



File Code: 1570-1

Date: May 11, 2007

Route To: (1570 (215))

Subject: 1570 (215) - ARO Letter - OT Mining 2007 Plan of Operations DN - Beaverhead-Deerlodge NF - Native Ecosystems Council. - #07-01-00-0131

To: Appeal Deciding Officer

This is my recommendation on disposition of the appeal filed by Sara Jane Johnson, on behalf of Native Ecosystems Council, protesting the OT Mining's Plan of Operations Decision Notice (DN) signed by the Jefferson District Ranger on the Beaverhead-Deerlodge National Forest.

The District Ranger's decision adopts Alternative 3, which includes allowing OT Mining to expand its geophysical and geochemical surveys into outlying areas of the claim not previously surveyed. Up to 260 miles of survey lines are allowed in this decision, but it is expected less will be surveyed as data is acquired. OT Mining will also be allowed to drill up to 18 holes. Each drill pad typically involves less than 1/8 acre of ground. To access some of the drill sites, OT Mining will be allowed to construct approximately 14,000 feet of temporary roads, which includes the re-opening of old roads that have been reclaimed. In addition, approximately 4,000 feet of system roads will be improved. The improvements mostly address drainage problems on these existing roads. OT Mining personnel and agency administrators may use the temporary roads from May 16 through November 30 for business purposes only (i.e., no hunting, firewood gathering, or recreating is allowed). Upon completion of drilling, in most cases the temporary roads will be obliterated immediately. If the drilling is not completed until late in the year, this reclamation work may be delayed until the next summer for more favorable working conditions. Obliteration/reclamation includes recontouring the roads and pads back to the original slope and revegetating them with native grasses. These routes will be reclaimed such that no one could use vehicles on them post-operation. Drill holes will be sealed per Montana DEQ standards to prevent interaction between ground and surface water. The proposed work will be staged over a 2- to 3-year period.

The decision also includes a suite of mitigation measures listed in the DN (pp. 2 to 3). One notable mitigation measure is the temporary year-round closure of 8 miles of roads to increase habitat security during the survey period. Gates will be installed on Forest Roads 9386, 9383, and 9398, and barriers will be placed on the non-system "jeep" trail near the confluence of Dry Gulch and Lowland Creek. These roads will remain closed to the public during the 2 to 3 years that OT Mining is operating in the area. OT Mining personnel and agency administrators may use these roads from May 16 through November 30 for business purposes only. These gates and the barriers will be removed at the conclusion of OT Mining's operations.

My review was conducted pursuant to, and in accordance with, 36 CFR 215.19 to ensure the analysis and decision is in compliance with applicable laws, regulations, policy, and orders. The appeal record, including the appellant's objections and recommended changes, has been



thoroughly reviewed. Although I may not have listed each specific issue, I have considered all the issues raised in the appeal and believe they are adequately addressed below.

The appellant alleges violations of the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Endangered Species Act (ESA), the Administrative Procedures Act (APA), the Clean Water Act, the Organic Act, the Deerlodge Forest Plan, and the Deerlodge Forest Settlement Agreement. The appellant requests the DN be remanded and an EIS developed. An informal meeting was held via conference call with the appellants. No resolution of the issues was reached during the call.

ISSUE REVIEW

Issue 1. The Native Ecosystems Council requests incorporation by reference all information and issues cited in their August 17, 2006, appeal of the OT Mining 2006 Plan of Operations DN/FONSI dated June 28, 2006.

Response: The OT Mining 2006 Plan of Operations DN/FONSI dated June 2006 was withdrawn on September 8, 2006 (PF, Doc. A7-8). The appeal of that decision is moot. However, as the Forest discusses in the Response to Comments (DN, Appendix A, p. A-4), the ID team reviewed the appellant's comments and appeal points on the 2006 OT Mining EA and DN. After the 2006 decision was withdrawn, the Forest reassessed the wildlife analysis, taking into account the appellant's concerns that were brought up in the 2006 appeal. The Forest has addressed the information and issues in NEC's 2006 comments and appeal. Therefore, I will not review the previous appeal.

Issue 2. The Forest Service has violated NEPA by failing to complete an Environmental Impact Statement (EIS) prior to approving the OT Mining 2007 Plan of Operations.

