BACKCOUNTRY HUNTERS & ANGLERS
MONTANA

Northern Regional Office
Responsible Officer: Forest Supervisor Mary Erickson

Attn: Objection Reviewing Officer
ECID, 26 Fort Missoula, Road
Missoula, MT 59804

Submitted via portal:
https://cara.fs2c.usda.gov/Public//CommentInput?Project=63115

RE: Montana BHA OBJECTION to Draft Decision Notice and Finding of No Significant Impact for East Crazy Inspiration Divide Land Exchange

The following objection is submitted on the Finding of No Significant Impact on for the East Crazy Inspiration Divide Land Exchange published September 27, 2023.

Projected Objected To

Pursuant to 36 C.F.R. § 218.8(d)(4), I object to the following project:

Project: East Crazy Inspiration Divide Land Exchange

Responsible Official and Forest/Ranger District: Forest Supervisor Mary Erickson, Northern Regional Office, Custer Gallatin National Forest, Bozeman and Yellowstone Ranger Districts

Timeliness

These objections are timely filed. Notice of the Draft Decision Notice and FONSI was published on September 27, 2023.

Lead Objector

As required by 36 C.F.R. § 218.8 (d)(3), the Objectors designate the "Lead Objector" as follows:

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Interests and Participation of the Objectors

Backcountry Hunters & Anglers is a non-profit organization headquartered in Missoula, Montana. MT BHA is a Chapter of BHA consisting of nearly 3,000 dues-paying members and tens of thousands of additional supporters in the state. We prioritize large landscape habitat conservation, public access, and fair-chase hunting and fishing opportunities. This includes protecting recreational and hunting opportunities for the public, on public lands and via public trails in the Crazy Mountains. As Montana sportsmen and women, MT BHA recognizes that standing up for these threatened resources, values and public access today is the only way our kids will enjoy the same opportunities in the future.

MT BHA has been engaged in issues across the Crazy Mountains since October of 2016. This engagement includes, but is not limited to, years-long collaboration with multiple statewide and local conservation organizations to address access issues, collect deeds and landownership records, compile years of historical use and access information, participation in a land swap and trail relocation in the western Crazies, participation in a land swap in the southern Crazies, conducted a survey to better understand public recreational use and access issues, and hosted several public events in Livingston, MT to talk directly to locals, and attended the public meetings hosted by the Forest Service and the public meetings of other groups concerning the Crazy Mountains. The purpose of this document is to deliver detailed and thoughtful objections to the Forest Service's Draft Decision based on our collective and extensive experience. MT BHA submitted its original comments to project and preliminary environmental assessment on December 21, 2022.

East Crazy Inspiration Divide Land Exchange

On November 9, 2022, the Custer Gallatin National Forest (CGNF) released public notice of a land exchange called the East Crazy Inspiration Divide Land Exchange. The preliminary environmental assessment (PEA) was released simultaneously to disclose and document the possible environmental effects which could arise from the Proposed Action. The original Proposed Action committed to exchange approximately 4,135 acres of National Forest System (NFS) lands for approximately 6,430 acres of non-Federal lands located in the Crazy Mountains of southcentral Montana and the Madison Mountains of southwest Montana.

Following public comments, on September 27, 2023, the USDA Forest Service prepared an environmental assessment and draft decision notice of finding of no significant impact

(DN/FONSI) for the Project. Based on public comments the new Environmental Assessment (EA) and DN/FONSI included analysis of an additional alternative, Alternative 1 ("Modified Proposed Action"). The Forest Service is planning to implement Alternative 1. The new EA made minor revisions to its purpose and need for the Modified Proposed Action, includes twelve (12) specialist reports, a comment consideration and response, as well as additional analysis as to its consistency with existing land management plans.

The Modified Proposed Action proposes to exchange about 3,855 federal acres for approximately 6,110 of non-federal acres. The Modified Proposed Action seeks to address public concerns raised as to wetland protection and balance, access and recreation and preservation of character and limited development. Notably, the Modified Proposed Action includes retaining ownership over an additional 200 acres of Section 10 to permit public access to portions of Sweet Grass Creek. Additionally, the Modified Proposed Action states that federal deed restrictions will be placed on Parcels 8, 9 and 10 to promote the protection of wetlands, as well as placing deed restrictions on Parcels 1, 2, 3 and 4 prohibiting subdivision and some mineral development.

OBJECTIONS

A. The Forest Service fails to consider the alternative of defending and/or litigating the historical access shown and described in the Travel Management Plan and National Forest Land Management Plan.

