



File Code: 1570-1  
#08-04-00-0057 A-215  
Date: September 5, 2008

Marv Hoyt  
Idaho Director  
Greater Yellowstone Coalition  
162 North Woodruff  
Idaho Falls, ID 83401

CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED  
7007 0710 0003 0193 7700

Dear Mr. Hoyt:

In accordance with 36 CFR 215.18, I have reviewed the appeal record, Record of Decision (ROD) and Final Environmental Impact Statement (FEIS) for the Smoky Canyon Mine Panels F & G Project on the Caribou-Targhee National Forest.

My review focused on the project documentation and the issues raised in the appeal you filed on behalf of the Greater Yellowstone Coalition, Natural Resources Defense Council, Caribou Clean Water Partnership, East Idaho Group Sierra Club, Defenders of Wildlife, and the Idaho Conservation League.

Regretfully, I must dismiss the appeals by the Caribou Clean Water Partnership and Defenders of Wildlife. The record for this project indicates the Caribou Clean Water Partnership and Defenders of Wildlife did not provide comments during the comment period. To be eligible to appeal, individuals or organizations must submit comments during the comment period (36 CFR 215.13).

Your appeal on behalf of Greater Yellowstone Coalition, Natural Resources Defense Council, East Idaho Group Sierra Club and Idaho Conservation League was filed in a timely manner and has been processed in accordance with provisions of 36 CFR 215.

In reviewing your appeal, I have considered the recommendation of the Appeal Reviewing Officer regarding the disposition of your appeal. A copy of that recommendation is enclosed.

### **APPEAL DECISION**

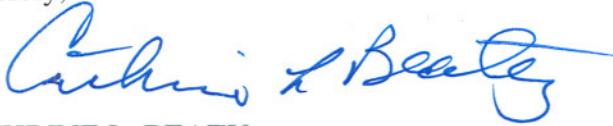
I am affirming the decision by Caribou-Targhee Forest Supervisor Larry Timchak.

I find that the ROD, FEIS, and the project record demonstrate that the Forest Supervisor complied with applicable laws, regulations, and policy. A more detailed response to the appeal issues is enclosed.



This constitutes the final administrative determination of the United States Department of Agriculture under 36 CFR 215.18 (c).

Sincerely,



CATHRINE L. BEATY  
Appeal Deciding Officer

Enclosures

cc: Larry Timchak

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**INTRODUCTION – Greater Yellowstone Coalition, et al.**

The appellants' request for relief is that the decisions to approve the mine expansion and authorize off-lease activities be vacated. The Forest Service (FS) decision which is the subject of this appeal was confined to authorization of the use of National Forest System (NFS) land outside of phosphate lease boundaries for access and haul roads, power lines, and temporary topsoil stockpiles. Under the Mineral Leasing Act (MLA), 30 U.S.C. 211, the Secretary of the Interior is authorized to lease phosphate deposits of the United States (US) and lands containing phosphate deposits, including associated and related minerals, when the Secretary determines the public interest will be served. The Secretary is also authorized to establish terms and conditions for such leases 30 U.S.C. 211(a). Accordingly, leases for phosphate on NFS lands are issued and modified by the Secretary of the Interior, and mining operations within lease boundaries are administered by the Secretary of the Interior in accordance with 43 CFR Part 3590.

Under the Secretary's regulations, the Department of the Interior (DOI) is required only to consult with the FS when issuing or modifying a phosphate lease, or when approving operations on a phosphate lease located on NFS land 43 CFR 3503.20, 3590.2(a). While the FS cooperates with DOI in evaluating the potential effects of leasing and on-lease operations on NFS land and resources through consultation, the FS makes no decisions regarding leasing, lease modification, or authorization of on-lease operations that have binding legal effect. The only related decisions of the FS that have legal effect concern the authorization of the use of NFS land outside of lease boundaries that are associated with on-lease operations.

Appellant's request for relief partially concerns the decisions of the DOI to modify leases and authorize mine development on-lease, and the environmental analysis supporting those decisions. This portion of the requested relief cannot be granted by the FS under the laws and regulations governing phosphate leasing and mining operations on phosphate leases on federal lands because the FS does not control the issuance or modification of phosphate leases, or regulate on-lease mining operations. Accordingly, the appeal response will be confined to the FS decision to authorize off-lease operations.

