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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

KARUK TRIBE OF CALIFORNIA, Plaintiff, v. **UNITED STATES FOREST SERVICE**; **JEFF WALTER**, Forest Supervisor, Six Rivers National Forest; **MARGARET BOLAND**, Forest Supervisor, Klamath National Forest, Defendants.	Civ No. 04-4275 (SBA) **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE MINERS' MOTION FOR INTERVENTION** Date: April 5, 2005 Time: 1:00 p.m. Ctrm: 3, 3d Floor Judge: Hon. Saundra B. Armstrong

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I. STATEMENT OF FACTS AND ISSUES

Pursuant to Fed. R. Civ. P. 24(a) and (b), the New 49'ers, Inc. and Mr. Raymond W. Koons (collectively "Applicants") seek to justify intervention by misconstruing Plaintiff's complaint and the remedies at hand, and asserting that they are inadequately represented by offering speculative disagreements with the Forest Service on issues that are outside the scope of this litigation. The primary issue in this litigation is a question of law: Can the Forest Service authorize mining in a specially protected class of national forest lands and waters known as "Riparian Reserves" via minimal "Notices of Intent," despite having promulgated Forest Plans that require that all mining operations in Riparian Reserves must be regulated via protective "Plans of Operations"?

Plaintiff asserts that the United States Forest Service ("Forest Service") must issue permits for in-stream suction dredge mining in accordance with their promulgated Forest Plans, as mandated by the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600-1614. As outlined in its motion to dismiss, the Forest Service maintains that its general regulations allow District Rangers to disregard the mine permitting requirements of their Forest Plans.

Applicants request to intervene by expanding the scope of this litigation and offering arguments that are irrelevant to these proceedings. The Court should reject this, and deny Applicants' motion to intervene. If the Court grants intervention, it should limit it to briefing on the Tribe's appropriate remedy, not on the merits. The Court should further impose a limiting order preventing Applicants from interjecting extraneous legal arguments.

II. ARGUMENT

A. Applicants Are Not Intervenors by Right Because Their Mining Claims Are Not a "Significantly Protectable" Interest; This Litigation Does Not "Impair or Impede" Their Ability to Protect That Interest; and They Are Adequately Represented by the Government.

Applicants do not satisfy the second, third, and fourth prongs of the four-part test for intervention: (1) the application for intervention is timely; (2) the applicants have a "significantly protectable" interest relating to the property or transaction that is the subject of the transaction; (3) they are so situated that disposition of the action may, as a practical matter, impair or impede their ability to protect that interest; and (4) their interest is inadequately represented by the existing parties in the lawsuit. Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 836 (9th Cir. 1996). Applicants bear the burden of satisfying all four prongs. See Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1010 n.5 (9th Cir. 1980). If granted, the Court has the well-established discretion to limit an intervenor's participation "subject to appropriate conditions or restrictions responsive among other things to the requirements of the efficient conduct of the proceedings." Fed. R. Civ. P. 24(a); United States v. Oregon, 913 F.2d 576, 588 (9th Cir. 1990).

Here, the Applicants have failed to meet the standard for intervention by right or permissive intervention. The Applicants' claimed "economic stake" in the outcome of this litigation is not a sufficient "protectable interest" justifying intervention. The Applicants also fail to show that a ruling finding the Forest Service in violation of federal law would adversely affect any rights possessed by the Applicants. Furthermore, the Applicants mischaracterize Plaintiff's complaint including any remedies that may be awarded to Plaintiff, speculate on potential disagreements in legal strategy between Applicants and the Department of Justice, and ask the Court to address unrelated arguments to allege that Applicants are not adequately

represented. As a result, the Applicants' intervention would prejudice Plaintiff's ability to achieve an efficient and expedient resolution to this case, a situation that directly contravenes the purpose of intervention under Fed. R. Civ. P. 24(a).

1. Applicants' Alleged "Economic Interest" Does Not Constitute a Significantly Protectable Interest

The Ninth Circuit Court of Appeal holds that Applicants' alleged "economic interest" does not satisfy the "significantly protectable" interest requirement to intervene:[1]

> Whether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established. Portland Audubon Soc. v. Hodel, 866 F.2d 302, 308 (9th Cir.), *cert. denied*, 492 U.S. 911, 109 S.Ct. 3229, 106 L.Ed.2d 577 (1989). Nevertheless, the movant must demonstrate a "significantly protectable interest." **An economic stake in the outcome of the litigation, even if significant, is not enough.** Id. at 309.

