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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
HAYWARD DIVISION

Karuk Tribe of California; and Leaf Hillman, Plaintiffs, vs. California Department of Fish and Game; and Ryan Broddrick, Director, California Department of Fish and Game, Defendants. THE NEW 49'ERS, *et. al.*, and GERALD HOBBS, Intervenors.	Case No.: RG 05211597 PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR ENTRY OF STIPULATED JUDGMENT DATE: Matter already submitted DEPT: 512 (Hayward) JUDGE: Hon. Bonnie Sabraw

I. INTRODUCTION

On April 18, 2006, the Court requested supplemental briefing to address the impact, if any, of the holdings in *Trancas Property Owners Association v. City of Malibu* (March 30, 2006) 41 Cal.Rptr.3d 200 on the Court's determination of Plaintiffs' and Defendants' Motions For Entry of the Joint Stipulation and Stipulated Judgment. Plaintiffs submit that the Joint Stipulation and Stipulated Judgment ("Stipulated Judgment") presented to this Court is clearly distinguishable from the settlement agreement vacated in *Trancas*.

The *Trancas* Court disapproved a settlement agreement between the City of Malibu and a developer. The Court ruled that the City contracted away its police powers by agreeing to refrain from passing any ordinances that would prohibit the project and by agreeing to release the developer from compliance with a particular zoning ordinance. *Id.*, at 206-207. The Court also ruled that the City violated the Brown Act by approving the settlement in a closed session. *Id.*, at 211. In contrast to the *Trancas* case, the Department of Fish and Game ("DF&G") has not relinquished any of its police powers, but, in fact, has retained all of its discretion as to the outcome of a future CEQA analysis and formal rulemaking. In addition, neither the Brown Act nor the Bagley-Keene Act (the counterpart of the Brown Act that applies to certain state agencies) applies to DF&G or this Court in entering a Stipulated Judgment. Finally, the Interveners have had ample opportunity to comment on the Stipulated Judgment and all interested parties will be notified and entitled to full participation in the future rulemaking, which will ensue on this Court's entry of the Stipulated Judgment.

It bears emphasis that the only matter pending before this Court is the request of Plaintiffs and DF&G that the Court enter a Stipulated Judgment. The settlement agreement (the "Joint Stipulation") simply provides that the parties will submit the Stipulated Judgment to the Court for its approval as the final resolution of this lawsuit. The Joint Stipulation does not establish any substantive regulations and does not require DF&G to depart from any administrative procedures or statutory requirements. The Stipulated Judgment contains a Court injunction against DF&G's issuance of certain suction dredging permits. It is the type of relief that both California and federal courts have traditionally issued in cases challenging an agency's

failure to comply with environmental impact requirements. In this case, the Stipulated Judgment now provides that DF&G will commence a rulemaking on its suction dredging regulations within 120 days of entry of the Stipulated Judgment, and that the injunction will terminate a year after the rulemaking is commenced. These changes were made in response to the Court's concern that the original Stipulated Judgment appeared to contemplate a permanent injunction without a commitment by DF&G to undertake a rulemaking.

II. THE PRESENT CASE IS DISTINGUISHED FROM *TRANCAS* BECAUSE THE DF&G DID NOT RELINQUISH ITS RIGHTS TO LEGISLATE IN FUTURE.

The Court in *Trancas* found the settlement agreement to be "intrinsically invalid" because it committed the City to refrain from regulatory actions, which may not lawfully be undertaken by contract. *Id.*, at 206. In contrast, DF&G has retained all regulatory powers. It stipulated to a formal rulemaking to consider modifications to its suction dredge mining regulations. However, it has not committed to what the outcome will be. While the Stipulated Judgment contains a Court injunction against certain DF&G actions pending the outcome of that rulemaking, DF&G's exercise of its police power is otherwise unaffected. DF&G has not sacrificed the "crucial control element", which is the hallmark of an improper surrender of police power. *108 Holdings, Ltd. v .City of Rohnert Park* (2006) 136 Cal.App.4th 186, 197.

The present action is also distinguished from *Trancas* because the settlement agreement does not involve DF&G foregoing procedural requirements, as the City had done by exempting the developer from the density zoning restriction without providing public notice or comment. *Id*., at 206. Moreover, all interested parties are entitled to participate in the future rulemaking, as required under CEQA and the APA.

