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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA
(Susanville/Redding Division)

UNITED STATES OF AMERICA, Plaintiff, v. TERRY L. McCLURE, Defendant.	Violation No. F2092617 **DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS** Judge: Hon. Craig M. Kellison

I. INTRODUCTION

The government alleges that Terry McClure was mining on National Forest land without an operating plan. The government, however, charged Mr. McClure with violating a regulation that penalizes "[u]se or occupancy of National Forest System land or facilities **without special-use authorization when such authorization is required** (emphasis added)." The government concedes that a "special-use authorization" cannot be required for mining because mining is a use of the National Forest System lands that is excluded from the purview of the special use regulation, 36 C.F.R. Part 251. The government now argues that "special-use authorization" has a different meaning when used in the regulation Mr. McClure was cited for violating. This brief demonstrates that the meaning of "special-use authorization," as used in that regulation, is the one defined in the special-use regulation, 36 C.F.R. Part 251. The government admits that it cannot charge Mr.

McClure with violating any other penal regulation. The violation notice should therefore be dismissed with prejudice.

II. BACKGROUND: THE JANUARY 18, 2005 HEARING ON THE MOTION TO DISMISS

This Court held a hearing on Mr. McClure's motion to dismiss on January 18, 2005. The plaintiff appeared by Samantha S. Spangler, Esq., Assistant United States Attorney.

The Court indicated at the outset that it understood the basis of the motion to dismiss: activity covered by the Forest Service's mining regulations is excluded from the "catch-all" special use regulations, *see* 36 C.F.R. § 251.50(a), the defendant could not obtain a special use authorization for his alleged mining activity, a "special-use authorization" thus could not be required for such alleged mining activity, and the violation notice therefore does not state an offense because 36 C.F.R. § 261.10(k)(the regulation specified in the violation notice) forbids "[u]se or occupancy of National Forest System land or facilities **without special-use authorization when such authorization is required**" (emphasis added).

Ms. Spangler told the Court that she had misunderstood the motion to dismiss while preparing the government's opposition to the motion. She said that she understood the basis for the motion only after reading the defendant's reply brief. Ms. Spangler then told the Court that the opposition brief of the United States to the motion to dismiss was not on point because of her misunderstanding and that she would provide the opposition of the government in her remarks at the hearing.

Ms. Spangler then informed the Court that Part 261 of Title 36 of the Code of Federal Regulations contains the Forest Service's penal enforcement regulations. She said that Part 261 has a set of definitions codified at 36 C.F.R. § 261.2("definitions"), which states that "[t]he following definitions apply to this part," and provides this definition of "special-use authorization": "Special-use authorization means a permit, term permit, lease or easement which allows occupancy, or use rights or privileges of National Forest System land."

Ms. Spangler claimed that this definition of "special-use authorization" applies to the offence stated in 36 CFR § 261.10(k) and not the one defined in 36 CFR § 251.50(a), which

excludes activities regulated by the mining ("mineral") regulations codified in 36 C.F.R. Part 228. She argued that the 36 C.F.R. § 261.2 definition of "special-use authorization" includes an plan of operation for a mining activity, and that the defendant is alleged to have operated a gold mining suction dredge on the Salmon River without having filed a mining plan of operation. *See* Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss at p. 1, line 26 to p. 2, line 9 (presumably the government means an *approved* plan of operation).

In view of the grounds for opposition presented for the first time at oral argument, the Court invited the parties to submit supplemental briefs by the end of January.

The defendant requests that the Court permit him to file a reply brief if the government's supplemental brief changes the grounds for opposition once again.

III. THE MOTION TO DISMISS SHOULD BE GRANTED BECAUSE A "SPECIAL USE AUTHORIZATION" CANNOT BE GRANTED FOR A MINING ACITIVITY

The government claims that Mr. McClure should have had an "operating plan" or "plan of operations" in order to conduct mining activities and that an "operating plan" is a "special-use authorization" as defined by 36 C.F.R. § 261.2. Simply put, an operating plan is not a "permit", a "term permit", a "lease" or an "easement" as defined in § 261.2 that "allows occupancy, use rights, or privileges of National Forest Service land." The federal statutory law of mining provides that "all valuable mineral deposits" in federal lands "shall be free and open to exploration and purchase" and the "lands in which they are found to occupation and purchase" under regulations prescribed by law, 30 U.S.C. § 22, and a prospector can thereby locate a mining claim that is "a property interest, which is itself real property in every sense." United States v. Shumway, 199 F.2d 1093, 1100 (9th Cir. 1999). Miners do not require permission from the Forest Service to utilize this property right. Ultimately, the regulatory authority of the Forest Service with respect to mining is limited to regulations that do not unreasonably interfere with mining activities. United States v. Weiss, 642 F.2d 296, 299 (9th Cir. 1981); 16 U.S.C. § 478.

