

comment to the

**Environmental Assessment**

for the

**Jackson Administrative Site Land**

**Conveyance and Development**

November 30, 2009

The Bridger-Teton National Forest (BTNF) plans to sell up to 10.4 acres of high-dollar real estate in Jackson Hole, Wyoming, which includes its Supervisor's Office and 28 other buildings currently in use. Commercial developers have long lusted after this prime piece of property on the Jackson Hole Monopoly board because of its 300 feet of frontage along the main corridor in downtown Jackson that forms the gateway to Yellowstone and Grand Teton National Parks and because of its unobstructed views of the National Elk Refuge and the Gros Ventre mountain range. Its cash value, some say, may be \$35 to \$50 million.<sup>1</sup> Its true value as a public asset is priceless.

The BTNF further plans to take the cash from its auction and build a bunch of stuff. It plans to reconstruct in various locations around the County every facility on this site including a new Supervisor's Office combined with the local District Rangers office, a new fire cache, new vehicle storage facilities, a new horse facility, new warehouse facilities and more bunkhouses; and it wants up to 18 new residences, a total of almost three-fold more employee houses than its current number. Those new houses it proposes to sprawl on a hillside of virgin Forest at the edge of Town in an area of critical winter wildlife habitat at the Putt-Putt trailhead.

How does an agency in a position of public trust get away with such a colossal scheme? First, it claims authority under the Forest Service Facilities Realignment and Enhancement Act of 2005 (FESREA)<sup>2</sup>—Bush-era legislation, which was never intended for such an elaborate purpose and has never before been used for any such elaborate purpose. Then, the agency attempts to circumvent the National Environmental Policy Act of 1969 (NEPA)<sup>3</sup> for this project by making its decision two-and-one-half years

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<sup>1</sup> Land Estimated to be Worth \$35 to \$50 Million, *Jackson Hole Daily* (March 3, 2008); USDA Forest Conveyance Fact Sheet (Dec. 19, 2007) (\$10 to \$40 million, depending upon actual acreage offered).

<sup>2</sup> Pub. Law 109-54, 119 Stat. 559-563, *as amended*, Pub. Law 110-329, *and as amended*, Pub. Law 111-8, 123 Stat. 748, *codified at* 16 USC 580d(note) (2005).

<sup>3</sup> 42 U.S.C. 4321, *et seq.*

before publishing its Environmental Assessment (EA), which it crafted just to justify its decision.

The following comments are intended to better inform the decision-makers for this government-sponsored real estate venture known as the Jackson Administrative Site Land Conveyance and Development project (project) and are responsive to the EA for this project dated October 28, 2009.<sup>4</sup> These comments explain why this project is (1) illegal and inappropriate under FESREA, (2) contravenes the purposes and requirements of NEPA, and (3) is a bad idea. Accordingly, for all the following reasons, the BTNF must abandon its plans, or in the alternative, chose the “No Action” alternative.

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<sup>4</sup> These comments are made pursuant to and in compliance with 36 C.F.R. §215.6. Notwithstanding the fact that one copy of this document is submitted, these comments are made on behalf of both the individual signatory, Charles L. Payne, Jr. residing in of Teton County, Wyoming, and on behalf of the organization he represents, Protect the Putt-Putt, a community action organization, duly registered as a Political Action Committee in the State of Wyoming and in the County of Teton, pursuant to WY Stat. 22-25-101(b). 36 C.F.R. §215.6(a)(3)(v).

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1. THIS PROJECT IS AN ILLEGAL AND INAPPROPRIATE APPLICATION OF THE ENABLING LEGISLATION.

This misapplication of FSFREA violates the plain meaning of the statute; it disregards Congressional intent; it abrogates the agencies own interpretation of the statute; and it contravenes public policy behind this legislation. Accordingly, this project is an illegal and inappropriate application of FSFREA.

- a. This project is illegal and inappropriate because the plain language of the statue prohibits this conveyance.

The plain language of FSFREA enumerates certain unambiguous parameters for its conveyances that must be met. For example, FSFREA explicitly requires that its conveyances must be in the public interest; it requires annual advanced notice to Congress of future and past conveyances; and it requires a fair and balanced consideration of “no action” as an integral part of agency decision-making for every conveyance. This project is illegal and inappropriate because it fails to comply with these “plain meaning requirements written into FSFREA.

**i. This project is not in the public interest as required by the statute.**

This project is illegal and inappropriate because it does not serve the public interest as required by FSFREA. Plain language of FSFREA excludes “[a]ny land that the Secretary determines . . . would be in the public interest to retain.”<sup>5</sup> Moreover, this statutory “public interest” requirement is not discretionary for the Secretary. The statute

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<sup>5</sup> FSFREA at §503(d)(3)(C).

specifically directs the Secretary of Agriculture<sup>6</sup> to reject any land sale that is not in the public interest as follows:

Rejection of Offers. The Secretary *shall* reject any offer made for the acquisition of an administrative site under this title if the Secretary determines that the offer is (1) not adequate to cover the market value of the administrative site; or (2) *not otherwise in the public interest*.<sup>7</sup>

When Congress amended FSFREA in 2009, it retained the original “public interest” requirements above and added two additional “public interest” requirements, thereby reiterating the importance of this “public interest” requirement.<sup>8</sup> Hence, the plain meaning of the statute requires that the Secretary stop this project because it does not serve the public interest.

This project disservices the public interest because it is nothing but a money-grab by the Forest Service driven by its own greed and by the greed of commercial real estate developers seeking to cash in on the allure of Jackson Hole. Greed is never in the public interest—especially by a government agency like the Forest Service that is entrusted with the care and protection of our public assets.

Our community has come to expect greed from its commercial real estate developers who use any means available to maximize profits at the expense of community values. But when the local Forest Service aligns its interests with those of the greedy developers in order to maximize its returns in a high-dollar land sale, the public loses.

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<sup>6</sup> *Id.* at §502(4)

<sup>7</sup> *Id.* at §504(e) (emphasis added).

<sup>8</sup> The Omnibus Appropriations Act, 2009 amends FSFREA §504(a)(3) to read in part as follows:

The conveyance of an administrative site under this title *shall be* subject to such terms, conditions, and reservations as the Secretary determines to be *necessary to protect the public interest*.

Pub. Law 111-8, §422(2)(A), 123 Stat. 748 (March 11, 2009) (emphasis added); *and see* §422(2)(B) (incorporating the same requirement into FSFREA §504(d)(4)(B)).

The public loses in this deal because “when it is gone, it is gone forever.”<sup>9</sup> The BTNF will sell our valuable public asset to the highest bidder for some short-term monetary gain for an agency otherwise funded by our tax dollars. When the money is spent, the land is gone and the money is gone too. At that point, the agency still needs more money to maintain all the new stuff it built. And where the agency once held a beautiful and functional tract of public land, we are left with another high-end hotel in Jackson Hole.

For this reason and for all the reasons stated herein below, the Secretary is required to reject this project because it does not meet the “public interest” requirement in the statute.

**ii. The Secretary has failed to comply with the notice requirement in the statute.**

This project is illegal under FSFREA because the Secretary has failed to comply with the statutory notice requirements. FSFREA requires the Secretary to identify this project in each of its annual budget justifications as follows:

Congressional Notifications. (1) Notice of anticipated use of authority.--*As part of the annual budget justification* documents provided to the Committee on Appropriations of the House of Representatives and the Committee on Appropriations of the Senate, the Secretary shall include--(A) *a list of the anticipated conveyances* to be made, including the *anticipated revenue* that may be obtained, using the authority provided by this title or other conveyance authorities available to the Secretary; (B) *a discussion of the intended purposes* of any new revenue obtained using this authority or

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<sup>9</sup> Heritage Forest Campaign at [http://www.ourforests.org/public\\_support/](http://www.ourforests.org/public_support/) .

other conveyance authorities available to the Secretary, and a list of any individual projects that exceed \$500,000;<sup>10</sup>

Notice of this project is not included in the Forest Service Budget Justification for fiscal year (FY) 2010<sup>11</sup> or in its revised version.<sup>12</sup> Moreover, the Secretary has never provided an accounting of the “anticipated revenue” from this project in any budget justification. Lastly, the Secretary has never provided a “discussion of the intended purposes” of revenue gained from this project in any budget justification.

This project first appeared in the FY 2008 budget justification as a proposal to sell 8 acres of BTNF administrative land.<sup>13</sup> That initial notice did not provide “anticipated revenue” or provide “intended purposes” for the revenue. In the FY 2009 budget justification, this project was changed to 16 acres.<sup>14</sup> But this annual notice also failed to provide “anticipated revenue” or provide “intended purposes” for the revenue.

In the FY 2010 budget justification, this project is not mentioned—not the project, not the “anticipated revenue,” and not the “intended purposes” for the revenue.<sup>15</sup>

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<sup>10</sup> *Id.* at §503(e)(1).

<sup>11</sup> USDA Forest Service Fiscal Year 2010 Budget Justification, pp. 12-9 to 12-14, available at <http://www.fs.fed.us/aboutus/budget>.

<sup>12</sup> USDA Forest Service Fiscal Year 2010 Budget Justification, *revised* June 17, 2009, pp. 12-9 to 12-14; *accord* FY 2010 USDA Forest Service Budget Justification Errata, pp. 12-11 to 12-12, available at <http://www.fs.fed.us/aboutus/budget>.

<sup>13</sup> USDA Forest Service Fiscal Year 2008 Budget Justification, p. 15-7, available at <http://www.fs.fed.us/aboutus/budget>; *but see* USDA Forest Service Fiscal Year 2007 Budget Justification, pp. 13-12 through 13-16.

<sup>14</sup> USDA Forest Service Fiscal Year 2009 Budget Justification, p. 13-6, available at <http://www.fs.fed.us/aboutus/budget>.

<sup>15</sup> This project first appeared in the BTNF Schedule of Proposed Actions (SOPA) as a new listing in the third quarter of 2008. It has remained on the BTNF’s SOPA through the third quarter of 2009, but this does not constitute “Congressional Notification” for the purposes of FSFREA. FSFREA at §503(e)(1).

Moreover, conveyance of any Jackson Ranger District land or offices is never mentioned anywhere.<sup>16</sup>

Congress relies upon the agency's annual Budget Justification in order to decide appropriate funding for the agency. Based upon the FY 2010 budget justification, Congress appropriated over \$5 billion in discretionary funds to the Forest Service.<sup>17</sup> That is in addition to \$1.15 billion already provided to the Forest Service through the American Recovery and Reinvestment Act of 2009 (ARRA).<sup>18</sup> Without proper notice of this project as an alternative funding source for the Forest Service, Congress allocated resources to this agency without being fully informed.

Accordingly, this project is illegal under FSFREA because it lacks the proper annual notification to Congress as required by the statute.

**iii. The “no action alternative” was never an option as required by the statute.**

FSFREA requires that the Secretary must consider, as a bona fide alternative, doing nothing, which was never considered for this project. FSFREA requires genuine consideration of the “no action alternative” as follows:

The National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall apply to the conveyance of administrative sites under this title, except that, in any environmental review or analysis required under such Act for the conveyance of an administrative site under this title, the Secretary is only

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<sup>16</sup> The Jackson Ranger District Office constitutes a separate Administrative Site under the meaning of FSFREA §502(1).

<sup>17</sup> FY 2010 Conference Summary, Committees on Appropriations (Oct. 27, 2009), available at [http://appropriations.house.gov/pdf/Interior\\_FY10\\_Conference\\_Summary.pdf](http://appropriations.house.gov/pdf/Interior_FY10_Conference_Summary.pdf).

<sup>18</sup> Pub. Law 111-5 (Feb. 12, 2009); *accord* US Forest Service Fiscal Year 2010 President's Budget Overview, p. 1-2, available at <http://gis.fs.fed.us/publications/budget-2010/overview-fy-2010-budget-request.pdf>.

required to [*inter ali*] evaluate the *alternative of not conveying the administrative site*, consistent with the National Environmental Policy Act of 1969.<sup>19</sup>

Plain language of FSFREA explicitly requires consideration of the “no action alternative” when NEPA only infers it.<sup>20</sup> NEPA requires that federal agencies include a detailed statement of “alternatives to the proposed action”<sup>21</sup> and that they “study, develop and describe appropriate alternatives.”<sup>22</sup> Congress took the extra step in FSFREA of specifically requiring the Secretary to evaluate the “alternative of not conveying the administrative site.”<sup>23</sup> However, for this project, the “no action alternative” was never an option ever considered.

