James L. Buchal, Esq., OSB #92161
2000 SW First Ave., Suite 320
Portland, OR 97201
Telephone: (503) 227-1011
Facsimile: (503) 227-1034

Attorney for Intervenors, *Pro Hac Vice*
THE NEW 49'ERS, INC., a California corporation, and
RAYMOND W. KOONS, an individual.

David Young, Esq., SBN #55341
11150 Olympic Blvd., Suite 1050
Los Angeles, CA 90064-1817
Telephone: (310) 575-0308
Facsimile: (310) 575-0311

Attorney for Intervenor
GERALD HOBBS, an individual.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

HAYWARD DIVISION

Karuk Tribe of California; and Leaf Hillman, Plaintiffs, vs. California Department of Fish and Game; and Ryan Broddrick, Director, California Department of Fish and Game, Defendants. THE NEW 49'ERS, *et. al.*, and GERALD HOBBS, Intervenors.	Case No.: RG 05 211597 **JOINT CASE STATUS STATEMENT OF THE NEW 49'ERS AND RAYMOND KOONS AND GERALD HOBBS, INTERVENORS** DATE: September 8, 2006 TIME: 9:00 a.m. DEPT: 512 (Hayward) JUDGE: Hon. Bonnie Sabraw

Preliminary Statement

The Miners[1] are pleased to see that the Tribe has formally withdrawn its right to seek interim injunctive relief, which narrows considerably the issues before the Court. Accordingly, the Miners will not address issues concerning appropriate procedures for resolution of any request for injunctive relief. And while the Miners are mindful of the ancient adage against looking a gift horse in the mouth, it appears to them that this horse is of a Trojan species, and thus they are compelled to continue to resist—to the extent outlined below—judgment against the Department on the merits.

In particular, the Miners must oppose any judicial declaration that they are harming fish, even if couched in the abstract statement that the existing regulatory structure results in permit issuance producing deleterious effects on fish. Such a conclusion would prejudice the outcome of any future rulemaking proceedings, once again subverting the CEQA and rulemaking processes (and this Court's prior ruling) designed to assure full and fair consideration of the issues. As a practical matter, this Court's adoption of the Department's opinion would constitute a conclusive finding that more restrictions on the Miners' property rights are required in the rulemaking. For this reason, the Tribe's suggestion that the Miners' interests are not affected by a determination of liability is meritless. (Pltfs' Case Status Statement at 4.) Moreover, this Court's finding that suction dredge miners are harming fish also threatens to metastasize into submissions to other courts and other forums, with far-ranging and significant effects.

Accordingly, the Miners set forth below their conclusions that:

- This is no longer a proper suit for declaratory relief; and
- Even if it were, the Department cannot "throw" the suit by means of an admission to which this Court owes no deference; and
- To resolve this "pattern and practice" claim, where review is not limited to the administrative record, substantial discovery and a full trial will be required.

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[1] For purposes of this Status Report, "the Miners" refers both to intervenors The New 49'ers and Mr. Koon, and Mr. Gerald Hobbs.

All that being said, the Miners do recognize that additional studies have been conducted concerning asserted impacts of suction dredge mining since the 1994 EIR, such as the comprehensive cumulative effects analysis conducted just over the border in Oregon which was unable to detect any effects whatsoever. As a practical matter, in order to terminate the litigation, the Miners would even stipulate to a judgment declaring that there is "fair argument" supporting the need for additional environmental analysis of the issue pursuant to § 21080 of the Public Resources Code, and directing the Department to perform such analysis.[2] This, claims the Tribe, is the Tribe's "fundamental goal in this litigation". (Pltfs' Case Status Statement at 5.)

