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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

KARUK TRIBE OF CALIFORNIA,

Plaintiff,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Defendants.

Case No. 04-4275 (SBA)

**THE MINERS' MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT**

Date: April 5, 2005
Time: 1:00 p.m.
Ctrm: 3, 3d Floor

Judge: Hon. Saundra B. Armstrong

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**MOTION**

The New 49'ers, Inc., a California corporation leasing mining claims in the Klamath National Forest, and Mr. Raymond W. Koons, an individual mining claim holder with claims in the Klamath National Forest (collectively, "the Miners"), hereby move for leave to intervene as defendants, pursuant to Rule 24 of the Federal Rules of Civil Procedure. The Miners seek leave to intervene as of right, pursuant to Rule 24(a), or, in the alternative, seek permissive leave to

intervene pursuant to Rule 24(b). This motion is noticed for hearing at 1:00 p.m. on April 5, 2005. The Miners have conferred with counsel for the plaintiff and the defendants. Counsel for the Plaintiff opposes this motion and counsel for the defendants take no position with respect to this motion.

This motion is supported by the accompanying memorandum, and the proposed Answer of the Miners is annexed hereto as Exhibit 1. A proposed order is filed herewith.

Pursuant to Local Rule 7.1(b), the Miners request that this motion be heard by a telephonic conference call.

**MEMORANDUM**

**Summary of Argument**

The New 49'ers, Inc., a California corporation leasing mining claims in the Klamath National Forest, and Mr. Raymond W. Koons, an individual mining claim holder with claims in the Klamath National Forest (collectively, "the Miners"), have valid possessory property rights recognized under federal law within the Klamath National Forest in the form of unpatented mining claims. (Proposed Answer of the Miners ¶ 3.) The Miners have for decades operated small suction dredges in these claims, typically powered by engines akin to those in ordinary lawn mowers, vacuuming stream beds in search of gold, and actually improving fish habitat in the process. (Proposed Answer of the Miners ¶¶ 22-23.) Because California regulations restrict them from operating when they might adversely affect fish, their adverse environmental impacts are insignificant, principally consisting of the fact that they "can be seen and/or heard on and around the streams and rivers where they are being operated". (Second Amended Complaint ¶ 26.) Of this tiny acorn of disruption a mighty Federal case has grown.

Through this action, plaintiff the Karuk Tribe of California (the "Tribe") plainly threatens to prevent the Miners from access to, and utilization of, their property. Indeed, when called upon to particularize their claims, the Tribe has cited several specific decision letters from the Forest Service, three of which were issued to Mr. Dave McCracken, President and General Manager of The New 49'ers, Inc. (Proposed Answer of the Miners ¶¶ 3, 5.) Indeed, the Tribe's Eighth Count is

directed *exclusively* at The New 49'ers. (Second Amended Complaint ¶ 126.) The Tribe's complaint is, for all practical purposes, filed against the Miners and those similarly situated.

Ignoring the comprehensive California regulatory scheme to which the Miners are subject, the Tribe seeks to force compliance with no fewer than nine additional Federal regulatory processes: (1) Plans of Operation pursuant to 36 C.F.R. Part 228; (2) reclamation plans and bonds pursuant to various Forest Plans issued under the National Forest Management Act, 16 U.S.C. §§ 1600-1614; (3) Formal Consultations under the Endangered Species Act pursuant to 16 U.S.C. § 1536(a)(2); (4) dredging permits pursuant to § 404 of the Clean Water Act, 33 U.S.C. § 1344; (5) National Pollution Discharge Elimination System permits pursuant to § 402 of the Clean Water Act, 33 U.S.C. § 1342; (6) State certification of the foregoing Clean Water Act permits pursuant to § 401 of the Clean Water Act, 33 U.S.C. § 1341; (7) preparation of an environmental impact statement or environmental assessment pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*; (8) special Tribal consultations pursuant to trust responsibilities and otherwise; and (9) Special Use Authorizations pursuant to 36 C.F.R. Part 251. As a practical matter, what the Tribe seeks is to send the Miners into a paperwork abyss from which they would never emerge (*see* Proposed Answer of the Miners ¶¶ 69-70), forfeiting their valuable property rights in the meantime for nonuse.[1]

Fortunately, because the adverse impacts of suction dredge mining *as actually conducted in these National Forests* exist almost exclusively in the fevered imagination of the Tribe's consultants, and for purely legal reasons discussed below, this Court need not become party to any such gross abuse of Federal authority and waste of Federal resources. The local Forest Rangers can and do adequately vindicate Federal interests (including Tribal trust obligations) through localized review and approval of Notices of Intent. (*See generally* Proposed Answer of the Miners ¶¶ 12, 32-33.)

