

Becca Smith
Pagosa Ranger District
PO Box 310
Pagosa Springs, CO 81147

Via electronic web submission at:

<https://cara.ecosystem-management.org/Public//CommentInput?Project=57154>

October 1, 2020

Dear Ms. Smith,

The following are the comments of Colorado Wild Public Lands and Rocky Smith on the proposed Valle Seco Land Exchange, as described in the environmental assessment (EA) for the project.

Colorado Wild Public Lands is a 501(c) 3 organization. Our mission is to protect the quality, size and integrity of Colorado's public lands, and our focus is advocating for the public in proposed land exchanges in our state.

Rocky Smith is an independent forest management analyst with 40 years' experience in reviewing plans and projects proposed for national forest lands, primarily in Colorado, including land exchanges.

We appreciate the agency's attempt to acquire land containing potentially important habitat for wintering big game wildlife. However, the benefit would likely be considerably less than the Forest Service states, and in any case is clouded by uncertainty. Also, the exchange of certain federal parcels to private ownership would not be appropriate. For these reasons, all elaborated below, we do not believe the proposed exchange is in the public interest, and thus should not be approved at this time.

I. THE FOREST SERVICE SHOULD NOT TRANSFER LAND OUT OF ROADLESS AREAS

To implement the proposed exchange, land in two Colorado Roadless Areas (CRAs) would be traded away. All of parcel 1 (175.2 acres) would be removed from the South San Juan Adjacent (SSJA) CRA, and 0.66 acres of parcel 2 would be removed from the Turkey Creek CRA. EA at 34.

The public expects that CRAs will be protected as roadless. Indeed, the SSJA was not recommended for wilderness designation in part because "[m]anagement under the Colorado Roadless Rule would protect roadless characteristics...". San Juan Forest Plan (Forest Plan) Final EIS at C-51. The proposed land exchange reneges on this promise.

The preamble to the Colorado Roadless Rule (CRR) stated:

Roadless areas belong to all Americans and are a resource to protect and pass on to future generations. The final rule will provide long-term management of CRAs to ensure roadless area values are passed on to future generations,...

77 Fed Reg 39577, July 3, 2012.

By trading away 175 acres of roadless lands, the Forest Service fails to fulfill the CRR's mandate to protect roadless lands in Colorado. It would trade away relatively pristine lands in management area 1, which should not be traded away. See section II below for a more detailed discussion on this issue.

Apparently attempting to compensate for a reduction in roadless acreage as a result of the proposed exchange, the Forest Service proposes to add considerable acreage to the Winter Hills/Serviceberry CRA (WH/S CRA) in alternatives 3 (4675 acres) and 4 (7425 acres)¹. See EA at 25. If the land proposed for addition to the CRA is roadless, why is it not already in one or more roadless areas and protected as roadless? While we support protecting these areas as roadless, adding areas to the CRAs that should already be in CRAs cannot count as compensation for the loss of roadless lands in the proposed exchange.

Making new roadless areas or adding acreage to existing ones would require approval from the Chief of the Forest Service under CRR provision 294.47(a). However, boundary modifications and creation of new roadless areas require a 90-day public comment period (*ibid.*), which the agency has not started for the additions proposed under alternatives 3 and 4, even though it did conduct such a comment period for the proposed reductions in roadless acreage that occur with the proposed exchange. (See the exchange description issued for scoping, dated November 13, 2019.) If the Forest Service is serious about possibly adding acres to existing CRAs or creating new ones, it must start the 90-day comment process.

Also, it is unlikely that either alternative 3 or 4 will be approved because NFSR 653 would be closed to public use well south of the southern boundary of parcel A (alternative 3) or decommissioned (alternative 4) (EA at 25). This would not fulfill part of the purpose of the exchange: to "[s]ecure public access to NFS lands". EA at 12. Under either alternative 3 or 4, additional access by road to national forest land would not occur.

Curiously, the acreage proposed to be added to the WH/S CRA is not contiguous with the existing roadless area. Both of the proposed additions are on opposite sides of Highway 84 from the existing CRA, so the proposed additions and the existing area cannot be connected. See EA Figure 6, p. 26. It would be better to create a new roadless area to place this land in the roadless system.

