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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLARK PEARSON,

Defendant.

Redding Case No.: 02-50009 cmk

MEMORANDUM OF DECISION AND  
JUDGMENT..

This matter came on regularly for trial on September 12, 13, and December 5, 2002 at the United States District Court in Redding, California, the Honorable Craig M. Kellison presiding; the United States Department of Agriculture, Plumas National Forest, appeared by and through Assistant United States Attorney Samantha Spangler; and the Defendant, Clark Pearson, was represented by Timothy Zindel, Assistant Federal Defender.

At the close of the Government's Case, counsel for Defendant Pearson moved for a judgment of acquittal under F.R.Cr.P. 29<sup>1</sup>, seeking acquittal as to all three counts of the Information [Information]. This Court reserved jurisdiction on said motion. F.R.Cr.P. 29(b).

Thereafter, the parties filed their respective post-trial briefs and this Court has reviewed and considered the same.

<sup>1</sup> Unless otherwise stated, any reference to Rule or Rules refers to the Federal Rules of Criminal Procedure.

|                           |  |
|---------------------------|--|
| Environmental Assessment: | Environmental Assessment dated 1996 relating to Slim Pickens Mine. Defendant's Exhibit V.                  |
| Information:              | Superseding Information filed on April 10, 2002.   |
| Larger Pond:              | The lower pond.  |
| Manual <sup>2</sup> :     | Forest Service Manual<br>Title 2800 Minerals and Geology, Sections 2817.2 to 2819.3. Defendant's Exhibit H |
| Mine:                     | Slim Pickens Mine  |
| New Road:                 | The improvement or activity alleged in Count II of the Information. Swath.                                 |
| New Pond:                 | The improvement or activity alleged in Count I of the Information.   |
| Plan of Operations:       | Plan of Operations dated May 25, 2001.<br>Government's Exhibit 1; Defendant's Exhibit A                    |
| Road Improvement:         | The improvement or activity alleged in Count III of the Information.                                       |
| Small Pond:               | The upper pond.  |

Small Pond: The upper pond.

1  
2 Swath: The New Road.

3  
4 1T:Page Day one of Trial (unofficial transcript):Page

5  
6 2T:Page Day two of Trial (unofficial transcript):Page

7  
8 3T:Page Day three of Trial (unofficial transcript):Page

9 Defendant Pearson was charged in each count of the Information with violating 36 CFR  
10 261.10(a).<sup>3</sup>

11  
12 Pearson is charged in Count I of constructing a water containment or settling pond [New  
13 Pond] “without a contract or approved operating plan”; in Count II, of constructing a “new access  
14 road” [New Road][Swath] without a contract or approved operating plan; and in Count III, of  
15 reconstructing or maintaining an existing access road [Road Improvement] without a contract or  
16 approved operating plan.

17 The elements of each count are:

- 18  
19 1. Constructing . . . any road . . . or improvement;  
20 2. On National Forest System lands . . . ;  
21 3. Without . . . [an] approved operating plan.

22  
23 **RULE 29 MOTION**

24  
25 The standard to determine whether a Rule 29 motion should be granted is whether, viewing  
26 the evidence in the light most favorable to the government, could any rational trier of fact have found

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27 <sup>3</sup> “The following are prohibited: (a) Constructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure,  
28 communication equipment, or other improvement on National Forest system land or facilities without a special-use  
authorization, contract, or approved operating plan.”

1 the essential elements of the crime beyond a reasonable doubt. United States v. Pacheco-Medina,  
2 212 F.3d 1162, 1163 (9<sup>th</sup> Cir. 2000).

3  
4 When a criminal defendant moves for acquittal under Rule 29<sup>4</sup> and the court reserves ruling  
5 on the motion, the court decides the “motion on the basis of the evidence at the time the ruling was  
6 reserved.” F.R.Cr.P. 29(b).

