

NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

NEVADA ENVIRONMENTAL COMMISSION

HEARING ARCHIVE

FOR THE HEARING OF September 16 and 17, 1998

HELD AT: Jarbidge and Elko, Nevada

TYPE OF HEARING:

REGULATORY

YES APPEAL (September 17, 1998)

YES FIELD TRIP (September 16, 1998) Jarbidge, Elko Co.

ENFORCEMENT

VARIANCE

RECORDS CONTAINED IN THIS FILE INCLUDE:

YES AGENDA

YES PUBLIC NOTICE

YES MINUTES OF THE HEARING

LISTING OF EXHIBITS

A G E N D A
NEVADA STATE ENVIRONMENTAL COMMISSION
PUBLIC HEARING

As provided by Nevada Revised Statutes (NRS) Chapter 233B and Nevada Administrative Code (NAC) inclusive, a panel of the Nevada State Environmental Commission will conduct an **appeal hearing on Thursday September 17, 1998, beginning 8:30 a.m.**, at the Elko County Convention Center, the Silver Room, 700 Moren Way, Elko, Nevada.

The Environmental Commission panel members will begin the hearing by conducting a site visit to the South Canyon, in the area of the Bluster and Pine Creek Campgrounds located south of Jarbidge, Nevada. The Commission will conduct the site visit on **Wednesday, September 16, 1998**. The Commission will travel in caravan from Elko to the aforementioned site, the place of the alleged violation. The Commission will depart from the Elko County Convention Center parking lot at approximately 9:30 am. Members of the public intending to travel with the caravan should contact the Executive Secretary at 702-687-4670 extension 3118 by 4:00 pm on September 15, 1998. Members of the public are responsible for providing their own transportation to and from Jarbidge. **Witness testimony will be taken on Thursday, September 17, 1998.**

This agenda has been posted at the Grant Sawyer State Office Building in Las Vegas; the Washoe County Library and Division of Wildlife in Reno; the Department of Museums, Library and Arts and Division of Environmental Protection Office in Carson City, and the Elko County Convention Center in Elko, Nevada.

The following items will be discussed and acted upon but may be taken in different order to accommodate the interest and time of the persons attending.

I. Appeal Hearing - * ACTION

Mr. Gary D. Woodbury, District Attorney, Elko County, 575 Court Street, Elko, Nevada, 89801, appeals the Nevada Division of Environmental Protection's Bureau of Water Pollution Control Finding of Alleged Violation and Order dated July 23, 1998.

The Nevada Division of Environmental Protection's Bureau of Water Pollution Control issued a Finding of Alleged Violation (FOAV) and Order on July 23, 1998 to Elko County, Nevada pursuant to Nevada Revised Statutes (NRS) 445A.675 "Violations: Remedies" and 445A.690 "Violations: Compliance Orders". The Finding alleges that Elko County is in violation of the state's water pollution control law due to activities conducted by the Elko County Road Department as part of its South Canyon Road repair project resulting in a point source discharge to the Jarbidge River. The Division alleges that Elko County violated NRS 445A.465 "Unlawful discharge of a pollutant without a permit". The Division alleges that Elko County failed to secure a water pollution control permit for a "point source" as required by Nevada Administrative Code (NAC) 445A.266(1)(c) and NRS 445A.395.

II. General Commission or Public Comment

Members of the public who are disabled and require special accommodations or assistance at the meeting are requested to notify the Executive Secretary in writing, Nevada State Environmental Commission, 333 West Nye Lane, Room 138, Carson City, Nevada, 89706-0851, facsimile (702) 687-5856, or by calling (702) 687-4670 extension 3117 no later than 5:00 p.m., September 10, 1998.

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NEVADA STATE ENVIRONMENTAL COMMISSION NOTICE OF APPEAL HEARING

A three member panel of the Nevada State Environmental Commission will conduct an appeal hearing in the matter of:

Mr. Gary D. Woodbury, District Attorney, Elko County, 575 Court Street, Elko, Nevada, 89801, appeals the Nevada Division of Environmental Protection's Bureau of Water Pollution Control Finding of Alleged Violation and Order dated July 23, 1998.

The Nevada Division of Environmental Protection's Bureau of Water Pollution Control issued a Finding of Alleged Violation (FOAV) and Order on July 23, 1998 to Elko County, Nevada pursuant to Nevada Revised Statutes (NRS) 445A.675 "Violations: Remedies" and 445A.690 "Violations: Compliance Orders". The Finding alleges that Elko County is in violation of the state's water pollution control law due to activities conducted by the Elko County Road Department as part of its South Canyon Road repair project resulting in a point source discharge to the Jarbidge River. The Division alleges that Elko County violated NRS 445A.465 "Unlawful discharge of a pollutant without a permit". The Division alleges that Elko County failed to secure a water pollution control permit for a "point source" as required by Nevada Administrative Code (NAC) 445A.266(1)(c) and NRS 445A.395.

The appellant asserts that a water pollution control permit is not required as pursuant to NRS 445A.335 "Diffuse source defined", 445A.570(1)(b) "Controls for diffuse sources: Conditions; delegation of administration to county or city", and NRS 445A.680 "Violations: Provisions concerning diffuse sources; remedies and NAC 445A.313 ". The appellant is asserting that their action was a non-point source discharge.

The appeal hearing will be held:

Wednesday, September 16, 1998 (site visit)
and continued to:
Thursday, September 17, 1998
8:30 a.m.
Elko Convention Center, Silver Room
700 Moren Way
Elko, Nevada

The Environmental Commission panel members will begin the hearing by conducting a site visit to the South Canyon, in the area of the Bluster and Pine Creek Campgrounds located south of Jarbidge, Nevada. The Commission will conduct the site visit on **Wednesday, September 16, 1998**. The Commission will travel in caravan from Elko to the aforementioned site, the place of the alleged violation. The Commission will depart from the Elko County Convention Center parking lot at approximately 9:30 am. Members of the public intending to travel with the caravan should contact the Executive Secretary at 702-687-4670 extension 3118 by 4:00 pm on September 15, 1998. Members of the public are responsible for providing their own transportation to and from Jarbidge. **Witness testimony will be taken on Thursday, September 17, 1998.**

Members of the public who are disabled and require special accommodations or assistance at the meeting are requested to notify the Executive Secretary by writing to the Nevada State Environmental Commission, 333 West Nye Lane, Room 138, Carson City, Nevada, 89706-0851; by facsimile to (702) 687-5856; or by calling (702) 687-4670 extension 3117 no later than 5:00 p.m., September 14, 1998.

This notice is issued pursuant to Nevada Revised Statutes (NRS) Chapter 233B. The hearing will be held in accordance with Nevada Administrative Code, (NAC) 445B.875 to 445B.897, inclusive.

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**STATE ENVIRONMENTAL COMMISSION
ELKO COUNTY APPEAL HEARING
SEPTEMBER 16, 1998
Verbatim Transcript of Site Visit to South Canyon**

Panel Members:

Michael Turnipseed, Panel Chairman
Alan Coyner, Panel Member
Mark Doppe, Panel Member

Staff:

David Cowperthwaite, Executive Secretary
Jean Mischel, Deputy Attorney General
LuElla Rogers, Recording Secretary

David Cowperthwaite: The meeting for the Bureau of Water Pollution Control is begun here on September 16, 1998, at approximately 2:00 p.m. Present are Commissioner's Turnipseed, Doppe, Coyner and the Attorney General's representing the State is Bill Frey and Chuck Meredith and the Attorney General for the Commission is Jean Mischel. I will turn this meeting over to the Chairman, Mr. Turnipseed.

Chairman Turnipseed: We are going to go right to the site so we can -

DAG Mischel: Let's take appearances for Elko County -

Chairman Turnipseed: Do you want to do that right now?

Kristin McQueary: Kristin McQueary, Elko County DA's office

Otis Tipton: Otis Tipton, Elko County Road Supervisor

Mike Nannini: Mike Nannini, Elko County Commission

Roberta Skelton: Roberta Skelton, Elko County Commission

George Boucher: George Boucher, Elko County Manager

Mike Murphy: Mike Murphy, Elko County Engineer

Chairman Turnipseed: Let's go to the site and I will explain the rules and then we'll mess with whatever testimony the County wants to put on.

Kristin McQueary: Is this a site of significance, a position involved in the reason for the citation?
Yes. I have asked all you guys, just so the record is clear, to put your name on there. What I would like to do is just sort of a brief question and answer format, have Mr. Tipton explain what he did, how he did and where he did it and this would be the starting point.

Chairman Turnipseed: I won't officially swear you in realizing that you are an honest man and you are going to tell the truth. This record will be transcribed if it goes up on appeal and so explain to us, not - one of the rules is we are here for orientation on what was done, not here today to tell us why it was done because we will get into that more tomorrow with witnesses, direct examination, cross examination, etc. etc. If you will just orient us here as to what we are looking at and then if we go up further into the watershed you can explain to us what we are looking at there.

Otis Tipton: Otis Tipton, Elko County Road Supervisor. What we did when we started work here is where you see the water coming down right now is the old original stream channel. The other channel that you see cutting to your left is where, during the flood event of 1995, the stream channel breached into the road and blocked the road creating this new channel that goes through here.

DAG Mischel: Mr. Turnipseed, I would appreciate it if there is any dispute that the Division have an opportunity to make objections today. This would be answered tomorrow but if there is any dispute as to the facts or the description I think we need to make that clear.

Chairman Turnipseed: Do we have that situation here? Does the Division see things differently than that?

DAG Frey: Well we certainly like to reserve our right to have an objection if we do see a factual discrepancy in our opinion so we will just reserve our right but we certainly want Mr. Tipton to go on and tell his side of the story.

Chairman Turnipseed: O.K. - It looks to me like the majority of the flow is coming from across the canyon. Is that a different fork of the Jarbidge River?

Otis Tipton: Yes, that is Pine Creek.

Chairman Turnipseed: And of the two which one supplies the most water? Today obviously it is Pine Creek but in spring runoff or during other times of the year -

Otis Tipton: I don't have the proper knowledge to answer that question.

Chairman Turnipseed: Is there anything further that we need to understand about this site?

Otis Tipton: Yes. This is where we originally started and the water was not running in this location, the original stream bed. It was going through over here to your left where it breached the road. The water was actually running down where the road is placed and out through here. What we did is, we worked, we started from this end - there was no live water - and we cleaned out the original channel up to where the river would come back in and we left a 6 foot dike. When we cleaned the channel we took it down to a depth just to where the water was seeping from the water but it would not run. It wasn't running, it was just puddling in the bottom. This area that you see right down here - where the river had run through - this area was actually ditched out. When we turned the water back into the original channel the water was running straight to this bank and what this was right here that is filled in is this is just a natural sedimentation area that we had so we didn't have - we had a natural catch to where we didn't have to disturb any more ground or create any more problems with it.

Kristin McQueary: Mr. Tipton, what sort of equipment did you use when you came up here to do the work?

Otis Tipton: When we started the work, I went to Cashman Equipment Company, we rented a D-6 Dozer, a 322 Excavator, and a 950 Loader.

Kristin McQueary: What sort of care did you take when you rented the equipment?

Otis Tipton: Knowing I would be around streams all the equipment had 1100 hours or less - it was virtually new equipment. The D-6 Dozer having 1100 hours, the 922 and the 950 having 500 hours or less. We inspected it, we made sure that there were not leaks, I mean it was all virtually brand new equipment.

Kristin McQueary: What other equipment did you use up here?

Otis Tipton: I brought a D-6 Dozer from the County that Cashman had just gone through the engine. We brought it in the shop, it was all inspected to make sure there were no hydraulic leaks or any problems with it.

Kristin McQueary: Please continue with your narrative.

Otis Tipton: Anyway, like I was saying, instead of - when I come up here instead of trying to construct the sediment retention area which would have caused more disturbance and really more sediment in this area - we had the perfect scenario here - we had a natural one - and like I said this water was running straight through here and after awhile as the sediment had built up it just went right on over into the natural stream channel.

Chairman Turnipseed: Any questions from Environmental Protection?

DAG Frey: Mr. Turnipseed, I will ask just one question - I'll just make this objection at the start so we can go on - there will be certain amount of repetition and duplication of the testimony today with what will be answered tomorrow. I just want to make that clear now so we just don't have to keep going over certain things.

Chairman Turnipseed: I would like to limit this portion of the hearing just to orientation so we can see what was done, not necessarily why it was done or for any part of the violation that is alleged - more just for our visual knowledge and then tomorrow we'll get into the laws, etc. etc. etc.

Kristin McQueary: Just for clarification if I may. Is this the bulldozer track here or what is this here.

Otis Tipton: Yes. This is where we traveled with equipment down through this area right here to go

over in there and start the work.

Commissioner Doppe: I have a question, Mr. Chairman. Mark Doppe with the Commission. Clarify again for me, what happened was a storm had caused the original channel to divert over to here?

Otis Tipton: That is correct.

Commissioner Doppe: O.K - and it was cutting into your road up above, is that right?

Otis Tipton: It breached into the road up above and the road where it is right now was actually the stream channel after the flood.

Commission Doppe: Gotcha! Prior to the flood event what we see now up here was the original channel?

Otis Tipton: That is the original channel, correct. But you understand it wasn't a storm that did it -

DAG Mischel: Excuse me. You will have an opportunity to explain more the questions right now are really just to orient to the location. Will you be available tomorrow to testify at the public hearing?

Otis Tipton: Yes, I will.

Chairman Turnipseed: O.K. - let's move on up -

Otis Tipton: And the other thing is the pictures that you have, I took a picture probably about 2 - 3 hours right after we had breached up above the dike that we had left and you can see that the water, well you can see over in this area, it was running right straight down forward and this sediment retention area that we have, it worked well. I mean this is where it went and then it diverted right back into the other channel again.

Chairman Turnipseed: Let's move on up the stream channel

Kristin McQueary: The stream channel or the road?

Otis Tipton: Whichever way.

Chairman Turnipseed: Let's just walk in the road.

We have moved up the road-bed maybe 100-150 feet to a new site, apparently right where the stream channel was right next to, or in, the road. Do you want to explain to us what happened here and what we are looking at?

Otis Tipton: Otis Tipton, Elko County Highway Department. What we are looking at is after the flood event of 1995 the stream channel come down where the road is now and it went right out through here and back into the original stream channel up there. What you are looking at over here is this is just the natural sedimentation and debris that come down with this flood event. This has not been touched in the whole area with any equipment or anything.

Chairman Turnipseed: Mike Turnipseed speaking. Was this ah - we had pretty heavy runoff just from snow melt in '95. Was that the same here or did you have rain on snow?

Otis Tipton: Rain on snow.

Chairman Turnipseed: Rain on snow.

Otis Tipton: Yes. It was both events.

Commissioner Coyner: Commissioner Coyner. Otis am I standing on the old road-bed right now? Is there any new cut here or is this where the old road-bed was?

Otis Tipton: This is where the original road was.

Chairman Turnipseed: How about the fill that we are standing on. You put this here as part of your work when you were in the stream bed or no?

Otis Tipton: This fill that you see right here?

Chairman Turnipseed: Yes.

Otis Tipton: Was taken off - what you don't see is when this stream bed had cut down into here there was such sedimentation and those rocks hanging up that you see - what we did for safety is we reached up with the track hoe and we cleaned off the rocks and we brought a lot of it down where it was dangerous and stuff, and that is what we put in to help fill it up too.

Chairman Turnipseed: There appears to be some mineralization or some discoloration in the stream bed. Are there hot springs here in the canyon?

Otis Tipton: Actually I -

Unknown: Yes - arsenic and iron.

Otis Tipton: You'll notice that, not just here but the springs all the way through the canyon you will see this mineralization.

Chairman Turnipseed: For the record, Mike Turnipseed again. We have moved up the road another 100 - 150 feet and west maybe over 50 feet over to where the stream is now. Do you want to explain to us again what we are looking at here.

Otis Tipton: Otis Tipton, Elko County Highway Department. What we are looking at is this is the natural stream bed as it existed pre 1995 flood event. Down the stream you can see the original channel where we had cleaned out the debris and up the stream you can see the same thing and how the trees are closer in - obviously it is a better shaded area.

Kristin McQueary: Mr. Tipton would you explain the mechanics of cleaning the creek bed.

Otis Tipton: The mechanics of cleaning the creek bed - what we did is not to, to try to keep as few disturbances as we could - like in this area where it is an open place we actually take the cats up here, shove it down and then I would shove it over and we have done this in several open places as you can see around here, this is just the natural area. This hasn't been touched, and we more-or-less just took it out, like I said, to where the point the water was subbing out of the bottom but it wouldn't run and we brought it into these areas. Now you have to keep in mind, when you are looking at this, you are only looking at 2 days worth of work. That is all we have done here. We haven't got a chance to finish anything, clean it up, or do any stabilization or anything. This is just 2 days work before we were shut down.

Kristin McQueary: Take us to the next site please.

DAG Frey: Can I ask some questions before we leave? This is Bill Frey. This is the original stream-bed that you cleared out with the equipment that you brought on, as you described at the first stop?

Otis Tipton: Yes.

DAG Frey: To get the equipment there did you have to cross the river with the equipment and then clean out this stream bed?

Otis Tipton: We crossed the river in that one location where we were standing.

DAG Frey: O.K. Thank you.

Commissioner Doppe: Mark Doppe from the Commission. How far up did you go, continue to clean, say from where we are now.

Otis Tipton: Approximately at total of 900 feet.

Commissioner Doppe: Continuing up from here though?

Otis Tipton: From here that would just be an estimation but the whole entire stretch is about 900 feet.

Kristin McQueary: One clarification. Mr. Tipton did you do any work on the other side of the creek, the side opposite of where we are standing?

Otis Tipton: No. No, I tried to keep all the material on this side so when we finished up in here my plans were to clean all this up and bring it out and this was going to be part of placement of the road.

Mike Turnipseed: Let's move on up the channel - well, take us to the next site that you would like us to see.

Otis Tipton: Apparently we have moved to the top of the disturbed area. Can you explain to us what we are looking at here.

Otis Tipton: Elko County Road Supervisor. After we had worked up and cleaned the channel, we left a 6 foot dike in this area. We let everything sit all night and that evening we had quite a few people from the town that asked if there was anything that they could do to help around here and of course I didn't want them around the equipment but I told them when we did breach the dike if we could get some volunteers to have nets and buckets and if there were any fish stranded in the channel to go ahead and pick them out and place them over there in the new channel. So the next morning, which was the morning of the 22nd, we took the track hoe - which was the 322 Excavator - we walked up to this end, we built a pad up on top and we reached out and breached the

dike and then we turned around, when the water went running through we turned around and placed the material that was piled up here in this area - now there was about, I am going to say the material that was piled up in this area was probably another 5 feet taller and so he reach around and grabbed all that material and smoothed all this out right in here. When we were placing then he turned around and he come down through this area and we started smoothing out the bottom so we could come in with the hoe. Now when we did this there wasn't any water. This water has subbed since we stopped working and of course up above here there's one spring that was a spring box that's a supply to Pine Creek Camp Ground, and it is running out - it runs quite a bit right there and they haven't repaired it or have done anything - they just left the pipes there.

Kristin McQueary:

Mr. Tipton, what is that black pipe there?

Otis Tipton:

That is the pipe that used to run down to Pine Creek Camp Ground, the Forest Service installed the spring box then the pipe line down the road.

Kristin McQueary:

Is it in operable condition?

Otis Tipton:

No it is not. No.

Chairman Turnipseed:

When you say bottom, for the record for when this is transcribed, you are talking about what was the stream bottom that was in the road - I can't remember what context you used that in but basically what we are looking at is some puddling of water from the old stream channel in what became the road or what was once the road.

Otis Tipton:

Yes. Like I said, when we were working up this hasn't subbed up but down below, in 1996 when we were up here with the Forest Service and that - we come up one time and the Forest Service was doing the work right after the flood event - they had the same problem and that portion down by Pine Creek Camp Ground has since sealed itself up but for some reason, after that event, the water just kept subbing up from the bottom and what they did was they put a Geo-Tech mat and about another 1½ - 2 foot over it. Now since then it has stopped. I don't notice it subbing a lot but in this area, of course you can see by the terrain, we would have to haul in material - there should be about 4 more feet of material hauled in here. We had the Geo-Tech mat - we had everything to finish it and do it correctly and once it was done, it we have been able to continue on - it wasn't subbing at that time - if we would have just continued on with the work for another day or two you would never even see any of this.

Chairman Turnipseed:

Is it your testimony that with exception when you crossed the river down at the lower end you were working in the dry until you got up here and then you got up on the bank with the track hoe and then breached the dike so you were in the dry again with the exception of the bucket.

Otis Tipton:

That is correct. That is absolutely correct. And then when the water was cut off we went down through here with the track hoe and we had about 12 volunteers from Jarbidge that were going down below. I didn't see any fish but I heard down at the end that they found 2 trout. Most of the time when water is cut off like that fish pretty much find their way out as the water goes down.

Chairman Turnipseed:

Any questions from counsel? Either side?

DAG Frey:

No.

Commissioner Coyner:

I've got one. Commissioner Coyner. Can you describe for me Otis the clarity of the water at the time you were here - clear, less clear, muddy - how did it look? The water was here, you were in the dry working. Was this water clear?

Otis Tipton:

Oh yes. Yes. We never ever disturbed this area the whole time we were working. There is a 6-foot dike left here, the stream was coming right down through here and it was perfectly clear. The only time that the water discolored was when we breached the dike, we turned it into the new channel, the water was probably discolored - it wasn't with the clays but it was from the natural sands and stuff the bottom of the stream bed - I am just going to say 1½ - 2 hours and that was it. It ran perfect - a matter of fact,

everybody commented how surprised how fast it ran clean.

Kristin McQueary: Mr. Tipton - Kristin McQueary again from the DA's office - would you clarify was there any other road work in the Jarbidge Canyon while you were working in the South Canyon area?

Otis Tipton: Yes. Our blade crews or our normal road crews which make the rounds every year, they were coming through the Diamond A and they were working in the northern part from town, probably about 6 miles from our location and what I am talking about our normal blade-ing crews - this is two blades, motor graders, a rock raker and sometimes we will have a loader working with them and they are doing rock, picking up rocks, cleaning up sluff and they do this. This is a once-a-year regular thing for us to make our rounds through here. What we do is we will come through the Gold Creek Way, down through the Diamond A, on to the main road, go all the way up through Jarbidge, up Pavlak Grade and out Charleston.

Chairman Turnipseed: For the record, the Diamond A is down on the Owyhee Desert, the ranching operation on the Idaho side.

DAG Frey: This is Bill Frey. I would like to just repeat my objection of earlier that we don't need testimony that is going to duplicated in the transcript that is going to be presented tomorrow and is it appropriate for me to ask some questions now?

Chairman Turnipseed: Sure.

DAG Frey: Mr. Tipton, when we came up the road here - I am looking north or downstream from us - there seems to be water on the road and next to the road. Could you tell us why that is?

Otis Tipton: Well it could be from several events. For one thing in this whole area water subs. You are in a canyon where water, you are in a gravel area and water moves all the way through. You are standing on water right now.

DAG Frey: Are there springs in that area?

Otis Tipton: There is a spring right here. This is a spring that hasn't been repaired after the flood and, if you want to walk up here, this spring is actually running out water dumping it right down in here, along the side too.

