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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

REPLY MEMORANDUM OF THE NEW 49'ERS AND RAYMOND W. KOONS IN OPPOSITION TO PROPOSED STIPULATED JUDGMENT

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

Neither the Tribe nor the Department offer the Court any precedent, California or otherwise, for allowing the Department to amend its regulations through secret settlement discussions. Neither the Tribe nor the Department respond to the powerful public policy objections to such a procedure, which has deprived the Miners, Siskiyou County, and many other parties from their lawful rights to participate in decisions of immense importance to them.

As anticipated, the Tribe and Department have come forward just days before the hearing on this matter with a raft of opinions to support the Proposed Stipulated Judgment, *but the record remains devoid of any proof that any suction dredge miner operating under the pre-November 30th regulations has ever injured so much as a single fish.* Indeed, the Department stands before the Court citing "*alleged* impacts to fish" and even says that "there is nothing to suggest the Department's suction dredge permitting program is out of compliance with CEQA". (Dfts. Opp. at 5; emphasis added.) Neither the Department nor the Tribe can explain how it is consistent with the public policy of the State of California to restrict lawful activity without any legal violation, solely on the basis of readily-contestable allegations of environmental harm.

Both parties present expert testimony from the fish-centric viewpoint that "it should be assumed that dredging is harming declining species unless it can be proved otherwise". (Moyle Decl. ¶ 11; *see also* Soto Decl. ¶ 7 (seeking avoidance of potential impacts); Manji Decl. ¶ 5 (restrictions "lessen the potential" for impacts).) But California law does not permit relief to be based upon mere presumptions; the question made relevant by Fish & Game Code § 5653 is whether there will be *actual harm* to fish populations, and the whole structure of CESA and CEQA is set up to foster activities to the maximal extent possible consistent with avoiding such actual harm. The Miners are filing herewith a Third Declaration from Mr. Greene which confirms the absence of actual harm and the insignificance of suction dredge mining to the overall population trajectories of the fish, and testimony from Mr. Maria that was previously unavailable.

By contrast, the harm to the Miners is clear. In further response to continued speculation by the existing parties (and even their biologists) that the Miners will suffer no real harm from the Proposed Stipulated Judgment, the Miners are filing herewith the Fourth Declaration of David McCracken, which documents the harm in detail.

II. NEITHER THE DEPARTMENT NOR THE TRIBE REFUTES THE LEGAL OBSTACLES TO THEIR PRIVATE RULEMAKING EFFORTS.

While the Department makes reference to a general policy favoring settlements, the Department does not explain how a policy designed to end disputes can possibly be invoked to

justify a judgment that can only serve to multiply litigation, and has indeed already triggered a separate lawsuit. Nor can the Department justify short-circuiting the entire CEQA and rulemaking process merely to "marshal its limited resources". (Dfts. Opp. at 4 n.1.) Those limited resources are going to be exhausted in defending the multiple suits arising from its unjust actions, which if approved by this Court will also require the Department to pay for immense quantities of gold it has taken by regulation. Indeed, if the Department really believes that it is appropriate to close rivers to a beneficial activity like suction dredge mining, which may even be associated with *increases in fish runs* (*see* 3d Buchal Decl. ¶¶ 6-7 & Ex. 5, at 7), based on the mere presence of listed fish, the Miners may be compelled to bring suit against the Department to apply that principle more broadly, to limit fishing, boating, and even swimming in California's rivers, from which they are excluded.

Nor do the existing parties offer any adequate response to the extensive authority identified by the Miners confirming the inappropriateness of rules negotiated in secret. The Department acknowledges that other settlements have merely involved programs to *develop* regulations, except for a one case in which a PUC rate-related settlement was affirmed. *Southern California Edison Co. v. Peevey*, 31 Cal.4th 781 (2003). In that case, the Supreme Court repeatedly stressed that the settlement did not involve any regulatory change: "the central commitment PUC made in the settlement was to *maintain the then existing rates* for an agreed period". *Id.* at 802 (emphasis in original); *see also id.* at 804-05 (the settlement agreement effected no rate change . . ."). [1] *In short, neither of the existing parties has identify any California (or other) case in which an administrative agency charged with specific substantive and procedural requirements for rulemaking can utilize a a secret settlement to evade those strictures and impose substantive rule changes, and neither party even responds to the powerful public policy objections to such a procedure.*

[1] The Court also emphasized the PUC's extraordinary, constitutionally-based authority, which the Department manifestly lacks. *Id.* at 800-01.

Ultimately, the Department retreats to *Pardee Const. Co. v. City of Camarillo*, 37 Cal.3d 465 (1984) and *Stephens v. City of Vista*, 994 F.2d 650 (9th Cir. 1993) in support of broad authority to enter into contracts, but those cases concerned the continuing viability of municipal settlements of zoning disputes against future regulatory changes. They do not remotely address the question whether an agency can evade substantive and procedural rulemaking requirements by agreeing to issue particular rules as a matter of contract.

