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U.S. Forest Service Regulations: Federal Appellate Court Addresses Individual's Challenge to Conviction for Activities On National Forest System Lands

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The United States Court of Appeals for the Ninth Circuit ("Court") addressed an individual's appeal of his conviction for allegedly violating United States Forest Service ("Forest Service") regulations that:

... prohibit an unauthorized "significant surface disturbance . . . on National Forest System lands," 36 C.F.R. § 261.10(a), "[d]amaging any natural feature or other property of the United States," 36 C.F.R. § 261.9(a), and "[v]iolating any term or conditions of a[n] . . . approved operating plan," 36 C.F.R § 261.10(l).

Dean Robert Mostad ("Mostad") argued on appeal that there was insufficient evidence to support six of seven of his convictions.

The Court initially notes that appellate sufficiency challenges ask whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

In reviewing the trial court evidence the Court determined that the Forest Service never authorized Mostad to disturb riparian vegetation or excavate pond G as part of his mining operations. Evidence supporting this conclusion include communications from the Forest Service referencing these areas and the destruction by the mining actions that are stated to have destroyed the riparian vegetation and pond G. This was deemed to be sufficient evidence to find an unauthorized significant disturbance to a National Forest System lands and damage to a natural feature of the United States. Further, the Court states that Mostad violated the terms of his approved operating plan.

The Court also references evidence that it states indicates Mostad's placement of an excavator near a waterbody without an oil catchment, as well as placing mining waste directly on riparian vegetation between 30 and 50 feet from a waterbody. This was deemed an indication that substances were placed in or near a stream which may pollute.

Mostad's challenge included an argument that the government failed to issue a notice of noncompliance as required by 36 C.F.R. § 228.7. This alleged failure was argued to violate his due process right to fair notice.

The Court notes that fair notice requires that a mining operator "of ordinary intelligence have a reasonable opportunity to know what is prohibited." The 2009 plan's detailing where geologic sampling

activities are permitted and the fact that riparian areas could not be disturbed are noted. Language in the plan requiring compliance with laws and prohibiting unapproved deviations, along with Mostad's awareness of these restrictions, are cited. The Magistrate's conclusion at the trial level that this individual had actual notice means that due process was provided.

Finally, Mostad argued that his actions were not subject to 36 C.F.R. § 261 because the government failed to exhaust § 228.7's administrative remedies. The Court rejects this argument concluding the doctrine is inapplicable to the circumstances of this case. It cites the lower court which stated:

. . . requiring exhaustion here would mean that miners would be able to operate outside of their plans of operations potentially causing mass destruction, and the Forest Service would have no recourse until exhausting administrative remedies.

In summary, the Court concludes that the cited statutory provision (§ 261) does not prohibit the Forest Service from bringing criminal charges against a mining operator without first issuing an administrative notice of compliance.

A copy of the decision can be found [here](#).