

## FOREST SERVICE (FS) ILLEGAL ROAD CLOSURE WORK SHEET

Presented to Congressman Lamborn and Governor Ritter

August 21, 2009

### FSR 371

#### Point of Contention

The FS has illegally closed this road to the public by not following National Environmental Policy Act (NEPA) procedures in general and specifically by not generating an Environmental Assessment (EA) or Environmental Impact Statement (EIS) or Findings of No Significant Impact (FONSI) and a Decision document. Also, by not observing Scoping and a public comment period, NEPA was violated.

#### FS CLAIM 1

This road is not a Forest System road therefore NEPA procedures do not apply.

#### Federal Law

36 Code of Federal Regulations (CFR) 220.4.a indicates that NEPA processes apply and must be followed if:

- ✓ The Forest Service has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated;
- ✓ The proposed action is subject to Forest Service control and responsibility;
- ✓ The proposed action would cause effects on the natural and physical environment and the relationship of people with that environment;
- ✓ The proposed action is not statutorily exempt from the requirements of this section.

#### FS Requirement

To provide specific legal reference as to why the above law does not apply to the closure of FSR 371.

#### FS CLAIM 2

The action does not require NEPA procedures because it is statutorily, i.e. categorically excluded.

#### Federal Law

The action of closing FSR 371 is not categorically excluded under Forest Service Handbook (FSH) 1909.15.31, 36 CFR 220.6 et seq., and 7 CFR part 1.b.3.

*Even if the action was categorically excluded, it still requires a Decision document (FSH 1909.15.32, FSH 1909.15.33.3, 36 CFR 220 et seq.).*

Scoping (an open process for determining the scope of issues) is required for *all* FS 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)

The scoping process requires the publishing of a Notice of Intent (NOI; 40 CFR 1508.22). This requires involvement of the public (40 CFR 1508.22).

#### FS Requirement

To provide specific legal reference as to why the above laws and procedures do not apply.

### **FS CLAIM 3**

This road closure was necessary to protect a Forester Sensitive Species, the Yellow Ladyslipper Orchid.

#### **Federal Law**

The protection of a forest sensitive species requires the implementation of NEPA as per 36 CFR 220.6.b.1.

#### **FS Requirement**

To provide specific legal reference as to why the above law does not apply to the closure of FSR 371.

### **FS CLAIM 4**

This road is under Special Use Permit by the Colorado Springs Utilities, therefore NEPA does not apply.

#### **Federal Law**

36 CFR 220 et seq. (NEPA) makes no exemptions for permits. Moreover, 36 CFR 213.3 states that the rules and regulations applicable to the national forests are set forth in title 36 CFR, and that they apply to permits, too. Therefore, NEPA provisions under 36 CFR 220 et seq. are applicable.

#### **Special Use Permit**

Under §F the permit forbids the permit holder to prevent public access to the permit area.

#### **FS Requirement**

To provide specific legal reference as to why the above law does not apply and why §F of the Special Use Permit does not apply.

### **CONCLUSION**

If any *one* of the above claims does not result in satisfactory reference to exemption under the law, then FSR 371 must be opened to the public until such time that the FS has attained the legal authority to close it.

### **FSR 322A, 300, etc.**

#### **Point of Contention 1**

The FS has closed FSR 322A under a Decision Memo titled: Forest Supervisor's Order for Temporary Closures of Roads and Trails for Resource Protection and Public Safety. This order expired April 29, 2009, yet FSR 322A remains closed.

Upon expiration, as per the Order, the FS shall review it and may extend or rescind it. This Order must be rescinded for the following reasons:

- A. This Order is unnecessary as under 36 CFR 215.2 and 36 CFR 215.10 the FS already has the authority to close roads for the protection of resources and public safety.
- B. 36 CFR 215 et seq. mandates that closures follow specific legal notice and appeal requirements. This Order circumvents these legal requirements as it gives the FS carte blanche to close any road and trail in the South Platte Ranger District without such legal notice and appeal rights to the public.
- C. Public notice and comment requirements are 30 days minimum (36 CFR 215.2); for this Order the public was granted two weeks.
- D. The Order must grant appeal rights (36 CFR 215.7), instead the Order denies appeal rights under 36 CFR 215.8.a.4 – a law that does not exist.

**FS Requirement**

To provide specific legal references addressing where points A-D do are not applicable.

**Point of Contention 2**

This Order is, as the title and the text within the order indicates, for the *temporary* closure of roads only. 36 CFR 220.6.d.8 and 36 CFR 220.6.e.8 defines temporary, or short term, as being one year or less; FSR 322A has been closed for nearly five years.

**FS Requirement**

- To provide legal reference that allows the agency to extend a temporary road closure beyond one year without employing those processes as required under 36 CFR 215 et seq. and 36 CFR 220 et seq.
- To provide the legal authority by which the agency may operate beyond the scope of the Forest Supervisor's Order, i.e., keeping a road closed for a period that exceeds "temporary."

**CONCLUSION**

If any *one* of the above claims does not result in satisfactory reference to exemption under the law, then this Order must be rescinded.