

1 McGREGOR W. SCOTT
2 United States Attorney
3 SAMANTHA S. SPANGLER
4 Assistant United States Attorney
5 JESSICA M. MAHONEY
6 Certified Law Clerk, Misdemeanor Unit
7 301 "I" Street, Suite 10-100
8 Sacramento, CA 95814
9 Telephone: (916) 554-2807

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,) Violation No. F2092617 CMK
12 Plaintiff,)
13 v.) MEMORANDUM OF POINTS AND
14 TERRY L. McCLURE,) AUTHORITIES IN OPPOSITION TO
15 Defendant.) DEFENDANT'S MOTION TO DISMISS
) Date: January 18, 2005
) Time: 11:00 am
) Judge: Craig M. Kellison

INTRODUCTION

The defendant, Terry Lee McClure, is charged with a violation of Title 36, CFR, Section 261.10(k). He moves to dismiss on the ground that the violation notice fails to state an offense, relying on United States v. Lex, 300 F. Supp. 2d 951 (E.D. Cal. 2003). However, this case is distinguishable from Lex on several grounds, including the post-Lex amendment to the regulation at issue in the present case.

FACTUAL BACKGROUND

On August 30, 2004, the defendant was observed operating a

gold mining suction dredge in the waters of the Salmon River, on
1
National Forest land administered by the Orleans Ranger District,
2
Six Rivers National Forest. The Forest Service officers who
3
witnessed this activity contacted the defendant and advised him
4
that federal regulations required that he file a mining Plan of
5
Operation with the Forest Service in order to operate a suction
6
dredge on the Salmon River. The defendant was further advised to
7
immediately cease his dredging operation; otherwise, he would be
8
given a citation for the violation. The defendant responded that
9
he would not file a Plan of Operation or a Notice of Intent, nor
10
would he cease dredging operations.
11

On August 31, 2004, Orleans District Ranger Joyce Thompson
12
contacted the defendant at his residence and served him with a
13
letter. Ranger Thompson discussed the contents and subject of
14
the letter with the defendant. Ranger Thompson notified him that
15
continuing dredging operations would result in a citation for
16
violation of National Forest regulations. The Ranger also
17
advised the defendant that his refusal to cease dredging
18
operations could result in his physical arrest for this
19
violation. The defendant responded by stating that he would
20
resume dredging on the Salmon River the next day.
21

On September 1, 2004, Ranger Thompson and other Forest
22
Service law enforcement personnel contacted the defendant at the
23
site of his dredging operations along the Salmon River. The
24
defendant was operating a suction dredge in the river at that
25
time. The defendant confirmed receipt of the letter the day
26

27

28

1 before which informed him that he was in violation of National
2 Forest regulations and ordered him to stop dredging;
3 nevertheless, he still refused to stop dredging. The defendant
4 was then issued a violation notice for violating Title 36, Code
5 of Federal Regulations, Section 261.10(k), use of National Forest
6 land without special use authorization. The defendant was
7 further advised that continued operation of the suction dredge
8 would result in his arrest and seizure of his equipment. The
9 defendant agreed to cease operation of the dredge and removed the
10 equipment from the river.

11 ARGUMENT

12 **I. A "SPECIAL USE AUTHORIZATION" CAN BE REQUIRED FOR A** 13 **MINING "USE OR OCCUPANCY" AND THEREFORE THE DEFENDANT'S** 14 **VIOLATION NOTICE DOES STATE AN OFFENSE.**

15 The defendant relies on United States v. Lex, 300 F. Supp.
16 2d 951 (E.D. Cal. 2003), to support his argument that a special
17 use authorization cannot be required for a "use or occupancy"
18 such as suction dredge mining. The defendant claims that because
19 Lex and Waggener prevailed in their challenge of 36 C.F.R.
20 Section 261.10(b), the government can "provide no principled
21 basis for distinguishing the mining related activities of the Lex
22 appellants from the mining activities allegedly performed on
23 National Forest System land by McClure." Defendant's P & A at
24 6:11-13. However, Lex is distinguishable from the present case
25 for the reasons provided below.

26 A. The Lex defendants were neither cited under the same C.F.R. provision
27 nor engaged in the same activity as was defendant McClure.

1 Forest Service officers found Lex and Waggener camping for an extended period near
2 their mining operation and were cited for violating the section 261.10(b) prohibition on “taking
3 possession of, occupying, or otherwise using National Forest System land for residential
4 purposes without a special use authorization” (emphasis supplied). Forest Service officers found
5 defendant McClure using National Forest System land without special use authorization when
6 such authorization is required, and cited him under section 261.10(k). McClure was not found to
7 be residentially occupying National Forest System land as subsection (b) prohibits. Furthermore,
8 McClure was cited for suction dredge mining without authorization; Lex and Waggener were
9 cited for living on forest land without authorization. As McClure was neither cited under the
10 same subsection of section 261 nor engaged in the same activity as were Lex and Waggener, his
11 reliance on the Lex decision to support his motion to dismiss is misplaced.

