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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,

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

Intervenors.

Case No. RG05 211597

SUPPLEMENTAL REPLY BRIEF OF THE NEW 49'ERS AND RAYMOND W. KOONS

Date: Matter already submitted
Time: n/a
Dept: 512 (Hayward)
Judge: Honorable Bonnie Sabraw

Action Filed: May 6, 2005
Trial Date: None Set

Argument

The New 49'ers and Raymond Koons (hereafter, the Miners) file this Supplemental Reply Brief pursuant to this Court's order of April 18, 2006. Defendants' Initial Memorandum of Points and Authorities (hereafter, "Dep't Br.") proves our case, as defendants acknowledge that "the Stipulated Judgment must be entered by the Court for the interim protective measures to remain in place". (Dep't Br. 3.) *In other words, the amended rules promulgated November 30, 2005, are patently unlawful unless the bare fact of a litigation settlement somehow empowers the Department to avoid all applicable rulemaking and CEQA requirements.* Neither the Department nor the Tribe offers any remotely plausible interpretation of *Trancas* or any other authority to support this proposition. The Tribe's Supplemental Brief (hereafter, "Tribal Br.") abuses this Court's leave to address *Trancas* with a host of arguments not remotely tied to *Trancas*, and Point IV of their Brief ought to be disregarded on that basis alone.

Both the Tribe and the Department focus upon the issue whether the Department has "relinquished any of its police powers". (*E.g.*, Tribal Br. 1; Dep't Br. 4 (asserting failure to adopt settlement would infringe on asserted police power).) The Department does not have any general police powers, and cannot acquire them by merely asserting their existence. The Department has the powers specifically conferred by the Legislature, which include the power to issue rules in compliance with the Government Code and CEQA, *and only in compliance with the Government Code and CEQA.* This is made clear in Fish and Game Code § 5653.9 specifically with respect to the suction dredging regulations, and both parties continue to ignore this statute.[1]

Lest there be any doubt about the Legislature's hostility to the notion of inherent and unbounded "police" or "trustee" powers to protect wildlife, Fish and Game Code § 1801(h) specifically provides that while it is the policy of the State to conserve wildlife resources, "[i]t is

[1] The Tribe repeatedly cites Public Resources Code § 21168.9 (Tribal Br. 3), but that statute addresses powers of the Court, not the Department, and powers the Court may exercise only "as a result of trial, hearing or remand . . ." upon the finding "that any determination, finding, or decision of a public agency has been made without compliance with this division [CEQA]", § 21168.9(a). There has been no trial or hearing containing any such finding, and the Department specifically denies any error in the Settlement Agreement. From this perspective, the Tribe's several authorities reflecting post-hearing injunctions are simply inapposite.

not intended that this policy shall provide any power to regulate natural resources or commercial or other activities connected therewith, *except as specifically provided by the Legislature*" (emphasis added). Inasmuch as the very same Code Article deems the Department a "trustee for fish and wildlife resources", *id.* § 1802, the Department cannot assert any inherent authority from its role as trustee to evade the Fish and Wildlife, Government and Public Resources Codes governing its authority to set standards for suction dredge mining. Nowhere has the Legislature empowered the Department to close down rivers to suction dredge mining by settlement agreement; to the contrary, § 5653.9 expressly requires adherence to the statutory procedures.

The Department again cites *Southern Cal. Edison v. Peevey*, 31 Cal.4th 781 (2003), ignoring the Supreme Court's reliance upon the PUC's broad constitutionally-based powers, giving it "inherent authority" to set rates by settlement unless barred by other statutes (*id*. at 800-01). By contrast, the Department is limited to statutory authority, in a context where the Legislature has expressly rejected inherent authority in Fish and Wildlife Code § 1801(h). The Department also ignores the Supreme Court's reliance in *Peevey* on the fact that action approved was not a change in rates at all, *such that the rule requiring open and public meetings for any change in rates did not apply*. *Peevey*, 31 Cal.4th at 802. Properly read, *Peevey* counsels that an express Legislative limitation on ratemaking authority cannot be circumvented by even inherent Constitutional authority. *Trancas*, which repeatedly cites *Peevey*, is perfectly congruent with it: whatever else the statutory litigation exemption may mean—an exemption conspicuously absent in the present case—it "cannot be construed to empower" the agency to take "action that by substantive law cannot be taken without a public hearing and an opportunity for the public to be heard". *Trancas*, 41 Cal. Rptr.3d at 200.

