IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America Plaintiff, v. Thomas E Tierney Defendant.	No. PO-2012-08162-TUC-CRP **ORDER**

Defendant is charged with a criminal misdemeanor for allegedly using National Forest System land without special-use authorization when such authorization is required in violation of 36 C.F.R. § 261.10(k). (Doc. 1). Defendant pled not guilty to the charge. Magistrate Judge Pyle held a bench trial on June 21, 2012 and took the matter under advisement. (Doc. 8). For the reasons discussed below, the Court finds Defendant not guilty.

Factual Summary from Trial

Defendant Thomas Tierney is a prospector who has mined claims in the Huachuca Mountains near Sierra Vista for a number of years. At issue in this case is Defendant's mining of a claim in Ash Canyon. Defendant and the Forest Service disagree as to the scale of Defendant's mining. On at least three different occasions since 2004, the Forest Service informed Defendant through written letter that Defendant's mining of his Ash

Canyon claim was causing a significant disturbance of surface resources such that Defendant should be required to file a notice of intent and plan of operations. (Exhibits 8, 9, 12).

Defendant was notified in February 2004, July 2009, and on February 24, 2011 that he needed to file a plan of operations. (*Id.*). In the February 24, 2011 letter, the District Ranger for Sierra Vista stated "I have determined that all mineral activities in Ash and Lutz Canyons have a potential to adversely impact other surface resources." (Exhibit 12). Thus, the District Ranger stated that she requires plans of operation for any mining activities in those areas. On May 3, 2011, Forest Service Officer Barry Sullins ticketed Defendant for mining his Ash Canyon claim without filing a notice of intent and plan of operations. (Doc. 1). Defendant maintains that his pick and shovel prospecting is not causing a significant disturbance to surface resources and he is, therefore, not required to file a notice of intent and plan of operations.

Prior to ticketing Defendant, Officer Sullins discussed the impact of Defendant's mining with Defendant in November 2010. In that conversation, Officer Sullins advised Defendant that if Defendant continued to work his Ash Canyon claim by digging a larger hole, Defendant would need to contact the District Ranger and file a plan of operations. Defendant testified that after he received the February 24, 2011 letter, he stopped mining his Ash Canyon claim. Officer Sullins testified that Defendant told him that he continued to mine the claim without a plan of operations because his lawyer told him he did not need a plan. Given Defendant's continued mining of the claim subsequent to his receipt of the February 2004 and July 2009 letters informing him that he needed to file a plan of operations as well as his continued mining after his conversation with Officer Sullins in November 2010, the Court finds Officer Sullins's testimony more credible on this point.

Officer Sullins testified that he ticketed Defendant in May 2011 because Defendant's mining had caused significant disturbance to the surface resources. Officer Sullins noted damage to trees surrounding the hole on Defendant's claim. The damage included several exposed roots of trees, and one small tree that had been recently sawed

off at the base. (Exhibits 1-7). Defendant testified that he did not cut down the small tree and to his knowledge he had never killed a tree while prospecting. Officer Sullins also testified that the size of the hole dug by Defendant was evidence of significant disturbance to the surface resources. Officer Sullins testified that the hole dug was approximately 10 feet deep by 17 feet wide by 20 feet long. (Exhibit 3). Defendant described a similarly sized hole, testifying it was approximately 10-12 feet deep by 8 feet wide by 15-20 feet long, with different depths at different places. Defendant testified that roots of trees are exposed while he is working a hole but he stated he backfills the hole when he is finished processing the materials. It was unclear from the testimony how long Defendant left this large hole without backfilling it. Based on testimony from Officer Sullins and Defendant, the hole at issue existed in some large size in November 2010 and still existed, in a larger size, in May 2011 when Defendant was ticketed. Thus, this hole was not backfilled for at least 7 months. Defendant testified that the hole was eventually filled during floods after the Monument Fire in the summer and fall of 2011.

Discussion

Defendant argues he is not guilty of the charge for three reasons. He contends (1) mining does not require special use authorization; (2) his mining of the Ash Canyon claim did not cause a significant disturbance of surface resources; and (3) federal regulations gave him 120 days after he received written notification from the Forest Service to file a plan of operations.

