

1 JAMES L. BUCHAL (SBN 258128)  
MURPHY & BUCHAL LLP  
2 3425 SE Yamhill Street, Suite 100  
Portland, OR 97214

3 Telephone: (503) 227-1011  
4 Facsimile: (503) 573-1939

5 *Attorney for Plaintiffs*

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12 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
13 **COUNTY OF SISKIYOU**

14  
15 THE NEW 49'ERS, INC., *et al.*,

16 Plaintiffs,

17 vs.

18 CALIFORNIA DEPARTMENT OF FISH  
19 AND WILDLIFE *et al.*,

20 Defendants.

Case No.

**DECLARATION OF JAMES BUCHAL RE:  
EX PARTE NOTICE AND OTHER  
MATTERS**

21  
22 James Buchal declares:

23 1. I am the attorney for plaintiffs. I make this Declaration in support of their motion for  
24 a temporary restraining order, order to show cause, and preliminary injunction against an  
25 emergency amendment to 14 Cal. Code Regs. § 228(a), which would render a crime the operation  
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27 DECLARATION OF JAMES BUCHAL

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28 James L. Buchal (SBN 258128)  
MURPHY & BUCHAL LLP  
3425 S.E. Yamhill, Suite 100  
Portland, OR 97214  
Tel: 503-227-1011  
Fax: 503-573-1939

1 of underwater gravel transport systems (GTSs) previously lawful to operate. A true copy of the  
2 Department's filing with the Office of Administrative Law (OAL) constituting its "Statement of  
3 Emergency" purporting to explain the exigency for action is attached hereto as Exhibit 1. The last  
4 Exhibit to this Declaration, Exhibit 16, shows the text of the emergency regulation, marked to show  
5 the changes from the initial regulation.

6 **Facts Concerning Notice to Defendants and Irreparable Injury**

7 2. Last Thursday, June 29, 2013, I was contacted by Mr. Bradley Solomon, an attorney  
8 representing the California Department of Fish and Game who was familiar to me from legal  
9 disputes concerning suction dredge mining. He inquired as to whether I intended to file litigation in  
10 the event that OAL approved the Department's emergency regulation. I told him I thought so, but  
11 did not have final confirmation. He asked where, and I told him I expected to seek a TRO in  
12 Siskiyou County, but would provide further information the next day, the day OAL was expected to  
13 make its decision.

14 3. Mr. Solomon expressed the desire that the litigation be conducted in an orderly and  
15 negotiated fashion. I proposed that the Department stipulate to a temporary restraining order or  
16 other agreement pursuant to which the Department would refrain from issuing criminal citations to  
17 miners employing GTSs pending a hearing to be set at Mr. Solomon's convenience (he was going  
18 on vacation).

19 4. Mr. Solomon conferred with the Department, and reported back that the Department  
20 refused to make any such arrangement. It is thus obvious that the Department insists upon and  
21 proposes immediately to enforce its illegal regulation.

22 5. This poses a particular threat to Siskiyou County communities because of the large  
23 number of vacationing miners, many of whom are visiting to observe the success of miners  
24 employing underwater gravel transfer systems. If the Department is permitted to begin citations of  
25 miners visiting Siskiyou County for criminal violations, a further and significant blow to Siskiyou  
26 County's tourism economy is likely to occur as described in other sworn statements filed herewith.

1           6.       On Friday June 30<sup>th</sup>, I confirmed that the litigation would indeed be filed, and insofar  
2 as we were unable to reach any standstill agreement, Mr. Solomon named two attorneys, Mr. John  
3 Mattox and Mr. Mark Melnick and, who would be covering the issue for him in his absence. The  
4 contact information I have for these individuals is:

5           John H. Mattox  
6           Office of the General Counsel  
7           California Department of Fish and Wildlife  
8           1416 Ninth Street, 12th Floor  
9           Sacramento, CA 95818

