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Title: Chairman

Comments: December 21, 2022

Forest Supervisor: Mary Erickson

Custer Gallatin National Forest

P.O. Box 130

Bozeman, MT 59771

Re: East Crazy Inspiration Divide Land Exchange Preliminary Environmental Assessment

Dear Mary Erickson:

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. Here, the Proposed Action is committed to exchange approx. 4,135 acres of National Forest System (NFS) lands for approx. 6,430 acres of non-Federal lands located in the Crazy Mountains of southcentral Montana and the Madison Mountains of southwest Montana.

On behalf of Montana Chapter of Backcountry Hunters & Anglers (MTBHA) we submit these comments on the PEA. We appreciate the opportunity to provide these comments on a variety of issues, including the need for the agency to include a project alternative for enforcing existing public easements and defending - through litigation or any other means - historical access over and across private property.

#### INTERESTS AND PARTICIPATION OF MONTANA CHAPTER OF BACKCOUNTRY HUNTERS AND ANGLERS

Backcountry Hunters & Anglers is a non-profit organization headquartered in Missoula, Montana. MTBHA 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, MTBHA 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.

MTBHA 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 comments to the Forest Service based on our collective and extensive experience

## BACKGROUND ON CUSTER-GALLATIN NATIONAL FOREST & CRAZY MOUNTAINS

Most of the federal "public domain" lands in the Custer-Gallatin National Forest originated with the Louisiana Purchase in 1803. Ex. A at 17. Thereafter, the national policy was to promote settlement and development of the American West and raise revenue by disposing of significant amounts of land in the public domain. Id. The primary early laws and actions that created the current landownership pattern within or near the Custer-Gallatin National Forest (including the Crazy Mountains) include land grants to the states, the Homestead Act,

various mining laws, and the railroad land grants (1835-1890). Id. To encourage development of western states, Congress provided 45 million acres of railroad land grants to Northern Pacific Railway. Ex. A at 18. These land grants resulted in the "checkerboard lands" the Service seeks to remedy in Crazy Mountains today.

Ownership of most of the original railroad lands has since transferred over several decades to the Burlington Northern Railroad Company and then to its corporate subsidiary, Plum Creek Timber Company. Ex. A at 18. These lands were mainly used for commercial timber production which resulted in the building of many roads across Forest Service property and private lands. Id. The Northern Pacific Railway, Burlington Northern, and Plum Creek eventually "sold a significant amount (roughly 200,000 acres) of their grant lands within [the Gallatin National Forest] to various private entities. Most of the intermingled sections in the Crazies . . . were sold in the early to mid-1900s, mainly to ranchers in those areas." Ex.A at 19.

In 1912, the Crazy Mountains and neighboring Yellowstone National Forest became the Absaroka National Forest. Ex. 7 at 20. In 1945, the Absaroka National Forest was abolished, and those lands merged into the Gallatin National Forest. Id. When the Gallatin National Forest was established in 194, well over 400,000 acres of intermingled private "checkerboard" lands existed within the boundary. Ex. 7 at 20.

Throughout the 1900s, ownership of most of the original Northern Pacific Railway lands transferred to various entities, such as miners, investors, homesteaders, stockgrowers and other private ownership. By 1940, the Northern Pacific Railway Company sold all its landholdings in and around the Crazy Mountains. When the Northern Pacific Railway transferred title of its odd-numbered sections of land to subsequent entities, the deed often expressly reserved "an easement in the public" for "any public roads heretofore laid out or established, and now existing over and across any part of the premises."

The original National Forest maps for the Crazy Mountains show a well-developed trail system into the interior of the Crazy Mountains and along the Crazy Mountains' periphery. This includes but is not limited to maps from 1925, 1930 and 1937. These maps depict the two National Forest System trails and multiple administrative access roads the Service intends to abandon in the land exchange.

#### THE EAST TRUNK AND SWEET GRASS TRAILS IN THE CRAZY MOUNTAINS

Several of the historic roads and trails on the Gallatin National Forest (and on other National Forests throughout the western United States) were established in the late 1800s and early 1900s. Ex. A at 2. "Since that time, these historic roads and trails have been maintained, signed, and used for Forest Service management purposes and public recreational activities." Id. at 2-3. Two such National Forest System trails in the Gallatin National Forest's Crazy Mountains include: the East Trunk trail (No. 115 and more recently No. 136) and the Sweet Grass trail (No. 122) on the eastside of the Crazy Mountains.

The East Trunk trail (No. 115) is a 100-year-old trail that is part of a "century old trail system that circumnavigates the Crazy Mountains and connected historic U.S. Forest Service guard stations (many of which are now rental cabins)." Ex. B at 1. A "Forest Guard Station once existed upon the trail . . . at its juncture in Big Timber Canyon." Id. The East Trunk trail (No. 115) was constructed by the Forest Service to connect the Forest Service guard stations and the trail is shown on Forest Service maps "dating back to at least 1925." Ex. C The East Trunk trail (No. 115) is sometimes referred to today as Trail No. 136 and it has "always been on official forest maps." Ex. B at 1

The Sweet Grass trail (No. 122) has been around for over 100 years and provides public access into Sweet Grass canyon on the eastside of the Crazy Mountains. Ex. D at 16 (map depicting trail). An August 4, 1930, Forest Service letter explains that the agency maintains a "a trail thru the Forest up Sweet Grass Canyon" and that there is "no objection to private individuals improving this trail to the point where it can be used for either wagons or automobiles." Ex. D at 1. The Forest Service said it was "distinctly interested in keeping all existing trails open for horse travel . . ." Id. The Sweet Grass trail (No. 122) was originally used by prospectors, trappers and hunters and latter ranchers brought sheep into the upper country and worked to maintain the trail "until the Forest Service took over." Ex. D at 2. Forest Service records of historic government trail construction expenditures for the Sweet Grass trail (No. 122) date back to 1930. Id.

The Sweet Grass trail runs from Sweet Grass Road (currently called "Rein Lane") and is approximately 10 miles in length. The trailhead for the Sweet Grass trail is located on private property in Section 2 (Township 4 North, Range 12 East). The Service has a "trailhead agreement" with the private landowners at this location. Pursuant to the agreement, the Service has a lock on a gate that crosses the road on their property and has built a facility (with an associated National Forest System sign) to allow for public access of pack and saddle stock and backpackers around the gate. The Service also constructed an unloading facility for the public at the trailhead and installed Service signs about use of the Sweet Grass trail.

Despite Service's contention, some sections of the two trails that cross private land in the Crazy Mountains are also covered by recorded express easements from the railroad grants deeds to the private landowners. Recorded express easements cannot be extinguished by non-use, abandonment, or reverse adverse use. Specifically, Sections 7 and 9 (within Township 4 North and Range 12 East) include a written easement for public access for the Sweet Grass trail. This is also true for Sections 1, 13 and 25 (within Township 4 North and Range 12 East) which include a written easement in the public for the East Trunk trail.

In previous publications, the Service asserted that it also had a "prescriptive easement" (on behalf of the public) on the two trails in the Crazy Mountains. Once established, title to an easement acquired by prescription is as effective as though it was evidenced by a recorded deed. The Service has since abandoned this position on premise that there may be some discrepancies in historical use. Despite the overwhelming evidence it once stood by and even testified to in cases such as *Montana Wilderness Association v. McAllister*, Service now believe that these historic access claims are "extraordinarily complicated[.]" 658 F. Supp. 2d 1249, 1252 (D. Mont. 2009), *aff'd*, 666 F.3d 549 (9th Cir. 2011), *aff'd*, 460 F. App'x 667 (9th Cir. 2011). See Ex. A, Declaration of Robert Denee.

Until mid-2017, the Service actively managed, signed, and maintained the two trails, protected the public's right to use the trails, and pushed back against illegal attempts by private landowners to block public access on them. But something changed by mid-2017 and the Service started meeting privately with the landowners and drastically changed its approach to the two trails, in ways that 1) violated applicable law; 2) are inconsistent with the Service's longstanding policies and actions with respect to the trails; 3) contradicted its repeated promises and representations to the public regarding access to the trails; and 4) rewarded landowners for their illegal actions related to the two trails.

## NATIONAL ENVIRONMENTAL PROTECTION ACT CONSIDERATIONS

NEPA establishes a "national policy [to] encourage productive and enjoyable harmony between man and his environment," and was intended to reduce or eliminate environmental damage and to promote "the understanding of the ecological systems and natural resources important to the United States." 42 U.S.C. [sect] 4321. *Public Citizen v. U.S. Dept. of Transp.*, 124 S.Ct. 2204, 2209 (2004). Congress thereby declared a national policy which will encourage productive and enjoyable harmony between man and his environment. 42 U.S.C. [sect] 4321. Our national policy is effectuated through the requirement that an agency prepare an EIS for any

"major Federal action[] significantly affecting the quality of the human environment." Id. The EIS informs both the federal agency and the public of environmental impacts and alternatives to the proposed action. The twin goals of informing both government agencies and the public of environmental impacts before a project is approved lie at NEPA's heart. *Methow Valley*, 490 U.S. at 349-50; *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1997).

