

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff-
Appellee,

v.

JOHN E. GODFREY,

Defendant-
Appellant.

No. 2:14-cr-00323 JAM

**ORDER AFFIRMING IN PART AND
REVERSING IN PART DEFENDANT'S
CONVICTIONS**

This matter is before the Court on Defendant John Godfrey's ("Defendant") appeal from his conviction on three counts following a trial before Magistrate Judge Kendall Newman (Doc. #36). With leave of the Court, The New 49'ers Legal Fund ("Amicus") filed an amicus curiae brief (Doc. #38). Oral argument was held before the Court on June 2, 2015. For the following reasons, Defendant's conviction is affirmed in part, and reversed in part.

///
///
///

I. FACTUAL AND PROCEDURAL BACKGROUND

1
2 This case arises from Defendant's gold mining operation on
3 the Lucky Bob Mining Claim in the Tahoe National Forest. Doc.
4 #32, Reporter's Transcript, Day 1 ("RT1") at 1-224. The Lucky
5 Bob claim is a placer claim, which means that gold was found
6 within gravels or sedimentary deposits, rather than in hard rock
7 or quartz. RT1 at 1-42. Because the Lucky Bob claim is
8 unpatented, the United States Forest Service retains jurisdiction
9 to manage the non-mineral surface resources on the land. RT1 at
10 1-42. During the relevant time period, Defendant had received
11 permission from the holder of the Lucky Bob claim to mine the
12 claim. RT1 at 1-224. As detailed below, Defendant took a number
13 of actions to improve land and trails on the claim. RT1 at
14 1-50 - 1-54. Defendant also installed a non-motorized hand
15 sluice, which was described at trial as follows: "A sluice box is
16 an elongated piece of metal with sides and with little partitions
17 in the lower half of the box that you run water through. And you
18 take material that's had the rocks and stones removed from it,
19 and put it in that box and let water flow over it and wash out
20 everything but hopefully heavy metals and gold." RT1 at 1-214
21 (testimony of defense witness, Larry Latta). Defendant's
22 convictions arise from his failure to comply with various
23 regulations - promulgated by the United States Secretary of
24 Agriculture and enforced by the United States Forest Service - in
25 mining the Lucky Bob claim.

26 On August 21, 2014, the Government filed a five-count
27 superseding information, which charged Defendant with five
28 federal Class B misdemeanor counts for allegedly conducting

1 various unauthorized activities on National Forest lands and for
2 causing damage to surface resources, in violation of 16 U.S.C.
3 § 551 and 36 C.F.R. § 261 et seq. Doc. #12. In Count One,
4 Defendant was charged with unauthorized cutting and damaging of
5 any timber, tree, and forest product, in violation of 36 C.F.R.
6 § 261.6(a). Id. In Count Two, Defendant was charged with
7 causing timber, trees, slash, brush, and grass to burn without a
8 permit, in violation of 36 C.F.R. § 261.5(c). Id. In Count
9 Three, Defendant was charged with damaging any natural feature or
10 property of the United States, in violation of 36 C.F.R.
11 § 261.9(a). Id. In Count Four, Defendant was charged with
12 unauthorized trail and significant surface disturbance on
13 National Forest System land, in violation of 36 C.F.R.
14 § 261.10(a). Id. Finally, in Count Five, Defendant was charged
15 with placing in or near a creek any substance which may pollute,
16 in violation of 36 C.F.R. § 261.11(c). Id.

17 On September 9-10, 2014, a two-day bench trial was held
18 before Magistrate Judge Newman. Doc. #18; Doc. #21. Acting as
19 the finder of fact, Magistrate Judge Newman found Defendant not
20 guilty of Counts One and Two, because Defendant's actions were
21 mining-related. Doc. #33, Reporter's Transcript, Day 2 ("RT2")
22 at 2-46. However, the Magistrate Judge found Defendant guilty of
23 Counts Three, Four, and Five, noting it was "not possible to look
24 at the photographs in this case and find that there was not
25 significant resource disturbance in this case, and that does
26 include the cutting of trees; the removing of bushes and brush;
27 the burning; the breaking up of boulders, and using chains and
28 using a drill to do so; the use of chemicals, whether non-toxic

1 or otherwise; the use of a hose, even if only for a few times,
2 but then to use a hydraulic method; the damming of the water.”
3 RT2 at 2-49.