The NEPA process is triggered when an agency proposes an action that may have significant environmental consequences. The agency's first step is to formulate a "Purpose and Need" for the project, which then leads to the development of alternative courses of action to achieve the purpose and need. Once a purpose and need is formulated, agencies must "study, develop, and describe appropriate alternatives to recommended courses of action." 42 U.S.C. § 4332(E). The development of alternatives is the "heart" of the NEPA process. 42 U.S.C. § 4332(E). "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Resources Ltd. v. Robertson*, 35 F. 3d 1300, 1307 (9th Cir. 1994) "[A]n agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action, and sufficient to permit a reasoned choice." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir.1992) (internal citation and quotations omitted).

NEPA requires federal agencies to craft a statement of purpose and need that fosters the development of a reasonable range of alternatives. 40 C.F.R. §1502.13. It is through the weighing and balancing of costs and benefits of different courses of action in an EA or EIS that leads to more informed decision-making and assures meaningful public participation – NEPA's ultimate goals. *Robertson v. Methow Valley Citizens*, 490 U.S. 332 (1989)

Here, the Forest Service lists seven needs for action, including to "resolve long-standing public access and land use disputes." As acknowledged by the Forest Service, there is a longstanding historical dispute between the agency, private landowners and the public on Sweet Grass and East Trunk trails. This conflict includes decades of attempted intimidation of public patrons on -

and illegal blockades across - these trails by private landowners. In recognition of these continued access issues, the 2006 Gallatin Travel Plan identified the two trails as locations with ***outstanding access needs.***

This new EA, however, proposes to evaluate an additional alternative which addresses *some* of the concerns raised from public comment but still limits the alternatives to Proposed Action and Alternative 1, both of which propose to relinquish existing easements and prescriptive rights. The Service "considered" but ultimately eliminated five other alternatives due to technical or economical infeasibility. The EA listed the considered alternatives as (1) Direct purchase; (2) Direct Right of Way/Easement Purchase; (3) Direct Right of Way/Administrative Easement Purchase; (4) Consider Six Individual Projects Rather than an Assembled Exchanges and (5) Legislated Land Exchange.

By the agency's account, all but the legislative exchange alternative, are de-facto losing alternatives as they rely on private landowners' willingness to cooperate. Specifically, the Forest Service explains, "[p]rivate landowners have only expressed interest in exchanging non-Federal lands for Federal lands located within, and adjacent, to their private lands." EA at 27. As for the alternative to purchase easements, the Forest Service reasoned that "landowners are not willing to sell or grant a right of way or easement[,]" despite "[n]otably public access would be improved." EA at 27 Therefore, the Forest Service proposes to do nothing, or capitulate and exchange the disputed land to those private actors perpetuating conflict.

The underlying rationale of these alternatives creates a pre-determined outcome: do what the private landowners want to do. This lack of alternatives, which subsequently leads to a predetermined outcome, is precisely the type of "foreordained formality" decision-making that violates NEPA as a matter of law. See *National Parks and Conservation Assoc. v. Babbitt*, 606 F.3d 1058, 1070 (2010); *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir.1998).

Importantly, in the Objective B-2 of the 2006 Gallatin Travel Plan directs the Forest System to acquire all interests and rights needed to meet the objectives and future uses of the National Forest System. This objective can be met by other reasonable alternatives that the Forest Service should consider. Most notably, would be the alternative action of defending or litigating the historical access shown and described in the Forest Service's plans.

The Forest Service identifies the need to "resolve longstanding access issues surrounding the Sweet Grass Trail No. 122 and the East Trunk Trail No. 136." It goes on to say that there is a "long history of disagreement between the Forest Service, landowners, and the public on the use of Sweet Grass and East Trunk trails where the agency has no recorded easements across private property to access the National Forest…" and "[w]ithout a written conveyance, the only lasting way to determine whether a public access right exists is through litigation 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." EA at 5. Here, the Forest Service fails to identify and analyze the very option it describes as an alternative: establishing its rights in court.

Instead, it states without citation:

> Forest Service policy affords broad discretion to Forest officials in how to approach each historic access situation. Officials must consider factors such as: what routes serve the greatest access needs; content and clarity of the existing record for each route; opportunities for resolving multiple issues or cases simultaneously; inherent uncertainty of a particular litigation outcome; and maintaining cooperative relationships with neighboring landowners.

The Forest Service's position on acquiring perpetual access through court intervention has significantly deviated from its forty-plus year stance on these two trails. For example, in 2015 the Forest Service Supervisor Mary Erickson stated the following in a letter to Sen. Daines (dated October 2, 2015):

> The Forest Service maintains that it holds unperfected prescriptive rights on this trail system as well as up Sweet Grass Creek to the north based on a history of maintenance with public funds and historic and continued public and administrative use.

