

1 James L. Buchal, Appearance *Pro Hac Vice*
MURPHY & BUCHAL LLP
2 2000 S.W. First Avenue, Suite 320
Portland, OR 97201
3 jbuchal@mblp.com
Tel: 503-227-1011
4 Fax: 503-227-1034

5 R. Dabney Eastham, Cal. Bar. No. 115533
44713 Highway 96
6 Seiad Valley, CA 96086
dabneylaw@sisqtel.net
7 Tel: 530-496-3677
Fax: 530-496-3319

8 Attorneys for The New 49'ers, Inc.
9 and Raymond W. Koons

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 KARUK TRIBE OF CALIFORNIA,
14 Plaintiff,
15 v.
16 UNITED STATES FOREST SERVICE, et al.,
17 Defendants.

Civ. No. 04-4275 (SBA)

THE MINERS' ANSWER TO SECOND
AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF

18
19 The New 49'ers, Inc. and Raymond W. Koons ("the Miners") provide the following
20 response to Plaintiff's Second Amended Complaint for Declaratory and Injunctive Relief:

21 1. Paragraph 1 of the Second Amended Complaint merely contains Plaintiff's
22 characterization of this action, which does not require answers, but to the extent that answers may
23 be required, deny.

24 2. The first three sentences of Paragraph 2 of the Second Amended Complaint merely
25 contains Plaintiff's characterization of certain objectives of its complaint this action, which does
26 not require answers, but to the extent that answers may be required, deny. The last sentence of
27 Paragraph 2 of the Second Amended Complaint, deny. The Miners note that for the reasons set
28 forth in Defendants' Motion to Dismiss, previously filed in this action, Plaintiff is not permitted to

1 challenge these “National/Regional Directives”, but must identify specific Forest Service
2 Decisions.

3 3. The first sentence of Paragraph 3 of the Second Amended Complaint merely
4 contains Plaintiff’s characterization of another objective of its complaint this action, which does
5 not require answers, but to the extent that an answer may be required, deny. With respect to the
6 second sentence of Paragraph 3 of the Second Amended Complaint, admit that the two letters
7 written to Mr. McCracken were received by him, deny for lack of knowledge the existence of the
8 other letters, and deny any characterization of the letters to Mr. McCracken. With respect to the
9 third sentence of Paragraph 3 of the Second Amended Complaint, deny for lack of knowledge.
10 With respect to the fourth sentence of Paragraph 3 of the Second Amended Complaint, deny.
11 With respect to the fifth sentence of Paragraph 3 of the Second Amended Complaint, deny for lack
12 of knowledge.

13 Mr. McCracken is the General Manager of The New 49’ers, Inc., and has at all relevant
14 times been acting for The New 49’ers, Inc. The New 49’ers, Inc. is a California corporation with a
15 principal place of business in Happy Camp, Siskiyou County, California. The New 49’ers, Inc.
16 leases mining claims located along the Klamath, Salmon, and Scott Rivers and some of their
17 tributaries. Raymond W. Koons is an individual residing in Happy Camp, Siskiyou County,
18 California and is an owner of several unpatented claims comprising many acres located and
19 around the Klamath River in Siskiyou County. These claims constitute valid possessory property
20 rights under Federal law and are leased to The New 49’ers, Inc.

21 The Miners further state that the proposed mining actions referenced in the May 25, 2004
22 letter to Mr. McCracken identified in the second sentence of numbered paragraph 3 of the Second
23 Amended Complaint are located in the Klamath National Forest and that the proposed mining
24 actions referenced in the May 13, 2004 letter to Mr. McCracken identified in the second sentence
25 of numbered paragraph 3 of the Second Amended Complaint are located in the Klamath National
26 Forest. The May 13, 2004 letter to Mr. McCracken, however, *rejected* the notice of intent filed for
27 The New 49’ers, Inc. and can hardly qualify as an action disapproved by the Plaintiff in view of
28 the theories it pursues in the Second Amended Complaint. The proposed mining actions

1 referenced in the other letters identified in the second sentence of numbered paragraph 3 of the
2 Second Amended Complaint all appear to concern areas within the Klamath National Forest. The
3 Miners further state that the Klamath National Forest and the potential mining actions identified in
4 numbered paragraph 3 of the Second Amended Complaint are entirely in Siskiyou County.

5 4. With respect to the first sentence of Paragraph 4 of the Second Amended
6 Complaint, deny for lack of knowledge. With respect to the second sentence of Paragraph 4 of the
7 Second Amended Complaint, admit that this is a correct quotation, and refer the Court to the May,
8 26, 2004 Regional Directive for a complete and accurate account of its contents.

9 5. The first sentence of Paragraph 5 of the Second Amended Complaint merely
10 contains Plaintiff's characterization of another of the objectives of its complaint this action, which
11 does not require an answer, but to the extent that an answer may be required, deny. With respect
12 to the second sentence of Paragraph 5 of the Second Amended Complaint, admit that the May 10,
13 2004 letter written to Mr. McCracken was received by him, deny for lack of knowledge as to the
14 existence of the other letters, and deny as to any characterization of the letter to Mr. McCracken.
15 With respect to the third sentence of Paragraph 5 of the Second Amended Complaint, deny.

16 The Miners further state that the proposed mining operations referenced in the letter to Mr.
17 McCracken identified in the second sentence of numbered paragraph 5 of the Second Amended
18 Complaint are located in the Klamath National Forest and the proposed mining actions referenced
19 in the other letters identified in the second sentence of numbered paragraph 5 of the Second
20 Amended Complaint appear, based on Plaintiff's allegations, to be in the Klamath National Forest.
21 The Miners further state that the Klamath National Forest and the potential mining operations
22 identified in numbered paragraph 5 of the Second Amended Complaint are entirely in Siskiyou
23 County.

24 6. Paragraph 6 of the Second Amended Complaint, admit that Plaintiff purports to
25 invoke the statutes listed, but deny each and every remaining allegation.

26 7. Paragraph 7 of the Second Amended Complaint, admit as to service of a letter
27 dated June 15, 2004 on Defendant Margaret Boland, deny for lack of knowledge as to service of a
28 letter dated June 15, 2004 as to the other Defendants, otherwise deny.

1 8. Paragraph 8 of the Second Amended Complaint, subject to the affirmative defenses
2 stated below, admit only as to subject matter jurisdiction over this action; otherwise deny.

