



PUBLIC LAND
WATER ACCESS
ASSOCIATION INC
· EST 1985 ·

PLWA Comments on East Crazy Inspiration Divide Land Exchange (63115)

The following are the Public Land Water Access Association's (PLWA) formal comments on the USFS Draft Decision Notice, Environmental Assessment, and Response to Comments for the [East Crazy Inspiration Divide Land Exchange \(ECIDLE\)](#). PLWA's previous comments and objections raised in the initial response to the Preliminary Environmental Assessment (PEA) remain and are available on our [website](#).

Among PLWA's organizational [objectives](#) are:

- Monitoring public land sales, exchanges, and purchases to ensure that no transfers are made without full consideration of conservation and recreational values;
- Monitoring public access routes and identifying access issues; and
- Pursuing every legal and ethical avenue to protect and maintain access to public lands and waters.

The Public Land Water Access Association has over three decades of experience investigating and defending the public's access to their Montana public lands and waters. As a neutral body, the organization evaluates the history and case for access, the level of evidence in existence, and the merits of every access issue and land exchange before making a statement or taking action. It should be noted that central to this work is the belief that *public lands and waters are of inherent value, and that this value is equal to that of any private lands and waters*. Those access rights held by the public and in trust by our public agencies are also *of equal value to those held by private individuals in the State of Montana*.

The work of PLWA and of our state and federal agencies is two-fold, as private individuals are both private landowners *and* public landowners. As such, it is the opinion of this organization that it is the duty of the US Forest Service and other governmental agencies to work on behalf of the public, as it has pledged to do many times in the past, to pursue access to public lands and waters *even when this policy conflicts with the interests of private landowners*. The argument that the task could prove difficult or that the outcome is not guaranteed as a rationale for inaction is merely procedural. It constitutes neither an historic nor reasonable rationale for lack of action to secure access or protect resources that the public may legally possess if pursued.

POSITION

PLWA **opposes** the current proposal for the East Crazy Inspiration Divide Land Exchange (ECIDLE). Concerns are detailed below.

SPECIFIC COMMENTS

Draft Decision Notice – FONSI

Rationale for Decision [Page 2]

Comments:

1. The following commentary provided in this section is misleading: *“One of the complex access issues in this area is a fundamental argument about whether the existence and historic use of roads and trails through adjacent private property affords a prescriptive right of access that the Forest Service could secure. The sole means of securing or perfecting a prescriptive easement across private lands when there is not agreement with the affected landowner is through litigation, with the courts adjudicating the existence of an easement. In other cases, the Forest Service has asked the court to determine the status of a prescriptive easement as a means of securing access where the facts and the record support such a claim. However, for the trails on the east side of the Crazies in Sweet Grass Canyon and the East Trunk Trail, decades of permissive use controlled by landowners, changes in the physical location of the trails and/or limited trail maintenance records over the span of years makes it more difficult to bring a successful claim and thereby increases the likelihood of an unsuccessful claim, which would leave the Forest Service and public with less access.”* Previous documentation provided by PLWA, published in news media, recorded in court documents, and authored by the USFS’s own legal department shows non-permissive use of the East Trunk Trail No. 136 within the past decade by multiple persons. As noted at the public listening session held in Bozeman in November 2022, multiple members of the public have utilized the Sweet Grass Trail No. 122 by foot into Sections 7 through 10 without permission during the summer season of 2022. There are additional reports of this occurring as late as summer 2023. Legally there is no case that can be assured to be victorious before initiation. Therefore, it is an incredible assumption that access should be relinquished in the Sweet Grass Canyon in Sections 8 and 10 without first testing the case. It should also be noted that any change of location in a trail or road over time does not affect the legal existence of an easement.

Achieving the Need for Action [Page 3]

Comments:

1. Objective 2 states a need to *“provide for more effective and efficient natural resource management and protection of consolidated lands”*. As noted in the initial comments on the proposed PEA, a superior alternative to ceding Sections 8 and 10 [S08, T04N, R12E and S10, T04N, R12E] without reserving the sections of Sweet Grass Trail No. 122 would have been either to obtain easements on the trail portion that has been in continual use in Sections 7 and 9 and the area which has had foot and horse easements on it for the past 50 years, or to retain the parcels altogether. These high-quality sections of public land contain trail access and the areas with the highest

quality stream access. At a minimum they require conservation easements on Sections 8 - 10. Only through changes to the current proposal may the public's stream access become meaningful. With the USFS's proposed alternative, the consolidation of interior lands comes at the cost of recreation value to the public. The Sweetgrass Exchange area also compromises the environmental and conservation objectives of the entire Sweetgrass Basin.