1. Mining Does Not Require Special Use Authorization

Defendant is charged with failing to obtain special use authorization when such authorization is required. The regulation prohibits the "[u]se or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required." 36 C.F.R. § 261.10(k). Many uses of Forest Service land do not require special use authorization. The regulation states:

> (a) All uses of National Forest System lands, improvements, and resources, except those authorized by the regulations governing sharing use of

> roads (§ 212.9); grazing and livestock use (part 222); the sale and disposal of timber and special forest products, such as greens, mushrooms, and medicinal plants (part 223); *and minerals (part 228)* are designated "special uses." Before conducting a special use, individuals or entities must submit a proposal to the authorized officer and must obtain a special use authorization from the authorized officer, unless that requirement is waived by paragraphs (c) through (e)(3) of this section.

36 C.F.R. § 251.50(a) (*emphasis added*).

Defendant argues he was not required to obtain special use authorization for mining activities because uses under "minerals (part 228)" are exempt from the requirement to obtain authorization. The Court agrees. Based on the plain language of the regulation, special use authorization is not required for mining activities as those are uses of Forest Service land under "minerals (part 228)." As such, they are exempted from the special use authorization requirement.

Defendant is not guilty of failing to obtain special use authorization when he was not required to obtain that type of authorization for the mining he was doing in Ash Canyon. While Defendant was charged under subsection (k) of § 251.50, the dispute between Defendant and the Forest Service and the evidence that was presented at trial all focus on whether Defendant's mining violated subsection (a) of the regulation. That subsection prohibits:

> Constructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure, communication equipment, *significant surface disturbance*, or other improvement on National Forest System lands or facilities without a special-use authorization, contract, or *approved operating plan* when such authorization is required.

36 C.F.R. § 261.10(a) (*emphasis added*). The February 2004 letter from the Forest Service cited this subsection of the Regulation when it warned Defendant that he needed to file a plan of operations. (Exhibit 8). Because both Defendant and the Forest Service focus on whether Defendant's mining caused a significant disturbance of surface

resources, the Court will address Defendant's other two arguments.

2. Defendant Did Not Cause Significant Disturbance Of Surface Resources

At the heart of the dispute between Defendant and the Forest Service is whether the scale of Defendant's mining activity caused a significant disturbance of surface resources. Under the federal regulations, *before* a person engages in any use that *might* cause a significant disturbance, that person is required to file a notice of intent. 36 C.F.R. § 228.4(a). A notice of intent is not required for:

> (ii) Prospecting and sampling *which will not cause significant surface resource disturbance* and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study which generally might include searching for and occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools;

36 C.F.R. § 228.4(a)(1)(ii) (*emphasis added*). A person is required to file a plan of operations if his *current* use of Forest Service land will cause or is causing a significant disturbance. The Regulation states:

> An operator shall submit a proposed plan of operations to the District Ranger having jurisdiction over the area in which the operations will be conducted in lieu of a notice of intent to operate if the proposed operations will likely cause a significant disturbance of surface resources. An operator also shall submit a proposed plan of operations, or a proposed supplemental plan of operations consistent with § 228.4(d), to the District Ranger having jurisdiction over the area in which operations are being conducted *if those operations are causing a significant disturbance of surface resources but are not covered by a current approved plan of operations*. The requirement to submit a plan of operations shall not apply to the operations listed in paragraphs (a)(1)(i) through (v). The requirement to submit a plan of operations also shall not apply to operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise will likely cause a significant disturbance of surface resources.

36 C.F.R. § 228.4(a)(3) (*emphasis added*).

Defendant maintains that he is a prospector who uses hand tools and no mechanized equipment to study mineral samples on his Ash Canyon mining claim. As such, he argues the scale of his mining does not cause a significant disturbance of surface resources and he is not required to file a notice of intent or plan of operations. The Forest Service argues the scale of Defendant's mining did cause significant disturbance of surface resources because roots of trees were exposed, one small tree was sawed off near the hole dug by Defendant, the size of the hole dug by Defendant was large and the hole was left unfilled for a number of months causing a danger to other users of Forest Service property including hikers, Border Patrol agents and illegal immigrants.

