

Data Submitted (UTC 11): 12/20/2022 7:00:00 AM

First name: Kathryn QannaYahu

Last name: Kern

Organization: Enhancing Montana's Wildlife & Habitat

Title: Founder

Comments: USFS, Attached are my full comments & documentation opposing the East Crazy Inspiration Divide Land Exchange - #63115 - Alternative A - No Action.

Kathryn QannaYahu Kern

Enhancing Montana's Wildlife & Habitat

924 11th Ave., Apt 2

Helena, MT 59601

Comment from Enhancing Montana's Wildlife & Habitat, Kathryn Q. KernUSFS, below are my comments opposing the East Crazy Inspiration Divide Land Exchange -#63115 - Alternative A - No Action.I am very disappointed in the this whole process, but especially in the obvious lack ofalternatives provided for the public to choose from.Where is the option for "Defend and maintain our already existing historical prescriptive easements" ???I am submitting the deed research that I uncovered on our already existing historicalprescriptive easement trail system. The Forest Service, per many FOIA documents in myFOIA requests, showed that the FS diligently sought out these railroad grant deeds for any[easement in the public] language, viewing them as gold. This is property law and cannot be ignored.In fact, in the USFS 1948 law case (attached) involving the Crazy Mountains public access,against the landowner that was blocking public access at two locations, Paul L. Van Cleve(father and grandfather to current owners Carroccia's and Dringman's), was founded on onerailroad grant deed [ndash] 3N 12E Section 3, which contained the coveted public easementlanguage: [dquo]the lands hereby conveyed being subject, however,, to an easement in the publicfor any public roads heretofore laid out or established, and now existing over and across anypart of the premises.[rdquo] You already have this law case, because I received it as part of one ofmy FOIA requests.In the DOJ filing, Amended Complaint No. 1098, June 25, 1949, arguing on behalf of theForest Service and the public, "VI. That the United States has a special right, title and interest in said highway and trail and all parts thereof, including the parts thereof situated upon landsnow owned by the defendants, amounting to an easement and right-of-way for said purposedby reason of the facts that said road and trail were established upon said land when it was inpart public land of the United States of America and in part in the ownership of the NorthernPacific Railroad Company... which said railroad company and railway company dedicated thesame public highway, which was appropriated by the United States and the general publicprior to the issuance of any patents therefor, thereby reserving unto itself and the generalpublic said public highway, road and trail, and by reason of the fact that the United States andits permittees and the public have for more than 50 years used said road and trail for saidpurposes and the United States has, during said period from time to time, expended uponsaid road and trail monies appropriated by Congress, for its construction and maintenance tothe end that it might serve said purposes; and the United States in common with the public isentitled to the possession of the right-of-way for said highway and that the same necessaryfor the protection, use and administration of the national forest and other property of theUnited States."Black's Law Dictionary defined Highway as, "A free and public road, way, or street; one whichevery person has the right to use. In all counties of this state, public highways are roads,streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by thepublic."Additionally, "V. That at all times mentioned herein, there has existed and there now exists apublic highway, viz., a road and trail in and along the canyon of Big Timber Creek enteringsaid Crazy Mountains Division of said national forest across the east boundary line... of NE1/4of the NE1/4 of section 12, Township 3 North, Range 12 East, extending westerly... andthrough and across Sections 1, 2, 3, 4, 5 and 6 of said township and range, and thencewesterly, then

