



United States
Department of
Agriculture

Forest
Service

Prescott
National Forest

344 South Cortez Street
Prescott, Arizona 86303

File Code: 1570/2810

Date: September 21, 1998

W. Scott Donaldson, Attorney-at-law
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CERTIFIED MAIL - RETURN
RECEIPT REQUESTED

Re: Appeal #98-03-09-002-A251

Dear Mr. Donaldson:

In accordance with appeal regulations 36 CFR 251, the following is my review decision of your appeal of District Ranger Ernest Del Rio's decision of March 12, 1998, on the Plan of Operations for the Roadrunner Prospector's Club.

BACKGROUND

On January 20 1998, Roadrunner Prospector's Club Inc. requested a renewal of their current plan of operation. The request was reviewed and new stipulations issued covering all of the claims owned by the Club on the Prescott National Forest. These stipulations were mailed to the Club on March 12, 1998.

We received your appeal of the District Ranger's decision on behalf of the Club on April 24, 1998, as well as your request for an oral presentation. Personnel of the Bradshaw Ranger District set up a meeting with you and members of the Club's Board of Directors on May 13, 1998, in an attempt to resolve appeal points in accordance with 36 CFR 251.93(b). During the afternoon of May 12, 1998, you informed that office that the Board had cancelled the meeting. The District Ranger prepared a Responsive Statement, addressing your appeal points on May 22, 1998, and provided you with a copy. On June 10, 1998, you requested an extension of time in which to reply to the Ranger's statement. I granted an extension until June 26, 1998. Your reply to the Responsive Statement was dated June 23, 1998.

The oral presentation which you requested was held on August 14, 1998 after several scheduling attempts. The presentation was attended by seven members of the Club and four Forest employees, including me.

I will address the appeal points as they were identified in the body of your appeal related to the stipulations and pages contained in the Rangers decision of March 12, 1998.



ANALYSIS OF APPEAL POINTS

Stipulation #2, page 1: "Roadrunner is not responsible for members' mining activities outside its claims. Gold removal from another's claim is covered in federal and state law.

Discussion: In his Responsive Statement, the District Ranger clarified that Roadrunners are responsible only for the activities of its members on the Roadrunner claims. You indicated that the Club accepted his clarification in your reply and this was reaffirmed at the oral presentation.

Finding: This stipulation will be retained in the plan of operations and will be interpreted in accordance with the District Ranger's explanation in his Responsive Statement.

Stipulation #3, page 1: The Club objects to the District Ranger's restriction of suction dredges to three inches or less, and to restricting dredges to areas below the high water mark.

Discussion: The District Ranger has imposed the three inch limitation on dredges to minimize the cumulative adverse environmental effects on the surface resources of the very sensitive and critical riparian areas. At the oral presentation, the Club agreed to accept the limitation, providing that four inch dredges would be grandfathered, as the District Ranger had previously agreed.

Item C.1. of the Plan of Operations which you submitted for the Club on May 12, 1995, states, "All mining operations will be confined to alluvial areas." Item D of the Plan described the "small scale placer equipment" as follows: "Suction dredges (not more than 3" intake), dry-washers operated with pick and shovel, sluice boxes" and further defined the area of operations as follows: "Equipment is generally used in washes." The District Ranger clarified these generalized operating areas in stipulation as, "...working within the active stream channel of drainages within the boundaries of the Club claims; the operation will not involve any mining activity taking place above the high water mark of any drainage." It appears that he intended to define the area applied for in the Plan of Operations, and based the reclamation costs for bonding purposes upon such activities.

Finding: The three inch dredge limitation will remain in the stipulation and existing four inch dredges will be grandfathered under the plan based upon a listing of such dredges and owners to be provided to the District Ranger no later than November 1, 1998, as agreed upon at the oral presentation. If work, involving surface disturbance, is desired above the high water mark of any drainages, such areas should be identified and requested in the Plan of Operations. The District Ranger will then conduct an analysis of the activity and determine if any additional reclamation or bond adjustment is needed.

