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SUPERIOR COURT OF CALIFORNIA

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COUNTY OF ALAMEDA

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UNLIMITED CIVIL JURISDICTION

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12 KARUK TRIBE OF CALIFORNIA and LEAF
HILLMAN,

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Plaintiffs,

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v.

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16 CALIFORNIA DEPARTMENT OF FISH
AND GAME and RYAN BRODDRICK,
Director, California Department of Fish and
17 Game,

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Defendants.

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Case No. RG05 211597

**OBJECTIONS OF THE NEW 49'ERS,
INC., AND RAYMOND W. KOONS TO
THE PROPOSED STIPULATED
JUDGMENT**

(Per December 20, 2005 Order After Case
Management Conference)

Res. No.: 556514

Date: January 26, 2006

Time: 9:00 A.M.

Judge: Honorable Bonnie Sabraw

Place: Department 512

Action Filed: May 6, 2005

Trial Date: None Set

1 **I. PRELIMINARY STATEMENT**

2 Pursuant to this Court’s December 20, 2005 Order after Case Management Conference,
3 proposed intervenors The New 49’ers, Inc., a California corporation, and Raymond W. Koons, an
4 individual (hereafter, “the Miners”) file these objections to entry of the Stipulated Judgment
5 proposed by Plaintiffs and Defendants. Their objections are supported by the declarations filed as
6 Exhibits to the Declaration of Neysa A. Fligor, and additional declarations (sometimes deemed the
7 “2d” declarations for clarity), Request for Judicial Notice, and Appendix of Non-California
8 Authorities filed herewith.

9 The Miners note that owing to the holiday season and travel plans of a key witness, the
10 Court’s schedule has not provided sufficient time to gather evidence to contest entry of the
11 stipulation. (*See Buchal Decl.* ¶¶ 5-6.) Moreover, the Miners’ lack of party status means that they
12 could not utilize discovery to gather evidence from the existing parties; when the Miners
13 attempted to use Public Record Act procedures to gather evidence from the Department, they were
14 stymied when the Department took the position—notwithstanding the settlement—that all relevant
15 information was exempt from public disclosure pursuant to Government Code § 6254(b).¹ (*See 2d*
16 *McCracken Decl. Ex. 1.*) Accordingly, the Miners present these objections to the Proposed
17 Stipulated Judgment without prejudice to their position that they have not yet had a full and fair
18 opportunity to respond to the Proposed Stipulated Judgment.

19 Nevertheless, the Proposed Stipulated Judgment should be rejected:

- 20 • The Department is not authorized to evade substantive and procedural statutory
21 rulemaking requirements by secret agreement, even if such agreement is reviewed by
22 the Court. (Point I(A))
- 23 • Particularly in a context where there is no evidence that any suction dredge miner has
24 injured so much as a single fish, there is no factual support for the regulatory
25 restrictions embodied in the Proposed Stipulated Judgment. (Point I(B))
- 26 • The Proposed Stipulated Judgment should be rejected because the device of
rulemaking by judicial decree is bad public policy. (Point I(C))
- The Proposed Stipulated Judgment should be rejected as contrary to public policy as

27 ¹ That section exempts from disclosure “[r]ecords pertaining to pending litigation to which the public agency is a party . . . until the pending litigation or claim has been finally adjudicated *or otherwise settled*” (emphasis added).

1 embodied in federal statutes limiting regulation of mining operations. (Point I(D))

- 2 • The Proposed Stipulated Judgment should be rejected as unfair and inequitable in the
3 circumstances of this case. (Point I(E))

4 **II. THE PROPOSED STIPULATED JUDGMENT MUST BE REJECTED INsofar**
5 **AS IT BINDS THE AGENCY TO SPECIFIC PROHIBITIONS ON SUCTION**
6 **DREDGE MINING.**

