



File Code: 1570 (215)

Date: October 11, 2000

Route To:

Subject: Lodestar Mining and Exploration DN, Appeal #00-01-00-0113, Gallatin NF

To: Appeal Deciding Officer

This is my recommendation on disposition of the appeal filed by Roger Flynn, Jeffrey C. Parsons, and Michael Reisner on behalf of the Cottonwood Resource Council and the Northern Plains Resource Council protesting the Lodestar Mining and Exploration Decision Notice (DN) signed by the Big Timber District Ranger, Gallatin National Forest.

The District Ranger's decision provides for Lodestar Mining and Exploration to develop two adits, construct 3,300 feet of temporary ATV road, construct a loading facility, and haul ore. Total disturbance on National Forest lands will be less than 1 acre. Operations will occur seasonally, from April 1 – December 31, over a 6-year time period.

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

The Appellants allege violations of the Mining Law of 1872, Federal and State Environmental laws, the National Environmental Policy Act (NEPA), and the National Forest Management Act (NFMA). The Appellants request a remand of the DN. An informal meeting was held but no resolution of the issues was reached.

ISSUE REVIEW

ISSUE I. The Lodestar Plan of Operations, and thus the Forest Service Decision approving that plan, does not comply with the Mining Law of 1872.

Contention A. The Forest Service cannot approve a mining plan of operations absent evidence in the record supporting the validity of claims.

Response: 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." 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 1955 Surface Resources Act, also known as the Multiple Use Mining Act and Public Law 167, (30 USC 612) gave additional authority to the Forest Service to regulate these activities. Among other things, it provided that mining claims shall not be used prior to issuance of patent for any purposes other than prospecting, mining or processing operations, and uses reasonably incident thereto.

The courts have repeatedly confirmed Forest Service authority based on the 1897 and 1955 Acts to reasonably regulate prospecting, exploration, development, and other mining activities and uses reasonably incidental to these activities. *U.S. v. Richardson*, 599 F.2d 290 (9th Cir. 1979); *U.S. v. Doremus*, 888 F.2d 630 (9th Cir. 1989). However, in *U.S. v. Weiss*, 642 F. 2d 296 (9th Cir. 1981), the Court also cautioned there are limits to Forest Service authority: “While prospecting, locating, and developing of mineral resources in the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition, the Secretary (of Agriculture) may adopt reasonable rules and regulations which do not impermissibly encroach upon the right to the use and enjoyment of placer claims for mining purposes.”

Long standing case law confirms an operator’s rights to go on the public lands for prospecting, exploration, and other locatable mineral operations, and that as a practical matter, necessary occupation and use of the public lands is part of these operations. These cases include *Union Oil Co. V. Smith*, 249 U.S. 337, 346 (1919). In that decision, the U.S. Supreme Court held that 30 U.S.C. 22:

. . . extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits, and this and the following sections hold out to one who succeeds in making discovery the promise of a full reward. Those who, being qualified, proceed in good faith to make such explorations and enter peaceably upon vacant lands of the United States for that purpose are not treated as mere trespassers, but as licensees or tenants at will. For since, as a practical matter, exploration must precede the discovery of minerals and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of pedis possessio of a bona fide and qualified prospector is universally regarded as a necessity. (Emphasis in original.)

The law provides that discovery of a valuable mineral deposit within the limits of a mining claim located on public lands in conformance with state and Federal statutes validates the claim and the locator acquires an exclusive possessory interest in the claim that may be asserted against the U.S. as well as third parties. Prior to discovery under the mining law, the doctrine of pedis possessio applies. That is, as long as a miner is actively seeking a discovery, a mining claim will hold against adverse locators or the general public, although such a claim would not constitute a possessory right against the U.S., who would continue to hold superior title (Maley, 1994). However, in order to prospect, explore, and make a discovery of a valuable mineral deposit or establish valid mining claims, miners have a right under both the 1897 Organic Act and 1872 Mining Law to enter upon national forests and to conduct upon those lands reasonable activities to prospect and explore for mineral resources (30 U.S.C. 22, 16 U.S.C. 479, 30 U.S.C. 612). See also *Davis v. Nelson*, 329 F.2d 840 (9th Cir. 1964).

That miners have some rights to conduct reasonably necessary excavations and disturbances even prior to making a discovery is also supported by the fact that the mining law at 30 U.S.C. 27 even specifically provided miners one means of conducting exclusive exploration prior to staking any mining claims. By staking a tunnel site, the locator obtains the exclusive right to drive a tunnel, prospect 3,000 feet along the line of the tunnel, and through the subsequent staking of lode mining claims, to obtain a possessory right to 1,500 feet of any blind lodes cut, discovered, or intersected by the tunnel. The tunnel site provision would be meaningless if it did not include the right to use unclaimed national forest surface in order to drive the tunnel and store the resulting excavated rock material.