Greene v. U.S., 996 F.2d 973, 976 (9th Cir. 1993) (emphasis added); see also, Northwest Forest Resource Council, 82 F.3d at 836. The gravamen of Applicants' motion is that any remedy awarded to the Tribe will interfere with their economic interests under the Mining Law of 1872, 30 U.S.C. §§ 21 et seq. Motion to Intervene at 5. Mr. Koons' economic interest derives from unpatented mining claims under the Mining Law of 1872. The New 49'ers allege an economic interest in leasing unpatented mining claims from third parties. Id.[2] Applicants' motion should

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[1] In the Ninth Circuit, an applicant to intervene need not satisfy the tests for Article III standing. Portland Audubon Society v. Hodel, 866 F.2d 302, 308 n.1 (9th Cir. 1988) (citing Sagebrush Rebellion Inc. v. Watt, 713 F.2d 525, 527-29 (9th Cir. 1983)). Nonetheless, the Ninth Circuit has stated that "the standing requirement is at least implicitly addressed by our requirement that the applicant must 'assert[] an interest relating to the property or transaction which is the subject of the action.'" Portland Audubon Society v. Hodel, 866 F.2d at 308 n.1 (citing County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986)).

[2] The interests alleged by Mr. Koons and The New 49'ers are not supported by any evidence, in the form of sworn affidavits or otherwise. Indeed, the Applicants provide no evidence or other basis for any of the multitude of conclusory factual allegations upon which they base their Motion to Intervene. The conclusory allegations extend not only to the Applicants' asserted interest in this case, but also myriad scientific assertions made by Applicants in both their

be denied since their "economic interests" do not establish the "direct" and "legally protectable" interest required for intervention by right. See Forest Guardians v. Bureau of Land Management, 188 F.R.D. 389, 395 (D.N.M. 1999) (determining that economic interests of holders of grazing permits were not sufficient to warrant intervention by right in a lawsuit against the Bureau of Land Management, alleging the permits were issued in violation of NEPA).[3]

Applicants' unsubstantiated claim that "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" indicates the Applicants' misunderstanding of this lawsuit. Motion to Intervene at 3.[4] As a result of this

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Motion to Intervene and Answer in Intervention with regard to the environmental and cultural impact of their in-stream mining operations. While the Court may accept non-conclusory allegations of fact, without competent evidence, this Court should not accept the Applicants' conclusory factual assertions as true, particularly absent any affidavits or declarations. See Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 820 (9th Cir. 2001) (accepting intervenors' non-conclusory factual allegations on the basis of well-pleaded and detailed declarations).

[3] Applicants cite to a contrary case, Southwest Center for Biological Diversity v. Berg, 268 F.3d 810 (9th Cir. 2001), in arguing that they have demonstrated a "significantly protectable" economic interest in the subject matter of this case. However, Berg is not analogous to the situation here. In Berg, the court granted intervention to parties who legitimately claimed "third party beneficiary" status to the contract agreement that was specifically at issue in the case. 268 F.3d at 820. Here, the case centers on whether the Forest Service is applying the proper set of regulations to the processing of mine permit applications. As set forth above, the federal courts are clear that miners such as Applicants have no legal interest in any particular set of regulations. Thus, unlike the intervenors in Berg, who had a distinct legal interest in the procedures detailed in the contract at issue, the Applicants here do not have the legally protectable interest necessary for intervention as of right.