For all these reasons, the Miners plainly have "an interest relating to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a). It is also apparent that "the

disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." Fed. R. Civ. P. 24(a). That being the case, the only remaining question for intervention as of right is whether the United States Department of Justice can adequately represent the interests of the Miners. *Id.*

While the defendants have yet to answer the Tribe's complaint, which would provide useful clarification of their positions, the Miners need only show that their interests *may be* inadequately represented. There is ample evidence of numerous conflicts between the positions of the United States Forest Service and the Miners, analyzed on a count-by-count basis in Point I(C) below. Above all else, the Forest Service's refusal to allow even operations approved by the Tribe (*see* Proposed Answer of the Miners ¶ 12, n.1) confirm that the Miners cannot reasonably rely upon the Forest Service's attorneys to represent them.

In the alternative, permissive intervention is appropriate pursuant to Rule 24(b), particularly since the Court has required prompt intervention so that granting this motion cannot "unduly delay or prejudice the adjudication of the rights of the original parties". Fed. R. Civ. P. 24(b).

**Argument**

**I. THE MINERS ARE ENTITLED TO INTERVENE IN THIS ACTION AS OF RIGHT.**

For an applicant to be entitled to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2),

> (1) the motion must be timely; (2) the applicant must claim a `significantly protectable' interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action. [citation omitted]

*Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993).

The rule is to be broadly construed in favor of allowing intervention. *United States v. Oregon*, 839 F.2d 635, 637 (9th Cir. 1988); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527

[1] Pursuant to the General Mining Law, 30 U.S.C. § 28, holders of unpatented claims such as those involved here (*see* Proposed Answer of the Miners ¶ 3) must perform expend at least $100 worth of labor annually or forfeit their claims.

(9th Cir. 1983); *see County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). A more recent Ninth Circuit decision, *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001), reiterates these standards, *id.* at 817-818, confirms that economic interests may intervene in environmental law suits that would, as a practical matter, affect those interests, *id.* at 822, and adopts a rule that district courts are required to accept as true the proposed intervenor's "well-pleaded, non-conclusory allegations", *id.* at 819-820.[2]

The Miners meet each requirement for intervention as of right.

**A. This Action Is Timely.**

Defendants have yet to respond to the Karuk Tribe's Second Amended Complaint, or even file the Administrative Record supporting the challenged decisions. In substance, it is as if the case has just been filed. Accordingly, this motion is timely.

**B. The Miners Have Significantly Protectable Interests That Are Threatened By This Action.**

At the outset, it is important to emphasize that the Miners do not have some vague, abstract, or speculative interest that they seek to protect through intervention. The Miners hold, among other things, mining claims (and leases of such mining claims) in the Klamath National Forest that have long been recognized as "property in the fullest sense of the word." *Bradford v. Morrison*, 212 U.S. 389, 394 (1909) (quoting *Forbes v. Gracey*, 94 U.S. 762, 767 (1877)); *see also United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999) (discussing scope of legal interests represented in mining claims); *United States v. Rizzinelli*, 182 F. 675, 681 (D. Idaho 1910) (miners hold a "distinct but qualified property right" with "possessory title"). The regulatory authority of the Forest Service with respect to mining is limited to regulations that do not unreasonably interfere with mining activities. *See generally Clouser v. Espy*, 42 F.3d 1522, 1529-30 (9th Cir. 1994), *cert. denied*, 515 U.S. 1141 (1995); 16 U.S.C. § 478. These authorities sharply distinguish this case from one in

[2] For this reason, the Miners interpret Local Rule 7.5 to require their factual contentions to be supported by citation to the proposed pleading. They can, if required, file additional declarations to provide further record support.

which the Forest Service (or other Federal agency) has discretion whether or not to permit the challenged activity at all.

In this Circuit, "`the "interest" test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *County of Fresno*, 622 F.2d at 438 (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). In particular, it is only a "threshold" test, "rather than the determinative criterion for intervention." *Id.* Moreover, the potential impairment of the interest at stake need not be direct; even the potential *stare decisis* effect of any rulings in this action would be an "important consideration" militating in favor of permitting intervention. *United States v. Oregon*, 839 F.2d at 638; *see also Smith v. Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981).

