



File 1570 (215)
Code:
Route
To:
Subject: Nicholson Mine DN, Appeal #99-01-00-0072,
Beaverhead-Deerlodge National Forests
To: Appeal Deciding Officer

Date: December 15, 1998

This is my recommendation on disposition of the appeal filed by Sara Jane Johnson on behalf of Native Ecosystems Council, Concerned Citizens of Pony, and Montana Environmental Information Center protesting the Nicholson Mine Decision Notice (DN) signed by the Jefferson District Ranger (Beaverhead-Deerlodge National Forests).

The District Ranger's decision adopts the Plan of Operations for the Nicholson Mine.

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.

FINDINGS

Appeal Review Findings

The Appellants allege violations of the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the National Forest Management Act, and the Administrative Procedures Act (APA). The Appellants request the decision be remanded. An informal meeting was held, but no appeal points were resolved.

Objection 1: The Forest Service has violated the National Environmental Policy Act (NEPA) by failing to evaluate and disclose all direct, indirect, and cumulative impacts of the proposed action.

Response: The Appellants make several allegations with respect to this objection. First, they contend that the long term cumulative effects of activity at the Nicholson Mine have yet to be addressed because the Agency has evaluated the activities in a piecemeal fashion. The United States mining laws (30 U.S.C. 21-54) confer a statutory right to enter upon public lands to search for minerals. The original Plan of Operations for activities at the Nicholson Mine was submitted in 1988. The regulations at 36 CFR 228, Subpart A, require that upon receipt of a Plan of Operations, the District Ranger shall "analyze the proposal, considering the economics of the operation along with the other factors in determining the reasonableness of the requirements for surface resource protection" [36 CFR 228.5(a)]. An Environmental Assessment (EA), Decision Notice (DN), and Finding of No Significant Impact (FONSI) were prepared resulting in approval of the Plan of Operations. Subsequent Plans of Operation were submitted in 1989, 1990, 1992, 1995, and 1997. NEPA documents analyzing the direct, indirect, and cumulative effects of the proposed activities were prepared for each Plan of Operations. The current EA, which references the analysis documented in the previous NEPA documents, discloses these effects in Chapter IV.

The appellants have several contentions regarding the construction and upgrading of the temporary road to the Nicholson Mine, including the effects on water quality and sensitive fish. The current proposal

does not include new road construction or upgrading of the existing road; therefore, the appellants concerns regarding the road are beyond the scope of this decision. Mitigation measure #10 requires a Forest Service Road Use Permit prior to hauling ore and states that if operations develop beyond the approved Plan of Operations, a new Plan of Operations must be submitted for review and additional analysis. It should be noted that the effects of the road on the roadless area were disclosed in the 1991, 1992, and 1998 EAs (Project File, Vol. 2, pp.21-22, pp. 24, 57; Vol. 1 pp. 14, 29 and 30).

The appellants contend that cumulative impacts of the project on mountain goats and grizzly bears were not evaluated in the 1998 EA. The 1998 EA references the previous EAs when describing effects of the project on wildlife, including mountain goats and grizzly bears (Project File, Vol. 1, pp. 14, 29). Cumulative effects on mountain goats are disclosed in Chapter IV of the 1998 EA (Project File, pp. 14, 33-34). The 1998 EA concludes that the effects of mine activities on mountain goats are mitigated by restricting the operating season. No access to the mine is allowed prior to June 30 or after October 15 (DN, p. 3, Mitigation Measure #25). The direct, indirect, and cumulative effect of the project on grizzly bears are disclosed in the 1998 Biological Assessment/Biological Evaluation (BA/BE) (Project File, Vol. 1, pp. 12-14). The 1998 BA/BE states that, "The project area is not known to be occupied by threatened or endangered species. It is not identified as any form of recovery area. I determine that this project would have no effect on threatened or endangered wildlife species" (Project File, Vol. 1, p. 12, 14).

The final contention raised with respect to this objection is that no monitoring results are provided in the current or previous EAs to demonstrate that mitigation efforts are preventing significant impacts. Permit administration and compliance are generally not issues addressed in environmental analysis documents. However, the 1998 EA discloses some monitoring results regarding acid generation potential, goat activity, and public safety. The Project File also contains documents demonstrating work on required mitigation measures and inspection reports.

I conclude that the direct, indirect, and cumulative effects of the Nicholson Mine project have been adequately disclosed in the 1998 EA, which includes analysis documented in previous NEPA documents for the project. I find no violation of NEPA.

Objection 2: The Forest Service violated NEPA by failing to clearly define the proposed action to the public.

