

## **National Park Trails**

### **September 16, 2019**

#### **INTRODUCTION**

On August 29, 2019 Secretary of the Interior David Bernhardt issued Secretarial Order number 3376, entitled “Increasing Recreational Opportunities through the use of Electric Bikes.” The heart of the Order directs that all Interior Department agencies, including the National Park Service (NPS), “shall allow...” e-bikes “...where other types of bicycles are allowed.”

On August 30, 2019, Deputy NPS Director P. Daniel Smith announced that “[T]his new policy will enable visitors to use e-bikes, low speed electric bicycles with power assistance, in the same manner as traditional bicycles, allowing them on park roads, paved or hardened trails, areas designated for off-road motor vehicle use and administrative roads.”

In short, the Secretarial Order and the new NPS policy directs that where the NPS now allows the use of bicycles, the NPS must now allow the use of e-bikes. This analysis examines the reach and effect of the Order and the NPS policy.

#### **THE ORDER AND POLICY ARE CONTRARY TO NPS REGULATIONS**

On June 30, 1983 the NPS adopted its current general regulations at 36 CFR Part 1 and 2. The regulations define a “bicycle” as “...every device *propelled solely by human power* upon which a person or persons may ride on land, having one, two, or more wheels.” Emphasis added. 36 CFR 1.4. Definitions. (48 FR 30276). By regulation, e-bikes are not bicycles.

On April 2, 1987, the NPS adopted a regulation at 36 CFR 4.30 governing the use of “Bicycles” in the national park system. The 1987 regulation provides that “[T]he use of bicycles is prohibited except on park roads, in parking areas and on routes designated for bicycle use...” The 1987 rules imposed an even stricter standard for designating routes for bicycle use outside of “developed areas.” A park manager could designate such routes **ONLY** by adoption of a special regulation for that park at 36 CFR Part 7.

On July 6, 2012, the NPS significantly weakened the 1987 regulatory requirements for allowing bicycles on backcountry trails. The new, and current, rule authorizes a local park manager to designate any existing trail in park backcountry as open to bicycle use by a process of designation in 36 CFR 1.5, and public notification in 36 CFR 1.7. The 2012 bicycle rule requires a special regulation only for bicycle use on “new trails.”

Weakened though it may be, current regulations (like its 1987 predecessor) allow a park manager to designate backcountry trails as open only to “bicycle” use. The 2012 regulation did not alter the definition of “bicycle” from the 1983 rulemaking. Thus, “e-bicycles” are not “bicycles” under existing regulations. The regulatory definition of “bicycle” has not been and, indeed, cannot be, repealed or revised by a Secretarial Order or NPS policy.

Such a revision, under the Administrative Procedures Act (APA) requires that the Secretary propose and adopt in final a regulatory revision to 36 CFR 1.4. Despite the Secretarial Order, trails in the backcountry, whether designated as open to bicycle use under a Part 7 special regulation or under the process of 36 CFR 1.5 and 1.7 remain closed to e-bikes throughout the national park system.

The Secretary's Order recognizes this and directs the NPS to revise 36 CFR 1.4. Until such a revised rule is adopted in final no park may allow e-bikes on backcountry trails or areas outside of developed

zones.

## **QUESTIONS ABOUT WILDERNESS**

The Secretarial Order is silent on “wilderness.” The NPS Policy announcement states that “[S]imilar to traditional bicycles, e-bikes are not allowed in designated wilderness.” The Wilderness Act prohibits both motor vehicles (e-bikes) and mechanical transport (bicycles generally). Only a change to the Wilderness Act can alter these prohibitions. Thus, the 2012 bicycle rule revision retains the wording of the 1987 bicycle regulation that “possessing a bicycle in a wilderness area established by Federal statute” is prohibited. 36 CFR 4.30(h)(2). Designated wilderness is safe from any and all administrative actions.

The Preamble to the Final Rule in 2012 states that the “NPS will continue to prohibit bicycle use in eligible, study, proposed, recommended and designated wilderness as required by NPS policy.” The Preamble continues “[T]herefore, a superintendent may not propose either use of bicycles on existing trails or propose new bicycle trails on any lands that meet the Management Policies definition of wilderness unless this policy is specifically waived in writing by the Secretary, the Assistant Secretary, or the Director.” 77 FR 39928. The 2012 bicycle regulation did not include this prohibition in the rule itself, despite a number of public comments urging the NPS to do so. But the NPS did reiterate this prohibition in the Preamble to the Final Rule.

