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

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.

Case No. RG05 211597

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

Res. No.: 550443
Date: January 26, 2006
Time: 9:00 A.M.
Judge: Honorable Bonnie Sabraw
Place: Department 512

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

I. PRELIMINARY STATEMENT

Neither the California Department of Fish and Game (hereafter, the "Department") nor the Karuk Tribe deflects the two critical points made in the Miners' motion to intervene: (1) this action threatens to lock them out of their property; and (2) there is no just cause for doing so, for there is no evidence that the Miners have injured so much as a single fish. While the Tribe does not oppose intervention by permission to permit the Miners to object to the Proposed Stipulated

Judgment, the Department defends the right to exclude the Miners from any hearing whatsoever on the question whether they should be locked out of their property, a strikingly unjust position.

Fortunately, the law imposes no such absurd result. Code of Civil Procedure § 387(b) manifestly permits the Miners to intervene as of right, for their federally-established possessory property interests manifest "relat[e] to the property or transaction which is the subject of the action . . .". The Proposed Stipulated Judgment alone proves the relationship, for it proposes to enjoin the Department from issuing permits allowing the Miners to use their property. Indeed, the only reason the existing parties offer for avoiding the requirement to name miners holding permits—which include Mr. David McCracken, as agent for The New 49'ers (3d McCracken Decl. ¶ 15)—as Real Parties in Interest is that the permits are only of one year's duration. Even if this Court is inclined to excuse the existing parties from joining all permit holders, the mere styling of this suit as challenging the "pattern and practice" of issuing permits cannot serve to justify excluding any and all miners from being heard in this action as of right.

In the alternative, the Miners should be granted permissive intervention pursuant to § 387(a), for they manifestly possess evidence of relevance to the Court's determination and no other party's interests provide an incentive to bring such material before the Court.

II. THE MINERS' INTERESTS ARE SUFFICIENT FOR INTERVENTION AS OF RIGHT

A. The Miners' Possessory Property Right Necessarily Relates To An Action Determining Whether They May Utilize Such Property.

The Department and Tribe advance the startling claim, unsupported by any authority, that property owners whose neighbors seek to enjoin their use of their own property do not have an interest qualifying for intervention under Code of Civil Procedure § 387(b). Specifically, the Department argues that because the mining claims themselves are not the "subject of the action", intervention is inappropriate. But the language of § 387(b) imposes no requirement that an interest asserted in support of intervention be *itself* the subject of the action; rather, the statute

requires that the proposed intervenor claim "an interest *relating to* the property or transaction which is the subject of the action . . ." (emphasis added).

The federal courts interpreting the same language in Rule 24(a) of the Federal Rules of Civil Procedure have refuted the Department's limiting and unfair interpretation.[1] The leading case of *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1493-94 (9th Cir. 1995), reversing a district court's denial of a motion to intervene in a NEPA suit, explained that

> "in order to establish a protectable interest sufficient to intervene as of right, an applicant-intervenor must establish (1) 'that the interest [asserted] is protectable under some law, and [(2)] that there is a relationship between the legally protected interest and the claims at issue". *Id.* at 1494 (quoting *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)).

Addressing the same statutory language "subject of the action", the court clarified that

> "where, as here, the injunctive relief sought by plaintiffs will have direct, immediate and harmful effects upon a third party's legally protectable interests, that party satisfies the 'interest' test of Fed. R. Civ. P. 24(a)(2); he has a significantly protectable interest that relates to the property or transaction that is the subject of the action". Id.

This result is in accord with fairness and common sense: citizens ought to be permitted to intervene, as of right, in actions that threaten their property no matter what sort of legal claims are presented to create that threat.

B. The Miners' Participational Rights and Right to Notice Support Intervention As Well.

The Department and Tribe disparage the Miners' participational rights in rulemaking, including CEQA rights, with the Department proffering the notion that rulemaking might proceed in the future consistent with the Proposed Stipulated Judgment. But the Department does not and cannot deny that it has already promulgated the rule on the basis of its agreement with Tribe, rather than any rulemaking process. Participational rights are meaningless if the rule comes first and the participation later.

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[1] The Tribe and Department object to citation of Federal law (Tribal Opp. 7; Dep't Opp. 2 n.1), but both ignore the authority of *Hodge v. Kirkpatrick Development Corp.*, 130 Cal. App.4th 540, 556 (2005), teaching that federal authority should guide interpretation of § 387(b).

