



United States
Department of
Agriculture

Forest
Service

Intermountain Region

324 25th Street
Ogden, UT 84401
801-625-5605

File Code: 1570-1

#08-04-00-0056 A-215

Date: September 5, 2008

Bill Bacon
Fort Hall Business Council
P. O. Box 306
Fort Hall, ID 83206

CERTIFIED MAIL – RETURN
RECEIPT REQUESTED
7007 0710 0003 0193 7694

Dear Mr. Bacon:

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 Shoshone-Bannock Tribes. 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



**Smoky Canyon Mine Panels F & G
Caribou-Targhee National Forest
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Shoshone Bannock Tribes**

INTRODUCTION – Shoshone Bannock Tribes

In their request for relief, the appellants have requested that the Forest Service (FS) and the Bureau of Land Management (BLM) decisions to approve the Smoky Canyon Mine expansion and all off-lease activities be vacated to address the issues raised in the appeal. The 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 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 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 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: Compliance with the Roadless Area Conservation Rule (RACR) 36 CFR 294

APPEAL ISSUE 1A: The determination of compliance with the RACR improperly relies on the assumption that the requirements of the RACR will be modified by the Idaho Roadless Petition

RESPONSE: Appellants contend that the Forest Supervisor improperly relied on the assumption that the Idaho Roadless petition would amend the RACR to remove prohibitions on road construction for the Smoky Canyon mine expansion. However, the proposed changes under the Idaho Roadless petition were not the basis for the Forest Supervisor's decision.

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The RACR prohibits road construction and timber cutting in inventoried roadless areas (IRA), with certain exceptions (36 CFR 294.12, 294.13). One exception to the prohibition of road construction is where a road is needed in conjunction with the continuation, extension, or renewal of a mineral lease issued by the Secretary of the Interior prior to January 12, 2001 (36 CFR 294.12 (b)(7)). All road construction authorized by the Forest Supervisor's decision off-lease that will take place in IRA is needed in conjunction with the Panel F and G phosphate leases, which were in place prior to January 12, 2001 (BLM ROD, pp. 10, 22). Accordingly, the Forest Supervisor correctly found that the decision would comply with the requirements of the RACR (FS ROD, pp. 13, 23; Final Environmental Impact Statement (FEIS), pp. 1-10, 1-11)

DOI chose to defer some decisions on the mine plan for several reasons. Specifically, certain operations in the south lease modification area were not proposed to commence for several years. DOI chose to defer decisions on authorization of those operations until they were proposed to commence. Accordingly, the decision acknowledges that circumstances may change before then, including possible modification of the RACR by the Idaho Roadless petition. The current decision merely states that when a decision is made regarding authorization of mining operations in the south lease modification area, it will be consistent with the laws and rules in effect at the time that decision is made (BLM ROD, pp. 10, 22, 24). Moreover, DOI was careful to reserve discretion in its decision to insure that any operations would be consistent with the version of the RACR in effect at the time of the decision in the event there are not changes to the rule. Therefore, the analysis of effects in the FEIS relied upon by the Forest Supervisor does not assume that the RACR will be modified by the Idaho Roadless petition, and would be fully compliant with the version of the RACR that was in effect at the time the decision was made. (FEIS, pp. 4-198 through 4-202; ROD, p. 23).

APPEAL ISSUE 1B: The FS decision permits mining as a component of the Panel F Haul Road construction.

RESPONSE: The Forest Supervisor's decision does anticipate that mining will occur in the north lease modification in conjunction with construction of the Panel F haul road. However, as explained above, the FS decision does not authorize mineral leasing, modification of the leases, or authorize mining operations on-lease. The on-lease mining operations to be conducted in conjunction with construction of the Panel F haul road were authorized by DOI pursuant to its authority under the MLA (BLM ROD, p. 10, 14).

The off-lease portion of the Panel F haul road within the IRA 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 location of the road was selected as the road location necessary 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).

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There is nothing in the RACR that prohibits mineral leasing or mining in an 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 would prohibit mining, or prohibit use of the road for mining in the north lease modification area within the IRA.

APPEAL ISSUE 1C: Alternative one minimizes the impact of the Panel F haul road on the IRA and is required to be selected under the RACR.

RESPONSE: Appellants refer to the provisions of 36 CFR 294.12 (b)(7), which provides the exception to the prohibition of road construction in inventoried roadless areas that was 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 laws.” The RACR would not require that a road be the minimum necessary for the activity. If a road is required, the RACR would require it to be constructed to minimize its effects on the roadless area. It is acknowledged that transportation Alternative 1 would have largely avoided road construction in an IRA for access to Panel F.

However, 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. 24). 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 selected 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.

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 of 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.

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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. Furthermore, the project would not be inconsistent with the RACR, and therefore should not be in violation of the California order.

APPEAL ISSUE 2: The decision violates off-reservation treaty rights and Executive Order (E.O.) 12898 by failing to adequately analyze impacts to tribal interests and failing to avoid or mitigate impacts.

RESPONSE: Appellants' concern goes primarily to decision of DOI to issue leases in this area and approve mining operations. Accordingly, the ability of the FS to remedy these concerns is limited.

The record indicates substantial efforts to consult with tribes and consider the potential impacts to treaty rights and other tribal interests (FS ROD, pp. 43-46; FEIS, pp. 6-5 through 6-21). The Tribes' concerns relate primarily to potential impacts to water quality, fisheries, and loss of access to the area occupied by mining activities for exercise of treaty rights and other cultural purposes. The predicted effects from the mine will not harm water quality or fisheries to the extent of impacting treaty rights. The loss of access to the area is temporary, and this is a relatively small geographic portion of the area for which treaty rights are held.

The analysis in the FEIS is sufficient to show that the Forest Supervisor's decision to authorize off-lease mining operations does not violate treaty rights and that tribal interests were adequately considered.

The FEIS does consider, analyze, and mitigate for the environmental, cultural, and spiritual concerns expressed by the Tribe throughout the project planning process. In addition, it considers the legal rights of the Tribe to use and occupancy of the project area based on previous treaties and agreements.

Specific treaty rights, and Tribal uses and interests, in the project area are itemized in the FEIS (FEIS, p. 3-210). The many FS and BLM staff and consultation meetings with the Tribe to help understand and address concerns are listed in the FEIS (FEIS, p. 214). The FS reaffirms their commitment to honor treaty rights (FEIS, p. 1-14).

Environmental consequences and impacts to treaty rights and Tribal interests are summarized for the entire project and found to be short term or minor/insignificant/negligible (FEIS, ch. 4). Impacts from the proposed project are estimated to be within regulatory standards and limits with stipulated mitigation. Possible mitigation for minimal loss of Treaty rights is discussed and nowhere are additional mitigation opportunities foreclosed at some future implementation stage.

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Opportunities for the Tribe to participate in inventorying and monitoring of the environment and possibly undetected cultural items remain as possible future options.

The FEIS states that all known resources of interest to the Tribe in the project area are also available throughout the surrounding public lands. The FEIS also notes that due to recent emphasis on restoration of public lands in the project vicinity, wildlife numbers are increasing and the reclaimed project site may provide habitat that encourages increased wildlife use and long-term increases in hunting success (FEIS, p. 5-75).

The FEIS records the issues raised during consultation with the Tribe and provides decisions on how the information will be used and the rational or limits of authority that the agency has to implement all of the Tribes recommendations (FEIS, p. 6-5).

Impacts from the total project are quantified generally as a temporary loss of 1340 acres of land or 0.13 percent of the one million acre Caribou National Forest and Grasslands. In addition, due to the incremental development and restoration of the project segments, not all of the acres would be heavily impacted at one time (FEIS, p. 4-228).

Out of the total project area impacted only about 300 acres (22% of the total project area to be impacted) are within the off-lease areas covered by the FS ROD (FS ROD, p. 4-229). These areas are primarily the haul roads and power line corridors. Impacts to the Tribe from the activities to be authorized under the FS ROD, when generalized in terms of acres, amount to less than 0.03 percent of the land available for use by the Tribe on the Caribou NF. This does not include the millions of acres of additional NF and BLM lands near by where the Tribe's treaty rights also apply

To consider the possibility of a violation of a treaty right I followed the analysis and standards used by the 9th Circuit Court in *Okanogan Highlands Alliance v. Williams* (236 F.3d 468). This 2000 decision dealt with similar Stevens Treaty rights regarding possible impacts from a proposed gold mine operation involving FS, BLM, and Washington Department of Natural Resources lands. In this case the 9th Circuit upheld the FS ROD.

