



File Code: 1570 – 251

#00-01-00-94

Date: August 15, 2000

Mr. Ronald W. Hartig
HC 64, Box 18A
Pierce, ID 83546

CERTIFIED MAIL – RETURN RECEIPT
REQUESTED

Mr. Edward C. Ogden, Jr.
P. O. Box 239
Pierce, ID 83546

Dear Mr. Hartig and Mr. Ogden:

This letter is my decision on your June 1, 2000, second level appeal of the Clearwater National Forest Supervisor's May 19, 2000, affirmation of the North Fork District Ranger's decision to not approve construction of an all-terrain vehicle (ATV) trail into your E & R Tough Luck mining claim located on that district.

My review was conducted pursuant to, and in accordance with, 36 CFR 251, subpart C. My responsibility as Reviewing Officer is to insure that the analysis and the decision are in compliance with the applicable laws, regulations and policies. My review decision hereby incorporates by reference the entire administrative appeal record, including the project file, and is conducted on that existing record [36 CFR 251.87 (c)(2)].

I apologize for the delay in acting upon your appeal. It is an extremely busy season and the staff time is stretched very thin.

I. DISTRICT RANGER'S DECISION

You are quite familiar with the following string of events relating to Ranger Gober's review and decision on your supplemental plan of operations for the E & R Tough Luck mining claim. I will, however, reiterate them for clarity as an essential part of my second level review of the decision sequence.

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 would not approve your proposal at that time. He goes on to state:

- 1) That your proposals to construct or develop an ATV trail into your claim was not compatible with the Clearwater National Forest Management Plan goals and standards for the claim area surface resources. These standards are to manage the area to protect wilderness character;



- 2) That, in addition to considering the goals and standards, Ranger Gober was concerned the stage (prospecting and exploration) and scale (one or two weekends a year) of your operations did not justify ATV trail construction; and
- 3) That several reasonable alternatives were available to access and haul needed materials to and from your claim.

II. OVERVIEW OF ISSUES RAISED IN THE NOTICE OF APPEAL AND RELIEF REQUESTED

Clearwater National Forest Supervisor Caswell identified several issues during his review of your appeal. My review agrees with his determination that the following are the issues you raised in your February 24, 2000, Notice of Appeal (NOA).

- 1) Whether the District Ranger exceeded his authority by refusing to process the supplemental plan of operations within the regulatory timelines listed in 36 CFR 228.5;
- 2) Whether 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;
- 3) Whether the Ranger's failure to comply with the timelines listed in 36 CFR 228.5 automatically approves the proposed ATV trail development; and
- 4) Whether the District Ranger failed to comply with his obligations by failing to perform an environmental assessment of the potential impacts from planned operations prior to refusing to allow a use.

As relief, Messer's Hartig and Ogden request that the plan of operations and the supplemental plan be approved, that an analysis of environmental impacts of their proposal be performed, and that the District Ranger act within his authority under law [36 CFR 228.5 (a)].

III. FOREST SUPERVISOR'S REVIEW

The Forest Supervisor evaluated and responded to each of the above issues in his June 9, 2000, Responsive Statement. I have made a thorough review of his response and incorporated pertinent elements into my statements in section IV.

IV. REGIONAL FORESTER'S REVIEW OF THE ISSUES RAISED IN THE NOTICE OF APPEAL

I have thoroughly reviewed the first-level appeal record, the concerns raised in claimants Hartig and Ogden's Notice of Appeal, the District Ranger's responsive statement, the claimant's reply to the Ranger's response, the Forest Supervisor's May 19, 2000, review decision, Messer's Hartig and Ogden's reply to the Forest Supervisor's first-level review decision, and the Forest Supervisor's June 9, 2000, responsive statement. I have provided my comments from this review below.

Issue 1: *“Whether the District Ranger exceeded his authority by refusing to process our Supplemental Plan within the regulatory timeline.”*

Mr. Hartig’s May 3, 1999, Supplemental Plan’s proposed access to the claim area was to drive on existing Forest Service roads west of the claim, then to “...walk by foot $\frac{3}{4}$ mile to the tunnel site.” The Plan also indicated the claimants’ “...intent to work with the U.S. Forest Service to develop an ATV trail down the ridge to the E & R Tough Luck mining claim.”

The latter statement, along with the rest of the May 3 plan, clearly shows that while claimants were thinking about future access by an ATV, they were not actually proposing in the May 3 plan any specific route or means of constructing an ATV trail upon which the Ranger needed to issue a decision.

Claimants were placed on written notice by the May 25 letter that the Ranger did not view the May 3 plan as an actual proposal for ATV trail construction and access. His letter did approve the means of access claimants had actually proposed, which was to walk by foot $\frac{3}{4}$ of a mile to the tunnel site. The letter indicated a future site visit and further discussions must take place, however, to see what claimants might want to propose for ATV access and where they might want to locate and develop such a trail. This shows the understanding was that an ATV proposal might be finalized and submitted sometime in the future. The May 25 letter also notified claimants that working with them to locate, put together, and analyze an ATV trail proposal would take some time and not be completed that summer.

