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Comments:

Sent via electronic submission

November 13, 2023

Custer Gallatin National Forest

Attn: Forest Supervisor, Mary Erickson P.O. Box 130

Bozeman, MT 59771

RE: Preliminary Environmental Assessment for the East Crazy Inspiration Divide Land Exchange

Forest Supervisor Erickson:

I am writing on behalf of Cottonwood Environmental Law Center ("CELC" or "Cottonwood"), a Bozeman-based conservation organization. Thank you for the opportunity to provide public comment to the Custer Gallatin National Forest ("Forest Service") on the Preliminary Environmental Assessment for the East Crazy Inspiration Divide Land Exchange ("EA"). Cottonwood formally objects to the Forest Service's Comment Consideration and Response (published September 2023) and Draft Decision Notice and Finding of No Significant Impact (published September 2023) for the following reasons:

I. The Forest Service is incorrect that corner crossing would not meet the "purpose and need" of the East Crazy Inspiration Divide Land Exchange project.

In its December 2022 Comment Letter ("2022 Comment Letter"), Cottonwood asserted that the Forest Service has not adequately analyzed a reasonable range of alternatives to the land exchange (as required by NEPA) because it had ignored corner crossing (where two corners of private land meet two corners of public land) as a legitimate alternative for allowing public access. 2022 Comment Letter at 1. The Forest Service responded that this analysis is not required under NEPA because "[c]orner crossing as a strategy would not meet the purpose and need for the project." 2023 Comment Consideration and Response at 17.

One of the seven purposes of the East Crazy Inspiration Divide Land Exchange project (as outlined in the Environmental Assessment) is to "resolve long-standing public access and land use disputes." Considering corner crossing rules is obviously a legitimate alternative that goes to the issue of resolving public access and land use disputes. Specific to Cottonwood, corner crossing is a legitimate alternative that would allow its members who are also members of the Crow Tribe to exercise their federally-reserved right to access the public land in question. Therefore, Cottonwood formally objects to the Forest Service's refusal to consider this legitimate alternative under NEPA.

II. Legal questions concerning corner crossing are not "nested in state law" because they implicate Tribes' federally-reserved treaty rights to access public land.

In its response to Cottonwood's 2022 Comment Letter, the Forest Service stated that the "legal status of corner crossings as the question is nested in state law." 2023 Comment Consideration and Response at 17. Cottonwood responds that, because corner crossings in this instance implicate federally-reserved Tribal rights to access public land, the legal status of corner crossings is nested in federal law. Moreover, the EA's purpose of resolving public access disputes more broadly is nested in the Federal Land Policy and Management Act of 1976 (FLPMA) in addition to state law. Similar disputes involving corner crossing rights have been decided by federal

courts and the U.S. Supreme Court. See, e.g., *Camfield v. U. S.*, 167 U.S. 518 (1897) (holding that the Unlawful Inclosures Act (UIA), which prohibits private landowners from enclosing public lands by fencing the corners of their private plots, was a valid application of Congress's powers under the Property Clause of the U.S. Constitution).

As described at length in its 2022 Comment Letter, Cottonwood has members that are also members of the Crow Tribe that have Treaty Rights that allow them to access public land behind corners in the Crazy Mountains. The Railway Acts of 1862 and 1864 created the private-public checkerboard structure that now exists in the Crazies. The Fort Laramie Treaties of 1851 and 1868 allow Cottonwood members that are also Crow members to access federal land that might otherwise be unavailable for hunting and spiritual ceremonies.

Because corner crossing is a legitimate alternative that would allow members of the Crow Tribe to exercise their federally-reserved right to access the public land in question, Cottonwood formally objects to the Forest Service's refusal to consider this alternative under NEPA.

III. The Forest Service did not analyze the indirect and cumulative impacts of increasing the Yellowstone Club's ski terrain, and therefore it did not meet NEPA process obligations.

In its 2022 Comment Letter, Cottonwood asserted that, under NEPA, the Forest Service is required to analyze the direct and cumulative impacts of increasing the Yellowstone Club's ski terrain. 2022 Comment Letter at 3. The Forest Service responds that it is not required to analyze the cumulative impacts of this project because "[p]ast projects were not within the boundary of this project" and "[n]o future projects in the Crazy Mountains are being considered or are reasonably foreseeable."

Cottonwood replies, as it asserted in its 2022 Comment Letter, that the Yellowstone Club applying for (and receiving) an additional permit to blow polluted snow on the newly acquired and adjacent land is a reasonably foreseeable action. The Forest Service has failed to analyze the cumulative impacts of such pollution, which go beyond the "the boundary of this project" because of natural processes including (but not limited to) the flow of water once the snow melts. See 2023 Comment Consideration and Response at 3. Therefore, Cottonwood formally objects to the Forest Service's refusal to consider these cumulative impacts.

Thank you for your consideration of these objections. If you have any questions, please contact John Meyer at 406-546-0149 or john@cottonwoodlaw.org.

Sincerely,

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