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5 THE NEW 49'ERS, INC., a California corporation, and
RAYMOND W. KOONS, an individual
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE 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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR LEAVE TO
INTERVENE OF THE NEW 49'ERS,
INC., INC., AND RAYMOND W.
KOONS**

Res No. 550443
Date: January 24, 2006
Time: 9:00 A.M.
Judge: Honorable James Richman
Place: Department 31

Action Filed: May 6, 2005
Trial Date: none set

1 **I. PRELIMINARY STATEMENT**

2 Proposed intervenors The New 49'ers, Inc., a California corporation, and Raymond
3 W. Koons, an individual (hereafter, "the Miners") seek leave to intervene in this action. They hold
4 federally-established possessory property and contract rights in roughly 60 miles of river and
5 streambeds to which the existing parties apparently propose to fully or partially bar access for
6 ongoing mining activity. This action not only threatens substantially to interfere with their
7 productive use of these property rights, but also to destroy their statutory and regulatory rights of
8 participation (and those of all other interested parties) in the public decisionmaking process under
9 the California Environmental Quality Act (CEQA) and Administrative Procedure Act (APA). The
10 threatened injunctive relief, as far as the Miners can tell, will result in either a full or substantial
11 reduction in the value of their property and loss of livelihoods to many people.

12 The truth is that the activities of the Miners do not cause any adverse effect of
13 significance to aquatic species, including the listed Coho, because the existing regulations
14 promulgated by defendant California Department of Fish and Game (CDFG), protect against all of
15 the adverse impacts to which Plaintiffs have complained about. As plaintiffs allege, CDFG issued
16 river-by-river regulations allowing dredging "based solely upon whether dredging will be
17 deleterious to fish" (*See* Request for Judicial Notice, ¶ 1, (Plaintiffs Karuk Tribe of California and
18 Leaf Hillman's Complaint (hereafter "Cmplt."), ¶ 39); harm to fish is not a function of whether
19 they enjoy any particular legal status, but whether their nests may be disturbed by the dredgers and
20 whether the juveniles are given adequate time to achieve full mobility before suction dredging is
21 allowed. From this perspective, the listing of Coho under the Endangered Species Act has no
22 bearing on the question of whether the existing regulations are adequate; plaintiffs do not and
23 cannot identify any new information concerning their habits suggesting greater impacts than those
24 previously identified by CDFG.

25 The miners invested countless hours over a period of years through an exhaustive
26 public process with CDFG, environmentalists and other interested persons and groups to identify
every known potential negative impact upon *every* known aquatic species in California. This
resulted in the existing regulations which afford adequate protection against *all* known impacts.

1 Moreover, the Miners invested considerable time and effort in negotiations with the plaintiffs and
2 developed comprehensive voluntary procedures adopting measures sought by the Tribe which
3 provided additional measures over and beyond the requirements of the regulations, and even shook
4 hands with the Tribe when a final agreement was reached.

5 The Tribe responded by filing two lawsuits without notice to the Miners. The first
6 was recently resolved, at least at the Federal district court level, adversely to the Tribe. *Karuk*
7 *Tribe v. U.S. Forest Service*, 379 F. Supp.2d 1071 (N.D. Cal. July 1, 2005). Unfortunately, the
8 Miners did not learn of this present suit until last week, in part because it was filed in violation of
9 CEQA notice requirements (*see* Public Resources Code § 21167.6.5). Both plaintiffs and CDFG
10 also failed to give the requisite notice of settlement discussions (Public Resources Code
11 § 21167.8), and continue to refuse to supply the Miners with a copy of the proposed settlement.
12 The limited information available to the Miners suggests that the settlement proposes to deprive
13 them and their members of the right to mine on more than half of their claims, and in many cases
14 to destroy access to claims entirely, potentially causing the Miners to forfeit claims under Federal
15 law.