If claimants believed their May 3, 1999, Supplemental Plan contained a specific proposal on ATV access that required a timely decision from the Ranger on ATV access, they had an opportunity to raise that issue and file an appeal of the Ranger’s May 25 letter. The fact they did not supports the Ranger’s understanding that while the May 3 plan mentioned a future intent to consider an ATV trail, a specific ATV trail access proposal had not yet been designed and submitted to him for a decision. In fact, there is no evidence in the record or in documents submitted by the claimants through their appeal demonstrating claimants ever submitted a specific ATV access proposal as required by 36 CFR 228.4 (c) and 228.12, including a written description, map showing the proposed route, design standards, and measures to protect the environment.

I find the Ranger processed and approved the May 3, 1999, Plan of Operations, the only formal proposal before him, on May 25, 1999, well within the regulatory timeline in 36 CFR 228 Subpart A.

Issue 2: *“Whether the District Ranger exceeded his authority by demanding that I not use an ATV to access our claim.”*

Miners have a right to reasonable access to their mining claims. This is not an unrestricted right, however. In addition to complying with the requirements at 36 CFR 228.4 and 228.12, miners are also constrained by provisions in the 1955 Surface Resources Act (30 USC 612).

The 1955 Act 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 further held that the Secretary of Agriculture, operating through the U.S. Forest Service, has authority under the 1955 Act to regulate mining activities. This includes consideration of whether activities are required for and reasonably incident to prospecting, mining or processing operations.

The record shows that the Ranger considered information from the claimants, the Forest Geologist, and the U.S. Bureau of Mines on the mineralization and stage of activities in which claimants were engaged (Documents 13 through 17 in the Project File). The sample and geologic evidence in the record demonstrate that while claimants have found some mineralized rock, they are still prospecting or in the early stages of exploration in search of a valuable mineral deposit that may or may not be on the claim.

Prospecting and early exploration activities typically involve using portable equipment brought in by stock, backpack, or helicopter. Claimants' own actions over the past decade of working just a few weekends a year and backpacking in portable equipment by the existing trail support the reasonableness of this level of access. Nothing has changed over the past decade as far as their delineation of a mineral resource. What has changed is that claimants want to have a more convenient means of access through an ATV trail. The 1955 Act standard is not to grant access that is most convenient to a miner, but to grant access required for and reasonably incidental to mining operations. The Ranger considered ATV access and properly determined it is not required for the stage of activities in which claimants are engaged, and that there are other means of reasonable access available to claimants that also serve to minimize adverse effects on the National Forest.

Issue 3: *“Whether the District Ranger failed to comply with the procedural requirements of 36 CFR 228.5 by refusing to process our Supplemental Plan, when in fact a lack of response and failure to comply with the allowed timeline, makes us believe that our plan is approved.”*

As discussed under Issue 1, the Ranger did process the Supplemental Plan in a timely fashion. When a Ranger is not able to meet the regulatory timeframes in 36 CFR 228 Subpart A, appellant appears to suggest that a pending proposed plan of operations is automatically approved. There is no basis in 36 CFR 228A to support that assertion. There are a number of statutory requirements, such as the Endangered Species Act, National Forest Management Act, and the National Environmental Policy Act, to name just a few, which may and often do preclude compliance with the timelines in 36 CFR 228 A. While the timelines in 36 CFR 228 A are regulatory, they are not specified in a law, and therefore they cannot override other statutory responsibilities.

Issue 4: *“Whether the District Ranger failed to comply with his obligations by failing to perform an environmental assessment of the potential impacts from my planned operations his authority by refusing to allow a use, which he deemed, without analysis, not to be absolutely “necessary”*

to my proposed operations, even though the use is “reasonably incident” to such operations.”
(sic)

Appellants appear to be arguing that the Ranger was required to perform an environmental assessment of the impacts of construction and use of an ATV trail before he reached his decision. There is no requirement in Forest Service regulations at 36 CFR 228A or National Environmental Policy Act regulations at 40 CFR 1500 that an environmental document must be completed before a decision such as the one at issue here is reached.

What is important is that in his decision, the Ranger did consider all relevant information, including but not limited to the nature of claimants’ past activities, information claimants and the Forest geologist had provided on the mineralization at the prospect, industry standards for access during prospecting, and reasonable access alternatives for the claimants.

From my review I find that the Forest Supervisor’s review decision is reasoned and the District Ranger’s decision is in conformance with applicable laws, regulations and policy.

V. DECISION

I affirm the Forest Supervisor’s decision; your request for relief is denied.

Pursuant to federal regulations at 36 CFR 251, Subpart C, 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