10           Phone: 916-651-7648

11           [John.Mattox@wildlife.ca.gov](mailto:John.Mattox@wildlife.ca.gov)

12           Mark Melnick  
13           Office of the Attorney General  
14           1515 Clay Street, Suite 2000  
15           Oakland, CA 94612-1413

16           Phone: 510-622-2133

17           [Mark.Melnick@doj.ca.gov](mailto:Mark.Melnick@doj.ca.gov)

18 (I should note that in recent negotiations with the Department's attorneys concerning other suction  
19 dredge litigation, there were at least three other attorneys within the Department of Justice working  
20 on the litigation, and there are two more I know of within the Department itself.) I promised to e-  
21 mail these attorneys immediately with all papers filed, and have ensured that they were fully  
22 apprised of all steps.

23           7.       On the morning of July 1st, 2013, I contacted this Court to obtain a hearing date for a  
24 hearing on a TRO, and obtained a hearing date of July 2, 2013, at 1:15 p.m. At approximately 8:21  
25 a.m., I communicated this information by e-mail to the three attorneys the Department had  
26 requested be notified: Mark Melnick, John Mattox and Wendy Bogdan.<sup>1</sup> I also left voicemail  
27 messages for Mr. Melnick and Ms. Bogdan. All three counsel are being provided courtesy copies  
28 today, by e-mail, of the voluminous pleadings as those materials are being delivered to the Court.  
Inasmuch as Mr. Solomon did not agree to accept service of process, hard copies of the materials  
are being transmitted to a process server in Sacramento for service on the Department and Director  
Bonham.

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1 **Facts Concerning Development of the Rule**

2 8. Facts concerning the Department’s advice to miners concerning the lawfulness of  
3 GTSs are set forth in the Declaration of James Foley. Attached as Exhibit 2 is true copy of e-mail  
4 exchanges between Mark Stopher and J. Clark, concluding January 2, 2013, in which the  
5 Department’s advice was again confirmed, and tied to an article summarizing the GTS concept  
6 submitted herewith as Exhibit 1 to the Declaration of David McCracken.

7 9. On March 20, 2013, the Karuk Tribe and its allies presented a petition to the  
8 Department to amend 14 Cal. Code Regs. § 228(a) to stop miners from using underwater gravel  
9 transport systems. I filed comments opposing this action, a true copy of which is attached hereto as  
10 Exhibit 3. On April 19, 2013, the Department denied that petition. A true copy of the Director’s  
11 letter of denial is attached as Exhibit 4.

12 10. On May 28, 2013, the Tribe filed a new emergency petition. Although I had  
13 provided comments against the initial petition, no one in the Department deigned to notify me or  
14 anyone else in the mining community that emergency regulation was under consideration. I  
15 consider this deliberate and reprehensible conduct designed to ensure that evidence contrary to the  
16 Department’s position was not entered into the rulemaking record.

17 11. Siskiyou County itself filed comments with OAL opposing the regulation; a copy of  
18 these comments is attached hereto as Exhibit 5. Once I learned that the emergency rule was before  
19 OAL, I also filed comments with OAL on behalf of The New 49’ers. The comments included as  
20 exhibits many of the declarations filed herewith and additional materials which I am attaching  
21 hereto as:

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25  
26 <sup>1</sup> In an e-mail exchange with Mr. Mattox, he had requested that she be notified as well.

1 Exhibit 6: A quantitative study conducted for the U.S. Forest Service  
2 demonstrating that both legal suction dredging and illegal mining together had no  
3 statistically-significant effect on fish populations in the Siskiyou National Forest;<sup>2</sup>

4 Exhibit 7: An estimate quantifying the gravel-moving impact of a forest full of  
5 suction dredge miners as compared to natural causes, prepared for the U.S. Forest Service in  
6 1995;

7 Exhibit 8: Comments submitted by David McCracken to the Department in  
8 connection with the suction dredge CEQA process;<sup>3</sup>

