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FILED
U.S. District Court
Eastern District of California
Susanville/Redding

2-2-2005
By: *Christy L. Pine*

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

UNITED STATES,

CASE NO. F2092617

Plaintiff,

vs.

ORDER

TERRY LEE McCLURE,

Defendant.

Defendant's Motion to Dismiss the citation/violation notice [Violation] pursuant to Rule 12(b)(2) & (3) of the Federal Rules of Criminal Procedure came on regularly for hearing on January 18, 2005, before the Honorable Craig M. Kellison, United States Magistrate Judge. R. Dabney Eastham appeared for and on behalf of Defendant, Terry Lee McClure; and Assistant U.S. Attorney Samantha S. Spangler appeared on behalf of the United States of America [Government]

Defendant moves to dismiss the Violation on the ground that it fails to state an offense. The gravamen of Defendant's argument is that Defendant is charged with using National Forest System land without special-use authorization, when the alleged activity that he is charged with doing (gold mining) does not require "special-use authorization". 36 C.F.R. 251.50(a).

Based on the very specific language in § 251.50(a) exempting such activity; and the court's ruling in Unites States v. Lex, 300 F.Supp2d 951, 960-61 (E.D. Cal. 2003) [Lex & Waggener], this Court agrees.

1 On September 1, 2004, the Defendant was charge with violating 36 C.F.R. 261.10(k) which
2 prohibits use of National Forest System land in the absence of "special-use authorization".¹

3
4 In that portion of the Violation entitled "Offense Description" the Defendant is
5 charged with "use or occupancy of national forest system land without special use authorization
6 pursuant [to] 16 USC 551".²

7
8 ¹§ 261.10 Occupancy and use.

The following are prohibited:

- 9 (a) Constructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure, communications equipment, or other
improvement on National Forest System lands or facilities without a special use authorization, contract, or approved operating
plan, unless such authorization, contract, or operating plan is waived pursuant to § 251.50(e) of this chapter.
10 (b) Taking possession of, occupying, or otherwise using National Forest System lands for residential purposes without a special-
use authorization, or as otherwise authorized by Federal law or regulation.
11 (c) Selling or offering for sale any merchandise or conducting any kind of work activity or service unless authorized by Federal
law, regulation, or special-use authorization.
12 (d) Discharging a firearm or any other implement capable of taking human life, causing injury, or damaging property as follows:
(1) In or within 150 yards of a residence, building, campsite, developed recreation site or occupied area, or
13 (2) Across or on a National Forest System road or a body of water adjacent thereto, or in any manner or place whereby any
person or property is exposed to injury or damage as a result in such discharge.
14 (3) into or within any cave.
(e) Abandoning any personal property.
(f) Placing a vehicle or other object in such a manner that it is an impediment or hazard to the safety or convenience of any person.
15 (g) Commercial distribution of printed material without a special use authorization.
(h) When commercially distributing printed material, delaying, halting, or preventing administrative use of an area by the Forest
16 Service or other scheduled or existing uses or activities on National Forest System lands; misrepresenting the purposes or
affiliations of those selling or distributing the material; or misrepresenting the availability of the material without cost.
17 (i) Operating or using in or near a campsite, developed recreation site, or over an adjacent body of water without a permit, any
device which produces noise, such as a radio, television, musical instrument, motor or engine in such a manner and at such a time
18 so as to unreasonably disturb any person.
(j) Operating or using a public address system, whether fixed, portable or vehicle mounted, in or near a campsite or developed
19 recreation site or over an adjacent body of water without a special-use authorization.
(k) Use or occupancy of National Forest System land or facilities without special-use authorization when such authorization
20 **is required.**
(l) Violating any term or condition of a special-use authorization, contract or approved operating plan.
21 (m) Failing to stop a vehicle when directed to do so by a Forest Officer.
(n) Failing to pay any special use fee or other charges as required.
22 (o) Discharging or igniting a firecracker, rocket or other firework, or explosive into or within any cave.

23 ²16 U.S.C.551 provides as follows:

24 *The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public*
forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section
25 471 of this title, and which may be continued; and he *may make such rules and regulations and establish such service as will*
insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from
26 *destruction*; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and
regulations shall be punished by a fine of not more than \$500 or imprisonment for not more than six months, or both. Any person
27 charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate judge
specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same
28 conditions as provided for in section 3401(b) to (e) of Title 18.

