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MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

To: Dave McCracken, New 49'er Association

From: James L. Buchal

Date: March 28, 2013

Re: Notice of Intent Requirement

You have asked me to render an opinion as to whether use of motors in small-scale mining categorically requires the operator to file a notice of intent with the Forest Service. The operative regulation, 36 C.F.R. § 228.4(a), provides that "a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources".

This regulation places the burden upon the operator in the first instance to determine whether his operations "might cause significant disturbance of surface resources". The regulations themselves provide no definition what constitutes a "significant disturbance of surface resources". The regulatory history does contain the statement that "'significant disturbance' refers to operations 'for which reclamation upon completion of [that operation] could reasonably be required,' and to operations that could cause impacts on NFS resources that reasonably can be prevented or mitigated". 70 Fed. Reg. 32713, 32724 (June 6, 2005). Most of the operations in which members of The New 49'ers are involved do not appear to fall within these categories, especially since members operate under rules that already adopt all reasonable (and even some unreasonably restrictive) mitigation measures.

Section § 228.4(a)(1) provides a list of seven categories of activities as to which a notice of intent is not required, but the list is not intended to be exclusive. At least one of the items on that list, § 228.4(a)(1)(i) exempts on-road use of motor vehicles in mining activities, refuting any notion that the involvement of motors categorically means that an activity might cause significant disturbance of surface resources.

Section 228.4(a)(1)(v) exempts "[o]perations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization". Other users of the National Forest System commonly employ motorized equipment in contexts that do not, as far as I know, require specific authorization, such as those who use water pumps to provide water to their campsites, to provide water to trucks for dust suppression on the roads, for fire prevention and

suppression, for boats being used on the water, or for generators, chain saws, and many other activities routinely found in the forest.

With respect to mining specifically, § 228.4(a)(1)(ii) exempts:

> "Prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study which generally might include searching for and occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools;"

The reference to "non-motorized hand sluicing" means that motorized sluicing activities are not *categorically* exempted from the requirement to provide notices of intent. However, neither does § 228.4(a)(1)(ii) mean that *any* motorized sluicing must give notice of intent.

Whether or not a particular activity "might cause significant disturbance" requires the operator to consider the specific factual circumstances surrounding the activity. *See* 70 Fed. Reg. 32713, 32720 (June 6, 2005) ("The environmental impacts of operating suction dredges, even small ones, are highly site-specific depending on the circumstances and resource conditions involved."). In particular, the Forest Service has expressly stated that "operation of suction dredges with intakes smaller than four inches may not require either a notice of intent to operate or an approved plan of operations in many cases". *Id.* This reasoning should apply to small-scale motorized sluicing or excavation creating impacts on the order of a small suction dredge. Because members of The New 49'ers operate under extensive rules limiting resource impacts, you can argue that their activities are even less likely to cause impact than suction dredge mining generally, and will not cause significant disturbance of surface resources.

While there is not a great deal of authority on the issue, the Forest Service has not had much success with criminal prosecutions of miners for failure to obtain required authorization before mining when the Forest Service disagrees with the miner's view that the activity is not one which "might cause significant disturbance of surface resources". For example, in *United States v. Tierney*, No. PO-2012-08162-TUC-CRP (D. Ariz. October 3, 2012), the Forest Service attempted to prosecute a miner who dug a hole ten feet deep and twenty feet long, arguing that his activities in fact caused a significant disturbance of surface resources. The Court disagreed, and acquitted the miner, finding his activities insignificant.

If you do not submit a notice of intent, under the Part 228 regulations, Forest Service jurisdiction over the prospecting activities will only arise if inspections by a ranger show that the operations are causing or "will likely cause significant disturbance of surface resources" pursuant to § 228.4(a)(4):

> "If the District Ranger determines that any operation is causing or will likely cause significant disturbance of surface resources, the District Ranger shall notify the

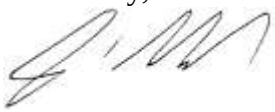
operator that the operator must submit a proposed plan of operations for approval and that the operations cannot be conducted until a plan of operations is approved."

The ranger's assessment should be based on the environmental impact of the operation as a whole, as there is no categorical rule that the mere presence of a motor and pump will likely cause significant disturbance, and the exemptions in § 228.4(a)(1) clearly contemplate some use of motorized equipment, as set forth above. *See also Tierney*, *supra*, slip op. at 8-10 (noting relevant factors for significance determination).

Since submitting a notice of intent will now trigger an extensive consultation process under the Endangered Species Act (ESA) whether or not the activity will likely cause significant disturbance of surface resources, it would seem wise to not file a notice of intent if you believe your impact is not likely to cause a significant disturbance to surface resources. This will place the burden on the ranger to exercise his authority in the first instance to make a judgment as to whether the operations are causing or are likely to cause a significant impact on surface resources.

If a ranger disagrees with your assessment, you should receive a written notice of the determination together with a demand that you file a plan of operations. Be aware that under the recent case of *United States v. Backlund*, 689 F.3d 986 (9th Cir. 2012), you must immediately exhaust all administrative appeals and/or file a civil action to challenge the ranger's significance determination, or you will likely lose the right to contest that determination in any subsequent criminal proceedings. Under *Backlund*, the miner in the *Tierney* case would have been convicted for failure to contest the ranger's determination in administrative or civil proceedings prior to the initiation of the criminal prosecution.

Sincerely,



James L. Buchal