

**DECISION NOTICE  
&  
FINDING OF NO SIGNIFICANT IMPACT**

**Elkhorn Minerals LLC  
Elkhorn Gravel Pit  
NW¼ of Section 34, T144N, R102W**

**Private Reserved & Outstanding Minerals**

**USDA FOREST SERVICE  
DAKOTA PRAIRIE GRASSLANDS  
MEDORA RANGER DISTRICT**

USDA Forest Service  
Dakota Prairie Grasslands  
Medora Ranger District  
Billings County, North Dakota

January 6, 2015

Responsible Official:

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## Introduction

The Medora Ranger District of the Dakota Prairie Grasslands (DPG) received a proposed Operating Plan from Elkhorn Minerals LLC the mineral owner and operator to mine and develop a proposed gravel pit in NW¼ of Section 34, T144N, R102W on February 9, 2010.

The proposed Operating Plan included all phases of gravel pit operations from mining, to stockpiling, washing, sorting, crushing, hauling, etc. with no specified timeframes. After approximately eighteen months of ongoing negotiations in which the initial Operating Plan was revised several times to address resource protection, surface use, and operation concerns, Elkhorn Minerals LLC submitted a final Operating Plans (OP) to the Medora Ranger District on September 1, 2011, which included the negotiated Operating Plan stipulations.

In May, 2012 an Environmental Assessment (EA) was released for public comment. Comments were received, analyzed and responded to. The Environmental Assessment has been revised to incorporate changes resulting from public and agency input. In April, 2014 the Draft DN/FONSI was released for a pre-decisional objection period. Six objections were received during that period. Following the objection review, clarifications to the EA were made, as well as completion of the NHPA Section 106 consultation process. This document details my decision and rationale, based on the analysis disclosed in the EA and contained in the Project Record (available upon request from the Medora Ranger District), relative to the proposal received from the mineral owner.

## Decision

Based upon the analysis contained within the Elkhorn Gravel Pit EA, and taking into consideration the applicants private property rights, my regulatory authority, and considering public comment received, I have decided to implement Alternative 2 as described in the EA (pages 23-25) for Elkhorn Minerals LLC's development of the proposed Elkhorn Gravel Pit. Under this decision the Forest Service will issue to Elkhorn Minerals LLC, special use and road use authorizations for use of the existing road system and a Surface Occupancy Permit for the development of the private mineral rights authorizing surface occupancy on National Forest System (NFS) lands.

Alternative 2 was chosen because this alternative results in minimum use of the surface, allows maximum resource protection measures, while allowing for development of valid private mineral rights. Thus it best meets the purpose and need for the project as described on page 8 of the EA.

My regulatory authority is based on case law associated with development of private mineral estates. Courts have determined that the mineral estate is dominant over the surface estate. In Duncan Energy Company v. United States Forest Service 50 F.3d 584 (8th Cir. 1995) involved a case in which the Forest Service owned the surface but did not own the mineral estate. The Appellate Court found that the mineral estate is dominant over the rights of the

surface estate holder. However, the mineral developer's rights are limited to using only so much of the surface as is reasonably necessary to develop their minerals. The Forest Service cannot deny the owner of the mineral estate the right to use the surface for development of the mineral estate, but has the right to impose reasonable mitigation for protection of the federal surface.

As discussed within the EA (pages 5-11), the mineral estate is dominant over the surface estate, that is, the owner of private minerals has the legal right to use as much of the surface as is reasonably necessary to access and develop the mineral estate, regardless of percentage of ownership, consistent with the mineral rights reserved or outstanding. The Forest Service (FS) must promptly respond to applications by allowing development of the private mineral rights in a manner that minimizes damage to National Forest System (NFS) resources. This is reinforced in DPG Land and Resource Management Plan (LRMP) direction to honor valid existing mineral rights (EA pages 14-15). The existing rights for this proposal are the mineral rights that were recognized at the time of the purchase of the ranchlands. Therefore I do not have authority to deny the exercise of a private mineral rights. The Forest Service has met with the mineral owner or lessee to develop surface protection and modifications needed to make an acceptable Operating Plan (OP).

The Secretary of Agriculture's Rules and Regulations of May 3, 1963 (36 CFR 251.15) govern the OP requirements for reserved mineral rights. The Operator is exercising their private outstanding mineral rights, however, they cannot develop the gravel pit without also developing the reserved minerals, the remaining third party minerals, and utilizing the roads of other permit holders. Therefore, the Operator has agreed to develop the gravel pit under the Secretary's Rules & Regulations of 1963 which are very similar to the outstanding mineral requirements.

I have evaluated the OP for compliance to these requirements and have determined that the OP meets the requirements as follows: 1) Proof of the right to exercise the mineral rights (Deed) has been provided and verified; 2) Advance written notice has been provided; 3) A complete Operating Plan with maps, area, methods, access needs, reclamation, resource protection, agent, etc. has been submitted; 4) The proposal uses only as much of the surface as is reasonably necessary; 5) The proposal is consistent with rights granted by deed; 6) The proposal is consistent with the DPG Land and Resource Management Plan (LRMP); 7) The proposal includes standard conditions (stipulations) necessary to protect public safety and resources; and 8) The proposal is compliant with Federal laws. The Applicant has agreed to implement 41 pages of surface protection measures including road designs and reclamation bonding. The stipulations also help to define operations. The Operator has agreed to every proposed mitigation measure with two exceptions which the Operator felt were unreasonable: 1) not mining and 2) replacing the removed gravel with filler materials.

The resource protection measures are included within Exhibit C of the EA under the Stipulations of the Operating Plan. Any unapproved deviation from the OP may be construed as unlawful, and the United States may take appropriate enforcement action. The mineral owner must also

abide by applicable State and federal law pertaining to mining, property, and environmental protection and is responsible for obtaining all of the necessary permits from the regulatory agencies.