1 The Statement of Probable Cause on the reverse side of the Violation provides a narrative
2 by the citing officer.³

3
4 In the present case, the alleged offense (being a Class B misdemeanor)⁴ is chargeable by
5 way of citation or violation notice.

6
7 Rule 58(b)(1) of the Federal Rules of Criminal Procedure allows that the trial of a petty
8 offense may proceed by way of a citation or violation notice as the charging document. A citation
9 or violation notice is the functional equivalent of an indictment or an information. Like indictments
10 and informations, a violation notice is required to cite the statute that the defendant is charged with
11 violating. See Fed. R. Crim. P. 7(c)(1) (providing that "[t]he indictment or information must be a
12 plain, concise, and definite written statement of the essential facts constituting the offense charged"
13 and shall include "the official or customary citation of the statute, rule, regulation or other provision
14 of law which the defendant is alleged therein to have violated").

15
16 In Defendant's motion to dismiss, he argues that since he is an individual engaged in mining
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21 ³[S. White] contacted Terry L. McClure along the Salmon River, on lands administered by the Six Rivers National
22 Forest. McClure was operating a gold mining suction dredge in the river. On 8/30/04, McClure had been verbally warned by
23 Forest Service personnel that dredging operations required prior authorization from the Forest Service. On 8/31/04, McClure
24 had been personally served with a letter advising him that authorization was required. On both occasions, McClure had told the
25 Forest Service personnel that he had no intention of submitting required paper work to seek authorization for this activity, and
26 that he intended to operate his dredge without any authorization. McClure told me the same thing on 9/1/04. Auth. Required
27 as per 36 CFR 228.4a.

28
29 ⁴ 36 C.F.R. 261.1b provides that [a]ny violation of the prohibitions of this part (261) shall be punished by a fine of not
30 more than \$500, or imprisonment for not more than six months, or both, pursuant to title 16 U.S.C. , section 551, unless
31 otherwise provided.

32
33 Part (261) prohibitions are defined as Class B misdemeanors under 18 USC 3559(7); and are classified as "petty
34 offenses" pursuant to 18 U.S.C. 19. Under 18 U.S.C. 3571(6), the maximum fine was increased to \$5,000.

activity⁵ which specifically does not require "special-use authorization" that he cannot be convicted under § 261.10(k). In support of this argument he references 36 C.F.R. 251.50(a) and cites this court's recent decision in Lex & Waggener, supra. In Lex & Waggener, supra at 959-960, Judge Karlton noted that:

"36 C.F.R. § 261.10(b) under which appellants were convicted, does not prohibit occupancy that is subject to a special use authorization or that is "otherwise authorized." Here, because activity *960 covered by the Forest Service's mining regulations is excluded from the special use regulations, see 36 C.F.R. § 251.50(a),⁶ the appellants could not obtain a special use authorization for their activity which was subject to the mining regulations."

The Government argues that the term "special-use authorization" as used in § 261.10(k) broadly includes a "plan of operations," as said term is used in 36 C.F.R. 228.4 and 36 C.F.R. 228.5. The Government suggests that a "plan of operations" is a specific type of permit and included by implication within the definition of "special-use authorization" as set forth in 36 C.F.R. 261.2 which provides in pertinent part:

The following definitions apply to [Subpart A—General Prohibitions]:

⁵
A perpetual concern of the Forest Service is the use of National Forest Service land for recreational or residential purposes under the auspices of mining. See generally, United States v. Shumway, 199 F.3d 1093, 1103 (9th Cir. 1999); United States v. Nogueira, 403 F.2 816 (9th Cir. 1968). In these situations, the individuals are simply trespassers, and arguably, suitable candidates for special-use authorization. Unfortunately, this observation does not assist the Forest Service in the present case. In the body of the Violation, the citing officer observed that Defendant "was operating a gold mining suction dredge in the river." In order for an individual to be subject to the requirements set forth in Part 228 (Mining Regulations), mere entry into National Forest System land for exploration or prospecting purposes is sufficient. In 36 C.F.R. 228.3 [mining] operations are simply defined as all "functions, work, and activities in connection with prospecting, exploration, development, mining or processing or mineral resources and all uses reasonably incident thereto. . ." Certainly, this is broad enough to include the Defendant's alleged activities described in the Violation.

⁶§ 251.50(a) Scope.

