

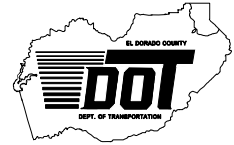


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Staff Report

January 15, 2010

Board of Supervisors
330 Fair Lane
Placerville, California 95667

Title: Rubicon Trail Location Recognition

Meeting Date: January 26, 2010

District/Supervisor: District IV/Supervisor Briggs

Dear Members of the Board:

Recommendations:

The El Dorado County Department of Transportation (Department) is recommending that the Board of Supervisors select a preferred Rubicon Trail location from the options described below, in order to comply with the requirements of the Cleanup and Abatement Order (“CAO”) No. R5-2009-0030 issued to the County by the Central Valley Regional Water Quality Control Board (CVRWQCB) on April 30, 2009.

Reasons for Recommendations:

Selection of a preferred Rubicon Trail route location is expressly required by the CAO,¹ and is necessary so that the Department will know where to expend its limited maintenance resources in the future, and be able to carry out the many remaining tasks required by the CAO. This present effort concerns only the section of the Rubicon Trail from the Wentworth Springs Campground easterly to the county line, which has not been formally accepted into the County maintained road system.

1 The CAO specifically requires: “Documentation of the actual location of the Rubicon Trail within El Dorado County, including the centerline and an agreed-upon width from each side of that line. The documentation shall be in a form that shall be easily understood by both the public and law enforcement officials.”

Introduction:

What is now commonly called the Rubicon Trail is a portion of Wentworth Springs Road, a historic road dating from gold rush days which goes between Georgetown in El Dorado County over the crest of the Sierra Nevada mountain range (at an elevation just over 7,000 feet) to Tahoma at Lake Tahoe in Placer County, where it is known as the McKinney-Rubicon Springs Road. The public acquired the right to use Wentworth Springs Road under a federal statute commonly known as Revised Statute (“R.S.”) 2477. On July 26, 1866, Congress adopted “An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes.” Section 8 of that act provides, in total: “And be it further enacted, that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” This is what is now called R.S. 2477.

R.S. 2477 remained in effect for 110 years until it was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S. C. §1701 *et seq.* When Congress repealed R.S. 2477, it specified that any valid R.S. 2477 right of way existing on the date of approval of the new FLPMA would continue in effect. This “savings clause” had the effect of “grandfathering” into permanent existence any R.S. 2477 rights-of-way that had been established up to October 21, 1976, and preventing any new R.S. 2477 rights from being created after that date. The express terms of R.S. 2477 only allowed rights-of-way to be created during the time that the federal land was “not reserved for public uses.” The creation of the Eldorado National Forest in 1905 reserved the land for public uses, so in regard to the Rubicon Trail, R.S. 2477 rights of way were created by the use of the land as a highway from 1866 to 1905. The Rubicon Trail passes over both federal and privately-owned land, but private landowners who acquired their land from the federal government took it subject to any rights-of-way previously established under R.S. 2477, so the public right-of-way established by R.S. 2477 is the same over both federal and private land.

R.S. 2477 created thousands of miles of public roadways across federal land during its 110 year existence. The existence, location, nature and extent of those thousands of miles of public roadway have generated much controversy over the decades. One of the reasons for this unusual level of controversy was that establishment of a road under R.S. 2477 required no formal action of the federal government, the public or any local jurisdiction, so public rights-of-way sprang into existence without any formalities, leaving none of the records most people are used to when important property rights are established. This leaves the precise location of an R.S. 2477 right-of-way somewhat obscure. There is general consensus that a historic trail exists by virtue of R.S. 2477 in the general vicinity of what we call the Rubicon Trail, but it is not known for certain where the trail is precisely located. Historic travel patterns indicate that people generally traveled over a variety of closely-linked individual paths along the same general route. Slightly different paths were used depending on weather conditions, vehicle size and capacity, driver competence, tolerance for risk/attraction to challenge, safety, time constraints, etc. This historic pattern is reflected today on the modern Rubicon Trail, where different drivers take slightly different paths depending on the same factors. It is therefore likely that the public’s legal right-of-way over what we call the Rubicon Trail is not limited to just one single path, but rather

includes a variety of closely-related paths along the same general route.

