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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 FOR THE COUNTY OF SAN BERNARDINO

14

15 Coordination Proceeding  
Special Title (Rule 1550(b))

16 **SUCTION DREDGE MINING CASES**

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24 **Related Actions:**

25 *Karuk Tribe of California, et al. v. California  
Department of Fish and Game*

26

27 *Hillman, et al. v. California Department of  
Fish and Game*

28

Judicial Council Proceeding No. JCPDS 4720

**REPLY DECLARATION OF DAVID  
MCCRACKEN IN SUPPORT OF  
MINERS' JOINT MOTION FOR  
INJUNCTION AGAINST DEFENDANTS**

Judge: Hon. Gilbert G. Ochoa

Dept.: S36

Date: June 23, 2015

Time: 8:30 a.m.

RG 05211597 – Alameda County

RG 09434444 – Alameda County

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<i>Karuk Tribe of California, et al. v. California Department of Fish and Game</i>	RG 1263796 – Alameda County
<i>Kimble, et al. v. Kamala Harris, Attorney General of California, et al.</i>	CIVDS 1012922 – San Bernardino County
<i>Public Lands for the People, et al. v. California Department of Fish &amp; Game, et al.</i>	CIVDS 1203849 – San Bernardino County
<i>The New 49'ers, et al. v. State of California; California Department of Fish and Game, et al.</i>	SCCVCV 120048 – Siskiyou County
<i>Foley, et al. v. State of California; California Department of Fish and Wildlife, et al.</i>	SCSCCV 13-00804 – Siskiyou County
<i>Walker v. Harris, et al.</i>	34-2013-80001439 – Sacramento County

1 David McCracken states:

2 1. I am the President of plaintiff The New 49'ers, Inc. and make this Declaration in  
3 support of the Miners' Joint Motion for Injunction against Defendants.

4 **Mercury Is Not an Issue for New 49'ers Mining.**

5 2. A large portion of both the Department of Fish and Wildlife (DFW) and Karuk  
6 Opposition filings to the Miners' Motion for an Injunction are based upon concerns about the  
7 resuspension of mercury and the perceived harmful effects upon fish from reduced water quality  
8 as a result of the tailings discharges from suction dredges. The effects of mild turbidity on fish  
9 have been addressed time and time again with the same result, so I am not going to engage in the  
10 same old, tired debate here. DFW's conclusion in both the 1994 and 2012 EIR's was that  
11 turbidity effects are less than significant upon fish. End of story.

12 3. As to mercury, I can assure this court that nobody else in the history of the earth  
13 has observed more area along the bottom of the Klamath River streambed than I have. For the  
14 past 30 years, I have devoted a large portion of my time either dredging the Klamath, teaching  
15 others how to dredge the Klamath, or overseeing the suction dredging activities of thousands of  
16 New 49'er members along the Klamath who have come and gone over this period of time. If  
17 there were any mercury hot spots along the mid-Klamath River, I would certainly know about  
18 them. They do not exist. The injunction we are seeking, insofar as it relates to dredging by  
19 members of The New 49'ers, has no chance of significantly increasing mercury concentrations  
20 not merely because the dredges would catch 98% of the mercury, but also because there is no  
21 problem to begin with.

22 **Response to Concern about Drought Conditions.**

23 4. Our opponents express concern that fish will not survive if we return to the dredge  
24 regulations which were in effect during 2009 when the unlawful moratorium was imposed upon  
25 our industry in light of the drought conditions California is experiencing. The Klamath is  
26 California's second largest river. Past history is full of stories about the Klamath being so low  
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1 during the summer months before the dams were constructed, that people could walk all the way  
2 across the River, something that would be completely impossible in the present day of flood  
3 control. Somehow, the salmon and other fish survived those days of extreme low flows  
4 compared to what we will encounter during the present drought.

5           5. As set forth in my opening Declaration, The New 49'ers have recently adopted  
6 internal Rules for properties we control that reduce the sizes of dredges allowed on our  
7 properties, and also limit their numbers, in order to do our part to mitigate concerns expressed by  
8 DFW and the Karuk Tribe.