In their decision the Court made the following findings and opinions that seem to bear on the FS Smoky Canyon ROD:

Colville argues specifically that the Forest Service failed to give adequate consideration to Colville's reserved hunting and fishing rights in five ways: (1) by failing to include in the EIS or the ROD a discussion of the effect of the Project on culture and subsistence, a feature of Colville's reserved rights; (2) by under calculating the tribal deer harvest; (3) by failing to include an adequate discussion of the effect of the Project on water quality, and, instead, deferring those issues to the state; (4) by failing to include an adequate discussion of mitigating measures; and (5) by failing to select Alternative C. Colville's challenge is, in essence, a challenge to the adequacy of the EIS, and the normal APA standard of review applies.

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Approximately 2000 acres of hunting and fishing territory will not be available to Tribal members over the life of the project. This is less than 1% of the total acreage of Federal lands available for Tribal hunting within the North Half. The small streams within the project area do not support fish populations. Project **effects to the harvest of wildlife and fish by tribal members is not quantifiable**; rather the effects to wildlife and fish habitat and stream flows has been disclosed in the FEIS (see Sections 4.11 Aquatic Habitat and Populations; and 4.12 Wildlife).

[W]e conclude that the discussion of Colville's reserved rights is sufficient. The EIS and ROD contain numerous acknowledgments of Colville's rights. See, e.g., EIS 4.27.7 at 4-251 (including Colville's reserved hunting and fishing rights, and tribal cultural properties, as environmental issues that were considered and addressed); EIS 1.9.3 at 1-11 (recognizing Colville as "distinct, separate, political entities that have a unique legal relationship with Federal agencies," and noting that their reserved rights are addressed); EIS 1.10.2 at 1-12 (stating that a key issue addressed in the EIS is the Project's "potential to affect cultural resources, reserved rights, trust issues, and responsibilities"); EIS 3.9.1 at 3-69 to 3-70 (noting that the water resources in the Project area "may be necessary to satisfy the Tribe's federally reserved water rights"); EIS 3.13.3 at 3-93 (acknowledging Colville's hunting rights in the North Half).

[T]he United States, as a trustee for the Tribes, has a responsibility to protect their rights and resources"). In the absence of a specific duty, this responsibility is discharged by "the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.

The EIS and ROD state repeatedly that Colville's reserved rights must be considered. The EIS extensively analyzes the issues that would affect those reserved rights and concludes that the impact would not be significant. We hold, then, that the Forest Service took the requisite "hard look" at the issues that will affect Colville's reserved rights.

Colville points to an error in EIS 3.15.4, in which the Forest Service estimated that Colville members harvested 28 deer in an area that includes the Project area. The Forest Service issued a corrected statement that increased the estimate to 219. That correction does not render the Forest Service's actions arbitrary or capricious. The decision that Colville's reserved rights would not be substantially affected by the Project was based on the mitigating measures (which are expected to increase deer habitat), and on a comparison of the amount of habitat affected to the total habitat. In other words, the decision did not depend on the number of deer harvested. Accordingly, we affirm the district court's ruling on this issue.

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Parallel to the 9th Circuit analysis above, I have not found any quantifiable effects to the Tribe's harvest of natural resources within the off-lease portions of the proposed project. There is nothing in the administrative record to indicate that the Tribe ever provided specific information to the FS on the quantity of use by tribal members within the project area upon which to evaluate possible impacts outside of general acre quantification. Therefore, like the 9th Circuit, I conclude that the FS has met the FS trust and legal obligations to the Tribe when I have complied with all relevant environmental statutes and BMPs.

For similar reasons I support the records finding that this project does not have a significant desperate impact on Tribal members that would violate the EO 12898 governing Environmental Justice policies.

The Tribe also made claims based on their aboriginal rights. However, the 9th Circuit has ruled in the past that aboriginal title was extinguished at the time the Forest was reserved [US v. Gemmill, (9th Cir., 1976, 429 U.S. 982)]

The Tribe also requested that extensive ethnographic studies be conducted. While I agree that such studies would have aided the FS ability to evaluate potential impacts and mitigate they would have required extensive time and funds. There is no legal requirement that this amount of additional research is warranted without preliminary evidence of very significant potential impacts to the Tribes treaty rights or the general environment.

With respect to statements by the Tribe that any impacts to them are significant (which includes other statements regarding the cultural and spiritual impacts), I can understand at a personal level. However, in light of court decisions dealing with claims based on the Religious Freedom Restoration Act [Navajo Nation v. United States Forest Service, (9th Cir., Aug. 8, 2008)] or the American Indian Religious Freedom Act [Lyng v. Northwest Indian Cemetery Protective Association, (485 US 439, 1988)], I do not find the necessary legal weight to defeat existing agency policy direction and the lease interests which propel the purpose and need for the proposed Smoky Canyon Mine Expansion.