[4] The Applicants' argument that their mining claims would be "forfeited" if the Forest Service had to comply with the requirements of the NFMA and NEPA ignores recent congressional amendments to the Mining Law. Motion to Intervene at 3, n. 1. Although the Mining Law originally required claimants to perform $100 worth of annual "assessment work" to hold a claim, Congress now requires only that a claimant pay a minimal $100/year "claim maintenance fee" to hold the claim. 30 U.S.C. § 28f(c); see Pub. L. No. 107-63, 115 Stat. 414 (2001). Thus,

misunderstanding, Applicants continuously raise collateral arguments, expanding the scope of this litigation, to justify their intervenor status. Courts within the Ninth Circuit Court of Appeal have rejected this reason for intervention:

> **Because the Intervenors' merely seek to interject their interests and concerns, outside of the administrative record**, in defense of the USFWS's decision, **they do not have legally protectable interests at this stage in the litigation.** *See, e.g.,* Alameda Water & Sanitation Dist. v. Browner, 9 F.3d 88 (10th Cir. 1993) (court denied intervention where intervenor sought to participate in lawsuit so that it could offer additional reasons, outside of the administrative record, to support an agency's denial of a dredge and fill permit).

Friends of the Wild Swan v. Fish & Wildlife Serv., 896 F. Supp. 1025, 1027 (D. Or. 1995)(emphasis added). Like these cases, the present case centers on challenges to federal agency actions. Here, the actions include the promulgation of National and Regional Directives regarding in-stream suction dredge mining and more local decisions authorizing mining in the Klamath, Salmon, and Scott Rivers and their tributaries.

The Applicants' Answer contains Affirmative Defenses that go well beyond any legal issues raised in the Complaint. For instance, the Applicants' assert that the Karuk Tribe is ineligible to receive any equitable injunctive relief from this Court based on a manufactured defense of "unclean hands" because the Applicants allegedly "relied upon Plaintiff's assurances and agreements … in making continuing investments in its operations." Answer in Intervention at 22-23 (Third and Fourth Affirmative Defenses). These arguments, even if true (which they are not), are entirely irrelevant to the legitimate issue of whether the Forest Service is in compliance with federal law. No relief is sought against the Applicants; yet, the Applicants' Answer demonstrates a determination to cloud this case with such groundless, unrelated, and irrelevant legal and equitable arguments.

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any argument that an adverse ruling against the Forest Service in this case would extinguish any mining claims is groundless.

While this case relates solely to the Forest Service's compliance with federal law, and the relief sought relates solely to the Forest Service's actions, the Applicants apparently intend to argue that the Army Corps of Engineers, the U.S. Environmental Protection Agency, and the California Department of Fish and Game should all be joined in this action. Answer at 23-24 (Sixth Affirmative Defense). Specifically, the Miners opine that the California Department of Fish and Game's regulation of suction dredging makes illegal all federal regulation of the same activities. See Motion to Intervene at 12. However, this ignores state regulations to the contrary. Cal. Code Regs. title 14, § 228(g) ("Nothing in any permit issued pursuant to these regulations [of suction dredge mining]. . . relieves the permittee of the responsibility of complying with applicable federal, State, or local laws or ordinances.").

The Miners also ask the Court to rework the Clean Water Act's regulatory scheme and order the Amy Corps of Engineers, not the Environmental Protection Agency, to regulate the outfall from suction dredges. See Motion to Intervene at 13-14. The Miners go so far as to declare unlawful the Order of a United States District Judge leaving the Coho salmon on the list of federally endangered species pending appeal. See Motion to Intervene at 8. Applicants' attempt to unnecessarily expand this litigation demonstrates that their true interest is to delay this case's resolution and confuse the straightforward issues presented in Plaintiff's Complaint.[5]

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[5] The Applicants also raise an affirmative defense of improper venue. Motion to Intervene at 10. However, the Applicants ignore the fact that, in addition to mining operations approved within the jurisdiction of the Six Rivers National Forest, this case challenges the Regional Directive regarding in-stream mining issued by the Regional Forester for the Pacific Southwest Region of the Forest Service, which is located in Vallejo, CA (within the jurisdiction of this Court). See May 26, 2004 Memorandum from Jack A. Blackwell, Regional Forester for the Pacific Southwest Region, to Forest Supervisors in that Region, with the subject of "Forest Service Regulation of Suction Dredging Operations." This Regional Directive was attached as Exhibit I to the Federal Defendants' Motion to Dismiss filed on December 14, 2004.

