

1 LAW OFFICES OF DAVID YOUNG
David Young, SBN 55341
2 11845 W. Olympic Boulevard, Suite 1110
Los Angeles, CA 90064
3 Telephone: (310) 575-0308
Facsimile: (310) 575-0311
4 Email: dyounglaw@verizon.net

5 *Attorney for Plaintiffs/Petitioners*
6 *Kimble et al. and PLP et al.*

7 JAMES L. BUCHAL (SBN 258128)
MURPHY & BUCHAL LLP
8 3425 SE Yamhill Street, Suite 100
Portland, OR 97214
Telephone: (503) 227-1011
9 Facsimile: (503) 573-1939

10 *Attorney for Plaintiffs The New 49'ers Inc. et al.*

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF SAN BERNARDINO
14

15 Coordination Proceeding
Special Title (Rule 1550(b))

16 **SUCTION DREDGE MINING CASES**

Judicial Council Proceeding No. JCPDS 4720

17 **DECLARATION OF DAVID**
18 **MCCRACKEN IN SUPPORT OF**
19 **MINERS' JOINT MOTION FOR**
20 **INJUNCTION AGAINST DEFENDANTS**

21 Judge: Hon. Gilbert G. Ochoa
22 Dept.: S36
Date: June 23, 2015
Time: 8:30 a.m.

23 **Related Actions:**

24
25 *Karuk Tribe of California, et al. v. California*
26 *Department of Fish and Game*

RG 05211597 – Alameda County

27 *Hillman, et al. v. California Department of*
28 *Fish and Game*

RG 09434444 – Alameda County

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<i>Karuk Tribe of California, et al. v. California Department of Fish and Game</i>	RG 1263796 – Alameda County
<i>Kimble, et al. v. Kamala Harris, Attorney General of California, et al.</i>	CIVDS 1012922 – San Bernardino County
<i>Public Lands for the People, et al. v. California Department of Fish & Game, et al.</i>	CIVDS 1203849 – San Bernardino County
<i>The New 49er’s, et al. v. State of California; California Department of Fish and Game, et al.</i>	SCCV 120048 – Siskiyou County
<i>Foley, et al. v. State of California; California Department of Fish and Wildlife, et al.</i>	SCSCCV 13-00804 – Siskiyou County
<i>Walker v. Harris, et al.</i>	34-2013-80001439 – Sacramento County

1 David McCracken states:

2 1. I am the President of plaintiff The New 49'ers, Inc. and make this Declaration in
3 support of the Miners' Joint Motion for Injunction Against Defendants.

4 2. I have been active in suction dredging since 1979 and am generally considered an
5 authority on the subject. I have consulted for companies and governments all over the world
6 concerning suction dredging, including, Borneo, India, Sumatra, Cambodia, Thailand,
7 Philippines, Papua New Guinea, Madagascar, South Africa, Guinea, Venezuela, Costa Rica and
8 elsewhere. I have published and produced most of the authoritative books and video material on
9 the subject of suction dredging. As I have devoted most of my adult-life to activities related to
10 suction dredging, I am very qualified to speak on the subject.

11 3. I also have extensive experience in utilizing gravity methods to recover fine gold,
12 mercury and gemstones – especially in recovery systems used by suction dredges. More
13 background about my experiences concerning suction dredges and recovery systems can be
14 found on my consulting web site at <http://www.promackmining.com/>. I have written extensively
15 on the subject of recovering fine particles of heavy metals and gem stones with the use of suction
16 dredges. One excellent article on the subject can be found at
17 <http://www.promackmining.com/differentsampling.htm>.

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19 **Background Concerning The New 49'ers.**

20 4. I founded The New 49'er Gold Prospecting Association in Siskiyou County 30
21 years ago, and have managed the program since the beginning. The company is a California
22 corporation. Its purpose is to provide abundant, hassle-free mining opportunities for our
23 members. In turn, our members pay dues to belong and gain access to over 60 miles of gold
24 bearing streams and rivers within Siskiyou County. Most of our mining property is located
25 within the Klamath National Forest along the Klamath River. This is because the earlier
26 generations of gold miners, to a very large degree, had difficulty reaching out into the larger,
27 deeper river where substantial reaches of original river bottom gold deposits still exist today.
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1 5. We have around 2,000 active members in The New 49'ers, though usually not
2 more than 100 or so are around at any given time. Weather conditions, winter flows and ice cold
3 water, for the most part, prevents underwater mining except during the more mild months of the
4 year. Having said that, I believe it is a fair statement for me to say that our activity draws more
5 visitors into Siskiyou County than any other private enterprise.

