



**File Code:** 1570 (251-2)  
#99-01-00-0080

**Date:** March 12, 1999

Christopher and Julia Burdge  
3655 East State Street  
Barberton, OH 44203

CERTIFIED MAIL-RETURN RECEIPT

Dear Mr. and Dr. Burdge:

This letter is my decision on your January 19, 1999, second level appeal of the Clearwater National Forest Supervisor's January 7, 1999, decision affirming the Palouse District Ranger's decision to issue you a notice of noncompliance for your activities on the East Fork of Meadow Creek and Piah Creek.

My review was conducted under 36 CFR 251. My responsibility as Reviewing Officer is to ensure that the analysis and the decision are in compliance with applicable laws, regulations, and orders. This review decision hereby incorporates by reference the entire administrative appeal record.

The record shows that the following activities took place on your mining claims: trail clearing, construction of a 6-foot wide log bridge over the East Fork of Meadow Creek and a small plank bridge over Piah Creek, installation of log cribbing in Piah Creek, tree cutting and log skidding, a levelling of a large area, and excavation of a large pit and several smaller pits.

A report by the District Hydrologist concluded that Best Management Practices were not utilized for the work which had taken place. Specifically:

- ? A 6-foot wide bridge had been constructed across the East Fork of Meadow Creek which could impede spring runoff and cause the creek to exit its channel.
- ? A small plank bridge over plastic pipe had been placed across Piah Creek, which would wash out under high flow.
- ? Areas on both sides of Piah Creek had been cleared of vegetation.
- ? Log cribbing had been placed along the banks of Piah Creek without being properly keyed in and stabilized.

These activities have the potential to increase stream erosion, particularly under runoff conditions, and thereby significantly increase sedimentation, cause water quality degradation, and destruction of fisheries habitat.

I. DISTRICT RANGER'S DECISION

By letter dated August 21, 1998, the Palouse District Ranger issued you a notice of noncompliance for your mining activities on the East Fork of Meadow Creek and Piah Creek. In that letter,

the District Ranger mentioned repeated attempts to reach you by phone to arrange a meeting to discuss your mining operation. Failing in that, the Ranger felt compelled to send you the letter.

## II. OVERVIEW OF ISSUES RAISED IN THE NOTICE OF APPEAL (NOA)

Essentially four issues have been identified in your appeal of Ranger Lockwood's decision:

1. Is your mining operation a significant impact on surface resources such that a plan of operations is required under the regulations at 36 CFR 228.4?
2. Do the regulations at 36 CFR 228.4 (a) (2) (iii) specifically exempt operations that cause a significant impact, while using only hand tools, from the requirements to file a plan of operations with the U.S. Forest Service?
3. Does the posting of "keep out" signs imply that the area is private property and threaten those who may venture onto the site?
4. Is the Forest Service trying to prohibit your legal access, lawful prospecting, location and development of a valuable mineral resource?

## III. FOREST SUPERVISOR'S REVIEW

You sent an undated letter to Forest Supervisor, James L. Caswell, which was received in his office on September 8, 1998. This letter included a response to the Palouse District Ranger's notice of noncompliance, and was treated as a notice of appeal against the Ranger's decision to issue you a notice of noncompliance.

On January 7, 1999, Forest Supervisor Caswell issued an appeal decision affirming the District Ranger's decision to issue you a notice of noncompliance.

On January 19, 1999, you filed a second-level appeal to the Regional Forester.

## IV. REVIEWING OFFICER'S REVIEW OF ISSUES RAISED BY THE NOA

I have thoroughly reviewed the first-level appeal record, including all of the documentation which you have provided; the concerns raised in your NOA; and the Forest Supervisor's first-level review decision.

**Issue 1** - Is your mining operation a significant impact on surface resources such that a plan of operations is required under the regulations at 36 CFR 228.4?

The purpose of our surface use regulations as stated in 36 CFR 228.1 is to "minimize adverse environmental impacts." The District Ranger's original decision to issue you a notice of noncompliance was based upon inspections of your mine site conducted by Forest Service resource specialists. Many surface resources are very limited in areal extent, and can be adversely affected, even with hand tools. The Forest Supervisor agreed with the District Ranger's decision that your surface disturbing activity, particularly the stream channel alteration and bridge construction, were significant impacts and therefore required a plan of operations pursuant to 36 CFR 228.4.

Also, inspections of the claim area indicated that mechanized equipment had been used to cut trees, mow vegetation, and move logs. Based on my review of the record I agree with the Forest

Supervisor in his conclusion. The key to significance depends on the impact of the disturbance to surface resources.