With regard to the nature of the interest, "no specific legal or equitable interest need be established". *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). Moreover, the interest of the intervenor does not have to be one protected by the statute at issue in the case. *Sierra Club*, 995 F.2d at 1483-84. As the Ninth Circuit has explained, to "clarify the current law," the proposed intervenor must merely demonstrate that (1) "the interest [asserted] is protectable under *some law*" and (2) "there is a relationship between the legally protected interest and the claims at issue". *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1493-94 (9th Cir. 1995) (quoting *Sierra Club*, 995 F.2d at 1484; emphasis added). Thus economic interests are cognizable interests for purposes of intervention, even in environmental cases. *See Sierra Club*, 995 F.2d at 1483-84.

Moreover, the Miners also have an interest in appropriate compliance by defendants and other federal agencies with the laws and regulations pertinent to suction dredge and other forms of mining. As we develop below, the Tribe seeks to replace a simple, workable regulatory scheme that meets all legitimate interests of the Tribe with a structure of multiple, overlapping regulatory schemes far beyond anything ever intended by Congress.

**C. The Interests of the Miners and its Members Are Not Adequately Represented by Existing Parties.**

The Ninth Circuit

> "has consistently followed *Trbovich v United Mine Workers*, 404 U.S.

> 528, 538 n.10, 92 S.Ct. 630, 636 n.10, 30 L.Ed.2d 686 (1972), in holding that the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests 'may be' inadequate and that *the burden of making this showing is minimal*."

*Sagebrush Rebellion*, 713 F.2d at 528 (emphasis added). Here there is compelling evidence that the existing parties will not adequately represent the interests of the Miners.

Obviously the Tribe does not represent the Miners' interests concerning mining operations. As alleged in detail throughout the proposed Answer of the Miners, the Tribe seeks restrictions on mining that lack any sound basis in science or resource management, and are contrary to law. Their position is diametrically opposed to that of the Miners

The federal defendants also do not adequately represent the Miners' interests. The Miners have a direct stake in continued mining operations that no other party does. The U.S. Forest Service and the Forest Supervisor defendants have no particular stake in whether or not mining continues within the National Forests—though they do have a general duty to comply with the statutes that provide for mining on the public lands and express the intent of Congress that mining is to be encouraged. *See, e.g.*, 30 U.S.C. § 1602 ("The Congress declares that it is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well being and industrial production with appropriate attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs."); 30 U.S.C. § 22 *("*"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, an the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such").

More importantly, the Miners will take distinct positions on factual and legal issues from both defendants and the Tribe. While the Miners discuss these positions in some detail below, they wish to stress that they are not required to demonstrate inadequacy of representation with respect to each and every Count of the Second Amended Complaint. To the extent that the United States

Department of Justice ultimately does take positions congruent with the positions of the Miners, the Miners will not burden the Court with wholly duplicative briefing concerning those positions.

*Count One and Endangered Species Act Issues*

In Count One, the Tribe asserts a violation of the Endangered Species Act by virtue of defendants' asserted failure to consult with federal fish and wildlife agencies concerning the effects of suction dredge mining on listed species. The only listed fish that plaintiff identifies as potentially affected by suction dredge mining is the "threatened Southern Oregon/Northern California coho salmon" (Second Amended Complaint ("2AC") ¶ 42).[3]

The United States District Court for the District of Oregon very recently granted summary judgment declaring this listing unlawful. *California State Grange, et al. v. United States Department of Commerce, et al.*, No. 02-6044-HO, Minute Order (D. Or. Jan. 11, 2005). At the same time, however, the Court granted the motion of NOAA Fisheries to leave the listing in place during remand. *Id.* The Miners will take the position that no legal duty to consult could arise based on a listing that was always unlawful, and believe that Count One should be dismissed for this reason alone. Insofar as the NOAA Fisheries sought in that action to maintain the listing pending remand, the position of the Justice Department is likely to differ from that of the Miners. (And to the extent that the Secretary attempts to re-list the coho salmon, the Miners would contend that such a renewed listing would be unlawful again.)

