

1 James L. Buchal, Appearing *Pro Hac Vice*
MURPHY & BUCHAL LLP

2 2000 S.W. First Avenue, Suite 320
Portland, OR 97201

3 jbuchal@mblp.com

Telephone: 503-227-1011

4 Facsimile: 503-227-1034

5 R. Dabney Eastham, Cal. Bar No. 115533
44713 Highway 96

6 Seiad Valley, CA 96086

dabneylaw@sisqtel.net

7 Telephone: 530-496-3677

8 Facsimile: 530-496-3319

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

10
11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION

14 KARUK TRIBE OF CALIFORNIA,

15 Plaintiff,

16 v.

17 UNITED STATES FOREST SERVICE, *et al.*,

18 Defendants.

Case No. 04-4275 (SBA)

**DECLARATION OF DAVID
McCRACKEN IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

Date: June 21, 2005

Time: 1:00 p.m.

Ctrm: 3, 3d Floor

Judge: Hon. Sandra B. Armstrong

21
22 I, David McCracken, declare as follows:

23 1. My name is David McCracken. I am a small-scale gold mining specialist with 25 years of
24 experience. My residence is at 27 Davis Road in Happy Camp, California. I have consulted in
25 this field in many places around the world; have published five books on the subject; have
26 produced several how-to video productions; and have trained hundreds of people in the activity of
27 small-scale gold mining. I am the President and general manager of The New 49'ers, Inc. ("The
28

1 New 49'ers"), one of the two intervenors in the above-captioned lawsuit. I have read the
2 Plaintiff's Second Amended Complaint for Declaratory and Injunctive Relief and the Plaintiff's
3 Motion for Summary Judgment and am familiar with the allegations in these documents.

4 2. As general manager of The New 49'ers, I am familiar with the types of mining operations
5 that are occurring in the Klamath National Forest. I have participated in numerous meetings with
6 the Forest Service and the Karuk Tribe of California (the "Tribe"). As part of my responsibilities, I
7 have personally finalized the mining Notices and/or Plans submitted to the Forest Service by The
8 New 49'ers for the past 20 years. I also have been directly responsible for overseeing the mining
9 activity that has taken place by our members during that time period, to ensure that our ongoing
10 operations have not exceeded our agreements with the Forest Service or the Tribe.

11 3. Suction dredge mining has been active along the Klamath, Scott, and Salmon Rivers within
12 the Klamath National Forest since the early 1960's or before. Hand-mining activity has been active
13 along these rivers since 1850 and is a large part of the cultural heritage within Siskiyou County.

14 4. I personally began mining along the Klamath River during the summer of 1983. There were
15 other active miners along the Klamath and Scott Rivers; and many along the Salmon River at that
16 time. I founded The New 49'ers during 1986. The purpose was primarily to create an association
17 of miners that could pool our resources to lease or purchase valuable mining properties which could
18 thereafter be prospected and mined by active members of The New 49'ers.

19 5. I have read the allegations in the Plaintiff's Second Amended Complaint for Declaratory and
20 Injunctive Relief and in the Declarations of Leaf Hillman and Toz Soto in Support of the Plaintiff's
21 Motion for Summary Judgment concerning the alleged harm caused by suction dredging and other
22 forms of small-scale mining to the interests of Karuk Tribe members such as Messrs. Hillman and
23 Soto. I was surprised when I read these allegations; because prior to this litigation, I and The New
24 49'ers have been pro-active in addressing every specific concern raised by or on behalf of the Tribe.

25 6. **Mechanized mining.** I am not aware of any mechanized mining activity in the Klamath
26 National Forest, as alleged in the Plaintiff's Second Amended Complaint for Declaratory and
27 Injunctive Relief (at paragraph 30) and in the Declaration of Toz Soto in Support of the Plaintiff's
28 Motion for Summary Judgment (at paragraph 10). By this, I mean the type of mining where

1 earthmoving equipment, such as bulldozers or backhoes, is used to facilitate the mining process. In
2 fact, the allegation that earthmoving equipment such as this is being used by The New 49'ers or
3 other small-scale miners in the Klamath National Forest is completely untrue. While small (usually
4 around 5 horsepower) motors are sometimes used to pump water to portable recovery systems up
5 out of the active waterway, the excavation process in surface mining activity, sometimes referred to
6 as "high-banking," is only accomplished with hand tools, like a pick and shovel; but most often
7 with a garden trowel or portable vacuum cleaner. Suction dredges, much like an underwater
8 vacuum cleaners, are powered by small motorized pumps. But because an average of 85% of the
9 streambed is made up of rocks that are too large to suck up, most of the excavation process is
10 accomplished by moving rocks out of the way by hand. This is also true up on the land. Streambed
11 material is mostly made up of rocks which must be moved by hand. Small-scale mining, both
12 above and below water, consists almost entirely of hand-work.