Stipulation #4, page 2: "Roadrunner objects to the BRD restriction of one active area of operation. Reclamation and bonding requirements will protect the claim areas."

Discussion: The District Ranger clarified the intention of this stipulation in the Responsive Statement and you agreed to that clarification in your reply of June 23, 1998. Club members concurred at the oral presentation.

Finding: The District Ranger is directed to adjust the first sentence of this stipulation to read, "Only one area of operation (AOP) per operator will be active at any one time."

Stipulation #5, page 2: "Roadrunner objects to BRD use of settling ponds to reduce turbidities. The BRD has not provided any scientific research showing the impact of turbidity on aquatic life in any of the streams and/or creeks for the claims listed in the Plan of Operation."

Discussion: The operating plan which was proposed by the Club on May 12, 1995, stated on page three, "Settling ponds will be used to filter out turbidity before the water leaves the claims." Under item 6 on page 5 of that same operating plan, the Club states that, "Limiting the type and size of equipment and the use of settling ponds, water quality will be preserved." The Club requested that the Plan of Operations be extended on December 16, 1996, and again on January 20, 1998. Settling ponds were originally proposed by the Club, and not imposed by the District.

The District Ranger is not obliged to provide scientific research proving the impact of turbidity of aquatic life. The Arizona Department of Environmental Quality (ADEQ) issued a Section 401 Water Quality Certification on March 17, 1995. Certification condition 20 states, "The turbidity in a watercourse shall not be increased above 50 NTU due to mining activity. Do not discharge dredge fines back into the water. Place them along the sides of the watercourse behind a dike or use a settling pond to filter out turbidity before water muddied by mining is returned to the watercourse." Your reply to the Responsive Statement indicated that Roadrunner would comply with all regulations and policies of ADEQ and the U.S. Army Corps of Engineers.

The District Ranger indicated that Stipulation #5 was the best way to inform members of their responsibility to protect the water quality, since they must have a copy of the Plan of Operations in their possession when operating.

Finding: The protection of water quality is of extreme importance in the arid Southwest and cannot be over-emphasized. This stipulation will be retained, but the District Ranger is directed to alter the wording to better reflect the wording from condition 20 of the ADEQ Water Quality Certification, in stipulation 5 of the Plan of Operations.

Stipulation #8, page 2: "Roadrunner objects to the BRD establishing a buffer zone based on the diameter of a tree."

Discussion: The appellant maintains that removal of vegetation is an approved manner of operating below the high water mark under the 1872 Mining Law. The District Ranger is concerned about the health of the riparian ecosystems, soil stability, and water quality. Also, riparian habitat is designated as restricted area for the threatened MSO (Mexican Spotted Owl). He cites Amended Forest Land Management Plan guidelines for the management of MSO restricted areas which emphasize restoring and maintaining healthy riparian ecosystems and preventing damage to vegetation, stream banks, and channels. This stipulation meets the intent and objectives of the MSO guidelines by protecting the riparian ecosystem and preventing negative impacts to the resources thereby precluding the need for a lengthy consultation process required with the U.S. Fish and Wildlife Service.

After your oral presentation and prior to this decision, I took it upon myself to become more familiar with your concern. I visited several locations where Roadrunner Club members have conducted operations. I found little evidence of abuse of the stipulation and reclamation satisfactory. Natural processes have also contributed to restoration. I commend club members for an ethic that protects valuable riparian areas. Although the stipulation may appear overly restrictive, operations by club members have been on-going to good results both from the operators and ecosystem health standpoints.

Finding: This stipulation will be retained because it is reasonable to meet the guidelines to protect Mexican Spotted Owl habitat, resulting in a favorable biological determination which does not require consultation with the U.S. Fish and Wildlife Service. If the Club wishes to remove riparian vegetation in specific areas of the claims, we will evaluate the effects of the proposed removals. Depending upon the extent of planned operations, consultation with the U.S. Fish and Wildlife Service may be necessary. During the period of consultation, the terms of this stipulation will be in effect.

Stipulation #13, page 3: The Club objects to the limitation of distances between operators as being too restrictive and prevents reasonable placer mining.

