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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

KARUK TRIBE OF CALIFORNIA,

Plaintiff,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Defendants.

Case No. 04-4275 (SBA)

**THE MINERS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

Date: April 5, 2005
Time: 1:00 p.m.
Ctrm: 3, 3d Floor

Judge: Hon. Saundra B. Armstrong

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## Summary of Argument

In a remarkable effort to distract the Court from its assertion of eight counts for relief invoking multiple federal statutes and other obligations, plaintiff, the Karuk Tribe of California, now styles its case as presenting a simple "primary issue": whether certain Forest Plans somehow repeal subsequently-promulgated federal regulations (36 C.F.R. § 228.4(a) (2004)[1]) to require "plans of operations" rather than "notices of intent." (Plaintiff's Memorandum of Points and Authorities in Opposition to the Miners' Motion to Intervene ("Tribal Mem.") at 1; *see also id.* at 10.) From that perspective, the Tribe accuses the Miners of "offering arguments that are irrelevant to these proceedings". (*Id.*) The Miners offer the Court the full panoply of statutes and regulations concerning the regulation of mining in National Forests, not the arbitrary subset proffered by the Tribe. The ultimate question for the Court will be whether the Forest Service has made a reasonable accommodation among conflicting statutory objectives, and this Court cannot possibly make that determination without reviewing all the relevant material.

As to the test for intervention, the Tribe claims that the certain impairment and possible destruction of the Miners' real property rights—mining claims—is not a "significantly protectable interest" for intervention. There is no authority for this shocking theory of law, which would forbid a homeowner from intervening in an action brought to compel the local government to destroy his house or place of business.

The Tribe also claims that disposition of this action will not "impair or impede" the Miners' ability to protect their property interests within the meaning of Federal Rule of Civil Procedure 24, but reach this conclusion only by ignoring the facts pleaded by the Miners, and advancing the erroneous view that the Miners "possess no 'rights' under the Mining Law of 1872 until they demonstrate compliance with all applicable Forest Service regulations" (Tribal Mem. at 8). This interpretation is not merely wrong as a matter of Federal law; it is Kafkaesque. The Tribe says, in substance, not only that citizens lose fundamental civil rights when accused of a violation of any

[1] *See* 69 Fed. Reg. 41430 (July 9, 2004)(notice of final rule-making amending 36 C.F.R. §.228.4(a)).

law, but also that such citizens cannot even appear in court to defend against the charge because they lack civil rights required for standing.

Finally, the Tribe asserts that the Forest Service can represent the Miners, because the Forest Service might take the same position on one of the eight counts of the Complaint. But the Forest Service has expressly refused to allow the Miners to conduct even an operation approved by the Tribe, proving that the interests diverge. Indeed, the Forest Service's rejection of the May 13, 2004 Notice of Intent would permit the Miners to file their own lawsuit raising the very issues raised by the Tribe. Rule 24 was enacted to avoid such wasteful and duplicative litigation.

## Argument

### I. THE MINERS' PROPERTY RIGHTS ARE SIGNIFICANTLY PROTECTABLE INTERESTS FOR PURPOSES OF RULE 24.

The Tribe does not distinguish or even reference the ample authority confirming the liberal construction of Rule 24, or the well-grounded nature of the Miners' property rights (see The Miners' Motion to Intervene and Memorandum in Support, ("Opening Mem.") at 5-6).[2] Instead, the Tribe argues that applicants have no "'rights' until they demonstrate compliance with all applicable Forest Service regulations". (Tribal Mem. at 8.) This is nonsense. As the Ninth Circuit explained in *United States v. Shumway*, 199 F.3d 1093, 1095 (9th Cir. 1999), "[m]ining claims. . . are vested possessory rights which are recognized as interests in real property; they are not merely assertions of rights, as claims are in the common sense of the word". *See also id.* at 1099-1100.[3] The

[2] The Tribe complains that the Miners have not filed declarations, but *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 819-820 (9th Cir. 2001). adopts the rule that "[c]ourts are to take all well-pleaded, nonconclusory allegations *in the motion to intervene*, *the proposed* complaint or *answer in intervention*, and declarations supporting the motion as true . . .[emphasis added],"., and Rule 24(a) merely requires that the applicant for intervention "claims an interest". Accordingly, the Miners saw no purpose in providing the factual allegations in multiple, redundant pleadings. However, to the extent that the Court would like to review the actual mining claims involved, the Forest Service decisions allowing and denying use of such claims, the permits of other government agencies, and the scientific studies quoted in the Proposed Answer, the Miners stand ready to file a Declaration authenticating and submitting these materials.