The statutory language in the 1897 Organic Act and the 1955 Surface Resources Act, as well as the 1872 Mining Law, demonstrates these laws recognized that mining progresses through several logical stages which may include prospecting, exploration, development, production, and reclamation and abandonment. Some of these terms referring to the different stages that mining operations may progress through have been defined in case law (Maley, 1994):

In *U.S. v. New Mexico Mines, Inc.*, 3 IBLA 101 (1971), the Board offered the following definitions for "exploration," "discovery" and "development":

"Exploration," within this context, is the process of searching for a valuable mineral deposit. The finding of mineralization of sufficient value to encourage further exploration does not successfully conclude the exploratory process or constitute a discovery.

"Discovery," to paraphrase the definition in *Castle v. Womble*, occurs upon the finding of a mineral deposit revealed to be of sufficient qualitative and quantitative value to warrant the expenditure of effort to develop a mine in the reasonable anticipation that a profitable mining operation will result.

"Development" refers to the physical work incident to the excavation of a mine for the extraction of the mineral values discovered. After discovery, certain exploratory activities incident to the actual production of the minerals are regarded as "development" rather than as "exploration." These would include the blocking out of the orebody, testing for engineering feasibility, determining the strike and dip of the vein beyond the extent of the qualifying knowledge, and related activities.

In *U.S. v. Lundy*, A-30724 (June 30, 1967), specific examples of exploration work are discussed by the Secretary of Interior:

There is a clear distinction between "exploration" and "development" as they relate to discovery under the mining laws. The separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work includes such activities as geophysical or geochemical prospecting, diamond drilling, sinking an exploratory shaft or driving an exploratory adit. It is that work which is done prior to a discovery in an effort to determine whether the

land is valuable for minerals. When inherently valuable minerals are found, it is often necessary to do further exploratory work to determine whether a valuable mineral deposit exists, i.e., whether the minerals exist in such quality and quantity that there is a reasonable prospect of success in developing a paying mine.

A comprehensive discussion and definition of all stages of mining activities and the related nature and extent of the mineral resource identified at each stage can also be found in the Forest Service publication, "Anatomy of a Mine from Prospect to Production" (Rev. 1995) and Forest Service Manual R1 Supplement 2800-92-2.

The facts in the Lodestar situation are very different than in the Crown Jewel case cited by appellants. Regardless, application of the Forest Service regulations in 36 CFR 228, Subpart A, to all of the activities in Lodestar's proposal is appropriate and consistent with the March 25, 1999, Crown Jewel letter that appellants reference. The regulations recognize an operator's right of access and right to conduct operations on or off mining claims at 36 CFR 228.3(a):

Operations. All functions, work, and activities in connection with prospecting, exploration, development, mining, or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part, regardless of whether said operations take place on or off mining claims. (Emphasis added.)

As these regulations indicate, the Forest Service must consider whether the activities proposed by an operator constitute use of the national forests for purposes reasonably incidental to and required for the particular stage of mining activity in which the operator is legitimately engaged (30 U.S.C. 612). This is an important aspect of the law because under it, the Forest Service has the authority to require plans of operations and regulate all activities that create significant resource disturbance and at all stages of an operation (prospecting, exploration, development, etc.), whether on or off mining claims, and regardless whether the miner has made a discovery of a valuable mineral deposit or not.

The 1955 Act at 30 U.S.C. 612 provided that except to the extent required for prospecting, mining or processing operations and uses reasonably incident thereto, no operator of an unpatented mining claim on a national forest shall sever, remove, or use any vegetative or other surface resources (emphasis added). In the 1979 case *United States v. Richardson*, 599 F 2d 294, the Ninth Circuit Court of Appeals affirmed the clear intent of the 1955 Act, and held that the Secretary of Agriculture, operating through the U.S. Forest Service, has authority under the 1897 and 1955 Acts to regulate mining activities. This includes consideration of whether activities are required for and reasonably incident to prospecting, mining or processing operations.

For a use to be required for mineral operations or reasonably incidental to it, the type and level of use must be justified as being appropriate to the stage of mining activity in which the operation is legitimately engaged (i.e., prospecting, exploration, development, production, abandonment, or reclamation). In turn, the determination of whether the stage of mining activity (and the related use the operator has proposed) is required, justified, and appropriate, must be based on the nature and extent of the mineral resource present. Generally, the more information that has been

gathered about the quality and quantity of a mineral resource and the closer an operator comes to delineating minable reserves, the more advanced is the stage of mining activity and use and the more extensive are the surface impacts that may be reasonable and justified.

