Inholding access

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

KIMBERLY JOHNSON, Trustee of the ABSAROKA TRUST,

Plaintiff,

vs.

UNITED STATES OF AMERICA, by and through the U.S. Forest Service, DAN GLICKMAN, Secretary, United States Department of Agriculture; MIKE DOMBECK, Chief, National Forest Service; DALE BOSWORTH, Regional Forester; DAVID P. GARBER, Forest Supervisor; DEBORAH K. JOHNSON, District Ranger; and BRENT A FOSTER, Acting District Ranger, all in their official capacities,

Defendants,

and

THE WILDERNESS SOCIETY; MONTANA WILDERNESS ASSOCIATION; GREATER YELLOWSTONE COALITION; PARK COUNTY ENVIRONMENTAL COUNCIL; and WILDERNESS WATCH,

Defendant-Intervenors.

Cause No. CV 00-217-BLG-RWA

FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Plaintiff, Kimberly Johnson, the sole trustee of the Absaroka Trust (hereinafter "the Trust"), filed this action for judicial

review of the decision of the United States Forest Service to deny a request to build a road through the Absaroka-Beartooth Wilderness to access Trust property. Pending before the Court are numerous motions filed by the Trust and the United States. Having considered the briefs of the parties, the materials submitted in support thereof, and the arguments advanced in open court on March 20, 2002, the undersigned United States Magistrate Judge issues the following findings and recommendations.

BACKGROUND

The Absaroka Trust owns a 124-acre parcel of land completely surrounded by the Absaroka-Beartooth Wilderness of the Gallatin National Forest. The property includes six contiguous, patented mining claims referred to as the Speculator Claims.[1] Located in extremely mountainous terrain, the property is approximately 600 feet wide and almost two miles long.

The Speculator Claims are accessible by foot, horseback, and helicopter. Forest Service trails terminate within 1/2 to 3/4 miles of the inholding, but none provide direct entry onto the property. The most direct trail to the property, the Speculator Trail, is not routinely maintained by the Forest Service. Four other trails are maintained annually. No road has ever accessed the property.

In April 2000, the Trust submitted a special use application

---

[1]Actually, the Speculator Claims are comprised of seven mining claims. However, only six of the claims are involved in this case.

to Deborah K. Johnson, District Ranger for the Big Timber Ranger District of the Gallatin National Forest, seeking construction of a new road across the Absaroka-Beartooth Wilderness to facilitate access to and egress from the Speculator Claims. The proposed road, which would travel just north of Speculator Creek, would consist of an approximately six-mile-long, 20-foot-wide gravel surface utilized for private, motorized, year-round access for transportation of personnel, materials, and equipment for the purposes of:

(a) constructing and utilizing a hunting and fishing lodge and cabins;

(b) conducting mineral test borings;

(c) hunting, fishing, and other recreation;

(d) emergency access (*e.g.*, medical, law enforcement); and

(e) any other lawful use of private property.

The Trust offered to assume the costs of construction and maintenance, estimated respectively at $150,000 and $5,000 per year, as long as the road was used solely to access the Speculator Claims.

On July 12, 2000, District Ranger Johnson advised the Trust by letter that she was rejecting the proposal for a new road for the reason that the proposal was inconsistent with the laws, regulations, and policies governing management of Forest Service lands and regulations governing access to private property within

Forest Service lands. She reached this conclusion after reviewing the historical access to the inholding, finding that traditionally access had been by foot or horseback or, more recently, by helicopter, and that this was consistent with the means of access to other inholdings in the Absaroka-Beartooth Wilderness. She found that no new road construction had been allowed through the wilderness area since its designation in 1978.

Johnson also considered whether the road would be needed for proposed mineral exploration and found no evidence to suggest the presence of mineral values sufficient to justify construction of a road. She noted that it was industry practice to conduct mineral exploration without road construction.

Finally, Johnson concluded that the current means of access to the property provided reasonable use and enjoyment of the property and that such access was more compatible with the management of the affected lands.

The Trust attempted to appeal the decision to David P. Garber, Forest Supervisor of the Gallatin National Forest. Among other things, the Trust took issue with the assessment of the mineral values of the property. The Trust contended that it had consulted with a geologist, who had assessed the mineral potential to be at least $20 million.