9 Exhibit 9: A Trillium Associates analysis of suction dredging and mercury  
10 submitted to the Department in connection with the suction dredge CEQA process;

11 Exhibit 10: Comments submitted by Claudia Wise to the Department in  
12 connection with the suction dredge CEQA process;

13 Exhibit 11: Presentation to the Department concerning selenium and mercury;

14 Exhibit 12: Federal Factsheet on selenium and mercury;

15 Exhibit 13: Water Board Study on Mercury in California Fresh Water Fish; and

16 Exhibit 14: Federal Biological Opinion on Suction Dredging in the Klamath  
17 National Forest.

18 12. The Department responded to our comments, and a copy of their response is attached  
19 as Exhibit 15. Upon review of the Department's comments, we determined that they were  
20 materially false insofar as they claimed that the Department did not previously know that the miners  
21 were not actually using the GTSSs, and so advised OAL on June 28<sup>th</sup>, submitting to OAL a copy of  
22 the Foley Declaration. OAL determined, without explanation, that the regulation would go into  
23 force (Exhibit 16).

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25 <sup>2</sup> The copy of this Exhibit was previously used as Exhibit 10 in another filing, and bears the notation  
"Exhibit 10" on each page, but it is Exhibit 6 to this Declaration.

26 <sup>3</sup> The copy of this Exhibit was previously used as Exhibit 12 in another filing, and bears the notation  
"Exhibit 10" on each page, but it is Exhibit 8 to this Declaration.

1 **Background on Related Litigation**

2 13. The Department has displayed a pattern of conduct that seems to evidence a serious  
3 bias in favor of the positions of the Tribe and against the miners. The Department and the Karuk  
4 Tribe initially made an illegal agreement to shut down mining with no notice to the miners back in  
5 2005, by purporting to settle a lawsuit concerning the miners about which the miners also had no  
6 notice. Legal action prevented this result, and the Department promised in a consent decree to  
7 update its environmental studies concerning suction dredge mining. The Department faithlessly  
8 breached its obligations under the consent decree, creating an opening for the Tribe to seek a  
9 preliminary injunction against the Department. Then, before that injunction could be successfully  
10 appealed, the Tribe and its allies procured a legislative moratorium barring the Department from  
11 issuing permits for suction dredge mining altogether.

12 14. Miners have been attempted to litigate the lawfulness of that moratorium ever since  
13 2009, and the Department has sought delay after delay and no court has reached the merits.  
14 Eventually all the cases were coordinated before the Judicial Council and assigned to a judge in San  
15 Bernardino County. The miners have finally obtained a hearing on a motion for a preliminary  
16 injunction against the moratorium, and it is scheduled to be heard on July 23, 2013.

17 15. In my negotiations with Mr. Solomon, he indicated that the Department would tell  
18 this Court to stay its hand in favor of allowing the San Bernardino Court to address the lawfulness  
19 of suction dredging generally. The issue to be heard in that case is whether the statutory  
20 moratorium is preempted by federal policies favoring the development of mining claims issued by  
21 the federal government on federal land.

22 16. Even if the Court were to grant the injunction, it would merely set aside the  
23 moratorium, and the Department would be in no position to immediately issue permits. Nor could  
24 such permits be issued in time to prevent the irreparable injury sought to be redressed herein.

25 17. This case concerns a narrow and distinct *legal* question not before the San  
26 Bernardino Court: whether the Department met the requirements of the Government Code for

1 short-circuiting regulatory protections and acting on an emergency basis. It presents a narrow and  
2 distinct *factual* question not before the San Bernardino Court: whether the operation of GTSs in  
3 Siskiyou County constitutes an “emergency” as defined in the Code.

4 I declare under penalty of perjury under the laws of California that the foregoing is true and  
5 correct.

6 Executed in Portland, Oregon this 1st day of July, 2013, with a duplicate original (to be filed  
7 this day) executed by my agent in Happy Camp, California.

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James L. Buchal

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