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Delivered via U.S. Mail and email to appeals-rocky-mountain-regional-office@fs.fed.us

Appeal Deciding Officer
USDA Forest Service, Rocky Mountain Region 2
740 Simms Street
Golden, CO 80401

RE: Boggy Glade Travel Decision – Part 215 Appeal

Dear Appeal Deciding Officer:

Please accept this Notice of Appeal under 36 C.F.R. Part 215 from the Boggy-Glade Travel Management Decision Notice and Finding of No Significant Impact ("DN-FONSI") and Environmental Assessment ("EA") (collectively, the "Decision"), dated December 5, 2012. This appeal is presented on behalf of the Trails Preservation Alliance ("TPA") and the Colorado Off Highway Vehicle Coalition ("COHVCO") (collectively "the Recreation Groups"). Additional individual and/or organizational members of these organizations may submit their own appeal(s) from the Decision. This appeal and any such additional appeals must be independently evaluated and the agency must comply with applicable review procedures for all such appeals. In addition to the specific issues and information included herein, we incorporate by reference our comments and submissions on the EA and planning documents and at any other times in the planning process, including all submissions by our members. The Recreation Groups also formally support and concur in the appeal(s) submitted on behalf of the Timberline Trail Riders and hereby incorporate the same by reference. Any communications regarding this appeal should be directed to Paul Turcke at the above-listed contact information and pat@msbtlaw.com, and to Don Riggle at (719) 338-4106 or info@coloradotpa.org.

I. INTRODUCTION

The Decision has some appropriate elements for a motorized transportation and recreation network, but is inadequate to address single-track motorized trail use. We urge the Forest Service to utilize the administrative appeal process to rectify this shortcoming of the Decision.

II. GENERAL LEGAL STANDARD

The Decision will ultimately be compared against the judicial standard of review, so it is appropriate to use that standard during the administrative review process. Executive-branch agency decisions are ultimately reviewable by the judiciary, which is empowered to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or found to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) & (D), see also, *Bonnichsen v. United States*, 367 F.3d 864, 880 (9th Cir. 2004) ("we review the full agency record to determine whether substantial evidence supports the agency's decision….").

The arbitrary and capricious standard is deferential and does not allow a reviewing court to substitute its judgment for that of the agency:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made....Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted) (emphasis added). Arbitrary and capricious review is the mechanism through which the courts can require basic fairness and reasonableness of agency behavior, for "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on discretion." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (quotation omitted).

Even where an agency may have substantial evidence supporting its decision, the presence of contradictory evidence might render the decision arbitrary and capricious. Thus, "even though an agency decision may have been supported by substantial evidence, where other evidence in the record detracts from that relied upon by the agency we may properly find that the agency rule was arbitrary and capricious." *American Tunaboat Ass'n v. Baldrige*, 738 F.2d 1013, 1016 (9th Cir. 1984) (citing *Bowman Transport, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284 (1974) (agency decision supported by substantial evidence may still be arbitrary and capricious)); see *Atchinson v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (where

agency modifies or overrides precedents or policies, it has the "duty to explain its departure from prior norms").

Even substantial evidence cannot properly support a decision if the information was not considered by the decision-maker at the proper stage of the process. Information cannot be presented as a post-hoc rationalization to justify a decision previously made. *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996). For the reasons identified below, the Decision violates these basic principles.

III. APPEAL ISSUE

The Recreation Groups wish to emphasize a single issue in this appeal. The agency must properly and expeditiously address single-track trail riding opportunity, which is illegally reduced in the Decision.

The 2005 Forest Service Travel Management Rule recognized that "[m]otorized recreation is a legitimate use" of the National Forests. Travel Management Rule Final Communication Plan, November 2, 2005, p.5. The various factors that must be reflected in a route designation decision include "provision of recreational opportunities" and "access needs." 36 CFR § 212.55(a). Then-Chief Dale Bosworth stated upon release of the Travel Management Rule that "[l]and Managers will use the new rule to continue to work with motorized sports enthusiasts, conservations, state and local officials and others to provide responsible motorized recreational experiences in national forests and grasslands for the long run." USDA Forest Service, News Releases, "*USDA Releases Final Rule for Motorized Recreation in National Forests & Grasslands*," dated November 2, 2005. Indeed, "it is Forest Service Policy to provide diversity of road and trail opportunities for experiencing a variety of environments and modes of travel consistent with the National Forest recreation role and land capability." Forest Service Manual 2353.03(2). The Forest Service should be planning for a managed system, and working with all groups, including OHV enthusiasts, in order to comply with not only the agency's own directives and the Travel Management Rule, but the policies behind the Rule.

Single track trails are among the most treasured recreational opportunities throughout Colorado and the West. The EA is woefully deficient in properly framing or addressing single track use and opportunity.

The EA starts from the flawed premise that "[n]o single track motorcycle trails exist currently and motorcycle[] riders use the road system or 50-inch ATV trails." EA at 8. This statement is factually incorrect. There are countless but uninventoried "trails" that motorcycle riders (and other users) have long traveled within the project area. More importantly, the EA's observation is inappropriate for an area that is (and has long been) open to cross country travel. There has been no legal or practical need to even inventory, let alone designate, single track trails. Rather than recognizing the opportunity to essentially write on a blank slate, the EA uses the current "open" status to effectively eliminate the opportunity to formalize existing (or new) trail system(s) through a "no trails exist so we won't recognize any" mentality. In response to

the comments submitted by the Recreation Groups and others, the agency has expressed an intent to analyze single-track opportunities for motorcycles and mountain bikes. DN-FONSI at 6; 40.

The Recreation Groups appreciate the agency's effort to prioritize future single-track analysis. However, this approach is insufficiently defined and all but reflects the agency's awareness of the inadequacy of the EA and planning process. In particular, the agency boxed itself into an illegally limited range of decision options through a flawed purpose and need, an inadequate inventory of existing and historically-accessed trails and areas, and an improperly narrow range of alternatives.

The Recreation Groups request that the Appeal Deciding Officer direct the District to withdraw the DN-FONSI and reinstitute the predecisional management prescriptions allowing continuing use of areas and associated single-track trails. In the alternative, we request the Appeal Deciding Officer direct the District to immediately initiate further analysis of single-track routes and take action establishing additional single-track motorized riding opportunities on or before June 1, 2013, or at the earliest feasible date.

IV. RELIEF REQUESTED

In light of the foregoing, the Recreation Groups respectfully request the Appeal Deciding Officer expeditiously grant any and all of the following relief from the Decision:

(1) Withdraw the Decision;
(2) Remand the Decision for further analysis;
(3) Utilize the Part 215 appeal process to facilitate additional analysis of at least portions of the decision (such as specific routes or trail systems), with implementation staged or delayed as appropriate.

We specifically request the opportunity for informal disposition, oral presentation, and/or any procedural opportunities required by or consistent with the applicable regulations.

Sincerely,

MOORE, SMITH, BUXTON & TURCKE, CHTD

/s/ Paul A. Turcke
Paul A. Turcke

PAT/ntt
cc: Don Riggle