7 It has long been recognized that the power of the courts to enter consent decrees “comes
8 only from the statute which the decree is intended to enforce”. *Mendly v. County of Los Angeles*,
9 23 Cal. App.4th 1193, 1207 (1994) (quoting *System Federation No. 91 v. Wright*, 364 U.S. 642,
10 651-53 (1961)). The most fundamental problem with the Proposed Stipulated Judgment is that the
11 result set forth in it—closure of entire rivers and tributaries to suction dredge mining absent any
12 rulemaking proceedings or any facts to support such closures—could not lawfully be attained by
13 the Department under any of the pertinent statutory authorities. Thus the Miners ask this Court to
14 exercise its authority to “reject a stipulation that is contrary to public policy, or one that
15 incorporates an erroneous view of law”. *Plaza Hollister Limited Partnership v. County of San*
16 *Benito*, 72 Cal. App.4th 1, 12 (1999) (quoting *Cal. State Auto Ass’n Inter-Ins. Bureau v. Superior*
17 *Court*, 50 Cal.3d 658, 664 (1990)). Most generally, this Court must exercise its duty “to see that
18 the judgment to be entered is a just one, [for] the court [is not] to act as a mere puppet in the
19 matter”. *Cal. State Auto Ass’n*, 50 Cal.3d at 664 (quoting *City of Los Angeles v. Harper*, 8 Cal.
20 App.2d 552, 555 (1935)).

21 **A. The California Department Of Fish And Game May Not Lawfully Promulgate**
22 **Regulations By Private Agreement.**

23 No provision of the Fish and Game Code authorizes defendants to promulgate regulations
24 by private agreement with interested parties. To the contrary, § 5653.9 provides that the suction
25 dredge mining regulations “. . . shall be adopted in accordance with the requirements of Division
26 13 (commencing with Section 21000) of the Public Resources Code and Chapter 3.5 (commencing
with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.” The Chapter 3.5
requirements are “applicable to the exercise of *any* quasi-legislative power conferred by any
statute heretofore or hereafter enacted . . .” (Government Code § 11346(a); emphasis added), with
certain statutory (emergency) exceptions that do not include rulemaking by settlement agreement.

1 The Division 13 requirements are similarly broad. *See, e.g.*, Public Resources Code § 21006
2 (“this division is an integral part of any public agency’s decisionmaking process”).

3 Allowing rulemaking by private agreement would permit agencies to avoid entirely
4 *substantive* restrictions on their rulemaking powers set forth in the Government Code. Among
5 other things, any regulation is subject to pre-enforcement review by the Office of Administrative
6 Law for “necessity”. Government Code § 11349.1(a)(1). A regulation passes this test only if “the
7 record of the rulemaking proceeding demonstrates by substantial evidence the need for a
8 regulation to effectuate the purpose of the statute, *court decision*, or other provision of law that the
9 regulation implements, interprets, or makes specific, taking into account the totality of the record”.
10 *Id.* § 11349(a); emphasis added. Under the legislative design, judicial decisions may find
11 regulations contrary to law, but the agency is to respond to such decisions in compliance with
12 rulemaking procedures. Here, the Department and the Tribe have inverted the ordinary and lawful
13 procedure: rather than identify any errors of law that may have been committed by the
14 Department and stipulate to a remand to address such errors, they blithely deny any error of law
15 (*see* Joint Stipulation ¶ 2), and stipulate to extensive regulatory prohibitions upon an industry
16 without any factual or legal foundation for doing so.

17 Regulations are also subject to review for “nonduplication” (Government Code
18 § 11349.1(a)(6)), which “means that a regulation does not serve the same purpose as a state or
19 federal statute or another regulation”. *Id.* § 11349(f). “This standard requires that an agency
20 proposing to amend or adopt a regulation must identify any state or federal statute or regulation
21 which is overlapped or duplicated by the proposed regulation *and justify any overlap or*
22 *duplication.*” *Id.* Here, as set forth in detail in the first McCracken Declaration (Fligor Decl.
23 Ex. B), site-specific conditions were negotiated between the Karuk Tribe, the Miners and the
24 Forest Service, producing a detailed “Notice of Intent” and approval thereof attached to that
25 Declaration. The restrictions set forth in that Notice of Intent serve precisely the “same purpose”
26 as that ostensibly served by the Proposed Stipulated Judgment. Permitting agencies to make rules
by agreement would bypass entirely the required substantive review by the Office of

Administrative Law, ignoring entirely the Legislative design and frustrating entirely the important

1 Legislative purpose of “reduc[ing] the number of administrative regulations and . . . improv[ing]
2 the quality of those regulations which are adopted”. Government Code § 11340.1(a). Nor can this
3 Court somehow step in to exercise the powers of the Office of Administrative Law, for no
4 rulemaking record was ever even generated, and the Department takes the position that it may
5 conceal from the public all materials related to the new rule. (*See* 2d McCracken Decl. Ex. 1.)

