



Printable version: Thursday, September 28, 2006

2. PUBLIC LANDS: Judge OKs Jarbidge River road settlement

Russell J. Dinnage, *Land Letter* reporter

A decade-long dispute over a road adjacent to bull trout habitat in the Humboldt-Toiyabe National Forest may finally be coming to an end.

U.S. District Judge Roger Hunt last week ratified a 2001 settlement agreement in which the Forest Service agreed not to contest Elko County's right-of-way claim to the road and the county agreed not to make any improvements to the road without federal approval.

Hunt emphasized that the settlement agreement does not transfer any controlling interest in the land to Elko County.



Bull trout inhabit only one river system in Nevada. Photo courtesy of the National Park Service.

"There is a huge gulf between granting someone an interest in land and refusing to argue about whether they have such an interest," Hunt wrote. "To avoid the risk of an adverse finding, the government has, in the spirit of compromise, elected to do the latter."

The 2001 agreement stemmed from a lawsuit in which the federal government attempted to prevent individual citizens from making repairs to a 1.5-mile portion of South Canyon Road that had been washed out by flooding in the late 1990s. The road runs along the Jarbidge River, home to the United States' southernmost surviving population of bull trout.

Elko County intervened in the case, claiming ownership of the road under the 1866 mining law RS 2477 because of its historical use and maintenance of the road prior to the land coming under Forest Service protection. The law

allows states to claim rights-of-way that existed before land was designated as federal property.

Although the Forest Service and Elko County reached an agreement in 2001 that seemed to put an end to the dispute, environmental groups challenged the deal, arguing that it violated federal laws and Forest Service regulations. The 9th U.S. Circuit Court of Appeals agreed with those arguments, sending the case back to the district court in Nevada in 2002.

But U.S. District Judge David Hagen struck down the agreement in 2003, saying the agency erred by implicitly giving up ownership of the road. Hagen ruled that ownership of the road could not be transferred to the county unless certain procedural requirements had been met, and he stayed the effectiveness of the agreement until the Forest Service complied with these procedures (*Land Letter*, July 3, 2003).

But Hunt, who took over the case after Hagen's retirement, ruled last week that the agreement did not grant an interest in land to Elko County, lifting the stay and allowing the agreement to take effect.

Elko County District Attorney Gary Woodbury agreed with that assessment, saying that the settlement agreement

does not transfer ownership of the land to the county. "The fact is the government and the county have an agreement that the court has ruled is legal," Woodbury said.

Michael Freeman, an attorney for environmental groups in the case, said his clients were disappointed by the decision. The environmental groups still maintain that the settlement implicitly transfers ownership of the road.

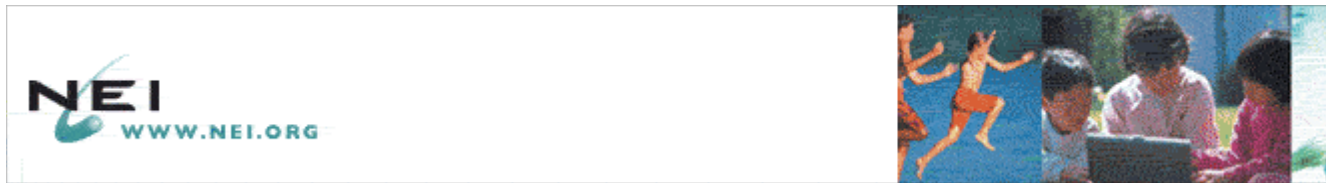
"By giving away public property to Elko County, the government is changing the laws pertaining to RS 2477 and easements in an illegal way," Freeman said.

Freeman said federal officials did not follow procedural requirements under the Federal Land Policy and Management Act such as rules for environmental reviews and public comment, thereby diminishing the federal government's ability to protect the bull trout and its habitat. The road should be closed to all motorized traffic in order to protect the trout in the Jarbidge River as well as the local environment, he added.

But Woodbury said that, despite the fact that the bull trout in the Jarbidge River are threatened, there is nothing more that needs to be done to ensure the maintenance of their habitat in the area. "That portion of the road is very remote. I don't think it even has 100 cars a year on it," he said.

Woodbury said he fully expects the two environmental groups to appeal the decision to the 9th U.S. Circuit Court of Appeals. Freeman said his clients have not made a final decision on whether to do so yet, but that they will have to make up their minds within 60 days in accordance with the circuit's stipulations.

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