3 9. Paragraph 9 of the Second Amended Complaint, admit that the headquarters of the
4 Six Rivers National Forest is in Eureka, California, that the address of the Defendant Jeff Walter,
5 Supervisor of the Six Rivers National Forest, is in Eureka, California, and that Eureka, California
6 is in the Northern District of California because that town is located in Humboldt County,
7 otherwise deny that venue is properly vested in this Court, because Plaintiffs have not specifically
8 stated any complaint against the Six Rivers National Forest.

9 The Miners further state that, as noted in connection with numbered paragraphs 3 and 5 of
10 the Second Amended Complaint, all of the proposed mining actions and operations identified in
11 those paragraphs were located in the Klamath National Forest. The only possible connection of
12 the Six Rivers National Forest to this suit is that it administers the Ukonom Ranger District of the
13 Klamath National Forest.

14 The Miners further state that in 2004 the Six Rivers National Forest, acting through its
15 Orleans District Ranger, rejected all notices of intent it received for proposed mining activities in
16 the Ukonom Ranger District, did not authorize suction dredge mining and, in fact, caused at least
17 one miner, Terry L. McClure, to be cited, threatened with arrest and transportation over two
18 hundred seventy miles away to appear before Federal Magistrate Judge Kellison in Susanville, and
19 threatened with confiscation of all of his mining equipment and his truck. Consistent with the
20 statutory and regulatory positions urged by the Miners herein (but not by Plaintiff and
21 Defendants), Mr. McClure's violation notice was dismissed on February 2, 2005 for failure to
22 state an offense. *United States v. McClure*, No. F2092617, Order (E.D. Cal. Feb. 2, 2005). The
23 Six Rivers National Forest and its Defendant Supervisor have, in substance, adopted the
24 interpretations of Forest Service plans and regulations urged by Plaintiff in this action, and to the
25 best of the Miners' knowledge and belief, there has been no suction dredge mining approved in the
26 Six Rivers National Forest for several years.

27 As the Six Rivers National Forest fully adopted the management-approach during 2004
28 that the Plaintiff is suing for, the Miners do not understand why Jeff Walter is named as a

1 Defendant in this Action. Because Six Rivers National Forest has no place in this action, venue is
2 not vested properly with this Court.

3 10. Paragraph 10 of the Second Amended Complaint, deny. As noted above, the lands
4 and waters and events/omissions giving rise to this suit are located in Siskiyou County.

5 11. Paragraph 11 of the Second Amended Complaint, admit that the Plaintiff has a
6 headquarters in Happy Camp, California, otherwise deny for lack of knowledge.

7 12. Paragraph 12 of the Second Amended Complaint, admit that members of the
8 Plaintiff have communicated with certain employees of the Forest Service concerning suction
9 dredge operations. The Miners further state that the Forest Service *has* consulted with Plaintiff
10 extensively with respect to the very decisions about which Plaintiff now complains, at least those
11 involving The New 49'ers. Specifically, Plaintiff was involved directly with Happy Camp Ranger
12 District management of The New 49'ers, Inc. mining operations during 2004, including weekly
13 inspections by representatives of Plaintiff of these operations. The New 49'ers, Inc. has consulted
14 extensively with representatives of Plaintiff, the Forest Service, and interested members of the
15 public, including a local environmental group, regarding The New 49'ers, Inc.'s mining
16 operations. The New 49'ers undertook these consultations in order to understand and address all
17 of Plaintiff's concerns with such operations, including concerns from any cultural, religious or
18 other perspectives. (In 2003 the Plaintiff's spiritual leader invited the general manager of The
19 New 49'ers, Inc., David McCracken, and his wife, Maria, to attend a multi-day spiritual retreat at
20 the Plaintiff's main spiritual center near Somes Bar on the Klamath River (Katimin) and Mr. and
21 Mrs. McCracken attended the retreat.)

22 The New 49'ers, Inc. accommodated Plaintiffs concerns by, for example, not permitting
23 mining on those sections of the claims it leases that were identified by Plaintiff's representatives
24 as having religious or cultural values of significance to the Plaintiff and its members, and meeting
25 each and every condition identified by Plaintiff's biological specialists and natural resource
26 managers. In particular, Plaintiff, The New 49'ers, and representatives of Defendants specifically
27 addressed Plaintiff's concerns with respect to the mining operations referenced in the May 10, 13
28 and 25, 2004 letters identified in paragraphs 2 and 5 above, and the parties shook hands and/or

1 otherwise signified their acceptance of such operations as modified by The New 49'ers.¹

2 Collectively, such consultations have taken literally hundreds of hours. The Miners deny the
3 remaining allegations of paragraph 12 for lack of knowledge.

4 13. Paragraph 13 of the Second Amended Complaint, deny.

5 14. Paragraph 14 of the Second Amended Complaint, deny. Plaintiff was given
6 substantial notice and took advantage of many opportunities to participate before decisions were
7 made by Defendants.

8 15. Paragraph 15 of the Second Amended Complaint, admit.

9 16. Paragraph 16 of the Second Amended Complaint, admit the first sentence and deny
10 as to the second sentence.

11 17. Paragraph 17 of the Second Amended Complaint, admit.

12 18. Paragraph 18 of the Second Amended Complaint, deny the first sentence for lack
13 of understanding as to the legal standing of the Southern Oregon/Northern California coho
14 salmon, insofar as the United States District Court for the District of Oregon recently held that the
15 Southern Oregon/Northern California Coho salmon were unlawfully listed as "threatened."
16 *California State Grange, et al. v. United States Department of Commerce, et al.*, No. 02-6044-HO,
17 Minute Order (D. Or. Jan. 11, 2005). The Miners deny the second sentence of paragraph 18.

18 19. Paragraph 19 of the Second Amended Complaint, deny for lack of knowledge as to
19 the first sentence, deny as to the second sentence as being purely speculative.

20 20. Paragraph 20 of the Second Amended Complaint, deny, except admit that some
21 suction dredge mining does occur along portions of the rivers and streams that are not significant
22 in proportion to the overall amount of such waterways in rivers and streams within the Klamath
23 National Forest.