7  
8 The crux of Pearson’s Rule 29 motion is that section 261.10(a) cannot be construed to  
9 impose criminal liability upon a miner who has acquired an approved operating plan, but then fails to  
10 follow said plan. The Defendant offers no authority to support this position, but for the reasons  
11 hereinafter stated, it is unnecessary for this Court to resolve this issue.

12 The Court does note parenthetically, however, that the only reasonable interpretation of 36  
13 CFR 261.10(a) is to make criminal those acts of construction or improvement by a miner that fall  
14 outside the Plan of Operations.

15  
16 As the Government correctly observes, if the Forest Service had chosen to prosecute the  
17 Defendant under section 261.10(l)<sup>5</sup> for violating a term or condition of the Plan of Operations, the  
18 Defendant would then have argued that there was nothing in the Plan of Operations to prohibit him  
19 from building or enlarging a road or constructing another settling pond.

20 The Ninth Circuit’s decision in United States v. Doremus, 888 F.2d 630 (9<sup>th</sup> Cir. 1989), also  
21 supports the proposition that activity which exceeds the scope of an approved operating plan can  
22 nevertheless be prosecuted without resorting to pursuing administrative remedies. There is nothing  
23 in the language set forth in 36 CFR 261.10(a) which expressly or impliedly discourages prosecution

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24  
25 <sup>4</sup> Rule 29. Motion for a Judgment of Acquittal. (a) Before Submission to the Jury. After the government closes its evidence or after  
26 the close of all the evidence, the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the  
27 evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a  
28 conviction. If the court denies a motion for a judgment of acquittal at the close of the government’s evidence, the defendant may  
offer evidence without having reserved the right to do so. (b) Reserving Decision. The court may reserve decision on the motion,  
proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the  
motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a  
verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved. . . .

<sup>5</sup> The following are prohibited: (l) Violating any term or condition of a special-use authorization, contract or approved operating plan.

1 of activity that exceeds the scope of an approved operating plan. This Court would hope that minor  
2 departures from an existing plan could be resolved by way of negotiation and plan amendment. The  
3 Government, however, is not prohibited from seeking criminal remedies for other violations under  
4 36 CFR 261.10(a), or its counterpart, 36 CFR 261.10(l), without pursuing administrative remedies.<sup>6</sup>

5  
6 As to Counts I and II of the Information, the Court denies Defendant's Motion for Judgment  
7 of Acquittal. The government introduced evidence when viewed in a light most favorable to the  
8 Forest Service, established that Pearson did construct improvements that could be construed as a  
9 New Pond and New Road. See *U.S. v. Hazeem*, 679 F.2d 770, 772 (9<sup>th</sup> Cir. 1982). In reviewing the  
10 evidence regarding the construction of the New Road and New Pond upon completion of the  
11 Government's case, this Court could reasonably find that these improvement resulted in a violation  
12 of 36 CFR 261.10(a).

13 As to Count III, however, this Court does grant Defendant's Motion for Judgment of  
14 Acquittal. The evidence presented by the government was insufficient to establish that the access  
15 road leading onto the claim had been enlarged or modified in such a capacity that could be construed  
16 as being outside the Plan of Operations. The testimony of Tricia Humpherys as to the road  
17 enlargement was inconclusive. Similarly, a review of Government's Exhibit 7K through 7L does not  
18 support the type of road modification or enlargement as contended by the Forest Service.<sup>7</sup>

19 The activity in question stems from the alleged minor modification or enlargement of the  
20 existing access road by Co-Defendant Allen so as to allow a travel trailer to be brought on to the site.  
21 No evidence was presented, however, to establish the condition of the road prior to the work, if any,  
22 done by Co-Defendant Allen.

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23  
24 <sup>6</sup> 36 CFR 228.7 provides as follows:

- 25 (a) Forest Officers shall periodically inspect operations to determine if the operator is complying with the regulations in this part  
26 and an approved plan of operations.  
27 (b) If an operator fails to comply with the regulations or his approved plan of operations and the noncompliance is unnecessarily or  
28 unreasonably causing injury, loss or damage to surface resources the authorized officer shall serve a notice of noncompliance  
upon the operator or his agent in person or by certified mail. Such notice shall describe the noncompliance and shall specify  
the action to comply and the time within which such action is to be completed, generally not to exceed thirty (30) days:  
*Provided, however,* that days during which the area of operations is inaccessible shall not be included when computing the  
number of days allowed for compliance.