To our knowledge, no park superintendent has designated a trail as open to bicycle use on lands in a park that are recommended, proposed or eligible for consideration as wilderness.

At this point, Secretarial Order 3376 does not waive the NPS Management Policies requirement regarding the protection and management of lands recommended, proposed or eligible for wilderness in parks. Such lands remain closed to bicycles and to e-bikes.

## **NPS TRAILS CURRENTLY OPEN TO BICYCLES**

Assuming that the Secretary successfully revises 36 CFR 1.4 and 4.30 to allow e-bikes on all trails in backcountry that are now open to traditional bikes, it could affect the following parks:

### A. Special Regulations (and year adopted)

The NPS, through its long history, has generally prohibited bicycles use outside of developed zones, i.e. on trails within the generic park backcountry. Until 2012, allowing bicycle use on backcountry trails required the promulgation of a special regulation. In the twenty-five years (1987-2012) of this regulation, the NPS adopted such special regulations only four times. These are the park areas that have opened backcountry trails to traditional bicycles under the 1987 method of special regulation at Part 7. The trails in these parks would be opened to e-bikes if Secretary Bernhardt succeeds:

1. 36 CFR 7.11 Saguaro National Park – Cactus Forest Trail, inside of the Cactus Forest Loop Drive (2003);
2. 36 CFR 7.36 Mammoth Cave National Park – 17 miles of trail (2012). (The NPS allowed bicycles on trails in Mammoth Cave beginning in 1999 contrary to NPS regulations at 36 CFR 4.30, based on a euphemism of “an experimental basis.” Thirteen years later the park adopted a special rule to allow use of, and construct new, trails for bicycles outside of developed areas);
3. 36 CFR 7.90 Chattahoochee River National Recreation Area – 9 miles of trail (2013);
4. 36 CFR 7.97 Golden Gate National Recreation Area – Routes not specified in special regulation but as “designated by the Superintendent” (1992) The designated routes open to bicycles extend for hundreds of miles in the Recreation Area and one small section in Muir Woods

National Monument.

#### B. Designation under the 2012 Regulations by 36 CFR 1.5 and 1.7

Here is a partial list of the parks that have designated trails in undeveloped areas as open to bicycle use under the current (2012) method of designation and notice via 36 CFR 1.5 and 1.7. The list is partial because there is no central location for all of the parks in this category.

In the 2012 rule, the NPS decided not to require publication of a Federal Register notice of such designations or of the environmental assessments for such trail designations.

The 2012 rule for bicycles eased the process to designate backcountry trails open to bicycles. The trails now open to traditional bicycles in the undeveloped areas of the following parks would be opened to e-bikes if Secretary Bernhardt succeeds in revising 36 CFR 1.4. Alternatively, these parks could preclude e-bikes by removing the backcountry trails from designation under 36 CFR 1.5 and 1.7 (which is done annually) as being open to traditional bicycles.

- Big South Fork National River and Recreation Area (KY/TN)
- Cuyahoga River National Park (OH)
- Delaware Water Gap National Recreation Area (NJ/PA)
- Point Reyes National Seashore (CA)
- Redwood National Park (CA)
- Santa Monica Mountains National Recreation Area (CA)
- Whiskeytown National Recreation Area (CA)

#### C. Designation of Bicycle Use By Statute

In 2009 Congress authorized the construction of a trail on the east side of Grand Lake in Rocky Mountain National Park (P.L. 111-11). The trail alignment area was excised from the NPS' wilderness recommendation for Rocky Mountain National Park when Congress designated wilderness in the Park for the purpose of allowing, among other things, “non-motorized bicycles.” This is the only example of an explicit statutory authorization for bicycle use in an area of the national park system. The Secretarial Order cannot permit e-bikes on this trail.

#### **CONCLUSION**

Until the Department of the Interior adopts a revised final rule at 36 CFR 1.4 and 4.30 no park manager may allow e-bikes on backcountry trails or areas outside of developed zones.