Response: The Forest Service has the responsibility to ensure exploration and mining activities are conducted so as to minimize adverse environmental impacts on National Forest System surface resources (36 CFR 228, Subpart A) and that the activities are reasonably incidental to the stage of the mining operations. The regulations at 40 CFR 1501.4(c) provide for the preparation of an EA to determine whether or not to prepare an EIS. As documented in the DN and FONSI, the District Ranger determined that this project is not a major federal action with significant effects on the quality of the human environment (DN, p. 14).

Specifically, the District Ranger reviewed the EA, especially the direct, indirect, and cumulative effects of the proposed activities; the Response to Comments; and the Addendum/Erratum and made the following findings: 1) The project is limited in context; the project is localized with implications only for the immediate area; the impacts are short-term; and the actions are consistent with the Deerlodge Forest Plan; 2) no significant impacts were identified in the EA; 3) there will be no significant or unacceptable effects on public health or safety; 4) there are no cultural resource concerns; the project will not occur in wetlands or near live water; 5) there is no

scientifically significant controversy over the environmental effects of this action; 6) there are not highly uncertain, unique, or unknown risks; 7) this project does not set a precedent for future actions; 8) other known and reasonably foreseeable activities were disclosed and considered in the EA, and further clarified in the Response to Comments; 9) there are no scientific, cultural, or historical resources affected by this decision; 10) there is no critical habitat in the project area and no T&E species would be adversely affected; and 11) the project does not violate any laws or requirements imposed for the protection of the environment (DN, pp. 12 to 14). From these findings it is clear the project is not a major federal action requiring an EIS. The use of an EA for this project is in compliance with NEPA.

Issue 3. The Forest Service should have completed an EIS because substantial questions remain regarding the ability of selected mitigation measures to reduce wildlife impacts to a nonsignificant level as defined by existing conditions, and/or established management criteria for big game developed through Forest Service Research, and/or Forest Plan standards.

Response: Based on my review of the decision record, I believe the Deciding Official provided sufficient evidence and rationale to support the decision and Finding of No Significant Impact, including the appropriateness of the selected mitigation measures and the consistency of the decision with the Deerlodge Forest Plan. The District Ranger considered these contentions and provided detailed discussions of his considerations and conclusions in his DN and Finding of No Significant Impact (DN, pp. 7, 8, 9, A-19, and A-20 through A-26). The potential effects of OT Mining's proposed exploration on big game are clearly limited in both context and intensity. The selected mitigation, while limited in effectiveness, as fully disclosed in the EA and DN/FONSI, is reasonable commensurate with the effects being mitigated.

Elk populations on the Forest are stable or increasing, and are very near the 2005 State Elk Management Plan objectives. The elk numbers within and around the project area (Hunting District 318) have also been relatively stable (EA, Addendum/Erratum; and PF, Doc. C2-10). While population numbers in the project area are below State objectives, they are largely influenced by factors wholly within State control (EA, pp. 62, A-53, and EA Addendum/Erratum). The project wildlife biologist determined the project is "not likely to influence the physical capacity (the forage base and degree of security provided by vegetation) of the forest/range resource to support viable populations of commonly hunted species in the project or cumulative effects analysis area" (EA, pp. 62 and A-53) and the "anticipated cumulative effects to elk...when combined with other past, present, and reasonably foreseeable future actions are negligible" (EA, Addendum/Erratum, p. 4; and PF, Doc. BB2-2).

The project is consistent with the 1987 Forest Plan. Findings relative to wildlife/big game related standards are discussed in the EA (pp. 65 and 66) and further elaborated on in response to specific public and agency comments in the DN (pp. 10, A-18 to A-21, and A-24 to A-26).

The road closure and related mitigations provide limited, but adequate, local benefits and protections for big game animals and habitat, the decision is consistent with the DNF Forest Plan, and the Finding of No Significant Impact is supported by the record. The use of an EA is in compliance with NEPA.

Issue 4. The Forest Service should have completed an EIS because even though the most suitable nesting areas for goshawk have been identified, these areas are not protected during the critical nesting period from disturbances during exploration activities.

