



United States
Department of
Agriculture

Forest
Service

Washington Office

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File Code: 1570-1/2810
Date: July 11, 2003

Sara Jane Johnson
NEC, for the Appellants
PO Box 125
Willow Creek, MT 59760

Re: appeal #03-13-00-0388 A215

Dear Ms. Johnson:

Pursuant to 36 CFR Part 215, I have reviewed the appeal record with regard to your appeal of the March 17, 2003 decision by the Regional Forester concerning the Beaverhead-Deerlodge National Forest Nicholson Mine Plan of Operation. I have also considered the written recommendations of the Appeal Reviewing Officer in respect to the disposition of your appeal. The reviewing officer's review focused on the decision documentation developed by the Regional Forester and the issues raised in your appeal.

Decision

The Reviewing Officer, based on a review of the records, found the documentation in the record to be sufficient and recommended the decision be affirmed. After my review of the appeal record, I concur with the Appeal Reviewing Officer's recommendation and I adopt and incorporate it into my decision.

My decision constitutes the final administrative determination of the Department of Agriculture.

Sincerely,

/s/ Gloria Manning
GLORIA MANNING
Appeal Deciding Officer



File Code: 1570-1/2810

Date: July 15, 2003

Route To:

Subject: Nicholson Mine Plan of Operation Appeal 03-13-00-0388 A215

To: Gloria Manning, Appeal Deciding Officer

Appellants: Sara Jane Johnson, Native Ecosystems Council, Alliance for the Wild Rockies, Mike Garrity, Janet Zimmerman, Thomas J. Elpel

I have reviewed the administrative record for the appeal of the March 17, 2003 Decision by the Regional Forester concerning the Beaverhead-Deerlodge National Forest Nicholson Mine Plan of Operation. I focused my review on the decision documentation developed by the Regional Forester in reaching his decision, issues and contentions raised in the appeal, and comments submitted by interested parties. Pursuant to 36 CFR 215.13(f)(2), this will constitute my written recommendations concerning the disposition of this appeal.

BACKGROUND

The purpose of the decision was to implement a proposed plan of operation for gold exploration on the Nicholson mining claim group. Past-approved operating plans have included exploration by drilling test holes in an existing roadbed to determine the grade and the extent of the mineralization. Mineralized bulk samples were later excavated and hauled to off-site facilities. The operator proposed the next stage of mineral exploration consisting of closing an upper adit, reclaiming 1600 feet of old road, construction of 1600 feet of new road to access his mining claims, further test drilling along the road, and the development of a new adit on private property. The operator will use the information to further determine the grade and location of additional mineralization.

RELIEF REQUESTED

The appellants request a full remand of Regional Forester Powell's decision to implement the 2003 Nicholson Mine Operating plan as defined in the 2003 DN, FONSI, and Nicholson Mine EA.

INFORMAL DISPOSITION

Pursuant to 36 CFR 215.16, an attempt was made to seek an informal disposition of the appeal. On June 3, 2003 Pat Barringer, Jefferson RD minerals staff, and Terry Sexton, Jefferson RD District Ranger, met with Janet Zimmerman and Sarah Johnson (Native Ecosystem Council) to explore opportunities for relief that would offer a possibility for a withdrawal of the appeal. The meeting concluded with no resolution on the appeal points.

ISSUES AND DISCUSSION

Issue A: The proposed project violates the NEPA, the NFMA, the APA, the ESA and the requirements identified in the Code of federal Regulations for the federal management of mining activities.

Findings: The EA adequately addresses requirements under NEPA, NFMA, APA and ESA. Based on the proposed activity, the proper range of alternatives was considered. The Nicholson EA and the preferred alternative meet the Forest Plan Management Direction for the project area. The proper level of consultation was completed with the U.S. Fish and Wildlife Service and appropriate mitigation was developed for the proposed plan of operation.

Issue A, Contention 1: (NOA, p.4) The Forest failed to complete an Environmental Impact Statement (**EIS**) to address significant, controversial and unpredictable impacts of the proposed mining operation.

Findings: The EA contains an analysis of all reasonably expected impacts from the exploration project. The analysis did not predict future speculative events. On page 5, the EA explains that mine development or production at the site is not reasonable foreseeable. The EA only analyzed what activity is reasonable foreseeable at this site. As stated on page 5 of the EA in the Decision to be Made section, if this analysis determined significant impacts may occur, an EIS would be prepared to further analyze the significant issues. The Regional Forester, who is the deciding officer, did review the EA and the public comments to the EA and concluded in his Decision Notice and Finding of No Significant Impact (FONSI) that there was no significant impact to the human environment and that a EIS was not necessary.

Issue A, Contention 2: (NOA, p.4) The Forest Service has failed to evaluate the cumulative impacts of the ongoing mining project in conjunction with connected, interrelated and indirect activities and development that have occurred in this landscape.

Findings: The EA adequately explains the various issues concerning different resources that could be impacted. The key issues are described in Chapter 3 (Affected Environment and Environmental Impacts) and the cumulative impacts from the ongoing human activities are analyzed. As explained in the EA (p.4), each specialist reviewed a list of past, present and reasonably foreseeable activities that might influence their resource, and incorporated appropriate activities into their effects analyses. The summary point of the various cumulative activities/impacts is that there are not many human activities in the analysis area.

