



## Colorado Wild Public Lands

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October 17, 2022

Chad Stewart, Forest Supervisor  
GMUG National Forest  
2250 Highway 50  
Delta, CO 81416  
Submitted via email

### **RE: Mt. Emmons Land Exchange #61798**

Dear Mr. Stewart,

Colorado Wild Public Lands (CWPL) is a 501(c)(3) organization dedicated to keeping public lands public and accessible. Our mission is to protect the integrity, size and quality of Colorado's public lands. We welcome this opportunity to comment on the proposed Mt. Emmons Land Exchange and look forward to ongoing engagement with this project as more information becomes available.

The Mt. Emmons exchange is the best proposal CWPL has seen in our 10 years of following land exchanges around Colorado, and we commend the elements of this project that taken together offer substantial public benefits. These include:

- Imposition of an extremely restrictive conservation easement on the lands conveyed into private ownership that will ensure no future mining or development of any kind on those lands,
- Extinguishment of all the proponents' mineral rights underlying the now public exchange parcels,
- Conveyances to Gunnison County and public access easements to the Forest Service over the proponents' post-exchange acquisitions ensuring permanent access for public infrastructure and multiple recreational amenities,
- Public acquisition of desirable inholdings that will consolidate public holdings, protect important habitat and ensure permanent access for the Colorado and Continental Divide Trail systems,
- Facilitation of upgrades to the dated water treatment facilities on the now federal parcels that will protect water quality in the locally important Coal Creek watershed.

The proponents' willingness to extinguish its mineral interests and to grant conservation and access easements protects the status quo and on-going public enjoyment of all the lands in the exchange. The proposal does not eliminate any existing public access, nor does it allow any future development on the now public lands. It increases access, affords public protections to wildlife habitat and offers incentives for better management of impacts from historic mining operations.

To ensure the public objectives of the land exchange espoused in the current proposal, CWPL urges the Forest Service ("Agency") to undertake any necessary measures to eliminate uncertainty about the future implementation of the purported public benefits. In that spirit, we offer the following comments.<sup>1</sup>

I. THE RECORD OF DECISION (ROD) SHOULD CONDITION THE EXCHANGE ON THE CBLT CONSERVATION EASEMENT AND MINING EXTINGUISHMENT

In the FA, the Agency is relying on implementation of these agreements to support its rationale for processing the exchange using a Categorical Exclusion rather than an EA or an EIS<sup>2</sup>:

"Because it is a foreseeable future condition, the Forest Service authorized officer may consider the conditions resulting from the proposed conservation easement to support the use of 36 CFR 220.6(d)(7) in analyzing the land exchange." [FA at 131]

This reliance suggests that absent these agreements, the exchange would merit a more robust NEPA review. Moreover, the reliance creates a hypothetical condition on which to base the review process that will not exist if the restrictions detailed in these agreements are not implemented, namely that the current uses will never change, therefore a NEPA review that would evaluate the potential future impacts of a change in use of lands in the exchange is not necessary.

The only way to guarantee implementation of these agreements is to condition the exchange on them in the ROD.

CWPL also suggests the agreements should be placed in escrow now. The FA says:

"Upon agreement of the easement language, [it] would be executed by both MECM and CBLT and held in escrow until the land exchange is complete" [FA at 52].

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<sup>1</sup> CWPL details many of these in our "pre-scoping" comment letter dated Aug. 31, 2022. Because the Agency is conducting much of the supporting analysis concurrent with rather than prior to the current scoping comment period, there is no new supporting documentation to evaluate in this set of comments; consider these comments in conjunction with the August ones.

<sup>2</sup> Sale or exchange of land or interest in land and resources where resulting land uses remain essentially the same [CFR 220.6 (d)(7)]

Presumably, the parties have reached agreement on the language of both the Conservation Easement and the Mineral Extinguishment Agreement because the Agency has released both documents for public review. Because the public is evaluating and supporting this exchange based upon the benefits described in the available documents, the documents should go to escrow now to ascertain the benefits which are the underpinning of this public support.

## II. CWPL SUPPORTS ADMINISTRATIVE EFFORTS TO REMOVE LANDS IN AND AROUND THE EXCHANGE FROM FUTURE MINING CLAIMS

CWPL detailed support for administrative withdrawal of these lands in our August 31, 2022 comments. In the meantime, President Biden has issued Executive Order [Oct. 12, 2022] that includes the desired permanent withdrawal of these claims on the lands in the exchange. Because a future prohibition on mining is integral to both the substance and the process of this land exchange, CWPL supports the agencies (USFS and BLM) efforts to facilitate this withdrawal.

