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4 Attorneys for Intervenors, *Pro Hac Vice*
THE NEW 49'ERS, INC., a California corporation, and
5 RAYMOND W. KOONS, an individual

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7 SUPERIOR COURT OF CALIFORNIA
8 COUNTY OF ALAMEDA
9 UNLIMITED CIVIL JURISDICTION
10

11 KARUK TRIBE OF CALIFORNIA and LEAF
HILLMAN,

12 Plaintiffs,

13 v.

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

17 Defendants,
18

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

21 Intervenors.
22
23

Case No. RG05 211597

**THIRD DECLARATION OF JAMES L.
BUCHAL IN OPPOSITION TO
PLAINTIFFS' AND DEFENDANTS'
MOTIONS FOR ENTRY OF
PROPOSED STIPULATED
JUDGMENT AND FOR PROTECTIVE
ORDER**

Date: March 23, 2006
Time: 9:00 a.m.
Dept: 512 (Hayward)
Judge: Honorable Bonnie Sabraw

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

24 James L. Buchal declares:

25 1. I am counsel to Intervenors The New 49'ers, Inc., a California corporation, and
Raymond W. Koons, an individual (hereafter, the Miners). I make this Declaration in further

1 opposition to Plaintiffs' and Defendants' Motions for Entry of Stipulated Judgment and for a
2 Protective Order.

3 2. I apologize to the Court for failure to hear the Court's direction to meet and confer
4 with opposing counsel concerning discovery requests. I had interpreted the remarks of opposing
5 counsel to mean that they would take the position that no discovery whatsoever was appropriate as
6 a matter of law, particularly since I had given written notice of my intent to seek discovery of the
7 Kuruk Tribe's (hereafter "the Tribe") water quality data in my reply memorandum in support of
8 intervention.

9 3. As to the California Department of Fish and Game (hereafter, "the Department"), I
10 had previously sought documents from the Department back in December pursuant to the
11 California Public Records Act, and the requests for materials relating directly to this litigation
12 (including the purported scientific justification for their agreement with plaintiffs which is the
13 focus of the discovery requests) were denied on legal grounds.

14 4. Accordingly, conferences with the Tribe and Department would certainly have
15 been futile. My thinking on the matter was also colored by my knowledge that in the ordinary
16 course, the existing parties would have thirty days to respond to any discovery requests, and that
17 even if they did choose to respond, I had to act quickly in order to get any information in time to
18 use it to oppose the Proposed Stipulated Judgment.

19 5. I have received information from multiple witnesses who, if called to testify, would
20 advise the Court that representatives of the Department told them that the Department has no
21 present intention of conducting any rulemaking process concerning suction dredge mining, and the
22 reason is that there is no intention to do so, because the revenues from selling permits to suction
23 dredge miners are only roughly \$150,000 per year, while the cost of a rulemaking process
24 conducted in compliance with California law would be in the neighborhood of \$500,000 per year.

25 6. Such witnesses are unwilling voluntarily to present written testimony to this Court
out of fear of adverse reaction from the Department in regard to other ongoing regulatory

1 activities. With the listing of highly-migratory species under the California Endangered Species
2 Act, many economic interests in rural Northern California are now subject to regulation by the
3 Department in ways that places their continued existence at the sufferance of Departmental
4 officials.

5 7. This information came to my attention after we served our discovery requests. It
6 was therefore my intention, to the extent the Court is disposed to grant an evidentiary hearing on
7 the question of whether the Proposed Stipulated Judgment should be entered, to subpoena these
8 witnesses to testify before the Court concerning such statements by the Department. To the extent
9 that the Court is not disposed to permit an evidentiary hearing, but is disposed to permit limited
10 documentary discovery, it would be my intention to seek additional documentary discovery of the
11 Department related to its willingness or ability to conduct further rulemaking proceedings.