**APPEAL ISSUE 1: The decision violates the Roadless Area Conservation Rule (RACR)**

**APPEAL ISSUE 1A: The exception to prohibitions on road construction for access to existing mineral leases do not apply to lease modifications that do not pre-date the RACR**

**RESPONSE:** Appellants assert that the decision would violate the RACR by authorizing road construction that is not necessary to access mineral leases that pre-date the RACR. All road construction authorized by the Forest Supervisor's decision is for access to the original Panel F and G phosphate leases. None of the road construction authorized by the Forest Supervisor is solely for access to operations in the lease modifications.

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The location of the Panel F haul road authorized under the decision is designed to allow full recovery of phosphate ore from the existing Panel F lease. The north lease modification approved by DOI will allow recovery and prevent waste of ore exposed during construction of the road, and the on-lease operations are authorized by DOI through the lease modification and mine plan (Bureau of Land Management (BLM) Record of Decision (ROD), p. 10). Once the road is constructed to allow access to the existing Panel F lease, there is nothing in the RACR that prohibits use of the road for operations within the north lease modification.

The off-lease portion of the Panel F haul road that was authorized by the FS, was authorized for access to the previously-existing Panel F lease under the exception to the RACR prohibitions contained in 36 CFR 294.12(b)(7) (FS ROD, p. 14). The Panel F lease was in place prior to January 12, 2001 (BLM ROD, p. 10, 22. Accordingly, the Forest Supervisor correctly found that the decision would comply with the requirements of the RACR (FS ROD, p. 13).

**APPEAL ISSUE 1B: The Panel F haul road is not needed without the north lease modification since the existing Panel F lease can be accessed under Alternative 1.**

**RESPONSE:** As explained in the Forest Supervisor’s decision, locating the Panel F haul road outside of the IRA was considered under Alternative 1, but that location would not allow full recovery of ore from the existing lease (FS ROD, p. 13). Accordingly, the selected alternative does not cause unreasonable or unnecessary surface disturbance in providing necessary access to the existing lease area.

The location of the road was selected by the Forest Supervisor to allow full ore recovery from the pre-existing lease. The road will cross phosphate reserves. In order to allow recovery and prevent wasting of ore exposed during construction of the Panel F haul road, DOI approved a lease modification (BLM ROD, p. 10). There is nothing in the RACR that would prohibit mineral leasing or mining in an inventoried roadless area (IRA). The Panel F haul road would be allowed under the exception for roads needed to access existing leases in the RACR (36 CFR 294.12 (b)(7)). Once the road is constructed for this purpose, there is nothing in the RACR that prohibits mining, or prohibits use of the road for mining in the north lease modification area within the IRA.

**APPEAL ISSUE 1C: Allowing mining in conjunction with construction of the Panel F road does not comply with the requirement of RACR to minimize disturbance of roadless areas.**

**RESPONSE:** Appellants refers to the provisions of 36 CFR 294.12(7), which provides the exception to the prohibition of road construction in IRA relied upon for this decision. When the exception applies, road construction “must be conducted in a manner that minimizes effects of surface resources, prevents unnecessary or unreasonable surface disturbance, and complies with all applicable lease requirements, land and resource management plan direction, regulations, and

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laws.” Transportation alternative one would have largely avoided road construction in an IRA for access to Panel F.

The Forest Supervisor rejected Alternative 1 because that access route would not allow full recovery of phosphate ore within the existing lease area (FS ROD, p. 14). Accordingly, the Forest Supervisor determined that Alternative 1 did not provide sufficient access to the existing lease. The decision provides mitigation and construction standards to insure that the Panel F haul road is constructed in a manner that minimizes effects on surface resources, and does not allow unreasonable or unnecessary surface disturbance (FS ROD, p. 31, 39). The selected location for construction of the Panel F haul road is reasonable and necessary for full recovery of ore from the existing lease.

Construction of the Panel F haul road at the location and elevation necessary to allow for full recovery of ore from the existing lease will expose phosphate ore. In order to recover this ore, and prevent waste, DOI approved a lease modification (BLM ROD, p. 10). There is nothing in the RACR that would prohibit mineral leasing or mining in inventoried roadless areas. Therefore, there was no inconsistency with the RACR.