DAG Frey: My next question is to talk about the dam you made up here, and I use that incorrectly, you called it a - did you call it a berm?

Otis Tipton: No. What we did is, there was no dam that we created. This is a natural area. See on the other side where the gravel had built up that hasn't been touched?

DAG Frey: Right -

Otis Tipton: This was all natural. The stream was running down here. All we did was leave that 6 foot dike in there. It was perfectly natural we never built -

DAG Frey: Then you never built anything - you just -

Otis Tipton: No we never built anything -

DAG Frey: You just dug up to it -

Otis Tipton: We went up to it, left the 6 foot dike, the next day we let everything settle in where we were working, we come up, we had volunteers from Jarbidge, we breached it, the water went down that way and we started coming down this way.

DAG Frey: Thank you.

Chairman Turnipseed: Is there anything else you would like us to see Kristin?

Kristin McQueary: What I would like to ask the Commission to do is hike up to the trail head so you can compare and contrast what Mother Nature has done to this river as opposed to what the county has done and no further narrative would be necessary unless you guys had questions or would like something specific pointed out.

Chairman Turnipseed: O.K. We will recess the hearing for today and we will walk up to whatever you want us to see what nature did.

DAG Mischel: It is my understanding that there is an exhibit that Elko County wanted the Commissioner's to have an opportunity to review.

Kristin McQueary: Elko County and the Nevada Division of Environmental Protection had a show cause

meeting at the end of August. Most of the county's statements and witnesses and position is in that transcript. Rather than putting on lots of live witnesses we would like to offer the transcript. We have made copies available for the Commission and Ms. Mischel and I understand we need to get one more copy for -

DAG Mischel: There is enough for us.

Kristin McQueary: O.K., and Mr. Frey has some comments about that.

DAG Frey: I just want to make a comment. My objection isn't to you receiving the transcript, which in agreement with. I just want to make a general objection. The contents of the transcript deal with many areas, many of which I consider irrelevant to the appeal that is going on. The appeal is based upon an order issued by the Division to cease and desist the work in the stream. There is a lot in the transcript that goes to reasons why the road is necessary, problems with the fish in the stream, etc. and I will make a more formal objection tomorrow for the record. I am just making that objection now so that as you peruse the document you keep that in mind. That is all I would ask.

Chairman Turnipseed: My question is going to be the relevance of the transcript since it was a show cause hearing obviously over the same incident but other things. Are we going to cover the same things tomorrow?

Kristin McQueary: I will have the witnesses available should you guys have further follow-up questions or I see questions develop through today but it is the county's position, and I am sure Mr. Frey agrees with me, that this is essentially a legal argument. It is the county's position though that there are items in that transcript which Mr. Frey may consider irrelevant which goes to the heart of the county argument before you tomorrow and we would ask that you consider all of it, knowing, of course, that it is your right to discard what you aren't interested in.

Chairman Turnipseed: Commissioner Doppe?

Commissioner Doppe: I make a motion to accept it into the hearing.

Chairman Turnipseed: Is there a second to the motion to accept the document?

Commissioner Coyner: I second it.

Chairman Turnipseed: It has been motioned and seconded. Any further discussion?

Commissioner Doppe: Aye.

Commissioner Coyner: Aye.

Chairman Turnipseed: Opposed?

DAG Mischel: For the record the Commission will not be reviewing the exhibit in tandem. They will look at it individually and will not discuss it until we reconvene tomorrow.

Chairman Turnipseed: O.K. We'll be in recess, let's go up the -

John Carpenter: Mike, is it proper that I make a statement?

Chairman Turnipseed: We'll have a public comment portion tomorrow after the hearing.

John Carpenter: I would like to make a statement now that - John Carpenter, Assemblyman representing the Elko District 33. I believe that while everybody is here that it is pertinent that this statement be made. As you can see and as it was presented here, the county did not get the opportunity to finish this project and I think that the environmental EPA people recognize that and so the county would like to be able to get a permit to come in here and finish this project because what we can see here, if this is not finished and we have just a normal run-off next year it is possible that this thing could be breached again and that we would then take a lot of this sediment and silt down so I think that it's - while you are here look at it. This is not a completed job. It wouldn't take the county very long to do this but I think that is one of the main situations here, no matter which side you are on is that this needs to be done and it needs to be finished. We think that the EPA has recognized that, the county has recognized it and we would like to - anything that we could do to help that position along we would like to do that because we don't have too much time to do it because it is going to be snowing here and etc., etc. but if you all look at this I think you can see

the situation, that it doesn't take too much water to get over this berm over here and it could be coming right down into the road again and that's a bad situation. I wanted to make that statement while everyone is here and can look at it.

Chairman Turnipseed: Well I am not sure that is relevant to today's portion of the hearing but thank you for those statements.

Chairman Turnipseed: Now we will recess the hearing and move up the canyon to see what Counsel wants us to look at.

**STATE ENVIRONMENTAL COMMISSION
ELKO COUNTY APPEAL HEARING
SEPTEMBER 17, 1998 - Verbatim Transcript
Elko Convention Center**

Panel Members:

Michael Turnipseed, Panel Chairman
Alan Coyner, Panel Member
Mark Doppe, Panel Member

Staff:

David Cowperthwaite, Executive Secretary
Jean Mischel, Deputy Attorney General
LuElla Rogers, Recording Secretary

Chairman Turnipseed: In the matter of the Division of Environmental Protection versus the County of Elko. This is a 3-member hearing panel as prescribed by statute and by regulation. For the record, my name is Mike Turnipseed. I will be chairing the meeting today, however, I am not the chairman of the Environmental Commission, I am the Nevada State Engineer. On my right is Mark Doppe, also of the Environmental Commission. On my left is Alan Coyner, also of the Environmental Commission. This meeting is an open meeting, open to the public, the meeting has been posted in accordance with the Open Meeting Law -

Operator: Hello -

Kristin McQueary: Gary Woodbury is on Line 1 if you just want to push in on the line.

Operator: I push in on the line and then how do I get it on speaker?

Kristin McQueary: It should just come up on speaker. If it doesn't, push the speaker button

Gary Woodbury: Gary?

Kristin McQueary: Yes.

Gary Woodbury: We are all here, we just started. Can you hear me?

Kristin McQueary: Yes.

Chairman Turnipseed: Good morning Gary. Mike Turnipseed.
The purpose of today's hearing is to collect evidence and testimony pertaining to the matter. There will be certain rules. I will try to exclude any evidence or testimony that I don't feel relevant. I don't expect to hear anything about the Endangered Species Act or why the bull trout was listed - things of that nature. I am more interested what you did and why you did it. Today's testimony is an evidentiary hearing. We will have direct testimony from the witnesses called by the Division, cross-examination by the County, re-direct by the Division and when their case in chief is finished we will have witnesses called by Elko County for the purpose of direct examination and witnesses will be available for cross-examination by the Division and once that question gets finished by re-direct examination by the County.
When the evidentiary portion of the hearing is finished the meeting will be open for public comment. At that time you can make any comment you want, it won't be sworn, it will just simply become part of the record.
First of all, statement of appearances.

DAG Bill Frey: Bill Frey for the Division of Environmental Protection.

Kristin McQueary: Kristin McQueary from Elko County for Elko County and Gary Woodbury is appearing by telephone, he is the District Attorney.

Chairman Turnipseed: Are you going to have him examine witnesses by telephone?

Kristin McQueary: No. That is not anticipated.

Chairman Turnipseed: Do you prefer to make an opening statement and then go right into your case in chief or would you each like to make an opening statement preliminary to the evidentiary hearing as to what you are going to prove and how you are going to prove it?

Kristin McQueary: Mr. Turnipseed, Mr. Frey and I have, because of the nature of the situation and our basic agreement on facts are going to do sort of an expedited hearing. He is going to present a couple of witnesses and I'll have either a couple of rebuttal witnesses, but we perceive this as a legal argument and primarily the focus of my presentation will be on our legal argument. There are some exhibits that you have been provided with but we aren't going to have a whole bunch of live witnesses for you.

Chairman Turnipseed: I should state for the record that we had a tour of the site yesterday for orientation purposes, however, we had some testimony that was recorded and the testimony to separate out as to what was done versus why it was done but I hope to clear up some of that today. I don't think any of us on the panel are lawyers so we won't be able to make a ruling based strictly on the legal issues, however, I am more interested in the factual issues. Of course we were handed a copy of the transcripts of the show cause hearing yesterday. I believe all the panel members have read those and you were going to offer that as an exhibit. That will be offered as Exhibit A -

Kristin McQueary: Mr. Chairman, we have it listed on our exhibit list as Exhibit G. We started preparing our exhibit list a couple of days ago.

Chairman Turnipseed: O.K. - It has been marked as Exhibit G. I don't remember if we accepted that into the record yesterday -

DAG Mischel: We did.

Chairman Turnipseed: We did? O.K. - The transcript of the show cause hearing is marked as Exhibit G and is entered into the record. Shall we go off the record for a moment to mark what other exhibits are going to be coming into the record?

DAG Frey: Mr. Chairman, we submitted our exhibits to Mr. Cowperthwaite the other day for marking so I believe they are all marked. And may I add one other thing? I think the County and the Division are in agreement that we may not be using the exhibits in the order that they are marked.

DAG Mischel: Counsel have these been stipulated as to admissibility?

Kristin McQueary: Yes. I will stipulate to the admissibility of the State's exhibits.

DAG Mischel: 1 through 6?

Kristin McQueary: Yes.

Chairman Turnipseed: Alright. Exhibits 1 through 6 on behalf of the State are admitted into the record. Any other preliminary matters to take care of?

DAG Frey: State of Nevada would you call your first witness?

Chairman Turnipseed: Mr. Chairman I was going to make a brief opening statement.

DAG Frey: Please do.

DAG Frey: Thank you.

Good morning Commissioners, counsel, ladies and gentlemen. I am Bill Frey, Deputy Attorney General representing the Nevada Division of Environmental Protection. With me this morning are: Allen Biaggi, Administrator of the Division; Joe Livak, Supervisor of the Enforcement Section; Icyl Mulligan, Permit Writer; and Chuck Meredith, also from the AG's office.

I would like to first thank the Commission staff, the County, the County Commission and the DA's office and all others participated in arranging yesterday's field trip. We took yesterday the testimony of Mr. Tipton who explained how and where the work was performed on the South Jarbidge Road and we appreciate the opportunity to have gone out to see the sight.

This morning's hearing is an appeal by Elko County of an order it received from the Division. NDEP is the agency charged by state law with regulating water pollution control in the state. In addition, pursuant to 445A.720, the Division is the final

authority in the administration of water pollution prevention. As such, the Division has the statutory authority under 445A.675 to issue orders whenever anyone violates or is about to violate any water pollution control statute or regulation. Acting in that capacity DEP issued such an order to Elko County to cease and desist from it's work on the South Jarbidge River, on the road next to the South Jarbidge River. The order was issued because the County had failed to obtain a temporary authorization to discharge, commonly referred to as a rolling stock permit, and the County has appealed that order.

Today's appeal is limited to two issues:

it did,

1) Did Elko County need a state water pollution control discharge permit for the work and

2) Did the County have the permit? That is it.

As I read the statutes, the Commission has three options: It can affirm; modify or reverse the order. All other issues, such as the need for the road, the ownership of the road, the status of the bull trout are irrelevant and not the subject of today's hearing. NDEP offers no opinion on these matters and believes that any dispute the County has regarding these issues is more properly reserved for a different forum with other parties.

We will present testimony today that Elko County has obtained such rolling stock permits in the past, that the Division notified the County of its need for the permit and that none was obtained. There will be testimony that the County used equipment that is considered rolling stock, that rolling stock is regulated as a point source, that the equipment placed a pollutant - that being dredged soil, sand and rocks - into waters of the state and that this action without a permit violates State Law. That concludes my opening statement.

Chairman Turnipseed:

Would you call your first witness please?

DAG Frey:

Thank you. I would like to call Icycl Mulligan as my first witness and I would like you to excuse the arrangement we have here, the witness will sit next to me.

Chairman Turnipseed:

Before you sit will you raise your right hand? Do you swear the testimony you give today will be the truth, the whole truth, and nothing but the truth before this panel?

Icycl Mulligan:

Yes, I do.

Chairman Turnipseed:

Have a seat please.

DAG Frey:

Will you state your full name for the record?

Icycl Mulligan:

My full name is Icycl Kathryn Mulligan

DAG Frey:

And what is your occupation?

Icycl Mulligan:

I am an Environmental Scientist for the Nevada Division of Environmental Protection, I am a permit writer and I am a geologist.

DAG Frey:

How long have you worked at the Division?

Icycl Mulligan:

Going on 9 years.

DAG Frey:

And specifically where do you work at the Division?

Icycl Mulligan:

I work in the Bureau of Water Pollution Control for DEP.

DAG Frey:

How long have you been there?

Icycl Mulligan:

A little over 5 years.

DAG Frey:

That's in the Bureau of Water Pollution Control?

Icycl Mulligan:

That is correct.

DAG Frey:

Before you went to the Bureau of Water Pollution Control where did you work at DEP?

Icycl Mulligan:
program.

I worked in the Bureau of Water Quality Planning in the non-point source pollution

DAG Frey:

What are your responsibilities at the Bureau of Water Pollution Control?

Icycl Mulligan:

My main responsibilities are to draft permits and I also inter-relate with the public, assist the public in general information about permitting issues.

DAG Frey:

Before I go into the permitting issues I would just like you to give us a summary of

your educational background.

Icyl Mulligan: I have a degree in history from the University of Nevada. I have a masters of science degree from the University of Nevada in geology. I have additional course work in renewable natural resources and I have the equivalent of almost 900 hours in fire science training.

DAG Frey: Thank you. Have you had special training in water pollution issues.

Icyl Mulligan: Yes I have. Again, my renewable natural resource training, seminars, conferences. This spring I attended the International Erosion Control Society's meeting in Sparks, Nevada and I took a class there on construction at stream crossing and there were other issues there, very good papers over a three-day period.

DAG Frey: Do you belong to any associations?

Icyl Mulligan: Yes I do. I belong to the International Erosion Control Association.

DAG Frey: All right. Let's go back to the permit. What types of permits do you write at the Bureau of Water Pollution Control?

Icyl Mulligan: I write discharge permits and that can be for anything from wastewater treatment plants to well testing, on the temporary permits now well testing, remediation, rolling stock permits, de-watering permits, almost any category of temporary permits that we would write. I write zero discharge permits, NPDES permits as well as ground water permits.

DAG Frey: Who needs to apply for a temporary permit?

Icyl Mulligan: Anybody that is going to be needing one would be an individual - it could be a contractor, it could be a city, a county, a federal agency, any responsible party.

DAG Frey: What activities would these people or entities need to be conducting? What is the activity when they would get a permit?

Icyl Mulligan: It would be for discharges to waters of the state, primarily.

DAG Frey: Could you tell us a little about the specifics of what these permits include?

Icyl Mulligan: Well NPDES permits of course is surface water discharge permits -

DAG Frey: Let me narrow it down for you. What specifically is included in a rolling stock permit?

Icyl Mulligan: O.K. - a rolling stock permit - again is for authorization to discharge pollutants into waters of the state and this would primarily concern soil, rock, sand, that type of thing. The permit stipulates that any equipment used in the stream zone - wetland area, must be steam-cleaned before it enters any water way, it has to be inspected daily for leaks and any type of problems, say hydraulic leaks, fuel leaks, and then there is the BMP's - part of it that cites specifically are incorporated in the permit for water pollution control to prevent erosion, sedimentation, siltation, and anything else that is specific to the site would be incorporated into that permit. There is general boiler plate language but it is site specific.

DAG Frey: Let me show you a document and I will just ask you to identify it. It has been previously marked as State's Exhibit 1 and we have it as 2 pages but if you could identify what this is.

Icyl Mulligan: Yes. This is -

DAG Mischel: Could you just describe what a BMP is - I'm not sure -

Icyl Mulligan: Oh, I'm sorry. A BMP is a Best Management Practice. The state has BMP Manual that lists these practices. There are many of them available, NRCS has them, cities and counties may have their own, they list the best management practices for controlling pollution in streams and for any other type of activity that might carry sediment into a waterway or stream. It would include things like - just for instance - silt fence, straw bales, erosion control matting, you know there's many, many different types of treatment that can be used to prevent pollution, erosion, sedimentation into waterways. Getting back to the document, Exhibit 1, this is an EPA form we use as an application form for a temporary permit, particularly in this case a rolling stock permit. It is basically asking for the responsible party information - name, address, telephone number, correct mailing address, and then of course the important signature. The

operator who does the actual work is also listed on here, same thing responsible party information.

DAG Frey:
Icyl Mulligan:

And the second page?

This is the guidance that we use and this guidance is a list of information that is necessary to be submitted to obtain the permit. Realizing it is rather generic - I can see one - I can read this, A narrative description or a mini work plan of the nature and scope of the project to include:

The purpose of the project and what it is;

The time-frame of the proposed project and its duration;

The kind of equipment to be used and how it will be operated and where;

A description of the physical location of the site;

A description of the work to be performed and where and how, reach by reach of the stream, if multiple sites;

The latitude and longitude, township, range and section;

The Best Management Practices to be implemented to prevent erosion to protect and restore the riparian vegetation of the stream zone that will be disturbed and for stream bank stabilization to protect water quality;

A topographic map with the site delineated and the proposed point or points outlined where the work in the stream, river, wetlands, will be conducted;

A site plan of the area showing the location and details of specific work elements;

A U.S. Army Corps of Engineer permit or clearance to conduct work must be done;

A State Lands, Department of Conservation and Natural Resources, clearance - they have their own permitting program for navigable waterways that doesn't apply to all streams;

And NDEP Bureau of Water Quality Planning has the State 401 Certification under certain circumstances - Mr. Glen Gentry does those -;

and then any other clearances that might be needed, say from NDOW. For fisheries interest many times they will stipulate that certain things need to be done protected, for instance spawning gravels are critical and they may have some suggestions on what needs to be implemented and that language could be incorporated into the permit. For instance, in here I have listed from June 1 to September 30 for the Truckee River there is a window of working after that time because spawning season starts and they cannot be in there.

You may have to check with ditch companies, conservation districts, and the cities or counties may have some specific concerns about a permit location.

The fee is \$250 for a temporary permit and then it lists the application form, EPA Form 1.

DAG Frey:

Is it true that you use the application form, the EPA application form, simply as a matter of convenience?

Icyl Mulligan:

That is right, it is just strictly a form that asks for responsible party information.

DAG Frey:

O.K. - thanks. Are you familiar with NRS 445A.465?

Icyl Mulligan:

Yes. That is on this poster board here -

DAG Frey:

And it says "except as authorized by a permit" and the word permit as used there is that consistent with the permits that you have described and that you write?

Icyl Mulligan:

Yes.

DAG Frey:

It goes on to say "except as authorized by a permit it is unlawful for any person to discharge from any point source any pollutant into waters of the state" - do you see that?

Icyl Mulligan:

Yes I do.

DAG Frey:

I would like to ask you some questions about that.

Icyl Mulligan:

O.K.

DAG Frey:

Like I say, we discussed the kind of permit that one would need and I am going to ask you some questions and sort of going to go through the statutes in reverse order. The

first one I would like to do is talk to you about waters of the state. Do you have a definition for that?

Icyl Mulligan: Yes there is, it is actually described in the - well you have it here already - in the statute.

"Waters of the state means all waters situated wholly or partly within or bordering upon the state including but not limited to: all streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems and drainage systems, all bodies or accumulations of water surface and underground, natural or artificial."

DAG Frey: In that list, I guess in number 1, what are the areas that we are concerned with out in the Jarbidge -

Icyl Mulligan: O.K. - we are concerned with streams, water courses and springs.

DAG Frey: And how about waterways?

Icyl Mulligan: Waterways, water courses, yeah.

DAG Frey: O.K. - Let me show you Exhibit 6 -

Icyl Mulligan: Yes.

DAG Frey: Could I get you to identify that?

Icyl Mulligan: Yes, this is a conceptual cross section of a stream body -

DAG Frey: Let me interrupt you so that we are clear. This does not, is not depended to depict the Jarbidge River.

Icyl Mulligan: No it is not. No.

DAG Frey: O.K.

Icyl Mulligan: This exhibit merely shows where the ordinary high water mark would be and where a low channel flow would be and when we do rolling stock permits we address the area in the stream zone between the ordinary high water mark even if the water at the time is only in the low-flow channel.

DAG Frey: O.K. - I am going to have to go back over that to make sure I understand. When we use the words water way or water course we are talking about what is marked on this exhibit as between the ordinary high water mark?

Icyl Mulligan: Yes, for the stream zone or water way.

DAG Frey: So as the flow - I ask you to look at what you marked as the low-flow channel.

Icyl Mulligan: Yes.

DAG Frey: Do you still then include, when the water is flowing that low, the area to the left of that as being in the water course even though it is above the water?

Icyl Mulligan: Yes it is included and -

DAG Frey: Why is that?

Icyl Mulligan: The reason is that any work that we conducted in that way would still discharge pollutants, i.e., sand, rock, and gravel that could be carried into flowing water and therefore would be pollution into waters of the state and that is part of the statute as well.

DAG Frey: O.K. - did you draw this?

Icyl Mulligan: Yes.

DAG Frey: Nice job.

The next portion of the statute I would like to ask you about is, we dealt with waters of the state, if you would flip back to the previous statute - 465 - is a discharge from any point source of any pollutant - could you tell us what a pollutant is?

Icyl Mulligan: A pollutant -

DAG Frey: Is that also defined by statute?

Icyl Mulligan: Yes it is. It is in 445A.400 - I will read it - "Pollutant"

1. Means dredged soil, solid waste, incinerator residue, sewage garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.

DAG Frey: And out at the Jarbidge River site what of those items are we concerned with?

Icyl Mulligan: We are concerned with soil, rock and gravel and sand.

DAG Frey: Sand. Very good.

O.K. let's go back to 465, we have covered 2 of them, the pollutant and waters of the state so the question then is we are talking about a discharge from a point source. Could you tell us about a point source? How is that defined.

Icyl Mulligan: O.K. - it is also covered in the statute and I will read that so that I have the language correct?

"Point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. The term does not include return flows from irrigated agriculture.

DAG Frey: O.K. In regards to the work that was done in Jarbidge which one of those items are you concerned with?

Icyl Mulligan: The rolling stock, primarily.

DAG Frey: Are there others that -

Icyl Mulligan: Well that would mainly be it.

DAG Frey: O.K. - and how do you define rolling stock?

Icyl Mulligan: Rolling stock refers to any wheeled or track heavy equipment vehicle that is working in or digging a stream zone or water course.

DAG Frey: O.K. - we're talking about point source and I know in the statutes they also refer to diffuse source and I would like to ask you first is there a difference between the term diffuse source and non point source?

Icyl Mulligan: The state refers to it as diffuse source, the federal agencies refer to it as nonpoint source.

DAG Frey: O.K. Could you tell us the difference between point source and diffuse source?

Icyl Mulligan: A diffuse source is discharge of any pollutant that is so diffused that it is not readily discernible and cannot be limited or confined to a discrete conveyance. A point source is just that, it is a point source discharge from a specific place or by a specific method. For instance, a trackhoe digging in a creek, that is a point source discharge by the action of the digging and the release of the sediment into the stream.

DAG Frey: How about if a backhoe was to dump its bucket into the stream?

Icyl Mulligan: Dumping dirt in the stream? Yes. That would also be the same type of release. You are releasing sediment and sand into that water course.

DAG Frey: I am going to ask you about a section in the Nevada Administrative Code and that is section 445A.309. In it is a definition of diffuse source and it includes in #4 "construction of buildings, dam and roads". I would like you to explain why the work that was done out at Jarbidge fits point source based on your rolling stock explanation and why does it fit into this buildings, dams and roads.

Icyl Mulligan: Right - well because it was a discrete activity at a given point with releases from a given point. Diffuse source refers to run-off from a broad area like urban run-off, stormwater run-off, run-off from agricultural, from mining activities, from silvicultural activities and even in this one here in 309 that you just cited it talks about modification of water courses or stream channels, that is the resulting discharge over the area of the project that would occur after that had occurred or it could also relate to a project activity going in to do what we call a "soft-arming" where you do willow planting, revetment installations on cut banks. Handwork in a stream, that would also probably be covered by the statute.

DAG Frey: So if you were building a road and you never got anywhere near the stream but if there was some run-off from it for some reason that would be a diffuse source?

Icyl Mulligan: That is correct.

DAG Frey: But the fact that the equipment is next to the river and either in it or placing items in it

causes it to be a point source?
Icyl Mulligan: That is correct.
DAG Frey: Thank you. In that definition leaves one word that is undefined - "discharge" and -
Icyl Mulligan: Well I would like to point out one thing there on item (d), it is important too that this language is "to allow a pollutant discharge from a point source or fluids injected through a well to remain in a place where the pollutants or fluids could be carried into waters of the state" and I think that is an important item also.

DAG Frey: Could you explain why?
Icyl Mulligan: If you were depositing material next to a stream and you had a rain-storm and it flushed it in then that would qualify under that "could be carried into waters of the state" by any means.

DAG Frey: Let me ask you a question then. If we look back at Exhibit 6 and we see that if the water was at the low-flow channel level and somebody deposited materials on what you have identified as the sand bar island, would you then consider that to be in violation of 465.1(d)?
Icyl Mulligan: Yes. I think you could probably interpret it that way or if it was even piled up on the flood plain and then spilled into.

DAG Frey: Thank you. Ms. Mulligan are you familiar with NDEP's file regarding this matter?
Icyl Mulligan: Fairly well.
DAG Frey: At this point I would also like to have the Commission take administrative notice of NDEP's file that is the public document, available to the public at the NDEP office in Carson City.

Chairman Turnipseed: Are you offering that for the purpose of us making a decision today?
DAG Frey: We have it here.
Chairman Turnipseed: What is the pleasure of the panel? Do you want to read the file today before we make a decision?
DAG Frey: Mr. Commissioner's my purpose is just to take items out of the file and use them.
DAG Mischel: Could you describe the file?
DAG Frey: We'll just withdraw that offer then and we will go through the exhibits. Would that be O.K.?

Chairman Turnipseed: That would be better.
DAG Frey: Have you had an opportunity to review the file prior to today's hearing?
Icyl Mulligan: Yes I have.
DAG Frey: And do you have it with you?
Icyl Mulligan: Yes I do.
DAG Frey: Can you tell us from your review of the file when the Division became aware of the County's intent to construct the Jarbidge Road?
Icyl Mulligan: We first became aware of it from a fax that was faxed to us by the U.S. Fish & Wildlife Service on the 17th of July.
DAG Frey: Based upon your review of the file what step did the Division take after becoming aware of the county's intent to construct the road.
Icyl Mulligan: A letter was written on July 20th by Mr. Allen Biaggi alerting the county as to what the rules and regs are concerning that type of an activity.
DAG Frey: Let me show you what has been marked as State's Exhibit 2 - Is that the letter you just identified?
Icyl Mulligan: Yes it is and it was addressed to Mr. George Boucher the County Manager of Elko.
DAG Frey: And could you summarize what the intent of that letter is?
Icyl Mulligan: The letter was to make the county aware of - under the conditions of what they were proposing to do - what the law required. They were required to get a permit, a rolling stock permit.

DAG Frey: O.K. From your review of the file and just your knowledge of working at NDEP do you recall what the county's response to that letter was?
Icyl Mulligan: We had no written response. I did have a telephone call from Mr. Boucher requesting

application forms for a rolling stock permit and those were mailed and faxed to him on the 21st.

DAG Frey: And had the county ever requested of you a rolling stock permit prior to this?

Icyl Mulligan: Yes they have. In fact, they obtained one this spring, I believe it was in March, for the Lower Lamoille Road Bridge Project.

DAG Frey: Let me show you State's Exhibit #5 and could you identify that?

Icyl Mulligan: Yes. This is the application form Mr. George Boucher submitted to NDEP to obtain a rolling stock permit for that project.

DAG Frey: Are you aware if that project also included pieces of equipment in or about the water course?

Icyl Mulligan: There were. Yes that is correct.

DAG Frey: Can you tell me what steps the Division took after it became aware that the county was in fact doing road work on the South Jarbidge Road?

Icyl Mulligan: After review of the information it was decided to issue a finding of violation and order and a verbal order, a cease and desist, was transmitted or given, however you would say it, to George Boucher at 4:02 - I believe it was - on the 22nd.

DAG Frey: A verbal cease and desist order?

Icyl Mulligan: Yes that is correct.

DAG Frey: And was that followed up with a written one?

Icyl Mulligan: Yes it was.

DAG Frey: Going back to some of your testimony, at the introduction part you said that you had fire training?

Icyl Mulligan: Yes.

DAG Frey: Could you tell me your background in fire suppression?

Icyl Mulligan: I started out on a mine fire brigade as a volunteer in 1966 and volunteered with the Forest Service, the BLM and different city and county entities and I now live in the Jack's Valley area in Douglas County and I was with that department for 12 years and I retired out of there as assistant chief. I have sort of filled every category from grunt fire-fighter to assistant chief and then I was acting chief many times as our chief was generally away at his full-time employment.

Chairman Turnipseed: Counsel, can you tell me how this is relevant to the situation before us today?

DAG Frey: I was anticipating that the county in their - the county has in their transcript has testimony regarding that there was a need for the road for fire danger but if you don't want me to pursue this I can stop. This was just rebuttal testimony.

Chairman Turnipseed: Do you want to hear it?

Commissioner Doppe: I do.

Chairman Turnipseed: O.K. - please proceed.

DAG Frey: When you reviewed the Division's file was there any material that you had received regarding fire dangers in the file?

Icyl Mulligan: Yes there was. The FMO for Nevada Division of Forestry, Mike McCarty, had made a determination for us and had the letter concerning that and then basically his decision on what he felt the circumstances were up there.

DAG Frey: Let me show you State's exhibit 4 - if I could get you to read the second paragraph of that.

Icyl Mulligan: O.K. - this is from Mike McCarty the FMO for the Northern Area. His quote is "the current fire danger (July 31, 1998) in the area appeared to be low to moderate due to above normal moisture during the past six months. The fuel loads in the area around the road in question are light. Grass, forbs and sage are still green. Fuel moistures appear to be high."

DAG Frey: Thank you. Ms. Mulligan have you been to this site?

Icyl Mulligan: Yes I have.

DAG Frey: And when were you there?

Icyl Mulligan: We were there on the 20th of August -

DAG Mischel: 1998?

Icyl Mulligan: Yes.

DAG Frey: About a month after the work had been done?

Icyl Mulligan: Just about a month after the work had been done.

DAG Frey: With your knowledge of, and your experience in, fire fighting what is your opinion as to the danger of not having - the danger posed to Jarbidge of not having that additional mile and a half of road.

Icyl Mulligan: I don't think it is very significant.

DAG Frey: And why is that?

Icyl Mulligan: The only reason that would really be of use to the people is if - a lot of ifs - if it was a small fire, if it was right next to the road and if people responded immediately. Your first 5 - 10 minutes in fire suppression is critical. It would be very unlikely that people would be at the ready, ready to go, the equipment was up and running, the pumps were running and they could arrive at the site to suppress the fire. Once it grows beyond a small fire it's at that time you evacuate, you back out and you call in the heavies. You bring in your air tankers, you bring in your hot-shot crews and smoke jumpers, whatever. It is out of a small person's hands. You can't fight a big fire with a mini-pumper. That is foolish and you would be putting people at risk.

DAG Frey: Let me go back to your visit to the site. Who were you there with?

Icyl Mulligan: I was there with Mr. Joe Livak, our enforcement officer from NDEP, Bureau of Water Pollution Control and we were met there by some county commissioners, Mr. Gary Back, Kristin was there, Mr. Carpenter was there. They led the tour, and Mr. Otis Tipton too, I don't want to forget him - he was there also.

DAG Frey: Did they explain to you the work that was performed on the road?

Icyl Mulligan: Yes they did.

DAG Frey: Did they explain how it was done?

Icyl Mulligan: I didn't hear all of the how - I heard part of it because I was more doing site observations.

DAG Frey: Did you hear an explanation of what type of equipment that was used?

Icyl Mulligan: Yes I did.

DAG Frey: Based upon the explanation you received of partially how and the equipment used and based on your professional knowledge and training, in your opinion was a temporary discharge permit needed for the work that was done?

Icyl Mulligan: Absolutely.

DAG Frey: And was one obtained by the county?

Icyl Mulligan: No it was not.

DAG Frey: I have no further questions.

Chairman Turnipseed: Cross examination?

Kristin McQueary: Thank you. Ms. Mulligan you have informed us how rolling stock is defined, you defined that as wheeled or track equipment?

Icyl Mulligan: That is correct.

Kristin McQueary: Where is that defined in NRS or NAC?

Icyl Mulligan: It is not defined specifically. That is the way it is interpreted.

Kristin McQueary: And who interprets that?

Icyl Mulligan: I believe the interpretation from that comes from the Commission.

Kristin McQueary: Is the written interpretation a written policy on which you follow?

Icyl Mulligan: It is a policy that has been followed by our Bureau ever since I've been aware of the permit being written.

Kristin McQueary: And is it a written policy that is available to the general public?

Icyl Mulligan: I'm not sure if we have a written policy on that it is just the way that I was trained to do it and that is the interpretation. There is nothing else that would fit that category. The only other interpretation of rolling stock is a railroad train and that doesn't quite fit.

Kristin McQueary: So if I am doing some activity out there how would I have guidance from statutes to regulations of knowing whether I needed a rolling stock permit if I don't know what a rolling stock is?

Icyl Mulligan: That is why you would need to contact the regulating authority to get all the details to have a full understanding of what is required.

Kristin McQueary: But it is not written down anywhere to your knowledge?

Icyl Mulligan: It may be. I won't say it is not. Rolling stock you know is in the statute and regulation.

Kristin McQueary: On the first exhibit that Mr. Frey asked you about, the letter from Mr. Biaggi, do you recall the date on that?

Icyl Mulligan: I believe it was July 20th.

Kristin McQueary: In your recollection would that have been a Monday?

Icyl Mulligan: That was on a Monday.

Kristin McQueary: How was that sent? Do you know?

Icyl Mulligan: I believe it was faxed. It was also sent, I believe, by registered or certified mail.

DAG Frey: Exhibit 2.

Icyl Mulligan: Yeah. It was sent certified mail and then I believe it was also faxed. I don't have the record

Kristin McQueary: of the fax but we probably have it or someone else may have it.

Icyl Mulligan: Was it mailed overnight mail or regular registered mail?

Kristin McQueary: It has a certified number on it. I don't know if it is just regular certified mail or not. It has a receipt number there.

Icyl Mulligan: You referred to a permit that the county received for the Lower Lamoille Bridge Project. Was that an emergency situation?

Kristin McQueary: No. It was necessary but not probably considered emergency.

Icyl Mulligan: Ms. Mulligan, you referred to NDEP's file. Are you aware of the phone log part of NDEP's file?

Kristin McQueary: Yes.

Icyl Mulligan: Did you take many of the phone log notes yourself?

Kristin McQueary: Yes. Not all of them though.

Icyl Mulligan: On July 21st you received a call from a Chris Butler. Who is that?

Kristin McQueary: Chris Butler is a hydrologist with the Forest Service in Elko.

Icyl Mulligan: On July 22nd you received a phone call from a Ben Seminole -

Kristin McQueary: Yes.

Icyl Mulligan: He told you that a biologist saw the county in the river. Is that correct?

Kristin McQueary: That is what he said -

Icyl Mulligan: Did he tell you the biologist's name?

Kristin McQueary: No, I don't believe so. I don't recall anyhow.

DAG Frey: I want to object to this line of questioning because if the questioning is leading to how the Division found out about the work that was going on in the stream I am objecting because we have stipulated of the work having been done and how it was done and we had testimony yesterday as to when it was done so I am not sure where this line of questioning is leading us.

Kristin McQueary: Basically, this line of questioning is to show you that NDEP has been victimized by outside forces. That they did not receive correct information - they were promised some things that I don't believe they received.

Chairman Turnipseed: Excuse me. I didn't understand that last statement. Who was promised by whom?

Kristin McQueary: I believe that this line of questioning will show that NDEP was told some things by the Forest Service and they were told they would receive some things from the Forest Service - they never got those.

Chairman Turnipseed: And how is that relevant to whether they needed a permit or whether it was an emergency?

Kristin McQueary: It is not precisely on point but it does go to show the investigation that took place leading up to the cease and desist order.

DAG Frey: Mr. Chairman, I don't know how relevant that is either because the statute says - I can get it out here in a second - that the Division can issue an order whenever it believes that someone has or is about to violate a statute so if we learn of somebody doing some work we can issue a cease and desist or about to do some work a cease and desist order at that time.

Chairman Turnipseed: Your response?

Kristin McQueary: The response is that the investigation that took place was based on, it will ultimately be shown, on at least triple hearsay.

DAG Frey: It doesn't matter whether we issue a cease and desist order on hearsay or not. We can issue it prior to the event having occurred so therefore even if it is a rumor that somebody is going to do something we could have issued that cease and desist order. However, at this point in time we know from yesterday's field trip that the county in fact was there doing the work so to show that we were expecting some information from the Forest Service or we had gotten mis-information doesn't matter because it has been admitted that the work went on.

Chairman Turnipseed: I guess my question is whether they issued the order on un-true facts or mis-guided facts, does that matter at this point because we all know the work was done.

Kristin McQueary: If you don't want to hear that I will move to another line of questioning.

Chairman Turnipseed: Please do.

Kristin McQueary: Ms. Mulligan you testified regarding Mr. McCarty's report and you explained your background in fire-fighting. In a area such as the Jarbidge South Canyon Road over the course of time does the fuel characteristics change via temperature, length-of-time of the season?

Icyl Mulligan: Yes. They will generally tend to dry out over time. That depends strictly on the climatic conditions, dew-points and aspects of slope and things of that nature.

Kristin McQueary: So at the point that Mr. McCarty wrote in his report that fire danger was low and fuel moisture was high that was specific for that day that he observed it. Is that correct?

Icyl Mulligan: That is correct. When we were there the conditions were essentially the same.

Kristin McQueary: As a fire fighter is it important to pre-plan how you would attack certain types of fires?

Icyl Mulligan: Yes.

Kristin McQueary: And that is to minimize the risk of property damage and increase the safety of fire fighters and other people in the area.

Icyl Mulligan: Pardon me, I can't hear.

Kristin McQueary: That would be to increase the ability to save property and protect people.

Icyl Mulligan: Yes. That would be part of it.

Kristin McQueary: Is prevention and pre-planning probably the most important tools that a fire fighter uses?

Icyl Mulligan: No. Training first. Un-trained people get killed.

Kristin McQueary: So if you have training then you are able to do some prevention and pre-planning.

Icyl Mulligan: Yes.

Kristin McQueary: Are you aware that the area in question, the Jarbidge South Canyon area is right next to a wilderness area?

Icyl Mulligan: Yes.

Kristin McQueary: Are you aware that you are not allowed to use mechanized equipment on a wilderness area?

Icyl Mulligan: That is correct.

Kristin McQueary: So if there were a fire that got away the only place that you could use mechanized equipment would be in the canyon area, not crossing the wilderness line.

Icyl Mulligan: You wouldn't put people at risk by putting them up in a fire chute like that. The fire fighting would be probably conducted completely by air tanker -

Kristin McQueary: That is not what I was asking - if you had the ability to use mechanized equipment you would be able to use it only in the South Canyon area not up above the wilderness

boundary.

Icyl Mulligan: That is the way the rules run on wilderness areas.

DAG Frey: I want to object only to the sense that we don't know where the wilderness boundary is out there. That hasn't been an issue in our case. We've been unconcerned with -

Kristin McQueary: I have been just talking about fire fighting in general because she addressed that.

DAG Frey: O.K. - thank you.

Kristin McQueary: Ms. Mulligan are you aware that - you didn't go all the way up to the trailhead the day that you were there, is that correct?

Icyl Mulligan: I missed the very last end because my leg was bothering me.

Kristin McQueary: And you were aware from personal observation from before where the road is closed, all the way up there are campsites along the river and next to the road. Is that correct?

Icyl Mulligan: I saw one or two old ones. They looked like old CCC Camps from the '30s.

Kristin McQueary: And it would be common for people to camp next to the road or the river in that area.

Icyl Mulligan: From what I could observe there was only a few places where they probably would consider a desirable place to camp - over where the picnic tables were.

Kristin McQueary: When campers go camping they tend to have campfires?

Icyl Mulligan: Depending, but in the summertime there is generally fire restrictions where you are not allowed to have any fire other than a Coleman stove or in an approved permitted area.

Kristin McQueary: But if you were there in an appropriate time of year you would like to have a - people have campfires - did you see evidence of campfires?

Icyl Mulligan: I believe the Forest Service has a permit system that you have to have a permit to have a fire.

Kristin McQueary: I am asking you, did you see their barbecues and fire rings along the way?

Icyl Mulligan: I only really observed that down in the Pine Creek Campground.

Kristin McQueary: But there is potential for - and campfires have a tendency on occasion to get away from -

Icyl Mulligan: Yes. People can be careless.

Kristin McQueary: Is it true that many fires smolder for many hours before bursting out into a big flame?

Icyl Mulligan: It is a possibility.

Kristin McQueary: And would access via the road allow people to fight campfires that got away.

Icyl Mulligan: It might be but it could happen in the middle of the night, when nobody was around, and get away. I mean there are thousands of "ifs" and "conditions" -

Kristin McQueary: I believe you stated earlier that it is better to fight a fire when it is small and easily gotten to.

Icyl Mulligan: That is always the case.

Kristin McQueary: In fact, Mr. McCarty's report to which you referred, in the third paragraph down on the - and I can't remember what number you marked this, it is also marked as a County's exhibit. Isn't the third paragraph which is at the bottom of the first page and goes to the top of the second page state that the road would be useful to attack a small fire -

Icyl Mulligan: That is what I said previously. That is true and that is why I said "if". If you had a trained person or persons, you should have two people on a truck at least, if they were there, if they could respond within 5 - 10 minutes - if, if, if, if, if - but the likelihood of any fire getting started up there is small it wouldn't be even discovered or whatever probably for hours and by that time it would be a fairly large fire.

Kristin McQueary: But you are speculating on the discovery time. I mean if a campfire got away the camper would call for help.

Icyl Mulligan: I don't think they could call. They would have to drive down into Jarbidge, find out whoever is going to respond with the equipment - and I saw one mini-pumper from NDF there - and there is a slightly larger class brush truck in a fire barn - and I don't know who is qualified to operate and run that equipment, they have to un-lock the building, man the truck and get up there. Their turn-around response time would be over half an hour and by that time a fire would be well on its way.

Kristin McQueary: But basically, if they got to a fire when it is small and quickly put it out that is the ideal situation?

Icyl Mulligan: Yes. That camper would have to take care of that.

Chairman Turnipseed: The witness should not be argumentative. Just answer the question yes or no or if it requires some explanation explain the answer.

Kristin McQueary: Can you get to a fire faster on foot or in a vehicle?

Icyl Mulligan: In a vehicle - unless you are standing next to it.

Kristin McQueary: When the Division issued the cease and desist order was the Division aware that there was an emergency situation regarding the South Canyon Road?

Icyl Mulligan: No. We heard of no emergency.

Kristin McQueary: You have referred to both point source and diffuse source statutes and regulations. Is a permit necessary under all circumstances for a person or entity to get a permit from the state?

Icyl Mulligan: No. There are some exemptions and I will have to go back to the statutes on that - They are found in Nevada Administrative Code 445A.228. Exemptions are:
Persons utilizing individual sewage disposal systems - for instance discharging pollutants other than toxic materials into a publicly owned or privately owned sewage system;
Discharge of pollutants from agricultural and silvicultural activities; and
small animal feeding operations are exempt. The states lists specifically the numbers of animals - if you have a number over that you have to have a permit for that facility, for instance slaughter and feeder cattle, 1,000 -

Kristin McQueary: That is sufficient for my purposes.

Icyl Mulligan: O.K.

Kristin McQueary: Under the explanation that you have given us of rolling stock, if I took my tractor across a creek on my ranch would I need a permit from you people to do that?

DAG Frey: Counsel, is this a hypothetical question?

Kristin McQueary: This is a hypothetical question.

Icyl Mulligan: Commonly, if you made one simple crossing and it was a rocky bottom crossing, once, no. But, if it was repeated crossings, yes, because you are dislodging pollutants into waters of the state. Most people build bridges so they don't get into that circumstance.

Kristin McQueary: What about crossing a road that crosses a creek where there is no culvert or bridge -

Icyl Mulligan: You are talking about a low-water crossing over rocky bottom creek?

Kristin McQueary: Yes, thank you. A low water crossing.

Icyl Mulligan: No. That is a standard roadway now.

Kristin McQueary: What is the difference between crossing a road under that circumstance and crossing to get to the other side with heavy equipment?

Icyl Mulligan: Well first of all you have heavy equipment and heavy equipment, by the nature of its weight, its mass, and the way the weight is distributed, digs up and dislodges a lot of sediment releasing it into a stream - sand, rock, whatever.

Kristin McQueary: But you said rolling stock could be a wheeled vehicle so if I took a pick-up truck?

Icyl Mulligan: No. It refers to a large wheel, like a large loader or something of that nature. We are talking large tires here not automotive class vehicles.

Kristin McQueary: How can we be sure of that?

Icyl Mulligan: That is the way we apply it - we couldn't write a permit for everybody crossing a stream. It is just common sense.

Kristin McQueary: In the area where Mr. Tipton first, right near the road closure sign is where he first pointed out the road work, if there were testimony that area had been used as a water crossing by other vehicles does a person need a rolling stock permit to get across that area?

Icyl Mulligan: Rolling stock is for construction activities and work activities in water bodies, not driving down a road but if you are taking heavy equipment into a stream zone you are not taking it there just because you are commuting you are taking it in there for a purpose.

Kristin McQueary: Don't vehicles crossing a stream dislodge sediment causing it to flow downstream?

Icyl Mulligan: Generally not, not to any large order. But anything - the heavier, the larger the vehicle the greater the disturbance.

Kristin McQueary: Does the amount of water flowing in the stream affect the amount of sediment knocked loose by equipment crossing it?

Icyl Mulligan: Well certainly the broader the stream the more the release.

Kristin McQueary: Ms. Mulligan you appear to be very familiar with the statutes and regulations covering your job. Where is emergency defined in the statutes and regulations governing NDEP's activities?

Icyl Mulligan: I am not knowledgeable of that. I will have to refer to Mr. Frey. I have not researched that.

Emergencies are generally declared by our director - administrator rather, I am sorry, and it has only happened to my knowledge once since I have been there working and that was for the flood of '97 where we wrote an emergency rolling stock permit for all cooperating agencies because an emergency existed, primarily on the Truckee, Walker, and Carson Rivers.

Kristin McQueary: One thing that you referred to in your testimony, under direct examination by Mr. Frey, you talked about the difference between road construction under the diffuse source area then you said that the sediment washing away from a road work area could also be considered a point source.

Icyl Mulligan: It is if it is deposited immediately adjacent to where - (d) says in this statute here "that could be carried into waters of the state by any means". Diffuse source regs on highway construction refer to a cross-country like building a freeway or road projects.

Kristin McQueary: It is the diffuse source running off the entire road-way project.
 Icycl Mulligan: And that is your opinion, is that correct?
 Kristin McQueary: No. That is the definition. That is the way it is applied and you will find this in the
 Icycl Mulligan: Federal Non-Point Source Regs as well. That is how it is applied.
 Kristin McQueary: And what reg is that?
 Icycl Mulligan: I would have to get that for you, I don't know, it is under the Clean Water Act.
 Kristin McQueary: But the Nevada Statutes says "road construction, modifications, stream channels" -
 Icycl Mulligan: Right.
 Kristin McQueary: It doesn't refer to the location of the roadway?
 Icycl Mulligan: No. Like I said before -
 Kristin McQueary: That is sufficient for me.
 Icycl Mulligan: All right.
 Kristin McQueary: I don't have any further cross examination of Ms. Mulligan.
 Chairman Turnipseed: Redirect?
 DAG Frey: Ms. Mulligan you have identified various training over the years, various courses, you
 have a Resource Management Degree -
 Icycl Mulligan: Not a degree - training.
 DAG Frey: Resource Management training. Based upon your past experience of the word "rolling
 stock does that include the type of vehicles that were used out in the Jarbidge River as
 described to you by the county?
 Icycl Mulligan: That is correct.
 DAG Frey: You also testified that Mr. Boucher called you to ask for information regarding
 obtaining a permit.
 Icycl Mulligan: That is correct.
 DAG Frey: At that time did he tell you that there was an emergency situation that demanded
 immediate attention.
 Icycl Mulligan: No he did not.
 DAG Frey: Thank you. I have no further questions.
 Chairman Turnipseed: I have a few.
 DAG Mischel: Any re cross on those questions?
 Kristin McQueary: No.
 Chairman Turnipseed: Exhibit 5 is an example of a rolling stock permit that Elko County filed application for
 on February 20, 1998, but I don't see any date of issuance. How long does it typically
 take to process and approve a rolling stock permit?
 Icycl Mulligan: On sensitive streams similar to the Jarbidge River the applicant provides us with all
 the information that is requested and that information is reviewed. Then I work with
 the Corps and I work with Glen Gentry of our Water Quality Planning Bureau and we
 discuss BMPs that might be necessary - we sort of evaluate what has been proposed.
 We generally initiate a meeting with all the concerned parties where the applicant
 presents their project to us, describing how the BMPs are going to be implemented and
 where and normally when everybody more-or-less agrees and has consensus on that
 then we have a site visit to where the applicant will say "we propose to install silt
 fencing here, we propose straw bales here, erosion matting there" so if there is any
 fine-tuning that needs to be incorporated into this permit or the erosion control plan
 that is done at that time. So the fine-tuning goes on the site visit and then as soon as all
 of that is agreed upon then the permit is issued, generally within a day or two. So that
 could be anywhere, depending on the time involved getting people together, it could
 be a week to two weeks to three weeks. We generally try to do it as quickly as
 possible to facilitate and accommodate everybody.
 DAG Mischel: Mr. Chairman, if I may clarify something - is there a public comment period as a part
 of this?
 Icycl Mulligan: No, there is not for a temporary permit.
 Chairman Turnipseed: So this application that was filed on February 20th likely would have been approved

within a week or two weeks?

Icyl Mulligan: This was probably done within a week - yes, because this was a pretty standard one, it was a bridge project and it didn't incorporate very much disturbance in the stream bed itself.

Chairman Turnipseed: With your knowledge of what Elko County did in the South Canyon of the Jarbidge would you classify that in the same category?

Icyl Mulligan: No.

Chairman Turnipseed: But still a permit could have been processed and approved within a week to three weeks?

Icyl Mulligan: Most likely, if we could get all the cooperating other agencies that have issues there like Nevada Division of Wildlife and U.S. Fish and Wildlife and the Forest Service, I imagine, would be involved as well for review from a resource standpoint.

Chairman Turnipseed: If they file an application today and you went through your normal process and involved all of the parties and they complied with the steam cleaning and the inspection for the leaks and the matting and the straw bales then they could have a permit within 3 weeks.

Icyl Mulligan: Yes, but they would have to have a Corps permit as well and it would be contingent upon getting the Corps permit and again, once consensus is arrived at the permit can be written within a day or two.

Chairman Turnipseed: I believe it was in the transcript that they believed the general state-wide permit of the Corps of Engineers was still in effect. Do you know if it is or not?

Icyl Mulligan: I don't believe so. I think it expired over a year ago. There was an emergency permit that was issued after that '95 rain-on-snow incident and it was for a 2-year time frame is what I understand and the Forest Service I think was actually applying for another one to keep it current but I don't know if it was ever issued. You would have to check with Kevin Roukey with the Corps. I don't know.

Chairman Turnipseed: Yesterday we heard testimony that they crossed the stream with a trackhoe and cleaned out an old channel or a previous channel and worked in the dry - they worked in the stream-bed gravel until they got down to where there was water termed as "subbing" and actually never had the equipment in the water with the exception of crossing it until they went up to breach the diversion dike - or whatever. I guess it is your testimony that a rolling stock permit would have been required both to cross the stream and then to dig out the breach -

Icyl Mulligan: Well also to construct the channel. They are still in the stream zone and there is underflow in that stream and they are again between that normal high water mark prime-to-prime location the entire time they are in there.

Chairman Turnipseed: Oh, I see -

Icyl Mulligan: And that is a stream zone, water way, water course, by our definition in the regs.

Chairman Turnipseed: Questions from the panel?

Icyl Mulligan: There is one other thing I would like to add to that too - our regs also include springs and they had equipment in the spring and the spring was pretty badly ripped up - they ripped the water pipe out and crushed it and dug it out and they had equipment operating in that spring and that is the same thing as working in the stream.

Chairman Turnipseed: Thank you.

Commissioner Doppe: Let me start with Mr. Frey - if this is not the witness that you think is best qualified to answer my question then I will withdraw it from this witness and you tell me who is going to answer it later - The code 445A.313(e) provides an exemption for emergency work to protect persons or property and I believe that falls under diffuse sources, right, so in the case of work being undertaken to protect persons or property a diffuse source permit or whatever would not be required in the event of that sort of work. Now what I am wondering and what I am looking for

DAG Frey: I am showing the witness 445A.313

Commissioner Doppe: And again Mr Frey, tell me if this is not the right person to ask this question.

DAG Frey: I think I can help you out right now. I am not sure if this is the right person to ask or not so you should go ahead and ask and we will find out if the witness knows.

Commissioner Doppe: Where is the - is there a comparable emergency power thing in the case of a point source or where a rolling stock permit would have been required?

DAG Frey: I think the witness can answer it.

Commissioner Doppe: Fine.

Icyl Mulligan: I don't know where the emergency statute is - I don't know of one. I would have to ask Allen.

Chairman Turnipseed: No no! You are the one on the witness stand so you can answer it yes or no.

DAG Frey: You can answer yes or no - I don't mean to rephrase your question but do you know?

Icyl Mulligan: No. Not to my knowledge.

DAG Mischel: I think I can help out legally -

Commissioner Doppe: I am just asking the question -

Icyl Mulligan: I don't know about the point source for emergencies. All that I know is that one was issued for the '97 flood that came down - actually from Pete Morros the Director through our Administrator at that time, Lew Dodgion - and he directed me to write an emergency permit because of the flooding on the Truckee, Walker and Carson Rivers. And to my knowledge that is the only that has ever been done - I

DAG Frey: That's right -

Chairman Turnipseed: Well for the record in the '97 flood on the Carson, Truckee and the Walker it was not only declared an emergency by the Director but also by the Governor and the President of the United States.

Icyl Mulligan: And the Corps and everybody else, yes. That was a true emergency.

DAG Frey: Commissioner, Could I add just one comment to that - There is power under I believe Chapters 414 and 416 that emergency rules, if you will, and most of them are instituted by the Governor. The Governor has to declare an emergency. There are some various other exceptions and it deals with agencies or counties dealing with OEM directly and coming to some agreement on how that works. I am not that familiar with them.

Chairman Turnipseed: Any other questions of the witness? My Coyner? I'm sorry, I didn't mean to cut you off -

DAG Frey: That is fine -

DAG Mischel: I'm sorry - after Mr. Coyner I have a couple of -

Commissioner Coyner: Ms. Mulligan, this is Commissioner Coyner for the record, with regards to the rolling stock requirements is it your opinion that originally that was written for the containment of oil, gas, fluids from the rolling stock rather than secondary causes like rocks, sand and silt?

Icyl Mulligan: No. I would say that it is just part of it. That is one of the potential releases - there was releases of sediment and there is potential releases of petroleum hydrocarbons or other pollutants.

Commissioner Coyner: So both are -

Icyl Mulligan: Both are incorporated into the permit.

Commissioner Coyner: Just to draw a parallel with another part of the code it talks about vessels - so if a vessel was on the water, again we are talking about potentially the release of contaminants from fuel etc., but if it did plow through a shallow in a lake or a stream it could churn up sediment.

Icyl Mulligan: Yes, it could - but not

Commissioner Coyner: But it certainly wouldn't be a permissible activity -

Icyl Mulligan: No, that wouldn't be - I mean that is pretty stretching it -

Commissioner Coyner: I understand. Let me stretch a little more then. With regards to the high water mark and the potential for materials to be carried into the streams, wouldn't you agree that areas of the road that are currently on a regular maintenance basis by the County - on

many of the miles that the panel drove yesterday on its way home the road courses go very close to the water, essentially right next to it, so in the ordinary course of their maintenance work wouldn't you agree that they place materials that certainly have a potential to wash into the stream on an on-going basis and is that a permissible activity?

- Icyl Mulligan: Well hopefully it is not placed that close to a stream. There may be some incidental run-off but generally, in proper road building, there is generally a rock ballast that is put in there and it is generally fairly stationary.
- Commissioner Coyner: Well I am a geologist too and I saw a lot of very fine material along the edges of those roadways as we drove through the Jarbidge Canyon and other areas where it is obvious that run-off will carry those fine materials into those streams -
- Icyl Mulligan: Right. That's true -
- Commissioner Coyner: Those are not permissible activities - in other words they don't require or obtain permits to do their regular road maintenance.
- Icyl Mulligan: Not normal road building - no. As long as it is not in the stream.
- Commissioner Coyner: Are you aware of the repairs that were done in the upper reaches of the Lamoille Canyon in the County?
- Icyl Mulligan: Yes. I wrote permits for that too.
- Commissioner Coyner: My question was to be were there permits required for that activity - now I am talking high up in the Canyon by the campground area.
- Icyl Mulligan: Yes. They had one or two different permits there because that was a 100-year event also, as it was in Jarbidge and they -
- Commissioner Coyner: I asked that question because I was there in June. I saw work that had been done that I would compare very comparable to -
- Icyl Mulligan: Yes, and they had permits for that, the Forest Service did.
- Commissioner Coyner: The Forest Service did - so the Forest Service is required to obtain permits as well -
- Icyl Mulligan: Yes they are. In fact I have one waiting to be done and I just completed one for them on other sites.
- Commissioner Coyner: One more question about the Forest Service. I noticed that the letter was cc'd to the Forest Service and Fish and Wildlife - this is the letter - I am not sure that you were directly involved in Exhibit 2 - do you know if, in your opinion, you commonly cc on these types of issues - on permit issues or is this a matter of convenience or a courtesy or is that sort of a -
- Icyl Mulligan: These people were cc'd because of the association with the project - U.S. Fish and Wildlife because of the sensitivity of the stream, the Forest Service because it occurred on Forest Service land, myself and then Mr. Nannini because of the County.
- Commissioner Coyner:A And lastly then, in the course of your testimony you indicated to get - you were asking about the issuance of a permit - you mentioned the Forest Service as part of the agencies that would be involved. Does the Forest Service necessarily have to concur with the issuance of a permit, let's say specifically for the Jarbidge situation.
- Icyl Mulligan: We would have to have their consensus at least as a general concept of how the plans would be done. You understand the Forest Service had applied for a permit to do this very same work the year before and the project was stopped due to a - some type of an action by Trout Unlimited and the Bull Trout Society and it was getting late in the year but we were to the point of going up and doing the site visit to check what BMP's they were going to put and we wanted to see them on the ground where they wanted to place them and they were about to get their permit to do it. They had done an EA on the whole project which took a 2-year period to do, at what cost I don't know, they had put a lot of work into it, they had a complete plan for putting this road in and at the time of this - I thought it was a lawsuit but they said no, it was some kind of a challenge or objection - legalese I don't know - that stopped the project because of the environmental concerns of the bull trout and the Trout Unlimited. At that time they contacted our office and they said "O.K., we can't do the project we're going to have to

go back to the drawing board, can we please have our plan back, can we please have our money back" and we refunded their money in October and their plan and the idea was they were going to re-submit again this year to complete the project but that never happened because of decisions that were made and a lot of it had to do, I guess, with environmental issues with the bull trout. That is not our concern, that they did not reapply this year although I anticipated to get one from them this summer but

Commissioner Coyner: That is a little more than I asked for but essentially the specific question was do you require a formal sign-off from those parties - do they submit written sign-offs approving of you issuing a permit?

Icyl Mulligan: We don't get a written sign-off but we try to get

Commissioner Coyner: Or a verbal consultation -

Icyl Mulligan: everybody to meet like we are meeting here and everybody discuss it so everybody is happy with what is planned, to the extent you can get that type of consensus. That way it makes for a better project and everybody is happy with it and supportive.

Commissioner Coyner: Thank you.

Chairman Turnipseed: I guess I have one further question. If you walked the site, or the majority of the site, then you are familiar with the amount of material that is adjacent to it in the stream today. In your opinion does some work need to be done to stabilize

Icyl Mulligan: Most definitely.

Chairman Turnipseed: the channel?

Icyl Mulligan: Most definitely.

Chairman Turnipseed: Thank you. Any other questions? Ms. Mischel had questions from a legal standpoint.

DAG Mischel: I just wanted to clarify for the Commission, you referred to some exemptions to the point source for a discharge permit and there was some discussion whether there was an emergency exemption for point sources as compared to diffuse sources. Do you recall that discussion in your testimony?

Icyl Mulligan: Well there is one apparently in diffuse source but as it was just stated that the Governor has to declare it for a point source.

Kristin McQueary: I would object to that answer. She is drawing a legal conclusion that I don't think she is qualified to determine.

DAG Mischel: I am just merely trying to get you to generally discuss the differences between the exemptions as you read them earlier in response to Ms. McQueary's question. Let me just say that NAC 445A.228 contains some exemptions to a discharge permit

Icyl Mulligan: Right.

DAG Mischel: Is there an exemption in that list that might apply to this particular project? Do you know? If you don't know -

Icyl Mulligan: Well I don't see where it would be - it lists sewage disposal systems so if you have a sewage disposal system you don't have to go out and get a permit for your individual one - I mean one for your house, and it doesn't apply to ag return flows - this is it - and then the small quantities of animals are exempt. If you have larger quantities you have to have an NPDES discharge permit and that is not a temporary permit that is a permanent permit and this is referring to permanent permits primarily, although we would generally apply the same thing, we don't write temporary permits for septic systems or small quantities -

DAG Mischel: With regard to the 1997 flood event where you discussed the -

DAG Frey: Excuse me, what year?

DAG Mischel: 1997 flood event - Was there a permit issued by NDEP?

Icyl Mulligan: Yes. I wrote a temporary rolling stock permit for all the agency cooperators that were designated by the Administrator to be incorporated in that - there were actually 2 permits written back-to-back to coincide with the emergency Corps permit that was also written and they coincided exactly, date-to-date.

DAG Mischel: So the 1997 flood event wasn't actually an exemption to the permit it created the existence of a permit?

Icyl Mulligan: I don't know if you could consider it an exemption it was something that the Governor of the State of Nevada declared and I guess his authority, however he interprets that I can't tell you, I can't answer how that process is but the Governor says it happens it happens.

DAG Mischel: Thank you.

Chairman Turnipseed: If there are no other questions the witness is excused. Call your next witness please.

Kristin McQueary: May I have a few questions that arose as a result of the Commission's questions?

Chairman Turnipseed: That depends. Generally I don't allow that but I am familiar with my hearing process and oftentimes, since I am a single decision maker I ask the questions that I want answered for my purpose or sometimes I even know the answer but I want it to be in the record in the event that there is an appeal. I don't expect to make the case of the Division and I don't expect to make the case of the County with my questioning. I just want the questions answered and I want them in the record so it depends on what the questions are.

Kristin McQueary: I've got two questions. The first is where the high water mark standard that she uses is written down and the second one is did she have prior knowledge of how the stream pipe got torn up?

Chairman Turnipseed: I will allow the witness to answer those questions.

Icyl Mulligan: O.K. The ordinary high-water mark is the standard that the Corps uses, our sister agency, The Nevada Division of State Lands, and we use the same for consistency.

Kristin McQueary: And where is that written down?

Icyl Mulligan: There is a , gee I don't know if, I have it with me, excuse me, let me get it. I believe it was an opinion by the State Attorney General's office

Kristin McQueary: That is not in the statute that you referred to earlier?

Icyl Mulligan: No, it is a

Kristin McQueary: While you are looking for that, prior to the County going to work in July had you been up to the Jarbidge South Canyon area?

Icyl Mulligan: I can't hear you, I'm sorry -

Kristin McQueary: Prior to the County doing its work in July, had you been to the Jarbidge South Canyon area?

Icyl Mulligan: Oh yes, several times, about a half-a-dozen times.

Kristin McQueary: So it is your opinion that it was the County's work that tore up that plastic pipe?

Icyl Mulligan: It didn't happen by itself. It looked like a trackhoe had spun a brody in the spring, if you really want my opinion.

Kristin McQueary: But did you observe that happening?

Icyl Mulligan: No, but I saw the effects of it and there is nothing else that could have rendered -

Kristin McQueary: That's -

Icyl Mulligan: that type of damage to the spring other than a large tracked equipment and there were track imprints in the ground in the spring.

Kristin McQueary: Can I follow up with that-

Icyl Mulligan: Robert List - Oh, I'm sorry -

DAG Frey: Can she answer your previous question - you asked her where her opinion came to as the high water mark I believe -

Kristin McQueary: She can answer that -

Icyl Mulligan: This was a conclusion by Robert List. It was dated April 20, 1976, and it defines the permanent and ordinary high water mark - let's see if it has a number on it - it is Opinion #204 by Attorney List, Attorney General List.

Kristin McQueary: Thank you.

Chairman Turnipseed: Your follow up question on the pipe?

Kristin McQueary: I will reserve that for my witnesses

Chairman Turnipseed: Witness is excused. Call your next witness please.

DAG Frey: With the Commission's indulgence could I just take a few minutes before I call another?

Chairman Turnipseed: Let's be in recess for a 15 minute break. We will reconvene at 10:15.

Commissioner Doppe: Is she permanently excused or -

Chairman Turnipseed: Yes, unless they want to call her back as rebuttal.

DAG Mischel: Would you like to reserve her?

Commissioner Doppe: I would like to reserve her.

Chairman Turnipseed: The witness will stay in attendance and be available for additional questioning.

Chairman Turnipseed: We'll call the hearing back to order. The Division will call its next witness.

DAG Frey: Mr. Commissioner we are not calling any further witnesses.

Chairman Turnipseed: You are finished with your case in chief?

DAG Frey: Yes.

Chairman Turnipseed: Do you want to reserve the right to call any rebuttal witnesses?

DAG Frey: Yes I do.

Chairman Turnipseed: O.K. then we will move to Elko County's case in chief.

Kristin McQueary: For the moment anyway we will have to speak louder and perhaps clearer. Will Elko County proceed with its case in chief?

Gary Woodbury: Gary can you hear?

Chairman Turnipseed: Yes.

Kristin McQueary: Welcome Gary -Elko County is about to proceed with its case in chief, the Division of Environmental Protection rests.

Chairman Turnipseed: Mr. Chairman, the first thing that Elko County would like to do is offer a number of exhibits. Exhibit A, B, C, D, E and F are affidavits from the people that appeared at the show-cause meeting at NDEP. The testimony taken down there was not placed under oath and each of these affidavits assures the Commission that the statements they made down there they would make again under oath and we would ask for admission of A, B, C, D, E and F.

Chairman Turnipseed: Any objections?

DAG Frey: I don't believe I do. I have no objection to that.

DAG Mischel: Are there copies for each of the Commissioners?

Kristin McQueary: I'm afraid I did not make copies for each.

Chairman Turnipseed: O.K. - we'll review them as you present your witnesses. Exhibits A through F are admitted into the record.

Kristin McQueary: You have already accepted the transcript of the show cause meeting with the state as Exhibit G. I don't know how much use we will get out of it but we have also brought a map of the area as Exhibit H - The South Canyon area is in the lower one-third of the map area and that helps to place a lot of items in perspective as far as size and distance.

Chairman Turnipseed: Exhibit I, which is a report from Mike McCarty from NDF has already been accepted as State's Exhibit #4.

DAG Frey: Exhibit J is a packet of statements from Jarbidge residents telling about what happened at the Forest Service meeting on July 2. NDEP was previously provided copies of those at the meeting down in Carson City at the show cause hearing and as you can see in the transcript they were also entered as exhibits down there.

Chairman Turnipseed: I object to the transcript or the copies of the statements regarding the Forest Service meeting as irrelevant.

Kristin McQueary: Response?

Chairman Turnipseed: Mr. Chairman they are relevant to place what the County's actions, why the County took the action they did in context because what the Forest Service told those people up in Jarbidge participated the County's actions in repairing the road.

Kristin McQueary: And we have those?

Chairman Turnipseed: Yes. A packet of them, they are too numerous to, Exhibit J - they were held together by a big fat binder clip. Some are hand-written and some are type-written.

Chairman Turnipseed: I think the panel will give them very little weight, they are simply statements by residents in Jarbidge that attended the meeting of the United States Forest Service. I

am not sure that is relevant here but if it precipitated the action by Elko County at the time and place that it did I suppose they ought to be in the record in the event there is an appeal so I will admit them into the record. That was Exhibit J - the packet?

Kristin McQueary: Yes.

