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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA  
11 HAYWARD DIVISION

12 KARUK TRIBE OF CALIFORNIA;  
AND LEAF HILLMAN,  
13  
14 Plaintiffs,  
15 v.  
16 CALIFORNIA DEPARTMENT OF FISH AND  
GAME; AND RYAN BRODDRICK, DIRECTOR,  
17 CALIFORNIA DEPARTMENT OF FISH AND  
GAME,  
18 Defendants.  
19  
20 THE NEW 49'ERS, a California Corporation; AND  
RAYMOND W. KOONS, an Individual; AND  
21 GERALD HOBBS, an Individual,  
22 Interveners.  
23

Case No.: RG 05 211597

**DEFENDANTS' CASE  
MANAGEMENT CONFERENCE  
STATEMENT WITH  
SUPPORTING DECLARATIONS  
OF NEIL MANJI AND BANKY E.  
CURTIS**

Judge: Honorable Bonnie Sabraw  
Place: Department 512

Date: October 17, 2006  
Time: 9:00 a.m.

Action Filed: May 6, 2005  
Trial Date: None Set

25 This Case Management Conference Statement is submitted by Defendants, California  
26 Department of Fish and Game, and Ryan Broddrick, Director, California Department of Fish and  
27 Game ("Department"), in compliance with the Court's September 8, 2006 Order Following Case  
28 Management Conference.

1 I. DESCRIPTION AND CURRENT STATUS OF THE CASE

2 Plaintiffs brought this action for declaratory and injunctive relief to challenge Defendants'  
3 pattern and practice of issuing suction dredge mining permits that imperil Coho salmon and other  
4 state and federally listed threatened species that were so designated after April of 1994, when the  
5 Department of Fish and Game certified a Final Environmental Impact Report ("FEIR") in  
6 conjunction with adoption of the suction dredge mining regulations in accordance with Fish and  
7 Game Code sections 5653 and 5653.9. Plaintiffs also allege that despite the subsequent listing of  
8 Coho salmon and other species, Defendants have continually issued suction dredge permits  
9 without conducting any analysis of the impacts of this activity under the California Environmental  
10 Quality Act ("CEQA"), Cal. Pub. Res. Code, §§ 21000 et seq. Plaintiffs complaint alleges that  
11 Defendants' actions constitute a violation of CEQA and a violation of the mandate in Fish and  
12 Game Code section 5653(b) that suction dredge permits issued by Defendants not be "deleterious  
13 to fish." Plaintiffs seek an injunction to require Defendants to apply the mitigation measures  
14 provided in the 1994 FEIR to the Coho salmon and other species named in the complaint. In the  
15 alternative, Plaintiffs seek to enjoin Defendants from issuing suction dredge permits until  
16 Defendant complies with CEQA.

17 Plaintiffs and Defendants reached a settlement agreement in this litigation in which  
18 Defendants stipulated to conduct an analysis under CEQA and to do a formal rulemaking under  
19 the APA to consider changing its regulations regarding suction dredge mining. The settlement  
20 also required Defendants to refrain from issuing permits for suction dredge mining on certain  
21 rivers for certain time periods, when the Coho salmon and other species named in Plaintiffs'  
22 complaint are most vulnerable.

23 Plaintiffs and Defendants submitted the settlement to the Court for approval on December  
24 20, 2005. Subsequently, the Court granted Intervenors New 49ers and Intervenor Gerald Hobbs  
25 leave to intervene in the action and to oppose the settlement. On June 16, 2006, the Court denied  
26 entry of the settlement.

27 Following the Case Management Conference with the Court on July 17, 2006, counsel for  
28 all parties met in Sacramento, initially without their clients on August 2, 2006, and again with

1 their clients on August 31, 2006. The purpose of these meetings was to discuss a possible  
2 settlement of the litigation. The parties were unable to agree upon a settlement, and the  
3 Department announced its intention to advise the Court of its admission to liability at the Case  
4 Management Conference then scheduled on September 8, 2006.