Effects of constructing Panel F haul road on the roadless area are expected to be minimal (FS ROD, p. 22, 23). At the conclusion of the mining activity the haul road will be fully obliterated (FS ROD, p. 25).

**Note:** Subsequent to the decision that is the subject of this appeal, the United States District Court for the District of Wyoming issued a decision in Wyoming v. USDA, No. 2:07-cv-00017-CAB (D. WY August 8, 2008) which set aside the RACR. Previously, on February 6, 2007 the United States District Court for the Northern District of California issued a decision reinstating the RACR. 3:05-cv-03508-EDL (N.D. Cal. 2007). The United States has filed petitions seeking relief and clarification on the effect of these orders from both courts. However, my response to this appeal must be provided before a decision from the courts will issue.

Granting the appellants’ requested relief might be viewed as a violation of the Wyoming order, as appellants request me to find that the project violates the RACR that the Wyoming court invalidated. Since I decline to grant such relief, there should be no inconsistency with the Wyoming Order. Since the project would not be inconsistent with the RACR, it also should not be inconsistent with the California order.

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**APPEAL ISSUE 2: The Final Environmental Impact Statement (FEIS) is inadequate, or the Draft Environmental Impact Statement (DEIS) should have been supplemented before the FEIS was issued.**

**APPEAL ISSUE 2A: Significant new information was developed after release of the DEIS**

**RESPONSE:** Appellants do not identify any significant new information regarding the Forest Supervisor's decision to authorize off-lease operations. The examples provided by appellants relate to the authorization of on-lease activities by DOI, and therefore do not provide a basis to vacate the Forest Supervisor's decision.

**APPEAL ISSUE 2B: The analysis failed to account for potential selenium discharge from the Panel F haul road**

**RESPONSE:** The FEIS recognizes potential water contamination from haul/access roads as indicated by the length of roadway which crosses the Meade Peak Shale of the Phosphoria formation. The length of roads that occur on Meade Peak Shale was used as an indicator of potential impacts to water resources (FEIS, p. 4-31).

The FEIS further analyzed and described potential groundwater impacts resulting from the Panel F haul/access road (FEIS, p. 4-62). The North lease haul/access road will be constructed using low selenium overburden and materials from road cuts (FEIS, p. 2-20). The access road would not cross the selenium-bearing Meade Peak Shale outcrops (FEIS, p. 4-91). The off lease portion of Panel F Haul/Access Road would largely be built over the outcrop area of the Wells formation with clean fill obtained from cuts in that lithology.

The analysis concludes "there should be no impacts to groundwater quality or flow from this road" (referring to the Panel F haul/access road; FEIS, p. 4-62).

Other potential sources of seleniferous loading to groundwater could occur from road fill materials. Best Management Practices (BMP) is proposed to reduce nonpoint sources of pollution to surface and groundwater (FEIS, 2.5.5; Appendices 2C and 2D). Seleniferous materials would not be used for road construction fill material (FEIS, Appendix 2C, p. 5, Appendix 2D, p. 3). Reclamation of temporary portions of the Panel F haul/access roads would occur as new temporary roads are constructed to access additional portions of the mine (FEIS, p. 2-20).

The off lease portion of the Panel F haul road will largely be built over the outcrop area of the Wells formation which, unlike the Phosphoria Formation, does not contain selenium that can be mobilized when exposed to water and oxygen. Given the absence of selenium and the application of best management practices for road construction, there should be no impacts to surface or groundwater quality or flow from this road (FEIS, p. 3-2; 4-62; 4-91).

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Accordingly, we conclude the FEIS did account for the potential selenium discharge from the off-lease portion of the Panel F haul road.

**APPEAL ISSUE 2C: The contractors used in preparation of the FEIS had a conflict of interest since they were selected by Simplot in violation of Council on Environmental Quality (CEQ) regulations**

**RESPONSE:** The CEQ regulations include three requirements for agencies using a contractor to prepare an EIS: 1) the contractor shall be chosen solely by the lead agency, 2) contractors shall execute a disclosure statement specifying that they have no financial or other interest in the outcome of the project, and 3) the responsible official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents (40 CFR 1506.5).

