

File Code: 1570
96-04-00-0050

Date: December 13, 1996

Mr. Wilbur T. Nelson
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The Marcus Law Building
737 North 7th Street
Boise Idaho 83702-5595

Dear Mr. Nelson:

You were advised you by letter dated November 15, 1996, that the Forest Service elected to exercise discretionary review pursuant to 36 C.F.R. 251.100, of the September 12, 1996, decision by Mr. Clair Beasley, the Reviewing Officer for the Intermountain Regional Office on the June 6, 1996, appeal that you filed on behalf of Mr. Douglas L. Baker. Mr. Beasley's decision upheld an April 23, 1996, decision by Challis National Forest Supervisor George Matejko. Forest Supervisor Matejko's decision required Mr. Baker to submit a proposed modification pursuant to 36 C.F.R. 228.4(e), of Mr. Baker's approved plan of operations for the Crazy Lumberjack mining claims on the Yankee Fork Ranger District of the Challis National Forest. Forest Supervisor Matejko's decision has also been construed as prohibiting Mr. Baker from conducting operations in accordance with the approved plan of operations for the Crazy Lumberjack mining claims pending submission and approval of a modification of that plan of operations pursuant to 36 C.F.R. 228.4(e) (3).

The relief requested in your notice of appeal is reversal of the decision requiring Mr. Baker to submit a modified plan of operations for the Crazy Lumberjack mining claims. In support of that request, your notice of appeal raised three issues. The first, predicated upon your contention that Mr. Baker was not conducting operations under his approved plan of operations which resulted in unforeseen significant disturbance of surface resources, is that Forest Supervisor Matejko lacked authority to require modification of that plan under 36 C.F.R. 228.4(e). Second, you contend that the administrative record does not support the conclusion that a sump/pond provided for in Mr. Baker's approved plan of operations failed to perform as anticipated. Finally, you allege that the record does not demonstrate that diversion of Adair Creek is the only alternative available to avoid turbid groundwater from reaching the Yankee Fork River.

Your reply to Forest Supervisor Matejko's responsive statement to your notice of appeal raises two additional issues. Specifically you allege that Mr. Matejko did not make three factual findings required by 36 C.F.R. 228.4 before he ordered Mr. Baker to file a proposed modification of the plan of operations for the Crazy Lumberjack mining claims.

You also contend that the Forest Service improperly advised Mr. Baker that he could not conduct operations pursuant to his approved plan of operations because Mr. Matejko did not determine that

Mr. Baker's operations were unnecessarily or unreasonably causing irreparable injury, loss or damage to surface resources as required by 36 C.F.R. 228.4(e) (3). Your reply to Mr. Matejko's responsive statement also appears to broaden your request for relief by seeking the reversal of Mr. Matejko's purported decision prohibiting Mr. Baker from conducting operations on the Crazy Lumberjack mining claims in accordance with his approved plan of operations pending the submission and approval of a modification of that plan of operations.

The administrative record before me has been carefully reviewed and this is my decision as provided for in the discretionary review process of 36 C.F.R. 251.100.

My review has identified serious gaps in the administrative record before me. Reviewing Officer Beasley's September 12, 1996, decision relies upon ten documents in affirming Forest Supervisor Matejko's decision. Only three of those documents are included in the record which the Intermountain Region transmitted to me on October 30, 1996. The missing documents relied upon by Mr. Beasley are:

- (1) The October 21, 1993, environmental assessment analyzing the proposed plan of operations which Mr. Baker submitted on January 9, 1993;
- (2) The 1993 decision on the proposed plan of operations which Mr. Baker submitted on January 9, 1993;
- (3) Mineral Specialist's Ken Rodger's November 11, 1993, memorandum to Yankee Fork District Ranger Gregory Johnson;
- (4) PACFISH Standards and Guidelines;
- (5) A biological opinion prepared by the National Marine Fisheries Service on the Challis National Forest Land and Resources Management Plan;
- (6) A 1995 draft environmental assessment analyzing Mr. Baker's operations on the Crazy Lumberjack mining claims; and
- (7) A letter dated July 17, 1996, from Forest Supervisor Matejko to Mr. Baker.