Trading away roadless area acreage as is proposed is not acceptable.

¹ Under all action alternatives, 529 acres, contiguous to the WH/S CRA, would be added to this CRA. EA at 23 and Figure 6 at 26.

II. THE FOREST SERVICE CANNOT TRANSFER LAND OUT OF WILD AND SCENIC RIVER CORRIDORS

The Forest Service proposes to trade away 5.7 acres in parcel 1 that is in a recreational wild and scenic river corridor. EA at 4-5. Trading this land to private interests is not appropriate.

Under the Forest Plan, 12.66 miles of the East Fork San Juan River is suitable for recreational designation under the Wild and Scenic Rivers Act. Plan at 198, 199. The analysis for the Forest Plan found that "...WSR designation is determined to be the best form of enduring protection of the ORV and free-flowing character of the stream." Plan FEIS at C-101.

This corridor of the East Fork San Juan River is assigned to management area (MA) 1 in the Plan. See *id.* at Figure 3.5, p. 184. MA 1 allowable uses are described as follows:

These relatively pristine lands are places where natural ecological processes operate free from human influences. Succession, fire, insects, disease, floods, and other natural processes and disturbance events shape the composition, structure, and landscape patterns of the vegetation. These areas contribute significantly to ecosystem and species diversity and sustainability, serve as habitat for fauna and flora, and offer wildlife corridors, reference areas, primitive recreation opportunities, and places for people seeking natural scenery and solitude. Roads and human structures are absent and management activities are limited on MA 1 lands.

Plan at 185. We do not see how trading any part of land in MA 1 complies with this direction. There is no provision in the Plan allowing for removing land in wild/scenic river corridors from public ownership. Indeed, such an action would contradict the following direction in the Plan:

Public lands are generally retained in federal ownership in order to provide long-term values. The vision for the planning area is to retain in public ownership all lands that meet the long-term needs of maintaining the integrity of contiguous natural ecosystems, river frontage, riparian areas and wetland ecosystems, recreation and open space, scenery, and clean air and water.

Id. at 137.

Even more specific plan direction states that the San Juan National Forest

should acquire or retain lands, interest in lands, or ROWs or easements:

within designated wilderness areas, other Congressionally classified areas, such as the Piedra Area and wild and scenic rivers (WSR), and WSAs;

Plan Guideline 2.18.16 at 142. While the East Fork corridor has not yet been designated, it is suitable for such designation, and its values must be protected. See the Forest Service's Land Management Planning Handbook, chapter 80, on Wild and Scenic Rivers. FSH 1909.12, section 84.

This direction makes no provision for exchanging away land in corridors around eligible rivers. See *id.* at sections 84.3 and 84.4. Also, the responsible official must determine that:

The intended use of the conveyed Federal land will not substantially conflict with established management objectives on adjacent Federal lands, including Indian Trust lands.

36 CFR 254.3(b)(1)(ii). Creating a private parcel of land in a wild and scenic river corridor that is now entirely in public ownership creates a potential conflict with management of that corridor.

It is clear from the above that the proposed exchange of land in a wild/scenic river corridor to a private owner is not consistent with the Forest Plan, nor with other agency direction. Noncompliance with the forest plan violates the National Forest Management Act, which requires that all “instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans”. 16 U. S. C. 1604(i).

In an attempt to limit activity in the portion of parcel 1 that is in the wild/scenic river corridor and would become private land, the Forest Service proposes to develop a conservation easement “to protect the wild and scenic river values associated with the East Fork of the San Juan River”. EA at 24; see also *id.* at 103. This is not sufficient to compensate for trading away national forest land within the wild and scenic river corridor. The public would have no say in the terms of this agreement. Once finalized, compliance with terms of the agreement would be completely out of the Forest Service’s control.

Trading away land in the wild/scenic river corridor is not acceptable.