The BLM and FS met all three requirements. The agencies selected JBR from a list of three contractors after a process including a Request for Qualifications letter and interviews (letter from Jeffrey Cundick, BLM to JBR, November 22, 2002; e-mail from James Blair, BLM to Lori Hamann, Simplot, November 22, 2002; memo, "Request for Qualifications for Preparation of an Environmental Impact Statement," from Lori Hamann, Simplot to All Consultants). It appears from correspondence that Simplot actually preferred a contractor other than JBR, because of JBR's higher cost, but the agencies judged JBR to be the better choice due to staffing and experience (e-mail from James Blair, BLM to Lori Hamann, Simplot, November 22, 2002). JBR executed the required disclosure statement ("Disclosure Statement for J.R. Simplot Smoky Canyon Mine, Manning and Deer Creek Panels Environmental Impact Statement Preparation," November 26, 2002).

The responsible official provided the appropriate guidance and evaluation in preparation of the EIS ("J.R. Simplot Company Smoky Canyon Phosphate Mine EIS, Memorandum of Understanding," March 3, 2004; "Request for Qualifications for Preparation of an Environmental Impact Statement," from Lori Hamann, Simplot to All Consultants).

As for the selection of Dr. James Chapman as a subcontractor, the agencies also met the regulatory requirements. They acknowledged that Dr Chapman had previously done work for Simplot in 2005, determined that this did not constitute a conflict of interest, and chose Dr. Chapman from a list of four candidates based on experience. Other candidates were eliminated because of conflicts regarding previous work for Simplot and the Idaho Mining Association (Memo, "Selection of Dr. Chapman," from Brian Buck to Bill Stout, February 8, 2008; Memo, "April 18, 2006 Simplot Panels F & G Conference Call," from Brian Buck to Scott Gerwe, et al, pp. 2-3, April 30, 2006; e-mail from Brian Buck to Scott Gerwe, April 25, 2006; e-mails circulated among Bill Stout, Brian Buck, Scott Gerwe, and Mary Kauffman, May 15, 2006).

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**APPEAL ISSUE 2D: Appellants allege that an exception will be sought to allow off-lease disposal of selenium overburden.**

**RESPONSE:** Regulations of the Secretary of Agriculture at 36 CFR 251.54(e)(1)(ix) and 251.54(e)(2) prohibit the FS from issuing an authorization for a proposed use of National Forest land that involves the disposal of solid waste, or other hazardous substances. The Forest Supervisor appropriately determined that he could not authorize disposal of selenium overburden off-lease. Since the Forest Supervisor's decision is in compliance with applicable regulations, there is no relief to be granted.

**APPEAL ISSUE 2E: The decision violates the forest plan requirement that there be no degradation of waters or other resources.**

Chapter 4 of the FEIS contains numerous references to requirements of the Caribou National Forest Revised Forest Plan (CNFRFP), disclosing impacts to specific resources and stating that elements of both the approved Mining and Reclamation Plan and off-lease uses of NFS lands will meet the goals, standards, and guidelines of the RFP.

More specifically, the CNFRFP includes several requirements in the form of goals, standards and guidelines to protect water resources (CNFRFP, pp. 3-17, 4-50). In Idaho, surface water quality is protected by implementing Idaho State Water Quality Standards (ISWQS) at IDAPA 58.01.02 (FEIS, p. 3-45). The project record includes two documents received from the Idaho Department of Environmental Quality (IDEQ) addressing requirements for Clean Water Act (CWA) compliance within the CNFRFP: 1) IDEQ responses to comments for Smoky F&G DEIS, addressed concerns with selenium water quality violations from overburden disposal areas. These concerns were addressed with additional analysis included in the FEIS, particularly Appendix D; and 2) IDEQ responded to the BLM that "Impacts from the mitigated mine expansion as described in the Preferred Alternative of the FEIS are not expected to be in violation of either ground water or surface water quality standards" (Letter to BLM from Toni Hardesty, 1/31/08).

The addition of selenium to an already impaired water body is not necessarily a violation of the Water Quality Standards (WQS). An increase in selenium only violates the anti-degradation policy when the increase results in water quality that further impairs the use. The addition of selenium that does not increase the concentration above the water quality criteria is not a violation of the WQS (FEIS, p. 4-97).

