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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
9 (Susanville/Redding Division)

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 TERRY L. McCLURE,

14 Defendant.

Violation No. F2092617

**DEFENDANT'S REPLY TO OPPOSITION
TO MOTION TO DISMISS**

Date: January 18, 2005

Time: 11:00 a.m.

Ctrm: United States District Court, 2986
Bechelli Lane, Redding, CA 96002

Judge: Hon. Craig M. Kellison

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18 The government's opposition to Defendant Terry L. McClure's motion to dismiss admits
19 that Mr. McClure's alleged "use or occupancy" for which he was given a violation notice was
20 suction dredge mining in the Salmon River in lands administered by the Six Rivers National Forest.
21 The opposition avoids addressing the argument in the motion to dismiss that a "special use
22 authorization" cannot be required for such a "use or occupancy." It attempts to mislead the Court
23 by arguing that Mr. McClure was charged with violating a different regulation than the one stated in
24 the violation notice. As if this were not enough, the opposition mischaracterizes a communication
25 of the undersigned attorney concerning an amendment of a regulation. The motion to dismiss
26 should be granted.

1 **I. The Government Admits that the Forbidden “Use or Occupancy” Was Suction**
2 **Dredge Mining**

3 Mr. McClure was arraigned on November 2, 2004 at the Court’s Redding location for a
4 violation of 36 C.F.R. § 261.10(k). He pled not guilty. 36 C.F.R. § 261.10(k) prohibits “[u]se or
5 occupancy of National Forest System land or facilities without special-use authorization when such
6 authorization is required.” See United States v. Adams, 388 F.3d 708, 710 (9th Cir. 2004)(affirming
7 conviction for organizing a gathering of 22,000 members of the “Rainbow Family” in the
8 Beaverhead National Forest without having obtained a special use authorization when such was
9 required). Because the violation notice did not contain this information, the motion to dismiss had
10 to show that the alleged use or occupancy for which McClure was given a violation notice was
11 suction dredge mining in the Salmon River in lands administered by the Six Rivers National Forest.
12 The government’s opposition contains a “Factual Background” (it would have been more properly
13 given the heading “Statement of Factual Allegations”) that admits this is indeed the alleged use or
14 occupancy.

15 **II. The Government Failed to Show that a “Special Use Authorization” Can Be**
16 **Required for a Mining “Use or Occupancy” and Therefore the Violation Notice**
 Fails to State an Offense

17 As explained in Mr. McClure’s motion to dismiss, the violation notice failed to state an
18 offense because a special use authorization cannot be required for a mining activity. The special
19 use authorization regulation, 36 C.F.R. § 251.50, excludes activity covered by the Forest Service’s
20 mining regulations. United States v. Lex, 300 F. Supp. 2d 951, 959-60 (E.D. Cal. 2003)(“because
21 activity covered by the Forest Service’s mining regulations is excluded from the special use
22 regulations, see 36 C.F.R. § 251.50(a), [footnote quoting this regulation omitted], the appellants
23 could not obtain a special use authorization for their activity which was subject to the mining
24 regulations”); see Black v. Arthur, 201 F.3d 1120, 1122 (9th Cir. 2000)(“Subpart B [of 36 C.F.R.
25 Part 251] governs "special uses," meaning uses other than timber harvesting, grazing, and mineral
26 extraction. See [36 C.F.R. § 251.50\(a\)](#).”).

27 The government avoids addressing this argument. The opposition never even mentions the
28 special use authorization regulation, 36 C.F.R. § 251.50, let alone the language in part (a) of that

1 regulation that states that uses authorized by the regulations governing minerals are not “special
2 uses” for which a special use authorization is needed. Instead, the government deliberately
3 confuses a special use authorization (36 C.F.R. § 251.50) with an allegedly required approved plan
4 of operations under the mining regulations, 36 C.F.R. Part 228 Subpart A.

5 To do this the government resorts to some evasive arguments. First, it tries to distinguish
6 the Lex case on specious grounds. The Lex defendants were conducting mining activities like
7 McClure’s alleged mining activities but the government cited them for “[t]aking possession of,
8 occupying, or otherwise using National Forest System land for residential purposes without a
9 special-use authorization, or as otherwise authorized by Federal law or regulation.” 36 C.F.R. §
10 261.10(b). Senior Judge Karlton decided on appeal from this Court that the miners in Lex “could
11 not obtain a special-use authorization for their activity which was subject to the mining regulations”
12 but nevertheless were “otherwise authorized to occupy the land” by virtue of the mining laws of the
13 United States. The act of camping on the land for the purpose of mining therefore was an activity
14 subject to the mining regulations and the Lex defendants could not obtain a special use
15 authorization for this activity because it is excluded from the special use regulations. Lex at 959-
16 960.

17 Mr. McClure was cited for the alleged activity of *mining*, under a regulation that prohibits
18 use or occupancy of National Forest System land without special use authorization when such
19 authorization is required. The government simply has not offered any principled explanation of
20 why Mr. McClure’s alleged activity, the act of mining, comes within the special use regulations
21 when camping on the land for the purpose of mining does not.

22 The government’s second evasion, the discussion of the amendment of the mining regulation
23 that had been “so vague and standard less that it offended due process,” Opposition at 4, is its
24 longest argument and appears to belong in a brief on some other motion.

25 Mr. McClure’s motion argues that an activity covered by the Forest Service’s mining
26 regulations is not a “special use” and therefore cannot be cited under 36 C.F.R. § 261.10(k), which
27 prohibits “[u]se or occupancy of National Forest System land or facilities without special-use
28 authorization when such authorization is required.” The actual content (and its amendment) of any

1 of the mining regulations is immaterial to the special use regulation, 36 C.F.R. § 251.50, and thus to
2 36 C.F.R. § 261.10(k), because these regulations do not apply to mineral resource development
3 operations in National Forests. The amendment suggested in Mr. McClure’s motion to dismiss at
4 page 7 had to do with the special use regulations, namely 36 C.F.R. § 251.50 and 36 C.F.R. §
5 261.10(k), not the mining or mineral regulations.

6 The government’s third evasion grows out of the second. The government, without actually
7 amending its violation notice, changes the regulation under which Mr. McClure was cited from 36
8 C.F.R. § 261.10(k) to one of the mining regulations, 36 C.F.R. § 228.4(a). On page 7 of its
9 opposition the government states “[t]he defendant fails to acknowledge in his motion that the very
10 regulation for which he was cited, the one at issue in Lex, has been *amended*. It was amended
11 *before* the defendant was cited.” The context in which this statement appears indicates that the
12 regulation mentioned is 36 C.F.R. § 228.4(a). The government does not assert that 36 C.F.R. §
13 261.10(k) has been amended. The government does, however, spend three of the seven pages of the
14 opposition discussing the 2004 amendment to 36 C.F.R. § 228.4(a).

15 III. The Amendment to 36 C.F.R. § 251.50

16 Footnote 2 of the opposition states: “Defense counsel did acknowledge the amendment in an
17 email communication to the undersigned on November 18, 2004, stating that he intended to
18 promptly notify the Court as well.” This footnote refers to the opposition’s discussion of the
19 amendment to 36 C.F.R. § 228.4(a) mentioned above. The footnote is utterly misleading.

20 After filing and serving the motion to dismiss on November 15, 2004, the attorney for the
21 defendant discovered that 36 C.F.R. § 251.50(a) was amended after the 2004 printing of Title 36 of
22 the Code of Federal Regulations (available on the Government Printing Office’s website at
23 <http://www.access.gpo.gov/cgi-bin/cfrassemble.cgi?title=200436>). The motion to dismiss relied on
24 the 2004 printed version of Title 36 and therefore quoted the un-amended version of 36 C.F.R. §
25 251.50(a).

26 A notice of final rule-making dated July 13, 2004 and published at 69 F.R. 41946, 41964
27 amended a number of regulations, including 36 C.F.R. § 251.50(a), effective on August 12, 2004.
28 The amended version of this regulation is set forth below.

1 251.50(a) All uses of National Forest System lands, improvements, and
2 resources, except those authorized by the regulations governing sharing use of roads
3 (§ 212.9); grazing and livestock use (part 222); the sale and disposal of timber and
4 special forest products, such as greens, mushrooms, and medicinal plants (part 223);
5 and minerals (part 228), are designated “special uses.” Before conducting a special
6 use, individuals or entities must submit a proposal to the authorized officer and must
7 obtain a special use authorization from the authorized officer unless that requirement
8 is waived by paragraphs (c) through (e)(3) of this section.

9 The amendment does not change this regulation insofar as it excludes from the category
10 “special uses” the uses authorized by the regulations governing minerals (part 228). The rationale
11 of the Lex decision in connection with the exclusion of mining activities from the special use
12 authorization regulations is not affected.

13 The undersigned attorney brought this amendment to the attention of counsel for the
14 government, Ms. Spangler and Ms. Mahoney, so that they would not be misled, and indicated that
15 he would inform the Court of the amendment, as done above. However, the government has
16 mischaracterized the undersigned attorney’s email message to Ms. Spangler and Ms. Mahoney as
17 referring to the amendment of the mineral or mining regulation 36 C.F.R. § 228.4(a). A copy of the
18 pertinent portion of this email message is attached to this brief as Exhibit A so that the Court can
19 judge for itself.

20 **Conclusion**

21 The government’s opposition to Mr. McClure’s motion to dismiss fails to vindicate a
22 criminal case brought in error by a misguided Acting Ranger. The mining regulations codified at 36
23 C.F.R. Part 228 Subpart A do not contain a criminal enforcement section, perhaps for reasons
24 having to do with the privileged status of prospecting and mining activities on the public lands
25 under the United States mining laws (30 U.S.C. §§ 21-54), which confer a statutory right to enter
26 upon the public lands to search for minerals. The determination to employ the power of criminal
27 sanctions, however, apparently induced the Acting Ranger to err by citing Mr. McClure under a
28 regulation having nothing to do with mining activities.

For the reasons given above and in the moving papers, a “special use authorization” cannot
be required for a mining-related “use or occupancy” and therefore the violation notice fails to state
an offense because no “special use authorization” could be required for the “use or occupancy

1 alleged. This Court therefore is respectfully requested to issue an order dismissing the violation
2 notice and terminating this case.

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Dated: January 13, 2005

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By: _____
R. Dabney Eastham

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Attorney for Defendant
Terry L. McClure

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1 **PROOF OF SERVICE**

2 I am employed in the County of Siskiyou, my business address is 44713 Highway 96, Seiad
3 Valley, CA 96086. I am over the age of 18 and not a party to the foregoing action.

4 I am readily familiar with the business practice at my place of business for collection and
5 processing of correspondence for personal delivery, for mailing with United States Postal Service,
6 for facsimile, and for overnight delivery by Federal Express, Express Mail, or other overnight
7 service.

8 On January 13, 2005, I caused a copy of the following document(s):

9 **DEFENDANT’S REPLY TO OPPOSITION TO MOTION TO DISMISS**

10 to be served on the interested parties in this action by placing a true and correct copy thereof,
11 enclosed in a sealed envelope, and addressed as follows:

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McGregor W. Scott, Esq. Attorneys for Plaintiff
United States Attorney United States of America
Samantha S. Spangler, Esq.
Assistant United States Attorney
Jessica M. Mahoney
Certified Law Clerk, Misdemeanor Unit
501 “I” street, Suite 10-100
Sacramento, CA 95814

15 **MAIL:** Such correspondence was deposited, postage fully paid, with the
16 United States Postal Service on the same day in the ordinary course
17 of business.

17 **ELECTRONIC** Such correspondence was sent by electronic mail to the addresses
18 **MAIL** provided earlier by the recipients: Samantha.Spangler@usdoj.gov
19 and to Jessica.Mahoney@usdoj.gov.

19 **EXPRESS** Such correspondence was deposited on the same day in the ordinary
20 **MAIL:** course of business with a facility regularly maintained by the United
21 States Postal Service.

22 I declare under penalty of perjury that the above is true and correct. Executed on January
23 13, 2005, at Seiad Valley, California.

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R. Dabney Eastham