Historically, National and Forest Service direction was to acquire perpetual easements for all NFS roads and trails across non-federal lands. A 2002 Forest Service Briefing Paper titled USFS 'National Forest System Trails across Private Land (dated August 2002)' specifically outlined the following:

> a variety of methods to acquire and protect road and trail access: negotiate to acquire easements by purchase or donation, land exchange and purchase, cooperative and reciprocal access agreements, establish existing right through adjudication, and as a last resort, condemnation.

The Forest Service position then explicitly considered litigation and even condemnation. Neither of those two alternatives were analyzed in the EA. Rather, the Forest Service provides an overview of historical disagreements between the public and private landowners without clearly outlining its perceived weaknesses to adjudicating its prescriptive rights.

Remedies: The Forest Service should publish all the documents it reviewed and relied on in concluding that adjudicating it prescriptive rights was not a viable option for meeting its stated purpose and need. It should further prepare an EIS and analyze alternatives previously relied on, including adjudication and condemnation.

B. The "Purpose and Need" for the Project, as defined in the EA, are not met by the project proposal.

The NEPA process is triggered when an agency proposes an action that may have significant environmental consequences. The agency's first step is to formulate a "Purpose and Need" for the project, which then leads to the development of alternative courses of action to achieve the purpose and need. Here, the Forest Service outlines seven (7) prudently revised purposes from its previous preliminary environmental assessment:

1. To resolve long-standing public access and land use disputes. This includes the need to address historically complicated management of checkerboard ownership patterns and to resolve longstanding access issues surrounding the Sweet Grass Trail No. 122 (Sweet Grass) and East Trunk Trail No. 136 (East Trunk).[1]

2. To provide for more effective and efficient natural resource management and protection of consolidated lands.

3. To improve recreational opportunities and provide for perpetual public access in the East Crazies, Smeller Lake and along Inspiration Divide.

4. To secure and protect roadless characteristics and provide a quiet, recreation opportunity consistent with the Crazy Mountain Backcountry Area and South Crazy Mountain Recommended Wilderness Area.

5. To conserve the existing traditional uses and landscape character of the Crazy Mountains by reducing the potential for development of private lands interior to and comingled with National Forest System lands.

6. To conserve wildlife connectivity and protect key habitat.

7. To protect interior sections of high country in the east Crazy Mountains, which will better protect landscapes important to the Crow Tribe.

While some of the needs proposed may objectively be met with the Modified Proposed Action, others are not. In general, an exchange of lower elevation for high elevation creates a worse deal for public access and recreational opportunities. The lower elevation lands are riparian, have more timber, carry gentler contours, are thus easier to traverse, offer better dispersed camping, offer higher quality wildlife habitat, are situated along spectacular perennial water sources and are unquestionably more robust ecosystems. And they're better hunting lands. The Modified Proposed Action will still result in the reduction of public access points to the Crazies, significantly reducing the quality of existing hunting and fishing opportunities, and overall alter the nature and scope of existing recreational opportunities in the Sweet Grass drainage.

[1] It is important to note that this purpose was revised to include the need to "address historically complicated management of checkerboard ownership patterns" which was previously excluded from the PEA.

i. Modified Proposed Action eliminates a significant amount of historical access for fishing and hunting opportunities.

The Forest Service supports its proposal on the guise that the Modified Proposed Action provides for secure public use and new recreational trail opportunities. While it is true on its face that new opportunities are being created, this contention ignores the tremendous loss of existing use of historical trails and loss of numerous recreational opportunities which are provided by access to the larger portions of Sweet Grass Creek and recreation to the north of the drainage. Currently, there are two routes for accessing the Crazies: a northern route and a southern route. Each route provides differing landscapes and recreational opportunities for the public's enjoyment and safety. For example, Sweet Grass Creek Trail 122 and Road 990 provide access from the north through the Sweet Grass Creek Drainage. This route provides river access along Sweet Grass Creek which fosters recreational fishing, kayaking and access to one of the most productive and over-objective elk areas in the district. The Modified Proposed Action, however, establishes a new route that bypasses most of the creek drainage and directs users up onto the steep bench above the creek bed.

The Modified Proposed Action now retains 200 acres in the south half of Section 10 where approximately 0.38 mile-stretch of Sweet Grass Creek runs through the northwestern corner of the parcel. This is the *only* access point to Sweet Grass Creek along the new proposed trail. This small stretch of access could be easily threatened by stream avulsion to the channel. Aerial imagery shows that the Sweet Grass Creek already has multiple upstream channels and separate channel systems. One flood year could easily cause partial or complete abandonment of the active channel and leave this stretch inactive or with substantially less flow. Only retaining such a small stretch of a dynamic creek does not ensure the public's perpetual access. It is reasonably foreseeable that all creek flows may jump into the channel system to the north, rendering the existing stretch and 200-acre acquisition futile for the purposes of riparian recreation. The Forest Service should remedy this potential ecological event by securing multiple access points on Sweet Grass Creek, if not the entire drainage beyond the high-water mark.