4 On November 5, 2014, Defendant was sentenced to five years
5 of probation, which may terminate in three years if he complies
6 with all terms of probation, including the payment of
7 restitution. Doc. #27. Defendant was also ordered to complete
8 200 hours of unpaid community service, pay \$7,500 in restitution,
9 and pay a \$30 special assessment. Id.

10 Pursuant to 18 U.S.C. § 3402, Federal Rule of Criminal
11 Procedure 58(g)(2)(B), and Local Rule 422, Defendant now appeals
12 his convictions on Counts Three, Four, and Five.

13
14 II. OPINION

15 A. Legal Standard

16 On appeal, questions of statutory construction and statutory
17 interpretation are reviewed *de novo*. United States v. Montes-
18 Ruiz, 745 F.3d 1286, 1289 (9th Cir. 2014). As Defendant timely
19 moved for a judgment of acquittal under Federal Rule of Criminal
20 Procedure 29, the Court’s review of the denial of the motion is
21 *de novo*. United States v. French, 748 F.3d 922, 935 (9th Cir.)
22 cert. denied, 135 S. Ct. 384 (2014). As with any sufficiency of
23 evidence challenge, the Court must consider the evidence
24 presented at trial in the light most favorable to the Government.
25 Id. Thus, the ultimate inquiry for the Court is “whether this
26 evidence, so viewed, is adequate to allow any rational trier of
27 fact to find the essential elements of the crime beyond a
28 reasonable doubt.” United States v. Nevils, 598 F.3d 1158, 1164

1 (9th Cir. 2010).

2 B. Statutory and Regulatory Framework

3 The United States Mining Laws Act of 1872 reserved to
4 "locators of all mining locations" the "exclusive right of
5 possession and enjoyment of all the surface included within the
6 lines of their locations." 30 U.S.C. § 26. This "exclusive
7 right" was modified and limited by the Surface Resources and
8 Multiple Use Act of 1955, which reserved to the United States the
9 right "to manage and dispose of the vegetative surface resources
10 thereof and to manage other surface resources thereof." 30
11 U.S.C. § 612(b). However, regulations passed pursuant to the
12 Surface Resources and Multiple Use Act of 1955 may not "endanger
13 or materially interfere with prospecting, mining or processing
14 operations or uses reasonably incident thereto." Id.

15 In accordance with 30 U.S.C. § 612(b) - and pursuant to the
16 statutory authority granted in 16 U.S.C. § 551 - the Secretary of
17 Agriculture promulgated a series of regulations that prohibit
18 certain activities within the National Forest System. 36 C.F.R.
19 § 261 et seq. These regulations are qualified by the limitation
20 that "nothing in this part shall preclude activities as
21 authorized by the U.S. Mining Laws Act of 1872 as amended." 36
22 C.F.R. § 261.1(b). Consistent with this language, the Ninth
23 Circuit has upheld the Secretary of Agriculture's authority to
24 regulate mining operations in the Natural Forest System, provided
25 that such operations are not "prohibited nor so unreasonably
26 circumscribed as to amount to a prohibition." United States v.
27 Weiss, 642 F.2d 296, 299 (9th Cir. 1981). As relevant in this
28 case, the Ninth Circuit has held that the Forest Service may

1 require prospective miners to submit either a notice of intent or
2 a plan of operations for approval under 36 C.F.R. § 228.4,
3 provided that these requirements apply only to operations "which
4 might cause significant disturbance of surface resources." 36
5 C.F.R. § 228.4(a); United States v. Doremus, 888 F.2d 630, 632
6 (9th Cir. 1989).