Addressing Key Concerns from Public Comments [Page 4]

Comments:

1. Access and Recreation
 - a. The Draft Decision notes that "*Access to Sweet Grass Creek and the surrounding 200 acres will be preserved through the Parcel 2 boundary modification.*" This modification leaves the public with access to Sweet Grass Creek which is clearly inferior to what is available currently. This raises serious questions about how stream access will be interpreted seasonally. Deed restrictions in Sections 7 - 10 have the potential to affect not only access but recreational use and ecological impact in this large swath of land.
2. Preservation of Character and Limited Development [Pages 4-5]
 - a. The deed restriction for Parcels 1, 2, 3, and 4 only restricts subdivision of parcels to less than 160 acres and prohibits mineral development and exploration. This allows for things such as agricultural practices and development. With stated purposes for this area already including outfitting, tourism operations, and agriculture / cattle operations, there is the potential for environmental impacts that could negatively affect the ecology and recreational quality of public access. The USDA's own [Conservation Reserve Enhancement Program](#) (CREP) program exists because of research the department has done which concluded that cropping and cattle ranching in watershed areas have dangerous impacts to flora and fauna. This proposal would not only affect the USFS's own objectives of avoiding environmental impacts, but without a more precise conservation easement included in the environmental assessment, PLWA fails to see how public recreational opportunities would remain the same, much less decrease. The route taken by the EDICLE land trade and the finding of no impact statement seem to contradict any argument for the department's own CREP program. Potential development on private land could further impact access routes. Potential ecological impacts and downstream recreational impacts are not addressed by deed restrictions.

Trail Construction and Trailhead Improvement [Pages 9-10]

Comments:

1. Sweet Trunk Trail No. 274: PLWA is concerned to note the USFS's new preferred approach of not defending *prescriptive easements*. As such it should also be noted that the sections of trail held on public lands are not being reserved, even in locations where constant non-permissive use has occurred. This move is significant as an

estimated 50–75% of trails and access points to the National Forest in the state of Montana *may constitute prescriptive easement* rather than *perfected easement* access. If this is the case, then the USFS’s position in this land exchange represents not only a change in position from previous leadership and internal USFS legal department & consultant guidance, *but jeopardizes the public’s and the agency’s ability to access & manage up to 75% of our National Forest lands in Montana.*

SPECIFIC COMMENTS

Environmental Assessment

1.5.1 Federal Regulations [Page 8]

Comments:

Regarding Forest Service Manual 5430.2 Objective which includes “*to further resource protection and use; to meet the present and future needs of the American people.*”

1. It is PLWA’s belief that the failure to pursue perpetual access in the Sweetgrass Trail No. 122 and East Trunk Trail No. 136 area simply because of landowner objection fails to meet the objectives of 5430.2. It is unrealistic to believe that it would be possible to meet these objectives without landowner opposition seeing as to do so would be against landowner self-interest. To meet the current and future needs of the American people, a precedent must be set to benefit the public in perpetuity and restore historic public access. At the same time, it would further the agency’s ability to protect resources and access, which is at risk in the current proposal.

2.6 Issues and Alternatives Considered but Eliminated from Detailed Analysis [Table 10, Page 27]

Comments:

Of the alternatives enumerated, only those considered agreeable by the landowners are included in Table 10 (a willingness to sell or exchange certain parcels, a willingness to sell or grant a right of way or easement). The language and alternatives considered are predicated upon a perceived inequity between the public and private landowners, with the latter holding the negotiating power. While much has been made of a prescriptive easement having to be perfected in court, this has yet to be tried or accomplished, and therefore it has not been proven that access does not exist. Especially in cases where there is historic use, current or previously documented and superior access, and in cases where the owned public sections are superior to the sections being traded, alternatives *must* be considered that constitute an equal or superior outcome *for the public*. This is especially true when there remains a legal question around whether the current or historic access held by the public is superior to that which is being proposed.

3.3 Recreation – Developed and Dispersed – Trails [Page 41]

Comments:

1. This section regarding East Trunk Trail No. 136 and sections of Sweet Grass Trail No. 122 notes that *“Access to these trails is not perfected, so if no action is taken public access will remain contentions and uncertain”*.
 - a. Access to the length of Sweet Grass Trail No. 122 from the interior via Section 7 has been continuous and not in question. This action should be treated as a separate issue.
 - b. It is accurate to say if no action is taken on both these locations the access will remain unperfected in totality. However, it should be noted that there is nothing preventing the USFS from taking action to perfect access to the Sweet Grass Trail system, and there has been departmental rationale to do so in the past.

