

PROTECT THE PUTT-PUTT

A COMMUNITY ACTION ORGANIZATION

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Position Statement

Subject: Request for 180 day stay of NEPA process by the Bridger-Teton National Forest Service for its Jackson Administrative Site Land Conveyance

Date: August 8, 2009

We are a community organization deeply disturbed by the flawed planning and decision-making process employed to date by the Bridger-Teton National Forest for its project known as the Jackson Administrative Site Land Conveyance. Even more alarming to us is the flawed BTNF planning and decision-making process advocating expenditure of public funds generated by this conveyance for housing construction on virgin forest at its Nelson Administrative Site. Such construction will (1) destroy valuable wildlife habitat, (2) disrupt human enjoyment of this popular recreation area at the Putt-Putt trailhead, and (3) contribute to community sprawl in a location that is already overburdened with development.

Accordingly, we have requested a 180 day stay from the BTNF in its National Environmental Policy Act (NEPA) process for this project for the following reasons:

1. This delay is necessary to allow for meaningful public input as NEPA requires.

NEPA requires federal agencies to use “all practicable means and measures” to fulfill their responsibilities under the Act. 42 USC §4331(b), 1969. The BTNF’s NEPA responsibilities include identification of people or organizations who are interested in the proposed actions. CEQ NEPA Regulations, 40 C.F.R. §1501.7. Such interested people and organizations must have the opportunity to “provide meaningful input” prior to a NEPA decision. NFS Regulations, 36 C.F.R. §215.1, *and see* CEQ NEPA Regulations, 40 C.F.R. §1501.4(b), 1506.6(b). Such meaningful public input plays an indispensable role in the NEPA process.

NEPA requires decision-makers to be fully informed of the environmental consequences of their decisions. And, members of the public must have access to relevant facts about this project and its potential impacts that are not otherwise available to decision-makers. Such information serves to educate decision-

makers of environmental effects that they may have misunderstood or failed to recognize. Public input can help reshape projects such as this to minimize their adverse environmental effects. While we are not sophisticated at it, we fervently desire to be fully engaged in this process. This delay will allow us time to assimilate and present important information ensuring the most well-informed decision “practicable”, as NEPA requires. Accordingly, the BTNF should stay this process for 180 days.

2. Public input so far has been stifled, misunderstood and/or ignored by the BTNF.

The public plays an indispensable role in the NEPA process. As set out herein above, public comments inform agencies of environmental impacts that they may have misunderstood or failed to recognize and often provide valuable insights for reshaping proposed projects to minimize adverse environmental effects. The public also serves as a watchdog ensuring Federal agencies fulfill their responsibilities under the law. Public participation in the NEPA process should allow citizens to communicate with and influence government actions that directly affect their health and well-being.

At public meetings, BTNF officials have evaded sincere questioning by concerned citizens. One BTNF decision-maker stated that he/she was unaware of any negative public comments about the Nelson project, which is not correct. Another BTNF official told the joint meeting of the Town Council and County Commissioners that citizens have reached virtual “consensus”, acknowledging “only two dissenters” on the Nelson redevelopment, which is not true either. This approach is contrary to both the spirit and letter of the NEPA requirements. It invalidates this process.

Moreover, the Nelson site plan presented to the public over the last three weeks does not accommodate previous public input about environmental impacts in this area. It ignores reports by neighbors and trail users of wildlife that inhabit the area. It ignores input about the social, cultural and economic impacts. It ignores concerns about the aesthetic impacts. This plan reinforces the belief that BTNF officials have misunderstood and/or ignored public input. This delay will allow us time to compare and contrast previous public input with agency actions so far. It will allow the BTNF time to get it right.

Accordingly, the BTNF must stay the NEPA process at least 180 days in order to allow us an opportunity to correct these defects in the process and to ensure that the BTNF Supervisor can reach a fully informed decision, which NEPA requires.

3. The NEPA planning for the Nelson site moved too quickly to allow meaningful public input.
 - a. BTNF planning rushed along in the last three weeks leaving citizens feeling railroaded.

Although the scoping documents appeared some time ago, the full extent of the Nelson development plan was revealed only in the last three weeks. During those three weeks, the Nelson development went from vague ideas to real architectural drawings. At public meetings in the last three weeks, when the BTNF revealed this full set of plans for the first time, citizens complained that this process moved too quickly. Citizens asked the BTNF to slow the process in order to allow for meaningful public input. Citizens want to be engaged; they do not want to be railroaded.

- b. The BTNF out-sourced planning for the Nelson site that occurred in the 11th hour.

BTNF planners did not allow adequate time to address environmental impacts of construction on the Nelson site. BTNF's traffic engineer gave his one and only report within the last few weeks. His conclusions were based entirely upon a "best guess". He conducted no study of the environmental impacts created by traffic at the site and surrounding areas. He collected no actual data in the area. He used vague generalities to refute public concerns about traffic issues raised the one recent meeting where he spoke. Whatever understanding of traffic issues the BTNF does have from this quick look deserves meaningful public input prior to decision, which requires more time.

