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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Case No. 3:99-cv-00547-MMD-WGC

Plaintiff,

ORDER

v.

JOHN C. CARPENTER and COUNTY OF
ELKO,

Defendants,

THE WILDERNESS SOCIETY and
GREAT OLD BROADS FOR
WILDERNESS,

Intervenors and Cross-Claimants.

I. INTRODUCTION

In 1995, a storm damaged a stretch of a remote road (“South Canyon Road” or “the Road”) in the Humboldt-Toiyabe National Forest in Elko County, Nevada. The Road’s resulting inaccessibility — and conflicting plans for its repair — sparked a lengthy legal dispute between the county government, the federal government, and environmental groups. In this latest phase of the litigation, the Court must determine whether to approve a consent decree that memorializes a settlement agreement between Plaintiff United States and Defendant Elko County. Intervenors and Cross-Claimants The Wilderness Society and Great Old Broads for Wilderness (together, “TWS”) object to the settlement, which recognizes Elko County’s right-of-way to the

1 disputed 2.4-mile portion of the road. (See ECF No. 118 at 7 (“The United States will not
2 now or in the future contest that Elko County has an R.S. 2477 right of way for a road
3 running generally from Pavlak Grade to the Snowslide Gulch Trail head.”); ECF No. 501
4 at 9.) In an earlier Order (ECF No. 507), the Court ruled that before the proposed
5 consent decree can be approved, Elko County must show by clear and convincing
6 evidence that such a right-of-way existed before the land was reserved from public use.
7 The parties participated in a two-week evidentiary hearing on this issue in May 2015.
8 This Order presents findings of fact and conclusions of law based on that hearing and
9 the parties’ related briefing.

10 **II. PROCEDURAL BACKGROUND**

11 This case has a long and complicated procedural history, including two trips to the
12 Ninth Circuit Court of Appeals.¹ The United States initiated the lawsuit in October 1999,
13 seeking declaratory and injunctive relief against several individuals who, following the
14 1995 storm, had threatened to rebuild the South Canyon Road. (ECF No. 1.) Elko
15 County was added as a defendant several weeks later; in response, the County asserted
16 a counterclaim seeking to quiet title to the South Canyon Road under a now-repealed
17 federal statute known as Revised Statute 2477 (“R.S. 2477”).² (ECF No. 9.) The parties
18 proceeded to mediation. (ECF Nos. 5, 10.) After lengthy attempts to settle the case,³ the
19 Court approved a settlement agreement between the United States and Elko County on

20 ¹A third appeal occurred in a related case, *Great Old Broads for Wilderness v.*
21 *Kimbell*, No. 3:07-cv-00170-RLH-RAM, in which TWS had challenged the Forest
22 Service’s decision on which methods to use in restoring the South Canyon Road. See
23 *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836 (9th Cir. 2013). TWS
24 appealed the district court’s decision to grant summary judgment in favor of the Forest
Service. *Id.* at 841. The Ninth Circuit affirmed the district court’s decision on the merits,
finding that the Forest Service’s decision regarding the Road was reasonable in light of
the National Forest Management Act, an executive order governing floodplain
management, and the National Environmental Policy Act. *Id.* at 849-55.

25 ²Once codified as 43 U.S.C. § 932 (repealed 1976), R.S. 2477 provided that “[t]he
right of way for the construction of highways over public lands, not reserved for public
uses, is granted.”

26 ³TWS points out that an initial settlement agreement reached as early as 2000 did
27 not recognize any right-of-way for Elko County. (ECF No. 501 at 12 (citing ECF No. 419
at 17-20).) Elko County objected to that agreement in November 2000. (*Id.*; see ECF No.
28 419 at 17-20 (voting to reject the settlement agreement and seek R.S. 2477 right-of-way
through mediation during an Elko County Commissioners meeting).)

1 April 24, 2001. (ECF No. 118.) The parties agreed not to dispute the existence of an R.S.
2 2477 right-of-way for Elko County. (*Id.* at 7.)

3 TWS moved to intervene on March 30, 2001, shortly before the Court approved
4 the settlement agreement. (ECF No. 104.) The Court entered an order denying the
5 motion to intervene, which the Ninth Circuit later reversed. (ECF No. 123); *see United*
6 *States v. Carpenter (Carpenter I)*, 298 F.3d 1122, 1125 (9th Cir. 2002) (finding that
7 TWS's motion to intervene following the announcement of the proposed settlement was
8 timely). Significant motions practice followed the appellate ruling, and the Court stayed
9 the implementation of the settlement agreement in the interim. In April 2006, the Court
10 held an evidentiary hearing on Elko County's quiet title claim; TWS, however, was not
11 permitted to participate fully in the quiet title litigation. (See ECF No. 165 (finding that
12 TWS lacked standing to defend against Elko County's quiet title claim).)

13 On September 19, 2006, several months after the hearing, the Court issued an
14 order approving the settlement agreement with respect to Elko County's right-of-way to
15 the South Canyon Road. (ECF No. 296.) TWS appealed the order and the Court's denial
16 of their request to participate fully in the evidentiary hearing. In 2008, the Ninth Circuit
17 vacated the Court's approval of the settlement of the quiet title claim, finding that TWS
18 should have been allowed to participate as a party to the settlement proceedings,
19 including the evidentiary hearing. *United States v. Carpenter (Carpenter II)*, 526 F.3d
20 1237, 1238-40, 1242 (9th Cir. 2008). Extensive litigation — as well as further attempts at
21 settlement — ensued for the next several years.

22 In July 2013, with the parties' input, the Court identified three threshold legal
23 issues to assist in streamlining the resolution of the disputed settlement agreement.
24 (ECF No. 474 at 13-14.) The issues were: (1) whether the statute of limitations governing
25 Elko County's quiet title claim has expired and, if so, its effect on the claim; (2) what
26 standard of review applies to determining whether to approve a settlement in which the
27 federal government relinquishes its property rights; and (3) what standard of proof
28 governs Elko County's assertion that it has a right-of-way for the disputed road. (ECF

1 No. 507 at 1-2.) In August 2014, after reviewing the parties' briefs regarding these
2 threshold issues, the Court held that the consent decree could not be approved unless
3 Elko County demonstrated a right-of-way to the South Canyon Road by clear and
4 convincing evidence. (*Id.* at 6-8.) The Court then granted Elko County's request for an
5 evidentiary hearing on the existence of a right-of-way under R.S. 2477. (ECF No. 510.)

6 The Court convened an eight-day evidentiary hearing between April 27, 2015,
7 and May 7, 2015. (ECF Nos. 557 to 560, 562 to 565.) Elko County and TWS also
8 submitted simultaneously filed post-hearing briefs in October 2015. (ECF Nos. 591, 592.)
9 In November 2015, TWS sought leave to respond to Elko County's brief, which the Court
10 granted.⁴ (ECF No. 594.) The following findings of fact and conclusions of law arise from
11 the evidentiary hearing and the post-hearing briefs. After considering the evidence and
12 legal arguments presented, the Court finds that Elko County has not demonstrated an
13 R.S. 2477 right-of-way by clear and convincing evidence. The Court accordingly cannot
14 approve the proposed consent decree.

15 **III. FINDINGS OF FACT**

16 **A. The South Canyon Road**

17 1. The South Canyon Road snakes for 2.4 miles through the southern end of
18 the Jarbidge Canyon (the "Jarbidge South Canyon" or "South Canyon"), a remote area
19 located in the northern part of Elko County, Nevada. (ECF No. 519 at 3; EC Ex. 1193;
20 US Ex. 710⁵ at AR-015414.)⁶

21 ⁴The Court also gave Elko County leave to file a reply to TWS's response. (ECF
22 No. 594.)

23 ⁵United States Exhibit 710 is a 2006 report on trail and road systems in the
24 Jarbidge South Canyon authored by Richa Wilson and Fred Frampton. The parties have
25 stipulated that the report "refers to historic governmental records and other documents
26 that actually exist." (EC Ex. 1198.)

27 ⁶The Court will refer to Elko County's evidentiary hearing exhibits as "EC Ex."
28 Similarly, TWS's exhibits will be cited as "TWS Ex.," and exhibits presented by the
United States during the 2006 evidentiary hearing will be referred to as "US Ex." Many of
the United States' and TWS's exhibits are stamped with an administrative record ("AR")
page number. For ease of reference, rather than citing the internal page number, the
Court will use the AR page numbers when citing to a United States or TWS document.
The United States filed a notice of manual filing of the AR (ECF No. 373) in June 2011; it
includes an index to the AR by page number. (ECF No. 373-1.) A list of the United
States' 2006 exhibits appears as ECF No. 568. Elko County's 2006 exhibits are listed at
(...*fn. cont.*)

1 2. The Jarbidge River flows in a northern direction through the Jarbidge
2 Canyon. (US Ex. 710 at AR-015414; Tr. 778.) Although generally referred to as the
3 Jarbidge River, the river that runs through the Jarbidge Canyon is technically the west
4 fork of the Jarbidge River.⁷ (US Ex. 710 at AR-015414; EC Ex. 1019.) Another river
5 dubbed the East Fork of the Jarbidge River runs several miles to the east. (EC Ex.
6 1019.)