9           6. At the same time DFW and the Karuk are seeking to limit dredging activities on  
10 account of drought conditions, there is no evidence that DFW is imposing any drought-related  
11 limitations on fishing by the Karuk Tribe and others. For example, the unregulated dipnet  
12 fishery at Ishi-Pishi Falls for members of the Karuk Tribe remains in the current California  
13 fishing regulations. Sports fishermen continue to be allowed to keep up to nine chinook salmon  
14 caught from the Klamath River. (California Supplement, Sport Fishing Regulations, Klamath  
15 River Basin Regulations, 91.1(C)(2)(b)(i).<sup>1</sup>). We would ask this Court to watch what DFW is  
16 *doing* with respect to direct killing of fish in the Klamath River, rather than what it is *saying* with  
17 respect to the almost-entirely-theoretical impacts of suction dredging on fish.  
18

#### 19 **Economic Losses.**

20           7. The Foley *et al.* litigation which has been consolidated coordinated by this court  
21 was originally filed in Siskiyou County by business owners from Happy Camp who are being  
22 crushed by the unconstitutional moratorium. Happy Camp is the location of our New 49'er  
23 headquarters. It is also the location of most of the Karuk administrative offices and housing  
24 developments, all paid for by those of us in the private sector who must work hard to make ends  
25 meet. That litigation was filed two years ago with an overflowing courtroom of Americans who  
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27 \_\_\_\_\_  
28 <sup>1</sup> Available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=100968&inline>

1 must produce something to make an honest living, pleading with the Superior Court for relief –  
2 which they still have not obtained.

3           8.       Instead of addressing losses to the Happy Camp community, the Karuks file a  
4 Declaration from Chris Hatton who has owned the Salmon River Outpost since 2003. That was  
5 the year that The New 49'ers acquired mineral right access to a substantial amount of the Salmon  
6 River, one of California's richest rivers for gold. Hundreds of our members visited the Salmon  
7 River that season. I am certain many of them, including myself, purchased food and other items  
8 from Mr. Hatton's store. With all due respect, miners do not look any different than any other  
9 people, and I am challenging how Mr. Hattan was able to distinguish the difference between a  
10 prospector and a rafter when they were paying for items at his cash register.

11           9.       In any event, between the Karuks, the anti-mining activists and the very well-  
12 established illegal marijuana-growing community along the Salmon River, the continuous  
13 harassment of our members was so painful that we completely withdrew from the Salmon River  
14 in 2004. By harassment, I mean threats of violence, gunshots fired over our campsites in the  
15 middle of the night, dredges being sunk on the river, cut loose from their anchor ropes or stolen,  
16 vehicles with their tires slashed, their radiator hoses cut, and their windows smashed.

17           10.      Since our organization promotes "hassle free mining opportunities," it became  
18 clear during the 2003 season that, as good as the gold was, the Salmon River was not for us.  
19 Those mining claims eventually ended up in the hands of just a few independent miners. So it is  
20 not surprising that Mr. Hattan has not endured a loss of business since the moratorium was  
21 imposed in 2009. The bulk of gold miners exited his area in 2004.

22           11.      Mr. Hattan is well known as an outspoken anti-mining activist. I challenge the  
23 Karuks to find a business owner in Happy Camp who has not suffered heavy losses from the  
24 suction dredging moratorium!

25           12.      The Karuks continue to push their notion that suction dredging, for the most part,  
26 is nothing more than any other type of recreational activity. This demonstrates a perpetual  
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1 misunderstanding or disagreement with the federal mining law – which allows free access for all  
2 Americans to search the public lands for valuable gold deposits. The law also triggers a real  
3 ownership interest in the event that a valuable deposit is found.

4 13. Just the possibility of finding real gold makes the activity of prospecting  
5 enjoyable and exciting. This is especially true with beginners. Because of this, it is not unusual  
6 for those who are uninformed to assume prospecting is just another form of recreation. But I can  
7 say with authority, from 30 years of managing America’s most active gold mining association,  
8 that once a valuable discovery is made, the program becomes deadly serious. This is at least half  
9 the reason why The New 49’ers employ a very active Internal Affairs staff.

10 14. America’s mining law does not disqualify a prospector if he is enjoying the  
11 activity. The law even goes so far as to guarantee a property right to every member of the Karuk  
12 Tribe, to Ms. Saxton, or any anti-mining activist who might stumble upon a valuable gold  
13 deposit while taking a walk or swim on the public lands, even if prospecting is the last thing on  
14 their minds.

15  
16 **Alternative Mining Methods.**

17 15. Ms. Saxton’s Declaration goes to great lengths to prove that gold can still be  
18 found on the riverbanks by making references to stories which I have published on our web site  
19 about our weekend group outings. It’s true that there is some gold to be found along the banks of  
20 most gold-bearing waterways in California. Since these very same areas were also accessible to  
21 previous generations of miners, for the most part, the gold we find there is either what was  
22 overlooked during earlier times, or small amounts that were washed there by more recent storm  
23 events. I can say with authority that it is a very rare exception when a pick & shovel mining  
24 program can recover enough gold to sustain the most basic poverty-level livelihood.

