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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	Case No.: RG 05 211597 PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO MOTION TO INTERVENE DATE: January 26, 2006 TIME: 9:00 a.m. DEPT: 512 (Hayward) JUDGE: Hon. Bonnie Sabraw

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

Seven months after this action was filed and after a settlement has been reached between the parties, intervention is now sought by third parties. The New 49'ers and Raymond W. Koons (hereinafter "Proposed Interveners") seek this intervention based on their alleged interests in federal mining claims. Their papers mischaracterize the nature of those claims, and they are not interests in any "property" which is the subject of this action. Plaintiffs' claims herein are concerned exclusively with the California Department of Fish and Game's future issuance of suction dredging permits. The Proposed Interveners also seek to inject a variety of issues into this case that are extraneous to the one remaining matter before the Court – the existing parties' request that the Court enter a Stipulated Judgment.

Plaintiffs submit that the Proposed Interveners are not entitled to intervene as of right. However, given this Court's broad latitude to allow permissive intervention, Plaintiffs do not oppose a limited intervention for the purpose of allowing the Proposed Interveners to present their opposition to the Stipulated Judgment.

II. STATEMENT OF FACTS

A. The Proceedings to Date in this Action

Plaintiffs filed this action on May 6, 2005, seeking declaratory and injunctive relief against the California Department of Fish and Game and its Director (hereinafter "DF&G"). The Complaint alleged that DF&G's annual issuance of permits for suction dredge mining imperils a state and federally listed threatened species, the Coho salmon, and other species of special concern in their habitat in the Salmon, Scott, and Klamath Rivers, and their tributaries.

The Complaint did not challenge the issuance of, or seek any relief against, any existing permits, but rather challenged DF&G's pattern and practice of continuing to issue such permits. The Complaint alleged that this pattern and practice was in violation of the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code §§ 12000 *et seq.*, since it failed to take into account the impact on suction dredging on newly listed special status species and failed

to implement the mitigation earlier promised to address such listings. The complaint also alleged that Fish and Game Code § 5653(b) was violated. The latter provision prohibits issuing any suction dredge permits that would be "deleterious to fish."[1] As relief, Plaintiffs sought an injunction against the future issuance of suction dredge mining permits on the referenced rivers until Defendants had complied with these laws.

Defendants filed an answer denying the allegations of the complaint, and Plaintiffs requested that DF&G prepare an administrative record for the case. The parties held a settlement meeting on July 13, 2005, and agreed to continue settlement discussions thereafter. Because it still appeared that the matter would have to be tried, the Court at a Case Management Conference on July 22, 2005, set early deadlines for filing the administrative record, briefing the matter and for a hearing on the merits so that the matter could be decided before the next season of DF&G's issuance of annual suction dredge mining permits. Further settlement discussions were held, and the parties requested and the Court granted 30 day continuances of the previous deadlines.

In late November, 2005, the parties reached a settlement, embodied in a Joint Stipulation. Among other things, the Joint Stipulation provided for the Court's entry of a Stipulated Judgment. The Stipulated Judgment would restrain DF&G from issuing suction dredge mining permits for certain segments of the rivers or their tributaries or for certain periods of the year pending its compliance with CEQA. It anticipated that DF&G would hold a rulemaking for this purpose, and based thereon could seek from the Court a termination of the injunction in the Stipulated Judgment.

The parties presented the Stipulated Judgment to the Court with a request that it be

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[1] As alleged in the Complaint, DF&G determined in an Environmental Impact Report ("EIR") issued in 1994 that rivers inhabited by species of special concern or threatened or endangered species (hereinafter "special status species") must be closed to suction dredge mining to prevent significant impacts to the species. The listing of the Coho salmon and other species as special status species occurred shortly thereafter. The Complaint alleged that Defendants have continued annually to issue suction dredge mining permits without closing to this mining the rivers inhabited by the Coho and other species of special concern and without conducting any analysis under CEQA of the impacts on the Coho and other species of special concern

entered at a Case Management Conference set for December 20, 2005. In the meantime, a motion to intervene was filed by the New 49'ers and Raymond W. Koons. At the Case Management Conference, the Court set a hearing date for January 26, 2006, at which time the Court would consider both the motion to intervene and the existing parties' request to enter the Stipulated Judgment.