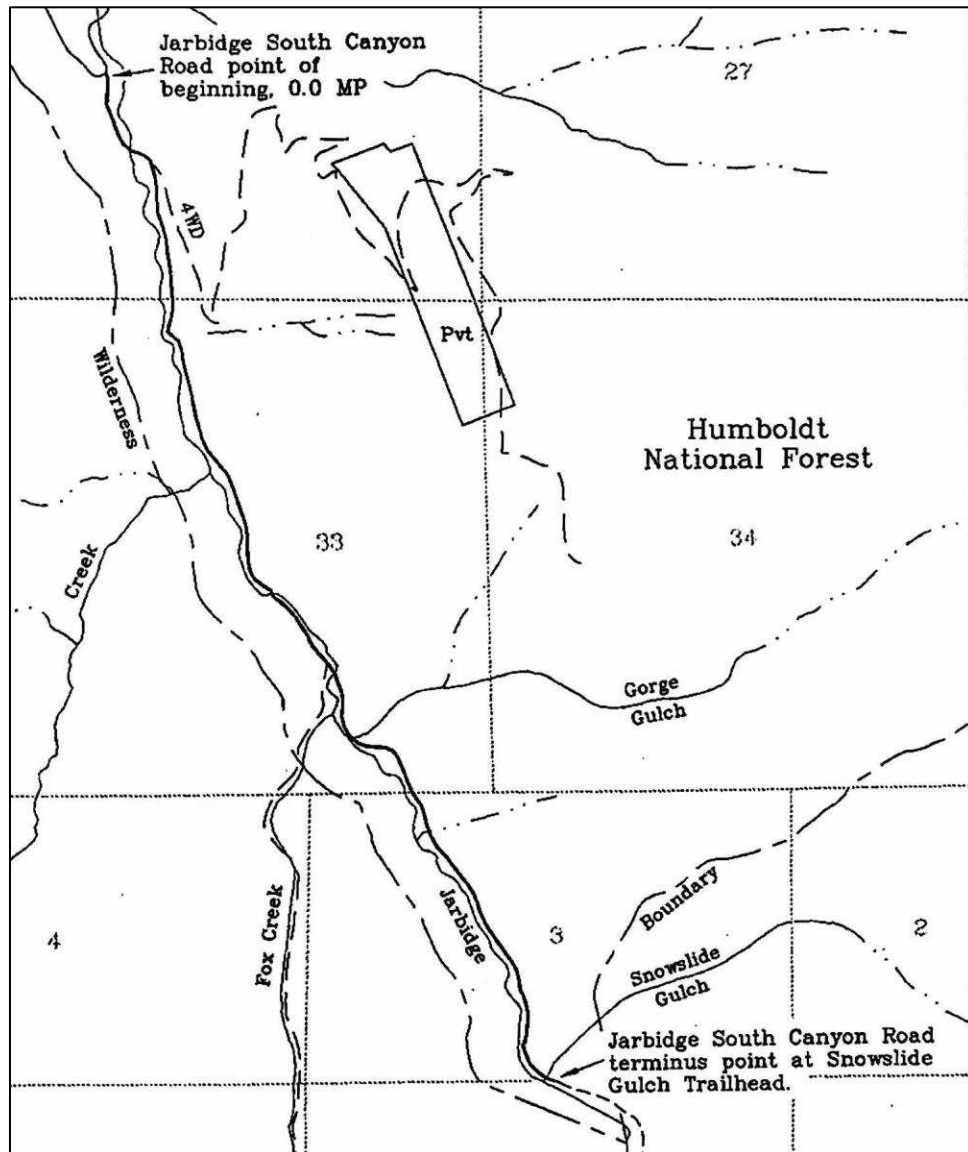
7 3. The Jarbidge South Canyon is part of an area once called the Bruneau
8 Addition to the Independence Forest Reserve. (ECF No. 519 at 3.) The Bruneau
9 Addition encompassed approximately 1,000 square miles. (Tr. 325, 1252, 1340.)
10 Although the Secretary of the Interior temporarily withdrew the Bruneau Addition for
11 consideration as a forest reserve on November 23, 1905, it was permanently reserved
12 as a national forest through a presidential proclamation on January 20, 1909. (ECF No.
13 519 at 3.) Currently, the Jarbidge South Canyon is part of the Humboldt-Toiyabe
14 National Forest. (*Id.*)

15 4. The disputed South Canyon Road runs for approximately 2.4 miles along
16 the Jarbidge River in the Jarbidge South Canyon. (ECF No. 118 at 20-21; *see infra*
17 Figure 1.) The Road stretches along the bottom of the Jarbidge South Canyon from a
18 northern starting point at approximately Pavlak Grade to a southern terminus at the
19 Slowslide Gulch trailhead. (ECF No. 118 at 7, 20-21.) The northern starting point is more
20 precisely described in the 2001 settlement agreement as “the southerly boundary of the
21 right of way for the existing road commonly known as County Road 748, located in the
22 SW 1/4 of Sec. 28, T. 46 N., R. 58 E. MDM.” (*Id.* at 20.) The proposed settlement
23 agreement grants Elko County a right-of-way over this entire 2.4-mile stretch at a width
24 “sufficient to accommodate the running surface of the existing road and turnouts, plus
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26 (*...fn. cont.*)
27 ECF No. 567, and the County’s exhibit list from the 2015 evidentiary hearing appears at
28 ECF No. 566.

⁷For clarity, the Court will refer to this river as the “Jarbidge River.”

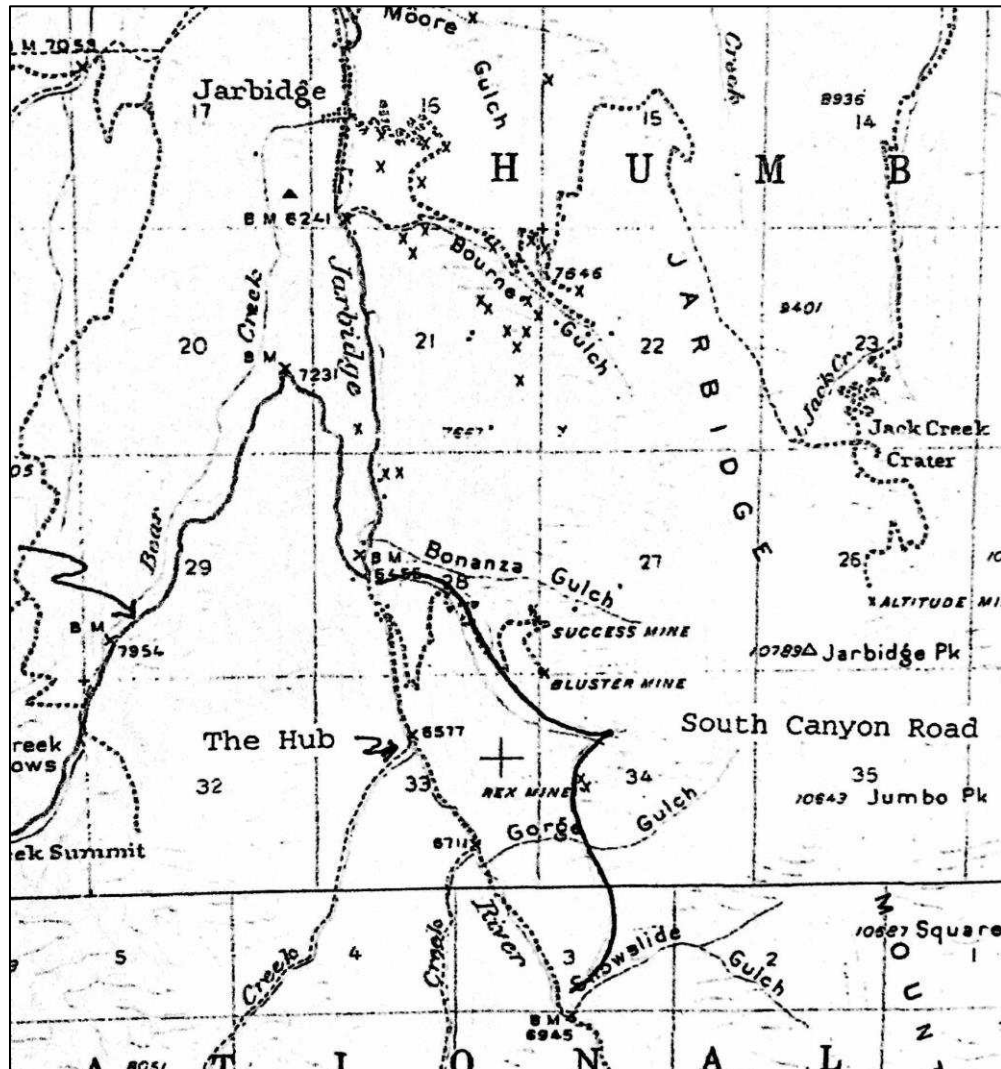
1 cut and fill slopes and back slopes necessary to maintain the running surface and
2 turnouts." (*Id.*)



22 Figure 1: Excerpt of ECF No. 118 at 21, showing the road in dispute. The northern
23 beginning point is the intersection of South Canyon Road and County Road 748. The
24 southern endpoint is the intersection of the Jarbidge River and the Snowslide Gulch
25 Trailhead.

26 5. The town of Jarbidge sits to the north of the Jarbidge South Canyon, near
27 the intersection of Bear Creek and the Jarbidge River. (EC Ex. 1072; Tr. 1446-47; see
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1 *infra* Figure 2.) The Idaho border is approximately 9 miles north of the town of Jarbidge.
2 (US Ex. 710 at AR-015414.)



21 Figure 2: Excerpt from Exhibit B of US Ex. 710, showing the town of Jarbidge north of
22 the South Canyon Road.

23 6. The Jarbidge South Canyon — and, in turn, the South Canyon Road — is
24 a small portion of the larger Jarbidge Area, which, as the term appears in this Order,
25 describes the Jarbidge Mountains, including the entire Jarbidge Canyon, the Jarbidge
26 River, and the East Fork of the Jarbidge River. (See US Ex. 710 at AR-015414 (similarly
27 defining the “Jarbidge Area”).)

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1 **B. Direct Evidence of Continuous Public Use of the South Canyon Road**
2 **Before 1909**

3 7. Aside from a contested map, the parties have not located any local, state,
4 or federal governmental record showing that the South Canyon Road was placed in
5 continuous public use before the Bruneau Addition was permanently reserved in 1909.
6 (EC Ex. 1198.)

7 8. The only direct evidence suggesting that a road or trail may have existed in
8 the Jarbidge South Canyon is an 1894 map of Elko County drawn by E.C. McClellan
9 (“1894 Map” or “the Map”). (EC Ex. 1191; See Tr. 834, 963-66, 1175-76, 1179.) The
10 1894 Map was produced two years before a General Land Office survey of the Jarbidge
11 South Canyon; the northern portion of the map — which is at issue here — lacks any
12 grid markers characteristic of areas that have been surveyed. (EC Ex. 1191; Tr. 120-21,
13 964.) The parties dispute the 1894 Map’s accuracy.

14 9. A river depicted by a solid line appears to bisect the northernmost
15 boundary of the 1894 Map. (EC Ex. 1191; Tr. 113-14, 959-60; see *infra* Figure 3.) The
16 river begins running in a northeastern direction and continues north to the Map’s border.
17 (EC Ex. 1191; Tr. 113.)