District Ranger Johnson reviewed the appeal papers and advised the Trust that she would reconsider the proposal. For this reason, Garber dismissed the appeal as moot. He also noted that Johnson's

decision would not have been subject to appeal in any event.

To assist in her reconsideration, Johnson asked the Trust for the following:

1. Information serving as the basis for the estimate of road construction costs and maintenance;
2. Information supporting the Trust's assertions about the mineral potential of the land, including any unpublished reports, mineral appraisals, geologic maps, sample assays, maps of workings, and the history of the property;
3. Permission for Forest Service staff to visit the property to obtain mineral and other relevant information;
4. Permission to contact the Trust's geologist; and
5. Any other factual information that would support the proposal.

The Trust failed to supply the requested information. Instead, its attorney wrote on September 26, 2000, that the $150,000 construction figure was a rough estimate and that more engineering information from the Forest Service would be needed to reach a more accurate figure. He estimated that the total cost would not exceed $225,000.

The attorney also refused to supply any information concerning mineral potential, claiming that it was not the province of the Forest Service to conduct mineral surveys on private property. The attorney asserted that the mineral potential was essentially

irrelevant anyway, because the construction of the road was warranted solely to serve the recreational uses of the property.

On November 8, 2000, Brent Foster, acting District Ranger for the Big Timber Ranger District, wrote to the Trust. For the reasons stated in Johnson's letter of July 12, 2000, Foster again denied the request for road construction.

The Trust filed this action for judicial review of the denial pursuant to the Administrative Procedures Act, 5 U.S.C. § 702 ("APA"). The complaint seeks an order directing the Forest Service to approve the application for special use permit; enjoining the Forest Service from interfering with the Trust's construction of a gravel road or clearing of any trails by any reasonable method; and directing the Forest Service to pay all costs and expenses incurred in the construction of the road. The complaint also requests judgments declaring that Speculator Trail is a public road established pursuant to R.S. § 2477 and that the Trust has an easement by necessity across the most direct trail to the property.

THE UNITED STATES' MOTIONS TO STRIKE AND TO SUBMIT ADDITIONAL AFFIDAVITS

In support of its motion for summary judgment, the Trust submitted affidavits and other materials, including the mineral appraisal to which the Trust referred in its attempt to appeal Johnson's July 2000 decision. The United States has moved to strike these materials because they are not included within the administrative record.

Except in very narrow circumstances, review of agency action is confined to the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1972). The Ninth Circuit allows extra-record materials under the following circumstances:

> (1) if necessary to determine "whether the agency has considered all relevant factors and has explained its decision," (2) "when the agency has relied on documents not in the record," or (3) "when supplementing the record is necessary to explain technical terms or complex subject matter."

Inland Empire Public Lands Council v. Glickman, 88 F.3d 697, 703-04 (9th Cir. 1996). Extra-record materials may also be submitted to the district court if the plaintiff can make a showing of agency bad faith. *Id.* at 704.

The Trust contends that the new materials are necessary to determine whether the agency considered all relevant factors. It further contends that the new materials should be allowed because some of the materials in the administrative record were created after Johnson rendered her July 2000 decision.

In response to these arguments, the Court observes that the administrative record before it is voluminous. The record, which consists of approximately 121 exhibits, includes numerous maps, technical reports, memos, laws, and forest management plans. Only two of the reports, a hydrology report and a letter concerning Park County road standards, were created after the final administrative decision. Although an agency may present supplemental materials to explain informal agency action, *Camp v. Pitts*, 411 U.S. at 143, the Court will not consider these two reports when conducting its

judicial review of the record.

Other reports will be considered by the Court. Documents created after Johnson made her decision in July 2000, but during the period of reconsideration, are appropriately before the Court for review.

Most, if not all, of the extra-record materials the Trust attempts to place before the Court contain the very same information specifically requested from the Trust to assist the Forest Service in its reconsideration of the Trust's application. The Court finds it disingenuous for the Trust to argue now that the materials are needed to determine whether the Forest Service considered all relevant factors when it flatly refused to provide these same materials to the Forest Service. The Court will not allow the Trust to circumvent the administrative process by withholding information at the administrative level and then presenting it to the Court as part of its judicial review.