Response: Habitat modeling and field reviews identified two areas in the project implementation area that provide potential goshawk nesting opportunities (EA, pp. 43 and 45). However, no proposed access roads or drill sites fall within these potential nesting habitat blocks (EA, p. 45); with the nearest proposed drill site being 0.75 miles away from this potential nesting habitat. The EA determines the disturbance from this distance would be negligible (p. 45). Each of the proposed drill sites is reviewed by a wildlife biologist; no nests have been identified at or in the general vicinity of the proposed drill sites or the access roads (DN, Appendix A, Response to Comments, p. A-28).

The EA states there is the potential that the geogrid survey, while a short term disturbance in any specific location, may occur near a nest tree or in an active territory (p. 45). However, if a nest territory is found during the geogrid survey, the goshawk mitigation discussed in the DN as part of the proposed action (p. 2) would be implemented: 1) activities within 100 yards of the nest will halt; 2) the Forest Service would be notified of the find; 3) a 40-acre no-activity buffer would be established around the nest and would remain in effect until after August 15.

The Beaverhead-Deerlodge National Forest conducted a Forest-wide analysis of available habitat for the northern goshawk in April 2003. The analysis determined that habitat for the northern goshawk is well distributed across the forested landscape of the BDNF (EA, p. 47). Likewise analyses of goshawk habitat have been conducted for the Northern Region of the Forest Service (EA, pp. 47 and 48). Based on the best available habitat information, suitable habitat is well distributed across the landscape for northern goshawk (EA, p. 48). With the small amount of vegetation that would be disturbed and the short amount of time any specific location would be visited during the geogrid survey, the wildlife biologist determined the project may impact individual goshawk and their habitat but will not likely result in a trend toward federal listing or reduce the viability of the goshawk population or the species (EA, p. 48). The impact to goshawk is not significant, and the use of an EA rather than an EIS is in compliance with NEPA.

Issue 5. Ongoing cumulative impacts on big game winter range within the analysis area were ignored simply because these impacts occur outside the activity period when mineral exploration is occurring.

Response: Potential effects of the proposal on big game winter range were specifically considered, addressed, and disclosed in the proposed action, EA, Biological Evaluation, and the Response to Comments. The District Ranger recognized the proposed activities would occur within big game winter range, which was identified using current winter range maps (EA p. 62; PF, Doc. BB2-2, p. 52). The proposal and decision mitigate the bulk of potential effects of the proposal simply by requiring that exploration activities occur only outside the winter season (EA,

p. 16; DN, p. 2). The EA summarizes the resulting impacts and concludes the project is not likely to influence the physical capacity (forage base and degree of security provided by vegetation) to support wildlife populations of commonly hunted species (EA, p. 62; DN, pp. 5 and A-17). Additionally, the 8 miles of year long road closure should reduce snowmobile use in those areas most recently delineated as winter range by the Montana Fish, Wildlife, and Parks (DN, pp. 5, A-16 to A-18; and PF, Doc. BB2-2, p. 52). The findings clearly support the Finding of No Significant Impact. The Forest does recognize that there are ongoing travel management / winter range concerns not connected to this proposal, and are taking appropriate measures to address those concerns (DN, pp. 5, 6, and 8; EA, pp. 5, 17, and 18; and PF, Doc. BB2-2, p. 52)

Issue 6. The significant cumulative impacts of ongoing exploration activity, as well as the potential for future mine development in this landscape, were never addressed in the EA.

Response: I have reviewed the decision documentation and believe the Forest thoroughly considered potential cumulative effects of the decision and appropriately described and disclosed those effects commensurate with their potential significance (DN and FONSI, pp. 4 to 9, 12 to 13, and Appendix A, pp. 5, 6 to 7, and 26 to 28; EA, pp. 2 to 9, 20, and 26 to 93; EA Addendum/Errata). The EA, intended to be a concise document (40 CFR 1508.9), provides an extensive summary of potentially cumulative past, present, and reasonably foreseeable actions (EA, pp. 2 to 9, 18, 22 to 25, 27-37, and EA Addendum/Errata, pp. 3 to 4). These discussions are based on an even more detailed inventory and evaluation in the project record (for example PF, Docs. BB1-6; BB1-7; BB1-9; BB2-2, pp. 3 to 13 and 67-72; BB2-9; and BB2-10). I would also note that the location and effects of the more recent past and ongoing actions have been analyzed and disclosed in previous NEPA decisions, and monitoring of those actions was used effectively in this analysis to refine and perfect the cumulative effects predictions presented here (see, for example, the discussion of the soil mitigation in PF, Doc. A6-2, p. A-37). The District Ranger provided logical rationale for determining what actions are reasonably foreseeable (for example EA, pp. 6 to 9, and 24 to 25; and DN, p. 9). The Ranger appropriately dismissed future mine development as speculative and inappropriate to consider as “reasonably foreseeable” at this time (DN, p. 9).