northerly to a point near the center of Township 4 North, Range 11 East where it joins the Sweet Grass Trail situated in the Sweet Grass Canyon ...and the upper drainage of Sweet Grass Creek for the use by the general public at large of the recreational areas, campgrounds, parks, and facilities of said national forest, and by the United States of America on behalf of the general public at large pursuant to the laws of the United States and the regulations of the Secretary of Agriculture relating to the protection, use and administration of the national forest." This paragraph relays that public access goes from the FS boundary in 3N 12E Section 12, west thru sections 1-6, then the trail (119) enters 4N 11E at the overlap between 3N 12E Section 6 and 4N 11E section 36 to Section 34, where it connects with the S. Fork of the Sweet Grass Trail #122, going north, to about the center of 4N 11E, where it joins the main trunk of the Sweet Grass Trail #122. When you combine that with the East Trunk Trail #115/136, we already have a beautiful loop of historical public access. After the 1948 Big Timber case was settled, in the benefit of the USFS and the public, perfecting the historical public access, Senator Conrad Burns writes to the FS Supervisor asking their intentions towards filing a Statement of Interest on the Trail System, since VanCleve is continuing to block access at Sweet Grass. Regional Forester Hal Salwasser replies (attached) on March 6, 1996, stating, [ldquo]...it is our position that the United States has an easement interest due to historic public and administrative use and maintenance.[rdquo] This position continued to be maintained by various FS public employees, including FS Supervisors, Yellowstone District Rangers and even Law Enforcement Officers. After a public hunter, Joe Rookhuizen, reached out to Senator Steve Daines about obstructed access on the East Trunk Trail #115/136, Daines wrote to FS Supervisor Mary Erickson. Erickson replied on Oct 2, 2015 (attached and part of FOIA documentation I received), repeating the same position the FS had held for decades, [ldquo]It is a historic trail that dates back a century or more. 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 continued public and administrative use.[rdquo] This position was reinforced by the Yellowstone District Ranger, Alex Sienkiewicz, with his yearly reminders to FS employees and seasonal volunteers, this one on July 7, 2016 (attached). Sienkiewicz stated to not sign in, nor ask for permission to access the national Forest Service thru routes shown on the maps, even if they cross private property, that these were historic public access routes, that signing in and permission played in to the private landowners objectives of establishing permissive access, against the public. After that 2016 email, the landowners and their local groups sought to get Sienkiewicz removed as District Ranger, which the FS did after Sonny Perdue was sworn in as Ag Secretary in 2017. After public outcry, based on my FOIA history, Sienkiewicz was restored but hindered from working on the public's behalf and Supervisor Erickson began pursuing more vigorously land exchanges on the south and directed the Yellowstone Club to the East Crazy Mountains for this exchange. This is where the shift in FS actions takes a turn towards privatization, instead of maintaining and defending our Crazy Mountains trail system. In addition to the railroad grant deeds with easement in the public language, there are historical documents I am attaching, that attest to the public access criteria, which even the FS Office of General Council looks for in filing a Statement of Interest. [bull] 1945 Sweet Grass Road - Discussion and receipt for road work on Sweet Grass Road from Brannin's to Ward's using FS funds and discussion of private funds, receipt for 42 hours of road work/construction. [bull] 1929-1938 The first public school in Sweet Grass Canyon was started in 1929 at the Ward and Parker Sawmill, presumably in Section 9, T4N, R12E. From there, it moved to the Brannin Ranch (Section 2, T4N, R12R) back to the sawmill for several years running. In the summer of 1933, the first real schoolhouse was built half way between Brannin's and Ward and Parkers (presumably in Section 10, T4N, R12E on NFS lands). This was called the Bachelor School because it was built by several Bachelors. It was located in School District #4 and operated until 1938. Can't have a public school on a private road. [bull] 1948 Sweet Grass County record of county inspecting Sweet Grass Canyon Road. [bull] County document with maps showing what Rein claims as Rein Lane was called Upper Sweet Grass Creek Road (among other names over time). [bull] Sweet Grass Creek landowner Cosgriff communications with FS and Rein that the road has always been public. He provided proof to the FS and stated an easement was not necessary "since it was a public road". Cosgriff also shared that WPA funds built a bridge, that Section 8 road was built under SUP in mid 30s and the permit had a condition that the road would be open to the public. [bull] Below is a Sweet Grass County map from 1965, showing the road went from the Melville Road in 5N 13E into 5N 12E. The map legend shows the upper part of the road was graded and drained to 5N 12E Section 24 midway. After that it is categorized as an unimproved road. That road continues from 5N 12 E Section 24