In addition to reduced historical river access, the type of fishing opportunities has completely changed. The Forest Service contend that collectively acquiring non-federal lands will result in a relatively minor negative impact on fishing opportunity because the public would gain perpetual public access to Smeller Lake. EA at 59. It is disingenuous to compare the historical stream fishing opportunities on Sweet Grass and Big Timber Creek to a hatchery stocked lake. In total, the Proposed Modified Action reduces the presence of trout-bearing streams by 47% and has a net loss of all fish-bearing streams in the Crazy Mountains portion of the project. The purpose and need of improving recreational opportunities is not met simply by switching out one very distinct type of activity for another.

The EA identifies that this project would in fact *change* hunting opportunities but justifies this change because the "secured public access routes and consolidated landownership would allow for a greater dispersal of hunters onto Federal lands in the East Crazy mountains." EA at 42. While this may be true on paper, it ignores the underlying issue of quality versus quantity. More

public access to lower quality hunting opportunities is not the actual benefit the Forest Service postures it to be.

This is specifically true when considering the elk population and distribution. Elk naturally avoid people, predators and stressors as much as possible and seek cover, security, food and water. All the lands the public gives up are lower-elevation lands that have more timber, gentler contours, better wildlife habitat, more water, more cover and thus more robust ecosystems. While the lands the public receive do provide habitat for some species, they are also steeper, have less timber, less water, less cover and are less productive big-game habitats. With stress and pressure, elk will seek lower elevations.

The Modified Proposed Action will lead to a net loss of public-land elk wintering grounds from -1,254 acres to -1,847 acres. FWP surveys indicate that the elk populations tend to inhabit those lower-elevation acres being exchanged to private ownership, particularly when stressors are introduced. The EA even acknowledges not only is it "expected that elk will continue to use the lower elevation private lands during the hunting season" but the elk "would likely face associated pressures from recreational hunting and other human disturbance." EA at 54.

Additionally, the proposed deed restrictions on subdividing are not stringent enough to avoid development's negative impacts to the elk population, specifically, as it relates to developing in-roads and permanent access routes. The effects of roads on elk can be divided into two broad categories: indirect effects on habitats occupied by elk, and direct effects on individual elk and their populations. The effects of roads in forested ecosystems have been well studied. With the primary effect of roads being habitat fragmentation, as "heavily roaded areas may contain few patches of forest cover large enough to function effectively as habitat for elk, especially where elk are hunted." (Leege 1984, Rowland et al. 2000). The EA should further address the indirect impacts to elk populations as it relates to private ownership of these wintering acres and the likelihood of increased private access for hunting. The Forest Service should impose additional restrictions on road development and permanent access routes on lands to be exchanged to help prevent habitat fragmentation.

The Modified Proposed Action would turn the Crazies into a one-shot season because after opening weekend, the elk will concentrate on the newly private low-elevation land with less snow and fewer stressors. Any gain of suitable habitat is negated by the realities of the premiere low-elevation habitat will be in the hands of private individuals with personal, monetary interests in allowing private, exclusive access and hunting on their property. Those who run private outfitting services will have access to even more elk on the low-land parcels they're gaining. The Forest Service makes this clear: "[t]here are four authorized outfitter guide permits that have day-use and overnight service days in federal Parcels 1-7 proposed for exchange…the action alternatives would improve and secure access that could result in increased recreational opportunities for **permitted outfitter guides**." EA at 43-44. MT BHA rejects the Forest Service contradictory proposition that the Modified Proposed Action will somehow increase hunting opportunities for the ***general public***. It's clear to see this will do the opposite.

The Proposed Modified Action not only eliminates an entire historic public access route for hunting big game, but it will also create de facto private-access-only management units for big game during the hunting season.

Remedies: The Forest Service should, at the very least, consider securing additional access points to Sweet Grass Creek on private lands. Preferably, the Forest Service should prepare an EIS and analyze the on-the-ground effects of the Proposed Modified Action on the public's hunting opportunities in relation to the spatial distribution of huntable wildlife.

ii. Modified Proposed Action reduces overall public access points and alters the nature and scope of Existing Recreational Opportunities

The Proposed Modified Action will create a more arduous and limiting trail system. Given the topography, the new trail loop will be significantly more difficult as compared to the historic trails. This is likely to eliminate use by those unable to negotiate steeper terrain and a multi-day adventure, and will undoubtably exclude a large portion of public-land trail users.

