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10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
12 HAYWARD DIVISION

13 KARUK TRIBE OF CALIFORNIA;
14 AND LEAF HILLMAN,

Plaintiffs,

15 v.

16 CALIFORNIA DEPARTMENT OF FISH AND
17 GAME; AND RYAN BRODDRICK, DIRECTOR,
18 CALIFORNIA DEPARTMENT OF FISH AND
GAME,

19 Defendants.

20
21 THE NEW 49'ERS, a California Corporation; AND
22 RAYMOND W. KOONS, an Individual; AND
GERALD HOBBS, an Individual,

23 Intervenor.
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Case No.: RG 05 211597

**DEFENDANTS' INITIAL
MEMORANDUM OF POINTS
AND AUTHORITIES IN
RESPONSE TO ORDER RE
SUPPLEMENTAL BRIEFING**

Judge: Honorable Bonnie Sabraw
Place: Department 512

Date: May 1, 2006
Time: 4:00 p.m.

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

INTRODUCTION

The Court has ordered that the parties and intervenors in this matter address the impact, if any, of *Trancas Property Owners Association v. City of Malibu* (March 30, 2006, B174674) ____ Cal.App.4th ____ [06 C.D.O.S. 2717, 2006 Cal.App. Lexis 466] ("*Trancas*"), on the Motions for Entry of Stipulated Judgment and for Protective Order. The California Department of Fish and Game and its Director, Ryan Broddrick, contend that the facts of *Trancas* and the settlement agreement in that case are fundamentally distinguishable from those before the Court, and therefore *Trancas* should have no negative impact on the disposition of the pending motions.

ARGUMENT

I. THE JOINT STIPULATION COMPORTS WITH LAW AND DOES NOT SURRENDER THE DEPARTMENT'S POLICE POWER.

In *Trancas*, the Court of Appeal found that the Malibu City Council unlawfully abdicated its zoning authority by approving a bilateral settlement agreement that gave preferential treatment to a regulated party and permanently exempted their development project from future legislative action. The Court held under these facts that the settlement agreement amounted to a surrender of the city's police power and was unenforceable as a matter of law and public policy. (*Trancas*, supra, 2006 Cal.App. Lexis 466, 14-15.)

The facts and settlement agreement in *Trancas* are fundamentally distinguishable from those before this Court. While the facts of *Trancas* support the Court of Appeal's conclusion that the city surrendered its police power, there is no factual basis for the same conclusion in this case. Unlike the *Trancas* agreement, which permanently precluded the city from exercising its zoning authority over a preferred party and his project, the Joint Stipulation and proposed Stipulated Judgment explicitly preserve the Department's regulatory authority and does nothing akin to the agreement in *Trancas* to restrict the exercise of its police power. Instead, the Department has agreed to temporary, interim protective measures for a threatened species and other species of special concern pending formal rulemaking and related environmental review. Nothing in the Joint Stipulation and proposed Stipulated Judgment forecloses the Department from pursuing the full range of its regulatory authority, nor does it bind the Department to any outcome of the rulemaking. In so doing the settlement reserves the Department's discretion and independent

1 judgment, which are the hallmarks of any public agency's exercise of its police power.

2 Consequently, the offensive elements that provoked the Court of Appeal's disapproval in *Trancas*
3 and supported its holding that the city's commitments were unenforceable as a matter of law and
4 public policy, do not exist as part of the Joint Stipulation and proposed Stipulated Judgment.

5 As the trustee and lead agency responsible for protecting and conserving California's
6 increasingly-threatened fish resources, the Department properly may settle pending CEQA
7 litigation by entering into agreements like the Joint Stipulation and proposed Stipulated Judgment.
8 (*Heckler v. Chaney* (1985) 470 U.S. 821, 831.) The California Supreme Court has recognized in
9 the context of the state's open meeting laws that state bodies are and should be permitted to settle
10 litigation, particularly if the state body believes that public disclosure would jeopardize its ability
11 to favorably conclude settlement negotiations.^{1/} (*Southern California Edison Co. v. Peevey* (2003)
12 31 Cal.4th 781, 800-801 ("*Peevey*").) Even the *Trancas* Court affirmed the values favoring
13 settlements, particularly those providing a public benefit (*Trancas*, supra, 2006 Cal.App. Lexis
14 466, 30-31), though the facts of that case prevented the Court of Appeal from upholding the city's
15 settlement because it waived the police power, ignored open meeting requirements, and deviated
16 from established regulatory regimes.

