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Subject: 1570 (215) - ARO Letter - OT Mining 2007 Plan of Operations DN - Beaverhead-Deerlodge NF - Alliance for the Wild Rockies - #07-01-00-0132

To: Appeal Deciding Officer

This is my recommendation on disposition of the appeal filed by Michael Garrity, on behalf of Alliance for the Wild Rockies, protesting 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 drill 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, mostly addressing drainage problems on these existing roads. OT Mining personnel and agency administrators may use these 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 important 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 Deer Forest Settlement Agreement. The appellant requests the EA, DN, and FONSI be withdrawn or remanded. An informal meeting was held via conference call with the appellants. No resolution of the issues was reached during the conference call.

ISSUE REVIEW

Issue 1. The EA and the DN and FONSI did not consider an alternative that does not allow additional mineral extraction in violation of NEPA.

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 direction 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). Two alternatives, including this one, were suggested during scoping. Each alternative was considered but not analyzed in detail (EA, pp. 17 to 18). In addition, the No Action Alternative was also analyzed as required under NEPA. As pointed out in the EA (p. 17), the No Action Alternative does address this request from the public.

An alternative that does not allow additional mineral extraction is not viable because it would not meet the purpose and need of the proposal, and is not consistent with federal law. The United States mining laws (30 U.S.C. 21-54) confer statutory rights to enter upon federal lands to search for minerals, unless the Secretary of the Department of the Interior withdraws the land. The Forest Service has an obligation to process Plans of Operations for mineral exploration. The Forest Service can apply reasonable mitigation measures to minimize potential adverse effects, but cannot prohibit mineral exploration and development on federal land that is open to mineral entry under the mining laws.

Issue 2. The environmental analysis does not adequately consider cumulative effects.

Response: I have reviewed the decision documentation and believe the District 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, and 12 to 13, Appendix A, pp. 5 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, and 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, BB1-6, BB1-7, BB1-9, and BB2-2, pp. 3 to 13 and 67 to 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 7, 8 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 3. On August 7th, The U.S. Forest Service was required by federal Magistrate Judge Paul Papak to enjoin gold mining activity in the North Fork Burnt River watershed in eastern Oregon. The Forest Service had unlawfully approved the mining in 2004 in violation of the Clean Water Act. The court held that the Forest Service may not ignore or defer its responsibility to remedy existing water pollution "based on a misguided notion that the right to mine trumps federal and state law." A similar situation is occurring here.

Response: There is no similarity between the North Fork Burnt River Mining Project and the OT Mining 2007 Plan of Operations project. The North Fork Burnt River Mining Project included placer mining, suction dredge mining, and lode mining. The OT Mining 2007 Plan of Operations EA included activities associated with mineral *exploration*, not mining operations (EA, pp. 13 to 17). In addition, the OT Mining Plan of Operations did not include mineral exploration activities in a stream bed (DN, Appendix A, pp. 12 to 13). The project and analysis are in compliance with the CWA (EA, p. 71).

Issue 4. The impacts of the project on the area's hydrology should have been analyzed. The FS needs to wait on granting additional mineral exploration until the TMDL is completed since the source of the water pollution is past mining. The DN and FONSI are therefore in violation of the CWA, NEPA, NFMA, the Organic Act, and the APA.

Response: The analysis presented in the EA (pp. 67 to 71) discussed the direct, indirect, and cumulative effects for the watershed resource and concluded that the project will not impact water quality. Due to the distance to live water (at least 1000 feet), the potential for sediment delivery is extremely low and no indirect effects are expected (EA, p. 70).

The action alternatives of exploring for minerals will not result in copper, mercury, or other heavy metals entering the water. The watershed analysis does not show any sediment or contaminants entering streams potentially affected by the actions. The 2006 303(d) list of impaired waters indicates Lowland Creek is water quality-limited due to channelization, dredge mining, and dredging. Boulder River is water quality limited due to acid mine drainage (EA, p. 68). The proposed activities in this project do not pose any threat of acid mine drainage or other habitat alterations related to dredge mining or dredging. Thus this proposal meets the requirements for management actions within a TMDL watershed. The project and analysis are in compliance with the CWA, NEPA, NFMA, Organic Act, and APA.

Issue 5. Fish populations in streams within the analysis area and downstream were not thoroughly analyzed, including the effects of erosion, sedimentation, and chemical contamination of surface waters.

Response: The analysis for fisheries and other aquatic organisms is contained in the EA (pp. 80 to 91). As discussed in the Response to Comments (DN, Appendix A, p. A-2), the Forest hydrologist concluded the project would not adversely affect water quality. The proposed activities are located far enough from any streams or wetland that sediment and other potential contaminants could **not** be delivered into them. Since there will not be any increase in sediment loads or decreased water quality, there would not be any impact to fish populations from this project. Based on potential impacts the analysis is adequate and is in compliance with NEPA, CWA, and ESA.

Issue 6. The Forest Service violated NFMA by not thoroughly analyzing the project's affects on soil productivity and soil compaction.

