11 purposes of this order. Joint Statement of Undisputed Facts (JSUF) no. 22, ECF No. 216.² The
12 Mine consists of 3,691 acres in eastern Sacramento County on a ranch that has been in the
13 Schneider family since 1906. JSUF no. 23; Schneider Decl. ¶ 1, ECF No. 219-2. It includes land
14 adjacent to the south bank of the Cosumnes River. JSUF no. 25.

15 The Cosumnes River is a tributary of the Sacramento River that runs from the east
16 in El Dorado County to the Sacramento and San Joaquin River Delta in the west. *See* Taras Decl.
17 ¶ 17, ECF No. 222-11. The River is one of the few undammed, free-flowing rivers on the
18 western slope of the Sierra Nevada Mountains. In the 1980s and 1990s, it flooded up into part of
19 the Schneider's ranch. *See* Schneider Dep. 225–27.

20 Until the fall of 2010, Joseph and Yvette Hardesty operated a surface mine on the
21 Schneiders' ranch, Hardesty Sand & Gravel (HSG), under an oral agreement between
22 Mr. Hardesty and the Schneiders. JSUF no. 69; Hardesty Decl. ¶¶ 4–7, ECF No. 247; Hardesty
23 UMF no. 17. Under this agreement, the Hardestys have exclusive control over the Mine and
24 related processing areas. Hardesty Decl. ¶ 6. They lease the Mine from the Schneiders. *Id.* ¶ 5.

25 ¹ In several record documents, "Cosumnes" is spelled using an epenthetic [n], reflective of
26 the common local pronunciation, i.e., "Consumnes." *See, e.g.*, Balestreri Decl. Ex. U, at
27 OMR000280, ECF No. 222-17. The court has not noted or changed this alternative spelling when
28 quoting from the record.

² Unless otherwise noted, electronic case file number citations are to the docket in the
Hardesty action, No. 10-2414.

1 The Hardestys do not own any of the real property at the Mine, and they do not have any home on
 2 the Mine property. JSUF no. 69. Although mining operations have ceased, the Hardestys' lease
 3 remains in place to date, and if the Hardestys could overcome the regulatory problems that are the
 4 subject of this lawsuit, HSG could resume operations. Hardesty Decl. ¶ 12.

5 B. The California Surface Mining and Reclamation Act of 1975

6 One statutory regime sits at the center of this case: the California Surface Mining
 7 and Reclamation Act of 1975 (SMARA), Cal. Pub. Res. Code § 2710 *et seq.*³ In general,
 8 SMARA is meant to prevent or minimize the adverse environmental impacts associated with
 9 surface mining, to allow mined spaces to be used again safely for other purposes after mining
 10 operations cease, and to balance mining production with competing recreational, ecological, and
 11 aesthetic concerns. *See* Cal. Pub. Res. Code § 2712; *Calvert v. Cty. of Yuba*, 145 Cal. App. 4th
 12 613, 617 (2006). Under SMARA, a surface mine operator must do three things: (1) obtain a
 13 permit, (2) operate under a reclamation plan, and (3) pledge sufficient financial assurances to
 14 follow through on the reclamation plan. *See* Cal. Pub. Res. Code § 2770(a); *People ex rel. Dep't*
 15 *of Conservation v. El Dorado Cty.*, 36 Cal. 4th 971, 984 (2005). A local agency or “lead agency,”
 16 usually a city or county, is responsible for issuing the permit and approving the reclamation plan
 17 and financial assurances. *See* Cal. Pub. Res. Code §§ 2770(a), (d); *Calvert*, 145 Cal. App. 4th
 18 at 618. The County itself is the lead agency in Sacramento County. Gamel Decl. ¶ 3, ECF
 19 No. 218-8.

20 A reclamation plan must show how the mined area will be reclaimed, i.e., restored
 21 and repurposed, after its operations have ceased. *See Dep't of Conservation*, 36 Cal. 4th at 981
 22 (citing Cal. Pub. Res. Code § 2770(a)). The reclamation plan must clarify how the mined land
 23 will be treated to minimize environmental impacts. *Id.* (citing Cal. Pub. Res. Code § 2773⁴).

24 _____
 25 ³ After the events of this case, California passed Assembly Bill 1142, which amended
 26 several of SMARA's provisions. *See* 2016 Cal. Legis. Serv. Ch. 7 (West) (approved by the
 27 Governor and chaptered by the Secretary of State on April 18, 2016). The parties have not
 suggested this amendment has retroactive effect, and the court assumes in this order that it does
 not. “Generally, statutes operate prospectively only.” *McClung v. Empt. Dev. Dep't*, 34 Cal. 4th
 467, 475 (2004) (citation and quotation marks omitted).

28 ⁴ “The reclamation plan shall be applicable to a specific piece of property or properties,
 shall be based upon the character of the surrounding area and such characteristics of the property

1 Financial assurances are pledges of funds sufficient to pay for the reclamation
2 plan. *Id.* (citing Cal. Pub. Res. Code § 2773.1(a)(1)). Financial assurance cost estimates, or
3 “FACEs,” are reports of a mine’s operations that estimate the costs of remediation. They may be
4 prepared by a third-party engineer engaged by the mine operator. *See* Sacramento County Code
5 § 20.04.080(D); Storelli Dep. 70–71. Financial assurance mechanisms, or “FAMs,” are the
6 financial instruments themselves.

7 SMARA’s permitting rule is subject to an exception. If a person has obtained a
8 “vested right to conduct surface mining operations prior to January 1, 1976,” SMARA does not
9 require that person to obtain a permit. Cal. Pub. Res. Code § 2776(a). A person has a “vested
10 right” if, “prior to January 1, 1976, the person has, in good faith and in reliance upon a permit or
11 other authorization, if the permit or other authorization was required, diligently commenced
12 surface mining operations and incurred substantial liabilities for work and materials necessary for
13 the surface mining operations. . . .” *Id.* This exception applies only “as long as no substantial
14 changes are made in the operation except in accordance with [SMARA].” *Id.* The vested rights
15 exception applies only to the permitting requirement. *See* Cal. Pub. Res. Code § 2776(a);
16 *Calvert*, 145 Cal. App. 4th at 617. That is, a surface mining operation with vested rights is not
17 relieved of its obligation to obtain approval of its reclamation plan and to provide approved
18 financial assurances. *Calvert*, 145 Cal. App. 4th at 617.

19 C. A Review of the Relevant California Regulatory Bodies

20 A gaggle of state regulatory bodies enforce SMARA.⁵ First, the State Mining and
21 Geology Board (the Mining Board) establishes policies and regulations to implement SMARA,
22 among other duties. *See* Cal. Pub. Res. Code § 2755. Second, the Mining Board is part of the
23 Department of Conservation (DOC), which is led by the Director of Conservation, an officer
24 appointed by the Governor. *Id.* § 601. Third, the Office of Mine Reclamation (OMR) is a

25 as type of overburden, soil stability, topography, geology, climate, stream characteristics, and
26 principal mineral commodities, and shall establish site-specific criteria for evaluating compliance
27 with the approved reclamation plan, including topography, revegetation and sediment, and
28 erosion control.” Cal. Pub. Res. Code § 2773(a).

⁵ The California Supreme Court’s decision in *People ex rel. Department of Conservation*
provides a summary of the relevant regulatory environment. *See* 36 Cal. 4th at 983–86.

1 department within the DOC. Cal. Pub. Res. Code § 607(d). Fourth, the DOC is in the Natural
2 Resources Agency, along with about twenty other entities. Cal. Gov't Code § 12805(a). The
3 head of the Natural Resources Agency is its Secretary. *Id.* §§ 12800(b), 12801.

4 Another entity within the Natural Resources Agency is the Central Valley Flood
5 Protection Board (the Flood Board). Cal. Gov't Code § 12805(a). It has several responsibilities
6 related to flood control in California's Central Valley. *See* Cal. Water Code § 8520 *et seq.* The
7 Flood Board has no direct connection to SMARA, but as the circumstances of this case
8 demonstrate, it may become involved with the regulation of surface mining.

9 Finally, the California Department of Fish and Wildlife (formerly the Department
10 of Fish and Game, or "DFG") is another member of the Natural Resources Agency. *See* Cal.
11 Gov't Code § 12805(a). Like the Flood Board, DFG has no direct responsibility over surface
12 mining, but its authority to enforce the California Fish and Game Code may bring it into contact
13 with surface mining operations, as was the case here.

14 D. The "AB 3098 List"

15 The California Public Resources Code charges the DOC with maintaining a list of
16 surface mining operations that comply with SMARA. *See* Cal. Pub. Res. Code § 2717(b). This
17 list is commonly referred to as the "AB 3098 list" after California Assembly Bill 3098, its
18 enacting legislation. *See* 1992 Cal. Legis. Serv. Ch. 1077 (West). The California Public Contract
19 Code prohibits state agencies from purchasing materials produced by any operation that is not
20 included on the AB 3098 list. *See* Cal. Pub. Cont. Code §§ 10295.5(a), 20676. OMR is
21 responsible for maintaining, publishing, and otherwise administering the AB 3098 list. JSUF
22 no. 54.

23 E. A General Timeline of Events

24 1. Early History through the 2000s

25 As noted above, the Mine has been in the Schneider family for a century.
26 Schneider Decl. ¶ 1, ECF No. 219-2. The Mine's early history is the subject of a number of
27 disagreements among the parties to this case. It is enough to say that Jay Schneider and his father
28 actively participated in mining operations on the Ranch throughout the 1970s and into the early

1 1980s, *id.*, and that at some time in the 1980s, HSG began its lease and surface mining operations
2 on the Mine under an oral contract, JSUF no. 69; Hardesty Decl. ¶¶ 5–6; Hardesty UMF no. 17.

3 In 1990, the Sacramento County Zoning Enforcement Office received a complaint
4 that illegal surface mining was taking place on the Schneider’s ranch. *See* Balestreri Decl. ¶ 7,
5 ECF No. 222-14; *id.* Ex. A, ECF No. 222-15; Schneider Decl. Ex. 3, ECF No. 219-5. An
6 inspector visited the Mine and “verified” the complaint. Schneider Decl. Ex. 3. After the
7 inspection, the County determined that no use permit or reclamation plan had been approved for
8 the Mine, so it ordered the Schneiders to stop mining activity immediately. *Id.* Schneider
9 responded that the Mine was exempt from regulation because it was subject to a vested right. *See*
10 Schneider Decl. ¶¶ 6–9.

11 Approximately two years later, the County asked Schneider to support his claim of
12 a vested right by submitting documentation that surface mining operations had been ongoing
13 since before 1976. *See id.* ¶¶ 11–12; *id.* Ex. 8, at 2, ECF No. 219-10; *id.* Ex. 9, at 1, ECF
14 No. 219-11. The record suggests Schneider first provided the requested documentation in 1994.
15 *See* Schneider Decl. ¶¶ 13–14; *id.* Exs. 10, 11, ECF Nos. 219-12, 219-13. Schneider cited several
16 documents, including soil maps, topographical maps, aerial photos, and assessors’ records. *See*
17 *id.* Ex. 11, at 1–2. He also sent declarations from two neighbors who reported their personal
18 knowledge that surface mining had been ongoing on the ranch since the 1940s. *See* Schneider
19 Decl. ¶ 14; *id.* Ex. 11, at 7–8, ECF No. 219-13.

20 In August 1994, a Sacramento County Senior Planner informed Schneider the
21 County had received his information and had accepted it as evidence of a vested right. Schneider
22 Decl. ¶ 17; *id.* Ex. 13, ECF No. 219-15; *see also* Balestreri Decl. ¶ 8; *id.* Ex. B, ECF No. 222-15.
23 The County specifically referred to a “Gravel Mining Operation” at “Parcel Nos. 128-0090-
24 035/037; Zone: AG-80.” Schneider Decl. Ex. 13. These parcels were later divided and
25 renumbered as 128-0090-039 to 042. Gamel Decl. ¶ 8. The County did not require Schneider to
26 obtain a use permit, but it did require a reclamation plan and financial assurances for all mining
27 activities since January 1, 1976. Schneider Decl. Ex. 13. Schneider was allowed thirty days to

28 ////

1 submit a reclamation plan and financial assurances, and the County warned that his failure to
2 comply may result in legal action. *Id.*

3 Despite the County's warning, it appears Schneider did not develop a reclamation
4 plan or obtain financial assurances, and no evidence suggests he requested more time. Also, no
5 inspections or other enforcement actions occurred for several years.

6 In July 1999, OMR, the state agency, inspected the Mine and reported mining
7 operations were "very active." Balestreri Decl. ¶ 9; *id.* Ex. C, ECF No. 222-15; *see also* JSUF
8 no. 31. HSG was reportedly removing material from old dredge tailings without "rhyme or
9 reason," and "holes" and "pits" were found throughout a "large area." Balestreri Decl. Ex. C.
10 According to the OMR report, the Mine had no reclamation plan or financial assurances, and the
11 Hardestys had told the inspector the Mine was "vested." *Id.*

12 After the OMR inspection, Schneider submitted the Mine's annual reports to OMR
13 for the years 1995 through 1998. JSUF no. 32; *see also* Balestreri Decl. ¶ 10; *id.* Ex. D, ECF
14 No. 222-15. Each of these documents reported that (1) HSG operates the Mine; (2) the Mine is
15 active; (3) the site is vested; and (4) the County had not performed its annual inspection. JSUF
16 no. 33. The OMR's records also show Schneider's attorney expected to submit a reclamation
17 plan and financial assurances to the County by late 1999. *See* Balestreri Decl. ¶ 12; *id.* Ex. F,
18 ¶ 10, ECF No. 222-15. But as of June 2000, the County had received no reclamation plan or
19 financial assurances. *Id.* ¶ 20.

20 In June 2000, the County sent Schneider a "Notice and Order Imposing
21 Administrative Penalty" of \$10,000 for "failure to provide a lead agency approved reclamation
22 plan and financial assurance[s]." *Id.* ¶ 12; *id.* Ex. F, at OMR008170. The notice and order were
23 appealable to the State Mining and Geology Board. *See id.* Ex. F, at OMR 8170-71. Schneider
24 and Hardesty did appeal, and the Mining and Geology Board affirmed the penalty after a hearing.
25 *See generally id.* Ex. I, ECF No. 222-15. The Sacramento County Superior Court, however,
26 granted Schneider's petition to set aside the penalty in June 2002, generally because the County
27 did not first give notice of the penalty or conduct a hearing. *See* Balestreri Decl. ¶ 16; *id.* Ex. J,
28 ECF No. 222-15.

1 Schneider and Hardesty eventually submitted an application for a reclamation
2 plan. The County requested assistance from the DOC during its review of Schneider's
3 application, Balestreri Decl. Ex. G, ECF No. 222-15, and OMR agreed to help, Hardesty Stmt.
4 Ex. 28, ECF No. 248-7. Over the next few years, Schneider developed a reclamation plan. JSUF
5 no. 34; Balestreri Decl. Ex. K, ECF No. 222-15. The County Board of Supervisors reviewed a
6 draft plan in August 2002, *see generally* Hardesty Stmt. Ex. 26, ECF No. 248-6, and a final
7 reclamation plan was approved in November 2002. *See* Balestreri Decl. ¶ 18; *id.* Ex. L, ECF No.
8 222-16; Hardesty Stmt. Ex. 6, ECF No. 248-1; Hardesty UMF no. 38. The 2002 reclamation plan
9 has never been amended. JSUF no. 67.

10 The reclamation plan describes the mining operation this way:

11 Material is excavated and classified, processed and stockpiled in
12 anticipation of market demand and seasonal considerations. When
13 the stockpiles are sufficiently diminished to justify further
14 excavation or when there is an actual or anticipated market demand
for a particular material, then such material is excavated, classified
or processed as necessary and prudent, thus avoiding unnecessary
excavation.

15 Balestreri Decl. Ex. L, at OMR007951, ECF No. 222-16. The plan anticipated a “low annual
16 average of sand and gravel mined,” so reclamation was determined to proceed in annual phases.
17 *Id.* It also anticipated mining would proceed in three phases. *Id.* The first area would be mined
18 between 2003 and 2023, the second between 2023 and 2063, and the third after 2063. *Id.*

19 At the time the reclamation plan was approved, demand for HSG's products was
20 tepid. Hardesty Decl. ¶ 20. But between 2003 and 2008, demand increased. *See id.* ¶ 21.
21 Reports submitted to the OMR and Sacramento County show production volumes increased by a
22 factor of ten between 1995 and 2003, and by six between 2003 and 2008. Gamel Decl. ¶ 11. In
23 2005, HSG began excavating material from large pits in an area just south of the Cosumnes
24 River. Hardesty Decl. ¶ 38; *see also* Hardesty Stmt. Ex. 47, at 3, ECF No. 248-8. These pits are
25 found in the area that, according to the reclamation plan, would be mined between 2023 and
26 2063. *See* Balestreri Decl. Ex. L, at OMR007962; Hardesty Stmt. Ex. 25, ECF No. 248-6. The
27 parties dispute whether the Mine's reclamation plan foresaw excavation on this scale. *See*
28 Hardesty UMF nos. 43, 46, 47; Reed Decl. ¶¶ 5–6.

1 The Mine’s 2005, 2007, and 2008 FACE reports disclosed this new excavation.
2 Hardesty Stmt. Ex. 47, at 3, ECF No. 248-8; *id.* Ex. 48, at 3, ECF No. 248-8; Balestreri Decl.
3 Ex. U, at OMR000280, ECF No. 222-17. In 2008, for example, HSG reported it was excavating
4 aggregate “from a terrace deposit along the Consumnes River,” creating a thirty-acre pit about
5 thirty feet deep. Balestreri Decl. Ex. U, at OMR000280. Excavation was expected to continue
6 eastward. *Id.* The southern pit walls away from the river had been mostly resloped and covered
7 partially with vegetation, but other walls were steep and would need to be contoured before the
8 final reclamation plan requirements were satisfied. *Id.* The total estimated cost of recovery in
9 this report was less than \$100,000. *Id.* at OMR000289.

10 In the same time period, the County performed periodic inspections of the Mine
11 and reviewed the Mine’s reports. Hardesty Decl. ¶ 28; *see also* Hardesty Stmt. Exs. 47, 48, ECF
12 No. 248-8 (reports). OMR’s records indicate it also exchanged correspondence with Mr.
13 Hardesty about the Mine’s annual reports and discussed issues with the Mine’s FACE between
14 2003 and 2007. *See* Balestreri Decl. ¶ 20; *id.* Ex. N, ECF No. 222-16. For example, OMR’s
15 notes show that in August 2007, an OMR representative noticed the Mine’s report did not specify
16 the number of acres subject to the reclamation plan, so OMR corresponded with Schneider and
17 apparently then received this information within a few days. *Id.* Ex. N.

18 No evidence suggests, however, that the County or State had any concerns about
19 the new excavations or the mushrooming demand for HSG’s products. Neither does the evidence
20 suggest that regulators questioned the Mine’s compliance with its reclamation plan. *See* Hardesty
21 Stmt. Ex. 45, at 6, ECF No. 248-8; *id.* Ex. 13, at 9, ECF No. 248-2. The County took no issue
22 with the Mine’s 2008 FACE report, which it found “adequate.” Balestreri Decl. ¶ 27; *id.* Ex. U,
23 at OMR000278. As late as June 2008, OMR’s staff also recommended approval of the Mine’s
24 FACE reports. Hardesty UMF no. 44; Reed Decl. ¶ 6; *id.* Ex. A, ECF No. 222-19. An OMR
25 staffer responsible for reviewing the reports explains that he “missed” the reports’ descriptions of
26 large excavations because his reviews are “quick and limited.” Reed Decl. ¶¶ 5–6.