13 7. There is no mechanized mining (backhoes, bulldozers and the like) activity involved in the
14 small-scale mining associated with The New 49'ers, myself or any other mining program that I am
15 aware of in the Klamath National Forest. All activity that I am aware of is being accomplished
16 using hand-work. These activities, if within the high-water boundaries of waterways, are managed
17 by the California Department of Fish and Game under Sections 1600-1616 of the California Fish
18 and Game Code. Under these regulations, excavations must be kept small enough so as to not
19 create a substantial streambed alteration. Discharges from the surface are not allowed into the
20 active waterway so as to cause a water-quality violation under Section 1602 ("deposit or dispose of
21 debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass
22 into any river, stream, or lake").

23 **8. Mining Density.** The impression that the Court might obtain from reading the Plaintiff's
24 Second Amended Complaint for Declaratory and Injunctive Relief and the Declarations of Leaf
25 Hillman and Toz Soto in Support of the Plaintiff's Motion for Summary Judgment is that a Karuk
26 Tribal member cannot find a quiet place along a river or stream in the Klamath National Forest for
27 spiritual reflection, recreation or fishing, because of all the suction dredges and other mining
28 activities. This is not the case. It is important to place things in actual perspective. Our activity

1 takes place upon such a small fraction of the forest, that it would be difficult to measure when
2 compared with the whole forest. During the 1980's we had more dredge operations within the
3 Klamath National Forest because of the discovery of substantial gold deposits at the "Glory Hole"
4 and the "Mega Hole" on the Klamath River between Seiad Valley and Happy Camp. The number
5 of dredging operations has since decreased dramatically. However, even in the days of highest
6 dredging activity (18 years ago), most of the rivers and streams available in the Klamath National
7 Forest by California law for dredging was not being dredged even during its season because access
8 to the river or stream was too difficult (this is especially the case on the Salmon River; access to
9 much of that river from the road is too difficult for nearly all miners because the river runs in a deep
10 and very steep-walled canyon well below the road) or the site was too remote from good
11 campgrounds or lodging. The same is true for other forms of prospecting. There simply are not
12 enough prospectors in existence to cover the vastness of the national forest. Exhibit 2 to the Soto
13 declaration is especially misleading because it consists of pictures showing certain dredges
14 operating on one of our Salmon River claims in 2003, but not showing a wide river view, and
15 certainly not showing that nearly all of the Salmon River included in those claims experienced no
16 suction dredge mining whatsoever in 2003. Furthermore, Mr. Soto's pictures do not indicate that
17 the dredges shown were operating only part of the day and not for even very many days. The
18 pictures are taken out of perspective of time and space. That is unfair. Even a mining excavation
19 with the use of a tablespoon can be made to look significant; if a single moment is framed in so
20 closely that there is no perspective to the real world. There is no justice in this.

21 **9.** While we do make over 60 miles of mining properties available to our members, seldom (if
22 ever), even during the most active summer months, do we ever have enough active members present
23 that would add up to even a single gold prospector per mile along our claims. Because we make
24 substantial property available, the result is that members generally spread out over a great distance,
25 and there is very little density. On top of that, our claims represent only a very small portion of all
26 the waterways within the Klamath National Forest. Almost all the rest is completely vacant of
27 mining activity. Since all of the activity by our members only consists of what a person can
28 accomplish by hand, I am surprised that anyone would consider it significant. For Example, even

1 the smallest road-slide alongside the Klamath, Scott or Salmon River roads, which would be
2 immediately cleaned up by Cal Trans or the County Road Department with no further consideration,
3 would create an impact many times greater than all of the combined activity of all our members
4 during a full season. Perhaps even more to the point, the logging road eradication program
5 conducted by the Karuk Tribe above the Salmon River during 2004 created thousands of times more
6 surface disturbance than all of the combined small-mining activity within the Klamath National
7 Forest during the same year; probably many times more disturbance than all of our combined
8 prospecting activity for the past 19 years! The truth is that it is actually the Tribe that is using
9 heavy earthmoving equipment to excavate within the Klamath National Forest. If a person could
10 pick a point at random on a river or stream available for dredging along one of our mining claims,
11 that person would most likely not see any mining activity at that point. However, what the person
12 will see at most such points on the Klamath River and its larger tributaries such as the Salmon River
13 is a number of rafting and kayaking parties going by in a continuous procession during the spring,
14 summer and fall months. Highway 96 and the other river roads have continuous traffic both day
15 and night. Therefore, complete solitude will not be found along these rivers as long as the Klamath
16 National Forest allows kayaking and rafting, camping, swimming, hunting, hiking, horseback
17 riding, firewood cutting, many other types of activities, and the roadways (which follow alongside
18 these waterways) continue to exist.

19 **10. Regulation of suction dredging by the State of California.** In the Klamath National
20 Forest, we conduct our surface mining activity (prospecting with the use of hand tools out of the
21 water) in conformance with the Section 1600 Streambed Alteration regulations. We do suction
22 dredging in conformance with the Section 5653 suction dredge regulations of the California Fish
23 and Game Code. Suction dredgers are required to obtain an annual permit. An extensive process
24 was undertaken by the State of California as required by the California Environmental Quality Act
25 (CEQA), codified at Cal. Pub. Res. Code §§ 21000-21178.1, to finalize an Environmental Impact
26 Report in 1994 on the effects of suction dredging. As a result of that process, regulations were
27 created to mitigate concerns and reduce perceived negative impacts to less than significant. These
28 regulations are codified at Cal. Code Regs. tit. 14, §§ 228 and 228.5 (1994) The regulations

1 include seasonal closures to protect salmon redds (eggs) and juveniles during critical time periods,
2 restrict the size of dredges allowed in different waterways, prevent dredging into the banks of
3 waterways, prevent importation of silt into the waterway, and many other measures to reduce or
4 eliminate those impacts that potentially could create a significant impact. Myself, and many others,
5 were very actively involved throughout the entire CEQA process which evolved into the present-
6 day suction dredging regulations. All suction dredgers in California are required by law to obtain a
7 suction dredge permit and operate within the regulations. Criminal penalties are imposed upon
8 those who do not conform to the regulations.