The “no action alternative” was never on the table because agency officials were under pressure to get this project done. BTNF officials acted upon “a directive to sell that land” from the former Regional Forester, Jack Troyer.<sup>24</sup> According to 2007 meeting notes, “The Regional Forester said that the Forest has a once-in-a-lifetime opportunity to set a course of action for future managers of the BTNF. The opportunity is to capture funds from sale of the Administrative Site in Jackson for use toward replace (sic) facilities.”<sup>25</sup>

“The Regional Office aims . . . to generate as many dollars as possible in order to provide for new buildings and reduce lease costs,” according to a 2007 Draft Communications

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<sup>19</sup> FSFREA at §505(d)(4).

<sup>20</sup> See e.g. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9<sup>th</sup> Cir. 1988) (The consideration of alternatives requirement . . . guarantees that agency decision-makers . . . take into proper account all possible approaches to a project *including total abandonment of the project*).

<sup>21</sup> 42 U.S.C. §4332(2)(C)(iii).

<sup>22</sup> *Id.* at §4332(2)(E).

<sup>23</sup> *Id.* at §4332(2)(C)(iii).

<sup>24</sup> quoting agency official, name withheld by request.

<sup>25</sup> Meeting notes from November 8 & 9, 2007, obtained from BTNF files in its response to our Freedom of Information Act (FOIA) request pursuant to 5 U.S.C. § 552, *as amended* (1996).

Plan for the Conveyance Project.<sup>26</sup> Without consideration of the “no action alternative,” this internal memo sets out “Options Being Considered” as follows: “Three options are being considered all of which assume a portion or the entire administrative site will be conveyed . . . .”<sup>27</sup>

The “no action alternative” was overlooked when the BTNF rushed to “initiate” the conveyance because FSFREA was set to expire at the end of September, 2008.<sup>28</sup> It had to get the project included in the USDA FY 2008 Budget Justification or risk losing this “once-in-a-lifetime opportunity.” So by May of 2007, it had assembled a “Conveyance Team.” The Team developed various timelines for the project without ever a mention or consideration of doing nothing.<sup>29</sup> Referring to its timeline in May of 2007, “Conveyance Team” meeting notes state, “We will sell this property and execute a Quitclaim Deed on 6/15/09.”<sup>30</sup>

In June of 2007, the BTNF Supervisor officially communicated to her “Conveyance Team” the Regional Forester’s mandate to “generate as many dollars as possible.” In a memo designating her Deputy Supervisor to serve as Forest Lead for the project, she gave him the following instructions: “I have appointed you to serve as Forest Lead for

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<sup>26</sup> Draft Communication Plan for the Supervisor’s Office Conveyance Project (Sept. 2007) , obtained from BTNF files in its response to our FOIA request.

<sup>27</sup> *Id.*

<sup>28</sup> Pub. Law 109-54, §503(f) (“The authority of the Secretary to *initiate* a conveyance of an administrative site under this title expires on September 30, 2008”).

<sup>29</sup> See e.g. SO/D4 Conveyance Team Meeting – draft notes (June 6, 2007) (“RO requesting projected construction timelines”), obtained from BTNF files in its response to our FOIA request.

<sup>30</sup> *Id.* (“Special Note: Michael confirmed with Jack Haddox after meeting, . . . the most recent time line schedule, dated 5/4/07 (attached). *We will sell this property and execute a Quitclaim Deed on 6/15/08*”) (emphasis added), obtained from BTNF files in its response to our FOIA request. At that time, the timeline had been tightened in order to meet federal rules of closing within 18 months of acceptance of this project; accord Forest Headquarters to Stay, by Corey Hatch, *Jackson Hole News & Guide* (March 21, 2008) (reporting that Regional Forester Harv Forsgren said that “an environmental assessment on the plan would have to be completed by the end of September [2008] to meet Congressional deadlines”); the EA was published for public comment at the end of September 2009, well after this BTNF sale was planned to take place.

the Jackson Conveyance Administrative Site Conveyance Project. The result of this project *will be* the successful conveyance of our acreage at the administrative site to the highest bidder . . . .”<sup>31</sup>

Once the BTNF had “initiated” the sale by including it in the list of “FY 2008 Land and Facilities Planned Conveyance Projects,”<sup>32</sup> the Wyoming Congressional delegation became concerned with agency behavior. In a letter the Regional Forester, they warned him not to prejudge the outcome of this project as follows:

We are concerned by reports that you have sent a “conveyance proposal” to your Washington, D.C. office before you have completed the outreach process. Such action could be interpreted as a decision having already been made in the matter before all the facts are known.<sup>33</sup>

Undeterred by these admonishments, the Regional Forester continued to position this sale as the only alternative. “I think the only sure mechanism we’ve got is that conveyance,” he said.<sup>34</sup> As the decision-maker for distribution of capital funds to the BTNF, the Regional Forester continued, “I don’t think there are real options to funding

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<sup>31</sup> Memo to Mike Balboni, BTNF Deputy Supervisor, from Carole “Kniffy” Hamilton, BTNF Supervisor (June 9, 2007), obtained from BTNF files in its response to our FOIA request. After this instruction to the Forest Lead for her “Conveyance Team” to sell “to the highest bidder,” Ms. Hamilton was appointed by the Regional Forester to make the final decision on the EA for this project.

<sup>32</sup> USDA Forest Service Fiscal Year 2008 Budget Justification, p. 15-7.

<sup>33</sup> letter to Harv Forsgren, R-4 Regional Forester, from U.S. Senator Mike Enzi, U.S. Senator John Barrasso, and Congresswoman Barbara Cubin (Nov. 11, 2007); *see also* [Agencies Offer Help with Forest Housing](#), by Corey Hatch (Dec.5, 2007) (“U.S. Rep. Barbara Cubin and U.S. Sens. Mike Enzi and John Barrasso had criticized the agency, saying it appeared the Forest Service had *made up its mind* . . . .”) (emphasis added).