I. BACKGROUND FACTS

Prior to the recent round of retirements that removed knowledgeable Department employees, such as Mr. Dennis Maria, the Department's position with respect to the Tribe's attack on the Miners was clear. Mr. Maria's extensive on-site inspection report squarely rejected the claims of the Tribe, and the Department itself advised other agitators for more restrictive regulations to provide evidence in support of their claims, which was never forthcoming. (*See* Exhibits 3-4 to 1/10/06 McCracken Decl.) Indeed, the Department's Recovery Strategy for Coho Salmon, issued February 2004, confirms that "there are no studies that document such dredging-related impacts on coho salmon or their habitat within the range of coho salmon". (1/24/06 2d Buchal Decl. Ex. 1, at 3.) Apparently failing to come up with *any* evidence of actual adverse impacts on fish, the Tribe instead commenced this action on May 6, 2005.

The Department's Answer to the Tribe's claims squarely denied each and every allegation of the Tribe (other than admitting the existence of the 1994 EIR and its contents), and offered nine Affirmative Defenses, including the statement that "[t]he Plaintiff's claim should be dismissed for lack of actual controversy . . .". (*See generally* Dep't Answer, July 22, 2005.) The Department and Tribe then stipulated to bifurcation so as to resolve CEQA claims first. (Order after CMC ¶ 1, July 22, 2205.)

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[2] Intervenor Gerald Hobbs would not stipulate that there is "fair argument" for additional environmental analysis.

Assertedly, at some point the Tribe supplied the Department with additional evidence which might or might not relate to such impacts, but the evidence has been consistently concealed by the Department and the Tribe under the settlement privilege. In any event, allegedly following negotiations concerning the meaning and significance of the secret evidence, the Department and Tribe stipulated to entry of judgment in an instrument in which the Departmental defendants "expressly deny fault or liability for any and all claims made in the Complaint . . .". (Joint Stipulation ¶ 2), and lodged that instrument with the Court for approval. Notwithstanding the denial of liability, the Department immediately and unlawfully promulgated restrictive regulations destroying the property rights of the Miners (many mining claims were locked up in their entirety), and sought to have this Court approve an injunction consistent with the unlawfully-issued regulations.

Thus the Miners moved to intervene, filing a [Proposed] Verified Complaint in Intervention in which they specifically controverted the factual allegations of the Tribe concerning suction dredge mining through written testimony from a former Department biologist familiar with the area and other expert witnesses. Their Objections to the Proposed Stipulated Judgment amplified that factual showing. On January 11, 2006, the Department and Tribe re-filed the Joint Stipulation for Entry of Judgment, containing the same disclaimer of liability by the Department. On February 9, 2006, this Court granted the Miners'[3] motion to intervene as of right pursuant to § 387(a) of the Code of Civil Procedure, with such intervention "limited to the issues raised in the original complaint". (Order, Feb. 9, 2006.)

The Department and Tribe offered testimony in support of the Joint Stipulation. In particular, the Department's representative Mr. Neil Manji offered the following testimony:

> ". . . the existing regulations governing suction dredging . . . serve to permit suction dredging activities while, at the same time, providing protection for spawning adult salmonids, including chinook salmon, and the developing eggs and larvae of such species, which remain in the gravel following spawning. The existing regulations provide this protection by establishing watercourse-specific closures and seasonal restrictions on suction dredging activities." (1/20/06 Manji Decl. ¶ 3.)

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[3] This Court granted Hobbs' motion to intervene on March 23, 2006.

Mr. Manji characterized the nature of the stipulated injunctive relief as follows: ". . . the additional restrictions were designed to substantially *lessen the potential* for significant impacts on various fish species that suction dredging *could* cause in the Klamath, Scott, and Salmon River watersheds". (1/20/06 Manji Decl. ¶ 5; emphasis added.) In short, as of January 20th, the Department did not opine that existing regulations are in any way actually deleterious to fish.