24 21. Paragraph 21 of the Second Amended Complaint, admit as to the first sentence and
25 deny the second sentence, because the discharge of dredged gravel and sand is in the same
26 immediate area from which the dredged materials were removed. The Miners further state that the

27 ¹ The Miners note that with respect to the May 13th letter, notwithstanding the above agreement,
28 the responsible Ranger retired, and in his absence the Six River National Forest official then

1 process of suction dredging removes other high density minerals from the streambed materials. In
2 particular, lead, a somewhat toxic heavy metal that is normally present in streambeds due to the
3 deposition therein by other river users of lost fishing weights, birdshot and bullets, and car battery
4 matrices, is removed from the streambed by the process of suction dredging. The streambed is
5 thus cleaned of one of its major contaminants. The Final Environmental Impact Report supporting
6 the California suction dredge mining regulations discussed below concluded at page 64 that
7 “removal of [lead] by suction dredgers is considered a benefit to the environment.”

8 22. Paragraph 22 of the Second Amended Complaint, deny, as the average dredge
9 pump, powered by engines akin to those in ordinary lawn mowers, produces only twenty-five
10 pounds of pressure, and suction at this low pressure is accomplished through a flexible hose rather
11 than a pipe. The Miners further state that the *maximum* allowable size of the opening in the nozzle
12 of a suction dredge under the California suction dredging regulations is eight inches (and only six
13 inches on the Salmon River), and that eight inch dredges are *very* uncommon. Suction dredge
14 nozzles and hoses commonly employed in the Klamath National Forest are from two to five inches
15 in diameter. The Miners also point out that suction dredging is a hand-operated process and quite
16 unlike the great mechanized bucket-line and drag-line dredge operations that took place in the first
17 half of the last century in such places as the outwash plains of Mother Lode rivers such as the
18 Feather, Yuba, and American Rivers and, in Siskiyou County, in the upper Scott Valley and Seiad
19 Valley. In suction dredging operations the miner actually has to be underwater and kneeling or
20 crawling on the streambed in front of the dredge, while breathing air through a snorkel or from a
21 regulator supplied with low-pressure air through a hose from a small air compressor, in order to
22 move the nozzle of the suction hose by hand. Every streambed contains a great number of stones
23 and rocks larger than the opening of the suction hose nozzle. The miner must move these stones
24 and rocks by hand a short distance out of the way so that she or he can direct the nozzle of the
25 suction hose to streambed material that can pass through the opening of the nozzle. In fact, most
26 of the physical effort in suction dredging consists of moving stones and rocks by hand underwater.

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acting refused to allow the operations.

1 23. Paragraph 23 of the Second Amended Complaint, deny. Rather than constituting
2 “disturbances,” the changes induced by suction dredge mining are considered by some fish
3 biologists to represent an improvement in fish habitat, for two reasons. First, cooler-water
4 “refugias” are created in dredge excavations that enhance habitat along the bottom of the
5 waterway. Second, suction dredging creates fresh gravel spawning beds that can replace barren,
6 impacted muddy bottoms. The Final Environmental Impact Report supporting the California
7 suction dredge mining regulations concluded at page 55 that “[i]n some circumstances suction
8 dredging may be beneficial to fish habitat,” particularly when the riverbed is “highly embedded
9 and nearly ‘cement-hard’ substrate which provides poor fish spawning and rearing conditions.
10 Suction dredging in such areas may break up compacted substrates and mobilize the fines,
11 particularly on dammed streams which do not receive high flushing flows.” (Citations omitted.)

12 Furthermore, suction dredging in California is comprehensively regulated by the state to
13 prevent adverse impacts to fish and other riverine species habitat. California suction dredge
14 regulations prevent the movement of large boulders, stumps or root wads that would allow stream
15 banks to be destabilized. The California suction dredge mining regulations, Cal. Code Regs. tit.
16 14, §§ 228 and 228.5, were adopted only after a Final Environmental Impact Report (FEIR) was
17 prepared in accordance with the California Environmental Quality Act (Cal. Pub. Res. Code §§
18 21000-21178.1). The FEIR, issued on April 1, 1994, concluded at page 61 that “[t]he proposed
19 regulations address impacts to river substrates, development of dredger holes and piles,
20 channelization of streams, and increasing the embeddedness of substrates by restricting the size of
21 the nozzle to 6 inches or less on small streams, prohibiting the importation of earthen material, and
22 prohibiting the winching of boulders outside the water line, and prohibiting of movement of
23 anchored woody material. * *. *. The adoption of these regulations would reduce these effects to
24 stream substrate to less than significant, and based on best available data, to not deleterious.”

25 24. Paragraph 24 of the Second Amended Complaint, deny. The Miners further state
26 that the California dredging regulations restrict suction dredge mining to periods when salmon
27 redds are not in the gravel, and/or when young salmon are not at risk. Every suction dredger in the
28 Klamath National Forest (as elsewhere in California) is required to obtain the California dredging

1 permit and abide by the regulations, which prevent the alleged disturbance of the redds. The FEIR
2 supporting the California suction dredge mining regulations concluded at page 50 that “[b]y
3 closing areas to suction dredging during fish spawning periods, the proposed regulations would
4 reduce these significant impacts [entrainment of developing eggs of salmonids] to less than
5 significant. Suction dredging under this proposed regulation would not be deleterious to yolk sac
6 fry and eggs because the seasonal closures would protect these life stages from any adverse
7 impacts from suction dredging.” With respect to sediment, the FEIR stated at page 51 that “[m]ost
8 of the effects [caused by suction dredging operations] related to turbidity and sedimentation, and
9 disturbance to spawning gravels reported were temporary and localized, and therefore, represented
10 impacts considered less than significant under regulated conditions.”

11 25. Paragraph 25 of the Second Amended Complaint, deny on the basis that no actual
12 data exists that supports this allegation concerning increased water temperatures due to dredging;
13 the effect is purely theoretical and of no real-world consequence. The Miners further state that a
14 hypothetical calculation of this theoretical effect would produce theoretical temperature changes
15 far too small to measure, and of no biological consequence to any life within the Forests. The
16 FEIR supporting the California suction dredge mining regulations concluded at page 63 that
17 “[e]ffects from elevated levels of turbidity and suspended sediment normally associated with
18 suction dredging as regulated in the past in California appear to be less than significant with
19 regards to impact to fish and other river resources because of the level of turbidity created and the
20 short distance downstream of a suction dredge where turbidity levels return to normal.”

21 26. Paragraph 26 of the Second Amended Complaint, admit.

22 27. Paragraph 27 of the Second Amended Complaint, deny.