3.5 Aquatic Resources – Environmental Effects: *Action Alternative 1 – Modified Proposed Action* [Page 58]

Comments:

1. This section notes *“These Federal deed restrictions will be managed by the Forest Service and would result in potentially more aquatic habitat being conserved or protected than both the no action and proposed action alternatives because newly acquired lands would be protected by federal ownership and conveyed lands would also be protected through deed restriction”*.
 - a. As one of PLWA’s organizational objective states that we must “ensure that no transfers are made without full consideration of conservation and recreational values”, PLWA requests clarification of the aquatic habitat that would be conserved and protected in the Sweetgrass area under the current land exchange. The language included in the current document posits that it has merely the *potential* to be protected, and as such is incongruous with the document’s following statement that the exchange is therefore superior to the no action and proposed action alternatives.

SPECIFIC COMMENTS

Comment Consideration and Response

Theme 2: Alternatives [Page 4]

Comments:

1. Per the admission of the Forest Service on Page 2 of the Rationale for Decision Making in the Draft Decision Notice, the feasibility of alternatives *does not depend* on the willingness of landowners to agree to them. There is a historic precedent and legal route to address land exchanges between private entities and the USFS that involve conservation and access elements which were dismissed out of hand and in opposition to the document’s own admitted objectives.

Theme 3: Land Exchange Process [Page 7]

Comments:

1. The document states that *"In their initial proposal to the Forest Service, the Crazy Mountain landowners have indicated that the intended uses for the federal parcels once in private ownership are incorporation into their existing ranching operations, guiding services, and residential use...The deed restrictions and conservation easements the landowners have agreed to will provide the necessary protection to limit development on the parcels."*
 - a. As noted previously, the proposed deed restrictions on public Sections 8 and 10 [S08, T04N, R12E and S10, T04N, R12E] represent almost no meaningful limits on development or impact upon the sections, especially once consolidated, and represent enormous threat to the quality of recreation available to the public in that area. The lack of any conservation easements whatsoever is puzzling, especially when considering the incredible and singular habitat of the area under discussion.
2. Further, *"In addition, it would be difficult for the Forest Service to secure funding in a timely manner to respond to a ROFR option."*
 - a. As the USFS has stated repeatedly in their original documents and in the response documents published in September 2023, they have no obligation to do more than what is legally required. Securing funding for their proposal as quickly as possible at the cost of conservation objectives and public access is not only not legally required, but seems contrary to the current practice employed by the USFS in this land exchange.

Theme 4: Specific Resource Comments – Recreation and Trails, Access [Page 10]

Comments:

1. The subsection commenting on the quantity and quality of access references Sections 1.2 and 3.2 of the original document, stating that *"This project will not result in the loss of any perfected access routes or points in the Crazy Mountain range"*. However, by stating in previous sections that the Forest Service *"will not reserve"* sections of trail currently held on the East Trunk and Sweet Grass sections, this implies that there is legally held access across public land that will be relinquished as part of this trade.
2. The subsection commenting on Rein Lane references only Forest Service mapping and Travel Plan information from as recently as 2006. However, it should be noted that Rein Lane is recently added nomenclature to refer to a road which has historically been referenced in National Forest, County, and private documents as "Sweet Grass Road" and "Trail" and has been maintained at various points by the County and utilized by the Forest Service and the public [see reference documents submitted in PLWA's preliminary PEA]. If the USFS states that it has no interest in County roads which are used to access National Forest parcels in the state of Montana, this creates an untenable situation for maintenance, research, access, and economic projects in the majority of USFS sections of the state, including the Crazies.

Final Comments

PLWA would like to finally reiterate that our organization has concerns regarding:

1. The seeming preference shown by the USFS for satisfaction of private landowners in the proposal over that of public access and conservation objectives;
2. The ceding of Sections 8 and 10 [S08, T04N, R12E and S10, T04N, R12E or Sections 1 & 2 in the PEA land swap designation] and the unclear nature of the ability for deed restrictions to achieve the stated objectives of the agreement;
3. The rationale for valuing speed of process in order to obtain financial gain over the possibility of securing potential public access; the proposal's ability to maintain high quality areas of recreation and wildlife habitat currently enjoyed by the public;
4. The degree to which the current proposal undermines objective 5430.2 of the Forest Service Manual.

This proposal represents a land exchange that will signal whether we the people are willing to patiently exhaust every opportunity to maintain access to our public lands and waters, or whether the siren of financial gain can sway us towards a hurried outcome. Whether we see from our current vantage point the generations down the line, and hold fast for more than a simple deed restriction, ensuring that this isn't the last time we hear the quiet of the Crazy Mountains and the burble of Sweet Grass Creek.

There are no assured victories or easy compromises, and sometimes we must decide that we are owed more than what someone is willing to give. There is a difference between a handshake of equals and the hand of a pauper extended. PLWA believes in partnership. We believe in compromise. We believe in research and equity and integrity. **In this instance, we believe to best serve the US Forest Service's objectives, which are stated as "to further resource protection and use; to meet the present and future needs of the American people", we must object to the current proposed land exchange.**

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On this day of Friday, November 10, 2023