southwesterly thru sections 25, 26, 35, entering 4N 12 E, Section 2, which has an icon similar to that on the Big Timber Canyon Road FS designations. This is where the #122 Trailhead was noted. But the road does not stop there, it continues thru Section 2 to the corner of 3, down into Section 10 (FS) to the border of Section 9, which then indicates [ldquo]primitive road[rddquo] after that. This map reflects FS, accounts, public school having been out there, other Sweet Grass landowner accounts, that this was routinely used by the public. There is abundant historical documentation, including FS records obtained in my FS FOIA requests that show routine trail maintenance was being conducted not only by FS employees, but also seasonal volunteers to repair damage, or nearby landowner attempts to obstruct public access, damage/debris from the outfitters and their clients, as well as other users. I think the above evidence is sufficient to show that there was a long history of documentation towards, at the very least, historical prescriptive easements on this trail system. But I would like to include a particular case of the Sweet Grass County Deputy, a landowner and the Sweet Grass County Attorney that confirm the difference between the FS trail system with an easement in the public and the rest of a private landowner's land [ndash] by their own actions. As part of my research, I heard about an incident involving alleged criminal trespass from a public hunter, Rob Gregoire, using the East Trunk trail (#115/136) in November, 2016 [ndash] the fall after the USFS did its trail work there. According to the Deputy Sheriff's report, the hunter had likely walked off of East Trunk (the public Forest Service trail) and onto private property and was cited for criminal trespass for this reason (not because he walked on the Forest Service trail). The criminal trespass case was eventually settled. After the fact, however, trying to figure out some conflicting statements, I was curious to know more about the incident so in April, 2018 I sent an open records request to the Sweet Grass County Sheriff's office to get the incident report and related documents/photos from the file. A true and accurate copy of my request and the Sweet Grass County Sheriff's response to this request are attached. The Deputy Sheriff Ronnenberg primary narrative, written on 12/27/2016 stated he was called out to Hailstone Ranch about a trespasser. He parked in the FS parking area next to Gregoire's vehicle and watched the hillside to the north, waiting for him to return. At 1:20 pm he sees a person traveling down the hill traveling south to the FS campground. He issues Gregoire a citation, later writing his primary narrative. Then Ronnenberg writes a Supplemental Report, citing a meeting with a Langhus family member, the Sweet Grass County Attorney, Pat Dringman and himself; where it was decided to return to the area of the trespass to verify visibility of Gregoire's descent, documenting it. Ronnenberg parked where he had before, looking towards the area he saw Gregoire emerge from the timber. When the Deputy Sheriff walked the East Trunk trail on April 10, 2017 to document the area and noticed a new sign and that the trail markers that had previously been there (in September, 2016) had been removed. He also noticed that the trail was harder to find and no longer [ldquo]established.[rdquo] Ronnenberg goes up the trail to the ridge to look back and see if he can see the parking area, notes that one step and the view was obstructed by the timber. He then walks back on the trail, which meanders. [ldquo]As I recall I saw Mr. Gregoire traveling South down the hill, and not change directions as I had on the trail. See, the landowner knowing his property, reading Ronnenberg's primary narrative, recognized that something was wrong with the description, if Gregoire had kept to the FS trail, visibility would have been different, gets in touch with Ronnenberg and the 3 have a meeting, deciding on the verification. There is a second Supplemental Report documenting a re-enactment on April 18, 2017. Ronnenberg parked in the campground as before, while Kevin Langhus goes up the trail with a GPS and radio. Each time Kevin can see Ronnenberg, he is to radio, and Ronnenberg photographs Langhus. Ronnenberg then directs Langhus to where he saw Gregoire previously, and when Langhus gets to the area, Ronnenberg radios to Langhus to verify if he is still on the trail. Langhus replies he is not and can't even see the trail. Ronnenberg talks him down to where he saw Gregoire, continuing to photograph. By the re-enactment, they determined Gregoire had gone off trail, taking an easier, more direct route back. After reading all the reports a number of times, I called and spoke with Ronnenberg, to verify my understanding of the events. He confirmed my understanding. I asked, why if they had proof of the trespass off the trail, why did they not prosecute? He said I would have to ask the County Attorney (one of the Sweet Grass landowners). Then it hit me why. By doing the re-enactment to see if Gregoire had gone off trail, they did more than prove their view that he trespassed, they confirmed the FS and our position that the trail has a different status than the surrounding private lands with historical prescriptive easements, otherwise there would have been no need to verify the trail and Gregoire's location at all. They couldn't go to court with that information, becoming part of the legal