7 As set forth in 36 C.F.R. § 228.4, "a notice of intent to
8 operate is required from any person proposing to conduct
9 operations which might cause significant disturbance of surface
10 resources." 36 C.F.R. § 228.4(a). "Operations" is defined as
11 including "[a]ll functions, work, and activities in connection
12 with prospecting, exploration, development, mining or processing
13 of mineral resources and all uses reasonably incident thereto[.]"
14 36 C.F.R. § 228.3(a). The regulations provide that "[s]uch
15 notice of intent shall be submitted to the District Ranger having
16 jurisdiction over the area in which the operations will be
17 conducted." 36 C.F.R. § 228.4(a). The regulations further
18 provide that a notice of intent to operate is not required for
19 certain activities, although these exceptions incorporate the
20 central standard of "significant surface resource disturbance."
21 36 C.F.R. § 228.4(a)(1). For example, a notice of intent to
22 operate is not required for "[p]rospecting and sampling which
23 will not cause significant surface resource disturbance and will
24 not involve removal of more than a reasonable amount of mineral
25 deposit for analysis and study which generally might include
26 searching for and occasionally removing small mineral samples or
27 specimens, gold panning, metal detecting, non-motorized hand
28 sluicing, using battery operated dry washers, and collecting of

1 mineral specimens using hand tools[.]” 36 C.F.R.
2 § 228.4(a)(1)(ii). Similarly, a notice of intent to operate is
3 not required for “[o]perations which will not involve the use of
4 mechanized earthmoving equipment, such as bulldozers or backhoes,
5 or the cutting of trees, unless those operations otherwise might
6 cause a significant disturbance of surface resources[.]” 36
7 C.F.R. 228.4(a)(1)(vi). Thus, even for these enumerated
8 “exceptions,” the central inquiry remains whether operations
9 might cause significant disturbance of surface resources.

10 As noted above, Part 261 sets forth a number of activities
11 which are prohibited within the National Forest System,
12 violations of which form the bases of the criminal charges
13 against Defendant. 36 C.F.R. § 261.1 specifically provides that
14 “Forest Officers may permit in the . . . approved [operating]
15 plan an act or omission that would otherwise be a violation” of
16 Part 261. 36 C.F.R. § 261.1a. Defendant did not however file a
17 notice of intent or a proposed plan of operations, and did not
18 obtain an approved operating plan. For these reason he was
19 prosecuted for violations of individual sections of Part 261, 36
20 C.F.R § 261.1a notwithstanding.

21 C. Discussion

22 1. Significant Disturbance of Surface Resources

23 Much of Defendant’s appeal rests on his position that his
24 operations did not cause significant disturbance of surface
25 resources. This issue requires the Court to determine whether
26 sufficient evidence was presented at trial for a rational trier
27 of fact to conclude, beyond a reasonable doubt, that Defendant’s
28 operations caused significant surface disturbance. For the

1 following reasons, the evidence was sufficient to so conclude.

2 At trial, Nichloas Shope, a law enforcement officer with the
3 U.S. Forest Service, testified that, while approaching the Lucky
4 Bob mining claim, he personally watched as Defendant "used his
5 drill [and] was drilling on rocks[.]" RT1 at 1-121. Richard
6 Weaver, a minerals and geology program manager for the U.S.
7 Forest Service, testified that he observed the following
8 conditions at the Lucky Bob mining claim: (1) "some clearing of
9 riparian vegetation"; (2) "piles of riparian vegetation, brush
10 and other vegetation that had been cut"; (3) "a pile where logs
11 and cleared brush . . . and riparian vegetation had been burned";
12 and (4) "a new trail" constructed by Defendant. RT1 at 1-50 -
13 1-54. Evidence was also introduced that Defendant cut 11 alder
14 trees, as well as one cedar tree that was already dead. RT1 at
15 1-196. Moreover, the Government introduced at trial a letter
16 submitted by Defendant to the Bureau of Land Management, in which
17 Defendant acknowledged (1) "clearing brush . . . to reopen the
18 trail"; (2) stacking and burning "three large piles of brush"
19 which "took a total of eight days"; (3) working for eight hours
20 at stacking rocks; (4) "repairing an existing trail"; and
21 (5) spending "two days removing brush and five days burning[.]"
22 Gov't Exhibit 100 at 3; RT1 at 1-211. This evidence was plainly
23 sufficient for a rational fact-finder to conclude, beyond a
24 reasonable doubt, that Defendant's operations caused significant
25 disturbance to surface resources. Even under a *de novo* standard
26 of review, which the Ninth Circuit has suggested may be
27 appropriate in determining whether a plan of operations is
28 required, the Court would - and does - reach the same conclusion:

