



## **Comment Supporting the Proposed East Crazy Inspiration Divide Land Exchange**

Property and Environment Research Center (PERC)

Bozeman, Montana

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### **Main Points**

- The proposed land exchange is a balanced, collaborative solution developed by landowners, tribal representatives, conservation organizations, and recreation groups.
- The proposed exchange will guarantee access to land-locked public lands while reducing conflict with private landowners.
- It will also conserve a large block of wildlife habitat and improve forest management.
- By reducing checkerboarding, the proposed exchange may benefit the local economy.

### **Introduction**

The Property and Environment Research Center (PERC) respectfully submits this comment supporting the proposed East Crazy Inspiration Divide Land Exchange. This exchange will reduce checkerboarding by consolidating federal lands while also increasing public access, conserving a large block of wildlife habitat, and advancing tribal interests. Indeed, the exchange was developed and proposed by a group of landowners, tribal representatives, conservation organizations, and recreation groups working collaboratively to address long-running access and management challenges. We commend the Forest Service for moving forward with this reasonable solution.

### **The Property and Environment Research Center**

PERC is the national leader in market solutions for conservation, with over 40 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana. Most relevant to the current proposal, PERC's researchers and scholars have long documented the benefits of consolidating checkerboarded lands.<sup>1</sup>

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<sup>1</sup> See, e.g. Bryan Leonard and Andrew J. Plantinga, *Stranded: The Effects of Inaccessible Public Land on Local Economies in the American West*, Working Paper, (Apr. 13, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4047357](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047357); see also Tim Fitzgerald, *Federal Land Exchanges: Let's End the Barter*, PERC Policy Series, (June 2000), <https://www.perc.org/wp-content/uploads/old/ps18.pdf>.

## **The Proposed Exchange Will Improve Public Access While Reducing Conflict**

The Crazy Mountains are a checkerboard of federal, state, and private lands, a result of haphazard federal disposal policies from the 19th century.<sup>2</sup> Many public parcels in the range are effectively islands, inaccessible to anyone but the surrounding landowners and those they grant permission to cross their private property to access federal land. As public interest in hunting and recreating in the area has grown, access has been a persistent source of unproductive conflict, with access advocates asserting aggressive and unproven prescriptive easement theories and landowners taking steps to block access and prevent potential easement claims. The proposed exchange can cool this conflict by assembling a large, consolidated area of public land, providing secure public-access rights to it, and constructing a loop trail to facilitate that access.

When Congress disposed of land in the 19th century, it generally did not reserve easements for accessing federal lands locked by the newly private lands.<sup>3</sup> Consequently, access to these lands depends on subsequently acquired easements, landowner permission, or unlawful trespass. For more than 30 years, the Forest Service has attempted to resolve access disputes in the checkerboarded Crazy Mountains by consolidating federal holdings, negotiating access easements, and finding other win-win solutions with neighboring landowners. That effort has produced several notable gains, including land consolidation in the northern and southern portion of the range and a deeded trail easement in the western Crazies. While progress has necessarily been slow and deliberate, we appreciate the Service's commitment to resolving these issues amicably.

The proposed exchange is a reasonable, balanced solution to long-running challenges on the east side of the Crazies. Years of conflict between public-access advocates and private landowners over the status of the East Trunk Trail have generated much ill-will but secured no additional access. Rather than waste more decades fighting over hypothetical easements, a group of solutions-minded landowners, tribal representatives, hunters, conservationists, and recreators have found common ground in this proposed exchange. Considering the long history of conflict among such groups, this collaboration is especially noteworthy and should be celebrated. The Service is right to reject consideration of alternatives that would jeopardize this agreement by demanding changes that would unreasonably tip the scales to favor one interest at the expense of another.<sup>4</sup>

Under the proposed exchange, the Forest Service will trade 7 parcels in the Crazy Mountains for which there are currently no legal access rights in exchange for 10 accessible parcels and construction of a public trail.<sup>5</sup> When combined with existing federal lands, the acquired parcels will create a 30-square-mile (10,640 acres) contiguous block of public land. It would also open Smeller Lake to

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<sup>2</sup> See Bryan Leonard, *Stranded: The economics of inaccessible public lands in the West*, PERC Reports (2020), <https://www.perc.org/2020/12/16/stranded/>.

<sup>3</sup> See *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).

<sup>4</sup> See Preliminary Env'tl Assessment at 17.

<sup>5</sup> The exchange also concerns a much smaller amount of land in the Inspiration Divide which similarly increases access and recreation opportunities. However, that area does not have the checkerboard challenges that are the focus of this comment.

public access. And a private landowner has agreed to grant the Crow Tribe access to Crazy Peak, a culturally significant location.

As the preliminary environmental assessment explains, this compromise would be a significant net-win for the Forest Service and the public, conserving wildlife habitat, improving land management, and increasing public recreation opportunities. Importantly, the exchange guarantees these outcomes, while the status quo offers only hypothetical access based on speculative easement claims.

Opposition to the proposal should not dissuade the Forest Service. Criticisms of the proposal ultimately rest on the mistaken assertion that the exchanged parcels are accessible. They are not. Despite appearing on historical maps, the Forest Service has never formally established easement rights in the Sweet Grass Trail or the East Trunk Trail where they cross private lands. For decades, there has been no access or access has only been with the permission of the private landowners. Indeed, a federal court recently affirmed the Forest Service's conclusion that it has no established easement rights to these exact trails.<sup>6</sup>

While some would prefer the Forest Service stoke conflict with its neighbors rather than move forward with a compromise solution,<sup>7</sup> the Service is correct to reject that approach. Any attempt to establish prescriptive easements would face numerous headwinds. Not only would it require the Service to pursue costly and time-consuming litigation that would sour relationships with neighboring landowners whose goodwill may be needed in the future. But it's likely that a prescriptive easement claim would fail. Under Montana law, a party asserting a prescriptive easement must establish a half-dozen factors under a heightened standard of proof (clear and convincing evidence). They must also overcome landowner defenses, including that any potential easement has been extinguished by landowners erecting signs, installing gates, and taking other steps to limit access for five or more years.<sup>8</sup> This may be the biggest hurdle, as access to these trails have been blocked or only by permission for decades, far longer than necessary to extinguish any hypothetical easement interests.<sup>9</sup>

Agency decisions must be grounded in reality, not conjecture.<sup>10</sup> It would be arbitrary, to say the least, to reject this reasonable compromise based on unfounded speculation. Therefore, in evaluating the proposed exchange, the Service should compare it to the world as it actually exists, where the landscape is fragmented and access to federal lands is blocked. Compared to this status quo, the proposal is a clear improvement. That the landowners intend to continue allowing permissive access in the Sweet Grass drainage, as they have for years, only makes the proposal that much more desirable.

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<sup>6</sup> See *Friends of the Crazy Mountains v. Erickson*, No. 19-66, Doc. 106 (D. Mont. Mar. 30, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.mtd.61150/gov.uscourts.mtd.61150.106.0.pdf>.

<sup>7</sup> See Hill, K. 2022. *Hunters Object to Land Swap in Montana's Crazy Mountains*. Outdoor Life. December 13, 2022, <https://www.outdoorlife.com/conservation/land-swap-montana-crazy-mountains/>

<sup>8</sup> *Dome Mountain Ranch v. Park Cty.*, 307 Mont. 420, 426 (2001).

<sup>9</sup> Notably, none of the activists asserting potential public easements has ever sought to establish them in court, where they would bear these burdens. This suggests that even they lack confidence in their unsubstantiated theories.

<sup>10</sup> See *Safari Club Int'l v. Haaland*, 31 F.4th 1157, 1176 (9th Cir. 2022); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1171 (9th Cir. 2010).

## **The Proposed Exchange Will Improve Public Lands Management**

The Crazy Mountains are of great importance to the ecological health of the Greater Yellowstone Ecosystem. The proposed consolidation of federal lands will improve the agency's ability to manage these lands in ways that benefit the environment, nearby landowners, and the public.

Checkerboarded landscapes can lead to habitat fragmentation and management challenges. Recent research suggests that consolidating public holdings is a cost-effective way to benefit wildlife. For example, one recent study co-authored by a PERC Senior Fellow found that the consolidation of public lands in Montana could significantly benefit wildlife habitat.<sup>11</sup> The proposed exchange would increase the Crazy Mountains roadless area from approximately 84,000 acres to more than 94,000 acres and provide a large, contiguous area of habitat for wildlife such as grizzly bears.

Checkerboarded landscapes also complicate the ability of public agencies to manage wildfire risk. A review of fires that started on public lands in the western United States between 1992 and 2015 found that fires that began on landlocked public land were between 14 percent and 23 percent more likely to grow beyond one acre in size than fires starting on more accessible public lands. The same review found evidence that this enhanced wildfire risk stems from the inability of agencies to conduct fuels management on landlocked parcels. The need to obtain permission to use privately held access points also creates delays in fire suppression.<sup>12</sup> Private landowners in checkerboarded landscapes face similar challenges in addressing wildfire risks on their land.

Current projections suggest that weather conditions in the Greater Yellowstone Ecosystem conducive to catastrophic wildfires may become 10 to 20 times more frequent by the end of this century.<sup>13</sup> The consolidation of public lands that would occur in the proposed exchange will improve forest managers' access to fire-prone areas, expand the agency's ability to manage the risk of wildfires, and limit the impact of wildfires on the local communities, ecosystems, and the climate. This is especially important given the increased prevalence of fire in the Crazy Mountains in recent years, such as the American Fork Fire, which burned over 17,000 acres in 2021.

## **Consolidation May Increase the Value of Public and Private Land Throughout the Range**

By reducing checkerboarding, the proposed exchange also has the potential to increase land values and benefit local economies. Of the more than 6 million acres of landlocked public lands in the West,

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<sup>11</sup> Powers, L. C., Larsen, A. E., Leonard, B., & Plantinga, A. J. (2022). Reconnecting stranded public lands is a win-win for conservation and people. *Biological Conservation*, 270, 109557.

<sup>12</sup> Leonard, B., Plantinga, A. J., & Wibbenmeyer, M. (2021). Stranded land constrains public land management and contributes to larger fires. *Environmental Research Letters*, 16(11), 114014.

<sup>13</sup> Westerling, A. L., Turner, M. G., Smithwick, E. A. H., Romme, W. H., & Ryan, M. G. (2011). Continued warming could transform Greater Yellowstone fire regimes by mid-21st century. *Proceedings of the National Academy of Sciences of the United States of America*, 108(32).

Montana is home to the most, with over 1.9 million inaccessible acres. The economic consequences of these “stranded” lands can be significant. A recent study by PERC researchers found that a 10 percent increase in the share of landlocked land in a county can reduce property values by approximately 3 percent county-wide.<sup>14</sup>

The reduced value partially stems from the aforementioned inability of public land managers to manage wildfires and other risks. Diminished outdoor recreation opportunities and increased incidents of trespassing that impose real financial costs on the owners of private property also add to the burden.<sup>15</sup> Landowners may choose to not invest in conservation efforts such as wildlife habitat restoration or streambed enhancement projects for fear that their improvements will attract trespassers and diminish their property rights.

### **Conclusion**

PERC commends the Forest Service for advancing a reasonable, balanced proposal developed in collaboration between landowners, tribal representatives, hunters, conservationists and recreators. If completed, the proposed exchange will provide significant benefits to people, the land, and rural economies. We encourage the agency to adopt this alternative.

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<sup>14</sup> Leonard & Plantinga, *Stranded*, *supra* n.1.

<sup>15</sup> *Id.*