9 **11. Accommodation of Tribal concerns.** The Karuk Tribe does not have a reservation, unlike
10 the Hoopa Tribe downstream on the Klamath River in Humboldt County. The land in which the
11 Karuk Tribe asserts an interest in this lawsuit, presumably based on the Karuk Tribe's historical
12 association with such land in times-past and the current usage by members of the Tribe that actually
13 live in Siskiyou and Humboldt Counties, is National Forest land, specifically, parts of the Klamath
14 National Forest and the Six Rivers National Forest. The Karuk Tribe does not own or control this
15 land, and members of the Karuk Tribe are obliged to share whatever use they make of these
16 National Forests with other users, such as private land owners, local commercial activity, hunters,
17 fishermen, river rafters, canoeists, kayakers, backpackers, through-hikers, bird watchers, tourists,
18 mushroom pickers, marijuana growers, loggers, and miners, as well as persons residing within these
19 National Forests that are not members of the Karuk Tribe. Non-members of the Karuk Tribe form
20 the vast majority of persons living in the Klamath National Forest. Gold miners have been actively
21 mining within the Klamath National Forest, alongside the Karuks and other forest-users, for over
22 150 years. Gold mining comprises a substantial historical use of the area and is an important part of
23 the local heritage. There are substantive rights involved. All the same, I and The New 49'ers, on
24 our own and in conjunction with National Forest officials, have accommodated every specific
25 expressed concern of the Karuk Tribe as they relate to our mining activities, particularly with
26 respect to Karuk Tribe cultural and religious concerns involving National Forest land. I will
27 describe below how we accommodated these concerns of the Karuk Tribe:

28

1 12. **First contact:** My first contact with the Tribe was during the dredging season of 1984. My
2 partner and I were dredging along our claim on the Klamath River, not far downriver from the
3 mouth of Clear Creek. We were approached by two members of the Karuk Tribe: Gary Beck (who
4 was the Tribal Chairman during the early-1990's), and Norman Goodwin (who is now a spiritual
5 leader in the Tribe). They explained that the area where we were dredging had historical, cultural
6 and spiritual significance to the Tribe, which the motor-noise from our dredge was disturbing. Out
7 of respect for their values, my partner and I withdrew our dredge from that area and never returned
8 there. Our cooperation was appreciated by the Tribe, because both Gary and Norman have told me
9 so.

10 13. There was no further direct contact from the Tribe for the following 20 years. I founded The
11 New 49'ers and pursued suction dredging and hand-mining activity in various locations along the
12 Klamath River from Interstate 5 down to around Ti Bar (100+ miles of gold-bearing river); and
13 along the lower five miles of the Scott River. Some of our members and other miners also engaged
14 in suction-dredge and hand-mining activity along the Salmon River. If the Karuk Tribe objected to
15 this activity, I was not aware of it, because it never made a formal complaint or approached us
16 directly. Nor did I hear of any complaint from the Forest Service or anyone else.

17 14. The New 49'ers have been operating within the Klamath National Forest since 1986 either
18 under a formal Operating Plan or a Notice of Intent. To my knowledge, the Forest Service has
19 never found our organization in violation of our agreements or obligations.

20 15. We acquired access to new mining claims on Klamath National Forest land along the lower
21 reach of the Salmon River during the early part of 2003, and intended to make those properties
22 available to the members of The New 49'ers. In planning for this, we decided to initiate contact
23 with the Karuk Tribe in advance, primarily to establish if it had any sensitive cultural sites or areas
24 along the lower Salmon River that we should avoid encroaching upon. In an attempt to initiate a
25 meeting with Tribal leaders, we telephoned the Tribal Facility no fewer than five times in May of
26 2003. Those phone calls were all directed to Sandy Tripp, Director of Natural Resources for the
27 Karuk Tribe.

28

1 16. **Second Contact:** The phone contact evolved into a meeting between me, our own Director
2 of Internal Affairs, and Sandy Tripp in her office in early June of 2003. During that meeting,
3 several things were discussed:

4 A) We told Sandy that we had no intention of engaging in any mining activity in or near the
5 Tribal spiritual area located near Somes Bar (I believe and understand this area is called “Katimin”
6 in the Karuk language); and offered to not do any mining upstream on the Klamath River from the
7 mouth of the Salmon River. That created a buffer-zone between any of our activity and the Tribe’s
8 most sensitive area.