1 Defendant's unauthorized operations caused significant
2 disturbance to surface resources. See United States v.
3 Brunskill, 792 F.2d 938, 940 (9th Cir. 1986) (noting that
4 "[w]hether a plan of operations is required is a question of law
5 reviewed *de novo*").

6 To the extent Defendant argues that his use of a non-
7 motorized hand sluice and other hand tools necessarily requires a
8 finding that he did not cause a significant disturbance of
9 surface resources, this argument is unpersuasive. In arguing
10 that "[b]oth hand tools and a non-motorized hand sluice are
11 explicitly listed as examples of activities which will not cause
12 significant surface resource disturbance," Defendant misreads 36
13 C.F.R. § 228.4(a)(1)(ii). Reply at 7. In its entirety, 36
14 C.F.R. § 228.4(a)(1)(ii) provides that a notice of intent to
15 operate is not required for "[p]rospecting and sampling which
16 will not cause significant surface resource disturbance and will
17 not involve removal of more than a reasonable amount of mineral
18 deposit for analysis and study which generally might include
19 searching for and occasionally removing small mineral samples or
20 specimens, gold panning, metal detecting, non-motorized hand
21 sluicing, using battery operated dry washers, and collecting of
22 mineral specimens using hand tools[.]" 36 C.F.R.
23 § 228.4(a)(1)(ii). By its plain terms, this language only
24 exempts those conducting prospecting and sampling *which will not*
25 *cause significant surface resource disturbance*. For the reasons
26 stated above, Defendant's operation did not meet this
27 requirement. Moreover, although this section specifically refers
28 to non-motorized hand sluicing and collecting of mineral

1 specimens using hand tools, the regulation merely notes that
2 exempted operations "might include" these activities. This is
3 far from the blanket exclusion urged by Defendant. Reply at 7.

4 Finally, this argument overlooks the cumulative effect of
5 Defendant's operations: while non-motorized hand sluicing, alone,
6 may not constitute significant surface resource disturbance, the
7 combination of each of Defendant's actions did, in fact, cause
8 significant surface resource disturbance. For this same reason,
9 Defendant's arguments regarding the breaking of rocks, and the
10 cutting of timber for clearance purposes, fail. Reply at 7. The
11 Court does not hold that these activities, in all forms, would
12 necessarily constitute significant surface resource disturbance.
13 Rather, the Court merely holds that, in this specific case,
14 considering the totality of Defendant's activity on the Lucky Bob
15 Mining Claim, Defendant's operation constituted such a
16 disturbance.

17 2. Count 3

18 In Count 3, Defendant is alleged to have violated 36 C.F.R.
19 § 261.9(a), which prohibits "[d]amaging any natural feature or
20 other property of the United States[.]" Defendant argues that
21 cutting down common trees or brush cannot sustain a conviction
22 under 36 C.F.R. § 261.9(a), because another, more specific
23 provision, in the same subsection, prohibits "[d]amaging any
24 plant that is classified as a threatened, endangered, sensitive,
25 rare, or unique species." Opening Brief at 12 (citing 36 C.F.R.
26 § 261.9(c)). Thus, Defendant argues, "natural feature" in 36
27 C.F.R. § 261.9(a) cannot be read to include common, non-
28 endangered, plants because such a reading would render 36 C.F.R.