Next the County wishes to call Otis Tipton for clarification of a date issue that Mr. Frey brought up and for rebuttal of Ms. Mulligan's statements.

Chairman Turnipseed: Please stand and be sworn. Raise your right hand please. Do you swear the testimony you give to this panel today will be the truth, the whole truth, and nothing but the truth?

Otis Tipton: I do.

Chairman Turnipseed: Please be seated.

Kristin McQueary: Would you please state your name and spell your last name for the record.

Otis Tipton: My name is Otis Wallace Tipton the 3rd. Tipton - T I P T O N.

Kristin McQueary: What is your occupation?

Otis Tipton: I am the Elko County Road Supervisor.

Kristin McQueary: And how long have you been Elko County Road Supervisor?

Otis Tipton: A little over 5 years now.

Kristin McQueary: Mr. Tipton were you the one that performed and directed the work in Jarbidge South Canyon?

Otis Tipton: I did both, yes.

Kristin McQueary: For clarification purposes would you, without going into the details, would you tell us what you did on which days? Let me put it this way - What did you do on July 20th - briefly, extremely briefly.

Otis Tipton: July 20th I went into Jarbidge, I reviewed the area, I took pictures of the area before work started and designated where the old stream bed was along with checking the Forest Service stakes and stations.

Kristin McQueary: On July 21st you performed some of the work at that time, is that correct?

Otis Tipton: July 21st?

Kristin McQueary: July 21st.

Otis Tipton: Yes, yes. That is when we started the cleaning of the old channel.

Kristin McQueary: On July 22nd what did you do?

Otis Tipton: On July 22nd we breached the dike letting the water go back down through the old channel and we went down to where the road used to exist, smoothed out the bottom, pulled down the large boulders off to the side where it was undercut and more-or-less tried to smooth up the whole area and get a road base.

Kristin McQueary: Did you receive any messages on July 22nd? What day of the week was July 22nd?

Otis Tipton: That was a Wednesday.

Kristin McQueary: What messages did you receive on July 22nd?

Otis Tipton: On July 22nd Jack Creechly got hold of me and said that he had a phone call from George Boucher and George Boucher, the County Manager, needed to talk to me as soon as possible.

Kristin McQueary: What did you do upon receiving that message?

Otis Tipton: I went to our only phone at the NDF building and I called George Boucher at his office.

Kristin McQueary: And based upon what George Boucher told you what did you do?

Otis Tipton: I stopped work and I brought the equipment back into town.

Kristin McQueary: Did you perform any work in the area on July 23rd?

Otis Tipton: Not in the South Canyon area, no.

Kristin McQueary: You heard testimony here today regarding the spring and the plastic pipe. What was the condition of the spring and the plastic pipe prior to you performing the work in the Jarbidge South Canyon area?

Otis Tipton: The spring area - as probably everyone seen yesterday - along with the old casing and pipes coming out is just as it was when we got there and I mean this is something that

happened in '95 - it is obvious by the vegetation and stuff that there was no equipment in that area. The pipe running down was a pipe that was buried into the road and I have no knowledge of who originally put in that pipe. I can tell you after the '95 flood the pipe was exposed and broken up in many places along there and what we did was we just merely, the pieces that you seen were the pieces that we could get hold of and put up there. Some of it was buried in the banks from sluff-off and other things in there.

- Kristin McQueary: To sum up, it is your testimony that it was the 1995 event which damaged the spring and the attendant equipment with it?
- Otis Tipton: Actually the spring is not damaged. The spring itself and the box has never been touched, it has still got a lock over it with a chain and the pipes are still coming out of it. It's just the pipeline that was damaged during the 1995 flood.
- Kristin McQueary: Mr. Tipton you testified up on the site yesterday. If you were asked to, would you repeat all those statements under oath?
- Otis Tipton: Yes I would.
- Kristin McQueary: Did you tell the truth, the whole truth and nothing but the truth yesterday?
- Otis Tipton: Yes I did.
- Kristin McQueary: I have no further questions of Mr. Tipton at this time.
- Chairman Turnipseed: Cross examination?
- DAG Frey: I don't have any Mr. Chairman. I just want to make one comment that the reason I asked Ms. McQueary to clarify the dates there is some conflict in the transcript that you have on what dates and I think Mr. Tipton accurately explained what went on.
- Chairman Turnipseed: I am going to ask you the same question that we asked the last witness. In your opinion does there need to be some work done up there yet to stabilize the channel?
- Otis Tipton: The channel and the road, yes.
- Chairman Turnipseed: I take it that your testimony yesterday and today is a reflection of Elko County's wishes that they wish the road to be go on beyond where it stops today for multiple reasons - tourism, campsites, access higher in the canyon in the event of fire?
- Otis Tipton: All those reasons, yes, plus the danger of floods, flash flooding and the building up of dams.
- Chairman Turnipseed: What we looked at yesterday were two, at least two, major rock slides out of side canyons that probably dammed up the river or the stream then were later breached by either run-off that same year or in later years and you are probably not the public safety officer for Elko County but in your opinion is there a need for access just to be able to prevent those types of things from happening again. I mean if there is further movement of those rock slides to dam up the river and then have the potential of being breached by run-off, do you consider that to be a public safety issue and public safety problem?
- Otis Tipton: That is one of my biggest concerns in the area, it's a monstrous problem that we have in certain canyons in Elko County and Jarbidge and it really does concern me a lot and I was really worried about it this spring with the events that were happening and the way they were happening.
- Chairman Turnipseed: Tell me about that. I am familiar with the weather that we had in the western part of the state this spring but will you tell me about the weather in this part of the state of this past spring and how it may have developed into a situation where you needed access to that area.
- Otis Tipton: This spring we had a fairly late snow. We really didn't get anything in January and that area, it was late snow. But the problem with this spring that we had was the same problem you guys were having around the Reno area - it was the rain on top of the snow and I mean it rained here all the way until June. Luckily, it stayed cold enough and the way things worked out - the ground saturation and other things so that we didn't have an event but boy we were sure prepared - we were getting ready for it. The other part of it, to get up there is yes, we have a real need to get equipment up in those

areas at certain times when there is potential damage. Jarbidge, the community of Jarbidge, they got some great volunteers there - we have Jack Creechly with a backhoe, we have some equipment there - we in the county, and there is a few other people that come in and have some dozers and other things around there and you couldn't believe what those people did during the '95 flood for themselves. And I am sure that if I couldn't get the equipment in there quick enough to help these people in a situation that they need a way to get up there to help themselves too you know. There is a terrible potential for dams and the breaking of those dams and washing out of the town and the road.

Chairman Turnipseed:
Commissioner Doppe:
Chairman Turnipseed:
Commissioner Coyner:

I have no further questions. Question Mr. Doppe.
No.
Question Mr. Coyner?

Otis Tipton:
Commissioner Coyner:

A couple Otis. Clarify for me the USFS work - I believe it was by the USFS - clarify for me the work that was done from the road where we turned and came towards town to where the current road closed sign is. Do you understand what I am asking?
Yes. Yes I do.
O.K. - was that area damaged as heavily in 1995 as well and now has been reconstructed or is just like it was in 1995?

Otis Tipton:

Well, let me - if we go back to the first question on the 1995 - that date. In 1995 when the county road crew was repairing the main road into Jarbidge, which I am talking the canyon road which would go out through Rogerson, Idaho - go that way - we were coming all the way through this area, down through here, and here is Pavlak Grade - which is the grade we come down - Charleston is what we call it and during this time when we were repairing the areas once we got it so we could get into the town of Jarbidge the Forest Service showed up and they had a combination backhoe-loader and that is pretty much all they had, they didn't have a lot of equipment. So what we did, and they were trying to make an effort to repair this section going to Pine Creek Campground to get it ready for the people coming in on the 4th of July

Commissioner Coyner:

Let me just ask you - excuse me - when you said "that section" that is kind of far for my old eyes - We are talking about the section where you make the turn to go into Jarbidge and where it says "road closed" -

Otis Tipton:
Commissioner Coyner:

That's correct -
In the same portion of the river channel that we walked in but just a little lower down on the slope - o.k. - and they were in there with mechanized equipment working.

Otis Tipton:

They were there making an attempt but they couldn't do it so in an effort to help get the road back in for the campers that were coming we joined efforts. We went down - we had the equipment that we had rented for the job and we were already sitting there so we down and we helped the Forest Service restore the road to the Pine Creek Campground and that is when the Forest Service, right there, they put the logs across the road, put a "road closed" sign up and that was it for that year.

Commissioner Coyner:
Otis Tipton:
Commissioner Coyner:
Otis Tipton:

Can you tell me whether that was done under an NDEP permit or not? Do you know?
I can only tell you that the county did not have one and I don't know -
The Forest Service isn't here to answer is it?

Now the following year, which goes on to the other part of your question, the following year there was terrible subbing of water after the flood in this area in the roads and that. As a matter-of-fact, Gary Campbell from the Forest Service asked us if we could go down and blade some of that road for campers coming in and I told Gary we tried it but we got stuck with the blade, being a motor grader, we are just used to these terms of what we call equipment. And Gary Campbell, who was the Forest Service Engineer at that time, with other people who had come from other places - I don't know where they come from in the Forest Service part, but they came into this area, they put GeoTech mat on the road and then they put about, I am going to say 1½ to 2 foot of fill on top of that and that was in 1996.

Commissioner Coyner: So in your opinion there was work carried in that section of the river that's similar to what the work was done on July 20 and 21.

Otis Tipton: Yes.

Commissioner Coyner: Let me ask, or I recall from the transcript that the county regularly maintains that road in cooperation with the Forest Service, the road being from the Pavlak Grade turnoff to the trailhead - regular being implied that least once a year you go out there and blade that road.

Otis Tipton: I can tell you that when I come aboard in 1993, in 1994 I have records where we had bladed that road, yes.

Commissioner Coyner: Is that designated as a county road? Is that a county road number? Is it acknowledged to be a county road? That portion, again from the turnoff Pavlak Grade to the trailhead?

Otis Tipton: The -

Commissioner Coyner: To your knowledge?

Otis Tipton: The acknowledgement was all roads in the county we consider county roads.

Commissioner Coyner: Can you tell me whether this project is atypical for projects that you typically do in Elko County, the reconstruction of that mile and a half? Would you say you do that in other areas of the county once a year, twice a year, would you call it a special project or would you call it regular maintenance? Well let's not ask you what you call it - let's just ask you have you done projects of that magnitude in other places in the county in the past?

Otis Tipton: Every year. Every year we will have a minor or major washout. Some of those places that - when you drove through the other day, if the river comes into the road we have to replace that section so people can pass on it.

Commissioner Coyner: Are you aware has the NDEP ever required you a permit for those types of operations in the past?

Otis Tipton: No. They have not.

Commissioner Coyner: I have one question on access to mining claims. Bill, I am not sure that he would be the person to ask.

DAG Frey: You can ask.

Commissioner Coyner: Are you aware does that road serve as right-of-access to mining claims?

Otis Tipton: I don't have any knowledge on that.

Commissioner Coyner: Perhaps some other witness could answer that question for me. Thank you, that is all I have.

Chairman Turnipseed: In that same light, there was some testimony in the transcript about the town of Jarbidge being isolated during that '95 flood and you just testified that you repaired the road from the state line to the town and above to the Pavlak Grade and yesterday as we were leaving we crossed a bridge over the Jarbidge River and there were old culverts laying off to the side. Was that bridge replaced as a result of the '95 flood?

Otis Tipton: No, it was not,

Chairman Turnipseed: Those culverts are probably laying there from some past washout of the bridge and the bridge was repaired some other time?

Kristin McQueary: Just for clarification purposes are you referring to a bridge that would be north of town?

Chairman Turnipseed: Right on the very north edge of town, as you leave town going north you cross a bridge and cross over to the east side of the river.

Otis Tipton: That project was not done by the Elko County Road Department it was taken care of by the engineering portion, Mike Murphy did that, and I wasn't there when work was being done and I have no knowledge of what was done so you would need to talk to the County Engineer on that -

Chairman Turnipseed: It is not important - I just thought that maybe that was replaced at the same time you were rebuilding the road -

Otis Tipton: No the bridge was not, that is the original bridge.

Chairman Turnipseed: O.K. - any further questions from the panel?
DAG Frey: Mr. Chairman I have a follow-up question.
Chairman Turnipseed: Before you answer it, let me know what it is. Again, I don't expect to make the case for the county and I don't expect to make the case for the state you -
DAG Frey: I just wanted to clarify some questions that were asked about the Forest Service doing the work just south of the work we saw yesterday - in other words, from the bridge that you enter town, up. I believe the witness testified that it was the same type of work that we saw yesterday and I just wanted to clarify did the Forest Service dig a new stream channel and divert the river into that?
Chairman Turnipseed: O.K. I will allow the answer.
Otis Tipton: O.K. - what the service did was -
DAG Frey: I think this calls for a yes or no answer. Did they dig a new stream channel?
Otis Tipton: No they did not.
DAG Frey: O.K. - thank you. So it is a different kind of work. It was different work.
Otis Tipton: Parts of it -
DAG Frey: No further questions.
Chairman Turnipseed: Again I am going to excuse the witness and let either party call him back again for rebuttal.
You are dismissed. Next witness.
Kristin McQueary: Mr. Chairman, as a result of Commissioner Coyner's questions I would like to call a witness that I hadn't planned. I would like to call Elko County Commissioner Roberta Skelton.
Chairman Turnipseed: Please remain standing and raise your right hand. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth before this panel today.
Roberta Skelton: I do.
Chairman Turnipseed: Thank you. Be seated.
Kristin McQueary: Just for the record would you please state your name and spell your last name.
Roberta Skelton: Roberta K. Skelton - S K E L T O N
Kristin McQueary: You are an Elko County Commissioner?
Roberta Skelton: Yes.
Kristin McQueary: For how long?
Roberta Skelton: 6 years.
Kristin McQueary: Commissioner Skelton are you familiar with the Jarbidge area?
Roberta Skelton: Yes.
Kristin McQueary: Why are you familiar with the Jarbidge area?
Roberta Skelton: I was raised there.
Kristin McQueary: Commissioner Coyner asked the question regarding the usefulness of the South Canyon as access to mining claims. Do you have personal knowledge of that?
Roberta Skelton: Yes.
Kristin McQueary: What access does that road provide to mining claims?
Roberta Skelton: It provides an access to mining claims as far as into the head of the canyon, the Norman claims. It has also been, at one time, commercial for travel to saw mills that are in the area, not what is in question today but above that which is now wilderness. I don't know - there is another gentlemen here - but there is many, many prospects in the area.
Kristin McQueary: I have no further questions on direct.
Chairman Turnipseed: Cross examination.
DAG Frey: Ms. Skelton do you own any claims.
Roberta Skelton: I own claims but not in that area.
DAG Frey: All right. Thank you.
Roberta Skelton: Is that it?
DAG Frey: Yeah.
Chairman Turnipseed: Any further direct?

Kristin McQueary: Nothing based on that.

Chairman Turnipseed: I have no questions - are there questions from the panel?

Commissioner Coyner: For the record I explain my line of questioning and that was to establish whether that particular portion of the road was being regularly used to access mining claims and if anyone had knowledge of that - that was the reason for that.

Chairman Turnipseed: Well that was sort of a question. Is it regularly used by miners to access their claims?

Roberta Skelton: Yes.

Chairman Turnipseed: I have not further questions. Witness excused. Next witness.

Kristin McQueary: The state would next call Gary Back.

Chairman Turnipseed: Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth before this panel today?

Gary Back: I do.

Chairman Turnipseed: Please be seated.

Kristin McQueary: Would you please state your name and spell your last name for the record.

Gary Back: Gary Norman Back. B A C K

Kristin McQueary: Mr. Back what is your occupation?

Gary Back: I am an ecologist and I work for JBR Environmental Consultants.

Kristin McQueary: What is your educational background?

Gary Back: I have a Bachelor's of Science in Fisheries and Wildlife Management, I have a Master's Degree in Forestry and a PhD in Wildlife Ecology.

Kristin McQueary: And what is your work experience?

Gary Back: I have worked for the University of Nevada, Reno as a research associate and for the BLM as a wildlife biologist and now as ecologist at JBR Environmental Consultants.

Kristin McQueary: Has JBR been hired by Elko County to consult on the Jarbidge South Canyon Road Project?

Gary Back: Yes they have.

Kristin McQueary: In JBR's work for Elko County what people have worked from JBR on this project?

Gary Back: We have had a Hydrologist, a 404 Permitting Specialist, myself as Wildlife Biologist and then we have had a Fisheries Biologist that we hired to work with us.

Kristin McQueary: And you have reviewed all of those reports?

Gary Back: Yes I have.

Kristin McQueary: And in the course of your experience, in the 1995 event how has that changed the stream area?

DAG Frey: I object to this as being cumulative to what has been admitted in the transcript.

Kristin McQueary: Some of this cumulative but it is leading up to rebuttal of some of Ms. Mulligan's statements.

Chairman Turnipseed: I am sorry, I didn't even hear the question. I was writing. Would you repeat the question please?

Kristin McQueary: The changes made to the stream channel as a result of the 1995 event?

Chairman Turnipseed: Changes caused by the '95 flood event?

Kristin McQueary: Yes.

Chairman Turnipseed: And you are asking him to describe what those were.

Kristin McQueary: Describe what those were , briefly.

DAG Frey: I objected that it was cumulative because this testimony is already in the transcript and I thought that we were just trying to have additional testimony or clarify what was in there - I didn't think that this was just an opportunity to repeat it.

Chairman Turnipseed: I will overrule the objection and allow the answer.

Gary Back: In 1995 an event, in the end of May we had a mass failure of two side canyons, both the Pine Creek Campground Snowslide Canyon and Gulch Canyon and there was a tremendous amount of rock and debris that was entered into the South Fork Canyon of the Jarbidge so you had a change in the channel, you had blockages that caused the stream to change course, some of that course was the old road - some of it was some new channels within the canyon and you had basically a built up of the canyon floor

with this new material being brought into the system.

Kristin McQueary: As a result of those changes, did that affect the high water mark in that area of the canyon that we are talking about?

Gary Back: Basically when we went up to do our evaluation of the site it was difficult to determine where the old water mark was because much of the material that was laid down was now above that mark and we determined that you had trees that were, instead of having a stump at ground level, were now covered by a foot or more of this debris so they would have been above the ordinary high water mark prior to 1995 and after 1995, because the channel had actually been raised, we had some change in that mark so it was difficult for us to determine where that mark was.

Kristin McQueary: At this time are changes still occurring in the stream?

Gary Back: Yes, and they will continue to occur. It is a stable but dynamic situation up there, stable in that there is some bedrock checks - we don't expect to see a lot of down-cutting, but within the alluvium that was brought into the stream bed we expect to see some lateral as well as some vertical movement of the stream.

Kristin McQueary: At this point in time in the area that we are talking about is there a definitive high water mark, currently?

Gary Back: It has only been 3 years since the event and with these activities taking place I don't think we have a defined high water mark at this point. I don't think I could go out, or a hydrologist could go out, and say it is right here.

Kristin McQueary: I have no further questions on direct exam of Mr. Back.

Chairman Turnipseed: Cross examination:

DAG Frey: Thank you. Mr. Back when you went out there you did eventually determine where a high water mark was?

Gary Back: We estimated where it was.

DAG Frey: Is it something you did by visual observation?

Gary Back: Some visual as well as some excavation of material around the stumps of the trees to get some idea of where the old bank level was.

DAG Frey: Hand excavation?

Gary Back: Do you think that it is possible that somebody else would be able to go out there through visual observation and determine where the high water mark is?

Gary Back: Where the old one was, yes.

DAG Frey: They couldn't determine where the new one was? That is something that only you could determine?

Gary Back: No, we didn't determine the new one.

DAG Frey: I thought that was my first question. At some point did you or did you not determine where there is a high water mark?

Gary Back: The old high water mark.

DAG Frey: That is it. I've got no further questions - I may have one further question. I have no further questions.

Chairman Turnipseed: Redirect?

Kristin McQueary: I've got nothing based on that.

Chairman Turnipseed: Any questions from the panel?

Commissioner Doppe: No.

Chairman Turnipseed: I have asked two of the prior witnesses if, in their opinion additional work needs to be done in order to, not necessarily to restore the road but to stabilize the channel. I realize that stream channels are inherently not stable but since you are an ecologist would it improve the ecology of the area if there were more work done there and done properly in the form of riprap or whatever could be done there to somewhat stabilize the channel. In your opinion is that necessary now at this point?

Gary Back: Yes. We pointed out in our report to the county that the work that they have completed to date is in danger of washing out with the next high flow because it is not stabilized where the channel was breached to allow the water into the new/old channel - if you

will - the way the stream goes it is coming right at the road at that point and you are right at a bend and that is where the energy is going to be directed and that area has not been stabilized and so the fill that they put in to recreate the roadbed is subject to washout with the next high flow if it is not stabilized.

Chairman Turnipseed: Without resorting to hearsay, although I generally do allow hearsay evidence in the record if it is appropriate, but do you know the rationale of the U.S. Forest Service in why, at least according to the transcript they had full intention of restoring the road and repairing the road during '95 and '96 and then changed their mind and decided not to restore the road. Do you know why that was.

Gary Back: I know the events that caused them to but as to their reasons I don't know that - the EA was done, it was put out for public comment and there was an appeal on the EA process and at that point the Forest Service decided rather than to go through the appeal process to re-do the EA and to either do a better job or as the county was told, to kind of fix it, so they could still do the road and then in June, I believe it was, was when they announced they had no more intention to repair the road. As to what reasons went in between the time the appeal came in to make that decision I don't know but it was the appeal that pulled the EA off the table.

Chairman Turnipseed: So you don't know whether they changed their mind for environmental reasons or financial reasons or political reasons or any other reason?

Gary Back: No.

Chairman Turnipseed: In the comments or the appeal of the EA, were they based on environmental reasons, political reasons, or financial reasons?

Gary Back: Environmental reasons in that the, if I recall correctly, the appeal felt that the Forest Service did not use accurate data to evaluate the impacts of the road if repaired to the fish, they also questioned the amount of money, somewhere between \$700,000 and \$1.4 million to repair that stretch of road based on the plan that was presented at that time and so they questioned the value of putting those dollars into that project. I am sure there were some political reasons but they certainly were not in the document.

Chairman Turnipseed: In the original plan, in the original EA, did it contemplate repairing the road clear to what was the end of the road prior to the '95 flood?

Gary Back: Yes. Up to the trailhead. I think the road actually went beyond that but with the wilderness designation the road had been set back to the trailhead area above Snowslide Gulch.

Chairman Turnipseed: We visited that area yesterday and there is some typical Forest Service Signs, there is a Forest Service restroom and a place where you could turn around in your car and it is your testimony that they intended to repair the road to that point.

Gary Back: Yes. That is the way I understand it, yes.

Chairman Turnipseed: Any other questions.

Commissioner Doppe: Mr. Back, I have read your transcript and with apologies to redundancy I do think that I do want to hear some of this stuff maybe again or maybe expanded on. If the road was repaired in accord with that original Forest Service plan - which I believe is what we saw the stakes in the ground for yesterday - if the road was repaired give me a brief summary of what the impact would be on the stream or on the river bed with regard to habitat and how would that be impacted versus the way it has been changed in the flood event of 1995.