<sup>34</sup> [Forest Headquarters to Stay](#), by Corey Hatch, *Jackson Hole News & Guide* (March 21, 2008).

these new facilities.”<sup>35</sup> In December of 2007, the *Jackson Hole News & Guide* reported, “Local forest officials have said *some portion of the 15 acres would be sold.*”<sup>36</sup>

Once the word of its decision to sell became public, the BTNF reluctantly engaged the community.<sup>37</sup> Nonetheless, in the meetings that followed, BTNF officials did not discuss a “no action alternative.”<sup>38</sup> At a public meeting in early 2008, Teton County Commission Chairman, Hank Phibbs, complained, “I’m being told that we are involved in a shadow dance and it’s a done deal.”<sup>39</sup> Responding, Mike Balboni, former Deputy Supervisor for the BTNF, admitted that the Regional Forester “will decide whether to sell *all or part of the property*, after which the agency would begin developing site and construction plans.”<sup>40</sup>

In February of 2008, Joe Albright, co-owner of Flat Creek Ranch and BTNF permittee, wrote a letter of caution to the BTNF about rushing to judgment saying, “You need to withdraw this decision, go through the [NEPA] process, and re-notify Congress.”<sup>41</sup> Again, in March of 2008, Mr. Albright cautioned the BTNF about other procedural missteps that could jeopardize their plans.<sup>42</sup> And, Mr. Albright’s attorneys wrote a letter of warning.<sup>43</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> Valley Leaders Call for Forest Housing in Town, by Cara Froedge, *Jackson Hole News & Guide* (Dec. 19, 2007) (emphasis added).

<sup>37</sup> B-T Talks Won’t be Public, by Corey Hatch, *Jackson Hole News & Guide* (Nov. 6, 2007); Forest Service set to Sell, by Corey hatch, *Jackson Hole News & Guide* (Nov. 21, 2007) (“the regional office still has no plans to invite the public to comment on the land sale” according to Regional Office spokeswoman Erin O’Connor).

<sup>38</sup> Planning for these upcoming meetings, the BTNF produced a series of “Talking Points,” which never identify the “no action alternative.” For example, one such document states as follows;

Q. Do you intend to sell the Forest Service property on Cache Street? Yes, a portion of or the entire site *will be offered* through a land exchange, auctioned off via live auction, or listed with an agent.

Draft Stakeholders Meeting Plan (2007), obtained from BTNF files in its response to our FOIA request.

<sup>39</sup> Public Blasts HQ Move, by Katie Niner, *Jackson Hole News & Guide* (Feb. 9, 2008).

<sup>40</sup> *Id.*; Before publishing its EA, in mid-2009, the BTNF had its “site and construction plans” in place.

<sup>41</sup> Public Blasts HQ Move, by Katy Niner, *Jackson Hole News & Guide* (Feb. 9, 2008).

<sup>42</sup> More Doubts on BTNF Headquarters Move, by Cory Hatch, *Jackson Hole News & Guide* (March 3, 2008).

But the BTNF and the Regional Forester ignored admonitions to stop and follow the proscribed process, admonitions from Mr. Albright, from our U.S. Senators, our Congresswoman, and from our County Commission Chairman.

In March of 2008, *The Jackson Hole News & Guide* reported that Regional Forester Harv Forsgren said “he hopes to make *a decision about how much land to sell* and where to place the new supervisor’s office by May.”<sup>44</sup> According to the report, “Forsgren said *selling all or part of the North Cache site is the only available option* to replace the current building”, and “Bridger-Teton supervisor Kniffy Hamilton said she hopes to start construction of the new building by 2010.”<sup>45</sup>

In September of 2008, the Supervisor Hamilton reiterated her earlier mandate for a “successful conveyance” in another private memo to her Forest Lead for the project as follows:

The result of this project *will be* the successful completion of the conveyance process and all the required pieces to this process. This includes successfully completing the necessary environmental analysis,

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<sup>43</sup> letter from Geraldine Edens, Esq., McKinney, Long and Aldridge, Attorneys at Law, to BTNF (Feb. 7, 2008) (Mr. Albright’s attorneys putting the BTNF on notice of its obligation to complete its NEPA process before planning the sale and notice of its obligation to give equal consideration to the “No Action Alternative”), obtained from BTNF files in its response to our FOIA request.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, see also, Forest Wants Offices to Stay on North Cache, by Corey Hatch, *Jackson Hole News & Guide* (March 21, 2008) (“At a press conference Mar. 20, Intermountain Regional Forester Harv Forsgren announced that officials would keep the forest supervisor’s office in Jackson Hole but *would continue efforts to sell some or all* of the current building’s 15-acre site to fund the new office building.”) (emphasis added); Jonathan Schechter, local newspaper columnist, wrote directly to Mr. Forsgren as follows:

Congress passed legislation authorizing the Forest Service to sell administrative land to raise needed capital. As a result, your office *unilaterally decided* that, in the foreseeable future, the most expeditious—if not only—way to get the money you need to build a new headquarters building is to sell some or all of the prime real-estate the Bridger-Teton headquarters sits upon.

reprinted in Forest Must Work with Valley, by Jonathan Schechter, *Jackson Hole News & Guide* (Feb. 13, 2008) (emphasis added).

decision document and actions necessary for the subsequent sale of property associated with the decision . . . . You will utilize your team to complete the NEPA process and associated activities . . . *up to and including our move into the new buildings.*<sup>46</sup>

Following its directive to sell and continuing to ignore the option of “no action,” over two-and one-half years, the BTNF expended exorbitant amounts of time and money to carry out its mandate. In preparation to sell off land and build stuff, among others, the BTNF gathered, completed and contracted for the following:

- Archeology and Historic Preservation Report;
- Asbestos Evaluation;
- Base Floodplain Elevation Determination by Pierson Land Works, Inc.;<sup>47</sup>
- Building Inventory;
- Cache Creek Waterline Legal Description;
- Civil Rights Impact Analysis (CRIA) contemplated, but not completed;<sup>48</sup>
- Conveyance Resources Report;
- Cultural Report, including consultation with the Wyoming State Historic Preservation Office;
- Environmental Engineering Assessments, pursuant to CERCLA<sup>49</sup>
- Excess Real Property Report (SF-118);
- Federal Land Status Report;
- Flood Development Permit Report by Jorgensen Engineering, P.C.;

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<sup>46</sup> memo to Mike Balboni, BTNF Deputy Supervisor, from Carole “Kniffy” Hamilton, BTNF Supervisor (Sept. 17, 2008) (“updating my Project Implementation Analysis dated 4/11/2008”), obtained from BTNF files in its response to our FOIA request.