We support HCCA's position on the relinquishment of unpatented claims on lands surrounding Federal Parcels 1,2 and 3 and agree that the potential downsides of the "strategic relinquishment" strategy described in the FA [at 52] are reason for the Agency to avoid any further consideration of it.

Additionally, for all the reasons described above, the Agency should segregate the now private lands from mineral location for the maximum 5 years to allow for closing of the exchange and agency determination regarding whether future location is suitable given the management objectives of public ownership of these parcels.<sup>3</sup>

## III. THE AGENCY MUST DEMONSTRATE TRANSPARANCY, CONTINUE TO ENGAGE THE PUBLIC, AND BE PREPARED TO UNDERTAKE A MORE RIGOROUS NEPA ANALYSIS IF THE RESOURCE EVALUATIONS SHOW IT IS WARRANTED

CWPL's August 31, 2022 comments detail this organization's discomfort with evaluating a land exchange proposal of this complexity and geographical scope through a Categorical Exclusion. We also think that the Agency should have completed the resource evaluations prior to the opening of this comment period so the information therein would be available to the public in their assessment of the proposal. However, we recognize that the likely outcomes of the exchange meet the criteria for using the CE; we also believe this proposal and accompanying public benefits to be in the public interest. CWPL can support the Categorical Exclusion under the following conditions:

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<sup>3</sup> Due to the wildlife habitat on these parcels [FA at 29-30], we anticipate that the future management of non-federal parcels A and B will prioritize protections for this habitat.

1. The Agency must continue to engage the public through full and timely disclosure of all supporting documentation (including all valuation documents)<sup>4</sup> and through additional opportunities for public comment on this documentation prior to the issuance of a Decision Notice (DN) and Record of Decision (ROD).
2. The Agency must commit to undertaking any level of additional NEPA assessment that the supporting documentation indicates is appropriate.

#### IV. OTHER ISSUES

*Water.* CWPL continues to have concerns about the disposition of the 5.5 cfs of water rights on non-federal Parcel A. If the Agency is still disinclined to accept those water rights and use them for public benefit, it should explain in more detail how and why the agency has chosen not to acquire the rights and recommend abandonment.

In our August 31 comments, we requested more information from the agency regarding the post-exchange water quality protections; the Agency has not yet provided that information. At a minimum, we recommend that the Agency recommend that the State review and renew the 2013 and 2016 water quality permits referenced on page 16 of the FA.

*Access Easements.* Because the access easements have not yet been drafted [FA at 13], the Agency should provide as much specificity as current information allows regarding the access afforded through the recreational easements purported in the FA.<sup>5</sup> This should include details about gps coordinates of start and end points, linear distance between points, descriptions of the areas that will continue to be accessible to skiing, and those that will no longer be, and details regarding allowable uses on those easements. This information would help to inform realistic public expectations about the future use of these amenities.

*Other Resource Issues.* The exchange would result in a net loss of lynx habitat [FA at 29]. Because the TES consultation has not yet begun, we have no way of knowing details about the quality of the habitat being exchanged. We reiterate that if this consultation raises questions about the future viability of local lynx populations, the Agency should undertake a more rigorous NEPA evaluation process.

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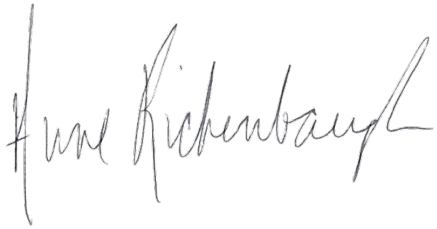
<sup>4</sup> We recognize the appraisals will not be complete by the close of this comment period. However, the agency does have a valuation consultation report from March '21 and has sent the Statement of Work to the appraiser, neither of which have been released to the public. As predictors of the appraisal contents, these documents are useful for current analysis. The Agency has instructed us that we will have to submit a FOIA request for these documents.

<sup>5</sup> This includes easements for FSR 732, 732A1, FST585, and FST 436 [FA at 68].

Additionally, if the SHPO concurrence suggests it is appropriate, the Conservation Easement should be amended to provide protection for the site eligible for National Historic Preservation Listing on federal Parcel 1[FA at 30].<sup>6</sup>

CWPL recognizes the momentum around this project resulting from the extensive engagement among the proponent, the local community and advocates and the Forest Service. That momentum carried all the way to Washington, DC eliciting support from the President for the steps necessary to ensure the outcomes of this exchange. If the Agency releases all relevant information and continues to engage and assist the public in evaluating that information, our organization will look forward to a Decision that benefits us all.

Sincerely,

A handwritten signature in cursive script, reading "Anne Rickenbaugh". The signature is written in dark ink and is positioned above the printed name.

Anne Rickenbaugh, Board Member

**ATTACHMENT A**  
**To Colorado Wild Public Lands' Oct. 17, 2022 Comment Letter**  
**on the Mt. Emmons Land Exchange**



## Colorado Wild Public Lands

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August 31, 2022

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2250 Highway 50  
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[chad.steward@usda.gov](mailto:chad.steward@usda.gov)

Re: Mt. Emmons Land Exchange

Dear Forest Supervisor Stewart,

Colorado Wild Public Lands (CWPL) is a 501(c)3 organization whose mission is to protect the integrity, size and quality of public lands in Colorado. In concert with this mission, we monitor land exchanges around the state; we also work to keep public lands both public and accessible.

After reviewing the information made available to the public concerning the proposed Mt. Emmons land exchange, we submit the following comments and requests for your consideration.

**1. The Forest Service must make all exchange documentation available to the public at each stage of whatever NEPA process the agency invokes; this documentation includes, but is not limited to drafts, updates, and final versions of:**

- Any and all land valuation documents, and appraisals
- Resource evaluations such as TES, wetland/floodplain studies and any other documentation of the public and biological resources on the lands in the exchange
- Management plans, and management agreements (MOUs/IGAs) among the Forest Service, the proponent, local government and any other parties active in future management of the lands in the exchange
- Conservation easements and extinguishment agreements.

CWPL continues to emphasize the importance of public review of appraisals and land value assessment documents related to public land exchanges during comment periods and prior to decision periods. These documents are the tools to evaluate FLPMA's Equal Value requirement for land exchanges and are a necessary component of the public interest

determination. Because the parcel configuration presented to the public in an EA or EIS for comment is determined by the appraisals, these documents drive the entire NEPA documentation process. We know that the Agency has the appraisals in hand when they release draft NEPA documents for public comment; the public should have an opportunity, as part of that process, to assess whether the lands in question constitute an equal exchange. Absent access to appraisals, the public is denied the opportunity for fully informed review and substantive comment.

This exchange merits careful assessment of equal value given its complexity, including conservation easements, contamination concerns, and acreage differential. It is imperative that the public be informed early and completely of this information. The agency must release the Valuation Consultation completed in March '22 in when it opens the formal Scoping comment period in September. It must also release the Appraisals and the TARPs once they are finalized and accepted for use in November (per the ATI), or with the opening of a subsequent comment period should the agency choose to do an EA or EIS.

Because the Agency is proposing to treat this exchange through a Categorical Exclusion, appraisals and any other supporting documentation on the public and ecological resources would ideally be complete and posted on the project website when the scheduled Scoping/comment period opens. However, since these will occur after the Scoping period closes, the agency must make these subsequent evaluations available for review upon completion.

**2. We reiterate that categorical exclusion is an inappropriate means of conducting a land exchange of this scope and urge you to commit to increased public input and review periods.**

We discourage any truncated review process through a Categorical Exclusion. Per FSH 1909.15 Chapter 31.2, there are extraordinary circumstances that warrant analysis under at least an Environmental Assessment:

“Resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or an EIS are:

- (1) Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species;
- (2) Floodplains, wetlands or municipal watersheds [FA at 48-49]

The exchange will result in a net loss of Canada Lynx habitat [FA at 29] and post-exchange, MEMC’s reclamation and water treatment activities in the Coal Creek watershed will no

longer be subject to federal oversight; Coal Creek is part of Crested Butte's municipal water supply and mis-management of these lands would adversely affect the Town.

Because of these circumstances and the highly valued access to public lands and infrastructure through the federal lands and the Forest Service should ensure rigorous public involvement and scrutiny. At a minimum, the agency must release all supporting documentation upon completion of the reports.

Additionally, a categorical exclusion will pre-empt any cumulative impacts analysis. Because CWPL monitors land exchanges on a statewide level and sees many impacts repeated in multiple exchanges, we discourage any analysis that treats this transaction in isolation.