Issue 6, Contention 1: Site and soil productivity are not maintained by taking actions like those approved by the OT Mining Plan of Operations DN and FONSI. "Temporary" road construction and drilling would essentially permanently reduce the productivity of the soil. The Response to Comments (EA, p. A-11) states, "Most soil effects will cease when disturbed areas are obliterated and revegetated after drilling is finished. Slight productivity reductions may linger after restoration but they are expected to be temporary and limited in extent." This statement is arbitrary and a violation of NFMA, NEPA and the APA.

Response: All roads and drill pads will be reclaimed. This is discussed in the EA (p. 70) and in the Response to Comments (DN, Appendix A, p. A-8). In the last few years, OT Mining has used roads and drill pads in a similar manner in the same area. The restoration of them has been monitored and found to be satisfactory. Pictures of the reclaimed sites are found in the EA (pp. 90 and 91).

The mitigation measures were effective in protecting the soil productivity. A synopsis of the reclamation is located in the project file (Doc. A6-2, Appendix A, Response to Comments, p. A-37), which states:

"There is on-site evidence of [restoration] effectiveness. The temporary roads built in the 1970s for earlier exploration access were reclaimed with good results. Where the roads went through grasslands, one can often not even see the difference between the reclaimed road bed and the undisturbed ground. Where it goes through timber, tree seedlings are re-establishing themselves on the reclaimed road bed. More recently, OT Mining has reclaimed its 2004 drill sites and temporary roads and some of the 2005 drill sites/roads. A field review by the ID team of the reclamation efforts has shown that the reclamation is as prescribed and has the desired outcome. These same practices will be applied in the ongoing exploration Plan of Operation."

Issue 6, Contention 2: The Forest Plan Soil and Water monitoring item 3 requires the FS to monitor "productivity changes in sensitive soils" using "field examinations and

laboratory testing” to look for “when changes of baseline levels of the soil’s chemical and physical properties exceed 20% as determined by lab analysis.”

Response: As discussed in the Response to Comments (DN, Appendix A, p. A-11), no drill sites or temporary roads are located on soils with a high hazard rating (EA, Tables 12, 13, 14, and 15, pp. 73, 75, 77, and 78), which means no highly sensitive soils will be affected by this project. Forest Plan monitoring item 3 does not have a bearing on this project.

Issue 6, Contention 3: In order to comply with NFMA, the Forest adopted the Northern Region’s Soil Quality Standards (FSM 2500-99-1). The Standards are clear—the DNF must measure the amount of detrimentally disturbed soil for past or ongoing logging, grazing, mining, off-road vehicle use, etc. in logically bounded Activity Area—especially if the soils in those disturbed sites would be further disturbed by proposed project activities.

Response: There is ample information provided in the EA and associated documents on the soil and vegetative health (i.e., productivity) of the study area. Mitigation measures are listed in the DN (p. 3). The EA (pp. 71 to 80) describes each drill site and management considerations. The EA (pp. 22 to 25) describes cumulative effects from past, present, and reasonable foreseeable activities. Because the activities proposed will be completely reclaimed, no or very minimal cumulative effect on the watershed is anticipated.

It is clear from reading the monitoring section of the Soil Quality Standards the standards are intended to be applied to vegetation management projects such as timber harvest, grazing, and wildlife projects. The standards do not apply to intensively developed sites such as mines (p. 3). Drill sites are not mines, but they are intensively developed sites, and certainly not a vegetation management project. The Soils Quality Standards, therefore, do not apply in this situation. Nevertheless, we are well within the 15 percent limit of detrimentally-disturbed soil. The amount of disturbance for the OT mining project was determined to be a total of 9 acres (EA, p. 79). The project implementation boundary is 7,242 acres (Addendum/Erratum attached to DN). Therefore, the amount of disturbed soil from this project amounts to less than 13 hundredths of one percent of the area.

Soil health is monitored by the Forest. Narratives provided in the Forest Plan Monitoring documents (PF, Docs. C2-8 and C2-9) describe quantitative tests using a penetrometer to ascertain the effects of heavy equipment and/or grazing on the forest floor with regard to compaction. The effects of logging on vegetative health are provided in the project file (Doc. BB1-6). These tests contribute to the overall knowledge of the condition of the soil and confirm visual assessments made by the soil scientist. The project is in compliance with NFMA.

Issue 7. The FS should have considered whether this activity would impact any T&E species, MIS, or their habitat. Impacts to biological communities, rare plants, alpine plants, and other plant species of concern should be considered.

Response: I have reviewed the decision record and found that the OT Mining 2007 Plan of Operation’s decision and Finding of No Significant Impact are based on, and supported by, a thorough evaluation of potential impacts to wildlife and plant species. These potential impacts

are appropriately discussed and disclosed in the Environmental Assessment (EA, pp. 20, 25 to 66, and 80 to 91) and are supported by the project record. Biological Assessments and Biological Evaluations were completed for the appropriate threatened, endangered, sensitive, and management indicator species (PF, Docs. BB2-2, BB2-3, BB2-4, BB2-5, BB3-3, and BB3-6).

