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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.

v.

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

Case No. RG05 211597

FINAL MEMORANDUM OF THE NEW 49'ERS AND RAYMOND W. KOONS IN OPPOSITION TO PLAINTIFFS' MOTION FOR PROPOSED STIPULATED JUDGMENT AND MOTION 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

I. Preliminary Statement.

This Court has accurately identified the duty of the existing parties to carry their burden to prove that the Proposed Stipulated Judgment "is a just one, is not contrary to public policy, and does not incorporate an erroneous view of law". (Order, Feb. 9, 2006.) Civil Code § 664 manifestly confers discretion upon the Court whether to accept a proffered settlement, and the

Court should be particularly wary of doing so in a context where the primary effect of the settlement is to extinguish the rights of nonparties to it—and under manifestly unjust circumstances. Lacking proof that any suction dredge miner anywhere has harmed or killed a single fish under the existing regulations, the existing parties ask Court to impose sweeping restrictions based upon vague allegations of potential harm—and refuse to disclose the scientific data upon which they rely.

The Proposed Stipulated Judgment incorporates an erroneous view of law, both because it would operate to allow the Department to evade each and every rulemaking and CEQA restriction that the Legislature has imposed to vindicate important substantive and procedural policy goals, and because the Department correctly and vigorously denies any legal violation that could serve as the predicate for the relief sought. The asserted legal violation is that back in 1994, the Department proposed to close waters containing listed species and has not done so. The Tribe, however, must carry its legal burden to show that the 1994 FEIS overlooked some biological effect of significance, and the Tribe has not done so. The legitimate concerns raised by the Tribe's specialists have already been exhaustively addressed in the FEIS completed by the Department to support the pre-existing suction dredging regulations. There is neither a legal nor factual predicate for the relief sought.

Finally, the Proposed Stipulated Judgment also runs roughshod over important Federal public policies fostering mining on lands belonging to the United States. California surely does not have a sufficient public policy interest in closing mining in the National Forests to override Federally-protected property rights in mining claims. While there are important public policies favoring settlement of disputes, those policies have little force where, as here, two parties reach agreement to destroy the rights of an absent party, thereby engendering further litigation the policy favoring settlements was designed to prevent. The Miners are not making irrelevant "threats"; they are merely describing what they will be required to do to secure just compensation for the taking of their valuable mineral rights should the Court adopt the Proposed Stipulated Judgment.

For all these reasons, the existing parties have not carried their burden to support entry of the Proposed Stipulated Judgment.

II. PRIOR FILINGS UPON WHICH THE MINERS RELY.

Pursuant to this Court's February 9th Order, the Miners identify the following documents as materials upon which they rely, and present limited supplemental briefing below.

1. Their Memorandum of Points and Authority in Support of Motion to Intervene, dated December 16, 2005 (concerning CEQA notice requirements and the nature of the Federally-protected property rights possessed by the Miners).

2. The Objections of The New 49'ers And Raymond W. Koons To Proposed Stipulated Judgment, filed January 10, 2006.

3. The Reply Memorandum of the New 49'ers and Raymond W. Koons In Opposition To Proposed Stipulated Judgment, filed January 26, 2006.

4. Their Appendices of Non-California Authorities, filed December 16, 2005, January 10, 2006, January 19, 2006, and

5. The Second, Third and Fourth Declarations of David McCracken, filed January 10, 19, and 26, 2005, and all exhibits thereto.

6. The Second and Third Declarations of Joseph C. Greene filed January 10 and 26, 2006 and all exhibits thereto.

7. The Second Declaration of Dennis Maria, filed January 26, 2006.

8. The First and Second Declarations of James L. Buchal filed January 10 and 26, 2006, and all exhibits thereto.

9. The Declaration of Neysa Fligor, dated January 10, 2006, and all exhibits thereto.

III. THE RELIEF PROPOSED IS UNJUST.

The notion that one property owner can enter into an agreement with a governmental agency to destroy the property rights of another property owner (1) without any initial notice of the action; (2) without disclosing the evidence in support of the action (no discovery), and (3) without requiring *any* neutral decisionmaker to "reach and resolve the claims of the parties",[1] ought to be fairly described as "unjust" within any common sense understanding of that term.

[1] *Bragg v. Robertson*, 83 F. Supp. 2d 713. 717 (D. W. Va. 2000).