The Tribe and Department both argue that the Proposed Stipulated Judgment does not bind the Department to promulgate any rules, and that the Department remains free to conduct rulemaking proceedings in the future. But neither party disputes that the Department has already instituted the new, agreed-upon regulations as of November 30th. The Department's repeated suggestion that this is just "narrowly tailored injunctive relief pending completion of a formal rulemaking action . . ." (Dfts. Opp. 5; *see also id.* at 8) is at best misleading since there is no such rulemaking action. It is also misleading for the Department to characterize the Proposed Stipulated Judgment as "reserving its full authority in any future rulemaking" (*id.* at 8), because the Court's permission is required to adopt any rules at variance with the agreed-upon outcome. It is worth noting that nothing prevented the Department from starting a new rulemaking last November or even sooner. Such rulemaking proceedings could have been completed before the start of the summer 2006 dredging season, such that there would have been no need for any injunctive relief at all. But that would, as the Miners have previously demonstrated, require the Department to demonstrate necessity for the rules, an insurmountable burden.

The Department urges the Court to find the Proposed Stipulated Judgment in compliance with § 21168.9 because if its assertedly-limited nature (Dfts. Opp. 5), but ignores the statute's presupposition that injunctive relief is to be limited "to that portion of a determination, finding, or decision or specific project activity or activities *found to be in noncompliance*" (where severable, etc.). This Court has not found any activity to be in noncompliance, and the Department emphatically denies any noncompliance. To the contrary, the Department argues that the only predicate necessary to support its mining shutdown is mere "*allegations* that the suction dredge

permitting program is resulting in impacts under CEQA that are deleterious to fish . . ." (Dfts. Opp. 9; emphasis added.)

The Department also cites § 21167.9(c), declaring that "[n]othing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way", in support of a peculiar claim that this Court could not order it to engage in rulemaking. (Dfts. Opp. 9.) The Department does not identify any authority in support of this proposition; if anything, § 21167.9 that section counsels against entering relief foreclosing the exercise of the Department's discretion to issue permits.

The Tribe contends that the injunction is well within the authority of the Court based on several CEQA cases affirming decisions to stop particular projects based on proof of particular environmental harm. But in most of those cases, the environmental plaintiffs had named the Real Party in Interest, and the Real Party in Interest was before the Court and had an opportunity to contest the allegations of the complaint, and effectively did so.[2] Interestingly, *Planning and Conservation League v. Department of Water Resources*, 83 Cal. App.4th 892 (2000), supports the position of the Miners in a critical respect. There the court rejected the idea that it should afford any deference to the settlement of the critical legal issue under CEQA: "While applauding the settlement success of the seven parties that negotiated the Monterey Agreement, defendants forget the 23 water contractors and the members of the public that were not invited to the table." *Id.* at 905.

The whole premise of the Tribe's legal argument, which this court should assess *de novo* notwithstanding the settlement, *see id.* at 906, is that a simple change in the legal status of a species gives rise to some sort of substantive change in the protection to be accorded such species, such that a new EIR is required. But Fish & Game Code § 5653 already addressed whether or not granting permits "will be deleterious to fish" without regard to their legal status. The Tribe has

[2] *Laurel Heights Improvement Ass'n v. Regents of the University of California*, 47 Cal.3d 376, 388 (1988) (court declines to "order UCSF's present activities at the new location stayed pending certification of a new EIR"); *San Bernardino Valley Audubon Society v. Metropolitan Water District of Southern California*, 89 Cal. App.4th 1097 (2001) (remand for proper application of § 21168.9). .

never offered any evidence to show any adverse effects not considered by the Department in its initial EIR. In short, the only claim the Tribe has ever had is that the Department's conduct is arbitrary and capricious insofar as the 1994 FEIR declared that "[w]aters of the state would also be proposed for closure [when] special status species are present" (Soto Decl. Ex. at 18), in that the Department purportedly did not offer an adequate explanation of its decision not to close waters when listed coho are present.

Since filing their initial memorandum, the Miners have discovered a Departmental document entitled "Recovery Strategy for California Coho Salmon", dated February 2004, which confirms that the existing regulations already assessed all relevant impacts. (2d Buchal Decl. Ex. 1.) Specifically, the document discusses suction dredge mining and coho, and states that "[t]he restrictions currently imposed by regulations on this activity are designed to eliminate the potential for impacts to coho salmon by restricting suction dredging actions to locations and times when such activities should not impact the species". (*Id.* at 3.) This document and the Department's position confirm, at the least, that the Tribe has not identified any error of law that as to require drastic injunctive relief against the Miners and miners generally.