27 Despite these reports and the absence of any enforcement action by the County or
28 the State, OMR’s records showed the Mine was not on the AB 3098 list as of June 2008.

1 Balestreri Decl. ¶ 28; *id.* Ex. V, ECF No. 222-17. OMR’s files show HSG had not been on the
2 list since 1999. Hardesty UMF no. 42; Balestreri Decl. ¶ 34. It is unclear why not, and it is
3 unclear on this record whether the Hardestys or Schneiders asked for HSG to be placed on the list
4 or even knew the Mine was not on the list.

5 2. Mid-2008: Legislative Interest and Competitor Requests

6 At least as early as 2007 or 2008, one or more of HSG’s local competitors began
7 sending complaints to federal, state, and local regulators. *See, e.g.*, Hardesty Stmt. Ex. 17, ECF
8 No. 248-3; Dadey Dep. 23–34. The only competitor the parties refer to by name is “Teichert
9 Aggregates.” *See, e.g.*, Dadey Dep. 23–26. Only a brief summary of these complaints and their
10 effects is necessary here; a more detailed description is included below.

11 In 2006 or 2007, the U.S. Fish and Wildlife Service and the U.S. Army Corps of
12 Engineers began receiving complaints from representatives of Teichert Aggregates. *See, e.g.*,
13 Hardesty Stmt. Ex. 17, at 1, 3–4, ECF No. 248-3. In an apparent response to these complaints, in
14 June 2008, the Army Corps of Engineers sent HSG a cease-and-desist letter. *Id.* Ex. 51, ECF
15 No. 248-10. According to this letter, HSG had “discharged dredged or fill material into creeks
16 and wetlands tributary to the Consumnes River, without a . . . permit” in violation of Section 404
17 of the Clean Water Act. *Id.* Ex. 51, ECF No. 248-10.

18 In October 2008, former California State Senator David Cox sent a letter to the
19 Secretary of the Resources Agency. Hardesty Stmt. Ex. 1, ECF No. 248-1. He enclosed the
20 Corps’ cease-and-desist letter. *Id.* at 3–4. According to his understanding, HSG had “expanded
21 both in size and scope in recent years and may have done so without necessary permits,” and he
22 suggested HSG’s activities were “impacting local creeks and wetlands.” *Id.* at 1. He encouraged
23 an investigation, noting that if one mine operator could avoid compliance with federal, state, and
24 local regulation, others would stand at a “competitive disadvantage.” *Id.* Senator Cox’s letter
25 specifically cited the California Public Contract Code and the AB 3098 list, and he sent a copy to
26 the Director of the California Department of Transportation (Caltrans). *Id.* at 2. He suggested the
27 DOC, the Mining Board, and the California Department of Fish and Game (DFG) work together

28 /////

1 to investigate the Mine. *Id.* at 1. The cease-and-desist letter Senator Cox cited was rescinded in
2 2012, although it is unclear why. Hardesty Stmt. Ex. 58, ECF No. 248-10.

3 Evidence also suggests that staff of former U.S. Congressman Daniel Lungren
4 arranged meetings about the Mine with the Army Corps of Engineers and Teichert
5 representatives. *See, e.g.*, Dadey Dep. 23–26; Hardesty Stmt. Ex. 55, ECF No. 248-10.

6 The Hardestys have filed copies of publicly available records that suggest between
7 2001 and 2008, Senator Cox received campaign contributions from Taylor & Wiley, a law firm
8 the Hardestys allege represented Teichert. *See* Hill Decl., ECF No. 230; *id.* Ex. 1. Similar
9 records show that Congressman Lungren received campaign contributions from James Wiley,
10 John Taylor, and Suzanne Taylor between 2006 and 2012, *id.* Exs. 3–4, 6, and that Congressman
11 Lungren received campaign contributions from “Judson T. Riggs” of “Teichert” between 2004
12 and 2012, *id.* Ex. 5.

13 3. July through December 2008: Inspections of the Mine

14 Zachary Simmons of the Army Corps of Engineers was assigned to investigate the
15 Mine, and after reviewing the file, he found what he believed were violations of federal law.
16 Simmons Dep. 13–15, 17. He inspected the Mine in July 2008. *Id.* at 26–27. During this
17 inspection, Hardesty accused Simmons of being on a competitor’s payroll and did not allow him
18 to inspect the last of three locations Simmons wanted to see. *Id.* at 27, 172.

19 After the July inspection, Simmons and other Corps staff decided to bring the
20 California DFG into the investigation. *Id.* at 70. The Corps and DFG commonly work together,
21 and DFG wardens may be able to obtain access to private property without a warrant. *Id.* at 70–
22 71. Simmons contacted DFG Warden Liz Gregory, and the two scheduled a follow-up
23 investigation of the Mine for September 2008. Gregory Dep. 39; Simmons Dep. 71; Gregory
24 Decl. ¶¶ 3, 6, ECF No. 217-3. They did not obtain a warrant or schedule their inspection with
25 HSG.

26 Simmons and Gregory drove onto the Schneiders’ ranch in Gregory’s patrol truck,
27 and began investigating possible Clean Water Act and California Fish and Game Code violations.
28 Gregory Decl. ¶ 8. Mid-way through the inspection, Hardesty and an HSG employee demanded

1 they leave. *Id.* ¶ 15. Only then did Gregory learn Hardesty had expelled Simmons from the Mine
2 in July. *Id.*

3 After the joint inspection, neither Gregory nor the DFG issued any citations or
4 orders to the Mine. *Id.* ¶ 30. Nevertheless, DFG sent OMR an email requesting a meeting to
5 discuss operations at the Mine. *See* Koehler Dep. 16–18 & Ex. 218. A meeting was arranged for
6 October 2008. Hardesty UMF no. 52. Before the meeting, as noted above, the Resources Agency
7 also received a letter from Senator Cox, which described possible violations at the Mine. JSUF
8 no. 35. The October 2008 meeting went forward as planned, Koehler Decl. ¶ 4, ECF No. 222-21,
9 and OMR decided to conduct an inspection.

10 OMR staff requested permission from HSG to visit and inspect the Mine. *Id.* ¶ 5;
11 Koehler Dep. Exs. 219–20. Hardesty denied the request. *See* Koehler Dep. 31–32 & Ex. 220;
12 Hardesty Stmt. Ex. 73, ECF No. 248-11. He was suspicious that some third party was behind the
13 recent spate of inspections. *See* Koehler Dep. Ex. 220; Hardesty Stmt. Ex. 73. HSG decided it
14 would not allow more inspections until the Resources Agency Secretary explained who or what
15 was behind the increased regulatory interest. Koehler Dep. Ex. 220.

16 OMR obtained an administrative search warrant from the Sacramento County
17 Superior Court, Koehler Decl. ¶ 5, and an inspection went forward in late December 2008, *id.* ¶ 6.
18 According to a report prepared after that inspection, OMR concluded that the Mine’s annual
19 reports and its approved reclamation plan inaccurately described the excavations just south of the
20 Cosumnes River. *See id.* ¶ 7; *id.* Ex. A, ¶¶ 2.2–2.3, ECF No. 222-22. OMR’s report details
21 several more specific findings: Gravel pits just south of the Cosumnes River covered 180 acres,
22 whereas the most recent reports had estimated the pits covered about thirty-nine acres. *Id.* ¶ 2.2.
23 The pits were deeper than thirty feet, the maximum depth approved by the reclamation plan. *Id.*
24 ¶ 2.3. The water level in the pits was four to five feet below the water level in the Cosumnes
25 River, and groundwater had seeped into the pits, which increased the possibility the river might
26 flow into or “capture” the pit. *Id.* ¶ 2.4. The slopes of the pit walls exceeded the gradients
27 foreseen in the reclamation plan. *Id.* ¶ 2.5. Finally, OMR found the Mine’s FAM was inadequate

28 /////

1 because it had been calculated based on an estimate that forty acres would be disturbed, but OMR
2 staff believed 180 acres had been disturbed. *Id.* ¶ 3.1.

3 The Hardestys and Schneiders dispute the accuracy of OMR's conclusions,
4 particularly with respect to the danger of pit capture. They cite the April 2014 report of Donald
5 Olsen, an engineer, who concluded no danger of pit capture ever existed. *See* Olsen Report at
6 OLS 02, ECF No. 202. Olsen does not address Schneider's deposition testimony that in previous
7 years, the Cosumnes River actually had flooded up into the area near where HSG had excavated
8 the gravel pits. *See* Schneider Dep. 226–27.

9 In any event, upon reviewing the results of the December 2008 inspection, Dennis
10 O'Bryant, OMR's Assistant Director, was worried about pit capture. His concern arose in part
11 from an experience several years before on another California river, where a pit had been
12 captured and had cost the State several million dollars for remediation. O'Bryant Decl. ¶ 18, ECF
13 No. 222-25. He also recalled working for OMR's predecessor in the 1990s, when a large pit-
14 capture event occurred on the Russian River. *Id.* In this case, he worried that if the pits near the
15 Cosumnes River were captured, California would not be able to contribute much funding to
16 remediate damage to the River. *Id.*

17 4. Early 2009: Reinstatement and Removal from the AB 3098 List

18 As noted above, HSG was not on the AB 3098 list in December 2008. But after
19 correspondence between HSG, its attorneys, and OMR, the Mine was placed on the AB 3098 list
20 in early February 2009. JSUF no. 46, 50.

21 At the time HSG was placed on the list, OMR had completed its December 2008
22 inspection, but it had not finalized its inspection report. Koehler Decl. ¶ 7, ECF No. 222-21. The
23 report was finalized in late February 2009, *see* JSUF no. 51, and in consideration of that report,
24 OMR decided to remove the Mine from the AB 3098 list immediately, without prior notice. *See*
25 O'Bryant Decl. ¶ 5; *id.* Ex. A, ECF No. 222-26. The December 2008 inspection had led OMR to
26 conclude that the Mine's operation did not comply with its reclamation plan, that financial
27 assurances on file with the OMR were inadequate, and that the Mine's operation did not comply
28 with the Public Resources Code. *Id.* Ex. A, at OMR007871. Before the Mine could be reinstated

1 on the AB 3098 list, OMR concluded it would be required to submit a revised FACE, approved
2 by the County and DOC, post a FAM in the amount of a revised FACE, submit an amended
3 reclamation plan, and comply with the standards of Public Resources Code section 2773,
4 governing reclamation plans. *Id.* at OMR007871–72.

5 On the same day OMR removed the Mine from the AB 3098 list, it filed a lawsuit
6 against HSG, Hardesty, and Schneider in Sacramento County Superior Court. *See Compl.*,
7 *Luther v. Hardesty Sand & Gravel*, No. 34-2009-00038102 (Sacramento Cty. Super. Ct. filed
8 Mar. 18, 2009).⁶ Two days later, OMR moved *ex parte* for a temporary restraining order (TRO)
9 enjoining the Mine from violating SMARA, arguing “the existing pits at the mine present [a]
10 hazard, warranting an injunction to compel the Defendants to reclaim the pits now to avoid risk of
11 pit capture, which would cause irreparable injury to Plaintiff on behalf of the public.” *Ex Parte*
12 *App.*, *Luther v. Hardest Sand & Gravel*, No. 34-2009-00038102. The Superior Court denied the
13 *ex parte* application the same day “on the merits of the papers presented to the Court.” Order
14 Determining Disposition of *Ex Parte App.*, *Luther v. Hardesty Sand & Gravel*, No. 34-2009-
15 00038102. After OMR’s request for a temporary restraining order was denied, little more
16 happened in the lawsuit. It was settled a few months later. Alderson Decl. Ex. L, ECF No. 222-
17 32. The settlement agreement reports the DOC believed any risk of pit capture had dissipated
18 with the conclusion of the 2008–2009 rainy season. *Id.*

19 On the same day OMR moved for a TRO in Sacramento County Superior Court, it
20 sent the County a fifteen-day notice under Public Resources Code section 2774.1(f).⁷ O’Bryant
21 Decl. Ex. F, ECF No. 222-26. The OMR’s letter gave notice of OMR’s conclusion that the Mine
22 was operating in violation of SMARA. *Id.* OMR expected that after receiving the notice, the
23 County would issue a notice of violation that, among other things, would require the Mine to post

24
25 ⁶ The court takes judicial notice of the filings in this case, which are public records whose
existence is subject to no reasonable dispute. *See Fed. R. Evid.* 201.

26 ⁷ Under Public Resources Code section 2774.1(f), the DOC may initiate an enforcement
27 action against a SMARA mining operation after the Director gives notice to the lead agency,
among other requirements. In 2009, the notice period required by section 2774.1(f) was fifteen
28 days, and in 2013 the period was lengthened to thirty days. *See* 2013 Cal. Legis. Serv. Ch. 417
(West).

1 an interim FAM of \$733,784, “the amount deemed adequate by the Department to reclaim the
2 estimated 180 acres disturbed based upon the site inspection of December 23, 2008, and pursuant
3 to the reclamation plan.” *Id.* at OMR007389; *see also* Reed Decl. ¶¶ 7–8.

4 In response to OMR’s letter, the County required the Mine to amend its
5 reclamation plan and post an interim FAM of \$733,784. O’Bryant Decl. Ex. G, at OMR000429.
6 In addition to referencing the violations noted in OMR’s letter, the County listed several other
7 concerns, including that the Mine did not appear to have a current business license, that it had not
8 submitted certain maps, that it appeared to be operating outside its reclamation plan, and that the
9 County had no record of building permits for structures found at the Mine. *See id.* at
10 OMR000430. The County required the Mine to file an application to amend its reclamation plan
11 within thirty days and warned that the Mine’s failure to respond as requested could lead to an
12 enforcement action and administrative penalties. *Id.* at OMR000431.

13 The County also sent Schneider, Hardesty, and their attorneys a letter informing
14 them it had received complaints that suggested the Mine’s operations had expanded beyond its
15 vested right. O’Dea Decl. Ex. A, ECF No. 218-5. Specifically, the County found that mining
16 operations in 1994 were “relatively small in scale” and “primarily confined to dredger tailings,”
17 whereas more recently “the mining appears to be focused on riverbed aggregates adjacent to the
18 Cosumnes River.” *Id.* at 1. In light of this evidence, the County believed operations at the Mine
19 had expanded beyond their scope at the time land use restrictions were first enacted in 1956. *Id.*
20 at 1–2. The Mine’s only recourse, according to the County, was therefore “to file for and receive
21 approval of a conditional use permit and rezone.” *Id.* at 2.

22 5. March 2009 through June 2011: Further Inspections

23 OMR geologists inspected the Mine again in March 2009, November 2009, June
24 2010, and November 2010. Wesling Decl. ¶¶ 12–13, ECF No. 222-5; Koehler Decl. ¶¶ 9–10,
25 ECF No. 222-21.

26 The OMR’s inspection in November 2009 concerned only excavations near the
27 Cosumnes River. *See* Wesling Decl. Ex. D, at OMR004196, ECF No. 222-7. According to an
28 internal OMR memo, OMR staff determined five violations remained unresolved: (1) the pits’

1 depth exceeded the maximum allowable depth under the reclamation plan; (2) the pits had
2 illegally impacted the “shallow groundwater aquifer,” but the reclamation plan does not address
3 groundwater; (3) the pits were located within the 100-year floodplain without proper notification;
4 (4) the Mine’s infrastructure (a processing plant, water ponds, settling basins, and stockpiles)
5 were not at the locations noted by the reclamation plan; and (5) the Mine had not observed best
6 practices for erosion and sediment control near the pits. *Id.* at OMR004197–99. OMR also
7 believed the risk of pit capture remained high. *Id.* at OMR004199. A formal report was
8 completed in June 2010. Wesling Decl. Ex. E, ECF Nos. 222-8 to -10.

9 OMR also prepared an inspection report for its June 2010 inspection, which was
10 completed in June 2011. *See* Koehler Decl. ¶ 9; *id.* Ex. B, ECF No. 222-23. Unlike the March
11 2009 and November 2009 inspections, the June 2010 inspection had a broader scope. *See id.* at
12 OMR004165. OMR believed nine violations had occurred: (1) the possibility of pit capture
13 endangered the public health and safety and the environment; (2) the pits had impacted
14 groundwater in the area, but the reclamation plan did not address groundwater; (3) mining had
15 exceeded allowable depths in the pits; (4) the pits’ slopes were unstable; (5) the Mine’s erosion
16 controls were inadequate with respect to the pits; (6) mining waste had been deposited on top of
17 wetlands; (7) the actual areas disturbed by mining operations were approximately 239 acres, but
18 the County’s reports had indicated about 112 acres were disturbed; (8) HSG’s processing plant,
19 processing ponds, settling basins, and stockpiles were not in the locations noted in the
20 reclamation plan; and (9) mining adjacent to the banks of the Cosumnes River was occurring
21 much earlier than allowed under the reclamation plan. *Id.* at OMR004170–74.

22 The Flood Board also conducted its inspections and negotiated remedial actions
23 with the Mine and HSG between 2009 and 2011, both in conjunction with other regulators and
24 independently. *See generally* Taras Decl., ECF No. 222-11.

25 Over the same period, the County’s FACEs began to diverge from FACEs
26 prepared for the Mine by its consultant. In December 2009, a County contractor estimated the
27 total costs of reclamation for the Mine would be \$194,745. *See* Olsen Rep. at OLS 03. In the
28 same time period, the Mine’s consultant calculated FACEs of between \$100,000 and \$140,000.

1 *See id.*; Balestreri Decl. Ex. EE, at OMR007788, ECF No. 222-17; *id.* Ex. FF, at OMR 008921.
2 Estimates for early 2010 differed somewhat, but were within the same order of magnitude. *See*
3 Olsen Rep. at OLS 03. But starting in mid-2010, the regulators' estimates were much higher. For
4 example, in June and December 2010, OMR estimated a \$984,000 FAM was necessary. Koehler
5 Decl. Ex. B, at OMR004175, ECF No. 222-23. Similarly, in December 2010, the County's
6 consultant estimated total costs of reclamation for the Mine would be \$835,303. *See* Olsen Rep.
7 at OLS 03. And in November 2012, the County's consultant estimated total costs of reclamation
8 for the Mine would be either \$901,336 or \$8,817,074, depending on whether material would be
9 imported to refill the gravel pits beside the river. Hardesty Stmt. Ex. 40, at OMR000851, ECF
10 No. 248-8. Over the same period, FACEs prepared by the Mine's consultant never exceeded
11 \$200,000. *See* Olsen Rep. at OLS 03.

12 6. April–September 2010: Notice of Zoning Violation and Hearings

13 In April 2010, the County sent a notice of violation to Schneider, charging the
14 Mine with zoning violations. O'Dea Decl. Ex. B, ECF No. 218-5; Schneider Decl. ¶ 3, ECF
15 No. 220-2. Schneider appealed the notice of violation to the County Board of Supervisors and
16 hearings were held between May and September of 2010. Gamel Decl. ¶ 19; Schneider Decl. ¶ 4;
17 Sacramento Bd. of Supervisors Meeting Trs. (May 26, July 13, Sept. 14, & Sept. 28, 2010), ECF
18 Nos. 220-3, 220-4, 220-6, 220-7. Jay Schneider and Richard Ross, the Schneiders' attorney in
19 this case, were both present at each hearing. *See generally* Sacramento Bd. of Supervisors
20 Meeting Trs. (May 26, July 13, Sept. 14, & Sept. 28, 2010).