This Court rejected the Proposed Stipulated Judgment, holding that it "would essentially operate as promulgation of new regulations on suction dredging, without such regulations having been subjected, as required by law, to the public notice and hearing requirements of the California Environmental Quality Act (CEQA) and the California Administrative Procedures Act". (Opinion, June 16, 2006, at 6.) Thereafter, the Department suddenly announced that it was "*of the opinion* that suction dredge mining in the Klamath, Scott and Salmon River watersheds under the existing regulations is resulting in deleterious effects on Coho salmon as alleged in Plaintiffs' complaint", and proposing to stipulate to entry of judgment. (Defendants' CMC Statement, Sept. 6, 2006, at 2; emphasis added.)

The Department has now filed a Status Report reiterating this opinion, and offering new testimony by Mr. Manji. Mr. Manji now contends, without identifying any supervening evidence that might account for his change in position, that "suction dredge mining under the existing regulations in the Klamath, Scott and Salmon River watersheds is having deleterious effects on coho salmon . . .". (10/2/06 Manji Declaration ¶ 8.) Given the foregoing history, it should by now be clear that neither the Department nor the Tribe has any evidence that any suction dredge mining in the Klamath and Six Rivers National Forests has harmed any fish. At most, they may have evidence that some mining may take place at some locations at which some fish may at some times be present – though their continuing refusal to disclose the evidence raises questions whether they have anything material at all.

II. THE DEPARTMENT AND TRIBE CANNOT BIND THIS COURT TO ACCEPT FALSE FACTS THROUGH ADMISSIONS OR STIPULATIONS, AND THE NEWLY-MINTED OPINION PROFFERED BY THE DEPARTMENT'S ATTORNEYS.

The Department argues that its admission of its newly-minted opinion that suction dredge mining harms fish is conclusive on the authority of *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304*, 227 Cal. App.2d 675, 678 n.17 (1964), and upon a general statement in a treatise that admissions "have conclusive effect". (Dep't Status Report at 3.) In *Fibreboard*, the plaintiff corporation sought and obtained from the trial court injunctions and damages against union picketing. On appeal, the question was whether sufficient evidence supported the jury's verdict for damages, and the effect of certain admissions in another forum by the corporation; in *dictum*, the court observed that "an admission made in the same case may constitute a judicial admission, i.e., a conclusive concession of the truth of a matter which has the effect of removing it from the issues". *Fibreboard*, 227 Cal.App.2d at 708 n.17.

But the Department cites no authority, and the Miners are aware of none, to the effect that a "judicial admission" must be binding *as against an intervenor*. The sole analogous California authority the Miners have found, albeit with somewhat murky facts, is *Shively v. Eureka T.G.M. Co.*, 129 Cal. 293 (1900). In that case, a corporation owed money to plaintiff, and assigned several claims to plaintiff, filing an answer that contained judicial admissions as to the validity of the claims. *See id.* at 294-95. An intervenor contested the admissions, taking the position that the corporation's admission of the claims was not in good faith, and the Supreme Court declined to give conclusive effect to the admissions and reversed the trial court. *See id.* at 295-96. It seems obvious that two neighbors cannot conspire to destroy the property rights of a third merely by filing a lawsuit against each other and making "judicial admissions" concerning the conduct of the third neighbor.

The Department also urges "deference" to its opinion of the moment. Deference is something courts afford to agency *decisions*, and outside the context of upholding formal agency rules (where deference is at its zenith), such deference "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later

pronouncements, and all those factors which give it power to persuade, if lacking power to control". *Yamaha Corp. v. State Bd. of Equalization*, 19 Cal.4th 1, 14-15 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Deference is at its nadir where, as here, the agency position is "merely its litigating position in this particular matter". *Culligan Water Conditioning of Bellflower, Inc. v. State Bd. of Equalization*, 17 Cal.3d 86, 93 (1976); *see also County of Sutter v. Board of Administration*, 215 Cal. App.3d 1288, 1295 (1989). All of the authority presented by the Department concerns deference accorded to regular agency decisions reached in regular proceedings and reviewed upon an administrative record. It is not at all on point here.