However, it should be noted that an operator may legitimately propose the same or similar activities at several stages of operations. That is, depending upon a number of factors, such as the geologic setting, the past activities at a site, and the nature of the mineralization, it may be necessary and reasonable under the circumstances to drive mine openings, sink shafts, dig trenches, and generate mine waste and place it upon the surface as part of exploration, development, or production stages. Each of these situations must be evaluated on its own merits. In all instances, however, operations must minimize adverse environmental impacts by avoiding unnecessary and unreasonable destruction of surface resources to be reasonably incidental to mining activities and in compliance with 30 U.S.C. 612 and 36 CFR 228 A. FSM 2817, FSM R1 Supplement 2800-92-2.

Our responsibilities as required under 36 CFR 228.5(a) are to analyze a proposal and consider, "...the economics of the operation along with other factors in determining the reasonableness of the requirements for resource protection." This is consistent with 30 U.S.C. 612 and *U.S. v. Richardson (supra)*. To require an operator to prove he or she has a discovery and established a valid claim prior to the Forest Service approving surface disturbance on lands open to mineral entry under the mining laws would nullify the intent of the laws to allow prospecting and exploration. It would result in a Catch-22 situation where an operator must prove to the Forest Service he has already found what he may still be trying to find. Appellants' legal theory would require an operator to prove he has established a discovery and a valid mining claim before the Forest Service authorizes him to conduct operations, even if those operations may be reasonably necessary to prospect, explore, make a discovery, and establish a valid claim. Except in special circumstance where the Forest Service may need to establish clear title to the lands involved (e.g. wilderness areas and other withdrawn areas, land adjustment cases, or patent applications), there is no legal requirement or need for the Forest Service to conduct validity determinations on unpatented mining claims.

In considering Lodestar's proposed operations, the issue should not be whether the claims are valid under the discovery requirements of the 1872 Mining Law, but based on the specific circumstances of the case, whether the proposed activity is required for and reasonably incidental to prospecting, mining, or processing operations under the 1955 Surface Resource Act (30 U.S.C. 612). In fact, it is very clear from the record the District did indeed identify the reasonableness of the operation as an issue very soon after Lodestar first submitted its proposed plan of operations. Numerous personal notes, memos, and emails indicate the District Ranger and her staff had concerns about the reasonableness of the proposal and debated whether an alternative should be considered that would require more exploratory drilling prior to approving the development of the two adits and production mining.

The Environmental Assessment (EA) at page 20 indicates such an alternative was considered but not given detailed study. The EA's rationale for dismissing that alternative and accepting the operator's proposal as reasonable is that the operator has shown the Forest Service evidence that he has completed remote sensing, surface sampling, shallow drill sampling, and processed an

1,850 lb. sample. The EA appears to conclude this information is sufficient to consider the proposal's reasonableness, and to imply that to require more information might be too burdensome on the budget of a small operation. (The EA states at p. 20 that it is not uncommon for small mining operations to have smaller prospecting and exploration programs, due to smaller budgets.)

I have reviewed the entire record, including the 20 documents referenced in the Forest's transmittal letter. While many of these documents show the District was very concerned about the issue, there is little in the record to show the District thoroughly analyzed whether the proposal consisted of operations required for and reasonably incidental to mining and milling. The record does contain several references to sampling and geological evidence the operator has collected, and there are suggestions this information may be extensive and persuasive. However, there is no clear indication and written analysis in the EA or elsewhere in the record showing the Forest Service had full access to that information, fully analyzed it, questioned it, or corroborated it through independent inspections or sampling.

After having such a basic and important issue raised, the Forest is obligated to analyze it. The Forest must disclose through the public process the basis for its decision and that it did conduct proper deliberations on the issues. While some of the operator's information may constitute trade secrets and be exempt from public release under the Freedom of Information Act, there is nothing to prevent the Forest Service from accessing it, or even gathering information independently to help consider the issue.

I reverse the District Ranger's decision not on the issue raised by appellants that claim validity investigations must be conducted, but on the point that the decision record does not show sufficient evidence of consideration of the reasonableness of the proposed activities and that the operations constitute uses required for or reasonably incidental to mineral prospecting, exploration, or development.

Contention B. The Forest Service cannot approve activities located off valid mining claims under the Mining Law of 1872 and Part 228 regulations.

