

ENVIRONMENTAL LAW FOUNDATION
 James R. Wheaton, State Bar No. 115230
 Lynne R Saxton, State Bar No. 226210
 1736 Franklin Street, 9th Floor
 Oakland, CA 94612
 Ph (510) 208-4555
 Fax (510) 208-4562

LAW OFFICES OF ROGER BEERS
 Roger Beers, State Bar No. 046524
 202 Glenwood Avenue
 New London, CT 06320
 Ph (860) 701-0499
 Fax (860) 701-0599

Attorneys for Plaintiffs Karuk Tribe of California,
 and Leaf Hillman

SUPERIOR COURT OF CALIFORNIA
 COUNTY OF ALAMEDA
 HAYWARD DIVISION

Karuk Tribe of California;
 and Leaf Hillman,

Plaintiffs,

vs.

California Department of Fish
 and Game; and Ryan Broddrick,
 Director, California Department of
 Fish and Game,

Defendants.

The New 49'ers, *et. al.*, and Gerald Hobbs,

Intervenors.

Case No.: RG 05 211597

**PLAINTIFFS' CASE STATUS
 STATEMENT**

DATE: October 17, 2006

TIME: 9:00 a.m.

DEPT: 512 (Hayward)

JUDGE: Hon. Bonnie Sabraw

1 **I. INTRODUCTION**

2 At the Case Management Conference on September 8, 2006, the Court requested, *inter*
3 *alia*, that Plaintiffs the Karuk Tribe of California and Leaf Hillman ("Plaintiffs") submit a Case
4 Status Statement to address: (1) what, if any, evidence Plaintiffs believe is needed in addition to
5 the submission envisioned by Defendants Department of Fish and Game and its Director, Ryan
6 Broddrick ("Department") on the liability issue, and what type of proceedings would be used to
7 present such evidence; (2) what remedy or remedies Plaintiffs intend to seek should the Court
8 determine that Defendants' actions as alleged in the complaint are in violation of CEQA and Fish
9 & Game Code §§ 5653 and 5653.9, including the nature of any injunctive relief to be sought; and
10 (3) if Plaintiffs seek injunctive relief that includes the closing of any rivers to suction dredging,
11 what type of evidence they intend to use to support their request, the type of proceedings they
12 believe is appropriate (briefing with oral argument, factual hearing, or some other proceeding),
13 and estimated length of such proceeding.

14 The Court's Order came in response to the Department statement pertaining to its
15 liability, presented in its Case Management Conference Statement, dated September 6, 2006:

16 The Department of Fish and Game, as lead CEQA agency and as trustee of
17 California's fish resources, and its Director, Ryan Broddrick, are of the opinion
18 that suction dredge mining in the Klamath, Scott, and Salmon River watersheds
19 under existing regulations is resulting in deleterious effects on Coho Salmon as
20 alleged in Plaintiffs' complaint. As such, the Department stipulates to entry of
21 judgment by the Court: (1) finding the Department is not in compliance with Fish
22 and Game Code sections 5653 and 5653.9; (2) finding under CEQA that such
23 deleterious effects on Coho Salmon constitute a substantial change in
24 circumstances under which the Department is currently carrying out the suction
25 dredge permitting program under the existing regulations; and (3) ordering the
26 Department to take necessary steps to bring its suction dredge mining regulations
into compliance with Fish and Game Code Sections 5653 and 5653.9, and to
comply with CEQA. The steps necessary for the Department to bring the existing
suction dredge mining regulations into compliance with Fish and Game Code
must necessarily include a timely request by the Department for and an
appropriation by the Legislature of sufficient funding for the Department to take
appropriate action under the APA and CEQA.

27 Defendants' Case Management Conference Statement, p. 2.
28

II. RESOLUTION OF THE LIABILITY PHASE OF LITIGATION

Plaintiffs' complaint seeks a declaratory judgment that the Department's pattern and practice of issuing suction dredge mining permits is a violation of CEQA and a violation of the mandate in Fish and Game Code § 5653(b) that the issuance of such permits not be "deleterious to fish." Plaintiffs' Complaint, p. 1-2. Plaintiffs contend that the Court may determine liability in a declaratory judgment action based on the Department's submission of: (1) a stipulation to the Court that it is not in compliance with CEQA or Fish & Game Code Sections 5653 and 5653.9; and (2) a declaration stating the factual basis for its admission.

An action for declaratory judgment seeks a determination of the rights and obligations of the parties. California Code of Civil Procedure ("CCP") § 1060. Thus, the Court should find that an administrative agency's admission that its own regulations are not in compliance with the law determinative of liability in such an action. This is particularly significant in the present matter, in which the Department is lead agency under CEQA and the trustee for the public's fishery resources. Thus, unless the factual basis on which the Department relies is clearly erroneous, the Court should give deference to the Department's interpretation of its regulations when it admits that suction dredge mining under the existing regulations causes deleterious effects to Coho Salmon in certain watersheds. *See, e.g., Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal.App.4th 1089, 1103-1104 (courts generally defer to an administrative agency's interpretation of a regulation involving its area of expertise, unless the interpretation "flies in the face of the clear language and purpose of the interpreted provision.").

