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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOHN GODFREY Defendant.	Case No. 2:14-MJ-00059-KJN **MEMORANDUM *AMICUS CURIAE* OF THE NEW 49'ERS LEGAL FUND**

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Proposed *amicus curiae* The New 49'ers Legal Fund (the "Fund") is a California nonprofit corporation established to defend the civil and statutory rights of members of natural resource dependent communities through public education, participation in litigation, and other public processes that involve such rights, and providing legal assistance to indigent members of such communities. (*See generally* Declaration of James L. Buchal, filed herewith.) The Fund and its counsel have significant experience with the legal issues governing this case. (*See id*.) This case threatens to impose very significant restrictions on the small-scale mining community that would infringe the civil and statutory rights under the 1872 Mining Act, as amended. Specifically, the Forest Service seeks the power, contrary to its own regulations, to criminalize mining conduct at the discretion of individual Forest Rangers with no training or experience in mining regulation, and in contradiction to the controlling regulations set forth in 36 C.F.R. Part 228.

INTRODUCTION

The Fund appears before this Court principally to urge the Court to reverse defendant's conviction on Count V, which charges a violation of 36 C.F.R. § 261.11(c), though the legal defects in the proceeding have broader ramifications. Section 261.11(c) appears under the heading "Sanitation," and is grouped with regulations on toilets, litter, and trash. It broadly states "placing in or near a stream, lake, or other water any substance which does or may pollute a stream, lake or other water" is prohibited.

The Fund is concerned because the conduct alleged to constitute a violation of § 261.11(c) was "non-motorized sluicing," a very common form of mining activity that is categorically exempted in the 36 C.F.R. Part 228 regulations from any requirement to provide advance notice of operations to the Forest Service. It is conduct that was "authorized by the . . . U.S. Mining Laws Act of 1872 as amended" and therefore not within the scope of the Part 261 regulations.

The Forest Service certainly has the power, under Part 228, to make a site-specific determination that defendant's operations extended beyond the authorization provided by statute

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and regulation, and to provide formal notice to defendant of its determination. Upon such notice, the conduct would no longer be authorized, and defendant might, among other things, be prosecuted for continued and now unauthorized use of National Forest lands. *See, e.g.*, 36 C.F.R. § 261.10(p). But the record here reflects no such notice. This makes the conviction defective as a matter of law.

The Magistrate Judge's concern that any requirement of advance notice could create a risk of "significant resource disturbance," such that the Forest Service must be able to immediately respond to any mining conduct with a criminal charge under Part 261, without regard to Part 228 requirements, sets aside the balance struck by Congress and the Forest Service in this complex regulatory scheme. Immediate criminal prosecution without regard to the Part 228 regulatory process also creates a class of standardless criminal prosecutions based on differing assessments of "significance" that has no place in the criminal laws.

Parts 228 and 261 are designed to produce a regulatory determination by competent regulators as to "significance" in the first instance, which the miner has an opportunity to appeal administratively. Criminal prosecutions for conduct assertedly "significant" conduct under Part 261 which is insignificant under Part 228 violates due process of law by confronting miners with an unconstitutionally vague regulatory scheme.

ARGUMENT

I. THE CONVICTION SHOULD BE REVERSED AS CONTRARY TO THE REQUIREMENTS OF FEDERAL LAW.

A. The Nature of Rights in Mining Claims under Federal Law.

Congress has declared "the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries". 30 U.S.C. § 21a(1). The United States Court of Appeals for the Ninth Circuit has confirmed the "all-

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pervading purpose of the mining laws is to further the speedy and orderly development of the mineral resources of our country," *United States v. Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968).

The legislative action constituting the cornerstone of these policies is the 1872 Mining Act, which, as amended, now declares:

> ". . . all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States . . ." 30 U.S.C. § 22."

Beyond its general action with respect to federal lands, Congress had a more specific purpose to grant property rights to locators of mining claims, such as the mining claim here operated by defendant. As initially formulated, "when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term . . .". *Wilbur v. United States*, 280 U.S. 306, 316 (1930); *see also United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999) (discussing scope of legal interests represented in mining claims).

As the federal agencies began to assert expanded regulatory powers, the miner's exclusive rights were limited under the Multiple Use Act of 1955:

> *"Rights under any* mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That *any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto* . . ." 30 U.S.C. § 612(b) (emphasis added)."

This statute confirms the long-standing federal policy of facilitating mining of claimed mineral deposits, and subordinates all other uses, including the protection of other resources such as fish

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and wildlife, to mining.[1]

In particular, this statute imposes unique substantive limitations on the Forest Service's regulatory authority. *See United States v. Backlund*, 689 F.3d 986, 997 (9th Cir. 2012) (regulatory authority of the Forest Service "is cabined by Congress' instruction that regulation not 'endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.'"). The Forest Service repeatedly recognizes this important rule in its own Manual, which declares that regulation "should be accomplished by the imposition of reasonable conditions which do not materially interfere with [mining or reasonably incident uses]". FSM 2817.02; *see also* FSM 2813.14; FSM 2814.24 (Buchal Decl. Ex. 4).[2]

Whether or not regulatory restrictions "materially interfere" with mining is to be evaluated on the commonsense basis of whether they will "substantially hinder, impede, or clash with appellant's mining operations". *See generally In re Shoemaker*, 110 I.B.L.A. 39, 48-54 (July 13, 1989) (reviewing legislative history of the Multiple Use Act; agency regulation cannot impair the miner's "first and full right to use the surface and surface resources") (copy submitted herewith as Buchal Decl. Ex. 3).

B. The Statutory Powers of the Forest Service.

The criminal information was presented under a provision of the Organic Act, 16 U.S.C. § 551, the statutory authority asserted for promulgation of 36 C.F.R. § 261.11(c). That provision reads:

"The Secretary of Agriculture shall make provisions for the protection against

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[1] *See also* H. Rep. No. 730, 84th Cong., 1st Sess. 10, reprinted in 2 U.S. Code Cong. & Admin News, at 2483 (1955) (Multiple Use Act does "not have the effect of modifying long-standing essential rights springing from location of a mining claim. Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator . . .").

[2] The pertinent portions of the Forest Service Manual ("FSM") and Forest Service Handbook ("FSH") are filed herewith as exhibits to the Declaration of James L. Buchal, and the Fund asks the Court to take judicial notice of them pursuant to Rule 201 of the Federal Rules of Evidence. It is appropriate for an *amicus* party to request judicial notice of documents such as these. *See generally Jamul Action Comm. v. Stevens*, 2014 U.S. Dist. LEXIS 107582, No. 2:13-cv-01920-KJM-KJN (E.D. Cal. Aug. 5, 2014).

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> 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 § 471 of this title, and which may be continued, and he may make such rules and reservations 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 destruction." 16 U.S.C. § 551.

The term "depredations" comes from the root "depredate" meaning "to plunder" or "to lay waste". *Webster's New Collegiate Dictionary* 305 (1974 ed.). Congress did not intend *bona fide* mining activities to be regarded as a depredation subject to regulation.

The Organic Act itself declares:

> "Nothing in sections . . . 551 of this title shall . . . prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, *and developing* the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests". 16 U.S.C. § 478 (emphasis added).

While miners were bound to "comply with the rules and regulations" the Secretary had adopted for "protection against destruction by fire and depredations", Congress never intended such "rules and regulations" to include rules unreasonably restricting mining activities. Thus the Ninth Circuit has admonished the Service that it "lack[s] authority effectively to repeal the [Mining Law of 1872] by regulations" unreasonably restrictive of mining rights. *See United States v. Shumway*, 199 F.3d 1093, 1107 (9th Cir. 1999).

Numerous additional statutes confirm this interpretation. At the outset, the Organic Act authority of the Service does not extend at all to "such laws as *affect* the . . . prospecting, locating, entering, relinquishing, reconveying, certifying or patenting" of public lands. 16 U.S.C. § 472 (emphasis added). More generally, the very act establishing the National Forests declares that "it is not the purpose or intent of these provisions . . . to authorize the inclusion therein of lands more valuable for the minerals therein . . . than for forest purposes". 16 U.S.C. § 475. As far as Congress was concerned, lands "better adapted for mining . . . than for forest usage"—*meaning lands with valuable minerals such as defendant's claim*—should not be part of the National Forests at all. 16 U.S.C. § 482. In § 482, Congress emphasized yet again that "any mineral lands in any forest which have been or which may be shown to be such ['better adapted for mining . . .

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than for forest usage'] . . . shall continue to be subject to location and entry, notwithstanding any provisions contained in §§ 473-78, 479-82 & 551 of this title [*i.e.*, the Organic Act]".

C. The Operation of the Part 228 Regulations.

The Service addressed its limited statutory responsibilities related to mining under its 36 C.F.R. Part 228 regulations:

> "*It is the purpose of these regulations to set forth rules and procedures through which use of the surface of National Forest System lands* in connection with operations authorized by the United States mining laws (30 U.S.C. 21-54), which confer a statutory right to enter upon the public lands to search for minerals, *shall be conducted* so as to minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R. § 228.1 (emphasis added).

By their terms, the Part 228 regulations apply to "operations hereafter conducted under the United States mining laws of May 10, 1872, as amended (30 U.S.C. 22 *et seq*.), as they affect surface resources on all National Forest System lands . . ." 36 C.F.R. § 228.2. The regulation broadly defines "operations" as including "[a]ll functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto . . .". 36 C.F.R. § 228.3(a). Defendant was plainly prosecuted for activities constituting mining "operations" within the meaning of the Part 228 regulations.

The Part 228 regulations specifically identify entire classes of mining activities which are of sufficiently small scale that there is no appreciable risk that they might impact surface resources, and these activities do not require that the miner notify the Forest Service of his operations—consistent with his statutory rights. In particular, "[a] notice of intent is not required for . . . [operations] which will not involve the use of mechanized earth moving equipment such as bulldozers or backhoes, or the cutting of trees". 36 C.F.R. § 228.4(a)(1)(vi). Such operations include "gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools". *Id.* § 228.4(a)(1)(ii).

The Part 228 regulations start from the premise that miners such as defendant have a statutory right to operate, subject to varying levels of restrictions set forth in those regulations.

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The Magistrate Judge disparaged the design of the regulations, suggesting that "it is a specious argument to assert that the defendant or any person has a free pass to do whatever on a mining claim until they get a notice of non-compliance when they never even submitted a plan or any notice". (ER18.) In fact, the regulations do place upon the miner in the first instance the responsibility to determine whether he is "proposing to conduct operations which might cause significant disturbance of surface resources". 36 C.F.R. § 228.4(a). This is not a "free pass" and it takes place in a context of close supervision of mining operations (*e.g.*, ER29 (multiple visits to the claim)).

The Forest Service is well aware of the mining claims on National Forest lands, and the Part 228 regulations state that "Forest Officers shall periodically inspect operations to determine if the operator is complying with the regulations in this part . . .". 36 C.F.R. § 228.7(a).[3] Within the context of ongoing inspections,

> 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." 36 C.F.R. § 228.4(a)(4).

The notice procedure is further formalized in the regulations to provide due process rights vital to striking the balance of policy interests set forth in the mining laws:

> "If an operator fails to comply with the regulations or his approved plan of operations and the noncompliance is unnecessarily or unreasonably causing injury, loss or damage to surface resources the authorized officer shall serve a notice of noncompliance upon the operator or his agent in person or by certified mail. Such notice shall describe the noncompliance and shall specify the action to comply and the time within which such action is to be completed, generally not to exceed thirty (30) days . . ." *Id.* § 228.7(b).

> "*The first step in any noncompliance action is to serve a written notice of noncompliance to* the operator or the operator's agent, in person, by telegram, or by certified mail. This notice must include a description of the objectionable or unapproved activity, an explanation of what must be done to bring the operation

[3] *See also* FSM 2817.3(3) ("Forest officers shall make note of, and report on, all operations for which neither notices of intention to operate or operating plans have been submitted. Such operations shall be identified and inspected as soon as practicable to determine if a plan of operations or a notice of intent is required") (Buchal Decl. Ex. 4, at 5).

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> into compliance, and a reasonable time period within which compliance must be obtained. *Continued refusal of the operator to comply after notice would usually require enforcement action*." FSM 2817.3(5)(a) (emphasis added) (Buchal Decl. Ex. 4, at 6.)

In short, proper Forest Service mining regulation requires that enforcement action proceed only after a proper notice of noncompliance under Part 228. Only "continued refusal" after such notice leads to the question of enforcement action. Here, however, the Forest Service simply disregarded the very Part 228 regulations it crafted to regulate mining entirely, and invoked immediate criminal enforcement under Part 261. This was unlawful.