(a) All uses of National Forest System lands, improvements, and resources, *except* those authorized by the regulations governing sharing use of roads (§ 212.9); grazing and livestock use (part 222); the sale and disposal of timber and special forest products, such as greens, mushrooms, and medicinal plants (part 223); and *minerals* (part 228) are designated "special uses." Before conducting a special use, individuals or entities must submit a proposal to the authorized officer and must obtain a special use authorization from the authorized officer, unless that requirement is waived by paragraphs (c) through (e)(3) of this section.

...
Special-use authorization means a permit, term permit, lease or easement which allows occupancy, or use rights on National Forest System land.

To adopt this argument would be contrary to the court's ruling in Lex & Waggener, supra, but more importantly, would render the statutory language in 36 C.F.R. 251.50(a) meaningless. This, the Court will not do. The terms "special-use" and "special-use authorization" as used in Title 36 C.F.R. are terms of art and are to be afforded the same meaning throughout title 36 C.F.R. We are also guided by the canon that identical terms used in different parts of the same act or legislation are intended to have the same meaning. Gustafson v. Alloyd Co., Inc., 513 U.S. 568, 570, 115 S.Ct. 1061 (1995).

The Court is mindful that the Forest Service oftentimes has difficulty in attempting to correspond an individual's alleged illegal activity with a specific Part 261 prohibition. The various categories of prohibited activities on National Forest System land as set forth in 36 C.F.R. 261 [Part 261 — Prohibitions] are often confusing, and very rarely inclusive.⁷ A miner may be charged under 36 C.F.R. 261 for violating an approved plan of operations, United States v. Doremus, 888 F.2d 630 (9th Cir. 1989); 36 C.F.R. 261.10(l), but, may not be charged for failing to submit a "notice of intent" or to file a "plan of operations." when required to do so. Lex & Waggener, supra, at 959-60.

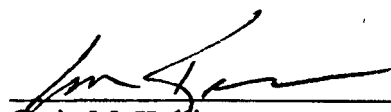
⁷ Being the Judge that was reversed in Lex & Waggener, I must remind myself that Lex & Waggener did not create the Part 261 enforcement problem—it simply defined it. Under Part 261, a miner can be charged with violating a "Plan of Operation," [Doremus & § 261.10(l)], but not by failing to obtain a "Plan of Operation" when required to do so under Part 228. The Court understands that pursuing a Part 261 violation against a noncomplying miner is a preferred remedy since it is expeditious and often results in a probationary term which mandates the miner's compliance. Here, the Government is not without remedy. It has always had the option of pursuing civil abatement. See generally, United States v. Shumway, 199 F.3d 1093, 1106 (9th Cir. 1999); United States v. Nogueira, 403 F.2d 816, 825 (9th Cir. 1968); United States v. Anderson, 645 F.Supp. 3, 15 (E.D. Cal. 1985); United States v. Langley, 587 F.Supp. 1258, 1266 (E.D. Cal. 1984); United States v. Smith-Christian Mining Enterprises, Inc., 537 F.Supp. 57, 64 (D. Or. 1981); Bales v. Ruch, 522 F. Supp. 150, 155 (E.D. Cal. 1981). Likewise, the Government is free to pursue criminal proceedings under appropriate sections of Part 261 for "waste" or "resource destruction" (Doremus; United States v. Good, 252 F.Supp.2d 1306 (D. Colo. 2000)); and Title 18 U.S.C. (United States v. Campbell, 42 F.3d 1199 (9th Cir. 1994)); Similarly, it may simply choose to amend § 261.10 to make criminal a miner's failure to file a notice of intent and/or plan of operation. See Lex & Waggener at 962. Here, however, § 261.10(k) is not an appropriate vehicle.

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For the foregoing reasons, and good cause appearing,

It is hereby Ordered that Defendant's Motion to Dismiss Violation Notice F2092617 is hereby granted.

Dated: Feb 2, 2005



Craig M. Kellison
United States Magistrate Judge

CERTIFICATE OF SERVICE


The undersigned hereby certifies that she is an employee in the Office of the United States District Court for the Eastern District of California, Redding Division, and is a person of such age and discretion to be competent to serve papers; that on February 2, 2005, she served a copy of the foregoing **Order** by placing copies in the U.S. Mail address as follows:

U.S. Attorney's Office
Misdemeanor Unit
Attn: Samantha Spangler
501 I Street, Suite 10-100
Sacramento, CA 95814

R. Dabney Eastham
Attorney at Law
44713 Highway 96
Seiad Valley, CA 96086-0642

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 2, 2005



Christy L. Pine
Deputy Court Clerk