Gary Back: Basically, these type of flood events where you have a lot of mass failure and introduction of material into the stream bed can actually be a positive impact on trout habitat in the long run. There is a lot of big material that you saw entered into the stream and those types of obstacles result in pools and resting places - hiding places - for the fish and so over the years, prior to the 1995 event there has been some of that material interjected to the system but generally by the description of that stream it doesn't have a lot of these big scour pools and it is one of the limitations to the trout in there. So right after the event you have a lot of material but it hasn't settled and sorted yet so basically you have a temporary degradation of habitat for trout. Then, as the flows of that even and subsequent high flows in '96, '97 and '98, you get this material to start to sort and you start getting the habitat back in. The fines are basically washed out in the first year, you get macro invertebrates back - the food that the trout feed on -

and these pools are created. So, if you go back in and repair the road you are going to do similar to what the county did - you are putting water back in the old channel and you are creating that old channel, you are temporarily changing the habitat - degrading it - if you will and moving any pools that existed but within several years the natural high flows, and with the correct placement of some boulders and debris and that type of thing you can recreate that habitat. So the road could be put back in, with some considerations for the fish and the fish habitat, with a temporary impact. Without stabilizing and not only the section the county worked on but, you went up to that site yesterday if you went to the trailhead, there is 3 or 4 other sections where the road is now occupied by the stream. It is right up against the east side and there is a lot of fine material that is going to be eroded. The west side, for the most part of that channel there is a lot of bedrock outcropping, it is more stable, except by that one bridge - I believe it is at Fox Creek or just above Fox Creek - where the bridge is and that side washed out and there was an old roadway that went up Fox Creek, but the part of that bend in the river is exposed to the stream energy right now has been basically rip-rapped by that '95 event, there was a lot of erosion but now there is a rip-rapped area. The concern we have from a hydrological standpoint is the plan, as presented by the Forest Service and as I understand what the county would have done is connect the bridges again - you know put the road back where it was and connect the bridges. Those bridges were built in the '50s and '60s - I doubt that there was a lot of hydrological information that went into the construction of those bridges. With the same in the stream condition after the '95 event I think it would be important that those bridges be evaluated in terms of handling the flow and the change of the stream channel. They may not be in the correct place and they may not be wide enough to handle the high flows and if they are not going to handle the high flows then you are going to have the stream do an end run around or over the bridge so I think the plan needs to be looked at in terms of those new conditions.

Commissioner Doppe:

I think I read in the transcript somewhere there is some concern about shade, how the trees were established in the original stream bank and then some of them left so in parts where the has now intruded onto the road it is basically - some of the are completely open. What is the impact of that as it exists now versus back, well I guess now it is back in the bank - the original, but what is the difference on a habitat perspective?

Gary Back:

Any section of the stream that is exposed to direct sunlight is going to have the potential to raise the water temperature and for the trout species that are involved in the stream, the bull trout and the red band trout, water temperatures are important in terms of the quality of their habitat. After the '95 event there was a lot of exposed area and in the three years a lot of the vegetation has come back - there are stretches of that stream, both above where the county did their work as well as from their to Jarbidge and probably to the Idaho border that are wide open and don't have much vegetation. Stretches, and as you saw yesterday where the county did their work there is one section that the trees still come right up to where the county did their work and there is sections where the county removed the vegetation to push the material out of the channel so in terms of the ratio of shade to unshaded areas I don't think the county has changed the over-all ratio of the stream with the work they did. If they continue to do the rest of the work you would have those types of disruptions but they would be temporary. As you walked up there you may have seen some of the stems coming up out of the gravel that the county moved so there is still willows and all those in place and I suspect they will show themselves next spring.

Commissioner Doppe:

My last question. If the properly completed its work, and I say properly with due attention being paid to things like making sure the bridges are capable of handling flows and restoring or enhancing even habitat by the proper placement of boulders, logs, etc. - if that took place, just like that, is there a net benefit over a long term to the

habitat in that area versus basically leaving it untouched or how does that work?

Gary Back: I think the net benefit would be that you stabilize those areas on the east side of the canyon. I said the west side is basically a bedrock, the west side there is a lot of alluvium that has come down from those hillsides and it is fine materials and that is going to continue to erode and prior to '95 the road was the buffer between the stream and those very easily erodible banks. Right now the stream is in the road so it is up against those banks and you are going to see continued erosion of that and because those are fine materials you are going to get a lot of sluffing and that is going to be a detriment to the trout.

Chairman Turnipseed: Excuse me - correction. You said the west side twice. I believe your testimony earlier was that the stream bank on the west side of the stream is largely bedrock and it is the east side that is the alluvium and the fine grained material.

Gary Back: That is what I meant to say. The east side is the alluvium. Right. So by stabilizing those sites you would have a long-term benefit to the trout. Leaving it as it is, those sites are going to continue to erode, there will be a longer impact, at some point those things will stabilize but I couldn't venture to take how that will be.

Chairman Turnipseed: Miss Mischel has a question - would you state it larger for the record?

DAG Mischel: You testified that you had a permit specialist with JBR. Did you have an opportunity to discuss this project with that specialist?

Gary Back: Yes I did.

DAG Mischel: What was that permit specialist's opinion with regards to permitting requirements for the road project that was just discussed?

Gary Back: Generally we would advise any of our clients to go through the permitting process and that is just a guarantee that something doesn't come back and bite you afterwards. In terms of, he has submitted a report regarding the Corps 404 permit requirements as well as the rolling stock and I think he would agree with Ms. Mulligan's testimony that the equipment that was used was rolling stock equipment. The question is to whether it is point, diffuse or pollution was not something he ventured to guess on and in terms of the emergency requirement he didn't venture a guess on that either.

DAG Mischel: When was that report issued?

Gary Back: It is actually a draft that I got earlier this week and I am reviewing it.

DAG Mischel: So it is still under review. Thank you.

Chairman Turnipseed: That raised another question. You have been consulting for Elko County since the outset, since the '95 flood and not just -

Gary Back: No. We got brought in right after the cease and desist order. We were contacted to go up and look at the site and evaluate the damage.

Chairman Turnipseed: I see. Any further questions? The witness is excused.

Gary Back: Thank you.

Chairman Turnipseed: Next witness.

Kristin McQueary: Mr. Chairman the county has no further live witnesses other than everyone - except for one person - that testified at the show cause hearing is available here today. If you guys have any follow-up questions as a result of the trip up to the site or something that you wish to have clarified I have them available. I don't have any reason for me to recall them and to have direct testimony at this time other than if you guys have some follow-up questions.

Chairman Turnipseed: Let's take another recess. I realize it is not all that long since we just had one. Let's have another 15 minute recess and we'll reconvene at 11:15. We can talk about whether we have any questions or not and come back on the record at 11:15.

Chairman Turnipseed: It is 11:15 - we will reconvene the hearing.
First of all I am going to take administrative notice of the order that was issued on July 23, 1998 since that is what we are charged with either upholding, modifying or denying and we have a couple of questions of counsel.
#1 for the state: Is it the purpose of this panel to only to find if there was a violation or are we also to set a penalty?

DAG Frey: No. We've discussed the penalty with the county separately. The appeal is simply of the order and whether to uphold it or deny it or amend it and at this time we are not seeking a penalty.

Chairman Turnipseed: And I guess the question for Elko County - can you point -

Commissioner Doppe: Follow up on your question if you would. He said at this time we are not seeking a penalty.

DAG Frey: We are not seeking a penalty before the Commission - we are seeking a penalty on the violation.

Commissioner Doppe: From us?

DAG Frey: No. We are either going to -

Commissioner Doppe: If we affirm that the violation occurred -

DAG Frey: If you affirm that the order stands we will seek a penalty and the statutory procedures in the area of the water statutes as opposed to the air statutes where the air statutes the Division is required to come to the Commission to seek a penalty first. In the water statutes the statutes provide that the Division goes to District Court to seek the penalty.

Commissioner Doppe: O.K. -

DAG Frey: We haven't put a penalty in the - there wasn't a penalty in the order or that would have been appealable.

Commissioner Coyner: Does that penalty eventually come back to the Environmental Commission for confirmation or not? Does the District Court only -

DAG Frey: Just to the District Court.

DAG Mischel: Mr. Chairman, just to follow up with that, it is my opinion that there is some ambiguity in the statute about jurisdiction over the penalty provision. The NRS states that the department shall set a penalty and that of course would be appealable to the District Court - civil penalty up to \$25,000 per day for violation and it is the use of the term civil that makes it a little less clear about whose authority it is to issue a penalty. On the other hand there is final reviewing authority by this agency prior to District Court on all final decisions of the agency - in this case it would be NDEP - So it is my opinion that because of this ambiguity that a penalty recommendation for modification of the findings would be sensible by this Commission and I understand that the Division has gone through a very objective process in reviewing findings and determining penalties. It is described pretty well in the transcript, your Exhibit G, in terms of setting up a penalty panel and setting these penalties but the Commission

DAG Frey: does have oversight authority over final decisions of the Division.
 Chairman Turnipseed: Mr. Chairman, could I just add one -
 DAG Frey: Yes. Go ahead -
 Chairman Turnipseed: thing. The Division does have a fairly extensive penalty matrix that we use in determining a penalty that we haven't done. We put in the violation, the culpability, all various reasons to take into account for determining the penalty and that is how we usually come up with a number. It is not just something we pull out of a hat.
 Chairman Turnipseed: Oh I know that. Commissioner Coyner, in our off the record discussion, had a recommendation for penalty and if he wants to bring that forth in the conclusion I will let him make that statement.
 Kristin McQueary: For the county we had a question, not necessarily for a witness and both of you are going to be given an opportunity to make a closing statement but the question came, can you point to a specific NAC or NRS where you could have covered this work under an emergency?
 Chairman Turnipseed: Yes. I can do that.
 Kristin McQueary: Well would you wait to do that. Make a note that you have to cover that in the closing argument.
 Chairman Turnipseed: It will be covered in closing argument.
 Kristin McQueary: O.K. If there are no further witnesses the evidentiary portion of this hearing is closed and at this time I am going to have a show of hands on how many people want to make a public comment. Three - would you do that now. I don't care what particular order - come to the microphone, state your name for the record and your comment won't be sworn it will just become part of the record in the event this issue goes up on appeal.
 John Williams: There are three,
 I assume this is not going to be hours and hours long.
 My name is John Williams. I live at Jarbidge, lived there off-and-on for 74 years and caught quite a few of the trout that were there. I've got a little news for Ms. Morgan, those weren't CC Camps up there they were Forest Service Camps and the tube that she was worried about being all tore up by the county equipment was put in by the Forest Service for water at Pine Creek Camp Ground. When the flood come the line broke and the Forest Service never fixed it and I know this is a little bit facetious maybe but I wonder where the EPA is when we have a big rain and the river gets all clouded up. Saturday afternoon my daughter and I went up the creek and it was a lot more riled than when the county was working up there.
 Chairman Turnipseed: Thank you. Next.
 Jack Creechly: Jack Creechly. I live in Jarbidge and I own and operate with my wife the Outdoor Inn, bar - restaurant - hotel. John covered some of the things that I wanted to clarify about the campgrounds, etc. the only thing I would like to add to that is the real need we have for more campgrounds or the campgrounds that are there with toilet facilities, etc. - on these weekends during tourist season we don't have enough. People are camping in town when they can't find a room and then you got debris and toilet paper hanging from trees, no toilet facilities, etc. The other thing is the fire protection. I could give an example of - I think it was 2 years ago - we had a fire in the main canyon at Jack Creek up on the ridge and no roads up there and it took the NDF crew of about 40 guys on a camp crew, fire fighters, it took them 4 hours to walk up there with their equipment and by now the fire is out of control so getting there, even with hand tools for the fire-fighters is important, I think. Other than that, that is about all I have except that all this publicity from the environmental groups etc. is really affecting our business and many of the people in Jarbidge have their life savings invested in their homes and whatever. I know I've got a big investment there and I know that it matters a lot to the whole town. Thank you.
 Chairman Turnipseed: Thanks for your comments. Mr. Carpenter?

John Carpenter:

John Carpenter. I am the Assemblyman representing Elko County. I guess to say the least this has been quite an education for me. I set on the Natural Resources Committee where these statutes are written and from my perspective this is the first time that I have saw and on-the-ground situation of how these regulations are applied and enforced and a person like I am, I have been out in the real world quite a while like I think you three gentlemen have, it's a great worry to see something in writing and how that is going to be enforced when something happens and I think that is what's happened here. Lew Dodgion, when he was the Administrator used to make the remark "well yes, it is here and it is in writing but we are not going to enforce it that way". I think that the way these statutes are written that you or I probably could not cross a vehicle across the stream and we all know that is not the real Nevada. In many of these streams here going up - whether you are going hunting or fishing or sightseeing or whatever - many times you cross the creek going up there a number of times. We all know that you can't have a permit every time you are going to do this so I think there has got to be some real clarification of these regulations. There is no question about it that this is a situation that if you go by the book in this case then you are going to have treat everyone the same and I think it is absolutely impractical - you will not be able to do it. This is why we've got to have some clarification in the statutes. Now we all know that Mother Nature has been working on that canyon for millions of years and so that debris and the rocks and everything has been basically put there by Mother Nature. So I am kind of wondering, because it was put there then because man might do a little bit there, is that really pollution? Like the gentleman here said you know that creek was riling after a little storm so we've got to have some practical application of the statutes. If we don't, we are going to be in a real problem and so I would like to - I think many of you people has saw this picture that was handed out in Tonopah. Maybe I could put it on the machine up there if I know how to work the thing -

Allen Biaggi:

It won't work on that - it has to be transparent, do you have copies?

Assemblyman Carpenter:

I think we have some more copies here but I would like for the members of the Commission to see is that we have a - it says for a comparison, forest road - it has a number, South Canyon road - it says "flood stream channel and where the Elko County was doing construction" - I don't think there is any question unless the county is allowed to go up there and stabilize that stream bank and finish that road we are going to be back in the same situation that we have here and it doesn't take any rocket scientists to see that this bank is continually going to sluff off for many, many years probably so I think it is imperative that the county be given some kind of a temporary permit to get up there and stabilize that situation. In looking through the statues I can't see anything that provides for a temporary permit but I think it can be done. That is one way that we need to change the statutes to take care of this kind of a situation because no matter where you stand on this issue I think that everybody that I have talked to agrees that it needs to be finished, it needs to be stabilized and probably you are not going to get the cooperation of the Forest Service or the U.S. Fish and Wildlife Service but after all this is Nevada and we are Nevadans and this is our resource and so I think we need to approach it in that way and give the county the chance to get up there and stabilize this. Otherwise we are really kind of all derelict in our duties. And after that the county will fight with the Forest Service over the ownership of the road and all these kinds of things but let's not let our emotions, or whatever you might want to call them, getting in the way of doing what we need to do up there and with that I will limit my testimony. I think there is a lot of things that need to be brought up. They were brought up in the hearing over there and I know that most of you people have read them and you will see that this was not done on a whim. I will be glad to answer any questions and I am sure that probably in the next legislative session we will try to make some changes to make this law, the statutes, more practical and workable out in

the real world while at the same time protecting our environment which us Nevadans are jealous of.
Thank you.

Commissioner Turnipseed: Just one question. Is this photo comparison in the South Canyon of the Jarbidge?
Assemblyman Carpenter: Yes. There is no question that - on the bottom area you can see where the county has done this work and this is the same rock that is - both pictures point to that same rock so I am sure it is in that same area.

Commissioner Turnipseed: What is the obstruction on the right hand side that is covered with snow in the top photo.
Assemblyman Carpenter: That was probably part of the road that didn't get washed away I guess.
Commissioner Turnipseed: Any other questions of Mr. Carpenter? Thank you.
Any other public comments? Ms. Skelton?

Roberta Skelton: I would like to have this back because this is original -
Roberta Skelton, Elko County Commissioner, just for clarification - the photos you are looking at were taken by the U.S. Fish and Wildlife Service and obviously they were for taken at two different times of the year and put together for submission, I think, to the Public Lands Committee which I attended in Tonopah on the 11th of this month. The emergency funding that we are talking about - or the clause - and I won't elaborate, was basically - we had applied or we were going to apply, the Forest Service said they were going to apply so we withdrew our application. They said they would work with us through the Corps of Army Engineers and we had major flooding over in other various other parts of the county as well as Jarbidge Canyon Road. And in these instances other parts of the state did receive some funds and were designated as flood areas, emergency. Elko County was denied throughout the process by the Governor's office. Consequently, we went back to the Forest Service and they said they would use, what was it EARTHLA funds, anyway FEMA and that where the process started and up to the point at this table we were working, we thought, cooperatively. As far as fire suppression we had the Coffee Pot Fire several years back, prior to the one Mr. Creechly talked about, that did almost get to town, it started on the other side of the canyon in the Bruneau. The Forest Service had done nothing for about 4 days before it really got out of control and burned many, many acres. This is another reason we need the road back and put it back to where it belongs and to put out small fires that the town and the folks can do. That's it. Thank you.

Chairman Turnipseed: O.K. That concludes the public comment period -
David Cowperthwaite: Mr. Chairman, my name is David Cowperthwaite, Executive Secretary of the Environmental Commission. I have before me a letter, that was sent to Pete Morros who is the Director of the Department of Conservation and Natural Resources, dated September 9, 1998. We received it on September 14, 1998, and it is specifically from Trout Unlimited and it addresses the issue of this hearing and matters before this hearing so I would like to put this as a part of the public comment record regarding this hearing. This is the correspondence.

Chairman Turnipseed: I guess - first are there any objections?
Kristin McQueary: We don't object to the item being placed in the record. Unfortunately this is not the forum on which Elko County can fight with Trout Unlimited.

Chairman Turnipseed: Is this going to be marked as State's Exhibit 7?
DAG Frey: No it is not. We are not presenting it as an exhibit -
Kristin McQueary: We certainly don't want it marked on our side either.
David Cowperthwaite: The only thing is, I received this and it related to this matter and they in fact commented on this hearing.

Chairman Turnipseed: I guess it is up to the panel. Do we want it in the record.
Commissioner Doppe: We can take it as public comment as if they were standing at the microphone.
Chairman Turnipseed: Alright. Agreed.
DAG Frey: I have no objections to that if it is public comment.

Chairman Turnipseed:

O.K. It is public comment, for whatever it's value.

Closing arguments on behalf of the state.

DAG Frey:

Thank you Mr. Chairman. I would also like to thank all of the witnesses who testified today. I usually write out a closing statement but I am going to depart from that briefly which frequently has been a mistake but I will do that anyway.

I want to just go back to my opening and repeat that today's issues are not regarding the need for the road, the ownership of the road, or the status or the needs of the bull trout in the river. These are issues that NDEP is not offering an opinion on nor, Assemblyman Carpenter brought up, that there is another fight that is probably going on or will go between the county and the Forest Service and that is not a part of today's hearing either. What we are here regarding is the appeal on simply whether or not a rolling stock permit was needed for the work that was done out there and there has been testimony today that it would not take long to get a rolling stock permit for a job that we have issued them in relatively quick time before and that this was not a project so major, in terms of complications, that it would take a long time in the review process of the permit application. So if we can just limit today's decision to those items I would request that. I believe that there was evidence that there was a discharge of a pollutant - and that's sand, rock, dredged soil - into waters of the state and we regulate that in all rivers, not just the Jarbidge River or in Elko County but in all rivers of the state - the Truckee, the Carson and we are concerned about that and it is difficult to have statutes that allow it some places and not allow it other places. We do treat everyone the same. We have treated the county the same as we would treat any other agency, any other private citizen. When we found out about it we asked them to stop - in fact, we provided notice before the work was commenced that a permit was required and we sent a letter notifying the county of that and the response was not, and there was no testimony that we immediately notified DEP that this is an emergency, we've got to get it done today.

I would like to just read the definition of emergency to you from the Black's Law Legal Dictionary and it defines emergency as "a sudden unexpected happening; an unforeseen occurrence or condition; specifically perplexed in continuancy or complication of circumstances; a sudden unexpected occasion for action; exudant pressing necessity" and I think without any dispute the act in 1995 when the rock and slide occurred an emergency might have existed during that happening and immediately thereafter. Immediacy is an important part of emergency. When a condition exists for three years the emergency no longer exists because people are aware of the circumstances. They are aware that there has been a rock slide and the road is closed. An emergency deals with something that you've got to respond to right away. In the resolution from the Board of Commissioners of Elko County in the fourth "Whereas" they talk of the South Canyon Road in and around Jarbidge and they say "it is in immediate need of repair or some reconstruction due to flood damages for the purpose of securing health, general welfare and safety for the public in the event there may need to prevent or fight the occurrence of life-threatening fire" this is action that is taken in advance of a hypothetical emergency so I don't see that there was any reason why the county was prevented or could not have gotten a permit, they had passed this resolution on July 15th, they could have applied for a permit the next day, the next week - I don't think that the emergency that we are talking about, which is the threat of fire, was any different whether they commenced the work on the 21st of if they had commenced it on the 16th or later that month or the next month, that there was plenty of time to obtain a permit.

Fundamental principals do not allow the county to decide when state laws are enforced unless the statute specifically so provides. To allow this would eviscerate the statutory scheme because whenever a county did not want to comply or was unable to comply with the need to get a permit it could ratify its decision after-the-fact emergency.

Arguably, in the case of the three year old condition that is what appears to have occurred.

More importantly though is that a specific statute in the water statutes, 445A.720, in no uncertain terms says that the "department is the final authority in the administration of water pollution prevention" so in statutory interpretation, even if there was a general statute that would allow counties to take action to circumvent the permitting procedure, where there is a specific statute that overrides a general statute and this statute clearly speaks to the Division as the source of authority regarding the pollution statutes.

The county contends that the equipment used and the manner of the work performed was not a point source yet NRS 445A.395 specifically states any discernible confined discreet conveyance, including rolling stock, is a point source.

The county in the past, in fact March of this year, obtained a temporary permit for work that they were doing so they were aware of the need to have a point source and Mr. Boucher's testimony in the transcript says that when he got back from vacation - I know this is all happening very quickly, I believe it was on the 20th or 21st - was one of the first thing he did was call to obtain information regarding the permit. He, at that time, did not notify DEP that this is an emergency and we don't need a permit however he asked that we fax to him the information needed to fill out the application and the permit itself.

The work was conducted on the 21st and 22nd and at no time, during those days, did the county or anyone from the county continue to say that the county was in an emergency situation and that no permit was required. They come up somewhat after the fact and after the cease and desist order was issued.

I think these statements will conclude my closing remarks. Thank you.

Counsel for Elko County.

Chairman Turnipseed:
Kristin McQueary:

I only get one shot at you so my presentation will be somewhat longer than Mr. Frey's first closing argument.

I too, would like to thank all the witnesses and the people from the state that have cooperated with us and we have learned a lot through this process.