16 Under these circumstances, the Miners easily meet the requirements for
17 intervention pursuant to Code of Civil Procedure § 387. Indeed, they are arguably considered
18 indispensable parties to this litigation pursuant to § 389, which mandates that “[w]henever
19 feasible, the persons materially interested in the subject of an action should be joined as parties so
20 that they may be heard . . .” *Countrywide Home Loans, Inc. v. Superior Court*, 69 Cal. App.4th
21 785, 793 (1999) (quoting West’s Ann. Code Civ. Proc.).

22 Given the limited amount of time and information available to the Miners before
23 this motion was filed, the Miners frankly have not had a reasonable opportunity to formulate an
24 ultimate position as to the relief they seek in this action, but have filed as an exhibit to their
25 motion to intervene a proposed Verified Complaint in Intervention further to apprise the Court of
26 their interests and positions vis-à-vis the existing parties. (*See* Declaration of Neysa A. Fligor in
support of Motion for Leave to Intervene of The New 49’ers, Inc., and Raymond W. Koons, ¶ 2,
Exhibit A, ([Proposed] Verified Complaint in Intervention of The New 49’ers, Inc., and Raymond

1 W. Koons (hereafter “Proposed Cmplt.”)).

2 In particular, while further environmental studies are unnecessary as a matter of
3 fact and law, the Miners do not necessarily seek to preclude CDFG from conducting such studies.
4 The Miners stand ready to work with the Court and existing parties to salvage so much of the
5 proposed settlement as will provide an administrative forum for plaintiffs to ventilate their
6 concerns, but must take all available legal avenues (*see also infra* n. 6) to oppose the
7 establishment of regulations which destroy their mining rights by secret negotiation between the
8 Tribe and the Attorney General.

9 **II. STATEMENT OF FACTS¹**

10 The New 49’ers, Inc., is a California corporation which leases over 60 miles of
11 mining claims in the Six Rivers and Klamath National Forests on behalf of its more than 1,000
12 members. (Proposed Cmplt. ¶ 1.) Mr. Raymond W. Koons is an individual mining claim holder
13 with claims in the Klamath National Forest, including an unpatented mining claim on the
14 mainstem Klamath River. (*Id.* ¶ 2.) As set forth below, the unpatented mining claims at issue
15 constitute valid possessory property rights recognized under federal law.

16 Both the Tribe and the Attorney General have refused to provide counsel for the
17 Miners with a copy of the proposed settlement. (*Id.* ¶ 20.) The Miners have some knowledge of
18 the settlement based upon hearsay from a miner who contacted the CDFG in an attempt to
19 ascertain why he was not allowed to buy a 2006 suction dredge mining permit. (*Id.* ¶ 18.) Upon
20 such information, the Miners believe that the existing parties propose to eliminate suction dredge
21 mining entirely, among other places, on Elk Creek, Indian Creek and the entire mainstem Salmon
22 River, where The New 49’ers lease claims. (*Id.* ¶¶ 18, 4.) In addition, they apparently propose to
23 close the lower Klamath River, where The New 49’ers lease claims (*id.* ¶ 4) and Mr. Koons owns
24 a mining claim (*id.* ¶ 5), to mining except from July 1st through September 15th. Under existing
25 regulations, the lower Klamath is currently open to suction dredging year round. (*Id.* ¶ 7.)
26

¹ These facts are drawn from the Miners’ Proposed Cmplt., which the Court is to take true in order to resolve the intervention question. *Cf. Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 819-20 (9th Cir. 2001) (federal district courts are required to accept as true the proposed intervenor’s “well-pleaded, non-conclusory allegations”).

