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10 UNITED STATES DISTRICT COURT  
11 FOR THE EASTERN DISTRICT OF CALIFORNIA  
12 (REDDING/SUSANVILLE BRANCH)  
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14  
15 UNITED STATES OF AMERICA, )  
16 Plaintiff, )  
17 )  
18 v. )  
19 )  
20 TERRY L. McCLURE, )  
21 Defendant. )  
22 \_\_\_\_\_)

Violation No. F2092617 CMK

NOTICE OF MOTION AND MOTION  
TO DISMISS; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO DISMISS

23 Date: **December 7, 2004**

24 Time: **11:00 a.m.**

25  
26  
27 Place: **United States District Court**  
28 **2986 Bechelli Lane,**  
29 **Redding, CA 96002**  
30

31  
32 NOTICE OF MOTION AND MOTION TO DISMISS

33 PLEASE TAKE NOTICE that on December 7, 2004, at 11:00 a.m., the undersigned  
34 attorney for defendant Terry L. McClure will bring a motion pursuant to Fed. R. Crim. P. 12(b),  
35 and by this document so moves, for an order dismissing the above-identified violation and  
36 criminal case against defendant Terry L. McClure on the grounds that the violation notice fails to  
37 state an offense.

1           The motion of the defendant Terry L. McClure to dismiss is supported by the following  
2 memorandum of points and authorities and by the accompanying Declaration of R. Dabney  
3 Eastham in Support of Defendant's Motion to Dismiss.

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5 Respectfully submitted,

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8 \_\_\_\_\_  
9 R. Dabney Eastham  
10 Attorney for Defendant Terry L. McClure  
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Date: November 15, 2004

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1 MEMORANDUM OF POINTS AND AUTHORITIES  
2 IN SUPPORT OF MOTION TO DISMISS  
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5 Defendant Terry L. McClure (“McClure”) was arraigned on November 2, 2004 at the  
6 Court’s Redding location for a violation of 36 C.F.R. § 261.10(k). He pled not guilty. 36 C.F.R.  
7 § 261.10(k) prohibits “[u]se or occupancy of National Forest System land or facilities without  
8 special-use authorization when such authorization is required.” As will be explained below, the  
9 government alleges that the particular use or occupancy for which McClure was given a violation  
10 notice was suction dredge mining in the Salmon River in lands administered by the Six Rivers  
11 National Forest. A “special use authorization” cannot be required for such a “use or occupancy”  
12 and therefore the violation notice fails to state an offense. This Court therefore should issue an  
13 order dismissing the violation notice and terminating this case.

14 **I. The Government Alleges that the Forbidden “Use or Occupancy” Was**  
15 **Suction Dredge Mining**  
16

17 In a case of this sort the defendant is not given an indictment or criminal complaint.  
18 Instead, he receives a “violation notice” that both lists the regulation that he allegedly violated  
19 and describes the offense. In this case, the violation notice, no. F 2092617, listed “36 CFR  
20 261.10K” and described the offense as “[u]se or occupancy of National Forest System land  
21 without special use authorization Pursuant 16 USC 551 [sic].” Declaration of R. Dabney  
22 Eastham in Support of Defendant’s Motion to Dismiss (filed with this document and referred to  
23 hereinafter as the “Eastham Declaration”), ¶¶ 3-4 and Exhibit A (includes copy of violation  
24 notice).

25 At the arraignment the Court informed the undersigned attorney that McClure was  
26 charged with a violation of 36 C.F.R. § 261.10(k) and then recited the language of that

1 regulation. The undersigned attorney requested the Court to specify the alleged “use or  
2 occupancy” and the Court referred the undersigned attorney to the representatives of the  
3 government then present, who appeared to be uniformed law enforcement personnel. These  
4 personnel provided the undersigned attorney with discovery that included a “Report of  
5 Investigation” having 23 attachments. The last attachment to this report was a copy of the  
6 violation notice issued to McClure placed side-by-side with a “Statement of Probable Cause (for  
7 issuance of an arrest warrant or summons).” Eastham Declaration at ¶ 3 and Exhibit A (copy of  
8 attachment no. 23 to Report of Investigation).

9 The Statement of Probable Cause was not provided to McClure at the time of his citation,  
10 perhaps because it had not been prepared at that time. It states that the citing officer “contacted  
11 Terry L. McClure along the Salmon River, on lands administered by the Six Rivers National  
12 Forest. McClure was operating a gold mining suction dredge in the river.” *Id.* at ¶ 4.

13 The undersigned attorney contacted the Assistant United States Attorney assigned to this  
14 case, Samantha S. Spangler. Ms. Spangler confirmed that the government is alleging that  
15 McClure’s “use or occupancy” of National Forest System land was suction dredge mining. *See*  
16 *id.* at ¶¶ 5-6 and Exhibit B (copy of e-mail message received from Ms. Spangler).

17 **II. A “Special Use Authorization” Cannot Be Required for a Mining “Use or**  
18 **Occupancy” and Therefore the Violation Notice Fails to State an Offense**  
19

20 The elements of a 36 C.F.R. § 261.10(k) offense may be identified by dividing the words  
21 of the regulation into logical groups. These elements therefore are the following:

- 22 (1) use or occupancy of National Forest System land;
- 23 (2) without special-use authorization;
- 24 (3) when such authorization is required.

1           The violation notice (as supplemented by the “Statement of Probable Cause” and the  
2 government’s statement of its allegations) fails to state an offense because a special-use  
3 authorization cannot be required for a mining activity.

4           In considering a motion to dismiss for failure to state an offense this Court is obliged to  
5 take all well-pleaded allegations in the indictment or other charging document(s) as true. *E.g.*,  
6 United States v. Jensen, 93 F.3d 667, 669 (9<sup>th</sup> Cir. 1996). The Court therefore must accept, for  
7 the purpose of deciding this motion only, that McClure’s “use or occupancy” was suction dredge  
8 mining, that this mining was taking place in “National Forest System lands,” and that McClure  
9 did not have a “special-use authorization” for such use or occupancy.

10           As explained in a recent case in the Eastern District of California that originated in this  
11 Court, “because activity covered by the Forest Service’s mining regulations is excluded from the  
12 special use regulations, see 36 C.F.R. § 251.50(a), [footnote quoting this regulation omitted], the  
13 appellants could not obtain a special use authorization for their activity which was subject to the  
14 mining regulations.” United States v. Lex, 300 F. Supp. 2d 951, 959-60 (E.D. Cal. 2003). 36  
15 C.F.R. § 251.50(a) states in part that “[a]ll uses of National Forest System lands, improvements  
16 and resources, *except those provided for in the regulations governing* the disposal of timber (part  
17 223) and *minerals* (part 228) and the grazing of livestock (part 222), are designated ‘special  
18 uses.’ Before engaging in a special use, persons or entities must submit an application to an  
19 authorized officer and must obtain a special use authorization from the authorized officer unless  
20 that requirement is waived by paragraph (c) of this section [emphasis supplied].”

21           As this Court may recall, in the Lex case two miners were cited for a violation of 36  
22 C.F.R. § 261.10(b) because they were camping for an extended period on their mining claim on a  
23 tributary (Cecil Creek) of the South Fork of the Salmon River. That particular regulation

1 prohibits “[t]aking possession of, occupying, or otherwise using National Forest System land for  
2 residential purposes without a special-use authorization, or as otherwise authorized by Federal  
3 law or regulation.” Senior Judge Karlton decided on appeal from this Court that the miners in  
4 Lex “could not obtain a special-use authorization for their activity which was subject to the  
5 mining regulations” but nevertheless were “otherwise authorized to occupy the land” by virtue of  
6 the mining laws of the United States.

7 In the Lex case the citing officer testified that the miners had “mining equipment”  
8 including “a portable suction dredge” at the creek. In the instant case the government does not  
9 allege that McClure was residing on National Forest System land. Instead it alleges that he was  
10 on such land for the purpose of suction mining dredging, which is clearly a mining activity of the  
11 type engaged in by the appellants in the Lex case. The government can therefore provide no  
12 principled basis for distinguishing the mining related activities of the Lex appellants from the  
13 mining activities allegedly performed on National Forest System lands by McClure. Because  
14 mining activities are excluded from the special-use regulations, they do not require and in fact  
15 cannot be granted a “special-use authorization” under the controlling authority of the Lex case.

16 The government appears to be advancing the theory that McClure could not suction  
17 dredge in the Salmon River without “prior authorization from the Forest Service” under one of  
18 the mining regulations (“36 CFR 228.4a”). Eastham Declaration at Exhibit A (copy of  
19 “Statement of Probable Cause”). The government apparently would like to vindicate this theory  
20 by charging McClure with a violation. It has, however, chosen an inappropriate penal  
21 enforcement regulation for the reasons given above.

22 The government says that it has the practice of charging under 36 C.F.R. § 261.10(k)  
23 “when somebody is using the forest without a permit that they are supposed to have,” Eastham

1 Declaration at Exhibit B (Spangler e-mail message). However, it cannot avoid the plain  
2 language of the regulations that it chose when it promulgated those regulations. As the Lex court  
3 stated in connection with the mining regulations (see footnote 10 in that case), the solution is to  
4 amend the regulations rather than to argue that the regulations mean something contrary to their  
5 clear wording.

6 For the foregoing reasons the Court is respectfully requested to issue an order dismissing  
7 the above-captioned violation and criminal case for failure to state an offense.

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9 Respectfully submitted,

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14 R. Dabney Eastham  
15 Attorney for Defendant Terry L. McClure  
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Date: November 15, 2004