17 Had the *Trancas* settlement resembled the Joint Settlement and proposed Stipulated
18 Judgment in this case, the Court of Appeal likely would have upheld the settlement, following *108*
19 *Holdings, Ltd. v. City of Rohnert Park* (2006) 136 Cal.App.4th 186 ("*108 Holdings*"), in which
20 the First Appellate District ruled that a settlement agreement similar to the Joint Stipulation and
21 Stipulated Judgment was proper because it did not require the city to surrender its police power by
22 bargaining away its authority to legislate in the future on matters that were the subject of the
23 settlement agreement. (*Id.* at 194-5). The decision in *108 Holdings* is not inconsistent with that
24 of *Trancas*, as both Courts of Appeal appear to accept the legitimacy and enforceability of an

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27 1. *Peevey* was decided in the context of the Bagley-Keene Open Meeting Act, Gov.
28 Code, § 11120 et seq., and *Trancas* was decided in the context of the Brown Act, Gov. Code, §
54950 et seq. The Brown Act applies to "local agencies." The Bagley-Keene Open Meeting Act
applies to "state bodies," though according to section 11121.1 of the Act, this term does not
include state agencies such as the Department that are administered by a director.

1 agency's settlement agreement when, as in this case, the agency has not "sacrificed the 'crucial
2 control element' that is the hallmark of an improper surrender of police power." (*Id.* at 197).

3 **II. THE JOINT STIPULATION DOES NOT CONSTITUTE FINAL ACTION AND**
4 **DOES NOT VIOLATE SUCH OPEN MEETING LAWS AS THE BROWN ACT**
5 **OR THE BAGLEY-KEENE ACT.**

6 The *Trancas* Court also disapproved of the manner in which the city's settlement was
7 adopted in closed session, and held that it violated the open meeting requirements of the Brown
8 Act. Unlike the Joint Stipulation and proposed Stipulated Judgment in this case, which impose
9 temporary, interim protective measures pending formal rulemaking and related environmental
10 review, the *Trancas* settlement constituted a final legislative or quasi-judicial act without any
11 public involvement before it was effective. This distinction between *Trancas* and the present
12 case is crucial, because the city's attempt to circumvent the Brown Act by using the settlement as
13 a substitute for the established regulatory regimes required for final zoning action motivated the
14 Court of Appeal's finding that the settlement was illegal. In significant contrast to the final
15 zoning action attempted by the *Trancas* settlement, the Joint Stipulation and proposed Stipulated
16 Judgment neither legislate finally nor circumvent future rulemaking and environmental review
17 under the established regulatory regimes of CEQA and the APA. To the contrary, the interim
18 protective measures required by the Joint Stipulation and Stipulated Judgment are of limited
19 duration and geographic reach, and the Department is committed to formal rulemaking with full
20 public notice and participation. While the *Trancas* settlement was bilateral and approved behind
21 closed doors with the intent that its terms would have the final and permanent force of zoning law,
22 the Joint Stipulation and Stipulated Judgment have been subject to critical review in open court,
23 with the participation of the intervenors, and the Stipulated Judgment must be entered by the
24 Court for the interim protective measures to remain in place.

25 Read in conjunction with *108 Holdings* and *Peevey*, the *Trancas* decision logically does
26 not stand for the proposition that a public agency may never include in a settlement agreement any
27 element that, outside the litigation, would require a hearing, formal rulemaking, environmental
28 review or any other action prescribed by statute to ensure government conducts its business in
public. Plaintiffs' lawsuit alleges new significant or substantially more severe environmental

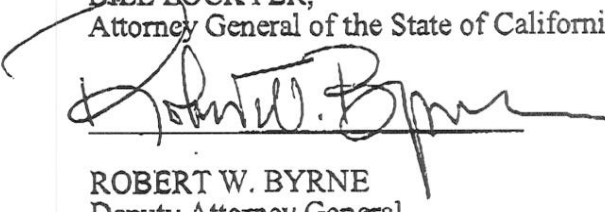
1 impacts on a threatened species and other species of special concern than were previously
2 addressed in the Department's 1994 EIR. The lawsuit, as a result, concerns potentially significant
3 adverse impacts under CEQA to fish and wildlife resources that the Department is charged by law
4 to hold in trust for the people of California. Thus, in settling the lawsuit and agreeing to formal
5 rulemaking and related environmental review, it is doubtful that the *Trancas* Court would intend
6 for its decision to prevent the Department from doing anything in the settlement to protect trust
7 resources in the interim. To read *Trancas* in this manner would, in fact, abrogate the
8 Department's police power.