9 B) We told Sandy that we would also avoid any other cultural areas, and requested the
10 Tribe to please identify them for us. No other culturally-sensitive areas were identified in that
11 meeting. Sandy did tell us that there were two very popular swimming holes (used by non-Karuk
12 locals) along the lower Salmon River. One is located at “Blue Hole.” The other is at “Hippo
13 Rock.” As both of these areas were located on mining claims that we were leasing, we volunteered
14 to prevent any mining activity in or around these two swimming holes. This restriction remains in
15 our organizational rules today.

16 C) We agreed to follow up with another meeting, as soon as Sandy had an opportunity to
17 confer with Tribal leaders.

18 17. **Third contact:** On or around the 2nd of July, 2003, just as the dredging season was starting
19 along the Salmon River, a meeting was organized at the elementary school in Somes Bar. Pete
20 Brucker and others were present representing the Salmon River Restoration Council (SRRC), which
21 is the primary environmental-advocacy group in that area. Toz Soto (the tribal fish biologist whose
22 declaration was filed in support of the Karuk Tribe’s Motion for Summary Judgment) was present
23 representing the Karuk Tribe. Several other local people were present. Two of our organizational
24 executives and I were present representing the mining community. During the meeting, several
25 things were discussed and agreed upon:

26 A) Toz Soto from the Tribe explained that the only serious fishery concern was to not
27 disturb cold water refuges along the Salmon River during the warm-water months. These are areas
28 where cooler water flows into the river from side-streams. Fish congregate in the cooler water

1 during the warmer summer periods. Only two refuges were identified: Wooley Creek, and Crapo
2 Creek. As the refuge at the mouth of Crapo Creek is located on mining claims that we lease, we
3 agreed to go there immediately with those concerned, and define the refuge, so we could prevent
4 any dredging activity in there at any time. We did that, and the area continues to remain off limits
5 to dredging in the Operation Guidelines and Rules our members agree to follow.

6 B) Wooly Creek is not an area that our association controls, so I made contact with the
7 miner who owns that claim (Roy Johnson). He has agreed to not mine within the vicinity of Wooly
8 Creek.

9 C) Strong concern was expressed in the meeting about a culturally-sensitive area located at
10 "George Geary Picnic Area." People representing the Tribe said the picnic area was popular to
11 Tribal members, and they did not want to hear motors running in the immediate vicinity. This area
12 is located along one of the mining claims that we lease. So we immediately went to George Geary
13 with the people voicing the concern and agreed to create an internal rule amongst our membership
14 that there would be no overnight camping at George Geary, and no motors operating (motors run
15 the small pumps that drive suction dredges) within 200 feet of the picnic area. The Tribal
16 representatives were satisfied with this. That rule remains in effect today, along with a sign posted
17 on a tree at George Geary declaring that there is no motorized-mining within 200 feet.

18 D) I was encouraged at this meeting to telephone Harold Tripp, who plays a leadership-role
19 in the Tribe, and try to arrange a meeting with Tribal leaders. I made this phone call as soon as I
20 returned to my office in Happy Camp. Because the 4th of July weekend was upon us, we agreed to
21 have a meeting the following week.

22 18. **Fourth contact:** The meeting with Harold Tripp took place in the 2nd week of July, 2003.
23 We met at the Somes Bar store, and then moved to the George Geary Picnic area. I was present to
24 represent the miners, along with our Director of Internal Affairs. Representing the Tribe were
25 Harold Tripp, Sandy Tripp, Leaf Hillman (the Vice Chairman of the Tribe whose declaration was
26 filed in support of the Karuk Tribe's Motion for Summary Judgment), Norman Goodwin
27 (acknowledged as one of the Tribe's spiritual leaders) and several others. During the meeting,
28 several concerns were discussed and resolved:

1 A) Norman communicated to the other Tribal leaders that we had shown sensitivity in the
2 past to Tribal concerns (First Contact).

3 B) I communicated that we had already agreed to prevent mining in or around the
4 swimming holes, motorized activity within 200 feet of George Geary, or within 500 feet of the
5 refugia at Crapo Creek.

6 C) I communicated that we had no intention of doing any mining on the Klamath River
7 upstream from the mouth of the Salmon River, in, or around, the Tribal spiritual area near Somes
8 Bar. I offered to help the Tribe get that complete area withdrawn from mineral entry, so that it
9 would never be impacted by mining-activity in the future, perhaps by others that might have little or
10 no sensitivity to Tribal cultural values.

11 D) I requested to know of any other culturally-sensitive areas. The Tribal representatives
12 told me there was another important area along the Salmon River upstream from the Oak Bottom
13 River access. This is an area which is taken in by mining claims which The New 49'ers are leasing.
14 Herald Tripp escorted me to the area and showed me the sensitive area where the Tribe had
15 conducted different kinds of ceremonies during the past. The area involved was quite extensive,
16 taking up around ¾-mile of gold-bearing river. I asked Herald to show me comfortable boundaries
17 of where the Tribe would like to see no mining activity concerning this area. Then I agreed that we
18 would post boundary signs in those locations, so that our members would not mine within the
19 sensitive area. Those boundary signs remain posted today. Harold was satisfied.