23 28. Paragraph 28 of the Second Amended Complaint, deny. The Miners further state
24 that the referenced effects are for the part either (a) barred by the California suction dredging
25 regulations; (b) pure speculation; or (c) ignore the fact that effects beneficial to salmon and
26 steelhead, such as improving spawning beds, outweigh adverse impacts to other species with less
27 protection in the legal and regulatory framework. The Miners will respectfully refer the Court, at
28 the appropriate juncture in this litigation, to the FEIR supporting the California suction dredge

1 mining regulations which addresses in detail all issues cited in paragraph 28 and concludes that
2 suction dredging as permitted under the suction dredge mining regulations would have a less than
3 significant or no impact. The Miners will also refer the Court to ongoing activities of the State of
4 California, including a report issued by the California Department of Fish and Game's fishery
5 biologist for the Mid-Upper Klamath River Watershed, Dennis R. Maria, based on an inspection
6 tour held on September 15, 2003 of the main stem of the Salmon River, which concluded: "*I saw*
7 *nothing that would be considered a violation or that would have a significant impact to the fishery*
8 *or significantly negatively impact the overall biotic community of the Salmon River.*" The Miners
9 will also emphasize, with respect to alleged "frightening" of fish, that the dredging community has
10 self-imposed restrictions well-beyond what is required by the California regulations, agreeing with
11 the U.S. Forest Service and the Karuk Tribe in the discussions summarized above (which included
12 Plaintiff) to not do any dredging within specified distances from *every* identified cool-water refuge
13 during warm water months in order to avoid frightening steelhead or spring Chinook from the
14 areas where they prefer to congregate during warm-water months. The Miners will also bring to
15 the Court's attention work by a team of researchers from the U.S. Geological Survey (USGS) and
16 Humboldt State University which recently concluded that an increase in the amount of suspended
17 organic particles can benefit filter-feeding invertebrates that are the prey of salmonids.

18 29. Paragraph 29 of the Second Amended Complaint, deny that suction dredge mining
19 exacerbates problems for migratory salmonid species, and deny knowledge or information
20 sufficient to form a belief as to the truth of the remaining allegations of Paragraph 29.

21 30. Paragraph 30 of the Second Amended Complaint, admit that a type of mining
22 called "high banking" has been practiced at places in the watersheds of the Klamath River and
23 some of its tributaries, deny each and every remaining allegation of Paragraph 30. The Miners
24 further state that numbered paragraph 30 of the Second Amended Complaint is highly misleading
25 in that it states that "motorized heavy equipment such as backhoes or bulldozers" are "often" used
26 to remove "rock, dirt, plants, and other materials from their natural locations." "High-banking"
27 involves the above-water excavation of surface materials such as gravel and sand by hand
28 methods. The surface materials are run through a sluice box for removal of the values. The sluice

1 box may use either water (“wet-wash”) or air (“dry-wash”) concentration. Water for “wet-wash”
2 sluicing is obtained from any nearby source such as a stream, lake or river. *Any and all* surface
3 mining activities performed by the Miners, and by any other active prospectors within the two
4 national forests of which the Miners are aware, are being accomplished only with the use of hand-
5 excavation tools, such as a shovel, hand trowel, whisk broom and sometimes a portable vacuum
6 cleaner. These activities, if within the high-water boundaries of waterways, are actively managed
7 by the California Department of Fish and Game under Sections 1600-1616 of the California Fish
8 and Game Code. Under these regulations, excavations must be kept small enough so as to not
9 create a substantial streambed alteration. Discharges are not allowed into the active waterway so
10 as to cause a water quality violation under Section 1602 (“deposit or dispose of debris, waste, or
11 other material containing crumbled, flaked, or ground pavement where it may pass into any river,
12 stream, or lake”). The Miners are aware of mining operations that took place in the past in the
13 Klamath National Forest involving the use of bulldozers and backhoes to obtain material for a
14 wash plant but have not practiced this kind of operation and do not know of any that have taken
15 place in the last ten years. The Miners believe that there is no justiciable dispute concerning the
16 use of bulldozers and backhoes, both because Plaintiff has specifically identified no such
17 activities, and because all parties agree that such operations would require a plan of operations
18 because it might have a significant impact on surface resources.

19 31. Paragraph 31 of the Second Amended Complaint, deny and object to the
20 misleading term “mechanical sluicing.”

21 32. Paragraph 32 of the Second Amended Complaint, admit that certain Ranger
22 Districts in the Klamath National Forest will, consistent with Federal law and regulations, make an
23 individualized determination that some mining activities will have no significant adverse impact
24 upon surface resources, and therefore allow such activities without requiring a Plan of Operations
25 or consultation with federal wildlife activities, and deny each and every remaining allegation of
26 Paragraph 32. The Miners further state that California State Fish and Game representatives are
27 often involved, as appropriate, in individualized review of mining activities, because they have the
28

1 duty of enforcing the California suction dredging regulations and the streambed alteration statutes
2 codified at Sections 1600-1616 of the California Fish and Game Code.

3 33. Paragraph 33 of the Second Amended Complaint, deny for lack of knowledge as to
4 the first and second sentences because the Miners are not privy to all communications between the
5 Plaintiff and the representatives of the Forest Service, and deny as to the third and fourth
6 sentences. As noted above, representatives of the Forest Service have properly consulted with
7 Plaintiff, the Miners, and other interested members of the public to enable the Miners to submit
8 Notices of Intent to conduct operations in a fashion that all involved parties conceded would have
9 no significant surface resource disturbance, and hence would not trigger the statutory and
10 regulatory authorities now alleged by Plaintiff.

11 34. Paragraph 34 of the Second Amended Complaint, deny.

12 35. Paragraph 35 of the Second Amended Complaint, admit as to the first sentence, and
13 admit as to the second sentence if this sentence is understood to refer to the mining operations
14 identified in the first sentence. The Miners further state that the individual Forest Service
15 decisions specified in numbered paragraph 3 of the Second Amended Complaint all refer to
16 proposed mining operations located in the Klamath National Forest in Siskiyou County, and that
17 the Six Rivers National Forest did not accept any notices of intent in the year 2004 with reference
18 to proposed suction dredging or surface high-banking mining operations.

19 36. Paragraph 36 of the Second Amended Complaint, admit as to the first sentence
20 with respect to the fifth plan of operation identified in numbered paragraph 5 of the Second
21 Amended Complaint, otherwise deny the first sentence for lack of knowledge with respect to the
22 first four plans of operations identified in numbered paragraph 5 of the Second Amended
23 Complaint, and deny as to the second and third sentences.