More generally, the Miners will take the position that mere speculation concerning possible effects on fish or wildlife is not an appropriate basis for invoking Federal regulation of their activities. The Tribe's complaint is larded with assertions concerning the effect of suction dredge mining that lack any empirical basis whatsoever. For example, the Tribe alleges that suction dredge mining "causes increased water temperatures". The Miners are unaware of *any* measured temperature increase at *any* suction dredge mining site *anywhere*, and note that the Tribe has noted

[3] The Tribe does suggest that there may be a duty to engage in consultations concerning the effect of suction dredge mining on bald eagles and northern spotted owls (*see* 2AC ¶ 18), but these claims are frivolous. If a formal consultation duty arises based on speculation as to "effects" on *aerial* species from tenuously-related *aquatic* activities such as suction dredge mining, all National Forests could never be open to visitors at any time for any purpose, as each and every visit would require

a *purely theoretical* possibility of such an increase; if anyone bothered to calculate the changes in water temperature resulting from temporary turbidity increases (on the assumption that such increases actually darkened the water slightly), they would find that the magnitude of the temperature changes would be orders of magnitude below the ability of measuring devices to detect, and could necessarily have no appreciable effect on aquatic life whatsoever. (*See* Proposed Answer of the Miners ¶ 25.)

Similarly, the Tribe alleges that sediment from suction dredge mining "suffocates the eggs and prevents young salmon from emerging". (2AC ¶ 24.) To the extent this allegation is made with respect to any activities of the proposed intervenors, it is grossly inaccurate, because the California regulatory scheme with which the proposed intervenors comply restricts all suction dredge mining from the river when salmon redds (nests) are present. (*See, e.g.,* Proposed Answer of the Miners ¶¶ 23-24.) Yet some representatives of the Forest Service have continued mindlessly to parrot this theory as well, presumably one of the reasons the Pacific Regional Southwest Office of the Forest Service reminded its Forest Supervisors last year that their Rangers must evaluate mining operations "including the environmental protection measures that are required through the state dredging permit". (Exhibit I to Defendants' Motion to Dismiss, at 2.) Nevertheless, the Miners have no confidence that the Justice Department will represent their interests in characterizing the impacts of suction dredge mining.

*Count Two and National Forest Management Act (NFMA) Forest Plan Issues*

In Count Two, the Tribe asserts a violation of the NFMA because "[t]he Six Rivers and Klamath National Forests, and the National/Regional Directives, have taken the position that the acceptance of NOIs from mining operators, rather than requiring Plans of Operations, is within the discretion of the agency". (2AC ¶ 104.) In fact, as alleged in the Proposed Answer, the Klamath National Forest has taken this position, while the Six Rivers National Forest has taken the opposite position. (Proposed Answer of the Miners ¶ 9.) At this juncture, the Miners have no idea what position the Justice Department will take, but the diversity of positions taken by the Forest Service,

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months of planning. Perhaps that is the Tribe's ultimate goal, but it is not one that this Court should countenance.

including those inimical to the interests of the Miners, demonstrates that it cannot represent the Miners.

As far as the Miners are concerned, the Tribe does not properly plead any claim involving the Six Rivers National Forest. This is true for at least two reasons. First, Plaintiff does not specifically identify any mining action within the Six Rivers National Forest at all. (*See* Proposed Answer of the Miners ¶ 9.) Second, the Six Rivers National Forest has, in substance, adopted the very policies urged by Plaintiff, rejecting every Notice of Intent filed with respect to the Ukonom District and going so far as to prosecute one miner who refused to submit an operating plan. (*Id.*)

Those portions of the Second Amended Complaint pertaining to the Six Rivers National Forest should be dismissed, and the case transferred to the Eastern District of California, the appropriate District for resolution of claims concerning the Klamath National Forest. Indeed, the Karuk Tribe, or its counsel, may well have been "forum shopping" in filing in this District because it knew that decisions in the Eastern District have squarely rejected positions the Tribe now raise in their complaint. *United States v. Lex*, 300 F. Supp.2d 951 (E.D. Cal. 2003); *United States v. McClure*, No. F2092617, Order (E.D. Cal. Feb. 2, 2005). The Miners do not know whether the Justice Department will share the view that venue is inappropriate or not.