5 II. THE DEPARTMENT'S ADMISSION

6 At the September 8, 2006 Case Management Conference, and in its Case Management  
7 Conference Statement of September 6, 2006, the Department made the following admission:

8 The Department of Fish and Game, as lead agency under the California Environmental  
9 Quality Act (CEQA)(Pub. Resources Code, §§ 21000-21178) and as trustee of California's fish  
10 resources, and its Director, Ryan Broddrick, are of the opinion that suction dredge mining in the  
11 Klamath, Scott, and Salmon River watersheds under the existing regulations is resulting in  
12 deleterious effects on Coho salmon as alleged in Plaintiffs' complaint. As such, the Department  
13 stipulates to entry of judgment by the Court: (1) finding the Department is not in compliance with  
14 Fish and Game Code sections 5653 and 5653.9; (2) finding under CEQA that such deleterious  
15 effects on Coho salmon constitute a substantial change in circumstances under which the  
16 Department is currently carrying out the suction dredge permitting program under the existing  
17 regulations; and (3) ordering the Department to take necessary steps to bring its suction dredge  
18 mining regulations into compliance with Fish and Game Code sections 5653 and 5653.9, and to  
19 comply with CEQA. The steps necessary for the Department to bring the existing suction dredge  
20 mining regulations into compliance with the Fish and Game Code must necessarily include a  
21 timely request by the Department for and an appropriation by the Legislature of sufficient funding  
22 for the Department to take appropriate action under the Administrative Procedure Act  
23 (APA)(Gov. Code, §§ 11340 et seq.) and CEQA.

24 The Department argued to the Court on September 8, 2006, that its admission is entitled to  
25 judicial deference as it is rationally based upon, and is supported by, a substantial body of  
26 evidence, including peer reviewed scientific evidence and data possessed by the Department, and  
27 therefore its opinion is neither arbitrary nor capricious. The Department further argued that if the  
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1 Court accepts this admission and defers to the Department's judgment as California's trustee  
2 agency for fish and wildlife resources and as lead CEQA agency, the liability stage of this  
3 litigation will be completed and the Court and the parties will progress to the remedy stage of the  
4 proceedings.

5 Intervenor, The New 49'ers and Gerald Hobbs, indicated their belief that they may  
6 challenge the Department's admission. The Court's September 8<sup>th</sup> Order Following Case  
7 Management Conference directed the Department to provide a Case Management Conference  
8 Statement that discusses, *inter alia*, how and in what form it intends to present to the Court the  
9 admission previously asserted both at the September 8<sup>th</sup> Case Management Conference and in its  
10 previous Case Management Conference Statement, and the time frame needed for such  
11 submission. The Court's Order also requires Plaintiffs and the Intervenor to provide responsive  
12 Case Management Conference Statements discussing those issues identified by the Court.

### 13 III. FORMAT OF DEPARTMENT'S PRESENTATION TO THE COURT

14 The Department believes the presentation of its admission in open court and its inclusion  
15 in this and the previous Case Management Conference Statement, provide the Court with the legal  
16 authority to enter a judgment on the Department's liability.<sup>17</sup> To provide the Court with further,  
17 more formal factual and scientific grounds upon which to accept the Department's admission, the  
18 declarations of Neil Manji, Fisheries Branch Chief, and Banky E. Curtis, Deputy Director of  
19 Regional Directions, are attached hereto and incorporated herein as Exhibits "1" and "2,"  
20 respectively. These declarations summarize for the Court the rational basis for the Department's  
21 administrative decision to end the liability stage of this litigation, reduce its exposure to attorneys'

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23 1. The Department's judicial admission is conclusive on the issue of the Department's  
24 liability and removes the admitted matter from consideration. (See *Fibreboard Paper Products*  
25 *Corp. v. East Bay Union of Machinists, Local 1304* (1964) 227 Cal. App.2d 675, 708, fn. 17; 1  
26 Witkin, Cal. Evidence (4<sup>th</sup> ed. 2000) Hearsay, §§ 92, 97, pp. 796, 799-800.) According to  
27 Witkin, matters admitted in a pretrial, or in a case management conference and embodied in a  
28 conference order have conclusive effect. The order supersedes the pleadings and an issue raised  
in the pleadings may be eliminated by the order. (Witkin, Cal. Evidence (4<sup>th</sup> ed. 2000) Hearsay,  
§ 92, p. 796.)

