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UNITED STATES DEPARTMENT OF INTERIOR
BOARD OF LAND APPEALS

TRAILS PRESERVATION ALLIANCE, COLORADO OFF HIGHWAY VEHICLE COALITION, ROCKY MOUNTAIN ENDURO CIRCUIT Appellant, vs. BUREAU OF LAND MANAGEMENT; Gunnison Field Office; BRIAN ST. GEORGE, Gunnison Field Office Manager Respondents.	)	IBLA NO. _____ **APPELLANTS' STATEMENT OF REASONS**

STATEMENT OF REASONS

On August 6, 2010, Trails Preservation Alliance, Colorado Off Highway Vehicle Coalition and Rocky Mountain Enduro Circuit filed a notice of appeal from Decision Record CO-160-2008-025-EIS for the Gunnison Basin Federal Lands Travel Management, the related environmental impact statement, and associated documents (the "Decision"). The Decision was signed on June 28, 2010. Appellants hereby file and serve their statement of reasons pursuant to 43 C.F.R. § 4.412.

STANDARD OF REVIEW

BLM has authority to regulate off highway vehicles[1] on public lands. *See* 43 CFR Part 8340; *Rainer Huck*, 168 IBLA 365 (2006). The agency has broad discretionary authority, and "a BLM activity plan implementing the ORV decisions in an RMP or other ORV management plan will be affirmed if the decision adequately considers all relevant factors including environmental impacts, reflects a reasoned analysis, and is supported by the record, absent a showing of compelling reasons for modification or reversal." *Rainer Huck*, 168 IBLA 365, 395 (2006). This Board's OHV decisions consistently reject appeals that can be characterized as "mere differences of opinion." *Id.* (citations omitted).

In a broader sense, these IBLA decisions fall within judicial authority applying the "arbitrary and capricious" standard under the Administrative Procedure Act (5 USC § 551 et seq.). 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.

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[1] The terms "off highway vehicle" ("OHV") and "off road vehicle" ("ORV") are used interchangeably to refer to "any motorized vehicle [with some exceptions not applicable here] capable of, or designed for, travel on or immediately over land, water, or other natural terrain…." 43 CFR § 8340.0-5(a); *see also Rainer Huck*, 168 IBLA 365, 367 n.4 (2006).

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).

APPEAL ISSUES

The Decision contains several independent flaws, any or all of which should be the subject of further analysis on remand.

A. The Agency Has Failed to Comply with Mandatory Procedures for Publication and Notice.

The Decision has not been properly published. The public has therefore not been formally notified of the Decision and applicable appeal rights. This flaw is not a difference of opinion but reflects BLM's incorrect interpretation (or application) of binding regulations.

The Decision appears to attempt "designation of roads and trails…considered [an] implementation decision[ ]" as opposed to "any change to the designation of *areas* as Open, Limited, or Closed" which "requires a [RMP] plan amendment and is subject to a public protest period and governor's consistency review…." ROD at 2 (italics in ROD) (attached hereto as Exhibit "A"). Assuming there is a difference in this distinction, the agency conducted a public planning process and thereby apparently proceeded under 43 CFR § 8342.2(a), as opposed to simply rendering a decision under "emergency" or "special rules" which might be exempt from the public participation requirement. However, BLM did not (and has not) published notice of the Decision in the Federal Register. This failure violates applicable law and regulation.

As noted above, the Decision stems from a "public participation" process under 43 CFR § 8342.2(a). When such a process includes "designation and redesignation of trails" it "is accomplished through the resource management planning process described in part 1600 of this title." *Id.* In particular, "[p]ublic notice of designation or redesignation shall be provided through publication of the notice required by § 1610.5-1(b) of this title." 43 CFR § 8342.2(b). The cited provision refers to publication of notice in the Federal Register, which among various purposes signals the start of a 30-day protest period. 43 CFR § 1610.5-2(a)(1).