For all these reasons, the primary question for this supplemental briefing is not whether the Department proposes in the Stipulated Judgment to limit the future assertion of its powers by contract. The question is whether the Department ever had the power to ignore the provisions of law the Legislature has required it to follow *before* exercising its power "to regulate natural resources or commercial or other activities connected therewith" (Fish and Wildlife Code § 1801(h)) by contract. Irrespective of whether the Department deems its agreed-upon regulation

as "temporary, protective measures" (Dep't Br. 1), the Department's action constitutes the exercise of regulatory power which can only be exercised in accordance with the substantive limitations and procedural requirements of the Government Code and CEQA.

In the language of *Trancas*, the suction dredge mining restrictions constitute "present, absolute commitments, adjudication of which is timely and appropriate". 41 Cal. Rptr.3d at 207. Nothing in *Trancas*, or any other authority of which the Miners are aware, suggests that such "present, absolute commitments" might be approved by this Court merely because the Department now promises to reconsider them in the future. To the contrary, when Trancas argued "that paragraph 2.1's exemption from compliance with density requirements cannot yet be termed a variance because those restrictions may be relaxed by the time Trancas is ready to build", the Court rejected the argument, stating that the settlement "presently provides Trancas a red carpet around them". *Id.* The Proposed Stipulated Judgment does not merely provide the Tribe a red carpet *toward* the substantive results it wants, it adopts those results now. As in *Trancas*, the mere possibility that the Department might someday rescind the restrictions cannot afford the Department the authority to adopt them in the first place.

Both the Department and the Tribe assert, citing no authority, that "critical review in open court, with the participation of the intervenors" (Dep't Br. 3) can somehow substitute for the procedural requirements in the Government Code and CEQA. Inasmuch as the Department and Tribe sought to enter the Stipulated Judgment absent any such critical review or participation—and vigorously opposed it—these arguments should properly be viewed as makeweights, rejected by *Trancas* and all the other pertinent authority. And of course the Department and Tribe do not and cannot explain how review by this Court could possibly discharge the functions provided by the Office of Administrative Law, the public at large, and all the other persons and agencies, including Siskiyou County, entitled by statute to various rights and roles with respect to proposed regulations of the Department.

Most of the balance of the Department and Tribal briefs is off-topic in the sense of reiterating their erroneous interpretations of cases other than *Trancas*. The Miners are unable to resist the siren call of a summary response:

1. *108 Holdings, Ltd. v. City of Rohnert Park*, 136 Cal. App.4th 187, 197 (2006) does indeed hold that the City in that case had not "sacrificed the 'crucial control element'" (Dep't Br. 3). This was because the settlement agreement did not alter a substantive rule; it merely bound the City to interpretations "facially consistent with the General Plan and [which] cannot be construed as amendments [thereto]". *Id.* (title case deleted). Had the City bound itself to an outcome inconsistent with the rules then in place—what the Department has done here—it would have run afoul of the *Trancas* holding that any "departures from standard zoning, however, by law require administrative proceedings". *Trancas*, 41 Cal. Rptr.3d at 207.

2. *Bragg v. Robertson*, 54 F. Supp.2d 653, 665-66 (D. W. Va. 1999), is to the same effect: all that the agency committed to was an *interpretation* of existing rules, or, in the subsequent case, to *propose* measures which might or might not be adopted, *see* 83 F. Supp.2d at 720. The Stipulated Judgment would not be objectionable if it contained mere proposals.

3. *Conservation Law Foundation v. Franklin*, 989 F.3d 54 (1st Cir. 1993) merely affirmed a consent decree establishing a timetable for action in the form of a new rulemaking, an outcome repeatedly described as within Secretary Franklin's discretion. *Id.* at 61.

For all these reasons, the Tribe's suggestion that these Federal cases involve decrees "of the kind" proposed here (Tribal Br. 4) is absurd.

Conclusion

The Proposed Stipulated Judgment must be rejected.

Dated: May 8, 2006.

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By: _____
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