public record and possibly becoming a case precedent, so they offered him a settlement with a fine. By the landowner, Sheriff Department and County Attorney's actions, they confirm our FS trail public access status. It has been over 7 years we've been collecting documentation on the Crazies and the evidence keeps growing [ndash] the FS, prior to 2017 was defending the status of the Crazy Mountain trail system, as historical prescriptive public access, and maintaining this trail system with FS employees, monies and volunteers, as well as documenting multiple use by the public. Yet, none of this history is represented in this proposal. Why have you abandoned such defense, not even including it as one of the Alternatives? Instead FS Supervisor Mary Erickson throws the weight and money of the Yellowstone Club into the Crazies to further muddy the waters. You even include in writing on Page 4 of the PEA the mafia shakedown leveraging of a private landowner's agreement with the Crow Nation for their access to one of the sacred sites on Crazy Peak. This access agreement has nothing to do with the exchange or public access in general, except to advertise it for the Crow Nation, to muscle them into submitting public comments in support of the proposal, if they want their sacred site access back. I especially object to yet another Crazy exchange, where the public will be quickly pushed off the rolling hills and productive habitat of the low country and relegated to the steep, high terrain largely consisting of rock and ice with the Mountain Goats. The landowners, however, receive the valuable and productive low land. This proposal asks the public to give up 100% of mineral rights on land going to the landowners. In return, however, the public receives only mineral rights on 2 of the 11 sections it's receiving. In Montana, mineral rights supersede surface rights, so it is not unreasonable to assume that the owners of these claims may decide to assert these valuable rights in the future. At that time, under Montana law, those owners would have the ability to disrupt the surface by building roads, cutting down trees, diverting water, and using any and all legal means they choose to develop their mineral rights on the newly consolidated public lands. The proposal asks the public give up all water rights on land it is giving to the landowners, while it does not receive the water rights on all the land it receives. Another win for the landowners and a loss for the public. The proposal asks the public to give up 52 acres of wetlands and receives only 7.8 acres in return, meaning the public stands to lose 44.6 acres of wetlands. Now to address some points in the PEA.