The mineral holder also has a legal right to access their mineral estate as per the terms of their deeded rights. However, that does not imply that the access is carte blanche. As stated on page 9 of the EA, the Alaska National Interest Lands Conservation Act of 1980 established that the Forest Service must provide access to non-federally owned land within the boundary of the National Forest System. The Forest Service can determine what level of access is adequate to allow the owner reasonable use and enjoyment of their private rights.

The approved access route will utilize four existing National Forest System Road (NFSR) segments: road segment #1 (NFSR 719C) from Blacktail Road to mile 2.96; road segment #2 (NFSR 7082) from mile 2.96 on NFSR 719C to mile 0.04 intersection with NFSR 7082-1; road segment #3 (NFSR 7082-1) from intersection NFSR 7082 to mile 0.34 intersection with NFSR 7082-2, and road segment #4 (NFSR 7082-1) from mile 0.34 intersection with NFSR 7082-2 to mile 0.41 entrance to gravel pit. Permits that are required to access the gravel pit include a Special Use (SU) Private Road permit for segments #2 and #3 and a Road Use (RU) permit for segment #1.

Although use of the existing road system will eliminate the need to construct new access roads, the existing road system will require some reconstruction and heavy maintenance to establish and reestablish turnouts and drainage. The reconstruction and maintenance requirements including road design are specified within the required mitigation measures. The only new road to be constructed is the road across the gravel pit area which is temporary and would be removed at the end of the use. The issuance of Special Use and Road Use permits will include additional maintenance requirements and standard administrative clauses (EA Appendix C).

Proposed mining operations would be completed in five phases. Once each mining phase has been completed the area involved would be reclaimed concurrent with the start of the next mining phase. Upon completion of all reclamation, the area would be monitored annually to ensure soil stabilization and the reestablishment of vegetation. A reclamation bond would be required until all reclamation has been accepted by the Forest Service. Upon final acceptance of the reclamation, the fence would be removed. Requirements to prevent noxious weed and invasive species during and after operations are included within the Operating Plan stipulations.

Total disturbance for the proposed pit and associated road work will be approximately 25.9 acres. The gravel pit area will be approximately 24.6 total acres on NFS surface; the mined area would be approximately 19.4 acres; with a buffer zone surrounding the mined area of approximately 5.2 acres. The remaining 1.3 acres will be road related disturbance. The stipulations will be attached to the Surface Occupancy Permit and required to be performed by the Operator.

This decision includes construction of a temporary road within the gravel pit. It also includes

the following Design Criteria:

### **Design Criteria for the Selected Action**

The following Design Criteria are included within the Operating Plan or within the construction, maintenance, or reclamation stipulations of the road permits in addition to the standard road permit clauses.

- The access route would utilize three existing roads to access the proposed gravel pit. These roads would be maintained to maintenance level three standard for the life span of the mining. That is, a road that is 14 feet wide road surface with turnouts, drainage and surfacing, and accommodates semi-trucks. Erionite free gravel rather than scoria would be used for road surfacing to minimize dust and visual impacts.
- A Road Use (RU) Permit would be issued for the use of NFSR 719C from Blacktail Road to mile 2.96 and would be resurfaced with gravel, all drainage and turnouts reestablished, cattle guards replaced where needed, and adequate signing installed.
- A Private Road Special Use Permit (SU) would be issued for the use of NFSR 7082 and 7082-1 from the intersection with NFSR 719C to the gravel pit. Both roads would be resurfaced with gravel, all drainage and turnouts reestablished, cattle guards replaced where needed, and adequate signing installed.
- The RU and SU Permits would require the pretreatment of invasive species and noxious weeds prior to any road maintenance or reconstruction. Both permits would require participation in a Road User Group responsible for the construction, reconstruction, and/or maintenance of the access road.
- Approximately 2,904 feet in length of NFSR 7082-1 would be reconstructed to reduce excessive grades and to develop adequate drainage and soil controls. New disturbance associated with this segment would be approximately 1.3 acres.
- Mining operations would be completed in five phases with phase one bringing the road system to standard and installation of a perimeter fence around the entire gravel pit and buffer zone. Upon completion of phase one, mining would commence. The gravel pit would be mined in four phases (2-5) over approximately a two year period, pending any weather or wildlife related delays.
- Each mining phase would be less than five acres and operations would include the removal and stockpiling of all available topsoil (estimated average of 0.5 feet) followed by the removal and stockpiling of all overburden materials (an estimated average of 2.17 feet). The topsoil and overburden would be stockpiled within the buffer zone on bare ground. This would be accomplished with bulldozers and front end loaders.
- Front end loaders would then load the exposed gravel into dump trucks which would haul the gravel to private property for crushing, sorting, separating, washing, grading, processing, and stockpiling. Once hauled away from the pit, no removed materials would be returned to the gravel pit. The gravel layer is estimated to be five to six feet thick but may vary from one to nine feet thick.
- A temporary road segment would be constructed within the gravel pit for hauling purposes. This temporary road would start inside of the pit behind a gate and run the

distance of the material pit. This temporary road would be obliterated and reclaimed upon conclusion of mining operations.

- Noxious weeds and invasive species would be treated during and after operations through final reclamation until accepted and released by the Forest Service. Equipment would be cleaned to help prevent them from spreading.
- The mined gravel would be frequently and regularly tested for Erionite utilizing State protocols. If Erionite is found to be present, additional required dust abatement mitigation measures for extraction and hauling would be implemented.
- Once a mining phase has been completed it would be reclaimed. The overburden material would be put back in place and the pit area and surrounding slopes would be shaped to near natural contours and all drainages would be re-established. Once the overburden is contoured, the stockpiled topsoil would be replaced and shaped, and the entire area seeded with a native seed mixture.
- Reclamation would be concurrent with the start of the next mining phase. Upon completion of all reclamation, the area would be monitored annually to ensure soil stabilization and the reestablishment of vegetation. An adjustable reclamation bond would be required until all reclamation has been accepted by the Forest Service. Upon final acceptance of the reclamation, the fence would be removed.

