

# Murphy & Buchal LLP

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## **BY FIRST CLASS MAIL**

The New 49'ers  
P.O. Box 47  
Happy Camp, CA 96039

Dear Mr. McCracken:

What follows are my recommendations for responding to the recent adverse developments affecting suction dredge mining in California: (1) the preliminary injunction issued in the Tribe's "taxpayer suit" forbidding General Fund spending to issue permits; and (2) SB 670.

It is my impression that the passage of SB 670 has rendered the Tribe's lawsuit moot in the sense that no further relief from the Court could be given to the Tribe that actually did anything for the Tribe beyond what the statute accomplishes. For this reason, I would propose to move to dismiss the Tribe's suit on mootness grounds.

There is a "public interest" exception to mootness which the Judge may invoke, and then we would have to continue to litigate the case, a considerably more expensive proposition. It is possible to appeal the Judge's grant of a preliminary injunction, and we understand that certain other mining interests will do so, but by the time that appeal is resolved, the Judge is likely to have entertained a request for a permanent injunction, mooting all issues relating to the preliminary injunction.

With respect to the passage of SB 670, the obvious and recommended response is a lawsuit in federal court to strike down the statute. There is a well-developed body of law under which the federal courts have struck down prior outright bans on mining as preempted by federal law.

I would propose to file the suit in the United States District Court for the Eastern District of California. My plan would be to file the suit, and then file a motion for summary judgment as soon as possible. Because we are unlikely to be able to obtain any effective relief before the end of the summer season, attempting to get a preliminary injunction against enforcement of the statute seems unnecessary.

In order to prevail on a motion for summary judgment, we will have to present a solid factual case as to how and why, in detail, the statute impairs the purposes of the federal mining laws. In particular, we will need to develop written testimony explaining in detail why the ban on suction dredges is the functional equivalent of an outright ban on mining, and why a so-called "temporary ban" is likely to be both (1) of indefinite duration; and (2) last many years beyond the Department's current 2011 projection. Finally, we need to demonstrate that even a temporary ban frustrates the purposes of the federal mining laws through a climate of regulatory uncertainty that chills capital investment, the loss of expertise, etc. To the extent these items are disputed, the case might have to go to trial.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Buchal", with a stylized flourish at the end.

James L. Buchal