In April 2009, the Central Valley Regional Water Quality Control Board issued a cleanup and abatement order (“CAO”) which requires the County and the United States Forest Service (“USFS”) to take a number of actions on the Rubicon Trail to cleanup and abate some of the problems that vehicular travel has created over the years. The CAO is based in part on the Water Board’s conclusion that some of the problems are caused, or at least exacerbated, by the use of multiple paths by motorized vehicles, and that not all of the variant paths are in areas that can be traversed without causing unacceptable damage. The CAO therefore requires the County and the USFS to determine the location of the Rubicon Trail, and document that location. The various other activities required by the order, such as maintenance and remediation, can then be concentrated on the identified trail location, and damage caused by vehicles and other associated activities at other locations can be remediated and the area restored.

The County does not interpret the CAO as necessarily mandating the identification of a single route in all areas traversed by the Rubicon Trail. The County therefore in this agenda item is proposing three options for consideration by the Board of Supervisors. One option is the identification of a single route. Two other options allow for additional variant routes in certain specific locations, where the Department feels that the variant routes are desirable and can be maintained up to a standard that would be acceptable under the CAO. This exercise does not create any new right-of-way, but rather selects one or more preferred routes from among the many already existing rights-of-way. The selection of a specific route, with or without variants, for maintenance under the CAO means that the use of the other non-selected variants would no longer be tenable. The County does not believe that it has the legal ability to vacate or abandon the rights-of-way held by the public under federal law, so the County is not proposing to legally eliminate the federal right-of-way that may or may not exist along the non-selected routes. The underlying principle is that by selecting a specific route, and maintaining the selected route according to the mandates of the CAO, while also remediating the non-selected routes and taking the appropriate steps to discourage continued public use of them, the objectives of the CAO can be achieved without time consuming, expensive and unpredictable litigation to determine precisely who drove where between 1866 and 1905. There is precedent supporting this approach. The Ellis Creek Intertie consists of a selected route that is used by virtually all users today, which successfully diverts users away from the previously-used route that went through Pleasant Meadow (see Map Location (O)) causing unacceptable damage. No legal rights-of-way were eliminated in the process, but the Ellis Creek Intertie route has successfully replaced the less-favored route through the meadow.

To summarize, the present route selection and location process is for the purpose of identifying the location of the places that the County will focus its maintenance, remediation and restoration efforts in the coming years. It will not affect anyone’s legal right to a right-of-way under R.S. 2477, and no potential right-of-way under R.S. 2477 is abandoned in this process. This is not a process to vacate or abandon a right of way under state law, either formally or by estoppel, nor does it purport to accept the preferred location into the county-maintained road system.

Background:

The DOT, County Counsel, and CAO's office have been working on the Rubicon Trail location recognition efforts since the summer of 2009. During this time, County staff has held two public meetings of the Rubicon Oversight Committee (ROC), and has met with members of the public, the two panels designated at the Water Board hearing, and the owners of the underlying property (both federal and private), to discuss this specific topic. In order to facilitate the dialog among the interested parties, and to focus on the specific CAO requirements, County staff identified four main guiding principles: reduction in sedimentation delivered to the waters of the State, reduction in contamination from sanitation problems, reduction in contamination from spills of hydrocarbon fluids, and safety.

From the information gained at these various meetings, and applying the guiding principles, County staff has narrowed the realistic options for the location of the Rubicon Trail for maintenance purposes to those discussed below.