<sup>7</sup> A review of the photographs reveals that the berms in question contain vegetation that would otherwise not exist if the berms and  
road enlargement had been recently constructed.



1  
2 Trisha Humpherys testified that she observed that several areas of the access road had been  
3 enlarged. The evidence at trial does not support a finding that Defendant Pearson had anything to do  
4 with the alleged enlargement. Without addressing the issue of "agency" or Pearson's dual  
5 responsibility under the Plan, the Court is still left with the issue that minor road modifications might  
6 be implied either under the Plan of Operations, or by virtue of the anticipated mining activities.<sup>8</sup>  
7 Furthermore, the Manual<sup>9</sup> appears to suggest that road improvement or modification need not be  
8 addressed by the Plan of Operations.

9  
10 SPECIFICITY OF PLAN OF OPERATIONS

11 Before discussing the findings of this Court as to Counts I and II, this Court does find that  
12 Defendant Pearson did possess an approved operating plan [Plan of Operations], which was in effect  
13 at the time of the alleged unauthorized activities alleged in Information. [Government's Exhibit 1;  
14 Defendant's Exhibit A].

15 This Court also finds that the activities alleged in Counts I and II occurred within the Plumas  
16 National Forest and within the subject matter jurisdiction of this Court. [IT:59]  
17

18 The Court finds that Defendant Pearson was an experienced and knowledgeable miner. At  
19 trial, no other witnesses testified as to matters relating to mining practices or techniques that would  
20 contradict or take issue with many of Pearson's contentions, e.g.:  
21  
22  
23

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24 <sup>8</sup> Common sense dictates that if the miner is required to file a Plan of Operations, he is anticipating bringing equipment and, possibly,  
25 camping equipment on site. Here, the Plan called for both.

26 <sup>9</sup> 2817.25 – Access. "Access," as used in 36 CFR 228 Subpart A, is limited to operations under the 1872 mining law and refers to  
means of ingress and egress, such as roads, trails, bridges, tramways, and landing fields for aircraft.

27 Any person prospecting, locating and developing mineral resources in National Forest System lands under the 1872 mining law has  
a right of access for those purposes.

28 Approval of an operating plan includes approval of the means of access and modes of transport described in the plan. Road  
construction or restoration on mining claims covered by an operating plan requires no separate permit or written authorization and  
neither are subject to charge.

- 1           1.     That the New Pond was within the interior boundaries and high water mark of the
- 2                 Larger Pond [2T:44];
- 3           2.     That the New Pond was created within the Larger Pond and lined with plastic to
- 4                 prevent water loss and seepage [2T:42, 43 and 46];
- 5           3.     That the Swath was constructed in an area contemplated for test activity under the
- 6                 Plan [3T:3];
- 7           4.     That the construction of the Swath was for purposes of removing overburden and
- 8                 subsequent testing [3T:2].

9           In the present case, the Government asks this Court to discount the validity of these  
10 contentions, and simply conclude the activities described in the Information were outside the scope  
11 of the Plan of Operations and not reasonably incident to Pearson's mining activity. Such a request is  
12 problematic. For reasons unknown to this Court, the Forest Service approved Pearson's Plan of  
13 Operations expeditiously and almost ministerially. What this meant was that the Plan of Operations  
14 was authored by Pearson with little, or no, input by the Forest Service. This makes it extremely  
15 difficult for this Court to conclude that the activities described in Counts I and II of the Information  
16 were not contemplated by Pearson with respect to his anticipated mining operation.

17           The second, but more important, observation by the Court, however, is the obvious failure of  
18 the Forest Service to prevent, limit or seek further definition of the activities that it now charges as  
19 being outside the Plan of Operations. If the Plan of Operations lacks sufficient specificity (which it  
20 does) then the Forest Service must bear the blame.

