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

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF ALAMEDA  
10 UNLIMITED CIVIL JURISDICTION  
11

12 KARUK TRIBE OF CALIFORNIA and LEAF  
HILLMAN,

13 Plaintiffs,

14 v.

15 CALIFORNIA DEPARTMENT OF FISH  
16 AND GAME and RYAN BRODDRICK,  
17 Director, California Department of Fish and  
Game,

18 Defendants

Case No. RG05 211597

**[PROPOSED] VERIFIED  
COMPLAINT IN INTERVENTION OF  
THE NEW 49'ERS, INC. AND  
RAYMOND W. KOONS**

Judge: Honorable Bonnie Sabraw  
Place: Department 512

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

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21 THE NEW 49'ERS and RAYMOND W.  
KOONS,

22 Intervenors  
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26 By leave of the court, The New 49'ers, Inc., a California corporation, and Raymond  
W. Koons, an individual (collectively "the Miners") hereby intervene in this action, and do hereby

1 unite with defendants in the position generally alleged in defendants' answer, but resist the  
2 settlement apparently negotiated by plaintiffs and defendants, as follows:

3 A. This action was commenced by Plaintiffs Karuk Tribe of California and Leaf  
4 Hillman ("Plaintiffs") on May 6, 2005. Defendant California Department of Fish and Game and  
5 Ryan Broddrick, Director of California Department of Fish and Game ("Defendants") have  
6 appeared in this action and answered Plaintiffs' Complaint on July 22, 2005.

7 B. The Miners have the right to intervene in this action under Code of Civil Procedure  
8 § 387(b) by virtue of the following facts.

9 C. In the alternative, the Miners claim an interest in the matter in litigation as follows  
10 by reason of which intervention is proper under California Code of Civil Procedure § 387(a).

### 11 **Parties and Interests**

12 1. The New 49'ers, Inc., is a California corporation leasing mining claims in the Six  
13 Rivers and Klamath National Forests. The New 49'ers lease over 60 miles of mining claims in  
14 Siskiyou County on behalf of its more than 1,000 members. The New 49'ers seek to promote  
15 suction dredge mining and to protect the interests of suction dredge miners who constitute its  
16 members and make use of claims leased on their behalf by The New 49'ers.

17 2. Many members of The New 49'ers are avid fish and wildlife advocates.

18 3. The New 49'ers also employ an Enforcement Director who patrols the rivers,  
19 prevents unauthorized access to the mining claims leased by The New 49'ers, and ensures that  
20 members abide by the rules adopted by The New 49'ers.

21 4. Among the claims leased by The New 49'ers are claims on Elk Creek and Indian  
22 Creek, the Salmon River and numerous other areas within the Six Rivers and Klamath National  
23 Forests.

24 5. Mr. Raymond W. Koons is an individual mining claim holder with claims in the  
25 Klamath National Forest on the mainstem Klamath River.

26 6. The mining claims held by the Miners constitute valid possessory property rights  
recognized under federal law. In its February 22, 1994 ADEIR on suction dredge mining,  
defendant California Department of Fish and Game declared that that the State could not preclude

1 access to mining claims outright without “a loss to the State economically in amounts the State  
2 would have to compensate for taking of private property to those who have valid existing prior  
3 rights under the federal mining laws”. Each mining claim typically covers a geographic area of  
4 the river or stream beds ¼ mile in length.

5 7. Under present regulations, mining is permitted on Elk Creek, Indian Creek and the  
6 Main Fork of the Salmon during the summer months, and year round on the mainstem Klamath  
7 River between the Salmon and Scott Rivers. Current regulations also permit mining on upper  
8 Klamath River from the last weekend in May through September 30<sup>th</sup>.

9 8. Members of The New 49’ers and Mr. Koons have mined in these areas for the past  
10 twenty years or longer. Under Federal law, they must access their claims to perform limited  
11 “assessment” work every year or forfeit the claims, although recent Congressional legislation has  
12 temporarily allowed miners to pay a \$100 annual fee in lieu of the assessment work. To the extent  
13 that suction dredge mining is prohibited by injunction on their claims, the Miners are not only  
14 prevented from developing the minerals on their property within public lands, a right guaranteed  
15 by federal law, but also stand at risk of having such claims cancelled. Many suction dredge  
16 miners who own claims in California buy permits every year and perform some work on their  
17 claims every year.