1 fees and costs, avoid future protracted and costly litigation under the existing suction dredge  
2 regulations, and to actively pursue the necessary legislative appropriation to conduct a formal,  
3 comprehensive rulemaking under the APA with related CEQA review. The Department will  
4 argue at the upcoming Case Management Conference that this rational basis is sufficient to  
5 withstand Intervenor's challenge, if any, and most importantly, to establish the grounds upon  
6 which the Court may give appropriate deference to the Department's decision to admit liability.

7       Should the Intervenor or another party object to the Court entering the requested  
8 judgment on the Department's liability based upon counsel's open court admission, this Case  
9 Management Conference Statement, and the supporting declarations attached hereto, the  
10 Department is prepared to move the Court for an order entering the requested judgment. The  
11 Department respectfully submits that this action is not necessary, as the Court is authorized to  
12 accept the Department's tendered judicial admission and supporting declarations as conclusive on  
13 the issue of liability. However, if the Court disagrees, the Department anticipates that a motion  
14 could be prepared in two weeks and filed and served according to Code of Civil Procedure,  
15 section 1005, subsection (b).

16 **IV. REQUIREMENT OF JUDICIAL DEFERENCE**

17       The declarations of Neil Manji and Banky E. Curtis, attached hereto, attest to the  
18 substantial evidence that suction dredge mining under the Department's current regulations is  
19 having deleterious effects on Coho in the Klamath, Scott, and Salmon Rivers and their  
20 tributaries.<sup>2/</sup> This factual and scientific evidence leads the Department to reasonably conclude that  
21 the existing regulations (Cal. Code Regs., tit. 14, §§ 228, 228.5) are not in compliance with Fish  
22 and Game Code sections 5653 and 5653.9, and supports the Department's well-considered  
23 decision to admit liability.

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25       2. "Substantial Evidence" is defined under section 15384 of the CEQA Guidelines (Cal.  
26 Code Regs., §§ 15000-15387) to mean, "enough relevant information and reasonable inferences  
27 from this information that a fair argument can be made to support a conclusion, even though  
28 other conclusions might also be reached...Substantial evidence shall include facts, reasonable  
assumptions predicated upon facts, and expert opinion supported by facts."

1 The Department's decision to admit liability, supported by a rational reliance upon a  
2 substantial body of factual and scientific evidence, is neither arbitrary nor capricious and therefore  
3 is entitled to judicial deference. The definition of "substantial evidence" in the CEQA Guidelines  
4 makes clear, it is of no consequence that other persons may reach different conclusions. (CEQA  
5 Guidelines, § 1538.) As the California Supreme Court has stated, "[a] reviewing court does not  
6 superimpose its own policy judgment upon a quasi-legislative agency in the absence of an  
7 arbitrary decision; rather the review is limited to an examination of the proceedings to determine  
8 whether the action is arbitrary or entirely lacking in evidentiary support...; in these technical  
9 matters requiring the assistance of experts and the collection and study of statistical data, courts  
10 let administrative boards and officers work out their problems with as little judicial interference as  
11 possible." (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702.) Such limited  
12 judicial review forecloses inquiry as to the agency's reasons for its actions, so long as a reasonable  
13 basis for such action exists, the motivating factors considered in reaching the decision are  
14 immaterial and supportive findings are not required. (*Stauffer Chemical Co. v. Air Resources*  
15 *Board* (1982) 128 Cal.App.3d 789, 794-795.) The limited scope of review of quasi-legislative  
16 decision making is grounded on the doctrine of separation of powers which (1) sanctions  
17 legislative delegation of authority to an appropriate administrative agency and (2) acknowledges  
18 the presumed expertise of the agency. (*Id.*; see also *California Hotel & Motel Assn. v. Industrial*  
19 *Welfare Com.* (1979) 25 Cal.3d 200, 211-212.)