Elko County is here today to ask you to consider the sole question of whether a permit was needed on the work done on the Jarbidge South Canyon Road by the Elko County in July of this year. This is not as simple a task as it seem at first blush because although Elko County and the Nevada Division of Environmental Protection agree on the basic facts and the basic issues we do not agree on which laws and which regulations need to be applied to this situation. I plan to discuss with you a brief history of the Jarbidge South Canyon Road to help you understand why the Elko County Commission took the action that it did. I will then the discuss the statutes and the regulations on which the County is basing its contention that a permit was not necessary. Elko County believes that when you apply the proper law and the proper regulations to these facts you will overturn the cease and desist order placed upon Elko County by NDEP. My argument is supported by the transcript, of which you have already been provided a copy, and documents you have also been provided. Should you need specific references to testimony I would be happy to provide those. The duly elected Board of Elko County Commissions are charged with protecting the health, safety and welfare of not only the citizens of Elko County but of the people visiting Elko County as well and creating and maintaining a road system is an important part of carrying out those duties. Roads provide people with the ability to get to the necessities of life - food, shelter, medical care - and roads can help authorities reach people and protect property in emergency situations - such as fires, floods, accidents - and roads also provide the means of getting away for recreational pursuits - such as hiking, hunting and sightseeing - I guess that would be the pursuit of happiness under the constitution. There is evidence that the South Jarbidge Canyon

Road has been used as a transportation corridor since the late 1800's and since at the least the mining boom in 1909 Elko County has maintained the Jarbidge South Canyon Road and has cooperated with the Forest Service in maintaining the South Canyon Road. But in 1995, after years of maintaining it and years of cooperation with the Forest Service the county was shut out of repairing and maintaining it. What happened in 1995, as described by Mr. Back, is that the gulches feeding into the South Canyon area experienced a mass wasting. As you saw for yourself, this brought down thousands of tons of rock which described several portions of the road by diverting the river onto the road bed. This should not be confused with your typical high water flow, this is a high rock flow. The after effects of the 1995 event are many - the loss of campsites, Forest Service toilets that can't be serviced, increased sedimentation from where the river is flowing on the old road bed and undercutting banks. The loss of campsites and reduced economic opportunity is hurting the economy of Jarbidge, as you heard Mr. Creechly say.

NRS 445A.300 states that "the policy of this state is to maintain the quality of water in part for the public health and enjoyment and for the economic development of this state." NDEP's order frustrates this policy because the county is unable to open access to campgrounds and other activities. The tiny town of Jarbidge relies on outdoor enthusiasts as a basis of its economy.

After the flood, as you heard testimony, Elko County immediately started repairing the entire Jarbidge road from the Idaho border going south. Once they hit the Pine Creek area the Forest Service stopped the county and that is where the road closed sign remains today. Elko County cooperated with the Forest Service because, as the transcript tells you, the Forest Service that it could get the money to build a better road so the county relied on the Forest Service to rebuild the road without having to use the county's limited road budget. The Forest Service repeatedly told the county that it would repair the road so in 1996 the county did not make an attempt to repair that section of the road. In 1997, still relying on Forest Service's promises, the county did not repair the road and in July of 1998 the Forest Service told the residents of Jarbidge, this is on July 2nd, that it would not fix the road, that is would take heavy equipment up the river and rip out the improvements - such as bridges and toilets. And, this Forest Service announcement timing was unique, it coincided with a County Commission meeting in Elko. The Forest Service, after years of promises, did not have the courtesy to inform the county in person that it would not repair the road. The county detrimentally relied on the Forest Service's repeated promises to fix the road. As a result of both the 1995 and the July 2nd of 1998 Forest Service reneging on its promise, the County Commissioners were faced with an emergency situation - either take action or lose that road forever. And, Elko County made that tough decision, and the decision on what constitutes an emergency on a county road is the County Commissioners alone.

Parts of Mr. Frey's definitions out of Black's Law Dictionary I agree with but they are not applicable to this situation. The statutes and regulations do not give NDEP the authority to make a determination of what is an emergency. Ms. Mulligan said that wasn't her call - she said that was the governor or the administrator.

The regulations do exempt emergency work to protect persons and property under Nevada Administrative Code 445A.313 and I will talk more about that in a minute. I have some case law on the definition of immediate and I would be happy to provide that, I didn't bring that today.

Despite the county's belief that it did not need a permit to perform the repair work the Elko County Road Department took care to make sure that pollution from the road work was as minimized as much as possible from the equipment that it used and the method of construction. As you heard Mr. Tipton describe yesterday, he rented clean, new equipment which he checked for leaks - such as hydraulic oil and fuel. He also

checked the county's dozer for leaks and testified that it had recently been in the shop for a check up. He only crossed the river once to get to the dry, old channel to begin cleaning the area and he did the initial channel cleaning and then let the area sit overnight before breaching the dike, and that part is in the transcript. And testified that it is important to have clean equipment without leaks so there would be no contamination of the stream bed. So, despite not needing a permit Elko County made sure that the public policy reasons for rolling stock permits were met - whatever the definition of rolling stock is.

Now the county recognizes that the bull trout listing is not an issue in this proceeding but we want to point out that the road and the trout have coexisted for at least 90 years and because of the enormous amount of misleading rhetoric the county wants this argument to be on the record someplace, and very clear. There is simply no credible evidence that reconstruction of the road poses any greater risk to bull trout and water quality than the stream scouring out the sediment laden road bed and there is simply no credible evidence that the county's road work would ever have the type of impact on trout habitat and water quality that the 1995 mass failure did.

Now we get to the crux of the matter. The Nevada Division of Environmental Protection issued a cease and desist order on Elko County on July 22nd for failing to obtain a rolling stock permit under NRS 445A.465, which is point source law. Elko County admits that it did not obtain a rolling stock permit before beginning reconstruction on the Jarbidge South Canyon Road. It is the county's contention, because of the two emergencies concerning the road - the 1995 mass wasting event and the 1998 permanent loss of the road by the Forest Service decision that the road work was emergency in nature.

Now rather than the point source statutes and regulations the county's road work more properly falls under the diffuse source statutes and regulations, the Nevada Administrative Code 445A.309 specifically defines road construction and modification of water courses or stream channels as diffuse sources. In the Jarbidge South Canyon Road area the county was constructing, or actually reconstructing, a long-time road. Modification of the old stream channel was a necessary part of road construction because the river had to be moved off the old road bed for road construction to take place and there are many advantages, as you heard Mr. Back's testimony, of getting the river away from the old road bed. You'll have less erosion off the hillside, you'll have more shade for the river and from the county's viewpoint, restoring the old road would be less arduous construction. Less erosion and more vegetation in the original river channel have benefits to the fish as well as to what we are concerned about here today, water quality.

NAC 445A.313 which is a regulation under the diffuse source area specifically exempts emergency work to protect persons and property. In the resolution passed by the County Commission it found that immediate repair of the road was necessary to protect the health, general welfare and safety of the public. The commission specifically found that the road was necessary for fire safety and emergency medical services.

As you have seen from the exhibits the Division of Forestry has determined that the road is useful in getting to a small fire and getting it out quickly - and certainly, as Ms. Mulligan pointed out - getting access to a fire when it is small is the ideal way to protect people and property. Elko County Engineer, Mike Murphy has also stated that the road is useful for early monitoring of potential flood situations like the one that devastated the area in 1995. Mr. Tipton also addressed similar concerns to you here today. Without the road any early warning will be lost to the down-stream residents of the town of Jarbidge.

NDEP is telling you that the county's work was not emergency work. However, NDEP has applied the wrong laws and regulations to the situation. No where in the statutes or

regulations did the Nevada Legislature give NDEP the authority to determine what is an emergency. NDEP uses the Lamoille Bridge Project as an example. The difference between the Lamoille Bridge Project of this year and the Jarbidge area is that the Lamoille Bridge Project was not an emergency situation where we were not faced with losing the road.

Now the Nevada Legislature, and this goes directly to Mr. Turnipseed's question, has provided some guidance in what constitutes an emergency on public roads. NRS 403.085 which deals with special elections for improving bonds for county roads and bridges states that "a special election for bonds may be held if the board of highway commissioners unanimously determine that an emergency exists". In Elko County the county commission sits as the board of highway commissioners. What is important about this statute is the guidance it gives in defining an emergency on county roads. Subsection 3 states "as used in this section emergency means any unexpected occurrence or combination of occurrences which requires immediate action by the board to prevent or mitigate a substantial financial loss to the county or to enable the board to provide an essential service to the residents of the county". Now there was both an unexpected occurrence and a combination of occurrences in this situation. The Forest Service's unexpected reversal of its decision to fix the road was completely unexpected after 3 years of promises by the Forest Service. When you combine that with the 1995 emergency which washed it out in the first place that creates a combination of occurrences meeting the statutory definition.

It is important for the Commission to keep in mind that Elko County has always intended that this road be re-opened, whether they did it themselves or as they detrimentally relied on the Forest Service to get that road open.

Now if the county did not initiate action to fix the road there would be severe financial, or substantial financial losses to the county and the loss of an essential service. Over the years, as testified by Commissioner Skelton, County Manager George Boucher and Road Supervisor Otis Tipton, the county has either maintained or cooperated in maintaining that road. The county would lose the time, money and effort spent over the past 90 years in keeping that road open if we allowed it to just go away. And the county, without action, would also lose an essential service to the county - a transportation corridor in that area, access to a historic road which not only allows access for outdoor activities but also allows for fire protection, flood monitoring and getting emergency medical people up there should a hiker or fisherman suffer some sort of accident.

Also keep in mind that the county, under NRS 403.090, has the exclusive control of all matters pertaining to the construction, repairing and maintaining of public highways, road and bridges within its county. That statute does not say that NDEP has the authority to determine what is an emergency on a county public road.

I will also tell you that Elko County is pursuing a permit process for this road without conceding that we need a permit. We do not want to be fighting with the state but we will just go forward so we don't have to do this process again.

Because NDEP has applied the wrong laws and regulations to the Jarbidge South Canyon Road reconstruction, because the county - and not NDEP - has the authority to declare what is an emergency on this situation, you as the Environmental Commission have no choice but to overturn the cease and desist order placed upon the county by NDEP. I thank you.

Chairman Turnipseed:
Commissioner Coyner:
DAG Mischel:
DAG Frey:

Our counsel says that we need to deliberate this on the record so I guess I will begin. He has the opportunity for rebuttal under the rules of practice. Mr. Chairman, Mr. Frey reserved some rebuttal time - I didn't reserve some but I thought that the rules said that I had that opportunity without reserving it.

Commissioner Coyner:

Closing rebuttal.

Chairman Turnipseed:
DAG Frey:

All right -
I will keep it brief so that you can get on with resolving this.
First, I think Ms. McQueary - and there may be some dispute on this but to my knowledge the county has not applied for a permit to this date.

Kristin McQueary:
DAG Frey:

We are pursuing the permitting process.
O.K. - short of applying for it -
Getting back to the question of point source, nonpoint source - the county's own expert admits that his advice to his clients would be a recommendation to obtain a permit and that this is in fact, this kind of equipment, is rolling stock.
We can't regulate natural disasters, we can't anticipate that and there is no permit that be issued for that so when there is a big flood event there is a lot of silt and rock moved into the stream and maybe that is greater than the amount of silt or rock that is put in the stream during man-made activities in work and construction in the streams. However, that doesn't mean we give up and we stop trying to protect the waters of the state. You can regulate and try to improve waters of the state where you can and where you can't it is beyond your control.

The other thing is you cannot use the regulations to re-interpret the statutes. The statutes comes first and the regulations must be read consistent with them. The statute says you need a permit for rolling stock. The regulations say you don't need it if you are doing road work but that doesn't eliminate the need to get a temporary permit for rolling stock as a point source - I would like to be clear on that because I don't see how you can use regulations to redirect the intent of the statute. Further, the Supreme Court in NR Decision Natural Resource Defense Counsel versus Chevron has specifically stated that the deference must be given to the agency interpretation of the regulation and the agency interprets the regulations where it is referring to construction as being incidental to a road project and not specifically where you have equipment in the stream zone or the stream bed.

So, I would like the Commission to affirm the order that the Division issued to the county based upon the testimony that was offered here today. Thank you.

Chairman Turnipseed:
DAG Mischel:

Now we are to the point where we deliberate, is that correct?

Chairman Turnipseed:

Yes - I do have a little guidance -

Well, I haven't come to a conclusion yet other than it appears to me that we have wasted a whole lot of people's time - not only today but for the last month or so. It is my opinion that Elko County should have filed an application for a permit and it is my opinion that the Division should have granted the permit. Now realizing that the U.S. Forest Service has authority to manage its lands as it sees fit, and we have no evidence that the reversal of their original charge was based on any kind of science. I really object to the Forest Service or the Fish and Wildlife Service or any other entity having veto power over the state permitting process, not Trout Unlimited, not anybody else. I really am sympathetic to Elko County's frustration with the Forest Service having been led down the primrose path, so to speak - no pun intended, understanding that this road was going to be repaired, was going to be repaired with Forest Service funds and then two years go by after the flood event and they change their mind. I don't believe there was a major violation as it pertains to silt and sand. The testimony was the concern was over leaking of fluids out of the equipment. By not opening the road it appears to me that the Forest Service has expanded the wilderness area de facto without authorization from congress. I am not sure they have the authority to do that. Part of the charge of the U.S. Forest Service is governed by the Multiple Use Sustained Yield Act and if that act includes recreation and it appears to me that what they have done is cut off the recreation for the upper two-thirds of the canyon by not re-building the road. It is available now for hikers but it is certainly not available for vehicular traffic. I think I will stop there and hear from the fellow commissioners and

we will see where we go from there.

Commissioner Coyner: Mr. Frey, I have a quick question for you. Since you say statutes exceed regulations in importance, NAC 445A.309 "Diffuse Source" defined - 445A.309

DAG Mischel: There is a statutory definition of diffuse source as well.

Commissioner Coyner: Well could I hear his comment on -

DAG Frey: Sure -

Commissioner Coyner: "Diffuse source" includes modifications of water courses or stream channels?

DAG Frey: Yes and that should -

Commissioner Coyner: What would be the case in which that would apply then?

DAG Frey: I believe the testimony earlier was that modification of water courses and stream channels is where there is work being done to put trees along an embankment or - I can't remember the entire testimony but we had some earlier - that was where there is planting of willows along a stream or something along that line.

Commissioner Coyner: So the implication, or at least your opinion is that doesn't include work in the stream channel by equipment.

DAG Frey: No. I think that for to read this consistent with the point source statute which says that rolling stock is a point source, you are allowed to do work until you get the equipment either into the stream zone or water course. If you read these statutes to be consistent is that the statute says "a point source includes rolling stock" that "waters of the state includes waterways, water courses, stream zones" that for those to be consistent and for this to be consistent that you then can't take a point source rolling stock into the stream zone but the simple work of doing modification such as planting willows, because that is the only example I can think off-hand, does not require a point source permit because that is a diffuse source. Mr. Coyner, am I answering your question?

Commissioner Coyner: I am just looking for a little bit of clarification on "point source" and "diffuse source" because it is still problematic for me.

DAG Mischel: Mr. Coyner, I have done a little research on that question because there is - I think - some potential for inconsistency between the regulation exemptions and definitions of diffuse source and the statutory definition of point source and diffuse source. NRS 445A.335 defines "diffuse source" that is the statutory definition and includes "any source of water pollution which is diffused to the extent that it is not readily discernible and cannot be confined to a discrete conveyance" and then there is a whole line of federal cases interpreting that exact language. That language comes from the Federal Clean Water Act. In the Federal Clean Water Act case log, and I am referring to a 1996 case from the United States District Court for the Southern District of West Virginia because it was one of the more recent cases - it is 915 §§ 797 - the court had the same question. There was some construction that occurred in a stream course using a bulldozer and there was a question of whether or not there was a permit required of the Corps of Engineers and in that case the court referred to the point source definition which is consistent - it is the opposite of the diffused source definition which states that it is a discernible confined or discrete conveyance and then it goes on to include rolling stock. And in their interpretation of the discernible defined and discrete conveyances it relates to bulldozers the court cites to half-a-dozen federal court cases and states that the "constant of the point source embraces the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States as such bulldozers, backhoes, drag-lines and other earth moving equipment are all point sources under the Clean Water Act.

I think that is pretty clear. I think what is not clear in this case is our regulation broadening, possibly, the definition of diffuse source except has been testified that it might include planting of willows or something of that nature. And as Mr. Frey stated,

Commissioner Coyner:
DAG Mischel:
Commissioner Coyner:
Commissioner Doppe:

the statutory definition- the statutory provisions supersede any regulatory language if there is a conflict or you can interpret regulations - you can narrow regulations so that they are consistent with a statutory provision. I hope that is helpful.

I guess that boils down to, at least in your opinion, this is a point source.

Yes.

Thank you.

I think that - I have been kicking back-and-forth in these things and the legal research notwithstanding, which I think apparently it takes - based on reading the code, to be able to figure out what we've got here but if I pick up this page of the code and say "Diffuse source" defined includes "Construction of buildings, roads, dams, utility lines or other improvements" Modification of water courses or stream channels" and that is what it says, black and white, and it pretty clear. If I jump down to exemptions I say I don't even need to get a permit for that if I am doing emergency work to protect persons or property and there is no definition of emergency. O.K.? Then I jump over into well maybe I am rolling stock in the point source but there is no definition of rolling stock other than as applied so it begins to strike me as though when we sit down in a group and figure out what everybody is talking about with all these things and dig out all the legal research and figure out what we are talking about then we could just about get to the bottom of this and we find O.K. this is a point source - a bulldozer falls into that category - this is a diffused source and maybe it doesn't fall into that category but if it takes that to do it then let's keep that in mind as we further deliberate.

The next issue is, as I look at it, yesterday up there, reading the transcript, testimony today, I can't see where, in my opinion, Elko County has tried to pull the wool over anybody's eyes. I don't know that they have made a conscious attempt to circumvent the environmental laws of the State and it seems to me that they probably have a pretty good history in the past of living up to those laws and I suspect that they intend to do that in the future but if they can be reasonably confused by the regulations, in clear need - in their opinion - of having to act to protect their citizens and take action now and honestly I was struck by the fact that if they don't move soon - this season - then they are not going to be able to do anything and they are going to have to roll the dice again for next springs flood season. They have a limited amount of time to be able to do something this year, now, and I can see why they feel they have an emergency. The fact that I have a piano hanging over my head with a thread and it doesn't break for two years doesn't mean I still don't have an emergency. And that is how I kind of look at that and I think they have been lucky up to now. Yet, when we sit down here and we finally figure out what all these things are trying to say and who it trying to do what is seems to be Elko County finds it is pretty clear that they probably should have applied for a permit. And I believe the Division is in its right to say "hey you guys have to stop and we have to get this sorted out" and so now, if we are going to deliberate, that is where I come to. I am thinking that:

- a) they should have had a permit
- b) they are acting in good faith
- c) I agree with your concerns very much that the last thing I want to see happen is this process get derailed by any way, shape or form because they have a job to do and they need to get it done, and
- d) personally I don't think there should be a penalty on this thing because I don't they are acting in bad faith or trying to get away with anything. I think they were doing what they thought was right to protect their people and I don't see how you can hammer somebody, especially when we give them all the ammunition they need in the form of ambiguity in the regulations to do what they thought was right. So fine, you

got what you wanted, you stopped them, we are going to make them come forth and bring a permit and review that properly. Good! My recommendation is I would like to affirm the finding and modify the order. The finding is that they were doing work without a permit and I don't think there is any question now after we have sat here for two days and now deliberated after the work is done they probably should have had a rolling stock permit but I don't think that the order - I would like to see the order, and I would like to add some stuff to it is basically where I am at with it.

You know I would like to say that we need to somehow have them bring forth this permit process, get it in front of you folks, do the proper reviews in short order so they can get this work done before they are no longer able to do it. And we can't compel you to give them a permit, we aren't the Governor right? We can't do the emergency thing I don't think - if we were I would do that because I believe that is a similar situation, but none-the-less I would like to see what we can get from the Division by way of assurances that this thing will be handled -not derailed - in a proper manner so that these people can get to work.

And then lastly, I'm very uncomfortable with the splitting of the process, unlike air pollution problems, where we sit up here and we can manage that whole process - penalty and liability at the same time - and here it seems very odd that we cannot do that and that makes me very uncomfortable and if that is in the statutes that may be something for Mr. Carpenter to look at along with some of the other stuff he brought up earlier.

There is my recommendation and position for you guys to chew on.

Chairman Turnipseed:

I concur with a lot of that, especially the part about the penalty, whether it is none or minuscule. Obviously the amount of silt that went down the river as a result of their construction in 1998 was really tiny compared to the amount that the flood caused in 1995. The trout didn't know any different whether it was natural or man-made and I happen to know first-hand that trout can stand quite a bit of turbidity in the water. I agree that they should have gotten a permit and I believe had they sought one and gotten it approved after they were advised they needed one on July 20 the permit would have been granted, the work would have been done, and we wouldn't be sitting here today. Or at least the State wouldn't be blocking the work being done.

I again want to emphasize that if you can get consensus with all these involved, fine. If you can't, I don't think they should have veto power over our permitting process. We should do what is right for the citizens of the state on the science that we know that the value that we are trying to protect, regardless of whether the bull trout is listed or sensitive or a candidate or whether it is just a fish in the river we should go through our process and make a judgement based on the best science we have and do the right thing for the citizens. If - well - Mr. Coyner you probably have some more comments.

Commissioner Coyner:

Well my two questions remain - the two that I brought to the table this morning -and that is can we determine the amount of the penalty because that is an important part of the concept of upholding or modifying the order and can we direct the NDEP to issue a permit. Those are the two bottom line concerns that I have and as part of the learning process today we found that in one phase, as least in the penalty phase, it escapes our grasp if we move on uphold or modify. I also have a large problem with that, as Commissioner Doppe has indicated.

I also understand that we can't blanket or blank check order NDEP to issue a permit but that is my ultimate goal, to have that permit issued and that road reconstructed. I come down on the side of access, in favor of access.

Chairman Turnipseed:

I don't know for sure, but I could bet that under the 1866 Mining Law if it were one of those mining claimants that was building a road to his mining claim, I bet he could do it. Now he would have to get all the various permits - so in this case it doesn't matter whether we are dealing with Joe Citizen that is trying to restore access to his mine or whether we are dealing with Elko County that is doing this for the benefit for all of the

citizens of the state, I don't think the Forest Service can stop a person from restoring the road that was once there to his mining claim. I don't know that for sure - I am not a lawyer.

Commissioner Coyner: Access to a wilderness area?
Chairman Turnipseed: Right. And what they have done here is created additional wilderness with a log - with a log, right.

Commissioner Coyner: With regards to the piano on the thread, I would like to ask Mr. Frey what penalty is contemplated and what amount. Do you have any idea, any thought for your matrix in a similar situation what penalty would result?

DAG Frey: I think I had said earlier - and if I hadn't, let me be clear - we usually go through a process to determine a penalty and we didn't start that yet because we hadn't put a penalty - we would have had to done that if we had put a penalty in the order and we never put a penalty in there. We usually have a process where we impanel what we call a "penalty panel" made up of bureau chiefs from the Division so that somebody who is too close to the situation, you know who has some emotions wrapped up in it, can't just decide what the penalty is but we get 5 people together and discuss the situation and then use, like I described, a matrix that gives different values to different actions and use that to come up with a penalty and we haven't done that yet.

Commissioner Coyner: You can't draw on past experience on a similar case and give me a feel for, in round numbers, are we 5 digits, 6 digits, 2 digits? Where are we on this?