III. THE STIPULATED JUDGMENT IS NOT GOVERNED BY OPEN-MEETING LAWS.

The *Trancas* Court also held that the settlement agreement violated the Brown Act because the City accepted the settlement in a closed meeting. This issue is not applicable to the present case. The Bagley-Keene Act, which is equivalent to the Brown Act's open meeting rules and applicable to state agencies, does not govern DF&G because it is a state agency that is

administered by a director. Gov't Code §11121.1. Moreover, the Court has given the Interveners ample opportunity to express their objections to the Stipulated Judgment.

IV. THE RELIEF IN THE STIPULATED JUDGMENT IS APPROPRIATE UNDER THE STATUTES AND IS NECESSARY TO PROTECT PUBLIC RESOURCES.

The Stipulated Judgment's one year Court-ordered injunction would temporarily protect endangered and special status species while DF&G has the opportunity to analyze the impact that suction dredge mining has on these species and to consider modification of its suction dredge mining regulations. Furthermore, this injunctive relief is appropriate because it is narrowly drawn to the specific areas of the rivers and the specific seasonal time periods in which the species of concern are at the highest risk. *See* Public Resources Code 21168.9(b). The relief leaves in place significant stretches of the rivers for which DF&G can continue to issue permits. Lastly, this injunctive relief is well supported by both the findings in the 1994 EIR and the declarations of respected experts.

Moreover, the relief is precisely the type which the Court could issue if the case were tried on its merits. Public Resources Code § 21168.9(a)(2) contemplates that a court may order a "public agency… [to] *suspend* any or all specific project activity" until the agency has come into compliance with CEQA. *San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (2001) 89 Cal.App.4th 1097, 1105 (emphasis added). In fact, in *San Joaquin Raptor Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713 the Court held that a remand to the agency, without any such injunctive relief, was not sufficient to secure compliance with CEQA. *Id.*, at 741. An injunction was necessary against the development activities to prevent "any actions which could result in an adverse change or alteration to the physical environment, until the public agency has taken any actions that may be necessary to bring the . . . decision into compliance with [CEQA]." *Ibid.* In addition, courts have upheld substantially similar relief. *See, e.g., Northern Alaska Environmental Center v. Hodel* (9th Cir. 1986) 803 F.2d 466, 471 (the Court upheld a preliminary injunction that restricted all permitting activity until the agency could conduct an analysis under NEPA); *Idaho Watersheds Project v. Hahn* (9th Cir. 2002) 307 F.3d 815, 823 (the Court upheld an injunction restricting the issuance of federal agency's grazing

permits).

Courts have also rejected arguments that a Stipulated Judgment of the kind proposed here violates notice and comment or other procedural requirements. *See Conservation Law Found. of New England, Inc. v. Franklin* (1st Cir. 1993) 989 F.2d 54, 62 ("The consent decree, therefore, does not violate the notice and comment requirements of the statute because it creates no rule for which notice and comment is required. Appellants will have an opportunity to voice their opinions" in the future.); *Bragg v. Robertson* (D.W.Va. 1999) 54 F.Supp.2d 653, 667 ("because the Settlement Agreement does not contain substantive rules, the provisions need not undergo a notice-and-comment period and the Agreement does not violate the APA.")

Finally, once the Court has determined that a consent decree – in this case, the Stipulated Judgment – does not itself violate these kinds of requirements, it should not proceed to second-guess the settlement reached between the parties. As the court stated in *Bragg v. Robertson* (D W.Va. 2000) 83 F.Supp.2d 713, "not only the law but also the parties' consent animate the legal force of a consent decree". *Id.*, at 721 (citations omitted). Therefore, the Court is not barred from entering a consent decree merely because it provides broader relief than the Court could have awarded after trial and the Court should not examine the Decree to determine if it affords relief the Court would have chosen to award. *Ibid.*

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request the Court to accept and enter the Proposed Stipulated Judgment.

Dated: May 1, 2006

Respectfully submitted,

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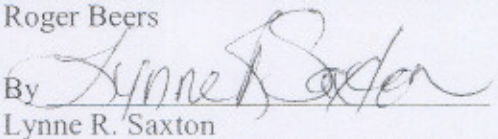
By 
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