25 16. These weekend projects which The New 49’ers sponsor are primarily to help  
26 beginners off to a good start on their learning curve. Many or most find their first gold on our  
27 projects. This is quite exciting for them. And once again, because of the enjoyment people  
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1 experience on our weekend projects, Ms. Saxton mistakes gold prospecting as a recreational  
2 activity, “You see? Dave has demonstrated that people can have just as much fun sluicing and  
3 panning up on the bank!” But if you follow these stories to the end, while everyone goes away  
4 with some gold, nobody ever goes away with enough gold to justify the hard labor as a money-  
5 making proposition.

6 17. To make a living at commercial gold mining, as many suction dredgers did before  
7 2009, you have to look for and develop the high-grade gold deposits where they are located. For  
8 small-scale gold miners, this nearly always requires gaining access to where the earlier  
9 generations of miners were not able to reach. This means the bottom of the waterways,  
10 especially the larger and deeper waterways, or even smaller waterways where terrain conditions  
11 did not allow the waterway to be diverted.

12 18. From 30 years of experience in overseeing thousands of suction dredgers over the  
13 many years, I can say with authority that most of the deeper and faster parts of the Klamath  
14 River are covered with original streambed that has never been mined. This is where the  
15 important discoveries are made that trigger a property right. My own best day dredging on the  
16 Klamath River was 24 ounces of gold.

17 19. In sum, while it is true that some people can enjoy themselves early on the  
18 learning curve by recovering pieces of gold that still exist alongside California’s waterways,  
19 nearly all of the commercial-grade deposits exist out in the deeper water where only a suction  
20 dredge can be used to discover and develop them. The prohibition on suction dredging is in  
21 substance a ban on mining the remaining commercially valuable placer gold deposits.

### 22 **The Harm of DFW Criminal Enforcement.**

23 20. DFW makes the point in its Opposition brief that we have presented evidence that  
24 only a small number of suction dredgers have been criminally cited, arrested or have had their  
25 mining gear seized, suggesting that it is only a very small number of people who want to suction  
26 dredge. Therefore, they argue that the existing situation does not justify injunction relief by this  
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1 court. DFW is in a position to know the actual number of enforcement actions, which is almost  
2 certainly far higher.

3 21. Since this Court has granted ex parte relief concerning a civil remedy available  
4 for suction dredgers in Siskiyou County, DFW has stepped up its ongoing harassment of suction  
5 dredgers. They are seizing all of the suction dredging equipment they can find on the river,  
6 sometimes without even writing a criminal citation. They have executed at least one criminal  
7 search warrant to take the dredging equipment out of someone's back yard, without even issuing  
8 a criminal citation!

9 22. I personally was present in the Siskiyou County Courthouse on June 9th when the  
10 judge pro tem informed Steve Jones and Dyton Gilliland that even though they had been arrested  
11 by DFW wardens, with tens of thousands of dollars of their equipment taken from them, that  
12 until the State filed a case against them, there was nothing that the court could do. The judge pro  
13 tem also informed these two hard-working men that the State has up to a full year to file a  
14 misdemeanor case, which he believed they were unlikely to do. Yes; he actually said that!  
15 "Meanwhile," the Judge pro tem said, "you guys are in a state of limbo."  
16

17 23. This situation allows DFW a very unreasonable opportunity to impose irreparable  
18 harm upon suction dredgers with no due process whatsoever. The situation creates a chilling  
19 effect upon other dredgers who would like to get started in view of this court's Ruling and Order.

20 24. Most suction dredgers, especially those who belong to our Association, are  
21 normal everyday people who work hard for a living just to make ends meet. They own homes  
22 and cars and have families to support. Some have children they hope to put through college one  
23 day. Many of our members are on a retirement income.

24 25. The average American cannot afford to be in criminal trouble! Criminal trouble  
25 under their circumstances would most certainly create irreparable harm. Nowadays it is difficult  
26 to get or keep many types of jobs if you have any criminal record at all.  
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1           26.     My staff and I receive phone calls and emails every day from frustrated members  
2 who have already lost the beginning of the 2015 season, along with perspective members who  
3 are waiting in the wings for this court to issue an Order instructing DFW to stop misusing the  
4 criminal process to punish gold dredgers.

5                                   **Cultural Resources.**

6           27.     Mr. Hillman's Declaration could be read to express concerns about the possibility  
7 of suction dredgers excavating human remains and/or cultural artifacts from the bottom of active  
8 waterways, particularly along the Klamath and Salmon Rivers.