**Issue 2** - Do the regulations at 36 CFR 228.4 (a) (2) (iii) specifically exempt operations that cause a significant impact, while using only hand tools, from the requirements to file a plan of operations with the U.S. Forest Service?

While it is true that the above CFR reference exempts certain operations with hand tools from the requirement of filing a notice of intent, this does not mean that an operator is authorized to cause a significant surface disturbance without any regulation or oversight should the Forest Service determine that those operations have produced a significant impact. Note that under 36 CFR 228.4 (a), 1st paragraph, "If the District Ranger determines that ... operations will likely cause significant disturbance of surface resources, the operator shall submit a proposed plan of operations to the District Ranger." Also, as stated above, the evidence indicates that mechanized equipment was used to cut and move trees. The Forest Supervisor agreed with the District Ranger that the disturbances observed on your mining claims are significant, and therefore require submittal of a plan of operations. In addition to the regulations under 36 CFR 228, Subpart A, regulations under 36 CFR 261.10 (a) prohibit: "Constructing, placing, or maintaining any kind of road, trail, structure, ... or other improvement on National Forest System land or facilities without a special-use authorization, contract, or approved operating plan." I agree with the decisions made by the Forest Supervisor and District Ranger.

**Issue 3** - Does the posting of "keep out" signs imply that the area is private property and threaten those who may venture onto the site?

The public has the right to enjoyment of the surface resources on your mining claims to the extent that it does not unreasonably interfere with your necessary operations. The Forest Supervisor found that your use of signs should be limited to addressing public safety and keeping the public from interfering with your ongoing operations. He suggested that you consult with the District to develop appropriate signing to avoid interference by the public while you are conducting operations, or to protect the public from any hazards that may be present on the site.

I agree with the Forest Supervisor's conclusions. Your "keep out" signs do convey the impression that the area is not open to the public, regardless of any additional information you may have posted along with the signs.

**Issue 4** - Is the Forest Service trying to prohibit your legal access, lawful prospecting, location and development of a valuable mineral resource?

The Forest Supervisor found no evidence in the case file that anyone in the Forest Service has tried to prohibit your legal access or other activities under the mining laws. He agreed that your access restrictions on Trail 244C would remain in effect, and that the bridge you have constructed across the East Fork of Meadow Creek must be removed until you have justified the need for such a facility in a plan of operations. Regulations at 36 CFR 228.12 regarding access state: "An operator is entitled to access in connection with operations, but no road, trail, bridge,... or the like, shall be constructed... until the operator has received approval of an operating plan in writing from the authorized officer when required by 228.4(a)." In addition, the Forest Service regulations provide for requirement of reclamation bonds to ensure removal of such facilities and proper reclamation of the affected site (36 CFR 228.13).

I agree with the Forest Supervisor. The regulations to which you are being held are the same as those for any other operator on National Forest System lands under the mining laws. Our surface use regulations have been put in place to ensure adequate and consistent protection of surface resources, while recognizing rights granted under the mining laws.

The original action taken by the District Ranger, which has resulted in your appeal, was to issue you a notice of noncompliance for activities which were causing a significant disturbance to surface resources, and which therefore required submittal of a plan of operations. This action did not deprive you of any of your rights, and included no punitive measures. It was a mechanism by which the Ranger informed you of resource problems which had resulted from your mining activity, as identified by Forest Service resource specialists, and laid out a process to resolve those problems.

Under such circumstances, our first course of action is to attempt to work with an operator to resolve any such problems and get the mining activity under an approved plan. Since the Ranger was unable to contact you directly to arrange for a meeting to reach resolution, a notice of noncompliance was mailed to you. This notice clearly identified the problems resulting from your actions and spelled out what you needed to do to come into compliance. Ranger Lockwood closed his letter by encouraging you to meet with him and his staff to work with them to resolve these issues, and get the activities into compliance and under an approved plan. This remains the best course of action.

V. DECISION

I find that the Forest Supervisor was correct in affirming the Ranger's decision to send you a notice of noncompliance for your activities on your mining claims. The notice was proper and in no way infringed upon your rights under the mining laws. I encourage you to work with the District to arrive at a mutually agreeable plan of operations which will provide adequate surface resource protection and meet your legitimate needs under the mining laws.

Pursuant to 36 CFR 251.87 (e) (3), this decision is the final administrative determination of the U.S. Department of Agriculture.

Sincerely,

/s/Gary A. Morrison

GARY A. MORRISON  
Reviewing Officer  
Director of Recreation, Minerals,  
Lands, Heritage and Wilderness