12 8. As far as I have been able to tell, although the Department has imposed the
13 restrictions set forth in the Proposed Stipulated Judgment back on or about November 30, 2005, no
14 steps have been taken to commence any rulemaking proceedings. Moreover, the Department
15 formally denies any obligation to commence such rulemaking proceedings in the Proposed
16 Stipulated Judgment. These facts tend to corroborate the anonymous hearsay information reported
17 above.

18 9. One of the reasons that the Miners seek an evidentiary hearing and an opportunity
19 to cross-examine the experts proffered by the existing parties is because the Miners believe that
20 believe that their testimony is heavily and irrationally biased in favor of restricting human use of
21 the natural environment. Attached as Exhibit 1 is an example of the sort of material that the
22 Miners would use to impeach the credibility of the experts. In this article, Dr. Moyle reveals his
23 powerful identification with Nature, to the point of irrational thinking (*e.g.*, the notion that the
24 Pacific Northwest may “run out” of trees). More importantly for purposes of this case, he reports
25 the simple truth that when “spawning gravel [is] cleansed”, fish populations are assisted. If put on
the stand, I am confident that he would not be able adequately to explain to the Court how the

1 Miners' activities in cleaning spawning gravel do not render the same assistance (albeit on a much
2 smaller scale) as the flood waters he describes. Indeed, Dr. Moyle would also be unable to
3 describe how the activities of the suction dredge miners cause any impact to the river beds
4 significantly different from those caused by salmon themselves, inasmuch as larger chinook
5 salmon dig nests nearly 18 inches deep and which can extend up to 17 square yards.¹ Other
6 impeachment material is available in which Dr. Moyle promotes particular environmental groups,
7 and makes serious errors in with regard to questions of mining and fisheries.

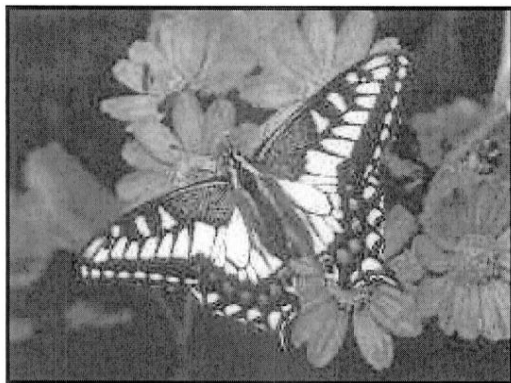
8 10. Attached as Exhibit 2 is a true copy of an opinion of the California Attorney
9 General, dated January 6, 2000.

10 I declare under penalty of perjury under the laws of the State of California that the
11 foregoing is true and correct.

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13 Dated: March 13, 2006

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15 
16 James L. Buchal
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¹ See J. Moore, Animal Ecosystem Engineers in Streams, 56 *Bioscience*, 237-246 (March 2006).



Peter Moyle

Summer 1995

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- ▶ [Mercedes S. Foster](#)
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- ▶ [Terry L. Maple](#)
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- ▶ [Janice E.](#)

Where is the anger? Why is there no storm of fury over a Congress that wants to nullify the existence of hundreds of species? Why hasn't a ripple of fear passed through the nation over the actions of politicians who would dump more poisons into rivers and allow streams to run dry? Are we going to sit around quietly, drinking bottled water from France, watching the fish die?

I wish I understood this complacency. In my office I have a map of the Sierra Nevada that illustrates the near-disappearance of chinook salmon that once kept people awake at night from the splashing of a million tails. California's coho salmon fisheries are nearly gone now. The fishermen know that a thousand frozen salmon from Alaska cannot replace a single coho in their catch.

Yet in the Pacific Northwest, keeping a few loggers employed for a few years (until the trees run out) or keeping a few cows grazing along unfenced streams is regarded as worth sacrificing entire fish populations that can support future generations.

Of course, the fish (and humans) were not doing well even before the present era of "Wise Use" and congressional myopia. More than one third of all the fish species in North America are in serious decline even with the Endangered Species Act in place. Every year, we pay more to filter the water we drink. Every year, more streams lose the vegetation along their banks, their runs of salmon and their ability to cleanse themselves.