1 Assuming the Miners' information is correct, the restrictions proposed by the
2 existing parties will eliminate suction dredge mining on nearly half the properties leased by The
3 New 49'ers, and restrict mining in other areas (including Mr. Koon's claim) from a 12-month
4 season to a ten-week season. (*Id.* ¶ 21.) Still hundreds of other miners and owners of private
5 property will be denied the right to suction dredge on their own property. (*Id.*) Most of those
6 persons are not even aware this litigation is in progress or that the existing parties are prepared to
7 settle away their rights. (*Id.*) In the limited time available before the December 20th hearing in
8 this action, the Miners have been unable to contact such miners. (*Id.*)

9 The Miners are also informed and believe that other areas plaintiffs believe to
10 constitute "refugia" for fish would be closed to mining for 500 feet in either direction. (*Id.* ¶ 18.)
11 Inasmuch as Fish and Game Code § 5653(d) makes it unlawful to operate a dredge within 100
12 yards of waters that are closed, the proposal would appear to shut down 1600 foot sections of the
13 rivers and creeks. Because the mining claims are typically ¼ mile long, or 1320 feet, such
14 closures threaten to entirely destroy access by suction dredgers to many other mining claims and
15 private property. In fact, miners frequently operate in the presence of fish which exhibit curiosity
16 as to the operation, swim over and inspect it, and even feed from organisms dislodged from the
17 riverbed and discharged by the dredge, all without any adverse effect to the fish whatsoever.²
18 Many miners are also avid fish and wildlife advocates. (*Id.* ¶ 2.)

19 The Miners have for more than twenty years operated small suction dredges in
20 these and other areas, typically powered by engines akin to those in ordinary lawn mowers,
21 vacuuming stream beds in search of gold, and actually improving fish habitat during the process.
22 (*Id.* ¶¶ 8, 24-25.) No evidence has been put forward that a single coho salmon has ever been
23 harmed in any way by suction dredge mining.³ The only impacts of significance would come if
24 dredgers vacuumed up or buried a nest of fish eggs or newly-emerged fish lacking the ability to

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26 ² The "benthic communities" of invertebrates in the riverbeds are typically recolonized within a
month. (Proposed Cmplt. Ex. 3, at 8.)

³ By contrast, plaintiff Karuk Tribe pursues extensive logging and unlawful dipnet fishing in the
rivers and tributaries; CDFG, despite complaints concerning the unlawful fishing, allows illegal
Karuk dipnetting of salmon to occur. (Proposed Cmplt. ¶ 29.) These facts raise serious questions
as to whether the equitable doctrine of "unclean hands" bars plaintiffs' request for equitable relief.
(*See also id.* ¶ 45.)

1 swim effectively. (*Id.* ¶ 26; *cf.* Cmplt. ¶ 17). But CDFG does not allow the mining to occur until
2 well after the eggs have hatched and the emerging juveniles have had time to mature for that
3 reason (Proposed Cmplt. ¶ 26.)

4 In the Proposed Verified Complaint in Intervention, and most extensively in the
5 exhibits thereto, the Miners responded in detail to the specific environmental concerns of plaintiffs
6 as articulated in the Federal action. The claims of plaintiffs concerning adverse effects of suction
7 dredge mining amounted to little more than sheer speculation, for the scientific literature
8 concerning the effects of suction dredge mining confirms that, when done in conformity with
9 existing regulations, the effects are both insignificant and evanescent. (*Id.* ¶ 22 & Ex. 3.) Winter
10 rains typically wash away traces of mining activity in the streambeds, and mining affects only a
11 minute portion of the streambeds to begin with. (*See generally id.* Ex. 3.) Much of the recent
12 work confirming no significant effects, including studies demonstrating the absence of cumulative
13 effects, was conducted after 1994. (*See, e.g. id.* ¶ 44.) The utter absence of adverse impacts is
14 consistent with plaintiffs’ allegation that CDFG has no documents whatsoever “that indicate
15 potential or actual harm to Coho resulting from dredging activities”. (Cmplt. ¶ 9.)

16 Nevertheless, the Karuk Tribe approached CDFG in 2004 to restrict suction dredge
17 mining in the Six Rivers and Klamath National Forest, but was unable to provide any support for
18 its claims that the activity was harming fish. (*Id.* ¶ 11.) The CDFG watershed biologist assigned
19 to that area confirmed in written testimony that suction dredge mining conducted in accord with
20 CDFG’s existing regulations causes no harm to fish. (*Id.* ¶ 23.)

