



File Code: 1570

Date: January 7, 1999

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

CERTIFIED MAIL-RETURN  
RECEIPT REQUESTED

Dear Mr. and Dr. Burdge:

This letter is my decision on your appeal of the Notice of Noncompliance District Ranger Carmine Lockwood signed on August 21, 1998. In particular, Ranger Lockwood's Notice states that you are conducting a mining operation without an approved Plan of Operation and that these activities are significantly disturbing the surface resources of the East Fork of Meadow Creek and Piah Creek.

As the Reviewing Officer for the District Ranger's decision, I must follow the procedure outlined under the Code of Federal Regulations (CFR), Part 251, Subpart C, and base my decision on the appeal record and applicable laws, regulation, policies and procedures. This review decision hereby incorporates by reference the entire administrative appeal record, including the Project File.

## **BACKGROUND**

Ranger Lockwood's Notice of Noncompliance and responsive statement, your appeal correspondence and reply to his responsive statement, and other project file documents summarize the background information pertinent to the appeal issues.

The appeal record contains the following documents:

1. Ranger Lockwood's August 21, 1998 Notice of Noncompliance
2. Your notice of appeal as stated in undated written responses to Ranger Lockwood, District Staff Officer/Minerals Administrator, Suzanne Lay and your letter to Forest Supervisor Caswell.
3. Ranger Lockwood's responsive statement including supporting documentation
4. Your reply to Ranger Lockwood's responsive statement including supporting documentation
5. The project file

This decision is based on a thorough review of the appeal record and pertinent laws, regulations and procedures. The following discussion outlines the issues you raised in the appeal, my response as the Reviewing officer and my decision as provided in 36 CFR Part 251. 99 (b).



## OVERVIEW OF ISSUES AND RELIEF REQUESTED

I have reviewed Ranger Lockwood's Notice of Noncompliance, your notice of appeal, Ranger Lockwood's responsive statement, your written reply to the responsive statement dated December 5, 1998, and the project file. Based on my review of these, I have identified the following issues:

1. Is your mining operation a significant impact on surface resources such that a notice of intent or 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 any notice of intent or plan of operations with the US 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 Ranger Lockwood trying to prohibit your legal access, lawful prospecting, locating, and development of a valuable mineral resources.

The relief you request is that Ranger Lockwood's Notice of Noncompliance be withdrawn.

## REVIEW FINDINGS

The following is my evaluation of the objections raised in your appeal.

**Issue:** Is your mining operation a significant impact on surface resources such that a notice of intent or a plan of operations is required under the regulations at 36 CFR 228.4.

**Contention 1:** You contend that because you only used hand tools in conducting operations on your mining claim, your operation does not require a notice of intent or a plan of operations.

**Response:** Ranger Lockwood, in his letter dated October 30, 1998, stated that although you claim you used only hand tools for your excavations, he has determined that your activities; in particular, the stream channel alteration and bridge construction, have caused, or have potential to cause, a significant impact to the surface resources. Factors resulting in this determination include the finding that the East Fork of Meadow Creek is a brook trout fisheries with summer rearing habitat. The East Fork was listed in the 1996 303 (d) list of Water Quality Limited Stream Segments for reasons of sediment. The Clearwater National Forest Plan standards for water quality state that Best Management Practices will be applied to project activities to ensure water quality standards are met or exceeded. Raw earth exposed during construction was not stabilized for overwintering. The subsequent erosion of the raw soils exposed by your excavations will increase the sediment load of the East Fork of Meadow Creek. These activities do not meet Best Management Practices that must be followed to meet Forest Plan standards.

In coming to his decision that your operation was having or had the likelihood of having a significant impact on surface resources, he relied on his field observations and on information provided by the District Minerals Administrator, Suzanne Lay. Suzanne Lay discussed what was occurring on the site with fishery biologists, hydrologists, a professional civil engineer, and Ranger Lockwood. Suzanne Lay is an experienced administrator and is the Forest Officer responsible for inspecting mining operations. The decision of Ranger Lockwood was that the operation was having a significant impact on surface resources such that a plan of operations is required per 36 CFR 288.4.