9           28.     All of our mining and prospecting activities take place within the high-water line  
10 of the active rivers and creeks. This is within the active flood zone where hundreds of years of  
11 storm events have scoured the river bottom time and time again. Hundred-year storm events  
12 occur from time to time which nearly clear all of the streambed from the bottom of waterways,  
13 only to deposit new streambed as the storms taper off. I know this to be true, because through  
14 thousands of hours of dredging time, I have learned to recognize the different streambed layers  
15 which were formed by different storm events.  
16

17           29.     I can generally recognize the time period within the streambed when American  
18 miners and settlers arrived, because those flood layers contain a concentration of manmade iron,  
19 lead and other objects. Out in the center of the Klamath River, those particular layers rest upon  
20 ancient streambed that has perhaps been in place for many thousands of years. The richest gold  
21 deposits are found in these extremely old streambed deposits.

22           30.     It is my expert opinion that if any nonmetallic historical, cultural objects or  
23 human remains ever ended up within the active river systems, they would in most cases be  
24 washed away by flood events. Indeed, there has never been a single time during my 30 years of  
25 managing The New 49'ers that any member has reported finding a single native American  
26 artifact or the remains of a human being while suction dredging.  
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1           31. I am personally sympathetic to more general concerns about spiritual and cultural  
2 values of the Karuk and other Tribes. This was the reason why myself and others within New  
3 49'er management went to extraordinary lengths during 2003 and 2004 to cooperate with Mr.  
4 Hillman, other Tribal leaders and the U.S. Forest Service to identify every sensitive cultural  
5 area, and every fishery concern which our program could possibly impact in a negative way. Mr.  
6 Hillman does not deny that we have honored those agreements to the present time.

7           32. The U.S. Forest Service publishes the dates and locations of all scheduled Karuk  
8 ceremonies at the beginning of every summer season. In turn, our Internal Affairs staff work in  
9 concert with the U.S. Forest Service to persuade our members and other prospectors not to  
10 pursue gold prospecting activities in those areas and during those time periods. In addition, we  
11 have withdrawn completely from all of the mining properties we controlled during 2004 which  
12 were located in the culturally sensitive areas identified by the Tribe. Mr. Hillman notes  
13 ceremonies that he says occur "at various locations along the Klamath and Salmon Rivers."  
14 While I am not familiar with all of the ceremonies he mentions, I do know that the annual World  
15 Renewal Ceremony, which I was very honored to attend during 2003, occurs in Somes Bar,  
16 approximately twenty-five miles below our most downstream mining claim.

17           33. The Karuks have more recently redrawn their Cultural Management Area map to  
18 overlay some of our most productive mining properties, properties which they expressed no  
19 interest in during 2004, and where they do not perform any spiritual ceremonies which any of us  
20 have ever observed. Mr. Hillman and other tribal leaders are now objecting to our presence in  
21 areas which we have been actively prospecting for 30 years without any previous objections  
22 from the Tribe.

23           34. While we strive to be careful to not interfere with the true cultural values of the  
24 tribe, and attempt to prevent our members from disturbing religious ceremonies, we are not the  
25 only non-Tribal members present in the area. There are numerous rafting companies which float  
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1 the river, motorcycle and bicycle groups that cruise the river road and independent campers and  
2 other recreationalists that frequent the area.

3 35. Because Mr. Hillman provides no specific testimony concerning any adverse  
4 encounters with non-Tribal members, it is entirely possible that he or others are mistaking  
5 someone else as a gold prospector when he says there have been violent encounters. Mr.  
6 Hillman and I made a firm agreement in 1994 that we would not allow our conflicts to reach the  
7 level of violence. To my knowledge, this agreement has not been broken on either side.

8 36. If there was any violence between The New 49'er members and local tribal  
9 members, I am positive I would have heard about it from our very active Internal Affairs staff. I  
10 have heard of no such events.

11 37. "Cultural Management Areas" do not eliminate the property interests which  
12 private land owners possess, or where prospectors have located an important mineral discovery.  
13 During our cooperative period in 2003, in good faith, I personally made an offer to acquire, at  
14 my own expense, the mining rights for each of the important cultural areas of the Karuk Tribe,  
15 and either turn the rights over to them or hold them in trust so that mining would not interfere  
16 with their historical and spiritual values. The leaders of the Karuk Tribe gracefully rejected my  
17 offer.

### 18 **The Breadth of the Injunction Sought.**

19 38. DFW resists the idea that it should be limited to enforcing mining regulations set  
20 forth in the 1994 regulations on the theory that such an injunction would be overbroad and that  
21 the 1994 regulations are not adequately protective. I think it would be useful for the Court to  
22 understand how those regulations were developed. I was intimately involved in a long and  
23 contentious process during 1993 and 1994 wherein DFW sought to conduct a prior EIR and  
24 enact regulations.