B. The Proposed Interveners have Mischaracterized their Interests and the Plaintiffs' Actions.

The Proposed Interveners assert their property interests in federal mining claims as their principal basis for seeking intervention herein. *See* Memorandum of Points and Authorities in Support of Motion for Leave to Intervene ("Int. Mem.") at 1, 10. However, it is apparent from their Proposed Verified Complaint in Intervention ("Int. Comp."), that the New 49'ers does not itself engage in mining in these areas, but leases mining claims from others so that it can sell "access" to people to conduct suction dredge mining. Int. Comp. ¶ 1; Hillman Dec. ¶ 4. Similarly, although their Complaint alleges that Raymond W. Koons is an individual mining claim holder, he also leases his mining claims to the New 49'ers. *See Karuk Tribe v. U.S. Forest Service*, 379 F.Supp.2d 1071, 1077 (N.D. Cal. 2005). The New 49'ers in turn charges a substantial fee for people to become "members" of the New 49'ers "Club" in order to gain access to the claims leased by the New 49'ers. Hillman Dec. ¶ 4. [2]

Thus, the primary purpose for the New 49'ers' location and leasing of mining claims is not for the New 49'ers itself to conduct mining operations. Nor, in general, do its members own any mining claims. Rather, the suction dredge operations of the members of the Club are conducted primarily for recreational enjoyment, and not to obtain substantial revenues above and beyond the total financial cost to the members to conduct such operations. The New 49'ers webpage is replete with advertising the "adventure" of gold mining. *See*

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[2] The New 49'ers charges a "membership" fee of $3,500. See http://www.goldgold.com/joinform1.htm This allows the "member" year-round access to the lands and waters that the New 49'ers makes available to its members. A smaller $100 "associate membership" fee allows someone to access to these lands and waters for a week. *See* Hillman Dec., Exh. 1.

http://www.goldgold.com/eventsschedule.html. The company focuses on the "family" recreation aspect of small-scale suction dredging and other activities, including potlucks and BBQs. *See* http://www.goldgold.com/eventsschedule.html. *See also* Hillman Dec. ¶ 4, Exh. 1.

While this Court need not decide this question, it is certainly arguable that this recreational mining by the members of the new 49'ers "Club," or by any person, is not authorized by the Mining Law of 1872 – and, indeed, is a perversion of that statute's allowance of mining claims on federal lands. Mining under the 1872 Mining Law is based on the filing of mining claims for legitimate mining operations. 30 U.S.C. §§ 26, 29. *See Cameron v. U.S.*, 252 U.S. 450, 460 (1920). The goal of the Mining Law, and the validity of the mining claims themselves, is premised on the "discovery of a valuable mineral deposit." 30 U.S.C. § 22. *See Cole v. Ralph*, 252 U.S. 286, 296 (1920).

Nevertheless, the Proposed Interveners argue as a further basis for their intervention that the proposed Stipulated Judgment herein would deny them the opportunity to conduct on-the-ground "assessment work" and they will "forfeit their claims." Int. Mem. at 10, 12. That is false and based on a complete misstatement of federal mining law and claim requirements. First, such "assessment work" is not required if the claimant simply submits a yearly "claim maintenance fee" of approximately $100, as the Proposed Interveners themselves concede. Int. Comp. ¶ 8.[3] Second, small mining claimants (holding ten or less claims) who prefer to do the assessment work instead of paying the fee, can perform any such work entirely off-site to keep the claim current. *See Chambers v. Harrington*, 111 U.S. 350 (1884). Third, mining claimants are exempted from having to pay any fee or do any assessment work if they are denied access to their claims.[4] Finally, the inability to acquire a permit to perform suction dredging does not bar

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[3] Congress enacted this allowance for the payment of the fee in lieu of performing the assessment work in a series of appropriation bills starting in 1992. See Pub. L. No. 102-382, 106 Stat. 1374, 1377-78 (1992). A more recent extension of these provisions occurred in 2001. See Pub. L No. 107-63, 115 Stat. 414 (2001).

