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BY FACSIMILE TRANSMISSION AND FEDERAL EXPRESS

Donald Koch
Department of Fish and Game
1416 Ninth Street
Sacramento, CA 95814

Re: *Petition for Emergency Rulemaking Concerning Suction Dredge Mining*

Dear Director Koch:

The New 49'ers, Inc. and other suction dredge mining interests have received portions of a petition for emergency rulemaking filed by the Karuk Tribe and others, and write to explain why the Department must reject the Petition, and the consequences if the Department does not do so.

Above all else, there is no “emergency” within the meaning of Government Code § 11346.1 or otherwise, for at least two reasons: (1) there are no significant adverse environmental impacts from suction dredge mining conducted pursuant to existing regulations and (2) there is manifestly no “emergency” with respect to the status of salmon runs in the Klamath River Basin (as opposed to other areas, such as the Sacramento River), insofar as the Department continues to authorize significant intentional killing of members of these species, including listed coho salmon.

With respect to environmental impacts, the primary “evidence” petitioners offer consists of unsupported statements by two Departmental officials made in the course of the ongoing litigation between the Department, the Karuk Tribe, The New 49'ers and others. Messrs. Curtis and Manji speculated as to possible “deleterious impacts”—without regard to their significance, or any “emergency”—but had no scientific basis for making these statements. Opinions concerning “deleterious impacts” have been refuted by a large body of evidence, including sworn testimony from the now-retired Departmental biologist with the most extensive knowledge of the area, who explained important *benefits* that suction dredge mining provides to coho salmon in the area. The New 49'ers and others have also lodged numerous scientific studies with the Department, including studies of the cumulative impacts of suction dredge mining on fish populations, which demonstrate no appreciable impacts whatsoever.

We also lodged formal Public Records Act requests with the Department seeking any scientific data supporting the opinions of Messrs. Curtis and Manji, and the Department has been unwilling or unable to release any such data to this day. For all these reasons, we construe the testimony of Messrs. Curtis and Manji as an expression of Departmental policy with respect to the lawsuit rather than scientific information that could support a finding of actual adverse impacts caused by suction dredge mining.

Petitioners also argue that the “decline [of coho populations generally] constitutes an emergency situation”, but an “emergency situation” cannot justify emergency regulations of activities that have no appreciable impact on the “situation”, and highly-localized mining moratoria cannot be justified by general problems with fish populations in other areas. Petitioners have submitted an April 2008 NOAA study (Exhibit B), but it does not even address Klamath-area populations. As to the February 2008 report (Exhibit A), it includes no data concerning the areas that are the subject of the proposed regulations, and makes it clear that recent coho declines arise primarily from poor ocean conditions and other factors having nothing to do with suction dredge mining. The 1998 frog study (Exhibit C) provides an account of *increasing* frog populations in mined areas, perhaps because suction dredging activities “provide some habitat for tadpoles and subadults”. Finally, the “SOS” report (Exhibit D), prepared by petitioner California Trout, an advocacy group using its own advocates masquerading as scientists, does tout its legislative initiative against suction dredge mining, but offers no *evidence* whatsoever of any adverse impacts from the activity.

Moreover, there can be no emergency in the Klamath area since substantial fisheries continue to be authorized, including a dipnet fishery for the Karuk Tribe in the heart of the area addressed in the proposed emergency regulations, with heavy impacts on all salmonid species, listed and unlisted. As far as we can tell, based on the extraordinarily limited response to the Public Records Act requests we presented on this subject, the Department does not even bother to monitor this fishery or estimate its impacts. For the Department to allow essentially unlimited directed killing of fish, yet issue “emergency” regulations against an activity that has never been demonstrated to kill so much as a single fish, would be utterly irrational.

Quite apart from the lack of any factual predicate of any basis for emergency regulations against suction dredge mining, any State action to impose local moratoriums seizing mining claims will run afoul of federal law. Suction dredge miners generally have federally-established possessory property rights in their mining claims, and in the words of the United States Court of Appeals for the Ninth Circuit, are not mere “social guests” who can be “shooed out the door”. *United States v. Shumway*, 199 F.3d 1093, 1103 (9th Cir. 1999). Arbitrary seizure of the mining claims will give rise to very substantial “takings” liability for the State of California, *see, e.g., United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (liability for five-month seizure), if indeed the seizure itself is not entirely invalid for conflict with federal mining law, *see, e.g., South Dakota Mining Ass’n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998). The State of California’s finances ought to counsel against multimillion dollar initiatives to buy up vast numbers of mining claims for no public benefit whatsoever. Indeed, powerful adverse impacts on local communities already ravaged by overbroad environmental restrictions on the activities that formerly fueled their economies will result.

If the Department enacts these rules, the miners will be required to vindicate their rights in multiple lawsuits against the Department; a division of labor in that regard has already been discussed within the mining community. Some miners will seek just compensation for the seizure of their claims; some will seek an injunction in federal court against any enforcement of regulations; and some will seek relief in state court against the emergency regulations. With respect to that final category of litigation, miners will present their own emergency petition to shut down the Klamath fisheries, giving the reviewing court the opportunity to observe the Department struggling to explain why an activity that has never been demonstrated to kill so much as a single fish must be shut down while other interest groups are permitted to kill essentially unlimited numbers of the same fish (unless, of course, the Department does determine to terminate the Karuk and other fisheries in the Klamath Basin). Even under the deferential standards of review the Department will enjoy, no such contradiction will withstand scrutiny.

We understand that the Department may well expect litigation from the fish-killing “environmental” interests in the event it does not enact the proposed emergency regulations, but the petitioners have already threatened to bring legal action for many months. Rest assured the miners will intervene to assist the Department in defeating litigation that may arise from denying the petition (assuming the Department determines to alert us to its filing, unlike last time around), and the risks to the Department, and the State, will be far less from such litigation than from the multiple suits the miners will initiate.

Sincerely,

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

James L. Buchal
Counsel to The New 49'ers, Inc.