6 Beyond the substantive limitations on agency rulemaking set forth in the California
7 statutes, there are also, of course, extensive procedural requirements under CEQA and the
8 Government Code provisions on rulemaking. As Justice William O. Douglas once observed,
9 “[p]ublic airing of problems through rule making makes the bureaucracy more responsive to
10 public needs and is an important brake on the growth of absolutism in the regime that now governs
11 all of us.”² The public process is important not only to the Miners, but to all other interested
12 parties, including but not limited to land owners within Siskiyou County, that have been entirely
13 and deliberately excluded from the Department’s secret dealings with the Tribe. Filed herewith is
14 a Declaration from a County Supervisor of Siskiyou County, duly authorized by resolution to
15 speak for the County on this matter. She affirms that the County was and is entitled to notice of,
16 and participational rights in, the Department’s regulatory decisions that have significant impacts
17 upon the County and its citizens. (*Fligor* Decl. Ex. C, ¶¶ 8-9.) The County urges this Court to
18 provide due process of law for it and other interested parties and to refrain from entering an
19 injunction substituting for the normal rulemaking process. (*Id.* ¶ 12.). Ignoring all these
20 substantive and procedural rulemaking requirements, the Department has already implemented the
21 additional restrictions on suction dredge mining set forth in the Proposed Stipulated Judgment,
22 effective November 30, 2005. (*See generally* Buchal Declaration ¶ 4 & Ex. 1.) Presumably the
23 Department seeks to establish that a simple agreement with an interested party, if subsequently
24 entered as a stipulated judgment by a court, can bypass all applicable rulemaking requirements and
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² *NLRB v. Wyman-Gordan Co.*, 394 U.S. 759, 778 (1969) (Douglas, J., dissenting).

1 moot the Department’s ongoing violation of Government Code § 11340.5(a)³ and other similar
2 provisions.

3 As far as the Miners can tell, this principle is heretofore unknown to California law.
4 Where federal courts have sustained settlements between environmental regulators and
5 environmentalists against challenges by regulated parties, they have typically done so on the basis
6 that the settlements merely commit the agency to investigate particular issues and propose
7 regulations,⁴ or vacate a regulation and remand the issue to the agency for a new rulemaking,⁵ or
8 because the proposed settlement contains merely “interpretative rules” not subject to particular
9 statutory rulemaking requirements⁶. The handful of California cases sustaining consent decrees
10 have done so in a context where the agencies involved were not bound by rulemaking restrictions
11 akin to those set forth in Fish & Game Code § 5653.9.⁷ In particular, as far as the Miners can tell,
12 no California court has ever permitted an agency to issue substantive regulations utterly
13 prohibiting previously lawful activities utilizing a settlement agreement to bypass all rulemaking
14 requirements. To the contrary, courts considering CEQA claims have emphasized that “due
15 process” requires that judicial relief not interfere with future challenges to the evidentiary bases
16 for agency CEQA determinations. *E.g., Resource Defense Fund v. Local Agency Formation*

17 ³ “No state agency shall issue, utilize, enforce, or attempt to enforce any . . . rule . . . unless the
18 . . . rule has been adopted as a regulation and filed with the Secretary of State pursuant to this
Chapter”.

19 ⁴ *See, e.g., Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1257 (D.C. Cir. 1980)
20 (“ . . . the Companies have not shown that the investigatory program envisaged by the [settlement]
21 modifications will have a direct and immediate effect on their activities. If, after completing its
22 investigation EPA decides to promulgate regulations—and it is these regulations that will impose
any requirements on the Companies—appellants will have ample opportunity to participate in
rulemaking proceedings”).