III. NEITHER PARTY OFFERS EVIDENCE THAT CONTINUED MINING WILL IN FACT BE DELETERIOUS TO FISH

Over and over and over again, the proponents of the Proposed Stipulated Judgment make reference to *potential* effects of suction dredge mining that do not *actually* occur. (*See also* Fligor Decl. Ex. A/Greene Decl. ¶ 3 (noting general reliance upon subjective assessments of potential effects). For example, all of the Tribe's witnesses complain over and over again of damage to fish eggs (*e.g.*, Soto Decl. ¶¶ 5-6; Duffy Decl. ¶¶ 7-8). The Department itself echoes the complaint. (Dfts. Opp. at 2.) But the 1994 FEIR makes it clear that "[s]uction dredging under this proposed regulation would not be deleterious to yolk sac fry and eggs because the seasonal closures would protect these life stages *from any adverse impacts from suction dredging".* (Soto Decl. Ex. at 50; *see also* 3d Green Decl. ¶ 14.)

Other claimed forms of damage are contradictory; on the one hand, it is well recognized that young salmon sometimes congregate at the outflow of the dredge to feed, yet Mr. Soto claims that the sediment discharged "affects the ability of young salmon to see their food" (Soto Decl. ¶ 5). Perhaps he meant that it makes it easier for the fish to find food. None of the Tribe's experts offer any balanced assessment of the positive and negative effects of turbidity. (*Cf.* Fligor Decl. Ex. A/Greene Decl. ¶¶ 47-63.)

Yet another claim is that "unstable tailings piles . . . attract fish to spawn on them", which *may* create mortality when high flows disperse the piles. (Soto Decl. ¶¶ 6 & 7(f); Moyle Decl. ¶ 13.) This is another area of almost pure speculation. At the outset, neither party refutes the tiny and insignificant scale of any mining impacts compared to natural movement of sand and gravel within the rivers. (Fligor Decl. Ex. A/Greene Decl. ¶¶ 4-7.) Nor do any of the witnesses provide any testimony concerning net effects: in other words, dredging may create piles of gravel, but loose gravel is superior spawning habitat, and the increased risk of scouring must be balanced against the better survival of eggs in redds dug in loose gravel (deeper redds and better water flow for oxygenation of buried eggs); it would be entirely consistent with all the testimony proffered for the tailings piles to cause a few redds to be lost with a significant net increase in fish populations from superior spawning habitat. (*See* Buchal Decl. Ex. 3, at 13-14, Ex. 5, at 7.) Nor do any of the witnesses balance the positive effects of creating thermal refugia (holes) (Fligor Decl. Ex. D. Maria Decl. ¶ 12), with asserted negative effects of tailings piles, or even offer any evidence as to whether the risk of scouring in tailings beds is any higher than in other areas with the loose gravel favored by salmon.

With respect to the very narrow issue of whether additional river areas should be closed, the existing parties offer little more than broad conclusions, and the Department refers to "the *alleged* impacts at issue" (Dfts. Opp. at 5; emphasis added). In his 2d Declaration, Mr. Greene noted that many areas proposed to be closed by the Proposed Stipulated Judgment as "thermal refugia" are too hot to serve that function. In response, Mr. Soto suggests that Mr. Greene's 20°C criteria is erroneous and "not supported by any fisheries research of which I am aware" (Soto

Decl. ¶ 10);[3] he cites evidence that fish avoid areas greater than 23°C (*id.*). But multiple measurements[4] by Mr. Greene show that temperatures exceed even this criterion (2d Greene Decl. Exs.), and *Mr. Soto never squarely denies that a "cold-water refuge", to serve that purpose, needs to be more less than 20°C.* Mr. Soto claims other, more comprehensive data supports identification of the supposed cold-water refugia, but does not provide the data, though the Department apparently has it (Soto Decl. ¶ 9) and has refused for more than a month to make it available to the Miners. Ironically, the one website Mr. Soto provides with actual data (Soto Decl. ¶ 8(n)) uses the same purportedly-unknown 20°C criterion as Mr. Greene (See Buchal Decl. ¶ 8 & Ex. 6), which ought to cause the Court to question Mr. Soto's credibility.

It defies credulity to suggest that when a dozen separate measurements of a river show its temperature over 25°C, the river can serve as a cold water refuge, but Mr. Soto testifies, in substance, that the Court should just trust the Tribe because of its secret, "more comprehensive" approach" (Soto Decl. ¶ 11.) The most specificity Mr. Soto offers is that at one location, Tom Martin Creek, his secret data shows that "substantial [1%, 10%, 50%?] parts of the refugia were within" the 20°C limit, and that coho were present. The Miners have no particular interest in mining in Tom Martin Creek, which is indeed itself cold, but there is no evidence presented to support the notion that huge hot stretches of the mainstem rivers into which these tiny cold creeks flow can serve as "cold water refugia". Indeed, the supposed experts blithely support closure of the lower Salmon River to dredging despite Mr. Maria's field observations that the "dredge holes

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[3] Mr. Greene has now provided citations to such research and an expanded statement of his qualifications. (3d Greene Decl. ¶ 11 & Ex. 1.) The Miners note that a leading treatise suggests that "juvenile coho preferred a temperature range of 12°-14°C, which is close to optimum for maximum growth efficiency". C. Groot & L. Margolis, *Pacific Salmon Life Histories* 420 (U.B.C. Press 1991).