21           Noteworthy is the lack of technical or professional expertise utilized by the Forest Service  
22 during its approval of the Plan of Operations. Pearson prepared the Plan, and its contents were  
23 merely discussed by way of a telephone conversation between he and Humpherys. [IT:68] The Plan  
24 of Operations offers very little information or specifics regarding Pearson's proposed mining  
25 operations.  
26

27           During the summer of 2001, Humpherys was an Assistant Resource Officer for the Plumas  
28 National Forest [ER 52]. Although the District Ranger signed the Plan of Operations, Humpherys

1 was actually the only Forest Service employee instrumental for adopting its contents and  
2 recommending its approval. Humpherys' accession to her position occurred by experience and hard  
3 work, but not by having an educational background in mining and geology [ER 93]. This lack of  
4 knowledge and experience in mining, complied with the almost "ministerial" approval of Pearson's  
5 Plan of Operations makes it extremely difficult for this Court to arrive at a finding that any effort  
6 was made by the Forest Service to gain further insight as to Pearson's intended activity. Even during  
7 Humpherys' visit to the Slim Pickens Mine on May 22, 2002, her visit was of short duration and she  
8 made no effort to educate herself as to Pearson's proposed mining activity.

9 Another shortfall by the Forest Service relates to the manner that the Plan of Operations was  
10 adopted. The Forest Service chose to adopt and accept the Environmental Assessment<sup>10</sup> that had  
11 been performed on the Slim Pickens Mine five years earlier. There was no attempt to update this  
12 report, even though the report was less than informative and the boundaries of the Slim Pickens  
13 Mine had changed since its preparation.<sup>11</sup> In making this observation, the Court notes that the Forest  
14 Service, in its Manual (Exhibit 7), could have required additional information:<sup>12</sup>

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15  
16 <sup>10</sup> The Environmental Assessment (Defendant's Exhibit V) was contemplated to last no more than four years. Despite this fact, it was  
utilized by the Forest Service in adopting Pearson's most recent Plan of Operations.

17 The Environmental Assessment poses additional problems. The boundaries of the Slim Pickens Mine changed between the time that the  
18 Environmental Assessment was prepared and the most current Plan of Operations was approved. It was also suggested during trial that  
the map attached to the Environmental Assessment was prepared by, or under the direction of, the Forest Service. The location and size  
19 of the containment ponds are different in the map attached to the Environmental Assessment in comparison to the map attached to the  
Plan of Operations.

20 In the Environmental Assessment, the proposed mining activities are described as follows: "Activities proposed include excavation of  
21 tailings on site, processing tailing using a small trommel at a rate of approximately 15 yards/hour, use/construction of two ponds: one  
22 small settling pond and one larger settling/water containment pond, development of a water source, maintenance of an existing road,  
installment of a gate along the existing access road, and on site camping. The operation is proposed for three months/year, over a period  
of four years." [Emphasis added]

23 The above paragraph is the only reference to the existing access road and the settling ponds. As noted above, the Environmental  
Assessment contemplated the use or construction of two ponds. Thus, in attempting to reconcile the map attached to the Environmental  
24 Assessment and the map attached to the Plan, it is difficult to determine what the true size and location of the Lower Pond was  
anticipated by the parties. In fact, the Environmental Assessment loosely utilizes the language "use/construction of two ponds" which  
would support the conclusion that either new pond construction or existing pond alteration was anticipated.

25 With respect to the ponds, the Plan is also confusing. The Plan refers to "2 lower containment ponds." [Ex 1, page 4 and 5]

26 <sup>11</sup> The Environmental Assessment and Plan of Operations each contain a map depicting the anticipated mining activities. The maps  
27 are slightly different and far from being "to scale."

28 <sup>12</sup> References in the Manual include:

Section 2817.21 – Requirements Within Plan.