The BTNF's biologist had one month to do a walk-around of the Nelson site. He recognized the inadequacy of his brief efforts to gather meaningful information and admitted that his conclusions are largely based upon assumptions, not actual observations. He acknowledged the seasonal variations in wildlife use of the area, which are not predictable from his walk-around in June. His lack of actual data pales in comparison to the enormous year-round experience of long-term neighbors and trail users in the area. NEPA's "meaningful" input requirement will be met only when all this information from various sources is compared and correlated, which requires more time.

- c. Last-minute architectural plans emerged for the Nelson site less than two weeks ago.

BTNF architects and designers presented their plan to the public on July 27th, less than two weeks ago. This occurred right at the conclusion of a public meeting, and no opportunity for public input occurred since. The next week, the BTNF presented its plan for the Nelson site to a joint meeting of the Town council and County commissioners for final approval there.

This “new” plan is a radical departure from the vague ideas discussed by BTNF officials up until three weeks ago. The public has a strong interest in the aesthetic, cultural, economic, social, and health effects of this “new” plan, and NEPA requires that the BTNF consider these effects. 40 C.F.R. §1508.8, *id.* at §1508.14. These effects are only discernable now that a specific plan is available.

Now that a specific architectural plan is proposed, NEPA requires that the BTNF allow adequate time for comment. Less than two weeks has passed since a few of us saw this plan for the first time. It is not published anywhere, so many other interested citizens have not even seen this plan. Without more time for public dissemination and input, the BTNF has circumvented the NEPA requirement for meaningful public input by waiting until the last minute to present these architectural plans. We want to assist with dissemination and input, but we need more time.

Accordingly, for all the foregoing reasons, the NEPA process has moved too quickly for meaningful public input, and a stay of 180 days is necessary to fully comply with NEPA requirements in this regard.

4. The NEPA process is flawed and must be fixed.
 - a. The NEPA planning process is flawed because its outcome was preconceived.

Government projects such as this have profound effects on the environment with important consequences to all Americans. NEPA obligates the BTNF to objectively consider these effects. Such unbiased weighing of these effects by public officials must occur *before* taking action. NEPA’s requirement for prospective environmental impact analysis is not an impediment to responsible government; it is a prerequisite for it.

In a recent public meeting, a BTNF official said that “there was already a plan” for the Nelson site. These surprises no one since the plan emerged so quickly, from nothing to completion with three meetings over two weeks time. So if there was already a plan, public input was meaningless, professional input was contrived,

and we were all deceived. This abrogates the basic tenet of NEPA, which requires prospective, unbiased analysis. This flaw in the BTNF process must be fixed.

- b. The NEPA process is flawed because the BTNF has failed to document its need for this program.

General assertions by the BTNF that it needs bigger and better offices are unsubstantiated by objective data. General assertions by the BTNF that it needs more housing for its employees, more than doubling its current capacity as called for in this plan, are unsubstantiated by any solid evidence. BTNF employee comments to the contrary indicate no such needs exist. Failure to adequately document its need for this program is a fatal flaw and must be corrected.

- c. The NEPA process is flawed because the BTNF has failed to study less intrusive alternatives.

Analysis of alternatives to the BTNF's proposed course of action is the heart of meaningful environmental review under NEPA. 42 USC §4332(c)(iii) and (e). Review of responsible alternatives ensures that the BTNF systematically evaluates the potential effects of its decisions and ensures that it properly protects the environment while implementing its missions.

The BTNF has failed to properly analyze its alternatives to this plan. Such alternatives include, for example, funding sources other than this conveyance, meeting its putative needs for office space and housing with less funding, and limiting construction to within the existing footprints of development. Moreover, the BTNF has not properly considered the "non-action" alternative. Failure to adequately study less intrusive alternatives to its proposal is another fatal flaw and must be fixed.

- d. The NEPA process is flawed because the BTNF has failed to study all significant direct, indirect and cumulative effects of this project.

Environmental effects under NEPA, which the BTNF must address, include (1) direct effects, (2) indirect effects and (3) cumulative effects. 40 C.F.R. §1508.8. Direct effects, which are caused by the action and occur at the same time and place, are significant with this project. Such direct effects of this project are immense and include, for example, increased noise, air and light pollution, disruption to wildlife habitat, and obliteration of the natural landscape.

Indirect effects of this project are more insidious, but no less important. Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Such indirect effects of this project are immense and include, for example, changes in neighborhood character, off-site parking and traffic problems, increased trial use in the area and increased burdens on town infrastructure for sewer and water, police and fire, and recreational and educational facilities.

Cumulative impact is the impact on the environment which results from incremental impact of the action when added to past, present and future actions, regardless of what agency or person undertake those actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Id. at* §1508.7. Such cumulative impacts of this project are immense and include, for example, the wide-ranging effects on-going and future development in adjacent neighborhoods. These impacts are predictable and certain to occur.

This NEPA process is flawed because the BTNF has failed to study all significant direct, indirect and cumulative effects of this project, and this must be rectified.