The Department and Tribe also argue that because this case was a "pattern and practice" case, the Miners need not have been joined and might properly be excluded from settlement negotiations. At the outset, even if, as a technical matter, the annual nature of the permits means that the existing parties need not name the recurring permitholders as indispensable parties, simple considerations of justice militate in favor of giving parties whose property is to be seized notice and an opportunity to be heard. Put another way, whether or not Public Resources Code § 21167.6.5 required notice to the Miners, it certainly evidences the public policy of the State of California that those whose lawful activities are implicated by CEQA suits have legitimate grounds for seeking to be heard in CEQA suits.

Neither the Tribe nor the Department offer any authority contrary to the simple, plain-language proposition that citizens who engage in ongoing activities that proceed under annually-issued permits are "recipient[s] of an approval that is the subject of" (§ 21167.6.5) a suit brought to enjoin the issuance of such permits. Indeed, in arguing that "[t]he subject of this action is the annual suction dredging permits issued by DF&G . . ." (Tribal Opp. 7) for purposes of limiting intervention under § 387, the Tribe all but concedes that the permit holders are entitled to notice for purposes of § 21167.6.5.[2] The Tribe correctly identifies practical difficulties in identifying such permitholders, but neither the Tribe nor the Department disputes that they could have joined any or all miners, by class or representative parties. They might even have named the Miners as representative parties, for has been obvious at all relevant times that the Miners were the objects of the Tribe's attention.

Final, the Department's status as a "trustee agency" with respect to fish and wildlife does not give it *carte blanche* to exclude all other natural resource interests from decisionmaking, as Siskiyou County emphasizes in its testimony filed in opposition to the Proposed Stipulated Judgment. The Miners are not attempting to subvert to deny the authority of the Department; they

[2] The Department argues that "no specific [permit] approvals are being challenged by petitioners in this 'pattern and practice' suit" (Dep't Opp. 5), but the authority cited by the Department does not excuse notice to permitholders whose permits are necessarily implicated in a suit challenging the practice of issuing permits; it does not address the question.

merely insist that the Department confine its exercise of authority within the bounds of law, which law requires that the Department listen to more than one of many interested parties in setting its regulations.

C. The Direct Interests Of The Miners Cannot Be Balanced Away To Deny Intervention.

Ultimately, the Department opposes intervention on the basis that its interest in fish and wildlife management outweighs any interest of the Miners, asking this Court to balance those interests in the context of resolving the motion to intervene. The "balance" is set forth in Fish & Game Code § 5653: where there is no harm to fish, the interests of suction dredge miners trump generalized interests in fish and wildlife management. The Department cites no authority in support of the startling proposition that the case should be determined on the merits, so to speak, as part of resolving the motion to intervene.

The authority concerning "balanc[ing] the desirability of intervention" that the Department does present occurs in the context of describing whether the asserted interest is "direct" or merely "consequential". *Continental Vinyl Products Corp. v. Mead Corp.*, 27 Cal. App.3d 543, 552 (1972) (denying shareholder of bankrupt action leave to intervene in action brought by corporation under control of bankruptcy trustee). Because the Proposed Stipulated Judgment "itself . . . detracts from [the Miners'] legal rights", *id.* at 549, the interest is "direct" within the teaching of *Continental Vinyl*, and there is balancing to be done. More importantly, *Continental Vinyl* and the other authority cited by the Department and Tribe concern *permissive* intervention under Code of Civil Procedure § 387(a), where the Court has greater discretion.[3] Where, as here, there is a *right* to intervene under § 387(b), it cannot be balanced away by speculation as to the merits of the interests involved.

[3] The Tribe argues that the Miner's injury is consequential, citing *Bechtel v. Axelrod*, 20 Cal.2d 390 (1942) and *Allen v. Cal. Water & Tel. Co.*, 31 Cal.2d 104 (1947), but both these cases concern § 387(a) language, not intervention as of right under § 387(b), and turn on their own peculiar facts.

D. The Tribe's Quibbling With The Precise Nature Of The Mining Interests And The Threat To Those Interests Does Not Defeat Intervention.

The Tribe points out that The New 49'ers, Inc. does not own mining claims, but merely leases them, and that Mr. Koons leases his claim to The New 49'ers. The Tribe offers no authority in support of the notion that real property interests cannot qualify for intervention because they are leased; *Cole v. Ralph*, 252 U.S. 286, 295 (1920), cited by the Tribe, confirms that a mining claim based on discovery (e.g., of gold) "gives an exclusive right of possession and enjoyment, is property in the fullest sense, *[and] is subject to sale and other forms of disposal . . .*" (emphasis added). Whether one locks a citizen out of his apartment or his house, due process still requires notice and an opportunity to be heard, and the interest manifestly supports intervention.