CEQA:

The purpose of selecting a preferred route from among the many legal rights of way that constitute the Rubicon Trail is so that the selected route can be maintained in compliance with the CAO, and that the non-selected routes can be restored in compliance with the CAO. The operation, repair, maintenance and minor alteration of existing highways, streets, sidewalks, gutters, bicycle and pedestrian trails and similar facilities, including road grading for the purpose of public safety, is categorically exempt from CEQA under the CEQA Guidelines, California Code of Regulations, title 14, §15301(c). The implementation of a cleanup order issued by a regional water board is also exempt under the CEQA Guidelines, California Code of Regulations, title 14, §15307 (Actions by Regulatory Agencies for Protection of Natural Resources) and §15308 (Actions by Regulatory Agencies for Protection of the Environment). As noted above, the cleanup and abatement order expressly requires the County to provide "Documentation of the actual location of the Rubicon Trail within El Dorado County, including the centerline and an agreed-upon width from each side of that line." The CAO further notes that the "implementation of this Order is also an action to assure the restoration of natural resources and/or the environment and is exempt from the provisions of CEQA, in accordance with California Code of Regulations, title 14, sections 15307 and 15308." Therefore the decisions to be made by the Board of Supervisors outlined in this staff report concerning a preferred location of the Rubicon Trail are categorically exempt from CEQA.

RECOMMENDED OPTIONS:

1. **OPTION 1:** Option 1 consists of one proposed centerline trail alignment (see the black line on Exhibit B – Rubicon Trail Location Map), with a specific width from each side of that line (25 feet on each side of centerline, or other such width that may be needed in certain specific locations in order to comply with the CAO). All variant routes (sometimes referred to as alternates or bypasses) will be restored using the applicable Best Management Practices (BMPs) in a manner similar to the Ellis Creek Intertie remedial work, and the use of variant routes will be discouraged.

The black line depicted within Exhibit B was developed by combining the 2004 DOT survey information and the 2008 CGS survey information, with a few modifications recommended by County staff.

This proposed centerline alignment generally represents the most used trail segments, except in a few places (see, *e.g.*, the discussions below concerning Map Location (A) “Vicinity of Postpile,” Map Location (D) “After Ellis Creek,” Map Location (E) “Soup Bowl,” Map Location (K) “Old Sluice Box,” and Map Location (L) “Original Trail at Buck Island”). County staff believes that this proposed centerline alignment will require the least amount of BMP trail improvements (i.e. water bars, rock checks, sediment basins, etc.) in order to be maintained in compliance with CAO. The recommended single centerline alignment goes through the Little Sluice Box, which means that the trail through the Little Sluice Box will be maintained in a manner that would allow passage by non-extreme vehicles. The situation at the Little Sluice Box can be best understood by considering the discussions of Map Locations G, H, I and J below.

If the Board of Supervisors chooses not to adopt the single centerline alignment of Option 1, then the Board can consider other potential routes described below in Options 2 and 3.

2. **OPTION 2:** Option 2 consists of the single centerline alignment of Option 1, plus some specific variant routes in selected locations. If the Board of Supervisors chooses to include variant routes in addition to the single centerline alignment of Option 1, staff recommends that the Board choose the additional variants from among the following “Recommended Variants.” Potential variant routes that staff recommends against selecting are discussed below under “Variants Not Recommended.”

RECOMMENDED VARIANTS:

Map Location (N) “Granite Bypass West of Postpile”- County staff recommends the recognition and maintenance of two alignments through this area. The northerly alignment provides an alternative that is more suitable when the more southerly route is saturated. The southerly alignment will require additional BMPs to comply with the CAO. County staff believes that both routes can be maintained using standard trail BMPs to comply with CAO objectives.

Map Location (A) “Vicinity of Postpile”- County staff recommends the recognition and maintenance of two alignments through the Postpile area. The more traditional “Postpile” route includes a historic rock which is difficult for some users to overcome, and presents more difficult drainage issues, while the recommended variant route avoids both. County staff believes that both recommended routes can be maintained using standard trail BMPs to comply with CAO objectives. Several other variant routes through this area are not recommended. County staff recommends eliminating the two westerly variant alignments (designated 1.3 and 1.5 on Map), which are infrequently used and do not comply with the CAO. The Department recommends remediation of the non-selected variants using standard trail BMPs and discouraging future use on them.

Map Location (B) “Top of Postpile”- County staff recommends the recognition and maintenance of two alignments in this area. The more northerly route is on granite and is more suitable in freezing conditions. The southerly route represents the historic route. County staff believes that both routes can be maintained using standard trail BMPs to comply with CAO objectives.