III. ACQUIRING PARCEL A WOULD LIKELY BE MUCH LESS OF A BENEFIT THAN IS STATED.

In the EA, the Forest Service extols what it believes would be a great benefit in acquiring parcel A, mainly because the agency would have jurisdiction over 880 acres that contains big game winter range, including winter concentration areas and an important migration corridor. EA at 57, 58. Indeed, it is generally desirable for the federal government to acquire land containing big game winter range. A closer look, however, indicates that much of this purported benefit would not be realized with Forest Service acquisition of this parcel.

A. LIVESTOCK GRAZING

Grazing by domestic livestock will be permitted on the east side of Parcel A, occurring on approximately 393 acres.

EA at 58. This acreage would be added to an active grazing allotment.

The remainder of parcel A, 487 acres, “will be included in the Lower Valle Seco Allotment which is currently closed to livestock grazing”. EA at 58, 100. However, this allotment could be reopened in the future. Indeed, a former owner (prior to the current owner) of this parcel did lease it out for livestock grazing. EA at 100. Stock would likely not be present during the winter, but they could still consume forage that could otherwise be used by wintering big game. Stock could also have other impacts, such as compacting soils and reducing new vegetation growth.

Fencing would be installed if the Forest Service acquires parcel A. While some old fences would be removed, some would be retained. Feasibility Analysis at 9. Also, a new fence that would separate the parcel to be grazed from the one that would not, at first, be grazed, would be built through the parcel and beyond. EA at 100. These fences could restrict big game movement and might limit their access to any habitat.

“All of the [federal and non-federal] parcels are in migration corridors for mule deer, and all parcels except Parcel 8 are in migration corridors for elk.” EA at 51; see also *id.* at Figures 20 and 21, pp. 124-125. Thus some wildlife habitat would be lost as well as gained in the propose exchange.

B. INCREASED PUBLIC ACCESS

“Acquisition of Parcel A will likely increase public access and use within the parcel and on surrounding NFS lands.” EA at 57. While much of this use would probably occur in the non-winter months, it would include “high use [] during the October through November big game rifle seasons”. EA at 58.

This would reduce the effectiveness of any wildlife habitat, as the increased presence of people will tend to scare the animals away from any habitat, especially big game during hunting seasons.

C. THE UNCERTAINTY OVER MINERAL RIGHTS OWNERSHIP

The ownership of mineral rights on parcel A is quite complex and is in flux. As the Agreement to Initiate the land exchange (ATI) states, for three mineral rights on parcel A:

The chain-of-title of the mineral owners subsequent to the original deed[s]... have yet to be determined.

ATI at 8. Efforts to sort out the mineral rights are expected to continue:

Additional efforts to determine the chain-of-title and acquire the outstanding mineral rights listed above will be conducted after the signing of the ATI.

Id. at 9. Indeed, as part of the ATI, the proponent will continue to attempt to acquire mineral rights:

Upon execution of the ATI, Bootjack Ranch, LLC commits to continuing its diligent efforts to secure additional mineral rights for conveyance to the Forest Service as part of the exchange.

Ibid.

The ATI further requires that after each of four “milestones”, the proponent must furnish a “comprehensive report regarding the mineral rights acquired and the status of the mineral acquisition effort”. Ibid. One of these milestones has not occurred: release of the draft decision notice. It is unknown to us whether a third milestone, appraisal instructions, has occurred.

At the time the EA was written, 69.18 percent of the mineral rights were said to be “owned by the non-federal party” EA at 85; see also ATI at 9. Notably, the ATI preceded the EA by approximately 17 months (ATI in May, 2019, EA in September, 2020). Given the complicated chain of ownership of mineral rights (ATI at 5-9) up to the time the ATI was prepared and the fact that the private owners appeared to make no progress in acquiring additional mineral rights for 17 months since then, it is reasonable to assume that the owners are some time away from securing 100 percent of the mineral rights associated with parcel A. As such, it is not appropriate to proceed with a land exchange involving this parcel at this time.

The current owners of parcel A have acquired the oil and gas leases on this parcel. EA at 83. That means the Forest Service would acquire them with parcel A in the exchange. Would these leases be developed if the Forest Service acquires them? If acquired, parcel A would be assigned to management area 3 (EA at 24), under which mineral leasing is allowed, though sometimes with special stipulations. Forest Plan at 186.

The parcel is said to have moderate potential for the presence and development of oil and gas, but currently “there are no producing oil and gas wells or infrastructure” on the parcel. Id. at 83, 84. If any development occurs, the associated roads, clearing of vegetation for well pads and appurtenant facilities, storage and/or production of toxic chemicals, noise from drilling and production, etc. would greatly reduce both the extent and the effectiveness of any wildlife habitat.

Exactly what mineral rights, if any, are retained by the current owners of Parcel A and the value of all mineral rights involved will be important to know with certainty prior to the exchange being approved because: a) these rights will affect the appraisal of the value of parcel A, which in turn affects the comparison of values of the lands to be traded and the determination of public interest; b) the public has a right to know what mineral rights will be acquired with parcel A, as any development of these rights would affect public recreational use and enjoyment of the property once the Forest Service acquires it, if it does; and c) development of mineral rights, especially if any remain with their current private owner, would reduce wildlife habitat and would likely also adversely affect the use of habitat in areas surrounding these developments.

We strongly recommend the Forest Service not acquire any lands without also getting 100 percent of all mineral rights. The agency should not create a split estate situation.² This would create confusion for public users of parcel A if it is acquired by the federal government. The EA aptly notes the possible problems with private mineral development:

Private oil and gas development has the potential to create management conflicts with the protected resources on the adjacent federal land, especially wildlife habitat, due to different regulatory requirements for federal and non-federal mineral management.

Id. at 85.

For parcel A to have anything close to the value the Forest Service believes it would have in public ownership, the oil and gas leases must be withdrawn or cancelled. In other words, the Forest Service must acquire them or in any case take steps to ensure they will never be developed.

Before proceeding further with the exchange, the Forest Service must know, and disclose to the public, the exact status and value of all mineral rights potentially involved in the exchange. For the oil and gas leases, the agency must disclose: a) the possibility of exploration and development on these leases, b) what areas of parcel A and any surrounding land are covered by the leases, and c) what stipulations are on the leases and where they apply.

D. THE FEDERAL PARCELS TO BE EXCHANGED HAVE CONSIDERABLE PUBLIC BENEFIT. In addition to the benefits for roadless lands (section I above); wild and scenic river corridor (section II above); and wetlands, riparian, and perennial stream channels (section IV below); most of the federal parcels that would be exchanged to private ownership have considerable public benefits for river access, wildlife and plant habitat, vegetation (including old growth), cultural resources³, and riparian and wetland areas. These benefits are detailed in separate comments by Colorado Wild Public Lands, which we endorse.

It would not be worth giving up these benefits to obtain parcel A.

IV. WETLANDS, RIPARIAN AREAS, AND PERENNIAL STREAM CHANNELS

Looking strictly at the acreage of wetlands involved in the exchange, there would appear to be a net gain of wetland acreage. EA at Table 14, p. 73. However, the wetlands on parcel A, including the largest one, appear to be drying up. Wetland-Floodplain Report at 16. In fact, “it appears

² Note that one of the factors that must be considered in determining whether the public interest “will be well served” as required is “consolidation of split estates”. 36 CFR 254.3(b)(1). By implication, creating a split estate would not be in the public interest.

³ Disturbingly, after the cultural sites on parcel 7 are recorded, they “may be conveyed with no adverse effect to the properties”. EA at 81. In other words, they could be destroyed by the new private owners after conveyance, but to the Forest Service it would still be “no adverse impact”. This likely violates the National Historic Preservation Act, and is not acceptable.

overall that the parcel may be transitioning to drier conditions for unknown reasons”. Ibid. Therefore the gain of wetlands from acquiring parcel A is less than the numbers indicate, and could disappear entirely over time.

There would also be a loss of riparian area and perennial stream channels. EA at 73. “Parcel A does not contain any perennial streams or fish habitat.” Id. at 54. Parcel 1, to be traded away, does have perennial streams and some fish habitat. Id. at 55. Thus the action alternatives would result in a “decrease in aquatic habitat for trout species”. Id. at 57, 59, 60.

With the proposed exchange, the Forest Service would trade away parcel 1, which has perennial streams and riparian areas, in exchange for dry upland parcel A. Overall, for wetlands, riparian areas, and perennial stream channels, there would be no gain to the public from the exchange.

V. THE FOREST SERVICE SHOULD NOT ALLOW PRIVATE OWNERS TO ACQUIRE NATIONAL FOREST LANDS THEY HAVE ILLEGALLY USED

Part of the reason, or maybe excuse, for this land exchange seems to be that: a) the owners of parcel A have threatened to turn the parcel into an elk farm (EA at 100) and other facilities (id. at 22); and b) that some of the federal parcels already have roads and other infrastructure, some of it unauthorized, that are used by the land exchange proponents. There are five unauthorized roads on parcel 1 (EA at 4), one on parcel 5 (id. at Figure 12, p. 116) and several such roads on parcel 11 (id. at 7 and Figure 14, p. 118⁴). Parcel 9 has an unauthorized ditch. Id. at Figure 13, p. 117.

It appears that over the years, the Forest Service neglected to monitor use of some of the federal parcels now proposed for exchange. The result has been illegal construction and use of roads and other facilities. Exchanging these parcels to the owners of adjacent land that illegally constructed roads would establish a bad precedent by saying to owners of land near or adjacent to national forest land: conduct unauthorized activities on federal land and the Forest Service will trade the land to you.

It would also set a bad precedent to respond to a threat to develop a parcel of land by trading away parcels with illegal roads to acquire a private parcel where this development is possible. The private owners of parcel A acquired it specifically for the purpose of a land exchange. Feasibility Analysis at 1, 9. Now they hold it hostage by threatening to develop it until they get what they want in an exchange.

Instead of exchanging the parcels with infrastructure on them to private interests, the Forest Service should close and obliterate the roads and ditch in question or force the private land owners who use the illegally-constructed facilities to obtain legal authorization for their use.

⁴ Figure 14 shows an unauthorized road running most of the length of the parcel, including a half-mile or so portion that is immediately adjacent to the entire length of parcel 11’s border with the Piedra Area Adjacent CRA. Use of this road could provide easy, illegal motorized entry into the CRA, and it should be promptly closed and obliterated.

V. APPROVING THE LAND EXCHANGE WOULD BE PREMATURE BECAUSE THE EXACT ACREAGES OF SOME OF THE PARCELS HAS NOT BEEN DETERMINED

If the land exchange were approved now, neither the Forest Service nor the public would know exactly what land would be exchanged to the private proponents:

The legal description and acreage of Federal Parcels 3, 5, 7, 8, 9, and 11 are approximate at this time. A cadastral survey needs to be completed before these figures can be finalized.

EA 2, fn to Table 2; see also ATI at 11-13.

This is not acceptable.

As discussed above, the final mineral rights ownership has not been determined. Add to that the uncertainty over the exact configuration and acreage of most of the federal parcels proposed for exchange, and it becomes clear that the proposed exchange is at best premature, as the public and the Forest Service do not know exactly what the government proposes to give away and acquire.

CONCLUSION

The proposed land exchange is not in the public interest, thus it cannot be approved. It would not comply with the forest plan, and therefore would violate the National Forest Management Act. While there may be some value in acquiring parcel A, increased use by the public, livestock, and possibly mineral development would reduce this value considerably. And to acquire this parcel, federal parcels with important resource values, including land in Colorado roadless areas and a wild/scenic river corridor, would have to be traded away, which is not acceptable.

The proposed land exchange is at best premature, with uncertainties over mineral rights ownership and the exact configuration and acreage of the federal parcels to be exchanged.

Sincerely,

Rocky Smith, Independent Forest Management Analyst
1030 N. Pearl St. #9
Denver, CO 80203
303 839-5900
2rockwsmith@gmail.com

James Katzenberger, Board Member
Colorado Wild Public Lands
PO Box 1772
Basalt, CO 81621
Coloradowildpubliclands@gmail.com