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SUPERIOR COURT OF CALIFORNIA

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,

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

Intervenors.

Case No. RG05 211597

SUPPLEMENTAL BRIEF OF THE NEW 49'ERS AND RAYMOND W. KOONS

Date: Matter already submitted
Time: n/a
Dept: 512 (Hayward)
Judge: Honorable Bonnie Sabraw

Action Filed: May 6, 2005
Trial Date: None Set

Argument

The New 49'ers and Raymond Koons (hereafter, the Miners) file this Supplemental Brief pursuant to this Court's order of April 18, 2006. As demonstrated below, the recent decision of the Court of Appeals in *Trancas Property Owners Ass'n v. City of Malibu*, 41 Cal. Rptr.3d 200 (March 30, 2006) confirms that this Court should not enter the Stipulated Judgment proposed by

plaintiffs and defendants, because doing so would permit the Department to evade substantive and procedural requirements for rulemaking.

In *Trancas*, the Court of Appeals declared a settlement agreement between the City and a developer "invalid" because "statutory procedures and protections of public involvement cannot be ignored, and established regulatory regimes such as zoning may not be deviated from solely on bilateral agreement". *Id.* at 211. While the holdings of the case concerned different "statutory procedures and protections of public involvement" and a different "established regulatory regime",[1] the concluding language just quoted manifests the generality of the holding, which squarely applies to the proposal proffered by plaintiffs and defendants.

In referring to "established regulatory regimes *such as* zoning", *id.* (emphasis added), the Court of Appeals' holding necessarily extends to all regulatory regimes. The Court of Appeals analogized the settlement agreement in *Trancas* to a variance from standard zoning rules, explaining:

> "Such departures from standard zoning, however, by law require administrative proceedings, including public hearings, followed by findings for which the instant density exception might not qualify. Both the substantive qualifications and the procedural means for a variance discharge public interests. Circumvention of them by contract is impermissible." *Id.* at 207.

As the Miners have demonstrated in prior briefing, there is a standard set of rules, duly-promulgated by the Department, and changes to those rules require administrative proceedings, including public hearings, followed by findings for which the Tribe's proposed closures "might not qualify" in the exact sense of *Trancas*.

Specifically, § 5653.9 of the Fish and Game Code requires departures from the existing rules to comply with ordinary rulemaking requirements set forth in the Government Code and CEQA requirements set forth in the Public Resources Code. Those Codes in turn impose substantive limitations on the Department (*see, e.g.*, Government Code § 11349.1(a)), and very extensive procedural requirements, including public hearings upon the request of interested parties

[1] The party challenging the settlement agreement did allege that "adoption of the [settlement agreement] required an evaluation under CEQA", *id.* at 208, but the Court of Appeals did not reach that claim because it had already declared the settlement agreement invalid as a "circumvention", *id.* at 207, of all the other "statutory procedures and protections of public involvement", *id.* at 211.

(*see generally id.* §§ 11346.2 to 11348). The CEQA Guidelines impose additional procedural requirements (*e.g.*, 14 C.C.R. § 15105), important to affected parties such as Siskiyou County. The Fish and Game Code itself (*see* §§ 5653(b) & 5653.9) requires agency findings concerning harm to fish. The Miners vigorously dispute any harm to fish under the pre-existing regulations, confirming, at the least, that the Tribe's proposed closures "might not qualify", *Trancas*, 41 Cal. Rptr.3d at 207, if the Department had followed the "statutory procedures and protections of public involvement", *id.* at 211. In the Settlement Agreement, the Department confirms that the requisite findings of harm to fish "might not" be made within the meaning of *Trancas*, for the Department denies any and all liability or infirmity in the existing regulations.

The Court of Appeals' additional holding concerning application of the Brown Act (Government Code §§ 54950-63) confirms the degree to which policies favoring settlement—of questionable applicability when two parties are attempting by settlement to destroy the rights of a third, absent party—cannot overcome specific statutory procedures. Even though the Brown Act contains an express exemption permitting closed meetings to discuss pending litigation (§ 54956.9), an exemption conspicuously absent from the Department's governing statutes, the Court of Appeals insisted that:

> ". . . whatever else it may permit, the exemption cannot be construed to empower a city council to take or agree to take, as part of a non-publicly ratified litigation settlement, action that by substantive law may not be taken without a public hearing and an opportunity for the public to be heard. As a matter of legislative intention and policy, a statute that is part of a law intended to assure public decision-making, except in narrow circumstances, may not be read to authorize circumvention and indeed violation of other laws requiring that decisions be preceded by public hearings, simply because the means and object of the violation are settlement of a lawsuit."

Trancas, 41 Cal. Rptr.3d at 210.

It is also apparent that the plaintiffs and defendants, even under their revised proposal, are attempting to circumvent the very same sort of substantive and procedural requirements that the Court of Appeals would not permit the City to circumvent in *Trancas*. Indeed, the Government Code's flat prohibition against enforcing "any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule . . ." unless rulemaking requirements are followed (§11340.5(a)) is arguably more strict than any statute considered in *Trancas*.

The plaintiffs and defendants propose what are in substance amended "regulations" within the meaning of Government Code § 11342.600 closing or further restricting hundreds of miles of rivers and forbidding miners from exercising their possessory property rights in their mining claims. The concession that this new regulatory regime will only persist for at least a year plus 120 days, plus such additional time as may be provided by this Court, does not vitiate the fundamental legal defect. Even in cases of "emergency"—manifestly absent here, without so much as the death of a single fish to threaten the public peace, health and safety or general welfare—the Department is bound to follow procedures of the Government Code (*e.g.*, § 11346.1) with which it has manifestly not complied.

Conclusion

Trancas and all the other authority previously advanced by the Miners confirms that the Department is not free to evade all of the substantive and procedural requirements the Legislature has established to "discharge public interests", *Trancas*, 41 Cal. Rptr.3d at 207. The Proposed Stipulated Judgment must be rejected.

Dated: May 1, 2006.

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By: _____
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