18 9. The Miners also have participational interests arising under the California  
19 Environmental Quality Act (CEQA) and Administrative Procedure Act (APA), and participated in  
20 prior processes in which CDFG created the existing suction dredge mining regulations based upon  
21 input from environmentalists, miners, local communities and all other interested parties. The  
22 Tribe’s positions with respect to suction dredge mining fall at one extreme end of the spectrum of  
23 views concerning suction dredge mining held by interested parties. Resolution of the issues  
24 presented by the Tribe in this action threaten to make useless the participational rights of the  
25 Miners.

26 10. Summer gold mining by members of The New 49’ers and individual claim holders  
provides an important contribution to the rural economy as miners purchase supplies from local  
businesses and stay in local lodging or campgrounds. The relief apparently proposed by the

1 existing parties would also have a direct negative impact upon all of the privately-owned property  
2 along hundreds of miles of waterways within the Klamath and Six Rivers National Forests.

### 3 **Background to the Present Dispute**

4 11. The Karuk Tribe previously approached CDFG informally in attempts to further  
5 restrict suction dredge mining, but was unable to provide any supporting data to CDFG for its  
6 claims of injury to fish. The Miners obtained and filed in the Federal Case the Declaration of  
7 Dennis Maria, a former CDFG watershed biologist who retired April 1, 2005, a true copy of which  
8 is annexed hereto as Exhibit 1 and incorporated by reference. Mr. Maria confirmed the Tribe's  
9 inability to provide *any* data indicating damage to fish from suction dredge mining, despite  
10 CDFG's written request of February 24, 2005 to the Tribe for such data.

11 12. Notwithstanding the absence of any harm to fish, the Miners met repeatedly with  
12 numerous representatives of the Karuk Tribe and the United States Forest Service and negotiated  
13 additional voluntary limitations on suction dredge mining in areas of concern to the Tribe. The  
14 lengthy history of these negotiations is summarized in the Declaration of Dave McCracken, a true  
15 copy of which is attached hereto as Exhibit 2. These negotiations resulted in a mutual  
16 agreement—over which the parties literally “shook hands”—voluntarily to limit mining by  
17 additional conditions that then satisfied the Tribe. The resulting agreement is enforced by The  
18 New 49'ers with respect to its members, and has been followed since 2004 notwithstanding the  
19 ongoing litigation.

20 13. The New 49'ers and others operating within the boundaries of the National Forests  
21 are also regulated under 36 C.F.R. Part 228, which in the context of suction dredge mining  
22 typically requires each suction dredge miner to give a “notice of intent” to the Forest Service.  
23 Specifically, 36 C.F.R. § 228.4(a) requires filing of such a notice for operations “which might  
24 cause disturbance to surface resources”.

25 14. As set forth in the McCracken affidavit, informal procedures have developed  
26 within the Forest to ensure that miners incorporate the agreed-upon voluntary restrictions in their  
“notices of intent” to avoid even the slightest risk of any impact to fish. Miners who incorporate  
such restrictions can avoid a finding by the local ranger and biologists that the proposed operations

1 “will likely cause significant disturbance”, thereby requiring a “plan of operations” and federal  
2 review under the National Environmental Policy Act (NEPA).

3 15. In October 2004, the Tribe filed a complaint in the United States District Court for  
4 the Northern District of California seeking to enjoin mining in the Six Rivers and Klamath  
5 National Forest (hereafter, the “Federal Action”). Upon information and belief, the Tribe was  
6 solicited by the “Western Mining Action Project” of Colorado to initiate the suit, funded by the  
7 Wilberforce Foundation and others.

8 16. The Miners gave notice of their intent to intervene on January 11, 2005, but did not  
9 file the motion until March 1, 2005, in light of a pending Forest Service motion to dismiss. Their  
10 motion to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure was  
11 granted by Minute Order of April 26, 2005.

12 17. Thereafter the parties engaged in summary judgment briefing focusing upon the  
13 Tribe’s claims that the Forest Service had violated the National Forest Management Act, the  
14 Endangered Species Act, and the National Environmental Policy Act, and the appropriateness of  
15 injunctive relief. On July 1, 2005, the Federal court denied the Karuk Tribe’s motion for summary  
16 judgment. On July 11, 2005, the Federal court entered final judgment dismissing the Tribe’s  
17 claims for relief. The Tribe has appealed.

### 18 **The Proposed Settlement**

19 18. The Miners learned of this additional litigation about a week ago when a miner  
20 attempted to purchase a 2006 dredging permit and was reportedly told by an employee of the  
21 California Department of Fish and Game (CDFG) that no permits were being issued because of  
22 the litigation with the Karuk Tribe. Plaintiffs are informed and believe that CDFG has agreed,  
23 among other things, to close Elk Creek , Indian Creek and the mainstem Salmon River to suction  
24 dredging, and to limit mining in other areas, including the mainstem Klamath River, to the period  
25 from July 15<sup>th</sup> through September 15<sup>th</sup>. The Miners are also informed and believe that the  
26 settlement identifies specific areas claimed to constitute “refugia” for protected fish, and to forbid  
all mining within 500 feet of such refugia.