<sup>47</sup> cost of \$2,150.

<sup>48</sup> Section 2.e hereinafter below.

<sup>49</sup> Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.* (1980).

- Floodplain Approval by the Town of Jackson Engineer/Floodplain Administrator;<sup>50</sup>
- Forest Plan Compliance Analysis;
- Geotechnical Investigation by private contractors;
- Initial Sales Implementation Schedule (SIS);
- Land Description Verification;
- Lands Transaction Screening Process;
- Lead Based Paint Risk Assessment;
- Letter of Inspection;
- Mineral Assessment Report;
- Multiple drafts and revisions to the SIS;
- Nelson Drive Housing Development Master Site Plan by Rendezvous Engineering, Carney Architects, Collins Planning Architects and Biota Research and Consulting, Inc.;<sup>51</sup>
- Notice of Proposed Realty Action;
- Notification of County and Local Government Officials;
- Parcel Maps;
- Preliminary Project Analysis (PPA);
- Sales Implementation Letter;
- Site Plan contracts;
- Soil Specialist Report;
- Request for Appraisal Services;
- Threatened and Endangered Species Report;
- Title Report;

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<sup>50</sup> Estimated cost of \$200.00.

<sup>51</sup> Estimated cost of \$20,000.00 to \$40,000.00, including \$5,000.00 contributed by the Town of Jackson and \$5,000.00 from Teton County.

- Valuation Consultation and Market Analysis by the Government Services Administration (GSA) and by Thompson, Cobb, Bazilio & Associates, P.C. (TCBA);<sup>52</sup>
- Water Rights Specialist Report;
- Wetlands and Floodplains Analysis Report;
- Wildlife Resource Report;

While completing all this preparation for the sale and new construction, it even drafted a Decision Document.

In addition to all this bureaucratic preparation for the sale, the BTNF contracted with TCBA for marketing of the sale. TCBA is a “full-service professional services firm” with offices in Washington, D.C. and five other major cities.<sup>53</sup> In partnership with TCBA, the BTNF developed a website to promote the property. It conducted a real estate investors’ seminar at the Snow King Resort. It invited selected real estate firms and commercial developers nationwide to its “Real Estate Forum,” a day-long event professionally produced by TCBA and simulcast over the internet. There the BTNF promoted its conveyance site as “The Gateway to Grand Teton and Yellowstone”.

In addition, the BTNF contracted with local consultants, Rendezvous Engineering, Carney Architects, Collins Planning Architects and Biota Research and Consulting, Inc., to plan how it would spend proceeds from this sale. It contracted for development of a site plan for building 18 new residences at its Nelson Administrative Site and moving eight more existing houses to the site. The contract included a professional presentation of its plans to the Joint Information Meeting of the Town of Jackson Council and Teton County Board of Commissioners in August of 2009.

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<sup>52</sup> Estimated cost of \$52,000.00.

<sup>53</sup> see <http://www.tcba.com>.

After all this work, the BTNF reached the point of no return. “We are going to sell the land, it’s just a matter of how much,” according to BTNF Supervisor “Kniffy” Hamilton, in July 2009.<sup>54</sup> At the Town Council and County Commission in August of 2009, Ms. Hamilton explained that “*they have now been directed to sell a portion of the land on Cache Street and to use the funds to replace the administrative facilities and to also provide some employee housing.*”<sup>55</sup>

Internally, the BTNF was stuck. According to staff meetings notes and e-mails, the “no action” was not discussed.<sup>56</sup> Staff was told the Supervisor’s goal is to “sell the least, and get the most” because “this could be a one-time opportunity to sell administrative land for generating revenue . . . .”<sup>57</sup> Sara Baldwin, acting Deputy Forest Supervisor for the BTNF, declared the “no action alternative” simply not feasible when she wrote in a private e-mail, “The Forest Service regionally has *invested much funding and staff time in this project* to date and embarked upon this project as it saw a compelling need for facilities replacement—so the rationale for deciding No Action will have to be extremely compelling.”<sup>58</sup>

How much money has the BTNF already invested in this project? The total is unknown, but at least \$100,000.00 went (1) for the day-long event at Snow King Resort planned by a private consultant to generate interest among potential investors, and went (2) to private engineers, architects, and landscape architects to develop and present the plan

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<sup>54</sup> K. Hamilton at public neighborhood meeting in July 2009.

<sup>55</sup> Meeting Minutes for the Joint Information Meeting of the Town Council for the Town of Jackson and Board of County Commissioners for Teton County, Wyoming (Aug. 3, 2009).

<sup>56</sup> See e.g. BTNF internal e-mail stating as follows:

Subject INTERNAL INFO. What’s happening with the Jackson Admin. Site conveyance??  
The Forest is selling about 4 acres along Cache Street for what we think will be about \$13 million.

e-mail from Mary Cernicek, BTNF Communications Officer, to BTNF employees (Aug. 1, 2007).

<sup>57</sup> Conveyance Project meeting notes re: Preferred Alternative (Oct. 10, 2009), obtained from BTNF files in its response to our FOIA request.