6 6. The *only* effective way of recovering submerged river bottom gold deposits is
7 with the use of modern suction dredges. These are portable machines which float on pontoons
8 and use a motor and pump to suck up mostly gravel material from the river bottom and pass it
9 over a recovery system where the gold drops out because it is heavy. The gravel flows directly
10 back into river near where it came from on the river bottom. For deeper dredging, a hookah
11 compressor is also attached to the motor and directs breathing air down to the diver(s) through an
12 extended airline.

13 7. Our office and headquarters are located next to the post office in Happy Camp.
14 We employ 5 full time administrative staff, and bring in extra help when necessary. In addition,
15 we have a Director of Internal Affairs (a retired deputy sheriff), whose Declaration is being filed
16 along with mine. We have always coordinated with the several government agencies which
17 possess some level of jurisdiction over our activities in the National Forest, chiefly the U.S.
18 Forest Service and California Department of Fish & Wildlife ("DFW"). Though we sometimes
19 have civilized differences of opinion over how laws and regulations properly apply to small-
20 scale mining activity, our overall relationship with these agencies has been cooperative and
21 productive since we began 30 years ago.

22 8. All of our members sign a Mining License when they join our organization. The
23 license allows members to keep the gold they recover from the properties that we manage. The
24 license also requires each member to abide by our published Rules and other site specific
25 restrictions that are outlined in our published Claims Guide. A true copy of our Claims Guide is
26 available at <http://www.goldgold.com/master-list.html>.
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1 9. Our Claims Guide defines the boundaries of all the properties which we manage,
2 provides useful information about the property, and outlines any site specific areas that are off
3 limits to mining or suction dredging. These off-limit areas have been established through
4 working relationships with the U.S. Forest Service, the Karuk Tribe and local communities.
5 They include popular swimming or recreation areas, areas of cultural concern and locations
6 along the Klamath River where cooler water enters from side tributaries during the hot summer
7 months.

8 10. Some fish biologists believe dredging activity might frighten fish away from these
9 cool water "refugias," but we have extensive experience underwater with the fish and see how
10 they are substantially attracted to the material which flows off the back of our dredges. This is
11 because our dredges penetrate otherwise armored stream bottom where smaller critters live
12 which the fish feed on. Even though our dredge holes are so small as to have no impact on the
13 larger waterway, the fish are certainly glad to be around the discharges of our dredges. In
14 addition, they like to take refuge in our dredge holes when we are not actively mining. This is
15 because larger rocks and boulders must be moved around by hand, which creates protected
16 habitat. Cooler ground water also flows into our dredge holes which the fish seem to be attracted
17 to during the hot summer months. All of the holes we make in the waterways are erased by
18 Mother Nature during winter storm flows.

19 11. Because we have a *very* attentive internal affairs staff, our management approach
20 has always been to resolve any and all problems internally, rather than have the authorities
21 involved. Since our beginnings, our relationship with the U.S. Forest Service has been such that
22 their Minerals Officer or District Ranger simply has to make a phone call to our office if there is
23 a concern about any activities associated with our program. Then we go out and immediately
24 resolve any problem if it exists. To a large extent, we have enjoyed a similar relationship with
25 the DFW.
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1 12. The Miners License each of our members signs allows The New 49'ers to
2 suspend the mining privileges of any member who is not following our Rules or is breaking the
3 law. The truth is that we have more leverage to bring members into compliance than any of the
4 agencies. Not that we have many troublemakers, but there are occasional things that come up.
5 When they do, we are all over it. In 30 years of operation in Siskiyou County, there has never
6 been a single citation or reprimand against The New 49'ers by any agency, even though our
7 membership is in the thousands.

8 13. During 1993 and 1994, representing The New 49'ers and the larger mining
9 community of Siskiyou County, I devoted countless hours to hammering out a reasonable set of
10 suction dredge regulations with DFW. Others from the mining community were also involved,
11 representing other parts of the state. The process was very contentious, and actually took three
12 full attempts (three full EIR's) before we finally arrived at a balanced regulatory scheme that
13 allowed suction dredging while protecting fishery resources. Those set of regulations served our
14 industry and the State very well until the unlawful moratorium was imposed by the California
15 legislature in 2009.