1 § 261.9(c) mere surplusage. Id. at 13. Although not presented
2 with this exact argument, the Ninth Circuit has indicated that
3 “live green trees are a feature of nature.” Doremus, 888 F.2d at
4 635. Regardless, the Court need not reach this issue because
5 Defendant clearly damaged a “natural feature or other property of
6 the United States” by “drilling on rocks[.]” RT1 at 1-121
7 (testimony of Nicholas Shope). As Defendant “engage[d] in some
8 conduct that is clearly proscribed” by 36 C.F.R. § 261.9(a), it
9 is immaterial whether damaging common trees and brush is an
10 *additional* violation of that regulation. See Vill. of Hoffman
11 Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495
12 (1982) (“A plaintiff who engages in some conduct that is clearly
13 proscribed cannot complain of the vagueness of the law as applied
14 to the conduct of others. A court should therefore examine the
15 complainant's conduct before analyzing other hypothetical
16 applications of the law.”).

17 Defendant argues that “[w]hen the magistrate judge explained
18 his determination that Mr. Godfrey was guilty of Count Three, he
19 concluded that there had been damage to trees and brush, but did
20 not refer to the rocks.” Reply at 8-9. This argument is belied
21 by the record. In addressing the evidence “as to each individual
22 count,” the Magistrate Judge concluded that significant resource
23 disturbance had occurred, pointing, in part, to “the breaking up
24 of boulders, and using chains and using a drill to do so[.]” RT2
25 at 2-49. This factual finding was supported by the testimony of
26 Nicholas Shope (RT1 at 1-121). Defendant’s conviction on Count 3
27 is therefore affirmed.

28 //

1 3. Count 4

2 In Count 4, Defendant is alleged to have violated 36 C.F.R.
3 § 261.10, which prohibits "constructing, placing, or maintaining
4 any kind of road, trail, structure, fence, enclosure,
5 communication equipment, significant surface disturbance, or
6 other improvement on National Forest System lands or facilities
7 without a special-use authorization, contract, or approved
8 operating plan when such authorization is required." 36 C.F.R.
9 § 261.10(a). As discussed above, Defendant's mining operation
10 caused significant disturbance of surface resources. Moreover,
11 much of Defendant's activity was in service of creating a "new
12 trail" to access his mining claim. RT1 at 1-54. As Defendant's
13 unauthorized trail work constituted a significant surface
14 disturbance, and he failed to obtain an approved plan of
15 operations, this work was in violation of 36 C.F.R. § 261.10(a).
16 Accordingly, Defendant's conviction on Count 4 is affirmed.

17 4. Count 5

18 In Count 5, Defendant is alleged to have violated 36 C.F.R.
19 § 261.11, which prohibits "[p]lacing in or near a stream, lake,
20 or other water any substance which does or may pollute a stream,
21 lake, or other water[.]" 36 C.F.R. § 261.11(c). Defendant
22 argues that his conviction on this count must be reversed because
23 "[p]utting materials from the creek back into the creek does not
24 constitute the 'placing' of a 'pollutant' into the creek."
25 Opening Brief at 17. Defendant cites language from a Supreme
26 Court case concerning the Clean Water Act: "If one takes a ladle
27 of soup from a pot, lifts it above the pot, and pours it back
28 into the pot, one has not 'added' soup or anything else to the

1 pot." Opening Brief at 16-17 (citing S. Florida Water Mgmt.
2 Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 110 (2004)).
3 Defendant contends that the evidence offered at trial shows that
4 he "did not introduce pollutants such as chemicals, oils, outside
5 dirt, other liquids, or trash into Poorman Creek." Opening Brief
6 at 17. The Magistrate Judge appeared to acknowledge as much
7 during the second day of trial: "We know he was breaking up
8 rocks. We know he was pouring some chemicals, whether non-toxic
9 or otherwise, but there wasn't any evidence that I'm aware of
10 that any of those broken up rocks or chemicals ended up in the
11 creek." RT2 at 2-44 - 2-45.