21 As far as the Miners can tell, all of the areas in which the Tribe has expressed an
22 interest lie within the boundaries of National Forests. Pursuant to 16 U.S.C. § 481, “[a]ll waters
23 within the boundaries of national forests may be used for domestic, mining, milling or irrigation
24 purposes, under the laws of the State wherein such national forests are situated, *or* under the laws
25 of the United States and the rules and regulations established thereunder”. (Emphasis added.)
26 Suction dredge mining within National Forests is regulated under 36 C.F.R. Part 228.

Specifically, suction dredge miners whose operations “might cause disturbance of surface
resources” are directed to file “notices of intent” with the Forest Service; local rangers and forest

1 biologists familiar with the specific areas then require the miners to file formal “plan of
2 operations” for operations that “will likely cause significant disturbance”. *See generally* 36 C.F.R.
3 § 228.4.⁴ The existence of a comprehensive federal regulatory scheme addressing precisely the
4 same issues raised by the plaintiffs under parallel state statutes is surely a factor militating against
5 the imposition of injunctive relief.

6 Notwithstanding the absence of any harm to fish, the Miners met repeatedly with
7 numerous representatives and fish biologists from the Karuk Tribe and the United States Forest
8 Service, and negotiated additional limitations on suction dredge mining in areas of concern to the
9 Tribe. The lengthy history of these negotiations is summarized in written testimony attached as
10 Exhibit 2 to the proposed Complaint in Intervention, resulting in a mutual agreement to conditions
11 that then satisfied the Tribe and a “handshake deal”. (Proposed Cmplt. Ex. 2, at 15.)

12 Notwithstanding the agreements between the Tribe, the Miners and the Forest
13 Service, in October 2004, the Tribe filed a complaint in federal court asking the court to declare
14 that the Forest Service has violated five or more federal laws in allowing suction dredge mining to
15 proceed, and to enjoin continuing mining. (Proposed Cmplt. ¶ 15.) The Miners gave notice of
16 their intent to intervene on January 11, 2005, but did not file the motion until March 1, 2005, in
17 light of a pending Forest Service motion to dismiss. (*Id.* ¶ 16.) Their motion was granted on
18 April 26, 2005. (*Id.*)

19 Thereafter the parties engaged in summary judgment briefing focusing upon the
20 Tribe’s claims that the Forest Service had violated the National Forest Management Act, the
21 Endangered Species Act, and the National Environmental Policy Act, and the appropriateness of
22 injunctive relief. On July 1, 2005, the Federal court denied the Karuk Tribe’s motion for summary
23 judgment, in an opinion reported at 379 F. Supp.2d 1071. On July 11, 2005, the Federal court
24 entered final judgment dismissing the Tribe’s claims for relief. The Tribe has appealed.

25
26 ⁴ In a partial settlement of the Federal litigation, the Forest Service agreed that formal NEPA
analysis was required for any such plans of operations, such that any mining activity that is
actually likely to have effects of environmental significance will be the subject of federal NEPA
analysis. The Miners assume that the Attorney General, in apparently agreeing to have California
devote scarce public resources to additional study, was ignorant of this settlement with the Karuk
Tribe.

1 (Proposed Cmplt. ¶ 17.)

2 Unbeknownst to the Miners, the Tribe had also commenced this present litigation,
3 alleging that the 1994 EIR prepared by CDFG was inadequate in light of the listing of Coho
4 salmon, and that additional regulatory measures were required to ensure that operations “will not
5 be deleterious to fish” within the meaning of Fish & Game Code § 5653. While the Miners do not
6 object to renewed consideration by CDFG of the environmental impacts of suction dredge mining,
7 particularly in light of the overwhelming evidence refuting adverse effects on aquatic species that
8 has accumulated since 1994, such studies and the regulations affecting the rights of gold miners on
9 the public lands inside California should be developed in accordance with the open and public
10 process afforded by CEQA and the Administrative Procedure Act, not by private deals between
11 the Tribe and the Attorney General.