16 14. In addition to the California regulations, to resolve protests by the Karuk Tribe
17 about our activity, in concert with the U.S. Forest Service, we mitigated to their satisfaction
18 *every single concern* the Tribe expressed. The concerns and mitigation solutions are well
19 documented. We still honor those agreements today.

20 15. It was shortly after making all these agreements with the Karuk Tribe more than
21 10 years ago, that we discovered that attorneys from the DFW and the Karuk Tribe had made a
22 secret agreement to impose substantial changes to our suction dredge regulations without any
23 notice whatsoever to our industry. This was a gross violation of CEQA and other California
24 administrative laws. How can an industry reinvest in business and plan for the future when a
25 State agency can secretly collude with special interest groups to completely change the
26 regulations which largely control your industry? The changes they agreed to proposed to make
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1 massive reductions in our mining seasons and closed suction dredging altogether on productive
2 waterways that have been worked by prospectors even before California became a State!

3 16. We intervened on the State litigation before the judge approved the secret
4 agreement, and the judge agreed that the DFW was not proceeding in accordance with law. That
5 litigation eventually evolved into a Consent Decree entered by the Court to update the suction
6 dredge regulations which were adopted during 1994. Determined to get their way, DFW went
7 through all the steps of a CEQA process to arrive at nearly the very same outcome as their
8 original Agreement with the Tribe. DFW's outcome-based CEQA was a corruption of the
9 CEQA process. Consequently, the ongoing litigation was expanded into objections of
10 unreasonable over-regulation by the miners, and unreasonable under-regulation by the Karuk
11 Tribe and their anti-mining allies, the litigation coordinated before this Court. The mining
12 community has spent in excess of a million dollars in legal fees. While this might not sound like
13 much in this day and age, coming up with the money to pay competent attorneys to represent our
14 industry has been more difficult than mining activity itself – which is brutally difficult.

15 17. As the CEQA process evolved with very oppressive draft regulations that at least
16 would have allowed some of our activity to resume, the State legislature passed a moratorium in
17 2009 that basically made it impossible for DFW to ever issue suction dredge permits again. So
18 even after selling us suction dredge permits for 2009, the State shut us down mid-season under
19 threat of criminal prosecution. No refunds were offered or provided. There were substantial
20 losses to the millions upon millions of dollars in capital expenditures the prospecting community
21 invested into mining property and equipment. Entire rural business communities which provide
22 services to the mining community across California had their business plans undermined. How
23 can you make business plans in an environment where special interests have the influence to get
24 the legislature to just shut you down?

25 18. This Court has found the permit moratorium and 2012 suction dredge regulations
26 an unlawful scheme by the State of California to defeat the intention of Congress. Yet DFW
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1 continues to enforce the illegal moratorium. Taking the Court's ruling to heart, after ten years of
2 active litigation, and having our dredges shut down for the past six years, the California mining
3 community has been gearing up for the fast-approaching 2015 season. Some of our members are
4 already dredging on the Klamath River.

5 19. At present, DFW wardens are coming out to the river and instructing our suction
6 dredging members that they are breaking the law. Sometimes they are seizing equipment,
7 sometimes issuing citations, and sometimes even arresting them. Some members, confident that
8 this Court's ruling protects them, even insisted upon being arrested for breaking the law so the
9 matter could be immediately resolved in front of a judge. However, the Siskiyou County District
10 Attorney has declined to cooperate in securing such a resolution.

11 20. In the wake of this Court's ruling on April 30th granting DFW's ex parte petition,
12 our members appear to have no access to due process of law (in the sense of a timely judicial
13 ruling on the lawfulness of their activities) other than to the extent we can represent them
14 indirectly before this Court in seeking the relief now sought.

15 21. Without such relief, DFW will continue to seize mining equipment and may never
16 get around to a prosecution. DFW wardens seized dredging equipment from one of our
17 members, Derek Eimer last fall, and have yet to charge him with a crime or return his gear. Even
18 if a citation is issued, the case may never be prosecuted.