Response: As the discussion of the previous issue shows, the statutory law does give miners the rights to conduct activities off of mining claims, including off valid mining claims. All of these activities are properly regulated by the Forest Service locatable mineral regulations at 36 CFR 228 Subpart A, under the Authority of the 1897 Organic Act and the 1955 Surface Resources Act. These regulations are very clear about the operations to which they apply:

All functions, work and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part, regardless of whether said operations take place on or off mining claims. [36 CFR 228.3 (a)].

The proper application of the locatable mineral regulations 36 CFR 228 A versus the special use regulations at 36 CFR 251 was the subject of the 1984 *U.S. v. Craig* decision (CR 81-0184, CR

82-8-H) in the United States District Court for the District of Montana, Helena Division. In that case, which was under appeal from a Magistrate's decision, Judge Battin cited the language from 36 CFR 228.3 (a), above, and ruled those regulations apply on or off mining claims. In *U.S. v. Craig*, Judge Battin also noted that not only are the 36 CFR 228 A regulations comprehensive in covering all mining related activities, the 36 CFR 251 regulations specifically except their application to mineral operations, and provide at 36 CFR 251.50:

“[a]ll use of National Forest System land, ... except those provided for in the regulations governing . . . minerals and mineral materials . . . are ‘special uses’ and must be authorized . . .”

In this decision, Judge Battin went on to say:

“A system other than use permits has been established for minerals and mineral materials. That system of regulation is found in 36 C.F.R., Part 252 (now 228). When the statute and the regulations give miners a statutory right to go upon and use the open public domain for purposes of mineral exploration and development, Forest Service officials may not unreasonably restrict that right by applying general Forest Service regulations and a permit system.”

I concur with the District Ranger's decision on this point.

Contention C. Lodestar's proposed use of National Forest lands for its waste rock dump violates the mining law.

Response: Appellants argue that the operator's proposal to temporarily store waste rock for 2 years on nearby unpatented placer claims owned by a third party requires permission or authority from the third party to make use of such placer claim. The waste rock would be used by Lodestar for reclamation of the disturbed area and for backfilling the mine opening. Appellants also argue that even if such permission were given, such a use could not be allowed because the waste is not being generated from the underlying placer claim owned by a third party.

The United States Supreme Court has ruled that any disputes or questions of the right of possession between rival claimants (potentially in this case, Lodestar and the unknown placer claimant) are properly determined by state courts [*Perego v. Dodge*, 163 US 160, 168 (1896)]. If the unknown placer claimant wants to challenge Lodestar on a right of possession, he can do so in state court, although the record does not indicate that Lodestar has asserted any possessory rights to the area encompassed by the placer claim by, for example, overstaking the placer claim with other claims.

On the issue of permission to temporarily place the rock and soil material on the unpatented placer claim, the 1955 Act at 30 U.S.C. 612 (b) provides for permitting surface uses on unpatented mining claims (the unpatented placer claim, in this instance):

Any such mining claim shall also be subject, prior to issuance of patent therefore, to the right of the United States, its permittees, and licensees, to use so much of the surface

thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however,* That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.

If the placer claimant wanted to assert endangerment or material interference with his future prospecting, mining, or processing operations under 30 U.S.C. 612, he should have been placed on constructive notice through this public process that a portion of the surface of his claim might be involved in Lodestar's operation as a temporary storage place for rock and soil, and therefore had an opportunity to raise the issue. However, there is no evidence in the record, including the discussion on cumulative effects in the EA, that any placer operations are reasonably foreseeable with which Lodestar's operations might conflict, or that endangerment or interference with other operations was raised as an issue.

As discussed in response to the preceding issues, operators have rights to access, prospect, and explore public lands open to mineral entry. Further, 36 CFR 228 A is the proper means for the Forest Service to regulate all such activities, as defined at 36 CFR 228.3 (a), and which includes temporary placement of rock and soil to be used for future reclamation of a mineral operation. In addition, the above quoted section of 30 U.S.C. 612 provides additional authority for the Forest Service to authorize use of the surface on the placer mining claim as long as the use does not endanger or materially interfere with the placer claimant's operations. As noted, there do not appear to be any existing operations with which Lodestar would be in conflict. If there were, the placer claimant has legal and regulatory remedies available to him.

I concur with the District Ranger's decision on this issue.

Contention D. Forest Service cannot approve a mine plan which does not fully comply with the Part 228 regulations. Specifically, a sufficient map or sketch was not supplied in accordance with the regulations.