[3] The Miners commend the *Shumway* case to the Court's attention as having the fullest discussion of the nature of mining rights of any of the Ninth Circuit cases, perhaps because of the participation of miners in the litigation.

authority cited by the Tribe merely confirms that the Forest Service has the power to promulgate reasonable regulations concerning mining in the National Forests, not that the miners or prospectors have no right of possession until Forest Service approvals are obtained. As the *Shumway* opinion explains,

> The owner of a mining claim owns property, and is not a mere social guest of the Department of the Interior to be shooed out the door when the Department chooses. Rather, pursuant to the Multiple Use Act, the Department must continue to co-exist with the holder of a valid claim whose right to possession has vested.

*Shumway*, 199 F.3d at 1103.

Moreover, the Tribe simply ignores the Ninth Circuit authority suggesting that the interest asserted for purposes of intervention is protectable "under some law", and that "there is a relationship between the legally-protected interest and the claims at issue". *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1493-94 (9th Cir. 1995). The Miners' interests are valid, existing interests under federal mining law, and they are related to the claims at issue because they are the rights the Tribe seeks to impair or destroy pursuant to such claims.

The Tribe then cites several cases, all readily distinguishable on account of the contingent or speculative interests asserted by the intervenor, or by the nature of the claims raised by the parties. Some of the cases are *sui generis*, such as *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825 (9th Cir. 1996), in which an environmentalist group, asserting interests in environmental laws, was denied leave to intervene in a case brought by industry interests to release timber sales under an appropriations rider which exempted those timber sales from environmental laws. The Ninth Circuit denied intervention because the asserted interest in enforcement of environmental laws simply did not relate to the litigation. *Id.* at 837.

Other cases concern only claims under the National Environmental Policy Act (NEPA), which is a purely procedural statute, and represents but one of the Tribe's eight counts for relief. *E.g.*, *Forest Guardians v. Bureau of Land Management*, 188 F.R.D. 389, 392-93 (D.N.M. 1999) (noting special rules for NEPA cases); *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir.

1989).[4] Where other statutes have been concerned, such as the Clean Water Act (the Tribe's sixth count), the Ninth Circuit has easily recognized a right of intervention. *Sierra Club v. U.S. Environmental Protection Agency*, 995 F.2d 1478 (9th Cir. 1993).

As the *Sierra Club* court explained,

> the lawsuit would affect the use of real property owned by the intervenor by requiring the defendant to change the terms of the permits it issues to the would-be intervenor, which permits regulate the use of that real property. These interests are squarely within the class of interests traditionally protected by law.

*Id.* at 1483.

That is precisely the case here, for the Tribe seeks to impose a very substantial amount of unnecessary regulatory requirements upon the Miners which would affect the productive use of their real property—the mining claims. Indeed, the Second Amended Complaint specifically seeks to forbid the Forest Service from allowing mining or mineral operations in the regions in which the Miners own or lease their mining claims without "an approved PoO [Plan of Operations], reclamation plan and bond for each individual or group proposed mining operation" (Second Amended Complaint for Declaratory and Injunctive Relief, docket no. 29 ("2AC"), Request for Relief ¶ B). The imposition of requirements that would override the U.S. Forest Service Part 228 mineral regulations, and have no legitimate purpose, would be manifestly arbitrary and capricious given the trivial and evanescent nature of the Miners' activities, all traces of which are generally washed away by the first heavy rain in the fall.

More recently, in *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001), the Ninth Circuit permitted a construction contractor and building trades association to intervene in an action brought by environmentalists to challenge Endangered Species Act compliance (the Tribe's first count) by various government officials concerning a development plan for San Diego. The Tribe seeks to distinguish this case on two grounds, both specious. First, the Tribe argues that the intervenors were "third party beneficiaries" of an "Implementation

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[4] In substance, *Portland Audubon* and its progeny have all been overruled *sub silentio*, because they relied upon the notion that the intervenors interests' had to be "protected by the statute at issue". 866 F.2d at 309. The Ninth Circuit subsequently, and correctly, clarified that the nature of the interest need only be protected under "some law". *Sierra Club*, 995 F.2d at 1484.

Agreement" governing "take" of species protected by the Act. (Tribal Mem. at 4 n.3.) But the Miners are more than third-party beneficiaries, they are the objects of the regulation themselves, and stand in the shoes of the government officials who were the parties in *Southwest Center*. Indeed, under the legal theories proffered by the Tribe, the Miners would have "applicant" status for purposes of the consultation requirements of the Endangered Species Act, 16 U.S.C. § 1536. *See* 50 C.F.R. § 402.02 (defining "applicant").