24 37. Paragraph 37 of the Second Amended Complaint, admit that The New 49'ers, Inc.
25 is being referred to in this paragraph although under an incorrect name and admit that The New
26 49'ers, Inc. is a California corporation that licenses mining claims for use by its members, deny
27 otherwise.
28

1 38. Paragraph 38 of the Second Amended Complaint, admit as to statements posted on
2 <http://www.goldgold.com>, deny otherwise. The Miners further state that controlling case law
3 interpreting existing mining rights allow any American citizen or person declaring his or her intent
4 to become a citizen the right to prospect for valuable mineral deposits in any or all of the public
5 lands which are not otherwise “withdrawn from mineral entry,” and to occupy and camp on such
6 lands, such as those in a National Forest for the purpose of prospecting or mining. Because the
7 rights to the minerals can be claimed as real property by individuals, private citizens also have the
8 right to form companies, partnerships or associations for the purpose of pooling financial
9 resources to buy or lease access to pre-existing mining claims. While more than 75 people do pay
10 dues to The New 49’ers, Inc., the mining claim properties involved extend over a very broad area,
11 and there are never that many people on a single mining claim property at one time. In fact,
12 during 2004, the Plaintiff agreed to include a provision within the New 49’ers, Inc. mining
13 proposal that would limit suction dredges to no more than 10 per mile along the Klamath River.
14 By setting limitations on the number of allowable small-operations within any given area, the
15 Plaintiff, the Defendants and the Miners have already agreed that the activity is maintained below
16 the level of where a substantial disturbance of surface resources will occur. In addition, both
17 Plaintiff and Defendants engaged in joint monitoring of New 49’er mining operations during the
18 2004 mining season, and there were no specific concerns expressed about any disturbance of
19 surface resources.

20 39. Paragraph 39 of the Second Amended Complaint, deny as conclusions of law.

21 40. Paragraph 40 of the Second Amended Complaint, deny as conclusions of law.

22 41. Paragraph 41 of the Second Amended Complaint, deny as conclusions of law with
23 respect to the first four sentences, deny as to the fifth sentence.

24 42. Paragraph 42 of the Second Amended Complaint, deny.

25 43. Paragraph 43 of the Second Amended Complaint, deny. The Miners further state
26 that the Grunbaum Summary identified in Paragraph 43 of the Second Amended Complaint
27 completely lacks any factual data or results of field observation concerning actual suction
28

1 dredging operations in the area of concern and consist solely of unfounded and poorly documented
2 speculations.

3 44. Paragraph 44 of the Second Amended Complaint, deny.

4 45. Paragraph 45 of the Second Amended Complaint, admit that The New 49'ers, Inc.
5 did not apply for an NPDES permit, deny knowledge or information sufficient to form a belief as
6 to whether other mining applicant/operators did so, and deny each and every remaining allegation
7 of paragraph 45. The Miners further state that suction dredge mining is permitted under Section
8 5653 *et seq.* of the California Fish and Game Code and the suction dredge mining regulations
9 adopted pursuant thereto. Hand-mining activities are regulated by the State of California under
10 Sections 1600-1616 of the California Fish and Game Code

11 46. Paragraph 46 of the Second Amended Complaint, deny.

12 47. Paragraph 47 of the Second Amended Complaint, deny.

13 48. Paragraph 48 of the Second Amended Complaint, deny as conclusions of law.

14 49. Paragraph 49 of the Second Amended Complaint, deny as conclusions of law with
15 respect to the first four sentences, deny as to the fifth sentence.

16 50. Paragraph 50 of the Second Amended Complaint, deny for lack of knowledge as
17 what the Forest Service "considers" in the respects mentioned.

18 51. Paragraph 51 of the Second Amended Complaint, deny for lack of knowledge as
19 what the Forest Service "considers" in the respects mentioned in the first two sentences, deny as to
20 the third sentence. The Miners further state that the "special-use authorization" regulations
21 codified at 36 C.F.R. Part 251 does not apply by their own terms to mining activities because such
22 activities are regulated by the regulations codified at 36 C.F.R. Part 228 Subpart A.

23 52. Paragraph 52 of the Second Amended Complaint, deny.

24 53. Paragraph 53 of the Second Amended Complaint, deny.

25 54. Paragraph 54 of the Second Amended Complaint, deny.

26 55. Paragraph 55 of the Second Amended Complaint, deny.

27 56. Paragraph 56 of the Second Amended Complaint, deny as conclusions of law. The
28 Miners further state that the individual Forest Service decisions specified in numbered paragraph 3

1 all refer to proposed mining operations located in the Klamath National Forest in Siskiyou County
2 and therefore the contents of the Six Rivers Forest Plan are irrelevant.

3 57. Paragraph 57 of the Second Amended Complaint, deny as conclusions of law, and
4 refer the Court to the Plans cited for a complete and accurate account of their contents. The
5 Miners further state that the individual Forest Service decisions specified in numbered paragraph 3
6 all refer to proposed mining operations located in the Klamath National Forest in Siskiyou County
7 and therefore the contents of the Six Rivers Forest Plan are irrelevant.

8 58. Paragraph 58 of the Second Amended Complaint, deny as conclusions of law, and
9 refer the Court to the Plans cited for a complete and accurate account of their contents. The
10 Miners further state that the individual Forest Service decisions specified in numbered paragraph 3
11 all refer to proposed mining operations located in the Klamath National Forest in Siskiyou County
12 and therefore the contents of the Six Rivers Forest Plan are irrelevant.

13 59. Paragraph 59 of the Second Amended Complaint, deny as conclusions of law with
14 respect to the first sentence, and refer the Court to the Plan cited for a complete and accurate
15 account of its contents, and deny as to the second sentence. The Miners further state that the
16 individual Forest Service decisions specified in numbered paragraph 3 all refer to proposed mining
17 operations located in the Klamath National Forest in Siskiyou County and therefore the contents
18 of the Six Rivers Forest Plan are irrelevant.

19 60. Paragraph 60 of the Second Amended Complaint, deny as conclusions of law, and
20 refer the Court to the Plans cited for a complete and accurate account of their contents. The
21 Miners further state that the individual Forest Service decisions specified in numbered paragraph 3
22 all refer to proposed mining operations located in the Klamath National Forest in Siskiyou County
23 and therefore the contents of the Six Rivers Forest Plan are irrelevant.