<sup>58</sup> e-mail from Sara E. Baldwin, acting BTNF Deputy Supervisor, to Jeanette A. Langston (Sept. 10, 2009), obtained pursuant to FOIA request.

for employee housing construction at the Nelson Drive Site to the Town Council and County Commissioners, and went (3) for private surveyors to recalculate the floodplain at the North Cache site, among other things.<sup>59</sup>

Where does the BTNF gets this much money? It borrows funds against its future FSFREA land sales. In late 2006, the Regional Office first began to consider creative financing for this project. “FSFREA allows proceeds to be spent in case work preparation,” it said. However, “the Forest conveyance will likely not be completed until FY 2009,” identifying its need for financing in advance.<sup>60</sup> Then it discusses the solution; “Proposal: RO-Lands and Engineering proposes to amend current process to allow for expenditure of funds from proceeds from lands/facilities (FSFREA conveyance) sales . . . .”<sup>61</sup> And in an e-mail, the Deputy Regional Forester, told staff “lands zone support for conveyance projects, salary and travel expenses, would come out of proceeds from projects.”<sup>62</sup>

Over the next two years, a series of internal memos from the Regional Office sets out its new system for “play now, pay later.”<sup>63</sup> Late in 2007, the Regional Forester wrote the BTNF to clarify the process of borrowing against future FSFREA land sales saying, “Please submit reauthorization requests (or new requests)” for cash advances against future sales and “include the following information” among other things: (1) “dollar amounts

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<sup>59</sup> Michael Schrotz, BTNF Planning-Lands Staff Officer, responding to question at East Jackson Neighborhood Association meeting (Nov. 18, 2009).

<sup>60</sup> Conveyance, RO Proposal to Fund RO Lands Team (Dec. 20, 2006) (stating, “We believe that the true project cost should be determined and not paid with hidden funds”).

<sup>61</sup> *Id.* (citing “Max limit for FY 07 is proposed at not more than 10% of the projected sales proceeds, or a maximum of \$150,000 from the entire conveyance program”); *see also*, Memo from Jack Troyer, former R-4 Regional Forester, to Forest Supervisors, file code 6520/7120-3/5570 (undated) (“hours of work and travel expenses . . . will be paid for out of Forest sales proceeds or by submitting a Regional request to P&BA for ‘advanced’ allocation of EXSC spending authority . . . pending collections from specific cases being worked on.”)(emphasis added).

<sup>62</sup> e-mail from Mary Wagoner, R-4 Deputy Regional Forester, to Jeanne Evender, *et al.* (Dec. 19, 2006), obtained from BTNF files in its response to our FOIA request.

<sup>63</sup> *See e.g.* Memo from Harv Forsgren, R-4 Regional Forester, to Directors and Forest Supervisors (Sept. 13, 2007).

needed”, (2) “project(s) that funds will be used for”, (3) “activity to be funded”, (4) “if cash loan is needed, provide the estimated date that proceeds will be available to repay the loan”, and (5) “*identify the project from which proceeds will be obtained to repay any cash loan.*”<sup>64</sup> Then in 2008, the Regional Director of Engineering, reiterated the FSFREA “play now, pay later” policy in another private memo stating, “If cash loan is needed, *identify the project from which proceeds will be obtained to repay loan* and estimated date that proceeds will be available to repay loan.”<sup>65</sup>

Once a Forest like the BTNF borrows funds from future FSFREA land sales, how could it ever consider *not* following through its planned sales? The “no action alternative”, required by FSFREA, is off the table once a Forest like the BTNF commits borrowed funds to expenditures like, *inter alii*, hiring private consultants for a real estate investors’ event at the local ski resort to swoon the tycoons and by committing borrowed funds to a presentation by private planners to tout its intentions to the Town Council and County Commission.

As if the BTNF obligation to complete this project was not already explicit, the Regional Forester recently reiterated his “play now, pay later” trap he set for the BTNF and this project as follows:

Since the Region has sufficient cash in FY 2009, Forests are given permission to spend up to the approved amounts . . . even if they do not have their own cash (they can go into a deficit situation). However, *we expect that those Forests will have sufficient proceeds from future sales to cover their deficit situation.* If EXSS proceeds are not sufficient to cover a

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<sup>64</sup> Memo from Harv Forsgren, R-4 Regional Forester, to Directors and Forest Supervisors (Dec. 19, 2007) (providing “clarification to the above referenced letter [dated 9/13/2007]”) (emphasis added).

<sup>65</sup> Memo from Keith Simila, R-4 Director of Engineering, to Directors and Forest Supervisors (Oct. 3, 2008) (Re FY 2009 Facilities Conveyance Spending Requests) (emphasis added), obtained from BTNF files in its response to our FOIA request.

Forest's deficit cash situation once the sales are completed, then the Forest will be required to repay the region with CP05 funds.<sup>66</sup>

Therefore, the BTNF became definitively locked out of the "no action alternative" as it expended funds, which must be repaid from the sale of its land.

The BTNF completely dumped the "no action alternative" a few months ago when it committed funds from sale of its North Cache property in Jackson Hole to construction of the Big Piney Ranger District Office (BP/DO). In a private memo on June 2, 2009, the BTNF told the Regional Forest of plans to proceed with construction of a new Big Piney Ranger District Office as follows:

Big Piney Office design is at 95% plan completion. Final plans expected to be completed in June with contracting to follow. This project is top priority on the Facilities Master Plan list, after SO/D4 admin and housing, of *projects to benefit from proceeds of SO/D4 conveyance sale.*<sup>67</sup>

The BTNF always listed construction of a new BP/DO as a potential project to be funded by the sale of its Jackson Hole property.<sup>68</sup> But the BP/DO was designated as a "want", not a "need". All buildings in Jackson consistently got a higher priority.<sup>69</sup>

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<sup>66</sup> Memo from Harv Forsgren, Regional Forester, to Forest Supervisors, re: Facilities Conveyance Funding for FY 2009, obtained from BTNF files in its response to our FOIA request.

<sup>67</sup> Intermountain Region Informational Briefing Paper (June 2, 2009) (emphasis added), obtained from BTNF files in its response to our FOIA request..

<sup>68</sup> *see* Proposed Project Analysis for the Bridger-Teton Jackson Administrative Site (August 11, 2008); *and see* BTNF Master Facilities Plan, as amended.

<sup>69</sup> *Id.*; *but see* e-mail from Dale Deiter, Jackson District Ranger, to "Kniffy" Hamilton, BTNF Supervisor, and to Mike Balboni, former BTNF Deputy Supervisor (July 23, 2008) (indicating a change in agency priorities, stating, "I know the RO wants a red badge of courage to say they got out of a lease" by building a new Big Piney District Office. "At the current lease price, it would take about 70 years before the 2.1 million cost of a new D-2 office would be spent"), obtained from BTNF files in its response to our FOIA request.