23 ⁵ *See, e.g., Home Builders Ass’ns of Northern Cal. v. Norton*, 293 F. Supp.2d 1 (D.D.C. 2002)
24 (vacating critical habitat designation under Federal Endangered Species Act over intervenor’s
objections)

25 ⁶ *E.g., Bragg v. Robertson*, 54 F. Supp.2d 653, 665-666 (S.D. W. Va. 1999) (approving Clean
26 Water Act settlement over intervenors’ objections that they would then be required to apply for
permits).

⁷ For example, in *Southern Cal. Edison Co. v. Peevey*, 31 Cal.4th 781, 800-01 (2003), the Supreme
Court emphasized that the “PUC’s authority derives not only from statute but from the California
Constitution”, with such authority being broad enough to enter into rate settlement agreement at
issue in that case.

1 *Comm'n*, 191 Cal. App.3d 886, 900 (1987). *A fortiori*, CEQA courts ought not to enter relief that
2 substitutes entirely for agency CEQA determinations.

3 Because rulemaking by secret deal is inconsistent with California's rulemaking statutes
4 governing the Department, that conflict is alone sufficient to require rejection of the Proposed
5 Stipulated Judgment as being contrary to law. The United States Department of Justice, which has
6 considered this question at length, concludes that "a settlement that would commit an agency to
7 promulgate substantive regulations of the kind ordinarily subject to the notice and comment
8 requirements of the APA [i.e., Federal Administrative Procedure Act, which like the Government
9 Code requires notice and comment rulemaking] would likely be prohibited by the APA".⁸ The
10 Proposed Stipulated Judgment improperly commits the Department to its "Exhibit 1" rules.

11 More generally, use of the judiciary to transform private agreements into rules of general
12 application constitutes a violation of the Constitutionally-guaranteed separation of powers,
13 pursuant to which "[p]ersons charged with the exercise of one power [*i.e.*, this Court, charged to
14 exercise judicial power] may not exercise either of the others except as permitted by this
15 Constitution". Cal. Const. Art. III, § 3. The process also raises serious Constitutional questions
16 concerning the delegation of legislative power to private interests; again the problem may be
17 avoided by limiting the scope of the relief to an agency commitment to consider particular issues
18 in public rulemaking. *See generally* W. Funk, *Bargaining Toward the New Millenium:*
19 *Regulatory Negotiation and the Subversion of the Public Interest*, 46 Duke L.J. 1351, 1373-74
20 (1997) ("limiting regulatory negotiation to the formulation of the proposed rule, combined with
21 the agency's formal reservation of authority to adopt the regulation solves the constitutional
22 problems . . .").

23 **B. The New Restrictions Lack Evidentiary Support And Are Not Necessary To Protect**
24 **Fish**

25 Fish and Game Code § 5653(b) provides that when "the department determines, pursuant
26 to the regulations adopted pursuant to Section 5653.9, that the [suction dredge] operation will not

⁸ Office of Legal Counsel Opinion, *The Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Discretion*, June 15, 1999 (reproduced at http://www.usdoj.gov/olc/consent_decrees2.htm) (*See* Request for Judicial Notice, ¶1, Exhibit 1).

1 be deleterious to fish, it *shall issue* a permit to the applicant” (emphasis added). The Department
2 had gone through an exhaustive CEQA process, developing an EIR and extensive suction
3 dredging restrictions embodied in the pre-November 30th regulations. The Rulemaking Record for
4 that process, a partial index of which is included as Exhibit 2 to the Second McCracken
5 Declaration, demonstrates compliance with the extensive CEQA and other procedures with which
6 this Court is familiar. The resulting regulations, consistent with § 5653.9, were crafted to avoid
7 injury to fish without regard to their legal status, listed or unlisted; scientific data, not legal
8 categorizations, properly determine the scope of restrictions. Thus by letter of February 24, 2005,
9 Donald E. Koch, the Regional Manager for the Northern California North Coast Region, advised
10 that:

11 “The Department is interested in considering the merits of regulation changes that
12 have demonstrable benefits to anadromous fish. *Any changes to the suction*
13 *dredging regulations will have to be supported by data that clearly confirm that*
14 *the current regulations result in negative impacts to fish, and that the changes*
15 *would decrease such impacts. Please provide the Department with copies of any*
16 *data in your possession that demonstrate that the current regulations result in*
17 *negative impacts to these species, and that those negative impacts would be*
18 *reduced by the regulation changes which you propose.” (2d McCracken Decl. Ex. 4;*
19 *emphasis added.)*

