



File Code: 1570-1

Date: August 3, 2011

Route To:

Subject: White River National Forest Travel Management Plan,
Appeal No. WR 11-02-00-0037 (215)

To: Appeal Deciding Officer

As the designated Appeal Reviewing Officer, this is my recommendation on disposition of the appeal filed by **Pitkin County** under the regulations at 36 CFR 215. Forest Supervisor Scott Fitzwilliams signed the Record of Decision (ROD) for the White River National Forest (WRNF) on March 17, 2011, and a legal notice of the decision was published in the newspaper of record on May 4, 2011. My recommendation is based on the appeal and the decision documentation (36 CFR 215.18(a)).

BACKGROUND

The White River National Forest (WRNF) travel planning effort is an extension of earlier planning processes to both update the WRNF travel management direction and to align the travel strategy on the Forest within the scope of the White River Forest Plan (Forest Plan). Due to public input and the complexity of the subject matter, the decision was made to separate the two plans and develop the Travel Management Plan (TMP) after the completion of the Forest Plan. Information gathered during the initial effort was used in this decision. This TMP adheres to the 2002 Forest Plan and does not amend the Forest Plan (FEIS, Summary p. 2).

On August 27, 2002, the Forest Supervisor of the WRNF published a Notice of Intent in the Federal Register for a forest-wide TMP and invited public comment until October 31, 2002. The agency held six public meetings in September 2002 and open houses were held where many members of the public provided input.

In November 2005, the National Travel Management Rule (36 CFR 212) was published revising regulations in response to the growing popularity and capability of off-highway vehicle use of the national forests and the effects of that use on the environment. Subpart B of the final Travel Management Rule requires designation of roads, trails, and areas for motor vehicle use. Before December 9, 2008, the travel management regulations for Subpart B did not require the completion of Subpart A (identification of the minimum road system) prior to implementation of Subpart B's designations. The Travel Management Rule does not require the Forest Supervisor to reconsider prior decisions authorizing motor vehicle use on the existing National Forest Transportation System (NFTS).

On July 28, 2006, the WRNF prepared and released for a 90-day public comment period the White River National Forest Travel Management Plan Draft Environmental Impact Statement (DEIS).



The DEIS examined three action alternatives along with the no-action alternative based on key issues identified during scoping. The DEIS incorporated direction from 36 CFR 212 Subpart B of the 2005 Final Rule for Travel Management: Designation of Roads, Trails, and Areas for Motor Vehicle Use (travel rule). The WRNF staff members held meetings with individuals, interest groups, and government representatives during this time.

On November 7, 2008, the WRNF released the White River National Forest Travel Management Plan Supplemental Draft Environmental Impact Statement (SDEIS) for public review and comment. Based on the original alternatives in the DEIS, the ability to better incorporate travel rule direction, and response to public comments received, the deciding official identified the preferred alternative in the SDEIS. Staff members again met with individuals, interest groups, and government representatives. Comments on this plan were accepted until January 6, 2009.

On March 17, 2011, the Forest Supervisor signed a Record of Decision (ROD) for travel management pursuant to the travel rule on the WRNF.

Pursuant to 36 CFR 215.17, an attempt was made to seek informal resolution of the appeal. The record indicates that informal resolution was not reached.

RELIEF REQUESTED

“We respectfully ask that you grant this appeal, and that the TMP be amended in accordance with the requests made in this letter.”

ISSUES AND DISCUSSION

APPEAL ISSUE 1: NON-MOTORIZED ROUTES WITHIN THE CRYSTAL RIVER VALLEY.

Appellant states: Pitkin County believes certain routes within the Crystal River Valley are important alignments for present and future non-motorized recreational use (the “Affected Routes”). A number of these routes, including those subject to this appeal, exist along the alignment of an historic wagon road for which the County holds an RS 2477 right of way. The ROD calls for most of the Affected Routes to be decommissioned and closed to public access.

Purporting to decommission these routes and close them to public access (or preclude their maintenance) is inconsistent with the County’s property rights in the Affected Routes. Until the parties’ respective property interests in the Affected Routes are adjudicated—or, preferably, resolved by an agreement between the Service and the County—these routes should remain designated for non-motorized public use in the TMP.

The Affected Routes that are subject to this appeal are located within the Sopris Ranger District, and are designated on the Travel Plan Map for that District as Forest Service Trails **3-1954W.1, 3-1966W.1, 3-1966W.2, 3-1966W.3, 3-310W.1F and 3-308.1A.**

The County reserves all rights to assert all available uses of the affected routes pursuant to RS 2477 and other applicable laws.

Rule:

36 CFR 212.1 - Roads or trails for which a state, county, or local public road authority holds a legally documented right-of-way are not NFS roads or NFS trails.

36 CFR 212.51(a) - The travel management rule exempts from designations only those rights-of-way that are legally documented.

36 CFR 212.55(d) – The travel management rule recognizes valid existing rights.

FSM 7703.3 provides an administrative framework for meeting the requirement of recognizing valid existing rights by providing guidance on documenting jurisdiction, transferring jurisdiction, and exercising jurisdiction over forest roads.

FSM 7718.3 - Use of a road or trail that is authorized by a legally documented right-of-way held by a state, county, or other local public road authority. The exemption for legally documented rights-of-way held by State, county, or other local public road authorities covers rights-of-way under RS 2477 that have been adjudicated through the Federal court system or otherwise formally established.

Revised Statute (RS) 2477 - Section 8 of the Act of July 26, 1866, 14 Stat. 253, Revised Statute 2477, 43 U.S.C. 932, repealed by the Act of October 21, 1976, (Federal Lands and Policy Management Act, FLPMA) and 90 Stat. 2793, (RS 2477).

Discussion:

Pitkin County (County) is concerned about the WRNF including the routes within the Crystal River Valley along the historic wagon road (for which the County claims they hold RS 2477 rights) in the decision for decommissioning, and would like the WRNF to retain those routes for non-motorized public use in the TMP.

According to information found in the administrative record, the following routes were identified for decommissioning: 3-1954W.1, 3-1966W.1, 3-1966W.2, 3-1966W.3 (/05_Resources/09_Planning/TMI/completed_spreadsheets/Changes/Sopris_Roads_02_23_10_version.xlsx). The other two routes, 3-310W.1F and 3-308.1A (Redstone Campground), were being retained by the WRNF as part of the travel management system.

There is a presumption that on federal lands, ownership and management authority of routes lie with the federal government. Numerous courts have held that the Forest Service has authority under the Property Clause of the United States Constitution and the agency's Organic Act (16 U.S.C. 551) to regulate reasonable use of roads and trails on NFS lands, including roads authorized by an RS 2477 right-of-way, even if these roads may be the subject of claims for public highway rights-of-way that may prove valid in the future (and become legally documented in accordance with federal law).

Application of the travel management rule to these roads and trails is reasonable, given the purpose of the rule to protect resources and manage conflicts among uses (70 FR 68265, 11/9/2005), and the inability of the Forest Service to adjudicate title to any RS 2477 claims that may be asserted (73 FR 74694; *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005)).

Thus, for purposes of the travel management rule, there is a presumption that Forest Service designations for motor vehicle use govern on NFS lands, unless a local public road authority submits legal documentation for an RS 2477 right-of-way. A county is not entitled to exercise unilateral management authority based on a mere claim for an RS 2477 right-of-way. The county must carry the burden of proof of title in a court of law or obtain some other recognition of the right-of-way under federal law.

The Forest Service does not have authority to adjudicate title in an RS2477 road to the County during the travel management planning process (73 FR 74694; *Southern Utah Wilderness alliance v Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005) and the landownership of the County wagon road was not in the travel management EIS scope of decisions to be made (FEIS, pg 19). The FEIS (pg. 23-24) recognized that valid outstanding rights may exist on this road. If a valid outstanding right exists, the Forest Service will honor a valid outstanding right when it is subsequently determined that the specific facts surrounding any claim to such rights meet the criteria set forth in any respective statute granting such occupancy and use. The Forest Service may do this by making a non-binding administrative determination (NBD) as to the potential validity of the RS 2477 right of way. If the Forest Service identifies a potentially valid RS 2477 right-of-way claim through the NBD process, the agency will encourage the claimant to accept jurisdiction pursuant to an easement granted by the U.S. Department of Transportation (23 U.S.C. 317) or by the Forest Service under Section 2 of the National Forests Roads and Trails Act (16 U.S.C. 533) or to adjudicate the claim pursuant to the Quiet Title Act (28 U.S.C. 2409a).

There is documentation in the project record regarding the possible future analysis of the County's claim to an RS2477 right to the Crystal River trail
(04_Team_Administration\02_Communications_Correspondence\groups\government_agencies\PitkinCounty-WagonRd_060311.docx):

“At this time the FS will not add any segments of trail along this corridor as system trails. These are not system routes nor will they be shown as system routes in the Final TMP as the entire system including necessary easements are not ripe for decision. Decommissioning of these routes would be more toward signing and blocking entrances, because of the historic value the trails themselves most would be left alone save any necessary resource protection measures if necessary. This will allow for future planning to occur.”