From the record before me it can not be determined whether these documents were in the administrative record before Mr. Beasley. If they were not, his consideration of them, with the possible exception of the PACFISH Standards and Guidelines was improper (36 C.F.R. 251.99(a) . In any event, my decision can not be based on documents which are not before me.

Also the documents relied upon by Mr. Beasley which are not in the record before me are not being requested because in so doing 36 C.F.R. 251.100(d) may be violated.

Other documents in the record before me are incomplete. Your July 26, 1996, reply to the Forest Supervisor Matejko's responsive statement attached trial testimony of several individuals, including Ken Rodgers and Gregory Johnson. Pages 42 through 53 of the trial transcript of Ken Rodgers are not included in the record before me. Similarly, pages 22-25 and all pages following page 77 of the trial transcript of Gregory Johnson are not included in the record before me. We can not determine

whether these pages were in the administrative record before Reviewing Officer Beasley. Again the missing pages are not being requested for the reason stated in the preceding paragraph. It also is not clear that one document in the record before me is properly part of the administrative record for this appeal. That document is an April 5, 1996, letter from Mr. Baker to Yankee Fork District Ranger Johnson. Unless that letter was included in the administrative record compiled in the proceedings before Mr. Beasley, 36 C.F.R. 251.100(d) prohibits my consideration of it. However, since it is the responsibility of the Forest Service to maintain the administrative record for your appeal and my failure to consider this document might prejudice Mr. Baker, the April 5, 1996, letter will be considered in reaching my decision.

The most basic issues raised by the appeal are the two discussed in your reply to Forest Supervisor Matejko's responsive statement. Therefore those two issues are discussed below:

ISSUE A: Did Forest Supervisor Matejko make the three findings required by 36 C.F.R. 228.4(e) before he ordered Mr. Baker to file a proposed modification of the approved plan of operations for the Crazy Lumberjack mining claims?

RESPONSE TO ISSUE A: The regulations at 36 C.F.R. 228.4(e) clearly state the process that must be followed when the Forest Service believes that modification of an approved plan of operations might be necessary. After the authorized officer, the Yankee Fork District Ranger in this case, makes a recommendation to his immediate superior, the Challis National Forest Supervisor, the Forest Supervisor must determine: (1) "Whether all reasonable measures were taken by the authorized officer to predict the environmental impacts of the proposed operations prior to approving the operating plan"; (2) "Whether the disturbance is or probably will become of such significance as to require modification of the operating plan in order to meet the requirements for environmental protection specified in 228.8"; and (3) "Whether the disturbance can be minimized using reasonable means."

The regulations at 36 C.F.R. 228.4(e) (3) also specifically provide that "[1]acking such determination that unforeseen significant disturbance of surface resources is occurring or probable and that the disturbance can be minimized using reasonable means no operator shall be required to submit a proposed modification of an approved plan of operations."

The record before me does not demonstrate that Forest Supervisor Matejko made the three determinations required by 36 C.F.R. 228.4(e) before he ordered Mr. Baker to submit a proposed modification of his approved plan of operations for the Crazy Lumberjack mining claims.

For this reason, I reverse Reviewing Officer Beasley's decision finding that Forest Supervisor Matejko properly required Mr. Baker to submit a proposed modification of the approved plan of operations for the Crazy Lumberjack mining claims.

Issue B: Did Forest Supervisor Matejko properly prohibit Mr. Baker from conducting operations in accordance with the approved plan of operations for the Crazy Lumberjack mining claims pursuant to 36 C.F.R. 228.4(e) (3) pending submission and approval of a modification of that plan of operations?

Response to Issue B: The regulations at 36 C.F.R. 228.4(e) (3) specify the process that the Forest Service must follow in order to prohibit operations from continuing in accordance with an approved

plan of operations pending submission and approval of a modification of that plan of operations. First, there must be a decision properly requiring the operator to submit a proposed modification of the approved plan of operations assuming that the operator does not voluntarily elect to submit a proposed modification of the approved plan of operations. Next, the authorized officer's immediate superior, the Challis National Forest Supervisor in this case, must determine that "the operations are unnecessarily or unreasonably causing irreparable injury, loss or damage to surface resources" The authorized officer's immediate superior also must "advise the operator of those measures needed to avoid such damage."