21 On September 28, 2010, the Board of Supervisors upheld the notice of violations.
22 *See* Gamel Decl. ¶ 19; Sacramento Bd. of Supervisors Meeting Tr. 30 (Sept. 28, 2010), ECF
23 No. 220-7. Schneider initially pursued but then abandoned a petition for a writ of mandate in
24 California superior court. *See Schneider v. Bd. of Supervisors*, No. 34-2011-80000857
25 (Sacramento Cty. Super. Ct. filed May 12, 2011).

26 7. Developments in 2010–2012

27 The Hardestys filed their complaint in this action in September 2010, midway
28 through the hearings on Schneider's appeal before the Board of Supervisors. *See* Hardesty

1 Compl., ECF No. 1. They asserted several constitutional claims against both federal and state
2 defendants for alleged violations of their First, Fourth, and Fourteenth Amendment rights. *See*
3 *generally id.*

4 In October 2010, after Schneider's appeal concluded, the County ordered
5 Schneider either to cease operations and begin reclamation or to apply for a conditional use
6 permit and rezoning. Gamel Decl. ¶ 20. The Schneiders and Hardestys have not applied for a
7 conditional use permit. *Id.* Mining ceased in Fall 2010. *See* Hardesty Decl. ¶ 10.

8 In January 2011, the County issued a citation to Schneider for selling existing
9 mining stockpiles without a permit. Schneider Decl. ¶ 100; Derby Decl. ¶ 10, ECF No. 218-5.
10 He appealed the citation. Schneider Decl. ¶ 101; Derby Decl. ¶ 11. The Board of Supervisors
11 denied the appeal and upheld the citation on May 4, 2011. Schneider Decl. ¶ 108. He filed a
12 petition for a writ of mandate with the Sacramento County Superior Court. *Id.* ¶ 109. As noted
13 above, he did not pursue the case to its conclusion. *See* Order Vacating Hr'g, *Schneider v. Bd. of*
14 *Supervisors*, No. 34-2011-80000857 (Sacramento Cty. Super. Ct. filed Jan. 11, 2013). In a
15 separate action, in March 2012, the Superior Court enjoined HSG from mining or removing
16 stockpiled materials from the Mine. Order, *Schneider v. Hardesty*, No. 34-2012-00119889
17 (Sacramento Cty. Super. Ct. filed Mar. 5, 2012), Dkt. No. 17.

18 The County conducted another inspection in May 2011. Derby Decl. ¶ 18. It
19 found violations of SMARA and the reclamation plan and notified Hardesty and Schneider of
20 these findings in a June 2011 letter. *Id.* In December 2011, the Board of Zoning Appeals adopted
21 portions of the June 2011 Notice and Order. *See* Hardesty Resp. County Defs.' Stmt. Undisp.
22 Mat. Facts no. 30, ECF No. 231; Schneider Resp. County Defs.' Stmt. Undisp. Mat. Facts no. 30,
23 ECF No. 240.

24 In the late summer of 2012, Schneider believed he would be unable to obtain
25 effective relief in California courts. Schneider Decl. ¶ 117, ECF No. 220-2. He filed an action in
26 this court in September 2012 to avoid the running of the statute of limitations. *Id.* ¶ 119. His
27 original complaint alleged several claims along the same lines as the Hardestys' complaint. *See*
28 *generally* Compl., Case No. 12-2457, ECF No. 1.

1 IV. PROCEDURAL MATTERS

2 As noted above, the Hardestys' original complaint was filed in September 2010.
3 Three rounds of motion practice have narrowed the case to the following claims, all under 42
4 U.S.C. § 1983:

- 5 • An equal protection claim against Dennis O'Bryant, Gay Norris (a geologist at
6 OMR), and Stephen Testa (the Mining Board's Executive Officer) related to
7 their allegedly selective enforcement of the AB 3098 list, Second Am. Compl.
8 (Hardesty Compl.) ¶¶ 116–28;
- 9 • A Fourth Amendment claim against Liz Gregory for conducting a warrantless
10 search of the Mine, *id.* ¶¶ 139–45;
- 11 • Substantive and procedural due process claims against Curt Taras (formerly of
12 the Flood Board) based on a cease-and-desist letter he sent to the Mine in
13 2009, *id.* ¶¶ 146–53;
- 14 • Due process and equal protection claims against Sacramento County and
15 Robert Sherry (the former Planning Director for the County) stemming from
16 the alleged revocation of the Hardestys' SMARA vested right, *id.* ¶¶ 154–62;
- 17 • An equal protection claim against Sacramento County, Cindy Storelli (a
18 principal planner for the County), and Leighann Moffitt (another principal
19 planner and later Planning Director) based on their alleged differential
20 treatment of the Mine's FACEs and FAMs when compared to other similarly
21 situated mining operations, *id.* ¶¶ 163–77; and
- 22 • A substantive due process claim against all the defendants based on their
23 alleged campaign to drive the Hardestys out of business, *id.* ¶¶ 192–204.

24 The Schneiders' pleadings also were the subject of motions to dismiss and
25 amendments, eventually arriving at a Third Amended Complaint, which includes the following
26 claims, all under 42 U.S.C. § 1983:

- 27 • A procedural due process claim against Sacramento County, Sherry, Storelli,
28 Moffitt, Roger Dickinson (a former member of the Sacramento County Board

1 of Supervisors), Jeff Gamel (former Sacramento County Senior Planner and
2 Aggregate Resources Manager), Tammy Derby (former Chief of the Code
3 Enforcement Division of Sacramento County), and Carl Simpson (another
4 former Code Enforcement Chief) related to the alleged revocation of land use
5 entitlements, Third Am. Compl. (Schneider Compl.), ¶¶ 241–50, Case No. 12-
6 2457, ECF No. 70;

- 7 • A substantive due process claim against Sacramento County, Sherry, Storelli,
8 Moffitt, Dickinson, Gamel, Derby, and Simpson related to the revocation of
9 the SMARA vested right, *id.* ¶¶ 251–62;
- 10 • A substantive due process claim against David Bieber (an engineer and
11 consultant), arising from the alleged inflation of FACEs he calculated for the
12 County, *id.* ¶¶ 263–80;
- 13 • First Amendment claims against all the defendants based on the allegedly
14 retaliatory increase in FACEs, *id.* ¶¶ 281–90; and
- 15 • An equal protection claim against Sacramento County, Sherry, Storelli,
16 Moffitt, Dickinson, Gamel, Derby, and Simpson based on their alleged
17 selective treatment of the Mine, *id.* ¶¶ 291–305.

18 The *Hardesty* and *Schneider* cases were related in May 2013, Related Case Order,
19 ECF No. 156, and in August 2014, the two actions were mostly consolidated with only the claims
20 against David Bieber remaining in the unconsolidated *Schneider* case, *see* Order Aug. 15, 2014,
21 ECF No. 186.

22 In October 2015, the parties filed several motions for summary judgment. As
23 confirmed at hearing, these motions place the entirety of the *Hardesty* and *Schneider* cases before
24 the court. The defendants move for summary judgment on all claims asserted against them in the
25 two cases.⁸ The Hardestys and Schneiders oppose these motions in total.⁹ The defendants also
26

27 ⁸ *See* State Defs.’ Mot., ECF No. 222; Gregory Mot., ECF No. 217; County Mot. Pt. 1,
28 ECF No. 218-1; County Mot. Pt. 2, ECF No. 218-2; County Mot. Pt. 3, ECF No. 218-3; Bieber
Mot., Case No. 12-2457, ECF No. 105.

1 each replied.¹⁰ In addition, the Schneiders move for partial summary judgment on their claim to a
 2 SMARA vested right and for partial summary judgment that they were deprived of this right
 3 without due process.¹¹ A subset of the defendants opposes these motions,¹² and the Schneiders
 4 replied.¹³ The court held a consolidated hearing on January 22, 2016 and allowed the parties to
 5 file written closing arguments.¹⁴

6 V. LEGAL STANDARD

7 A motion for summary judgment will be granted “if the movant shows there is no
 8 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
 9 Fed. R. Civ. P. 56(a). A motion for summary judgment calls for a “threshold inquiry” into
 10 whether a trial is necessary at all, that is, whether “any genuine factual issues . . . properly can be
 11 resolved only by a finder of fact because they may reasonably be resolved in favor of either
 12 party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The court does not weigh
 13 evidence or assess the credibility of witnesses; rather, it determines which facts the parties do not
 14 dispute, then draws all inferences and views all evidence in the light most favorable to the
 15 nonmoving party. *See id.* at 255; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
 16 574, 587–88 (1986). “Where the record taken as a whole could not lead a rational trier of fact to
 17 find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587
 18 (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

19 ⁹ *See* Opp’n State Defs.’ Mot., ECF No. 243; Opp’n Gregory Mot., ECF No. 236;
 20 Hardesty Opp’n County Mot. Pt. A, ECF No. 234; Hardesty Opp’n County Mot. Pt. B, ECF
 21 No. 235; Schneider Opp’n County Mot. Pt. A, ECF No. 238; Schneider Opp’n County Mot. Pt. B,
 ECF No. 239; Opp’n Bieber Mot., Case No. 12-2457, ECF No. 108.

22 ¹⁰ *See* State Defs.’ Reply, ECF No. 256; Gregory Reply, ECF No. 253; County Reply
 Pt. 1, ECF No. 255-1; County Reply Pt. 2, ECF no. 255-2; County Reply Pt. 3, ECF No. 255-3;
 23 Bieber Reply, Case No. 12-2457, ECF No. 112.

24 ¹¹ *See* Schneider Mot. Vested Right, ECF No. 219; Schneider Mot. Due Process, ECF
 No. 220.

25 ¹² County Opp’n Vested Right, ECF No. 228; County Opp’n Due Process, ECF No. 228-
 1; State Defs.’ Joinder, ECF No. 237.

26 ¹³ *See* Reply Vested Rights, ECF No. 258; Reply Due Process, ECF No. 257.

27 ¹⁴ *See* Minutes, ECF No. 263; Hr’g Tr., ECF No. 268; State Defs.’ Br., ECF No. 272;
 Gregory Br., ECF No. 271; County Br., ECF No. 269; Schneider Br., ECF No. 270; Hardesty Br.,
 28 ECF No. 273; Bieber Br., Case No. 12-2457, ECF No. 118; Schneider Br., Case No. 12-2457,
 ECF No. 119.

1 The moving party bears the initial burden of “informing the district court of the
2 basis for its motion, and identifying those portions of [the record] which it believes demonstrate
3 the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
4 (1986). If the party opposing summary judgment bears the burden of proof at trial, the moving
5 party need only illustrate the “absence of evidence to support the non-moving party’s case.” *In re*
6 *Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). The burden then shifts to the
7 nonmoving party to “go beyond the pleadings” and “designate specific facts showing that there is
8 a genuine issue for trial.” *Celotex*, 477 U.S. at 324 (quotation marks omitted). The non-moving
9 party “must do more than simply show that there is some metaphysical doubt as to the material
10 facts.” *Matsushita*, 475 U.S. at 586. “Only disputes over facts that might affect the outcome of
11 the suit under the governing law will properly preclude the entry of summary judgment.”
12 *Anderson*, 477 U.S. at 248.

13 VI. MONELL CLAIMS

14 The Hardestys and Schneiders assert several claims against the County of
15 Sacramento and its officers under 42 U.S.C. § 1983. Municipal bodies are subject to liability
16 under 42 U.S.C. § 1983. *Monell v. Dep’t of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 & n.54
17 (1978). The “touchstone” of a claim against a municipal government under § 1983 is the
18 plaintiff’s allegation that the defendant’s “official policy” deprived her of constitutional rights.
19 *Id.* at 690–91. Thus a plaintiff may pursue relief under § 1983 against a municipal body to
20 address an unconstitutional decision a municipal government’s officers officially adopted or
21 promulgated. *Id.* at 690.

22 A municipality must be the “moving force” behind the plaintiff’s injury. *Bd. of*
23 *Cty. Comm’rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 404 (1997). “That is, a plaintiff must
24 show that the municipal action was taken with the requisite degree of culpability and must
25 demonstrate a direct causal link between the municipal action and the deprivation of federal
26 rights.” *Id.* But “[w]here a plaintiff claims that a particular municipal action *itself* violates
27 federal law, or directs an employee to do so, resolving these issues of fault and causation is
28 straightforward.” *Id.* (emphasis in original). “[P]roof that a municipality’s legislative body or

1 authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right
2 necessarily establishes that the municipality acted culpably.” *Id.* at 405.

3 Here, in its briefing, the County argued this case involves no allegedly
4 unconstitutional policy because the plaintiffs have produced no evidence of a longstanding
5 practice. *See* County Mot. Pt. 2 at 8–9. At hearing, however, counsel withdrew from this
6 position. As noted in the previous paragraph, the County may have adopted a “policy” despite
7 the absence of any longstanding practice or custom. *See, e.g., Pembaur v. City of Cincinnati*, 475
8 U.S. 469, 480 (1986); *see also Hammond v. Cty. of Madera*, 859 F.2d 797, 803 (9th Cir. 1988)
9 (county board of supervisors subject to suit for both ratifying an official’s misconduct and
10 “actively participat[ing] in the deprivation of [plaintiffs’] property rights”), *abrogated on other*
11 *grounds as noted in L.W. v. Grubbs*, 92 F.3d 894, 898 (9th Cir. 1996); *Evers v. Custer Cty.*, 745
12 F.2d 1196, 1198–1203 (9th Cir. 1984) (an official declaration that deprived a person of a real
13 property right, though a single act, could support a local government’s liability under § 1983).
14 Indeed the parties generally refer not to the individual defendants’ actions, but to the County’s
15 actions. The claims against the County may proceed if not otherwise adjudicated in this order.

16 VII. SEARCH AND SEIZURE: DEFENDANT GREGORY

17 The Hardestys claim DFG Warden Liz Gregory conducted an unconstitutional
18 search when she and Zachary Simmons of the Army Corps of Engineers inspected the Mine in
19 September 2008.

20 A. Undisputed Facts

21 A more detailed review of the facts specific to this claim is first necessary to
22 explain the court’s reasoning. In July 2008, Zachary Simmons of the Army Corps of Engineers
23 was assigned to the investigation of HSG and the Mine. Simmons Dep. 13–15. After reviewing
24 aerial and satellite photography and looking through the Corps’ files, it appeared to him that HSG
25 possibly violated federal law or regulations. *See id.* at 15, 17. Simmons scheduled a visit for July
26 2008. *Id.* at 18–20, 25.

27 The inspection lasted several hours. *Id.* at 170. Hardesty seemed frustrated and an
28 HSG employee suggested Simmons was on the payroll of an unnamed competitor. *Id.* at 171–74.

1 Hardesty refused to allow Simmons to inspect one of three locations of interest and asked him to
2 leave. *See* Simmons Interview 145 (Apr. 18, 2013)¹⁵; Simmons Dep. 68.

3 In a meeting after the investigation, Simmons and other Corps staff considered
4 how they could complete an inspection of the entire Mine. Simmons Dep. 70. Someone
5 suggested planning a joint inspection with the DFG. *Id.* This was unsurprising to Simmons, as
6 the DFG and the Corps typically work together on investigations and because DFG wardens may
7 be able to obtain access to private property. *Id.* The next step in Simmons' and the Corps'
8 investigation was therefore to contact their counterparts at the DFG. *Id.* at 71.

9 When Simmons contacted DFG, he was routed to Liz Gregory. Simmons Dep. 71;
10 JSUF no. 70. This was the first Gregory had heard about the Mine. Gregory Dep. 61. Simmons
11 gave Gregory information about potential violations of the California Fish and Game Code at the
12 Mine. *Id.*; Simmons Dep. 72–73; Doody Decl. Ex. 80, ECF No. 217-8. At that time, Gregory
13 had some experience investigating streambed alteration issues under California Fish and Game
14 Code section 1600. Gregory Decl. ¶ 2, ECF No. 217-3. But none of her previous inspections
15 under those sections involved surface mining. *Id.* Simmons told Gregory he had been to the
16 Mine before, but he did not say with whom or how many times he had gone. Gregory Dep. 61–
17 62. She knew he had visited two locations and knew that he had information about a third
18 location, but she did not know Simmons had been prevented from inspecting the third site. *Id.* at
19 70–72.

20 Simmons sent Gregory some pictures of the Mine, and Gregory passed these on to
21 a more experienced Fish and Game Warden, who agreed the Mine might have violated the Fish
22 and Game Code. Doody Decl. ¶¶ 1–5, ECF No. 217-8. Simmons and Gregory planned an
23 unannounced inspection of the Mine. *See id.* Ex. 78, No. 217-8; *id.* Ex. 80, ECF No. 217-8.

24 Gregory and Simmons met at the Mine as planned. Gregory Decl. ¶ 6. Before
25 they entered the Mine, Simmons told Gregory he had received a message from a congressman's
26

27 ¹⁵ To the extent the court relies on this testimony here, Gregory's implied objection is
28 overruled. *See* Gregory Reply at 2 n.3. The court's limited consideration of that testimony here
subjects Gregory to no prejudice.

1 office that morning. *Id.* This was the first either of them knew that any legislator had an interest
2 in the investigation. *Id.*; Gregory Dep. 65; Simmons Dep. 76–77. Gregory called her captain,
3 Mark Lucero, who told her to go ahead with the investigation. Gregory Decl. ¶ 6.

4 Gregory and Simmons drove in Gregory’s patrol truck onto the Mine through an
5 open gate on an access road. Gregory Decl. ¶ 8. Gregory did not have a warrant and did not
6 believe she needed one. *Id.* ¶ 17. The ranch is fenced by barbed wire in some places, including
7 on its border along Meiss Road near where Gregory and Simmons entered. *Id.* ¶ 10; *see also id.*
8 Ex. VV-1, ECF No. 217-4 (photograph of the fence from Meiss Road). Gregory parked her truck
9 on the access road and began inspecting a pond area in the middle of a wide-open, grassy field.
10 *Id.* ¶ 11; *see also id.* Exs. UU-1, WW-1, ECF No. 217-4 (photographs of the pond area and the
11 field). The two then went back to the truck and continued north. Gregory Decl. ¶ 12. They
12 stopped briefly near a weigh station, then continued again. *Id.* Near a processing facility Gregory
13 turned east and drove past a settling pond, then parked on the shoulder of the road. *Id.* She and
14 Simmons left the truck and began walking south. *Id.* The area where they stood was a wide-open
15 field. *Id.* ¶ 13; *see also id.* Ex. FF, at OMR003196–97 (overhead aerial photographs of the area);
16 *id.* Ex. SS-1, at LG00793, Photo 9 (ground-level photograph of the field).

17 While Simmons and Gregory were standing in the field, a Mine employee asked
18 them to go to the Mine’s weigh station. *Id.* ¶ 14. They did, and met Hardesty. *Id.* ¶ 15. Hardesty
19 told them they had no right to be on the property, and Gregory disagreed, explaining she had
20 authority and had brought Simmons to show her where he believed there may have been damage
21 to waterways or wildlife. *Id.* Hardesty told her he had ordered Simmons off the property during
22 his July 2008 inspection, and Hardesty said something about suing Teichert. *Id.*; Gregory
23 Dep. 72. That was the first time Gregory had heard anything about Teichert. Gregory Decl. ¶ 15.
24 Gregory left the property after she spoke to Lucero again on the phone, who told her to leave. *Id.*
25 Gregory was upset that she had brought Simmons along and had not known he had been
26 forbidden from the property before. Gregory Dep. 73.