The Tribe also reiterates its unsupported claim that the Miners have "no legal interest in any particular set of regulations". (Tribal Mem. at 4 n.3.) If that were true, miners could never have brought the very case the Tribe cites, challenging mining regulations (*Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994), *cert. denied sub nom. Clouser v. Glickman*, 515 U.S. 1141 (1995)), *because they would have had no standing to do so*. The Miners cannot begin to grasp the mindset that claims that citizens have no legal interest in the regulations that affect their livelihoods. Recent Ninth Circuit cases have confirmed again and again that "economic injury is clearly a sufficient basis for standing". *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 855 (9th Cir. 2002) (quoting *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996)).[5] The Ninth Circuit mining cases stand for the proposition that the Forest Service has power, within reason, to regulate mining in National Forests, but also that the Miners have a substantive right to a regulatory scheme that is "'reasonable' and do[es] not impermissibly encroach on legitimate uses incidental to mining . . . claims". *Shumway*, 199 F.3d at 1107.

## II. THIS ACTION THREATENS TO IMPAIR OR IMPEDE RIGHTS OF THE MINERS WITHIN THE MEANING OF RULE 24.

The Miners are well aware of what the Tribe really means when it says "[i]f plans of operation are required, compliance with the other natural resource laws cited by Plaintiff flow from that requirement" (Tribal Mem. 11): It means the Tribe seeks to send them into "a paperwork abyss from which they never emerge" (Opening Mem. at 3; see The Miners' Answer to Second Amended

[5] As the Tribe acknowledges, the test for intervention requires less of an interest than the standing requirement to prosecute a case as plaintiff. (Tribal Mem. 3 n.1) As noted above, the Miners plainly could sue the Forest Service for rejection of their Notice of Intent as alleged in their proposed Answer (¶ 3).

Complaint for Declaratory and Injunctive Relief, docket no. 33, attachment no. 1 ("Miners' Answer") at ¶¶ 69-70). The Supreme Court long recognized, however, that the sort of additional, redundant environmental analysis sought by the Tribe under just one of its counts could take 18 months to prepare, *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 789 n.10 (1976)—if there were even sufficient funding available to prepare it. The Miners do not, in any sense, "misunderstand[] . . this lawsuit." (Tribal Mem. at 4.)

The Tribe claims that the Miners will not necessarily lose their mining claims outright during transfinite delays for environmental reviews and subsequent challenges, merely the opportunity to use and enjoy the claims, because the Miners can pay fees to keep the claims alive. (Tribal Mem. at 4 & n.4.) First, the loss of use of property *is* impairment for purposes of Rule 24. Preventing miners from mining for an extended period of time creates economic hardship akin to taking someone's livelihood away. The Tribe's intent to shut down all forms of small-scale mining on all established mining claims within the high-water marks of three separate river drainages is a very serious matter which will have a devastating economic impact upon hundreds of people. If a miner is prevented from working his mining claim for an extended period of time, he or she may be forced to forfeit mining as a livelihood and seek another type of career. The impairment also undermines the value of the mining claim, which is only as valuable as the capability to productively work the claim.

Second, the statute cited by the Tribe, 30 U.S.C. § 28f(c), concerning "oil shale claims", manifestly does not apply; § 28f(a) provided a limited right to keep claims alive through payments from 2004 through 2008, but it manifestly impairs the interests of the Miners to have to make such payments, and there is no guarantee that the statute will continue to provide the right to make such payments. Locking someone out of their possessory interest in property, with a concomitant risk of destroying that real property right, merely because the studies needed to allow its use have not yet been conducted is sufficient threatened impairment for purposes of Rule 24.

In addition to the potential lockout and forfeiture of the Miners' property interests is the potential *stare decisis* affect of this Court's determinations concerning the proper scope of regulation. As the Ninth Circuit has explained in allowing intervention by regulated entities in an

environmentalist suit under the Clean Water Act, in terms that may be neatly paraphrased to fit this case:

> . . . the relief sought by [the Tribe] would constrain the [Forest Service], which would not then be free to violate the terms of the declaratory or injunctive relief in later administrative proceedings. [Citations omitted.] The [Miners] could not use [their] appeal of [any Plans of Operation or other requirements] to put at issue the extent of the [Forest Service's] regulatory duties. [Citation omitted.] The case at bar would have controlling force on those issues. Although the [Miners] might challenge various determinations in separate proceedings, those proceedings would be constrained by the *stare decisis* effect of the lawsuit from which [they] had been excluded. . . . . The relief sought by [the Tribe] would necessarily `result in practical impairment of the [Miners'] interests.'