- e. The NEPA process is flawed because the BTNF has failed to consider mitigation of its environmental impacts.

Mitigation of adverse environmental effects includes (1) avoiding the impact altogether by not taking a certain action or parts of an action, (2) minimizing impacts by limiting the degree of magnitude of the action and its implementation, (3) rectifying the impact by repairing, rehabilitation or restoring the effected environment, (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action, and (5) compensating for the impact by replacing or providing substitute resources or environments. *Id. at* §1508.20. This project has many obvious opportunities for mitigation, which the BTNF has not considered. This is another flaw in the NEPA process, and it must be fixed.

- f. The NEPA process is flawed because the BTNF fails to recognize the "significant impact" on the environment from this project, which requires a full Environmental Impact Statement.

NEPA requires that, when the proposed action *potentially* could "significantly impact" the environment, it must prepare a full Environmental Impact Statement. 40 USC 4332(2)(c). "Significantly", as used in the statute requires both considerations of (1) context and (2) intensity. Context means that the

significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Both short- and long-term effects are relevant.

Intensity refers to the severity of impact, which includes, *inter ali*, the following considerations: (1) impacts that may be both beneficial and adverse; a significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial; (2) the degree to which the proposed action affects public health or safety; (3) unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas; (4) the degree to which the effects on the quality of the human environment are likely to be highly controversial; (5) the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks; (6) the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; (7) whether the action is related to other actions with individually insignificant but cumulatively significant impacts; significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment; (8) the degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973; and (9) whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment. 40 C.F.R. §1508.27.

This project has “significant” environmental impacts, both contextually and in intensity, which require a detailed environmental analysis. The BTNF’s failure to recognize the need for a full EIS is a fatal flaw and requires correction.

Accordingly, for all the foregoing reasons, the NEPA process is flawed and must be fixed. A stay of 180 days is necessary to allow us time to better clarify these flaws and to better engage the BTNF to correct the flaws.

5. This delay allows the BTNF time to respond to our FOIA request, which will contribute to a better public understanding of this project.

In order to effectively participate in the NEPA process, citizens must be well informed. They must understand agency actions, and the rationale behind them. Our pending Freedom of Information Act request will allow us to be so informed and allow us to better provide “meaningful input” pursuant to NEPA requirements for this project. Such FOIA request became relevant only after specific plans for the Nelson site emerged in the last three weeks. Now, we anticipate that response to our request containing *inter ali* anonymous comments, internal memos, communication with other agencies and outside planners, and other

work product from the U.S. National Forest, its Intermountain Regional office and the BTNF will reveal information that is highly relevant to this NEPA process. Until we obtain such information and have time for review, our input will be incomplete. Accordingly, a 180 day stay is required to allow the BTNF time to respond to our FOIA request and allow time for meaningful public input, which NEPA requires.

6. This delay may prevent future costly appeals and lengthy litigation.

Citizens denied “meaningful input” and processes that are flawed inevitably create fodder for costly appeals and lengthy litigation. A better approach is to get it right the first time. Accordingly, we insist upon a 180 day delay in order to engage the BTNF with constructive input, to correct previous deficiencies in its process, and to ensure a better informed decision.

7. This delay will allow us time to preserve all our issues for appeal from an adverse decision.

In order to protect public interests in this matter, we need time to preserve our issues for appeal. If the BTNF fails to follow the law, we are entitled to administrative and judicial review. Accordingly, we demand a 180 day stay in the NEPA process in order to adequately present to the BTNF all our relevant issues, and thereby reserve our right to appeal any adverse decision on all relevant issues. 36 CFR pt. 215.11 (a) (2). Failure to allow us adequate time should be construed as an intentional maneuver to circumvent our rights in this regard.

8. This delay in the NEPA process will have no negative impact on the project, which should be delayed for other reasons.

The BTNF is required to make “highest and best use” of its public resources. Conveyance of our public land at this time would be a waste of valuable resources because the local economy is not conducive to real estate sales of this magnitude at this time. Local developers told the BTNF this is the wrong time to precede with this conveyance. Accordingly, this delay is appropriate for economic reasons.

Moreover, the Town and County are currently revising the Comprehensive Plan for Development. The purposed revisions to that plan contain far more “favorable” treatment of commercial development of the land that is the subject of this conveyance and its adjacent land. Until such revisions are complete, conveyance of this land would not respect the ongoing Town and County process to revise its Comprehensive Plan for Development. And, a delay in this

conveyance will, at the very least, allow the Town and County to legislate a more favorable disposition for this land. And therefore, a hasty disposition of this land is not its "highest and best use" of public resources.

Accordingly, this delay in the NEPA process will not negatively impact this project because it should be delayed for other reasons.

This Jackson Administrative Site Land Conveyance is exactly the type of federal agency action that Congress sought to address with NEPA. And, the agency neglect and abuse by the BTNF, as outlined herein above, is exactly what NEPA and its regulations are designed to prevent. Therefore, for all the foregoing reasons, the BTNF must stay the NEPA process for 180 days to allow time for correction of its flawed procedures.