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1 Over the course of their joint inspection, Gregory and Simmons entered no
2 buildings. Gregory Decl. ¶ 17. They encountered no locked or closed gates and no other physical
3 barriers. *Id.* They went nowhere that appeared to be private. *Id.*

4 After the inspection, Gregory received emails and participated in meetings about
5 the Mine, but she played no further role in any investigation or enforcement actions. *See* Gregory
6 Decl. ¶¶ 18–27. She never heard any state or county personnel say or imply they intended to put
7 the Mine out of business or harm HSG’s business. *Id.* ¶ 28. In a declaration, she avers likewise
8 her goal was always to “identify and resolve violations of the California Fish and Game Code and
9 any related threats to the public or to fish and wildlife resources.” *Id.* ¶ 29. Neither Gregory nor
10 the DFG issued any citations or orders to the Mine. *Id.* ¶ 30.

11 B. Discussion

12 “The Fourth Amendment safeguards ‘[t]he right of the people to be secure in their
13 persons, houses, papers, and effects, against unreasonable searches and seizures.’” *Atwater v.*
14 *City of Lago Vista*, 532 U.S. 318, 326 (2001) (quoting U.S. Const. amend. IV). It applies against
15 states and state agencies. *Elkins v. United States*, 364 U.S. 206, 223–24 (1960). The Supreme
16 Court recently clarified its two-part interpretation of the words “searches and seizures.” *See*
17 *generally United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012). First, by mentioning
18 “persons, houses, papers, and effects,” the Amendment prohibits certain intrusions on a person’s
19 property. *See id.* at 949. Second, because “the Fourth Amendment protects people, not places,” it
20 prohibits searches and seizures that violate a person’s “reasonable expectation of privacy,” *id.*
21 at 950 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). These two conceptions operate
22 independently. A search or seizure may be unreasonable and violate the Fourth Amendment if it
23 concerns the type of property listed in the Fourth Amendment, regardless of the person’s
24 expectation of privacy. *See id.* at 949–53 (monitoring a person’s location with a GPS tracker
25 attached to his car was a “search” because the car was an “effect”). Likewise a search may
26 violate the Fourth Amendment regardless of any trespassory intrusion if the search violates the
27 person’s objectively reasonable expectation of privacy. *See generally, e.g., Kyllo v. United*

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1 *States*, 533 U.S. 27 (2001) (the government conducted a “search” of a person’s home when it
2 used a thermal imaging camera from across the street).

3 Under these rules, the Fourth Amendment does not offer protection against
4 searches and seizures in “the open fields.” *See Hester v. United States*, 265 U.S. 57, 59 (1924).
5 A field is not a person, house, paper, or effect, and an assertion of privacy in open fields “is not
6 an expectation that society recognizes as reasonable.” *Oliver v. United States*, 466 U.S. 170, 179
7 (1984) (citations and quotation marks omitted). This is true even if the field is secluded,
8 demarcated by “No Trespassing” signs, and surrounded by a barbed wire fence. *See id.* at 181–
9 83. For example, in *United States v. Dunn*, 480 U.S. 294 (1987), the Supreme Court held that the
10 police did not conduct a “search” for purposes of the Fourth Amendment when they shone a
11 flashlight into a barn on a private ranch in the middle of an open field, even though to reach the
12 barn they had first crossed several fences. *See id.* at 297–98, 303–05.

13 Here, although it is undisputed Simmons and Gregory had no warrant, the property
14 they searched was an “open field”: grass and rolling hills, under wide blue skies. *See* Gregory
15 Decl. Exs. UU-1, VV-1, WW-1, ECF No. 217-4. No evidence suggests Gregory and Simmons
16 entered any private area, structure, or home. The Hardestys have no home on the Schneider
17 ranch. They can maintain no Fourth Amendment claim against Gregory because no “search”
18 occurred.

19 The ulterior motive the Hardestys ascribe to Gregory’s inspection—providing a
20 back door for Simmons to snoop around the Mine without the Hardestys’ or Schneiders’
21 permission—would not transform that inspection into a Fourth Amendment search. Opp’n
22 Gregory Mot. 6–11, ECF 236. Neither does the fact that the Mine was a private industrial
23 property. The Hardestys’ arguments to the contrary rest on incorrect interpretations of several
24 decisions.

25 First, they cite the Ninth Circuit’s decision in *Berger v. Hanlon*, 129 F.3d 505 (9th
26 Cir. 1997), *vacated and remanded*, 526 U.S. 808 (1999) (per curiam).¹⁶ In that case, federal

27 ¹⁶ The Supreme Court vacated and remanded *Berger* in light of its intervening decision in
28 *Wilson v. Layne*, 526 U.S. 603 (1999). The *Wilson* court held that police officers violated the
Fourth Amendment by inviting media to record the execution of an arrest warrant inside a private

1 agents had obtained a warrant to search the plaintiff’s Montana ranch for evidence he had
2 poisoned and shot endangered eagles. 129 F.3d at 508–09. The Ninth Circuit concluded the
3 agents had run afoul of the Fourth Amendment by allowing news media to secretly record video
4 and audio during the search. *Id.* The Ninth Circuit rejected the agents’ citation to the open-fields
5 doctrine because that doctrine “is not a license for the police to bring trespassers on to private
6 property.” *Id.* at 512. Had the plaintiffs sued the agents for conducting a warrantless search of
7 the field, the doctrine would have removed the case from the Fourth Amendment’s reach, but it
8 could not “immunize the officers from liability for conduct that has no law enforcement purpose.”
9 *Id.* Here, unlike in *Berger*, the Hardestys sue Gregory for conducting a warrantless search, and
10 although the parties dispute whether her inspection was a pretext for Simmons’ continued
11 investigation, it is undisputed that both Simmons and Gregory meant to search the Mine for
12 violations of federal and state laws. That is, the parties agree Simmons and Gregory had a “law
13 enforcement purpose,” and the *Berger* court’s reasoning does not apply. *Berger* also is
14 distinguishable from this case in light of the *Berger* court’s passing discussion of evidence, noting
15 “that the shed and other outbuildings that were a focus of the cameras were places in which the
16 [plaintiffs] did have a reasonable expectation of privacy.” *Id.* at 512–13. No similar evidence has
17 been presented here.

18 Second, the Hardestys cite *Alexander v. City and County of San Francisco*,
19 29 F.3d 1355 (9th Cir. 1994). In that case, officers stormed a man’s home, intending to arrest
20 him, without first obtaining a warrant for his arrest. *See id.* at 1357–59. Rather, the officers had
21 obtained a warrant to investigate suspected health and safety violations on his property. *Id.* The
22 Ninth Circuit applied the longstanding rule that prevents police from using administrative search
23 warrants for criminal-law purposes. *See id.* at 1360–61; *see also Ashcroft v. Al-Kidd*, 563 U.S.
24 731, 736–37 (2011) (reviewing rule that “Fourth Amendment reasonableness is predominantly an
25 objective inquiry” except when it comes to “administrative-search cases,” where the officers’

26
27 home. Because the Supreme Court vacated the Circuit’s order, that order is non-precedential in
28 total. *See Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991). It remains at most
persuasive. *See DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1175–76 (9th Cir. 2005).

1 purpose “is not to attend to . . . the investigation for which the administrative inspection is
2 justified” (citations and quotation marks omitted)). Here, by contrast, the purported search was
3 not of a home, but of an open field. “The Government’s physical intrusion on such an area . . . is
4 of no Fourth Amendment significance.” *Jones*, 132 S. Ct. at 953. Moreover, Simmons and
5 Gregory did not use an administrative-law search for criminal-law purposes.

6 Third, the Hardestys cite *United States v. Dunn*, *supra*, 480 U.S. 294, for the
7 Supreme Court’s discussion of a home’s curtilage, “the area immediately surrounding a dwelling
8 house,” which the Fourth Amendment protects from unreasonable searches and seizures. *Id.*
9 at 300. The Hardestys maintained no home on the Schneiders’ ranch, and the Supreme Court has
10 not decided whether and how its decisions addressing the curtilage of a home may be applied to a
11 business. *See, e.g., United States v. Dow Chemical*, 476 U.S. 227, 239 n.7 (1986). But the Court
12 has confirmed that “[p]lainly a business establishment or commercial or industrial facility enjoys
13 certain protections under the Fourth Amendment.” *Id.* at 235; *see also Marshall v. Barlow’s, Inc.*,
14 436 U.S. 307, 312 (1978) (“[I]t is untenable that the ban on warrantless searches was not intended
15 to shield places of business as well as of residence.”); *See v. City of Seattle*, 387 U.S. 541, 543
16 (1967) (“The businessman, like the occupant of a residence, has a constitutional right to go about
17 his business free from unreasonable official entries upon his private commercial property.”). And
18 a number of district and appellate decisions have found the areas immediately surrounding a
19 commercial or industrial facility receive some Fourth Amendment protection. *See, e.g., United*
20 *States v. Elkins*, 300 F.3d 638, 654 (6th Cir. 2002) (“There may be circumstances in which the
21 area adjoining a business structure is sufficiently private to enjoy a protection analogous to a
22 home’s curtilage.”); *United States v. Swart*, 679 F.2d 698, 702 (7th Cir. 1982) (adopting the
23 possibility a search took place “within the curtilage of the [defendant’s] business buildings”);
24 *Pearl Meadows Mushroom Farm, Inc. v. Nelson*, 723 F. Supp. 432, 440 (N.D. Cal. 1989)
25 (“[U]nder existing law, commercial curtilage is subject to the Fourth Amendment.”).

26 If the traditional rules of curtilage could be extended to commercial and industrial
27 buildings, this is not the case for extension. Four factors define the extent of a home’s curtilage:
28 “the proximity of the area claimed to be curtilage to the home, whether the area is included within

1 an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps
2 taken by the resident to protect the area from observation by people passing by.” *Dunn*, 476 U.S.
3 at 301. Here, the evidence does not suggest Simmons and Gregory inspected any area near a
4 building. They did not enter any buildings or any enclosure surrounding a building. They
5 encountered no locked gates, and nothing suggested to them that the fields and gullies on the
6 Mine were private. There is no evidence HSG used security cameras, guards, check stations, or
7 similar countermeasures to ward off intruders. *Cf. Dow Chemical*, 476 U.S. at 241 (describing
8 Dow’s “elaborate” security measures). Simmons and Gregory drove onto the Mine on an open
9 road. Considering that a person’s “expectation of privacy in commercial premises . . . is different
10 from, and indeed less than, a similar expectation in an individual’s home,” *New York v. Burger*,
11 482 U.S. 691, 700 (1987), this evidence cannot support a finding that the inspection encroached
12 on any “industrial curtilage.”

13 Gregory’s motion for summary judgment is granted as to the Hardestys’ Fourth
14 Amendment claim.

15 VIII. EQUAL PROTECTION

16 The Hardestys and Schneiders allege the defendants deprived them of their right to
17 equal protection under the Fourteenth Amendment. They contend the defendants singled them
18 out arbitrarily for more vigorous enforcement in an effort to drive the Mine out of business. They
19 assert multiple claims analyzed below, following an introductory discussion of the nature of claim
20 asserted.

21 A. Class-of-One Claim

22 The Equal Protection Clause can support the type of claim plaintiffs bring,
23 commonly referred to as a “class-of-one” claim. *See, e.g., Engquist v. Or. Dep’t of Agr.*, 553 U.S.
24 591, 601–02 (2008). A plaintiff can succeed in a class-of-one claim if she shows the defendants
25 intentionally and arbitrarily treated her differently than they treated others who were in the same
26 situation. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). In other
27 words, a class-of-one claim has three elements: the defendant acted intentionally, treated the
28 plaintiff differently than other similarly situated persons, and did so without a rational basis.

1 *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011). Here, the first element, an
2 intentional act, is not in dispute. The parties agree the defendants acted intentionally. This leaves
3 the second and third elements.

4 As for the second element, the plaintiffs must show the defendants treated them
5 differently than other similarly situated persons. *Willowbrook*, 528 U.S. at 564. In this context,
6 “similarly situated” means that in all relevant respects, the comparators are “alike,” *Nordlinger v.*
7 *Hahn*, 505 U.S. 1, 10 (1992), “arguably indistinguishable,” *Ross v. Moffitt*, 417 U.S. 600, 609
8 (1974), or “identical,” *Chico Scrap Metal, Inc. v. Raphael*, 830 F. Supp. 2d 966, 975 (E.D. Cal.
9 2011), *aff’d and remanded on unrelated question sub nom. Chico Scrap Metal, Inc. v. Robinson*,
10 560 F. App’x 650 (9th Cir. 2014). In the land-use context, the First Circuit has found this to be a
11 “very significant burden,” one to be enforced “with particular rigor.” *Cordi-Allen v. Conlon*, 494
12 F.3d 245, 251 (1st Cir. 2007) (quoting *Discovery House, Inc. v. Consol. City of Indianapolis*, 319
13 F.3d 277, 283 (7th Cir. 2003)). Likewise the Second Circuit has described the plaintiffs’
14 “stringent” burden to “show an extremely high degree of similarity between themselves and the
15 persons to whom they compare themselves.” *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d
16 Cir. 2006).

17 As for the third element, if the plaintiffs show the defendants treated them
18 differently than others in the same situation, they must prove the defendants had no legitimate
19 reason to make this distinction. *Willowbrook*, 528 U.S. at 564; *Gerhart*, 637 F.3d at 1023. The
20 question is not whether the defendants’ actions were themselves rational, but whether the
21 defendants had a valid reason to single the plaintiffs out. *Gerhard*, 637 F.3d at 1023. A
22 distinction is permissible if it “bears a rational relation to a legitimate state interest.” *Squaw*
23 *Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004) (citation and quotation marks
24 omitted), *overruled in part on other grounds, Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 532
25 (2005). The government does not necessarily act irrationally if it selectively enforces valid laws.
26 *Id.* Some other evidence of the defendants’ malice, arbitrariness, or irrationality is essential. *See,*
27 *e.g., Valley Outdoor, Inc. v. City of Riverside*, 446 F.3d 948, 955 (9th Cir. 2006); *Squaw Valley*,
28 375 F.3d at 944.

1 If a defendant offers a rational explanation for the distinctions, the case may
2 nevertheless go to trial to resolve factual disputes about whether that explanation is objectively
3 false or pretext for an underlying impermissible motive. *See, e.g., Valley Outdoor*, 446 F.3d at
4 955; *Squaw Valley*, 375 F.3d at 945–46. For example, in *Valley Outdoor*, the plaintiffs offered
5 evidence that could have shown the government denied a permit application out of spite. *See*
6 446 F.3d at 955. And in *Squaw Valley*, the plaintiff cited evidence suggesting the defendants’
7 enforcement actions were motivated by personal animosity. *See* 375 F.3d at 946–47.

8 The Hardestys argue incorrectly that a plaintiff is excused of her burden to show
9 the defendants treated her differently if she produces evidence of their false or pretextual
10 explanations. *See, e.g., Hardesty Opp’n County Mot. Pt. A* at 11. The kernel of equal protection
11 is a comparative test: did the government discriminate? *See, e.g., Willowbrook*, 528 U.S. at 564
12 (“[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every
13 person within the State’s jurisdiction against intentional and arbitrary discrimination”
14 (citation, alterations, and quotation marks omitted)). Or in other words, “[d]ue process’
15 emphasizes fairness between the State and the individual dealing with the State, regardless of how
16 other individuals in the same situation may be treated, [whereas] ‘[e]qual protection,’ . . .
17 emphasizes disparity in treatment by a State between classes of individuals whose situations are
18 arguably indistinguishable.” *Ross*, 417 U.S. at 609.

19 Without exception, the Ninth Circuit and Supreme Court have required class-of-
20 one plaintiffs to show they were treated differently than others who were similarly situated. *See,*
21 *e.g., Engquist*, 553 U.S. at 601 (the Equal Protection clause “ensure[s] that all persons subject to
22 legislation or regulation are indeed being ‘treated alike, under like circumstances and
23 conditions.’”); *Willowbrook*, 528 U.S. at 564 (a class-of-one claim must rest on the plaintiff’s
24 allegation “that she has been intentionally treated differently from others similarly situated and
25 that there is no rational basis for the difference in treatment”); *Teixeira v. Cty. of Alameda*, ___
26 F. 3d ___, 2016 WL 2849245, at *4 (9th Cir. May 16, 2016) (same); *Gerhart*, 637 F.3d at 1022
27 (same); *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008) (same); *Valley*
28 *Outdoor*, 446 F.3d at 955 (referring to “differential treatment”); *Squaw Valley*, 375 F.3d at 944

1 (“[A]ll persons similarly situated should be treated alike.” (citation and quotation marks
2 omitted)).

3 To support their position on the question of similarly situated persons, the
4 Hardestys rely on *Squaw Valley Development Co. v. Goldberg*. See Hardesty Opp’n Sherry Mot.
5 at 11 (citing 375 F.3d at 944). But in *Squaw Valley*, the defendants conceded they had “afforded
6 [the plaintiff] more oversight” and imposed “more formal regulatory and enforcement action” as
7 compared to similarly situated persons. 375 F.3d at 944. The passages the Hardestys cite to
8 support their argument appear in the *Squaw Valley* court’s discussion of the defendants’ reasons
9 for singling the plaintiff out, not whether similarly situated persons could be found. See *id.* at
10 944–45 (concluding the defendants had “articulated a rational reason for their actions”). The
11 Ninth Circuit discussed comparisons with other persons only to show why it believed the
12 defendants’ explanation was rational: the comparators the plaintiff proposed were not similarly
13 situated. See, e.g., *id.* at 945 (“[T]he record does support that [the defendant] imposed harsher
14 penalties on [the plaintiff] However, again, [the plaintiff] has simply not provided evidence
15 that these dischargers are similarly situated.”).

16 The court does not read the Ninth Circuit’s recent decision in *Erickson v. County*
17 *of Nevada ex rel. Board of Supervisors*, 607 F. App’x 711 (9th Cir. 2015), to conflict with *Squaw*
18 *Valley* in this respect. The *Erickson* court’s brief citation of *Squaw Valley* is best understood as
19 an analogy, as it is preceded by a “see also” signal and follows a citation to the Supreme Court’s
20 decision in *Engquist*. See *id.* at 712. In any event, *Erickson*’s unpublished interpretation of
21 *Squaw Valley* is not binding on this court, see Ninth Circuit Rule 36-3, and neither the *Erickson*
22 nor *Squaw Valley* panels could have overruled the Supreme Court’s and Ninth Circuit’s many
23 decisions that require a showing of similarity in any class-of-one claim.

24 With these rules in mind, the court now considers the specifics of the Hardestys’
25 and Schneiders’ equal protection claims.

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1 B. The Hardestys' Second Claim Against O'Bryant, Norris, and Testa

2 The Hardestys allege defendants O'Bryant, Norris, and Testa subjected the Mine
3 to unusually harsh enforcement with respect to the AB 3098 list. *See* Hardesty Compl.
4 ¶¶ 120–21.