20 19. There was very little contact with the Tribe throughout the 2003 mining season – which
21 ended along the Salmon River in mid-September, due to the California dredging regulations.

22 20. **Fifth contact:** I initiated a meeting in early September 2003 with Tribal leaders Leaf
23 Hillman and Norman Goodwin. The meeting took place at Norman's house in Somes Bar.

24 Discussions at the meeting:

25 A) I wanted to know how the Tribe perceived the current mining season, asking if there was
26 anything else the miners could do to harmonize our program with cultural or other concerns of the
27 Tribe. No specific problems were raised by Norman or Leaf.

28

1 B) I explained that we were interested in leasing some mining claims downstream along the
2 Klamath River from the mouth of the Salmon River. I wanted to know if there were any cultural
3 concerns for the Tribe down that way. They told me they were not aware of any.

4 C) Norman told me the whole area along the Klamath River between Clear Creek and Ferry
5 Point has some cultural sensitivity. This is a much larger area than the Tribe expressed concern
6 about before (see First contact) – around 4 miles of the river, all which is gold-bearing. As we lease
7 most of that area, I agreed to make our portion off limits to motorized mining activity – which I did;
8 and it remains off limits today.

9 D) Once again, I offered to spearhead the effort to try and get the entire Karuk Tribe
10 spiritual area near Somes Bar completely withdrawn from mineral entry, so the Tribe would never
11 have to worry about future conflicts with mining in their most sacred area. Norman and Leaf
12 declined my offer of assistance in this matter.

13 E) Norman and Leaf invited me and my wife, Maria, to attend the Tribe’s annual World
14 Renewal Ceremony (“Katimin”) in late September. This is one of the most important and sacred
15 ceremonies of the Tribe. Both my wife and I were greatly honored that we would be invited to
16 attend this very private, special event. We accepted, and spent two full days with the Karuks in late
17 September. The experience was very meaningful to us. As this was a spiritual ceremony, there was
18 no discussion about business or mining for gold.

19 21. Looking ahead towards the 2004 mining season, in September of 2003, The New 49’ers
20 retained the services of George Harper. George is a retired Forest Service District Ranger who
21 managed the Happy Camp Ranger District for many years. He managed mining activity, along with
22 The New 49’ers’ activities, in the National Forest for a number of years. He had extensive
23 experience dealing with the Tribe, various environmental groups, resource issues, and the inner-
24 workings of the Forest Service. We hired George specifically for the purpose of communicating
25 with the Forest Service, the Tribe, and other stakeholders, to help us identify and resolve any
26 problems in advance, so that our formal Notice of Intent in 2004 would be something that was
27 already in harmony with local concerns.

28

1 22. Our management approach is, and always has been, to communicate with the Forest Service
2 and other concerned stakeholders in advance, so we can try to mitigate solutions before making a
3 formal Notice of Intent. This was the mission George Harper was hired to help us accomplish
4 starting in September of 2003, well in advance of the 2004 season. George was not hired to
5 represent or lobby on our behalf. He was hired to communicate with the Forest Service, the Tribe,
6 and other stakeholders in an effort to establish any and all concerns or issues that we might resolve
7 in advance of making our formal Notice of Intent to the Forest Service.

8 23. George had multiple conversations with the Rangers of the Scott, Salmon, Happy Camp and
9 Orleans ranger districts throughout the following months.

10 24. **Final Inspection From 2003 Season:** On September 15, 2003 (the final day of the
11 California dredging season along the Salmon River), prompted by concerns voiced by local
12 residents along the Salmon River, the California Department of Fish and Game (DFG) organized an
13 inspection, to which they invited the Tribe, Forest Service, SRRC, any local residents who might
14 want to attend, and The New 49'ers. Thirteen people participated in the inspection, including Pete
15 Brucker from SRRC, seven people from Forest Service (including two District Rangers, three
16 minerals officers and one fish biologist), and three representatives of The New 49'ers, including me.
17 The inspection was headed-up by lead California Department of Fish and Game fishery biologist
18 from Yreka, Dennis Maria, and his superior, Bob McAllister from Redding.

19 25. Dennis Maria wrote a report concerning this inspection, so I will not duplicate it here; but he
20 did summarize as follows: *“I saw nothing that would be considered a violation or that would have a
21 significant impact to the fishery or significantly negatively impact the overall biotic community of
22 the Salmon River.”*

23 26. **Sixth contact:** In late March of 2004, Alan Vandiver (Happy Camp District Ranger)
24 organized a meeting in his office where we could listen to any concerns about mining that might be
25 voiced by the Karuk Tribe. Leaf Hillman was present representing the Tribe. I was present
26 representing the miners. The Forest Service was represented by Alan Vandiver, Pat Garahan
27 (Resources Officer for Happy Camp) and Bill Bemis (lead fish biologist for Happy Camp).

28

1 27. Primarily, the discussion revolved around the concept of what would be considered a
2 “*significant surface disturbance.*” I explained that the hope of the small-scale miners was to
3 conduct operations that would generally be considered to create less than a significant impact. The
4 general agreement was to try and establish a threshold-level whereby the Forest Service, in concert
5 with the Tribe and other stakeholders, would be comfortable allowing or approving small-scale
6 mining operations that created impacts less-than the threshold.

