



United States
Department of
Agriculture

Forest
Service

Clearwater
National
Forest

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File Code: 1570 (251)
#00-01-05-0001

Date: May 19, 2000

Ronald Hartig
Edward Ogden, Jr.
E & R Tough Luck Mine
H. C. 64, Box 18A
Pierce, ID 83546

Certified mail

Return Receipt Requested

Dear Mr. Hartig:

This letter is my decision on your February 24, 2000, appeal of the North Fork District Ranger's February 1, 2000, decision to not approve the development of an all terrain vehicle (ATV) trail to your E & R Tough Luck mining claim near Blacklead Mountain.

My review was conducted under the 36 Code of Federal Regulations (CFR), Part 251, Subpart C. My responsibility as Reviewing Officer is to ensure that the analysis and the decision are in compliance with applicable laws, regulations, policies and procedures. This review decision hereby incorporates by reference the entire administrative appeal record, including the Project File.

The record shows that in the Supplemental Plan of Operations approved May 28, 1999, you expressed a desire to work with North Fork District Ranger Gober to locate and develop an ATV trail down the ridge to E & R Tough Luck mining claim. On August 26, 1999, Ranger Gober and his staff met you in the field to review your proposal. After walking two potential trail locations and inspecting your operation Ranger Gober said he would get back to you with a decision on your trail proposal.

I. DISTRICT RANGER'S DECISION

On May 3, 1999, you and Mr. Ogden submitted a Supplemental Plan of Operation to North Fork District Ranger Gober. He approved your Supplement on May 28, 1999. By agreement, you met with Ranger Gober and members of his staff on August 26, 1999, to review your access proposal in the field. He relayed to you his findings based on the field review in a letter dated February 1, 2000. In that letter Ranger Gober stated he could not approve your proposal at that time. He explained:

1. How your proposal, as presented, would violate Forest Plan goals and standards for B2 management areas (Forest Plan proposed wilderness).
2. Why the present stage and scale of your current operation (prospecting/exploring 2-3 days a summer) did not justify ATV trail construction.



3. Alternative modes of transport (pack stock and backpacking) that would be acceptable in B2 management areas.

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

I have thoroughly reviewed the appeal record, including all of the documentation you have provided. Essentially, four issues have been identified in your appeal of Ranger Gober's decision. They are as follows:

1. The District Ranger exceeded his authority by refusing to process the supplemental plan within the regulatory timelines listed in 36 CFR 228.5.
2. The Ranger's failure to comply with the timelines listed in 36 CFR 228.5 automatically approves the proposed ATV trail development.
3. The District Ranger exceeded his authority when he determined that ATV trail development to the E & R Tough Luck mining claim was not reasonably incident and necessary to your present stage of operations.
4. The District Ranger failed to do an environmental assessment of the potential impacts from your planned operations prior to issuing his decision letter.

III. REVIEW FINDINGS

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

Issue 1: The District Ranger exceeded his authority by refusing to process the supplemental plan within the regulatory timeline of 36 CFR 228.5.

Response: On May 3, 1999, the North Fork Ranger District received a Supplemental Plan of Operations for the E & R Tough Luck mine. According to 36 CFR 228.5, the authorized officer has 30 days from receipt of the Plan of Operations to analyze the proposal and reply to the proponent. Ranger Gober, as the authorized officer, approved the Plan on May 28, 1999. This was within the 30 days required.

In the Supplemental Plan of Operations, you and Mr. Ogden stated his "intent to work with the U. S. Forest Service to develop an ATV trail down the ridge to E & R Tough Luck mining claim." I find Ranger Gober complied with this aspect of the Supplemental Plan of Operations by agreeing to meet with you in the field to review the proposed trail location after the snow had melted and the area was accessible. This review would be the first stage to any potential trail development.

On August 26, 1999, Ranger Gober and his staff met you near his claim. They reviewed two potential locations for the proposed ATV trail. After the field review, Ranger Gober told you he

would notify him concerning his decision on the ATV trail. On February 1, 2000, he sent you a letter with his decision to not approve your request to construct an ATV trail into the E & R Tough Luck mining claim.

I cannot find in the administrative record or project file where Ranger Gober refused to process the supplemental plan. In fact, I did find where Ranger Gober processed the Supplemental Plan of Operation in a timely manner. Further, I also found Ranger Gober's February 1, 2000, letter detailing his conclusions based on the August 26, 1999, field review. This letter included an apology for the length of time that had elapsed between the field review and the posting of those finding to Mr. Hartig.

However, I also note in both the Supplemental Plan of Operations and in the Notice of Intent, you indicate your operating season was to end September 15, 1999. This is within 30 days of the field review of your proposal. Therefore, I conclude the delay in Ranger Gober's posting of his decision did not materially interfere with your operation in 1999. The timelines listed in 36 CFR 228.5 are goals every Ranger should try to attain; however, workloads and other administrative demands sometimes interfere with punctual decisions.