NEPA's requirement that a detailed statement be prepared before an agency can proceed reflects Congress's determination that federal agencies must look before they leap. As the Supreme Court explained in *Methow Valley*, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the dye otherwise cast. *Methow Valley*, 490 U.S. at 349 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976)). NEPA "emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Churchill County v. Norton*, 276 F.3d 1060, 1072-73 (9th Cir. 2001). NEPA imposes a high burden on federal agencies to take a "hard look" at the environmental impacts of federal projects. Because NEPA is procedural, rather than substantive, the "hard look" is often the only check that ensures NEPA's Congressional mandate of environmental protection is fulfilled. Armed with knowledge about impacts, agencies are more likely to choose less environmentally damaging courses of action and will impose more protective mitigation. Absent the "hard look," agencies defeat Congressional intent to carry out a national policy of environmental protection.

Here the Custer Gallatin National Forest failed to take the required hard look at environmental impacts of the Proposed Action and thus cannot make an informed decision. NEPA imposes specific requirements on federal agencies under the Council of Environmental Quality Regulations, whether the agency prepares an EA or EIS. These requirements inure to the United States Forest Service ("Service") like they do all other federal agencies. The Montana Chapter of Backcountry Hunters and Anglers ("MTBHA") provides the following overview of the ways in which the Preliminary Environmental Assessment for the East Crazy Inspiration Divide Land Exchange ("the Project") fails to meet the specific requirements of federal law.

A. 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) purposes:

1. To resolve long-standing public access and land use disputes.
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 both 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 BCA and South Crazy Mountain RWA.

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 NFS lands.

6. To conserve wildlife connectivity and protect key habitat.

7. To increase protection of high elevation lands in the Crazy Mountain Range, an important traditional cultural area identified by the Crow Tribe.

While some of the needs proposed may objectively be met with the Proposed Action, others are not. Out of the seven purposes five are not supported by the Proposed Action. 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. Despite the Forest Services' characterization of the Proposed Land Exchange, the proposal not only violates the Travel Plan but creates a net loss to public recreations opportunities. Specifically, the Proposed Land Exchange will result in the reduction of public access points to the Crazies, greatly reduce the quality of existing hunting and fishing opportunities, and overall alter the nature and scope of existing recreational opportunities in the Sweet Grass drainage.

i. Proposed Action eliminates historical fishing and hunting opportunities.

The Forest Service supports its proposal on the guise that the 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 lower portions of Sweet Grass Creek. 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 other water sports, as well as providing parched hikers a fresh water source. The Proposed Land Exchange, however, establishes a new route that bypasses the creek drainage and directs users up onto the steep bench above the creek bed. This proposed new route completely precludes public access to the creek and riparian zone - giving that land wholly to private parties - and in turn eliminates historical fishing access, as well renowned whitewater paddling opportunities. As proposed, all fishing and boating opportunities will be in the landowners and private outfitters' hands.

In justifying this reduction to recreational opportunities, the agency erroneously contends it meets the projects goals because in its current state Sweet Grass Trail is "a long out and back trail with no scenic destination [,]" where "[c]urrent use levels are low[.]" EA at 35. This not only mischaracterizes the actual extremely scenic river canyon and recreational attributes of hiking along Sweet Grass Creek drainage but is based on the false premise that Sweet Grass Creek is not currently in use. Use of Sweet Grass Creek for recreational opportunities, importantly fishing, paddling, and hunting access is very well documented and is renowned by American citizens across the country,

Additionally, as the Forest Service acknowledged, most use of Sweet Grass Trail occurs during the fall hunting season. Eliminating access to those areas will also preclude historical access opportunities for hunting. As discussed in section below, the Proposed Action exchanges biologically rich low elevation wildlife habitat for comparatively barren higher elevation alpine and sub-alpine habitat. The proposed land exchange lies within big game management units for deer and elk, antelope, black bear, moose, mountain goat and mountain lion. To this end, the PEA acknowledges that "[h]unters are drawn to the area by black bear, elk, mule deer, white tail deer, and other wildlife species." PEA at 36.

Nevertheless, the PEA concludes that "proposed exchange would result in an increase in the current level of secure habitat by nearly 5,000 acres benefiting elk and other big game species." PEA at 48. While on paper this simple land acreage math is correct, the ecological reality identified in FWP's own surveys indicates that the elk populations inhabit lower elevation acres being exchanged to private ownership, particularly when stressors are introduced. The Service brushes over the 1254-acre loss of big game winter habitat "given the lower elevation of current federal lands." PEA at 48. This winter-range loss would put more big game on private lands during the late shoulder season.