12 **B. The mining regulation found in Lex to be unclear and difficult to
13 comply with was thereafter amended, and the amended regulation
14 was in effect at the time the defendant was cited.**

15 In reversing the Lex defendants’ convictions, the district court identified the infirmities in
16 36 C.F.R. Section 228.4(a)(2) and declared it to be so vague and standardless that it offended due
17 process. Lex, 300 F. Supp. 2d at 963. At the time the Lex defendants were cited, subsection
18 (a)(2) read, in pertinent part, as follows:

19 A notice of intent need not be filed:

20 (i) Where a plan of operations is submitted for approval in lieu thereof,

21 (ii) For operations excepted in paragraph (a)(1) of this section from the requirement to
22 file a plan of operations,

23 (iii) For operations which will not involve the use of mechanized earthmoving equipment
24 such as bulldozers or backhoes and will not involve the cutting of trees.

25 In reversing the defendants’ convictions, the district court declared that “(a)s the
26 regulations are currently structured, so long as no earthmoving or tree-cutting equipment is
27 involved, a miner can camp on his claim indefinitely, despite the environmental impact that such
28

activity may have. The solution to this problem, however, is to amend the regulations[.]” Lex,
1
300 F. Supp. 2d at 951.
2

3 On July 9, 2004 the regulation was amended to cure its vagueness and clarify its
4 requirements for compliance. 36 C.F.R. Section 228.4(a)(2) now provides, with the
5 modifications delineated, as follows:

6 A notice of intent need not be filed:

7 (i) Where a plan of operations is submitted for approval in lieu thereof,

8 (ii) For operations excepted in paragraph (a)(1) of this section from the requirement to
9 file a plan of operations; or

10 (iii) For operations which will not involve the use of mechanized earthmoving equipment
11 such as bulldozers or backhoes and will not involve the cutting of trees, unless those
12 operations otherwise might cause a disturbance of surface resources.

13 The district court criticized the earlier version of the regulation because it did not “specify
14 whether factors (i) through (iii) should be read in the conjunctive or the disjunctive. . . . Thus,
15 under the regulations, until appellants determined that their operations would involve the use of
16 earthmoving equipment or tree-cutting, they were under no obligation to file a notice of intent.”
17 Lex, 300 F. Supp. 2d at 961. The court stated that if no Notice of Intent was required, no Plan of
18 Operation could be required; thus, the defendants could not be in violation of the regulation and
19 their convictions had to be reversed. The amended subsection’s addition of “or” clarifies that
20 each of its three elements must be read *disjunctively*, rather than conjunctively, thus curing the
21 ambiguity lamented by the Lex court and making the regulation more straightforward and easier
22 to abide by.

23 The language in the amended regulation expands its scope beyond operations involving
24 only mechanized earthmoving equipment such as bulldozers or backhoes or involving tree-
25 cutting. Now a Plan of Operation is required for *any* operation which might cause a disturbance
26 of surface resources. This difference is a key reason why the defendant’s reliance on Lex is in

27

28

error: the very regulation found to be inadequate in Lex has been amended, is no longer
1
inadequate, and calls for a Plan of Operation for suction dredge mining when the District Ranger
2
determines one is needed. The government expects the evidence at trial to show that Ranger
3
Thompson made such a determination in this case, the defendant refused to comply, and he
4
cannot defend his actions by relying on a case that was decided before the applicable regulation
5
was amended.¹
6

7
8
9
10
11
12
13
CONCLUSION

14 ¹In his motion to dismiss, the defendant tries to distinguish the facts
15 in his case from those of Lex and Waggener. However, a motion to dismiss
16 cannot be granted if the motion is "substantially founded upon and intertwined
17 with" the evidence concerning the offense. United States v. Lunstedt, 997
18 F.2d 665, 666 (9th Cir. 1993). "[T]he issue in judging the sufficiency of the
19 [charging document] is whether it adequately alleges the elements of an
20 offense, not whether the government can prove its case. The allegations of
21 the [charging document] are to be presumed true for purposes of determining
22 the sufficiency of the charges." United States v. Gilbert, 813 F.2d 1523,
23 1529 (9th Cir. 1987). The Court should not determine evidentiary questions on
24 a motion to dismiss. United States v. Knox, 396 U.S. 77, 83 (1969). The
25 defendant asks the Court to look at the Violation Notice and determine that he
26 is not guilty of the charge. Based on the authorities cited above, the Court
27 should decline the invitation.
28

1 In his Motion to Dismiss, the defendant attacks the language of the regulation for which
2 he was cited as a basis for dismissal of the violation. Indeed, he notes that “[a]s the Lex court
3 stated in connection with the mining regulations . . . the solution is to amend the regulations
4 rather than to argue that the regulations mean something contrary to their clear wording.”
5 Defendant’s P & A at 7. The defendant fails to acknowledge in his motion that the very
6 regulation for which he was cited, the one at issue in Lex, *has* been amended.² It was amended
7 *before* the defendant was cited. Furthermore, the government expects the evidence at trial to
8 show that the defendant was not cited until District Ranger Thompson satisfied all of the
9 requirements of the regulation. The defendant’s motion to dismiss is therefore baseless and the
10 Court should deny it.

11 Dated: _____

SAMANTHA S. SPANGLER
Assistant U.S. Attorney

12
13
14
15
16
17
18
19
20
21
22
23
24 _____
25 ²Defense counsel did acknowledge the amendment in an email communication
to the undersigned on November 18, 2004, stating that he intended to promptly
notify the Court as well.

26
27
28

CERTIFICATE OF SERVICE BY MAIL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers.

That on January 7, 2005 she served a copy of MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS by United States Mail on the person named below.

R. Dabney Eastham, Esq.
44713 Highway 96
Seiad Valley, CA 96086-0642

Jessica M. Mahoney