Nonetheless, on June 17, 2009, the BTNF posted a solicitation for bids to build a new BP/DO.<sup>70</sup> Then on September 17, 2009, it awarded the contract to SE/Z Construction, LLC for \$1.15 million.<sup>71</sup> So the BTNF committed over a million dollars to a construction project always listed about thirteenth in importance. This after the BTNF has publically argued for two-and-one-half years that no other funding is available for its facilities maintenance and construction.<sup>72</sup> Even if the BTNF magically found other funds to build a new BP/DO, which it did not, it cannot escape the inference that it skipped over their top priorities because it already knew the “cash-cow” sale of North Cache in Jackson Hole will fund those. Thus the decision to sell was already made, and the “no action alternative” was never an option.

The “no action alternative” was never on the table because the NEPA document says so.<sup>73</sup> In the EA, Chapter 2 entitled “Alternative Descriptions” states the assumption that “[e]ach alternative would generate revenue sufficient to construct all facilities,” never mentioning the alternative of selling nothing. It continues, “Therefore, the same facilities are shown in *each alternative*, with only the location varying,” again without mentioning the “no action alternative.”<sup>74</sup> When the EA does address the “no action

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<sup>70</sup> USDA Big Piney Office Construction, Solicitation #AG-02NV-S-09-0059, posted June 17, 2009 at [www.FedBizOpps.gov](http://www.FedBizOpps.gov).

<sup>71</sup> See [https://www.fbo.gov/index?s=opportunity&mode=form&id=e0293c0e74f296d5601905bf3cc600fd&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=e0293c0e74f296d5601905bf3cc600fd&tab=core&_cview=1) (“This project includes constructing a ranger district office, parking lots, RV parking areas, site grading, removal and disposal of existing structures, minor site improvements, and necessary utilities for the building. Utility work includes installing new waterline and electrical service, constructing a new septic system with drainfield, install a new pumphouse and installing a geothermal heat pump system.”)

<sup>72</sup> See generally Section 2.a.iii herein below; see e.g. *Forest Prefers Selling 10 Acres*, by Corey Hatch, Jackson Hole News & Guide (Oct. 28, 2009) (“At this point, we have not found another way to finance this stuff,” quoting BTNF Planning-Lands Staff Officer, Michael Schrotz).

<sup>73</sup> Throughout this process, BTNF Timelines, reference herein above, continued to push back the completion date of the NEPA decision document. This EA was finally published in late September of 2009, two-and-one-half years after formation of the BTNF “Conveyance Team.”

<sup>74</sup> EA at p. 18 (emphasis added), see also Conveyance Project / NEPA Determination notes (April 2, 2008) (listing four “scenarios”, not ever mentioning no action, “as [the] Forest continues with conveyance of land/facilities located in Jackson, WY”), obtained from BTNF files in its response to our FOIA request.

alternative,” it dismisses it as simply “required” by NEPA and “serves as a baseline from which to measure, evaluate and examine change” created by the other real alternatives.<sup>75</sup>

The EA is designed to justify this project, not fairly consider the “no action alternative,” which FSFREA requires it to do. Reviewing the draft EA for the BTNF, Gail Baer, NEPA Officer for the Region 4, Salmon-Challis National Forest, admonished its authors, “You have the need and authority to do this project, now you need to present it better.”<sup>76</sup> So with her help, the BTNF tweaked this document to advocate the sale North Cache property without considering the option of doing nothing.

The EA even explicitly proclaims that “the Forest Service Supervisor *was directed* to use [FSFREA] authority to sell land as a funding mechanism . . . .”<sup>77</sup> Moreover, even after the BTNF published its EA, during the mandatory 30-day public comment period, the BTNF continued to move forward on this project. In November of 2009, it reported to the Regional Forester in a private memo, “The Forest continues to make progress toward a land sale of the SO Administrative Site”, reciting all the progress that it has made.<sup>78</sup>

Accordingly, this project is illegal and inappropriate under FSFREA because the agency made its decision before gathering the facts and without evaluating the “no action alternative,” as it is required to do. By the time the agency published its EA, which only gives lip service to the “no action alternative,” it already was locked into its decision by

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<sup>75</sup> *Id.* at 19.

<sup>76</sup> BT Conveyance EA Concerns, by Gail Baer, obtained in response to FOIA request; *see also* handwritten notes by Mike Balboni, BTNF Deputy Supervisor, from conference call with Keith, Mary, Mike, and Erin (2007) (“We are in charge of analysis. We can craft the criteria.”), obtained from BTNF files in its response to our FOIA request.

<sup>77</sup> EA at 12.

<sup>78</sup> Intermountain Region Informational Briefing Paper (Nov. 12, 2009), obtained from BTNF files in its response to our FOIA request.

its expenditure of exorbitant amount of time and money, money that it must pay back out of proceeds from the sale.

- b. This project is illegal and inappropriate because Congress never intended for FSFREA to be used in this way.

Congress never intended for FSFREA to be used in this way because FSFREA was only meant to be used to dispose of administrative facilities “no longer needed” for Forest Service purposes.<sup>79</sup> FSFREA’s legislative history makes this clear.

FSFREA became law as Title V of the appropriations bill for the Forest Service for its fiscal year 2006.<sup>80</sup> As is customary, that legislation originated in the House Appropriations Committee as H.R. 2361.<sup>81</sup> When reported out of committee, H.R. 2361 contained no mention of FSREA.<sup>82</sup> Six days later, when it passed the full House as amended, it contained no mention of FSREA.

Title V, which became FSREA, was added to H.R. 2361 in the Senate Appropriations Committee. According to its report, “The Committee has included legislation that . . . authorizes the Secretary of Agriculture to sell, lease, exchange or combine a sale and exchange of *any administrative site the Secretary determines is no longer needed for National Forest Service purposes*” (emphasis added).<sup>83</sup> After inconsequential

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<sup>79</sup> The EA blatantly misstates Congressional intent in this regard. It states that “appropriated funds are lacking to accomplish” construction of “facilities that need to be replaced” by the BTNF. EA at 3. “In response to this need, Congress passed [FSFREA],” states the EA. *Id.* This false statement of Congressional intent by the BTNF lends insight into how FSFREA got perverted by the BTNF into such a money-grab, ignoring the true Congressional intent of the statute.