The legal framework for mining and prospecting activities, which in certain circumstances requires preparation of "operating plans" under the 36 C.F.R. Part 228 regulations, puts those activities on an entirely different legal footing from other activities where the Forest Service must

affirmatively issue a "permit", a "term permit", a "lease" or an "easement" that is the instrument creating the permission to engage in the activity. As explained below, this common sense interpretation is consistent with the detailed structure and history of the Forest Service regulations involved.

A. The Proper Construction of the Definition of "Special-Use Authorization" in 36 C.F.R. 261.2 is that It Has the Same Meaning as that Set Forth in 36 C.F.R. 251.50(a)

Examination of the history of enactment and amendment of 36 C.F.R. §§ 251.50(a), 261.2, and 261.10(k), the Forest Service's interpretation of 36 C.F.R. § 261.2, and the interrelation of these sections with others in the Forest Service regulations, compels the conclusion that the definition of "special-use authorization" in 36 C.F.R. § 261.2 must be construed to be the same as that of 36 C.F.R. § 251.50(a). It manifestly does not include a plan of operations for a mining activity.

In 1984 the Forest Service published a notice of final rule-making that added the earlier-quoted definition of "special-use authorization" to 36 C.F.R. § 261.2. 49 Fed. Reg. 25447 (June 21, 1984). The same notice added 36 C.F.R. § 261.10(j)("Use or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required [is prohibited]") to the occupancy prohibitions. Id. In 1995 § 261.10(j) was re-numbered as 36 C.F.R. § 261.10(k)(the section identified in the violation notice in this case). 60 Fed. Reg. 45258, 45295 (Aug. 30, 1995).

The June 21, 1984 notice of final rule-making also amended 36 C.F.R. § 251.50(a) to read as follows:

> All uses of National Forest System land, improvements, and resources, except those provided for in the regulations governing the disposal of timber (Part 223) and minerals (Part 228) and the grazing of livestock (Part 222), are designated "special uses" and must be approved by an authorized officer.

Since 1984, 36 C.F.R. § 251.50(a) has been amended twice: the first time to make clear that one must submit an application to the "authorized officer" for approval, 60 Fed. Reg. 45258, 45293 (Aug. 30, 1995), and the second time to add some additional uses (for example, sale and disposal of "special forest products" such as mushrooms) that are not included in the category of special uses that require special-use authorization, 69 Fed. Reg. 41946, (July 13, 2004).

The 1984 notice of final rule-making did not include any discussion of the definition of "special-use authorization" added to 36 C.F.R. § 261.2. The notice of proposed rule-making that preceded the notice of final rule-making, however, explained why this definition was added and how it is to be interpreted. This notice explained:

> Pursuant to 16 U.S.C. 551, the Secretary of Agriculture is authorized to promulgate regulations governing use of National Forest System lands. **Regulations covering issuance of special use authorizations (permits, term permits, leases, or easements) are contained in 36 CFR Part 251.** Regulations governing prohibited acts upon National Forest System lands are contained in 36 CFR Part 261.

48 Fed. Reg. 35465 (August 4, 1983)(emphasis added).

And further:

> Presently, **all uses of National Forest System lands are considered special uses, except those uses provided for in the regulations governing disposal of timber and minerals and the grazing of livestock.** A special use authorization is required in advance of any special use other than "noncommercial temporary use or occupancy of National Forest System land or facilities by individuals for camping, picnicking, hiking, fishing, hunting, riding, boating, parking of vehicles and similar purposes."

Id. (emphasis added).

Thus,

> The proposed rule would make some changes in the present regulations governing special use authorizations that are primarily technical or conforming. Of particular note, § 261.1a would clarify that any act or omission that would otherwise be a violation of Part 261 may be authorized in a contract, special use authorization, or approved operating plan. Also, § 261.3a (47 FR 29229 July 6, 1982) would be transferred to § 261.3(c), and § 261.16 would be amended to eliminate an inconsistency with § 261.57(h). **For ease of reference, definition of the term "special use authorization" as used in Part 251 would be incorporated in Part 261.**

Id. (emphasis added).