[4] According to federal mining law, the performance of the required assessment work "may be deferred by the Secretary of the Interior as to any mining claim or group of claims in the United States upon the submission by the claimant of evidence ... that other 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." 30 U.S.C. § 28b. *See also* 43

all access to the claim, or prohibit other types of activities that might constitute assessment work.

The Proposed Interveners also invite this Court to undertake an inquiry into the federal laws and regulations affecting suction dredge mining. In their proposed Complaint, they allege that the Forest Service has certain procedures for regulation of suction dredge mining that "avoid even the slightest risk of any impact to fish." Int. Comp. ¶¶ 13-14. In their memorandum, they then argue that "[t]he existence of a comprehensive federal regulatory scheme addressing precisely the same issues raised by the plaintiffs under parallel state statues is surely a factor militating against the imposition of injunctive relief." (p. 6). Indeed, the Proposed Interveners also assert that "serious questions" are raised that federal law preempts the state regulatory structure here. Int. Mem. at 10, n. 6.

Not only do the Proposed Interveners seek to lead the Court into detours into federal law, but their assertions, quoted above, are in direct contradiction to what they told the Federal Court in the Federal Action. In that action, they argued that the existence of *California's regulatory scheme* for suction dredge mining has the effect of "mooting the entire question of federal regulation for mining conducted under California suction dredge permits." *See* Beers Dec., Exh. 1 at 4, note 2 ("The Miners' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment," filed May 17, 2005). They emphasized: "At the least, the statue counsels this Court intent to give substantial weight to California's comprehensive regulatory scheme for suction dredge mining in reviewing the Forest Service's decisions herein." *Id.*

Before the Federal Court, they further disavowed any notion that the federal regulations preempted the California regulations, contrary to the "serious questions" that they are alleging here. In particular, they argued to the Federal Court that the federal regulations in question were "silent on the question of pre-empting the California regulations" and cited authority for the proposition that any attempt by federal regulations to preempt state laws must be done with "specificity." *Id.* Indeed, they cited to the Federal Court – but not to this Court – the federal

C.F.R. § 3835.11 (federal Interior Department mining claim regulations applicable to lands in question).

statute which makes clear there is no preemption. *Id.* (16 U.S.C. § 481 provides that "[a]ll waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes *under the laws of the State wherein such national forests are situated*, or under the laws of the United States and the rules and regulations established thereunder.").

Finally, the Proposed Interveners seek to further cloud this action by aspersions cast upon the Plaintiffs. In particular, they allege that the Tribe is acting in bad faith in filing this lawsuit because the New 49'ers reached voluntary "handshake" agreements with the Tribe that "satisfied the Tribe" that its concerns about suction dredge mining had been adequately addressed. See Int. Comp. ¶ 12; Declaration of David McCracken ("McCracken Dec.") ¶¶ 12 -48. Their papers also allege that the Tribe's commitment to protect fish species is in conflict with "their desire to kill and eat these species," based on the asserted observation that members of the Tribe have engaged in illegal fishing with "dip nets." Comp. ¶ 29. Finally, they allege that the Tribe has engaged in "logging activities" which "created thousands of times more surface disturbance" than all of the suction dredge mining combined. McCracken Dec. ¶ 9. As reflected in the accompanying Declaration of Leaf Hillman, Vice Chairman of the Karuk Tribe and himself a plaintiff herein, none of these allegations is true.

III. IF GRANTED, THE INTERVENTION SHOULD BE LIMITED.

In *People v. Brophy*, 49 Cal. App. 2d 15 (1942), the court held that the burden rests upon the one seeking to intervene to show that this is a proper case for intervention. As demonstrated below, the Proposed Interveners have not met that burden in claiming that they are entitled to intervene as of right herein. However, Plaintiffs recognize that this Court has broad discretion to allow permissive intervention, and do not oppose intervention on that basis for the limited purpose of allowing the Proposed Interveners to present their opposition to the requested Stipulated Judgment.

A. The Proposed Interveners are Not Entitled to Intervene as of Right.

The Proposed Interveners attempt to justify their intervention as of right under the

Federal Rules of Civil Procedure rather than California law. Int. Mem. at 8.[5] However, it is California law that is controlling – in particular, Section 387 of the Code of Civil Procedure. That provision allows intervention as of right only "if any provision of law confers an unconditional right to intervene or if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action," among other requirements. In this case, there is no unconditional right to intervene granted to the Proposed Interveners by statute, and the "property interest" they claim is not the subject of this action. Nor is their intervention *required* because of alleged "participational interests in CDFG decisionmaking." Int. Mem. at 11.