The deciding officer was aware of the claims made by the County and made the decision not to include these trails as Forest Service system trails, which would be inconsistent with the County's claims. The deciding officer also decided to decommission the trail by signing and blocking entrances to the trail; the decommission steps would be easily reversible should the County prevail in its RS2477 claims.

Recommendation:

The record demonstrates the fact that the County's assertion of a RS2477 valid existing right was recognized by the Forest Supervisor as a possible valid claim.

In the absence of proof offered by the County sufficient to satisfy the administrative needs of the Forest Service concerning the likely validity of this right, or the absence of a court decree, I find that that Forest Supervisor appropriately balanced the treatment of the Crystal River trail in the TMP decision.

However, I encourage the WRNF to work with the County on a NBD on the routes in question. If there is sufficient evidence to show that an RS 2477 right of way was created prior to forest reservation on the same alignment, and was not subsequently vacated or abandoned, the blockage and signage should come down and the WRNF should work with the County on how they would like to manage the right-of-way. I recommend the Forest Supervisor's decision be affirmed on this issue.

APPEAL ISSUE 2: PARKING DEMANDS FOR KOBAY PARK SNOWMOBILERS.

Appellant states: The Travel Management Plan designates certain areas for winter recreational use without taking into account how recreationalists will, as a practical matter, access those public lands. The most obvious example of this is snowmobile use in the Kobey Park area.

Snowmobile users require parking areas designed to accommodate the trailers and large trucks that transport snowmobiles to the Forest. The Service has failed to provide such parking, and thus transfers the consequences of its winter management decision to the County. Moreover, Lenado Road itself is not in an acceptable condition for the high level of recreational vehicle use it receives.

The Forest Service seems content to designate Kobey Park for public access without making concrete efforts to address the obvious access concerns created by the designation.

Rule:

36 CFR 212.53 – The responsible official shall coordinate with appropriate Federal, State, county and other local governmental entities and tribal governments when designating National Forest System roads, National Forest System Trails, and areas on National Forest System lands pursuant to this subpart.

Discussion:

The County is concerned with the agency's identification of winter motorized/snowmobile use in the Kobey Park area and the inability of the agency to provide adequate parking to accommodate trailers and large trucks that transport snowmobiles to the Forest.

The Forest received this concern as a comment on the SDEIS. The Forest responded that it has met with the County on this matter and explained that the road through Lenado is currently the only viable and reasonable access for snowmobiles and skiers to access Kobey Park area and Margy's Hut during the winter. The WRNF indicated in its Response to Comments that it will continue to work cooperatively with the County on these issues (8_ResponseToComments_FEISAttachement3.pdf pg. 49 (Aspen/Sopris 26)).

Recommendation:

There is evidence in the record the Forest is working with the County on this issue. I recommend the Forest Supervisor's decision be affirmed on this issue.

APPEAL ISSUE 3: WINTER TRAVEL NEAR COUNTY OPEN SPACES.

Appellant states: The County's Open Space and Trails program currently owns mining claims comprising an approximately 365-acre in-holding in the Kobey Park area, and a 160-acre parcel in the Sellars Park area. The Winter Management Plan has much of these County lands bordering or entirely within its "Open Motorized Access" zones. The Pitkin County Code prohibits motorized uses on its Open Space and Trails properties. Such inconsistencies in management of public lands in the backcountry would obviously create confusion among users and would be difficult to enforce.

Adjusting the boundaries for the proposed winter travel areas so that the County-owned in-holdings are removed from proximity to the "Open Motorized Areas" and located within either the "Restricted – Motorized Routes Only" or "Motorized Prohibited Areas" would resolve this problem. The specific locations of these in-holdings lend themselves to making such adjustments, as they are located in areas adjacent to either specified travel routes, or in areas that see little, if any, winter travel... We understand that precedent exists for creating buffer areas around Tenth Mountain Hut facilities, and request that the Service make the boundary adjustments requested here as well.

Rule:

36 CFR 212.53 – The responsible official shall coordinate with appropriate Federal, State, county and other local governmental entities and tribal governments when designating National Forest System roads, National Forest System Trails, and areas on National Forest System lands pursuant to this subpart.

Discussion:

The County has raised concern about the WRNF winter management plan and the proximity of its "Open Motorized Access" zone to lands under the jurisdiction of the County that prohibit motorized use. They are concerned this may cause confusion among the motorized snowmobilers and would be difficult for the County to enforce.

The Forest received this concern as a comment on the SDEIS as letter number 467 (8_ResponsesToComments_FEISAttachment3.pdf). The Forest responded that they will work with the County to resolve these issues where appropriate. In the winter NFSR 528 receives little to no snowmobile traffic. The County may have to do some signage on their properties as well (8_ResponseToComments_FEISAttachment3.pdf pg. 49 (Aspen/Sopris-26)).

The documentation in the record suggests that the Forest Supervisor considered the comments in making a decision and intends to continue to work cooperatively with the County to resolve management issues in this area. NFSR 528 was not included in FEIS Attachment 2 (3_TMP_Final_Plan_routelisting_FEISAttachment2.pdf) under either the winter or summer strategy.

Recommendation:

The Forest documented that it considered the County's comment in the final decision and intends to continue to work cooperatively with the County. I recommend the Forest Supervisor's decision be affirmed on this issue.

APPEAL ISSUE 4: RED CANYON AND DRY WOODY CONNECTION TO ASPEN VALLEY RANCH TRAIL.

Appellant states: For several years, Pitkin County has held a trail easement providing for recreational access through Aspen Valley Ranch to the public lands in Red Canyon and Dry Woody Creek. Negotiations with the landowner to settle litigation over a historic road alignment through AVR and into these areas¹ have recently resulted in a settlement that provides for improved public access to public lands for pedestrians, equestrians, and cyclists. This new trail alignment will provide a beautiful connection to the old road alignments that extends into the public lands in these areas. In turn, the existing roads and trails on the Forest in this location provide a more gradual means of non-motorized access into the public lands than is available on other access routes such as Triangle Peak Road. The County has invested significant resources into providing a means for the public to access public lands through AVR. It respectfully requests that the Forest not adopt a designation that would thwart the ability of cyclists and equestrians to make use of these areas.

Rule:

36 CFR 212.1 - Roads or trails for which a state, county, or local public road authority holds a legally documented right-of-way are not NFS roads or NFS trails.

36 CFR 212.53 – The responsible official shall coordinate with appropriate Federal, State, county and other local governmental entities and tribal governments when designating National Forest System roads, National Forest System Trails, and areas on National Forest System lands pursuant to this subpart.

Discussion:

Pitkin County is concerned that they have had on-going negotiations with the landowner(s) in Aspen Valley Ranch with regard to public recreational access. They request the Forest not adopt a route designation that would thwart the ability of cyclists and equestrians to access public lands in that area.

The Forest received similar comments on the SDEIS regarding Red Canyon trail, 1-2189.1A and Dry Woody Creek trail, 1-2188.1. Documentation in the record indicates that the FS understands the ongoing easement issues between the County and landowner. The record indicates that the Forest was not adding the route to the designated/rehabilitated road system as further study is warranted (8_ResponseToComments_FEISAttachment3.pdf, pg. 25 (Aspen/Sopris-2)).

However, the route listing in FEIS Attachment 2 shows Red Canyon trail, 1-2189.1A, and Dry Woody Creek trail, 1-2188.1 as “closed to the public” under the summer strategy for decommissioning (3_TMP_Final_Plan_routelisting_FEISAttachment2.pdf). It’s displayed as “not needed” on the spreadsheet for Aspen Ranger District (/05_Resources/09_Planning/TMI/completed_spreadsheets/Changes/Aspen_Changes.xlsx).

Recommendation:

¹ The County has historic information indicating that RS 2477 rights of way exist into Red Canyon and Dry Woody; as with the Crystal, the County’s intention is only to provide for non-motorized use along these alignments, and we would seek a cooperative agreement with the Service to this effect here as well.

I recommend that the decision of the Forest Supervisor as documented in the FEIS Attachment 2 (3_TMP_Final_Plan_routelisting_FEISAttachment2.pdf) be updated to reflect documentation in the record indicating that the agency is continuing to work with Pitkin County. The status of the route should be updated when further study is completed.

RECOMMENDATION

I recommend that the Forest Supervisor's March 17, 2011 decision be affirmed with the instructions outlined under Appeal Issue 4, and that the Appellant's request for relief to amend the TMP be granted on that issue.



RICHARD A. COOKSEY
Appeal Reviewing Officer

Deputy Forest Supervisor,
Medicine Bow-Routt National Forests
Thunder Basin National Grassland