**I agree with Ranger Lockwood's decision that, even though you claim you used only hand tools for excavations, the stream channel alteration and bridge construction on the East Fork of Meadow Creek has caused and is likely to continue to cause significant disturbance to the surface resources such that a plan of operations is required per 36 CFR 288.4. In addition my review of the project file contains evidence that a lawn mower, chainsaw, and other equipment to move large logs was also used on the claim that may require approval under a plan of operation.**

**Contention 2:** You contend that because you used only hand tools to excavate dirt along the south side of Piah Creek and used only hand tools to transport the dirt and fill the area north of Piah Creek, you did not significantly impact the surface resources and that a notice of intent or plan of operation was not required.

**Response:** Ranger Lockwood has determined that the hole (approximately 27 feet by 11 feet by 2 feet) excavated along the south side of Piah Creek and the area you filled north of Piah Creek are causing and will likely continue to cause significant impacts to the surface resources such that a plan of operations is required.

Piah Creek is a tributary of the East Fork of Meadow Creek and, like the East Fork, is also a brook trout fishery. Thirteen feet of streambank was removed as part of excavating the hole. The excavation of the hole exposed raw earth that was not reclaimed or stabilized. The area you filled north of Piah Creek is within the floodplain. Both areas of raw earth were not stabilized for overwintering. It is the Clearwater National Forest Plan goal to rehabilitate and improve degraded streams on developed portions of the Forest. It is a Forest Plan Standard that the stability, equilibrium, and function, (physical and biological) of a tributary stream must be maintained as it relates to the beneficial uses of local, downstream, and parent stream. No short term or long term precautions were taken to prevent the raw soils from eroding and delivering sediment into Piah Creek and then into the East Fork of Meadow Creek.

**I agree with Ranger Lockwood's decision that the hole you excavated on the south side of Piah Creek and the area you filled north of Piah Creek has caused and is likely to continue to cause significant disturbance to surface resources such that a plan of operations is required per 36 CFR 288.4.**

**Issue:** DO the regulations at 36 CFR 228.4 (a) (2) (iii) unequivocally exempt operations using hand tools from the requirements to file any Notice of Intent or Plan of Operations with the U.S. Forest Service.

**Contention:** The regulations at 36 CFR 228.4 (a) (2) (iii) state, "A notice of intent need not be filed: (iii) for operations which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes and will not involve the cutting of trees."

**Response:** The district ranger determines whether a proposed activity will likely cause significant disturbance of surface resources (36 CFR 228.4 (a)). Generally, operations that do not use mechanized earthmoving equipment and do not involve the cutting of trees have less potential to cause significant disturbance to surface resources. Your operation was inspected by Ranger Lockwood, District Minerals Specialist Suzanne Lay, and by other District and Forest Specialists. After consulting with and considering the findings of these specialists, Ranger Lockwood then decided that the surface disturbances are significant and therefore required an approval under a plan of operation.

**I agree with Ranger Lockwood's decision that your disturbances of the surface resource along the East Fork of Meadow Creek and on your Piah Creek mining claim activities were significant and therefore required approval under a plan of operation.**

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

**Contention:** You contend that the "keep out" signs were posted only to keep people from interfering with your operation, and you were not restricting access to the rest of your mining claim.

**Response:** After visiting your mining claim on Piah Creek, Ranger Lockwood questioned the need for the "keep out" signs. The signs create the perception that this is your private property rather than an unpatented mining claim. However, after reading page 33 of your December 5, 1998, reply to Ranger Lockwood's responsive statement, I understand that you are aware the United States has title to the land. The use of signs, as well as fences, are appropriate for hazardous sites or when the public has the potential to interfere with a mining operation. In examining the photos supplied by Ranger Lockwood and by you, I did not see any safety hazards on your Piah Creek mining claim nor did I find any evidence of the public interfering with your active operation. Furthermore, operations on your claim ceased prior to the issuance of the August 21, 1998, Notice of Noncompliance. Any signs that would have been necessary to limit the public's interference with your operation should have been removed prior to your ceasing operations.