The United States' motion to strike should be granted and the extra-record affidavits and other materials, including the mineral appraisal, submitted by the Trust should be stricken. Similarly, the United States' motion to submit affidavits in response to those filed by the Trust should be denied. The review of the Forest Service's decision should be confined to the administrative record.

CROSS MOTIONS FOR SUMMARY JUDGMENT

Judicial review in this case is limited by the parameters of the APA. Review is narrow and highly deferential. Informal agency

action may be overturned only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Camp v. Pitts*, 411 U.S. at 142 (quoting 5 U.S.C. § 706(2)(A)). Agency action may not be set aside unless there has been a clear error in judgment or there is no rational basis for the decision. *Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986). In reviewing agency action, the Court examines whether the agency considered all relevant factors and articulated a rational connection between the facts found and the choice made. *Yerger v. Robertson*, 981 F.2d 460, 463 (9th Cir. 1992).

Here, the Forest Service found that the construction of a gravel road for motorized traffic was inconsistent with the laws, regulations, and policies governing management of Forest Service lands. In making this decision, the Forest Service was guided by the Wilderness Act, 16 U.S.C. § 1131, *et seq.*, and the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3101, *et seq.*[2]

---

[2]The Forest Service did not refer to the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, in its decision. Both the Trust and the United States nevertheless assume that FLPMA applies in this case.

Enacted in 1976, the FLPMA vests the Secretary of Agriculture with the authority to grant, issue, or renew rights-of-way for roads, trails, and highways. 43 U.S.C. § 1761(a)(6). As defendant-intervenors point out, however, wilderness areas are expressly excluded from the Secretary's authority under the FLPMA.

> (a) The Secretary, . . . and, the Secretary of Agriculture, with respect to lands within the National Forest System (*except in each case land designated as*

Passed in 1964, the Wilderness Act was enacted to protect certain undeveloped Federal holdings from encroachment by an ever-increasing human population. 16 U.S.C. § 1131(a). The Act defines wilderness as follows:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c).

In keeping with the primitive nature of wilderness, Congress forbade roads and motorized vehicles and equipment in wilderness

---

> *wilderness*) are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for--
>
> . . .
>
> (6) roads, trails, highways . . . .

43 U.S.C. § 1761(a)(6) (emphasis added).

Because the Secretary's power to issue rights-of-way under the FLPMA does not extend to wilderness areas, the Court will not include the Act in its discussion.

areas. 16 U.S.C. § 1133(c).

> Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

Id.

Congress nevertheless recognized that private landowners must have a right of adequate access to property located within wilderness areas. 16 U.S.C. § 1134(a).

> In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this chapter as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture[.]

Id.

Congress also made provisions for access for holders of mining claims located within wilderness areas, providing that such access should be in accordance with that customarily enjoyed by similarly situated properties. 16 U.S.C. § 1134(b).

> In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress

> and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.

Id.

In 1980, Congress enacted ANILCA. This Act, like the Wilderness Act, gave private owners of land surrounded by wilderness area a right of access subject to reasonable regulation by the Secretary.[3] 16 U.S.C. § 3210(a).

> Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided,* That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

Id.

Read together, the Wilderness Act and ANILCA provide that an owner of private land surrounded by wilderness, such as the Trust in this case, has a right of access adequate for the reasonable use and enjoyment of its property. These access rights, however, are subject to reasonable regulation by the Secretary. *Adams v. United States*, 255 F.3d 787, 795 (9th Cir. 2001). ANILCA, 16 U.S.C. § 3210(a), vests the Secretary with the discretionary authority to determine what type of access is adequate, and in making this

---

[3]Relying on *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), intervenor-defendants contend that ANILCA does not apply outside of Alaska and urge the Court to so hold. This the Court will not do. As intervenors themselves acknowledged at oral argument, the issue is not dispositive. Even applying ANILCA to the facts of this case, the Forest Service's decision is sustainable. *See* discussion *infra*.

determination, the Wilderness Act, 16 U.S.C. § 1134(b), directs the Secretary to allow the same kind of access that has been or is being customarily enjoyed by other similarly situated areas.

