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Bozeman, MT 59715

Via Electronic Submission

December 23, 2022

Ms. Mary Erickson
Forest Supervisor
Five Valleys Land Trust
120 Hickory Street, Suite B
Missoula, MT 59801

Re: Comments on the East Crazy Inspiration Divide Land Exchange Preliminary Environmental Assessment

Dear Ms. Erickson:

Thank you for the opportunity to comment on the “*East Crazy Inspiration Divide Land Exchange Preliminary Environmental Assessment*.” I whole-heartedly support this effort at cooperative federal and private land planning, believing it to be in the best interests of the public and of affected landowners.

I am an attorney who lives in Bozeman, who for thirty years has represented Montana land trusts and landowners in their efforts to protect private lands from development and to preserve agricultural opportunities and lifestyles. I have also worked in partnership with federal, state and local entities on land conservation related matters, including reviews of environmental impact statements and environmental assessments. I am also a part owner of a ranch in Livingston, and in the 1970s I worked as a wrangler on the east slope of the Crazy Mountains for a guest operation. I know that area well.

My comments today are informed by all of these experiences and by my legal training and experience. My comments are personal; they are not submitted in a representative capacity.

I support the East Crazy Inspiration Divide Land Exchange without the need for additional NEPA review for many reasons. The most important are summarized as follows:

1. Land ownership consolidation. The importance of consolidating ownership of public lands in the Crazies into larger ownership blocks is of paramount importance to effective, coordinated, environmentally sound federal land management for the public interest. Elimination of checkerboard ownership will allow the Custer-Gallatin National Forest to manage these lands for roadless uses emphasizing wilderness values, with secure and clear public access. Such large scale land consolidation to remove checkerboard ownership.

Such public benefits should not be underestimated. Currently, without the negotiated solution offered by the East Crazy Inspiration Divide Land Exchange the USFS is unable to implement cohesive and coordinated long-term management goals and objectives such as the Crazy Mountain BCA and South Crazy Mountain RWA. If the land exchange is approved, such long-

term National Forest management objectives can be implemented. Federal land managers can move forward, rather than remain in the legal quagmire which has paralyzed effective public land management. It worked twenty years ago in the Gallatins; it can work today in the Crazies.

2. Compromise in recognition of access limitations. As a legal matter – whether it is right or wrong in the subjective opinions of members of the public (including me) -- public access to National Forest lands between Big Timber Canyon and Sweet Grass Canyon has always required the public to traverse private lands. The right of landowners to protect their private property interests is fundamental to real property rights. That is why prescriptive public easements under Montana law do not arise by mere public use without more, but must, of course, meet certain required legal parameters under Montana law. If the parameters are not met, the right to control access to and across private lands, even to reach public lands remains with private landowners.

The draft Environmental Assessment recognizes these legal principles and the attendant access issues at pages 5-6 with respect to the. The USFS notes specifically in the Environmental Assessment that for “the Sweet Grass and East Trunk trails . . . the agency has no recorded easements across private property to access the National Forest.” Furthermore, the EA points out that Rein Lane is not a Forest Service Road. See EA at p. 6. No county roads lead across private lands to the National Forest boundary. Without written access easements, the Environmental Assessment recites the applicable legal standard to establish a public prescriptive easement at page 5:

“... the only lasting way to determine whether a public access right exists is through litigation in court, where the Agency must establish clear and convincing evidence of “open, notorious, adverse, continuous and uninterrupted use of the claimed easement for the full statutory period,” which in Montana is five years.”

See generally *Public Land/Water Association Inc. v. Robbins*, 2021 MT 75, 403 Mont. 491, 483 P.3d 1102 (Mont. 2021) at ¶38; *Leisz v. Avista Corp.*, 2007 MT 347, ¶ 37, 340 Mont. 294, 174 P.3d 481 (Mont. 2007) at ¶37. The record of public use Sweet Grass Trail No. 122, the East Trunk Trail No. 136, and Rein Lane, also as noted by the Environmental Assessment, notes facts about access to these trails and road that do not support the elements necessary for the USFS to establish a public prescriptive easement.