### **3. CWPL is concerned about post-exchange water quality impacts.**

The FA refers to water treatment and maintenance and re-vegetation plans that the Forest Service has not yet approved and mentions the current water treatment plant "has exceeded the end of its ... lifecycle" [FA at 15]. It also suggests that the proponent has some autonomy in ongoing oversight of reclamation plans, facilities and contractors:

"MEMC oversight of the facility and contractors would likely continue after the Federal Parcels are conveyed out of Federal ownership, though as today there would be no requirements by the Forest Service to do so." [FA at 16]

The documents currently available do not allay our concerns shared in the Southern Rockies Conservation Alliance letter [April 7, 2022] that adequate water quality protections will be in place post land exchange; the Agency should provide further details during scoping about these safeguards and other measures they might employ or why they believe the currently agreed upon measures are adequate.

Also, the FA indicates that the Agency will not receive the 5.5 cfs of surface water rights associated with Parcel A in the exchange [FA at 43]; we believe the public could and should benefit from those water rights and question why the Agency has declined to accept them. We also share the concerns expressed in the multi-party opposition to MEMC's conditional water rights; it is not apparent how those water rights are necessary for the Company's operations and the water rights should be abandoned.

### **4. The Forest Service should exercise a mineral withdrawal on the unpatented mining claims surrounding the MEMC lands included in the exchange.**

However unlikely it may be, the unpatented mining claims present a danger of outside parties stepping in to prevent extinguishment of those rights under the Conservation Easement, which will not go into effect until after the land exchange closes. The FA does not state that the Agency *cannot* undertake this withdrawal, only that it is choosing not to, due to:

“unlikely support within the Forest Service, BLM, and Department of the Interior of the need for a mineral withdrawal given that the conservation easement ... would prohibit mining (i.e., the mining threat would be removed).” [FA at 53]

Because the mineral extinguishment is such an integral part of this exchange and drives so much public support for this proposal, we urge the Agency to do everything possible to ensure the outcome that it is touting to the public.

**5. CWPL strongly opposes the Forest Service’s reliance on a private consultant to conduct outreach on this exchange. The Agency must conduct its own public outreach.**

We commend the Proponent’s efforts to engage the public and acknowledge that this effort has been uncommonly extensive. However, the agency should acknowledge that the Proponent is not a neutral party and should never rely on outreach conducted by private entities to supplant the agency’s responsibility to engage the public in the NEPA process. In order to ensure a comprehensive, objective, and completely transparent public process the agency must act in its capacity as advocate for the public interest and conduct its own outreach process that represents all stakeholder points of view; CWPL and perhaps our peers such as HCCA could assist the agency in organizing and promoting an (or series of) public open house(s) to provide an informational forum on the proposal, the supporting documentation and how to participate in the Scoping Process.

**6. CWPL discourages 3<sup>rd</sup> Party Contracting for NEPA Analyses.**

Exhibit D of the ATI indicates that the Non-federal party is responsible for both contracting and paying for the appraisals [ATI at 20]. We reiterate our objections to this practice of the proponent contracting and paying for the third-party vendors that do the environmental/field studies, especially the appraisals. Under this practice, the proponent not only influences, but owns the work product, undermining the objectivity and, therefore, credibility of work that should be done by the agency charged with the responsibility to act in the public interest, not that of the proponent.

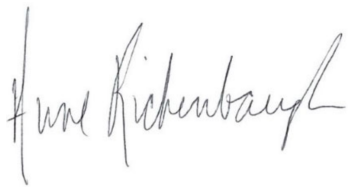
**7. Other issues and outstanding questions**

- a.) Section 5 of the Conservation Easement prohibits some activities in Zone 1 and not in Zone 2 [CE at 6-8]. Why are some activities allowed in Zone 2 and not prohibited?
- b.) We have reviewed the Conservation Easement, as it is available on the Proponent's project website; the Agency should also post it on their project website to ensure the public has easy access to it for scoping.

This exchange has the potential to truly benefit the public as well as the proponent in significant ways and it is one that CWPL would very much like to support as long as the agency undertakes every effort possible to ensure the outcomes promoted to date and provides the public its right to due diligence through a fair NEPA process. We urge you to please consider these concerns and implement the suggestions herein.

Thank you for your consideration of these comments.

Yours sincerely,

A handwritten signature in dark ink, appearing to read "Anne Rickenbaugh". The signature is fluid and cursive, with the first name "Anne" written in a larger, more prominent script than the last name "Rickenbaugh".

Anne Rickenbaugh  
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