19 22. In substance, the State of California is doing everything it can to use badges of
20 authority to frighten prospectors ("you will be prosecuted later"), and running off with their
21 mining gear, thereby imposing punishment upon them while refusing to provide them an
22 immediate hearing in front of an impartial judge. This misuse of authority has a very chilling
23 effect on business. It is particularly difficult in that we devoted 10 years of litigation, and
24 already lost six mining seasons, to finally arrive at a ruling—which the State will not honor.
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Emergency Regulations for The New 49'ers Claims.

23. Since it is unclear which, if any, suction dredge regulations the State has the authority to enforce, in light of this Court's ruling, which we understand to mean that the State cannot legally demand permits it refuses to issue, The New 49'ers have adopted a reasonable set of Emergency Dredging Rules which only apply to the properties which we manage.

24. These Rules, operating in conjunction with claim-specific restrictions in the Claims Guide, are more restrictive than what was allowed under the regulations which were in affect during 2009 when the unlawful moratorium was imposed. For example, the 2009 regulations allowed up to 6-inch suction nozzles on all of our creek properties in Siskiyou County, 8-inch nozzles on the Klamath and Scott Rivers and 6-inch nozzles on our Salmon River properties. Our Emergency Rules have reduced all of our waterways down to a 4-inch intake except the much larger Klamath River, which was reduced to 6-inches. Since we control long stretches of waterway, we reduced the number of operating dredges to no more than 10 per mile on the Klamath, no more than 3 per mile on any of the creeks, and no more than 5 dredges per mile on the Scott and Salmon Rivers. There were no restrictions on dredge concentration in DFW's 2009 regulations. We also made off limits to dredging during the warm summer months every cool water refugia that was identified to exist on our properties exactly according to our agreements with the Karuk Tribe and U.S. Forest Service in 2004. No such restrictions were in DFW's 2009 regulations.

25. The reason we did this was because, with the uncertainty over DFW existing authority, we do not want unregulated suction dredging to occur on our properties. Through this motion, plaintiffs are seeking general relief that would limit DFW enforcement on federal lands to circumstances where miners may be operating out of compliance with the 2009 regulations. However, as part of our continuing effort to reach an accommodation with the Karuk Tribe, we propose to continue to enforce our more restrictive Emergency Regulations on our properties in

1 the event the Court believes more restrictions are necessary until such time as formal regulations
2 are adopted.

3 **The Mercury Issue.**

4 26. As time has passed without any evidence that any dredger anywhere has ever
5 injured so much as a single fish or frog, suction dredge opponents have seized upon the mercury
6 issue as a primary point of attack against suction dredgers. We do not use mercury in our
7 dredges, but some hydraulic miners early in California history did, and in some places, the
8 mercury they lost persists in isolated spots within some goldmining areas. Because the mercury
9 is very heavy, in those few places where it was used abundantly, some of the mercury sank and
10 collected in pools along the bedrock. In my more than thirty-five years of suction dredging, the
11 only place I ever saw a pool of mercury was on the South Fork of the Yuba River during a
12 cooperative program with several government agencies to work out a method to mitigate the
13 contaminated area. I would add that the contaminated area was discovered by suction dredgers
14 who reported it to State and federal agencies.

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16 27. As far as I know, there have been no studies to characterize the levels of mercury
17 within California's waterways outside of just a few identified hot spots. The vast majority of
18 California's waterways do not contain mercury hot spots (we know, because dredgers are not
19 finding mercury in most places). Simply because there may be occasional, isolated areas of
20 concern, shutting down the entire State to suction dredging is not a reasonable approach to
21 regulation.

22 28. The State's conclusions concerning mercury are based upon studies that have
23 been conducted in known mercury problem areas. These areas are not typical of the mining
24 claims on which suction dredgers operate, and certainly do not represent conditions on mining
25 claims owned or controlled by The New 49'ers. Our members rarely find any mercury beyond
26 an occasional trace that may adhere to a gold nugget.
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1 29. One researcher, Humphreys (2005), has measured the percentage of mercury
2 recovered out of a contaminated hot spot with the use of a suction dredge as 98%. It has at all
3 times been obvious that removing 98% of the mercury encountered is a net environmental
4 benefit, but the State has contended that the net effect is negative because of the release of the
5 remaining 2% from the dredge, most of which would sink back into the streambed. In particular,
6 the State has suggested that Humphreys (2005) observed that suction dredges would “flour”
7 mercury, that is, break it into vastly smaller pieces. The State’s theory is that this floured
8 mercury would then travel further downstream than otherwise would have been the case.