27 Figure 3: Excerpt of EC Ex. 1191 with an arrow pointing out the river in question, which
28 sits about halfway between either side of the Map.

1 10. As the river moves south, a dotted line begins to appear alongside it. (EC
2 Ex. 1191; see *infra* Figure 4.) The dotted line continues to run to the south even after the
3 solid line ends, eventually reaching the drainage of the Humboldt River. (EC Ex. 1191;
4 Tr. 114.) According to the Map’s legend, a dotted line designates a road. (EC Ex. 1191.)



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18 Figure 4: Excerpt of EC Ex. 1191, showing the dotted line running alongside the river.

19 11. Although the river feature is not clearly labeled on the map, a smudged “B”
20 appears to the left of the northern starting point of the dotted line. (EC Ex. 1191.) The “B”
21 appears to be the beginning of a more-smudged label, which seems to read “Bruneau.”
22 (EC Ex. 1191; see *infra* Figure 5.) The Bruneau River is a separate river approximately
23 10 miles west of the Jarbidge River. (EC Ex. 1193.) The Bruneau River runs in a
24 northeastern direction near the northern border of Elko County. (EC Ex. 1193.)

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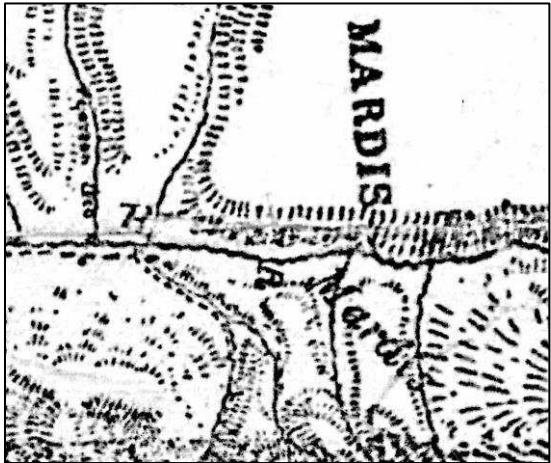


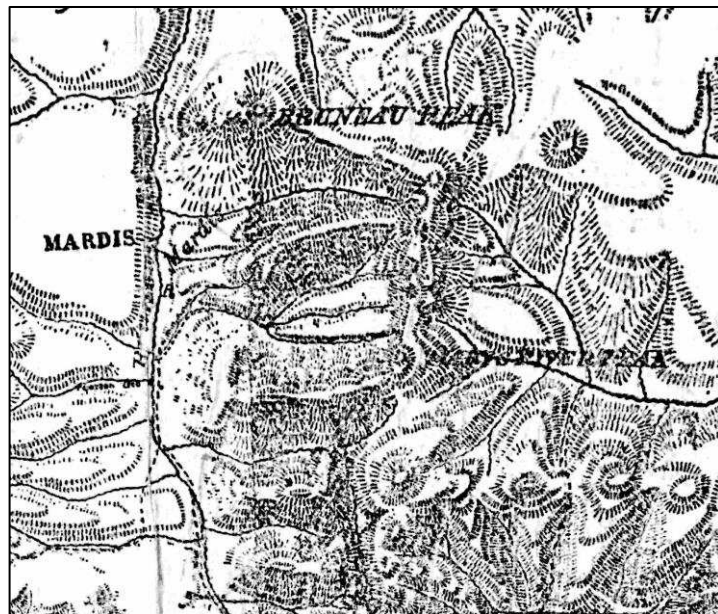
Figure 5: Excerpt of EC Ex. 1191, showing the smudged “B” along the river. This image has been rotated to the right by 90 degrees.

12. The Jarbidge River, however, also runs north at the northern border of Elko County. (EC Ex. 1193; Tr. 963.) And the Jarbidge River shares similar topography to the river depicted in the middle of the 1894 Map. (Tr. 961-62, 964-65.) But even in light of this similarity, an Elko County witness testified that the river depicted on the Map is several miles west of the Jarbidge River’s correct location — there appears to be a “three-mile offset on the 1894 McClellan Map.” (Tr. 966 (explaining that the Jarbidge River “should be dr[a]wn three miles farther to the east than it is,” but testifying that the river is likely the Jarbidge).)

13. The dotted line is just below the word “Mardis,” which appears twice near the road on the Map: first, in all-capital letters to the west of — and perpendicular to — the road, and second, in italicized letters running almost parallel to the road to the east. (EC Ex. 1191; see *supra* Figure 4.) Mardis was an established mining district before 1894. (Tr. 1212-13.) The Mardis district is near a town now known as Charleston, which, on modern maps, appears several miles to the southwest of the Jarbidge South Canyon. (EC Ex. 1196; US Ex. 112; Tr. 1213; see Tr. 818 (describing Mardis and Charleston as “in the same vicinity”). *But see* Tr. 946 (asserting that the town of Mardis and the town of Charleston are six or seven miles apart.) The Mardis mining district was not in the Jarbidge Canyon. (Tr. 820.)

1 14. As of 1894, an established toll road named the Mardis Toll Road ran in a
2 northeastern direction from Gold Greek to the Bruneau River. (Tr. 1213-15, 1464; US Ex.
3 710 at AR-015451; US Ex. 9.) A claim for the Mardis Toll Road — along with a
4 description of its location — was made with the Elko County Recorder’s Office. (Tr.
5 1440-41.) The claim states that the Mardis Toll Road “terminate[s] at a point on the
6 Bruno [sic] River at the Mouth of the Young America Gulch.” (ECF No. 591-1 at 4; see
7 US Ex. 9.)

8 15. The 1894 Map also identifies Mary’s River Peak, which appears
9 approximately 10 miles east of the river at issue. (EC Ex. 1191, Tr. 1218, see *infra*
10 Figure 6.) In modern maps, however, Mary’s River Peak appears approximately one mile
11 east of the headwaters of the Jarbidge River, near the Jarbidge South Canyon. (Tr.
12 1216-17; EC Ex. 1019.) Mary’s River Peak is about 11 miles east of the Bruneau River.
13 (Tr. 1217; EC Ex. 1019; EC Ex. 1193.)



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24 Figure 6: Excerpt from EC Ex. 1191, showing Mary’s River Peak in proximity to the river
25 at issue on the 1894 Map.

26 16. In light of these inconsistencies, the Court finds that the 1894 Map does
27 not accurately depict a road running along the Jarbidge River. Instead, the Map appears
28 to show the known Mardis Toll Road, which ran to the Bruneau River.

1 **C. Other Possible Evidence of Continuous Public Use of the South**
2 **Canyon Road Before 1909**

3 17. Elko County presented extensive evidence of various activities in the
4 Bruneau Addition and the Jarbidge Area prior to 1909, including sheep grazing,
5 prospecting, and other commerce. For example, there is no dispute that more than half a
6 million sheep were in the Bruneau Addition by 1908. (EC Ex. 1198.) But these activities
7 occurred either across the Bruneau Addition — which encompassed approximately
8 1,000 square miles (Tr. 326-27) — or were generally within the Jarbidge Area. This
9 indirect evidence does not establish continuous public use specifically of the Jarbidge
10 South Canyon before 1909.

11 **1. Visitors to the Jarbidge South Canyon Before 1909**

12 18. The evidence indicates that a handful of visitors passed through the
13 Jarbidge South Canyon — or the nearby area — before 1909. There is no evidence,
14 however, that those visitors engaged in continuous public use of a trail or other
15 thoroughfare through the Jarbidge South Canyon.

16 **a. Frank H. Winter**

17 19. In 1894, prospector Frank H. Winter and several associates filed two placer
18 mining claims in the Jarbidge South Canyon. (US Ex. 710 at AR-015454; EC Ex. 1040;
19 EC Ex. 1194;⁸ Tr. 845-46.) Winter named the claims the Avalanche Placer Mine
20 (“Avalanche”) and the April Fool Mine (“April Fool”). (EC Ex. 1040 at 571, 576.) The

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24 ⁸Elko County Exhibit 1194 is a map created by Elko County witness Michael
25 Price. (EC Ex. 1194; Tr. 418.) The exhibit includes several pages, but lacks internal page
26 numbers. The third page of the map packet shows Winter’s Avalanche and April Fool
27 claims. (EC Ex. 1194.) The page also depicts a magenta line running along the Jarbidge
28 River; the line is meant to mark “Historic Trails.” (*Id.*) Michael Price has admitted that the
magenta lines reflect “trails that we’ve modeled that *might have been used* to travel back
and forth between the Mary’s River Basin and Jarbidge.” (Tr. 418 (emphasis added); see
Tr. 453-54.) Because these magenta lines are speculative and not historical, the Court
will not rely on Elko County Exhibit 1194 as proof that a trail existed in the Jarbidge
South Canyon. The Court has considered the exhibit, however, for its mapping of mining
claims along the Jarbidge River.

1 Avalanche claim, which was located on April 9, 1894, began at the intersection of Pine
2 Creek and the Jarbidge River, and continued south for two miles. (*Id.* at 571.) The
3 Avalanche claim was 1/8 of a mile wide (*id.*); it covered the portion of the South Canyon
4 Road between Pine Creek and Snowslide Gulch. (Tr. 852-53.) The April Fool claim
5 similarly ran for two miles on the Jarbidge River, beginning at a point approximately 2.5
6 miles from the upper Wilkins crossing, which appears to be a route known at the time as
7 the Deer Creek Trail. (EC Ex. 1040 at 576; see US Ex. 710 at AR-015431.)

8 20. Because the April Fool claim was based on a less accurate geographic
9 marker, it is less clear whether the April Fool claim covered the remaining northern
10 section of the South Canyon Road. (Tr. 851-52.) Elko County's witnesses have provided
11 conflicting testimony on whether the April Fool claim ran from the intersection of Pine
12 Creek and the Jarbidge River (which is the northern starting point of the Avalanche
13 claim) north to the Pavlak Grade area — that is, whether the two claims combined
14 covered the entirety of the South Canyon Road in dispute. (Tr. 849-52; *compare* EC Ex.
15 1086 (2006 exhibit showing the April Fool and Avalanche claims covering the length of
16 the South Canyon Road) *with* EC Ex. 1194 (2015 exhibit showing only the boundaries of
17 the Avalanche claim, but not the April Fool claim).) In light of this conflicting testimony,
18 the Court finds that the April Fool claim covered some portion of the Jarbidge South
19 Canyon floor in the two miles north of the Avalanche claim. (Tr. 852-53; EC Ex. 1040 at
20 576; EC Ex. 1194.)