Above all else, the striking inconsistencies between the Department's positions over time (and that of its purportedly-expert witness) counsel against providing any deference to its present position. What the Department now appears to believe (at least as far as the Miners can tell) is that the mere presence of fish means that the mining is "deleterious to fish". Such an opinion is utterly inconsistent with the Legislature's repeated and express commands in CESA and CEQA that call for continuing human activities "to the greatest extent possible" (Fish and Game Code § 2053; *see also* Public Resources Code § 21168.9(b)), which necessarily requires careful consideration of actual effects by actual activities. Properly understood, the Department's opinion is a wholesale evasion of its responsibility carefully to consider and minimize adverse impacts on listed species, in favor of an approach that ignores all interests but those of the fish (of course, if the fish could speak, they might well urge the Court to give conclusive effect to the positive effects of suction dredge mining, feeding them, providing refuges, and restoring spawning habitat).[4] For all these reasons, the Court need not and should not afford any deference

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[4] The Miners disagree with the Tribe's claim that all the Department is offering is an interpretation of its regulations (Plaintiffs' Case Status Statement at 3), but even if the Department were offering a legal interpretation, that interpretation is not entitled to deference because it ignores entirely the statutory policies of allowing human activity to go forward absent appreciable adverse impacts on fish.

to the Department's present litigation position.[5]

The Tribe proposes to achieve binding effect by the device of propounding a request for admissions to the Department, which admission would, pursuant to § 2033.410 of the Code of Civil Procedure, be "conclusively established against the party making the admission". That the Department could not thereafter change its opinion does not mean that this Court is bound to accept that opinion. It the opinion of one party, and as the Supreme Court has explained, "[t]he issue is not disposed of until both parties are heard from"—or in this case, all parties. *See Cembrook v. Superior Court*, 56 Cal.2d 423, 429 (1961) (in bank). This Court is free to disagree with the Department's opinion. *Cf. Milton v. Montgomery Ward & Co.*, 33 Cal. App.3d 133, 138 (1973) ("Even if that admission is accepted literally, it is merely respondent's opinion. The jury could disagree with that opinion and obviously did."). We anticipate the Court will disagree with the Department's opinion because the Miners also propose to serve requests for admission establishing that neither the Department nor the Tribe has any evidence whatsoever to back it up.

In sum, the question whether permits issued under the existing regulations harm fish remains a live issue, kept alive by virtue of the Miners' Complaints in Intervention. In substance, there is now a present and genuine controversy between the Miners, on the one hand, and the Tribe and the Department, on the other hand, as to whether the "pattern and practice" of issuing permits under the existing regulations harms fish. While the Tribe complains that the Miners, as intervenors, "should not be permitted to prolong litigation" (Pltfs' Case Status Statement at 3), the Miners are plainly entitled to defend their property rights notwithstanding the Department's acquiescence in the Tribe's attack. Neither the Tribe nor the Department offers

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[5] The Department also alludes to its "trustee" status, which it insinuates should be construed to give the Department greater powers in this context. It must be remembered that the "trustee" status is merely a label that affords the Department no greater authority than that conferred by statute. The very Chapter of the Fish and Game Code characterizing the Department as a "trustee" (§ 1802), makes it very clear that notwithstanding general policies of the State to conserve wildlife resources, "[i]t is not intended that this policy shall provide any power to regulate natural resources or commercial or other activities connected therewith, *except as specifically provided by the Legislature.*" Fish and Game Code § 1801(h) (emphasis added).

any authority for the startling proposition that this Court can ignore the Miners' claim by entering an order "superceding the pleadings". (Dep't Status Report at 6.)

III. THERE IS NO GENUINE CONTROVERSY BETWEEN THE DEPARTMENT AND THE TRIBE TO SUPPORT THIS COURT'S JURISDICTION OVER PLAINTIFFS' DECLARATORY JUDGMENT CLAIMS.