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, 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 and are less productive. With stress and pressure, elk will seek lower elevations. Montana FWP surveys indicate most of the elk inhabit lower elevations outside of the exchange during hunting season. See Image below. Therefore, the Proposed 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 hunting season.

(See uploaded document for image)

The Service must thoroughly analyze the on the ground effects of the Proposed Action on the public's hunting opportunities in relation to the spatial distribution of huntable wildlife. Merely relying on a net increase of consolidated land acres does not address the realities of the privatization of easy-access, riparian wildlife habitat during prime hunting season.

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

Flatly, the Proposed 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 undoubtedly 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 a 22-mile loop with only one access point from the south. This new route not only eliminates a separate public access point but severely alters 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, Forest Service stated that the previous Sweet Grass Trails were 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, bottleneaking 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 PEA.

Without further analysis, Forest Service's rationale in the PEA arbitrarily discounts what recreational opportunities exist and will be lost along Sweet Grass Creek Trails. Forest Service must conduct further analysis into what actual recreational opportunities will be eliminated and what will be gained by way of Proposed Land Exchange.

iii. Forest Service incorrectly asserts it holds no recorded easement over Sweet Grass Creek Road and therefore,



undermines its basis for a need to secure access

In its PEA, Service incorrectly asserts it currently holds no recorded access to portions of the Sweet Grass Trail No. 122 in Sections 2, 7 and 9, T4N, R12E. PEA at 28. This however is disputed by old railway deeds conveying title to private landowners in the early 1900s that expressly reserved "an easement in the public for any public roads heretofore laid out or established, and now existing over and across any part of the premises." This incorrect assumption underlies the agency's position that that the Proposed Action will ameliorate its purpose and need to secure "perpetual public access" in the Crazyes.

When the Northern Pacific Railway transferred title, the deed expressly reserved "an easement in the public" for "any public roads heretofore laid out or established, and now existing over and across any part of the premises." The reference to "public roads" in the Northern Pacific Railway grant refers to public rights-of-way that existed in those sections at the time the conveyance was made. Sweet Grass Trail No. 122 (or Sweet Grass Road No. 199) and East Trunk Trail were public rights-of-way that existed at the time the Northern Pacific Railway conveyance was made. This fact has been acknowledged in their own April 8, 2021 Briefing Paper on the Crazy Mountains East Trunk Trail. See Ex C.

Moreover, the existence and validity of the deeded public easements was addressed in a 1948 federal case where the United States sued the Van Cleve Company for interfering with their public right away through their property in Sections 1, 2, 3, and 5 in T4N, R12 E in Sweet Grass County. See U.S. v. Paul L. Van Cleve, et al; see Ex E. In this matter, the United States argued that the dedicated public highway by way of the Northern Pacific Railroad Company deed granted the government a "special right, title and interest in the highway and trail all parts thereof[hellip]amounting to an easement and right-of -way" for the general public's use. Ex. E at 3. The parties entered into a settlement agreement by which an easement and road right of way was conveyed to the United State under deed dated December 10, 1953, recorded in the Book 44 of Deeds page 5 in the office of County Clerk and Recorder in Sweet Grass County, Montana. The government's argument in this case highlights the Service's misguided contention that they have no recorded easement, as well as illuminates a new nefarious position on being managers of public land.

Despite these recorded instruments, Service maintains it holds no recorded easements. Service has previously acknowledged the existence of these reserved rights and have been provided these documents in previous litigation. See Exhibit E. Service must consider these existing deeded public right-aways in its analysis, as the existence of the recorded public easement severely undermines the purpose and need of the Proposed Action. Service's reluctance to exploring all their options as a part of the requisite alternatives analysis for ensuring historic public access is troublesome and violates NEPA. Service must consider the existence of these recorded easements in its final environmental analysis. To ignore the potential of legal recorded public rights belies the ownership interests of the public.

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

The Proposed Land Exchange 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 Service to manage national forest for public access.

B. The requisite alternatives analysis is faulty because it does not describe or consider the alternative of defending and/or litigating the historical access shown and described in the Travel Management Plan and the USFS National Forest Management Plan.

The development of alternatives is the "heart" of the NEPA process. 40 C.F.R. [sect] 1502.14. "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) (quotations omitted). "[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). The NEPA implementing regulations refers to the selection and review of alternatives as "the heart" of the environmental review. 40 CFR [sect] 1502.14. Comparison of the alternatives help in "sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public."

The regulations provide clear guidelines on how to select alternatives:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

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). Here, Service lists seven needs for action, including to "resolve long-standing public access and land use disputes." As acknowledged by the 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 landowner. In recognition of these continued access issues, the 2006 Gallatin Travel Plan identified the two trails as locations with outstanding access needs.