My academic life has been partly spent documenting the loss of California's native fishes. My first paper documented the brief return of chinook salmon to the Kings River in the San Joaquin Valley where it had not been seen for 25 years and has not been seen since. Subsequent papers documented dramatic declines in fishes and frogs native to the Sierra Nevada foothills. I continue my academic studies, but for every ecological paper I publish, I publish two on species declines. In 1975, one of my students caught and released the last known bull trout in California. Attempts to reestablish the species have failed. Destruction of species and ecosystems is easy and cheap, restoration hard and expensive.

This year it rained in California as it has not rained for years. Fisheries are rebounding, because the water has been purified, the spawning gravel cleansed and riparian habitat flooded. This gives hope that salmon, sturgeon and splittail can recover if we let them. However, the drought California's fish have suffered will be repeated if water diversions and environmental degradation continue.

Pressured by the Endangered Species Act and other environmental laws, there is an effort to negotiate solutions to California's water problems. Yet Congress seems bent on destroying this to favor the greedy few. Where is the anger?

EXHIBIT 1
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Thompson

► Edward O.
Wilson

Peter Moyle is a professor in the Department of Wildlife, Fish, and Conservation Biology at the University of California, Davis. He is a member of the American Fisheries Society, the Ecological Society of America and the Society for Conservation Biology.

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE



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January 6, 2000

Ann Malcolm
Chief Deputy General Counsel
Department of Fish and Game
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Sacramento, CA 95814

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JAN 10 2000

LEGAL AFFAIRS DIVISION
DEPARTMENT OF FISH AND GAME

CONFIDENTIAL-ATTORNEY-CLIENT COMMUNICATION

RE: Informal Opinion Request: Issuance of Special Suction Dredge Permits

Dear Ms. Malcolm:

You have asked whether the California Environmental Quality Act (CEQA), Public Resources Code sections 21000-21177, applies to the issuance of special suction dredge permits by the Department of Fish and Game. The short answer to the question is that CEQA does apply to such permits. However, before answering that question we wish to discuss a question which you did not raise, whether the Department actually has the authority to issue special permits.

Background

The Department issues suction dredge permits pursuant to Fish and Game Code section 5653. In 1994 section 5653 was amended to prohibit the use of suction dredge equipment "except as authorized under a permit issued to that person by the department in compliance with the regulations adopted pursuant to Section 5653.9." Section 5653.9 was amended at the same time to require the Department to adopt regulations to carry out section 5653. It continued to permit the Department to adopt regulations implementing sections 5653.3, 5653.5 and 5653.7. Any such regulations had to be adopted in compliance with CEQA. Amendments to subsection 5653(b) had the effect of requiring the Department to adopt regulations designating where and when vacuum or suction dredges could be used pursuant to a permit. Amendments to subsection 5653(c) required the Department to determine that the operation would not be deleterious to fish prior to issuance of the permit. Finally, subsection 5653(d) remained in effect. It prohibits the operation of a suction dredge in or within 100 yards of any water that is closed to suction dredging.

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Regulations were adopted by the Department and are found at Title 14, California Code of Regulations, section 288 et seq. These regulations set forth classifications and special use regulations for streams and portions of streams within each county. (Title 14, Cal. Code Regs., § 288.5.) These regulations also specify permissible and prohibited equipment and methods of operation. (*Id.*, § 228 (e), (f).) Subsection 228(b) of the regulations allows the issuance of special suction dredge permits to operate a suction dredge with a larger than otherwise allowable nozzle, in a closed water or during a closed season, if the proposed permittee submits a written plan and the Department concludes that the proposed operation would have no deleterious impact on fish.