12 At trial, the Government presented the testimony of Jeff
13 Huggins, a water control engineer for the Central Valley Regional
14 Water Quality Control Board in Rancho Cordova. RT1 at 1-161.
15 Huggins was accepted by the Court as an expert witness. RT1 at
16 1-163. Huggins testified that he personally observed mining
17 wastes in Poorman Creek, downstream of Defendant's mining
18 operation. RT1 at 1-171. When asked to define "mining wastes,"
19 Huggins noted that it is "a very wide definition" which includes
20 "the process fluids, the process solids, the overburden . . . the
21 sand, silts, and clays, gravels, coarser grain fraction,
22 overburden waste rock, processing fluids, processing solution."
23 RT1 at 1-174. However, Huggins did not define any of these
24 terms, and only testified that he personally observed "sands,
25 silts and clays and bottom deposits" in Poorman Creek "downstream
26 of the operation." RT1 at 1-171. Huggins further testified that
27 the location of Defendant's mining operation was "all within the
28 high water mark within the flood plain of Poorman Creek, so the

1 mining activities are being conducted within the normal high
2 water mark of Poorman Creek." RT1 at 1-170. Huggins testified
3 that both "sediment" and "mining waste" are "pollutant[s]." RT1
4 at 1-173. Of course, this final piece of testimony is a legal
5 conclusion, and does not aid the Court's ultimate analysis.

6 In finding Defendant guilty of violating 36 C.F.R.
7 § 261.11(c), the Magistrate Judge noted that Defendant's
8 operation presented "something very different" than "removing a
9 ladle of soup and putting it back in the soup pot." RT2 at 2-50.
10 The Magistrate Judge reasoned that it differed from the "one
11 ladle of soup" example:

12 "not only because of the trench, but again, the
13 government also did present expert testimony in terms
14 of the impact by the defendant here. This is not
15 someone speculating well, you've moved some small
16 amount through your mineral and we think this may be
17 harming. There is a reason why these basins to -
18 water's such a precious resource here, and when it's
19 flowing into other rivers and it's affecting usage for
20 people, farms, agriculture, habitat and while I
21 recognize water flows will vary during high water
22 months and low water, and rain and snow melt, again
23 we've been in a drought here, it is very easy looking
24 at the photographs to realize the significant impact
25 that the defendant had on Poorman's Creek through
26 damming, blocking, altering that creek."

27 RT2 at 2-52 - 2-53.

28 Accepting the evidence at trial in the light most favorable to
the Government, the Court finds that these factual findings are
supported by sufficient evidence. Specifically, Defendant's
mining operations resulted in the addition of "sands, silts and
clays and bottom deposits" into Poorman Creek downstream of the
operation. Additionally, the evidence supports the Magistrate
Judge's factual finding that these additions could have a
significant effect on larger ecosystems. See RT1 at 1-177

1 (testimony of Jeff Huggins that the "beneficial uses" of Poorman
2 Creek include "domestic and municipal water supply, agricultural
3 water supply, power supply, recreation, esthetics [sic], fish and
4 - fish and wildlife habitat, spawning").

5 However, the legal issue of whether the release of materials
6 found within the high water mark of Poorman Creek constitutes
7 "placing a pollutant" into the creek remains. As this is an
8 issue of statutory construction, the Court's review is *de novo*.
9 United States v. Montes-Ruiz, 745 F.3d 1286, 1289 (9th Cir.
10 2014).

11 As an initial matter, the structure of 36 C.F.R. § 261.11 is
12 informative. The subsection is labeled "Sanitation" and 36
13 C.F.R. § 261.11(c) is surrounded by prohibitions on
14 (1) depositing in a toilet or plumbing fixture a substance which
15 could interfere with its operation; (2) leaving refuse, debris,
16 or litter in an unsanitary condition; 3) failing to properly
17 dispose of all garbage; and (4) improperly dumping refuse,
18 debris, trash, or litter. 36 C.F.R. § 261.11(a)-(e). Thus, the
19 provisions surrounding 36 C.F.R. § 261.11(c) lend support to
20 Defendant's argument that "any substance which does or may
21 pollute" must be a foreign substance, not a substance which is
22 already found within the high water mark of the river.