21 21. To claim both the April Fool and Avalanche claims, Winter and his party
22 filed documents with the Elko County Recorder. (EC Ex. 1040.) Those documents, which
23 were recorded on April 26, 1894, make no mention of a road or trail along the South
24 Canyon floor. (*Id.*; Tr. 848-49.)

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1 26. According to the General Land Office's 1894 instructions, "[r]oads and
2 trails, with their directions, whence and whither," were "required to be noted" by
3 government surveyors like Scully. (US Ex. 53 at 58-59.) Scully did not note a road or trail
4 when he crossed the Jarbidge South Canyon. (Tr. 39-46, 48-50; US Ex. 59-B; US Ex.
5 726.)

6 27. In the other 66 miles of his survey, Scully noted roads 15 times, and noted
7 trails 7 times. (Tr. 38-39.) The closest noted road to the Jarbidge South Canyon was 17
8 miles away. (Tr. 39.) Scully did not, however, call out Winter's 1894 mining claims. (See
9 Tr. 1375-76.)

10 28. Some possible discrepancies or inaccuracies in Scully's work have been
11 noted. First, the General Land Office repeated the 9th Standard Parallel survey between
12 1935 and 1936. (Tr. 55-56, 83-84.) Although it is a routine practice to repeat an earlier
13 survey (Tr. 55-56), the later survey revealed that Scully's standard parallel line ran
14 between 10 and 100 feet north of the 1936 line. (Tr. 84, 93-94.) Second, Scully recorded
15 his observations in tablets, which he later transcribed into his field notes. (TWS Ex. AR-
16 6243X; Tr. 89-90.) Then, based on his field notes, Scully drafted a plat, which was later
17 finalized by a draftsman with the General Land Office. (Tr. 89-90.) It is possible that
18 discrepancies between field notes and the plat would arise through the drafting process,
19 including the failure to record features noted by the surveyor on the final plat. (Tr. 89-90.)
20 Third, Scully's notes indicate that the Jarbidge terrain was "some of the roughest country
21 in the United States," and was difficult to survey. (US Ex. 710 at AR-015420.) A
22 newspaper article published 18 years later suggests that Scully required assistance from
23 a Mr. Baker to continue west after his party had entered the Jarbidge South Canyon. (*Id.*
24 at AR-015421; Tr. 1367-72.) There are no other references to Mr. Baker's alleged role in
25 helping the Scully survey, or to any regular activity that he conducted in the Jarbidge
26 South Canyon. (Tr. 1444-45.)

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1 across Perkins’s land claim, no road or trail appears along the Jarbidge River in the
2 Jarbidge South Canyon. (*See id.*)

3 33. A map created by the U.S. Forest Service in 1909 similarly shows a trail
4 running east to west near the Perkins Cabin. (TWS Ex. AR-8706; *see infra* Figure 7.) No
5 road is depicted along the Jarbidge River. (*Id.*)

6 34. Some secondary sources suggest that Perkins prospected the Jarbidge
7 Canyon in 1892. (*See, e.g.*, EC Ex. 1023 Section D-3 (handout stating that Bill Mahoney
8 occupied the Perkins Cabin in 1892); EC Ex. 1032 at 68 (asserting that the cabin was
9 constructed in 1892); EC Ex. 1039 (statement by Frank Winter, asserting that “[a]bout
10 this time [perhaps around 1892] Wm Perkins came in and prospected for several
11 years”).) Because these secondary sources conflict with the primary documents
12 described above, the Court finds them less than credible. (*See* US Ex. 710 at AR-
13 015422 n.51; Tr. 1201-02, 1247.) Nevertheless, even assuming those sources are
14 correct, the evidence regarding the Perkins Cabin and land claims does not demonstrate
15 that any road or trail ran through the Jarbidge South Canyon as of 1892 or 1904.

16 35. In 1910, Perkins was reported to be at a different cabin in the Foster
17 Camp, which was located at the head of the Jarbidge South Canyon. (Tr. 878, 1249-51;
18 EC Ex. 1050 at 19-21; US Ex. 710 at AR-015422.) There is no evidence that Perkins
19 was present at the Foster Camp before August 1910. (Tr. 878, 1251.)

20 36. William F. Mahoney — who purchased the Perkins Cabin in 1905 — was
21 involved in the sheep industry in Elko County. (US Ex. 710 at AR-015423 to AR-
22 015424.) Like Perkins, Mahoney had also filed a possessory land claim in the Jarbidge
23 Area in 1903. (EC Ex. 1042A at 179.) The claim ran near Mary’s River, south of the
24 Mary’s River Basin. (*Id.*; US Ex. 101.)

25 37. Elko County witness William Price testified that there was “only one
26 practical way” for Mahoney to travel between the Mary’s River land claim and Perkins
27 Cabin — “[o]ver the Mary’s River Summit and into the Jarbidge Canyon.” (Tr. 702.) Price
28 then conceded that despite the purported ease and convenience of traveling up the

1 Jarbidge South Canyon from the south, there were “plenty of ways” to travel between
2 those two sites. (Tr. 702.)

3 38. One such route is shown on the 1904 Map, which depicts a trail running
4 north from the Mary’s River Basin, where Mahoney’s claim was located. (US Ex. 101.)
5 The trail then moves west across the Jarbidge River, bisecting Perkins’s land claim. (*Id.*)
6 That crossing was known as the Deer Creek Trail or the Jarbidge Crossing. (Tr. 1241-
7 42.) The 1904 Map does not show any trail running along the Jarbidge South Canyon
8 between Mahoney’s Mary’s River claim and Perkins’s claim. (US Ex. 101.)

9 **2. Other Relevant Land and Mining Claims**

10 39. In addition to Winter, Mahoney, and Perkins, several other parties sited
11 land or mining claims in and around the Jarbidge Canyon.

12 **a. David Bourne and John Escalon**

13 40. David Bourne set off a mining boom in the Jarbidge Canyon in the summer
14 of 1909. (US Ex. 710 at AR-015435 to AR-015436.) In June 1909, he located claims in
15 an area later known as Bourne Gulch, which is a few miles north of the Jarbidge South
16 Canyon; Bourne filed mining claims with Elko County in September 1909. (*Id.* at AR-
17 015435; EC Ex. 1019.) He located additional claims in August 1909, and recorded them
18 with Elko County in November 1909. (US Ex. 710 at AR-015435.)

19 41. According to several secondary sources, Bourne was prospecting near the
20 Jarbidge Canyon as early as 1908. (EC Ex. 1023 Section D-3; TWS Ex. AR-9445X at
21 AR-009460; US Ex. 710 at AR-015435; Tr. 516-17.) One such source was a January
22 1910 article from the *Elko Free Press*, which reported Bourne as claiming that in
23 November 1908, he and his wife reached the Jarbidge River from the south and
24 continued “to a point nine miles from the Idaho line.” (Tr. 629 (quoting US Ex. 202 at AR-
25 9028).) In his 1924 manuscript, Winter — whose mining claims were discussed above —
26 wrote that he encountered Bourne in Mountain City in the fall of 1908. (EC Ex. 1039.)
27 Mountain City is approximately 30 miles west of the Jarbidge Mountains. (Tr. 831.)
28 Furthermore, the year listed in the Winter manuscript, which is handwritten, appears to

1 have been corrected — it could read either 1908 or 1909. (EC Ex. 1039.) Even
2 assuming that Bourne visited the Jarbidge Canyon in 1908, this evidence does not
3 establish that he made frequent use of a route through the Jarbidge South Canyon.

4 42. While discussing the 1910 *Elko Free Press* article about Bourne, Elko
5 County witness William Price testified that Bourne and his wife could have reached the
6 Jarbidge Canyon in November 1908 by traveling north over the Mary's River Basin and
7 through the Jarbidge South Canyon, or by coming in "somewhere north of the Jarbidge
8 Mountains and then work[ing] [their] way back south along the Jarbidge River." (Tr. 629-
9 30.) But Price clarified that the route over Mary's River Basin would have been
10 impossible to pass if heavy snow had fallen. (Tr. 630, 634-35.) Price also testified that he
11 failed to find any documents showing that Bourne and his wife entered the Jarbidge
12 Canyon through the southern head of the canyon. (Tr. 826.) And Winter's 1924
13 manuscript states that in the fall of 1908, Bourne was in Mountain City, approximately 30
14 miles west of the Jarbidge Mountains. (EC Ex. 1039; Tr. 831.) In short, whether Bourne
15 reached the Jarbidge Canyon from the north or the south is ambiguous at best.

16 43. John Escalon similarly located mining claims in the summer of 1909 near
17 the Jarbidge Canyon, where he had traveled from Charleston. (EC Ex. 1039; TWS Ex.
18 AR-9445X at AR-009460.) A 1910 article in the *Elko Free Press* indicates that Escalon
19 traveled from the headwaters of the Bruneau River along the west side of the Jarbidge
20 Mountains before dropping into the north end of the Jarbidge Canyon, north of the
21 Jarbidge South Canyon. (TWS Ex. AR-9062 at AR-009064; Tr. 1272.) The evidence
22 does not show that Escalon traveled through the Jarbidge South Canyon, let alone that
23 he used a route through the Jarbidge South Canyon.

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1 48. Typically, sheep graze in the low country during the winter and move to
2 higher ground — with more green for grazing — in the summer. (Tr. 230.) Sheep tend to
3 spread out as they move across the land, rather than traveling along a route or trail. (Tr.
4 233.) Bands of sheep can reach about a half mile when they are spread out. (Tr. 233.)

5 49. Although sheep would graze throughout the Jarbidge Mountains, there is
6 no direct evidence indicating that sheep, sheep herders, or their attendants were in the
7 Jarbidge South Canyon. (Tr. 326-30; 1407-11.) Given the number of sheep in the
8 Bruneau Addition, however, it is possible that sheep entered the Jarbidge South Canyon
9 before the 1909 reservation. (Tr. 1407-11.)

10 50. Sheep grazing was permitted along parts of the Jarbidge River after the
11 Bruneau Addition was reserved as a national forest in 1909. (US Ex. 234 at AR-009380.)
12 But no evidence shows continuous use of the Jarbidge South Canyon for grazing
13 purposes before 1909.