12 Indeed, the Legislature provided specific regulatory authority to CDFG to adopt
13 regulations governing suction dredge mining, but declared in Fish & Game Code § 5653.9 that

14 “The regulations shall be adopted in accordance with the
15 requirements of Division 13 (commencing with Section 21000) of
16 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.”

17 None of those sections authorize the Attorney General to meet in secret to fashion regulations.

18 **III. LEGAL AUTHORITY AND ARGUMENT**

19 **A. THE MINERS SHOULD BE GRANTED LEAVE TO INTERVENE** 20 **AS OF RIGHT PURSUANT TO CCP § 387(b).**

21 Code of Civil Procedure § 387(b) provides that

22 “. . . if the person seeking intervention claims an interest relating to
23 the property [or] transaction which is the subject of the action and
24 that person is so situated that the disposition of the action may as a
25 practical matter impair or impede that person's ability to protect that
interest, unless that person's interest is adequately represented by
existing parties, the court *shall*, upon timely application, permit that
person to intervene.” (Emphasis added.)

26 Caselaw establishes that § 387 “should be liberally construed in favor of intervention”. *City of Malibu v. California Coastal Comm’n*, 128 Cal. App.4th 897, 902 (2005) (quoting *Lincoln Nat’l Life Ins. Co. v. State Bd. of Equalization*, 30 Cal. App.4th 1411, 1423 (1994)).

1 This statute “is in substance an exact counterpart to Rule 24(a) of the Federal Rules
2 of Civil Procedure “[t]herefore, the Legislature must have intended that they should have the
3 same meaning, force and effect as have been given the federal rules by the federal courts . . .”
4 *Hodge v. Kirkpatrick Development, Inc.*, 130 Cal. App.4th 540, 556 (2005) (reversing trial court
5 denial of intervention).

6 Federal courts have developed a four-factor test concerning intervention as of right
7 pursuant to Rule 24(a)(2),

8 (1) the motion must be timely; (2) the applicant must claim a
9 ‘significantly protectable’ interest relating to the property or
10 transaction which is the subject of the action; (3) the applicant must
11 be so situated that the disposition of the action may as a practical
matter impair or impede its ability to protect that interest; and (4) the
applicant’s interest must be inadequately represented by the parties
to the action. [citation omitted]

12 *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993). They have also confirmed that the rule
13 is to be broadly construed in favor of allowing intervention. *United States v. Oregon*, 839 F.2d
14 635, 637 (9th Cir. 1988); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983); *see*
15 *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980).

16 **1. This Motion Is Timely, Notwithstanding the Proposed**
17 **Settlement.**

18 The general rule is that “a right to intervene should be asserted within a *reasonable*
19 *time* and that the intervener must not be guilty of an *unreasonable delay after knowledge of the*
20 *suit*”. *Sanders v. Pacific Gas & Elec. Co.*, 53 Cal. App.3d 661, 668 (1975) (noting that the
21 “intervener is not likely to become aware of the action during the relatively unnoticed pleading
22 stage, and may not discover the facts concerning its nature and his interest until the trial . . .”).
23 The Miners filed this motion as soon as reasonably practicable after learning of the existence of
24 this action. In the leading case of *Truck Insurance Exchange v. Superior Court*, 60 Cal. App.4th
25 342, 351 (1997), an insurer was permitted to intervene “[e]ven though real parties interest were on
26 the eve of obtaining a default judgment”, because “the real parties in interest have not shown any
prejudice other than being required to prove their case”.

That the existing parties have apparently entered into a settlement agreement does

1 not make this motion untimely. While the Miners remain ignorant of the precise scope of the
2 proposed settlement, and therefore cannot reasonably be expected to present their objections
3 within the confines of this motion, it is well-established that upon application of a third party, this
4 Court “may reject a stipulation that is contrary to public policy, or one that incorporates an
5 erroneous view of law”. *Plaza Hollister Limited Partnership v. County of San Benito*, 72 Cal.
6 App.4th 1, 12 (1999) (quoting *Cal. State Auto Ass’n Inter-Ins. Bureau v. Superior Court*, 50 Cal.3d
7 658, 664 (1990)). Indeed, an appropriate party may even intervene in an already-settled case in
8 which final judgment had been entered and appealed. *Mallick v. Superior Court*, 89 Cal. App.3d
9 434 (1979); *see also Morton Regent Enterprises, Inc. v. Leadtec California, Inc.*, 74 Cal. App.3d
10 842 (1977) (post-judgment intervention permitted to vacate default judgment).

