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MEMORANDUM

To: Dave McCracken, New 49'er Association

From: James L. Buchal

Date: September 16, 2011

Re: Adverse Development in Karuk Litigation

We had previously prevailed first in the District Court for the Northern District of California, and then in the Ninth Circuit, against a Karuk Tribe attack asserting that Forest Service review of notices of intent was "agency action" requiring full-blown consultation under the Endangered Species Act. These were important victories, for the court opinions held that Forest Service review of a notice of intent did not "authorize" the private mining activity, reasoning which applies to any small-scale mining conducted under a notice of intent, not just suction dredging.

By contrast, if review of notices of intent is held to "authorize" mining, the resulting endangered species act consultations for each and every notice of intent will, as a practical matter, shut down all small scale mining activity. This is not because the activities have any adverse effects on listed species, but because the consultation procedures are so time-consuming and expensive that the Forest Service cannot complete them, as has been the case when large numbers of plans of operations have been filed. And, of course, it is utterly contrary to the mining law to suggest, as a general proposition, that miners require advance authorization to mine on lands open for mining.

Unfortunately, on September 12, 2011, the Ninth Circuit issued an order stating that "upon the vote of a majority of nonrecused active judges, it is ordered that the case be reheard *en banc* . . .". The order also included a provision that the initial three-judge panel opinion shall no longer be cited as precedent, but this was pursuant to a general order and should not be used to infer anything about the Court's attitude toward the initial opinion.

This means that the case will be reheard by Chief Judge Kozinski and an assertedly-randomly-selected panel of ten additional judges. A second order has indicated that the oral argument will take place in San Francisco during the week of December 12, 2011. (We will find out the precise date about a month in advance, and find out the identity of the panel members about a week in advance.) If the eleven-judge panel overturns the initial three-judge panel decision, there is a theoretical option to petition for rehearing by the full court of 27 judges.

I would speculate that the votes for rehearing were driven by the dissenting opinion, which was both intemperate and inaccurate. Hopefully, the less extreme elements on the court will recognize these features of the dissent upon more careful review, and adhere to the ruling of the initial opinion. The orders also required us to deliver 25 copies of the briefing and appendix to the Court within seven days; they have been dispatched.