



June 24, 2009

Bob Leaverton  
Forest Supervisor  
Pike/San Isabel National Forests  
2840 Kachina  
Pueblo, CO 81008

Dear Mr. Leaverton:

I am in receipt of your response to my third Freedom of Information Act (FOIA) request to Ranger Botts governing FSR's 371 and 322A dated June 9, 2009. Please note that this response to your writing, beyond addressing some of your points, also represents a **FOURTH FOIA request** and a call, again since previous ones have been ignored by the Forest Service (FS), **to rescind the already expired April 28, 2004 Decision Memo governing the Temporary Closure Of Roads And Trails For Resource Protection And Public Safety in the South Platte Ranger District and to reopen FSR 322A** (the reasons for which are elucidated below).

#### **FSR 371**

You state that the public notice "on site" regarding closure of FSR 371 was only as a courtesy to the public and not part of the NEPA process. You go on to state that this was done because "the public had been illegally using this access road for a number of years." However, as *all* writings from the FS indicate, to include the 1984 Land and Resource Management Plan Map, FSR 371 is just that, a FSR and not an access road. Therefore, public travel on this road was never illegal. Indeed, to this date, signs on the ground indicate that this road *is* FSR 371, with only the last approximately two miles of the road being gated off. Therefore, it is still legal for the public to travel this road, even though maps subsequent to the 1984 map do not acknowledge the presence of this road either beyond the intersection with Emerald Valley or only up to the gate. Indeed, it fails any test of logic to claim that public access to this road is illegal past the intersection with Emerald Valley Ranch, yet to allow access for about one mile up to the gate. Also, of the 32 Amendments to the 1984 Land and Resource Management Plan, none indicate that FSR 371 is actually an access road and was mislabeled.

Therefore, based on 36 CFR 220 et seq., the FS must comply with NEPA procedures to close this road. As far back as September 2001, the FS has known this as evidenced by Steve Tapia's writing of 9/21/01 in which he states, "we would investigate the potential of gating/closing FSR 371 but it wouldn't be quick because it requires some level of NEPA." Of note, his writing not only confirms that FSR 371 is indeed a FSR and not, as you claim, an access road but also that NEPA is required. However, even if FSR 371 were not a FSR and instead an access road, closing it to the public would still require NEPA. This, because in explaining the rationale for closing this road in many letters to me and most recently in one dated July 2, 2008, the FS points to the protection of a Forester Sensitive Species. This automatically triggers NEPA as per 36 CFR 220.6.b.1.

Also to consider is that none of multiple requests for documentation regarding the closure of this road has produced a Decision Document/Memo. The action of closing FSR 371 is not categorically excluded under FSH 1909.15.31, 36 CFR 220.6 et seq, and 7 CFR part 1.b.3, therefore NEPA procedures are required, which includes a Decision Document (and of course an EA, EIS, or FONSI). And even if the action is categorically excluded, a Decision Memo is required (FSH 1909.15.32) and must follow the format and content as per FSH 1909.15.33.3 and 36 CFR 220 et seq.

In my writing of May 5, 2009 I requested, among other documentation, the SOPA governing this road closure. From the printout you sent me it is not discernible which Project Number pertains to the closure of this road. So kindly clarify this for me.

Note that a SOPA requires a Decision document (36 CFR 220.3) and “shall not be used as the sole scoping mechanisms for a proposed action” (36 CFR 220.4.e.3). Therefore I must ask again, where is the Decision document for the action of closing FSR 371? Also note that scoping is required for *all* FS proposed actions, “including those that would appear to be categorically excluded from further analysis and documentation in an EA or an EIS,” (36 CFR 220.4.e.1; 40 CFR 1501.7) and that a NOI must be generated (40 CFR 1508.22). Why has the scoping documentation not been forwarded to me? Why was I not provided with the NOI? Finally, since the action of closing this road is not categorically excluded (36 CFR 220.6 et seq; 7 CFR part 1.b.3), why have I not been allowed to review the EA (36 CFR 220.7)? Clearly, since I have asked for a review of *all* documents regarding this road closure, it would include those generated via scoping to include all required components under 40 CFR 1501.7.

Based on the above, I am asking via FOIA that you provide me with all documentation, to include legal references, that

- a. describe how FSR 371 is not FSR 371 and instead an access road,
- b. why in this instance the protection of a Forester Sensitive Species does not require NEPA,
- c. the Decision document, EA, and NOI regarding this road closure, and
- d. all remaining documents generated via scoping.

If you cannot provide such documentation, I am asking that you provide me with the date by which you will reopen this FSR to the public until such time as the FS has observed NEPA as mandated under 36 CFR 220 et seq. and has obtained the legal authority to close this FSR.

### **FSR 322A**

I now understand your point governing this road and the documentation I requested. I was operating under the assumption that due to the nature of this road closure the FS would proceed under a separate process, which in hindsight it should have, since the Decision Memo governs “temporary road closures” and this road has been closed for over four years. However, considering that the Decision Memo governing the closure of this road expired on April 29, 2009, and that upon expiration the FS may extend or rescind it, I am again requesting that the FS rescind this order and reopen FSR 322A. This request is based on:

1. The Decision allows *only* for the “temporary closure of roads and trails.” Also, based on Ranger Botts’ writing of April 14, 2009 this Decision is in accordance with 36 CFR 261 to provide for “short-term resource protection.” This road has been closed to the public for over four years which is clearly and unequivocally in violation of the definition of “temporary” and “short-term,” which is one year or less (36 CFR 220 et seq.).
2. The public comment period for proposed actions is 30 days (36 CFR 215.2); we received only two weeks to comment.

3. The Decision Memo cites 36 CFR 215.8.a.4 as NOT providing the public with appeal rights. This law does not exist and per 36 CFR 215.12.e appeal rights do exist.

Clearly, it is not possible to simply extend this Decision, nor is a simple review sufficient. The Decision must be rescinded and the FS must employ those steps as mandated by federal law to once again attain legal authority to temporarily close this and other roads and trails in the South Park Ranger District. To that end, I request a review and possible copying of all documentation and laws governing the FS's ability to extend this Decision Memo despite the three points listed above.

#### **FOIA REQUEST**

I am requesting a review and possible copying of *all* records/documentation, in *any* format, to include legal references, that a. describe how FSR 371 is not FSR 371 and instead an access road, b. why in this instance the protection of a Forester Sensitive Species does not require NEPA, and c. all documentation related to the federal requirements of generating SOPA, scoping, NOI, and a Decision document for closing this road.

I am also requesting a review and possible copying of *all* records/documentation, in *any* format governing the laws and processes that allow the FS to extend the currently expired Decision Memo governing the temporary closure of roads in the South Park Ranger District.

Finally, since there is a lack of congruence between several of the FS generated maps as it pertains to FSR's, I am requesting a review and possible copying of *all* records/documentation, in *any* format, to include legal references, that explain how and when the FS has the legal authority to omit FSR's from MVUM's and other FS maps.

This request is submitted under the Freedom of Information Act and is in accordance with 7 CFR 1.5 and 36 CFR 200.7. Please note that you need not ascertain copying fees, as any copies that I may require will be done with my own equipment (36 CFR 200.6.c.2). Moreover, 7 CFR Part 1, Subpart A, Appendix A, Section 3.c states that fees need not be assessed in monitoring my inspection of these records. If all or any part of this request is denied, please cite those exemptions you believe to justify your refusal so that I may appeal this denial.

Kindly contact me via the e-mail address or phone number on this letterhead to set up a mutually beneficial time for me to review these records (36 CFR 200.6.c.3).

Sincerely,

Dan Wagman

CC: Rick Cables, Abigail Kimbell