1 In reviewing these specific provisions of the Manual, the Court concludes that the Forest  
2 Service had ample opportunity to request additional information, and it chose not to do so.  
3 Similarly, the Forest Service could have obtained input from its own internal resources (biologist,  
4 geologist, etc.) and also chose not to do so.

5 Upon receiving Pearson's proposed Plan of Operations in late May, the Forest Service chose  
6 not to conduct an onsite visit.<sup>13</sup> It would have appeared only reasonable for the Forest Service to  
7 have conducted an onsite meeting with Pearson and Humpherys (or her designee) prior to the  
8 approval of the Plan of Operations.

9  
10 If the Forest Service deemed such an onsite meeting or inspection unnecessary, it becomes  
11 difficult for the Court to accept the Forest Service's contentions that Pearson's specific activities as  
12

13  
14 5. A surface disturbance map of the area within which onsite and offsite surface resource disturbing activities will, or could,  
15 take place. The scale and accuracy of the map must be adequate to permit identification of the site on the ground.

16 In Section 2817.21.7, the following information may be requested:

17 "The type and magnitude of the proposed operation. This should be documented and closely tied to the information on the  
18 maps. The Forest Service will require sufficiently detailed information, especially on earthmoving and site clearance operations, to  
19 identify the precautions which the operator needs to take to reasonably prevent and/or minimize adverse environmental impacts on  
20 National Forest surfaces during and after the proposed operations." . . .

21 Section 2817.22:

22 "In evaluating a proposed operating plan the authorized officer is expected to utilize mining geologists, mineral examiners, civil  
23 engineers, hydrologists, foresters, fisheries and wildlife biologists, cultural resource specialists, and landscape architects, where and  
24 when necessary. Within 30 days after receipt of a plan of operations which meets the requirements of 36 CFR 228 Subpart A, the  
25 authorized officer shall review the plan, prepare an environmental analysis according to instructions in FSM 1950, and notify the  
26 operator that the operating plan is: . . ."

27 Section 2817.23 – Review and Approval of Plans. When possible, the authorized officer or duly appointed representative shall  
28 review the plan of operations with the operator, on a person-to-person basis, to facilitate joint development of a reasonable  
agreement relative to the proposed operations. . . .

13 The Manual also provides:

Section 2817.3 – Inspection and Non-compliance.

4. Inspector Qualifications. Inspection shall be conducted by Forest officers who are familiar with the equipment and methods needed  
to find and produce minerals and who can accurately assess the significance of surface resources disturbance. Inspectors should be  
capable of identifying those activities of an operator which are reasonably necessary to the operation, which ones could perhaps be done  
differently with less effect on surface resources without endangering or hindering the operation, and which ones are unreasonable or  
unnecessary.

1 alleged in Counts I and II (which were not specifically discussed in the Plan of Operations) should  
2 now be the subject of criminal activity.

### 3 4 CONSTRUCTION OF THE NEW SETTLING POND

5 Much of the trial was devoted to whether Pearson constructed a New Pond as opposed to  
6 simply utilizing a smaller portion of the existing Larger Pond. The Government maintains that  
7 Pearson constructed a New Pond, whereas Pearson maintains that the settling pond was actually a  
8 smaller part of an existing larger settling pond [Larger Pond] that had been in existence for decades.

9  
10 Since both the Environmental Analysis and the Plan of Operations contemplated the use of at  
11 least two settling ponds, it became necessary for the Government to prove that the New Pond  
12 described in Count I was an unauthorized improvement not contemplated by the Plan, or not  
13 reasonably incident to Pearson's anticipated mining activity.

14  
15 This Court is unable to arrive at a conclusion from the evidence presented that the New Pond  
16 was an unauthorized improvement under the Plan of Operations, as opposed to simply encompassing  
17 a utilization of a smaller portion of the Larger Pond that had been in existence for many years.

18 Cheryl Griffith [Griffith] was a summer intern for the Forest Service during the summer of  
19 2001 and worked as a Minerals Technician. Griffith visited the Slim Pickens Mine on two occasions  
20 and speculated that one pond [Larger Pond] had been made into two ponds [ER 16, 21-22].

