

## Murphy & Buchal LLP

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### MEMORANDUM

#### ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

To: Dave McCracken, New 49'ers Association

From: James L. Buchal

Date: November 14, 2012

Re: Status of New 49'er Cases

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The New 49'ers, Inc. are currently involved in several cases handled by this office:

1. The ongoing dispute over whether the Forest Service's receipt and review of a notice of intent constitutes "agency action" requiring interagency consultation under the Endangered Species Act is now pending before the United States Supreme Court. As you may recall, we initially prevailed before the Ninth Circuit in a 2-1 decision, but the case was re-heard *en banc* where we lost 7-4. Unfortunately, there is not automatic right of review by the Supreme Court; our petition for discretionary review by writ of *certiorari* remains pending.

We were able to secure two briefs from other mining associations as *amicus curiae* supporting review. The Forest Service (USFS) is opposing Supreme Court review. We have the opportunity to reply to this brief, but the reply must be received by the Supreme Court by November 19<sup>th</sup>; it appears appropriate to point out to the Court that the environmentalists have already commenced follow-on litigation to shut down suction dredge mining in Oregon based on the Ninth Circuit ruling. At stake in this litigation is whether or not USFS will be required to engage in lengthy and complex consultation with multiple other agencies to consider whether or not proposed small-scale mining operations create a significant disturbance on the public lands.

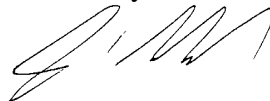
2. Our appeal concerning the ongoing dispute over whether the Bureau of Land Management (BLM) may invalidate claims, in some cases years after location, on the basis of the shape of the claim (the so-called *Snow Flake* problem), remains pending before the Interior Board of Land Appeals. The Board did not act on our motion for a stay, so the claims are now invalid unless BLM is later reversed. We are in communication with another party that has initiated a federal lawsuit aimed at overriding the administrative process on his contemporaneous Board appeal raising the same issue, and at some point, continued inaction by the Board may require judicial relief. At stake in this case is whether or not BLM can reach back into time and take away mining claims which have met all requirements of law, but which it subsequently decides does not conform to the desired shapes.

3. We continue to participate in the cases brought by the Karuk Tribe in the California state courts. As you may recall, the cases began when the Tribe sought to enjoin further issuance of suction dredging permits by the California Department of Fish and Game on the ground that insufficient environmental studies had been conducted. We successfully defended that case, and were then required to intervene in a follow-on case after the Department failed timely to complete the environmental review. The Legislature then began issuing a series of moratoriums against further permit issuance, and the cases went dormant while the Department's environmental review continued.

When the Department finally completed its environmental review and issued new regulations, we commenced an action challenging those new regulations as either invalid (whether under state law or by reason of federal preemption) or a taking of property in violation of constitutional property rights in mining claims on streams now closed to suction dredge mining. At the same time, the environmentalists brought their own action challenging the new regulations. All of the California state cases concerning suction dredging have now been coordinated before a single judge in San Bernardino County.

Those cases are presently stayed, and the environmentalists have caused further delay by challenging the assigned judge as prejudiced. Nevertheless, we are in the process of preparing an amended complaint to challenge the latest statutory moratorium, and a motion for summary judgment on the federal preemption issue. At stake in these cases is whether or not suction dredging will ever resume in California; and if not, whether or not claim holders will be compensated for the lost productive use of their property.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Buchal', with a stylized flourish at the end.

James L. Buchal