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PATRICK E. DUFFY, CLERK

By _____
DEPUTY CLERK, MISSOULA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

MCR 08-5050-M-JCL
CVB Violation No:
FAAM011 M7

vs.

JUDGMENT

STEVE A. HICKS,

Defendant.

I. INTRODUCTION

This matter comes before the Court following Defendant Steve Hicks' non-jury trial conducted on November 21, 2008, with regard to the above-referenced violation notice. The notice charges Hicks with conducting a work or service activity on National Forest System land without a proper special use authorization as required by both federal law and regulation, all in violation of 36 C.F.R. § 261.10(c).

During the trial an issue of law arose as to whether Hicks' activities charged in the violation notice are excepted from the operation of 36 C.F.R. § 261.10. Therefore, the Court ordered the parties to file briefs on the legal issue. Having reviewed the parties' briefs, the Court concludes Hicks' activities are

excepted from the scope of § 261.10 as expressly stated in 36 C.F.R. § 251.50(a), and the violation notice must be dismissed.

II. FACTUAL BACKGROUND

The referenced violation notice charges Hicks with conducting activities on National Forest System land in violation 36 C.F.R. § 261.10(c) which prohibits the following activities:

(c) Selling or offering for sale any merchandise or conducting any kind of work activity or service unless authorized by Federal law, regulation, or special-use authorization.

36 C.F.R. § 261.10(c).

The parties do not materially dispute the factual circumstances underlying the violation notice which allegedly support the above-referenced regulatory violation. The underlying facts are as follows:

The United States concedes that Hicks has a valid unpatented mining claim in the Avalanche area of the Helena National Forest. Hicks invites individuals, groups, or tourists to come to the location of his mining claim where he teaches them how to pan for gold. Hicks employs mining tools, equipment, and extraction methods to demonstrate the activity of panning for gold, and he allows the visitors to experience and engage in the gold panning activities. Hicks charges the tourists or visitors a fee for the opportunity to come to the location of his mining claim to pan for gold. Hicks characterizes his activities as educational mining activities, and the United States characterizes Hicks'

conduct as providing educational, recreational, or tourist activities or services in violation of § 261.10(c).

III. DISCUSSION

The basic legal and regulatory scheme applicable to the circumstances of this case is clear and equally relied upon by both parties to this case. The Mining Law of 1872 at 30 U.S.C. § 22 provides individuals with a statutory right to conduct mining operations on federal land in accordance with applicable regulations. Hicks' unpatented mining claim is authorized by § 22 and other applicable federal laws and regulations.

The United States' prosecution of this violation notice is premised on the legal principle that although Hicks has a valid mining claim, his rights under his claim are not unlimited. Specifically, federal law limits unpatented mining claim rights as follows:

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

30 U.S.C. § 612(a). See *United States v. Shumway*, 199 F.3d 1093, 1101 (9th Cir. 1999) (affirming the limitation imposed by § 612(a) to preclude "sham mining claims used for other purposes"). Consequently, and by way of example, a mining claimant does not have a right to harvest timber at the location of the mining claim (*Teller v. United States*, 113 F. 273, 281 (8th Cir. 1901)),

to lease the location for grazing livestock (*United States v. Etcheverry*, 230 F.2d 193, 196 (10th Cir. 1956)), or to use the land for residential and livestock purposes (*United States v. Bagwell*, 961 F.2d 1450, 1455 (9th Cir. 1992)).

Other competing limitations on a mining claimant's rights are the laws and regulations applicable to National Forest System lands administered by the United States Forest Service and the Secretary of Agriculture. Specifically, the Secretary of Agriculture is charged with the obligation to protect public and national forests from destruction and depredations, "to regulate their occupancy and use and to preserve the forests [...] from destruction." 16 U.S.C. § 551. The regulation at issue in this case, 36 C.F.R. § 261.10(c), is amongst those regulations promulgated under the authority of § 551.

The broad authority given to the Secretary of Agriculture under 16 U.S.C. § 551, however, may not be applied to "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." 16 U.S.C. § 478. See *United States v. Craig*, CR 82-8-H (D. Mont.), April 16, 1984 Memorandum Opinion at 4 (citing § 478). Accordingly, although the United States Forest Service regulates all uses of the National Forest System lands, as required by § 478 the Secretary of Agriculture has specifically excepted from

the "special use" regulations those uses "authorized by the regulations governing [...] minerals". 36 C.F.R. § 251.50(a). Mineral use activities conducted on forest lands are, instead, governed by the regulations in Part 228, Chapter II of Title 36 of the Code of Federal Regulations. Thus, where an individual is conducting a mining operation, his or her activity is excepted by 36 C.F.R. § 251.50(a) from the Forest Service's "special use" regulations, and the regulations under § 261 are not applicable to the miner's operations. *United States v. McClure*, 364 F. Supp. 2d 1183, 1185-86 (E.D. Cal. 2005). "[S]pecial use permits such as those required by 36 C.F.R., Part 261 are not required for mining-related operations such as exploration and development." *Craig*, April 16, 1984 Memorandum Opinion at 8.