*Sierra Club*, 995 F.2d at 1486.

Here, the case is far stronger for intervention, because the Clean Water Act is merely one of several regulatory authorities the Tribe hopes to bring down upon the Miners. The Tribe even specifically names one of the Miners in its Second Amended Complaint, expressly seeking to require the Forest Service to impose additional permitting requirements. (*E.g.*, 2AC ¶ 126)

From this perspective, the Tribe's claim that "no relief is sought against the Applicants [Miners]" (Tribal Mem. at 5) is hypertechnical nonsense. Rule 24 does not require that parties be named as defendants in order to intervene, for intervention would not be necessary in such circumstances; it merely requires that "disposition of the action may *as a practical matter* impair or impede" the Miners' ability to protect their interests (emphasis added). In any practical sense, the Tribe's action is against the Miners.

## III. THE TRIBE'S CHARGE THAT THE MINERS ATTEMPT TO RAISE COLLATERAL ISSUES IS BOTH FALSE AND NOT PERTINENT.

The Tribe accuses the Miners of raising collateral issues, citing a district court case in Oregon that rejected intervention where proposed intervenors "merely seek to inject their interests and concerns, outside of the administrative record". (Tribal Mem. at 5 (quoting *Friends of the Wild Swan v. Fish & Wildlife Service*, 896 F. Supp. 1025, 1027 (D. Or. 1995).) In *Friends of the Wild Swan, Inc. v. U.S. Fish and Wildlife Service*, 896 F. Supp. 1025, 1028 (D. Or. 1995), environmentalists challenged the refusal of the Service to list bull trout in a context where the only remedy was a remand to the agency for "further consideration". The proposed intervenors sought to

present "their interests in timber and fishing" to determine whether the failure to list was arbitrary and capricious, but such interests were wholly irrelevant because 16 U.S.C. § 1533(b)(1)(A) requires that listing decisions be made "solely on the basis of the best scientific and commercial data available."

The Tribe points to the Miners' proposed Affirmative Defenses as the injection of "collateral issues." The appropriate remedy, if the Affirmative Defenses were defective, would be to move against them, not to deny intervention.

In any event, the Affirmative Defenses are not collateral, they are merely contingent. For example, the Miners' proposed "unclean hands" defense is solely a defense to equitable relief. The defense would not become relevant at all unless and until the Court decided that a violation of law had occurred. Under those circumstances, it hardly seems likely that the defense will "cloud this case" (Tribal Mem. at 5) at all. So too is the Sixth Affirmative defense contingent, in the sense that the Tribe seems to be arguing that the Administrative Record of the Forest Service can alone be employed to determine compliance by the Miners with regulations and permitting processes of other agencies. (*See* Joint Case Management Statement and Proposed Order, at 2 (stating that the case "should be resolved upon summary judgment based upon the Defendants' submittal of a complete administrative record"). Insofar as the Miners were required to prepare a proposed pleading without review of that record, they could not determine whether and to what extent additional information may be required from such other agencies.

Note that the Miners do not, as the Tribe claims, argue that California's regulation "makes illegal all federal regulation" (Tribal Mem. at 6); rather, they argue that California's suction dredging and streambed alteration regulations and permitting system discharge any additional environmental obligations the Forest Service may have pursuant to 36 C.F.R. § 228.8(h) ("Certification or other approval issued by State agencies or other federal agencies of compliance with laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations").

Nor do the Miners "ask the Court to rework the Clean Water Act's regulatory scheme." Rather, the Miners point out that their activities fall under the jurisdiction of the U.S. Army Corps

of Engineers, which has in the past issued pertinent § 404 permits, accompanied by California's requisite § 401 certification, all in a context where such regulation expressly removes any further Clean Water Act regulation pursuant to 40 C.F.R. § 122.3(b). The Miners do not seek to bring evidence into this case "outside of the administrative record" except as may be permitted under long-standing rules for supplementation and/or completion of that record. *See generally Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153 (9th Cir. 1980). Obviously, the fact that California has issued a certification pursuant to § 401 of the Clean Water Act (Miners' Answer ¶ 83) is of relevance to assessing potential Clean Water Act violations, whether or not the Justice Department manages to assemble a Forest Service administrative record that includes that document.

Nor do the Miners seek to "declare unlawful" a federal court order concerning the listed coho. (Tribal Mem. at 6.) Rather, the Miners seek to argue that because there is no lawful listing, the Forest Service cannot be violating the Endangered Species Act in this action.