It proposes however to evaluate only "two" alternatives, (1) a "no-action alternative" and (2) Proposed Land Exchange. The Service "considered" but ultimately eliminated four other alternatives due to technical or economical infeasibility. In other words, other than the Proposed Land Exchange, the Service evaluated only the no-action alternative required by regulation. This does not satisfy the Service's obligation to "rigorously explore and objectively evaluate reasonable alternatives," including "reasonable alternatives not within the jurisdiction of the lead agency." The Service must consider additional alternatives either been eliminated from further consideration or have not been considered at all.

According to the PEA, four additional alternatives were initially considered but were eliminated from analysis because they "do not adequately respond to the purpose and need for action, are technically or economically infeasible, are speculative, or would have substantially similar effects as an existing alternative." Those alternatives detailed included: (1) a direct purchase of the non-federal lands; (2) purchase of easements over disputed trails; (3) meet and negotiated with landowners individually and process exchange independently; and (4) legislated land exchange by Congress.

By the agency's account, all but the legislative exchange alternative, are de-facto losing alternatives as they rely on the private landowner's 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." PEA at 18. As for alternative to purchase easements, 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." PEA at 18. Therefore, Forest Service proposes to do nothing or capitulate and exchange the disputed land to those private actors perpetuating conflict.

The law does not support this limited range of alternatives, as it is reasonable to consider them as viable alternatives in the PEA. The underlying rationale of these alternatives create 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. *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, the Objective B-2 of the Travel 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's plans.

The Service states the "primary need for action for this land exchange proposal is to resolve longstanding access issues surrounding the Sweet Grass Trail No. 122 and the East Trunk Trail No. 136." PEA at 5. 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[hellip]" and "[w]ithout a written conveyance, the only lasting way to determine whether a public access right exists is through litigation in court, where the Agency must establish" prescriptive use. *Id* (emphasis added). In its PEA, Service incorrectly asserts it has no recorded access to portions of the Sweet Grass Trail No. 122 in Sections 2, 7 and 9, T4N, R12E. This however is disputed by the deeded easements from Northern Pacific Railway which demonstrate that there are express reservations of easements recorded for public access. In addition, and perhaps of greater importance, Service fails to identify the very option it describes as an alternative: establishing its rights in court. For this reason alone, the alternatives analysis must fail.

C. The PEA is faulty because it relies on and describes public benefits which it does not and cannot legally consider as a part of the Project proposal because those benefits are not guaranteed as no final contracts have been disclosed.

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 [sect] 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. [sect]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.* [sect] 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. Here, the Forest Service submits in its assessment without providing the following elements on private lands or near the exchange area that they contend enhance overall public benefits:

\* The proposal respects the status quo regarding permissive public access into the upper Sweet Grass Creek drainage over Rein Lane. The landowners have indicated that they intend to continue allowing permissive seasonal access across the private lands they own, so long as private property is respected.

\* Tribal access to Crazy Peak in Section 7, T3N, R12E. The details of this arrangement will be described in an agreement between the Crow Nation and Switchback Ranch, LLC. The Forest Service would not be signatory to this agreement nor involved in its management or oversight.

\* Switchback Ranch, LLC has agreed, in conjunction with the land exchange, to grant a conservation easement to the Montana Land Reliance to maintain the open space character of Section 7 to preserve wildlife habitat, quiet enjoyment, and other values that enhance the surrounding character of the forested lands. The proposed conservation easement will prohibit all residential development on the property.

\* WLG has committed to continued discussions with land conservation organizations and wildlife conservation groups regarding additional conservation measures that would be accomplished post exchange to include additional voluntary conservation easements.

All the highlighted elements are speculative and have not yet been secured or provided to the public. It is longstanding precedent that "[C]ongress 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). While the Forest Service is not a party to some of the proposed agreements, the abstract nature of these benefits cannot be firmly relied on by the agency in supporting the nature and purpose of the Proposed Land Exchange. The Forest Service has the affirmative duty to receive these assurances, 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.

MTBHA submits that the final EA or EIS must include any proposed conservation easements be provided to the public for review and comment. Any conservation easement must be agreed upon concurrent with the proposed exchange, and in place for federal land parcels traded out of their ownership. MTBHA also submits that in line

with its purpose and need to secure public access, it is imperative that the public is granted an easement right and is not permitted access through permissive use to Sweet Grass Creek. This easement right should not be limited to seasonal use and should afford the public the same access it has had historically. This easement should be granted concurrently with the exchange over and across Sweet Grass Road (Rein Lane) in Sections 7, 8, 9, 10 and 13 to allow public use of the road or trail in perpetuity.

## FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 CONSIDERATIONS

### A. The PEA Fails to Comply with FLMPA Mandates

Federal Land Policy and Management Act of 1976 (FLPMA) requires the Service to determine that the public interest will be "well served" by an exchange in interests in land before approving such exchange. 43 U.S.C. [sect] 1716(c); 36 C.F.R. [sect] 254.3(b). The Service must consider several factors when making a public interest finding in support of an exchange. 36 C.F.R [sect] 254.3(b)(1). These factors include:

- \* opportunity to achieve better management of Federal Lands and resources, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: protection of fish and wildlife habitats, cultural resources, watersheds, and wilderness and aesthetic values;

- \* enhancement of recreation opportunities and public access;

- \* consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates;

- \* expansion of communities;

- \* accommodation of existing or planned land use authorizations ([sect] 254.4(c)(4);

- \* promotion of multiple-use values;

- \* implementation of applicable Forest Land and Resource Management Plans; and fulfillment of public needs. Id.

[sect] 254.3(b)(1).

a. Service must disclose the valuation of 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. [sect] 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. [sect] 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. [sect] 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. [sect] 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. [sect] 1716(h); 36 C.F.R. [sect] 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. [sect] 486.

Here, Forest Service is obliged to calculate and consider the value of exchanged lands. They must also determine the valuation of other interests appurtenant to property exchanged or reserved that should be duly considered in its calculation and assessment. Forest Service must conduct not only, valuation of the lands exchanged, including existing mineral rights but should also include the value of water rights previously held by the federal government.

While the PEA includes a table of the water rights being exchanged, it does not describe the legal elements of those rights, or the substantive and financial value of those rights. Instead, the PEA describes that "The Forest Service Handbook (FSH) directs that a water rights analysis be completed to address ground or surface water rights associated with the Federal and non-Federal lands (FSH 5409.13, 32.45). This analysis is summarized within this document and can be obtained from the project record upon request." Pg. 13. However, when the undersigned reached out to the individual identified on the project website as the point of contact for this

additional information in the project record, the following adverse correspondence was received:

(see uploaded document for image)

Ultimately, Ms. Ball did upload the conducted analysis related to water rights. This addition, two days before the deadline is very short notice. However, after review of the "report", there is nothing substantive within that document to review. Instead, the "analysis" is simply a restatement of the elements of the water rights being exchanged. For example, it states the purpose of the water rights, the claimed place of use, period of use, and priority date. Yet, the report does not include any substantive analysis of the actual value of those water rights, whether on a functional or financial basis. More specifically, it does not describe either physical or legal availability issues, whether good or bad. Furthermore, it does not describe any comparative financial valuation of the various rights.

Finally, several water rights are being reserved from the transaction by the Private Parties. The PEA omits any analysis of how excepting those water rights from the transaction will affect use of the parcels where that water is appurtenant, or their value. Without appurtenant water, Montana law controls that water can be diverted and conveyed away to the legal place of use, without concern for the land from which the water is diverted. While it is wholly unclear what the outcome of this transaction is in this regard, including this analysis in the final EA will allow the public to better understand what the value is of water rights being transferred and reserved as a part of this Proposal.

b. The Proposed Action directly violates the 2006 Gallatin Travel Plan

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. [sect] 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. [sect] 1505.3

There are several historic routes in the Crazy Mountain Range ("Crazies") that cross private land and have been used to access Service lands, some for which the 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 Forests' Road and trail system.



The Travel Plan directs the 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 Action directly violates the 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 Service.

For example, Travel Plan designated the Sweet Grass Trail No. 122 as non-motorized and non-mechanized. It is currently managed from the west to T. 4 N., R. 12 E., Section 8, as a Trail Class 3 trail for foot and stock use. The Forest Service 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]" See Table I-3 Forest Access Objectives (Chapter I Forest-wide Goals, Objectives, Standards, and Guidelines, pages I-4 through I-8). The Proposed Action, however, would not reserve Sweet Grass Trail No. 122 for administrative or public use, directly conflicting with Forest Services' own desires and objectives.

B. The PEA incorrectly states that the Project does results in increased wildlife benefits or habitat connectivity.

The Crazy Mountains is an island range in south-central Montana, but there is scientific evidence indicating this island range plays a critical role in wildlife connectivity. The Crazy Mountains plays a beneficial role in the corridor movement of predators such as wolverine, Canadian lynx, and the grizzly bear from the Northern

Continental Divide Ecosystem to the Greater Yellowstone Ecosystem.