This situation is frustrating, to say the least, to hunters, hikers, backpackers, equestrians, and other potential public recreational users. But such frustration, alone, cannot overcome the legal standards to support public use. The Forest Service must establish public use rights in court. This legal limbo – a faceoff between those who hope that a court might someday find a public prescriptive easement and landowners who have a long history of allowing permissive use of their private lands – may drag on for years, and, ultimately, such litigation risks a court decision that could be very bad for the recreating public, unambiguously taking away all rights whatsoever and leaving the checkerboard land configuration intact for future generations.

Neither the current stasis nor the prospect of loss of all legal access rights on the East Side of the Crazies serves the public interest, especially if the tradition and history of access has relied on

permissive access granted by private property owners, as clearly described in the EA. *The compromise proposed in the East Crazy Inspiration Divide Land Exchange therefore represents a reasonable solution that balances rights of the public with the private property rights of the affected landowners and, in my opinion, serves the public interest.*

3. Environmental, recreational, and conservation concerns. Opinions published in the popular press, and a number of comments submitted suggest that (a) development of the East Trunk Trail will displace wildlife, especially elk, from public lands to private lands, and (b) the parcels exchanged in Sweet Grass Canyon will grant private property owners exclusive access to valuable riparian resources and wetlands, who will threaten their long-term protection. The first concern is puzzling; the second concern is largely uniformed.

First, the “displacement” of elk and other wildlife species from high elevation public lands to lower elevation private lands during the Fall hunting season arguably may occur is an East Trunk Trail is located on public lands. But this displacement will be a consequence of improving and securing legal access to these lands. So, the USFS faced a conundrum: Improve access to public lands, or maintain the status quo where elk are not displaced by public use. Which of these competing public values should be maximized?

These issues are addressed in the Environmental Assessment and, ultimately, the USFS made a hard choice, but a reasoned deliberate choice, that securing good and defensible trail access to public lands outweighed concerns about displacement of wildlife, if any. Weighing these conflicting interests and making a hard choice between them is the job of federal land managers, and the EA strikes the right balance in this circumstance. Long-term, secure public trail access to the East Crazies and to Sweet Grass Creek outweighs potential impacts to secure elk habitat on public lands, to which the public has only questionable legal access.

Second, with respect to the riparian resources on Sweet Grass Creek that the landowners may gain in the exchange located in Sections 8 and 10, T4N, R12E, Sweet Grass Creek in these sections is a “*losing stream*.” That is, the Creek goes completely dry every year soon after spring snowmelt. This phenomenon is readily apparent on numerous publicly available aerial photos. Accordingly, Sweet Grass Creek on the exchange lands that are proposed for private ownership provide no angling or water-based recreational opportunity at all for 10 months every year. And, while there are some small springs on Section 10, where the flow in Sweet Grass Creek starts to resurface, development of such wetlands if transferred to private ownership will be heavily regulated by federal and state laws and regulations.

Accordingly, the proposed land exchange would not transfer into private ownership any special or significant riparian resources along Sweet Grass Creek, while the public gains huge benefits from the accession into federal ownership of Smeller Lake and surroundings. Again, this is a trade-off that provides far more water-based recreational benefit to the public than loss.

In summary, I support the “Alternative B – Proposed Land Exchange” at Section 2.2 of the East Crazy Inspiration Divide Land Exchange Preliminary Environmental Assessment for the specific reasons noted above.

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More generally, I believe **the Custer Gallatin National Forest has identified important land management goals and objectives for the National Forest at Section 1.3 of the Environmental Assessment (“Need for Action”) and that the proposed land exchange would serve all of these objectives well for the benefit of the public. Finally, I also believe that the current stalemate in federal land management in the Crazyes serves no one well – not the public, not the private property owners, and not the Forest Service – so adopting a proposed negotiated solution to the ongoing stalemate represents a desired dispute resolution outcome.**

Thank you again for the opportunity to submit these comments.

Sincerely,

Andrew C. Dana

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