All of these arguments are "before this Court", and do "derive from Plaintiff's complaint" (*cf.* Tribal Mem. at 7). The Tribe is simply not entitled to confine the litigation to a carefully-selected subset of the applicable federal statutes, regulations, permits and orders so as to mislead the Court. It is certainly true that Rule 24 "is not intended to allow for the creation of whole new suits by intervenors", *Washington Elec. Coop., Inc. v. Massachusetts Municipal Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990), but the Miners manifestly seek no such thing. They add no new claims whatsoever, and merely seek to defend themselves against the treacherous and unwarranted attacks of the Tribe.

## IV. THE MINERS CANNOT RELY UPON THE FOREST SERVICE TO REPRESENT THEIR INTERESTS.

At the outset, it is worth repeating that the burden of showing inadequate representation is "minimal". *Sagebrush Rebellion v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). There is no sense in which the Forest Service and the Miners share the "same ultimate objective" as in the cases cited by the Tribe. In *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir.), *cert denied sub nom. Hoohuli v. Lingle,* 540 U.S. 1017 (2003), the proposed intervenors ran afoul of the "assumption of adequacy when the government is acting on behalf of a constituency it represents", *id.* at 1086, confirmed by an express

finding that the government was committed to defending the race-based privileges challenged in the case, *id.* at 1087 ("counsel for the State and HHC/DHHL, and OHA have stated before the Court that they will make all arguments necessary to defend the benefits to native Hawaiians").

Here, by contrast, the defendants are not a government, but merely one of many federal agencies and its officials, who have no constituency to which they must answer. There are no similar assurances from the Forest Service, which has not merely failed to defend the Miners, but has itself rejected their May 13, 2004 Notice of Intent, adopting, in substance the position of the Tribe, at least with respect to areas under the management control of the Six Rivers National Forest. (Miners' Answer ¶¶ 3 and 9)

Beyond the stark conflict with respect to this First Count issue, the Miners have provided the Court with a count-by-count demonstration of how the position of the Federal defendants is different from that of the Miners, right down to the Justice Department's peculiar assertion in an Idaho action, contrary to 40 C.F.R. § 122.3(b), that duplicative permitting requirements under both §§ 402 and 404 of the Clean Water Act may be required. (*See* 2AC ¶ 84).

The Tribe suggests that all these divergent positions between the Miners and the Forest Service may be disregarded as "extraneous issues," but as demonstrated in Point III, *supra*, the questions of what additional regulations, if any, must be imposed upon the Miners require consideration of all the relevant statutory and other authority. The Tribe ultimately acknowledges that it seeks compliance with all "the other natural resource laws cited by Plaintiff" (Tribal Mem. at 11), those being the same laws with respect to which the position of the Miners and the Federal defendants have differed. The Miners have reviewed the Federal defendants' Answer to the Second Amended Complaint, but for the most part it does not provide useful information on the positions the Federal defendants will take with respect to these laws.

One thing is apparent from review of the Answer, however. With respect to the specific allegations concerning the Miners, the Federal defendants' Answer (at ¶¶ 52-53) alleges that the Federal defendants lack knowledge concerning the Tribe's allegations against The New 49'ers, Inc. in ¶¶ 52-53 of the Second Amended Complaint. The Federal defendants cannot possibly adequately

represent the Miners when they lack sufficient knowledge concerning the Miners even to answer the Second Amended Complaint.

It is not that the Miners merely suspect "that they can litigate this case better than the Forest Service" (*id.* at 12)—though the Miners certainly believe that to be the case given the egregious errors that arose last time these sorts of issues were litigated without their participation. *See Siskiyou Regional Education Project v. Rose*, 87 F. Supp.2d 1074 (D. Or. 1999). It is that the interests of the Miners diverge sharply from those of the Forest Service, and the Forest Service and its attorneys have demonstrated through prior conduct that they can not, do not, and will not represent the Miners' interests.

**Conclusion**

For the foregoing reasons, and the reasons stated in the opening memorandum, the Court should enter an order permitting the Miners to intervene in this action as of right; in the alternative, permissive intervention should be granted.

Dated: March 22, 2005

MURPHY & BUCHAL LLP

By: s/ James L. Buchal
James L. Buchal

Attorneys for The New 49'ers, Inc. and Raymond W. Koons

**CERTIFICATE OF SERVICE**

I certify that on March 22, 2005, I electronically filed the foregoing THE MINERS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE, with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the following:

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