*Count Three, Trust Responsibilities and the Adequacy of Consultations with the Tribe*

With respect to Count Three and other Counts, the Tribe asserts a failure to adequately review impacts of suction dredge mining in violation of "trust and consultation responsibilities owed to the Tribe". (*See, e.g.*, 2AC ¶ 111.) In fact, the Miners have spent literally hundreds of hours in consultation with representatives of the Tribes and the Forest Service. (Proposed Answer of the Miners ¶ 12.) With respect to at least three of the specific decisions cited by the Tribe, the Miners met with the Tribe's fisheries specialists and developed operational constraints which met the Tribal interests then asserted, which were embedded into the Notices of Intent filed with the Service. (*Id.*) The parties literally "shook hands" on the deals only to have, in the case of the Notice of Intent filed for mining claims in the ranger district administered by the Six Rivers National Forest, the acting Forest Supervisor renege on the understanding reached at the meeting of April , 2004. (*Id.*)

What the local Rangers had done, at least with respect to the Miners' operations, was to approve the functional equivalent of a local settlement agreement. The Miners note that if any third party challenged federal approval of a settlement agreement entered among tribal and mining interests, not only would the relevant tribe be permitted to intervene in the action, *it would be regarded as an indispensable party whose absence would preclude any challenge to the federal approval. Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996)(affirming dismissal of complaint because two native American tribes that had entered into a mining lease were indispensable parties but could not be joined due to their sovereign immunity). It would be contrary to all reasonable conceptions of due process and fair play to bar the Miners from even intervening in this action. Furthermore, the Forest Service defendants are not in a position to adequately defend without the intervention of the Miners because they will not have details about all the mitigation the Miners did with the Plaintiff Tribe directly, and thereby excusing the Forest Service Defendants from the obligation to resolve issues that had already been "worked out."

Issues concerning suction dredge mining are necessarily highly localized in nature, involving highly specific and small areas of concern to the Tribe. Until this action was filed, the Miners believed that all the parties were working together in good faith to achieve a practical resolution of the Tribes' concerns. It now appears that the real agenda of the Tribe, or at least those out-of-state interests that have emerged to represent them,[4] is to substitute a workable (and working) regulatory scheme with unworkable documentation requirements far beyond any scale reasonably associated with the trivial and evanescent impacts associated with suction dredge and other forms of small-scale placer mining (hand excavation).

*Count Five and the Role of Federal versus State Regulation*

With respect to Count Five, the Tribe points out that 36 C.F.R. § 228.8 requires the Miners to comply with various environmental regulations. The Second Amended Complaint, however, omits to disclose that 36 C.F.R. § 228.8(h) provides that:

[4] The Miners frankly wonder, in light of their handshake deals with the Tribe, whether the professional judgment of the Western Mining Action Project in presenting these claims has been somehow affected in violation of Rule 3-310(F) of the California Rules of Professional Conduct.

"Certification or other approval issued by State agencies or other Federal agencies of compliance with laws and regulations relating to mining operations *will be accepted as compliance with similar or parallel requirements of these regulations*." (Emphasis added.)

The significance of this rule arises from the fact that in 1994 California initiated a comprehensive regulatory scheme for suction dredge mining, also omitted from the Second Amended Complaint. *See generally* California Fish and Game Code § 5653; Cal. Code Regs., titl. 14, §§ 228 and 228.5.

Above all else, these regulations restrict suction dredge mining to periods when juvenile fish and the fish redds (nests) are not likely to be injured at all, because the fish are gone from the gravel. (Proposed Answer of the Miners ¶ 24.) They also carefully designate and restrict the precise stream locales where dredging may occur, strictly limit the size of suction dredge nozzles, and restrict related activities with potential to damage streamside resources. (*Id. ¶¶* 22-23) The Miners wish to emphasize that they appear in this action to defend suction dredge mining in compliance with these regulations, and it is by virtue of compliance with these regulations that the Miners confidently allege the utter absence of any significant negative impacts imagined by the Tribe.

The Miners believe that the State of California adequately vindicates the relevant environmental interests through these regulations, and that careful review of the somewhat tortured history of the Federal regulatory approach will confirm this. Indeed, the Administrative Record will show (unless it is incomplete) extensive involvement by representatives of the California Department of Fish and Game to protect aquatic resources.

The Miners are not certain as to the position the Forest Service will take concerning the relationship between the California regulatory scheme and its own regulations, particularly 36 C.F.R. § 228.8(h), but from all appearances, and from the conduct of the Six Rivers National Forest officials, the Justice Department is not likely to defend the proposition that compliance with the

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The Miners have no idea who in fact is funding this litigation against them, but presume that information has been shared with the Tribe pursuant to Rule 3-310(F)(3).