20 As far as the Miners can tell, no such data was ever transmitted to the Department. (2d
21 McCracken Decl. ¶¶ 5-6.) Yet the Department has now proceeded to impose crushing new
22 regulations on the Miners, eliminating suction dredging on over 100 miles of Siskiyou County
23 waterways, in the absence of any data whatsoever. This is quintessential arbitrary and capricious
24 conduct, and forms another reason to reject the Proposed Stipulation as contrary to law.

25 It is obvious that if no fish are present, they cannot be injured by suction dredge mining
26 operations. As set forth in the accompanying Declaration of Joseph Greene, high summer water
27 temperatures (over 20°C) are lethal to the fish, which therefore avoid areas with such water
28 temperatures. (2d Greene Decl. ¶ 3.) Yet the new restrictions designate some such areas (*e.g.*, Elk
29 Creek) as “thermal refugia”, even though the fish cannot persist in these areas, and there is no
30 ground for closing them. (*See id.* ¶ 9.) More generally, the record before the Court establishes the
31 absence of any significant adverse environmental impact of suction dredge mining, which in fact

1 operates to improve fish habitat. (*See generally* Fligor Decl. Exs. A, D; 2d Greene Decl. ¶ 8 (even
2 Tribe recognizes potential positive effects)).

3 Neither the Tribe nor the Department can identify any additional or unanticipated effects
4 arising from suction dredge mining that were not fully and adequately considered during the 1994
5 CEQA process. Rather, the Tribe argues that at one point, the Department suggested that it might
6 close rivers to suction dredging based on the suspected presence of listed fish, and that when the
7 fish were listed, the Department did not close the rivers. The Department’s proposal, however,
8 was not lawful when made, and is not lawful now, for the Department must have some evidence of
9 tangible harm to fish before acting.

10 The California Endangered Species Act cannot possibly be construed to authorize
11 wholesale closure of California rivers to suction dredge mining on the basis that listed species
12 might possibly be present and might be injured. To the contrary, the Act specifically provides that
13 agencies shall develop measures that avoid jeopardizing the continued existence of listed species
14 “while at the same time maintaining the project purpose [here suction dredging] to the greatest
15 extent possible” (Fish & Game Code § 2053); where mitigation measures are required of private
16 parties, “the measures or alternatives required shall be roughly proportional in extent to any
17 impact on those species that is caused by that person” (*id.* § 2052.1). Even under the Federal
18 Endangered Species Act, courts have not hesitated to set aside agency regulations based on
19 “prospective harm” without actual evidence that the species of concern are present at the particular
20 location concerned *and* will be adversely affected. *See generally Arizona Cattle Growers’ Ass’n*
21 *v. U.S. Fish & Wildlife*, 273 F.3d 1229 (9th Cir. 2001).

22 The general principle of limiting restrictions to the minimal extent necessary is also
23 incorporated into CEQA, and made expressly applicable to judicial relief such as the injunction
24 the existing parties propose to have this Court enter. *See* Public Resources Code § 21168.9(b)
25 (court’s orders “shall include only those mandates which are necessary to achieve compliance with
26 this division and only those specific project activities in noncompliance with this division”); *e.g.*,
County Sanitation District No. 2 of Los Angeles County v. County of Kern, 127 Cal. App.4th 1544,
1605 (2005) (existing biosolids standards permitted to continue pending EIR preparation given

1 reliance of regulated interests). An order that entire rivers or tributaries be closed at all times
2 merely because some portions of them may be inhabited at some times by some members of
3 species for protection (*cf.* Karuk Cmplt. ¶ 2) is patently inconsistent with the legislative direction
4 in both the California Endangered Species Act and CEQA. The larger implications of such a
5 principle, if accepted, would foreclose all swimming, rafting and kayaking (which might scare fish
6 or injure their redds and eggs), fishing of any kind (fishers might hook and injure listed fish), and
7 logging anywhere in the watershed (land disturbance might, unlike suction dredge mining,
8 actually add silt to the river bed). (*See also* 2d McCracken Decl. Ex. 5, at 2 (Departmental
9 biologist makes this very point).)