Discussion: The Club states that the restriction would prevent their members from operating in a reasonable manner. Ranger District personnel developed the stipulation in conjunction with board members of the Club, who agreed to utilize and evaluate it for one year. They also realized there would be exceptions, should a paystreak be encountered.

This stipulation appears to be an attempt to reduce conflict between Club members and to assure adequate working space, as well as to reduce the cumulative impacts to the environment in an area. No evidence has been provided to indicate that past concentrations of users has resulted in unreasonable resource disturbance, providing that environmental stipulations such as numbers three through twelve are adhered to.

Finding: Although the Club previously participated in development of this stipulation and agreed to test it, I am directing the District Ranger to remove the distance restriction between operators. If unreasonable environmental disturbance results from concentration of operators in the future, it will be documented and stipulations will be developed to prevent such impacts. The Club should take measures to avoid conflicts between members working in the same areas.

Stipulation #18, page 3: The Club requests deletion of this stipulation on the basis they are afforded access to all its mining claims in the performance of mining activities pursuant to a fully bonded plan of operations.

Discussion: Access to claims is addressed in 36 CFR 228.12, which says in part, "An operator is entitled to access in connection with operations, but no road, trail, bridge, landing area for aircraft, or the like, shall be constructed or improved, nor shall any other means of access, including but not limited to off-road vehicles, be used until the operator has received approval of an operating plan in writing for the authorized officer when required by 228.4(a)."

The operating plan submitted by the Club on May 12, 1995, and subsequently extended, indicated, "Access will be on state highways, Forest Service and existing roads. No new construction is needed. Passenger vehicles, four-wheel drive vehicles and recreational vehicles are used." Cross country travel was not requested, nor was the impact considered in the rehabilitation needs and bond determination.

The existing Access Management Policy for the Prescott National Forest states that Cross-country travel by any vehicle is prohibited with a few exceptions including, "Persons with a valid permit to perform: Big game retrieval (Direct ingress/egress with valid permit); Fuelwood retrieval (Direct ingress/egress with valid permit); Approved resource management activities (employees/permittees)" It further allows, "Vehicle ingress and egress to a campsite within 300 feet of a road (This does not apply to trails)". The third exception to this policy is interpreted to include miners with a valid operating plan allowing them to deposit and retrieve large equipment, but not for normal travel between the equipment and campsite.

Finding: I find that the Club has never requested cross country travel and the District Ranger was correct in informing the them of the need to comply with the Access Management Policy as all other miners and users of the Forest do. Adequate road access to all of the claims has been provided.

Stipulation #21, page 4: "Roadrunner objects to the timing restrictions on its mining claims pursuant to the Endangered Species Act.

Discussion: The Club asserts that neither the Forest Plan Amendment #9 August 1996, nor the Recovery Plan for the Mexican Spotted Owl, restrict mining activities. They furthermore state that the Record of Decision for the Amendment of Forest Plans generally allows continuation of the level of recreation activities that was occurring prior to listing (page 88). At the oral presentation, Club member indicated that they did not wish to be considered a recreational use, but indicated that their activity was no more detrimental than the recreation activity referred to in the Record of Decision, i.e. a dredge running as opposed to an off-highway vehicle.

The Final Environmental Impact Statement For Amendment of Forest Plans issued December 4, 1995, disclosed the impacts of the alternatives that were considered in arriving at the decision to amend the Forest Plans. The environmental effects of the alternatives upon statutory rights is discussed on page 28. It states that "Seasonal restrictions for management activities in occupied Mexican spotted owl and northern goshawk habitat are proposed in all action alternatives." This indicates that the authors of the document fully intended that seasonal restrictions on mining activities be implemented. The Record of Decision selected Alternative G for implementation.