The principal argument asserted for an entitlement to intervene is the allegation that they hold "unpatented mining claims" which are property interests. Int. Mem. at 10-11. As set forth above, the Proposed Interveners have not in fact demonstrated that they own and are themselves actively working any such property interests, and recreational suction dredge mining is not a property interest protected by federal law. More fundamentally, whatever their legal status, the "unpatented mining claims" are not the property "which is the subject of this action," as required by C.C.P. § 387. The subject of this action is the annual suction dredging permits issued by DF&G under state law.

Nothing in the Fish & Game Code or DF&G's regulations for the issuance of suction dredge mining permits purports in any manner to require or affect any kind of federal "unpatented mining claims." *See* Fish & Game Code §§ 5653 *et seq.*; 14 Cal. Code Regs. §§ 228 *et seq.* These are annual permits issued for the use of suction dredging equipment in California rivers and streams under the jurisdiction of DF&G. *See* 14 Cal. Code Regs. § 228(a) ("Every person who operates the intake nozzle of any suction dredge shall have a suction dredge permit

[5] For example, Proposed Interveners rely on a Ninth Circuit decision to claim that their allegations must be accepted as true for purposes of the motion to intervene. In that case, however, the court made clear that "we do not foreclose consideration of the pleadings and affidavits of opponents to intervention." *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). In that case, the Ninth Circuit cited with approval *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981), which held that "motions to intervene are usually evaluated on the basis of well pleaded matters in the motion, the complaint, and any responses of opponents to intervention."

in his/her immediate possession." They are issued alike to people who have federal mining claims and those who don't.

Thus, the Proposed Interveners are not *entitled* to intervene because of the allegations that they will "forfeit" or "lose" their federal mining claims as a result of the restrictions on California suction dredge mining permits in the proposed Stipulated Injunction. As demonstrated above, these allegations are simply wrong as a matter of law. Moreover, even if *arguendo* they would suffer these purported injuries, they are "consequential" and "indirect" and not a basis for intervention. *See Bechtel v. Axelrod*, 20 Cal.2d 390, 392 (1942); *Allen v. California Water & Tel. Co.*, 31 Cal.2d 104 (1948).

Nor do the Proposed Interveners gain anything from the false allegation that the suction dredge mining permits issued annually by DF&G "are properly thought of as ongoing permits." Int. Mem. at 12. There is nothing "ongoing" or "continuing" about these permits, and the Proposed Interveners cite nothing to support this characterization. DF&G's regulations provide that "[s]uction dredge permits shall be valid from the first of the year for one calendar year or if issued after the first of the year, for the remainder of that year." 14 Cal. Code Regs. § 228(a). In other words, people desiring to engage in suction dredging have to apply each year for suction dredge mining permits. Obviously, the number of such applications may vary substantially from one year to the next.

Nor is intervention as of right established by the single-sentence claim that the Proposed Interveners "have important participational interests in CDFG decisionmaking." Int. Mem. at 11. The Proposed Interveners had no right to participate in the settlement negotiations in this case. Nothing in that settlement forecloses their participation in future rulemakings that may affect suction dredge mining. No California case has ever held that this kind of vague allegation establishes a right to intervene in a case.

Finally, the Proposed Interveners allege that the Plaintiffs have "plainly acted in bad faith" and may have engaged in "collusion" with DF&G. Int. Mem. at 11. There is no

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substantiation for these charges, and they are clearly wrong. As set forth above in the accompanying Declaration of Leaf Hillman, there was never any agreement between the Plaintiffs and the Proposed Interveners that the Plaintiffs' concerns about the impacts of suction dredge mining had been fully satisfied or that Plaintiffs would not pursue their concerns in other forums. As must be evident to the Court from the first Case Management Conference on July 22nd of last year, the parties were proceeding vigorously with the litigation of this matter at the same time that they had embarked on settlement discussions. As those settlement discussions became more serious, they requested continuances of the early deadlines for filing the administrative record, briefing the matter and for the hearing on the merits.