DAG Frey: Probably from past experience I would say 5 digits.
Commissioner Coyner: Five being up to 99 -
DAG Frey:

DAG Mischel: No where near that -
May I clarify the penalty process to the extent that I can. In re-reading the statutory I did not understand until yesterday that they were bifurcating the process but in re-reading the statutory provision on remedies it does appear that the remedy would be alternately ordered by the court, not this body, and that their penalty determination would be a recommendation and not a final order. Is that correct?

DAG Frey: Yes.
DAG Mischel: So that it would not be appeal-able to the Commission. I interpret that as a finding or an order.
Commissioner Coyner: Which gives me a little heartburn.
DAG Mischel: It would be - well - no matter what it would have to be ordered by a court so that their determination would be a recommendation.

DAG Frey: Can I just add one other thing? We have been in discussions with the County to settle this and I would never bring up settlement discussions outside of that because it is between the parties and there is no need to disclose it so I leave it at that.

DAG Mischel: If there is no settlement negotiated in the stipulated order presented to the court the court would hold a separate penalty hearing and consider the same things that you would consider.

Commissioner Doppe: Right. In-as-much as we are still here today though, we haven't reached settlement and as far as I am concerned I am kind of back to square one, the same as Commissioner Coyner's and I don't, again, I don't want to go forward knowing that I have penalized Elko County for something I don't think they ought to be penalized for.

DAG Frey: If you are asking me to reveal what we have discussed with the County I would do that if the County said it was O.K. but -
Commissioner Doppe: No. I am not asking that at all.
DAG Frey:

O.K.

Commissioner Doppe: I guess what I am looking for is a stipulation from the department that they are thinking "this" kind of a number and they aren't going to go past that when it comes time to recommend something to the panel.

Chairman Turnipseed: At least from my standpoint, being an administrator - however, I am not governed by a commission or a board - I would bet you that Mr. Biaggi is going to take to heart what we are talking about right now. I would bet you that is the case.

DAG Mischel: Right- you get some direction -

Chairman Turnipseed: He is going to give a lot of deference to what we are talking about right now. Mr. Doppe talked earlier about modifying the order. The order says: "immediately cease and desist of the operation of any rolling stock in the waters" - that has been done - "immediately remove the bulldozer and any other heavy equipment from the stream channel" - that has been done - "On August 14, 1998, to appear before the division for a show cause hearing" - and that has been done - now you wanted to add more specific language to that?

Commissioner Doppe: Right. Can I first ask them if you guys have one final thing to say about that penalty thing -

Chairman Turnipseed: I think they did - I cut them off in mid-

DAG Frey: We discussed back-and-forth on this and we're of the opinion that you certainly can modify it to put in what we should consider in the panel -

Commissioner Doppe: O.K. that is fine. I am perfectly willing to do that.

DAG Frey:

O.K. - thank you.

Chairman Turnipseed: And now I think it is the consensus that we want to modify this order?

Commissioner Doppe: Number 4.

Chairman Turnipseed: Number 4. - O.K.

Commissioner Doppe: I would add as a 4th point that Elko County be required to submit a permit application within -it has to be a real one and it has to be done, you know, with due process to the work it is going to take. Wouldn't you think so? How long are you going to need.

Kristin McQueary: Well, we have run into some stumbling block with the Forest Service on that and one of the requirements is, it is our understanding, that we need a survey of the area. Our surveyor says that a photo survey would speed the process up and you have to place white plastic X's in appropriate spots, you need to get a permit from the Forest Service to place temporary white plastic X's down -

Mike Murphy: They won't let us do it.

Chairman Turnipseed: Yesterday we visited some re-bar that had been driven into the ground, I don't remember if it was on the center line of the road or the edge of the road - and there was also some re-bar driven in what they thought and wants to be the original channel and there was flagging on that - is it a matter of just bearing a distance just shooting those various re-bar and a grade?

Mike Murphy: We need topography to meet the requirements of that process and that is what we are trying get.

Chairman Turnipseed: If you shoot the center-line grade you will have basically what the road-bed is now and from that you can determine what the road-bed will be.

Mike Murphy: We have that information now, based on the Forest Service documents we have we do not have the topography of the river and the surrounding areas that is required under the permit process.

Kristin McQueary: For the record that was Mike Murphy, County Engineer.

Chairman Turnipseed: I am sorry. I neglected that.

DAG Frey: Mr. Commissioners, could I ask you to recognize Mr. Biaggi? He has a comment.

Chairman Turnipseed:
Allen Biaggi: Certainly.
Thank you and I just want to let you know that the Division concurs with you 100% that there is additional work that needs to be done. To that end, the Division has sent out a letter to Elko County and all of the other parties in this action to try to come to some sort of an agreement and consensus to repair and continue to fix the work that has been done out there. So we are attempting to do that, we want to work with the County and we want to work with all the parties to do it. It is going to be difficult, there's highly polarized parties here, highly polarized issues, but we are working towards that end and the County, I am hoping, will submit an application soon so that we can proceed with that process.

Chairman Turnipseed: I am not sure - obviously it is public land and anybody can go on there and survey, you probably would need permission from them to put out your control, isn't that what we are talking about, the white X's?

Mike Murphy: Yeah, the big white -

Chairman Turnipseed: I don't know if they can stop you from going on there with a transit or a GPS or a level and a level rod. Is it your requirement that the Forest Service permission be granted before you either accept the application or grant it?

DAG Frey: That gets to be a very difficult situation because it becomes a land owner-ship issue and that is one of the contested issues here. There is also perhaps the need for an Army Corps of Engineer's permit -

Chairman Turnipseed: I understand that -

DAG Frey: Which many times we make contingent, both of them have to be in place before we can issue. so there's some concerns out there and we don't know the answer to those concerns right now but we are willing to proceed ahead in recognition that there is something that needs to be done here within the next, really, three weeks before the weather starts to turn on us and the snow starts to fly.

Commissioner Doppe: Question for you Allen. Somebody had mentioned once that Lew, I think Ms. Mulligan when you testified Lew had issued an emergency, or declared that there was an emergency and issued a emergency rolling stock permit. Is that correct? Did Lew do that by himself or -

DAG Frey: No. That was done as a result of the 1997 floods in Northern Nevada and as Mr. Turnipseed indicated that was done as a presidential order of emergency as well as the governor.

Commissioner Doppe: Well, here-in lies my problem. From an environmental perspective it strikes me as though you have this situation that can be made better and should be made better but as it sits it gets worse to the extent of the under-mining of the existing road-bank. From a public safety issue, which I am not sure that is our ultimate charge cause to be here but the fact-of-the-matter is, it is a real issue and I think we do have the power, in one way, to make sure that doesn't get taken up but I think that honestly John Carpenter has more probability of going to the legislature next session, in 1999, and amending the law, before, to get all these people to sit down at the same table and nod their heads at the same time -

Mike Murphy: Agreed -

Commissioner Doppe: And meanwhile the road gets cut out, sediments get dumped into the river, and next spring those people are subject to who knows what, if a fire doesn't come first. So that's, we are stuck between a rock and a hard place.

Chairman Turnipseed: Do you know, Otis or Mike, can the Forest Service prevent you from gaining that topography with just a level rod and a level?

Mike Murphy: Based on our understanding, they can't stop us from hard type surveying, the problem we ran into was the time involved. We only have a staff of one surveyor and me. You know it is kind of hard for me to drop everything in the world to go up there and

survey - how many miles of canyon. They are looking for some kind of - we were looking for some kind of topography information because there is none - we need topography information to show where the creek is now because everything, like this map here, is probably post-1960, we have no accurate topography information which is a requirement of the permit from NDEP.

DAG Mischel:

Mr. Chairman -

Chairman Turnipseed:

Yes -

DAG Mischel:

I am wondering whether that has already been done. Have you already looked into their EA -

Kristin McQueary:

We have got copies of the -

DAG Mischel:

That is a public document -

Kristin McQueary:

surveyor's notes from the Forest Service. Randy Brown, Elko County Surveyor is not present today but in discussions with him apparently each surveyor sort of has their own way of doing things and he cannot interpret the survey notes of the Forest Service. He said unless he found the guy, whoever it was - we don't have the name, and talked to him. The Forest Service has not been - made road information very available to the County.

Chairman Turnipseed:

We have gone a little bit beyond deliberation here but apparently Assemblyman John Carpenter would like to make a comment.

Assemblyman Carpenter:

Thank you Mr. Chairman and members of this panel. You know, I think that I understand where you are coming from and I think that we should not get bogged down in details of how we are going to get this thing surveyed, things like that, the County could have a larger staff than one to go out there and survey that road and do what they need to do. They have people that they hired that now know where they need to place the rocks and that in the creek to make it right and I think that the County needs to put a plan together, they can do that in a short period of time, and submit it to these people and if the EPA thinks that it is a reasonable plan, reasonable for Nevada, we don't need to worry about the Forest Service. And as far as the ownership of that road, I think that it belongs to the County and everyone else does and certainly the County has the right to go on their roads and do a survey to make it right and I think that we should not get bogged down in a lot of details here. We should just say, "County get your act together, get a plan here in 3 or 4 or 5 days and submit it to these people so we can get it done. We don't have any time to monkey around here. Once it starts snowing up there we're not going to be able to do it and I think that the County can get it done if you people say, you know, get your plan as quick as you can. If they don't do it, then the monkey is on their back then all of this thing that we have been talking about the last 2 months doesn't make any sense. But I think, and I know - I guarantee the County will get this thing within a short period of time.

Chairman Turnipseed:

O.K., we are back to Number 4 and that is the only reason we got hung up, was this time period. I believe Mr. Doppe made the - he didn't make it a motion yet - but was offering Number 4 that the County apply for a permit within blank number of days.

Commissioner Doppe:

Right. I need to make sure though they do that - they convince the Forest Service somehow that they can apply a topo on that thing and bam! they have it and they finish up this permit process and they hand it to these people. Can you actually do that in a reasonable length of time?

Mike Murphy:

Sure.

Commissioner Doppe:

O.K. Good! Then that works.

Chairman Turnipseed:

And if your concern is hydrocarbon pollution you certainly don't need a topo to do that, you are mainly looking at how many lineal feet or how many lineal miles of alterations there is going to be, that will dictate then what kind of conditions you put

Allen Biaggi: on the permit in the way of straw bales or whatever - is that correct?
That is correct - I mean the basic fundamental part to start this process is to get the application in hand so that we can determine what BMP's, as Ms. Mulligan indicated, need to be put into place and we will work with the County. It is not a DEP dictates to the County how to do it, it is the County and DEP work together along with the other parties. Now I want to point out something, that even though the DEP may issue a permit - as I said - there's other parties here, they may stop us from issuing, either legally or some other way so -

Chairman Turnipseed: But then the monkey is on their back.
Allen Biaggi:

Chairman Turnipseed: That is correct.
And if they submit their application within 20 days and it sound like they want to do it much quicker than that and then you will review it and have some kind of decision, yay or nay, within the next -

Allen Biaggi: Once we get the full application and it is satisfactory we can issue very quickly. Again, there is some complicating factors here and there is other parties involved so that - there is a requirement though, I believe, in the regulation, in the statute, that was put in the 1997 session of the Nevada Legislature, that no matter what, we still have to issue within 60 days. So with that in mind, we are going to issue much quicker than that. We have, I mean at the outset 60 days is our max.

Commissioner Doppe: Allen, are there things on that application that they have to go ask permission from somebody for -

DAG Mischel: Yes.

Commissioner Doppe: Other than the survey thing?
Allen Biaggi: I believe there are some things that they are going to have to -
Commissioner Doppe: That they are not likely to get based on what you know?
Allen Biaggi: I will have to defer to Icyl -
DAG Mischel: They don't know.
Commissioner Doppe: That you would know of? Because this is all fine but if they need somebody's blessing and that person is not going to give it to them.

Chairman Turnipseed: Well with a steel chain you can give them the lineal feet but you are going to need some kind of, even for your own records, how many cubic yards of material you are going to have to move so you are going to have to have some kind of topography -
Commissioner Doppe: This is their road, I would get on there, put that stuff down and do it.
Chairman Turnipseed: Your flag man and operator knows -
Otis Tipton: We can do it -
Commissioner Doppe: That is up to you but that is how I would do it if I were you -
Allen Biaggi: Mr. Chairman, the three things that I see, based upon the permit application instruction sheet that comes with the permit application that could cause a bog-down of issuance of the permit is the U.S. Army Corps of Engineers Permit Clearance to Conduct Work, if necessary; State Lands Department of Conservation & Natural Resources Clearance - I am confident that we can get that through.

Chairman Turnipseed: They don't have jurisdiction here.
Allen Biaggi: They don't have jurisdiction here, that's right, and any clearances from the Nevada Division of Wildlife, if needed. So -
Commissioner Doppe: Army Corps of Engineers, if necessary?
Allen Biaggi:

Commissioner Doppe: Uh huh.
Icyl Mulligan: Is it necessary?
They will be placing soil and dredge material so I am sure it will be necessary,

Commissioner Doppe: Even to put it back the way it was?
Icyl Mulligan:

Chairman Turnipseed: Yes.
Unfortunately, here we are dealing with a tributary to the Snake River which goes to ocean and for your information there is a Fourth Circuit Court opinion that says it doesn't apply to wetlands and playas and various things that never become part of a navigable body of water but EPA and the Corps of Engineers - what EPA has told their agencies to ignore that in all states other than where the Fourth District applies - that might be kind of ironic - but at any rate - so the Corps of Engineers does have jurisdiction here and that permission has to be acquired before you can issue your permit.

Allen Biaggi: That is the way our requirements of the application read and that is why it has been done on a consensus basis in the past.

Chairman Turnipseed: Well I can understand consensus if it can be obtained. What I object to is them having veto power over our permitting process if it can't be obtained.

Allen Biaggi: I agree, and that is a decision that we can make internal to the Division.

Chairman Turnipseed: So that is a policy and not a statute?

Allen Biaggi: I don't believe that is a statutory requirement -

Icyl Mulligan: I don't believe -

Allen Biaggi:

Chairman Turnipseed: Or a regulatory requirement either.
And regs can be waived and policies can be waived to -

Allen Biaggi: Policies can be waived. Regs can't be waived.

DAG Mischel: Well this is a delegated program so if the Corps of Engineers complains too loudly we might all authority.

Allen Biaggi: Well EPA is already involved because EPA is the enforcement arm and by EPA, Mr. Carpenter, I mean Federal EPA, not NDEP.

DAG Mischel:

Allen Biaggi: Right.
Federal EPA is already involved because of their enforcement requirements for Corps permits so there is already an EPA, Federal EPA involvement in this situation.

DAG Mischel:

Chairman Turnipseed: Right.
Well at any rate, if they file their application - if we modify this order and give them 20 days to file their application and they get that done as quickly as they can, staff and the Division will review it as quickly as possible, is this sufficiently specific, and either approve it or deny it and for the reasons shown. If it is denied because the Corps of Engineers denied them access then the monkey is on the Corps back. If EPA denies it, the monkey is on their back but at least it is not on the State's back.

Kristin McQueary: Mr. Turnipseed. The Elko County Manager, George Boucher, would like to make a comment.

Chairman Turnipseed: Sure.

George Boucher: Members of the panel and everyone present, George Boucher for the record. My opinion, and what we have been talking about back here - four on the left side here - is calendar-wise, the way it is running is what we are looking for, I think at this point in time, is to get what permitting we need to secure the work that the County did. To go the rest of the way up the canyon, I think that is going to be a large, long, hard fight. We can't get that done this season. So I think about the best thing the County can pursue at this point in time is to get the permitting or the access to get in there to do what is necessary to secure what, and it has been asked several times here today, you asked each witness what their opinion was, and Mr. Biaggi's letter to me where he would like to get the four agencies, or entities now where we can get together and

secure what has been accomplished prior to when the order to cease and desist was given. If we can get that permitted and get that going, charged, the rest of it is going to take us a lot longer to go the rest of the way up there.

Chairman Turnipseed: Are you suggesting then that you get permitted the 900 feet of work that you've done -

George Boucher: Correct. To secure what we've got and then there is a lot more battle to go the rest of the way that doesn't involve this, NDEP.

Chairman Turnipseed: Do you anticipate further, restoring the road - its for the most part been dewatered down -

George Boucher: For the role of Elko County, yes, restore the road to the trailhead.

Chairman Turnipseed: No - no! I am talking about from the area where you began, to finish that work -

George Boucher: That is what we need to secure - that is why we say we need permitting to accomplish what permitting we can to get that secured this fall.

Chairman Turnipseed: And do you anticipate any further work in the now stream channel or are you going to let that take its natural course?

George Boucher: I think all we can talk about permitting right at this moment for this fall is to get what work has been accomplished, let's say, the first 1,000 feet - 900 to 1,000 feet - whatever it is, do whatever is necessary and get that secured this fall. The overall permitting to go the rest of the way, whatever it is, that is something that is going to have to take through the winter and spring and whatever.

Chairman Turnipseed: That makes sense to me but my question was are you going to have to get equipment in the old channel that has become the new channel, are you going to any additional work there or just let nature take its course.

George Boucher: I don't believe so. I am going to have to yield to what, again, our environmental firm would suggest and perhaps what may come -

Chairman Turnipseed: I guess we don't have to make that a part of this order but I appreciate that understanding of what you are hoping to do.

George Boucher: Thank you.

Commissioner Coyner: Mr. Boucher just to clarify, Commissioner Coyner for the record, you are saying you couldn't do the rest of the length of the river because of permitting problems or just because of time, money and equipment problems.

George Boucher: I think - well -

Commissioner Coyner: Be a realist -

George Boucher: Looking at the permitting, for the questions and requests for information and those things that goes with the permit to secure, or to submit the permit to Ms. Mulligan's office to direct - there are items on there that they want and need to how we justify our permit as to what needs to be accomplished. Physically, we can't do that this fall, in a sense, because we've got other problems - we've got the ownership battle we've got - we know we have other organizations or other bodies out there to perhaps say "no, we shouldn't have a permit" and the calendar doesn't allow that at this time so we, that is why we just want to address the first 900 - 1,000 feet at this time.

Commissioner Coyner: Let me be perfectly clear because I think this represents a little bit of a shift and you may want to talk to this that under the emergency scenario that we painted if we deny and let you go forward with emergency repair I am asking you, do you have the ability to go up and secure - at least remove - some of the emergency obstacles that might occur this winter, next spring, now - with equipment. I am talking permits, ownership, I am just talking money and equipment.

George Boucher: Yes. We could do that. If all the permitting roadblocks were removed and we could go the rest of the way we would do it knowing full well that was the intent of the board in their action was to go all the way.

Commissioner Coyner: O.K. My perception as a geologist that some of the emergency situation that may exist are up on the big slide, not down where you were doing the work.

George Boucher: That is correct. But this is why I came up with this time-wise where it is going if we going to get discretion all we can really do is secure the first 900 feet but if we had the emergency to go the rest of the way, yes we would go.

Commissioner Coyner: If we deny and they go under their emergency position and go up there tomorrow and start moving dirt it is going to be some court or someone else, some other legal entity is going to step in and have their day.

Chairman Turnipseed: Are we ready for a motion? I think we have come pretty much to a consensus on what, how the order ought to be amended. I guess our charge today is a firm modify or rescind and they have already completed the 3 parts that were in the order and you suggested a modification -

Commissioner Doppe: **I make a motion then to affirm with the modification to the order. I would add a point number 4 that states that Elko County will apply for a permit for the work that they have done to date within 20 days and that the Division will exercise every expediency to recognize that whether they grant that permit or not** - that work is already done and what we are trying to do now is we want to finish that work to stabilize that work and make sure that it doesn't get any worse so it strikes me as though that would be hard for anybody to disagree with. And I would add a 5th point and the 5th point would say that the Division would find it that regard to penalties they not access a penalty greater than some sort of compensatory thing to make sure that the Department is not put out dollar-wise for having run through this process over the last couple of months.

DAG Mischel: I think the way it would be worded is that the penalty panel consider limiting it to that.

Commissioner Coyner: Can that be part of the order? Can that be really part of the order that came from them to them? I'm not sure.

DAG Mischel: No, that's true. This is an NDEP order. What you would be doing is giving them some outside direction.

DAG Frey: If I could just make a comment. I have no problems with you limiting the amount of penalty in this case but just be advised that penalty amounts don't come to the Division, they go into the Distributive School Fund so it is not actually a reimbursement for Division's costs in this case. We don't get the money. I don't have a problem with you directing us on limiting the amount of penalties but just be aware that it is not like -

Commissioner Doppe: I appreciate the information.

Commissioner Coyner: I think you will have to limit your amendment to the order -

Commissioner Doppe: **Stop the order at the first four and we'll ask for your consideration on that and that's my motion.**

Chairman Turnipseed: Do we have a second? I'll second. Any discussion on the motion?

Commissioner Coyner: I think that the motion opens the door for continued delay. In my experience with federal entities in the past, federal entities are brought into the permitting process that there are going to be, I think that **I would like to add a further modification to waive the Corps of Engineer requirement, specifically, as part of the permit if that is possible.**

Chairman Turnipseed: You will have to ask Counsel.

DAG Mischel: The Clean Water Act is really outside, I mean the Federal Enforcement of the Clean Water Act is outside of this Commission's jurisdiction -

DAG Frey: Right. You couldn't waive the County's need to obtain that in the future but if you are suggesting - are you waiving the requirement in the application that we look at that - I am trying to -

Commissioner Coyner: I just heard a few minutes ago that you have it within your power to not have to seek the consensus of the Corps of Engineers.

DAG Frey: Oh - but I just want to understand what we are talking about. I don't think the Commission can waive the requirement that the Army Corps of Engineers are under -

Commissioner Doppe: Oh, obviously - no -

Commissioner Coyner: But I don't want that to become a condition of holding up our permit. I want to get the state out of the way, essentially not be the person or the entity that is holding up -

DAG Frey: If it doesn't break any law, any Federal Law that we are obligated to abide by, then we could do that.

Commissioner Doppe: I would modify my motion to bring that in. I tried to make that when I said "with all expediency to issue" with that regard but that makes it more clear and I am for that.

DAG Frey: As long as you are not ordering us to break some statute that may be out there.

Commissioner Doppe: No.

Commissioner Coyner: If not required to seek it, don't! How's that?

Commissioner Doppe: That works with regard to the work that is already in place and like I said, then Elko County is free to go fight the battle on the remainder of the work that needs to be done and I hope you win.

Mike Murphy: Thank you.

Chairman Turnipseed: **There has been a motion and second, with a modification, all in favor of the motion as modified say aye.**

Commissioner Doppe: **Aye.**

Commissioner Coyner: **Aye.**

Chairman Turnipseed: Any opposed? Motion passed unanimously.
Any further comment?

Commissioner Coyner: **A motion. I move that the panel direct to the NDEP that they not seek a penalty in excess of \$1,000.**

Chairman Turnipseed: Second.

Commissioner Doppe: Yes.

Chairman Turnipseed: There has been a motion and a second. Any further discussion?
Hearing none, it is up for a vote. All in favor say aye.

Commissioner Doppe: Aye.

Commissioner Coyner: Aye.

Chairman Turnipseed: Aye. Passed unanimously.
Any further business before the Commission?
Hearing none the Commission hearing is closed.