These arguments are not before this Court, do not derive from Plaintiff's complaint, and grossly flout the general rule that an intervenor may argue only those issues raised by the principal parties and may not enlarge those issues. See Washington Electric v. Mass. Mun. Wholesale Electric, 922 F.2d 92, 97 (2d Cir. 1999) (intervention may not be used to "interject collateral issues into an existing action"); Southwestern Pa. Growth v. Browner, 121 F.3d 106, 121 (3rd Cir. 1997) (*citing* Vinson v. Washington Gas Light Co., 321 U.S. 489 (1944)). Here, as in Friends of the Wild Swan and Alameda Water, the Applicants seek to interject collateral issues into this litigation through their alternative defenses for the Forest Service's actions. This Court should reject such an attempt and deny the Applicants' Motion to Intervene.

2. A Legal Ruling In Favor of the Tribe Will Not Impair or Impede Any Rights of the Applicants Under the Mining Law of 1872

Applicants fail to demonstrate that a ruling on the merits against the Forest Service will "impair or impede" any rights Applicants have to mining claims because there is not "a relationship between the legally protected interest and the claims at issue." Sierra Club v. EPA, 995 F.2d 1478, 1484 (9th Cir. 1993):

> [T]he Ninth Circuit only grants intervention as of right where litigation will have a direct effect on the applicant's alleged interest. See *e.g.* Sierra Club v. EPA, 995 F.2d 1478. … [Here,] any impact … depends on several post-litigation actions by a federal agency. An interest which is contingent upon the occurrence of a train of subsequent events will not support intervention. Washington Electric, 922 F.2d at 97; Oregon Env. Council, 775 F.Supp. at 358.

Silver v. Babbitt, 166 F.R.D. 418, 427 (D. Ariz. 1994). Neither does the Tribe seek, nor would any remedy permit, the dissolution of any unpatented mining claims held by Mr. Koons, let alone leases held by The New 49'ers. The Applicants' alleged general interest in mining alone under the Mining Law of 1872 does not satisfy this requirement. Motion to Intervene at 5.

Applicants possess no "rights" under the Mining Law of 1872 until they demonstrate compliance with all applicable Forest Service regulations. The Forest Service's Organic Administration Act of 1897 ("Organic Act") requires that "such persons [holders of mining claims] must comply with the rules and regulations covering such national forests." 16 U.S.C. § 478; see United States v. Weiss, 642 F.2d 296, 299 (9th Cir. 1981). As such, any "rights" bestowed by the Mining Law are wholly subject to Forest Service regulation. See Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994) (The Forest Service has the authority to regulate mining operations in the national forest by requiring miners to submit for approval operating plans for their proposed operations); Siskiyou Regional Education Project v. Rose, 87 F. Supp.2d 1074, 1085-86 (D. Or. 1999) (Forest Service "can reject an unreasonable plan [of operations] and prohibit mining activity until it has evaluated the plan and imposed mitigation measures.").

The issue before the Court is the degree of this regulation. Mining operators have "no legal entitlement to any given set of procedures" regarding their plans of operation. Northern Alaska Environmental Center v. Hodel, 803 F.2d 466, 469 (9th Cir. 1986); see Sierra Club v. Watt, 608 F. Supp. 305 (E.D. Cal. 1985) (absent mineral claim owners not required to be joined in action challenging Department of Interior's land withdrawal procedures).[6] Mining could be

[6] Although Northern Alaska Environmental Center v. Hodel and Sierra Club v. Watt were decisions dealing with joinder of parties under F.R.C.P. 19(a)(2), the discussions contained therein are relevant due to the strikingly similar tests for intervention under F.R.C.P. 24 and joinder under F.R.C.P. 19(a)(2). F.R.C.P 19(a)(2) provides for joinder where "the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest." Similarly, F.R.C.P. 24(a) provides for intervention as of right where: "the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest…." Moreover, both cases speak directly to the mining "rights" asserted by Applicants in this case as the basis for intervention, specifically rejecting a "right" to any specific set of procedures for approval of mining operations.

temporarily suspended at most while the Forest Service completes the legally required environmental analysis, consults with NOAA Fisheries, and ensures compliance with the Clean Water Act. The Forest Service's mining regulations already contemplate such delays. See 36 C.F.R. § 228.4(a)(5) (Forest Service required to notify operator if mining plan cannot be approved until an environmental impact statement has been completed). Therefore, Applicants do not quality as intervenors because the Forest Service's compliance with federal environmental laws and determining the degree of Forest Service regulation will not affect any rights to mining claims or leases.