Although the Record of Decision states, "Generally allow continuation of the level of recreation activities that was occurring prior to listing", the Final Environmental Impact Statement qualifies such activities. On page 26, it indicates that, "There are varying effects to recreation opportunities in each alternative. Primitive recreation opportunities like wilderness use will not be affected in any alternative...However, recreational special events like motorcycle racing and off-road vehicle use will also be affected by operational restrictions or permit elimination." Just because an activity was occurring prior to listing, does not mean that it can continue if it affects the Mexican spotted owl or the northern goshawk. Thus the qualification of the statement by the word "generally".

Dredges operating throughout daylight hours at specific locations are considerably more disruptive than an off-highway vehicle traveling through the same area. The Club's dredge use is more comparable to a permitted off-road vehicle event, which is restricted or eliminated in MSO or northern goshawk habitat. The duration of disruption is considerably longer.

The Bradshaw Ranger District personnel have developed standard stipulations which, if implemented on mining operations, result in a No Effect determination for the Mexican spotted owl and the northern goshawk. Activities outside of those specified for the protection of these species may result in a determination of affect on the species which may require consultation with the U.S. Fish and Wildlife Service. Such consultation may result in considerable delays as described in the Final Environmental Impact Statement on page 28 under the Environmental Effect on Statutory Rights.

The Club further stipulates that although the Ecosystem Management in Northern Goshawk Habitats (Standards), states "Limit human activity in nesting areas during the breeding season", that "Nowhere in this subpart is human activity restricted." Webster's II New Riverside University Dictionary defines the transitive form of the verb "limit" as, "To restrict or confine within limits." The same form of "restrict" is defined as, "To hold within limits." These two words are also used as synonyms for each other in The Random House Thesaurus College Edition. Therefore, I interpret the statement, "limit human activity", to also mean "Restrict human activity".

Finding: This stipulation will be retained. I find that it is necessary and appropriate to meet the intent of the Endangered Species Act and is within the standards and guidelines of the Amended Forest Plan, as well as the Mexican spotted owl Recovery Plan. This finding is further supported by the Suction Dredging 401 Certification Condition number 10, issued by Arizona Department of Environmental Quality on March 17, 1995.

Stipulation #1, page 5: "Regarding claims Gold Palace #1-#5, Roadrunner objects to the timing restriction of September 1 through February 28, pursuant to the Endangered Species Act. The above cited authorities again do not restrict mining activities."

Discussion: The discussion for Stipulation #21, page 4 applies to this stipulation for the protection of the Mexican spotted owl. During the oral presentation, I understand your concern that low level mining activities were not substantially different from recreational activities such as camping and hiking. Examples of low level mining activity include dry washes with pick and shovel, sluice boxes, pick and shovel exploration, stream reconnaissance and other such non-motorized activity. Your reply to item 9 of the June 23, 1998, Reply to Responsive Statement, was a reasonable proposal. However, during the discussion, you requested that the words "but for dredging", be eliminated from your June 23 reply. I interpret this change to mean you request that all mining activities be permitted without timing restrictions.

Finding: I find that low level mining activities are similar to recreation activities (examples listed above) and therefore direct the District Ranger to amend the stipulation. The first sentence shall read "Dredging activity on these claims is restricted to the period of September 1 through February 28". The second sentence should read "Any dredging activity occurring outside of this time period is prohibited. The remainder of the stipulation remains unchanged.

Stipulation #1, page 5: "Regarding claims Brave #1-#4, Roadrunner objects to the timing restriction of April 1 through August 1, pursuant to the Endangered Species Act for the reasons listed above."

Discussion: The zone-tailed hawk is a sensitive species. Departmental Regulation 9500-4 directs us to develop and implement management practices to ensure that the species does not become threatened or endangered. The south half of the Brave #1 remains open to mining, as does Brave #2 and #3 with certain precautions while loading, unloading and camping on Brave #1. The District Ranger has restricted the minimal area necessary to protect the known nesting area of a zone-tailed hawk during the breeding season. I concur with the rationale that the low level mining activity is similar to permitted recreation activities similar to the above stipulation.

Finding: I find that this stipulation is essentially necessary with the exception to allow low level mining activity. Therefore, I am directing the District Ranger to amend the second sentence to, "No dredging activity may occur on those portions of the claims listed above during the period of restriction".