The laws require the Secretary to harmonize two competing interests. On the one hand, the Secretary is required to preserve wilderness areas by prohibiting road construction and motorized vehicles. On the other hand, the Secretary must provide adequate access to inholdings held by private owners.

In an attempt to balance these competing interests, the Secretary has implemented a permit system to regulate private use of National Forest System lands. *See, generally*, 36 C.F.R. Pt. 251. Inholders whose access needs entail surface-disturbing activities must apply for a special-use authorization. 36 C.F.R. § 251.110(d). A special-use authorization is "a permit, term permit, lease, or easement which allows occupancy, use, rights, or privileges of National Forest System land." 36 C.F.R. § 251.51.

The permitting regulations attempt to merge the requisites of the Wilderness Act and ANILCA by defining "adequate access" as a "route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources." 36 C.F.R. § 251.111. Where a conflict in resource use exists, the preservation of wilderness predominates over other values. 36

C.F.R. § 293.2(c).[4]

In determining whether to issue a special-use authorization for access to non-Federal lands, the regulations direct the issuing agency to authorize only those modes of access which are needed for reasonable use and enjoyment and which, at the same time, minimize the impact on federal resources. 36 C.F.R. § 251.114(a). The authorizing officer must make her determination of "what constitutes reasonable use and enjoyment based on contemporaneous uses made of similarly situated land in the area and any other relevant criteria." *Id.*[5] Prior to issuing any access permits, the authorizing officer must ensure that "[t]he route is so located and constructed as to minimize adverse impacts on soils, fish and wildlife, scenic, cultural, threatened and endangered species, and other values of the Federal land." 36 C.F.R. § 251.114(f)(2).

Where the proposed access route is through designated

---

[4]36 C.F.R. § 293.2(c) reads:

> In resolving conflicts in resource use, wilderness values will be dominant to the extent not limited by the Wilderness Act, subsequent establishing legislation, or the regulations in this part.

[5]36 C.F.R. § 251.114(a) provides:

> In issuing a special-use authorization for access to non-Federal lands, the authorized officer shall authorize only those access facilities or modes of access that are needed for the reasonable use and enjoyment of the land and that minimize the impacts on the Federal resources. The authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria.

wilderness, the authorizing officer is also directed to consider the past and present methods of ingress and egress on similarly situated non-Federal land, as well as modes of travel that will cause the least lasting impact on the wilderness while permitting at the same time, the reasonable use of the private property. 36 C.F.R. § 251.114(g)(1) and (2).[6]

When a special use permit application is received by the Forest Service, it is initially screened to ensure that it meets one of the nine minimum criteria of 36 C.F.R. § 251.54(e)(1). In this case, the pertinent criteria are whether the proposed road is consistent with laws, regulations, orders, and policies establishing or governing national forest system lands, other federal law, and state law. 36 C.F.R. § 251.54(e)(1)(i). If a proposal does not meet these minimum criteria, it is rejected. 36 C.F.R. § 251.54(e)(2).

---

[6]36 C.F.R. § 251.114(g)(1) and (2) provides:

> (g) In addition to the other requirements of this section, the following factors shall be considered in authorizing access to non-federally owned lands over National Forest System lands which are components of the National Wilderness Preservation System:
>
> (1) The use of means of ingress and egress which have been or are being customarily used with respect to similarly situated non-Federal land used for similar purposes;
>
> (2) The combination of routes and modes of travel, including non-motorized modes, which will cause the least lasting impact on the wilderness but, at the same time, will permit the reasonable use of the non-federally owned land[.]

If the proposal survives the initial screening, it is considered in greater detail in a second level evaluation process under 36 C.F.R. § 251.54(e)(5). At this second tier, the Forest Service determines whether the proposed use would be inconsistent or incompatible with the purposes for which the lands are managed or whether the proposed use is in the public interest. 36 C.F.R. § 251.54(e)(5)(i) and (ii).