To make matters worse, the Miners worked with extraordinary diligence to satisfy the legitimate concerns of the Tribe and developed a self-regulatory program going above and beyond the Department's then-existing regulations to accommodate the Tribe's biological and other concerns. *See generally* 1st McCracken Decl. ¶¶ 11-48 (Ex. B to Fligor Decl. Jan. 10, 2006); 3d McCracken Decl. & Exs. A-C, Jan. 18, 2006). Now they have been repaid not only by faithless repudiation of their agreements, but by the Tribe cutting a deal in private with the Department in this venue, remote from both the Tribe and Miners, and imposing enormous litigation costs upon the Miners.

Nor will the Miners and other interested parties, such as the County of Siskiyou, have any opportunity to "voice their concerns . . . during the rule-making process under CEQA . . . which is required under the injunctive relief provisions of the [Proposed] Stipulated Judgment" as claimed by the Tribe. (Tribal Memo in Support of Ex Parte Application, Mar. 1, 2006, at 3. *The Proposed Stipulated Judgment requires no such thing*, and such a bald misrepresentation of its terms ought to cast doubt upon the Tribe's other positions before this Court. The Proposed Stipulated Judgment closes areas to mining unless and until this Court orders otherwise, and only mentions the *possibility* that the Department *may* adopt future regulations. (Proposed Stipulated Judgment ¶ 3.)

The Department more carefully asserts that "it has been the Department's intention from the outset of the settlement discussions to conduct a rule-making to amend its suction dredge regulations". (Dfts. Motion for Entry of Stipulated Judgment, Feb. 27, 2006, at 3.) Since those discussions commenced last July (and probably before that), the Department has had *eight months* to effectuate that alleged intention by commencing a rulemaking process. Since illegally amending its regulations in November, the Department has had two-and-one-half months. In fact, the Department has no concrete plans to conduct any rulemaking in the foreseeable future because of the cost of such a rulemaking process (3d Buchal Decl. ¶¶5-6)—whatever its alleged intentions.

Moreover, the Department has already told this Court that "a judicial mandate to the Department that it initiate a rulemaking action is beyond the scope of this Court's authority".

(Defendants' Opposition, filed Jan. 23, 2006, at 9 (citing Public Resources Code § 21167.9(c)[2]).) The real plan of the Department and the Tribe is to lock the Miners out of their property, and leave them without any remedy whatsoever—except an action against the Department for a "taking" of their valuable gold claims. It is apparent that the existing parties are asking this Court to foster a very substantial injustice.

To the extent the Department genuinely believed that additional restrictions were necessary to protect fish—and they are not—the Department might at any time implement the appropriate public process under CEQA and other law to address and remedy any perceived deficiencies with the pre-existing suction dredge regulations. Even emergency regulatory authority is available. What has not been granted, however, is authority to make secret agreements with secret data and evade each and every substantive and procedural restriction imposed by the Legislature.

IV. THE PROPOSED SETTLEMENT IS CONTRARY TO LAW.

A. There Is No Predicate CEQA Violation.

The Tribe has a simple claim: the 1994 FEIR promised to close waters "where threatened and endangered species exist" (1994 FEIR at 59), and didn't, even after additional species were listed. But there is no CEQA claim for breach of promise; the question is whether or not the FEIR adequately considered environmental effects. The Tribe cannot demonstrate any failure to consider the effects of suction dredge mining on fish, nor has any factual data been presented to this Court that demonstrates pre-existing regulations do not adequately protect fish. Indeed, the Department has continued to monitor mining since the FEIS and its inspection report states that ongoing suction dredging operations by Miners presented "nothing that would be considered a violation or that would have a significant impact to the fishery or significantly negatively impact the overall biotic community of the Salmon River." (2d McCracken Decl. Ex. 3, Jan. 10, 2006; see also Maria Decl. ¶ 13 (Ex. D to Fligor Decl. Jan. 10, 2006).) Thus the Tribe retreats further to the claim that updated environmental analysis is required merely because of the listings themselves. While a change in legal status of a fish manifestly does not change the effect of

[2] It appears the Department intended to cite § 21168.9(c); it is not clear to the Miners that the Department correctly interprets this provision, if it is indeed the one it intended to rely upon.

suction dredging on such a fish,[3] the Tribe claims federal authority supports a legal requirement for a new EIS in light of the change in the legal status of a species. Their case, *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000), manifestly turns upon Forest Service regulations requiring special management attention when legal status changes, *see id.* at 556 n.2, 559 & n.5. Indeed, the case expressly distinguishes a contrary holding in *Swanson v. United States Forest Service*, 87 F.3d 339 (9th Cir. 1980), finding that mere changes in legal status not associated with a change in biological status are insufficient to trigger a duty to update an EIS. No other rule of law would make sense.

