

November 30, 2009

Carol "Kniffy" Hamilton, Forest Supervisor
Bridger-Teton National Forest
PO Box 1888
Jackson, WY 83001

Re: Comments on draft EA on proposed sale of public land on North Cache

Dear Supervisor Hamilton:

The Jackson Hole Conservation Alliance would like to supplement the views we have already expressed on the proposed sale of Forest Service property on North Cache Street in Jackson, WY.

We believe that the community should support the Forest Service in its effort to fund the reconstruction of the Bridger-Teton National Forest Supervisor's headquarters on North Cache in Jackson, WY.

But we also believe there must be a better way than selling off our birthright -- public land passed along to our generation by generations past -- just to pay for deferred maintenance.

Based on the documentation that has been released so far, it appears to us that a strong case could be made that it would be illegal for the Forest Service to push ahead to sell the public's land under Alternatives 2, 3 or 4. We believe that if all the facts were assembled, the full record would convincingly demonstrate that the Forest Service Regional Office in Ogden, Utah, has failed to follow the requirements of the Forest Service Facilities Realignment and Enforcement Act of 2005 (FSFREA) and should halt the conveyance process now.

More specifically, we believe the full record would show that Regional Office has ignored the Forest Service's legal obligation to evaluate a "no action" alternative before taking "irrevocable action" that makes the "no action" alternative impossible to adopt.

We base this contention on a study of internal Forest Service documents that have been obtained by a member of the Alliance from Forest Service files through the Freedom of Information Act (FOIA) --especially covering actions by the Regional Forest Service Office in Ogden, Utah between April and October, 2009.¹

For the sake of continuity, let us begin at the beginning.

¹ A member of the Alliance, Joe Albright, obtained the documents described in this letter through FOIA. Nothing in this letter reflects the policies, opinions or judgments of any other organization with which he may be associated. He was acting out of his interest in this issue as a private citizen for the past three years.

The Forest Service Failed to Comply with NEPA in 2007

A lawyer specializing in NEPA, Geraldine E. Edens of McKenna Long & Aldridge in Washington, D.C., wrote the following to Regional Forester Harv Forsgren on February 7, 2008:

It is evident that the Forest Service has made the decision to convey all or part of the 15.2 acre Supervisor Office parcel without fulfilling the Forest Service's legal obligations under the National Environmental Policy Act (NEPA). We request that the Forest Service withdraw its decision to convey the Supervisor Office, prepare an Environmental Assessment that analyzes the impacts of commercial development on all or part of the Supervisor Office parcel, and if a fully informed decision to convey the Supervisor Office is made, then notify Congress pursuant to FSFREA.

Ms. Edens' letter proceeded to spell out in meticulous detail why she reached the legal conclusion that the Forest Service "has made a decision to convey the Supervisor's Office many months before it even initiated its NEPA process."

Ms. Edens' letter contained the following paragraph of legal analysis under the heading "The Forest Service Has Failed to Comply With NEPA":

It appears that the Forest Service fails to appreciate that NEPA sets forth "action-forcing" procedures that require agencies to take a "hard look" at the environmental consequences of its actions. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). Proper timing is one of NEPA's central themes. *Save the Yaak Comm. V. Block*, 840 F.2d 714, 717 (9th Cir. 1988). NEPA requires that an Environmental Assessment (EA) or environmental impact statement (EIS) be "prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made." 40 C.F.R. 1502.5 (1987). The phrase "early enough" means "at the earliest possible time to insure that planning and decisions reflect environmental values." *Andrus v. Sierra Club*, 442 U.S. at 351 (1979); *see also* 40 C.F.R. 1501.2. The Supreme Court has stated that Environmental Assessments that inform government agency actions "shall be prepared at the feasibility analysis (go-no go) stage." *Andrus*, 442 U.S. at 351-352 n.3.

The Forest Service Compounded its Failure to Comply With NEPA in 2009

Despite the request of Ms. Edens, the Regional Forest Service office moved relentlessly ahead in 2008 and 2009 to complete the sale of the public land on North Cache, continuing to sidestep what we believe were its obligations under NEPA and FSFREA.

Under FSFREA, the Forest Service is required under section 4) (C) to take the following action before any conveyance of public land:

“evaluate the alternative of not conveying the administrative site, consistent with the National Environmental Policy Act of 1969.”

Despite the admirably clear language of this requirement, internal Forest Service documents appear to us to demonstrate that the Bridger-Teton National Forest Supervisor was given written instructions from the Regional Forest Service Headquarters in Ogden, Utah which have made it impossible for her to genuinely evaluate the “no action” alternative that would result in not selling the public land on North Cache.