Authority to Issue Special Permits

Before discussing the question you raised, we observe that section 5653 does not authorize special permits, that is, permits that do not comply with the generally applicable regulations specifying permissible and prohibited waters, equipment and methods of operation. Rather, section 5653 contemplates that the Department will designate permissible and closed waters, maximum sizes for dredges and times of the year for their use, and then issue all permits that comply with these regulations where there is no deleterious impact on fish. The Legislature specifically amended section 5653(a) and section 5653.9 to make mandatory the adoption of regulations specifying open and closed waters and permissible equipment, whereas previously they had been discretionary. (See former Fish & Game Code, § 5653.9.) The Legislature also made it unlawful to possess a suction or vacuum dredge in or near any water that is closed to the use of vacuum or suction dredging. This would presumably include both waters that are always closed to suction dredging and waters that are closed at that particular time. That the Legislature continued to make it a crime to possess a suction dredge in or near closed waters suggests that it did not intend for the Department to be able to authorize the issuance of permits which would allow suction dredging in closed waters.

This conclusion is reinforced by the Legislative Counsel's Digest for AB 1688, the 1994 amendments:

"This bill would expressly prohibit use of a vacuum or suction dredge by any person in any river, stream, or lake of this state, except as authorized by a permit issued to that person by the department and pursuant to the regulations adopted by the department. The bill would require, instead of permit, the department, by regulation, to designate waters or areas wherein vacuum or suction dredges may be used pursuant to a permit, waters or areas closed to those dredges, the maximum size of dredges permitted to be used, and the time of year when the dredges may be used."

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Neither the bill nor the Legislative Counsel's Digest mentions special permits that would allow dredging in waters which the regulations designated as closed. Thus, the Department appears to lack the authority to issue special permits for waters that are otherwise closed.

Although section 5653(a) does permit the department to adopt regulations and issue permits pursuant to those regulations, all regulations must be within the adopting agency's authority and consistent with existing statutes. Regulations that "alter or amend the statute or enlarge or impair its scope are void, and courts not only may, it is their obligation to strike down such regulations." (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11; see also Gov. Code, § 11342.1 [Regulations are invalid if they are not consistent or conflict with the authorizing statute].) Thus, regulations may not permit what the statute forbids. It is thus likely that a court would strike down that part of section 288(b) that allows the issuance of special permits for otherwise closed waters or at times when a water is otherwise closed if it were challenged.

Application of CEQA

Assuming that the Department can issue special permits, at least for larger dredges than would otherwise be allowed, the question is whether the Department must comply with CEQA when it issues them. Under CEQA an environmental analysis is required for any project undertaken by a public agency, with certain exceptions. CEQA applies whenever an agency carries out a project that could conceivably have a significant adverse impact on the environment, unless the project is subject to some exemption. (Pub. Resources Code, § 210.) The first question is whether there is any exemption that would apply. There are a number of statutory exemptions in Public Resources Code sections 21080-21080.26. If the project falls within a statutory exemption, it is exempt entirely from CEQA.

One exemption is for projects that are "ministerial" rather than "discretionary" in nature. CEQA applies only to discretionary projects undertaken by public agencies. (Pub. Res. Code, § 21080(a).) It does not apply to ministerial projects. (*Id.*, § 21080(b)(1).) A "discretionary project" is one in which the agency "can use its judgment in deciding whether and how to carry out or approve" the project. (CEQA Guidelines, Title 14, Cal. Code Regs., 15002(j).) Unlike the issuance of a general permit under Fish and Game Code section 5653(b), the issuance of a special permit does appear to be subject to the Department's discretion. An Environmental Impact Report was done for the regulations that established closed waters, closed seasons and permissible equipment. Allowing dredging in an otherwise closed water or with a larger dredge would result in greater, and potentially adverse, impacts that would have to be evaluated on a case-by-case basis. That determination is an exercise of discretion. While reference could be made to findings in the EIR for the regulations where appropriate, at least some additional

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environmental analysis will be needed on a case-by-case basis.

In undertaking this analysis, the Department should be aware that a categorical exemption cannot be used where there is a reasonable possibility that the activity will cause a significant adverse effect on the environment. (Guidelines, § 15300.2.)

If you have further questions, please do not hesitate to call.

Sincerely,



M. ANNE JENNINGS
Deputy Attorney General

For BILL LOCKYER
Attorney General