"It is the general rule that an intervention will not be allowed when it would retard the principal suit . . . or delay the trial of the action, or change the position of the original parties." *Willett v. Jordan* (1934) 1 Cal. 2d 461, 465 (internal quotation and citation omitted); *see also Beshara v. Goldberg* (1963) 221 Cal. App. 2d 392, 396. Although the Interveners the New 49ers' and Gerald Hobbs' ("Interveners") are already parties to this litigation, the legal principal is aptly relevant in that they should not be permitted to prolong litigation by opposing the Department's liability when the Defendant has offered an admission to the contrary.

1 Additionally, Interveners will have an opportunity to address any factual disputes about the harm
2 caused to Coho and other special status species from suction dredge mining during the
3 rulemaking process.

4 Furthermore, a judgment regarding the Department's liability does not directly affect the
5 Interveners' interests in this matter. The Interveners' interests pertain to whether, and what,
6 interim remedy the Court may grant while the Department is conducting a rulemaking, which is
7 presumably the action it will take to come into compliance with CEQA and Fish & Game Code
8 §§ 5653 and 5653.9. *See, e.g.,* Objections of the New 49ers, Inc., and Raymond W. Koons To
9 The Proposed Stipulated Judgment, January 10, 2006, p. 1 (Interveners The New 49ers oppose
10 the Proposed Stipulated Judgment between Plaintiffs and Department based on the interim relief
11 agreed upon by parties). Thus, the Court should exercise its discretion to rule on the issue of
12 liability, regardless of a contest to the Department's admission that its regulations are not in
13 compliance with CEQA and Fish & Game Code §§ 5653 and 5653.9.

14 However, should the Court require additional evidence to determine liability, other than
15 the Department's stipulation and factual support for its position, Plaintiffs propose to serve a
16 limited set of Requests for Admission on the Department. As matters admitted in response to a
17 request for admission is conclusively established against the party making the admission,
18 Plaintiff contends that such responses will be sufficient to determine the issue of liability. *See*
19 CCP § 2033.410.

20 Plaintiffs further contend that the October 17, 2006 or a subsequent Case Management
21 Conference thereafter will be an appropriate proceeding for the Department to submit the
22 necessary information to the Court.

23 **III. RESOLUTION OF THE REMEDIAL PHASE OF LITIGATION:**

24 In addition to the other stipulations presented by the Department in its September 6, 2006
25 Case Management Conference Statement, Plaintiffs request that the Court order the Department
26 to take the necessary steps to come into compliance with CEQA and Fish & Game Code §§ 5653
27 and 5653.9 *within a period of eighteen (18) months from entry of judgment.* Plaintiffs
28 understand the financial constraints the Department faces to commence a rulemaking for the

1 regulations of its suction dredge mining permitting program, and Plaintiffs appreciate that the
2 Department seeks to secure the appropriate funding in order to do a comprehensive review of
3 these regulations. However, such financial constraints do not alter the Department's legal duty
4 to comply with CEQA and Fish & Game Code §§ 55653 and 5653.9. A period of eighteen
5 month from entry of judgment would allow the Department six months to submit its budget
6 proposal to the Legislature and determine its 2007-2008 budget, which Plaintiff understands is
7 released in June 2007. The Department will then have 12 months to initiate and complete a
8 rulemaking in compliance with the APA. Plaintiff makes this request on the basis that the Court
9 has discretion to grant such a request in an equitable action, such as this.


10 Lastly, Plaintiffs' fundamental goal in this litigation has been to require the Department
11 to conduct a proper environmental review of its suction dredge mining regulations and
12 implement necessary measures to protect the Coho Salmon and other endangered and special
13 status species of fish, which have been listed subsequent to the 1994 EIR, from the harmful
14 effects caused by suction dredging. Plaintiffs contend that the most protective mitigation
15 measures for the Coho and other special status species can be best procured through a formal
16 rulemaking procedure. Due to the fact that an injunction that seeks to closings certain portions
17 of rivers would require an evidentiary hearing, and that such a hearing could significantly delay a
18 final judgment in this matter, Plaintiffs will forego their right to seek interim injunctive relief.
19 Plaintiffs' decision to forego such relief was made after long deliberations and in order to
20 expedite the commencement of the rulemaking process, which has been the envisioned outcome
21 of the CEQA matter since the inception of this case.

22 IV. CONCLUSION

23 For the reasons stated above, Plaintiffs request that the Court: (1) enter a judgment based
24 on the Department's stipulations, identified above, upon a submission of the Department's
25 stipulation of liability and factual support thereof; and (2) order the Department to take the
26 necessary steps to come into compliance with CEQA and Fish and Game Code §§ 5653 and
27 5653.9 within eighteen months from entry of judgment.

Respectfully submitted,

Dated: October 2, 2006


Lynne R. Saxton, Esq.
Attorney for Plaintiffs