7 28. Leaf Hillman (Karuk Tribe) said he was not comfortable consenting to such a threshold
8 without involving more fishery specialists, especially those working for the Tribe. So the result of
9 this meeting was that we scheduled another meeting to occur on April 20, 2004, where multiple
10 fishery specialists could be present to voice their concerns.

11 29. **Seventh Contact:** The Forest Service organized a very substantial meeting at their meeting-
12 hall in Orleans on April 20, 2004. There were sixteen people who participated from the Forest
13 Service, nine people from the Tribe, five people from the California Department of Fish and Game,
14 one person representing NOAA Fisheries, and at least four people representing two separate
15 environmental-advocacy groups. I was there representing the miners, along with our Director of
16 Internal Affairs and George Harper. There were many fishery specialists present, along with the
17 District Rangers and/or their minerals-staff for each of the Ranger Districts where we do mining
18 activity within the Klamath National Forest. Fishery specialists for the Tribe were present and
19 actually made a formal presentation.

20 30. As the Forest Service wrote a report concerning what happened at this meeting, I will not
21 duplicate it here. It is fair to conclude that all of the interested stakeholders (concerning small-scale
22 mining activity along the Klamath, Scott and Salmon Rivers) were represented, and every concern
23 that anyone could think of was presented at the meeting. “*The group determined they wanted to*
24 *identify the biological, social and environmental issues associated with suction dredge mining. The*
25 *purpose is to ID the issues and the info that is available to help identify solutions to the issues.*”
26 (Page 1 of Forest Service written report concerning the meeting).

1 31. It was generally agreed among all the participants: *“The next step would be to put together a*
2 *group for a long term study and a look at concerns and issues for this year’s operations.”* (Page 8
3 of Forest Service written report concerning the meeting).

4 32. **Eighth contact:** The meeting on April 20th evolved into a working-group meeting that
5 followed shortly thereafter. District Rangers, Alan Vandiver (Happy Camp) and William Heitler
6 (Orleans) and their minerals-staff were present representing the Forest Service. Leaf Hillman and
7 Sandy Tripp were present representing the Tribe. Pete Brucker and others were present
8 representing the interested environmental-advocacy groups. George Harper and I were present
9 representing the miners.

10 33. Based upon all the input from the earlier meeting, the primary purpose of this working
11 meeting was to identify any critical concerns and make plans to implement action to find solutions
12 that everyone could live with. Because of timing considerations (approaching season), The New
13 49’ers needed to submit a Notice to the Forest Service without much further delay (it can take time
14 for the USFS to process a Notice of Intent). We wanted to mitigate acceptable solutions with the
15 Karuk Tribe before submitting the Notice.

16 34. During the meeting, I pressed Leaf Hillman to work out solutions. He said he was not
17 comfortable making those kind of decisions without his fishery specialists directly involved. So we
18 agreed to set another meeting out in the field with the Tribal fishery specialists on April 23, 2004.
19 Leaf said he would allow the Tribe’s Fishery specialists to make final decisions on behalf of the
20 Tribe concerning acceptable mitigation.

21 35. **Ninth contact:** We met at the Karuk Tribal Center in Somes Bar on April 23, 2004.
22 District Ranger William Heitler and his minerals officer were present to represent the Forest
23 Service. Three fisheries specialists (including fishery biologist, Toz Soto) and Sandy Tripp were
24 present representing the Tribe. Nat Pennington was present representing SRRC (environmental
25 activist group). George Harper, I, and, our Internal Affairs Director were present representing the
26 miners.

27 36. The reason our Internal Affairs Director participates in these meetings is that our
28 organization must enforce any new operation guidelines or rules that we adopt for our members. So

1 it is important to have our own enforcement officer present at the times when we are considering the
2 potential realities of different potential solutions.

3 37. This meeting was a field trip, whereby the Tribal representatives took us to each and every
4 location along the Salmon River where they wanted us to mitigate solutions. As the Forest Service
5 wrote a report concerning what happened at this meeting, I will not duplicate it here. The report is
6 important to read, though; because it acknowledges:

7 A) We agreed to no mining in or around the swimming holes.

8 B) We agreed to no motorized pumps within 200 feet of George Geary.

9 C) We agreed to postpone our dredging season from the mouth of the Salmon River to the
10 mouth of Wooly Creek until the 1st of August (that is a 2/5 reduction of the dredging season allowed
11 by the California regulations), and limit the number of dredges to no more than two within any 500-
12 foot stretch of that portion of the river.

13 D) We agreed to maintain the boundary agreements to keep mining out of the Tribal
14 ceremonial area upstream on the Salmon River from Oak Bottom.

15 E) We agreed to help protect cold-water refuge areas by making dredging off limits within
16 500 feet of the mouth of Crapo Creek, and 300 feet from the mouths of Morehouse, Butler and
17 Nordheimer Creeks.

18 38. These restrictions and conditions are in addition to all of the other (extensive) provisions
19 within the California suction dredge regulations and those included within our ongoing mining
20 program in the Klamath National Forest; a program that has been operating successfully for the past
21 nineteen mining seasons.