## **Decision Rationale**

The Selected Alternative best meets the purpose and need of allowing development of private mineral resources on the Dakota Prairie Grasslands while ensuring protection of federal surface resources (see EA page 11).

## **Consistency with Grasslands Plan**

At the time of the acquisition of the surface estate, in 2007, the Forest Service recognized and agreed to honor all valid existing private mineral rights and all twenty-nine (29) existing encumbrances including nine oil and gas facilities, nineteen pipeline right-of-ways or assignments, and four right-of-ways for electric and telephone lines. With this recognition of valid existing rights came the understanding that there could be future exploration and development of both surface and subsurface minerals such as sand, gravel, clinker, and oil and gas.

The Selected Alternative meets Dakota Prairie Grasslands Land and Resource Management Plan Goals and Objectives pertaining to honoring valid existing mineral rights while providing for proper protection and reclamation of the surface. ( EA pages 14-15). This decision honors the outstanding and reserved mineral rights in existence when the lands were acquired.

One of the concerns raised during public comment on the EA and during the objection period, was that an Amendment to prescribe specific management direction for the acquired Elkhorn Ranchlands must be completed prior to processing the plan of operations for the gravel pit. The need for the Forest Service to take action on the project comes from the ownership and

exercise of valid existing mineral rights which were recognized at the time of acquisition of the ranchlands. Resource protection standards and guidelines, including the protection of historic, scenic, and valid mineral rights, are included within Chapters 1 and 2 of the current LRMP. The importance of the ranchlands have been taken into consideration in developing the site specific Operating Plan stipulations which both honor the private mineral rights and provide protection to the Historic District. The basis for all of the mitigation measures originated from the current LRMP. However, the negotiated stipulations are more stringent than would be applied under general LRMP requirements. To date, the mineral owner has agreed to every proposed mitigation measure with the exception of 1) replacing the removed materials with other materials and 2) dropping the proposal altogether. The future LRMP amendment will still need to honor valid existing rights to avoid violating federal law. In addition, there are other resource and social issues that will be considered and analyzed in the amendment covering the acquired lands that are outside the scope of the current proposal. This was considered as an alternative but not carried forward in detail in the EA (page 22).

## **Relationship to Issues**

### **Cultural**

There is a concern that the proposal would adversely affect two historic properties, the Theodore Roosevelt Elkhorn Ranch and Greater Elkhorn Ranchlands National Historic District (Elkhorn Ranchlands NHD) and the Elkhorn Ranch Unit of the Theodore Roosevelt National Park (TNRP).

The proposed gravel pit project lies within the boundaries of the Elkhorn Ranchlands NHD, listed by the Keeper of the Register (National Park Service) on September 28, 2012. Development of valid mineral rights is recognized within the designation. The Theodore Roosevelt Elkhorn Ranch Site (State Historic Site and Elkhorn Ranch Unit of Theodore Roosevelt National Park) lies approximately 4,240 feet (0.8 miles) southwest of the proposed gravel pit (see Soundscape, Visuals and Air Quality discussions in Chapter III of the EA for further discussion).

In consultation with the Advisory Council on Historic Preservation (ACHP) and North Dakota State Historic Preservation Office (NDSHPO), the DPG defined the undertaking's composite Area of Potential Effect (APE) as the area of direct effect, the viewshed APE, and the soundscape APE, for the purposes of compliance with Section 106 of the National Historic Preservation Act (NHPA). Specifically, the area of direct effect is defined as the 24.6 acre gravel operation footprint, associated access roads and a buffer zone. The viewshed APE includes the viewshed equal to or greater than 70 % probability of being seen by an observer located within the general vicinity of the proposed gravel pit. This includes the Elkhorn Ranch Unit of Theodore Roosevelt National Park and the Elkhorn Ranchlands NHD. The viewshed analysis was conducted by the National Park Service using standard viewshed analysis protocols. The coordinated soundscape APE utilized analysis (see Soundscape in Chapter III for further discussion) derived through consultation with the ACHP and NDSHPO. This resulted in a defined two-mile affected area radiating from the center of the proposed gravel pit from all

directions. See Appendix F Section 106 National Historic Preservation Act Memorandum of Agreement.

Theodore Roosevelt found solace and solitude at his cabin during a very tragic part of his life and this played an important role in his thinking. Visitors to his cabin site may get a glimpse of what Roosevelt saw and heard, but Roosevelt's soundscape and viewshed did not include modern day noises and intrusions, such as semi-truck traffic on the county and oil gas roads, oil and gas wells drilling and production, and agricultural activity. Gravel pit development may add to these various intrusions.

In consultation with NDSHPO, ACHP and all Section 106 consulting parties, it was determined that the project may have an adverse effect on the character-defining qualities of the Elkhorn Ranchlands NHD, in accordance with criteria of adverse effect in the NHPA and 36 CFR 800.5. Specifically, the gravel pit operation may have visual (pit, machinery), audible (equipment and vehicle noise), and atmospheric (dust, equipment and vehicle fumes) effects that will diminish the property's historical integrity (see discussion below and see Soundscape, Visuals and Air Quality discussions in Chapter III). The gravel pit operations may be visible within the viewshed from Theodore Roosevelt's ranch headquarters on nearby National Park Service land, which have historic features, interpretive signage, and a public presence.

The Forest Service and project proponent has agreed to design criteria and mitigation measures to reduce potential adverse impacts to the APE and the Elkhorn Ranchlands NHD. The Operating Plan and road permits offer additional mitigation measures. Section 106 consulting parties were invited to discuss these mitigation measures and the resolution of possible adverse effects to the Elkhorn Ranchlands NHD. In addition to frequent communication exchanges between Forest Service and various consulting party members, group conversations took place on three occasions. These group consultation conversations included the project proponent, NDSHPO, ACHP, TRNP, NTHP and Forest Service. A NHPA Section 106 Memorandum of Agreement among the Forest Service, NDSHPO and the ACHP has been prepared and signed which includes a description of the Section 106 process resolving potential adverse effects and denotes pertinent mitigation measures from the Operating Plan. Other consulting parties who were invited to sign this agreement include the project proponent, Standing Rock Sioux Tribe (SRST) and Mandan, Hidatsa and Arikara (MHA) Nation, TRNP, and the NTHP.

Visual and soundscape mitigation measures described in the EA (pages 53 and 47), and Section 106 National Historic Preservation Act Memorandum of Agreement would mitigate adverse effects to the Elkhorn Ranchlands NHD (See Appendix F Section 106 National Historic Preservation Act Memorandum of Agreement). NDSHPO concurs with this recommendation. The SRST THPO and MHA Nation verbally agreed with the US Forest Service findings and recommendation to NDSHPO. SRST THPO documented his concurrence in a letter addressed to Ronald Jablonski dated June 18, 2014, THPO reference file 14-104.

The project design criteria and additional mitigation measures are consistent with Grassland-

wide direction for protecting cultural resources (DPG LRMP p. 1-24 to 1-25). They will reduce, though not eliminate, the adverse effects to the Elkhorn Ranchlands NHD. Some mitigation measures, such as the re-contouring of previously disturbed land back to its natural appearances and reestablishing the natural form, line, color, texture and pattern with native grass species will have a positive effect on the current conditions.

The landscape that now comprises the Elkhorn Ranchlands NHD was the scene of many human activities prior to its acquisition by the Forest Service. The ranchlands, and surrounding area, have been modified by farming, ranching and livestock grazing, road construction, oil and gas development, recreational use and other historic and modern activities. Many of these activities, particularly energy development, are expected to continue into the foreseeable future.

Gravel pit development will add another tier of activity, and cumulative effect, upon an already busy, historic-modern landscape. However, unlike many other activities, gravel pit development, use and reclamation, as proposed, will be temporary. In addition, project design criteria and mitigation measures will reduce some of the impacts through the duration of the project. Still, despite reclamation, the gravel pit and its ancillary roads and staging areas will leave a subtle permanent fingerprint on the landscape that may detract from the overall integrity of the Elkhorn Ranchlands NHD.

### **Soundscape**

There is a concern that the proposal would adversely affect the soundscape of the area, primarily from Theodore Roosevelt National Park (TRNP), North Dakota Parks & Recreation (NDPR) Lands, and from residential areas.

As discussed on pages 39-47 of the EA, the noise from the mining proposal (average 65 dBA), would clearly be noticeable within the immediate foreground and foreground viewshed of the Elkhorn Ranch NHD and from within the park, adjacent state lands, and from the residential area during daily operations for the duration of the operations of two to three years. They cannot be completely eliminated. Most of the noise would be sporadic in nature and occur only during the day. In mitigation of soundscape impacts all equipment will require mufflers. There will be no night operations and Elkhorn Minerals LLC has also agreed to suspend operations, upon request from TRNP, for special events.

### **Tourism**

A concern was raised that the gravel pit would have a negative effect on tourism to the Theodore Roosevelt National Park (TRNP) and North Dakota Parks & Recreation (NDPR) Lands. The number of visitors to the Elkhorn Ranch Unit of TRNP and/or the adjacent NDPR lands is unknown. The Forest Service requested tourism data from TRNP in 2012 and 2013 as they have managed the park units since 1947 and would be the best source of tourism data or estimates. As recently stated by TRNP, the number of actual visitors to the Elkhorn Ranch Unit has never been tracked or estimated. Although the peak visitation season is from April through November, the 2.7 mile gravel road is not always accessible especially during wet road

conditions. Access to the ranch site by passenger car and other low clearance vehicles will prove to be difficult.

The Park's management plan did not predict high usage and there is no current or revised statistical data to indicate otherwise. There are no available or reliable numbers or estimates for determining the number of actual visitors. Therefore determining results for an economic effect or any deviations from current use or trends would be highly speculative.

As stated by TRNP, the quality of the visit outweighs the quantity of visitors. There will be soundscape and visual impacts that will diminish the quality of the individual visitors experience as further discussed in the EA pages 39-55. Overall visitor numbers to the Elkhorn Ranch Unit may decrease during the mining and reclamation phases of the project for two to three years. Visitors may alter their destination plans. These impacts are short term in nature (~3 years), and will not last beyond the operations of the gravel pit.

### **Visuals**

Concerns were expressed about the potential impacts of the proposed action on the visual resources of the area including the viewshed east from TRNP, NDPR lands, and from the Little Missouri River. The mining operations will be visible within the immediate foreground and foreground viewshed of the Elkhorn Ranch NHD and from the higher locations and open areas within the area of the cabin on both the park and state lands for the duration of the operations for two to three years. These effects are will not last beyond the time period that the gravel pit is in operation. Pages 29-32 and 50-51 of the EA describe the current setting and visuals of the area and the effects to each.

Effects to visuals are discussed on pages 50-55 of the EA. In mitigation of visual impacts, there will be no dust plumes as the crushing and processing equipment was moved off site. Mining operations will occur in five acre phases in which no more than two blocks would be exposed at a time, and one of which would be in reclamation status. The area would be reclaimed with native seed mixtures to blend into natural habitat eliminating the prominence of invasive and noxious weed species throughout the area. The overall site would be lower in elevation as the gravel is removed, however, an eight foot reduction in elevation would not be highly noticeable from the park or state lands 4,300 feet away as the pit is not located on the dominate skyline and the natural landscape will remain intact. There is no new road construction within the viewshed of the park and state lands and the temporary road will be obliterated at the end of the use. Dust abatement measures are in place to prevent dust plumes from trucks.

### **Public Involvement**

The Elkhorn Gravel Pit project proposal was first listed on the Dakota Prairie's Schedule of Proposed Actions (SOPA) on October 5, 2011. Public scoping began in October, 2011 via a letter sent to a mailing list of one hundred contacts including county commissioners, state, and federal agencies, tribal governments, environmental groups, private interested individuals, and the press. A total of seventy-one responses were received from the public. Documentation of

the scoping and public involvement process is included in the Project Record available at the Medora Ranger District Office.

Comments generated from the Forest Service's request for comments on the proposed action were analyzed using the content analysis process. The content analysis can be found in the Project Record.

Using the comments received on the proposed action, the ID Team developed a list of issues to address. An Environmental Analysis (EA) was prepared and the EA was put out for a 30 day comment period starting on May 11, 2012. A total of fifty-four responses were received from the public. Documentation of the comments and public involvement process is included in the Project Record available at the Medora Ranger District Office.

The 45-day pre-decisional objection period began on April 29, 2014. Six objections were received. More information on the objections and the resolution can be found later in this document.

### **Tribal Consultation**

The USDA Forest Service Dakota Prairie Grasslands (DPG) initiated consultation with Tribal governments in October 2011. Project letters were sent to the SRST Tribal Chairman, THPO, and Environmental Protection Specialist; the MHA Nation Tribal Chairman, Cultural Preservation Officer, and Administrator of Natural Resources; and the Lower Brule Sioux Tribe Public Relations representative. Consultation continued with supplemental letters, information and meetings in 2012 and 2013, as documented in the EA project record.

The SRST THPO and MHA Nation THPO concur that no historic properties of significance to these tribes have been identified in the proposed project area. Identification of sites of religious and cultural significance concluded with SRST THPO on June 11, 2014, when the Grasslands Archaeologist accompanied the SRST THPO Archaeologist to the project area. The SRST THPO Archaeologist further confirmed that there are no intact stone features of religious or cultural significance in the proposed project area and documented his finding in a letter addressed to then District Ranger Ronald Jablonski dated June 18, 2014. The Grasslands Archaeologist continues to keep the SRST THPO updated on proposed Elkhorn gravel pit progress.

### **Other Alternatives Considered**

Six alternatives were considered, but not analyzed in further detail for this project. They are as follows, with rationale for not carrying them forward.

1. An alternative was considered that included all phases of gravel pit operations at the proposed location: In 2008-2009, the operator submitted special use applications to test drill and sample gravel in sections 21, 22, 27, 33, and 34 over a three year period. Through many

discussions concerning the operator's rights and requirement to prove mineral rights and title, the operator chose only to focus on the proposed pit area in Section 34. The operator withdrew their special use applications and submitted their initial Operating Plan to mine and develop the proposed pit in Section 34 on February 9, 2010. The Operating Plan included all phases of gravel pit operations from mining, to stockpiling, washing, sorting, crushing, hauling, etc. with no specified timeframes. The initially proposed Operating Plan did not address all resource, surface use, and operation concerns. This resulted in approximately eighteen months of negotiation in which the initial Operating Plan was replaced with the current proposed Operating Plan inclusive of the negotiated Operating Plan Stipulations.

2. An alternative was considered that would have purchased the mineral rights from the Operator:

The mineral estate consists of a combination of reserved and outstanding surface and subsurface minerals with multiple ownerships. The private minerals were not available for purchase at the time of purchase of the surface estate. This was common knowledge among all of the major participants in the acquisition process at the time.

Federal purchases of private land are very complex and involve at a minimum the following: 1) Willing seller and buyer; 2) Congressional (House & Senate) oversight and approval; 3) Public involvement; 4) Satisfaction of National Environmental Policy Act requirements; 5) Approved appraisals that are not over 1 year old; 6) Acquisition of title history and documents and clearing encumbrances; 7) Involvement with the Bureau of Land Management minerals division in regards to federal minerals; 8) Administrative approvals; and 9) Arrangements to convey title within a reasonable period. This requires involvement at the Unit, Regional, Washington Offices, and others. The District Ranger is no longer the deciding official.

Unless 100% of the surface and subsurface mineral ownerships can be acquired, the other mineral holders would still retain development rights. It is unlikely that all of the mineral estates would be available for purchase. Finally, the mineral purchase is beyond the scope of this proposal, would require a separate analysis, and relative to the current proposal, the effects of this alternative would be the same as those displayed in the EA for the No Action alternative (until such time as one of the remaining mineral owners exercises their own right to develop their private rights).

3. An alternative was considered that would have exchanged the surface mineral rights between the Operator and the Forest Service: The obstacles for an exchange are very similar to those discussed within the Purchase Alternative above in relation to purchase. As further discussed below, additional obstacles regarding Erionite and 100% mineral ownership surfaced. As above, the effects of this alternative would be the same as those displayed in the EA for the No Action alternative (until such time as one of the remaining mineral owners exercises their own right to develop a pit).

Agreement In Principal (AIP): An AIP was signed on July 18, 2012 with the objective for

accomplishing a mineral exchange between Peggy Braunberger (mineral owner) and Roger Lothspeich, (Power of attorney for Peggy Braunberger) and the United States Forest Service (USFS). The AIP included clauses which placed processing of the Plan of Operations on hold and asked the Forest Service to begin the process of searching for potential gravel and/or scoria exchange sources.

Withdrawal from the AIP: On July 31, 2013 the Forest Service met with Peggy Braunberger, Roger Lothspeich, and their legal counsel to discuss the issues, specifically the 100% acquisition of the surface mineral ownership and the overall timeframes to resolve and exchange minerals. This resulted in the Agreement in Principal being withdrawn on July 31, 2013 by Peggy Braunberger and Roger Lothspeich with a written August 2, 2013 request from their legal counsel to finish the environmental analysis and to authorize the Operating Plan. The mineral owners had the right to withdraw from the AIP as per Clause #7.

4. An alternative was considered that would have exchanged gravel for gravel between the Operator and the Forest Service for the volumes related to the current mining proposal: The Forest Service continued the search for alternative pit sites, even after the operator's withdrawal from the AIP. Eventually there was renewed discussion between the Forest Service and the operator as locations were found and processes defined. The intent was to determine the gravel pit proposal volume and exchange an equal amount of gravel from an alternate pit location on the McKenzie Ranger District in exchange for the mineral rights associated with the current mineral proposal.

This alternative was foreclosed by the operator in a November 13, 2014 memo from their legal counsel to the Forest Service. They requested that the review process for the mining proposal be brought to a conclusion as soon as possible. Had this alternative been carried further in the EA, the environmental effects would be the same as those displayed in the EA for the No Action alternative (until such time as one of the remaining mineral owners exercises their own right to develop a pit).

5. An alternative was considered where the operator would donate the surface mineral rights to the Forest Service: The most recent effort in 2014 was to respond to a request from the operator to consider a possible donation of their surface mineral rights to the Forest Service. However, the operator rejected this option in a November 13, 2014 memo from their legal counsel to the Forest Service. Had this alternative been carried further in the EA, the environmental effects would be the same as those displayed in the EA for the No Action alternative (until such time as one of the remaining mineral owners exercises their own right to develop a pit).

6. An alternative was considered that would have incorporated a land and resource management plan (LRMP) amendment encompassing the acquired Elkhorn Ranchlands: The need for the project derives from the owners right to exercise valid existing mineral rights which were recognized at the time of acquisition of the ranchlands. Resource protection

standards and guidelines, including the protection of historic, scenic, and valid mineral rights, are included within Chapters 1 and 2 of the current LRMP. The importance of the ranchlands have been taken into consideration in developing the site specific Operating Plan stipulations to both honor the private mineral rights and provide protection to the Historic District. The basis for the mitigation measures originated from the current LRMP. The mineral owner has agreed to every mitigation measure with the exception of 1) replacing the removed materials with other materials and 2) dropping the proposal altogether. The future LRMP amendment will still need honor valid existing rights to avoid violating applicable law.

### **No Action Alternative**

In addition to the Selected Alternative, a No Action Alternative was analyzed in the EA. This alternative serves as a baseline analysis for environmental affects analysis as described in 40 CFR 1502.14 (d). This alternative would not meet the purpose and need described in the EA (page 11) nor would it be in compliance with Grasslands Plan direction. In addition, this alternative would involve a taking of private mineral rights. The Forest Service does not have authority to deny the exercise of outstanding mineral right.

### **Findings Required by Other Laws and Regulations**

Secretary of Agriculture's Rules And Regulations To Govern Exercise Of Mineral Rights Reserved In Conveyances To The United States (January 23, 1937 Rules And Regulations and July 3, 1947 Rules and Regulations) – This decision allows for the issuance of special use permits and road use permits authorizing the access and for the issuance of a surface occupancy permit on the National Forest System land in accordance with the applicable Secretary of Agriculture's Rules and Regulations for reserved mineral rights. Consistent with Forest Service policy, an authorization letter is used where there are outstanding mineral rights (EA page 8).

Alaska National Interest Lands Conservation Act of 1980 - This act established that the Forest Service must provide access to non-federally owned land within the boundary of the National Forest System lands. The Forest Service can determine what level of access is adequate to allow the owner reasonable use and enjoyment of their rights. This decision allows use of the existing road system which will provide reasonable access to the proposed gravel pit. This road system will require some road reconstruction and extensive road maintenance. Access will be authorized through the issuance of Special Use and Road Use permits (EA, pages 9, and 65-70).

Clean Water Act, Executive Order 11990 (wetlands) and 11988 (floodplains): No impacts to wetlands, groundwater resources, or floodplains would occur due to the Proposed Action and therefore no cumulative impacts would occur to those resources (see EA, pages 61-62).

Clean Air Act, Air Quality Act of 1967 and the Clean Air Act Amendments of 1970, 1977, and 1990: No adverse effects to the air quality would occur due to the Proposed Action and therefore no long term cumulative impacts would occur to those resources (see EA, pages 55-57).

Endangered Species Act (ESA): This decision is consistent with the Endangered Species Act. A biological evaluation has been completed (located in the Project Record) and a “No Effect” determination was made for each listed species anticipated to be, or have habitat within, the analysis area (see EA, pages 58, 72-73).

Environmental Justice (Executive Order 12898): This decision was assessed to determine whether it will disproportionately impact minority or low-income populations. No minority or low-income populations were identified during public involvement activities.

Invasive Species (Executive Order 13112): Both alternatives comply with this order directing Federal Agencies, whose actions may affect the status of invasive species, to prevent the introduction of invasive species, and detect and respond rapidly to, and control populations of, such species in a cost-effective and environmentally-sound manner as appropriations allow. Noxious weeds would be controlled pursuant to the DPG Noxious Weed EIS (see EA, pages 62-63, and Appendix C Operating Plan Stipulations #13 and #25).

National Historic Preservation Act: The project area has been surveyed for heritage resources. Based on designed criteria and resource mitigation and consultation concurrence from the ND State Historic Preservation Office, it has been determined that the project will have an “adverse effect” on the overall integrity of the Elkhorn Ranch NHD, however; it will be mitigated sufficient so that it is “not a significant adverse effect” (October 29, 2013 NDSHPO concurrence letter). The consequent mitigation measures have been encapsulated in a 2014 Memorandum of Agreement (MOA) between the NDSHPO, the Advisory Council on Historic Preservation ACHP, and the USDA Forest Service (see EA, pages 35-39).

Migratory Bird Treaty Act: This decision is consistent with the Migratory Bird Treaty Act (See EA, pages 74-75).

Management Indicator Species (MIS): Consistent with regulations at 36 CFR 219.19, both alternatives were evaluated for potential impacts (direct, indirect and cumulative) to habitats for the Black-tailed Prairie Dog, Greater Sage Grouse, and the Sharp-tailed Grouse. This evaluation, as documented in the Project Record, determined that the alternatives would not affect the viability of the populations and MIS will be maintained in the impact area of the project (See EA, pages 73-74).

Sensitive Species (Regional Forester’s List): In the Biological Evaluation prepared for this project a determination of “no impact” was made for 12 of the 14 listed species. A determination of “may impact individuals or habitat, but not likely to lead to a trend toward federal listing” was made for the Baird’s sparrow and the Loggerhead Shrike (see EA, page 72-73).

Wild and Scenic Rivers -No Wild and Scenic Rivers Act designated rivers exist within or near the project area. The Little Missouri River, a state scenic river, is located approximately 4,300 feet west of the proposed project. No significant effects are anticipated on the river (EA, pages 61-62).

## Finding of No Significant Impact

My review of the site specific analysis prepared by the ID Team indicates that this decision is consistent with Dakota Prairie Grasslands Land and Resource Management Plan direction, compliant with other applicable laws, and responds to public concerns. After thorough consideration, I have determined that actions selected do not constitute a major federal action, individually or cumulatively, and these actions will not significantly affect the quality of the human environment. The site-specific actions of Alternative 2, in both the short and long-term, although adverse, are temporal and mitigatable, and therefore are not significant. Therefore, the preparation of an environmental impact statement is not needed.

### *Context*

The legal context for this decision is described in detail in the EA (pgs. 1 to 14). In summary, the federal action is limited to 1) selecting the route and method of ingress and egress that minimizes damage or disturbance to National Forests System (NFS) lands and resources (36 CFR 251.111) and, 2) selecting those design criteria and stipulations that are reasonable and necessary to protect the federal surface resources. The mineral owners' rights to develop their minerals and their right of ingress and egress across NFS lands are established by law and, thus, are not discretionary federal actions.

In this context, the federal action is entirely mitigative in nature. The environmental effects of applying the federal decision are entirely beneficial when compared to the mineral owner's initially submitted plan of operation (see discussions EA pages 23-26, 35-77, and Appendix C Operating Plan Stipulations). The mineral owner has been exceedingly cooperative in identifying and agreeing to all reasonable stipulations. No other reasonable routes or stipulations have been identified through the environmental review process.

The setting of the Proposed Action is in a localized area with implications only for the immediate area. The EA discusses the resources that will be affected by this project and displays the environmental consequences on those resources.

### *Intensity*

The intensity of effect was considered in terms of the following:

*Intensity:* This refers to the severity of impact and the following areas should be considered in evaluating the intensity of the actions. Discussion is organized around the ten significant criteria described in the National Environmental Policy Act (NEPA) regulations (40 CFR 1508.27). After considering the environmental effects as described in the EA (Pages 35-77), of the actions analyzed, in terms of context and intensity of impacts, I have determined the overall gravel pit development may have an "adverse effect" on the overall integrity and character-defining qualities of the Elkhorn Ranch NHD however; it will be mitigated sufficient so that it is "not a

significant adverse effect” on the quality of the human environment (40 CFR 1508.27). Therefore, an environmental impact statement will not be prepared. I base my finding on the following:

- 1. Impacts may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that, on balance, the effect will be beneficial:** Beneficial and adverse impacts of this decision are addressed in Chapter 3 Environmental Effects of the EA (pages 27-77). While the selected route and stipulations do not avoid all adverse environmental effects, all reasonable discretionary mitigations have been applied. While adverse impacts to some resources are anticipated, they are short term (2-3 years) and limited in scope, given negotiated mitigation and the nature of the proposal.
- 2. The degree to which the proposed action affects public health or safety:** Alternative 2 would not have significant effects on public health and safety. Mining will be in compliance with the approved Operating Plan which includes forty-one pages of resource mitigation measures and a certified set of road plans specifically designed to protect the public’s health and safety during the mining operations. There is a potential for the presence of naturally occurring Erionite (similar to asbestos) within any gravel source on the Medora Ranger District. However, the initial tests within the area, conducted on September 12, 2013 by an independent lab, were negative. The Operating Plan Stipulations provide mitigation measures for the extraction and hauling of Erionite should there be any positive tests for Erionite. There are currently no federal or state health regulations concerning Erionite at this time. There is nothing out of the ordinary concerning public safety and health in regard to permitting this Operating Plan.
- 3. Unique characteristics of the geographic area, such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas:** As previously stated, the proposed gravel pit lies within the boundaries of the Elkhorn Ranchlands NHD, formally listed by the Keeper of the Register (National Park Service) on September 28, 2012. The Elkhorn Ranchlands NHD includes the Elkhorn Ranch Unit of Theodore Roosevelt National Park (TRNP) and the adjacent Little Missouri River and North Dakota Park & Recreation (NDPR) lands all approximately 4,300 feet to the southwest. The project may have an “adverse effect” on the overall integrity of the Elkhorn Ranch NHD however; it will be reasonably mitigated sufficient so that it is “not a significant adverse effect” as concurred with by NDSHPO on October 29, 2013. The consequent mitigation measures have been encapsulated in Appendix F of the EA: Section 106 National Historic Preservation Act (NHPA) Memorandum of Agreement).
- 4. The degree to which the effects on the quality of the human environment are likely to be highly controversial:** I anticipate this decision will not be acceptable to all. However, I have taken into consideration public concern and it has been determined that the effects although adverse on the overall integrity of the Elkhorn Ranch NHD, can be mitigated sufficient so that there is “not a significant adverse effect”. The mining is short term, in that operations would occur for two-three years depending on timing restrictions.