Map Location (H) “Little Sluice Long Bypass”, and (I) “Little Sluice South Bypass”- County staff recommends the recognition and maintenance of two variant routes in the vicinity of the Little Sluice Box, primarily because of the difficulty in passing through the Little Sluice Box (included in Option 1) in its current condition. Both variant H (Long Bypass) and variant I (Short Bypass) are recommended, since each provides an easier alternate route over granite. County staff believes that these two recommended variant routes through the Little Sluice Box area can be maintained using standard trail BMPs to comply with CAO objectives.

Map Location (K) “Old Sluice Box” and “Indian Trail Bypass”- County staff recommends the recognition and maintenance of two alignments in this area. Both are historically-used routes. The easterly Indian Trail Bypass is more scenic and easier to traverse, and since it passes mostly over granite, presents fewer sediment issues. It is included as part of Option 1, the preferred single alignment. The westerly route has a difficult section at its southerly end (called the “Old Sluice Box”) which presents formidable drainage and sediment issues, but is challenging and attractive to skilled users. Staff believes that both routes can be maintained using standard trail BMPs to comply with CAO objectives.

Map Location (L) “Buck Island”- County staff recommends the recognition and maintenance of two alignments in this area. The southerly route is the historic

route but is impassable when the lake has high water due to SMUD operations. The newer northerly route avoids high water and presents fewer difficult sediment and drainage issues. County staff believes that both routes can be maintained using standard trail BMPs to comply with CAO objectives.

VARIANTS NOT RECOMMENDED:

Map Location (M) “Wentworth Springs Campground Bypass”- County staff recommends against further use of the northerly variant through this area. The northerly alignment (designated 1.1 on Map) represents a user-created variant which avoided a low lying area which retained water prior to the Department and Friends of the Rubicon (FOTR) 2006/2007 joint maintenance efforts. It is the Department’s opinion that the 2006/2007 installed standard trail BMPs have improved the conditions of the recommended single alignment (1.0) at this location in accordance with the CAO requirements, eliminating the need for the secondary variant (1.1). Hence, the Department recommends remediating the non-preferred northerly variant using standard BMPs and discouraging future use on it.

Map Location (C) “14N34B”- A USFS historic trail designated 14N34B, also known as the McKinstry Trail, intersects with the recommended Rubicon Trail alignment just west of Ellis Creek. This trail is on USFS property, and it drains into the recommended Rubicon Trail and into nearby Ellis Creek. This trail is mostly on the USFS property, and is outside the current preferred Rubicon Trail alignment. The Department does not recommend that it become part of the Rubicon Trail. Standard trail BMPs can be used at the intersection to control run-off and sediment, and to discourage future access to/from the Rubicon Trail at this location in order to comply with CAO requirements. All other trail work on 14N34B necessary to comply with the CAO should be completed by the USFS.

Map Location (D) “After Ellis Creek” – The southerly, historic trail section has been a major sediment source and drainage problem. County staff recommends utilizing the most popular variant located just to the north (designated 1.6 on Map) as the preferred single alignment in Option 1. Starr recommends remediating and restoring the non-preferred southerly trail section using standard trail BMPs, and discouraging future use on it.

Map Location (E) “Soup Bowl” – County staff recommends retaining the most used variant location (designated 1.0 on Map) as the preferred single alignment in Option 1, and remediating the northerly variant which is a major sediment source and safety problem. The northerly variant is a more recently developed section of the trail that splits uphill, which is considered more challenging. Vehicles typically get stuck in this area creating a safety hazard and blocking traffic on both routes. Therefore, the Department recommends remediating the northerly variant using standard trail BMPs and discouraging future use on it.

Map Location (F) “West of Winter Camp” – County staff recommends
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retaining the most used variant location (designated 1.0 on Map) as the preferred single alignment in Option 1, and eliminating the northerly variant (designated as 1.7 on Map) which is a major sediment source. The Department recommends remediating the non-preferred variant using standard trail BMPs and discouraging future use on it.