Issue 8. The fact that continued implementation of the Forest Plan constitutes a “taking” of the lynx is not disclosed in the EA. Such taking can only be authorized with an incidental take statement, issued as part of a BO during Section 7 consultation. The analysis must incorporate terms and conditions from a programmatic BO into a FP amendment or revision before projects affecting lynx habitat, such as the 2006 OT Mining POO, can be authorized.

Response: The ID team responded to this comment from the appellant about lynx in the Response to Comments (DN, Appendix A, pp. A-30 to A-31). 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 BB2-the7a), 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 in February 2006 prior to it 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).

Issue 9. Unroaded areas and Roadless Areas

Response: The EA (p. 16) documents that no activities would occur in any Roadless Areas. The analysis guidelines described in the Forest Plan (p. II-31) for roads was followed for the OT Mining Exploration proposal. The pre-exploration miles of open road would be compared to the post-exploration miles of open road, the result being no net change in open- road density (EA, p. 31).

The EA (p. 31) discusses 10 of the 18 proposed drill sites are located on or immediately adjacent to an existing open road or restricted road prism. The indirect effects of the activities associated with each of the alternatives, wildlife species would not be expected to be displaced out of the area (EA, p. 35), and thus corridors or linkages between Roadless Areas would not be affected.

Issue 10. We requested a thorough economic analysis of the project and an analysis showing that the bond posted by OT Mining is adequate. This was not done in violation of NEPA, NFMA, the Organic Act, the APA, and the Forest Plan. Losses in ecosystem integrity (including species, ability to provide ecosystem services, and levels of biodiversity in the project area) should be incorporated in the economic analysis.

Response: The purpose of the exploration work is to determine whether minerals occur in economic concentrations. The determination as to whether an ore body exists would be the responsibility of OT Mining personnel. A thorough economic analysis is not possible until exploration is completed (EA, p. 5). The EA (p. 16) indicates OT Mining would maintain a bond with the State of Montana Department of Environmental Quality, adequate to fully cover all costs for reclamation of the resulting disturbances. The State of Montana Department of Environmental Quality calculates bond coverage amounts.

Maximizing net public benefit refers to Regional- or Forest-wide economic analysis, which is not within the scope of this decision. The EA does not address the economic benefits that mine operations provide. The EA focuses on the surface resources, as this is the Forest Service's primary responsibility when evaluating the Plan of Operations. Project-level economic analysis does not require that non-commodity economic values be addressed. "Weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations" (40 CFR 1502.23). The NEPA process shall be used "...to emphasize real environmental issues and alternatives" [40 CFR 1500.2(b)]. Further more, the purpose of an EA is to determine whether an EIS is necessary (40 CFR 1508.9). The economic effects of a project, in themselves, are not intended to require preparation of an EIS (40 CFR 1508.14).

The 1897 Organic Act authorized the Secretary of Interior (now, the Secretary of Agriculture) to manage the forest reserves and to regulate mining activities. At 16 U.S.C. 479, the Act states, "Nor shall anything herein prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Such persons must comply with the rules and regulations covering such national forests" (EA, p. 2). The 1897 Organic Act, therefore, provides a means of regulating and authorizing prospecting and exploration activities in search of mineral resources, as well as development activities after mineral resources have been found. By their very nature, the mining activity stages of prospecting, exploration, and development all include digging some type of hole in the ground (tunnels, shafts, pits, trenches, drill holes, etc.) and placing the rock material that came out of the hole somewhere on the surface. The project and analysis are in compliance with the NEPA, NFMA, Organic Act, APA, and the Forest Plan.

Issue 11. The Deerlodge NF is not meeting the economic monitoring requirements of NFMA and the Forest Plan; therefore, any economic statements in the EA are arbitrary.

Response: Monitoring as required by the Forest Plan relates to monitoring at the Forest-wide level, and is not required on every project. The monitoring requirements are found in the Land and Resource Management Plan (Figure V-1, pp. V-4 through V-17). As required by the Forest Plan, this monitoring is being conducted and the results of the Forest Plan monitoring is reported in the yearly Monitoring and Evaluation reports. The project file contains the most recent report (PF, Volume C, Doc C2-10, pp. 44 to 47), which indicates the Forest is conducting the Forest Plan mandated monitoring of economics as required in the Forest Plan. The Forest Plan monitoring requirements for economics are applicable to timber sales not mining proposal by third parties.

A response was provided to the contention that the GAO found the Forest Service's accounting data were not reliable (PF, Doc. A6-2, pp. A6-A7). Since the release of the January 2001 report, the Forest Service has received clean audit reviews. The Forest Service is funded through Congress and obligated to process and administer all mineral Plans of Operations submitted by mineral proponents. The project and analysis are in compliance with the NFMA, and the Forest Plan.

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