23 Although "pollute" is not defined within Part 261, the
24 dictionary definition of "pollute" is instructive. See Phillips
25 v. AWH Corp., 415 F.3d 1303, 1319 (Fed. Cir. 2005) (noting that
26 "dictionaries, encyclopedias and treatises are particularly
27 useful resources to assist the court in determining the ordinary
28 and customary meanings of [relevant] terms"). The Merriam-

1 Webster Dictionary offers two definitions of "pollute:" (1) "to
2 make physically impure or unclean;" and (2) "to contaminate (an
3 environment) especially with man-made waste." As with the
4 structure of the regulation, these definitions suggest that
5 "placing any substance which does or may pollute" necessarily
6 entails the introduction of a foreign substance, possibly even a
7 man-made substance.

8 Returning to the Supreme Court's "one ladle of soup"
9 example, the Court agrees that the present case is not closely
10 analogous. S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of
11 Indians, 541 U.S. 95, 110 (2004)). Defendant did not merely
12 remove water from one location in Poorman Creek and return that
13 same water to another location in Poorman Creek. Rather, he
14 diverted the water through his mining operation, and returned it,
15 along with "sands, silts and clays and bottom deposits" to
16 Poorman Creek, downstream of his operation. However, as noted by
17 the Magistrate Judge and as emphasized now by Defendant, the
18 entire mining operation occurred beneath the high water mark of
19 Poorman Creek. Importantly, there is no evidence that any
20 foreign substance (such as a chemical) was introduced to Poorman
21 Creek. See RT2 at 2-44 - 2-45 (the Magistrate Judge, noting that
22 "there wasn't any evidence that I'm aware of that any of those
23 broken up rocks or chemicals ended up in the creek"); see also
24 RT1 at 182 (testimony of Huggins, noting that "chemicals getting
25 into the water" was "not the major concern in this case"). In
26 this sense, a more apt analogy may be that of a bowl of cereal.
27 At its low point, Poorman Creek is much like a bowl of Cheerios
28 with very little milk in it, with a number of Cherrios pieces

1 "stranded" up on the sides of the bowl. Filling the bowl with
2 milk releases those "stranded" Cherrios pieces back into the
3 milk, but nothing foreign has been added to the bowl. Similarly,
4 Defendant's operation merely released sediment that was already
5 part of the creek-bed back into the creek. As testified to by
6 Jeff Huggins, this activity may have caused a significant
7 effect on Poorman Creek and those ecosystems which rely on it.
8 RT1 at 1-177. Indeed, as discussed above, Defendant has been
9 properly convicted of causing an unauthorized significant
10 disturbance to surface resources. However, the Government's
11 evidence was insufficient to sustain Defendant's conviction under
12 36 C.F.R. § 261.11 for *polluting* the creek. Accordingly,
13 Defendant's conviction on Count 5 is reversed.

14 5. Notice

15 The New 49'ers Legal Fund ("Amicus"), as amicus curiae,
16 argues that the Forest Service's failure to give Defendant formal
17 notice of his violations runs afoul of both the regulatory
18 framework of 36 C.F.R. § 228 et seq., as well as broader
19 constitutional principles of due process. Amicus Brief at 7, 13.
20 With regard to the regulatory framework, Amicus argues that Part
21 228 places the burden on the Forest Service to conduct
22 inspections of all mining operations within the National Forest
23 System, and to give formal notice to individuals that their
24 operations are in violation of the regulations. Amicus Brief at
25 7. Because Defendant never received a formal "notice of
26 noncompliance" under 36 C.F.R. § 228.7, Amicus argues that cannot
27 be prosecuted under Part 261. Amicus Brief at 7. Practically,
28 as the Magistrate Judge observed, this approach would make little