5 1. Denial of Appeal and Selective Provision of Guidance

6 First, the Hardestys allege they were selectively denied any appeal of OMR's
7 decision to remove HSG from the AB 3098 list. But they have produced no evidence to show any
8 other mine operator was allowed an appeal. This claim therefore cannot support their case.
9 Similarly, the Hardestys argue OMR denied them an explanation of how they could be reinstated
10 on the AB 3098 list, whereas it gave those instructions to another mining operation. Hardesty
11 Opp'n State Defs.' Mot. at 48–49. But the Hardestys rely only on the unverified complaint to
12 support this allegation. *See id.* at 48 (citing Hardesty Compl. ¶ 124). Allegations do not suffice
13 in response to a motion for summary judgment. *See, e.g., Arpin v. Santa Clara Valley Transp.*
14 *Agency*, 261 F.3d 912, 922 (9th Cir. 2001).

15 2. Norris and the Truck

16 Second, the Hardestys allege OMR singled them out for unusually harsh
17 enforcement when one of its staff, Gay Norris, followed a truck that left the Mine, then told a
18 customer not to buy HSG's products.

19 Norris participated in OMR's December 2008 inspection of the Mine. Norris
20 Decl. ¶ 2, ECF No. 222-20. During the inspection, she saw loaded trucks leaving the Mine. *Id.*
21 After the inspection, she checked OMR's records and found the Mine was not on the AB 3098
22 list. *Id.* ¶ 3. At O'Bryant's suggestion, she decided to follow a loaded truck as it left the Mine.
23 Norris Dep. 101–02 & Ex. 97; Hardesty UMF no. 68; O'Bryant Decl. ¶ 26. Following trucks to
24 delivery sites was one way the DOC enforced the AB 3098 list and SMARA. O'Bryant Decl.
25 ¶ 26.

26 The next month, Norris and another OMR staffer followed a truck as it left the
27 Mine. JSUF no. 36. The truck stopped near a construction site. JSUF no. 37. Norris pulled
28 alongside the truck and approached the driver. *Id.* She identified herself and asked the driver

1 where he was coming from and if the construction site was his delivery stop. JSUF no. 38. He
2 said he was coming from the Mine and that his destination was the construction site across the
3 street. JSUF no. 39. Norris went to the nearby construction office and spoke with a
4 representative of the construction project. JSUF nos. 40, 41. Norris learned the project was for
5 the East Bay Municipal Utility District (EBMUD), a California local government agency. JSUF
6 nos. 42, 43. Norris told the representative that HSG was not on the AB 3098 list and that
7 EBMUD should not buy gravel from HSG. JSUF no. 44.

8 Norris's involvement in this case ended soon after she followed the truck. JSUF
9 no. 53. Although HSG was later temporarily reinstated on the AB 3098 List, Norris did not
10 inform EBMUD of this fact. Norris Dep. 150–53. That was just “not something [OMR] would
11 do.” *Id.* at 153.

12 This record could not allow a jury to find OMR's truck-following tactics were
13 unusual or arbitrary. Following trucks to delivery sites was one way DOC enforced the AB 3098
14 list and SMARA; it had used the same tactic in the past. O'Bryant Decl. ¶ 26. More specifically,
15 aside from HSG, only two active California mining operations were not on the AB 3098 list: an
16 unidentified mining operation in Riverside County, and the Pacific Rock Mine in Ventura
17 County. *See* JSUF nos. 55, 56. Nothing suggests OMR treated these mines any differently than
18 HSG. Norris also warned a state agency not to purchase materials from the unidentified
19 Riverside County operation. JSUF no. 55. When Norris learned the Pacific Rock Mine was not
20 on the AB 3098 list, she tried to follow its delivery trucks, but was unsuccessful. JSUF no. 56;
21 Norris Dep. 136–37.¹⁷

22 3. Removal from the AB 3098 List Without Notice

23 Lastly, the Hardestys allege OMR selectively denied them any notice before
24 removing HSG from the AB 3098 list. It is undisputed both that OMR removed HSG from the
25 list without notice and that the removal was intentional. The Hardestys must therefore show they
26

27 ¹⁷ The parties also refer to the Horseshoe Mine, but it is unclear what OMR did or did not
28 do about the Horseshoe Mine and whether the Horseshoe Mine is comparable to HSG. *See*
Hardesty Compl. ¶ 65; State Defs.' Mot. at 48; Norris Decl. ¶¶ 6–7.

1 were treated differently than other similarly situated persons. They propose to compare HSG to
2 all California surface mining operations that were “at risk of being removed from the AB 3098
3 list by OMR.” Opp’n State Defs.’ Mot. at 42. The court agrees that for all relevant purposes,
4 another surface mining operation would be in an identical situation if (1) it was active, (2) in
5 OMR’s view, it did not meet the listing requirements, and (3) OMR was considering whether to
6 remove the mine operator from the list. The Hardestys bear the burden to point to evidence that
7 would allow a trier of fact to find OMR treated a surface mining operation in this situation
8 differently than it treated HSG.

9 OMR ordinarily gave thirty days’ notice before removing a mining operation from
10 the AB 3098 list. *See, e.g.*, O’Bryant Decl. ¶ 14. As a matter of discretion, OMR also
11 occasionally gave a mine operator more than thirty days’ notice.¹⁸ *See id.* ¶ 15; Koehler Decl.
12 ¶ 14, ECF No. 222-21; *see also* O’Bryant Dep. Ex. 356 (letter notifying the County of
13 Sacramento several mine operators were at risk to be removed from the AB 3098 list also sent to
14 those mine operators). But HSG was removed from the list without prior notice. A jury could
15 credit this evidence and find HSG was treated differently than comparable mining operations.
16 The focus therefore shifts to the defendants’ explanation for their decision to treat HSG
17 differently.

18 The defendants cite evidence showing that if OMR believed a mine operator
19 would not or could not fix a problem, the operator was sometimes removed from the list without
20 notice. O’Bryant Decl. ¶ 14. This appears to have been the case with the Pacific Rock and Truck
21 Village Quarry mines, *see id.* ¶ 20; *id.* Ex. H, ECF No. 223-1; *id.* Ex. I, ECF No. 223-2, but not
22 the Lehigh Southwest Cement Company, *see, e.g.*, Pompy Decl. ¶¶ 5–9, ECF No. 222-27. As for
23 HSG, defendant O’Bryant explains that he believed, after speaking to his staff, that Hardesty and
24

25 ¹⁸ Some courts have concluded that after the Supreme Court’s decision in *Engquist*, any
26 discretionary decision is incompatible with liability under a class-of-one theory. *See, e.g.*,
27 *Sansotta v. Town of Nags Head*, 724 F.3d 533, 542 (4th Cir. 2013) (acknowledging this
28 uncertainty); *Flowers v. City of Minneapolis, Minn.*, 558 F.3d 794, 799 (8th Cir. 2009) (relying
on *Engquist* to conclude that a police officer’s discretionary decisions are incompatible with a
class-of-one claim). Absent a binding decision from the Ninth Circuit or Supreme Court, this
court declines to grant summary judgment on this basis.

1 Schneider had no desire to correct problems that would require the Mine to be removed from the
2 AB 3098 list. O’Bryant Decl. ¶ 16. O’Bryant also believed the Mine would need far more than
3 thirty days to correct these problems. *Id.* ¶ 17. If, from OMR’s perspective, HSG was unlikely to
4 comply and unlikely to correct problems within thirty days, removing the Mine without advance
5 notice would save time and effort and might spur the Mine into action. This is a rational
6 explanation for treating the Mine differently.

7 The Hardestys contend this facially rational explanation hides an improper goal:
8 the defendants’ desire to put HSG out of business at the behest of legislators and competitors.
9 Their presentation of evidence in support of this contention is haphazard at best. The Hardestys
10 have filed a separate statement of 407 allegedly disputed facts. *See Hardesty Stmt.*, ECF No. 246.
11 Many include citations to page “????” of a deposition or section “????” of the Public Resources
12 Code. *See id.* nos. 74, 170, 177, 199, 205, 206, 213. Some documents are cited with cryptic
13 abbreviations. *See, e.g., id.* nos. 163, 164 (citing “KH Declaration”). Others are not facts, but
14 opinions or commentaries on the evidence. *See, e.g., id.* no. 214. Many are not cited in the
15 Hardestys’ briefs. And attached to their separate statement are 129 exhibits. Most are a
16 collection of letters, emails, memos, diagrams, or reports, which the Hardestys present without
17 explanation, authentication, foundation, or context.

18 Summary judgment is not a “disfavored procedural shortcut,” but “an integral part
19 of the Federal Rules as a whole” that allows defendants to avoid wasteful trials by proving a
20 plaintiff’s claims “have no factual basis.” *Celotex*, 477 U.S. at 327. For this reason, when a
21 defendant moves for summary judgment and carries its initial burden to “inform the court of the
22 basis for its motion,” the plaintiff must “designate specific facts showing that there is a genuine
23 issue for trial.” *Id.* at 324 (quotation marks omitted). The Local Rules of this district require
24 citations to “particular portions” of the record to support the non-moving party’s case. E.D. Cal.
25 L.R. 260(b). Separate statements of disputed facts must be both “concise” and supported by “all
26 evidentiary documents.” *Id.* The court has no duty to “comb the record to find some reason to
27 deny a motion for summary judgment.” *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1029
28 (9th Cir. 2001) (citation and quotation marks omitted). “If a district court must examine reams or

1 file cabinets full of paper looking for genuine issues of fact, as though the judge were the adverse
2 party's lawyer, an enormous amount of time is taken away from other litigants." *Id.* Of course
3 some cases, like this one, call for the evaluation of decades and reams of documentary evidence.
4 But even in a complicated case, and especially in a complicated case, litigants must cite particular
5 portions of the record and explain those citations.

6 Moreover, evidence must be "presented in a form that would be admissible in
7 evidence." Fed. R. Civ. P. 56(c)(2). This Rule does not require a party who opposes summary
8 judgment to present its evidence in strict adherence with the Federal Rules of Evidence. *See*
9 *Celotex*, 477 U.S. at 324; *Fraser*, 342 F.3d at 1037. But a party presenting a document to the
10 court must convey it can satisfy basic foundational precursors: Where did it come from? When
11 was it created? Who created it? What does it mean?.

12 By presenting the Hardestys' evidence in the form before the court, counsel runs a
13 great risk that the court will be unable to verify his clients' interpretation of the facts. In an effort
14 to resolve the pending motions on their merits rather than counsel's organizational shortcomings,
15 the court has reviewed the documents cited in the Hardestys' briefing to determine whether the
16 information in those documents could be presented in an admissible form at trial. At the same
17 time, the court has taken pains to avoid doing counsel's job for them. The documents the
18 Hardestys cite are as follows:

19 (a) As summarized above, *see supra* section III.E.2, page 13–14, on October 3,
20 2008, Senator Cox sent a letter to the Secretary of the Resources Agency. Hardesty Stmt. Ex. 1,
21 ECF No. 248-1. He expressed concern that HSG had secured a competitive advantage by flouting
22 federal, state, and local regulations. *Id.* This letter could be introduced in some form at trial.

23 (b) October 2008 emails between staff at the Resources Agency and DOC suggest
24 Senator Cox's letter motivated the agencies to move quickly. *See* Hardesty Stmt. Ex. 72, at 2,
25 ECF No. 248-11 ("Given that Senator Cox is aware of, and has written to Sec. Chrisman, about
26 this issue, I (and the Secretary) want it resolved one way or another as quickly as possible."). The
27 same email exchange suggests the agencies understood the investigation was more than "just a
28 question about compliance with the law," but rather "competitive advantage." *Id.* It appears

1 these emails could also be presented in admissible form, for example through the testimony of the
2 sender or receiver.

3 (c) Diane Anderson, who previously represented the Hardestys in this action, ECF
4 No. 72, submitted a declaration in support of the Hardestys' current opposition. ECF No. 227.
5 She would testify at trial that in February 2009, she exchanged emails and spoke on the phone
6 with another attorney named John Williams. *Id.* ¶¶ 3–4. Williams suggested he was working
7 with one of HSG's competitors to convince state and federal regulators to begin enforcement
8 actions against the Mine. *Id.* ¶ 4. Anderson believes Williams contacted her under the mistaken
9 impression that she was "against" Hardesty. *Id.* ¶ 5. Anderson attached a string of emails she
10 received from Williams that explained his plan. *Id.* Ex. 1. "Plan A" was to convince state
11 regulators to revoke a permit they had granted HSG to use portable equipment on the Mine. *Id.*
12 Ex. 1, at 3–4. "Plan B" was to convince Sacramento County to revisit its decision to recognize a
13 vested right to mine. *See id.* Ex. 1, at 4–5. Williams also forwarded Anderson correspondence he
14 had sent to the U.S. Fish and Wildlife Service in 2007, which encouraged an investigation of
15 HSG and the Mine. *See id.* Ex. 1, at 6–7; *see also* Hardesty Stmt. Ex. 17, at 1, ECF No. 248-3
16 (Mar. 7, 2007 letter from John Lane of Teichert Aggregates to Justin Cutler of the U.S. Fish &
17 Wildlife Service); *id.* Ex. 17, at 2 (internal Fish & Wildlife emails about a possible investigation
18 at the Mine in response to the letter); *id.* Ex. 17, at 3–4 (November 2007 emails between Lane and
19 Michael Finan of the U.S. Army Corps of Engineers encouraging an investigation of HSG and the
20 Mine). Ms. Anderson's declaration lays an adequate foundation for this evidence, at least for the
21 court's consideration at this stage.

22 (d) A document titled "Strategy Matrix: Hardesty Sand and Gravel" includes a
23 table with rows for several state and federal regulatory agencies, including the U.S.
24 Environmental Protection Agency, the U.S. Army Corps of Engineers, the U.S. Fish & Wildlife
25 Service, OMR, the Flood Board, DFG, and Sacramento County. *See generally* Hardesty Stmt.
26 Ex. 19, ECF No. 248-3. One column is titled "Teichert Strategy & Updates" and contains
27 bulleted lists of past and future planned events or actions for each agency. *See generally id.* For
28 example, in the row for the OMR, the table includes the entries "Met w/DOC Chief Deputy

1 Director 3/30,” “Met w/ Sen. Dave Cox’s office,” “Met w/Dennis O’Bryant and staff on Aug. 31,
2 2010,” “OMR conducted investigation in 2009 of area near Cosumnes River,” and the table notes
3 O’Bryant and Norris are named in this lawsuit. *See id.* at 5–6. The table is dated October 28,
4 2010. *See generally id.* The table is marked as Exhibit 281 to the deposition of Curt Taras. *See*
5 *id.* at 1. The Hardestys have not cited pages of Taras’s deposition or other evidence to explain
6 who created or maintained the table or what its entries mean. The court therefore does not
7 consider this document.

8 (e) A memo titled “Talking Points/Script” and “Meeting with Senator Dave Cox
9 May 4, 2010” including a bulleted paragraph that reads, “After significant pressure from
10 Teichert/others, the following agencies are conducting their own individual investigations,” and
11 lists OMR, among other federal and state agencies. Hardesty Stmt. Ex. 20, ECF no. 248-3. The
12 memo suggests the Senator could help by arranging meetings, sending letters to the Attorney
13 General, and calling the heads of state agencies. *Id.* The memo is marked as Exhibit 358 to the
14 deposition of Dennis O’Bryant. *See id.* at 1. But the Hardestys have not cited to it or other
15 evidence to explain who created the memo, when, or why, or to explain its contents. The court
16 therefore does not consider it.

17 (f) In an August 2010 email, Kate Wheatley of Taylor & Wiley, writing “[o]n
18 behalf of Teichert Aggregates,” sent O’Bryant a request for a meeting “to discuss the County of
19 Sacramento’s enforcement action for the Hardesty Sand & Gravel (Schneider Historic Mine).”
20 Hardesty Stmt. Ex. 60, ECF No. 248-10. O’Bryant replied and confirmed a meeting date later
21 that month in his office. *Id.* It appears the Hardestys could likely lay a foundation for this
22 email’s admission in some form at trial, although it is unclear whether a meeting actually went
23 forward as planned. *See O’Bryant Dep.* 195–97.

24 (g) An undated memo lists names and contact information for officers in a number
25 of federal and California state agencies. Hardesty Stmt. Ex. 18, ECF No. 248-3. The memo
26 notes, “Highlighted names are those we’ve met with.” *Id.* at 1. It includes Brett Koehler and Ken
27 Trott at the OMR, whose names are highlighted *Id.* at 2. In addition, two business cards are
28 copied on the first page: Brian Lungren of Platinum Advisors, and Kate Wheatley of Taylor &

1 Wiley. *Id.* Mr. Hardesty understands Brian Lungren is the brother of former Congressman Dan
2 Lungren and that Teichert hired Brian Lungren to advocate on its behalf. Hardesty Decl. ¶ 39,
3 ECF No. 247. The memo is marked as Exhibit 77 to the Lucero deposition. *See id.* at 1. But the
4 Hardestys have cited no part of that deposition or other evidence to explain who created the
5 memo, when, or why, or to explain its contents. The court therefore does not consider this
6 document.

7 (h) Another of the Hardestys' former attorneys, Scott Morris, wrote to Kenneth
8 Trott in October 2009 to explain the Hardestys' belief that OMR was participating in a politically
9 motivated scheme to drive HSG out of business. Hardesty Stmt. Ex. 62, ECF No. 248-11¹⁹; *see*
10 *also* Hardesty Decl. ¶ 40 (expressing the same belief). Zachary Simmons of the Army Corps of
11 Engineers also appears to have believed that HSG did not present any regulatory concern, unlike
12 other mining operators who had complained about HSG's operations. *See* Hardesty Stmt. Ex. 52,
13 ECF No. 248-10. This evidence could be introduced in some form at trial.

14 (i) The Hardestys filed copies of publicly available records that suggest (i) several
15 times between 2003 and 2012, former Supervisor Roger Dickinson received campaign
16 contributions from Taylor & Wiley, the law firm they allege represented Teichert, *see* Hill Decl.,
17 ECF No. 230; *id.* Ex. 1; (ii) former Senator David Cox received campaign contributions from
18 Taylor & Wiley in 2001, 2002, 2003, 2007, and 2008, *id.*; (iii) Dickinson received campaign
19 contributions from "A. Teichert & Sons, Inc." between 2001 and 2014, *id.* Ex. 2; (iv) Dan
20 Lungren received campaign contributions from James Wiley, John Taylor, and Suzanne Taylor
21 between 2006 and 2012, *id.* Exs. 3–4, 6; and (v) Dan Lungren received campaign contributions
22 from "Judson T. Riggs" of "Teichert" between 2004 and 2012, *id.* Ex. 5. This evidence is
23 presented largely in compliance with Rule 56.

24 In addition to this evidence of alleged pretext, as noted above, a trial may be
25 necessary for a second reason: if the evidence could show the defendants' rational explanation

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28 ¹⁹ The Hardestys also cite Morris's deposition, and say he made the same observation, but
do not refer to a specific page. *See* Hardesty Stmt. no. 213, ECF No. 246.

1 itself was false. *Squaw Valley*, 375 F.3d at 945–46. Aside from the evidence of pretext reviewed
2 above, the Hardestys also argue the factual foundation of OMR’s decision is in dispute.

3 OMR explains its decision not to give the Hardestys and Schneiders notice before
4 taking HSG off the AB 3098 list by citing the report of its December 2008 inspection. *See*
5 O’Bryant Decl. ¶ 5; *id.* Ex. A, ECF No. 222-26. As a result of that inspection, OMR determined
6 (i) the pits just south of the Cosumnes River were larger, deeper, and more steeply sloped than
7 reported or permitted by the Mine’s reclamation plan; (ii) the pits’ depth had caused groundwater
8 to seep into them, which in turn undermined the integrity of the pits’ walls and increased the
9 possibility the river might flow into the pits; and (iii) the Mine’s FAM was inadequate because it
10 was prepared without knowledge of the pits’ actual size. *See* Koehler Decl. ¶ 7, ECF No. 222-21;
11 *id.* Ex. A, ¶¶ 2.2–2.5, 3.1, ECF No. 222-22. OMR geologists are prepared to testify about these
12 conclusions and their reasoning. *See generally id.*; Wesling Decl., ECF No. 222-5.

13 To contest these findings, the Hardestys point out that their former attorney, Scott
14 Morris, concluded that OMR’s theory of pit capture was not viable. Morris is an engineer and
15 formerly worked for the Army Corps of Engineers. Morris Dep. 11. As part of his
16 responsibilities, he worked to repair levees in the Sacramento area after they were damaged in a
17 1986 flood. *Id.* at 11–12. He also helped write and obtain approval of SMARA reclamation
18 plans in Stanislaus, Merced, and Tuolumne Counties. *Id.* at 12–13. Morris believes OMR
19 misclassified riverbanks as levees, falsified inspection reports, misused the SMARA process, and
20 invented its theory of pit capture or flood danger. *See id.* at 49–52. In his opinion, the earthen
21 wall between the pits at the Mine and the Cosumnes River were thicker and more stable than most
22 levees in Sacramento. *See id.* at 98.

23 The Hardestys also rely on the opinion of engineer Don Olsen. Olsen is a
24 Principal at Holdrege & Kull, an engineering consulting firm that has provided services to HSG
25 and the Mine. Olsen reviewed documents, reports, topographical maps, and photographs,
26 interviewed engineers and others who knew about the Mine, visited the Mine, and drew on his
27 personal knowledge to conclude the pits were never in danger of being captured. *See* Olsen Rep.
28 at OLS 02, ECF No. 202.

1 In sum, before 2008, OMR and other state regulatory agencies made only sporadic
2 attempts to require HSG and the Mine to comply with SMARA's provisions. OMR was not
3 particularly concerned with HSG's operations. It seemed satisfied HSG was operating the Mine
4 under a vested right and an approved reclamation plan. Then, after HSG's operations expanded
5 significantly, competitors voiced concerns to legislators and regulators, who contacted several
6 federal and state agencies. OMR abruptly began a series of inspections and enforcement actions.
7 It moved more quickly than it would have if no legislator or competitor were involved. OMR
8 decided to remove HSG from the AB 3098 list without notice, which was out of the ordinary, on
9 the basis of its belief that the Schneiders and Hardestys would not fix problems at the Mine site.
10 OMR also believed that even if the Schneiders and Hardestys did move quickly to address its
11 concerns, they would need more than the thirty-day notice period to do so. But two experienced
12 engineers believe OMR's conclusions were faulty.

13 On this record, a jury could find that OMR's enforcement decisions were a
14 legitimate attempt to enforce the law in response to complaints. A regulator cannot always be
15 said to have acted on improper motives by responding to complaints from legislators and voters.
16 *Cf., e.g., U.S. ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1146
17 (9th Cir. 1998) (“[C]itizens are entitled to advocate the passage or enforcement of laws and
18 members of Congress may seek to influence agency action.”); *accord Eastern R.R. Presidents*
19 *Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961); *Radio Ass'n on Defending*
20 *Airwave Rights, Inc. v. United States Dep't of Transp.*, 47 F.3d 794, 808 (6th Cir. 1995); *Sierra*
21 *Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981). A jury could also find HSG was operating
22 outside its reclamation plan and was unable or unwilling to fix problems within the OMR's
23 standard thirty-day notice period. But on the other hand, a jury could find that OMR's decision to
24 treat HSG differently was motivated by politics, not reason, and that OMR intended its
25 investigation to harm the Hardestys' business, not to remedy violations of SMARA. Because
26 both conclusions are reasonable interpretations of this record, the motion for summary judgment
27 cannot be granted on the basis of the state defendants' explanation for their decision to remove
28 HSG from the 3098 list.

1 That said, no evidence connects defendant Testa to OMR’s decision to remove
2 HSG from the AB 3098 list. The same is true of defendant Norris. The Hardestys’ equal
3 protection claims therefore cannot proceed against these two defendants.

4 O’Bryant argues he is protected by his qualified immunity. At summary
5 judgment, to resolve the question of qualified immunity, courts engage in a two-part inquiry.
6 *Tolan v. Cotton*, ___ U.S. ___, 134 S. Ct. 1861, 1865 (2014) (per curiam). A district court may
7 take either of these two parts first, *Pearson v. Callahan*, 555 U.S. 223, 242 (2009), but typically
8 the court first determines whether the facts, viewed in the light most favorable to the party
9 asserting an injury, show the defendant violated one or more of the plaintiffs’ federally protected
10 rights. *Tolan*, 134 U.S. at 1865; *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168
11 (9th Cir. 2013). The discussion above answers this question in the affirmative: the Hardestys
12 have presented evidence that would allow a rational trier of fact to conclude that O’Bryant
13 arbitrarily removed HSG from the AB 3098 list without notice in violation of the Equal
14 Protection Clause.

15 The second part of the qualified-immunity inquiry tests whether the federal right
16 asserted was “clearly established” at the time of the alleged violation. *Tolan*, 134 S. Ct. at 1866.
17 That determination hinges on whether the law as it was gave the defendants fair warning that their
18 conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Here, at the time OMR
19 removed HSG from the 3098 list, the Supreme Court had clearly confirmed that the Equal
20 Protection Clause prohibits government officers from intentionally and arbitrarily treating a
21 person differently than others in the same situation. *See, e.g., Willowbrook*, 528 U.S. at 564.
22 Likewise, it was clearly established that an officer in O’Bryant’s situation may face liability if his
23 explanation for this differential treatment is objectively false or is pretext for an impermissible
24 motive, *see, e.g., Valley Outdoor*, 446 F.3d at 955; *Squaw Valley*, 375 F.3d at 945–46, both
25 triable questions in this case. O’Bryant is not entitled to qualified immunity.

26 4. Summary

27 In conclusion, the state defendants’ motion for summary judgment is granted with
28 respect to the equal protection claims against defendants Norris and Testa. The motion is also

1 granted with respect to the claims (1) that O’Bryant selectively denied the Hardestys an appeal of
2 their removal, (2) that O’Bryant selectively ignored their requests for guidance on reinstatement
3 on the AB 3098 list, and (3) that O’Bryant selectively instructed OMR staff to follow trucks as
4 they left the Mine. The motion is denied with respect to the claim that O’Bryant selectively
5 denied the Hardestys notice before removing HSG from the AB 3098 list.

6 C. The Hardestys’ Sixth Claim against Sacramento County and Sherry

7 The Hardestys propose three bases for this claim. First, they argue “Sherry
8 allowed other mines to remain on the AB 3098 list despite outdated and completely misleading
9 FACE amounts, while hounding the Hardestys and raising their FACE amounts by 500% to
10 1000%.” Hardesty Opp’n County Mot. Pt. A at 11 (citing Hardesty Stmt. no. 205). This
11 argument cannot apply to Sacramento County or Sherry because it is undisputed that state
12 agencies control membership on the AB 3098 list, not Sacramento County or its officers. *See*,
13 *e.g.*, JSUF no. 54.

14 Second, the Hardestys argue another mine, which they refer to as the Kennefick or
15 Pilliken mine, was allowed to operate during the pendency of its application for a conditional use
16 permit, but they were not allowed to continue operations without a conditional use permit. *See*
17 Hardesty Opp’n County Mot. Pt. A. at 12 (citing Hardesty Stmt. nos. 399–402). They cite only
18 Mr. Hardesty’s declaration to support this assertion. *See* Hardesty Stmt. nos. 399–402 (citing
19 Hardesty Decl. ¶¶ 80–83). Mr. Hardesty’s declaration does not establish a foundation for his
20 assertions and does not clarify during what time period the Kennefick mine was allowed to
21 operate. *See* Fed. R. Evid. 602 (“A witness may testify to a matter only if evidence is introduced
22 sufficient to support a finding that the witness has personal knowledge of the matter.”). Even if
23 his statements were admitted, they would not show HSG and the Kennefick mine were alike in all
24 relevant respects. For example, it remains uncertain whether the two mines were a similar size,
25 whether they operated over a similar time period, and whether they operated under similar
26 permits.

27 Third, the Hardestys argue other mining operators were allowed to move their
28 processing plants without risking violation of their reclamation plans or permit status. Hardesty

1 Opp'n County Mot. Pt. A at 12. But they offer no evidence to show where these other mines
2 were located, when processing plants were moved, and how these unnamed mining operations
3 were otherwise similarly situated.

4 The motion for summary judgment is granted with respect to the equal protection
5 claims against Sacramento County and Sherry.

6 D. The Hardestys' Seventh Claim Against Sacramento County, Storelli, and Moffitt

7 The Hardestys rely on three allegations to support this claim. First, they allege
8 that “[u]nlike the other similarly-situated mining operators in Sacramento County, the Defendants
9 selected and hired an environmental inspector, Dan [sic] Bieber, to inspect the Plaintiffs’ mining
10 operations and prepare a FACE.” Hardesty Compl. ¶ 168. Second, they allege the defendants
11 substantially increased the amount of their required financial assurances and ordered HSG to halt
12 its operations, but allowed similarly situated competitors to continue operating for decades
13 without posting additional financial assurances. *Id.* ¶ 169. And third, they allege the defendants
14 inspected the Mine far more often than other surface mining operations. *Id.* ¶ 172.

15 The record includes no evidence of another surface mining operation. Rather, the
16 Hardestys impugn the defendants’ failure to offer evidence or assert that other mines were
17 subjected to the same regulatory scrutiny. *See* Hardesty Opp’n County Mot. Pt. B at 9. This is
18 not the defendants’ burden to carry. The Hardestys, not the defendants, would be required to
19 prove at trial that HSG was treated differently than other similarly situated mine operators. *See,*
20 *e.g., Gerhart*, 637 F.3d at 1022. On summary judgment, the defendants “need only prove that
21 there is an absence of evidence” to support the Hardestys’ case. *In re Oracle*, 627 F.3d at 387.
22 And the Hardestys must respond by “designat[ing] specific facts demonstrating the existence of
23 genuine issues for trial.” *Id.*

24 The Hardestys have not produced the evidence they would use to show a jury that
25 HSG and another competitor are, in all relevant respects, “alike,” *Nordlinger*, 505 U.S. at 10,
26 “arguably indistinguishable,” *Ross*, 417 U.S. at 609, or “identical,” *Chico Scrap Metal*, 830 F.
27 Supp. 2d at 975, as they must in a class-of-one case. If the jury is to make something of their

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1 case, it needs “grist” for the mill. *See* Hardesty Opp’n County Mot. Pt. B at 8 (quoting *Cordi-*
2 *Allen*, 494 F.3d at 251).

3 The motion for summary judgment is granted with respect to the equal protection
4 claims against Sacramento County, Storelli, and Moffitt.

5 E. The Schneiders’ Fifth Claim

6 The Schneiders’ equal protection claims are a subset of the Hardestys’ claims
7 under the same Amendment. *See* Schneider Compl. ¶¶ 296–302 (alleging the defendants required
8 higher-than-normal financial assurances and conducted an unusually large number of inspections
9 in an effort to drive the Mine out of business). They offer no evidence in addition to that cited by
10 the Hardestys and in fact rely on the same briefing. *Compare, e.g.*, Schneiders’ Opp’n County
11 Mot. Pt. B, *with* Hardesty Opp’n County Mot. Pt. B. Because only the claims against O’Bryant
12 will proceed to trial, and the Schneiders assert no claims against him or other OMR staff, the
13 motion for summary judgment is granted for the County defendants as to the Schneiders’ equal
14 protection claim.

15 IX. PROCEDURAL DUE PROCESS

16 The Schneiders and Hardestys claim the defendants deprived them of their
17 property interests in the Mine without due process. The Due Process Clause prohibits the
18 government from depriving a person of life, liberty, and property rights without first undertaking
19 an adequate process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). A person
20 can therefore succeed in a § 1983 lawsuit against a government actor by showing (1) that she had
21 a liberty or property interest protected by the Constitution, (2) that the defendant deprived her of
22 that interest, and (3) that the process the defendant undertook, if any, was lacking, *see, e.g.*,
23 *Shanks v. Dressel*, 540 F.3d 1082, 1090 (9th Cir. 2008).

24 First, the Constitution does not create the property interests it protects.
25 *Loudermill*, 470 U.S. at 538. Those interests “are created and their dimensions are defined by
26 existing rules or understandings that stem from an independent source,” for example, California
27 law. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Given a particular interest, “federal
28 constitutional law determines whether that interest rises to the level of a ‘legitimate claim of

1 entitlement’ protected by the Due Process Clause.” *San Bernardino Physicians’ Servs. Med. Grp.*
2 *v. Cty. of San Bernardino*, 825 F.2d 1404, 1408–09 (9th Cir. 1987) (quoting *Memphis Light, Gas*
3 *& Water Division v. Craft*, 436 U.S. 1, 9 (1978)).

4 Second, to succeed, the Hardestys and Schneiders must show not only that their
5 rights or interests are protected, but also that the defendants deprived them of those interests or
6 rights. *Shanks*, 540 F.3d at 1090. If they cannot, then their claims may not proceed. *Guatay*
7 *Christian Fellowship v. Cty. of San Diego*, 670 F.3d 957, 984 (9th Cir. 2011).

8 And third, the process itself—what “process” is “due” varies from one situation to
9 the next. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). But, generally speaking, “[t]he
10 fundamental requirement of due process is the opportunity to be heard at a meaningful time and
11 in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation and quotation
12 marks omitted). In most circumstances, the Constitution requires a hearing before the
13 government deprives a person of liberty or property. *Zinermon*, 494 U.S. at 127.

14 A. The Hardestys’ Fifth Claim Against Curt Taras

15 The Hardestys allege Curt Taras deprived them of due process “by issuing a cease
16 and desist letter demanding that Hardesty stop all work regulated by the California Water Code
17 and California Code of Regulations at the Mine without any notice, hearing, or opportunity for
18 appeal.” Hardesty Compl. ¶ 150. They allege the cease-and-desist letter prevented Hardesty
19 “from removing aggregate thereby depriving him of a legally cognizable property interest without
20 due process of law.” *Id.* ¶ 151. But the Hardestys have not supported these allegations with
21 evidence.

22 Curt Taras worked at the Flood Board beginning in February 2009. JSUF no. 17.
23 He participated in an inspection of the Mine in May 2009. Taras Decl. ¶ 6, ECF No. 222-11. He
24 took measurements and pictures of the pits near the Cosumnes River. *Id.* After his inspection, he
25 sent Hardesty and Schneider a letter summarizing his findings: (1) the pits were within a
26 designated floodway; (2) the pits were fifty feet deep and deeper than the surface of the river;
27 (3) water was seeping from the river into the pits; (4) the pits’ slopes were steep and had failed in
28 some places; (5) a reservoir had been created illegally; and (6) stockpiles had been placed within

1 the designated floodway. *Id.* Exs. C, D, at CVFPB 000013, 16, ECF No. 222-13. The letter
2 directed Hardesty to “cease and desist all work regulated by the California Water Code and
3 California Code of regulations on your property,” including “all excavation work, levee
4 alterations, reservoir filing, and dam construction.” *Id.* at CVFPB 000014, 17.

5 Scott Morris, the Hardestys’ attorney, remembers receiving Taras’s letter and
6 calling the Flood Board to say Mr. Hardesty did not believe the letter was binding. Morris
7 Dep. 189. Taras’s superior told Morris the Flood Board would not enforce the letter and would
8 visit the Mine. *Id.* Taras visited the mine again, at Hardesty’s invitation, on June 12, 2009.
9 Taras Decl. ¶ 8. After the meeting, the Flood Board agreed Hardesty could continue mining, and
10 Hardesty volunteered to complete repairs, restore the terrain, move his stockpiles, and excavate
11 only beyond the regulatory setbacks. *Id.* The Mine was free to continue excavations. Morris
12 Dep. 188–90. Hardesty completed all the Flood Board’s requests, even though he was under no
13 obligation to do so. *Id.* at 100.

14 Flood Board staff visited the Mine again the next year, and in an April 27, 2011
15 letter, the Flood Board informed Schneider it would not pursue an enforcement action. Taras
16 Decl. Ex. H, ECF No. 222-13. Taras left the Flood Board in April 2015, and to his knowledge the
17 Flood Board had not received the information it requested in its previous letter but had not taken
18 any enforcement actions. Taras Decl. ¶ 16.

19 This evidence cannot show the Hardestys were deprived of any right. *See, e.g.,*
20 *Guatay*, 670 F.3d at 984 (local government did not deprive plaintiff of any protected property
21 interest by sending notice of violation and cease-and-desist letter because it never brought
22 enforcement action). In response to Taras’s argument that Hardesty was deprived of no right, the
23 Hardestys argue only that the letter forced them “to hire attorneys and pay for additional reports”
24 because “Taras used [the letter] in his appearance at the Schneider appellate hearing on the vested
25 right to mine.” Opp’n State Defs.’ Mot. at 55. They do not cite authority to support this position,
26 and the court has located none.

27 The motion for summary judgment is granted as to this claim.

28 /////

1 B. The Hardestys' Sixth Claim against the County and Sherry

2 The Hardestys allege the County deprived them of due process by “initiating
3 proceedings to revoke —and revoking—the vested legal non-conforming use on the Mine without
4 providing any notice or a hearing to [them].” Hardesty Compl. ¶ 157. Generally speaking, in a
5 case like this, the Due Process Clause requires “notice reasonably calculated, under all
6 circumstances, to apprise interested parties of the pendency of the action and afford them an
7 opportunity to present their objections.” *Gallo v. U.S. Dist. Court For Dist. of Ariz.*, 349 F.3d
8 1169, 1181–82 (9th Cir. 2003) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S.
9 306, 314 (1950)).

10 The County advances two arguments in favor of its motion. First, it argues the
11 Hardestys are collaterally estopped from arguing they were denied due process because the
12 Sacramento County Superior Court already determined they lack a constitutionally protected
13 interest in any vested right. County Mot. Pt. 2 at 9–11; O’Dea Decl. Ex. E, ECF No. 218-5
14 (transcript of proceedings on Friday, July 20, 2012 in *Hardesty v. Bd. of Supervisors of*
15 *Sacramento Cty.*, No. 34-2012-80001138 (Sacramento Cty. Super. Ct. 2012)). The Superior
16 Court denied the Hardestys’ motion for a preliminary injunction because “there is not a vested
17 property interest to Mr. Hardesty that [was] before [the court] in this lawsuit.” O’Dea Decl. Ex.
18 E, at 18.