3. The Applicants Have Not Demonstrated a Lack of Adequate Representation Because the Forest Service and Applicants Share the Same Objective.

Applicants do not offer any argument that is within the scope of this litigation to demonstrate that the Forest Service will not adequately represent their interests. The Ninth Circuit holds that an applicant does not quality as an intervenor where the applicant and a party share the same ultimate objective, but differ on litigation strategy:

> The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties. 7C Wright, Miller & Kane, § 1909, at 318 (1986). When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. League of United Latin Am. Citizens, 131 F.3d at 1305. If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation. 7C Wright, Miller & Kane, § 1909, at 318-19.
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> There is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents. City of Los Angeles, 288 F.3d at 401. In the absence of a "very compelling showing to the contrary," it will be presumed that a state adequately represents its citizens when the applicant shares the same interest. 7C Wright, Miller & Kane, § 1909, at 332. Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention. City of Los Angeles, 288 F.3d at 402.

Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003), cert. denied, 540 U.S. 1017 (2003). Here, the Applicants and the Forest Service both assert that the District Rangers can ignore the specific requirements in the agency's binding Forest Plans which require Plans of Operations for mining

in Riparian Reserves. Therefore, the Applicants are adequately represented by the Forest Service.

The Applicants go to great lengths to create a conflict between themselves and the Forest Service through the assertion of multiple divergent Affirmative Defenses. However, as detailed above, Ninth Circuit intervention law prohibits the interjecting of extraneous issues as the basis for a grant of intervention. Thus, the Applicants' extraneous issues are not properly before this Court, and should not be used as the basis for a finding of inadequate representation. Both the Applicants and the Forest Service concur on the ultimate objective and the primary question of law before the Court – that the District Rangers can ignore the Forest Plans' mine permitting requirements. The Applicants admit that the Forest Service's position in this case coincides with that of the Applicants, Motion to Intervene at 7-8, and that currently "[t]he local Forest Rangers can and do adequately vindicate Federal interests…." Motion to Intervene at 3.

Moreover, the Forest Service already has demonstrated through its filing of a Motion to Dismiss that it will raise all available defenses to Plaintiff's Complaint and vigorously defend the case, including the primary defenses alleged by Applicants. See Answer in Intervention at 22 (First Affirmative Defense alleging lack of subject matter jurisdiction).[7] Although the Forest Service may not renew its Motion to Dismiss (based on the Tribe's stipulated filing of the Second Amended Complaint), the agency has given every indication that it will vigorously defend its position that in-steam suction dredge mining operations may be authorized via

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[7] The Applicants also argue that the Forest Service may not defend against the Tribe's Eighth Cause of Action regarding the commercial activity of the New 49ers in charging "membership" fees to access its leased mining claims. Motion to Intervene at 16. Contrary to the assertion that this Cause of Action relates to actual mining operations, this Cause of Action argues that the New 49ers' selling of access to their leased claims is not actual mining but instead is a "commercial use or activity" that should be regulated under agency special use regulations found at 36 CFR Part 251, not as legitimate mining operations regulated under 36 CFR Part 228.

minimal Notices of Intent – the exact same position taken by the Applicants. Therefore, Applicants provide no reason to believe that the agency will not continue to adequately represent these interests.

Applicants patently misrepresent the premise of the Karuk Tribe's Complaint to allege that they are not adequately represented. In particular, the Applicants argue that "[t]he U.S. Forest Service and the Forest Supervisor defendants have no particular stake in whether or not mining continues within the National Forests." Motion to Intervene at 7. The Tribe does not argue in any way that mining be prohibited in the National Forests. The Tribe argues that the Forest Service must comply with the Forest Plan requirements to regulate in-stream mining operations through protective Plans of Operations, and not through mere Notices of Intent. If plans of operations are required, compliance with the other natural resource laws cited by Plaintiff flow from that requirement. The Applicants' attempts to put forth a long litany of speculative disputes with the Forest Service are largely irrelevant. The Tribe's argument is premised upon an assumption that mining will continue to occur in the Six Rivers and Klamath National Forests, and demonstrates the inaccurate presupposition of the Applicants' arguments of lack of adequate representation. The Forest Service adequately represents Applicants because the Forest Service has demonstrated its ability to adequately represent the Applicants' interests on that issue.

