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Jarbidge dispute focuses on road's origin

Reno judge hears conflicting claims of who owns two-mile stretch in Elko County

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RENO -- After a decadelong fight over the Endangered Species Act, property rights and a threatened fish called the bull trout, the fate of a two-mile stretch of national forest road in one of the most remote canyons in the West might come down to a simple question: Who was there first?

Was the dirt road in northeast Nevada built before Congress added the wildly rugged terrain to the Humboldt National Forest on Jan. 20, 1909?

It's a dispute that's playing out in several states as more and more rural counties stake claims to roads the government insists are federal property -- a legal and political divide the 10th U.S. Circuit Court of Appeals described in a ruling in Utah earlier this year as "one of the more contentious land use issues in the West." A federal court ruling expected this summer might be viewed as a precedent in jurisdictions with similar conflicts.

The issue in Elko County's Jarbidge Canyon is how much of South Canyon Road leading to federally protected wilderness should be off-limits to motorized vehicles given its proximity to the southernmost population of the bull trout in the United States. The concern is that vehicles traveling the road that follows and sometimes crosses the Jarbidge River could damage the stream bed and push the fish into extinction.

The county covers 17,135 square miles of northeast Nevada -- an area larger than the state of Maryland, more than two-thirds of it owned by the U.S. government. It is home to the "Shovel Brigade," a group of mostly conservative and libertarian-minded activists made famous for defying federal orders and rebuilding the washed out road after a 1995 flood.

"We'd been maintaining that road for years. We felt it was a public road and should remain as a public road corridor," former County Manager George Boucher, 75, testified this month during a five-day hearing in U.S. District Court in Reno.

The county contends that prospectors, sheep herders and American Indians used the road near the Idaho line years before the national forest was created, which would give the county a right of way under a provision of a Civil War-era mining law.

The Forest Service disagrees and cites historic maps, survey records, newspaper clippings and personal accounts written nearly a century ago that suggest no real road existed before David Bourne struck gold there in June 1909.

"Based on the historical evidence, all indications are that a trail -- later turned into a road -- was constructed in Jarbidge Canyon in 1910," said Richa Wilson, the Forest Service's regional architectural historian based in Ogden, Utah.

The conflicting accounts introduced as evidence include a Western Shoshone legend of an evil man-eating devil that supposedly kept Indians from venturing into Jarbidge Canyon and a livestock census that estimated 500,000 sheep were being grazed in the area by 1908.

While the county and the federal government remain at odds over the road's history, the two are on the same side of the only legal question technically before the court. They both want a federal judge to reinstate a settlement the Forest Service and county reached in 2003 in which the agency agreed not to challenge the county's right-of-way claim if the county promised to seek agency approval for any road improvements it plans.

The lone opponent in the courtroom was a lawyer for The Wilderness Society and the Utah-based Great Old Broads for Wilderness, which won an order last year temporarily blocking the agreement. The groups argue the Forest Service broke a number of U.S. environmental laws by giving away its authority over the land.

"The larger issue here is this property belongs to the American public. It should be managed in compliance with the laws Congress has passed," said Michael Freeman, a Denver-based lawyer representing the environmental groups who say the deal could kill off the fish.

The 9th U.S. Circuit Court of Appeals in San Francisco ruled for the environmentalists last year when it agreed they had a right to try to halt the agreement and sent the case back to U.S. District Judge David Hagen in Reno. After hearing their arguments about the threat to the bull trout and the violation of environmental laws, Hagen granted the environmentalists' motion to stay the settlement.

U.S. District Judge Roger Hunt held a five-day hearing earlier this month primarily so Elko County could try to prove why the agreement should be reinstated, given the conflicting claims of who owns the road.

"Both sides have spent a lot of money that would have been better spent on road maintenance," said Kristin McQueary, Elko County's deputy district attorney.

Wilson, the Forest Service historian who helped write a recent 59-page report on the canyon citing hundreds of accounts, said the Shoshone legend of "Johrbitch" or "Jarvidge" might explain why they found minimal use of the canyon by Indians.

"There is a legend that Jarvidge the Indian devil lives over in that country and the monster comes out and carries off squaws," the Gold Creek (Nev.) News wrote in a 1897 report.

"No inducement was sufficient enough to get an Indian to go there," wrote Frank Winters, one of the area's first ranchers.

Dennis Scully, a deputy surveyor the U.S. General Land Office sent to survey the land in the summer of 1896, described the canyon as "some of the roughest country in the United States."

"It is about the least known portion of the country and on the maps, it is a total blank," the Gold Creek News wrote in the 1897 account.

County officials countered with mining claims filed as early as 1894, a cabin built in 1903 and 650 people living in Jarbidge according to the 1910 U.S. Census.

"It created a set of circumstances that it would have practically been impossible to not use the Jarbidge Canyon," said William Price, a professional land surveyor and mineral land manager who testified for the county.

McQueary said the circumstantial evidence is persuasive though they have been unable to find evidence of the road on any map before 1909.

Cyd McMullen, a history professor specializing in the American West at Great Basin Community College in Elko, said the documented record frequently shows "only the tip of the iceberg."

"People lose things. Fire destroys them. They are cached somewhere and no one discovers them," McMullen testified.

"Most historians would not assume something didn't happen because you couldn't find documents that supported it," McMullen said.

Judge Hunt suggested he would not rely solely on the dozens of maps entered into evidence.

"There was a cabin built by 1903. We had (mining) claims made in 1894. People had to get from here to there one way or another," Hunt said.

"The fact somebody did not put on a map 'Hey, there's a trail here,' is not evidence to establish it one way or another."

Freeman said the outcome of the case could set an important precedent.

"I don't know if it would trigger a run on courthouses," he said, "but there are a lot of these claims throughout the West -- in Utah, Montana, Idaho, California."

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