24 61. Paragraph 61 of the Second Amended Complaint, deny as conclusions of law, and
25 refer the Court to the Plans cited for a complete and accurate account of their contents. The
26 Miners further state that the individual Forest Service decisions specified in numbered paragraph 3
27 all refer to proposed mining operations located in the Klamath National Forest in Siskiyou County
28 and therefore the contents of the Six Rivers Forest Plan are irrelevant.

1 62. Paragraph 62 of the Second Amended Complaint, deny as conclusions of law, and
2 refer the Court to the Plans cited for a complete and accurate account of their contents. The
3 Miners further state that the individual Forest Service decisions specified in numbered paragraph 3
4 all refer to proposed mining operations located in the Klamath National Forest in Siskiyou County
5 and therefore the contents of the Six Rivers Forest Plan are irrelevant.

6 63. Paragraph 63 of the Second Amended Complaint, admit as to the first sentence,
7 deny as to the second sentence as being speculation and deny Plaintiff's implication that any
8 mechanized earthmoving equipment is involved with Miners' operations. Admit as to the third
9 sentence with respect to the operations of New 49'ers, Inc. and/or David McCracken with the
10 understanding that all surface mining activity is conducted by the use of hand tools, otherwise
11 deny any implication that any mechanized earthmoving equipment is involved with such
12 operations, and deny with respect to the other operations for lack of knowledge.

13 64. Paragraph 64 of the Second Amended Complaint, deny.

14 65. Paragraph 65 of the Second Amended Complaint, deny as to all allegations as
15 conclusions of law, except deny knowledge or information sufficient to form a belief as to the
16 truth of statements by representatives of the Klamath and Six Rivers National Forests to the
17 Plaintiff.

18 66. Paragraph 66 of the Second Amended Complaint, deny. The Miners further state
19 that the Grunbaum report contains absolutely no data or even anecdotal accounts of actual mining
20 operations and consists only of unfounded and poorly documented speculation.

21 67. Paragraph 67 of the Second Amended Complaint, deny, except refer the Court to
22 the Plans cited for a complete and accurate account of their contents.

23 68. Paragraph 68 of the Second Amended Complaint, deny.

24 69. Paragraph 69 of the Second Amended Complaint, deny as conclusions of law. The
25 Miners further state that permitting their activities which do not significantly affect surface
26 resources is part of providing a "sustainable flow of uses, values, products and services", and that
27 the extensive, overlapping multiple analysis of insignificant effects apparently now sought by
28 Plaintiffs does not reflect a sustainable regulatory strategy for the National Forests; as practiced in

1 other Forests with respect to timber management such “paralysis by analysis” has in fact resulted
2 in catastrophic forest fires and other loss of resources because very limited resources must be
3 diverted from active management to duplication of actions that have already been accomplished
4 by other agencies, over-management of non-significant activity, and useless, in fact, wasteful
5 paperwork..

6 70. Paragraph 70 of the Second Amended Complaint, deny as conclusions of law,
7 except refer the Court to the Plan cited for a complete and accurate account of its contents. The
8 Miner further state that the laws governing the Forest Service to not mandate a pre-scientific
9 perspective in which all things and beings are connected in a fashion that must be the subject of
10 formal, written analysis of the relationship between each and every thing, such as falcons and
11 miners. The Miners are informed and believe, based upon statements by Forest Service
12 Representatives, that the Forest Service could not possibly accomplish the sort of analysis sought
13 by Plaintiff for many years, or perhaps ever, as budgetary constraints would prevent completion.
14 Furthermore, insofar as scientific knowledge concerning the environment constantly advances, and
15 the environment itself changes, analysis of the type sought by Plaintiff could never be completed,
16 for once one abandons a requirement of an empirically-demonstrated, real-world effect or
17 relationship of practical significance, there will always be one more species, interest or
18 relationship to analyze. This type of approach is bottomless, and designed to put private industry
19 out of business. The object of the governing plans, laws and regulations is to ensure that projects
20 of practical significance receive adequate environmental analysis, and the operations the Miners
21 and other suction dredge miners do not, individually or cumulatively, have a significant effect that
22 would invoke such authorities.

23 71. Paragraph 71 of the Second Amended Complaint, deny as conclusions of law,
24 except refer the Court to the Plan cited for a complete and accurate account of its contents.

25 72. Paragraph 72 of the Second Amended Complaint, deny as conclusions of law,
26 except refer the Court to the Plan cited for a complete and accurate account of its contents.

27 73. Paragraph 73 of the Second Amended Complaint, deny as conclusions of law,
28 except refer the Court to the Plan cited for a complete and accurate account of its contents.

1 74. Paragraph 74 of the Second Amended Complaint, deny as conclusions of law,
2 except refer the Court to the Plan cited for a complete and accurate account of its contents.

3 75. Paragraph 75 of the Second Amended Complaint, deny as conclusions of law,
4 except refer the Court to the Plan cited for a complete and accurate account of its contents. The
5 Miners further state that as noted above, Plaintiff has not alleged a single specific complaint
6 concerning the Six Rivers National Forest.

7 76. Paragraph 76 of the Second Amended Complaint, deny as conclusions of law,
8 except and refer the Court to the Plan cited for a complete and accurate account of its contents.

9 77. Paragraph 77 of the Second Amended Complaint, deny.

10 78. Paragraph 78 of the Second Amended Complaint, deny as conclusions of law,
11 except refer the Court to the Plan cited for a complete and accurate account of its contents.

12 79. Paragraph 79 of the Second Amended Complaint, deny as conclusions of law with
13 respect to the first two sentences, except refer the Court to the Plan cited for a complete and
14 accurate account of its contents. Deny as to the third and fourth sentences. The Defendants and
15 the Miners have consulted extensively with the Plaintiff prior to determining threshold limits for
16 approving or allowing small-scale mining activities.

17 80. Paragraph 80 of the Second Amended Complaint, deny, except refer the Court to
18 the Plan cited for a complete and accurate account of its contents.

19 81. Paragraph 81 of the Second Amended Complaint, deny. The Miners further state
20 that representatives of the Klamath and Six Rivers National Forests and The New 49'ers, Inc. have
21 had numerous meetings with representatives of the Plaintiff to ensure that mining activities do not
22 interfere with any cultural activity or native American value identified by the Plaintiff and that
23 numerous accommodations have been made as a result by limiting mining activity in certain
24 places and at certain times. Every single cultural activity and native American value identified by
25 the Plaintiff has been addressed and fully mitigated to the expressed satisfaction of Plaintiff.