Mining operations are defined in part by 30 U.S.C. § 612(a), *supra*, and more specifically by 36 C.F.R. § 228.3. The regulation defines "operations" as follows:

All functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part, regardless of whether said operations take place on or off mining claims.

36 C.F.R. § 228.3(a).

The *McClure* case involved a misdemeanor charge filed against Defendant Terry McClure for allegedly violating a provision of 36 C.F.R. § 261.10. Specifically, McClure was charged under § 261.10(k) for "operating a gold mining suction dredge" on

National Forest System land without a special use authorization. *McClure*, 364 F. Supp. 2d at 1183, 1184. The court noted that for an individual to be subject to the mining regulations under 36 C.F.R., Part 228, "mere entry into National Forest System land for exploration or prospecting purposes is sufficient." *McClure*, at 1185 n.5. The court applied the broad definition of "operations" at § 228.3(a), *supra*, and readily concluded that *McClure*'s gold mining suction dredge activity fell within the definition.¹ *Id.* Accordingly, the court dismissed the charges on the grounds that *McClure*'s mining operations were excepted from the special use regulations, that *McClure* would not, therefore, be able to obtain a special use authorization for his mining activities, and that he could not be charged under 36 C.F.R. § 261.10 relative to his mining operations. *Id.* at 1185-87. "Any violation of by a miner of Forest Service regulations should be charged under 36 C.F.R., Part [228]", not under Part 261. *Craig*, Memorandum Opinion at 10.²

¹Title 36 C.F.R., Part 228, applies "to all operations conducted under the U.S. mining laws of 1872" either before or after a formal plan of operation is approved. *Craig*, April 16, 1984 Memorandum Opinion at 6-7 (construing the predecessor to Part 228 set forth at 36 C.F.R., Part 252).

²The *McClure* court noted that a miner could, however, be charged under 36 C.F.R. 261.10(1) for violating an approved plan of operation, or under other legal authority for committing waste or resource destruction. *McClure*, 364 F. Supp. 2d at 1186 and 1186 n.7 (citing *United States v. Doremus*, 888 F.2d 630 (9th Cir. 1989)). *Hicks* is not charged under § 261.10(1), nor is he charged with waste or destruction.

In view of the foregoing discussion of law, Hicks' activities at issue in this case are excepted from the operation of 36 C.F.R. § 261.10(c). Hicks explained that he employs mining tools, equipment and methods to engage in the activity of panning for gold with others who he invites to the location of his mining claim. That activity falls within the definition of mining "operations" which includes "activities in connection with prospecting [... or] mining[.]" 36 C.F.R. § 228.3(a). Under *McClure*, Hicks' mere entry on to forest lands "for exploration or prospecting purposes is sufficient" to subject him to regulation under 36 C.F.R., Part 228.

More specifically, 36 C.F.R. § 228.4 provides that a "notice of intent to operate" is not required for "[p]rospecting and sampling which will not cause significant surface resource disturbance" or mineral deposit removal. 36 C.F.R. § 228.4(a)(1)(ii). "Prospecting and sampling" as contemplated in § 228.4(a)(1)(ii) can "include searching for and occasionally removing small mineral samples or specimens, [or] *gold panning[.]*" *Id.* (emphasis added). Panning for gold is quintessentially a mining operation. Therefore, the regulations confirm Hicks was engaged in a mining operation, and the United States has not cited to any regulatory provision prohibiting the type of gold panning activity in which Hicks engaged with

visitors or tourists.³

Furthermore, the circumstances of this case invoke the application of the Rule of Lenity. The Rule requires ambiguous criminal laws be interpreted in favor of a defendant accused of violating them. *United States v. Nader*, 542 F.3d 713, 721 (9th Cir. 2008). The Rule and "fundamental principles of due process [...] mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Id.* In this case, any potential ambiguity as to the applicability or inapplicability of the mining operation regulations to Hicks' activity and, thus, whether Hicks' activity is excepted from the special use regulations, must be construed in Hicks' favor.

Because Hicks' activities are governed by Part 228, the activities are excepted by 36 C.F.R. § 251.50(a) from the special use regulations under 36 C.F.R. § 261.10. Therefore, since the instant violation notice does not set forth facts constituting an offense for which Hicks may be charged under 36 C.F.R. § 261.10(c), **IT IS HEREBY ORDERED** that the violation notice is dismissed.


The Clerk of Court is directed to forward a copy of this Order to the U.S. Attorney's office, and to the Defendant at P.O. Box 394, White Sulphur Springs, MT 59645-0394.

³The issue of whether, under the circumstances, Hicks should be required to submit a "notice of intent to operate" is a separate question not before the Court in this proceeding.

The Clerk of Court is further directed to forward a copy of this Judgment to the Central Violations Bureau at P.O. Box 780549, San Antonio, Texas 78278-0549. CVB is directed to enter TD as the disposition code for this matter.

Hicks paid a \$225 bond to CVB pursuant to the Court's Order entered September 4, 2008. **ACCORDINGLY, IT IS HEREBY ORDERED** that CVB shall return the \$225 bond to Hicks at his address set forth above.

DATED this 9th day of January, 2009.



Jeremiah C. Lynch
United States Magistrate Judge

C: USA

Def

CVB