22 39. These were all of the “**critical concerns**” raised by the Tribe and SRRC during this meeting
23 to the field. All of the solutions were agreed-to by everyone present, and we all shook hands,
24 feeling that we were all satisfied with the result. The Tribe was well-aware that we were preparing
25 to submit a Notice of Intent that would be considered by the District Ranger to be below the
26 threshold of “significant disturbance.”

27 40. Upon the completion of the meeting, District Ranger William Heitler encouraged us to
28 immediately submit our formal Notice of Intent, including the points that we had agreed-to on that

1 day. He pledged that he would allow us to proceed according the provisions outlined in our **Notice**,
2 having decided that the activity, under those conditions, did not rise to the level of a “significant
3 surface disturbance.”

4 41. Even after all the work to establish an acceptable threshold by all the interested stakeholders,
5 when we submitted our Notice of Intent to the Forest Service, it was rejected on May 13 by the Six
6 Rivers Acting Forest Supervisor, William Metz. At that point, The New 49’ers chose to withdraw
7 our Notice for a group-organized program along the lower Salmon River. Therefore, we did not
8 conduct any mining operations under a group notice of intent within the area of the Klamath
9 National Forest (the Ukonom Ranger District) supervised by the Six Rivers National Forest in 2004.

10 42. Thereafter, the Six Rivers National Forest rejected every notice of intent submitted to it
11 during 2004 for suction dredge mining or hand-mining along the lower Salmon River, stating that
12 an environmental analysis and consultation would be required that could take a year or longer to
13 complete.

14 43. **Tenth contact:** A meeting was conducted by representatives of the Tribe, Forest Service
15 and The New 49’ers on May 17, 2004. Sandy Tripp and a person from the Tribe’s fisheries staff
16 were present to represent the Tribe. The Forest Service was represented by Alan Vandiver (Happy
17 Camp District Ranger), Pat Garahan (Happy Camp Resources Officer), William Bemis (Happy
18 Camp Senior Fishery Biologist) and Jon Grunbaum (Forest Service biologist). The New 49ers were
19 represented by George Harper and our Director of Internal Affairs.

20 44. The purpose of this meeting was to mitigate solutions to concerns that had been raised about
21 dredge density and protecting cold-water refugia along the Klamath River. Again, The New 49’ers
22 were looking for agreement from the interested stakeholders for a level of mineral operations that
23 would be considered less than a significant surface disturbance by the Forest Service. During the
24 meeting, we agreed to:

25 A) To protect known cooler-water areas where fish might collect during the warm summer
26 months (June 15 through October 15):

- 27 • **Dillon Creek** – No dredging within 500 feet of the mouth.

- 1 • **Aubrey Creek** – No dredging within 500 feet upstream and 1500 feet downstream of the
2 mouth.
- 3 • **Swillup Creek** – No Dredging within 500 feet of the mouth.
- 4 • **Coon Creek** – No dredging within 500 feet of the mouth.
- 5 • **Ukonom Creek** – No dredging within 500 feet upstream and 2000 feet downstream of the
6 mouth.
- 7 • **Elk Creek** – No dredging within 500 feet of the mouth of Elk Creek.
- 8 • **Little Grider Creek** – No dredging within 500 feet of the mouth of Little Grider Creek.
- 9 • **Indian Creek** - No dredging within 500 feet upstream and 1,500 feet downstream of the
10 mouth of Indian Creek.
- 11 • **Cade Creek** – No dredging within 500 feet of the mouth.
- 12 • **O’Neil Creek** – No dredging within 500 feet of the mouth. Dredging is permitted below the
13 major rapid downstream of the mouth of O’Neil Creek.

14 B) Limit dredging on the Klamath River to no more than ten dredges per mile.

15 C) Limit dredging on Elk Creek, Indian Creek and Thompson Creek to no more than three
16 dredges per mile.

17 D) Backfill any dredge holes created along Elk Creek from the mouth of East Fork to the
18 mouth of Cougar Creek

19 45. These restrictions and conditions are in addition to all of the other (extensive) provisions
20 included within the California regulations and our ongoing mining program within the Klamath
21 National Forest; a program that has been operating successfully for the past nineteen mining
22 seasons. We agreed to these restrictions and the others discussed above in paragraphs 16-18 and 37
23 in order to address specific concerns raised by the Tribe and others in a spirit of compromise and to
24 endeavor to be a good neighbor, not because we were ever presented with any data or hard
25 information that our activities were actually causing any harm to wildlife.

26 46. The Tribal representatives expressed satisfaction with these mitigations. Ranger Vandiver
27 told us if we included them within our Notice of Intent, that he would make a determination of no
28

1 significant surface disturbance. There was also a commitment by Ranger Vandiver to collaborate
2 with the Tribe to do regular monitoring of small-scale mining operations within his district
3 throughout the 2004 mining season.