19 In federal court, the preclusive effect of a previous state-court determination is
20 governed by that state’s rules of preclusion. *ReadyLink Healthcare, Inc. v. State Comp. Ins.*
21 *Fund*, 754 F.3d 754, 760 (9th Cir. 2014). Collateral estoppel, or issue preclusion, bars the
22 relitigation of an issue that was argued and decided in prior proceedings. *Lucido v. Superior*
23 *Court*, 51 Cal. 3d 335, 341 & n.3 (1990) (en banc). A previous decision has preclusive effect
24 only if (1) the issue was identical to that decided in the previous proceeding; (2) the issue was
25 actually litigated; (3) the issue was necessarily decided; (4) the previous decision was final and on
26 the merits; and (5) the person against whom preclusion is sought was the same person as in the
27 earlier proceeding or is in privity with that person. *Id.* The party asserting preclusion bears the
28 burden of establishing each of these elements. *Id.*

1 Here, the County has not borne its burden to establish the Superior Court's
2 decision was final. The Superior Court's order denied a motion for a preliminary injunction. "A
3 preliminary injunction is a *provisional* remedy, and the trial court possesses the inherent power to
4 modify its preliminary injunction which is of a continuing or executory nature." *Huntingdon Life*
5 *Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228, 1248 (2005)
6 (citation and quotation marks omitted; emphasis in original). A preliminary injunction is binding
7 only if "it appears the court intended a final adjudication of the issue involved." *Id.* (citation and
8 quotation marks omitted). The County has presented no evidence to show the Superior Court
9 intended its decision to finally adjudicate the case. Because the burden is the County's to bear,
10 the motion cannot be granted on the basis of issue preclusion.

11 The County's second argument concerns the actual notice the Hardestys had of the
12 mid-2010 hearings before the Board of Supervisors. County Mot. Pt. 2 at 12–14. It is undisputed
13 the Hardestys received the County's April 2, 2009 letter, which reported the County's finding that
14 the Mine was operating outside the scope of its vested right, *see* O'Dea Decl. Ex. A, ECF
15 No. 218-5. But no evidence suggests the Hardestys received the County's April 2010 notice of
16 violation. *See id.* Ex. B, ECF No. 218-5; Schneider Decl. ¶ 3, ECF No. 220-2. Neither the
17 Hardestys nor their attorney attended the mid-2010 hearings before the Sacramento County Board
18 of Supervisors. *See* Sacramento Bd. of Supervisors Meeting Tr. at 2 (May 26, 2010), ECF
19 No. 220-3; Sacramento Bd. of Supervisors Meeting Tr. at 2 (July 13, 2010), ECF No. 220-4;
20 Sacramento Bd. of Supervisors Meeting Tr. at 2 (Sept. 14, 2010), ECF No. 220-6; Sacramento
21 Bd. of Supervisors Meeting Tr. at 2 (Sept. 28, 2010), ECF No. 220-7.

22 The court disagrees that the Hardestys' complaint in this case, filed about three
23 weeks before the Board of Supervisors had made a decision on Schneider's appeal, shows the
24 Hardestys had actual notice of the proceedings before the Board of Supervisors and had an
25 opportunity to voice objections in those proceedings. Although the Hardestys' original complaint
26 describes the pending appeal, *see* Compl. ¶¶ 52–53, the record does not allow the court to say
27 conclusively that the Hardestys knew about the status of the appeal or had a meaningful
28 opportunity to participate. The County's motion cannot be granted on this basis.

1 The motion is denied as to the Hardestys’ procedural due process claim against
2 Sacramento County and Sherry.

3 C. The Schneiders’ Claims

4 The Schneiders and the County defendants both move for summary judgment on
5 the Schneiders’ claims that they owned a vested right in the Mine and that the County deprived
6 them of this right without due process. Specifically, the Schneiders challenge the Board of
7 Supervisors’ September 2010 decision upholding the County’s April 2010 notice of violation.

8 1. Undisputed Facts

9 On April 2, 2009, the County sent Jay Schneider, Joseph Hardesty, and their
10 attorneys a letter informing them the County had received a complaint challenging their vested
11 rights to mine. O’Dea Decl. Ex. A, ECF No. 218-5. After an investigation, the County
12 concluded that HSG’s operations had expanded impermissibly since the time land use restrictions
13 were first enacted in 1956. *Id.* at 1–2. Therefore the County believed the Mine’s operations were
14 not within the scope of the Mine’s vested right. *Id.* at 2. The Mine’s only recourse was “to file
15 for and receive approval of a conditional use permit and rezone.” *Id.*

16 In April 2010, the County sent a notice of violation to Schneider, charging the
17 Mine with violations of the Sacramento Zoning Code. O’Dea Decl. Ex. B, ECF No. 218-5;
18 Schneider Decl. ¶ 3, ECF No. 220-2. The letter warned that the County could seek to revoke any
19 applicable permits, declare the Mine a public nuisance, and prosecute in civil or criminal court.
20 *See* O’Dea Decl. Ex. B, at 1–2. The County allowed Schneider fifteen days to request an
21 opportunity to appear before the County’s Board of Supervisors and appeal the County’s
22 determination. O’Dea Decl. Ex. B, at 2. Schneider appealed and hearings were held on May 26,
23 July 13, and September 14 and 28, 2010. Gamel Decl. ¶ 19; *see also generally* Schneider Decl.,
24 ECF No. 220-2. Schneider and his attorney were both present at the hearings, where they offered
25 evidence and made arguments against the County’s decision. *See generally* Sacramento Bd. of
26 Supervisors Meeting Tr. (May 26, July 13, Sept. 14, & Sept. 28, 2010). On September 28, 2010,
27 the Board of Supervisors upheld the notice of violation and made detailed findings of fact. *See*
28 Gamel Decl. ¶ 19; Sacramento Bd. of Supervisors Meeting Tr. 30 (Sept. 28, 2010).

1 In May 2011, Schneider filed a petition for a writ of mandate under California
2 Code of Civil Procedure section 1094.5. *See* Pet. Writ of Mandate, *Schneider v. Bd. of*
3 *Supervisors*, No. 34-2011-80000857 (Sacramento Cty. Super. Ct. filed May 12, 2011).²⁰ He
4 raised several claims: (1) the Board of Supervisors had acted in excess of its jurisdiction by
5 revoking their vested right; (2) they were denied a fair trial because they “were not advised of the
6 legal basis or evidence forming the basis of the decision to revoke their vested rights” and the
7 Board “engaged in *ex parte* communications with staff prosecuting the appeal as well as with
8 non-parties relative to the merits of the case,” among other reasons; (3) the Board did not follow
9 SMARA’s procedural requirements; (4) the Board improperly relied on evidence collected after it
10 determined a violation had occurred; (5) the County had already recognized that Schneider had a
11 vested right to conduct a surface mining operation; (6) the Board unconstitutionally denied them
12 of substantive and procedural due process rights; (7) the Board incorrectly determined they
13 possessed no vested right; (8) the Board made no effort to comply with the California
14 Environmental Quality Act; (9) the Board’s decision was an unconstitutional taking; and (10) the
15 Board’s decision was a breach of contract.

16 In July of the same year, Schneider moved *ex parte* for a temporary restraining
17 order, and the motion was denied. *See* Minute Order, *Schneider v. Bd. of Supervisors*, No. 34-
18 2011-80000857 (Sacramento Cty. Super. Ct. filed July 25, 2011). After the *ex parte* application
19 was denied, Schneider did not pursue the litigation. *See* Order Vacating Hr’g, *Schneider v. Bd. of*
20 *Supervisors*, No. 34-2011-80000857 (Sacramento Cty. Super. Ct. filed Jan. 11, 2013) (noting
21 Schneider had filed no opening brief and vacating the hearing on their petition). According to the
22 state court docket, the writ petition remains open.

23 2. Claim and Issue Preclusion

24 The County first contends the Schneiders’ claim is precluded by the results of the
25 proceedings before the Board of Supervisors and Sacramento County Superior Court.

26 ////

27 _____
28 ²⁰ The court takes judicial notice of this document and the other filings in the same action,
as they are public records whose filing can be subject to no dispute. *See* Fed. R. Evid. 201.

1 Federal courts give preclusive effect to state-court judgments whenever that state's
2 courts would do the same. 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 96 (1980). As
3 summarized above, in California, the doctrine of issue preclusion bars the “relitigation of issues
4 argued and decided in prior proceedings.” *Lucido*, 51 Cal. 3d at 341. In addition, the doctrine of
5 “[c]laim preclusion prevents relitigation of the same cause of action in a second suit between the
6 same parties or parties in privity with them.” *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813,
7 824 (2015).

8 An unreviewed state administrative decision can also preclude later litigation of a
9 repurposed § 1983 claim in federal court. *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798 (1986). If a
10 state agency, acting in a judicial capacity, resolves disputes of fact or law properly before it, and
11 the parties had an adequate opportunity to litigate those disputes, federal courts give the agency's
12 decision the same preclusive effect the state's courts would recognize. *Id.*; see also *United States*
13 *v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966); *Avila v. L.A. Police Dep't*, 758
14 F.3d 1096, 1100 (9th Cir. 2014); *Wehrli v. Cty. of Orange*, 175 F.3d 692, 694 (9th Cir. 1999).
15 The idea is to promote comity between federal and state courts and to enforce repose, i.e., to
16 prevent state administrative proceedings from becoming dress rehearsals for follow-on
17 constitutional litigation in federal court. See *Elliott*, 478 U.S. at 798; *Miller v. Cty. of Santa Cruz*,
18 39 F.3d 1030, 1038 (9th Cir. 1994).

19 The Ninth Circuit's decision in *Miller* illustrates how these rules operate in
20 practice. In that case, the plaintiff, a former Sheriff's Deputy, had been terminated for allegedly
21 failing to report an overpayment of wages, among other disciplinary violations. 39 F.3d at 1032.
22 He contested the termination before the County's Civil Services Commission, which held a public
23 evidentiary hearing. *Id.* The deputy was represented by counsel at the hearing and was permitted
24 to present evidence and arguments. *Id.* After the hearing, the Commission sustained his
25 dismissal. *Id.* Although he had been notified of his right to appeal under California Code of Civil
26 Procedure sections 1094.5 and 1094.6, the deputy chose to file a lawsuit in federal court instead,
27 asserting claims under § 1983 for violations of his constitutional rights to equal protection and
28 substantive and procedural due process. 796 F. Supp. 1316, 1317 (N.D. Cal. 1992), *aff'd*, 39 F.3d

1 1030 (1994). The district court granted the defendants’ motion for summary judgment on the
2 basis of issue and claim preclusion, and the Ninth Circuit affirmed. 39 F.3d at 1031–32. The
3 Circuit directly acknowledged the absence of any review by a state court. *See id.* at 1033–34; *see*
4 *also Plaine v. McCabe*, 797 F.2d 713, 719 n.12 (9th Cir. 1986) (“If an adequate opportunity for
5 review is available, a losing party cannot obstruct the preclusive use of the state administrative
6 decision simply by foregoing her right to appeal.”).²¹

7 Here, the County defendants argue that because Schneider has not pursued his
8 state mandamus action to its conclusion, the Schneiders are barred from challenging the Board of
9 Supervisors’s 2010 determinations here. For three reasons, the court disagrees.

10 First, the action before the Superior Court has reached no conclusion, and no
11 judgment has been entered. Whether as a matter of issue or claim preclusion, that case has no
12 preclusive effect here. A claim is precluded only after entry of “a final judgment on the merits in
13 the first suit,” and an issue is precluded only if “argued and decided” such that it is resolved
14 conclusively by the “prior judgment.” *DKN Holdings*, 61 Cal. 4th at 824–25.

15 Second, the Schneiders challenge not just the Board of Supervisors’ factual
16 findings and legal conclusions, but the procedure the Board followed. The preclusion rules
17 described in *Miller* do not apply when a plaintiff raises a constitutional challenge to the

18 ²¹ These preclusion doctrines are distinct from two other doctrines the court finds
19 irrelevant, although they are raised in the parties’ briefing: administrative exhaustion and
20 ripeness.

21 First, by giving preclusive effect to a state agency’s unreviewed decision, a federal court
22 does not require administrative exhaustion. *See Miller*, 39 F.3d at 1034 n.3. Administrative
23 exhaustion is not a prerequisite to an action under § 1983. *Patsy v. Bd. of Regents of State of Fla.*,
457 U.S. 496, 501 (1982). An aggrieved person may elect to pursue a claim under § 1983 in
24 federal court or obtain review in a state administrative agency proceeding, but she may not try
25 again in federal court after unsuccessfully litigating an issue before an administrative body.
26 *See id.*

27 Second, because federal courts have no jurisdiction where there is no case or controversy,
28 a claim must be ripe before litigation begins in federal court. *See, e.g., Nat’l Park Hosp. Ass’n v.*
Dep’t of Interior, 538 U.S. 803, 807 (2003). For this reason, when a plaintiff’s § 1983 claims
target a state agency’s administrative actions, the agency must have reached a final decision. *See,*
e.g., Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172,
186 (1985). Finality is an element of both ripeness and preclusion, but for different reasons:
when it comes to ripeness, a court assures itself of its jurisdiction by testing that the dispute is
real, whereas preclusion requires a final decision to avoid giving final effect to temporary
decisions.

1 administrative body's procedure itself. *See Ass'n for L.A. Deputy Sheriffs v. Cty. of L.A.*, 648
2 F.3d 986, 992 n.5 (9th Cir. 2011). Neither can the court give preclusive effect to an unreviewed
3 administrative decision if the procedure the agency deployed gave the parties no adequate
4 opportunity to litigate. *Utah Const.*, 384 U.S. at 421. If, as the Schneiders argue, the proceedings
5 before the Board of Supervisors were poisoned by conflicts of interest and improper *ex parte*
6 communications, and if the Board never truly informed them of the legal or evidentiary basis of
7 its decision, the Board's decision can be given no preclusive effect.

8 Third, barring the Schneiders' due process claims would be inequitable given the
9 circumstances of this litigation. The County defendants have waited far too long, more than two
10 years and after the close of discovery, to argue for issue or claim preclusion. *See, e.g., N.*
11 *Pacifica, LLC v. City of Pacifica*, 366 F. Supp. 2d 927, 929 (N.D. Cal. 2005) (a defendant may
12 waive *Miller* preclusion by raising that defense too late in the litigation, citing, *inter alia*, *Kern*
13 *Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988)). On a similar note,
14 although the County defendants argue now that Schneider should have litigated his state court
15 petition to its conclusion, in a related state court case, they argued that any state proceedings
16 should be stayed while this action is pending. *See Opp'n Mot. Prelim. Inj. 1-2, Hardesty v. Bd. of*
17 *Supervisors*, No. 34-2012-80001138 (Cal. Super. Ct. Sacramento filed June 28, 2012). The
18 County cannot have it both ways.

19 The Schneiders' due process claim is not barred by the Board of Supervisors'
20 September 2010 decision. In this limited respect, their alternative motion for partial summary
21 judgment of the County defendants' fifth affirmative defense is granted, *see* Schneider Mot. Due
22 Process at 1, but as explained below, their motions are otherwise denied.

23 3. Whether Schneider Possessed a Vested Right to Mine

24 The Schneiders request partial summary judgment that they possessed a vested
25 right to conduct surface mining operations on their ranch. Specifically, they seek an order
26 declaring that "[a]t all times prior to April 2, 2009, the real estate parcels associated with the
27 Schneider Historic Mine were protected as a 'vested mine' within the meaning of the Surface

28 /////

1 Mining and Reclamation Act of 1975 (SMARA), Public Resources Code, Sections 2710–2796.”
2 Notice of Motion at 2, ECF No. 219-1.

3 California Public Resources Code section 2776(a) provides,

4 No person who has obtained a vested right to conduct surface
5 mining operations prior to January 1, 1976, shall be required to
6 secure a permit pursuant to this chapter as long as the vested right
7 continues and as long as no substantial changes are made in the
8 operation except in accordance with this chapter. . . .

9 The same section defines “vested right”:

10 A person shall be deemed to have vested rights if, prior to January
11 1, 1976, the person has, in good faith and in reliance upon a permit
12 or other authorization, if the permit or other authorization was
13 required, diligently commenced surface mining operations and
14 incurred substantial liabilities for work and materials necessary for
15 the surface mining operations. . . .

16 Cal. Pub. Res. Code § 2776(a).

17 In *Hanson Brothers Enterprises, Inc. v. Board of Supervisors*, 12 Cal. 4th 533
18 (1996), the California Supreme Court held that the “diminishing asset doctrine” applied to the
19 vested right to conduct mining operations as defined in Public Resources Code section 2776.
20 Under that rule, “[w]hen a mining or quarrying operation is a lawful nonconforming use,
21 progression of the mining or quarrying activity into other areas of the property is not necessarily a
22 prohibited expansion or change of location of the nonconforming use.” *Id.* at 553. Rather,
23 “[w]hen there is objective evidence of the owner’s intent to expand a mining operation, and that
24 intent existed at the time of the zoning change, the use may expand into the contemplated area.”
25 *Id.* Thus, for example, “where increased population creates an increased demand for the
26 aggregate used in road construction, an increase in production to meet that demand would not be
27 construed as an enlargement or intensification of the use.” *Id.* at 573.

28 Here, it remains unclear whether “no substantial changes [were] made in the
operation except in accordance with [SMARA].” Cal. Pub. Res. Code § 2776(a). Specifically, it
is undisputed that mining operations on the Schneiders’ ranch expanded substantially between
1995 and 2009. A rational trier of fact could conclude on this record that the mining operation
that existed until 1994, which was the operation the County considered when its personnel

1 recognized the Schneiders' vested right, was significantly smaller. A trier of fact could likewise
2 find that HSG began excavating large pits south of the Cosumnes River between 2002 and 2008,
3 and that this was a significant departure from the mining operations that had occurred before
4 2002. If this were a jury's conclusion, the departure would likely represent a "substantial change"
5 within the meaning of Public Resources Code section 2776(a). Neither have the Schneiders cited
6 evidence to show that as of 1976 or another earlier date, mining operations at the ranch were
7 expected to expand into the area directly south of the Cosumnes River or that mining operations
8 were to expand beyond the excavation of dredger tailings.

9 The Schneiders' motion for summary judgment on this question is denied.

10 4. Whether the County Deprived the Schneiders of a Property Interest

11 The Schneiders also move for summary judgment that the County deprived them
12 of a vested right to mine without due process. Because the Schneiders have not shown as a
13 threshold matter that they possessed a vested right to mine, this motion cannot be granted. This
14 leaves the question of the County's cross-motion on the same claim. The County argues the
15 Schneiders have cited no evidence to show they have a vested right. With respect to the due
16 process aspect of this claim, the County relies on the hearings it conducted in 2010.

17 The Supreme Court has taken care to note that district courts should act "with
18 caution in granting summary judgment," and have authority to "deny summary judgment in a case
19 where there is reason to believe the better course would be to proceed to a full trial." *Anderson*,
20 477 U.S. at 255. A trial may be necessary "if the judge has doubt as to the wisdom of terminating
21 the case before trial." *Gen. Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1507
22 (9th Cir. 1995) (quoting *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994)). This may be
23 the case "even in the absence of a factual dispute." *Rheumatology Diagnostics Lab., Inc v. Aetna*,
24 *Inc.*, No. 12-05847, 2015 WL 3826713, at *4 (N.D. Cal. June 19, 2015) (quoting *Black*, 22 F.3d
25 at 572); accord *Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1285 (11th Cir. 2001). Given
26 the fact-bound context of a due-process claim, which concerns the plaintiff's "opportunity to be
27 heard at a meaningful time and in a meaningful manner," *Mathews*, 424 U.S. at 333, an uncertain
28 factual record on summary judgment may simply necessitate a trial.

