



File Code: 1570-1
#05-04-00-0038
Date: July 21, 2005

CERTIFIED MAIL – RETURN
RECEIPT REQUESTED

A. Grant Gerber
491 4th Street
Elko, NV 89801

Dear Mr. Gerber:

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.

Because of a change in Cathrine Beaty's schedule, I have been designated the Appeal Deciding Officer for this project. My review focused on the project documentation and the issues raised in the appeal you filed on behalf of John Carpenter, Demar Dahl, Jarbidge Shovel Brigade and Elwood Mose. 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 South Canyon Road
John Carpenter, Demar Dahl, Jarbidge Shovel Brigade and Elwood Mose
Appeal #05-04-00-0038

APPEAL ISSUE: The Forest Supervisor's decision is not consistent with the settlement agreement entered between Elko County and the United States; or with direction from the Federal District Court.

RESPONSE: The appellants did not specify how the decision is not consistent with direction from the District Court. On June 12, 2003, the United States District Court for the District of Nevada issued an Order, which provides as follows:

If the United States disclaimed its property interest in the Road, this disclaimer equates to the issuance of a right-of-way, which triggers the requirement that the government comply with Federal Land Policy and Management Act (FLPMA), National Environmental Protection Act (NEPA), and Forest Service regulations. Having acquired this new evidence, this court no longer finds the settlement to be fundamentally fair to the public interest because it allows the government to circumvent the procedural mandates laid out by Congress (*United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990)). As a result, pursuant to Fed. R. Civ. P. 60(b), this court stays the effectiveness of the settlement agreement pending compliance by the Forest Service with these laws.

The effectiveness of the settlement agreement (#118) is stayed pending compliance by the Forest Service with the requirements of FLPMA, NEPA and any associated regulations triggered by the granting of a right-of-way to Elko County.

On May 3, 2004, the Court issued a second Order clarifying the June 12 Order, which provides as follows:

The court also is powerless, however, to approve a settlement agreement purporting to recognize (much less convey) an R.S. 2477 right of way without being satisfied that there are facts supporting the existence of such an easement.

Accordingly, the court declined to reconsider its earlier Order to stay effectiveness of the settlement agreement.

Pursuant to these orders from the District Court, the Forest Service is currently precluded from implementing the settlement agreement with Elko County. Accordingly, the appellants' assertion that the Forest Supervisor should have followed the provisions of the settlement agreement is without merit.



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Route To:

Subject: Reviewing Officer Recommendation, Jarbidge Canyon South Canyon Road, Appeal #05-04-00-0038

To: Appeal Deciding Officer

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

John Carpenter, Demar Dahl, Jarbidge Shovel Brigade, and Elwood Mose (Appellants) collectively filed this appeal.

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 request the record of decision be changed to:

- Honor and comply with the Settlement Agreement
- Honor the jurisdiction of the Federal Court in the case of the *United States vs. John C. Carpenter, et al*, and the County of Elko



Appeal Summary

The Appellants assert that the Forest Service is legally estopped from taking any action that contests the RS2477 right-of-way of Elko County to the Jarbidge Road from the Idaho-Nevada border through the Town of Jarbidge to Snowslide Gulch and that the Record of Decision directly violates the Settlement Agreement by intending to close Elko County's RS 2477 road between the Urdahl area and Snowslide Gulch.

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, legal documents, scientific reviews, and public comment, all of which support the rationale for the decision by the Forest Supervisor.

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' complaints in the appeal all stem from the assertion that the Forest Supervisor's decision is not consistent with the Settlement Agreement entered between Elko County and the United States and with unspecified direction from the Federal District Court. I have reviewed two Orders issued by the United States District Court for the District of Nevada (June 12, 2003 and May 3, 2004) relating to Appellants assertion. The Forest Service is currently precluded from implementing the Settlement Agreement with Elko County. The Forest Supervisor's decision is consistent with Orders of the Federal District Court. Accordingly, the appellants' assertion that the Forest Supervisor should have followed the provisions of the settlement agreement is without merit.

Recommendation

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

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