21  
22 No one disputes the fact that the area in question had been subject to considerable soil  
23 disturbance and mining activity in the past. Exhibits S-1 through S-3 depict the area of the Larger  
24 Pond within the disturbed area. The photographs and video tape evidence the fact that the  
25 boundaries of the Larger Pond are defined by the natural high water mark. Similarly, Exhibits T2  
26 through T5, which were taken during the winter months, also support the Defendant's argument that  
27 the high water mark is the best indicator as to what the exterior boundaries of the Larger Pond are  
28 now, or would have been historically.

1 By concluding that the New Pond was located within the historic boundaries (using the high  
2 water mark as a gauge) of the Larger Pond, this Court is unable to conclude that the Defendant  
3 violated 36 CFR 261.10(a), since it was permissible under both the Plan and Environmental  
4 Assessment to utilize the existing ponds. The Plan neither requires the use of the entire portion of  
5 the Larger Pond, nor prohibits the use of a small portion thereof.

#### 6 ROAD MODIFICATION

7  
8 In Count II, the Government contends that the Defendant constructed a new access road  
9 [Road Modification], which constituted an improvement outside the activity contemplated under the  
10 Plan of Operations.

11  
12 Humpherys describes the Swath as being a road having the approximate dimensions of 250  
13 feet in length and having a width of 10 feet. Mitch Gerlanger [Gerlanger] testified that its length  
14 approximated 100 feet. Regardless of the length of the road or Swath, it appears to have been  
15 constructed in an area that all parties agree was intended to be utilized for test activity.

16  
17 The Government argues that the Swath must certainly be a road since it appears to be such. It  
18 further argues that the Plan of Operations limited mineral extraction from test pits and not from long  
19 horizontal cuts. Also, the Government claims that Co-Defendant Allen had admitted to Humpherys  
20 that the Swath was constructed to access the upper portion of the claim.

21 Even accepting the truth of these arguments, the Court is still left with issues of whether the  
22 construction of the Swath was consistent with Defendant's mining activity and constructed within  
23 the area contemplated under the Plan for mining activity. The Court cannot conclude from the maps  
24 and testimony of the witnesses at trial that the area at the upper end of the Swath was not within the  
25 area contemplated under the Plan for test pits to have been dug. If test pits could have been dug at  
26 the upper end of the Swath, then the Plan of Operations must have contemplated the ability to move  
27 machinery to this location.  
28

1 The Swath was constructed in the general area that test samples were to be extracted. The  
2 area of the Swath was described as near the end of the existing access road and located in an area of  
3 heavy usage. It must be assumed that in the area of test activity as contemplated by the Plan,  
4 equipment and machinery were intended to be used. It must necessarily follow that implicit in the  
5 operation of the Plan is the ability of the operator to create methods of access within the test area to  
6 allow equipment and machinery to be used within the area. Constructing access for equipment in an  
7 area of heavy usage would not only be consistent with the Plan of Operations, but anticipated.

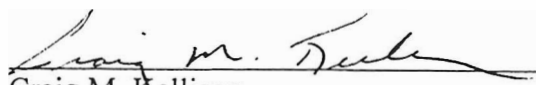
8 Pearson testified that material taken from the Swath was taken to the trommel to be tested.  
9 Even if the Court were to disbelieve this contention, the Court is still left with the conclusion that it  
10 was done in a portion of the map that was designated for mining activity.

11  
12 Lastly, the Court is simply left with the conflicting testimony of the witnesses. None of the  
13 Government's witnesses possess the expertise or experience to refute or challenge Defendant's claim  
14 that the Swath was a method of mining activity to test the soil of the area in question.

15  
16 As such, this Court is unable to conclude that the Swath resulted in an unauthorized  
17 construction under the existing Plan of Operations.

18 For the foregoing reasons, the Court finds the Defendant not guilty of all counts.

19  
20 Dated: June 11, 2003

  
Craig M. Kellison  
U.S. Magistrate Judge