"Significant disturbance of surface resources" is not defined in the federal regulations. The regulations give the District Ranger discretion in determining what constitutes significant disturbance. 36 C.F.R. § 228.4(a)(4). Such discretion, however, cannot be unfettered. As a matter of due process, a criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute," *United States v. Harriss*, 347 U.S. 612, 617 (1954), or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972), is void for vagueness. "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Harriss*, 347 U.S. at 617.

The Forest Service asserts, in the letters sent by the District Ranger to Defendant, the District Ranger has full authority to determine what is or is not significant disturbance. In the February 24, 2011 letter, District Ranger Annette Chavez stated she has "determined that all mineral activities in Ash and Lutz Canyons have a potential to adversely impact other surface resources." (Exhibit 12). Based on her determination, the District Ranger concluded "an approved Plan of Operations (POO) must be a requirement for any mineral related activities in Ash and Lutz Canyons, including activities [on Defendant's mining claims]." (Exhibit 12). The position of the District Ranger that all mining in these two canyons requires an approved plan of operations is untenable. Such

unfettered discretion fails to notify a person of what constitutes significant disturbance of surface resources.

While the term significant disturbance of surfaces resources is not defined in the federal regulations, limits of its definition can be discerned from the uses the federal regulations usually permit without a plan of operations. The Federal Regulation states:

> (1) A notice of intent to operate is not required for:
>
> (i) Operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest System purposes;
>
> (ii) Prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study which generally might include searching for and occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools;
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> (iii) Marking and monumenting a mining claim;
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> (iv) Underground operations which will not cause significant surface resource disturbance;
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> (v) Operations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization;
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> (vi) Operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources; or
>
> (vii) Operations for which a proposed plan of operations is submitted for approval;

36 CFR § 228.4(a)(1). Based on these exemptions, the regulations do not usually require notices of intent or plans of operations for small scale mining. Removing small samples

of minerals, using hand or battery operated tools and even some types of underground mining are usually permissible without a plan of operations. In contrast, large scale mining involving mechanized earthmoving equipment like bulldozers and backhoes does require a plan of operations.

In addition to the regulatory language, Questions and Answers developed by the Forest Service when it promulgated the applicable regulation address uses in which the Forest Service anticipated a plan of operations would be necessary and also address the limits of what constitutes significant disturbance. 70 Fed. Reg. 32713 (June 6, 2005). The Federal Register states:

> As reorganized by the final rule, § 228.4(a) will describe in sequence when an operator is required to submit a notice of intent to operate before commencing operations, what operations are exempt from the requirement for prior submission of a notice of intent to operate, when an operator is required to submit and obtain approval of a proposed plan of operations before commencing operations, what operations are exempt from the requirement for prior submission and approval of a proposed plan of operations, and a District Ranger's authority to require submission and approval of a proposed plan of operations before an operator commences proposed operations or continues ongoing operations. This reorganization parallels the typical progression of mining operations from the least functions, work, or activities for prospecting or casual use, which would not normally require prior submission and approval of a plan or operations, through exploration, which often would require prior submission of a notice of intent to operate, and might require prior submission and approval of a plan of operations, to development and production, which normally would require prior submission and approval of a plan of operations. These changes should enhance the final rule's clarity and comprehensibility.

70 Fed. Reg. at 32719-32720.

The parties in this case agree that Defendant does not use mechanized equipment, that his work as a prospector involves a pick and shovel. Defendant is engaging in a "casual use" as contemplated by the regulations. Such use of Forest Service land would not normally require prior submission of a plan of operations. The Forest Service contends Defendant's casual use has extended outside the contemplated bounds to constitute significant disturbance and he should be required, unlike most other casual use

prospectors, to file a plan of operations.

