NEYSA A. FLIGOR (SBN 215876)
STEIN & LUBIN LLP
600 Montgomery Street, 14th Floor
San Francisco, CA 94111
Telephone: (415) 981-0550
Facsimile: (415) 981-4343

Attorneys for Proposed Intervenors
THE NEW 49'ERS, INC., a California corporation, and
RAYMOND W. KOONS, an individual

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

UNLIMITED CIVIL JURISDICTION

KARUK TRIBE OF CALIFORNIA and LEAF HILLMAN,

Plaintiffs,

v.

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

Defendants.

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

I. PRELIMINARY STATEMENT

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

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

Nevertheless, the Proposed Stipulated Judgment should be rejected:

- The Department is not authorized to evade substantive and procedural statutory rulemaking requirements by secret agreement, even if such agreement is reviewed by the Court. (Point I(A))
- Particularly in a context where there is no evidence that any suction dredge miner has injured so much as a single fish, there is no factual support for the regulatory restrictions embodied in the Proposed Stipulated Judgment. (Point I(B))
- 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

[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).

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

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

II. THE PROPOSED STIPULATED JUDGMENT MUST BE REJECTED INSOFAR AS IT BINDS THE AGENCY TO SPECIFIC PROHIBITIONS ON SUCTION DREDGE MINING.

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

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

No provision of the Fish and Game Code authorizes defendants to promulgate regulations by private agreement with interested parties. To the contrary, § 5653.9 provides that the suction dredge mining regulations ". . . shall be adopted in accordance with the requirements of Division 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.

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

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

Regulations are also subject to review for "nonduplication" (Government Code § 11349.1(a)(6)), which "means that a regulation does not serve the same purpose as a state or federal statute or another regulation". *Id.* § 11349(f). "This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation *and justify any overlap or duplication.*" *Id.* Here, as set forth in detail in the first McCracken Declaration (Fligor Decl. Ex. B), site-specific conditions were negotiated between the Karuk Tribe, the Miners and the Forest Service, producing a detailed "Notice of Intent" and approval thereof attached to that Declaration. The restrictions set forth in that Notice of Intent serve precisely the "same purpose" 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

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

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

[2] *NLRB v. Wyman-Gordan Co.*, 394 U.S. 759, 778 (1969) (Douglas, J., dissenting).

moot the Department's ongoing violation of Government Code § 11340.5(a)[3] and other similar provisions.

As far as the Miners can tell, this principle is heretofore unknown to California law. Where federal courts have sustained settlements between environmental regulators and environmentalists against challenges by regulated parties, they have typically done so on the basis that the settlements merely commit the agency to investigate particular issues and propose regulations,[4] or vacate a regulation and S6660a

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

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

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

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

Fish and Game Code § 5653(b) provides that when "the department determines, pursuant 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).

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

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

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

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

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

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

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

The general principle of limiting restrictions to the minimal extent necessary is also incorporated into CEQA, and made expressly applicable to judicial relief such as the injunction the existing parties propose to have this Court enter. *See* Public Resources Code § 21168.9(b) (court's orders "shall include only those mandates which are necessary to achieve compliance with 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

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

Here the Department has manifestly shirked its duties under § 5653 and the California Endangered Species Act to make any rational determination of whether fish are actually and adversely affected, and to craft alternatives permitting suction dredge mining to proceed to the "greatest extent possible". It is conceivable that the Department or Tribe parties will cobble together some sort of record, heretofore concealed, in an effort to provide some substantive basis for the closures. But this Court cannot possibly evaluate the necessity of the proposed restrictions based upon whatever scraps of evidence the existing parties may deign to reveal in their filings; only review of the whole record can discharge the important substantive review required under Government Code § 11340. Nor would it be fair to permit these parties, having concealed the existence of the lawsuit and all documents concerning it for months, to make selective disclosures at the last minute purporting to justify the stipulated relief, but untested by discovery[9] or cross-examination. It is difficult for the Miners to convey the degree to which the biologists whose opinions have been advanced in the past by the Karuk Tribe are seized with an irrational hostility toward suction dredge mining; only cross-examination before this Court could adequately educate the Court as to the profound degree of their bias.

To illustrate this phenomenon as best they can, the Miners provide one example of an e-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.

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

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

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

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

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

[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.

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

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

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

The process also restricts the power of the Legislature and the Department. The Department can no longer exercise its regulatory authority without "appl[ying] to this Court for a termination of the injunction" (Proposed Stipulated Judgment at 2), a process that would be common to all such cases. No change in policy, whether motivated by changed circumstances or changed administrations (the product of democratic elections), can be instituted without judicial approval. The will of the people becomes attenuated in favor of exaggerating the power of the special interest groups such as the Tribe that obtain the consent decree, and then may reasonably be expected to oppose any changes to what they have achieved by private agreement. And the 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.

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

Dated: January 10, 2006

STEIN & LUBIN LLP

By: _____
Neysa A. Fligor
Attorneys for THE NEW 49'ERS, INC., a California corporation, and MR. RAYMOND W. KOONS, an individual

Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES