



File Code: 1570-1
#05-04-00-0037
Date: July 21, 2005

Michael Freeman
Faegre & Benson
3200 Wells Fargo Center
1700 Lincoln Street
Denver, CO 80203-4532

CERTIFIED MAIL – RETURN
RECEIPT REQUESTED

Dear Mr. Freeman:

In accordance with 36 CFR 215.18, I have reviewed the appeal record, Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) for the Jarbidge South Canyon Road project.

My review focused on the project documentation and the issues raised in the appeal you filed on behalf of The Wilderness Society and The Great Old Broads for Wilderness. I have also considered the recommendations 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 Humboldt-Toiyabe Forest Supervisor Robert Vaught.

I find that the activities documented in the FEIS, ROD, and the project record are in compliance with applicable laws, regulations, and policy. A more detailed explanation of the response to the appeal is enclosed.

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

Sincerely,

/s/ Mary Wagner
MARY WAGNER
Appeal Deciding Officer

Enclosures

cc:
Humboldt-Toiyabe Forest Supervisor (Robert Vaught)



**Jarbidge Canyon South Canyon Road
The Wilderness Society and Great Old Broads for Wilderness
Appeal #05-04-00-0037**

In the appeal, appellants stated that the decision fails to comply with law for “the reasons stated in the attached comment letters”. However, the appeal did not specify how the decision failed to comply with law, or specify which aspects of the letters the decision failed to consider.

Appellants must provide sufficient project specific evidence and rationale, focused on the decision, to show why the decision should be reversed, including why the appellant believes the decision failed to consider substantive comments and how the decision specifically violates law, regulation or policy (36 CFR 215.14(a) and (b)). Since the appellants failed to specify how the decision did not respond to the attachments, this response addresses only those issues actually raised in the appeal.

APPEAL ISSUE 1: The Forest Service’s decision is arbitrary, capricious, and fails to comply with applicable law.

RESPONSE: The Administrative Procedures Act (APA) provides that a reviewing court may set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” (5 USC 706(2)(A)). Judgment of APA compliance is therefore primarily a subject for judicial review, rather than administrative review. The National Environmental Policy Act (NEPA), its implementing regulations (40 CFR 1500-1508), and other federal law applicable to Forest Service projects guide the decision making process. The appeal does not identify specific violations of law or policy.

The Humboldt National Forest (Forest) analyzed potential environmental impacts in the Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS). The project record provides the detailed factual and analytical foundation for the analysis. The decision by the Forest Supervisor is based on the FEIS, including public comments and response, and is documented in the Record of Decision (ROD). The ROD summarized the rationale for the decision, as well as description of how the decision complies with specific federal laws (ROD, pp. 9-12 and 19-23). Legal compliance is also described in the FEIS (pp. 3-189 through 192).

The FEIS meets the requirements of NEPA, National Forest Management Act (NFMA), and their implementing regulations. The Forest Supervisor’s decision is reasonable, based on documentation in the record and consistent with the Forest Plan.

APPEAL ISSUE 2: The final decision does not resolve the concerns stated in the appellants’ comment letters.

RESPONSE: Council on Environmental Quality (CEQ) regulations list requirements for responding to public comments:

40 CFR Sec. 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to: Modify alternatives including the proposed action; develop and evaluate alternatives not previously given serious consideration by the agency; supplement, improve, or modify its analyses; make factual corrections; explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

The regulations require “consideration” and “response to” public comments. They do not require the agency to “resolve” the concerns. The Forest considered the comments from the appellants, reproduced them in full in the FEIS, and provided brief responses to comments that were substantive (FEIS, pp. H-48 and H-49). For example, the Forest Service’s response to appellants’ comment letter describes a factual correction made in Table 2-3 on river relocation costs; and explains that road ownership claims are not a component of the analysis (FEIS, pp. H-48 and H-49). The ROD describes the Selected Alternative, a combination of elements from Alternatives 1, 3, and 4, and provides rationale for the decision (ROD, pp. 4-9 and 9-11). The ROD states that the many public and agency comments that used in the decision making process and helped “...make a better informed decision. I have considered all views that have been expressed and have incorporated them where feasible” (ROD, p. 9).

The FEIS adequately considered and responded to substantive comments provided by the appellant during the NEPA process.

APPEAL ISSUE 3: The Forest Service should have selected Alternative 2A (a non-motorized trail from Pine Creek Campground to the Jarbidge Wilderness boundary).

RESPONSE: Agencies have the authority and discretion to select an alternative that meets project objectives while meeting laws, regulations, and policies. They are entitled to deference in selecting which alternative to implement.

As stated above in the Response to Issue #2, the Forest Supervisor’s Selected Alternative combines elements from Alternatives 1, 3, and 4. He cites multiple reasons for his decision, including project purpose, Forest Plan consistency, FEIS and Biological Assessment (BA) effects determinations, and FEIS issues addressed (ROD, pp. 9-13).

The appellants have consistently supported a non-motorized trail alternative. The record shows their expressions of support for Alternative 2A (FEIS, p. H-48; June 20, 2003, comment letter on DEIS; September 11, 2003, letter to Forest Supervisor; September 24, 2004, letter to James Winfrey; and April 13, 2005, comment letter to Forest Supervisor). The Forest Supervisor was aware of the appellants' desires, but in consideration of additional factors, decided to approve motorized access as far as the Urdahl concentrated use area, with trail access beyond.

The FEIS and ROD demonstrate the Forest Supervisor thoroughly considered policy and management direction found in the Forest Plan, Inland Native Fish Strategy (INFISH), technical reports, scientific reviews, and public comment, all of which support the rationale for the decision. The decision to choose the Selected Alternative was appropriate.



File Code: 1570-1

Date: July 20, 2005

Route To:

Subject: Reviewing Officer Recommendation, Jarbidge Canyon South Canyon Road,
Appeal #05-04-00-0037

To: Appeal Deciding Officer

This is my review and recommendation on the disposition of the following appeal for the Jarbidge South Canyon Road (ROD).

Michael Freeman of Faegre and Benson, LLP, filed the appeal on behalf of The Wilderness Society and Great Old Broads for Wilderness (Appellants).

Project Background

The project area for the proposed action on the South Canyon Road portion of Jarbidge Canyon is located on the Humboldt-Toiyabe National Forest (Forest). The general location is in the northeast corner of Nevada in Elko County, within the Bruneau River Subbasin of the Snake River Basin. The Project Area contains 11 miles of the Charleston-Jarbidge Road and 2.4 miles of the Jarbidge Canyon Road (referred to as the South Canyon Road).

The Selected Alternative approves the use and maintenance of the current high-clearance, four-wheel drive road in the South Canyon area between the Pine Creek Campground and the Urdahl area with minor adjustments; construction of a trail to provide non-motorized access between the Urdahl area and Snowshoe Gulch; and the issuance of a forest closure order within the Project Area to restrict off-road vehicle use to designated routes, i.e. South Canyon Road. The Selected Alternative combines elements of several alternatives analyzed in detail in the Final Environmental Impact Statement (FEIS). The decision allows the public continued motorized access into the canyon up to the Urdahl area.

Actions taken by the Forest Service, Elko County, the U.S. Fish and Wildlife Service, the Jarbidge Shovel Brigade, several individuals, and the U. S. District Court during the period between June 1998 and March 2001, resulted in the development and filing of a court-mediated Settlement Agreement in April 2001. Based on decisions within the Settlement Agreement, a Notice of Intent (NOI) to prepare the subject FEIS was published in March 2002.

Appellants Request for Relief

Appellants did not explicitly request relief, however they urge the Forest Service to select alternative 2a and to withhold any final decision on this project until the legal challenge to the Settlement Agreement is finally resolved.



Appeal Summary

The Appellants assert that:

- The Forest Service's decision is arbitrary, capricious, and fails to comply with applicable law
- The final decision does not resolve the concerns stated in Appellant's comment letters
- The decision should be changed to select Alternative 2a.

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 Responsible Official's decision is clearly, if not succinctly, described in the ROD. Recognizing the decision is made up of elements of three alternatives, the ROD would have benefited from having a clear and complete description of the decision in the opening paragraph. However, the decision becomes clear upon further reading and study. The rationale for the decision is logical and explains how the Responsible Official derived the selected alternative from the individual alternatives, explaining well how the selected alternative addresses the five major issues. He also did a good job of explaining the history of the project area leading to the Settlement Agreement, explaining the relationship of the FEIS to the Settlement Agreement, and of distinguishing this decision from the Settlement Agreement and related issues of Elko County's R. S. 2477 assertion. The Purpose and Need was well developed in the FEIS and was met by the selected alternative. The FEIS and ROD demonstrate a thorough consideration of policy and management direction found in the Forest Plan, Inland Native Fish Strategy (INFISH), technical reports, scientific reviews, and public comment, all of which support the rationale for the decision by the Forest Supervisor. He was aware of Appellants' desire for alternative 2, but in consideration of additional factors elected to proceed with the selected alternative and clearly stated his reasoning.

2. Comprehension of Benefits and Purpose of the Proposal

The Purpose and Need and the Decision Framework are clearly stated in the FEIS and ROD. The FEIS adequately describes the need to provide access within the West Fork of the Jarbidge River Canyon to the Jarbidge Wilderness while improving the environment and aquatic habitat and conditions for the listed bull trout. The selected alternative is consistent with and will accomplish the stated purpose and need.

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

I find the decision to be consistent with agency policy, direction and procedures for completing the FEIS, ROD, and supporting documentation. The FEIS and ROD for this project adequately

disclose the environmental effects and provide enough evidence and analysis to make a reasoned decision.

4. Effectiveness of Public Participation Activities and Use of Comments

The Forest conducted formal scoping from May 9, 2003, until June 23, 2003. When the Draft Environmental Impact Statement (DEIS) was published, the Forest placed public notices in five newspapers in Nevada and Idaho, held five public meetings, and mailed the DEIS or summary to 327 agencies, organizations, and/or individuals. In August 2004, the Forest sent a letter to all addresses on their project mailing list stating that Elko County's claim to the South Canyon Road and implementation of the Settlement Agreement had been stayed by the U. S. District Court. This letter also stated that the Forest Service believed that the current condition of the road was not acceptable, and the agency planned to proceed with the FEIS and move forward on this project to avoid environmental damage from the road. The Forest requested comments on this intent, and these comments were reviewed and considered during preparation of the ROD.

From the project record it is apparent that the public had the opportunity for involvement throughout the process. Comments received were considered, and the FEIS details changes made as a result of comments. At several of the public meetings, names of those commenting were not recorded, but the substance of the comments was recorded.

The Forest Supervisor acknowledges consideration of public comments in formulating his decision and credits those comments in helping him make a better informed decision.

5. Requested Changes and Objections of the Appellant

Appellants request that the Forest Service select alternative 2a and withhold any final decision on this project until the legal challenge to the Settlement Agreement is finally resolved.

The Forest Supervisor was aware of Appellants desire for alternative 2a prior to making his decision. He developed his rationale for his selected alternative citing multiple reasons including project purpose, Forest Plan consistency, FEIS and Biological Analysis effects, and FEIS issues addressed (ROD, pp. 9-13). He has the authority and discretion to select an alternative that meets project purpose and need while meeting laws, regulations, policies, and Forest Plan direction. As discussed above in Section 4, the current condition of the road is unacceptable and action is needed to avoid on-going environmental damage. In my review I did not find that Appellants presented compelling arguments in contrast to the information the Responsible Official had to make his decision.

Recommendation

The FEIS presents analysis that supports the decision. Based on my review of the Forest Service Manual, FEIS, and ROD, I recommend that the decision made by Forest Supervisor Robert Vaught be affirmed.

/s/ William A. Wood
WILLIAM A. WOOD
Appeal Reviewing Officer