20 CEQA sections 21168 and 21168.5 also limit a court's ability to substitute its own  
21 judgment for that of a public agency. Both sections agree that in any action or proceeding to  
22 attack, review, set aside, void, or annul a determination, finding, or decision of a public agency, a  
23 court's inquiry is limited ultimately to whether the determination or decision is supported by  
24 substantial evidence. (See also *National Parks and Conservation Ass'n v. County of Riverside*  
25 (1999) 71 Cal.App.4th 1341, 1352.) In applying the substantial evidence standard, the reviewing  
26 court must resolve reasonable doubts in favor of the administrative finding and decision. (*Id.*)  
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1 V. RECOMMENDATION

2 The Department's admission was made publically, both orally on the record in open court  
3 during the last Case Management Conference and in writing in this and its previous Case  
4 Management Conference Statements. As such, the Department's judicial admission is factually  
5 and legally conclusive on the issue of liability. The Department respectfully requests that the  
6 Court accept the admission, which is based upon substantial evidence as attested to in the attached  
7 declarations of Neil Manji and Banky E. Curtis, and enter a Case Management Conference Order  
8 superseding the pleadings, concluding the issue of liability, and requiring the Department to take  
9 necessary steps to comply with CEQA and bring its suction dredge mining regulations into  
10 compliance with Fish and Game Code sections 5653 and 5653.9. The Court should not sanction  
11 a challenge by the Intervenor or any other party to the Department's administrative decision to  
12 judicially admit liability, as that decision is entitled to judicial deference and by allowing a  
13 challenge the Court would be placing itself in the position of substituting its judgment for that of  
14 the agency that is presumed to have the technical expertise required to carry out its quasi-  
15 legislative function. With entry of the Case Management Conference Order as recommended, the  
16 Court and the parties may proceed to the remedy stage of the case.

17 VI. INJUNCTIVE RELIEF

18 The Department takes no position on Plaintiff's request for injunctive relief.

19 VII. CASE MANAGEMENT ORDERS

20 An Order After Case Management Conference was issued by the Court on July 22, 2005.  
21 The Court ordered bifurcation of the CEQA and Fish and Game Code claims and set dates for  
22 certification of the Administrative Record and a briefing schedule for the hearing on the CEQA  
23 claims. Those dates were subsequently deferred while Plaintiffs and Defendants negotiated a  
24 settlement agreement.

25 On December 20, 2005, the Court issued another Order After Case Management  
26 Conference, in which the hearing on the CEQA claim was vacated while the Court made its  
27 determination regarding entry of Plaintiffs' and Defendants' settlement agreement.

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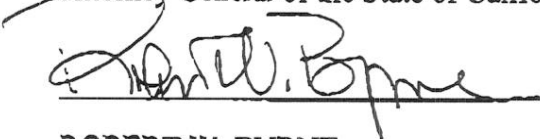
On July 17, 2006, the Court issued a Case Management Conference Order and Order Setting Further Case Management Conference on September 8, 2006.

The Court entered an Order Following Case Management Conference on September 8, 2006, which was described earlier in this Case Management Conference Statement. In addition, the Court issued an Order from the Bench on September 8, 2006, rescinding its previous Order bifurcating Plaintiffs' CEQA and Fish and Game Code claims.

Dated: October 2, 2006

Respectfully submitted,

BILL LOCKYER,  
Attorney General of the State of California



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Attorneys for Defendants California Department of Fish and Game and Ryan Broddrick, Director, California Department of Fish and Game