There is not a single shred of evidence – or even a specific allegation – presented by the Proposed Interveners in support of their "bad faith" or "collusion" hypotheses. In *La Mesa Lemon Grove & Spring Valley Irrig. Dist. v Halley*, 195 Cal. 739, 742 (1925), the court rejected a proposed complaint in intervention which attempted to enlarge the issues in the case by charging that the action is "collusive, unnecessary and not defended in good faith." The court noted that these kinds of allegations are "mere conclusions" and must be supported by facts to merit any consideration.

As to the allegations that the settlement negotiations were conducted in "secret," that characterization assumes that the Proposed Interveners were entitled to receive notice of this action and to participate in the settlement discussions. As noted above, even if the Proposed Interveners had been parties to this lawsuit from the outset, they would have had no right to participate in the settlement discussions. In fact, the parties were not required to provide notice of the lawsuit to the Proposed Interveners.

The Proposed Interveners apparently concede that they are not "indispensable parties" to this lawsuit. Int. Mem. at 12. Nor were they entitled to notice of the lawsuit under Public Resources Code § 21167.6.5, which requires that a plaintiff in a CEQA suit "name, as a real party in interest, any recipient of an approval that is the subject of [the] action." This provision was intended to codify the court decisions which held that a CEQA plaintiff was required to

name as a real party in interest the recipient of a permit or approval that was issued in an administrative proceeding and subsequently challenged by the CEQA lawsuit. *See, e.g., Sierra Club v. California Coastal Comm'n*, 95 Cal.App.3d 495, 502 (1979). In that circumstance, the "recipient" --- e.g., the applicant for a development project who receives a challenged conditional use permit from a local government – has an identified stake in the challenge and is readily identifiable. However, no California case has ever suggested that a future, unknown applicant must be named, and Section 21167.6.5 does not require any such thing.

In this case, Plaintiffs' complaint did not challenge any suction dredge mining permit that had been issued, but only DF&G's "pattern and practice" of continuing to issue such permits without complying with CEQA. *See* Complaint ¶¶ 1, 34, 35. The reason that existing permits were not challenged and the recipients of those permits not named in the lawsuit was specifically set forth in Paragraph 37 of the Complaint, as follows:

> In addition, since the permits issued by Defendants are not restricted to any particular water body, Plaintiffs are unable to challenge the individual permits used for suction dredge mining in the Coho salmon habitats (and the habitats of the aforementioned species of special concern). Defendants issue thousands of permits each year, and Plaintiffs have no way of determining from these permits where a particular miner will dredge. It is impractical and a waste of judicial resources for Plaintiffs to challenge suction dredge mining permits one at a time, rather than with a single lawsuit. Plaintiffs direct its challenge to the cumulative effects of dredging in the aforementioned water bodies, not to the effects of any individual dredger.

To construe Section 21167.6.5, as Proposed Interveners assert, would have required Plaintiffs to *guess* what individuals would be applying for permits in the succeeding year as well as where those permits might be used. It would require joining thousands of such individuals as real parties in interest in the lawsuit and serving all of them with a copy of the complaint within 20 days of service on DF&G. This is absurd. Section 21167.6.5's requirement to serve the "recipients" of particular permits challenged cannot be read to require service on all potential

future permit applicants.[6]

The Proposed Interveners are also wrong in asserting that they were entitled to notice of the settlement meetings of the parties required by Public Resources Code § 21167.8(a). Int. Mem. at 10. That provision requires that the defendants serve notice of a settlement meeting on "each party" or its counsel. As Proposed Interveners themselves characterize that provision, its notice requirements "are plainly intended to operate in a context where real parties in interest...*are participating as parties.*" *Id* (emphasis added). The Proposed Interveners were not required to be named as "parties" to the litigation, were not parties when the notice was sent, and are not parties even now prior to the ruling on their motion to intervene. Thus, there was no requirement that either the Plaintiffs or the Defendants herein serve notice of any settlement meeting "on the permit holders generally" (Int. Mem. at 10) – whatever that may mean.

In sum, the Proposed Interveners have presented no basis for intervening as of right in this action.