10 Here the Department has manifestly shirked its duties under § 5653 and the California
11 Endangered Species Act to make any rational determination of whether fish are actually and
12 adversely affected, and to craft alternatives permitting suction dredge mining to proceed to the
13 “greatest extent possible”. It is conceivable that the Department or Tribe parties will cobble
14 together some sort of record, heretofore concealed, in an effort to provide some substantive basis
15 for the closures. But this Court cannot possibly evaluate the necessity of the proposed restrictions
16 based upon whatever scraps of evidence the existing parties may deign to reveal in their filings;
17 only review of the whole record can discharge the important substantive review required under
18 Government Code § 11340. Nor would it be fair to permit these parties, having concealed the
19 existence of the lawsuit and all documents concerning it for months, to make selective disclosures
20 at the last minute purporting to justify the stipulated relief, but untested by discovery⁹ or cross-
21 examination. It is difficult for the Miners to convey the degree to which the biologists whose
22 opinions have been advanced in the past by the Karuk Tribe are seized with an irrational hostility
23 toward suction dredge mining; only cross-examination before this Court could adequately educate
24 the Court as to the profound degree of their bias.

25 To illustrate this phenomenon as best they can, the Miners provide one example of an e-
26 mail exchange in which Mr. McCracken pointed out that that salmon coexist quite happily with

⁹ The Karuk Tribe probably possesses additional water quality data proving that there is no basis for the restrictions it seeks (*see* Greene Decl. ¶ 8), which should be subject to discovery in this action.

1 operating dredges, showing up “like pets” to feed “off the end of the dredge”, prompting the
2 biologist to respond that the fish may be driven to this behavior because suction dredging has
3 destroyed the food supply in the river such that “remnant aquatic invertebrates that are resurfaced
4 by the dredging action . . . are ravenously eaten by remaining starving surviving fish”. (2d
5 McCracken Decl. Ex. 5, at 5, 3.) Given that suction dredges actually affect only a tiny portion of
6 the river bottom (Fligor Decl. Ex. A ¶¶ 4-7) and the effects on invertebrates are insignificant and
7 utterly ephemeral (*id.* ¶¶ 33-41), these comments are difficult to understand as anything other than
8 the product of an insuperable bias against suction dredge mining. In the same e-mail exchange,
9 the Departmental biologist gently advises that the effects of suction dredging are positive based on
10 his observations. (2d McCracken Decl. Ex. 5, at 1-2.).

11 The right result, however, is to require that new regulations be developed in an open
12 CEQA process that can take advantage of all the biological and other information provided by the
13 Miners, the Tribe, the Department, local land owners, Siskiyou County, and the many other
14 persons and groups that have an interest in such regulations.

15 **C. Permitting The Department To Regulate By Settlement Agreement Constitutes Bad**
16 **Public Policy.**

17 As far as the Miners can tell, this is a case of first impression as to whether a California
18 agency may substitute a settlement agreement for specific rulemaking requirements set forth in
19 Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code and CEQA requirements.
20 There are powerful public policy arguments against “government by consent decree”.¹⁰ *See*
21 *generally* Funk, *supra*.

22 First, the goals of the statutes involved can be accomplished without resort to judicial
23 approval of any private agreement. The Department might properly stipulate to a violation of
24 CEQA or such other finding of law as might be supported in these circumstances, agree to enter
25 into rulemaking proceedings, and then reach precisely the same result as the proposed restrictions.

26 ¹⁰ The arguments herein are drawn from Judge Wilkey’s widely-cited dissent in the leading case of *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1130-37 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984). That case, a follow-on case to *Environmental Defense Fund, Inc. v. Costle*, *supra*, involved continuing disputes over the same consent decree which “was ‘process’ rather than ‘result’ oriented”, 718 F.2d at 1121; unlike the Proposed Stipulated Judgment, it did not bind the agency to issue any particular regulations.