The Tribe also claims that the mining that goes on is "recreational" activity by members of The New 49'ers rather than "legitimate mining operations" by The New 49'ers. In fact, The New 49'ers, Inc. is directly involved in mining and holds, through an agent, the annual permits at issue in this litigation. (3d McCracken Decl. ¶ 15.) The Miners disagree with the Tribe's characterizations of its activities (*see generally id.* ¶¶ 12-16),[4] but such disagreements are irrelevant for purposes of intervention, for the Tribe makes no showing that Federal law does not protect claims if they are leased even for recreational purposes (*see id.* ¶ 16).

The case the Tribe cites on this point, *Cameron v. United States*, 252 U.S. 450 (1920), involved administrative proceedings wherein the Secretary of Interior determined "no discovery of mineral had been made" and there was "no evidence before the department showing the existence of any valuable deposits or any minerals within the limits of the location". *Id.* at 458. The Tribe does not and cannot contend that the claims are devoid of gold; there would be no quarrel before

[4] The Tribe argues, for example, that because The New 49'ers website declares that entire families can enjoy suction dredging, there is manifestly no "attempt to discovery or develop commercially-valuable materials". (Hillman Decl. ¶ 4.) The nature of these placer claims requires that they be worked with suction dredges; any alternative means that the Tribe might view as having a more "commercial" scale, such as permanent structures in the rivers, would manifestly be associated with greater disturbance of the natural environment. To have the Tribe arguing that operations must be severely limited to protect the environment, and at the same time argue that the Miners have no legally-protectable interests because of the environmental restrictions imposed again fuels the Miners' perceptions of bad faith on the part of the Tribe.

this Court were that the case. Moreover, this Court is not the forum established by Congress for any challenges to the legitimacy of the claims owned and leased by the Miners. It is odd indeed to see the Tribe complaining on the one hand that the Miners seek to "enlarge the issues", while at the same time suggesting that this Court reach out to exercise the functions of the Department of Interior to evaluate the "legitimacy" of the claims held by the Miners.

The Tribe also downplays the risk that the Miners might actually forfeit their claims once locked out of them, noting that Congress has occasionally permitted the miners to pay fees in lieu of assessment work, and that the Secretary might even entertain an excuse pursuant to 30 U.S.C. § 28b. While the Miners quarrel with the reliability of these means of avoiding outright forfeiture,[5] whether or not the Miners need not forfeit their entire property interests to sustain a claim of right to intervene; it is enough that they are locked out.

Finally, the Tribe argues that the Miners took inconsistent positions in the Federal case, denying that the Federal regulations would supercede the California ones. There is no inconsistency. The Miners took the position, not resolved by the Court, that 16 U.S.C. § 481 permits miners to comply with either Federal and State regulations *permitting mining to proceed* in the waters of the National Forests. (Beers Decl. Ex. 1, at 4 n.2); by contrast, it is wholesale closure of such waters that runs afoul of Federal law.

III. THE MINERS DO NOT SEEK TO "ENLARGE THE ISSUES" IN ANY WAY INCONSISTENT WITH STATUS AS INTERVENORS.

The Miners do not intend to "enlarge the issues" in this suit in any way other than opposing the entry of any injunctive relief restricting their mining. The Miners will not oppose any effort by the Department and the Tribe to settle the legal claims raised by the Tribe in a lawful

[5] Because the Department will not actually bar access to the claims, but mining thereon, it is by no means clear that the Miners could prove "legal impediments exist which affect the right of the claimant to enter upon the surface of such claim or group of claims or to gain access to the boundaries thereof" within the meaning of 30 U.S.C. § 28b, a statute manifestly aimed (through language cropped from the quote by the Tribe) at right of way issues. Nor does *Chambers v. Harrington*, 111 U.S. 350 (1884), contain any general principle authorizing "off-site" work (cf. Tribal Opp. 4); rather, the case allowed off-site work where one claimant was drilling an mine shaft "with a view to the future working and development of all three of said claims". *Id.* at 355.

fashion that merely commits the Department to considering (or even proposing) new rules for suction dredge mining, and examining particular issues of interest to the Tribe.

The Department and Tribe suggest that the Miners are attempting to "enlarge the issues" by "introduc[ing] aspects of federal mining law" (Dep't Opp. 7; Tribal Opp. 7), but the Miners make no federal claims in the case. The Miners introduce the federal mining law for two purposes only: first, to show their federally-protected property rights interest supporting intervention, and second, to explain to the Court that granting an injunction shutting down all mining in particular areas of the National Forests will not put an end to the disputes between the parties, but merely multiply litigation.