1. The PEA violates the current Travel Plan.
 - a. The PEA creates a net loss to public recreation opportunities and a reduction of existing public access points to the Crazies.
 - b. The PEA eliminates existing hunting and fishing opportunities, and overall alters the nature and scope of existing recreational opportunities in the Sweet Grass drainage.
 - c. The PEA contemplates relinquishing three (3) historically used public access trails and four (4) administrative roads to private ownership; this directly violates current Travel Plan objectives.
2. The PEA does not meet the stated goals within the same PEA.
 - a. Within the PEA, the Custer Gallatin National Forest (CGNF) admits to a reduction in public recreational opportunities. To justify this loss, the agency erroneously contends that it meets the project's goals because in its current state Sweet Grass Trail is [ldquo]a long out and back trail with no scenic destination[rdquo] where [ldquo]current use levels are low.[rdquo] This not only mischaracterizes the actual trail which connects with other trails and is widely considered one of the more scenic trails in the Crazies and provides significant recreational value (especially to hunters), but the claim is also based on the false premise that Sweet Grass Creek is not currently in use.
 - b. Use of Sweet Grass Creek for recreational opportunities, including hunting and fishing access, is very well documented. Additionally, as the USFS acknowledged, most use of Sweet Grass Trail occurs during the fall hunting season. Eliminating access to those areas would preclude historical access opportunities for hunting and angling.
 - c. As proposed, a new 22-mile East Trunk Trail would be constructed with only one access point from the south. This new route would not only eliminate a separate, existing public access point but would severely alter the nature of and use of the trail for compatible recreational opportunities. For the public to enjoy previously accessed property from the northern route, the public would need to hike at least 11 miles. This distance, in conjunction with a single access point, renders previous hunting, fishing or day-hike opportunities inaccessible; it would shift historical recreation use of the area.
 - d. Additionally, the single access point also creates additional concerns as it relates to increased trail use in areas not previously accessed, bottlenecks and creating congestion at the trail head area, increasing remote, long-distance use, straining maintenance crews and emergency-rescue personnel while increasing expenses for trail maintenance, and creating unfeasibility of use for certain recreational users due to severely steepened trail topography and inconvenient trail distances.
3. The PEA fails to analyze the effects that severed ownership of mineral interests in the parcels being acquired by USFS could have on those lands in the future.
 - a. Tenets of mineral law observe a

general rule of mineral estate dominance, meaning one of the foundational rights to mineral ownership is the right to enter upon the surface of the property and make any use of it that is reasonably required for enjoyment of the mineral estate. Simply put, mineral rights supersede surface rights, and that makes it very difficult to stop mineral exploration and development.

b. In this exchange, 100% of the federally owned mineral rights would be transferred to the non-federal parties, and only 18% of non-federal mineral rights would be transferred to federal ownership in return. This would lead to a significant imbalance of monetary value and property rights, with the public getting the short end of the stick on both.

c. The law in Montana is clear in relation to the dominance of the mineral estate. Thus, it is not unreasonable to assume that the unknown and unanalyzed severed owners of these claims may decide to assert these valuable rights in the future. At that time, under Montana law, those owners would have the ability to disrupt the surface by building roads, cutting down trees, diverting water, and using any and all legal means they choose to develop their mineral rights.

4. The PEA is faulty because it does not disclose the monetary value of land exchanged.

a. Federal Land Policy and Management Act (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.

b. The PEA omits public disclosure of land valuation exchanged.

c. Therefore, we believe the PEA is faulty, misleading, and perhaps illegal.

5. The PEA is faulty because it does not disclose valuation of severed water rights.

a. A reasonable appraisal would contain the value of water rights exchanged.

b. The PEA does not contain any publicly disclosed value of severed water rights from Federal to non-Federal parties.

6. The PEA is faulty because it does not disclose a valuation of timberlands in the exchange.

a. Federal Land Policy and Management Act (FLPMA) requires that timberland values received by the public in an exchange are equal to or higher than that of the timberland values received by the non-federal party in the exchange.

b. The PEA omits public disclosure of timberland values exchanged.

c. Therefore, we believe the PEA is faulty, misleading, and perhaps illegal.

7. The PEA is faulty because it relies on public benefits which it does not provide, and therefore cannot consider as a part of the Project proposal because those benefits are not guaranteed.

a. The PEA claims non-federal parties will construct the new trail, make the trailhead, and provide parking lot improvements. No contracts between federal and non-federal parties have been disclosed to the public for review within the PEA.

b. The PEA claims non-federal parties will provide access to Crazy Peak to the Crow Nation, allow access across private lands, and consider conservation easements on lands received in the exchange. These agreements do not include the federal party involved in the exchange and therefore are misleading and cannot be considered by the public as an additive value resulting from the exchange. There are no guarantees these agreements can be trusted/guaranteed or enforced, rendering their benefits inappropriate to include in the PEA.