**In the future, if there is a need to protect the public or if the public does interfere with your active operation, then appropriate signing certainly might be a consideration. However, in the appeal record there is no justification for the posting of "keep out" signs on your Piah Creek mining claim. I therefore agree with Ranger Lockwood in that the "keep out" signs restrict public access. At this time, I agree with Ranger Lockwood's decision that the "keep out" signs are inappropriate and need to be removed.**

**Issue:** Is Ranger Lockwood trying to prohibit your legal access, lawful prospecting, locating, and development of a valuable mineral resources.

**Contention:** You contend that Ranger Lockwood and his predecessor, Ranger Hodge, have taken on a campaign to prevent sufficient legal access to your Piah Creek mining claim for its perfection and future development.

**Response:** I have reviewed the appeal record and I could find no evidence that Ranger Lockwood nor his predecessor, Ranger Hodge, denied you access to your Piah Creek Mining Claims.

Ranger Lockwood recognizes your right to reasonable access to your mining claims. However, without a proposed plan of operations, Ranger Lockwood had no way of knowing why you need more access rights to Trail 224C than are already provided; why you constructed the bridge across the East Fork of Meadow Creek when an existing bridge was already in place a short distance downstream; and why you improved Trail 224C.

As stated in 36 CFR 228.12,

"An operator is entitled to access in connection with operations, but no road, trail, bridge, landing area for aircraft, or the like, shall be constructed or improved, nor shall any other means of access, including but not limited to off-road vehicles, be used until the operator has received approval of an operating plan in writing from the authorized officer when required by 228.4(a)."

"When required by 228.4(a)" refers back to your arguments that, because you claim you used only hand tools to clear the brush and construct the bridge, you are exempt from filing a notice of intent or plan of operations. Ranger Lockwood determined that because of the significance of your surface disturbances, your claim of using only hand tools does not exempt you from filing a plan of operations.

**Therefore, at this time, I agree with Ranger Lockwood's decision that the access restrictions on Trail 244C will remain in force and the bridge across the East Fork of Meadow Creek needs to be removed until you have justified in a plan of operations the need for such additional access. Ranger Lockwood's requirement that you submit a plan of operation for these facilities is not unreasonably restricting your access or other rights to use national for purposes of mineral exploration, development and production.**

## **DECISION**

I have carefully reviewed the appeal record and the pertinent regulations that I must follow in order to come to my decision. The District Ranger determines whether a proposed activity will likely cause significant disturbance of surface resources. Operations not using mechanized earthmoving equipment have less potential to cause significant surface disturbances. However, the determination of what is significant disturbance depends more on a case-by-case evaluation of proposed operations and the kinds of lands and other resources involved. Ranger Lockwood, advised by his minerals administrator and other specialists, determined that the size of your

disturbances, their proximity to fish-bearing streams and their location in the floodplain are significant disturbances of surface resources. I agree with Ranger Lockwood's determination and his requirement that you submit a plan of operations.

The District Ranger's decision to issue a notice of noncompliance was reasoned and he acted properly within established laws, regulations, and policy. Therefore, I am affirming the District Ranger's decision of August 21, 1998, in full. Your request for relief is denied.

I suggest you contact Ranger Lockwood and negotiate a schedule for submitting a plan of operations prior to commencing your 1999 mining activities. Your plan needs to include how you will be in compliance with this decision.

In accordance with 36 CFR 251.87, this decision may be appealed to the Regional Forester within 15 days of this decision. Any appeal must be fully consistent with 36 CFR 251.90, "Notice of Appeal Content", including the reasons for the appeal.

Appeals must be filed with:

Regional Forester  
Northern Regional Office  
P.O. Box 7669  
Missoula, MT 59807

Sincerely,

/s/ James L. Caswell

Reviewing Officer  
Forest Supervisor