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**MEMORANDUM**

To: Dave McCracken

From: James L. Buchal

Date: May 28, 2011

Re: Response to Threatened Moratorium

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If the State of California enacts current trailer bill language to shut down the SEIR process and extend the moratorium on suction dredge mining for another five years, it is clear that the State's course of conduct amounts to a substantial and illegal interference with federal mining law and policy. While a narrow majority of the Supreme Court found in the *Granite Rock* case that states may issue permits for federal mining activity, where state law stands as an obstacle to the accomplishment of federal purposes, it will be struck down.

Here the State of California has demonstrated, through a long series of abuses, that it is unwilling to permit the accomplishment of the federal purpose to foster mineral development, or to recognize federally-protected property rights and rights of operation in placer mining claims. In the initial *Karuk* case, the State's department of fish and game asserted a need to update its environmental analysis, promised to do so in a consent decree, and then breached that promise. After a second round of litigation in the *Hillman* case, the State (acting through Judge Roesch) issued an injunction against permitting, although the State again promised to complete environmental analysis. Then the State (acting through the Legislative Assembly), enacted a "temporary moratorium" in SB 670, which moratorium was to be lifted upon the completion of environmental analysis and new regulations. The State (acting through its appeals court) also refused to end the preliminary injunction as moot in light of SB 670.

With the environmental review process now substantially complete, on a basis that would allow at least some continued mining on some claims, the State is now threatening an additional five-year moratorium and to terminate the environmental analysis. Even if the moratorium were to be lifted in five years, restarting the environmental review process would take additional years, and many claimholders will be dead before any prospect that mining would resume.

It is well-established that an outright ban on mining is preempted by State law, and the State's continuing attacks on suction dredge mining are best understood as an attempt to destroy suction dredge mining on placer claims through actions that can be falsely characterized as merely temporary. A powerful case can be made that the prospect of years-long delay, with no guarantee of any positive outcome, is the functional equivalent of a mining ban.

While the courts have been disposed to give leeway to states to protect environmental interests, and the Forest Service has in its mineral regulations indicated that miners are to comply with state laws on these subjects, these courts have presupposed that the state has an operative permit system that can protect environmental interests without materially interfering with federal policy. I think it likely that the courts would take a second moratorium that terminates environmental analysis as a "step over the line" with respect to the scope of the State's regulatory authority concerning federal mining claims, and strike down the moratorium. Given the likelihood that the moratorium will pass, we should begin preparing our attack.