As a result, the Proposed Action will eliminate short-distance access opportunities. As proposed, the new East Trunk Trail creates an ambitious 22-mile loop with only one access point from the south. This new route will not only eliminate a separate public access point but will severely alter the nature and use of recreational opportunities on the route. For individuals to enjoy any semblance of Sweet Grass Creek habitat previously accessed by a short walk, one would need to hike at least 11 miles, each way. This distance, in conjunction with a single access point, renders previous day-hike opportunities impossible and now shifts the historical use to one that is different in size and nature.

For example, Sweet Grass Trails are predominantly used during hunting season. Traversing a single-access-point, 22-mile loop trail is not reasonable access for hunting, fishing or day use. The single access point also creates additional concerns as it relates to increased trail use in areas not previously accessed, bottlenecking and congestion at trail heads areas, increased remote long-distance use and strains on maintenance crews and emergency-rescue personnel, while increasing expenses for trail maintenance, and the ultimate unfeasibility of certain recreational uses due to inconvenient trail distances. These will seriously diminish recreational opportunities in the Crazies and substantially alter the current nature and use of the national forest. None of these issues are identified or analyzed in the EA.

Remedies: The Forest Service should publish an EIS that further analyzes what actual recreational opportunities will be eliminated and what, if any, will be gained by way of the Proposed Modified Action. This analysis should also consider the value added in accessibility for each recreational opportunity, for example historical access to angling on Big Timber and Sweet Grass Creek versus access to the hatchery stocked Smeller Lake.

C. The Forest Service should not abandon its outstanding public access claims.

The Service is obliged to consider existing management plans when considering whether the proposed exchange serves the public interest. Importantly, the agency "**shall** consider **only** those exchange proposals that are consistent with land and resource management plans." 36 C.F.R. § 254.3(f). Here, the Proposed Action is inconsistent with the 2006 Gallatin Travel Management Plan (Travel Plan). The 2006 travel plan and record of decision approving the travel plan is an amendment to the forest plan. The Service must comply with obligations included (and commitments made) in its travel plan and record of decision approving the travel plan. *Id*.; 40 C.F.R. § 1505.3

There are several historic routes in the Crazy Mountain Range ("Crazies") that cross private land and have been used to access Forest Service lands, some for which the Forest Service *has* acquired recorded easements and several that do not have recorded easements. In the Travel Plan the agency identified the need to acquire *additional access* within the Crazies for the *purpose of recreation and administration* of the Forest. The Travel Plan specifically identified and established opportunities for public recreation use and access using the Forest Service's road and trail system.

The Travel Plan directs the Forest Service to manage the Custer Gallatin National Forest by following goals and objectives:

- GOAL B. Access. Provide and maintain reasonable, legal access to Gallatin National Forest lands to provide for human use and enjoyment and to protect and manage Forest resources and values.

- OBJ. B-1. Acquire Perpetual Easements. Acquire, across non-National Forest System (NFS) lands, perpetual road and trail easements needed to assure adequate protection, administration and management of National Forest resources and values

- OBJ. B-2. Acquire All Rights Needed. Acquire all interests and rights needed to meet the objectives and future uses of the National Forest System.

- OBJ. B-3. Access Locations. Obtain and protect public and/or administrative access rights in locations as identified in attached Table I-3.

The Proposed Modified Action directly violates the Forest Service's own Travel Plan objectives. Of the trails identified by the Travel Plan's East Crazy Travel Plan Area Access, the Proposed Land Exchange contemplates relinquishing three (3) historically used public access trails and four (4) administrative roads to private ownership. Importantly two of these trails have historical evidence of use and have existing associated easements held by the Forest Service.

Instead of adhering to the Travel Plan' stated goals and objectives, the Proposed Modified Action relinquishes existing claims to the area. These areas have been the subject of litigation since 2019 and have ongoing appeals in the Ninth Circuit. If the Forest Service abandons their outstanding claims, it will violate their Travel Plan objectives and will certainly preclude the

public from ever regaining access through litigation if evidence of the historic right of way for the public's use is affirmed by the courts. While litigation progresses, the Forest Service should maintain the status quo and explicitly reserve public and administrative access claims in the Sweetgrass drainage in sections 7, 8 and 10. To do otherwise, is a significant failure on behalf of the public and disservice to those vigorously pursuing court intervention to settle the disputed access issues.

D. Modified Proposed Action must specifically identify deed restrictions for protection of wetlands and include specific development prohibitions in riparian areas.

MT BHA commends the Forest Service for further negotiating with private landowners to retain additional wetlands and riparian areas under Federal jurisdiction, as well as secure deed restrictions protecting wetlands on the exchanged properties. However, MT BHA objects to these unspecified terms for deed restriction as it relates to the protection of wetlands, including but not limited to what actions are prohibited, baseline objectives and monitoring requirements. Moreover, the Proposed Modified Plan does not contain strong enough restrictions and/or management requirements on the exchanged riparian habitats.