Specifically, on June 23, 2009 and September 2, 2009, she was instructed in writing to move forward with contracting for the construction of another Forest Service building in Big Piney, Wyoming, 100 miles from the Bridger-Teton Supervisor’s Office headquarters in Jackson. In each of these instances, she was instructed by the Regional Office to which she reports that she would be expected to pay for the Big Piney building out of the future proceeds from "conveyances" of Forest Service administrative sites in the Bridger-Teton National Forest. In effect, this instruction meant only one thing: the Bridger-Teton National Forest Supervisor is hereby instructed to sell at least some of the 15.2 acres of public land constituting Bridger-Teton Supervisor’s headquarters property. The reason she was left with no other source of funds for Big Piney: there was only one administrative site that she was authorized by Congress to consider selling – the Bridger-Teton Supervisor’s headquarters. She was told she had to pay for Big Piney, and she was left with only one valuable source for raising that money: selling the public land on North Cache in Jackson.

When the Forest Service’s EA on the Bridger-Teton conveyance was finally released on October 28, 2009, it purported to contain the FSFREA-mandated evaluation of the “no action” alternative of not selling the Bridger-Teton Supervisor’s Headquarters.

Yet by the time of the release of this Environmental Assessment, the Forest Service Regional Office had already signed a contract for \$1,158,998.78 to construct the building in Big Piney. Also by then, an Idaho Falls construction company had already broken ground in Big Piney. From this sequence of events, it appears to us that the Forest Service’s Regional Office in Ogden, Utah, had already turned this supposed “evaluation” of the no-action alternative into a sham.

Timeline of the Elimination of the “No Action Alternative”

In order to substantiate the factual underpinnings for the previous section, let us present a chronology based on internal Forest Service documents found on www.fedbizopps.gov or released by the Forest Service under FOIA on November 20 and 21, 2009. The Forest Service has not completed the document search required by FOIA, and further facts may well be added to this chronology when the remaining Forest Service documents are released.

July 10, 2008 -- A team of Bridger-Teton National Forest officials led by then-Deputy Forest Supervisor Michael L. Balboni prepares a "Total Forest Priority List" showing 32 construction and repair projects the Forest would like to carry out, using funds to be derived from the proposed sale of public land on North Cache. The Big Piney District Ranger's building project was listed as 13th-highest on the priority list. The Bridger-Teton list showed the new Supervisor's Headquarters in Jackson and all related support buildings and employee housing as having higher priority than Big Piney. (Revised draft by S. Haydon, 7/10/2008)

August 11, 2008 -- Balboni's team completes a "Preliminary Project Analysis" on the proposed sale and reconstruction of the Bridger-Teton National Forest Supervisor's Office and attaches the July 10, 2009 priority list showing the Big Piney building as having 13th priority. In a section called "Purpose and Need," the document includes one bullet referring to the advantages of the possible construction of the Big Piney District Ranger's Office if sufficient funds are available: that the current ranger's office is in a leased building whose lease is about to expire. By building a new building on Forest Service property in Big Piney, it would be possible to "eliminate the lease costs." (Approved by Michael L. Balboni, August 11, 2008.)

April 10, 2009 – The Regional Forester in Ogden, Utah decides to raise the priority of the Big Piney construction project in order to avoid renewing the lease and incurring long-term lease costs. He does so by forwarding to the Forest Service Washington Office a “reprogramming approval request” that seeks funding for construction of a Forest Service District Ranger’s Building in Big Piney, Wyoming even though it is not in the Forest Service's 2009 budget. The reprogramming request asks Washington’s approval to pay for the Big Piney project by borrowing funds budgeted by the Forest Service for the Humboldt-Toiyabe National Forest in Nevada and California. (Regional Forester Harv Forsgren to Chief of Forest Service in Washington, April 10, 2009)

June 17, 2009 – While Washington is considering the reprogramming request, Forest Service’s Region 4 Idaho-Wyoming Acquisition Service Center in Idaho Falls, ID, invites contractors to bid on the proposed construction of the Big Piney District Ranger’s Office building by August 4, 2009 at 3 PM. The notice said “the estimated price range is between \$1,000,000 and \$5,000,000.” (Solicitation Number AG-02NV-S-09-0059.

June 23, 2009 – Keith Simila, director of engineering of Forest Service Region 4 in Ogden, Utah, writes a two-page letter to the Bridger-Teton National Forest Supervisor containing this instruction: “Please move forward with contracting the project...” In the same letter, Mr. Simila spells out the Regional Forester’s commitment to fund the Big Piney project out of funds to be obtained later from the sale of Forest Service land within the Bridger-Teton National Forest. “The reprogramming approval request sent to the WO and

Congress requires we reimburse the borrowed funds back to the projects on the H-T NF that were deferred. It is intended that the conveyance proceeds from the B-T NF be used for this purpose sometime in FY 2010 or beyond.” (Keith Simila to Forest Supervisor, Bridger-Teton NF, June 23, 2009)²

July 2, 2009 – Forest Service Idaho-Wyoming Acquisition Service Center in Idaho Falls, Idaho, issues a 60-page solicitation for the Big Piney construction project. The document states that construction “will begin” on September 14, 2009. (Solicitation Number 02NV-S-09-0059)

July 30, 2009 - Forest Service Washington Office notifies Regional Office in Ogden, Utah, that congressional officials in Washington, D.C. have turned down the Regional Office’s reprogramming request. “The bottom line is that the Hill is not willing to approve this,” explains Forest Service budget coordinator Kathleen Atkinson from the Washington Office. “The feeling is that there is no compelling reason to allow the reprogramming,” especially since Big Piney was a new project not included in the Forest Service’s FY 2009 budget. (Kathleen Atkinson email, July 30, 2009)

August 4, 2009 – Deadline for bids for Big Piney project is delayed by 10 days while officials in Regional Office consider what to do about Washington’s denial of the reprogramming request.

August 14, 2009 – Bids for Big Piney project are received.

August 25, 2009 – Regional Director of Engineering Keith Simila reports to others in the Forest Service Regional Office in Ogden, Utah: “The bids came in very low on this office contract. We may have enough conveyance proceeds here in R4 without borrowing from the WO.” He reports that he is checking with officials of the Caribou-Targhee National Forest “to see if they’d be willing to swap this for a FY11 CIP project to make the C-T (i.e. Caribou Targhee) whole on borrowing their funds. If they are agreeable, then we may be in a position to award this contract.... I’ll try to bring this to closure tomorrow if possible.” (Keith Simila email to Linda Blubaugh and other officials in the Forest Service Regional Office in Ogden, Utah.)

September 2, 2009 – Regional Forester Harv Forsgren writes a letter to Bridger-Teton Forest Supervisor explaining and documenting decisions that the Regional Office had made on funding the Big Piney Office construction. Forsgren’s letter repeats the Regional Office’s position that the Bridger-Teton National Forest must repay other National Forests for the funds spent on construction in Big Piney. Forsgren's letter appears to leave the Bridger-Teton Supervisor no wiggle room: “It is understood that the B-T NF will return the

² “H-T NF” is an internal Forest Service abbreviation for the Humboldt Toiyabe National Forest; “B-T NF” is an abbreviation for “Bridger-Teton National Forest”; “WO” is an abbreviation for “Washington Office.”

borrowed funds once other conveyances on the forest are complete.” (Harv Forsgren to Bridger-Teton Supervisor, September 2, 2009.)

September 2, 2009 – Forest Service Regional Office releases \$1,159,000 to Bridger-Teton National Forest for construction of the Big Piney District Ranger’s Office. An internal Forest Service budget document shows the funds for the construction of the Big Piney project are now coded “EXSC,” which means the funds come from the conveyance of administrative sites under FSFREA. (R-4 Budget Assignment Document, Request to Move Funds, Number ENG-9-55, signed by Christina Province, Budget Officer)

September 17, 2009 – Forest Service Idaho Wyoming Acquisition Service Center in Idaho Falls, Idaho, announces the award of a \$1,158,998.78 contract for the construction of the Big Piney District Ranger’s Building to SE/Z Construction, LLC, of Idaho Falls, Idaho.

October 27, 2009 – Big Piney office is reported to be already under construction. (Jackson Hole News and Guide, October 28, 2009)

October 28, 2009 – Bridger-Teton National Forest Supervisor’s Office releases Environmental Assessment on proposed sale of public land on North Cache Street in Jackson. The report purports to contain an evaluation of the “no action” alternative of not conveying the land – even though the Forest Service Regional Office has already begun to spend \$1,158,998.78 at Big Piney out of funds anticipated from the conveyance of Forest Service land in the Bridger-Teton National Forest.

Our judgment, based on this timeline, is that once the Bridger-Teton National Forest Supervisor received and accepted the June 23, 2009, instruction from Regional Forest Service official Keith Simila, she no longer had a genuine opportunity to “evaluate the alternative of not conveying the administrative site,” as she was required to do under FSFREA and NEPA. It appears to us that from that day onward, any purported evaluation by the Forest Service of the required “no action” alternative was a hollow bureaucratic exercise because of the Regional Office’s preemptive actions.

It is also our judgment that Regional Forester Harv Forsgren’s September 2, 2009, letter confirmed that the Bridger-Teton National Forest Supervisor was obliged to sell the Bridger-Teton Supervisor’s Office property in order to repay other National Forests for money borrowed from their budgets to pay for the Big Piney project. The Bridger-Teton National Forest has only one pending conveyance project large enough to generate sufficient funds to absorb the cost of the Big Piney office building – the proposed sale of the Bridger-Teton Supervisor’s Office property.

Taken together, the Simila and Forsgren letters mean to us that the Bridger-Teton Forest Supervisor had been deprived by September 2, 2009, of any real chance of following

FSFREA's mandate that she must evaluate the "no action" alternative of not selling the Bridger-Teton Forest Supervisor's Headquarters property.

These two letters were followed by two "irrevocable actions" that appear to have rendered meaningless any evaluation in the EA released October 29, 2009 of the "no action alternative. The first was the award of a binding government construction contract to SE/Z Construction. The second was the actual start of construction a few weeks later.

If that conclusion were to hold up after all the facts and documents were assembled, we believe a strong case could be made that the Forest Service is obliged now to halt the process of selling the Bridger-Teton Supervisor's Office parcel in its tracks.

Sincerely,

Cindy Harger
Interim Director

Louise Lasley
Director of Public Lands

Anthony Stevens
Board Chair