Response: The regulations at 36 CFR 228.4 (c) (2) require:

A map or sketch showing information sufficient to locate the proposed area of operations on the ground, existing and/or proposed roads or access routes to be used in connection with operations as set forth in 228.12 and the approximate location and size of areas where surface resources will be disturbed.

These requirements are fairly general and allow the District Ranger to exercise judgment in determining the degree of detail needed in a map or sketch submitted by the operator. Any map or sketch should allow the authorized officer to understand what is being proposed, analyze the effects in the EA, insure compliance with 228.12, and stipulate the necessary mitigation in the plan of operations. Based on my review of the topographic map, aerial photo, and other maps in the record cited by the Forest in the transmittal record, I conclude the proposed plan did comply with the 36 CFR 228.4 (c) (2) and the District Ranger decided properly on this issue.

ISSUE II. The Forest Service cannot approve a mining proposal that will violate Federal and State environmental laws. Lodestar has yet to obtain at least three state environmental permits necessary for the project: an air quality permit, an MPDES stormwater permit, and an MPDES point source discharge permit.

Response: Mr. Northcutt has been informed that an air quality stationary source permit application must be completed and submitted to the DEQ (Doc. 13e). This is documented in a letter from DEQ in the project file (Doc. 13e) and in the DN (pp. 20 and 40).

Montana Department of Environmental Quality has stated that a stormwater permit and a Groundwater Discharge Permit are not required for the project. As stated in their May 26, 2000, letter (Doc. 13A): “Northcutt is not required to obtain a Groundwater Discharge Permit at the mill site, nor an MPDES Permit at the mine site under 75-5-401, MCA, because he is not discharging nor proposing to discharge any water... Department guidelines require that a Stormwater Permit under MPDES be secured if a disturbance of greater than 1 acre is located within 100 feet of a stream. Mr. Northcutt’s disturbances are not projected to exceed the 1-acre threshold at either of the adit sites. The mill site is not within 100 feet of a stream.”

Regardless, the Forest Service is not responsible for enforcing all other Federal and State laws and regulations. The appropriate State or Federal agency is responsible for enforcement of, and the operator is responsible for compliance with, other applicable statutory or regulatory permit requirements.

ISSUE III. The Forest Service decision violates the interim rule suspending temporary and permanent road construction in inventoried roadless areas.

Response: The concern that proposed road building and mining will adversely impact Inventoried Roadless Area 1-371 was identified as a significant issue (p. 15) and is discussed in the environmental consequences chapter (p. 39) in the EA.

The DN and FONSI address this issue in a number of places. On page 13, the DN states “the rationale considered in choosing Alternative 3 and its potential effects on the North Absaroka Inventoried Roadless Area, include the provision in the current interim rule for roadless areas to provide for access, including road construction, for the development and extraction of minerals, given the rights provided under the 1872 Mining Law.” The FONSI addresses this issue again on page 16 where it states, “There will also be a temporary intrusion into the North Absaroka Roadless Area with the construction of 3,300 feet of temporary ATV road and the development of an adit. This activity is temporary and will be reclaimed upon completion of mining or by the year 2006. Past reclaimed mine and exploration activity in the area have not excluded “unroaded (reclaimed)” areas from being considered and/or inventoried in the future as roadless areas.” Later, page 17 states “Adit 1 is located within the North Absaroka Roadless Area and would require construction of 3,300’ of temporary ATV road to the site. The road is temporary and will be in place no more than 5 years. By the end of 2006 this road will be recontoured and reclaimed. These actions will not degrade from the six roadless characteristics as described in the EA.”

As stated in 36 CFR 212.13(c) 4, Administration of the Forest Development Transportation System, new road construction within inventoried roadless areas that is pursuant to reserved or outstanding rights is exempted from this moratorium. This exemption is documented in the Mineral Leasing and Interim Road Policy Memo in the project file (Doc. 131).

With respect to the validity discussion, please refer to response IA above.

ISSUE IV. The Forest Service violated numerous requirements of the National Environmental Policy Act.

Response: Because additional analysis is required to address the reasonableness of the proposed activities, I will not review the NEPA issues presented in the appeal. I recommend that the District Ranger reconsider these issues and any new information they receive as they complete their additional analysis.

RECOMMENDATION

I find that the record does not adequately address the reasonableness of the proposed activities in terms of whether the operations constitute uses required for or reasonably incidental to mineral prospecting, exploration, or development. I recommend the District Ranger's decision be reversed.

/s/ Daniel O. Castillo

DANIEL O. CASTILLO
Reviewing Officer
Assistant Director, Forest and Rangeland