Response: The appellants contend that the Forest Service has failed to describe the full extent of the activity being allowed at the mine or address compliance by the mining company for numerous mitigation measures, which were required to avoid significant impacts. The appellants list several examples to illustrate their contention. Many of the concerns raised are administrative issues rather than environmental concerns (e.g., periods of inactivity, status of the reclamation bond, enforcement of mitigation measures, and status of the special use road) and are beyond the scope of the decision and environmental analysis documented in the 1998 EA and DN.

The appellants contend that the public has been misled, because initially, the Forest Service indicated exploratory activity would be limited but activities have been incrementally added over time without adequate disclosure. As discussed in response to Objection 1, NEPA documents analyzing the direct, indirect, and cumulative effects of the proposed activities were prepared for each of the six Plans of Operation submitted to the District Ranger. The current EA, which references the analysis documented in the previous NEPA documents, discloses these effects in Chapter IV. I conclude that the activities proposed at the mine have been clearly defined to the public. The record demonstrates that the analysis of effects has been thorough and adequately documented.

Objection 3: The Forest Service has violated the National Forest Management Act (NFMA) by allowing Forest Plan violations without completion of Forest Plan amendments, and violated the

Endangered Species Act (ESA) and NFMA by failing to promote viability of threatened and endangered species.

Response: The appellants contend that the Nicholson Mine project results in a violation of the NFMA because the Forest Plan requires that conflicts in mountain goat habitat be resolved in favor of the goat. As discussed in response to Objection 1, the direct, indirect, and cumulative effects of the project on mountain goats are disclosed in the 1998 EA as well as the previous EAs. The effects of mining activities at the Nicholson Mine have been mitigated to the extent possible by restricting use during the critical periods of kidding and breeding (DN, p. 3, Mitigation Measure #25). I conclude that there is no violation of Forest Plan direction with respect to protection of mountain goat habitat.

The appellants also contend that visual quality objectives are not being met in violation of the Forest Plan. The 1998 EA discloses that the selected alternative does not meet Deerlodge Forest Plan visual quality standards for Management Areas 4 and 5 during the mining operation. Both Management Areas allow for mining activities to occur. As previously mentioned, the United States mining laws (30 U.S.C. 21-54) confer a statutory right to enter upon public lands, including providing access, to search for minerals. The DN states that the effect to the visual area occurred with the construction of the road in 1989 (DN, p. 7). The effects to the visual resources of the area are site specific and temporary, with reclamation of the site at the conclusion of operations returning the area to a desirable mix of visual quality objectives.

Finally, the appellants contend that failure to manage key habitats for the grizzly bear violates NFMA for viability, as well as ESA by failing to promote recovery of threatened and endangered species. The direct, indirect, and cumulative effects of the project on grizzly bears are disclosed in the 1998 Biological Assessment/Biological Evaluation (BA/BE) (Project File, Vol. 1, pp. 12-14). The 1998 BA/BE states, "The project area is not known to be occupied by threatened or endangered species. It is not identified as any form of recovery area. I determine that this project would have no effect on Threatened or Endangered wildlife species" (Project File, Vol. 1, pp. 12, 14). Based on this information, I find no violation of NFMA or the ESA.

Objection 4: The Agency has violated the Administrative Procedures Act (APA) and Forest Service regulations by making arbitrary and capricious decisions regarding public lands.

Response: The appellants contend that the decision to approve continued mining activity is arbitrary and capricious because there is no evidence that the Nicholson Mine will complete any significant exploratory activities. As previously explained, United States mining laws (30 U.S.C. 21-54) confer a statutory right to enter upon public lands to search for minerals. The regulations at 36 CFR 228, Subpart A, require that upon receipt of a Plan of Operations, the District Ranger shall, "analyze the proposal, considering the economics of the operation along with the other factors in determining the reasonableness of the requirements for surface resource protection" [36 CFR 228.5(a)]. Forest Service Manual (FSM) 2817, "Surface Management Procedures Under 36 CFR 228, Subpart A, "provides further direction regarding mining operations conducted under the 1872 Mining Law. Based on the direction provided in these regulations, I find that the decision to approve the Plan of Operations for the Nicholson Mine is not arbitrary or capricious.

Recommendation

Based on my review of the Project Record for the Nicholson Mine, I recommend that you affirm the District Ranger's decision and the Appellant's requested relief be denied.

/s/ J. Doug Glevanik

J. DOUG GLEVANIK
Reviewing Officer
Director, Ecosystem Assessment and Planning