Upon receiving a notice of noncompliance, the miner has the right to an administrative appeals. 36 C.F.R. § 228.14. Through this process he may explain why the operation is in compliance with regulations, that whatever conduct is at issue is reasonably incident to mining, and challenge any restrictions as an improper material interference forbidden by 30 U.S.C. § 612 and other authority. An administrative appeal would be the ordinary means of resolving disputes between the miner and the Service, with the Service retaining the option of seeking civil injunctive relief if the Service believed immediate action was needed to halt operations on the mining claim. Indeed, the Forest Service Handbook generally provides that where there is occupancy of Forest Service land "under an alleged right or title to the land . . . if the right is in question, then the appropriate course may be to institute civil action to end the occupancy rather than criminal action". Forest Service Handbook 5309.11/23.22a (Buchal Decl Ex. 5, at 1.) Criminal prosecutions typically arise in the context of miners who simply ignore notices and take no appeals. *E.g., United States v. Doremus*, 888 F.2d 630, 632-33 (9th Cir. 1989).

Had the Forest Service reasonably determined that there was something about defendant's mining operations that made the risk of significant resource disturbance beyond ordinary "non-motorized sluicing operations" covered by § 228.4(a)(1)(ii), such that a notice of intent or plan of operations was required, the Forest Service could and should have simply issued a notice of noncompliance, but no such notice appears in the record before this Court. Instead, the Forest

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Service ignored entirely the governing Part 228 regulations, and simply issued immediate criminal citations under Part 261, followed by additional Part 261 charges in a superseding information.

It is important to understand that Congress specifically oversaw the development of the Part 228 regulations and rejected any general requirement that miners obtain advance approval from the Forest Service before conducting *any* mining operations. Congress recognized that mineral development was vital, the minerals could only be extracted from their locations, and that such locations would inevitably be disturbed in the process.

The Service initially promulgated the Part 228 (then Part 252) Organic Act regulations as a proposed rule in 1973. 38 Fed. Reg. 34,817 (Dec. 19, 1973). The initial rules provoked a Congressional oversight hearing during which members of Congress made clear their opposition to Service mining regulations which would entangle small-scale miners in environmental regulations. *See generally Proposed Forest Service Mining Regulations: Hearings before the Subcommittee on Public Lands, House Committee on Interior and Insular Affairs*, 93rd Cong., 2d Sess. 1-4 (Mar. 7-8, 1974). Testimony before the Subcommittee confirmed that even back in 1974, it would often be impossible to comply with environmental processes consistent with the "length of the field season" (*id.* at 37); the industry noted, however, "no objection to a notification procedure which would alert the Forest Service to the expected activities" (*id.* at 41).

During the hearings, the Service initially defended the position that each and every mineral operation would require an approved plan of operations. *See id.* at 10 (Testimony of Chief); *see also* proposed 36 C.F.R. § 252.7, 38 Fed. Reg. 34,817, 34,818 (Dec. 19, 1973 (with certain exceptions, "[n]o operations shall be conducted unless they are in accordance with an approved plan of operations . . ."). Thereafter, the Service conformed to Congressional intent and amended the proposed regulations to add a "notice of intent provision" to make it clear that mining could proceed until halted by the Service. 39 Fed. Reg. 26,038, 26,039 (July 16, 1974) (proposed 36 C.F.R. § 252.4). The final rule was adopted August 28, 1974. 39 Fed. Reg. 31,317 (Aug. 28,

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1974). The careful balance struck by Congress, but cast aside by the Magistrate Judge, has persisted to this day.

D. The Role of the Part 261 Regulations.

The Service's Part 261 regulations, under which defendant was prosecuted, by their terms eschew any attempt to regulate statutorily-authorized mining activities. Those regulations are adopted under the authority of 16 U.S.C. § 472, which generally excludes mining from the purview of Service authority. Pursuant to 36 C.F.R. § 261.1 ("Scope"), "[n]othing in this part shall preclude activities as authorized by the . . . U.S. Mining Laws Act of 1872 as amended".

Because of the carefully-crafted structure of the Part 228 regulations, *bona fide* mining operations are *authorized* within the meaning of § 261.1(b) unless and until the Forest Service gives notice that they exceed the scope of § 228.4(a), notice that defendant did not receive here. Miners can, of course, be prosecuted immediately for activities, such as cutting down and selling trees, that are not reasonably incident to mining operations.

This special treatment is rooted in the fact, as the Forest Service has explained, that unlike all others on National Forest lands miners have a "statutory right, not mere privilege . . . to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production". 39 Fed. Reg. 31317 (Aug. 23, 1974) (Notice promulgating predecessor to Part 228 regulations). *See also United States v. Lex*, 300 F. Supp.2d 951, 962 & n.10 (E.D. Cal. 2003) (noting that most criminal prosecutions do not involve activities covered under § 228.4(a)(1)).

As the Ninth Circuit explained in *Doremus*, "Part 228 does not contain any independent enforcement provisions; it only provides that an operator *must be given a notice of non-compliance and an opportunity to correct the problem*." *Doremus*, 888 F.2d at 632 (emphasis added). It is this lack of notice and opportunity that is fatally defective to the Government's case here.

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And if the Forest Service provides such a notice and opportunity, 30 U.S.C. § 612(b) and 36 C.F.R. § 261.1(b) operate as an overriding overlay to the specific Part 261 regulations to limit their operation so they do not materially interfere with mining operations. *See Doremus*, 888 F.2d at 632. For this reason, Part 261 prohibitions that on their face a miner would otherwise violate, such as cutting down a tree for use in the mine, may still not be criminal violations, even if the Forest Service has issued a notice of noncompliance. If the miner disagrees and appeals that notice and loses, he still has the opportunity in his criminal trial to demonstrate that the Forest Service's determinations amount to a forbidden material interference with mining. *E.g.*, *Backlund*, 689 F.3d at 1001 n.16.

The Magistrate Judge was apparently concerned that miners such as defendant might cause "significant resource disturbance" in advance of Forest Service review. (*See* ER20 (characterizing defendant's activities as significant").) The problem with this interpretation is that it is for the Forest Service, in the first instance, utilizing trained personnel with mining expertise, [4] to evaluate the operations and make an administrative determination whether the mining operations are likely to cause "significant resource disturbance," not the courts.

As the Forest Service explained in its 2008 Federal Register Notice, "Clarification for the Appropriate Use of a Criminal or Civil Citation to Enforce Mineral Regulations, "[s]ignificant surface disturbance is a site-specific term and the responsibility for making the determination of what disturbances are likely to be 'significant' to the environment belongs to the District Ranger." 73 Fed. Reg. at 65,993 (Nov. 6, 2008). But no such determination was made here; instead, at least with respect to the charges for which defendant was convicted, the U.S. Attorney's office made that determination in a superceding information.

From the prosecutorial standpoint, proceeding criminally only after the required administrative determination and notice to the miner is a far superior process to the Forest

[4] *See* FSM 2817.3(4) ("Employees who perform administration of locatable mineral operations shall be certified as a Locatable Minerals Administrator or work under the guidance and oversight of a certified Locatable Minerals Administrator") (Buchal Decl. Ex. 4, at 6).

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Service's attempt to charge Part 261 violations in a haphazard and standardless fashion. Post-notice prosecutions merely require the United States to offer up the notice with its "description of the objectionable or unapproved activity, an explanation of what must be done to bring the operation into compliance, and a reasonable time period within which compliance must be obtained" (FSM 2817.3(5)(a) (Buchal Decl Ex. 4, at 6). The prosecution of such cases need consist of little more than that the Miner refused to take the action demanded in the notice. In many cases, the notice will involve a command to cease and desist operations until an approved plan of operations is in place, making proof of noncompliance highly efficient. The burden then shifts to the miner to prove that his conduct is reasonably incidental to his mining and that the Forest Service's restriction materially interferes with his mining.

Instead of simply following the carefully crafted procedures in Part 288 and the Manual, it appears to the Fund that elements within the Forest Service are attempting to avoid a large body of existing law and simply criminalize ordinary mining conduct without the requisite notice and an opportunity to respond. The Fund is informed that defendant was initially charged with Counts 1 and 2, relating to cutting of trees and burning, yet the government conceded at trial—consistent with 30 U.S.C. § 612(b) and the inherent limitation in § 261.1(b) discussed above—that defendant could only be guilty of Counts 1 and 2 of the superseding indictment at all "if his actions were not mining related". (ER17.) Then, after plea negotiations on those Counts failed, the additional Counts were added. This is simply not a process consistent with due process of law and the careful structure of the Part 228 regulations. It is this injustice that motivates the Fund to get involved at this level to correct the situation as rapidly as possible.