Now that the Tribe has abandoned its request for injunctive relief, all that remains is the Tribe's request for declaratory relief. Such relief is authorized under § 1060 of the Code of Civil Procedure, which declares that:

> "Any person . . . who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of *actual controversy* relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties . . ." (emphasis added).

As explained in *O'Grady v. Superior Court*, 139 Cal. App.4th 1423, 1451 (2006):

> "The requirement of a *genuine* controversy reflects the desirability of avoiding not only collusive litigation, *but cases in which one or both parties lack a real motive to diligently contest the issues.* If the competing considerations are not adequately explored and presented, the court may reach a less-than-circumspect result, potentially sending the law down a wrong precedential trail. The rule also reflects an aversion to the needless burden that courts and the public would assume if judicial resources could be diverted to resolving academic or inconsequential controversies." (Emphasis added.)

It has been apparent throughout this litigation that the Department has lacked a motive to "diligently contest the issues", and has indeed sought to avoid such a contest at every opportunity.

Further proof that the required "actual controversy" is absent here comes from the requirement that an "actual controversy" be

> "one that admits of definite and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. The judgment must decree, not suggest, what the parties may or may not do."

Pacific Legal Foundation v. California Coastal Comm'n, 33 Cal.3d 158, 171 (1982) (quoting *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 117 (1983)). Here, there are no particular facts whatsoever, as there is and has never been any evidence that suction dredge mining under the existing regulations are harming fish, much less specific evidence concerning specific fish killed or harmed by a miner operating under a specific permit. And the Department

proposes that this Court merely order it "to take necessary steps to bring its suction dredge mining regulations into compliance . . .". (Dep't Status Report at 2.) Such relief "is insufficiently concrete and fails to touch the legal relations of parties with actual adverse legal interests". *City of Santa Monica v. Stewart*, 126 Cal. App.4th 43, 64 (2005). For all these reasons, there is no longer any "genuine controversy" between the Tribe and Department sufficient to exercise jurisdiction under CCP § 1060.

The Miners believe that the circumstances of the action, including the initial unlawful regulation, the ongoing secrecy, and the striking inconsistencies of the Department's positions, are sufficiently egregious as to generate a discoverable question as to whether the suit was collusive in the first place. It has, of course, long been the law that "an action not founded upon an actual controversy between the parties to it, and brought for the purpose of securing a determination of a point of law, is collusive and will not be entertained; and the same is true of a suit the sole object of which is to settle rights of third persons who are not parties." *Golden Gate Bridge and Highway Dist. v. Felt*, 214 Cal. 309, 316 (1931). The Miners believe that the suit was brought in order to provide a vehicle for implementing regulations without the cost of compliance with rulemaking procedures and hearing from those subject to the rule, and that once the Court properly rejected that approach, the suit was then transformed into a vehicle for extracting money from the Legislature to accomplish the same result.

Indeed, the Department now offers testimony that for "the Department to bring the suction dredge permitting program into compliance . . . the Department must and will seek an appropriation by the Legislature of funding sufficient for the Department to take appropriate action under the APA or CEQA." (10/2/06 Curtis Decl. ¶ 5.) The Department might, of course, simply offer such testimony to the Legislature. Instead, the Department and Tribe shamelessly seek to use this Court to add force to such testimony through a judgment calculated to enhance the prospect of success in the appropriation process.

As the *O'Grady* opinion explains,

> ". . . the lawmaking function of courts should generally be confined to narrow interstitial questions, questions the political branches have failed or refused to resolve, or questions (such as matters of procedure) peculiarly within the judicial bailiwick. The broader and more abstract the issues presented for adjudication, the greater is the risk of

> encroachment onto legislative prerogatives. Such encroachment is to be avoided not only because it offends abstract conceptions of the separation of powers, but because it provides legislators with an escape route from controversial issues for the resolution of which they ought to be responsible to the electorate." *O'Grady*, 139 Cal. App.4th at 1451-52.