14 **4. Presence of Native Americans in the Jarbidge Area**

15 51. Although Native Americans were present in the Jarbidge Area well before
16 1909, there is no direct evidence that they continuously used the Jarbidge South
17 Canyon.¹² (US Ex. 710 at AR-015415 to AR-015416.) After searching the Jarbidge
18 South Canyon for evidence of prehistoric use, TWS witness Frederick Frampton testified
19 that he found “one very, very, very small site” of interest. (Tr. 1224.) The site consisted of
20 “four flakes,” which were a byproduct of the crafting of a prehistoric knife that took about
21 ten seconds to create. (Tr. 1224.) Evidence of Native American use of the Jarbidge
22 Mountains over the past 300 years also exists, but no such evidence has been
23 discovered in the Jarbidge South Canyon. (Tr. 1225-26; US Ex. 710 at AR-015415 to
24 AR-015416.)

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27 ¹²It is not clear to the Court that prehistoric or indigenous use of the Jarbidge
28 South Canyon would be appropriate evidence of an R.S. 2477 right-of-way. In any event,
no evidence suggests that indigenous people made continuous use of the Jarbidge
South Canyon.

1 52. Various newspaper articles from the 1890s and early 1900s report that
2 Native Americans avoided the Jarbidge South Canyon because a legend placed a devil
3 or giant there. (Tr. 1087-92; US Ex. 710 at AR-015417 to AR-015418; see EC Ex. 1039
4 at 4.) It is not clear where this legend originated. According to Elko County witness
5 Cydnee McMullen, it could have come from Native American people, or from colonizers
6 who may have used the story in an attempt to justify exploiting native populations. (Tr.
7 1091-92.) TWS witness Frederick Frampton, however, believes that the legend arose
8 from Native Americans, based on his interactions with Shoshone tribe members. (Tr.
9 1227-28.) Aside from the legend, Frampton further testified that Native Americans may
10 have avoided the Jarbidge South Canyon because of its inaccessibility and heavy
11 woods. (Tr. 1228.) These factors further support the conclusion that Native Americans
12 did not make continuous use of the Jarbidge South Canyon before 1909.

13 **5. Newspaper Accounts, Maps, and Other Documents**

14 **a. Newspaper Accounts**

15 53. The parties presented many newspaper articles throughout the evidentiary
16 hearing. (See, e.g., Tr. 600-31, 1075-90.) Those articles generally help in describing
17 activities occurring in Elko County and the Jarbidge Area. With regard to the Jarbidge
18 South Canyon, the parties agree that there are a number of newspaper accounts
19 appearing in Elko County newspapers including the *Elko Daily Free Press*, the *Gold*
20 *Creek News*, the *Nevada State Herald*, and the *Metropolis Chronicle* that describe the
21 Jarbidge Area as mountainous, steep and rugged, or words to that effect, prior to the
22 January 1909 reservation. (EC Ex. 1198.) For example, an 1897 article in the *Gold*
23 *Creek News* described the Jarbidge Canyon as “a total blank” and “one of the least
24 known portions of the country.” (TWS Ex.-AR6862; Tr. 1230-31.)

25 54. The newspaper articles do not, however, describe a road or trail in the
26 Jarbidge South Canyon before January 1909.

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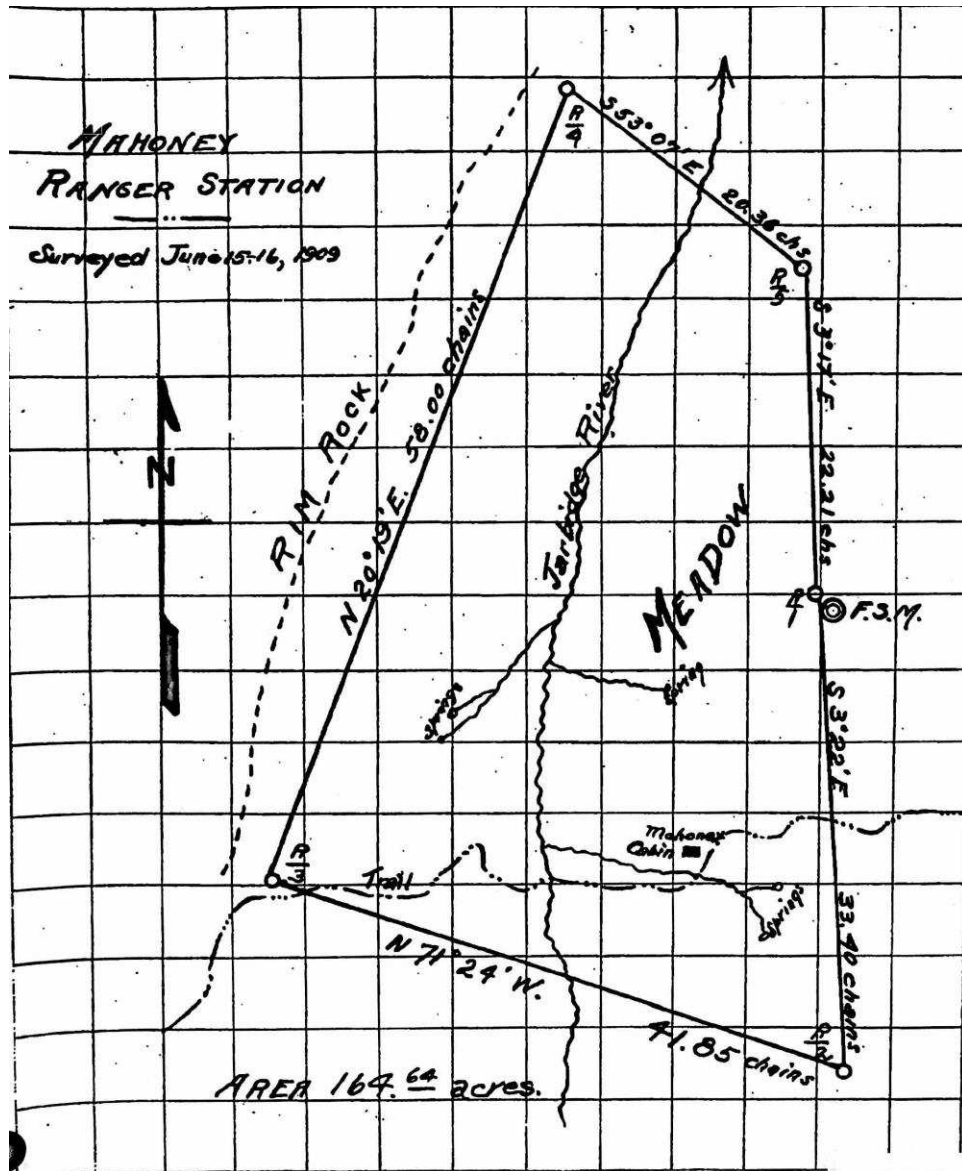


Figure 7: Excerpt of TWS Ex. AR-8706, depicting a west-to-east trail near the Perkins Cabin.

59. The following year, W.W. Fisk issued a map ("Fisk Map") of surveyed and unsurveyed land claims along the Jarbidge River. (US Ex. 177 at AR-008728.) Unlike the USFS Map, this 1910 map does not identify any trails or roads. (*Id.*) Mineral survey mapping guidelines at the time required mineral surveys to identify all topographical markers like roads and trails. (US Ex. 178 at AR-08557.) But the Fisk Map was not itself a survey — instead, it compiled both surveyed and unsurveyed claims in the region. (Tr. 170.) It is not clear whether Fisk would have been required to note roads and trails on the map. (Tr. 170.) Even assuming that Fisk erred by failing to identify known roads or

1 trails, those mistakes do not demonstrate that other government maps — such as
2 Scully’s survey of the 9th Standard Parallel — were similarly flawed.

3 60. Maps drafted in the years following the 1909 mining boom show a road
4 running through the Jarbidge South Canyon. (See, e.g., US Ex. 710 at Ex. L (1911 map
5 showing a “River Road” running parallel to the Jarbidge River in the Jarbidge South
6 Canyon).)

7 **c. Other Documents**

8 61. The parties agree that between the summer of 1909 and April 1910, after
9 the mining boom had begun, more than 500 mining claims were located and filed in the
10 Jarbidge Area. (EC Ex. 1198.) As a result, all — or almost all — of the Jarbidge South
11 Canyon was covered by mining claims after April 1910. (*Id.*)

12 62. There is no evidence of a Forest Service permit for a trail or road through
13 the Jarbidge South Canyon after the Bruneau Addition was reserved in 1909. (US Ex.
14 711 at AR-015159.) The 1908 Forest Service regulations, however, required only the
15 “consent” and supervision of a Forest Service officer for constructing a trail. (US Ex. 166
16 at AR-008319.) Similarly, wagon roads constructed by states or counties — but not by
17 private parties — did not require permits. (*Id.*) Under the 1905 regulations, miners could
18 construct roads within their claims without a mining permit. (See US Ex. 711 at AR-
19 015159 to AR-015162; US Ex. 111 at AR-007722 to AR-007723.)

20 **6. Expert Opinions**

21 63. McMullen, who is a historian, concluded that there is a “strong possibility of
22 a trail in the” Jarbidge South Canyon. (Tr. 1174; see Tr. 1055-57 (qualifying McMullen as
23 an expert in general history but deferring request to qualify McMullen as an expert on
24 “sense of place” and “how people use their environment”¹³.) She based this conclusion
25 primarily on historic patterns of travel in “rugged[,] mountainous areas.” (Tr. 1174-75.)
26 Typically, McMullen testified, people use waterways for travel both to sustain themselves

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28 ¹³Qualification in the latter two categories is unnecessary as the Court assigns
little weight to McMullen’s testimony in these categories.

1 and as a means of marking routes through difficult terrain. (Tr. 1175.) Moreover, miners
2 with placer claims in the Jarbidge Canyon would have been interested in the Jarbidge
3 River, and, in her opinion, likely would have used the River to travel through the Jarbidge
4 Canyon. (Tr. 1175.)