BLM may contend here that the aforementioned procedures were not required based on an asserted distinction between RMP amendment and "implementation decision" processes. ROD at 2. Even if this contention is correct, even the ROD acknowledges the Decision is subject to appeal "in accordance with the regulations at 43 CFR 4.400." ROD at 12. Those regulations indicate two (2) different situations for calculating the 30-day appeal period. For "a person served with the decision" an appeal must be filed "within 30 days after the date of service." 43 CFR § 4.411(a).[2] Where (as here) BLM contemplates a decision of broader applicability or otherwise not susceptible to being served on a finite number of individuals, the regulation provides that the 30 day appeal period starts from the date a decision is published in the Federal Register. *Id.* These procedures make sense. Many BLM decisions, such as grazing decisions, involve permittees or interested persons of record susceptible to service by certified mail. Other decisions of broader "legislative" character which apply to the general public such

[2] "Service" upon a person is defined as "delivering the copy [of a document] personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau." 43 CFR § 4.422 (1)(c). Service further requires, in addition to accomplishing one of these methods, "sign[ing] a written statement certifying that service has been or will be made in accordance with the applicable rules and specifying the date and manner of such service." 43 CFR § 4.422(2).

as trail or area designations (or restrictions) are more appropriately formalized through legal notice in the specified source of record.

Under any of the potential regulatory pathways BLM has failed to formally provide notice. The source of record identified in the regulations is the Federal Register. BLM has not accomplished publication in the Federal Register. The appeal period has not yet started to run, at least for many potential appellants. This defect prevents implementation of the Decision.

B. The Decision Fails to Provide Site-Specific Rationale for Individual Routes.

Site-specific decisions are apparently behind many, if not all, of the specific designations within the Decision. However, the agency has generally failed to present the rationale for individual routes. The ROD only mentions the alternative selected and generally summarizes route mileage by certain categories. ROD at 5. The only mention of specific routes is for those whose designations were changed after the close of comment. ROD at 5-6. There are several problems with this approach. For most routes the public has no insight whatsoever into the agency's analytical process. Further, even for the routes which are identified in the ROD, the discussion occurs after the close of comment and therefore a post hoc justification of an agency decision.

Appellants cannot and will not attempt to "prove the negative" regarding such routes. Appellants appreciate the requirement they do more than merely "second guess" BLM's conclusions, but the Decision's approach affords no other option as the Decision (and FEIS) only catalogue agency conclusions without underlying analysis. Appellants request, on remand or in ongoing analysis, that closures motivated by wildlife, watershed or other "technical" conclusions be specifically identified. This should include direction to BLM to reconsider the designation

status of the route segments identified, as well as any segments which were not designated for use but for which no justification is presented.

C. The Decision Made Substantial Changes to the Preferred Alternative Not Subject to Public Input.

BLM additionally failed to conduct supplemental analysis after making meaningful changes between the FEIS and Decision Record. An agency must prepare a supplemental EIS if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns." 40 CFR § 1502.9(c)(1)(i). It is important to note that the relevant "environment" for purposes of evaluating impacts is the "human environment" which includes not just the physical environment but "the relationship of people with that environment." 42 USC § 4332(2)(C); 40 CFR § 1508.14. The FEIS pretends that unauthorized routes do not exist, precluding NEPA's required comparison between the action alternatives and the human environmental baseline. The Council on Environmental Quality has further clarified that a supplement is not required when the final alternative/decision is "qualitatively within the spectrum of alternatives that were discussed in the draft" and reflects only "minor variation" from them. Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed.Reg. 18026, 18035 (Mar. 17, 1981). These requirements seem intuitive - the public cannot be expected to provide meaningful input to decision options not revealed by the agency.

The supplementation requirement arises in large part from NEPA's public information purposes. An EIS:

> serves two ends. A properly prepared EIS ensures that federal agencies have sufficiently detailed information to decide whether to proceed with an action in light of potential environmental consequences, and it provides the public with information on the environmental impact of a proposed action and encourages public participation in the development of that information.