Because IDEQ has determined that there is not a conflict between the 303(d) listing for selenium and the Agency Preferred Alternative, the FS has determined that their CNFRFP Standard regarding this issue would also be met (USFS 2006b) (FEIS p. 4-98).



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The projected impacts from land uses authorized by the FS will comply with State surface water quality regulations, the CWA, and the Idaho Ground Water Quality Rule through application of mitigation measures. Permitted operations are predicted to meet IWQS and protect in-stream beneficial uses and comply with the requirements of the CWA and therefore meet CNFRFP requirements for water quality (FEIS, p. 4-84; FS ROD, p. 55)

**APPEAL ISSUE 2F: The Caribou NF Forest Plan does not contain sufficient management indicator species (MIS) of aquatics and other non-forested habitats to determine if the requirements to maintain diversity under the National Forest Management Act (NFMA) have been met.**

**RESPONSE:** Appellants assert that the Caribou NF Forest plan violates NFMA and its implementing regulations by failing to select a sufficient list of MIS as required by 36 CFR 219.19(a)(1). Specifically, the appellants contend that the Forest failed to select sufficient MIS for aquatic and non-forested habitats.

The NFMA regulatory requirements for the designation of MIS are found at 36 CFR 219.19(1)(a) and state that “in order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and /or invertebrate species present in the area shall be identified and selected as MIS and the reasons for their selection will be stated. These species will be selected because their population changes are believed to indicate the effects of management activities” (FSM 2621.1). Nothing in NFMA, its implementing regulations or the FSM requires the Forest to select a MIS to represent every major habitat type within a planning unit. Forests are required to use a deliberative process for the selection of MIS, and to document their selection rationale.

The protocol process used for the Caribou NF Forest Plan included a review of existing MIS and a determination of whether these species were adequate to retain as an MIS. Habitats were also identified for MIS monitoring. Habitat identification generally included habitat areas considered at high risk, through the Forest’s Vegetation Properly Functioning Condition assessment, the Idaho Bird Conservation Plan, or the Columbia River Basin Assessment. Where appropriate species could be found for these priority habitats, MIS were selected. In several cases, no wildlife species met the selection criteria, or population trend data could not be realistically gathered (Caribou NF Forest Plan, p. 3-223).

The Caribou NF Forest Plan documents that appropriate MIS could not be identified for riparian, which includes stream habitat (FEIS, Appendix D, Table 35), and other non-forested community types. Instead of using MIS to monitor these habitat types the direct monitoring of vegetation communities is recommended (FEIS, Appendix D, p. 38). Specific monitoring and reporting requirements for these communities are outlined in Table 5.4 of the Caribou NF Forest Plan.

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**APPEAL ISSUE 3: Violation of Data Quality Act**

**RESPONSE:** Appellants have filed a petition for correction of information used in the FEIS under the Data Quality Act. A response to that petition has been provided in accordance with Guidelines of the Department of Agriculture.



File Code: 1570-1

Date: 9/5/2008

Route To:

**Subject:** Reviewing Officer Recommendation, Smoky Canyon Mine Panels F and G Expansion for Off-Lease Activities, Appeal #08-04-00-0057-A215.

**To:** Appeal Deciding Officer, Cathy Beaty

This is my review and recommendation on the disposition of the following appeal on the Smoky Canyon Mine Panels F and G Expansion by Marv Hoyt, Idaho Director, Greater Yellowstone Coalition (GYC) who filed the appeal on behalf of the National Resources Defense Council, East Idaho Group Sierra Club, and Idaho Conservation League.

### **Project Background**

The project is located on the Caribou-Targhee National Forest (CTNF). The Environmental Impact Statement (EIS) is a joint analysis between the Bureau of Land Management (BLM) and the CTNF. Two individual Records of Decision (ROD) were issued by the BLM and Forest Service (FS) which cover the separate activities each agency is responsible for implementing. The BLM ROD covers the on-lease portions of the proposed Mine and Reclamation plan and expansion, while the FS ROD covers the off-lease activities. The BLM was the Lead Agency, while the FS was a Joint Lead Agency. The Idaho Department of Environmental Quality (IDEQ) participated as a cooperating agency. The existing Smoky Canyon Mine is located in Caribou County, Idaho approximately ten air miles west of Afton, Wyoming on the east slope of the Webster Range between Smoky Canyon to the north and South Fork Sage Creek to the south. Year-round access to the mine is gained by traveling west from Afton on State Highway 237 approximately three miles, then north about four miles on State Highway 238 toward Auburn, WY.