1 This course of action would give all parties affected by the proposed regulations, including but not
2 limited to the Miners and Siskiyou County, a chance to be heard.

3 While the particular agreement here may seem desirable to those who see environmental
4 regulation as an unmitigated social good, the device of rulemaking by private agreement might
5 just as easily be used to permit interested parties to agree to *less* environmental regulation. This
6 Court should think carefully about the long-term consequences of permitting the Department to
7 discharge its regulatory duties by private agreement with special interests, which in the future may
8 include the regulated parties. Judicial review of such agreements can accomplish little in a context
9 where the Department is permitted to withhold from public scrutiny all materials pertinent to its
10 decisions, presenting the Court with only that evidence it deems supportive of its action.

11 Ultimately, the process of regulation by consent decree is fundamentally incompatible with
12 the ordinary regulatory processes of a representative, democratic government. Use of the device
13 makes it virtually impossible for interested parties to monitor agency actions and influence their
14 development. Third parties would have the nearly impossible task of continuously monitoring
15 litigation in all of California's counties, as lenient venue requirements can (and did) permit
16 litigation to proceed far from the area where the regulations actually apply. In nearly all cases,
17 interested parties would be faced with a binding decree entered without any notice to them.

18 The process also restricts the power of the Legislature and the Department. The
19 Department can no longer exercise its regulatory authority without "appl[ying] to this Court for a
20 termination of the injunction" (Proposed Stipulated Judgment at 2), a process that would be
21 common to all such cases. No change in policy, whether motivated by changed circumstances or
22 changed administrations (the product of democratic elections), can be instituted without judicial
23 approval. The will of the people becomes attenuated in favor of exaggerating the power of the
24 special interest groups such as the Tribe that obtain the consent decree, and then may reasonably
25 be expected to oppose any changes to what they have achieved by private agreement. And the
26 power of the judiciary is enhanced, though the judiciary is the branch of government which is by
design least susceptible to democratic pressures and least capable of accommodating the many,
conflicting interests affected by the decree.

1 Finally, the device of regulation by consent decree promises to ensnare this Court in
2 continuing disputes as the decree lives on through successive administrations and ever changing
3 circumstances, and to engender still further litigation. At least one lawsuit has already been filed
4 challenging the November 30th regulatory changes, *Hobbs v. Department of Fish and Wildlife*, No.
5 06AS00028 (Sacramento Cty.), and Miners faced with a *de facto* seizure of their property will
6 have no recourse but to commence additional lawsuits in federal court to set aside the regulations,
7 or, in the alternative, for compensation for the taking of their valuable gold claims. The policy
8 favoring settlement of disputes, intended to conserve judicial resources (and the resources of the
9 litigants), has no application where, as here, the inevitable result will be even more extensive
10 judicial involvement in the issues presented. Again, a simple command to the Department to
11 initiate rulemaking proceedings to address such issues as the Department and Tribe agree merit
12 renewed consideration would avoid all these vices.

13 **D. The Proposed Restrictions Are Contrary To Public Policy As Embodied In Federal**
14 **Law.**

15 Pursuant to 30 U.S.C. § 22, “all valuable mineral deposits in lands belonging to the United
16 States . . . shall be free and open to exploration and purchase . . .”. 30 U.S.C. § 22. As the Ninth
17 Circuit has commented, “[n]o citation of authority is required to support the statement that the all-
18 pervading purpose of the mining laws is to further the speedy and orderly development of the
19 mineral resources of our country”. *United States v. Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968).
20 While miners are not immune from regulation of their activities, they enjoy unique statutory
21 protection requiring regulators to structure such regulation so as to “not endanger or materially
22 interfere with prospecting, mining or processing operations or uses reasonably incident
23 thereto . . .” 30 U.S.C. § 612(b) (emphasis added); *see also* 16 U.S.C. § 478 (U.S. Forest Service
24 regulatory authority “shall not be construed as prohibiting any person . . . from entering upon such
25 national forests for all proper and lawful purposes, including that of prospecting, locating, and
26 developing the mineral resources thereof”).