APPEAL ISSUE 3: The EIS failed to consider fugitive dust during the initial road and mine construction phase which could cause significant additional fugitive dust. The project's settling characteristic model should be compared with the Environmental Protection Agency (EPA) AP-42 calculations for unpaved roads.

RESPONSE: Air emissions including fugitive dust are regulated by the Idaho Department of Environmental Quality (IDEQ) and U.S. EPA regulations. Smoky Canyon mine operates under an IDEQ permit issued July 6, 1983 (State of Idaho 1983) (FEIS, p. 4-15). This permit includes fugitive dust control measures, and other air pollution control requirements (FEIS, p. 4-15). Fugitive dust emission standards are based on the State Implementation Plan (SIP), adherence to IDAPA 01.01.650, and are regulated based on opacity standards (FEIS, p. 4-15).

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The FEIS estimates air emissions, including fugitive dust, for the off-lease access road alternatives by using the EPA approved Industrial Source Complex Short Term, Version 3 (ISCST3) model (FEIS p. 4-16).

In addition, the project record reflects that the FEIS contractor also utilized a simple version of the AP-42 emission factor equation to calculate the fugitive emissions from active disturbance, including access roads (Technical Memo, JBR Environmental, October 2006). The FEIS (Consultation and Coordination) describes additional best management practices the operator will employ to reduce fugitive dust and meet air quality standards (FEIS, p. 6-14 through 6-20).

Therefore, the FEIS did analyze the effects of fugitive dust for all phases of the mining and road construction including initial construction of the off-lease haul access roads covered by the FS decision.



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 #08-04-00-0056-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 Alfonzo A. Coby who filed the appeal on behalf of the Shoshone-Bannock Tribes.

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 request that the FS vacate the decision issued June 6, 2008 by Forest Supervisor Lawrence A. Timchak until all issues raised have been adequately addressed.

Appeal Summary

The Shoshone-Bannock Tribes asserts that the CTNF has violated Tribal Treaty Rights, interests and trust resources, the MLA, Clean Water Act (CWA), Roadless Area Conservation Rule (RACR), and other federal laws and policies such as the National Environmental Policy Act (NEPA), the Appeals Reform Act (ARA), 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 – Compliance with the RACR 36 CFR 294:

- 1a - The determination of compliance with the RACR improperly relies on the assumption that the requirements of the RACR will be modified by the Idaho Roadless Petition;
- 1b - The FS decision permits mining as a component of the Panel F Haul Road construction;
- 1c - Alternative 1 minimizes the impact of the Panel F haul road on the inventoried roadless area (IRA) and is required to be selected under the RACR.

Appeal Issue 2 - The decision violates off-reservation treaty rights and Executive Order (E.O.) 12898 by failing to adequately analyze impacts to tribal interests and failing to avoid or mitigate impacts.

Appeal Issue 3 - The EIS failed to consider fugitive dust during the initial road and mine construction phase which could cause significant additional fugitive dust. The project's settling characteristic model should be compared with the Environmental Protection Agency's (EPA) AP-42 calculations for unpaved roads.

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 IRA, 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." Consultation with the Fort Hall Business Council of the Shoshone-Bannock Tribes is required on land management activities that could affect forest uses and access to the forest by tribal members.

The Agencies consulted with the Shoshone-Bannock Tribes, Fort Hall Business Council, acknowledging the federal trust responsibility arising from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian Tribes. Five Government to Government consultations took place from scoping to release of the Final Environmental Impact Statement (FEIS) and the ROD. In addition to the consultations, meetings were held with the Fort Hall Business Council that governs the Shoshone-Bannock Tribes. These meetings provided a project overview prior to release of the DEIS, and two meetings to discuss the DEIS and Tribal comments. The final two consultations provided a review of both agencies Preferred Alternatives and notified the Council of the FEIS release. Beyond formal consultation, three site visits, four technical meetings, and several letters were exchanged.

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.

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, off-reservation treaty rights, E.O. 12898, fugitive dust during the initial road and mine construction phase, and water quality are adequate to support the decision.

A handwritten signature in blue ink, appearing to read "Robert G. MacWhorter". The signature is fluid and cursive, with a large initial "R" and "M".

Robert G. MacWhorter
Appeal Reviewing Officer