1 sense: miners would essentially be immune from prosecution under
2 Part 261 for any mining-related activity, regardless of its
3 severity, as long as the operations were conducted before a
4 Forest Service officer learned of the violation and gave formal
5 notice. RT1 at 1-191 ("The Court:

6 . . . If he went out and clear-cut 20 acres, pushing a backhoe
7 and bulldozer, would your position be that you can't cite him for
8 that, you haven't given him a notice of non-compliance? [Defense
9 Counsel]: Yes"). Such a policy would provide little incentive
10 for prospective miners to submit either a notice of intent to
11 operate or plan for approval of mining operations, as required by
12 36 C.F.R. § 228.4(a), and would provide a perverse incentive of
13 immunity from prosecution to miners who could avoid detection by
14 the Forest Service.

15 More importantly, this argument fails because of the
16 structure of 36 C.F.R. § 228 et seq. Prior to any mention of
17 notices of noncompliance, 36 C.F.R. § 228.4(a) provides that "a
18 notice of intent to operate is required from any person proposing
19 to conduct operations which might cause significant disturbance
20 of surface resources" and that "[s]uch notice of intent shall be
21 submitted to the District Ranger having jurisdiction over the
22 area in which the operations will be conducted." In a subsequent
23 subsection, titled "Inspection, noncompliance[,]" the regulations
24 provide that "Forest Officers shall periodically inspect
25 operations to determine if the operator is complying with the
26 regulations in this part *and an approved plan of operations.*" 36
27 C.F.R. § 228.7(a) (emphasis added). The regulations go on to
28 provide that, "[i]f an operator fails to comply with the

1 regulations or *his approved plan of operations* . . . the
2 authorized officer shall serve a notice of noncompliance upon the
3 operator[.]” 36 C.F.R. § 228.7(b). Given the structure of Part
4 228, and the specific references to “an approved plan of
5 operations,” this subsection must be read as requiring periodic
6 inspections and notice of noncompliance *subsequent* to the
7 submission of a notice of intent to operate, and the receipt of
8 an approved plan of operations by the miner. As Defendant did
9 not submit the requisite notice of intent to operate, nor did he
10 obtain an approved plan of operations, 36 C.F.R. § 228.7 is not
11 applicable and the Forest Service was not obligated to provide
12 him with a notice of noncompliance prior to citing him for
13 violations of Part 261.

14 With regard to Amicus’ constitutional due process challenge,
15 the Court need not determine whether citing a miner under Part
16 261 - without giving prior actual notice that he was in danger of
17 violating the regulations - runs afoul of due process. Reply at
18 13. At trial, David Brown, a minerals administrator with the
19 Forest Service, testified that, on April 2, 2013, he received a
20 phone call from Defendant, during which he informed Defendant
21 that “he would need a plan of operations” because his mining
22 “activities might be causing significant surface disturbance and
23 that would require a plan of operations.” RT1 at 1-31. Brown
24 also testified that Defendant had informed him that he would stop
25 work at his mining site until he had contacted the appropriate
26 Forest Service personnel. RT1 at 1-32. While testifying,
27 Defendant himself acknowledged that this phone call occurred,
28 although he did not remember the substance of the conversation.

1 RT1 at 1-249. Thus, even without a formal notice of
2 noncompliance, Defendant was on actual notice that a notice of
3 intent to operate was required, and that continued operations
4 were improper. Amicus proposes an "as applied" constitutional
5 challenge, and the Court need not consider the constitutional
6 implications of a counterfactual case in which no notice was
7 provided. Acosta v. City of Costa Mesa, 718 F.3d 800, 821-22
8 (9th Cir. 2013).

9
10 III. ORDER

11 For the reasons set forth above, the Court AFFIRMS
12 Defendant's convictions on Count 3 and Count 4 and REVERSES
13 Defendant's conviction on Count 5. This matter is remanded to
14 Magistrate Judge Newman for further proceedings, including
15 reconsideration of the restitution Order entered by him on
16 November 5, 2014.

17 IT IS SO ORDERED.

18 Dated: June 4, 2015

19
20
21
22
23
24
25
26
27
28

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE