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**BY HAND**

Governor Arnold Schwarzenegger
State Capitol Building
Sacramento, CA 95814

Re: *Budget Trailer Bill Control Language re: Suction Dredge Permits*

Dear Governor Schwarzenegger:

The State of California has for many years operated a permit program establishing river-by-river timing requirements to avoid interaction between suction dredge mining and fish nests (or "redds") in the river gravels. The miners are not permitted to operate their small-scale dredges in river gravels when fish eggs are present. The permit program, including its effects on coho salmon and other species of concern, was the subject of a 1994 Environmental Impact Review which noted positive environmental benefits of the program.

In 2005, the Karuk Tribe of California sought to enjoin continued issuance of permits on the ground that the Department had failed to update the 1994 EIR despite the listing of the coho and others species as endangered (though it had studied and mitigated effects on such species). The Department and Tribe quickly reached a private agreement to shut down permit issuance without notifying or involving any mining interests, which belatedly intervened in the suit. The Court found the Department's private regulating at the behest of the Tribe to be illegal, and the parties ultimately settled the case on the basis that the Department would conduct further environmental review, but permit issuance would continue unless and until the Tribe could establish the case for an injunction at an evidentiary hearing. The Court "findings" to which the Assembly and Senate have referred, are in fact quotations from a consent judgment negotiated by the parties.

The Tribe was and is unwilling and unable to present any actual, concrete evidence of harm from the dredging, as there is no proof that so much as a single fish has ever been killed by the miners. The Tribe and its allies next attempted to shut down the permit program by securing passage of AB 1032, which you properly vetoed. Presumably you recognized that it is extraordinarily bad policy and law to shut down an entire field of economic enterprise by statute in lieu of ordinary administrative regulation, particularly when the activity in question has been the subject of a full-blown EIR. Generally speaking, both the California Endangered Species Act (CESA) and Environmental Quality Act (CEQA) express the policy that regulation of economic activities should be limited to the extent necessary to mitigate actual adverse effects.[1]

Now the Assembly and Senate again propose to shut down suction dredge mining through trailer bill language that would halt permit issuance until the Department completes a new EIR. Because the permits are issued annually, and the Department's last EIR took three years to complete, such language would operate to terminate the program, on which 2,500 miners[2] and mining-related businesses depend, for at least three years and probably longer. In addition to the miners themselves, several rural counties, particularly Siskiyou County, would face significant hardship as a cornerstone of their recreation-based economies is removed.

The Assembly has pointed to the "crisis" the state is facing with salmon populations as a rationale for the action, but most of the suction dredge mining occurs in the Klamath River Basin, and there is no salmon crisis there; the crisis relates to Sacramento River runs, and has nothing to do with suction dredge mining. Indeed, the Department is actively promoting the fact that that recreational fishing on the Klamath River will soar this fall as salmon that would be allocated for the ocean fishery can instead be caught by in-river fisherman.[3]

Having failed to hold any hearings on the issue or obtain input from the suction dredge mining community, the Assembly and Senate budget committees were presumably ignorant of the fact that the miners hold federally-established possessory property rights in their mining claims, and in the words of the United States Court of Appeals for the Ninth Circuit, are not mere "social guests" who can be "shooed out the door". *United States v. Shumway*, 199 F.3d 1093, 1103 (9th Cir. 1999). Arbitrary seizure of the mining claims will give rise to very substantial "takings" liability for the State of California, *see, e.g., United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (liability for five-month seizure), if indeed the seizure itself is not invalid for conflict with federal mining law, *see, e.g., South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998).

If the trailer bill language is sustained by the Conference Committee, the miners will be required to vindicate their rights in federal court; some will seek just compensation for the occupation of the claims, based on lost mining production, and some will seek an injunction against any enforcement of the bill language. One way or another, the exercise promises to waste the time, energy and resources of both the miners and the State in a context where the State has no legitimate reason to support an industry-wide shutdown. Again, not so much as a single fish has been harmed by the mining, and the mining actually improves the quality of spawning habitat for anadromous fish.

We hope that in light of these and other considerations, you will prevent the proposed trailer bill language from being enacted into law.

Sincerely,

James L. Buchal
Counsel to The New 49'ers, Inc.

cc: Mike Chrisman, Secretary, Resources Agency
Michael Genest, Director, Department of Finance
Donald Koch, Director, Department of Fish and Game
Assemblywoman Karen Bass, Speaker of the Assembly
Assemblyman Mike Villines, Assembly Republican Leader
Senator Don Perata, Senate Pro Tempore
Senator Dave Cogdill, Senate Republican Leader
Assemblyman John Laird, Chair, Assembly Budget Committee
Assemblyman Roger Niello, Vice Chair, Assembly Budget Committee
Senator Denise Moreno Ducheny, Chair, Senate Budget & Fiscal Review Committee
Senator Bob Dutton, Vice Chair, Senate Budget & Fiscal Review Committee

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[1] For example, CESA specifically provides that agencies shall develop measures that avoid jeopardizing listed species "while at the same time maintaining the project purpose [here suction dredging] to the greatest extent possible" (Fish & Game Code § 2053); where mitigation measures are required of private parties, "the measures or alternatives required shall be roughly proportional in extent to any impact on those species that is caused by that person" (*id.* § 2052.1). The general principle of limiting restrictions to the minimal extent necessary is also incorporated into CEQA, and made expressly applicable to judicial relief such as the injunction the existing parties propose to have this Court enter. *See* Public Resources Code § 21168.9(b) (court's orders "shall include only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division").

[2] The Assembly Budget Subcommittee No. 3 report on the issue falsely stated that DFG "processes about 300 permits a year"; the true figures are reported on the Department's web site at http://www.dfg.ca.gov/licensing/pdffiles/sp_items_10yr.pdf, p. 2 (accessed June 9, 2008).

[3] *See, e.g.*, M. Ma, "Board of Supervisors to Discuss fishing on Klamath, *The Daily Triplicate*, May 10, 2008 (quoting Departmental biologist Sara Borok as saying fishing activity can double).