B. If this Court Exercises its Discretion to Grant Permissive Intervention to the Proposed Interveners, the Scope of their Intervention is Necessarily Limited to their Statement of Opposition to the Proposed Stipulated Judgment.

Plaintiffs submit that the Proposed Interveners have made no showing that would entitle them to intervene as of right. However, Plaintiffs also recognize that this Court has broad discretion to grant permissive intervention to an applicant, and accordingly Plaintiffs do not oppose the grant of permissive intervention for the purpose of allowing the Proposed Interveners to present their opposition to the proposed Stipulated Judgment.

The existing parties have reached a final settlement of the claims alleged herein by Plaintiffs against Defendant DF&G. That settlement is contained in the Joint Stipulation of the parties. The only matter now pending before this Court is the parties' request that the Court enter

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[6] If Section 21167.6.5 were read in this absurd fashion, its resulting requirement to serve thousands of persons who *may* be future permit applicants could not be satisfied, as Proposed Interveners suggest, by serving only a "subset" of them. Int. Mem. at 10. Either every such potential future applicant would be required to be named or none.

the proposed Stipulated Judgment. Code of Civil Procedure § 664.6 expressly grants the Court the authority to enter the Stipulated Judgment requested by the existing parties to this litigation pursuant to their Joint Stipulation. In general, the Court's inquiry in this context is limited to whether the parties entered into a valid and binding settlement agreement. *Viejo Bancorp, Inc. v. Wood*, 217 Cal.App.3d 200 (1989).

There is nothing left for adjudication regarding the claims alleged in the Complaint. *See Malouf Bros. v. Dixon*, 230 Cal.App.3d 280 (1991) (the questions of fact that the complaint and answer raised in the parties' underlying suit were resolved without trial by the parties' settlement). If their intervention is granted, the Proposed Interveners must take the case in the present posture. An intervener is bound by the record of the action at the time intervention is sought. *Allen v. California Water & Tel. Co.*, 31 Cal. 2d 104, 109 (1947); *Librascope, Inc. v. Precision Lodge No. 1600, etc.*, 189 Cal. App. 2d 71, 76 (1961).

The Proposed Interveners correctly note that upon objection by a third party to a stipulated judgment the standard is whether the stipulation "is contrary to public policy, or one that incorporates an erroneous rule of law." Int. Mem. at 9 (citing *Plaza Hollister Limited Partnership v. County of San Benito*, 72 Cal.App.4th 1, 12 (1999)). *See also California State Auto. Ass'n Inter-Ins. Bureau v. Superior Court*, 50 Cal. 3d 658, 664 (1990). This high threshold for rejecting stipulated judgments is set because – in the words of the *Plaza Hollister* case – settlements of litigation are "highly favored" and "[g]enerally, when parties decide to eliminate the risks of further litigation by stipulated agreement, . . . the courts should respect the parties' choice and assist them in settlement." 72 Cal.App.4th at 12.

Thus, the Proposed Interveners are not entitled at this stage of the proceeding to litigate the merits of the Plaintiffs' case. Nor do their allegations that the Stipulated Judgment will have an impact on their recreational suction dredging have any bearing on the existing parties' request that the Court enter that Stipulated Judgment. The Proposed Interveners are limited at this stage of the proceeding to presenting whatever showing they can make that the proposed Stipulated Judgment "is contrary to public policy, or one that incorporates an erroneous rule of law."

Neither their proposed Complaint nor their memorandum of points and authorities contains any specific allegation that the proposed Stipulated Judgment violates this standard. Plaintiffs believe that it is impossible for the Proposed Interveners to meet this burden, but we will respond to whatever showing they attempt to make in our response to their opposition to the settlement due January 10, 2006.

However, the Proposed Interveners suggest in their papers that they seek by this intervention to litigate issues beyond the existing parties' request for this Court to enter the Stipulated Judgment. They seek to cast aspersions on the Plaintiff Karuk Tribe of California – by denigrating their commitment to protect fish species, by asserting that their "dip net" fishing is illegal, by accusing them of harmful but undefined "logging activities," and by asserting that they have acted in bad faith toward the Proposed Interveners and may be in "collusion" with the Defendant DF&G herein. Comp. ¶¶ 12, 29, 45; Int. Mem. at 11. These allegations are preposterous (*see* Hillman Dec. ¶ 12), and clearly not cognizable in the present context.