11 Here the Court has not yet approved any settlement, and has yet to exercise its duty
12 “to see that the judgment to be entered is a just one, [for] the court [is not] to act as a mere puppet
13 in the matter”. *Cal. State Auto Ass’n*, 50 Cal.3d at 664 (quoting *City of Los Angeles v. Harper*, 8
14 Cal. App.2d 552, 555 (1935)); *see also* Public Resources Code § 21168.9(b) (court’s orders “shall
15 include only those mandates which are necessary to achieve compliance with this division and
16 only those specific project activities in noncompliance with this division”).

17 In this case, heightened judicial scrutiny is especially appropriate in light of the
18 failure of the existing parties to give *any* notice to suction dredge miners as required by Public
19 Resources Code § 21167.6.5 (plaintiffs must “name, as a real party in interest, any recipient of an
20 approval that is the subject of [a CEQA suit]”) and serve them with the complaint. Members of
21 The New 49’ers and Mr. Koons are plainly the recipients of an approval (a permit) that is the
22 subject of this suit. Plaintiffs did not do so, perhaps unaware that this provision has been very
23 recently added to CEQA.⁵ Plaintiffs did allege that they were unable to challenge individual
24 permits, and that the volume of permits made it “impractical” to challenge permits “one at a time”,
25 but offered no excuse for dispensing with all notice to affected parties. (*See* Cmpl. ¶ 37).

26 Plaintiffs may argue that the permits are issued annually, and that their action only

⁵ The section was added by Stats.2002, c. 1121 (S.B. 1393), § 5, and amended by Stats.2004, c. 522 (A.B. 2814), § 1.

1 affected future permits, but most miners purchase permits annually (*see* Proposed Cmplt. ¶ 8),
2 such that the situation may be analogized to a continuing permit. This is because, as plaintiffs
3 know from the Federal briefing, pursuant to the General Mining Law, 30 U.S.C. § 28, holders of
4 unpatented claims such as those involved here must perform certain “assessment work” or expend
5 at least \$100 worth of labor annually or forfeit their claims. Presumably, CDFG maintains a
6 database with the addresses of permitholders that would have been the obvious place to start for
7 providing some sort of notice; Code of Civil Procedure § 382 would even have permitted the
8 existing parties to join a subset of permitholders and secure “virtual representation” of mining
9 interests. *Cf., e.g., Mallick*, 89 Cal. App.3d at 436-37.

10 In any event, the Public Resource Code’s provisions concerning the settlement of
11 CEQA suits (§ 21167.8) are plainly intended to operate in a context where real parties in interest
12 such as the Miners are participating as parties. Nothing prevented plaintiffs or defendants from
13 serving notice of settlement meetings pursuant to § 21167.8(a) on the permit holders generally, or
14 on mining associations, or any other means reasonably calculated to provide some notice to
15 affected parties. In essence, the plaintiffs have prosecuted a class action suit against suction
16 dredge miners without any notice to them at all, raising serious due process concerns. Under these
17 circumstances, it would be entirely appropriate for the Court to reject the existing, tainted
18 settlement and send the parties, this time with the Miners included, back to the bargaining table.

