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7 IN THE SUPERIOR COURT OF CALIFORNIA
8 FOR THE COUNTY OF SAN BERNARDINO
9

10 THE NEW 49'ERS, INC., a California
11 corporation, DEREK D. EIMER; STEPHEN
12 JONES; DAVID GUIDERO; MARVIN GARRY
LAMPSHIRE II; and DYTON W. GILLILAND,

13 Plaintiffs and Petitioners,

14 v.

15 CALIFORNIA DEPARTMENT OF FISH AND
16 WILDLIFE and CHARLTON H. BONHAM, in
his capacity as Director of the California
Department of Fish and Wildlife,

17 Defendants and Respondents.
18

Case No.

**DECLARATION OF DAVID
MCCRACKEN IN SUPPORT OF MOTION
FOR A TEMPORARY RESTRAINING
ORDER AND/OR PRELIMINARY
INJUNCTION**

19
20 David McCracken declares:

21 1. I am the President of plaintiff The New 49'ers, Inc. and make this Declaration in
22 support of a motion for Temporary Restraining Order and/or Preliminary Injunction Against
23 Defendants.

24 2. I have been active in suction dredging since 1979 and am generally considered an
25 authority on the subject. I have consulted for companies and governments all over the world
26 concerning suction dredging, including, Borneo, India, Sumatra, Cambodia, Thailand, Philippines,

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1 Papua New Guinea, Madagascar, South Africa, Guinea, Venezuela, Costa Rica and elsewhere. I
2 have published and produced most of the authoritative books and video material on the subject of
3 suction dredging. As I have devoted most of my adult-life to activities related to suction dredging, I
4 am very qualified to speak on the subject.

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

12 **Background Concerning The New 49'ers**

13 4. I founded The New 49'er Gold Prospecting Association in Siskiyou County 30 years
14 ago, and have managed the program since the beginning. The company is a California corporation.
15 Its purpose is to provide abundant, hassle-free mining opportunities for our members. In turn, our
16 members pay dues to belong and gain access to over 60 miles of gold bearing streams and rivers
17 within Siskiyou County. Most of our mining property is located within the Klamath National Forest
18 along the Klamath River. This is because the earlier generations of gold miners, to a very large
19 degree, had difficulty reaching out into the larger, deeper river where substantial reaches of original
20 river bottom gold deposits still exist today.

21 5. We have around 2,000 active members in The New 49'ers, though usually not more
22 than 100 or so are around at any given time. Weather conditions, winter flows and ice cold water,
23 for the most part, prevents underwater mining except during the more mild months of the year.
24 Having said that, I believe it is a fair statement for me to say that our activity draws more visitors
25 into Siskiyou County than any other private enterprise.

1 popular swimming or recreation areas, areas of cultural concern and locations along the Klamath
2 River where cooler water enters from side tributaries during the hot summer months.

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

13 11. Because we have a very attentive internal affairs staff, our management approach has
14 always been to resolve any and all problems internally, rather than have the authorities involved.
15 Since our beginnings, our relationship with the U.S. Forest Service has been such that their
16 Minerals Officer or District Ranger simply has to make a phone call to our office if there is a
17 concern about any activities associated with our program. We go out and immediately resolve any
18 problem if it exists. To a large extent, we have enjoyed a similar relationship with the DFW.

19 12. The Miners License each of our members signs allows The New 49'ers to suspend
20 the mining privileges of any member who is not following our Rules or is breaking the law. The
21 truth is that we have more leverage to bring members into compliance than any of the agencies. Not
22 that we have many troublemakers, but there are occasional things that come up. When they do, we
23 are all over it. In 30 years of operation in Siskiyou County, there has never been a single citation or
24 reprimand against The New 49'ers by any agency, even though our membership is in the thousands.

25 13. During 1993 and 1994, representing The New 49'ers and the larger mining
26 community of Siskiyou County, I devoted countless hours to hammering out a reasonable set of

1 suction dredge regulations with DFW. Others from the mining community were also involved,
2 representing other parts of the state. The process was very contentious, and actually took three full
3 attempts (three full EIR's) before we finally arrived at a balanced regulatory scheme that allowed
4 suction dredging while protecting fishery resources. Those set of regulations served our industry
5 and the State very well until the unlawful moratorium was imposed by the California legislature in
6 2009.