Except for a small summary describing the loss of winter habitat, but no "critical winter habitat" loss, the PEA does not provide an adequate analysis of the type of winter habitat involved in the exchange (critical vs non-critical), nor does it describe in adequate detail a quantitative analysis of winter habitat traded to non-federal parties.

Typically, the Forest Service seeks to protect core habitat and wintering grounds should be a top priority. This is important given the loss of winter habitat across the state, and even more important in this scenario because the winter habitat loss briefly described in the PEA is not going to be protected from development. In terms of productivity, the low-lying Forest Service lands that will be transferred into private holdings have a substantially higher forage base than the higher elevation lands primarily inhabited by limber pine, mountain goats and pica. The Final EA should include additional comparative analysis related to the ecological value of the parcels being exchanged.

a. There will be a loss of habitat for aquatic species.

The Proposed Land Exchange creates a net loss in riparian habitat. Executive Order 12962 directs Forest Service 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. The Forest Service is directed to regulate aquatic resources for the benefit of increased fishing opportunities. Here, the Land Exchange Proposal does the exact opposite. The Forest Service asserts there will be minor negative impact on stream fishing opportunity. This is disingenuous as there will be no net fish habitat being gained by federal ownership. Not only does the plan remove historical riparian access, thereby decreasing fishing opportunities, it also results in the loss of regulatory control over important riparian habitats. The elimination of Sweet Grass Creek riparian areas from federal ownership does not benefit the public or the riparian habitat.

In addition to its failures under Executive Order 12962 to promote healthy aquatic habitat for recreational fishing opportunities, the project would violate the federal goals of no net loss in wetland acreage and function. The PEA preliminarily estimates the total wetland value within the non-Federal parcels to be 7.8 acres and the total wetland acreage within the 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. Under, Executive Order 11990 land exchanges must preserve the resource values of wetlands. This is typically achieved by ensuring that the wetland values present on the lands acquired by the Forest Service meet or exceed those present on the lands conveyed to private ownership. As noted by the PEA, there is significantly more wetlands being exchanged to private hands than what the federal government will receive. The Forest Service states it will conduct a final assessment on wetland quality and quantity. This assessment must use the best available science and provide for its obligations under EO 11990. The Forest Service must comply with EO 11990 as it does not contemplate loss of net wetlands in an exchange on the basis of "long term challenges relating to public and administrative access." The Proposed Land Exchange would facilitate its very own obstacle for complying with the federal

mandates.

Therefore, to comply with EO 12962, the Service must revise its proposed action to include some safeguard to fish habitat and recreational fishing opportunities. MTBHA submits that the Service acquire a public access over the Sweet Grass riparian areas in excess of the ordinary high-water mark permitted under the Montana Stream Access laws to ensure the public is afforded the same access rights as those of the landowners or private parties.

MTBHA requests that the Service conduct a full assessment on the wetland quality and quantity to apprise the public of the total value lost and any proposed action will equal a zero loss. If the Service intends to permit a net loss of wetland acreage, to ensure Service is in compliance with the EO 11990, it must impose a conservation easement over and around the total wetland acreage to create a buffer of protection. This conservation easement should be provided to the public for review and comment and shall be executed prior to any land exchange that includes wetland acreage.

C. The EA 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.

The relevance mineral estates as a part of the Project proposal here is two-fold: (1) the Majority of parcels being transferred to USFS have severed or partially owned mineral estates; and (2) there has been no requisite analysis of the value of the mineral estates being transferred by the United States to the non-federal parties. While both are important aspects of the transaction that the EA should consider, for a variety of reasons it is the transfer of parcels with severed owner to the public that is most concerning. A short legal history of the issue is necessary to help exemplify the concerns at issue here.

As early as 1922, the Montana Supreme Court secured the state's position as an "ownership-in-place" theory<sup>1</sup> state. *Gas Products Co. v. Rankin*, 207 P. 993, 63 Mont. 372 (1922). This characterization of oil-and-gas rights is used in a majority of jurisdictions, and generally stands for the proposition that the owner of minerals owns an estate in fee simple absolute in those minerals before the oil is extracted. *Id.* However, under this theory, any interest in the minerals terminates if the oil and gas flows out from under the owner's land. *Id.* In addition, this doctrine gives the mineral owner the right to use the land surface to search for, develop, and produce minerals from the property.<sup>2</sup>

As a basic premise, oil and natural gas held beneath the surface of the earth are usually regarded as minerals. *Mid-Northern Oil Co. v. Walker*, 65 Mont. 414, 211 Pac. 353. Listing several "basic, well-established rules" in the field of oil and gas, the Montana Supreme Court, in its opinion in *McDonald v. Unirex Inc.*, explained the following: 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. 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.