Smoky Canyon Mine Panels F & G Authorization for Off-Lease Activities project includes issuance of a special use authorization by the FS to permit J.R. Simplot Company to construct access and haul roads, power lines, and to temporarily stockpile topsoil on National Forest System (NFS) lands in connection with development and mining on two adjacent federal phosphate leases (Manning Creek I-27512 – referred to as Panel F, and Deer Creek I-01441 – referred to as Panel G) administered by the BLM.

The off-lease activities are needed due to BLM receiving an application in April 2003 from J.R. Simplot Company (Simplot) to exercise development rights granted to them in their Federal mineral leases. Simplot's application proposes expanding the existing phosphate mining operations at their Smoky Canyon Mine by constructing Panels F and Panel G. The United States Department of the Interior (DOI) manages the mineral estate belonging to the United States. For non-energy leasable minerals like phosphate, BLM is the designated agency within the DOI that is responsible for minerals management functions on most Federal lands, including NFS lands. Authority to issue phosphate leases and approve mine and reclamation plans for





mining operations within lease boundaries lies with the DOI under the Mineral Leasing Act (MLA) of 1920.

### **Appellant's Request for Relief**

The appellants respectfully request that the FS vacate the decision of the Caribou-Targhee National Forest Supervisor Lawrence A. Timchak approving the expansion of the Smoky Canyon Mine, including his authorization of the off-lease activities necessary for this expansion.

### **Appeal Summary**

The Greater Yellowstone Coalition (GYC) asserts that the CTNF has violated the Clean Water Act (CWA), Roadless Area Conservation Rule (RACR), Data Quality Act and other federal laws and policies such as the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), as well as the Administrative Procedures Act (APA). Specifically, the following appeal issues were raised which I have summarized below:

#### **Appeal Issue 1 - The decision violates the Roadless Area Conservation Rule (RACR)**

- 1a - The exception to prohibitions on road construction for access to existing mineral leases do not apply to lease modifications that do not pre-date the RACR
- 1b - The Panel F haul road is not needed without the north lease modification since the existing Panel F lease can be accessed under Alternative 1.
- 1c - Allowing mining in conjunction with construction of the Panel F road does not comply with the requirement of RACR to minimize disturbance of roadless areas.

**Appeal Issue 2 - The Final Environmental Impact Statement (FEIS) is inadequate, or the Draft Environmental Impact Statement (DEIS) should have been supplemented before the FEIS was issued.**

- 2a - Significant new information was developed after release of the DEIS
- 2b - The analysis failed to account for potential selenium discharge from the Panel F haul road
- 2c - The contractors used in preparation of the FEIS had a conflict of interest since they were selected by Simplot in violation of Council on Environmental Quality (CEQ) regulations
- 2d - Appellants allege that an exception will be sought to allow off-lease disposal of selenium overburden.
- 2e - The decision violates the forest plan requirement that there be no degradation of waters or other resources.
- 2f - The Caribou NF Forest Plan does not contain sufficient management indicator species (MIS) of aquatics and other non-forested habitats to determine if the requirements to maintain diversity under the National Forest Management Act (NFMA) have been met.

**Appeal Issue 3: Violation of Data Quality Act for correction of information used in the FEIS.**

## **Findings**

As Appeal Reviewing Officer, my role is to review the substantive quality and correctness, or appropriateness of the project decision with respect to clarity, comprehension, effectiveness of public participation, and requested changes. My findings are based on my review of the decision and project record, in accordance with 36 CFR 215.19.

### **1. Clarity of the Decision and Rationale**

The Forest Supervisor's decision is clearly described in the ROD/EIS and is well reasoned. The decision document describes the selected alternative, the rationale, and what was considered in making this decision. The decision is based on review of the record, which shows a thorough examination of relevant scientific information, consideration of responsible opposing views, and the acknowledgment of incomplete or unavailable information, scientific uncertainty, and risk. The best available science has been considered in making this decision. The requirements of the Caribou National Forest Revised Forest Plan (CNFRFP) (2003) were also considered. The decision is consistent with the Forest Plan, which recognizes phosphate mining as an appropriate use of NFS land in this portion of the Caribou National Forest (CNF).

