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5 THE NEW 49'ERS, INC., a California corporation, and
RAYMOND W. KOONS, an individual
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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION
11

12 KARUK TRIBE OF CALIFORNIA and LEAF
HILLMAN,

13 Plaintiffs,

14 v.

15 CALIFORNIA DEPARTMENT OF FISH
16 AND GAME and RYAN BRODDRICK,
Director, California Department of Fish and
17 Game,

18 Defendants.
19

Case No. RG05 211597

**SECOND DECLARATION OF DAVID
MCCRACKEN IN SUPPORT OF THE
OBJECTIONS OF THE NEW 49'ERS
AND RAYMOND W. KOONS TO THE
PROPOSED STIPULATED
JUDGMENT**

Date: January 26, 2006
Time: 9:00 a.m.
Judge: Honorable Bonnie Sabraw
Place: Department 512

Filing Date: January 10, 2006
Trial Date: None Set

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22 David McCracken, being duly sworn, deposes and says:

23 1. I am President of The New 49'ers, Inc., a California corporation that is based in
24 Happy Camp, California, Siskiyou County. An associate, Mike Higbee, and I devoted most of
25 Wednesday, January 4, 2006, going through certain files which were made available to us in
26 Sacramento by defendants at the request of our attorney. We copied just under 500 documents.

1 2. Attached as Exhibit 1 is a true copy of a letter from defendants' attorney, Stephen
2 Puccini, describing the documents defendants agreed to make available. Unfortunately,
3 defendants refused to make available any documents directly concerning this litigation other than
4 the Joint Stipulation for Entry of Judgment and the Proposed Stipulated Judgment. This included
5 not only material described as "attorney-client communications" or "attorney work product", but
6 also any factual material. Therefore, we were not able gain access to any biological data or other
7 material concerning the environmental consequences of suction dredge mining or other potential
8 rationales (if they even exist) for the regulatory changes proposed by the Department of Fish &
9 Game (DFG).

10 3. When we objected to the withholding of such documents, Mr. Puccini told us that
11 because DFG was implementing the regulatory changes pursuant to a settlement agreement in
12 litigation, rather than pursuant to normal or even emergency procedures, we were not entitled to
13 gain access to any documents which might support the decisions to change the regulations.

14 4. In going through those documents which were made available to us, we found:

15 (a) What appeared to be the full record of the original 1994 CEQA process to develop the
16 initial suction dredging regulations. To illustrate the exhaustive nature of this process, I have
17 included as Exhibit 2 to this Declaration a true copy of the index to the rulemaking file for those
18 proceedings (one page is missing).

19 (b) Documents relating to DFG's review of the regulations under CEQA between 1995-
20 1997.

21 (c) More recent communications between DFG, the U.S. Forest Service (USFS) and the
22 suction dredging community concerning the need to implement the CEQA process to evaluate
23 further possible needed changes to the regulations in view of the coho listing in California and
24 other concerns expressed by the Karuk Tribe. The mining community was concerned that DFG's
25 regulations should reflect the mitigated solutions between ourselves, the Karuk Tribe and the
26 USFS. Curiously, the materials produced did not contain a report by California Department of
Fish and Game senior biologist Dennis Maria concerning a September 2003 inspection of suction
dredging activities, in which he had concluded that he "saw nothing that would be considered a

1 violation or that would have a significant impact to the fishery or significantly negatively impact
2 the overall biotic community of the Salmon River”. I possess an electronic copy of this document,
3 which is an accurate copy of the original except for the computer-generated date thereof, and
4 include it as Exhibit 3 hereto.

5 5. While there is DFG correspondence in the files to both the USFS and Karuk Tribe
6 asking for biological data to support changes sought by some USFS officials and the Karuk Tribe
7 (one such letter is annexed hereto as Exhibit 4), there is no such biological information in the files.
8 As far as I know, there is no evidence that any suction dredge miner operating in the areas
9 addressed in the Proposed Stipulated Judgment (or elsewhere in the Klamath and Six Rivers
10 National Forests) have ever injured a single coho salmon or other fish.

11 6. Because the Department did not provide us with any list of documents that were
12 being withheld pursuant to the asserted privileges from disclosure, we were unable to tell whether
13 the absence of any data was because such data had been withheld, or because neither the USFS
14 officials nor the Karuk Tribe were ever able to produce any data supporting the regulatory changes
15 they sought. Some of the information known to the Department, through Mr. Maria, is contained
16 in e-mails I possess, but which were not present in the documents presented for review by DFG.
17 Attached as Exhibit 5 is a true copy of one such e-mail, reflecting my comments, the comments of
18 a biologist upon whom the Tribe has relied on the past, and Mr. Dennis Maria.

19 7. There is, as a practical matter, no way to mine for gold in the river and streambeds
20 at issue in this litigation other than by using suction dredge mining techniques. The Department’s
21 proposal to close certain tributaries and rivers to suction dredge mining at all times amounts to an
22 outright ban on mining in these rivers and tributaries. The areas addressed in the Proposed
23 Stipulated Judgment are all within the boundaries of National Forests.

24 8. In my initial declaration filed in Federal court and attached as Exhibit B to the
25 Declaration of Neysa A. Fligor in support of Objections of The New 49’ers and Raymond W.
26 Koons to the Proposed Stipulated Judgment, I discussed restrictions on suction dredging The New
49’ers had voluntarily undertaken as part of a collaborative process involving representatives of
the Karuk Tribe, the U.S. Forest Service, and the California Department of Fish and Game.

1 Notwithstanding the Tribe's repudiation of these restrictions, The New 49'ers have continued to
2 abide by them since that time.

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

5 Dated: January 9, 2006

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David McCracken

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