There is certainly the theoretical possibility that a miner might unreasonably determine that his activities were not likely to cause a significant surface disturbance, and therefore cause such a disturbance, before the Forest Service even found out about it. That is not the case here, for the record reflects ongoing monitoring of defendant's activity, which is typical in the Fund's experience. But even a surprise significant disturbance does not leave the Service (or the surface)

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without a remedy. For example, there is a general requirement of reclamation after the conclusion of operations. 36 C.F.R. § 228.4(g). The Forest Service also may utilize "civil litigation seeking declaratory, injunctive, or other appropriate relief". 70 Fed. Reg. 32,713, 32,721(June 6, 2005); *see also United States v. McClure*, 364 F. Supp.2d 1183, 1186 n.7 (C.D. Cal. 2005) ("the Government is not without remedy . . . [i]t has always had the option of pursuing civil abatement").

The Magistrate Judge's conclusion, relying upon *United States v. Doremus*, 888 F.2d 630 (9th Cir. 1989), that regulation of mining was not limited to Part 228 (ER9-10), oversimplifies the legal context. *Doremus* did not hold that the Forest Service might enforce the Part 261 regulations without regard to Part 228. *Doremus* was predicated upon circumstances in which the Forest Service's review and approval of the operating plan provides "a reasonable method of striking the statutory balance between 'the important interests involved . . .'". *Id.* at 633. Full due process protections were available because "if the miners were unsatisfied with the conditions of the plan, they could have appealed to the Regional Forester". *Id.*

II. IF THE SERVICE CAN CRIMINALIZE MINING WITHOUT REGARD TO PART 228, THE REGULATORY SCHEME MAY NOT CONSTITUTIONALLY BE APPLIED TO DEFENDANT.

The Magistrate Judge's opinion concerning "significance" is at odds with other courts that have considered the issue and the Part 228 provisions declaring that significance is on the order of operating with bulldozers, not hand tools. For example, in *United States v. Tierney*, No. PO-2012-08162-TUC-CRP, slip op. at 5-10 (D. Az. Oct. 3, 2012) (copy submitted herewith as Buchal Decl. Ex. 1), a miner received proper notice that Forest Service officials disagreed with his determination that his use of hand tools and no mechanized operations, resulting in a large hole and cutting trees, was a "significant resource disturbance". The Court reversed the conviction, noting that "[p]rospectors dig holes, which in the middle of a forested area, exposes the roots of trees" and "the destruction of one small tree unlikely constitutes significant disturbance of surface resources". *Tierney*, slip op. at 9; *see also United States v. Handsaker*, No. CA33/F2058037 (E.D.

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Cal. Aug. 18, 2000) (non-motorized sluicing) (copy submitted by Federal Defender). The Federal Defender addresses this point in detail; the Fund writes separately to point out the constitutional infirmities of prosecution without the requisite notice under Part 228.

Absent Part 228 notice, miners relying upon the large body of law discussed herein may well reach different conclusions than particular rangers or prosecutors as to what constitutes "significance disturbance of surface resources". To criminally prosecute such differences of opinion offends fundamental principles of due process of law. Criminal prosecutions under Part 261 without regard to the operation of Part 228 create fatal confusion because of the statement in § 261.1(b) that "[n]othing in this part shall preclude activities as authorized by the . . . U.S. Mining Laws Act of 1872 as amended," particularly in light of the authorizations set forth in the 1872 Mining Law, as amended, and confirmed in the Part 228 regulations.

As the Supreme Court explained in *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09 (footnotes omitted).

Prosecutions for violation of Part 261 that are not preceded by the requisite Part 228 notice "trap the innocent," who are entitled to read the plain language of § 261.1(b) as making Part 261 prohibitions inapplicable to *bona fida* mining activities proceeding under Part 228.

Indeed, no miner could reasonably be expected to read Part 261 and conclude that their conduct which is set forth in § 228.4(a) as exempt from even requiring notice to the Forest Service might be criminal. *Cf. United States v. McClure*, 364 F. Supp.2d 1183 (C.D. Cal. 2005) (Part 261 violation for lack of special use permit dismissed where pursuant to 36 C.F.R. § 251.50(a), mineral uses were not "special uses" for which the permit was required); *United States v. Hicks*,

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2009 U.S. Dist. LEXIS 39332 at *9 (dismissing Part 261 charge under rule of lenity) (copy submitted as Buchal Decl. Ex. 2).

Ironically, the Forest Service noted in its 2008 Federal Register Notice that:

> ". . . having the prohibitions targeted to specific users of NFS lands set forth in the CFR part applicable to those users while having the generic prohibitions in another part of the CFR could lead to persons being unfairly surprised about the scope of prohibited conduct." 73 Fed. Reg. 65,984, 65,987 (Nov. 6, 2008).