The Custer Gallatin National Forest Land Management Plan (CGLMP) recognizes riparian areas are of great value and significant to ecological integrity. The GCLMP specifically states that "riparian habitats are disproportionately critical in providing habitat and habitat connectivity for fish, other aquatic biota, and wildlife[,]" whose ecological conditions "must be maintained, restored, or enhanced." CGLMP at 26. he CGLMP goes on to lay out various land-use activities that are specifically allowed or suitable in riparian areas. For example, the plan addresses new groundwater developments that should not "be developed in riparian management zones…[or] measurably lower river flows, lake levels, or flows to wetlands or springs[.]" FW-GDL-FAC-01. The Proposed Modified Plan does not impose similar important conservation mechanisms on riparian resources under private ownership.

In fact, the proposed deed restriction for wetland protection in the Crazy Mountains only apply to 23 acres in Parcel 7, along Big Timber Creek and Big Timber Canyon Road. The Proposed Modified Action does not address deed restriction for wetland protection in Parcel 2 despite the identification of wetlands not retained under the new alternative. Additionally, while the new wetlands analysis did not indicate delineated acres in Parcel 1, it is well established that stretches of Sweet Grass Creek are present. Indeed, as proposed, Sweet Grass Creek runs through both Parcels 1 and 2 without additional deed restrictions related to riparian management and monitoring. The Proposed Modified Action only offers deed restrictions to these parcels as it relates to subdivision and mineral development. EA at 17.

It is imperative that any lands, particularly those with important riparian resources, be exchanged under the same management conditions and restriction imposed by the CGLMP. For example, FW-SUIT-RMZ-01 determines that "riparian management zones are not suitable for timber production." The proposed deed restrictions do not address timber projects in areas where such activity was once be prohibited. Without congruent embedded conservation mechanisms, the

traded parcels would be free to be managed in a fashion that is contrary to CGLMP. This in turn, results in checkerboard resource management, which is problematic to maintaining the ecological integrity of the landscape as a whole and belies FS alleged benefits of consolidation.

Remedies: Publish the exact language of the proposed deed restrictions as it relates to wetland protections, including management and monitoring requirements. Additionally, the deed restrictions imposed on all parcels containing riparian habitats should mirror the conservation objectives and standards laid out and imposed by CGLMP. To do otherwise undermines the Forest Service's position that the consolidation puts more resources under federal management.

E. The EA fails to evaluate the impending listing of wolverines under the ESA.

The Forest Service must include additional analysis on wolverines in light of the imminent listing under the ESA. Through a recent court order, the USFWS is required to issue a new listing decision for the wolverine by November 26, 2023. In prior assessments the USFWS justified not listing the wolverine under the ESA. However, USFWS's recent Special Status Assessment found that "[o]verall, future wolverine population in the contiguous U.S. **may be less secure** than we described in our 2018 SSA. **Uncertainty** over the wolverine's future condition in the contiguous U.S. is **relatively high**." SSA (2023) at pp. 70 (emphasis added). Importantly, the SSA identified that "core wolverine habitats are projected to become smaller and more fragmented in the future as the result of climate change and human disturbance. *Id.* These threats include "[i]ncreased human development, infrastructure and associated anthropogenic disturbance[s,]" such as housing developments. *Id* at 34. USFWS also sites to the unsustainably high impact of trapping on wolverine mortality. *Id.* at 44.

The Proposed Modified Action identifies the exchange of primary and dispersal habitat to private ownership. The EA find that this exchange and trail building would be negligible as more acres are being brought into federal ownership. The EA also fails to consider on-the-ground realities and the cumulative effects on the wolverine populations. Lands being exchanged to private ownership have limited restrictions on the use of the property. As noted by the USFWS, a major threat to wolverine mortality is trapping. The exchange of primary and dispersal wolverine habitat to private hands increases the likelihood that wolverines may unintendedly be trapped and killed by trappers targeting other species. The cited deed restrictions certainly do not prohibit or address these potential impacts on the wolverine populations.

The Forest Service must take in consideration the wolverine's upcoming listing decision and thoroughly analyze the cumulative effects to the wolverine population and its primary habitat. The Forest Service must consult with USFWS on how this exchange will impact the soon-to-be listed species. More importantly, the Forest Service must consider how their listing will impact the proposed exchanged lands should critical habitat be designated on portions of those parcels and consult with the USFWS to ensure the Proposed Modified Project will not result in a take.

Remedies: The Forest Service must address the upcoming listing of the wolverine population and engage in Section 7 consultation with the USFWS as it relates to the Proposed Modified Project.

The Forest Service, should preferably in an EIS, analyze these impacts and publish USFWS's findings as to this project in light of the population's designation.