19 **2. The Miners Have an Interest Qualifying Them To Intervene In**
20 **This Action**

21 The unpatented mining claims held by the Miners (or leases of such mining claims)
22 have long been recognized as “property in the fullest sense of the word”. *Bradford v. Morrison*,
23 212 U.S. 389, 394 (1909) (quoting *Forbes v. Gracey*, 94 U.S. 762, 767 (1877)); *see also United*
24 *States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999) (discussing scope of legal interests
25 represented in mining claims); *United States v. Rizzinelli*, 182 F. 675, 681 (D. Idaho 1910) (miners
26 hold a “distinct but qualified property right” with “possessory title”).⁶ As set forth above, their

⁶ The Federal nature of the Miners’ rights raises serious questions of pre-emption under Federal law with respect to state regulation that would close down mining claims in National Forests to further mining for an indefinite period. *Cf. South Dakota Mining Ass’n v. Lawrence County*, 155

1 owned and leased property falls squarely within the areas that the Tribe and CDFG propose to
2 close to mining. Furthermore, the regulatory changes being asked for by Plaintiffs would have a
3 direct negative impact upon all of the privately-owned property along hundreds of miles of
4 waterways within the Klamath and Six Rivers National Forests. (Proposed Cmplt. ¶ 10.)

5 The Miners also have important participational interests in CDFG decisionmaking
6 which are threatened by entry of a settlement that would substitute nonpublic negotiations between
7 two of many stakeholders for the process required under the Administrative Procedure Act.

8 In evaluating the sufficiency of the Miners' interests, it is important to remember
9 that even if the Miners did not have a sufficiently direct interest—and they do—

10 “What would otherwise be a consequential interest not justifying
11 intervention may become a direct interest permitting it when bad
12 faith of a party to the litigation, the assertion by all parties to the
13 litigation of claims adverse to the party seeking to intervene,
14 collusion, impossibility of asserting a position that should be
15 presented in the litigation, or similar circumstances render strict
16 definition of direct interest likely to result in injustice.”

17 *Continental Vinyl Products Corp. v. Mead Corp.*, 27 Cal. App.3d 543, 551 (1972). The Tribe has
18 plainly acted in bad faith with respect to the Miners (*see generally* Proposed Cmplt. Ex. 2), and
19 both existing parties appear to be advocating injunctive relief adverse to the Miners. Even
20 collusion cannot be ruled out; it is odd indeed that notwithstanding CDFG's failure to identify the
21 slightest adverse impact to listed Coho (Cmplt. ¶ 27), its attorneys are willing to stipulate to
22 drastic injunctive relief so invasive of the property rights of the Miners. Under these
23 circumstances, it would be “likely to result in injustice” to exclude the Miners from this litigation.

24 F.3d 1005 (8th Cir. 1998) (county ordinance prohibiting mining preempted). Should this Court
25 enter the injunction apparently requested, a federal action may be required to set aside this Court's
26 judgment, which is itself a factor militating in favor of intervention. *Sanders*, 53 Cal. App.3d at
668 (“The main purpose of intervention is to obviate delay and multiplicity of actions”).

Alternatively, those miners who have suffered a **loss** of access to their claims may have to
commence “takings” cases, a concern that CDFG previously stated would “cause a loss to the
State economically in amounts the State would have to compensate for taking of private property
to those who have valid existing prior rights under the federal mining laws”. (Proposed Cmplt.
¶ 6.) It makes no sense to clog the courts with such additional litigation in the context of an
activity that has never been implicated in killing a single protected fish—fish that the plaintiffs
themselves kill for food and religious reasons.

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3. This Action Threatens the Miners’ Interests.

Inasmuch as plaintiff’s complaint asks the Court to “close the rivers and tributaries to suction dredging that constitute the habitat of the Coho” (Cmplt. ¶ 45), and inasmuch as those rivers and tributaries also constitute areas where the Miners own or lease mining claims (Proposed Cmplt. ¶¶ 4-5), the threat is obvious. Not only do the Miners lose access to their property, or lose the right to develop the commercial opportunities that exist there, they may forfeit it altogether under Federal law for nonuse.