5 64. McMullen also explained that significant commerce occurred near railroad
6 stops in the region, including Deeth, which is approximately 50 miles south of Mary's
7 River Peak. (See Tr. 527, 1058, 1100-01.) Deeth was an important area for restocking
8 for cattlemen and sheep grazers in the Jarbidge Area, and was the source of large
9 numbers of sheep and cattle that entered the Bruneau Addition. (Tr. 1100, 1132.)
10 McMullen, however, testified that none of the articles or other sources she reviewed
11 discussed a specific route from Deeth through the Jarbidge South Canyon. (Tr. 1181-
12 82.)

13 65. McMullen further assumed that the road depicted on the 1894 Map ran
14 along the Jarbidge River, even in light of the Map's inaccuracies. (Tr. 1175.) McMullen
15 testified that, as a historian, she "would not draw a conclusion that because there is no
16 map; therefore, there was no trail or route."¹⁴ (Tr. 1176.)

17 66. Elko County witness Michael Price, an expert in GIS mapping, testified that
18 the easiest route from Deeth to Jarbidge would have run through the Jarbidge South
19 Canyon. (Tr. 478-79.) Assuming that a traveler took the Mary's River corridor north from
20 the Deeth area, Price asserted that the "most direct, safest route" would continue north
21 along Mary's River and through the Jarbidge South Canyon to the Jarbidge River. (Tr.
22 478; see EC Ex. 1089 (tracing a yellow line along this proposed route); EC Ex. 1194
23 (showing the proposed route with a magenta line).) Price's assessment was "primarily
24 gained by digital analysis" of the region — he had no evidence that this proposed route
25 was used prior to 1909. (Tr. 478, 483.)

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28 ¹⁴McMullen's testimony may reflect a historian's approach, but not that of a court,
which must view the evidence presented under an established standard of proof.

1 **D. Evidence That the South Canyon Road Was Constructed After 1909**

2 67. A road in the Jarbidge South Canyon begins to appear on maps and other
3 documents after Bourne set off a gold rush in the Jarbidge Canyon in the fall of 1909.
4 (See US Ex. 710 at AR-015435, AR-015448.) Prior to 1909, the only known trail near the
5 Jarbidge South Canyon was the Deer Creek Trail, which met the Jarbidge River near the
6 Perkins Cabin, which, as noted above, was north of the Jarbidge South Canyon. (*Id.* at
7 Ex. G, AR-015441 to AR-015442.)

8 68. A 1912 report on the mining boom described the widespread travel to the
9 Jarbidge camp — which was several miles north of the Jarbidge South Canyon (see US
10 Ex. 710 at Exs. B, L; EC Ex. 1089) — as “remarkable, for there were no established lines
11 of transportation and no wagon road within 12 miles of the camp.” (TWS Ex. AR-9445X
12 at AR-009461.) As prospectors entered and extended into the Jarbidge South Canyon
13 between 1909 and 1910, a road was developed between the Jarbidge mining camp and
14 “the Hub,” a group of mining claims at the intersection of Fox Creek and the Jarbidge
15 River to the south. (US Ex. 710 at Ex. L, AR-015449; see TWS Ex. AR-9442X.) As of
16 December 1910, the road had been extended 2 miles south of Fox Creek. (US Ex. 710
17 at AR-015449; TWS Ex. AR-5269.) A trail continued farther south, from Fox Creek to an
18 area known as Foster Camp. (TWS Ex. AR-9422X; TWS Ex. AR-9445X at AR-009457;
19 Tr. 1457.)

20 **IV. CONCLUSIONS OF LAW**

21 Before its 1976 repeal, R.S. 2477 granted “[t]he right of way for the construction of
22 highways over public lands[] not reserved for public uses.” See 43 U.S.C. § 932
23 (repealed 1976). Rights-of-way that existed before R.S. 2477’s repeal remain intact.
24 *Adams v. United States*, 3 F.3d 1254, 1258 (9th Cir. 1993). The statute “did not itself
25 create R.S. 2477 roads; rather, it *authorized* the states to construct highways over public
26 lands.” *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1077 (9th Cir. 2010). R.S. 2477
27 has thus been understood “as presenting a free right-of-way ‘which takes effect as soon

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1 as it is accepted by the State.” *Mills v. United States*, 742 F.3d 400, 403 (9th Cir. 2014)
2 (quoting *Lyon*, 626 F.3d at 1077).

3 State law, in turn, controls whether and how a state may accept the right-of-way.
4 *Lyon*, 626 F.3d at 1077 (citing *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248, 250
5 (9th Cir. 1974)). Once a highway is constructed under state law, R.S. 2477 automatically
6 granted a right-of-way for that road. *Id.* Acceptance of the right-of-way “requires merely
7 ‘some positive act on the part of the appropriate public authorities of the state, clearly
8 manifesting an intention to accept.’” *Id.* (quoting *Wilderness Soc’y v. Morton*, 479 F.2d
9 842, 882 (D.C. Cir. 1973)). The party claiming a right-of-way bears the burden of
10 establishing its existence. *Id.* (citing *Shultz v. Dep’t of Army*, 96 F.3d 1222, 1223 (9th Cir.
11 1996)). Here, as the party seeking a right-of-way, Elko County must show, by clear and
12 convincing evidence, that its alleged right-of-way existed before the Jarbidge South
13 Canyon was reserved as a national forest in 1909.¹⁵ (ECF No. 507 at 7-8.)

14 Elko County effectively concedes, as it must, that no mechanical construction of a
15 highway occurred before 1909. (See ECF No. 521 at 10-12.) Instead, the County
16 proceeds under a theory of public use, arguing that enough public use of the South
17 Canyon Road occurred before 1909 to have signaled the acceptance of an R.S. 2477
18 right-of-way. (*Id.* at 10-14.) Although TWS disputes whether Nevada law even permitted
19 a right-of-way to be established through continuous public use in 1909,¹⁶ they contend
20 that Elko County has failed to demonstrate any continuous public use of a route through
21 the Jarbidge South Canyon before 1909. (ECF No. 591 at 18-20.) The Court agrees.

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24 ¹⁵As discussed below, the Court finds that Elko County has failed to establish the
existence of a right-of-way even under a preponderance of the evidence standard.

25 ¹⁶TWS presented this argument in a motion for summary judgment (ECF No. 527)
26 that the Court denied (ECF No. 553). TWS has already requested the Court’s
27 reconsideration of that decision, and their request was denied. (ECF No. 553.)
28 Accordingly, the Court will not reconsider whether, in 1909, a right-of-way could be
established by continuous public use under Nevada law. Moreover, this argument is
irrelevant in light of the Court’s finding that Elko County cannot show, by either clear and
convincing evidence or a preponderance of the evidence, continuous public use of the
South Canyon before 1909.

1 **A. Elko County Must Demonstrate a Right-of-Way Prior to 1909**

2 As an initial matter, TWS argues that the Jarbidge South Canyon was reserved
3 from public use before 1909, first by mining claims located in the South Canyon in 1894,
4 and later by a temporary withdrawal of the Bruneau Addition in 1905. (ECF No. 591 at
5 19, 35-37.) Neither cut-off date unequivocally reserved the South Canyon Road from
6 public use.

7 The relevant mining claims are the Avalanche and April Fool claims located by
8 Frank Winter and his colleagues through almost the entirety of the Jarbidge South
9 Canyon. (*See supra* Section III.C.1.a.) There is some dispute over the precise reach of
10 the April Fool claim, and whether the two claims combined to cover the entire span of the
11 South Canyon Road. (*See* EC Ex. 1086; EC Ex. 1194.) The Court has found, however,
12 that the April Fool claim covered at least some portion of the Jarbidge South Canyon in
13 the two miles north of the Avalanche claim. (*See supra* Section III.C.1.a.) But the
14 evidence does not establish that Winter’s claims covered the entire 2.4-mile stretch of
15 the South Canyon Road. The Court accordingly cannot conclude that the claims
16 removed the relevant portion of the Jarbidge South Canyon from public use in 1894.

17 Even assuming that Winter’s claims covered the 2.4 miles in dispute, the
18 evidence indicates that Winter and his colleagues never improved the claims, which left
19 them open to relocation. (*See supra* Section III.C.1.a.) An R.S. 2477 right-of-way can be
20 created only while land retains its “public character.” *Great Old Broads for Wilderness v.*
21 *Kimbell*, 709 F.3d 836, 842 n.1 (9th Cir. 2013) (citing *Humboldt Cty. v. United States*,
22 684 F.2d 1276, 1281 (9th Cir. 1982)). Land loses its public character once a person’s
23 claim or right attaches to it. *Humboldt Cty.*, 684 F.2d at 1281 (citing *Columbia Basin*
24 *Land Prot. Ass’n v. Schlesinger*, 643 F.2d 585, 602 (9th Cir. 1981)). By locating a valid
25 mining claim, a prospector like Winter was granted “the exclusive right of possession and
26 enjoyment of all the surface included within the lines of [the claim’s] location[.]” *United*
27 *States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1281 (9th Cir. 1980) (quoting 30
28 U.S.C. § 26)). A properly located mining claim therefore “segregate[s] [the land] from the

1 public domain.” *St. Louis Mining & Milling Co. v. Mont. Mining Co.*, 171 U.S. 650, 655
2 (1898).

3 The Avalanche and April Fool claims were recorded with Elko County in 1894.
4 (EC Ex. 1040 at 571, 576; *see supra* Section III.C.1.a.) Because locating the claims gave
5 Winter the right of possession and enjoyment of the surface of the property, the land
6 covered by the claims was no longer part of the public domain.¹⁷ *See St. Louis Mining &*
7 *Milling Co.*, 171 U.S. at 655. But mining claims like Winter’s could be abandoned or
8 forfeited under federal law, which required a minimum amount of work to be performed
9 on the claim annually. *See* 30 U.S.C. § 28; *Farrell v. Lockhart*, 210 U.S. 142, 148 (1908);
10 *Belk v. Meagher*, 104 U.S. 279, 281-82 (1881). Failing to perform the annual
11 assessment work jeopardized the mining claim’s validity, such that the claim could be
12 forfeited.¹⁸ *Farrell*, 210 U.S. at 148. Here, according to Winter’s own account, neither he
13 nor his colleagues performed additional work on the Avalanche and April Fool claims
14 after locating them in 1894. (EC Ex. 1039.) Indeed, by 1909 and 1910, other prospectors
15 eventually located new claims over Winter’s former claims. (EC Ex. 1198.) Because

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17 ¹⁷Elko County suggests that Winter’s claims were not proper because they were
18 filed to preserve access to water for sheep herding, and not for mining. (ECF No. 592 at
19 41.) This practice was known as sheep mining. (*Id.*) But aside from generally arguing
20 that sheep mining was considered fraudulent, and from pointing out that Winter was a
rancher, Elko County does not cite to any evidence suggesting that the Avalanche and
April Fool claims were fraudulent. (*Id.* at 28-29, 41.) In any event, the Court need not
decide whether Winter’s claims were valid because the Court finds that Winter effectively
abandoned the claims by failing to improve them.