Issue A, Contention 3: (NOA, p.5) The claims that threatened and endangered species will not be significantly affected by this continued mining activity are arbitrary and unsupported due to the lack of analysis and reasonable evaluation criteria; conclusions that the current and planned land management practices are not reducing habitat for threatened and endangered species are questionable due to a lack of analysis of direct, indirect and cumulative impacts.

Findings: See Findings under Issue A, Contention 2, 4, and 5.

Issue A, Contention 4: (NOA, p.8) The Forest Service has failed to update the Beaverhead Forest Plan to address management needs for the threatened grizzly bear, in violation of both the ESA and the NFMA.

Findings: The unique habitat of the project area does not support or provide suitable habitat for most species. The Biological Assessment (BA) and the Biological Evaluation (BE) explain the rationale for expected impacts to various Threatened, Endangered and Sensitive (TES) wildlife species. The BA states that there will be no direct affect to grizzly bears, as the mining activities would be localized and occurs in habitat generally not used by grizzly bears. The project area is

not located in a grizzly bear recovery area. The US Fish and Wildlife Service have agreed with this determination in their BO.

Issue A, Contention 5: (NOA, p.8) The Forest Service failed to complete amendments to the Forest Plan to allow for violations of Forest Plan direction for mountain goats and visual quality.

Findings: The Nicholson Mine EA identifies mountain goat habitat as a key issue and is discussed in Chapter 3 – Affected Environment and Environmental Impacts. At the end of the section titled, Consistency With the Forest Plan, is a discussion on why, with the mitigations in place to reduce human disturbance during critical goat kidding, nursery and breeding seasons, the alternatives are consistent with the Forest Plan wildlife objectives.

Issue A, Contention 6: (NOA, p.9) The Forest Service has failed in its responsibility to ensure “reasonable development” of mining resources because mitigation requirements have not been met.

Findings: Over the last 13 years, Tobacco Mountain Gold (TMG) has followed logical and appropriate steps in the exploration process. Based on the EA analyses, the Forest Service found each earlier Plan of Operation reasonable and the environmental impacts have been minimized through project design and appropriate mitigation measures. Based on the exploration and mining history of the Nicholson Mine, considering the reported value of gold removed, and also looking at more recent geological information, the Forest Service has no reason to challenge TMG’s assertion that the potential exists for a viable producing mine. The EA (pages 3 and 4, Administrative Scope) explains how the General Mining Law gives the mining proponent certain statutory rights to reasonable access and develop mineralized areas.

Issue A, Contention 7: (NOA, p.10) The Forest Service has failed to ensure reasonable development of these mining resources because the level and length of the disturbances and impacts on the environment appear to exceed the potential for mineral development of this sensitive landscape.

Findings: See Findings under Issue A, Contention 6.

Issue A, Contention 8 (NOA, p.10) The Forest Service has never looked at the entire scope of this exploration project because the NEPA analyses have been tiered to preceding reviews.

Findings: The EA discloses the past, present and reasonably foreseeable actions for each of the key issues discussed in chapter 3. On page 17 the EA discusses past mining-related projects within the roadless area. Since 1988 the Forest Service has prepared 7 NEPA documents (including the 2002 EA) for the Nicholson Mine project. Each one of these analyses did consider the cumulative impacts of the Nicholson Mine exploration activities that occurred up to that point.

Issue A, Contention 9: (NOA, p. 11) The Forest Service has failed to look at all reasonable alternatives to mineral development of the Nicholson Mine site and the surrounding landscape.

Findings: Chapter 2 (Alternatives) of the EA describes the process used in consideration and development of alternatives. Pages 10 and 11 (Alternatives Considered in Detail) explain the rationale why only one action alternative was developed. This is simply due to the fact that the small scale of the project with a specific purpose does not provide for many options. The

proposed exploration activity is the next reasonable step in determining the mineral values and the geology of the project area.

Issue B: (NOA, p.13) The Nicholson Mine project will violate the Clean Water Act.

Findings: Concerning the water quality, the EA (Issues, pages 8 and 9) discusses water quality, describing past water sampling and location of the nearest live surface water. Montana DEQ (MDEQ) has documented that no discharge to surface water was found. Discharge water, if any, will be handled through a MPDES permit from the Water Protection Bureau if the development of the adit does result in an increase in flow that reaches surface waters. Furthermore the Forest Service has worked out a water monitoring plan with MDEQ. MDEQ will also require that TMG probe-drill 20 feet ahead of the adit working face in order to determine water quantity and quality and to prevent unanticipated, and uncontrolled flows. The project does not violate the Clean Water Act.

Issue C: (NOA, p.15) The Forest Service will violate the Forest Plan, the NEPA and the NFMA if the Nicholson Mine 2003 Operating plan is implemented due to the lack of economic analysis and monitoring.

Findings: The EA adequately explains (Issues, Economic, page 9) why an economic analysis was not necessary. TMG has satisfied the Forest Service's requirement that this next stage of TMG's exploration is reasonable and represents the "next logical step" in determining minerals values in the Nicholson Mine group. The EA did not show any irretrievable commitment of resources that could be linked to other businesses.

Issue D (Note: the appeal lists this issue as C): (NOA, p.17) The agency previously determined that an environmental impact statement would be required to address impacts associated with the Nicholson Mine development.

Findings: See Findings under Issues A, Contention 1.

RECOMMENDATION

I recommend the Regional Forester's decision be affirmed.

/s/ Jack L. Craven

JACK L. CRAVEN, Appeal Reviewing Officer
Director of Lands