The real vice of the FEIS, from the Miners' perspective, is that in the very next sentence after proposing to close waters where "threatened and endangered species exist", the Department declared: "Suction dredging may be permitted *in these areas* under a special permit if the Department determines that site-specific suction dredging operations would not result in a take of the listed species." (1994 FEIR at 59 (emphasis added)). Thus there never was any intention on the part of the Department to lock up the waters for all time merely because listed fish swam in them. Nor could there have lawfully been such a restriction. As the Miners demonstrated in their initial memorandum, CESA and CEQA both require the least intrusive approach required to vindicate environmental concerns. *E.g.,* Fish & Game Code §§ 2052.1, 2053; Public Resources Code § 21168.9(b). Even closing the area generally, while irrational from the Miners' perspective, would at least have allowed mining to proceed by permits in the closed areas, and the Miners could have worked to obtain such permits.

But it appears the Department no longer has such permitting authority, if it ever did (*see* 3d Buchal Decl. Ex. 2), which has undermined the legal premise upon which the FEIR proposed to close the waters in the first place. In other words, the Department knows full well it ought not to restrict suction dredge mining where there is no harm to fish, and its actions now to close the waters without exception by permit or otherwise, potentially forever, is patently contrary to law.

[3] The Tribe does not dispute that further CESA documents, such as the Proposed Coho Recovery Strategy (Feb. 2004) endorse the prior regulations. (2d Buchal Decl. Ex. 1, at 3.)

B. The Existing Parties Cite No Case, And There Is None, That Permits The Department To Evade Rulemaking And CEQA Requirements By Agreement.

In previous briefing which the Miners incorporated above by reference, the Miners adequately demonstrated extensive federal authority, including an opinion of the United States Attorney General, which concluded that where, as here, rulemaking requirements impose substantive and procedural limitations on agency decisionmaking, agencies go too far by agreeing to issue new rules by settlement agreement. Against all that authority, the existing parties offer *108 Holdings, Ltd. v. City of Rohnert Park*, 38 Cal. Rptr. 3d 589 (2006), a case that does not involve mandatory rulemaking and CEQA requirements at all.

The "central contention" before the Court, *id.* at 595, was whether a city had contracted away its police power. Inasmuch as "[r]eservation of the police power is implicit in all government contracts" and the "Stipulated Judgment place[d] no restrictions on the City's exercise of its police power in the future", *id.* at 597, the plaintiff had failed to articulate a sensible theory opposing the City's action, and that portion of its complaint was dismissed on a demurrer.

Two particular decisions of the City at issue are relevant. First, the City agreed to seek an amendment to its General Plan. *Id.* at 592-93. *That is the precise analogy to relief the Miners concede would be proper in this case: the Department may properly agree to commence a new rulemaking process to consider issues of concern to the Tribe and others.*

Second, the City agreed to "interpret and apply certain policies . . . in a manner set forth in the Stipulated Judgment". *Id.* at 593. The analog to the agency rules and rulemaking requirement at issue in this case was the City's General Plan. As the Court carefully explained, the fundamental flaw in plaintiff's argument was its premise that "the challenged provisions of the Stipulated Judgment constitute 'amendments' to the City's General Plan". *Id.* at 598. The Court carefully examined each challenged paragraph of the settlement, but none were inconsistent with that Plan. *See id.* at 600-603.

Here, by contrast, the Department has expressly amended—albeit in irregular fashion—its suction dredging regulations, publishing "new restrictions" effective November 30, 2005. (Exhibit 1 to Buchal Decl. filed Jan. 10, 2006.) Those "new restrictions" override and nullify the

provisions of the existing regulations by closing waters that would otherwise be open. This is simply not a case, like *108 Holdings*, in which a party has bound itself to provisions shading its interpretation of General Plans, "semantical exercises which require considerable interpretation on the part of persons charged with implementing them". *108 Holdings*, 38 Cal. Rptr. at 603 (quoting *Bownds v. City of Glendale*, 113 Cal. App.3d 875, 883 (1980)). This is black and white. The existing parties cite no case, and the Miners are aware of none, where any court has endorsed rulemaking by settlement agreement to prohibit previously lawful uses of private property.