In analogous circumstances, where environmental claims affect development of specific property, the courts have gone so far as *dismiss* actions pursuant to Code of Civil Procedure § 389 for failure to join the affected property owner as an indispensable party. *E.g., Sierra Club, Inc. v. California Coastal Comm’n*, 95 Cal. App.3d 495, 501 (1979) (“[w]here the plaintiff seeks some type of relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party”). While subsequent authority refused to dismiss cases in contexts where plaintiffs have sought general, prospective relief rather than canceling or suspending permits previously issued, *e.g., Camp v. Board of Supervisors*, 123 Cal. App.3d 334, 354 (1981), the permits herein are properly thought of as ongoing permits, and this line of authority all preceded the enactment of Public Resources Code § 21167.6.5. The new Code provision presents grounds for dismissal of this action, inasmuch as it declares that “[f]ailure to name potential parties, *other than those real parties in interest described in subdivision (a)*, is not grounds for dismissal pursuant to Section 389 . . .” (emphasis added). In any event, the Miners do not contend that each and every permit holder is indispensable, or that the action must be dismissed on this ground; they do claim that they are necessary parties entitled to intervene, who must be heard for the Court to do justice in this action.

4. The Miners’ Interests Are Not Adequately Represented by the Existing Parties.

Neither CDFG nor plaintiffs remotely represent the interests of the Miners.

B. IN THE ALTERNATIVE, PERMISSION TO INTERVENE SHOULD BE GRANTED PURSUANT TO CCP § 387(a).

Code of Civil Procedure § 387(a) provides:

1 “Upon timely application, any person, who has an interest in the
2 matter in litigation, or in the success of either of the parties, or an
3 interest against both, may intervene in the action or proceeding. An
4 intervention takes place when a third person is permitted to become
5 a party to an action or proceeding between other persons, either by
6 joining the plaintiff in claiming what is sought by the complaint, or
7 by uniting with the defendant in resisting the claims of the plaintiff,
8 or by demanding anything adversely to both the plaintiff and the
9 defendant, and is made by complaint, setting forth the grounds upon
10 which the intervention rests, filed by leave of the court . . .”

11 Case law establishes four factors for the Court to consider akin to the Federal factors discussed
12 above: (1) that proper procedures have been followed; (2) that the proposed intervenor have a
13 “direct and immediate interest in the litigation”; (3) that the intervention will not “enlarge the
14 issues in the case”; and (4) that the reasons for intervention “outweigh any opposition by the
15 existing parties”. *Truck Ins.*, 60 Cal. App.4th at 346; *see also Reliance Ins. Co. v. Superior Court*,
16 84 Cal. App.4th (2000). The Miners are following proper procedure, and the motion is timely as
17 discussed above. For reasons explained below, the motion of the Miners also should not be
18 regarded as “enlarging the issues in the case” within the meaning of the applicable case law, and
19 the Miners will in reply respond to any “opposition by the existing parties”.

20 In their Proposed Verified Complaint in Intervention, the Miners have written at
21 some length to set forth their positions on all the issues raised by plaintiffs. The Miners do not by
22 presenting this pleading propose to “enlarge the issues in the case”, but only to demonstrate their
23 interests, and the sharp divergence of interest with existing parties, in a manner consistent with the
24 Code of Civil Procedure § 387, which requires the Miners to file a “complaint, setting forth the
25 grounds upon which the intervention rests”.

26 Obviously, to the extent the proposed settlement is regarded as removing all issues
from the case, the Miners do propose to “enlarge” the case, but properly understood, this factor
refers to attempts to broaden the issues beyond those appearing in plaintiffs’ pleading; to the
extent the Miners appear by permission, rather than as of right, it is appropriate to limit them to
litigation of such issues.

IV. CONCLUSION

For the foregoing reasons, this Court should grant the Miners leave to intervene in

1 this action. More generally, the Court should refrain from executing the stipulated settlement filed
2 by the existing parties to this action and establish further proceedings which, at a minimum,
3 provide for consideration of the question of interim equitable relief in a manner consistent with the
4 due process rights of the Miners, but further briefing, after disclosure of the stipulation,
5 concerning the nature and extent of such further proceedings seems most appropriate.

6 Dated: December 16, 2005

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