5. **The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks:** Scoping did not identify highly uncertain, unique or unknown risks. The possible effects on the human environment are not highly uncertain, and do not involve unique or unknown risks. The process for mineral development is highly regulated by the USFS to protect the human environment. We have developed many gravel pits on the Medora Ranger District over the years, and I find nothing unique to this proposal that poses a significant risk to the human environment (see EA, pages 5-13, 23-25, and Appendix C Operating Plan Stipulations).
  
6. **The degree to which the action may establish a precedent for future actions with significant effects, or represents a decision in principle about a future consideration:** Gravel pit developments on the Medora Ranger District, Little Missouri National Grassland are not without precedent and are consistent with the USFS policy as the DPG has been authorizing gravel pits to the counties for 30-40+ years. Any proposed future project must be evaluated on its own merits and effects.
  
7. **Whether the action is related to other actions with individually insignificant but cumulatively significant impacts:** The EA discloses the direct, indirect and cumulative effects of the Proposed Action. Based on the information presented in the EA, Alternative 2 cumulative impacts when considered in conjunction with other past, ongoing and reasonably foreseeable activities are not significant (see EA, pages 39, 47, 49-50, 54-55, 57, 60-61, 62, 63, 65, 69-70, 71, and 77).
  
8. **The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed, or eligible for listing, in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources:** As previously stated, the proposed gravel pit project lies within the boundaries of the Elkhorn Ranchlands NHD which includes the Elkhorn Ranch Unit of TRNP and the adjacent Little Missouri River and NDPR lands all approximately 4,300 feet to the southwest. The Elkhorn Ranchlands NHD was established four years after the submission of the first application to mine gravel.

After the 2012 listing of the Elkhorn Ranch NHD, and based on concerns expressed from the public and other agencies, the DPG reviewed the project and revised its determination to the NDSHPO that there is an “adverse effect” to historic properties; however, it was also determined that the effects will be mitigated sufficient that it is “not a significant adverse effect”. NDSHPO concurs with this recommendation. The effect to cultural resources is discussed on pages 35-39 of the EA. Refer also to the Tribal Consultation section above.

9. **The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered**

**Species Act of 1973:** There are no known resident Threatened Endangered (T&E) animal or plant species or critical habitat on the Little Missouri Grassland, therefore a “No effect” determination was made for each listed species anticipated to be, or have habitat within, the analysis area (see EA, pages 58-61 for plants and pages 72-74 for animals).

**10. Whether the action threatens to violate Federal, State, or local law or requirements imposed for the protection of the environment:** The action will not violate Federal, State, and local laws or requirements for the protection of the environment. Applicable laws and regulations were considered in the EA (see EA, pages 5-11, 13-14, 35, 55, 57-61, 64-70, and 71-77). The action is consistent with the Dakota Prairie Grasslands Land and Resource Management Plan (see EA, pages 14-15).

After considering the effects of the actions analyzed, in terms of context and intensity, I have determined that, while the project may have an “adverse effect” on the overall integrity of the Elkhorn Ranch NR District however; it will be reasonably mitigated sufficient so that it is “not a significant adverse effect” on the quality of the human environment. Therefore, an environmental impact statement will not be prepared.

### **Pre-Decisional Objection Opportunity**

This decision was subject to a pre-decisional objection period, pursuant to 36 CFR 218.

The Draft DN/FONSI was made available for a 45-day pre-decisional objection period starting on April 29, 2014. Six objections were received during the objection period. A resolution meeting was held July 21, 2014. All objectors were sent notification of the meeting on July 2, 2014. Four of the six objectors, as well as the mineral owner and his representative, participated in the resolution meeting

The objection resolution period was extended in order to provide additional time to attempt resolution of the issues raised. Notification of this extension was provided via a letter sent to the objectors on July 28, 2014.

The objection review concluded with a letter from the Objection Reviewing Officer signed on August 27, 2014. In that letter, the issues were summarized, as well as, direction to provide additional discussion and documentation relative to some issues. In particular, completion of the NHPA Section 106 consultation - prior to signing the decision – was directed. This has been completed, as discussed previously. Further discussion relative to alternatives considered, but not analyzed in detail was also directed. This has been completed in the EA and summarized above in this document. Information requested in the Objection Review letter has also been added to the project documentation.

### **Administrative Appeal Opportunities**

Those who are legal instrument holders, or applicants, will have standing to appeal under 36

CFR 214.4(b) and (c) and must meet the requirements of 36CFR 214.3. Appeals must meet the content requirements of 36 CFR 214.8 and be filed within 45 days of the date of the decision. Appeal filing information will be provided to the applicant.

### Implementation Date

Implementation may occur immediately upon signing this decision, unless an authorized stay is granted under §214.13(b) or an automatic stay goes into effect under §214.13(c).

### Contact

For additional information concerning this decision, contact: Babete Anderson, Public Affairs Officer, (701)-989-7300.

### Signature

   
KAREN E. DUNLAP Date  
Acting District Ranger

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