26 82. Paragraph 82 of the Second Amended Complaint, deny as conclusions of law.

27 83. Paragraph 83 of the Second Amended Complaint, deny as to the first two sentences
28 and deny for lack of knowledge as to the allegations in the third sentence. The Miners further

1 state that the implementing regulations for § 402 of the Clean Water Act specifically exclude from
2 coverage “discharges of dredged or fill material into waters of the United States which are
3 regulated under § 404 of the CWA.” 40 C.F.R. § 122.3(b). The Miners are aware that in 1995 the
4 San Francisco District of the U.S. Army Corps of Engineers issued a Regional General Permit
5 authorizing suction dredge mining activities permitted under the California regulations within
6 portions of the Klamath River system, and are informed and believe that the Corps subsequently
7 issued another Regional General Permit expressly authorizing suction dredge mining in the areas
8 at issue in this suit. The Miners are also aware that on May 23, 1995, the State of California
9 issued a certification under § 401 of the Clean Water Act covering all suction dredge mining done
10 in compliance with the California regulations pursuant to permits issued thereunder.

11 84. Paragraph 84 of the Second Amended Complaint, deny for lack of knowledge.

12 85. Paragraph 85 of the Second Amended Complaint, deny.

13 86. Paragraph 86 of the Second Amended Complaint, deny for lack of knowledge.

14 87. Paragraph 87 of the Second Amended Complaint, deny.

15 88. Paragraph 88 of the Second Amended Complaint, admit as to the first sentence and
16 deny as to the second. The Miners further state that the U.S. Forest Service requires all suction
17 dredgers to obtain suction dredge permits from the California Department of Fish and Game
18 before its representative will approve an Operating Plan.

19 89. Paragraph 89 of the Second Amended Complaint, deny as conclusions of law.

20 90. Paragraph 90 of the Second Amended Complaint, deny as conclusions of law.

21 91. Paragraph 91 of the Second Amended Complaint, deny as conclusions of law.

22 92. Paragraph 92 of the Second Amended Complaint, deny the first sentence for lack of
23 knowledge, and object to the implication that anything other than hand-mining activity is at issue
24 in this action. Hand mining does not rise to the level of a “major action.” Deny the second
25 sentence, because Defendants have provided substantial notice to Plaintiff and others who have
26 shown an active interest, and allowed them to help shape existing policy concerning the allowance
27 of small-scale mining activity along the listed waterways. The Plaintiff has been directly involved
28 every step of the way, before formal mining proposals were made by the Miners, and before the

1 proposals were considered by Defendants. The Miners further state that all notices of intent and/or
2 plans of operation for mining activities may be obtained by a Freedom of Information Act request
3 and on information and belief the Plaintiff or its representatives have filed such requests.

4 93. Paragraph 93 of the Second Amended Complaint, deny. The Miners further state
5 that in or about April 1994, the California Department of Fish and Game issued a Final
6 Environmental Impact Report covering all suction dredge mining conducted pursuant to the
7 California regulatory scheme. Cumulative impacts from suction dredging were addressed on page
8 71 of the California FEIR, which concluded that “[b]ased on this limited information [four cited
9 studies] the cumulative effects of suction dredging appear to be less than significant and not
10 deleterious to fish.” More recently, a Draft Final Report (2002) authored by Peter B. Bayley, from
11 a study in cooperation between the Oregon Department of Fisheries and Wildlife, Oregon State
12 University and the Siskiyou National Forest, made the following conclusions: “The activities of
13 suction dredge mining (SDM) in streams of the Siskiyou National Forest have attracted the
14 attention of environmental organizations, many of whom oppose such activity in the Forest...”
15 “This report describes a first analysis of existing, recent data which accounts for cumulative
16 effects of suction dredge mining...” “The statistical analysis did not indicate that suction dredge
17 mining has no effect on the three responses measured, but rather *any effect that may exist could*
18 *not be detected at the commonly used Type I error rate of 0.05.*” “*The reader is reminded of the*
19 *effect of scale.*” “*...on the scales occupied by fish populations such local disturbances would*
20 *need a strong cumulative intensity of many operations to have a measurable effect.*” “*Given that*
21 *this analysis could not detect an effect averaged over good or bad miners and that a more*
22 *powerful study would be very expensive, it would seem that public money would be better spent on*
23 *encouraging compliance with current guidelines than on further study.*” Plaintiff’s position in
24 Paragraph 93 of the Second Amended Complaint is especially unreasonable because Plaintiff has
25 been directly involved with the Miners and the Defendants in setting agreed-upon threshold limits
26 to the number of dredges to be allowed within different reaches of the waterways, to prevent the
27 possibility of negative cumulative impacts.

28 94. The Miners repeat their answers to paragraphs 1-93.

1 95. Paragraph 95 of the Second Amended Complaint, deny as conclusions of law.
2 96. Paragraph 96 of the Second Amended Complaint, deny.
3 97. Paragraph 97 of the Second Amended Complaint, deny.
4 98. Paragraph 98 of the Second Amended Complaint, deny.
5 99. Paragraph 99 of the Second Amended Complaint, deny.
6 100. Paragraph 100 of the Second Amended Complaint, deny.
7 101. The Miners repeat their answers to paragraphs 1-100.
8 102. Paragraph 102 of the Second Amended Complaint, deny as conclusions of law.
9 103. Paragraph 103 of the Second Amended Complaint, deny as conclusions of law.
10 104. Paragraph 104 of the Second Amended Complaint, deny.
11 105. Paragraph 105 of the Second Amended Complaint, deny.
12 106. Paragraph 106 of the Second Amended Complaint, deny.
13 107. The Miners repeat their answers to paragraphs 1-106.
14 108. Paragraph 108 of the Second Amended Complaint, deny.
15 109. Paragraph 109 of the Second Amended Complaint, deny.
16 110. The Miners repeat their answers to paragraphs 1-109 of the Second Amended
17 Complaint.
18 111. Paragraph 111 of the Second Amended Complaint, deny.
19 112. Paragraph 112 of the Second Amended Complaint, deny.
20 113. The Miners repeat their answers to paragraphs 1-112.
21 114. Paragraph 114 of the Second Amended Complaint, deny.
22 115. Paragraph 115 of the Second Amended Complaint, deny.
23 116. The Miners repeat their answers to paragraphs 1-115.
24 117. Paragraph 117 of the Second Amended Complaint, deny.
25 118. Paragraph 118 of the Second Amended Complaint, deny. The Miners further state
26 that no provision of Federal law imposes a duty upon the Forest Service to verify that all those
27 who enter the Forests are in full compliance with all Federal, State and local regulatory schemes,
28 and that the attempt to make each agency responsible for every other agency, especially a federal

1 agency being required to ensure that a miner is in compliance with all State agency regulations,
2 again reflects an unworkable approach to the implementation of the modern regulatory state.