The Applicants also attempt to identify factual assertions set forth in Plaintiff's Complaint that may not be addressed by the Federal Defendants. However, in doing so the Applicants rely on pure speculation, alleging only for instance that "the Miners have no confidence that the Justice Department will represent their interests in characterizing the impacts of suction dredge mining." Motion to Intervene at 9. Regarding the Tribe's claims under NEPA,

the Applicants state that "[a]gain the Miners are uncertain as to the position the Department of Justice will take." Id. at 14. Such speculative differences cannot overcome the presumption of adequacy of the Forest Service's representation of the Applicants' interests, are not substantial, and simply evince the Applicants' belief that they can litigate this case better than the Forest Service. This is not a valid ground for granting intervention. See U.S. v. City of Los Angeles, Cal., 288 F.3d 391, 402-3 (9th Cir. 2002); Northwest Forest Resource Council, 82 F.3d at 838; Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7C *Federal Practice and Procedure: Civil 2d*, § 1909, at 344 ("A mere difference concerning the tactics with which litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party[.]").

B. The Applicants Do Not Qualify as Permissive Intervenors

Applicants alternatively request to be granted permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). Motion to Intervene at 16-17. As discussed above, the central issue in this case is whether the Forest Service can ignore the requirements of its Forest Plans when regulating in-stream mining operations. The Forest Service and the Applicants do not differ on this point. Federal courts have denied permissive intervention in such cases, just as courts have denied intervention by right in such cases. In Forest Guardians, 188 F.R.D. at 395, the court denied the permissive intervention sought by cattle grazers because "[applicants] can do no more than the [federal agency], which is in the best position to present a compliance argument." The central issue in that case was whether the federal agency was properly regulating grazing. Similarly, the court should deny Applicants' motion to intervene in this case

because the Forest Service, not Applicants, can best present an argument that it is adequately complying with federal environmental laws.

Applicants attempt to justify their status as permissive intervenors by opining that they will "significantly contribute to the full development of the underlying … issues in the suit." Motion to Intervene at 16 *quoting* Spangler v. Pasadena City Board of Education, 552 F.2d 1326, 1329 (9th Cir. 1977). However, Applicants' assertions and Affirmative Defenses make clear that they intend to expand and complicate the issues presented before this Court, and apart from this will not contribute to the full development of those issues already presented by Plaintiffs. The district court has discretion to deny permissive intervention to prevent the litigation of additional issues not raised by Plaintiffs. Donnelly v. Glickman, 159 F.3d 405, 412 (9th Cir. 1998) *quoting* Deus v. Allstate Ins. Co., 15 F.3d 506, 525 (5th Cir. 1994) ("The intervention rule … is not intended to allow the creation of whole new lawsuits by the intervenors.").

C. If the Court Grants Intervention, the Court Should Limit Applicants' Participation to Briefing Only on the Appropriate Relief.

If the Court grants intervention, participation should be limited to briefing only on the appropriate relief available to the Tribe – not on the legal issue of whether the Forest Service is in compliance with the NFMA, ESA, CWA, NEPA, and other requirements.[8] This Court has the well-established discretion to limit an intervenor's participation "subject to appropriate conditions or restrictions responsive among other things to the requirements of the efficient

[8] In an effort to reach a compromise on the intervention issue, counsel for the Tribe informed counsel for the Applicants that the Tribe would not oppose intervention if intervention was limited to briefing on the appropriate remedy, not on the legal issues surrounding the Forest Service's compliance with federal law. Counsel for the Applicants did not respond to this offer, but instead simply filed the intervention motion and stated that "Plaintiff opposes this motion." Motion to Intervene at 2.

conduct of the proceedings." FRCP 24(a); United States v. Oregon, 913 F.2d 576, 588 (9th Cir. 1990).