The Department also suggests that the Miners are attempting to "enlarge the issues" through "vague allegations of violations of public processes" (Dep't Opp. 7). But the Miners do not claim that the Department has violated the law in its pre-November 30th suction dredge mining regulations; rather, the Miners oppose entry of the Proposed Stipulated Judgment on the basis that the Joint Stipulation itself represents of a violation of the California rulemaking and CEQA statutes. Opposing entry of a settlement on the basis of public policy and errors of law is not "enlarging the issues" in the underlying lawsuit; rather, the existing parties enlarged the case when they purported to agree to sidestep all substantive and procedural rulemaking requirements to simply give the Tribe what it wanted in terms of new suction dredge mining regulations. This Court has already determined that the Miners may be file objections to entry of the settlement, such that the Department's claim that they "should be limited to the issues raised in the Karuk's complaint" (Dep't Opp. 8) has already been rejected, in some sense.

While not important to the question of intervention, the Miners wish to defend themselves against the Tribe's charges of "cloud[ing] the action with aspersions" which Mr. Hillman asserts are categorically untrue. At the outset, the only party that can be properly chastised for "aspersions" is the Tribe, which as scoured the Internet for comments manifestly intended to prejudice this Court against miners generally and blithely filed them with the disclaimer that "I have no way of knowing how representative these remarks are of The New 49'ers membership".

(Hillman Decl. ¶ 7.) In fact, Mr. Hillman has no idea if these individuals are even members of The New 49'ers at all, and the Tribe should be admonished for presenting scurrilous material of no relevance to the issues before the Court—other than to demonstrate that the Miners perception of the injustice of secret rulemaking is shared more broadly within the mining community. (*See also* 3d McCracken Decl. ¶ 9 (identity of posters unknown; offensive postings removed).)

With respect to the Tribe's killing of fish, the Tribe correctly brings to the Court's (and Miner's) attention that the Department amended its regulations in or about 2004 in an attempt to authorize the unlawful harvest about which Mr. McCracken testified. *Compare* http://www.fgc.ca.gov/2003/7_50b91_1regs.pdf (2003 regulations) *and* http://www.fgc.ca.gov/2004/7_50b91_1fregs.pdf (2004 regulations) (*See* Request for Judicial Notice, ¶¶ 1 -2, Exhibits A and B). The Miners also acknowledge that the Proposed Complaint incorrectly summarized the Tribe's environmentally-relevant activities as "logging activities"; Exhibit 2 to that Complaint (the first McCracken Declaration) more accurately stated the point: "the logging road eradication program conducted by the Karuk Tribe above the Salmon River during 2004 created thousands of times more surface disturbance and all of the combined small-mining activity . . .". (Ex. 2 to Fligor Decl. Ex. A, ¶ 9.) The Tribe does not dispute that it has expressed no concern to regulators that CEQA or other processes be utilized to assess the very-substantially-larger effects of its own activities, which is relevant to the question whether injunctive relief ought to be entered at the Tribe's behest. (*See also* 3d McCracken Decl. ¶ 17 (Miners did not intend to object to the activities themselves).)

The Miners recognize that if allowed into the suit as permissive intervenors, rather than intervenors as of right, this Court has discretion to fashion appropriate limitations on their participation. Certainly at the outset, the Miners' participation is limited to contesting the Proposed Stipulated Judgment. Once this Court declines to enter that Judgment, the scope of future participation will become clearer. In the event the existing parties opt to reframe the settlement to comply with law, such that the Department merely commits to engage in rulemaking

proceedings considering regulatory changes on the issues of concern to the Tribe, the case will also be over.

But if the Tribe elects to pursue its claims, as to which there is presently no admission of liability on the part of the Department, the Miners should be permitted to assert any defenses to injunctive relief that the existing parties (*e.g.*, unclean hands) may not be inclined to pursue. They should be permitted to present their evidence on the ultimate factual issues concerning harm to fish, including the Tribal biologists' agreement to limited dredging as adequate to protect fish (*e.g.*, 3 dredges per mile on Indian Creek as opposed to outright closure). And they should be permitted discovery into the Tribe's water quality data to confirm that the proposed thermal refugia have no purpose. Such participation is not "enlarging the case"; it is ensuring that the issues already in it are correctly decided, particularly in a context where neither of the existing parties has any incentive or interest to consider mining interests.

IV. CONCLUSION

For the foregoing reasons, this Court should grant the Miners' Motion for Leave to Intervene.

Dated: January 19, 2006

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