F. The EA fails to analyze the effects of the severed mineral rights for the parcels acquired by Forest Service

The EA fails to analyze the effect of the severed mineral rights for the parcels acquired by the Forest Service. Of the parcels being exchanged into federal jurisdiction, only two own the whole mineral estate. Montana law states that: 1) Montana is an ownership-in- place theory state with regard to oil, gas, and other minerals; 2) title to the mineral interest in land may be separated from the rest of the fee simple title; 3) under a mineral deed conveyance, the grantee receives, among other incidents, the right to go upon the land and explore for and produce oil and gas. *McDonald v. Unirex Inc*., 221 Mont. 156, 158, 718 P.2d 316, 317 (1986).

Because of this common law recognition of mineral owners' rights to freely sever and transfer their estates, any percentage of a mineral estate in Montana may be separately owned. Ownership of a mineral estate can result from multiple situations: independent transfer of some portion; an owner reserving some portion to himself; or, from a transfer of the land in fee.

Here, the EA identified eight (8) parcels with outstanding mineral rights, with ownership that is fractionalized among many owners. This means most of the land acquired in the exchange have outstanding mineral interests while all of the federal land exchanged to private ownership are owned entirely by the Federal government.

The Forest Service states that the Modified Proposed Action contemplates the private owners to "continue to diligently pursue acquisition of the outstanding mineral rights for conveyance to the United States by contacting the outstanding mineral owners to determine if they are willing to convey their mineral interests to the United States." EA at 23. This means the Forest Service will have no control over whether those non-parties will exercise their right to go upon the acquired land and explore for and produce minerals, oil or gas. This is antithetical to Forest Service's contention that consolidation will provide for better resource management of these parcels.

Without any assurances, the Forest Service must analyze the reasonably foreseeable possibility that non-parties exercise their rights on newly acquired federal lands. The Forest Service has an obligation to assess the foreseeable impacts form mineral exploration and development on parcels with severed interests. Moreover, pursuant to 36 C.F.R. § 254.9(b)(1), Forest Service must also seriously consider whether the value of the property being acquired without these mineral interests and whether such an imbalanced exchange of lands with intact mineral rights to private ownership is in the public's best interest. 43 U.S.C § 1716(h); 36 C.F.R. § 254.11.

Remedies: The Forest Service should, preferably through an EIS, analyze the reasonably foreseeable impacts from non-parties exercising their right to mineral exploration and development on the proposed acquired land. In this analysis, the agency should assess whether the severed mineral rights affect the value of the lands being acquired versus those being

exchanged. Finally, in addition to the landowners, the Forest Service should engage in negotiations and provide tangible assurances from non-parties that they will not exercise theses rights on public lands.

G. The EA still fails to disclose exact contract language or agreement provisions as it relates to proposed deed restrictions and conservation easements.

NEPA requires agencies to "[u]tilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment."42 U.S.C § 4332(2)(A). The agency must identify the methodologies used and must explicitly refer to the scientific and other sources of information relied upon for conclusions set forth in the EIS. 40 C.F.R. §1502.24. The information included in an Environmental Assessment "must be of a high quality," and must allow for "[a]ccurate scientific analysis, expert agency comments, and public scrutiny." *Id.* § 1500.1(b).

NEPA requires that federal agencies provide the data upon which it bases its environmental analysis. *Idaho Sporting Congress*, 137 F.3d at 1150 ("allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions"). Providing concrete data, studies or agreements by which an agency relies upon to substantiates their position and provides the public with full transparency of the agency's decision-making.

The EA vaguely references prohibitions imposed to negate identified impacts on a variety of resources. Some portions of the EA site to the proposed deed restrictions or conservation easements as a mechanism to limit impacts from the project, while other rely merely on the private landowners' future intention. For example, when addressing direct impacts to lynx habitat the EA states:

> To limit the potential for loss and fragmentation of habitat, mandatory conservation easements and deed restrictions have been agreed upon for some of the parcels entering private ownership. The habitat within the North Madison LAU would be covered under a conservation easement that would limit development in perpetuity (parcels 8, 9, and 10). Habitat within the East Crazies LAU would receive some level of protection through county deed restrictions (parcels 1, 2, 3, 4, and 7) which would prevent subdivision to smaller than 160 acre lots and preclude mineral development. While these provisions would not eliminate the potential for negative impacts to existing habitat condition, they do establish sideboards to limit the extent of the impacts and retain habitat value.

EA at 47. The EA then identifies cumulative impacts to the lynx including, but not limited to, livestock grazing, timber management, wildfire management and human infrastructure development. The EA suggest that "[p]rivate landowners **intend** to maintain land as undeveloped rangeland or to continue similar use in the foreseeable future[,]" and therefore, the "potential for cumulative effects to Canada lynx would be negligible." EA at 48.

