

File Code: 1570-1

89-13-0135

Date: September 27, 1999

Mr. Mark Donham
RR #1, Box 308
Brookport, Illinois 62910

Dear Mr. Donham:

This is in response to your June 28, 1989, appeal of Regional Forester Floyd J. Marita's June 8, 1989, decision consenting to the issuance of a prospecting permit for lands within the Shawnee National Forest. The appeal was processed under regulations at 36 CFR 217 (as of 1989).

Background:

On June 8, 1989, Regional Forester Marita signed a Decision Memo consenting to the issuance of prospecting permit ES-37969 to explore for kaolin, a type of clay, on 598 acres in the Shawnee National Forest. The Decision Memo described this action as the first of a four-stage process which could result in mining of kaolin. The Decision Memo stated that at each stage an environmental analysis and decision document would be prepared.

You reason that because issuance of a prospecting permit is the first step in a process that could lead to mining, then prospecting and mining are "connected actions" under 40 CFR 1508.25. As a consequence, you claim the Forest Service must analyze the environmental effects of mining before consenting to the issuance of the prospecting permit. You also believe that the four-step process and the environmental effects of mining should have been disclosed to the public before the Regional Forester consented to the issuance of the prospecting permit.

Discussion:

With respect to the question of whether prospecting and mining are connected actions, I wish to point out that the prospecting permit involved would contain a stipulation reserving to the government the right to deny the permittee a preference right lease even if the permittee makes a discovery. Without a preference right lease, no mining can occur. Therefore, the government is not making an irretrievable commitment to allow mining at the time the prospecting permit is issued, and the Forest Service is not required to comprehensively analyze the environmental effects of mining prior to consenting to issuance of the permit. This is not to say that the stipulation totally eliminates the need to consider mining prior to consenting to a prospecting permit, simply that mining does not have to be analyzed in detail. If it is clearly evident when an application for a prospecting permit is being reviewed that no method of mining would be acceptable, the Forest Service should not consent to the issuance of the permit. In this case, it appears that clay mining was generally considered in the Shawnee National Forest Land and Resource

Management Plan, and found acceptable or at least worthy of site by site consideration. Based on this general consideration of mining and the use of the stipulation that nevertheless reserves the right to deny mining, the Regional Forester's decision consenting to issuance of the prospecting permit without comprehensively analyzing the reasonably foreseeable impacts of mining can be supported.

However, while eliminating the need to comprehensively analyze the impacts of mining, a stipulation simply reserving the right to deny mining has no effect on the need to analyze reasonably foreseeable environmental impacts of prospecting activities. Depending on the likely nature and scale of those activities, and the environmental setting, the potential environmental effects could be considerable.

With respect to this prospecting permit application, it does not appear the reasonably foreseeable environmental impacts of prospecting activities were adequately analyzed. A modest drilling program was given some consideration, but much more extensive activities would be possible under this largely unstipulated prospecting permit. If analyzed, these other possible activities could have resulted in an environmental assessment (EA) or even an environmental impact statement (EIS) being prepared. Instead the decision was categorically excluded from documentation in either an EA or an EIS. The categorical exclusion apparently was based on future exploration activities being subject to subsequent analysis under the National Environmental Policy Act (NEPA). While that is correct, issuance of the prospecting permit would have already committed the government to approving activities required by the permittee to make a discovery of a valuable deposit. Even if future analyses found there would be unacceptable environmental impacts, the Forest Service could not impose any new restrictions that would prevent the permittee from discovering a valuable deposit. Any restrictions having that effect would have to be imposed at the time of permit issuance through stipulations.

It also appears the categorical exclusion of the decision consenting to the issuance of the prospecting permit relied on the premise that the standards and guidelines in the Shawnee National Forest Land and Resource Management Plan would ensure protection of other forest resources and values. However, the permit would not have included a stipulation establishing those standards and guidelines as applicable to the permittee's operations. Thus, the Forest Service could not require compliance with those standards and guidelines if they would prevent activities required to discover a valuable deposit. In order for the standards and guidelines, or any other restriction, to have that effect the requirements must be made a part of the prospecting permit by means of stipulations attached to the permit.

Further, for categorical exclusion of a decision consenting to the issuance of a prospecting permit to be proper, the prospecting rights being granted would ordinarily have to be fairly restricted, and carefully described by stipulations limiting the amount, type, timing, and location of activities that could occur. In essence, the rights would have to be limited to that which had been analyzed and which had been determined to qualify for categorical exclusion. If an analysis considered the reasonably foreseeable impacts of a particular prospecting scenario, the stipulations would have to reserve the right to deny all activities beyond those in the specific scenario. If an analysis does not consider the impacts of any prospecting scenario, then stipulations would have to reserve to the government the right to deny all prospecting activities.

Finally, I agree that the public should have been more clearly informed that mining might eventually follow the issuance of the prospecting permit. However, I do not view this shortcoming as critical. Mining cannot occur unless a preference right lease is issued, and the stipulation to be included in the permit allows the government to refuse to issue a preference right lease, even if the permittee discovers a valuable kaolin deposit. Given that the prospecting permit will not irretrievably commit the government

to allowing mining, sufficient public disclosure of mining and its reasonably foreseeable environmental effects can take place in connection with the Forest Service's review of any application for a preference right lease eventually submitted by the permittee.

Decision:

Although you did not specifically challenge the Forest Service's consideration of the environmental effects of kaolin exploration in your notice of appeal, I find that the Regional Forester did not adequately consider this matter prior to consenting to the issuance of the prospecting permit. Consequently, I am reversing the Regional Forester's decision to consent to the issuance of prospecting permit ES-37969 and directing that a new decision be rendered consistent with the foregoing discussion.

This constitutes the final administrative decision of the Department of Agriculture, unless the Secretary of Agriculture elects to review it within 15 days of receipt (36 CFR 217.17(e)(3) (1989)). You shall be notified as to whether the Secretary elects to review this decision. The Secretary will not accept a notice of appeal or a petition for review of this decision (36 CFR 217.17(a)).

Sincerely,

/s/ Paul Brouha

PAUL BROUHA
Associate Deputy Chief
National Forest System

cc: Regional Forester
Forest Supervisor
Acting for Joyce Kelly
Pamela Piech - OGC
Karl Duscher
Mike Greeley

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