V. THE PROPOSED STIPULATED JUDGMENT IS CONTRARY TO PUBLIC POLICY.

The parties ask this Court, in substance, to apply the important public policy of protecting species of special concern to override all other public policies, but provide no authority for this proposition. Moreover, the strength of that public policy depends upon the degree of actual impact from the suction dredge mining activity, and the record demonstrates that it has *actual* positive and only *potential* negative effects. And against that public policy must be weighed important public policies of due process and fairness in governmental decisionmaking, and the important Federal policies fostering mining activity on Federal property.

VI. DISCOVERY AND AN EVIDENTIARY HEARING ARE APPROPRIATE.

The Miners acknowledge that under Civil Code § 664.6, it is entirely within this Court's discretion whether discovery should be used to assist its decisionmaking. *See Malouf Bros. v. Dixon*, 230 Cal. App.3d 280 (1991) (court *may* issue ruling based "upon declarations alone). The cases the Tribe cites for the proposition that entry of the judgment is purely a question of law are not on point. *Jackson v. Rogers & Wells*, 210 Cal. App.3d 336, 349-50 (1989) (whether contract is void as illegal or contrary to public policy is a question of law); *Bovard v. American Horse Enterprises, Inc.*, 201 Cal. App.3d 832, 838 (1988) (same).[4]

The additional authority cited by the parties concerning expert discovery supports the Miners' position. For example, in *St. Mary Medical Center v. Superior Court*, 50 Cal. App.4th

[4] The Miners appreciate the Tribe's acknowledgement that they do not seek sanctions in connection with the motion for a protective order, and also do not seek sanctions.

1531 (1996), the Court allowed expert depositions in the summary judgment context when the party "raises significant questions relating to the foundation of an expert's opinion . . .". *Id.* at 1534. The primary question in that case was whether plaintiff presented triable issues of fact; here, the experts' opinions are offered to support ultimate and permanent relief, making discovery manifestly more appropriate.

The Miners seek discovery precisely into the foundations of the expert opinions: the data and studies supporting their assertions. For example, an important foundation of the restrictions is the concept that certain areas are both cold *and* necessary to keep free of human influence; the Declarations of Mr. Greene present limited data to suggest that at least some of the waterways are too hot to serve that purpose. Allowing limited discovery of the Tribe's more complete data set and other scientific materials asserted to support the restrictions set forth in the Proposed Stipulated Judgment is far less intrusive than the discovery allowed in *St. Mary Medical Center.*

Recent years have seen the rise of so-called "junk science", imposing an increasing duty upon the courts to police expert opinion submitted to them on scientific questions. As the United States Supreme Court explained:

> "Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human behavior. Green 645. *See also* C. Hemple, Philosophy of Natural Science 49 (1966) ("[T]he statements constituting a scientific explanation must be capable of empirical test"); K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability") (emphasis deleted)." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993).

In this case, the purported experts have not bothered even to test the theory that suction dredge mining injures fish. The record is not merely devoid of evidence that suction dredgers kill fish (other than by the obvious and long-forbidden way of killing eggs if the miner hits a nest), it is devoid of any experiment which tested the truth of the theory and found harm. The *actual* studies of *potential* cumulative impacts find no such impacts at any measurable level.

If the "suction dredge mining hurts fish" theory were correct, it should be possible to measure changes in fish populations based upon mining activity. Yet the only evidence before the

Court concerning that proposition suggests a positive correlation between mining activity and fish populations (2d Buchal Decl. ¶ 6 & Ex. 5), consistent with the findings of benefits from the mining in the 1994 FEIS. What has come to substitute for science in this area is mere general assertion of potential impacts put forth by anti-mining advocates, which any ordinary citizen would not be permitted to put before a jury in a civil trial under *Daubert* and similar cases.

The Miners believe that only cross-examination is adequate to expose the gossamer nature of the experts' claims, and therefore reiterate their request for an evidentiary hearing, if the Court cannot already conclude that the Proposed Stipulated Judgment ought not to be entered for the reasons outlined above.

VII. Conclusion

For the foregoing reasons, and the reasons set forth in the other pleadings filed by the Miners, this Court should decline to enter the Proposed Stipulated Judgment, or defer that decision pending discovery and an evidentiary hearing to craft appropriate relief.

Dated: March 13, 2006

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By: _____
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