They also apparently seek to prove that the fish-protection rationale for any regulation of suction dredge mining is flawed. They allege that by their heavy vacuuming of the river bottoms where endangered species exist, they are providing these fish with food and "actually improving fish habitat during the process." Int. Mem. at 4. They want to revisit the 1994 EIR prepared by DF&G regarding suction dredge mining with their own interpretations of what that document means. And, they claim to be in possession of "overwhelming evidence refuting adverse effects on aquatic species since 1994." Int. Mem. at 7.

They even assert that the federal and state "special status" listings of the Coho salmon and other species which the Stipulated Judgment are designed to protect are "arbitrary, capricious and contrary to state and federal law." Int. Comp. ¶ 36. At bottom, they allege that any issue relating to the effects of suction dredge mining "appears to be less an issue of environmental protection and more of an issue of certain organized individuals and groups being unwilling to share the outdoors with others without like interests." *Id.* ¶ 22.

The Proposed Interveners also apparently want to contest the propriety of venue in this

Court. Int. Comp. ¶ 31. Ultimately, they serve notice in their intervention memorandum that they "do propose to 'enlarge' the case" by revisiting issues raised by the Plaintiffs' complaint (Int. Mem. at 13), regardless of the parties' settlement of those issues and the pendency before this Court only of the parties' request to enter the Stipulated Judgment.

California courts have held that the original parties have a right to conduct their lawsuit on their own terms and "[t]he issues of the action may not be enlarged by the proposed intervention." *Fireman's Fund Ins. Co. v. Gerlach*, 56 Cal.App.3d 299, 303 (1976). *See also People v. Brophy*, 49 Cal. App. 2d 15, 34-35 (1942) ("An intervener cannot be permitted to broaden the scope or function of such special proceeding by urging claims or contentions which have their proper forum elsewhere.").

While the Proposed Interveners would also like to take this Court on a detour through their alleged mining interests under federal law and the impact of the Stipulated Judgment thereon, it is clear that these kinds of matters are beyond the proper scope of their participation as interveners at this stage of the proceeding. The interveners will not be allowed to go into other collateral or future issues consequent on what may follow performance of what was sought originally in the suit. *La Mesa Lemon Grove & Spring Valley Irrig. Dist. v. Halley*, 195 Cal. 739 (1925)

IV. CONCLUSION

The Proposed Interveners do not meet the standards for intervention of right, because they have not shown that they have any purported property interests which are the "subject" of this litigation. To the extent that the Court is disposed to grant permissive intervention, it should make it clear that the interveners must take the case as they find it, are limited to the legal standards for when the Stipulated Judgment may be approved, and may not expand the litigation into new and different areas.

Dated: January 12, 2006

Respectfully submitted,

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By Roger Beers

Attorneys for Plaintiffs Karuk Tribe of California, and Leaf Hillman

PROOF OF SERVICE

I am employed in the County of Alameda, over the age of 18 years, and not a party to the within action. My business address is 2930 Lakeshore Avenue, Oakland, California 94610.

On January 12, 2006 in the matter of KARUK TRIBE OF CALIFORNIA, et al. v. CALIFORNIA DEPARTMENT OF FISH AND GAME, et al., Alameda County Superior Court, Hayward Division, Action No. RG 05 211597, I caused to be served the attached documents entitled as follows:

1. **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO MOTION TO INTERVENE;**
2. **DECLARATION OF LEAF HILLMAN IN SUPPORT OF PLAINTIFFS' RESPONSE TO MOTION TO INTERVENE;**
3. **DECLARATION OF ROGER BEERS IN SUPPORT OF PLAINTIFFS' RESPONSE TO MOTION TO INTERVENE;**

The methods of service were in the following manners:

a) XX By Facsimile Machine. The document was transmitted by facsimile transmission and the transmission was reported as complete and without error.

b) XX Via US Mail by placing for collection and mailing on this date, following ordinary business practices, a true and complete copy thereof in a sealed envelope, postage thereon fully prepaid, with the United States Postal Service.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 12, 2006, at Oakland, California.

Anita Albini