This term, significant disturbance of surface resources, has been included in some form of the applicable regulation since 1974. 70 Fed. Reg. at 32719-32723. While the term has never been defined in the regulation, the Forest Service discussed limits of the term in its promulgation of the regulation in 1974 and in 2005. *Id.* at 32723-32724. Significant disturbance can include operations "for which reclamation upon completion of that operation could reasonably be required and to operations that could cause impacts on National Forest Service resources that reasonably can be prevented or mitigated." *Id.* at 32724 (internal quotation and citation omitted).

Defendant's pick and shovel mining is not an operation that required reclamation after it concluded nor was there damage to Forest Service resources that could have reasonably been prevented or mitigated. At trial the Court asked the Government to identify damage that required reclamation. The Government noted the exposed tree roots, the sawed off small tree and the size of the hole as well as the length of time the hole was left unfilled. The Government did not identify any impacts on Forest Service resources such as specific concerns for wildlife or specific environmental concerns. The evidence presented and highlighted by the Government failed to show a significant disturbance of resources that would require reclamation. Prospectors dig holes, which in the middle of a forested area, exposes the roots of trees. That tree roots are exposed for some limited amount of time is not a permanent damage of resources or a disturbance that requires reclamation. Defendant testified that he backfills the holes he digs and there is no evidence that this is not a true statement. The hole at issue in this case was filled shortly after Defendant was ticketed. There is no evidence that the small sawed off tree was cut down by Defendant and Defendant testified that he has never killed a tree while prospecting. Further, the destruction of one small tree unlikely constitutes significant disturbance of surface resources.

The size of the hole and the length of time it was left unfilled is also not significant disturbance. While the hole dug was large and it was left unfilled for many months, the hole was eventually filled. The Government did not present evidence to show

reclamation would be necessary due to the size of the hole or the length of time it was left unfilled. No evidence was presented that the size of the hole or length of time it was exposed caused specific damage to Forest Service resources. The Court does acknowledge the concern voiced by Officer Sullins that the safety of other Forest Service land users may be compromised with large, unfilled holes left for months at a time. A large, unfilled hole could present a danger to hikers, Border Patrol agents and illegal immigrants who may pass through the Canyon. Nothing, however, in the regulation at issue allows the Forest Service to ticket prospectors for creating a large hole that is potentially a danger to other users of the area. The regulation focuses on preservation of the environment and Forest Service surface resources generally; it does not focus on the safety of other users of the land. Defendant did not cause a significant disturbance.

3. The 120 Day Statutory Time Did Not Apply to Defendant

Defendant's final argument is that he was not guilty of charge because the regulations gave him 120 days to file a plan of operations after he received written notice in the February 24, 2011 letter. Defendant is incorrect on this point. When the regulation was promulgated on July 6, 2005, a person had 120 days from that date to file a plan of operations to be in compliance with the new regulation. The applicable subsection states:

> (b) Any person conducting operations on the effective date of these regulations, who would have been required to submit a plan of operations under § 228.4(a), may continue operations but shall within 120 days thereafter submit a plan of operations to the District Ranger having jurisdiction over the area within which operations are being conducted: *Provided, however*, That upon a showing of good cause the authorized officer will grant an extension of time for submission of a plan of operations, not to exceed an additional 6 months. Operations may continue according to the submitted plan during its review, unless the authorized officer determines that the operations are unnecessarily or unreasonably causing irreparable damage to surface resources and advises the operator of those measures needed to avoid such damage. Upon approval of a plan of operations, operations shall be conducted in accordance with the approved plan. The requirement to submit a plan of operations shall not apply: (1) To operations excepted in § 228.4(a) or (2) to operations concluded prior to the effective date of the regulations in this part.

36 C.F.R. § 228.4(b). This subsection and the 120 day grace period applied only to people whose use of the land on July 6, 2005, may have required a plan of operations. It does not apply to Defendant who was notified in February 2011 and ticketed in May 2011.

IT IS ORDERED the Court finds Defendant **NOT GUILTY** of violating 36 C.F.R. § 261.10(k).

Dated this 3rd day of October, 2012.

CHARLES R. PYLE
UNITED STATES MAGISTRATE JUDGE