Arizona Cattle Growers' Ass'n v. Cartwright, 29 F.Supp.2d 1100, 1116 (D. Ariz. 1998) (citing *Oregon Envt'l Council v. Kunzman*, 817 F.2d 484 (9th Cir. 1987). In particular, supplementation is necessary:

> when the [DEIS] is insufficient to bring about the necessary public comments due to significant new information or changes to a plan. "[I]n the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance-or lack of significance-of the new information."

Id. (quoting *Marsh v. ONRC*, 490 U.S. 360, 378 (1989)). Where proper analysis of impacts depends on location-specific factors, at least one court has found that the failure to disclose changing locations coupled with discussion of only general types of impacts "would be anathema to NEPA's 'twin aims' of informed agency decisionmaking and public access to information." *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 707 (10th Cir. 2009) (quoting *Marsh*, 490 U.S. at 371).

The Decision made substantial changes that were relevant to environmental concerns. The Decision identifies multiple changes, both for and against motorized access, that were made to the FEIS Preferred Alternative. ROD at 5-6. It is admirable that BLM considered and responded to public comment, but procedurally unacceptable to address such input by essentially creating a new alternative and adopting it as the final decision. The public was unable to anticipate and comment upon what was not only a viable alternative but the agency's ultimate selected outcome to the public planning process. On remand BLM should be directed to prepare a supplemental analysis.

D. Specific Routes Were Arbitrarily Excluded from Meaningful Analysis.

The BLM improperly failed to consider designation of certain routes based on the perception that portions of (or connections to) those routes on Forest Service land would not be designated open for vehicle use. The Decision was reached through an interconnected analysis performed by the BLM Gunnison Field Office and the Gunnison National Forest. Given the nature of the intermingled land ownership patterns, there are some existing and historically-traveled routes which occur on both BLM and Forest Service (and possibly other) lands. As a result, one of two evils occurred. Either BLM limited its analysis based on "inside" discussions about the Forest's handling of a route, or BLM (or the Forest) simply failed to meaningfully engage analysis of certain routes in the absence of the sister agency's designation

Appellants are particularly concerned about the following routes that were affected by this dynamic:

(1) East – West Corridor Gunnison NF 4WD Trail 807 to BLM West Roads

(2) The area south of Highway 50 including the BLM connection to Gunnison NF 4WD Trail 806, and the BLM connection to Gunnison NF roads 789.2B to 775 to 854.2A.

(3) Beaver Creek, FS trail # 447. The closure of this trail is of significant concern to the motorized community. This trail is the only single track access off the Lands End area. There is extensive historical use of this area, with closure and decommissioning of alternative routes. If stream crossing issues are the purported rationale, the agency has failed to consider reasonable mitigation options. Further, stream crossing impacts are typically attributable to the existence of a route far more so than travel upon it, and it seems arbitrary to restrict motorized travel while leaving the route in place for continuing use by other groups.

The record does not reflect meaningful consideration of these options despite being repeatedly noted by Appellants and others. Designation of all the routes in question would reflect existing and historical use of the area, would not have adverse effects on physical resources, and would allow sustainable loop trail riding that would arguably reduce impacts, be safer, and provide for enhanced visitor experience.

CONCLUSION

BLM's Decision is an admirable first step at the difficult challenge of designating trails in the Gunnison Field Office. However, the Decision reflects deviation from mandatory procedures. Failure to follow mandatory procedures, particularly when relating to proper legal notice of the Decision and fundamental aspects of public participation, reflect compelling reasons for modification or reversal. Appellants respectfully request the Decision be remanded for further analysis.

Dated this _____ of August, 2010.

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Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing STATEMENT OF REASONS was delivered on August 27, 2010, by delivering the same via facsimile to 970-642-4425 and via U.S. Mail, certified delivery, return receipt requested, addressed to the following:

Brian St. George, Field Manager
US DOI-BLM, Gunnison Field Office
216 N, Colorado
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I further certify that a true and correct copy of the foregoing STATEMENT OF REASONS was delivered on August 27, 2010, by placing the same in the U.S. Mail, certified delivery, return receipt requested, addressed to the following:

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Paul A. Turcke