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10 30. As set forth below, this is not true, but even it were, mercury is continuously
11 migrating downstream, particularly during flood events. The State has never attempted to
12 balance asserted negative effects from making some unknown fraction of the 2% of mercury not
13 recovered more mobile against the benefits of removing 98% in the first place.

14 31. In my very informed opinion, the dredge Mr. Humphries used in his experiment,
15 even though of an older design which created more turbulence in a “crash box,” did not flour the
16 very small percentage of mercury that he discovered in the dredge tailings. The period of time it
17 takes for dredged material to pass through a dredge’s sluice box is only a few seconds. While
18 that could potentially break mercury down into smaller-sized goblets (which Mr. Humphries did
19 not find in the dredge tailings), it requires a prolonged period of violence to succeed in breaking
20 mercury down into particles so small as to become the size of flour.

21 32. Since Mr. Humphries neglected to test the raw material (the material that was fed
22 into the dredge), he was not able to determine if the floured mercury already existed prior to the
23 dredging. That such mercury was just too small in size to receive a 100% recovery rate in the
24 dredge’s recovery system in no way proves that dredges flour mercury. Mr. Humphries in his
25 report showed an image of mercury (partially floured) that he panned out of a waterway without
26 the use of a dredge, and the report also acknowledged that he returned later to the very same
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place he dredged during the test and found more mercury there, showing that the floured mercury was surely present before entering the dredge.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 17, 2015.

Dave McCracken
David McCracken

1 PROOF OF SERVICE

2 I, Carole Caldwell, hereby declare under penalty of perjury under the laws of the State of
3 California that the following facts are true and correct:

4 I am a citizen of the United States, over the age of 18 years, and not a party to or
5 interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my
6 business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

7 On May 18, 2015, I caused the following document to be served:

8 DECLARATION OF DAVID MCCRACKEN IN SUPPORT OF MINERS' JOINT MOTION
9 FOR INJUNCTION AGAINST DEFENDANTS

10 by transmitting a true copy in the following manner on the parties listed below:

11 Honorable Gilbert Ochoa
12 Superior Court of California
13 County of San Bernardino
14 San Bernardino Justice Center
247 West 3rd Street
San Bernardino, CA 92415-0210
Via U.S. Mail

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Court Programs and Services Division
(Civil Case Coordination)
455 Golden Gate Avenue
San Francisco, CA 94102
Via U.S. Mail

15 Bradley Solomon
16 Deputy Attorney General
17 455 Golden Gate Avenue, Suite 11000
18 San Francisco, CA 94102-7004
E-mail: Bradley.Solomon@doj.ca.gov
Via E-mail

Marc Melnick
Office of the Attorney General
1515 Clay Street, Suite 2000
Oakland, CA 94612
E-mail: Marc.Melnick@doj.ca.gov
Via E-mail

19 John Mattox
20 Department of Fish & Game
21 1416 Ninth Street, 12th Floor
22 Sacramento, CA 95814
E-mail: jmattox@dfg.ca.gov
Via E-mail

James R. Wheaton
Environmental Law Foundation
1736 Franklin Street, 9th Floor
Oakland, CA 94612
E-mail: wheaton@envirolaw.org
E-mail: elfservice@envirolaw.org
Via E-mail

23 Glen Spain
24 Pacific Coast Federation of Fisherman's
25 Association
26 Southwest Regional Office
27 P.O Box 11170
28 Eugene, OR 97440
E-mail: fishlifr@aol.com
Via E-mail


Jonathan Evans
351 California St., Suite 600
San Francisco, CA 94104
E-mail: jevans@biologicaldiversity.org
Via E-mail

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E. Robert Wright
Friends of the River
1418 20th St., Suite 100
Sacramento, CA 95811
E-mail: bwright@friendsoftheriver.org
Via E-mail

Lynne R. Saxton
Saxton & Associates
912 Cole Street, #140
San Francisco, CA 94117
E-mail: lynne@saxtonlegal.com
Via E-mail

Keith Robert Walker
9646 Mormon Creek Road
Sonora, CA 95370
Via U.S. Mail


Carole Caldwell
Declarant