4 47. We submitted the Notice shortly thereafter, and District Ranger Vandiver acknowledged his
5 non-significance determination in a letter on May 25, 2004. We have also submitted a Notice of
6 Intent for 2005 operations, a true copy of which is attached as Exhibit 1, which was approved by
7 Ranger Vandiver in a letter of April 26, 2005, a true copy of which is attached as Exhibit 2. As in
8 the case of prior Notices, we propose in the 2005 Notice to take extensive precautions to prevent
9 any adverse effect upon other Forest resources and users. The Tribe's request for injunctive relief
10 would cause substantial and irreparable injury to our organization, our members, many independent
11 miners and claim-owners within the Klamath National Forest, along with local communities that
12 depend upon the substantial amount of income brought into the area by miners and prospectors.
13 While there are full-time prospectors who work all year round, most of our active members plan
14 their prospecting ventures around vacation-time from other types of work. Such planning is done
15 far in advance, with reservations and advanced payments made to secure lodging or spaces in local
16 RV parks. A big part of the summer economy in local river communities is dependant upon the
17 influx of gold prospectors and their families. The 2005 season has already begun, with more
18 prospectors arriving each day, as has been happening every year long before we started The New
19 49'ers. Any Order to stop all of this activity will have substantial negative consequences on many,
20 many people and the economy of Siskiyou County.

21 48. **Further contacts:** The monitoring activity by Forest Service and the Karuk Tribe occurred
22 through the 2004 mining season. I was present during one of their inspections in July 2004 near
23 Rocky Point along the Klamath River. Our Internal Affairs Director was informed of another
24 inspection that took place on the Klamath River near the Sluice Box River access. Several other
25 members also reported that they were inspected.

26 49. **The Prospecting Process:** Prospecting for mineral deposits requires a lot of flexibility.
27 The process often begins with historical research, study of maps and various types of geological
28 information, and then is followed up with visual exploration. Different types of electronic

1 detection devices can be used on the ground, from the air, in the water, or even from satellites in
2 space, to help pinpoint and evaluate a potential mineral prospect. Small mineral or water
3 samples can be extracted and analyzed in numerous different ways to determine if further pursuit
4 of a prospect is warranted. The result of each bit of information can dramatically change a
5 sampling plan. By a means of persistent trial and error, and perhaps some luck, a prospector can
6 work his or her way into the discovery of a valuable mineral deposit. Many (most) prospects do
7 not result in a valuable discovery. A deposit, when found, can usually be confirmed by a series of
8 samples. Samples, as a much smaller portion of the whole deposit, can be dipped, dug, dredged
9 or drilled.

10 50. Every prospecting situation is different. Sampling on a small scale (using hand methods
11 to move rocks out of the way) causes very little surface disturbance. If done within the high-
12 water lines of a waterway, the first winter storm of the rainy season usually erases any and all
13 signs that the prospector was ever even present. Step by step, the sampling process can take
14 months or years.

15 51. A prospector almost never knows where a sampling plan is going to take him when he or
16 she begins the process. Therefore, a sampling plan cannot be studied in advance. New
17 information can prompt a prospector to completely alter a plan, start a new plan, or abandon a
18 plan altogether.

19 52. Section 228 allows prospectors the freedom they need to remain flexible, with the Forest
20 Service becoming involved only when the prospecting activity begins creating a significant
21 surface impact. The vast majority of prospecting activity is accomplished in small steps which
22 do not create any meaningful impact; especially when measured against other traditional use of
23 the forest, like boating, rafting, hiking and camping.

24 53. If it becomes necessary to obtain approval in advance for every new step in a sampling
25 plan, as what the Tribe appears to be suggesting, especially if substantial time were added to the
26 approval process, it would no longer be practical to pursue prospecting activity in pursuit of
27 valuable mineral deposits. The process would take too long to complete. Added to the
28

1 substantial risks already associated with prospecting, this would increase the burden to the point
2 where prospecting as we know it would be eliminated from the waterways of Siskiyou County.

3 54. Prospecting activity has been continuously active in the Klamath National Forest for the
4 past 150 years. Members of our Association are actively prospecting in the Klamath National
5 Forest in our 20th consecutive year. Other active prospectors were here long before us.

6 55. Without offering a single shred of evidence that any of us have ever created any
7 significant impact upon the Forest, the Tribe is apparently asking this Court to put a complete
8 stop to all prospecting activity along all of the waterways of the entire Klamath National Forest.

9
10 I declare under penalty of perjury that the foregoing is true and correct.

11 DATED: This 16th day of May, 2005.

12
13
14 /s/ David McCracken
15 David McCracken
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that on May 17, 2005, I electronically filed the foregoing DECLARATION OF DAVID McCracken in opposition to Plaintiff's Motion for Summary Judgment, 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
- James Russell Wheaton, sarah-rose@thefirstamendment.org
- Roger Flynn, wmap@igc.org
- Barclay Thomas Sanford, Clay.Samford@usdoj.gov
- Brian C. Toth, brian.toth@usdoj.gov

s/ James L. Buchal

JAMES L. BUCHAL
Attorney for Potential Intervenors
The New 49'ers, Inc. and Raymond W. Koons

1 **ATTESTATION OF SIGNATURE**

2 I hereby attest that I have on file all holograph signatures for any signatures indicated by a
3 “conformed” signature (/S/) within this efiled document.

4 Executed this 17th day of May, 2005.

5
6
7 s/ James L. Buchal
8 JAMES L. BUCHAL

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28