9 CONCLUSION

10 The Joint Stipulation and proposed Stipulated Judgment share nothing in common with
11 the *Trancas* settlement: not in the manner they would become effective; the extent to which they
12 preserve the Department's police power authority; the temporary, interim nature of their
13 protective measures; or their promise of public participation under the established regulatory
14 regimes of CEQA and the APA. Rather, the Joint Stipulation and proposed Stipulated Judgment
15 are reasonable, minimally burdensome, and lawful exercises of the Department's "substantive
16 mandate" under CEQA, that provide remedies similar to those the Court could order if the case
17 proceeds to the merits and the Plaintiffs prevail. The Joint Stipulation and proposed Stipulated
18 Judgment come well within the parameters defined by *Trancas* and *108 Holdings* for proper
19 agency action in the lawful exercise of the police power. Accordingly, the Department and its
20 Director, Ryan Broddrick, respectfully request that the pending Motions for Entry of Stipulated
21 Judgment and Protective Order be granted by the Court.

22
23 Dated: April 28, 2006

BILL LOCKYER,
Attorney General of the State of California


24
25
26 ROBERT W. BYRNE
Deputy Attorney General

27 Attorneys for Defendants California Department of
28 Fish and Game and Ryan Broddrick, Director,
California Department of Fish and Game

DECLARATION OF SERVICE BY FACSIMILE AND MAIL

Case Name: **Kuruk Tribe v. California Dept. Fish and Game, et al.**

No.: **RG05 211597**

I, **Rebecca S. Amos**, declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. My facsimile machine telephone number is (415) 703-5480.

On April 28, 2006 at 1:57 PM., I served the attached *Defendants' Initial Memorandum Of Points And Authorities In Response To Order Re Supplemental Briefing* by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2008. The facsimile machine I used complied with Rule 2003, and no error was reported by the machine. Pursuant to rule 2008(e)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. Per the Court's Order of April 18, 2006, a courtesy copy of the attached was sent to the court by facsimile to (510) 670-5687, with the original sent by Federal Express, overnight courier to the Clerk of the Superior Court, Department 512, Hayward Hall of Justice. In addition, I placed a true copy of the attached in a sealed envelope with postage thereof fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 28, 2006, at San Francisco, California.

Rebecca S. Amos
Declarant



Signature

BILL LOCKYER
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DEPARTMENT OF JUSTICE



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FAX TRANSMISSION COVER SHEET

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MESSAGE/INSTRUCTIONS

*Defendants' Initial Memorandum Of Points And Authorities
In Response To Order Re Supplemental Briefing*

PLEASE DELIVER AS SOON AS POSSIBLE!
FOR ASSISTANCE WITH THIS FAX, PLEASE CALL THE SENDER



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April 28, 2006

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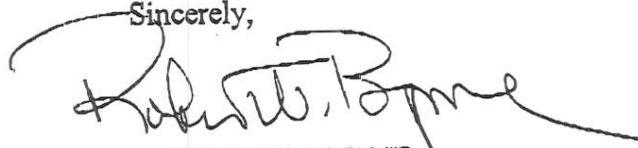
RE: Karuk Tribe of California et al. v. California Department of Fish and Game et al.
Docket No.: RG05 211597
Our File No.: SF2005200207

Dear Sir or Madam:

Enclosed for filing please find an original and two (2) copies of Defendants' Memorandum of Points and Authorities In Response to Order Re Supplemental Briefing in the above captioned matter. One copy is a courtesy copy for the Honorable Bonnie Sabraw, Department 512. Please return the remaining copy, stamped filed, in the enclosed self-addressed stamped envelope to the undersigned for our file.

Thanking you for your attention and courtesies in this matter.

Sincerely,


ROBERT W. BYRNE
Deputy Attorney General

For **BILL LOCKYER**
Attorney General

cc: Service List