There is established Ninth Circuit precedent to allow intervention only to brief the remedy/relief issues. See Donnelly v. Glickman, 159 F.3d 405, 409-411 (9th Cir. 1998); Churchill County v. Babbitt, 150 F.3d 1072, 1083 (9th Cir. 1998); Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489 (9th Cir. 1995). In Southwest Ctr. for Biological Diversity v. U.S. Forest Service, 82 F. Supp. 2d 1070, 1074 (D. Ariz. 2000), the court limited intervention in an Endangered Species Act (ESA) action to the remedial phase of the suit, which challenged the Forest Service's failure to undertake consultation with the U.S. Fish and Wildlife Service for a listed species:

> In addition to following clear Ninth Circuit precedent, . . . limiting intervention makes great practical sense. The heart of this legal battle is whether the Forest Service has performed its duty . . . Because only the Forest Service can "comply" with this duty, only the Forest Service can and should be a defendant for the liability phase of this litigation.

Id. In denying the applicants the ability to participate in briefing on the merits, the court cited to the line of NEPA cases which generally "bar intervention when a lawsuit seeks compliance with a law for which only the federal government can be held responsible." Id. at 1073. The court rejected intervenors' attempt to distinguish the long line of NEPA authority from the ESA claims, stating that "[u]nder both Acts, federal agencies are required to perform an analysis of the environmental impact of proposed action." Id. at 1074. Similarly, in Forest Guardians, 188 F.R.D. at 395, with respect to participation in briefing on the merits, the court denied intervention by right and permissive intervention to holders of grazing permits because the proposed intervenors could do no more than BLM, which was in the best position to present a compliance argument. This approach of limiting intervention would be appropriate in this case,

assuming the Applicants have a right to intervene at all, which they do not.[9]

Applicants admit that it is the potential imposition of injunctive relief that may impact their alleged interests. For instance, the Applicants argue that their interests and the potential for those interests to be impaired stems from the Applicants' perception that "the Tribe seeks restrictions on mining that lack any sound basis in science or resource management" (Motion to Intervene at 7), and that "it appears that the real agenda of the Tribe…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 dredg[ing]…." (Motion to Intervene at 11).[10]

Setting aside the Applicants' greatly exaggerated and erroneous legal and factual statements, it is apparent that their major concern is that they not be prohibited from mining should liability against the Forest Service be found. Thus, if this Court grants intervention at all, it should restrict the Applicants' participation to briefing on the appropriate remedy, not the merits, to ensure that cumbersome and improper extraneous legal issues are not interjected into

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[9] These cases recognizing that only the federal government can "comply" with federal laws such as those at issue in this case fatally undermine the Applicants' novel argument that because of some informal discussions between the Tribe, the Applicants and the Forest Service through which the Tribe unsuccessfully attempted to resolve the injuries occasioned by the suction dredging occurring on its home waters, the Applicants are somehow an "indispensable party" to this litigation. See Motion to Intervene at 11. There is no legal basis for such an argument, and as such, it should be ignored by this Court.

[10] The Applicants' assertion that there are only "trivial" environmental impacts from in-stream suction dredge mining is hard to reconcile with the leading federal case dealing with such mining practices. See Siskiyou Regional Education Project v. Rose, 87 F.Supp.2d 1074, 1102 (D.Or. 1999) (endorsing expert report detailing a number of environmental impacts of in-stream suction dredge mining: "suction dredge mining causes sedimentation when the streambed is disturbed and when tailings are discharged; … sedimentation can be lethal to aquatic species; fish are attracted to sediment and tailings when nesting; these tailings are unstable and eggs may suffocate when stream flows destroy the nest; sediment can choke eggs and alevins; … amphibian eggs are susceptible to harm from sedimentation; if stream materials are moved during dredging, older fish may suffer adverse impacts….")

this case.

III. CONCLUSION

The Applicants fail to satisfy the standard for intervention by right or permissive intervention. Therefore, their motion should be denied. If the Court permits intervention, it should limit the Applicants' arguments to those raised by Plaintiffs and limit their participation to briefing only on remedy issues, not on the merits of the Forest Service's lack of compliance with federal law.

Respectfully submitted this 15th day of March, 2005.

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CERTIFICATE OF SERVICE

I certify that on March 15, 2005, I electronically filed the foregoing Plaintiff's Memorandum of Points and Authorities in Opposition to the Miners' Motion for Intervention, with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the following:

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/s/ Roger Flynn
_____
Roger Flynn