3 119. Paragraph 119 of the Second Amended Complaint, deny.

4 120. The Miners repeat their answers to paragraphs 1-119.

5 121. Paragraph 121 of the Second Amended Complaint, deny as conclusions of law.

6 122. Paragraph 122 of the Second Amended Complaint, deny as conclusions of law.

7 123. Paragraph 123 of the Second Amended Complaint, deny.

8 124. Paragraph 124 of the Second Amended Complaint, deny.

9 125. The Miners repeat their answers to paragraphs 1-125.

10 126. Paragraph 126 of the Second Amended Complaint, deny.

11 127. Paragraph 127 of the Second Amended Complaint, deny.

12
13 **FIRST AFFIRMATIVE DEFENSE**

14 The claims fail to state a basis upon which relief may be granted with respect to any
15 decision of Defendants pertaining to the Six Rivers National Forest, for reasons alleged above and
16 in Defendants' Motion to Dismiss.

17 **SECOND AFFIRMATIVE DEFENSE**

18 This Court lacks jurisdiction over the claims asserted, because Plaintiff has provided
19 inadequate notice of its intent to sue pursuant to the Endangered Species Act and Clean Water Act.

20 **THIRD AFFIRMATIVE DEFENSE**

21 The equitable relief demanded cannot be granted and the claims should be dismissed
22 because Plaintiff comes to this Court with unclean hands. As alleged above, the Miners expended
23 significant time and money in many, many meetings with representatives of Plaintiff and others
24 and modified their mining plans in order to meet all concerns then presented by Plaintiff. As such,
25 Plaintiff's pursuit of this action vindicates no legitimate interest of Plaintiff insofar as the Miners'
26 operations are concerned, but constitutes an attempt to require extensive, burdensome bureaucratic
27 activity and consultation, which ultimately will do nothing of importance to improve the
28 environment. Plaintiff's real purpose is to drive the Miners from the Forests for an indefinite, and

1 perhaps transfinite, period of time during which the Miners may forfeit their claims or be forced to
2 find some other means to support themselves. Plaintiff's dishonorable, bad faith breach of its
3 agreements with the Miners, and apparent pursuit of this action for no legitimate purpose,
4 constitutes unclean hands that should prevent this Court from extending its equitable powers to
5 grant relief.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 Plaintiffs are equitably estopped from asserting any claims concerning the Miners, for the
8 reasons alleged above, and insofar as the Miners reasonably relied upon Plaintiff's assurances and
9 agreements as alleged above in making continuing investments in its operations.

10 **FIFTH AFFIRMATIVE DEFENSE**

11 Venue for this action lies in the Eastern District of California, and the suit is not properly
12 brought in the Northern District. All of the specific decisions of the Defendants challenged by
13 Plaintiff concern the management of land in the Eastern District, Plaintiff's headquarters are in the
14 Eastern District (as stated in numbered paragraph 11 of the Second Amended Complaint), and the
15 Miners are also situated in the Eastern District (also located in Happy Camp, California as is the
16 Plaintiff's headquarters).

17 **SIXTH AFFIRMATIVE DEFENSE**

18 Insofar as Plaintiff invokes the Endangered Species Act, over which federal fish and
19 wildlife agencies have primary jurisdiction, and the Clean Water Act, over which the U.S. Army
20 Corps of Engineers and the U.S. Environmental Protection Agency have primary jurisdiction, and
21 impliedly challenge the adequacy of the State regulatory framework over which the California
22 Department of Fish and Game has primary jurisdiction, these agencies are necessary and/or
23 indispensable parties to resolution of the issues raised by Plaintiff. Indeed, it is improper for
24 Plaintiff to attempt to seek wide-ranging review under the Administrative Procedure Act against
25 the Forest Service alone, in a context in which review may be limited to the Administrative
26 Record of the Forest Service, because the lawfulness of the agency action can only rationally be
27 evaluated with a full record that includes the regulatory rationales of the other agencies involved.
28 Without joining these agencies as parties, or otherwise expanding the Administrative Record, the

1 Court cannot assess whether the Forest Service approach to regulation of suction dredge mining is
2 arbitrary, capricious and contrary to law.

3 **REQUEST FOR RELIEF**

4 For the foregoing reasons the Miners, having fully answered, respectfully request that the
5 Court dismiss this action with prejudice and that they be granted their costs and attorney fees
6 pursuant to the Equal Access to Justice Act.

7 Respectfully submitted,

8
9
10 Dated: March 1, 2005

MURPHY & BUCHAL LLP

11
12 By: _____
13 JAMES L. BUCHAL

14 Attorneys for Miners:
15 The New 49'ers, Inc. and Raymond W. Koons
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1 **CERTIFICATE OF SERVICE**

2 I certify that on March 1, 2005, I electronically filed the foregoing Exhibit 1 (Miners'
3 Answer to Second Amended Complaint for Declarative and Injunctive Relief), with the Clerk of
4 the Court, using the CM/ECF system, which will send notification of such filing to the following:

5 Joshua Borger, srmeredith@envirolaw.org

6
7 James Russell Wheaton, sarah-rose@thefirstamendment.org

8
9 Roger Flynn, wmap@igc.org

10 Barclay Thomas Sanford, Clay.Samford@usdoj.gov

11
12 Brian C. Toth, brian.toth@usdoj.gov

13 I further certify that I caused to be served a copy upon the following individuals by first-
14 class mail:

15 Jeffrey C. Parson
16 Western Mining Action Project
17 2260 Baseline Rd
18 Suite 101A
19 Boulder, CO 80302

20 Iryna A. Kwasny
21 Environmental Law Foundation
22 1736 Franklin Street, 9th Floor
23 Oakland, CA 94612

24 s/ R. Dabney Eastham
25 R. DABNEY EASTHAM
26 Attorney for Miners
27 The New 49'ers, Inc. and Ray Koons
28