Stipulation #3, page 5: "Roadrunner objects to the closure of the access road through Brave #1-3 mining claims as part of final reclamation."

Discussion: In his Responsive Statement, the District Ranger indicated that the road had been ripped, waterbarred and seeded as part of the reclamation for a previous mining operation on the claims. The Club was allowed to re-open the road on the condition that they would return the road to the pre-existing closed condition, which they agreed to do.

In your Reply to Responsive Statement of June 23, 1998, in item 11, you indicated that Roadrunner accepts the District's clarification and agrees to reclaim the road upon cessation of operations. I assume that the citing of "**Stipulation No. 2, Brave #1-4, page 5**" was in error and should have been Stipulation #3, page 5. This was confirmed by club members at the oral presentation who also expressed agreement to this stipulation.

Finding: This stipulation will be retained in the plan of operations.

Stipulation #4(a-e), page 5: "Roadrunner objects to the closure of the access road through Brave #1-4 mining claims as part of final reclamation."

Discussion: The above discussion applies to the same road. Item 12 of your Reply to Responsive Statement indicates that the Club accepts the reclamation provisions and this was confirmed at the oral presentation.

Finding: This stipulation will be retained in the plan of operations.

Stipulation #1, page 6: "Regarding claims JDR #1-3, Laura Kay #1, Wolf Creek #1-6, Roadrunner #1, Gold Palace #6-#8, Bonny, Clyde, Clinton, Hidden Treasure, Sharon Lee #1-#4, and Oro de Valenzuela, Roadrunner objects to the BRD timing restrictions due to the leopard frog. The BRD has not provided the research data to support the contention that mining activities would have a negative impact on this species. The BRD has not provided a recovery plan for this species. Without actual site-specific data showing the number of individuals of a species and how many will be killed or displaced by this proposal, the BRD cannot logically conclude that the viability of these species is threatened by the mining operations proposed in the plan of operations."

Discussion: At the oral presentation, Club members provided a sheet referencing information from an Arizona Game and Fish Department study - Technical Report 12 which referenced the lowland leopard frog as being found in rivers, streams, stock ponds and other permanent water, and indicating a "strong preference" for associating with lotic habitats (flowing water) in Arizona. Elevational ranges are quoted up to 3000, 4500 and 5500 feet.

District personnel conferred with an Arizona Game and Fish herpetologist to determine the habitat requirements of the lowland leopard frog. They designed and implemented surveys according to the herpetologist's current information. A qualified biological technician actually examined areas on the ground, assessed the habitat, and observed lowland leopard frogs in numerous locations.

There is no recovery plan for the lowland leopard frog because it is a sensitive species, rather than a listed species under the Endangered Species Act. As such, we have been directed to develop and implement management practices to ensure that the species does not become threatened or endangered (Departmental Regulation 9500-4). Restrictions prohibiting mining within the stream channels of identified lowland leopard frog habitat allows for the reproductive needs of the frog during the most critical period of their annual cycle.

Finding: I find that the determination of lowland leopard frog habitat is based upon the best available information, site-specific field surveys, and observations by qualified individuals. Since all proposed operations occur within the stream channel, the stipulation prohibiting mining operations from January 1 to April 15 is reasonable and necessary to ensure the species does not become threatened or endangered.

This review decision is subject to administrative review pursuant to 36 CFR 251. Pursuant to 36 CFR 251.87(c)(2), this decision is appealable to a second level of administrative review. The second level appeal must be filed in writing within 15 days of the date of this Forest level decision. A second level appeal must be submitted to: Regional Forester, 517 Gold Avenue SW, Albuquerque, NM 87102-0084. For additional information concerning this decision, or the Forest Service appeal process, contact Bruce Lamb, Prescott National Forest, 344 S. Cortez, Prescott, AZ 86303, or phone (520) 771-4770.

Sincerely,

/s/Michael King
MICHAEL R. KING
Forest Supervisor

cc Bradshaw Ranger District
Regional Office Appeals Coordinator
Regional Office Minerals