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

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

I. PRELIMINARY STATEMENT

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

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

The miners invested countless hours over a period of years through an exhaustive 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.

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

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

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

Given the limited amount of time and information available to the Miners before this motion was filed, the Miners frankly have not had a reasonable opportunity to formulate an ultimate position as to the relief they seek in this action, but have filed as an exhibit to their motion to intervene a proposed Verified Complaint in Intervention further to apprise the Court of 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

W. Koons (hereafter "Proposed Cmplt.")).

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

II. STATEMENT OF FACTS[1]

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

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

[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").

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

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

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

[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.)

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

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

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

As far as the Miners can tell, all of the areas in which the Tribe has expressed an interest lie within the boundaries of National Forests. Pursuant to 16 U.S.C. § 481, "[a]ll waters within the boundaries of national forests may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such national forests are situated, *or* under the laws of the United States and the rules and regulations established thereunder". (Emphasis added.) 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

biologists familiar with the specific areas then require the miners to file formal "plan of operations" for operations that "will likely cause significant disturbance". *See generally* 36 C.F.R. § 228.4.[4] The existence of a comprehensive federal regulatory scheme addressing precisely the same issues raised by the plaintiffs under parallel state statutes is surely a factor militating against the imposition of injunctive relief.

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

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

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

[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.

(Proposed Cmplt. ¶ 17.)

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

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

> "The regulations shall be adopted in accordance with the requirements of Division 13 (commencing with Section 21000) of 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."

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

III. LEGAL AUTHORITY AND ARGUMENT

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

Code of Civil Procedure § 387(b) provides that

> ". . . if the person seeking intervention claims an interest relating to the property [or] transaction which is the subject of the action and that person is so situated that the disposition of the action may as a 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.)

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)).

This statute "is in substance an exact counterpart to Rule 24(a) of the Federal Rules of Civil Procedure '"[t]herefore, the Legislature must have intended that they should have the same meaning, force and effect as have been given the federal rules by the federal courts . . ."' *Hodge v. Kirkpatrick Development, Inc.*, 130 Cal. App.4th 540, 556 (2005) (reversing trial court denial of intervention).

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

> (1) the motion must be timely; (2) the applicant must claim a `significantly protectable' interest relating to the property or transaction which is the subject of the action; (3) the applicant must 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]

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

1. This Motion Is Timely, Notwithstanding the Proposed Settlement.

The general rule is that "a right to intervene should be asserted within a *reasonable time* and that the intervener must not be guilty of an *unreasonable delay after knowledge of the suit*". *Sanders v. Pacific Gas & Elec. Co.*, 53 Cal. App.3d 661, 668 (1975) (noting that the "intervener is not likely to become aware of the action during the relatively unnoticed pleading stage, and may not discover the facts concerning its nature and his interest until the trial . . ."). The Miners filed this motion as soon as reasonably practicable after learning of the existence of this action. In the leading case of *Truck Insurance Exchange v. Superior Court*, 60 Cal. App.4th 342, 351 (1997), an insurer was permitted to intervene "[e]ven though real parties interest were on 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

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

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

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

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.

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

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

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

The unpatented mining claims held by the Miners (or leases of such mining claims) have long been recognized as "property in the fullest sense of the word". *Bradford v. Morrison*, 212 U.S. 389, 394 (1909) (quoting *Forbes v. Gracey*, 94 U.S. 762, 767 (1877)); *see also United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999) (discussing scope of legal interests represented in mining claims); *United States v. Rizzinelli*, 182 F. 675, 681 (D. Idaho 1910) (miners 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

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

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

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

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

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

F.3d 1005 (8th Cir. 1998) (county ordinance prohibiting mining preempted). Should this Court enter the injunction apparently requested, a federal action may be required to set aside this Court's 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.

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 an 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:

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

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

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

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

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

Dated: December 16, 2005 STEIN & LUBIN LLP

By: _____
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