California regulations adequately vindicates Federal interests. Accordingly, the Miners cannot rely upon the Forest Service defendants to represent their interests.

*Count Six and Clean Water Act Issues*

Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits "for the discharge of dredged or fill material". The governing regulations manifestly describe "in-stream mining" as "resulting in a discharge of dredged material". 33 C.F.R. § 323.2(2)(i).

Nevertheless, the Tribe takes the position that the outfall from a suction dredge is a "point source" required to be regulated under § 402 of the CWA, 33 U.S.C. § 1342, concerning the "discharge of any pollutant". In support of this proposition, the Tribe resorts to citing a letter from a Forest Service official in Idaho, and the Justice Department's apparent litigation position in that action. (2AC ¶ 83.) The Tribe takes the position that a permit under § 404 may also be required. (Id. ¶ 85.)

The notion that these small-scale activities require two entirely distinct and wholly duplicative permitting process under the CWA from two different federal agencies (neither party to this suit) should be rejected out of hand, particularly insofar as the § 402 regulations expressly exclude from coverage "discharges of dredged or fill material into waters of the United States which are regulated under § 404 of the CWA". 40 C.F.R. § 122.3(b); *see generally Canada Community Improvement Society, Inc. v. City of Michigan City*, 742 F. Supp. 1025, 1030-31 (N.D. Ind.1990) (rejecting duplicative § 402 permitting requirement for dredging); *see also Coeur D'Alene Lake v. Kiebert*, 790 F. Supp. 998, 1011-12 (D. Idaho 1992) (same).

This is of particular significance insofar as the Miners have understood their activities to have been authorized under certain "Regional General Permits" issued by the U.S. Army Corps of Engineers pursuant to § 404 of the CWA (*see*, Proposed Answer of the Miners ¶ 83), and certified by the State of California pursuant to § 401 of the CWA (*id.*). Discussion of this regulatory scheme is omitted entirely from the Second Amended Complaint. The Miners note, however, that Exhibit I to Defendants' Motion to Dismiss declares (at 2) that "the Corps of Engineers is no longer

regulating suction dredging under § 404". The Miners are continuing to investigate this situation, and expect the Administrative Record to shed additional light in this issue.

To the extent that the Justice Department maintains the "double CWA permitting" position it apparently took in Idaho—and it should not—the Miners obviously cannot adequately be represented by the Justice Department. Nor can they be adequately represented if the Justice Department takes the position that § 402 of the CWA, not § 404, should apply. Based on their present understanding, and the prior practice, the Miners contend that § 404 properly applies, not § 402. After review of the Administrative Record, the Miners may need to amend their proposed pleading to secure effective relief on this issue—unless, of course, the continuing apparent lack of proper notice pursuant to the citizen suit provisions of the CWA disposes of this Count.

*The Seventh Count and National Environmental Policy Act (NEPA) Issues*

Again the Miners are uncertain as to the position the Department of Justice will take. The Miners believe that the California Final Environmental Impact Report of April 1, 1994 (FEIR), which concluded that suction dredging within the regulations does not create a significant impact on the environment (*see generally* Proposed Answer of the Miners ¶¶ 21-28), narrowed the scope of activities in ways removing the need for further NEPA-style analysis. Specifically, the Miners contend that their activities as conducted in compliance with the California regulations analyzed in the FEIR manifestly constitute neither a "major federal action" requiring preparation of an environmental impact statement (a process that skillful and obstructionist attorneys might drag on for years), nor an action "expected to have a significant impact on the environment" and requiring an environmental assessment. The actual process followed, in which local rangers consider the areas that will be impacted, in consultation with Tribal interests, also more than adequately vindicates NEPA values, and is a process appropriately scaled to the activities at issue.

The Miners also expect to take the position that the Forest Service regulations expressly exempt their activities from even a requirement to file a Notice of Intent. This is because 36 C.F.R. § 228.4(2) declares that "a notice of intent need not be filed" in at least two relevant cases. First, no notice need be filed when the operations "will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes and will not involve the cutting of trees, unless those

operations otherwise might cause a disturbance of surface resources". 36 C.F.R. § 228.4(2)(iii). Although the Forest Service (and thus presumably the Justice Department) appears to disagree on this point (*see generally* Exhibit I to Defendants' Motion to Dismiss (mis-citing regulations)), the small suction dredges authorized under the California regulations are not remotely akin to bulldozers or backhoes, particularly with respect to their effect on "surface resources"—the resources under the jurisdiction of the Forest Service and the object of the Organic Act regulations.