If the proposal does not fulfill the criteria of both screening processes, the process goes no further. 36 C.F.R. § 251.54(g)(1). The proponent is notified in writing of the denial. *Id.*

In this case, the Forest Service evaluated the Trust's proposal under the first and second screening levels. The Forest Service rejected the proposal, finding that it was inconsistent with the laws, regulations, orders, and policies governing the management of National Forest lands. The Forest Service concluded that the proposal was not in the public interest because it "would create an unnecessary and unreasonable conflict with management of the Absaroka-Beartooth Wilderness . . . ." Admin. Rec. Ex. 102 at 2. Having reviewed the record, the Court finds that this decision was not arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law.

The Forest Service reached its decision after examining the historical methods of access to the Speculator Claims and means of access to other private inholdings within the Absaroka-Beartooth

Wilderness. The Forest Service found that no new roads had been constructed in the wilderness area since its designation by Congress in 1978. It further found that access to the Speculator Claims had traditionally been by foot or horseback, or occasionally, helicopter. It further determined that this access was consistent with that of other similarly situated properties in the Absaroka-Beartooth Wilderness.

The Trust criticizes these findings, arguing that the Forest Service erred by failing to consider other similarly situated properties in areas other than the Absaroka-Beartooth Wilderness. The record shows, however, that the Forest Service did undertake a survey of authorized motorized access to private lands located within wilderness areas throughout the west. Admin.Rec. Ex. 99. That survey found about 100 cases nationwide where motorized use had been authorized to inholdings within wilderness areas. In each of these cases, however, the roads had existed prior to the area's designation as a wilderness. Because these roads pre-dated the wilderness area, the Forest Service allowed their historic uses to continue after the wilderness designation. The Forest Service found only one case where new road construction had been authorized in a wilderness area.

The record demonstrates that the Forest Service considered methods of access in similarly situated properties outside of the Absaroka-Beartooth Wilderness. The Forest Service found that motorized vehicles were allowed only on roads that existed prior to

an area's wilderness designation. With only one exception, properties situated similarly to that of the Trust, *i.e.*, those that had never been accessible by road, were not permitted to construct new roads for motorized use. The Forest Service's failure to include this information in its letter of rejection does not require reversal of the decision.

The Trust also challenges the Forest Service's conclusion that the mineral value of the property did not justify road construction and that mineral exploration could be conducted without building a road. The administrative record, however, supports the Forest Service's determination.

The record shows that in 1973 and 1974, prior to the designation of the Absaroka-Beartooth Wilderness, the United States Bureau of Mines/USGS conducted a mineral survey of the Speculator Claims. The Bureau of Mines assayed the mineral values of the claims. The assay demonstrated generally low mineral values on each of the claims.

In 1980 and 1981, the Forest Service conducted an appraisal of all seven Speculator Claims as a single property to determine their highest and best use and fair market value. The appraisal included a mineral examination to determine if mineral values should be considered in arriving at an overall value. The mineral assay correlated with the earlier findings of the Bureau of Mines. Concluding that the claims did not possess enough mineral to support a profitable mining operation, the Forest Service found

that the best use of the property was recreational, with potential for an outfitter's camp.

In July 2000, Forest Service geologist Sherm Sollid assessed the need for the proposed road for mineral exploration purposes. After reviewing the earlier mineral surveys, he concluded that the limited exposures on the Speculator Claims made it difficult to determine the mineral value, but concluded that it was reasonable to assume a "low potential for the occurrence of copper, silver and gold." Admin.Rec. 89 at 1.

Due to the low mineral potential, Sollid recommended an exploration program consisting of geological mapping and an extensive sampling program. He further recommended that if the sampling results were promising, then a helicopter drilling program be initiated to further evaluate the property.

In October 2000, to assist in the Forest Service's reconsideration of the Trust's proposal, Sollid prepared a supplemental report, again evaluating the mineral potential of the Speculator claims. In this report, Sollid calculated mineral values assuming 100% recovery and the cost of operating the mine. The calculations demonstrated that the gross value of the minerals would not begin to cover operating costs.

Sollid also identified other obstacles to a commercially viable mining operation: the property's narrow, 600-foot width, steep terrain, and remoteness. He noted that in backcountry areas industry standard for mineral exploration is deep drilling

supported by helicopter.

The Trust suggests that the Court disregard the supplemental mineral evaluation report, arguing that the Forest Service could not possibly have relied upon the report because it was prepared after the rejection letter of July 2000. However, the supplemental report, which was completed before the second rejection letter of November 2000, was prepared to assist in the Forest Service's reconsideration efforts. There is no reason to believe that the Forest Service did not rely upon the report in reaching its final decision.

Finally, the Trust challenges the finding that access by foot, horseback, and helicopter was adequate for reasonable use and enjoyment of the property. The Trust contends that helicopter access is expensive and impracticable. ANILCA, however, does not guarantee the cheapest access, only adequate access. *See* 56 Fed.Reg. at 27,415 ("[T]here is no requirement that the selected route or method of access be the most economical . . . ."). Given the fact that the Trust has visited the property via helicopter in the past, as well as the fact that a local mining company conducts mineral exploration by helicopter, the Forest Service did not exercise a clear error in judgment in determining that helicopter access was adequate.

The Trust also argues that trail access is insufficient because the trails have become impassible for livestock. Indeed, it is true that the most direct route to the property, Speculator

Trail, receives only minimum maintenance and is unsuitable for livestock. Nevertheless, other trails are maintained for stock use, and have been used in the past to access the property. In light of the harm to the pristine and primitive nature of the wilderness that would be caused by the construction of a gravel road, the Forest Service did not abuse its discretion in determining that the alternate trails, while more lengthy than the direct route, were adequate for the Trust's reasonable use and enjoyment of the property.

In reviewing the Trust's proposal, the Forest Service was required to evaluate what type of access would be adequate for the landowner, would most minimally impact Forest Resources, and would comport with the limitations on man-made activities imposed by the Wilderness Act, including the Act's prohibition against permanent roads and motorized traffic. In conducting its evaluation, the Forest Service considered the reasonable uses of the property, the environmental impacts upon the wilderness area, and the expenses of road construction.[7] The Forest Service's decision to deny the proposal was based on a consideration of relevant factors and articulated a rational connection between the facts found and the choice made.

The administrative record demonstrates that the Forest Service made a thorough analysis of the Trust's proposal and, after so

---

[7]While the Trust estimated that the road construction costs would run about $225,000, the Forest Service estimated that the costs would more likely be $1.7 million.

doing, determined that the construction of a road where none had before existed was incompatible with wilderness resource values. The decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. It must be upheld.

The United States' motion for summary judgment should be granted and the Trust's motion for summary judgment should be denied.

THE UNITED STATES'
MOTION TO DISMISS
AND
FOR PARTIAL SUMMARY JUDGMENT

Early on in this litigation, the United States moved to dismiss Counts IV and V in the complaint and the Trust's claim for monetary relief. In response, the Trust conceded that Count IV, which sought a judgment declaring that Speculator Trail is a public road established pursuant to R.S. § 2477, is not viable.

Count V sought a judgment declaring that the Trust had an easement by necessity across the most direct trail to the property. The United States argued that the claim should be dismissed as it arises under the Quiet Title Act, 28 U.S.C. § 2409(a), which has not been pleaded in this case. At oral argument, the Trust's attorney conceded that the action is based solely on the APA. Accordingly, the United State's motion to dismiss Count V is well taken.

The motion to dismiss the claim for monetary relief is moot. Because the Court has determined that the Forest Service did not err in rejecting the proposal for new road construction, there is

no need to determine whether the United States would have been forced to absorb the cost of the road had one been required.

RECOMMENDATION

In accordance with the foregoing, the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B), RECOMMENDS as follows:

1. The United States' motion to strike (docket no. 69) be granted and all extra-record materials be stricken.

2. The United States' motion for leave to submit additional affidavits (docket no. 68) be denied.

3. The United States' second motion for summary judgment (docket no. 46) be granted.

4. The Trust's amended motion for summary judgment (docket no. 52) be denied.

5. The United States' motion to dismiss Counts IV and V (docket no. 28) be granted. The United States' motion to dismiss the claim for monetary relief (docket no. 28) be denied as moot.

Under 28 U.S.C. § 636(b) and Rule 72(b), the parties may serve and file written objections to these recommendations within 10 days of receipt thereof.

The Clerk of Court shall forthwith forward copies of these findings and recommendations to counsel of record.

DONE and DATED this 2d day of April, 2002.

RICHARD W. ANDERSON
UNITED STATES MAGISTRATE JUDGE