1 Here, two basic concerns prevent the court from granting the County defendants’
2 motion. First, it is unclear when the alleged deprivation occurred and which hearings or appeals
3 were devoted to which actions or decisions. For example, in April 2009, the County wrote to
4 Schneider to explain its opinion that the Mine no longer had a vested right under SMARA. *See*
5 O’Dea Decl. Ex. A, at 1–2, ECF No. 218-5. But there is no evidence the County attempted to
6 prevent any continued mining operations for the next year. Moreover, during that year, the
7 County appeared to have assumed the Mine needed no permit because it had a vested right. *See*
8 Schneider Decl. ¶ 28, ECF No. 219-2; *id.* Ex. 22, at 1 ECF No. 219-24. When the County took
9 up the issue again in April 2010, its notice referred to violations of the County’s Zoning Code, not
10 to SMARA. *See* O’Dea Decl. Ex. B, at 1–2, ECF No. 218-5. The County also took apparently
11 contradictory positions during the 2010 appeal. Its attorney argued both that the County was not
12 “attempting to revoke some vested right,” Sacramento Cty. Bd. Supervisors Hr’g Tr. 60 (Sept. 14,
13 2010), and that Schneider had no vested right to mine, *see, e.g., id.* at 11 (Deputy County Counsel
14 explains, “The relevant case is *Hanson*,” 12 Cal. 4th 533 (1996), discussed above, “So what the
15 Board needs to look at is: Did the operator have an objective manifestation of an intent to mine
16 the area as of 1956? . . . So we’re looking for initia [sic] that he did or did not show he intended to
17 mine what is now being minded [sic]”).

18 The court’s second concern surrounds the procedure itself. Schneider has filed a
19 detailed declaration describing several procedures he considers questionable that the Board of
20 Supervisors employed during his 2010 appeal. *See generally* Schneider Decl., ECF No. 220-2.
21 Were his claims to go to trial, Schneider could be expected to testify, for example, that the
22 County did not tell him what evidence it would rely on in his appeal and that the County
23 forwarded its evidence to HSG’s competitors, but not to him. *See id.* ¶¶ 5–16, 23–25, 31–32. He
24 would also testify that the County’s attorney received technical assistance from HSG’s
25 competitors but did not inform Schneider of this assistance. *Id.* ¶¶ 14, 38–39.

26 In these circumstances, the wiser course is to proceed to trial. The County’s cross-
27 motion is denied.

28 /////

1 X. SUBSTANTIVE DUE PROCESS

2 The Due Process Clause prohibits government officials from arbitrarily depriving
3 a person of her constitutionally protected property or liberty interests. *See, e.g., Action Apartment*
4 *Ass’n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1025–26 (9th Cir. 2007). This
5 includes the right to devote land to any legitimate use, *Harris v. Cty. of Riverside*, 904 F.2d 497,
6 503 (9th Cir. 1990), and to pursue a given profession, *Greene v. McElroy*, 360 U.S. 474, 492
7 (1959). But “only ‘egregious official conduct can be said to be arbitrary in the constitutional
8 sense’: it must amount to an ‘abuse of power’ lacking any ‘reasonable justification in the service
9 of a legitimate governmental objective.’” *Shanks*, 540 F.3d at 1088 (quoting *Cty. of Sacramento*
10 *v. Lewis*, 523 U.S. 833, 846 (1998)); *accord N. Pacifica*, 526 F.3d at 484 (“The irreducible
11 minimum of a substantive due process claim challenging land use regulation is failure to advance
12 any governmental purpose.”). Only conduct that “shocks the conscience” violates the Due
13 Process Clause. *See, e.g., United States v. Salerno*, 481 U.S. 739, 746 (1987).

14 A. The Hardestys’ Claims against Taras

15 “To state a substantive due process claim, the plaintiff must show as a threshold
16 matter that a state actor deprived it of a constitutionally protected life, liberty or property
17 interest.” *Shanks*, 540 F.3d at 1087. Because the plaintiffs have not shown that Taras’s cease-
18 and-desist letter deprived them of any property interest, as discussed above, in the context of the
19 Hardestys’ procedural due process claim against Taras, summary judgment is granted as to this
20 claim.

21 B. The Hardestys’ Claims against Gregory

22 The Hardestys allege Gregory “engaged in a politically-motivated scheme” with
23 the other defendants to drive the Hardestys out of business. *See Opp’n Gregory Mot.* at 13. They
24 expressly disclaim any allegations of a conspiracy, *see id.* at 12–13 n.3; Gregory’s liability
25 therefore depends on her own actions, not the actions of others. The only evidence the Hardestys
26 cite to support their claim is that before Gregory’s inspection she may or may not have known
27 that Simmons visited the Mine before and was expelled, and she became aware a legislator was
28 interested in the case, albeit immediately before entering onto the Mine site at which point she

1 checked with her supervisor before proceeding. These facts could not allow a jury to decide she
2 was part of a politically motivated scheme or that she deprived the Hardestys of their interests in
3 engaging in their chosen profession.

4 Gregory's motion for summary judgment is granted as to this claim.

5 C. The Schneiders' Claims against Bieber

6 David Bieber is a registered Professional Geologist, Geophysicist, Engineering
7 Geologist, and Hydro-Geologist in the State of California. Bieber Decl. ¶ 1, Case No. 12-2457,
8 ECF No. 105-2. He worked as a senior geologist for Geocon Consultants between March 2001
9 and June 2013. *Id.* ¶ 2.

10 Geocon provided consulting services to the County during its investigation of the
11 Mine. *See, e.g., id.* ¶ 5. In 2009, Bieber and Geocon were retained by the County of Sacramento
12 in anticipation of litigation and hearings about the Mine. *Id.* ¶ 4. Geocon entered a contract with
13 the County in each year between 2009 and 2012. *Id.* ¶ 5. Between 2009 and 2012, Bieber
14 accompanied County inspectors on their annual inspection of the Mine, and after each inspection,
15 he was directed to draft a report. *Id.* ¶ 7. His reports were to include a description of the
16 conditions at the Mine and evaluate an annual adjustment to the FACE. *Id.* Based on his report,
17 County personnel would complete a formal inspection report and determine the appropriate
18 FACE. *Id.*; JSUF no. 58. Bieber also testified as an expert on the County's behalf. Bieber Decl.
19 ¶ 10.

20 As relevant here, the County asked Bieber to calculate a 2012 FACE for the Mine.
21 *See id.* ¶ 11. The County directed him to assume the pits south of the Cosumnes River would be
22 backfilled to be consistent with the surrounding topography. *Id.* Bieber determined a depression
23 of ten or fifteen feet below the original, pre-mining ground level would be consistent with the
24 surrounding topography. *Id.* ¶ 12. This assumption was based on his observation that ten to
25 fifteen feet below ground level was above the 100-year floodwater level of the Cosumnes River.
26 *Id.* He calculated that more than one million cubic yards of material would be required to backfill
27 the pit areas to this elevation. *Id.* County Counsel told Bieber it was unclear whether stockpiles
28 of aggregate at the Mine could be used to fill the pits. *Id.* ¶ 13. He therefore performed two

1 calculations: (1) the cost of reclamation if fill materials were imported; and (2) the cost of
2 reclamation should on-site materials be available for the County to use. *Id.* He calculated a
3 FACE value of \$8,817,074 if soil were imported and \$901,336 if on-site materials were used. *Id.*;
4 *see also id.* Ex. D, Case No. 12-2457, ECF No. 105-6 (Bieber’s report); JSUF no. 65. The
5 difference was attributable to his estimate that the cost of importing soil would exceed \$6 million.
6 *See* Bieber Decl. ¶¶ 13–14; *see also* JSUF nos. 61, 62.

7 The Schneiders’ claim against Bieber is founded on 42 U.S.C. § 1983, which
8 prohibits the denial of a federal right “under color of law.” *See* Schneider Compl. ¶¶ 263–80;
9 *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 946 (1982). Assuming without deciding that Bieber
10 can be said to have acted “under color of law,” the evidence before the court would not allow a
11 rational trier of fact to conclude his actions “shock the conscience.” The undisputed facts show
12 Bieber prepared a report in line with the County’s instructions, performed inspections and
13 calculations, gave testimony to explain his conclusions, and otherwise followed through on the
14 assignment for which he was hired. The Schneiders’ complaint, at its core, has little to do with
15 Bieber’s actions and everything to do with the County’s decisions about the Mine’s reclamation
16 plan and financial assurances.

17 Bieber’s motion for summary judgment is granted as to this claim, and the court
18 does not reach his other arguments.

19 D. Sacramento County Defendants

20 The Hardestys and Schneiders claim the County defendants stripped them of their
21 vested right to operate a surface mine, which deprived them of their right to pursue their chosen
22 profession and to devote their land to a legitimate use. The Constitution protects both of these
23 interests. *See, e.g., Greene*, 360 U.S. at 492; *Harris*, 904 F.2d at 503. Plaintiffs’ substantive due
24 process claims may proceed if the evidence, viewed in the light most favorable to their case,
25 shows the County lacked any legitimate government purpose for its actions. *Shanks*, 540 F.3d
26 at 1088.

27 The Hardestys and Schneiders argue the County defendants were motivated by
28 political pressure rather than a legitimate government purpose. Several years ago, the Ninth

1 Circuit opined that a local government’s arbitrary land use decisions, if motivated by “political
2 pressure from neighbors,” could support a substantive due process claim. *Del Monte Dunes at*
3 *Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990). More recently, in an
4 unpublished memorandum disposition, the Ninth Circuit cited *Del Monte Dunes* and confirmed
5 that a substantive due process claim may proceed to trial if the evidence could show the
6 government’s regulatory decisions were motivated by “political or other considerations.”
7 *Swenson v. Siskiyou Cty.*, 498 F. App’x 719, 721 (9th Cir. 2012).

8 The defendants do not dispute these general conclusions, but argue instead that a
9 jury could not find, on this record, that they intended to drive HSG out of business and were
10 motivated by political pressure. The evidence highlighted above, in the discussion of the
11 Hardestys’ equal protection claim, could allow a rational trier of fact to conclude that Sacramento
12 County and its officers were motivated by political pressure from HSG’s competitors rather than
13 a legitimate intent to enforce SMARA and the County’s Zoning Code.

14 The County defendants’ motion is denied as to this claim.

15 E. The Hardestys’ Claims against O’Bryant

16 The Ninth Circuit also has held that “excessive and unreasonable” enforcement
17 schemes may violate the Due Process Clause. *See Benigni v. City of Hemet*, 879 F.2d 473, 478
18 (9th Cir. 1988) (allowing Due Process claim to go forward where jury could have found that
19 police harassed bar’s customers and staff and conducted frequent and unjustified inspections or
20 surveillance in effort to harm bar’s business). Here, a jury could conclude that O’Bryant directed
21 “excessive and unreasonable” enforcement actions at the Mine at the behest of legislators and
22 competitors. Whether O’Bryant intended to drive HSG out of business or merely to enforce the
23 law is a question not for this court, but a jury. *See, e.g., Newman v. Checkrite Cal., Inc.*, 912 F.
24 Supp. 1354, 1380 (E.D. Cal. 1995) (citing authority for proposition that “[o]rordinarily, intent and
25 motive are paradigmatic issues for resolution by the trier of fact at trial”).

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1 XI. FIRST AMENDMENT RETALIATION

2 The First Amendment prohibits government officials from retaliating against a
3 person for “speaking out.” *Hartman v. Moore*, 547 U.S. 250, 256 (2006). To succeed in a First
4 Amendment retaliation claim, a plaintiff must present evidence to establish three facts. First, the
5 plaintiff must have engaged in an activity the First Amendment protects. *See Coszalter v. City of*
6 *Salem*, 320 F.3d 968, 973 (9th Cir. 2003). Second, the defendants’ actions must be shown to have
7 deterred a “person of ordinary firmness” from engaging in that activity. *Lacey v. Maricopa Cty.*,
8 693 F.3d 896, 916 (9th Cir. 2012) (en banc). The plaintiff is not required to show she was herself
9 deterred. *See id.* Third, the plaintiff must show the defendant’s actions were motivated by an
10 intent to deter her from asserting her First Amendment rights. *Mendocino Env’tl Ctr. v.*
11 *Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999). The defendant’s “retaliatory animus” must
12 be the but-for cause of its actions; if, without any intent to retaliate, the defendant would have
13 done the same thing, the plaintiff cannot succeed. *See Hartman*, 547 U.S. at 260. The
14 defendant’s intent to deter may be demonstrated by either direct or circumstantial evidence.
15 *Mendocino*, 192 F.3d at 1300–01.

16 Here, the Schneiders allege that after they filed this lawsuit in this court in
17 September 2012, Sacramento County, several of its officials, and its consultant, David Bieber,
18 retaliated against them by demanding much larger financial assurances for the Mine. *See*
19 *Schneider Compl.* ¶¶ 284–86. They also allege the County intended to prevent them from filing
20 any lawsuit at all by crippling them financially. *See id.* ¶ 282.

21 A. Bieber

22 The claims against Bieber have no evidentiary support. The Schneiders argue
23 Bieber retaliated against them by calculating a higher FACE in November 2012, but Bieber was
24 not served with notice of this lawsuit until April 2013. JSUF no. 66; *see also* Summons, Case
25 No. 12-2457, ECF No. 11. Based on the record before the court, Bieber would testify at trial that
26 he did not know the Schneiders had filed their complaint until after he finished his report. Bieber
27 Decl. ¶ 15. He could not have retaliated against them for filing this lawsuit if he did not know the
28 lawsuit had been filed. The Schneiders cannot avoid summary judgment of this claim by arguing

1 Bieber must have known, given the Hardestys' pre-existing civil rights lawsuit filed in this court
2 in 2010, that he would be named as a defendant in the Schneiders' complaint. This theory does
3 not establish a cause-and-effect relationship between the Schneiders' complaint and Bieber's
4 decision, let alone a but-for causal relationship.

5 Summary judgment is granted as to the First Amendment claims against Bieber.

6 B. County Defendants

7 This leaves the claims against the County defendants. Unlike Bieber, the County
8 defendants do not argue they were unaware of the Schneiders' lawsuit here when they increased
9 the Schneiders' FACE requirement. Their motion rests on two alternative arguments. First, they
10 argue a person of "ordinary firmness" in the Schneiders' position would not have been deterred
11 from filing a civil rights lawsuit because, as it turns out, the Schneiders were not deterred.
12 County Mot. Pt. 3 at 18–19. But the Schneiders can succeed even if they were not deterred from
13 continuing in this case. *Lacey*, 693 F.3d at 916. "[I]t would be unjust to allow a defendant to
14 escape liability for a First Amendment violation merely because an unusually determined plaintiff
15 persists in his protected activity." *Mendocino*, 192 F.3d at 1300. A jury could reasonably
16 conclude that a mine operator of ordinary firmness would be deterred from pursuing a civil rights
17 lawsuit if a County official demanded several hundred thousand dollars more in financial
18 assurances.

19 The County also argues the Schneiders have not established a logical connection
20 between its late-2012 FACE calculations and their civil rights action. It points out that by the
21 time the Schneiders filed their complaint, the Hardestys had been pursuing very similar claims for
22 about two years. County Mot. Pt. 3 at 19. This interpretation of the evidence is reasonable, and
23 could support a verdict in the County's favor. But the evidence could also support the
24 Schneiders' case. Before the Schneiders' complaint was filed, the County had required them to
25 post financial assurances of less than \$200,000. A few months after they filed their complaint,
26 the County demanded financial assurances of between \$0.8 million and \$8 million.
27 Circumstantial evidence such as this is enough to survive summary judgment. *See, e.g.*,
28 *Mendocino*, 192 F.3d at 1300–01 (citing *Hines v. Gomes*, 108 F.3d 265 (9th Cir. 1997)). The

1 County defendants may yet prevail at trial by showing they would have done exactly the same
2 thing had the Schneiders never filed a civil rights action. *See Hartman*, 547 U.S. at 260. But that
3 is not the only reasonable conclusion a jury could draw from this evidence.

4 That said, the Schneiders' other theory of the County defendants' liability, that the
5 County intended to avoid a civil rights lawsuit by financially ruining the Mine, is supported by
6 nothing but speculation. It is unclear what the Schneiders would present to the jury to support
7 this claim.

8 The County defendants' motion is denied as to the Schneiders' allegation that the
9 Mine's FACE was increased in retaliation for filing a civil rights lawsuit, and granted on the
10 allegation that the County intended to prevent a civil rights lawsuit by financially ruining the
11 Mine.

12 XII. CONCLUSION

13 This order resolves the pending motions for summary judgment in Case
14 No. 10-2414 (the *Hardesty* case), ECF Nos. 217, 218, 219, 220, and 222, and in Case No. 12-
15 2457 (the *Schneider* case), ECF No. 105, as follows:

16 The Defendants' Motions in the *Hardesty* Case

17 Summary judgment is GRANTED as to the following claims:

- 18 (1) The second claim, under the Equal Protection Clause, against defendants Norris and Testa,
19 and against O'Bryant to the extent this claim is based on the allegations that O'Bryant
20 selectively denied any right to appeal HSG's removal from the AB 3098 list and selectively
21 provided no guidance on reinstatement on the AB 3098 list;
- 22 (2) The fourth claim, under the Fourth Amendment, against defendant Gregory;
- 23 (3) The fifth claim, under the Due Process Clause, against defendant Taras;
- 24 (4) The sixth claim, under the Equal Protection Clause, against the County and defendant Sherry;
- 25 (5) The seventh claim, under the Equal Protection Clause, against the County and defendants
26 Storelli and Moffitt; and
- 27 (6) The ninth claim, under the Due Process Clause, against defendants Taras and Norris.

28 /////

1 Summary judgment is DENIED as to the following claims:

- 2 (1) The second claim, under the Equal Protection Clause, as to defendant O'Bryant, to the extent
3 this claim is based on the allegation that O'Bryant selectively removed HSG from the AB
4 3098 list without advance notice;
- 5 (2) The sixth claim, under the Due Process Clause, against the County and defendant Sherry.
- 6 (3) The ninth claim, under the Due Process Clause, against the County and defendants Storelli,
7 Moffitt, Sherry, and O'Bryant.

8 The Defendants' Motions in the *Schneider* Case

9 Summary judgment is GRANTED as to the following claims:

- 10 (1) The second claim, under the Due Process Clause, against defendant Bieber;
- 11 (2) The third claim, under the Due Process Clause, against defendant Bieber;
- 12 (3) The fourth claim, under the First Amendment, against defendant Bieber, and against the other
13 defendants to the extent this claim is based on the Schneiders' allegation that the defendants
14 intended to prevent a civil rights lawsuit by financially ruining the Mine; and
- 15 (4) The fifth claim, under the Equal Protection Clause.

16 Summary judgment is DENIED as to the following claims:

- 17 (1) The first claim, under the Due Process Clause, against all defendants except Bieber
- 18 (2) The fourth claim, under the First Amendment, against all defendants except Bieber, to the
19 extent this claim is based on the Schneiders' allegation the defendants intended to retaliate for
20 the filing of the complaint in the *Schneider* case.

21 The Plaintiffs' Motions in the *Schneider* Case

22 The motions are DENIED.

23 * * *

24 Additionally, the unconsolidated portion of the *Schneider* case, against defendant Bieber, is
25 CLOSED.

26 IT IS SO ORDERED.

27 DATED: June 8, 2016.

28


UNITED STATES DISTRICT JUDGE