8. The PEA is faulty because it violates Executive Order 12962 requiring a no-net-loss of wetlands in land exchange.

a. The PEA estimates the total wetland value within the currently non-federal parcels to be 7.8 acres, with the total wetland acreage within the currently federal parcels to be 52.4 acres. This means that the Proposed Land Exchange would result in a significant loss of wetland acreage under federal control: a net loss of 44.6 acres to be specific.

b. The wetlands analysis has been done twice and in each case the public was found to be losing significant wetland acres.

9. Typically, this type of proposal has multiple options, however the PEA proposes to evaluate only [two] alternatives: (1) a [no-action] alternative and (2) Proposed Land Exchange.

a. NEPA requires an agency to [study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.] 42 U.S.C [sect] 4332 (2)(E).

b. The Service eliminated four other alternatives due to claims of technical or economic infeasibility. In other words, the Service evaluated only the Proposal from the Yellowstone Club and adjacent landowners plus the no-action alternative required by law.

c. The law does not support this limited range of alternatives, as it is reasonable to consider others - such as defending current access rights - as viable alternatives in the PEA.

The underlying rationale of one two alternatives creates the perception of a pre-determined outcome: do what the Yellowstone Club and adjacent landowners want. 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.

10. The Project sets a dangerous precedent by reinforcing and rewarding the negative and anti-public behavior of the landowners involved.

a. The Proposed Land Exchange would set a terrible precedent and is poor public policy. Encouraging private landowners to stand their ground in obstructing legal public access until the USFS acquiesces to their demands is dangerous to all members of the public and all public

federal land, particularly in Montana. b. State, federal, and local agencies should be promoting the enforcement of their own rights, rules, and regulations, rather than capitulating to parties who are undermining the public's rights. 11. The PEA fails to analyze that the Project will result in habitat loss and degradation of the riparian zone along Sweet Grass Creek. a. The USFS is directed to regulate aquatic resources for the benefit of increased fishing opportunities. Here, the PEA does the exact opposite. The USFS asserts there will be a minor negative impact on stream fishing opportunity. This is disingenuous as there will be no net fish habitat improved or protected, or fishing opportunity gained, by federal ownership. b. The PEA would create a net loss in federal riparian habitat. Executive Order 12962 directs USFS agencies to the extent permitted by law and where practicable, to improve the quantity, function, sustainable productivity, and distribution of U.S. aquatic resources for increased recreational fishing opportunities. This PEA does the opposite. 12. The public forever loses rightful claim up Sweet Grass Creek Road and Trail #122a. The current Travel Plan designated the Sweet Grass Trail No. 122 as a public, non-motorized and non-mechanized trail. It is currently managed from the west to T. 4 N., R. 12E., Section 8, as a Trail Class 3 trail for foot and stock use. The USFS determined that the access to the area was [inadequate] and thus, included in its Travel Plan the need and desire to [Perfect trail access across private in-holdings within Sweet Grass [hellip]] b. The PEA, however, ignores the goals set forth in the Travel Plan and does not reserve Sweet Grass Trail No. 122 for administrative or public use. This is in direct conflict with Forest Services' own objectives and would forever relinquish a public access point in the Crazy Mountains. 13. The public trades low-lying and highly productive and diverse wildlife habitat for steeper and higher elevation rock and ice. Particularly for elk hunters, this is concerning because of the reduction in quality elk hunting opportunities this will create. I strongly admonish the FS to abandon these privatization efforts, and return to the FS Region policy documenting, defending and maintaining our Historical Prescriptive Easement public access on the Crazy Mountains and work towards perfecting it, as before. Our public trust is being grossly trampled by this proposal. Thank you, Kathryn Qanna Yahu Kern Enhancing Montana's Wildlife & Habitat 924 11th Ave., Apt 2 Helena, MT 59601