From the Miners' perspective, that is what is happening here (albeit in an inverse context): the Department and Tribe seek to supplant Legislative discretion with judicial fiat. It is thus odd indeed to see the Department claiming that this Court should put its litigation position in a judgment to protect the separation of powers. (Dep't Status Report at 5.)

Under Code of Civil Procedure § 661, this Court may refuse declaratory relief "in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." This case cries out for application of § 661, and the Miners would propose, after further discovery, to present a motion to dismiss on the ground that the case does not meet the statutory requirements for declaratory relief.[6]

IV. THE NATURE OF FURTHER PROCEEDINGS.

Ordinarily, environmental plaintiffs unhappy with a California agency's decision to permit activity asserted to injure the environment seek review of the decision though administrative mandamus. In such proceedings, review is ordinarily limited to the administrative record supporting the agency's decision. *See generally Western States Petroleum Corp. v. Superior Court*, 9 Cal.4th 559 (1995) (in bank). The Tribe, however, purports to sue upon a "pattern and practice" of issuing permits. As best the Miners can tell, this cause of action was invented in a 1990 Court of Appeals decision, *Californians for Native Salmon and Steelhead Restoration v. Department of Forestry*, 221 Cal. App.3d 1419, 1422 (1990), which addressed the circumstances under which "an action for declaratory relief may lie against an administrative agency when it is alleged that the agency has a policy of ignoring or violating applicable laws or

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[6] The Department's expediently-evolving positions (denying liability, denying liability but agreeing to shut down mining, admitting liability) are also sufficiently striking as to invoke policies against "sham pleading". *Cf., e.g., Owens v. Kings Supermarket*, 198 Cal. App.3d 379, 384 (1988) ("the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint.")

regulations, but when no specific agency decision is attacked". Specifically, the First District Court of Appeals, found that

> "Appellants have alleged a policy to (1) issue responses after the notice of THP [Timber Harvest Plan] approval and (2) to fail to assess cumulative impacts in THPs. Clearly the allegations of appellants' complaint sufficiently set forth an actual controversy over significant aspects of respondents' legally-mandated duties." *Californians for Native Salmon*, 221 Cal. App.3d at 1427.

The Court of Appeals viewed the complaint as "challeng[ing] not a specific order or decision, or even a series thereof, but an overarching, quasi-legislative policy set by an administrative agency". *Id.* at 1429.

Interestingly, that same year the United States Supreme Court wisely abolished such lawsuits under federal law, explaining that environmental plaintiffs:

> "cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must address its attack against some particular 'agency action' that causes it harm . . . . The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts."

Lujan v. National Wildlife Federation, 497 U.S. 871, 891-94 (1990). The Miners propose to include in their motion to dismiss argument urging this Court to follow the Federal approach, recognizing, of course, that it is up to the Court of Appeals, and ultimately the Supreme Court, to determine this issue. Specifically, the Miners will argue that it is not proper to pursue a "pattern and practice" case in lieu of administrative mandamus where, as here, the Tribe could easily have challenged specific permitted mining operations, or the specific failure to close areas to mining based on the mere presence of fish.

In an action for administrative mandamus, review would be limited to the administrative record, which would not include the "secret evidence", and the Department's newly-minted opinion assertedly based, in part, upon such evidence, would not even be relevant. The Miners have reviewed the administrative record, and believe they could easily prevail on a motion for summary judgment based on that record, because the record is devoid of evidence that permitting under the existing regulations injures fish. That is why the coho recovery plan

said in February 2004 that there was no such evidence, and why the record contains, instead of such evidence, the Department's letter soliciting it.