I also note in your Notice of Intent signed April 23, 1999, in item 3. Proposed Operations, there is no mention of an ATV trail. In fact, in describing the proposed access to the claim, you state you plan to "walk by foot ¾ of a mile down ridge to claim".

Issue 2: A lack of response and failure to comply with the allowed timeline automatically approves a proposed activity.

Response: In reviewing the record, I find Ranger Gober did respond in a timely manner by approving the Supplemental Plan of Operations on May 28, 1999. In addition, he did meet with you in the field in a timely manner to review your proposal. However, even if Ranger Gober had not met the timelines described in 36 CFR 228.5, this would not, under any circumstance, result in automatic approval of a proposed mining related activity--in your case, development of an ATV trail would not automatically be approved.

Issue 3: The District Ranger exceeded his authority when he determined that ATV trail development to the E & R Tough Luck mining claim was not reasonably incident and necessary to your present stage of operations.

Response: The District Rangers of the Clearwater National Forest are the authorized officer with delegated authority to review and approve operating plans for mining operations for their respective Ranger Districts (36 CFR 228.3 (e)). The E & R Tough Luck mining claim and the proposed trail development are located on the North Fork District of the Clearwater National Forest. Ranger Gober is the District Ranger assigned to the North Fork District of the Clearwater National Forest. Therefore, it is fully within Range Gober's authority to approve mining operations on your claim.

It is District Ranger Gober's responsibility to analyze and process your operating plans. The Forest Service Manual (FSM) states the authorized officer shall bear in mind that the Forest Service function is the management and protection of surface resources in a manner compatible with reasonable and logical mining operations. This includes a determination of what is reasonably incident and necessary to your operation. (FSM 2817.23- Review and Approval of Plans (R1 Supplement)).

Ranger Gober, in his February 1, 2000, letter to you, outlined the reasons for coming to his conclusion that development of an ATV road into your claim was not appropriate at this time. He determined your stage of operation did not justify trail construction at this time. Ranger Gober also concluded that your proposal was not compatible with the Clearwater Forest Plan goals for B2 management areas—particularly visual impacts and retention of wilderness character.

The exploration stage is defined as occurring once a geologically favorable target area with moderate to high mineral potential has been identified through prospecting. The development stage is defined as occurring once exploration has identified a valuable mineral deposit (FSM 2817.23, R1 Supplement).

Traditionally, you have worked 1-2 weekends a year on the E & R Tough Luck mining claim. You and your partner backpacked your equipment the $\frac{3}{4}$ mile to your claims for 15 years. You feel that allowing ATV access will allow you to operate 3-4 weekends a year. Your plan was to prospect and sample using the same equipment and methods you have employed over the past 15 years. The only change was the hope of working 3-4 weekends instead of 1-2 weekends a year.

I agree with the District Ranger's assessment and manual direction—you are presently in the prospecting and maybe early exploration phase of your operation. There is no documentation supporting your contention that you are in the exploration and development phase of your operation. Your assays values currently are low as shown in all four assay reports in the project file. You have not identified a valuable mineral deposit. (FSM 2817.23, R1 Supplement) More prospecting is warranted before ATV trail development should be considered.

Issue 4: The District Ranger failed to do an environmental assessment of the potential impacts from your planned operations prior to issuing his Decision Letter.

Response: 36CFR 228.4(f) does not require a NEPA decision on every Plan of Operation submitted. In Ranger Gober's February 1, 2000, letter he outlined his reasons for not approving the development of your proposed ATV trail. In reviewing his letter, I support his evaluation of the stage and scale of your current operations. In balancing that evaluation with the effects of developing your proposed trail, I concur that ATV trail development, as it was presented, is not warranted at this time.

IV. DECISION

I have carefully reviewed the appeal record and pertinent regulations that I must follow in order to come to a decision. I find that Ranger Gober did adequately follow the regulations in

approving your Supplemental Plan of Operation and in evaluating the environmental effects of implementing your proposal as outlined in 36CFR 228.4(f). However, I do find him lax in notifying you of his findings.

Based upon these findings, I conclude Ranger Gober has complied with the applicable laws regulations and policy. I also agree with his conclusion that development of this ATV trail is not appropriate given the stage of operation and the forest plan management area designation. I find the entire documentation for your claim, beginning with your initial 1985 Plan of Operation, is in disarray. By this decision letter, I am making the Forest Geologist, Vern Bretz, available to assist you and Ranger Gober in updating and organizing the records of your claim. In addition, I direct Ranger Gober to be more timely in relaying his findings to you.

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
Attn: Appeal Reviewing Officer
P.O. Box 7669
Missoula, MT 59807

Sincerely,

/s/ James L. Caswell

JAMES L. CASWELL
Reviewing Officer
Forest Supervisor