Issue 7. The agency failed to consider an adequate range of alternatives that would address public concerns and that would better mitigate environmental impacts on wildlife.

Response: The regulations at 40 CFR 1508.9(b) require the alternatives in an EA be developed as required by section 102(2)(E) of the Act. Section 102(2)(E) requires *appropriate* alternatives be studied, developed, and described. The courts have established that this does not mean every conceivable alternative must be considered, but that selection and discussion of alternatives must permit a reasoned choice, and foster informed decision making and informed public participation.

As stated in the Scope of the Proposed Action in Chapter 1, the main function of the Forest Service is to administer regulations designed to protect the surface resources of the project area through appropriate mitigation measures while allowing the minerals developer to exercise their rights under the mining laws to meet their objectives (purpose and need), thus the range of

alternatives are limited (EA, p. 12). Chapter II of the EA describes how comments received from the public were used to identify issues and develop alternatives. The EA describes three alternatives analyzed in detail. In addition, two alternatives specifically suggested during scoping were considered, but not analyzed in detail (EA, pp. 17 to 18).

Establishing the purpose and need of a project, and how narrow or all encompassing it is, is up to the discretion of the responsible official. The purpose and need and the range of alternatives is in compliance with NEPA.

Issue 8. The agency has violated ESA by failing to address impacts on the threatened Canada lynx.

Response: Based on the results of the National Lynx Survey (PF, Doc. BB2-8) the Beaverhead-Deerlodge National Forest is not considered occupied by Canada lynx. The U.S. Fish & Wildlife Service, Montana Field Office (FWS), removed Canada lynx from the Beaverhead-Deerlodge National Forest list of threatened and endangered species in July 2006 (PF, Doc. BB2-6). Consistent with the Canada Lynx Conservation Agreement direction (PF, Docs. BB2-7 and 7a), the two agencies need not consult on actions that would occur in unoccupied areas. The project is in compliance with ESA.

I would also like to point out that the Forest did, in fact, consult with the FWS on impacts to lynx from this project in February 2006 prior to lynx being removed from the Forest's list of threatened and endangered species (PF, Doc. B5-1). The wildlife biologist pointed out that lynx have not been found in the Boulder Mountains since the mid 1980s (p. 10), and determined this project may affect a small amount of lynx habitat but is not likely to adversely affect lynx. The FWS concurred with the determination and stated the project's "effects on Canada lynx would be insignificant" (PF, Doc. B5-2).

In her appeal (pp. 17 and 18), the appellant points to two situations she feels would have the potential to impact lynx: the high open-road density in the area and high winter recreational use. These are existing conditions, not results of the OT Mining project. As the EA discusses in the wildlife report (Appendix A: Wildlife, p. A-54), the chosen alternative would temporarily close 8 miles of roads, thereby increasing the overall habitat security in the cumulative effects area. All temporary roads produced by the project will be closed to the public, and restored after use. If the temporary roads are left over winter the entrances would be closed to prevent public use, including use by snowmobiles (DN, pp. 2 to 3). The DN (p. 2) also states that no exploration activities will take place from December 1 to May 15. This winter period is the time of highest stress for animals, including lynx. It is clear the project has mitigated for the activities the appellant is concerned about. The appellant does not point to any concerns about impacts to lynx from the project-generated core drilling or geo-surveys themselves.

The ID team also responded to the one comment from the public about lynx that was made during the comment period (DN, Appendix A, pp. A-30 to A-31). The project is in compliance with NEPA, as far as the lynx analysis is concerned.

RECOMMENDATION

I have reviewed the record for each of the contentions addressed above and have found that the analysis and decision adequately address the issues raised by the appellant. I recommend the District Ranger's decision be affirmed and the appellant's requested relief be denied.

/s/ Paul Bradford
PAUL BRADFORD
Appeal Reviewing Officer

cc:
Forest Coordinator
Responsible Official