1           24. Mr. Maria also noted that to the extent that suction dredgers create temporary  
2 excavations in the streambed, such holes create areas where cooler water can accumulate and  
3 provide thermal relief to salmon. In one case, they “created the only discernable juvenile rearing  
4 habitat that I witnessed”.

5           25. Other well-documented positive effects of suction dredge mining are the removal  
6 of toxic metals such as lead and mercury from the riverbeds, and the creation of superior quality  
7 spawning beds by breaking up compacted gravel and substrate.

8           26. Upon information and belief, CDFG’s regulations are designed to avoid and do  
9 avoid the only potentially substantial adverse impact of suction dredge mining, which is the  
10 potential entrainment of salmonid eggs and fry into the dredges. CDFG’s regulations accomplish  
11 this by closing the spawning areas to suction dredging until after the eggs hatch out and matured  
12 enough to easily avoid the dredges. Such regulations protect fish irrespective of their status as  
13 endangered or not endangered.

14                           **Response to the Specific Allegations Asserted in Plaintiffs’ Complaint**

15           27. For their response to paragraph 1 of the Complaint, the Miners adopt the position of  
16 defendant CDFG, and further state that the 1994 EIR did not constitute any agency determination  
17 that rivers inhabited by “special status species” “must be closed to suction dredge mining to  
18 prevent significant impacts to the species”. The two pertinent paragraphs of the 1994 EIR appear  
19 on page 19, and provide:

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21                           “Waters of the State would also be proposed for seasonal or permanent closure if  
22 special status species are present (includes threatened, endangered, rare, species of special  
concern and candidate species).

23                           “(The first DEIR states that waters of the state would be proposed for seasonal or  
24 permanent closure if special status species are present and are adversely affected by  
25 suction dredging. In light of the Biological Opinion that was prepared pursuant to CESA  
26 and the Department’s determination that avoidance is the best protective measure for  
threatened and endangered special status species, the Department proposes closing areas  
seasonally or permanently, if special status species are present.)”

Two facts are apparent from this material. *First*, the agency made no decision concerning any particular river, but stated that waters “would also be *proposed* for seasonal or permanent closure”.

1 Any such closures would be the subject of future decisionmaking by regulations issued pursuant to  
2 Administrative Procedure Act procedures, in which the Miners and other interested parties would  
3 have the opportunity to participate in decisionmaking. *Second*, the proposal to close rivers is  
4 manifestly not based on “significant impacts to the species”, but upon the idea that “avoidance is  
5 the best protective measure” despite no evidence of any adverse affects. The Miners presume that  
6 CDFG subsequently reviewed its legal charge pursuant to Fish & Game Code § 5653(b), which  
7 states that CDFG “shall issue a permit to the applicant” if it determines that “the operation will not  
8 be deleterious to fish”, and concluded that it had no authority to exclude suction dredge miners  
9 from the rivers and streams of California in the absence of any “deleterious” effects. It is apparent  
10 that CDFG has never actually adopted an “avoidance” determination as a matter of policy, for if so  
11 it would be unable to authorize any salmon fishing in the State of California and all water-based  
12 activities, including kayaking and swimming, would have to cease, as such activities can be  
13 demonstrated to have even greater *potential* adverse effects on listed species. The Miners are  
14 unaware of any case in which any suction dredge miners has ever injured any member of any  
15 special status species; fisherman routinely catch them and kill them inadvertently or with unlawful  
16 intent.

17 28. For their response to paragraphs 2-5 of the Complaint, the Miners adopt the  
18 position of defendant CDFG.

19 29. For their response to paragraph 5 of the Complaint, the Miners adopt the position of  
20 defendant CDFG, and further state that the plaintiffs’ commitment to protect wild salmon,  
21 steelhead and other species is in conflict with their desire to kill and eat these species. The Miners  
22 have observed members of the Karuk Tribe fishing with dip nets below the Ishi Pishi Falls,  
23 catching and killing five and six fish at a time. These fish constitute the same fish the Tribe  
24 purports to attempt to protect further upstream in the upper Klamath, Scott River, Elk and Indian  
25 Creeks. This mode of fishing is not authorized by CDFG fishing regulations, but upon  
26 information and belief, CDFG is aware of the practice and turns a blind eye towards it.

30. For their response to paragraphs 6-13 of the Complaint, the Miners adopt the  
position of defendant CDFG.



1           31. For their response to paragraph 14 of the Complaint, the Miners adopt the position  
2 of defendant CDFG, but deny that venue is most appropriate in this Court. Upon information and  
3 belief, if indeed any injunctive relief is appropriate, none of the witnesses with knowledge useful  
4 in fashioning appropriate injunctive relief, such as the local CDFG fish biologists and forest  
5 rangers, are present in this County.

6           32. The Miners admit the allegations of paragraph 15 of the Complaint.

7           33. The Miners deny the allegations of paragraphs 16-17 of the Complaint, and further  
8 state that the CDFG position lacks sufficient information or belief to form an opinion as to the  
9 truth of the allegations is proof positive that it cannot reasonably be expected to defend the  
10 interests of the Miners in this action.

11           34. For their response to paragraphs 18-19 of the Complaint, the Miners adopt the  
12 position of defendant CDFG.

13           35. For their response to paragraphs 20-21 of the Complaint, the Miners adopt the  
14 position of defendant CDFG and further incorporate their response to paragraph 27 above, which  
15 responds to the plaintiffs' misinterpretation of the 1994 FEIR, and deny that the listed species are  
16 present in these rivers during critical time periods or early stages of development when they could  
17 be harmed by suction dredging activity.

18           36. The Miners deny the first two sentence of paragraph 22 of the Complaint, refer the  
19 Court to the referenced listings for a full and accurate statement of their contents, admit that the  
20 listings cover Coho salmon in the Klamath, Scott and Salmon Rivers, and further state that these  
21 listings are arbitrary, capricious and contrary to state and federal law, though the Miners do not  
22 take the position that the lawfulness of the listings must be pursued in this action; they are subject  
23 to challenge in other, ongoing litigation.

24           37. For their response to paragraphs 23-26 of the Complaint, the Miners adopt the  
25 position of defendant CDFG and further incorporate their response to paragraph 27 above, which  
26 responds to the plaintiffs' misinterpretation of the 1994 FEIR. The absence of any adverse effects  
of suction dredge mining on fish under the existing regulations has been fully analyzed and those  
effects do not depend in any way upon the legal status of the species .

1           38. For their response to paragraphs 27-28 of the Complaint, the Miners adopt the  
2 position of defendant CDFG and further state that inasmuch as CDFG has no documents  
3 memorializing any adverse impact on any special status species that are listed in the Complaint,  
4 the Miners cannot conceive how the Administrative Record could possibly support the entry of  
5 relief based on such adverse effects.

6           39. For their response to paragraphs 29-30 of the Complaint, the Miners adopt the  
7 position of defendant CDFG.

8           40. For their response to paragraph 31 of the Complaint, the Miners adopt the position  
9 of defendant CDFG and further incorporate their response to paragraph 27 above, which responds  
10 to the plaintiffs' misinterpretation of the 1994 FEIR.

11           41. For their response to paragraph 32 of the Complaint, the Miners adopt the position  
12 of defendant CDFG and further state that a change in the legal status of the fish is not "new  
13 information or changed circumstances" which shows "that the project will have a significant effect  
14 no discussed in the previous EIR"; again, the effects are independent of the legal status of the fish.

15           42. For their response to paragraphs 33-39 of the Complaint, the Miners adopt the  
16 position of defendant CDFG.

17           43. For their response to paragraph 40 of the Complaint, the Miners adopt the position  
18 of defendant CDFG and further incorporate their response to paragraph 27 above, which responds  
19 to the plaintiffs' misinterpretation of the 1994 FEIR.

20           44. For their response to paragraphs 41-45 of the Complaint, the Miners adopt the  
21 position of defendant CDFG.

22           45. The Miners adopt the Affirmative Defenses pleaded by defendant CDFG, and  
23 believe that the unclean hands defense is particularly relevant given the Tribe's fishing and  
24 logging activity with actual adverse impacts on special status species, as contrasted to sheer  
25 speculation of adverse impacts arising from suction dredge mining.

26           WHEREFORE, the Miners pray that:

1. Plaintiffs' complaint be dismissed with prejudice;
2. The Plaintiffs take nothing by their action;

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- 3. Judgment be awarded against Plaintiffs and in favor of the Miners and Defendants;
- 4. Allowable fees and costs, including their reasonable attorney fees; and
- 5. Such other and further relief as the Court may deem just and proper.

Dated: \_\_\_\_\_

STEIN & LUBIN LLP

By: \_\_\_\_\_

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