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MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

To: Dave McCracken, New 49'er Association

From: James L. Buchal

Date: June 7, 2012

Re: New Ninth Circuit Opinion on Endangered Species Act and Notices of Intent

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I am very disappointed to report that on June 1, 2012, the Ninth Circuit, by a vote of 7-4, determined that Forest Service review of a miner's notice of intent triggers a duty to engage in Endangered Species Act consultations. The earlier panel opinion to the contrary was overturned.

The opinion purports to implement § 7 of the Endangered Species Act, which provides:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that *any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action')* is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." (Emphasis added.)

The majority opinion concluded that a miner's notice-level activities on his or her own claim were somehow transformed into federal "agency action" by virtue of Forest Service review of a notice provided by the miner. In substance, the majority held that the miner's activities were "authorized" by the review of the notice of intent.

This represents a serious legal error, as emphasized in a remarkable, forceful and even illustrated dissent, which suggests that citizens have entered into a particular hell ("Abandon all hope, ye who enter here") wrought by the Ninth Circuit's abandonment of the rule of law in this and other environmental cases. As the four dissenting judges explained, until this opinion it was quite clear, based upon numerous court of appeals decisions, that a federal agency's inaction—as in reviewing a notice of intent and declining to insist upon a plan operations—was not "agency action" for purposes of the Endangered Species Act.

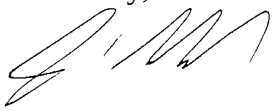
As a practical matter, this means that many prospecting and small-scale mining activities in the national forests across America that would otherwise proceed without delay will now likely be subjected to needless and lengthy reviews, perhaps indefinite waiting periods, especially in view of budget cutbacks to the agencies involved.

I know this will be a substantial disappointment to members of The New 49'ers, since your organization has been the only group within the mining industry which has fought against this particular irrational approach toward interpretation of the mining laws, and has prevailed in all the prior decisions going back to 2004, when the Tribe commenced its attacks.

The force of the dissent will increase what are ordinarily long odds for obtaining discretionary review of the decision by the Supreme Court through a petition for *certiorari*. The relevant standard for granting review, set forth in Supreme Court Rule 10(a), is that the decision is "in conflict with the decision of another United State court of appeals on the same important matter" or "has so departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power". A strong case can be made that the majority opinion meets this test.

A petition for *certiorari* must be filed within ninety days after the Ninth Circuit enters judgment, should The New 49'ers choose to pursue it. I encourage you to rally your members around this matter, since the end result will strongly affect how small-scale mining and prospecting activities will be either allowed or delayed in America's national forests for the foreseeable future.

Sincerely,



James L. Buchal