[4] Although the Tribe's experts apparently derive their expertise from being "familiar with the literature" and having personally observed a dredge in operation (Soto Decl. ¶ 5; Moyle Decl. ¶ 8; Duffy Decl. ¶ 5; *cf* Manji Decl. ¶ 3 (no apparent source of expertise beyond general status as biologist)), the Tribe complains that Mr. Greene's declaration involves "double hearsay" (Tribe Br. 6). Mr. Greene merely provided the supporting quotations as part of the data on which his expert conclusions were based, rather than blithely offering his opinions without regard to what the literature stated; nothing in *Miley v. Harper*, 248 Cal. App.2d 463 (1967), would make the opinions inadmissible. If anything, the quotations make the expert testimony more persuasive, not less.

in the riverbed created the only discernable juvenile rearing habitat that I witnessed" and "likely were providing thermal relief in a reach of the Salmon River that typically exceeds 70F during July and August . . .". (Fligor Decl. Ex. D. Maria Decl. ¶ 12)

The Tribe also chides the Miners for "neglecting to tell this Court that the effects of suction dredge mining have already been litigated" in *Siskiyou Regional Education Project v. Rose*, 87 F. Supp.2d 1074 (D. Or. 1999). What the Tribe does not tell this Court is that this case was in substance a collusive suit between environmentalists and the U.S. Forest Service, and the factual claims were not contested. (*See* 2d Buchal Decl. ¶ 3.) When the environmentalists brought a second round of litigation, this time miners intervened and contested the factual allegations. (2d Buchal Decl. ¶ 4 & Exs. 2-3) And this time, the Court (the very same Magistrate Judge) entered in substance precisely the opposite opinion. (2d Buchal Decl. Ex. 4.) In short, on the two occasions in Federal court when the miners have had an opportunity to contest the factual claims of those opposed to suction dredge mining, they have succeeded in doing so.

The Miners note that one of the principal concerns expressed in the *Rose* case was about "potential cumulative effects". (87 F. Supp.2d at 1103). Thereafter, a study was conduct which "could not detect an effect" and suggested that "public money would be better spent on encouraging compliance with current guidelines than on further study". (Ex. 3 to Fligor Decl. Ex. A, at 15; *see also* 3d Greene Decl. ¶ 3.)

None of the expert witnesses demonstrate any actual significant adverse impact to fish from allowing suction dredge mining to continue under the pre-November 30th regulations.[5] All that there testimony stands for is the proposition that biologists would prefer to exclude all human activities from any area where fish may be present. Indeed, the degree to which the Tribe's experts are willing to speculate that anything and everything may injure fish is established by Dr.

[5] The Tribe also raises questions with respect to fish parasites (lamprey); as Mr. Greene has explained, there is no published research demonstrating any mortality associated with suction dredging and "based upon field observations, it is not likely that they would suffer direct mortality because of their tough skin and flexible body". (Fligor Decl. Ex. A/Greene Decl. ¶ 32 (quoting study).) With respect to sturgeon, the only data refers to a limited area of the Salmon River below Ishi Pishi Falls, and it merely establishes the presence of fish, not harm to them. (*See generally* 2d Maria Decl.)

Moyle's testimony that the bare fact that the Miners sometimes go swimming can stress fish. (Moyle Decl. ¶ 15.) Under this standard, any and all human visitation to the Forest must cease, at least as long as people go near the water. (2d Maria Decl. ¶ 6.)

Entering judicial relief based upon such extreme, speculative views would make a mockery of the serious purposes of California's environmental laws. In restricting suction dredge mining where "deleterious to fish", the Legislature manifestly did not intend to curtail this important activity merely because biologists testify that sometime, somewhere, an individual fish might be injured. Rather, as trustee of California's natural resources, the Department must make a reasoned assessment, using all available information (not just information from anti-mining activists), as to whether there is appreciable harm to fish populations. In a context where runs have varied widely, including striking increases in populations notwithstanding continuing suction dredge mining (*see generally* 3d Green Decl.), there is no lawful basis for the restrictions in the Proposed Stipulated Judgment.

IV. CONCLUSION

For the foregoing reasons, and the reasons set forth in the other pleadings filed by the Miners, this Court should decline to enter the Proposed Stipulated Judgment.

Dated: January 25, 2006

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