21 ¹⁸There appears to be some uncertainty over whether the failure to perform
22 annual work on a mining claim automatically forfeited the claim. In *Farrell*, the Supreme
23 Court considered a mining claim to be “forfeited for want of the annual labor required” at
24 the close of the statutory period allotted for that work. 210 U.S. at 148. But the Court has
25 further explained that even if a miner failed to perform the requisite annual work, the
26 miner could recover the forfeited claim by performing work after the statutory period, so
27 long as another individual had not staked a new claim on the land. *Belk*, 104 U.S. at
28 282-83. The Court also clarified that the failure to perform annual work was not an “ipso
facto” forfeiture, but rather an action that opens the claim to relocation. *Ickes v. Virginia-*
Colorado Dev. Corp., 295 U.S. 639, 645 (1935), *disagreed with by Hickel v. Oil Shale*
Corp., 400 U.S. 48, 56-58 (1970) (agreeing with *Ickes* that “every default in assessment
work does not cause the claim to be lost,” but disagreeing to the extent *Ickes* suggested
that only other private parties, and not the government, might benefit from the failure to
perform work). Here, even if Winter’s claims were not automatically forfeited, they were
subject to relocation due to Winter’s failure to perform any work on them. More
important, whether Winter’s claims reserved the Jarbidge South Canyon is ultimately
irrelevant in light of the Court’s finding that no right-of-way existed before 1909.

1 Winter's claims could be considered forfeited as of January 1, 1896, *see Farrell*, 210
2 U.S. at 144 (finding that a claim located in August 1900 was forfeited for failure to
3 perform annual work on December 31, 1901), the Court finds that the underlying land
4 was not reserved from public use for R.S. 2477 purposes as of 1894.

5 TWS additionally contends that the 1905 temporary withdrawal of the Bruneau
6 Addition should count as the cut-off date for Elko County's R.S. 2477 claim. (ECF No.
7 591 at 36-37.) In November 1905, the Secretary of the Interior withdrew "from all forms
8 of disposition, excepting under the mineral laws, all of the vacant unappropriated public
9 lands in the [Bruneau Addition] . . . with a view to the ultimate creation therefrom of the
10 Independence Forest Reserve." (TWS Ex. AR-7841; ECF No. 519 at 3.) Such a
11 withdrawal removes land from certain kinds of private appropriation under public land
12 laws, "preserving the status quo while Congress or the executive decides on the ultimate
13 disposition of the subject lands." *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425
14 F.3d 735, 784 (10th Cir. 2005). A withdrawal thus differs from a reservation, which not
15 only withdraws land, but also "dedicates [it] to a particular public use." *Id.* This language
16 is tracked in R.S. 2477, which recognizes rights-of-way for highway construction over
17 lands "not reserved for public uses."

18 It is not clear that the 1905 withdrawal qualifies as a reservation of public land for
19 R.S. 2477 purposes. The withdrawal does explicitly state that its purpose is to prepare
20 for "the ultimate creation . . . of the Independence Forest Reserve," suggesting that the
21 withdrawal occurred to facilitate a particular public use of the land. (TWS Ex. AR-7841.)
22 On the other hand, the withdrawal exempts from its reach any disposition of the lands
23 "under the mineral laws." (*Id.*) The Ninth Circuit, in turn, has explained that R.S. 2477
24 was passed as part of a larger suite of laws designed to facilitate mineral development.
25 *Humboldt Cty.*, 684 F.2d at 1281-82 (declining to extend an R.S. 2477 right-of-way to a
26 county in part because the road's purpose "would be purely for recreation," not for
27 mining or economic development). Because the 1905 withdrawal did not affect
28 dispositions under the mineral laws, it seems that a right-of-way under R.S. 2477 —

1 which was passed in the context of an 1866 mining law — could have been established
2 regardless of the withdrawal. *See id.* But the Court need not decide whether the 1905
3 withdrawal reserved the Jarbidge South Canyon from public use. Instead, even
4 assuming that the temporary withdrawal did not foreclose the establishment of rights-of-
5 way under R.S. 2477, the Court finds that no right-of-way was created before the
6 Bruneau Addition was reserved to create a national forest in 1909.

7 **B. Elko County Has Not Shown by Clear and Convincing Evidence that a**
8 **Right-of-Way Existed Before 1909**

9 Elko County claims that extensive public use of the Jarbidge South Canyon took
10 place before the Bruneau Addition was reserved as a national forest on January 20,
11 1909. Such public use, the County argues, was sufficient under Nevada law to qualify as
12 an “acceptance” of an R.S. 2477 right-of-way.¹⁹ As the Tenth Circuit has explained, such
13 an acceptance was one of two steps required to establish a public right-of-way under
14 common law. *S. Utah Wilderness All.*, 425 F.3d at 769. The other step — “an express
15 dedication of the right of way by the landowner” — was satisfied by R.S. 2477 itself. *Id.*
16 Although states have different rules governing how a right-of-way might be accepted,
17 many western states provide for the acceptance of a right-of-way by “continuous public
18 use over a specified period of time.” *Id.* at 770 (citing cases from Alaska, Nebraska, New
19 Mexico, Utah, and Wyoming). States have defined different periods of time for
20 continuous public use: some imported their rules on easements by prescription, others
21 established new rules specifically for R.S. 2477, and some used “simply a period long
22 enough to indicate intention to accept.” *Id.* at 771 (citations omitted).

23 Equally important is the nature of the public use, which must be more than
24 random, “merely occasional,” *id.* at 775 (quoting *Ball v. Stephens*, 158 P.2d 207, 211
25 (Cal. Ct. App. 1945)), or “infrequent and sporadic.” *Id.* at 776 (citing *Hamerly v. Denton*,
26 359 P.2d 121, 125 (Alaska 1961)). Although states differ in terms of what activities

27 ¹⁹This argument assumes that before January 20, 1909, Nevada law permitted
28 the creation of a right-of-way through public use. (*See supra* note 16.)

1 qualify as sufficient public use, it is clear that “occasional or desultory use is not
2 sufficient.” *Id.* at 771. The Utah Supreme Court, for example, rejected a right-of-way for
3 land traversed by a single cattleman who “herd[ed] his cattle across the lands of another
4 to get to and from winter grazing land.” *Id.* at 774 (citing *Cassity v. Castango*, 347 P.2d
5 834, 835 (Utah 1959)). The Montana Supreme Court similarly denied a right-of-way after
6 witnesses testified that they had used a trail “perhaps ‘once a year, twice a year, three
7 times; not over that; maybe some years not at all.’” *Id.* at 775-76 (quoting *Moulton v.*
8 *Irish*, 218 P. 1053, 1054 (Mont. 1923)).

9 Few cases in Nevada discuss the extent of public use required to establish a
10 right-of-way under R.S. 2477. In *Anderson v. Richards*, 608 P.2d 1096, 1098-99 (Nev.
11 1980), the Nevada Supreme Court held that a valid right-of-way existed for a road under
12 both federal and state law. Noting that “nearly every map introduced by the parties
13 showed [the] roadway” at issue, the court concluded that “[t]he record leaves no doubt
14 that there existed a road or trail from early pioneer days.” *Id.* at 1097. As for the road’s
15 legal validity, the court reasoned that the road was in use before 1866, when Nevada
16 first enacted legislation establishing the state’s public highways.²⁰ *Id.* at 1099 (citing NRS
17 § 403.410). The 1866 legislation recognized all existing public roads — including the
18 road at issue in *Anderson* — as public highways. *Id.* The court further reasoned that the
19 road was proper under R.S. 2477, suggesting that the statute “protect[ed] persons who
20 had already encroached upon the public domain without authorization, but who had
21 been allowed to remain there with the knowledge and acquiescence of the government.”
22 *Id.* at 1098. In discussing the breadth and import of R.S. 2477, the court cited a passage
23 from the Colorado Supreme Court, which suggested that “user is the requisite element
24 [under R.S. 2477], and it may be by any who have occasion to travel over public lands,
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26 ²⁰The 1866 statute recognized “[a]ll public roads . . . in incorporated cities and
27 towns in this state, used or lawfully entitled to be used as such on March 9, 1866,” as
28 public highways. *Anderson*, 608 P.2d at 1099 n.7 (quoting NRS § 403.410). The statute
also declared as public highways roads that were opened after March 9, 1866, by “the
board of county commissioners of the county in which they are situated.” *Id.*

1 and if the use be by only one, still it suffices.” *Id.* at 1098-99 (quoting *Brown v. Jolley*,
2 387 P.2d 278, 281 (Colo. 1963)).

3 Elko County points to *Anderson* in arguing that even sporadic use of land as a
4 trail or pathway may be sufficient to establish an R.S. 2477 right-of-way in Nevada. (See
5 ECF No. 592 at 37-38.) But the *Anderson* ruling hinged on extensive evidence that the
6 road at issue was well established, especially the fact that the road appeared on almost
7 every map introduced to the court. *See Anderson*, 608 P.2d at 1097-98 (“The contention
8 that Tunnel Creek Road is a public road is confirmed in the record by evidentiary
9 material.”). The court discussed the Colorado Supreme Court opinion later, in describing
10 the federal legal framework of R.S. 2477. *See id.* at 1098-99. There is no indication that
11 the *Anderson* court would have granted a right-of-way based on evidence of a single use
12 of public lands for travel. Moreover, Elko County’s logic contradicts the rulings of several
13 other states, which, as noted above, rejected rights-of-way when presented with
14 evidence of only minimal, random, or sporadic travel across the land at issue.