This interpretation is confirmed by the second relevant exemption: 36 C.F.R. § 228.4(2)(i), which excludes "operations excepted in paragraph (a)(1) of this section from the requirement to file a plan of operations". That subsection in turn exempts both "individuals desiring to search for and occasionally remove small mineral samples or specimens" (regrettably but accurately describing the usual success of individual Miners), as well as "subsurface operations which will not cause significant surface resource disturbance".

In a nutshell, the Miners will take the position that because they need not file Notices of Intent to use their property in the limited way permitted under the California State regulations, properly understood, there is no enabling Federal action that could trigger NEPA requirements. The Tribe is proceeding as if the Forest Service itself were conducting the mining, but as noted above, the Miners have possessory property interests protected by Federal statute, and the Forest Service's discretion to regulate the Miners' use of their property is restricted to regulations that do not unreasonably interfere with that right. It cannot be the law that the Miners cannot even intervene in a case designed to extend those regulations in manifestly unreasonable ways that would destroy the property rights of the Miners.

The Miners also note that the Forest Service is required by law to "cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements". 50 C.F.R. § 1506.2. The Miners look forward to reviewing the Administrative Record to determine the level of Federal involvement in the preparation of the FEIR, which might well discharge any NEPA responsibilities even if NEPA did somehow apply.

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*The Eighth Count and Special Use Regulations*

This Count is aimed specifically and directly at The New 49'ers, and seeks to require it "and/or their members" to obtain "special use permits" under 36 C.F.R. Part 251. (2AC ¶ 126) At the outset, the miners note that the very first paragraph of the Part 251 regulations declares that "all uses . . . *except those authorized by the regulations governing . . . minerals (part 228)* are designated special uses". 36 C.F.R. § 251.50(a) ("Scope") (emphasis added). Insofar as mineral prospecting activities are specifically excluded from the scope of the regulations, this Count appears to be dead on arrival. *See also United States v. Lex, supra; United States v. McClure, supra*.

Once again, the Miners do not yet know what position the Justice Department will take, given apparent ambiguities in other portions of the regulations. The Miners, however, know what position the Department of Justice, through the U.S. Attorney of the Eastern District of California, took an inconsistent position in *United States v. McClure, supra,* arguing that special-use authorization regulation applied to mining activities, and may attempt to make that argument again notwithstanding its rejection by the *McClure* court. At the least, however, the Miners have met the *Sagebrush Rebellion* requirement of showing that representation by the Justice Department "may be" inadequate.

Pursuant to the existing schedule, defendants' next filing will be made before the reply in support of this motion is due. The Miners expect to take the opportunity to update the Court, if necessary, concerning specific positions taken by the defendants that further demonstrate why the Miners should not be required to depend upon defendants to represent their interests.

## II. IN THE ALTERNATIVE, THE MINERS SHOULD BE GRANTED PERMISSIVE INTERVENTION

As noted above, the Miners' intervention is timely, and the Miners have interests that will be affected by the outcome of this litigation and those interests are not represented by any other party. It should be apparent from the discussion above that the Miners "will significantly contribute to full development of the underlying . . . issues in the suit and to the just and equitable adjudication of the legal issues presented." *Spangler v. Pasadena City Board of Education*, 552 F.2d. 1326, 1329 (9th

Cir. 1977) (allowing permissive intervention); *see also State of New York v. Reilly*, 143 F.R.D. 487 (N.D.N.Y. 1992) (primary issue is undue delay or prejudice).

For all these reason, in the alternative, the Miners should therefore be granted permissive intervention. Fed. R. Civ. P. 24(b).

**Conclusion**

For the foregoing reasons, the Court should enter an order permitting the Miners to intervene in this action as of right; in the alternative, permissive intervention should be permitted.

Dated: March 1, 2005

MURPHY & BUCHAL LLP

By: s/ James L. Buchal
James L. Buchal

Attorneys for The New 49'ers, Inc. and Raymond W. Koons

**CERTIFICATE OF SERVICE**

I certify that on March 1, 2005, I electronically filed the foregoing THE MINERS' MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT, with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the following:

Joshua Borger, *srmeredith@envirolaw.org*

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I further certify that I caused to be served a copy upon the following individuals by first-class mail:

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s/ R. Dabney Eastham
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The New 49'ers, Inc. and Raymond W. Koons