Forest Supervisor Matejko's April 23, 1996, decision has been construed by the Forest Service as prohibiting Mr. Baker from conducting operations in accordance with his approved plan of operations for the Crazy Lumberjack mining claims pursuant to 36 C.F.R. 228.4(e) (3). That conclusion is disagreed with for several reasons.

First, as previously stated, one prerequisite for prohibiting operations in accordance with an approved plan of operations pending submission of a modification of that plan of operations is not present here. That prerequisite is a decision by Forest Supervisor Matejko properly requiring Mr. Baker to submit a proposed modification of the approved plan of operations for the Crazy Lumberjack mining claims since Mr. Baker declined to voluntarily submit such a proposed modification.

Even if this prerequisite was met, there is a more fundamental problem here. That problem is that Forest Supervisor Matejko's April 23, 1996, letter simply does not purport to prohibit Mr. Baker from conducting operations in accordance with the approved plan of operations for the Crazy Lumberjack mining claims pending submission and approval of a proposed modification of that plan of operations. Reviewing Officer Beasley's decision recognizes that Forest Supervisor Matejko's letter "did not contain the requisite language" However, Mr. Beasley found that Mr. Matejko's April 23, 1996, letter nonetheless was adequate by relying on a subsequent letter from Mr. Matejko to Mr. Baker dated July 17, 1996. Mr. Beasley noted that the July 17, 1996, letter "indicates that [Forest Supervisor Matejko] properly applied the criteria set forth in the regulations and intended to suspend operations at that time."

Forest Supervisor Matejko's July 17, 1996, letter to Mr. Baker can not be relied on because it is not in the record before me. Further, the administrative record before me does not demonstrate that Forest Supervisor Matejko's July 17, 1996, letter was in the record before Reviewing Officer Beasley either. For this reason alone, there is compelling reason to reverse Mr. Beasley's decision on this issue because 36 C.F.R. 251.99(a) requires that a Reviewing Officer's decision be based upon "**the appeal record** and applicable laws, regulations, orders, policies and procedures." Emphasis added. It is also worth noting that even if Forest Supervisor Matejko's July 17, 1996, letter had clearly been included in the administrative record before me and before Mr. Beasley, Forest Supervisor Matejko's April 23, 1996, decision would have been found to have improperly prohibited Mr. Baker from conducting operations pursuant to the approved plan of operations for the Crazy Lumberjack mining claims. It is not appropriate to put the burden on an operator authorized to conduct operations on a mining claim to ascertain the unexpressed intent of a letter issued by a Forest Service officer. If a Forest Service officer intends to prohibit operations in accordance with an approved plan of operations pending submission and approval of a modification of that plan pursuant to 36 C.F.R. 228.4(e) (3), fundamental fairness dictates that the officer must specifically and clearly advise the operator that the officer has made a decision to that effect. For these reasons,

Reviewing Officer Beasley's decision finding that Forest Supervisor Matejko properly prohibited Mr. Baker from conducting operations in accordance with the approved plan of operations for the Crazy Lumberjack mining claims pending the submission and approval of a modification of that plan of operations pursuant to 36 C.F.R. 228.4(e) (3) is reversed.

Remaining Issues: All three of the remaining issues presented by your appeal are factually intensive and many of the documents relied upon by Reviewing Officer Beasley in ruling on those issues are missing from the administrative record before me. In view of the major gaps in the administrative record before me, it appears that my decision on the three remaining issues would be of little moment, particularly since my resolution of the two issues discussed above provides Mr. Baker all of the relief requested by your appeal. Therefore, it is appropriate for me to decline to rule on the remaining issues raised in your appeal.

Conclusion: In summary, it is my decision to reverse Reviewing Officer Beasley's September 12, 1996, decision. Mr. Baker may ignore previous Forest Service demands that he submit a proposed modification of his approved plan of operations for the Crazy Lumberjack mining claims. Further, Mr. Baker may conduct operations on the Crazy Lumberjack mining claims in accordance with his approved plan of operations and applicable laws and regulations.

Nothing in this decision prohibits future consideration by Forest Service officers of the applicability of 36 C.F.R. 228.4(e) to Mr. Baker's operations on the Crazy Lumberjack mining claims.

In accordance with 36 C.F.R. 251.87, my decision constitutes the final administrative determination by the Department of Agriculture on this appeal.

Sincerely,

/s/ Lyle Laverty

DAVID G. UNGER
Acting Chief