The wording of the definition of "special-use authorization" in 36 C.F.R. § 261.2 may not be a model of draftsmanship compared to, for example, the definition of "operating plan" in the same regulation that is discussed below. The Forest Service simply listed the "permits, term permits, leases, or easements" mentioned in the notice of proposed rule-making without including the "contained in 36 CFR Part 251" language used in that notice. The Forest Service, however, clearly intended that the definition of "special-use authorization" of 36 C.F.R. § 261.2 refer to "the term 'special use authorization' as used in [36 C.F.R.] Part 251."

The Court should follow this interpretation, which is akin in this instance to legislative history that defines the intent of the legislator, because the "[Forest] Service's interpretation of its own regulations will prevail unless it is 'plainly erroneous or inconsistent' with the plain terms of the disputed regulations." Everett v. United States, 158 F. 3d 1364, 1367 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1132 (1999)(quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)(" Because the salary-basis test is a creature of the Secretary [of Labor]'s own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation'" [citations omitted])).

The Forest Service's interpretation is also consistent with the canon that identical words used in different parts of the same act are intended to have the same meaning. Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995)(definition of "prospectus" in Securities Act of 1933); Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986) ("earned income credit" included in definition of "overpayment" for interception for unpaid child support). In this case, the identical term, "special-use authorization" is used in both the 36 C.F.R. Part 251 and Part 261 regulations. In fact, the term was included in regulations that were introduced in the same 1984 notice of final rule-making, as noted above.

The Forest Service's interpretation is also consistent with other provisions of 36 C.F.R. Part 261. For example, 36 C.F.R. § 261.2 has, since its inception in 1977, contained a separate definition of "operating plan": "[o]perating plan means a plan of operations as provided for in 36 CFR part 228, subpart A, and a surface use plan of operations as provided for in 36 CFR part 228, subpart E." The general use prohibitions in 36 C.F.R. § 261.10 specify a number of violations involving "operating plans." 36 C.F.R. § 261.10(a) prohibits making various types of improvements on National Forest land or facilities "without a special-use authorization, contract, or approved operating plan." 36 C.F.R. § 261.10(l) prohibits "[v]iolating any term or condition of a special-use authorization, contract, or approved operating plan." An operating plan, therefore, is not the same as or subsumed in the definition of "special-use authorization" or the regulations would not specify it as a distinct entity.

Adoption of the Forest Service's interpretation of "special-use authorization" as being the same as that defined in 36 C.F.R. Part 251 is further compelled by two other canons of construction.

The Forest Service regulations pertaining to special-use authorizations will be void for vagueness if the definition of "special-use authorization" in 36 C.F.R. § 261.2 is not limited by Part 251, because of the ambiguity (outright conflict) in the term "special-use authorization" that the government urges this Court to find in the regulations. *See* City of Chicago v. Morales, 527 U.S. 41, 52 (1999)("an enactment . . . may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests; Schwartzmiller v. Gardner, 752 F.2d 1341, 1345 (9th cir. 1984)("a statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, [citation omitted], or if it invites arbitrary and discriminatory enforcement, [citation omitted]").

The canon of constitutional avoidance requires a court to construe statutes (and regulations) to avoid constitutional doubts. Clark v. Martinez, ___ U.S. ___. 125 S. Ct. 716, 2005 U.S. LEXIS 627 (January 12, 2005)("when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail -- whether or not those constitutional problems pertain to the particular litigant before the Court").

Another canon, the "rule of lenity," requires the court to interpret any ambiguity in the petitioner's favor if a criminal enforcement context exists, as in the present case. Leocal v. Ashcroft, ___ U.S. ___, 125 S. Ct. 377, 384 n.8; 160 L. Ed. 2d 271 (2004); United States v. Thomson/Center Arms Co., 504 U.S. 505, 518 (1992).

The definition of "special-use authorization" in 36 C.F.R. § 261.2 therefore must be construed according to the Forest Service interpretation so as to avoid a constitutional doubt and satisfy the rule of lenity: it must refer to "the term "special use authorization" as used in [36 C.F.R.] Part 251."

B. The Courts Consistently Interpret the Phrase "Special Use Authorization" as used in the Cited Regulation, 36 C.F.R. 261.10(k), to Have the Meaning Set Forth in the Special Use Regulation at 36 C.F.R. Part 251

The Court inquired at oral argument on this motion whether any cases existed holding that a special-use authorization was required for mining activities. Counsel for Mr. McClure has reviewed the case law again and the answer remains "no." In fact, the existing case law confirms that the term "special-use authorization" used in 36 C.F.R. Part 261 refers to the term "special use authorization" as used in [36 C.F.R.] Part 251."

No case has been found that cites or mentions the definition of "special-use authorization" that has been part of 36 C.F.R. §261.2 since 1984.

Only one case mentions the regulation under which Mr. McClure was cited in any way in connection with mining. In Anderson v. U.S. Forest Service, 645 F. Supp. 3 (E.D. Cal. 1985), this Court held that the plaintiff miner could not, without first having a special-use authorization (referring specifically to 36 C.F.R. §§ 261.10(a). 261.10(b), and 261.10(j) (now 261.10(k)), contract or an approved operating plan permitting such use, maintain a residential building and other structures and property on a mining claim that the Interior Board of Land Appeals had held to be null and void. However, this Court specifically authorized the plaintiff in Anderson to continue mining on the claim with a suction dredge without submitting a plan of operations. Id. at 8.

United States v. Doremus, 888 F.2d 630 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991), mentioned by Ms. Spangler during oral argument, concerned a conviction for violation of 36 C.F.R. § 261.10(l). This regulation, then identified as 36 C.F.R. 261.10(k), was later renumbered in 1995. 60 Fed. Reg. 45258, 45295 (Aug. 30, 1995). It states that "[v]iolating any term or condition of a special-use authorization, contract or approved operating plan [is prohibited]." The defendant in Doremus was convicted for, *inter alia*, violating the terms of his approved operating plan by knocking down live trees and digging more ditches than allowed by that plan. 888 F.2d at 634.

By far the great majority of cases in which defendants are cited for violating 36 C.F.R. § 261.10(k)("[u]se or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required"), the regulation Mr. McClure is charged with violating, concern the determined efforts of the "Rainbow Family" to conduct mass meetings in

National Forests without first obtaining special-use authorizations. *See, e.g.,* United States v. Kalb, 234 F.3d 827 (3d Cir. 2000), *cert. denied*, 534 U.S. 1113 (2002); United States v. Linick, 195 F.3d 538 (9th Cir. 1999); United States v. Johnson, 159 F.3d 892 (4th Cir. 1998). These cases identify 36 C.F.R. Part 251 as the regulation that defines when a special-use authorization is needed (in the Rainbow Family situation, for "non-commercial group use" as defined by 36 C.F.R. § 251.51) and how it is issued. Kalb, 234 F.3d at 830("'Special uses' include all uses other than timber harvesting, grazing and mineral extraction"); Linick, 195 F.3d at 540 n.3 ("Subject to certain exceptions not relevant here, any person wishing to engage in a special use of National Forest System land must first obtain a permit. See 36 C.F.R. §§ 251.50(a) &261.10(k). "); Johnson, 159 F.3d at 894 ("The regulations provide that such 'special use authorization' must be obtained for 'noncommercial group uses,' id. § 251.50, and defines 'group use' as 'an activity conducted on National Forest System Lands that involves a group of 75 or more people, either as participants or spectators.' Id. § 251.51."). No cases have been found that hold or imply that the term "special-use authorization" used in the Forest Service regulations (36 C.F.R. Chapter II) has any meaning separate from that given in 36 C.F.R. Part 251.

C. A "Special Use Authorization" Cannot Be Required or Granted for a Mining Activity and therefore the Violation Notice Must Be Dismissed

As stated in the original motion to dismiss, a "special-use authorization" can only be granted for certain uses of National Forest System lands. Those uses do not include uses covered by the regulations governing minerals (Part 228). Black v. Arthur, 201 F.3d 1120, 1122 (9th Cir. 2000)("Subpart B [of 36 C.F.R. Part 251] governs "special uses," meaning uses other than timber harvesting, grazing, and mineral extraction. *See*36 C.F.R. §251.50(a "); Everett v. United States, 158 F.3d 1364, 1365 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1132 (1999)("[Forest] Service regulations designate 'all uses of National Forest System lands' as 'special uses,' with the exception of those uses provided for in the regulations governing the disposal of timber and minerals and the grazing of livestock."); United States v. Lex, 300 F. Supp. 2d 951, 959-60 (E.D. Cal. 2003)("because activity covered by the Forest Service's mining regulations is excluded from the special use regulations, see 36 C.F.R. § 251.50(a), [footnote quoting this regulation omitted], the

appellants could not obtain a special use authorization for their activity which was subject to the mining regulations"); Elko County Board of Supervisors v. Glickman, 909 F. Supp. 759, 764 (D. Nev. 1995)(" uses of Forest Service land relating to 1866 ditch rights -- unlike uses relating to 1872 mining rights -- are neither exempted by 36 C.F.R. § 251.50(a) from the regulations defining "special uses" which require permits, nor excluded from 36 C.F.R. § 261.1(a)'s description of the scope of prohibited activities").

The mineral regulations govern mining and therefore a special-use authorization cannot be granted for or required for a mining activity. Lex, 300 F. Supp. 2d at 959-60. Mr. McClure is charged with suction dredge mining on the Salmon River in the Klamath National Forest. That is a mining activity and a special-use authorization cannot be granted or required for such an activity. The violation notice therefore fails to state an offence and should be dismissed.

D. The Government Has the Power to Enforce the Forest Service Mining Regulations by a Civil Action if It Chooses Not to Amend Its Penal Enforcement Regulations

The Court will by now have noticed that a miner can be convicted for violating the terms of an approved operating plan under 36 C.F.R. § 261.10(l), as in United States v. Doremus, 888 F.2d 630 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991), yet no enforcement regulation exists that punishes a miner for simply mining without an operating plan, whether approved or not. This is one of the oddities of the Forest Service's regulations. As suggested in the original motion to dismiss, the Forest Service can amend its regulations to provide itself with an enforcement regulation to meet this situation if it so desires, as long as it complies with the Administrative Procedure Act and finds statutory sanction for the new regulation. What the government cannot do is to prosecute Mr. McClure under an inappropriate regulation simply because it currently has no other, as Ms. Spangler admitted at oral argument.

Nevertheless, the Court may be concerned that if it grants the motion to dismiss it will be telling miners that they need not obtain approved operating plans when such plans are appropriate under 36 C.F.R. Part 228. As the undersigned attorney advised the Court at oral argument, the government has civil remedies available. It has often used them in the past. *See, e.g.*, United States v. Shumway, 199 F.3d 1093 (9th Cir. 1999)(reversing summary judgment of eviction in civil action

brought against mill site owners denied approval of operating plan); United States v. Brunskill, 792 F.2d 938 (9th Cir. 1986)(affirming injunction granted to compel defendants to remove various structures from a mill site in the absence of an approved plan of operations); United States v. Weiss, 642 F.2d 296 (9th Cir. 1981)(United States filed suit to enjoin owners of unpatented mining claims from conducting mining activity until an approved plan of operations had been filed and a bond was posted); Anderson v. U.S. Forest Service, 645 F. Supp. 3 (E.D. Cal. 1985)(granting partial summary judgment in favor of the United States to remove miner's residence and property from mining claim and enjoining him from carrying out various activities); United States v. Langley, 587 F. Supp. 1258 (E.D. Cal. 1984)(defendant enjoined from maintaining a residence on mining claim without an approved operating plan). As this Court said in another mining case, United States v. Hall, 751 F. Supp. 1380, 1384 (E.D. Cal. 1990), the "United States Attorney's office is merely a phone call away for the seeking of a temporary restraining order or preliminary injunction" when a miner is not complying with the mining regulations.

IV. CONCLUSION

The violation notice fails to state an offence under 36 C.F.R. § 261.10(k) because a "special-use authorization" cannot be required (or granted) for a mining activity. Ms. Spangler told this Court that the government cannot amend the violation notice to allege violation of another regulation and therefore the prosecution stands or falls on the applicability of 36 C.F.R. § 261.10(k). The Court is therefore respectfully requested to dismiss the violation notice with prejudice.

Respectfully submitted,

Dated: January 31, 2005

By: _____
R. Dabney Eastham

Attorney for Defendant
Terry L. McClure

PROOF OF SERVICE

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

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

On January 31, 2005, I caused a copy of the following document(s):

DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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

McGregor W. Scott, Esq. United States Attorney 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	Attorneys for Plaintiff United States of America

[X]	**MAIL:**	Such correspondence was deposited, postage fully paid, with the United States Postal Service on the same day in the ordinary course of business.
[X]	**ELECTRONIC MAIL**	Such correspondence was sent by electronic mail to the addresses provided earlier by the recipients: Samantha.Spangler@usdoj.gov and to Jessica.Mahoney@usdoj.gov.
[ ]	**EXPRESS MAIL:**	Such correspondence was deposited on the same day in the ordinary course of business with a facility regularly maintained by the United States Postal Service.

I declare under penalty of perjury that the above is true and correct. Executed on January 31, 2005, at Half Moon Bay, California.

R. Dabney Eastham