Without publishing the specific terms and provisions the promises are speculative. It is longstanding precedent that "[]Congress has imposed an affirmative duty on the federal party to the exchange to receive assurances of the plans of the private developer prior to the exchange." *Nat'l Forest Pres. Grp. v. Butz,* 485 F.2d 408, 412 (9th Cir. 1973); see also Public Land Law Review Comm'n, One Third of the Nation's Land 266-67 (1970). The abstract nature of these benefits cannot be firmly relied on by the agency in supporting the nature and purchase of the project. The Forest Service has the affirmative duty to receive these assurances in writing, share them with the public and any other data used in basing its environmental analysis.

Without these assurances the public is severely limited in its ability to participate in the decision-making process. The PEA treats these non-binding and hypothetical agreements as fact, instead of speculative and unconfirmed actions. The agency fails to address in a meaningful way the various uncertainties surrounding the "public benefits" and in turn thwarts NEPA's purpose of informed decision making and informed public disclosure.

Remedies: Forest Service should publish all agreements, current and previously negotiated, to assure the public of the actual language and restrictions to be imposed, and inform the public of what monitoring and enforcement mechanism are available to the relevant agency or adjudicator.

H. The Proposed Modified Action sets a dangerous precedent by reinforcing and rewarding negative and anti-public behavior of the landowners involved.

The Proposed Modified Action sets a terrible precedent and is poor public policy. Encouraging private landowners to stand their ground in obstructing legal public access until the Forest Service capitulates is dangerous to all public federal land, particularly in Montana. State, federal, and local agencies should all be promoting the enforcement of their own rights, rules, and regulations, rather than promoting behind-closed-door deals with private bad actors. Approval of the Proposed Land Exchange will embolden private landowners everywhere to disallow public access and encourage others to buy up properties throughout Montana's numerous remote wild areas in hopes of gaining private access to its pristine riverfronts and premiere wildlife habitats. This dangerous precedent is not in the public's interest and undermines the authority of the Forest Service to manage national forest for public access.

I. Forest Service must disclose the valuation of the land and severed water rights.

FLPMA requires the Service to appraise the land or interest in land included in an exchange before agreeing to the exchange. 43 U.S.C. § 1716(d)(1). The appraisal must set forth an opinion regarding the market value of the interests that are the subject of the exchange. 36 C.F.R. §

254.9(b). In determining the market value, the appraiser shall determine the highest and best use of the property to be appraised, estimate the value of the lands and any interests, and include historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values or amenities in its estimate. 36 C.F.R. § 254.9(b)(1) The Service's regulations implementing FLPMA requires the Service to prepare an environmental analysis in accordance with NEPA after "an agreement to initiate an exchange is signed" by the Service. 36 C.F.R. § 254.3(g). In making this analysis, the Service "shall consider timely written comments received in response to the exchange. . ." Id.

FLPMA allows for the exchange of lands which are "of approximately equal value" so long as a determination is made that the exchange is in the public interest, the value of lands to be conveyed out of Federal ownership is not more than $150,000 (based on a statement of value prepared by the appraiser), the interests in land to be exchanged are in a substantially similar in location, acreage, use and physical attributes, and there are no elements requiring complex analysis. 43 U.S.C. § 1716(h); 36 C.F.R. § 254.11

FLPMA requires that the value of exchanged lands be equal, adjusted for any difference in value by cash equalization payments up to 25% of the value of the Federal lands to be disposed. Agency regulations require that values for exchange purposes be determined by appraisals prepared in conformance with the uniform Appraisal Standards for Federal Land Acquisitions which was most recently updated in 2016. Additionally, either party to an exchange may make reservations of timber, minerals, or easements, the values of which shall be duly considered in determining the values of the exchanged lands.16 U.S.C. § 486.

Here, the EA expands on the elements of the water rights being severed but provides no valuation of the lands being exchanged. Nor does the EA provide valuation of mineral rights being severed or acquired.

Remedies: The Forest Service should prepare an EIS that provides the actual valuation of the lands being exchanged and how it was calculated so that the public is fully apprised of the valuation of other interests appurtenant to property exchanged or reserved.

CONCLUSION

MTBHA hereby request a meeting to discuss potential resolution of issues raised in this objection, pursuant to 36 C.F.R. § 218.11(a). We hope that the Forest Service will use the objection process and such a meeting as opportunities to engage with stakeholders, including the MTBHA to develop a land exchange proposal that is legally and ecologically sound and is truly in the public's interest.

If you have any questions about questions about the content of these objections, we can be reached at the contact information listed below.

Respectfully submitted on November 10, 2023

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