15 Elko County’s theory is further belied by Nevada’s prescriptive easement rules,
16 which require a showing of “[a]dverse, continuous, open and peaceable use for five
17 years.” *Stix v. La Rue*, 368 P.2d 167, 169 (Nev. 1962). If, as Elko County suggests, a
18 single person could accept an R.S. 2477 right-of-way by simply traversing government
19 land, then it would make little sense to require five years of continuous, adverse, and
20 open use to establish an analogous right over private land. Moreover, from a policy
21 standpoint, requiring more extensive public use to signal the acceptance of a right-of-
22 way seems necessary. Otherwise, Elko County could claim an R.S. 2477 right-of-way
23 over any public land in the Bruneau Addition that a single person traversed before the
24 land was reserved as a national forest in January 1909.

25 Ultimately recognizing that continuous public use of the South Canyon Road
26 requires a demonstration of more than random or merely occasional use, Elko County
27 has presented a detailed picture of the many activities occurring throughout the Jarbidge
28 Area at the close of the twentieth century. According to Elko County, even without direct

1 evidence of a road in the Jarbidge South Canyon, the indirect evidence establishes that
2 the Jarbidge South Canyon was used as a travel route. But neither the direct nor the
3 indirect evidence raises more tenuous inferences that a route existed in the Jarbidge
4 South Canyon before 1909. Those inferences fall short of establishing continuous public
5 use of the South Canyon Road by a preponderance of the evidence, let alone by clear
6 and convincing evidence.

7 **1. Direct Evidence: The 1894 Map**

8 The only evidence that directly suggests the existence of a route through the
9 Jarbidge South Canyon is the 1894 Map. (EC Ex. 1191.) The 1894 Map shows a road
10 running alongside a river that appears to bisect the northern border of Elko County; the
11 parties dispute whether the road appears next to the Jarbidge River — and, in turn, runs
12 through the South Canyon — or next to the Bruneau River. (*See supra* Section III.B.)

13 Testimony on the 1894 Map by both parties' witnesses exposed many
14 inaccuracies. First, the 1894 Map attempted to depict portions of northern Elko County
15 that had not yet been surveyed, including the Jarbidge South Canyon. The river at issue
16 is not clearly labeled, but appears to depict a smudged "B," suggesting that the road
17 runs alongside the Bruneau River, not the Jarbidge River. (*See supra* Section III.B.)
18 Next, several landmarks on the Map appear to be in the wrong place, including Mardis
19 — a known mining district — and Mary's River Peak. (*See supra* Section III.B.) The 1894
20 Map places Mardis just north of the point at which the road first appears alongside the
21 river, when, in reality, Mardis was several miles southeast of the Jarbidge South Canyon.
22 (*See supra* Section III.B.) And Mary's River Peak is about nine miles farther away from
23 the Jarbidge River on the map than it ought to be. (*See supra* Section III.B.) Ultimately,
24 the 1894 Map appears to depict a road running alongside the Bruneau River, not the
25 Jarbidge River; the Map is therefore of limited import in showing that a route through the

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1 Jarbidge South Canyon existed in 1894. The Map does not constitute clear and
2 convincing evidence of a road in the Jarbidge South Canyon.²¹

3 **2. Indirect Evidence**

4 Elko County chronicled many activities in the Jarbidge Area before the Bruneau
5 Addition's 1909 reservation, including surveying, prospecting, and sheep herding. (See
6 *supra* Section III.C.) The evidence shows that at least two parties — Frank Winter and
7 Dennis Scully — made their way into the Jarbidge South Canyon in the 1890s to
8 prospect and survey, respectively. (See *supra* Sections III.C.1.a, III.C.1.b.) But neither
9 Winter nor Scully left any indication that a trail or road existed in the South Canyon. More
10 important, Scully was tasked with noting any roads or trails he encountered during his
11 government survey, which ran through the South Canyon. (See *supra* Section III.C.1.b.)
12 Although Scully documented other roads and trails along his route, his 1896 survey
13 makes no mention of a road or trail in the Jarbidge South Canyon. Indeed, Scully's
14 survey might contain several inaccuracies, such as Scully's departure from the true 9th
15 Standard Parallel, possible drafting errors, or measuring errors as a result of difficult
16 terrain. (See *supra* Section III.C.1.b.) But these possible deficiencies do not change the
17 fact that the survey depicts no road or trail in the Jarbidge South Canyon.

18 Other evidence of use of the Jarbidge South Canyon by land claimants,
19 prospectors, and sheepherders similarly falls short. There is no dispute, for example,
20 that the Perkins Cabin was established just north of the Jarbidge South Canyon years
21 before the 1909 reservation. (See *supra* Section III.C.1.c.) There is likewise no evidence
22 that Perkins — or Mahoney, who subsequently purchased the Perkins Cabin —
23 necessarily traveled through the Jarbidge South Canyon to reach the Cabin. Instead,
24 they could have taken any number of routes to get there, including several established
25 trails to the east and west of the Jarbidge Mountains that appeared on maps as early as
26 1904. (See *supra* Section III.C.1.c.) The same holds true for prospectors like Bourne and

27 ²¹Nor does the 1894 Map establish the existence of a route by a preponderance
28 of the evidence.

1 Escalon, who reached the area north of the Jarbidge South Canyon around 1909. (See
2 *supra* Section III.C.2.a.) While it is possible that Bourne and Escalon traveled north
3 through the Jarbidge South Canyon, it is equally plausible that they took other
4 established routes to the area north of the South Canyon that eventually became
5 modern-day Jarbidge. No evidence, however, suggests that Bourne and Escalon
6 necessarily went through the Jarbidge South Canyon to reach Jarbidge. (See *supra*
7 Section III.C.2.a.) Shepherders likewise may have entered the Jarbidge South Canyon
8 at some point before the January 1909 reservation, but the evidence does not show any
9 repeated or widespread use of the Jarbidge South Canyon as a route for sheep. (See
10 *supra* Section III.C.3.) Even if bands of sheep made their way into the Jarbidge South
11 Canyon a handful of times before 1909, such sporadic use of the area does not rise to
12 the level of continuous public use. See *S. Utah Wilderness All.*, 425 F.3d at 769-76.

13 In short, after adding up all of the evidence of activities in the Jarbidge Area, Elko
14 County has suggested the possibility of only minimal and sporadic entries into the
15 Jarbidge South Canyon before January 1909. Even assuming that the several known
16 visitors to the Jarbidge Canyon before the 1909 mining boom — including Winter, Scully,
17 Perkins, Mahoney, Bourne, Escalon, and possibly Baker — traveled alongside the
18 Jarbidge River in the Jarbidge South Canyon, those few uses of the route still fall short
19 of proving that continuous public use occurred along what is now the South Canyon
20 Road before 1909. See *id.* at 772-76 (suggesting that continuous use of a route requires
21 more extensive travel); *Anderson*, 608 P.2d at 1097-98 (finding that the facts supported
22 a right-of-way under Nevada law after multiple maps unquestionably demonstrated that
23 the road in question existed). The evidence is too scant to conclude, without speculating,
24 that any of those visitors traveled on an established route through the Jarbidge South
25 Canyon.

26 Finally, the opinions of Elko County's expert witnesses do not constitute clear and
27 convincing evidence that a right-of-way existed in the Jarbidge South Canyon. McMullen,
28 for instance, made clear that significant commerce and travel occurred in the Jarbidge

1 Area before 1909. (*See supra* Section III.C.6.) Even without any maps definitively
2 showing a route through the Jarbidge South Canyon, McMullen concluded that such a
3 route may have existed based on inferences about likely travel routes through the
4 Jarbidge Mountains' rugged terrain. (*See supra* Section III.C.6.) Her opinion was
5 corroborated by Price, who used modern mapping technologies to define the Jarbidge
6 South Canyon as the fastest route to reach the town of Jarbidge from the south. (*See*
7 *supra* Section III.C.6.) Both witnesses, however, rely on inferences derived from
8 generalities about topography and likely travel routes. While this testimony suggests that
9 travel along the Jarbidge South Canyon possibly occurred before January 1909, it does
10 not establish that any route existed by clear and convincing evidence.

11 Taken together, the evidence falls short of the clear and convincing standard that
12 Elko County must meet. Indeed, even under the less stringent preponderance of the
13 evidence standard, Elko County has not shown that it is more likely than not that
14 continuous public use of the Jarbidge South Canyon existed before the area was
15 reserved as a national forest in January 1909. The mere possibility that a handful of
16 people traveled through the Jarbidge South Canyon is not sufficient to establish an R.S.
17 2477 right-of-way.

18 **C. Absent a Showing of Clear and Convincing Evidence, the Court**
19 **Cannot Approve the Proposed Consent Decree**

20 The Court can approve a consent decree only if it is “fair, reasonable and
21 equitable and does not violate the law or public policy.” *Turtle Island Restoration*
22 *Network v. U.S. Dep’t of Commerce*, 672 F.3d 1160, 1165 (9th Cir. 2012) (quoting *Sierra*
23 *Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990)). The
24 proposed consent decree provides that “[t]he United States will not now or in the future
25 contest that Elko County has an R.S. 2477 right of way for a road running generally from
26 Pavlak Grade to the Snowslide Gulch Trail head [the South Canyon Road].” (ECF No.
27 118 at 7.) Unless Elko County can establish that it already owns a right-of-way through
28 the Jarbidge South Canyon, the proposed consent decree would relinquish the United

1 States' property to the County. As the Court has already ruled, if the consent decree has
2 the effect of disposing of federal land, it would not comply with applicable laws and
3 policies. (ECF No. 507 at 5.)

4 Elko County has failed to show by clear and convincing evidence — indeed, even
5 by a preponderance of the evidence — that it has a right-of-way through the Jarbidge
6 South Canyon. Because the consent decree would give Elko County the disputed right-
7 of-way in contravention of applicable law and policy, the Court must reject the proposed
8 consent decree.

9 **V. CONCLUSION**

10 The Court finds that no continuous public use of the Jarbidge South Canyon
11 occurred prior to the reservation of Bruneau Addition in January 1909. Elko County has
12 accordingly failed to establish that it has an R.S. 2477 right-of-way for the South Canyon
13 Road. The proposed consent decree, however, explicitly recognizes Elko County's right-
14 of-way. (ECF No. 118 at 7.) Without evidence that Elko County owns the right-of-way,
15 the consent decree gives land of the United States to Elko County without following
16 proper procedural requirements. The Court therefore cannot approve the proposed
17 consent decree.

18 DATED THIS 16th day of August 2016.

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21 _____
22 MIRANDA M. DU
23 UNITED STATES DISTRICT JUDGE
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