### **2. Comprehension of Benefits and Purpose of the Proposal**

The Purpose and Need and Decision Framework are clearly stated in the EIS and ROD. The EIS describes the need to evaluate and respond to a proposed Mine and Reclamation Plan (Simplot's Proposed Action) that would recover phosphate ore reserves contained within Panels F and G phosphate leases, as directed by the MLA of 1920. The EIS explains that FS authorization is required for all off-lease operations related to the project, such as haul roads and utilities. The FS must determine whether and how to authorize these operations (EIS, p. 1-5, section 1.1).

The selected alternative is consistent with and will accomplish the stated purpose and need. The economic benefits of expansion of the Smoky Canyon Mine and associated off-lease activities are clearly described in the EIS (EIS, pp. 4-239 through 4-250, sec. 4.16; ROD, p. 28, sec. 3.3).

### **3. Consistency of the Decision with Policy, Direction, and Supporting Information**

I find the decision is consistent with agency policy, direction and procedures for completing the EIS and ROD. The EIS, ROD and the record for this project adequately disclose the environmental effects and provide sufficient evidence and analysis to make a reasoned decision.

### **4. Effectiveness of Public Participation Activities and Use of Comments**

The FS and BLM conducted a thorough scoping and public involvement process. The public involvement process included the following:

- Publishing the Notice of Intent (NOI) in the Federal Register, September 15, 2003.



- Legal Notices in Pocatello, Idaho, September 19, 2003 and in Afton, Wyoming, September 25, 2003.
- News release published in Pocatello, Idaho (September 17, 2003) and Boise, Idaho (September 18, 2003) newspapers.
- A public mailing of 115 scoping letters were sent to federal, State, and local government agencies, and members of the interested public. Two hundred twenty nine comments were received.
- Two public meetings were held. One was held in Afton, Wyoming on October 8, 2003 at Star Valley High School and the other in Pocatello, Idaho on October 7, 2003 at the BLM Pocatello Field Office.
- A 60-day Draft EIS (DEIS) review period was initiated by publication of the Notice of Availability (NOA) for the DEIS in the Federal Register on December 29, 2005 by BLM and December 30, 2005 for the EPA NOA. The NOA was amended January 13, 2006 and a comment period extension was published by the EPA on February 24, 2006. The comment period was extended an additional 15 days and ended March 20, 2006. At the end of the comment period, a total of 38,616 letters, email, and comment forms had been received. Of these, 1,055 were original comment letters. The remaining 37,561 were form response letters or other organized response campaigns.

The record is clear that substantive comments received through scoping and on the Proposed Action were addressed. Identified concerns included potential effects of the project on inventoried roadless areas, water quality, wetlands, wildlife and fishery habitats, livestock grazing, soils, air quality, socioeconomics, private property values, forested areas, recreation, development of Best Management Practices (BMP) for mine operations, and 1868 Fort Bridger Treaty Rights.

## **5. Consultation with Tribes**

The Shoshone-Bannock Tribes have reserved Treaty Rights on the public domain lands, in this case, administered by the CTNF. The Fort Bridger Treaty of July 3, 1868 reserved hunting and fishing rights for Tribal members on “all unoccupied lands of the United States.” Consultations, site visits, technical meetings were conducted with the Fort Hall Business Council of the Shoshone-Bannock Tribes on land management activities that could affect forest uses and access to the forest by tribal members.

## **6. Requested Changes and Objections of the Appellant**

The appellant requests that the FS vacate the decision due to violations of laws and regulations. In my review of the appeal I did not find that the appellants presented a compelling argument in contrast to the information the Forest Supervisor had to make his decision. I feel the decision and record adequately address and refute the appellant’s rationale for vacating the decision.

## 7. Recommendation

I recommend that the decision by Forest Supervisor Lawrence A. Timchak be affirmed. The environmental analysis and supporting information in the project record as it relates to the RACR, potential selenium discharge from the Panel F haul road, contractors conflict of interest, off-lease disposal of selenium overburden, MIS of aquatics and other non-forested habitats, correction of information used in the FEIS under the Data Quality Act, and water quality are adequate to support the decision.



Robert G. MacWhorter  
Appeal Reviewing Officer