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

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

20 16. We intervened on the State litigation before the judge approved the secret agreement,
21 and the judge agreed that the DFW was not proceeding in accordance with law. That litigation
22 eventually evolved into a Consent Decree entered by the Court to update the suction dredge
23 regulations which were adopted during 1994. Determined to get their way, DFW went through all
24 the steps of a CEQA process to arrive at nearly the very same outcome as their original Agreement
25 with the Tribe. DFW's outcome-based CEQA was a corruption of the CEQA process.
26 Consequently, the ongoing litigation was expanded into objections of unreasonable over-regulation

1 by the miners, and unreasonable under-regulation by the Karuk Tribe and their anti-mining allies,
2 the litigation coordinated before this Court. The mining community has spent in excess of a million
3 dollars in legal fees. While this might not sound like much in this day and age, coming up with the
4 money to pay competent attorneys to represent our industry has been more difficult than mining
5 activity itself – which is brutally difficult.

6 17. As the CEQA process evolved with overly-restrictive draft (2012) regulations that at
7 least would have allowed some of our activity to continue, the State legislature passed a series of
8 moratoriums beginning in 2009 that basically made it impossible for DFW to ever issue suction
9 dredge permits again.

10 18. This Court has found the permit moratorium an unlawful scheme by the State of
11 California to defeat the intention of Congress. Yet, DFW continues to enforce the illegal
12 moratorium.

13 19. Taking the Court’s ruling to heart, after ten years of active litigation, and having our
14 dredges shut down for the past six years, many of our members made plans to dredge during the
15 2015 season. Some of our members are dredging along the Klamath River as I write this
16 Declaration.

17 20. DFW wardens have been coming out to the river and instructing our suction
18 dredging members that they are breaking the law. Sometimes they are seizing equipment,
19 sometimes issuing citations, and sometimes even arresting them. Some members, confident that
20 this Court’s Order protects them from criminal prosecution, even insisted upon being arrested for
21 breaking the law so the matter could be immediately resolved in front of a judge. However, the
22 Siskiyou County District Attorney has declined to cooperate in securing such a resolution.

23 21. In substance, the State of California is abusing its authority to frighten prospectors
24 (“you will be prosecuted later”), and running off with their mining gear, thereby imposing
25 punishment upon them while refusing to provide them an immediate hearing in front of an impartial
26 judge. This misuse of authority has a very chilling effect on business. It is particularly difficult in

1 that we devoted 10 years of litigation, and already lost six mining seasons, to finally arrive at a
2 ruling—which the State will not honor.

3 **The Mercury Issue**

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

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

19 24. The State's conclusions concerning mercury are based upon studies that have been
20 conducted in known mercury problem areas. These areas are not typical of the mining claims on
21 which suction dredgers operate, and certainly do not represent conditions on mining claims owned
22 or controlled by The New 49'ers. Our members rarely find any mercury beyond an occasional trace
23 that may adhere to a gold nugget.

24 **We Seek Reasonable Relief**

25 25. It is my understanding that this Court has found California's refusal to issue dredging
26 permits to be unconstitutional, along with the 2012 Regulations, but has declined to issue statewide

1 relief permitting miners to operate under the pre-existing 1994 regulations. As best we can
2 understand, the Court found that the acknowledged harm to dredgers was outweighed by
3 environmental risks identified by the opposing parties, in a context where the Supreme Court had
4 under review the question of federal preemption.

5 26. As Mr. Walker had pointed out in his own *pro se* lawsuit, the refusal to issue permits
6 was also a violation of the California State Constitution. Application of that rule of law would
7 result in the conclusion, but for this Court's prior ruling, that the 2012 Regulations were fully
8 effective. Under the circumstances, we believe the reasonable thing to do for the moment is allow
9 suction dredging to proceed under those 2012 regulations.

10 27. The 2012 regulations opened the Klamath River up to 4-inch dredges during the
11 months of July and August and September. The Department certified that there would be no harm to
12 fish under those regulations.

13 28. The New 49'ers only have control over the properties which we manage, and we
14 have enough background experience along our properties to certify that there are no mercury hot
15 spots present, and no sensitive cultural concerns expressed that we have not already mitigated, and
16 we are thus only seeking interim relief along the Klamath River properties which we control. Our
17 internal affairs staff has the capability to enforce the dredge regulations which were adopted in 2012
18 and additional internal Rules along our properties until such time as the Department either adopts
19 new regulations or begins issuing suction dredge permits once again. And, of course, the
20 Department has the resources to enforce the 2012 regulations within our limited area, since they are
21 already making such a strong effort to stop all suction dredging on our properties.

22 29. This is not to say that we are pleased with the 2012 regulations. We believe they are
23 overly-restrictive and need modification in order to meet the intent of Congress to encourage
24 prospecting and development of mineral resources on the public lands. We would gladly assist the
25 Department in developing a more reasonable set of regulations.