To integrate legal recognition of separately owned mineral estates and their position as vested and cognizable property interests, courts were forced develop several unique implied attributes of a mineral estate. These incidental rights include: the right to develop; the right to alienate; and the right to assign. Because these rights are incidental to ownership of the minerals themselves, when an undivided mineral interest is conveyed or reserved, courts presume that all these attributes remain with the mineral interest. *Carbon County. v. Union Reserve Coal Co.*, 271 Mont. 459, 473, 898 P.2d 680, 6893 (1995).

Tenets of mineral law observe a general rule of mineral estate dominance. Dating back to 1930, Montana courts have held that "the grant of a particular interest in property tacitly carries with the grant of those incidents without which the grant would be of no avail." *Yellowstone Valley Co. v. Associated Mortg. Investors*, 88 Mont. 73, 80-81, 290 P. 255, 257 (1930), see also *Carbon*, and 988. Out of this logic, courts have ruled that ownership of a mineral interest includes, by implication, those rights reasonably necessary to extract minerals. See *Hurley v. Northern Pacific Railway Company*, 153 Mont. 199, 202, 455 P.2d 321, 323 (1969). One of the foundational rights incidental 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. *Hurley*, at 323. Ultimately, courts in Montana and other jurisdictions reached these legal constructions for the reason that without a right to access the surface of another's property to extract the oil from the ground beneath it, ownership of a mineral estate would be valueless. *Hunter v. Rosebud Cnty.*, 240 Mont. 194, 198, 783 P.2d 927, 929 (1989).

This right of a mineral owner to use the surface of another's property for the enjoyment of the mineral estate serves to create a hierarchy of the two property interests, with mineral estates and their incidental rights holding a greater priority than those of surface estates. The Montana Supreme Court affirmed this belief stating, "The general rule is that the owner of the mineral estate enjoys the dominant estate, and the surface owner of the remaining estate holds the subservient estate. This theory is based upon the realities that accompany mineral exploration and development. Obviously, in order to fully utilize a mineral estate, one usually must have access to the surface. " *Hunter v. Rosebud County*, 240 Mont. 194, 198, 783 P.2d 927, 929 (1989).

In relation to the Project proposal at issue in the Preliminary EA, MTBHA is concerned that the EA does not even include any description or analysis of the above-described area of law. This is relevant due to the ecological and recreational resource values being placed on the lands being transferred to the public as a part of the cost-benefit analysis required by FLPMA.

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 show up someday to assert these valuable rights. 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 for development of their rights that they choose. Obviously, these activities can and will have an enormous impact on the parcels at issue, and the ecological and recreational resource values that are being touted here in support of the Project exchange.

The EA is woefully inadequate in analyzing the above-described issues and this comment seeks to request the USFS to address this issue in detail in the Final EA. In addition, FLPMA requires that the EA look at the economic value of the mineral rights being exchanged. As the current Preliminary Draft contains no such analysis, USFS must include the same in the Final EA product as well.

## CONCLUSION

Overall, there are several notable accomplishments of the Proposed Action. Of greatest importance is the increase in overall publicly owned acreage and the consolidation of that acreage within the range. These are worthy accomplishments.

However, these gains are dramatically undercut and effectively offset by the negative impacts of the Proposed Action. The PEA fails, on a fundamental level, to offer a comparative analysis of the ecological, recreational, spiritual, historical, and financial value of the lands being exchanged. Additional work is needed in the Final EA to meet the requirements of NEPA in relation to each of these aspects.

Furthermore, at its core, the PEA fails to identify, describe, or analyze the concept of public ownership of the "disputed" access identified as the purpose and need of the project. Not only is it possible that legal access already exists through the existence of public reservations in historical railroad deeds, but also the Forest Service sidesteps their ability to challenge the Private Parties contentions in court and to enforce the Service's clearly articulated and long-held assertions of ownership. Simply put, allowing private land owners to dictate an outcome they desire through obstinate obstruction of public lands belies the Service's own instructions and internal operating policies. As a matter of public policy, this sets a dangerous precedent and establishes a playbook for bad actors to replicate state-wide. The Final EA should analyze this issue in greater depth, describe actions that are being taken to protect the public parcels being exchanged (i.e. conservation easements and recorded easements on Sweet Grass Creek), and include a more robust alternatives analysis that includes defending the long-asserted public ownership interests at issue.

Respectfully submitted on December 21st, 2022

/s/ John B. Sullivan III .

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/s/ Graham J. Coppes .

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