In any event, assuming the Miners' motion to dismiss is denied, and a "pattern and practice" action proceeds, a subsequent First District Court of Appeals case declares that in such "pattern and practice" actions, the ordinary rule that judicial review is limited to the administrative record does not apply. *East Bay Municipal Utility District v. Department of Forestry and Fire Protection*, 43 Cal. App.4th 1113, 1123 (1996) ("The present action represents the first declaratory relief action of the type sanctioned by *[Californians for] Native Salmon* to go to trial").[7] Accordingly, ordinary rules of civil procedure, including the right to discovery, should apply in this action, and the Miners would propose to serve such discovery by a deadline to be established by the Court in order to provide the Court with a concrete and particularized opportunity to address the scope of allowable discovery.

Broadly speaking, the Miners see two types of discovery as relevant: (1) discovery concerning the alleged impact of suction dredge mining on fish and (2) discovery concerning the nature of the Department's decisionmaking concerning this issue. The former type of discovery is straightforward, and would consist of documentary discovery and requests for admissions, followed by depositions of those individuals (including those who have previously filed declarations) expected to offer testimony at trial. The general goal would be to conduct an initial round of questioning of witnesses by deposition, so as to reduce the amount of cross-examination that would be needed at trial.

The latter type of discovery consists of material that would ordinarily form part of the administrative record on review, but which in this case has been withheld on grounds of a settlement privilege, including communications between the Tribe and the Department. The Miners do understand that Government Code section 6554(b) exempts from the Public Records Act "[r]ecords pertaining to pending litigation to which the public agency is a party . . . until the

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[7] *But see Friends of the Old Trees v. California Department of Forestry*, 52 Cal. App.4th 1382 (1997) (citing *East Bay* and declaring "in the future, we believe courts should review the Department's approval of a THP by administrative mandamus (Code Civ. Proc., § 1094.5) and that review should ordinarily be confined to the administrative record").

pending litigation or claim has been finally adjudicated or otherwise settled". However, pursuant to section 6260, "[t]he provisions of this chapter shall not be deemed in any manner to affect the . . . rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state . . .".

While this matter, like many other matters raised in this Status Report, merits fuller briefing in the context of a specific motion, the Miners believe that fundamental principles of fairness and due process will not permit the Court to accept the Department's suggestion that a highly significant policy decision (to seize property rights of Miners by committing the Department to evict them from more significant portions of the State's rivers and streams) can be ensconced in law on the basis of a secret administrative record. In evaluating the Department's position, the nature of communications with the Tribe are relevant, because "[d]ecisions of administrative agencies may also be challenged if unlawful factors, including improper political influence, have tainted the agency's exercise of discretion . . .". *Fallini v. Hodel*, 725 F. Supp. 1113, 1118 (D. Nev. 1989), *aff'd*, 783 F.2d 1343 (9th Cir. 1986). In that case, "[t]he record shows that the violation was charged partially as a result of political pressure by wild horse activists, and the sensitive nature of wild horse issues, rather than on a 'reasoned process of considering the relevant factors pertaining to this problem.'" *Id.* Here, an administrative record would ordinarily include communications from the Tribe, and the Miners believe that particularly given the absence of any actual harm to fish, upon discovery of such evidence it will be easy to establish that the Department's present position is the product of political factors, rather than a reasoned process of considering evidence concerning actual mining actually conducted under actual permits.

Conclusion

Assuming that the Department and Tribe persist in seeking a judicial declaration, contrary to fact, that the Miners are harming fish, and are unwilling to resolve the action on terms less prejudicial to the Miners, the Miners believe this Court should:

1. Establish a deadline for service of discovery demands;
2. Establish a deadline for moving to object to any such discovery;

3. Establish a deadline for any dispositive motions to be presented (followed by oral argument); and

4. Establish a date for trial (factual hearing), if necessary.

At this juncture, prior to discovery, the Miners cannot provide a useful estimate of the length of any trial proceedings.

Respectfully submitted,

Dated: October 10, 2006.

James Buchal, Esq.
Attorney for Intervenors New 49ers and Raymond W. Koons

Dated: October 10, 2006.

David Young, Esq.
Attorney for Intervenor Gerald Hobbs