In light of this and other statutory authority, federal courts have repeatedly admonished the
Forest Service that it “lack[s] authority effectively to repeal the [30 U.S.C. § 22] by regulations”

1 unreasonably restrictive of mining rights. *E.g., United States v. Shumway*, 199 F.3d 1093, 1107
2 (9th Cir. 1999). As the *Shumway* court emphasized,

3 “[t]he owner of a mining claim owns property, and is not a mere social guest of
4 the Department of Interior to be shooed out the door when the Department
5 chooses. Rather, pursuant to the Multiple Use Act, the Department must continue
6 to coexist with a holder of a valid claim whose right to possession is vested.”
7 *Shumway*, 199 F.3d at 1103.

8 In short, in contrast to nearly any other object of California regulators, the Miners have federal
9 possessory property rights and a special, protected status under Federal law. The areas the
10 Department and Tribe propose to close lie within the boundaries of National Forests within the
11 State of California. (2d McCracken Decl. ¶ 7.) Because there is, as a practical matter, no way to
12 mine for the gold contained in these river and stream beds other than suction dredge mining, the
13 proposed refusal to issue permits for particular rivers and streams amounts to an outright ban of
14 mining in such areas. (*Id.*) State regulation constituting an outright ban of mining on Federal
15 property is pre-empted by federal law. *South Dakota Mining Ass’n v. Lawrence County*, 155 F.3d
16 1005 (8th Cir. 1998) (county ordinance prohibiting mining preempted).

17 The Miners do not ask this Court to rule on the federal supremacy argument by this filing,
18 which manifestly requires fuller briefing. Rather, they ask this Court to withhold approval of the
19 settlement as contrary to the federal public policies governing mining on federal land, in favor of
20 allowing the parties to stipulate to a remand for rulemaking proceedings before the Department
21 that can provide an appropriate forum for balancing all the competing interests. Regulations
22 developed through the ordinary rulemaking proceedings which minimize intrusion into federal
23 mining rights may well be sustained against a supremacy claim. *Cf., e.g., California Coastal*
24 *Comm’n v. Granite Rock Co.*, 480 U.S. 572 (1987).

25 **E. The Proposed Settlement Is Not Fair, Just Or Equitable.**

26 As set forth in considerable detail in the first McCracken Declaration (Fligor Decl. Ex. B),
the Miners have gone to enormous lengths to accommodate every reasonable concern of the Karuk
Tribe, substantially limiting their mining activities *notwithstanding the absence of any evidence*
that any of the Miners (or any other miner) have injured so much as a single fish. The Miners

1 have continued to adhere to these restrictions notwithstanding the Tribe's faithless repudiation of
2 its agreement and surreptitious resort to litigation. (2d McCracken Decl. ¶ 8.)

3 As summarized in the initial Greene Declaration (Fligor Decl. Ex. A), the advance of
4 scientific understanding since the 1994 rulemaking proceedings has only undermined the notion
5 that suction dredge mining is deleterious to fish, whether evaluated on a permit-by-permit basis or
6 cumulatively. By all appearances, the Tribe has responded to the collapsing case for restrictions
7 on suction dredge mining by avoiding an ordinary demand for the Department to engage in
8 rulemaking in favor of negotiating in secret with the Department to lock the Miners out of their
9 property entirely—even as the Tribe itself actually does kill fish. *Cf. Jicarilla Apache Tribe v.*
10 *Andrus*, 687 F.2d 1324, 1340 (10th Cir. 1982) (NEPA injunction denied on basis of “unclean
11 hands” where Tribe engaged in similar conduct without seeking environmental review of its own
12 conduct). It was manifestly unjust for the Department to make a secret agreement with one of
13 many interested parties to impose significant restrictions upon known absent parties, and approval
14 of such an agreement would be inconsistent with this Court's duty to see that the judgment entered
15 is a fair one.

16 **III. CONCLUSION**

17 For the foregoing reasons, this Court should decline to enter the Proposed Stipulated
18 Judgment, and instead invite the parties to either fashion a settlement consistent with California
19 law (*e.g.*, merely committing the Department to conduct new rulemaking proceedings), or to
20 litigate the case on the merits.

21 Dated: January 10, 2006

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24 By: _____

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25 corporation, and MR. RAYMOND W. KOONS, an
26 individual

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