The unfairness may be avoided by utilizing the Part 228 notice procedures to render continued operation unauthorized, and then prosecuting under Part 261 for the unauthorized mining operations. What makes blanket application of the Part 261 prohibitions without regard to application of Part 228 regulation by knowledgeable mineral regulators even more irrational and unfair is that federal mining safety regulation frequently *requires* miners to take actions for which they may now be charged as criminals without notice under Part 261. *Compare* 30 C.F.R. § 56.3200 ("ground conditions that create a hazard to persons shall be taken down . . .") *and* 36 C.F.R. § 261.6 (forbidding cutting of trees, even if they create a hazard). Defendant was charged, in part, for such conduct.

This Court is bound to consider "not only the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of [Service officials]". *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972). The Service's "criminalization at will" approach would permit a district ranger to deem any particular residence criminal or noncriminal with no standards governing the exercise of discretion beyond what the "officer considers necessary for the protection or administration of the National Forest System, or for the promotion of the public health, safety, or welfare" (36 C.F.R. § 261.1a (July 1, 2009)).

The district ranger may, under the view of law propounded by the United States, assume the role of mining manager, deeming any particular activity reasonable or unreasonable without regard to any specific environmental concerns whatsoever. Such decisions produce "a

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government of men rather than a government of laws; such a system of government is fundamentally unfair and violates due process". *Big Eagle v. Andera*, 418 F. Supp. 126, 131 (D.S.D. 1976) (setting aside disorderly conduct conviction).

The Ninth Circuit has affirmed the dismissal of a criminal information based on an analogous Forest Service regulation. *United States v. Linick*, 195 F.3d 538 (9th Cir. 1999). In that case, the "Rainbow Family", without any statutory right of occupancy under the mining laws or otherwise, held a large gathering in a National Forest without a permit[5] and was prosecuted for violation of 36 C.F.R. § 261.10(k), which then prohibited "the use or occupation of 'National Forest System land or facilities without special use authorization when such authorization is required'". *Linick*, 195 F.3d at 540 n.2.

The Court noted that 36 C.F.R. § 251.56(a)(1)(ii) provided that the special use permits in question might "contain such 'terms and conditions as the authorized officer deems necessary to . . . otherwise protect the public interest'". *Linick*, 195 F.3d at 541. The mere potential that this authority—precisely analogous to the same "public interest" authority set forth in § 261.1a—might "be abused in a manner that could limit the use of public land by parties who hold political views disfavored by the Forest Service" meant that the permitting scheme was "overbroad on its face". *Id.* at 542. Only an interpretative rule narrowing § 251.56(a)(2)(vii) was deemed to save the rule, *id.* at 543, but there is no such interpretative rule here. *See also Papachristou*, 405 U.S. at 170 ("Where, as here, there are not standards governing the exercise of discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law").

The Fund understands that the Ninth Circuit rejected a vagueness argument to the criminal application of Part 261 to mining activities in *Doremus*. However, it is clear that the opinion relied upon the availability of an administrative process for resolving disputes as to the scope of an

[5] The case does not report the facts, but it is well known that the Rainbow Family gatherings involve many thousands of people and impose huge costs and damage upon the National Forests. *See generally* http://en.wikipedia.org/wiki/Rainbow_Family.

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operating plan "to clarify the meaning of the regulation", *Doremus*, 888 F.2d at 635 & n.4 (quoting *Village of Hoffman Estates*, 455 U.S. 489, 498 (1982). Defendant never even got the notice that would have invoked an administrative appeal. At the least, this is a quintessential case for application of the rule of lenity, a rule not addressed in *Doremus*: "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971).

Conclusion

For the foregoing reasons, this Court should set aside defendant's conviction, and issue an opinion advising the Forest Service that this Court should not be seeing criminal charges against miners unless the Forest Service has issued a notice of compliance under Part 228, and the miner has ignored it. Such a ruling will conserve a great deal of judicial and prosecutorial resources and provide due process to the miners concerned.

Respectfully submitted,

Dated: February 13, 2015.

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DECLARATION OF SERVICE

I, Carole Caldwell, hereby certify that I served the foregoing MEMORANDUM *AMICUS CURIAE* OF THE NEW 49'ERS LEGAL FUND on the following attorneys by causing it to be electronically filed on February ___, 2015. According to prior case notices, each are enrolled in the Court's electronic notice system.

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