Map Location (G) “Little Sluice Short Bypass” – County staff recommends eliminating this non-preferred variant route. This variant is located just to the northeast of Little Sluice Box proper, and is mostly used during the summer months to get around the difficult and often-blocked Little Sluice Box. Some maintenance work was done in 2003 by the Department, USFS, and FOTR. However, this variant is very dangerous during the winter and late spring months due to snow and ice on the steep slopes. The Department recommends remediating this non-preferred variant with standard trail BMPs and discouraging future use of it.

Map Location (J) “Thousand Dollar Hill Bypass” – County staff recommends eliminating this non-preferred variant. It is variant off the Little Sluice Long Bypass, Map location H. This variant is a loose, rocky climb with several off-camber spots which is dangerous and presents sedimentation problems. The Department recommends working with the private landowner to remediate this non-preferred variant with standard trail BMPs and discouraging future use on it.

Map Location (Q) “Alternative Route Near Placer County Line” – County staff recommends eliminating this non-preferred variant. This user created variant (designated as 1.11 on Map) is southwest of the main Rubicon Trail (1.0) and is not needed. Both the main route and non-preferred variant are located on privately-owned land. The Department recommends working with the private landowner to remediate the non-preferred variant using standard trail BMPs and discouraging future use on it.

3. **OPTION 3:** Option 3 consists of either of the above two options, plus a wide “corridor” in two specific locations. The corridor would allow one or more preferred routes to be maintained and used now, but also preserve the potential for other variant routes within the corridor to be brought into operation in the future, when it can be done in compliance with the principal goals of the CAO. The proposed corridor locations are:
 - a) **Little Sluice (Map Locations G, H, I and J).** A corridor encompassing the Little Sluice Box area would allow the single route of Option 1, with or without the variant identified in Option 2, to be used now, but preserve the ability to consider other arrangements in the future depending on availability of resources, development of specialized BMPs, etc. The presently-selected route(s) can be maintained now using current standard trail BMPs to comply with CAO objectives as future options are developed.

- b) Buck Island (Map Location L).** A corridor through this area would allow the single route of Option 1, with or without the variant identified in Option 2, to be used now, but preserve the ability to consider other alternatives in the future, particularly the various stub routes that have developed. The presently selected route(s) can be maintained now using current standard trail BMPs to comply with CAO objectives, while other arrangements are considered for the future.

Fiscal Impact/Change to Net County Cost:

The fiscal impact of the route selection process cannot be accurately determined at this time. Since the effected section of the Rubicon Trail is not within the formally-designated county maintained road system, road fund monies cannot be used to maintain it. The maintenance efforts to date have been mostly funded through county general funds, OHV commission grants, and volunteer labor donated by user groups and overseen by County staff. It is anticipated that future maintenance, remediation and restoration efforts will be funded in a similar manner.

Any consideration of fiscal impacts must include a recognition of the potential penalties that maybe levied for any violation of the cleanup and abatement order. As noted above, the CAO mandates that the actual location of the Rubicon Trail be determined, and documented. Any failure to carry out the mandate of the CAO carry severe penalties. The CAO describes the potential consequences as follows:

“If in the opinion of the Executive Officer, the Responsible Parties fail to comply with the provisions of this Order, the Executive Officer may refer this matter to the Attorney General for judicial enforcement or may issue a complaint for administrative civil liability. Administrative Civil Liability of up to \$10,000 per violation per day may be imposed pursuant to CWC [California Water Code] sections 13268, 13350, and/or 13385.”

Action to be Taken Following Approval:

Upon direction by the Board of Supervisors as to the location of the Rubicon Trail to be maintained, County staff will proceed with the various steps necessary to comply with the CAO mandates, including locating the selected route(s) on the ground, reconciling the CGS and county maps, developing appropriate signage, developing trail BMPs, developing a maintenance training plan, developing a maintenance schedule, holding maintenance training sessions, and carrying out the maintenance efforts during the 2010 and following seasons. Staff will also commence discussions with the underlying federal and private landowners concerning the appropriate method to document the selected route (right-of-way agreement, easement, etc.).

Sincerely,

Steve Kooyman, P.E.
Supervising Civil Engineer

SK:
Attachments