25 39. Indeed, DFW was required to prepare three separate environmental impact reports  
26 (EIRs) to consider the effects of suction dredging during 1993 and 1994, because Governor Pete  
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1 Wilson fully rejected the first two attempts as outcome-based documents. By that, I mean to say  
2 that DFW had predetermined the outcome even before they began the process, and abused the  
3 process only to support the outcome which they desired. The first EIR produced an outcome  
4 where the preferred alternative was to end suction dredging altogether in California – which was  
5 the objective, and remains the objective, of our opponents and elements within DFW. The  
6 second EIR resulted in a predetermined outcome which restricted suction dredging so severely,  
7 that the proposed regulations would have eliminated all or most of the commercial underwater  
8 mining potential in California, very similar to the regulations adopted in 2012.

9  
10 40. During the first two attempted EIR's in 1993 and 1994, the DFW officials who  
11 were in charge of the process completely ignored all or most of the comments and concerns  
12 expressed by California's small-scale mining industry. For the most part, they only gave weight  
13 to the comments and concerns which were expressed by anti-mining activists. From my  
14 perspective, DFW was pursuing a sort of predetermined outcome in the very same manner as in  
15 the 2012 process.

16 41. It was only during the third EIR process in 1994 that DFW finally changed its  
17 direction, listened to the comments and concerns voiced by the mining community, and made a  
18 good faith effort to balance environmental concerns with the concerns of our industry, and  
19 produced a more balanced regulatory result which mitigated genuine environmental concerns  
20 while allowing our industry, in most cases, to survive and flourish. That process evolved into the  
21 1994 regulations which served the State and our industry all the way until 2009 when the  
22 unlawful Moratorium was imposed.

23 42. DFW's complaints about the 1994 regulations should be viewed in light of this  
24 history, the history of these coordinated cases (involving, among other things, a secretly-  
25 negotiated consent decree with the Karuk Tribe to severely restrict our suction dredging  
26 regulations), DFW's failure to abide by the consent decree, triggering an injunction, and the  
27 legislative efforts involving DFW and the Tribe. Simply put, DFW and the Tribe will never be  
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1 satisfied with any regulations which are not unreasonably prohibitory in character, based on their  
2 longstanding opposition to suction dredge and other small-scale mining.

3 43. The more recently proposed legislation by the Water Quality Board seeks, once  
4 again, to dramatically change and expand the definition of "suction dredge," now to also include  
5 hand sluicing up on the stream bank if the sluice is fed water by a motorized pump. Said another  
6 way, a motorized pump can be used to fill a water truck, for agriculture, for fire-fighting or  
7 nearly any other purpose; but if a pump is used to supply water to a sluice box that supports a  
8 pick and shovel gold mining program, the State of California would classify it as a "suction  
9 dredge" subject to all the prohibitions the State is able to impose.

10 44. In short, DFW and the Tribe have an overriding desire to put an end to small-scale  
11 mining in California, which colors their views as to what might constitute a reasonable  
12 injunction in this matter. We had hopes, based on the settlement process, that DFW and the  
13 Tribe might work to craft reasonable injunctive provisions, but it now seems clear that they do  
14 not accept any operation of federal mining law on federal lands and will say or do anything  
15 necessary to destroy our industry, without regard to objective environmental facts.

16 I certify under penalty of perjury under the laws of the State of California that the  
17 foregoing is true and correct.

18 Executed on June 16, 2015.

19  
20  
21 David McCracken  
22 David McCracken  
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1 PROOF OF SERVICE

2 I, Carole Caldwell, hereby declare under penalty of perjury under the laws of the State of  
3 California that the following facts are true and correct:

4 I am a citizen of the United States, over the age of 18 years, and not a party to or  
5 interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my  
6 business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

7 On June 17, 2015, I caused the following document to be served:

8 REPLY DECLARATION OF DAVID MCCRACKEN IN SUPPORT OF MINERS' JOINT  
9 MOTION FOR INJUNCTION AGAINST DEFENDANTS

10 by transmitting a true copy in the following manner on the parties listed below:

11 Honorable Gilbert Ochoa  
12 Superior Court of California  
13 County of San Bernardino  
14 San Bernardino Justice Center  
15 247 West 3<sup>rd</sup> Street  
16 San Bernardino, CA 92415-0210  
17 *Via U.S. Mail*

Chair, Judicial Council of California  
Administrative Office of the Courts  
Attn: Court Programs and Services Division  
(Civil Case Coordination)  
455 Golden Gate Avenue  
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