<sup>80</sup> Pub. Law 109-54 (2005)

<sup>81</sup> Legislative history available at Library of Congress, “Thomas” website at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.02361:>.

<sup>82</sup> House Appropriations Committee report on H.R. 2361, House Report 109-080 (May 13, 2005).

<sup>83</sup> Senate Appropriations Committee report on H.R. 2361, Senate Report 109-080 (June 10, 2005).

amendments to Title V on the Senate floor,<sup>84</sup> H.R. 2361 passed by unanimous consent without debate.<sup>85</sup>

FSREA remained in the bill with modification through Conference Committee. According to the Conference Committee report, “This provision allows the Forest Service to *dispose of administrative facilities that are no longer needed* and use all revenue to reduce the administrative-site deferred maintenance backlog” (emphasis added).<sup>86</sup> And the Conference Committee report repeats the language from the Senate Appropriations Committee report stating, “The legislation authorizes the Secretary of Agriculture to sell, lease, exchange or combine a sale and exchange of *any administrative site the Secretary determines is no longer needed for National Forest Service purposes*” (emphasis added).<sup>87</sup>

The Conference Report passed the House after one-hour debate with no mention of FSREA<sup>88</sup> and passed the Senate on unanimous consent without debate.<sup>89</sup> On August 2, 2005, the President signed the bill into law without any relevant Presidential Statement on FSREA.<sup>90</sup> Therefore, the legislative history<sup>90</sup> repeatedly and consistently reserves FSFREA specifically for sale and exchange of administrative sites *no longer needed for National Forest Service purposes*.<sup>91</sup>

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<sup>84</sup> Senate Amendments 1056-1058 to H.R. 2361, *Congressional Record* at S744-45 (June 27, 2005).

<sup>85</sup> Library of Congress, “Thomas” website at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.02361>.

<sup>86</sup> Conference Report on H.R. 2361, *Congressional Record* at H6562-628 (July 26, 2005).

<sup>87</sup> *Id.*

<sup>88</sup> See Conference Report debate on H.R. 2361, *Congressional Record* at H7013-23 (July 28, 2005).

<sup>89</sup> Library of Congress, “Thomas” website at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.02361>.

<sup>90</sup> See “Statement on Signing the Department of Interior, Environment, and Related Agencies Appropriations Act, 2006”, Weekly Compilation of Presidential Documents, Vol. 41, No. 31, p. 1243 (Aug. 8, 2005).

<sup>91</sup> *Accord*, Pub. Law 107-63, 115 Stat. 414 (Nov. 5, 2001) (Title III, §329 of the Department of the Interior and Related Agencies Appropriations Act, 2002 was the predecessor of FSFREA, which provided for a pilot program through FY 2005 under which the Secretary “may by sale or exchange make conveyances

Therefore, Congress never intended for FSFREA to be used for sale of any portion of a cherished \$50-million-dollar<sup>92</sup> track of BTNF land in downtown Jackson, Wyoming, which currently houses all of its administrative facilities, including the Supervisor's Office, the fire fighting facilities and the homes of eight employees and their families.

Congress never intended FSFREA sales of this magnitude. Previous FSFREA conveyances have never approached the scale of land values involved with this project. The largest amount of proceeds ever collected for any one conveyance exclusively pursuant to FSFREA in FY 2006 was \$680,000,<sup>93</sup> in FY 2007, \$265,000,<sup>94</sup> and in FY 2008, \$1.5 million.<sup>95</sup> Therefore, this project potentially generates greater than ten-fold more cash than any project completed before October of 2008.

Congress never intended FSFREA sales to fund construction of new facilities of this magnitude. FSFREA conveyances have only ever been used for minor facilities improvements. This project eliminates 28 existing structures that are actively used by the BTNF.<sup>96</sup> Those structures include *every single building* on the North Cache campus as follows:

- A 10,000 square foot Supervisor's Office building;
- Three other office buildings at 3,000 square feet each;
- Fire Cache faculties, warehouses and storage in 10 buildings that total 14,000 square feet;
- Eight private homes for BTNF employees;

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of excess buildings and other structures on National Forest System lands on up to ten sites.”) (emphasis added).

<sup>92</sup> Forest Office Parcel may be worth \$50M, by Noah Brenner, *Jackson Hole News & Guide* (Nov. 11, 2007).

<sup>93</sup> FY 2008 Budget Justification, p. 15-15 (Kalamath Ranger District in the Freemont-Winema National Forest conveyance).

<sup>94</sup> FY 2009 Budget Justification, p. 13-12 (Siskiyou National Forest conveyance).

<sup>95</sup> FY 2010 Budget Justification, p. 12-11 (Mt. Baker National Forest conveyance).

<sup>96</sup> EA at 6.

- Five housing units for seasonal employees; and
- A horse facility.<sup>97</sup>

All of these facilities are in active use by the BTNF and none are excess or duplicative; none are “no longer needed.”

Once sold and destroyed, this project replaces each and every facility on the North Cache campus. And in addition, it builds up to 18 new residences and a bunkhouse for eight people. Thus, this project replaces every facility in Jackson, Wyoming and almost doubles the number of houses.

Accordingly, this project does not convey land or facilities “no longer needed for National Forest Service purposes” as Congress intended. Rather, it represents a wholesale purging of everything currently in use by the BTNF at its administrative site in downtown Jackson, while grabbing as much cash as possible for new construction, which Congress clearly never intended.<sup>98</sup> Therefore, this project is an illegal and inappropriate application of this legislation.

- c. This project is illegal and inappropriate because it contravenes the agency’s own interpretation of the statute.

The U.S. Department of Agriculture (USDA) is charged with implementing FSFREA and executing FSFREA conveyances consistent with it.<sup>99</sup> To ensure such consistency with the

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<sup>97</sup> Revised BTNF inventory (March 10, 2009).

<sup>98</sup> No judicial opinions interpreting FSFREA are found because litigation under this statute has been rare, if not non-existent, reflecting the small-scale, non-controversial, and inconsequential nature of all other conveyances under FSFREA, except for this one exploitation of FSFREA.

<sup>99</sup> In the absence of established jurisprudence as noted in footnote 98 herein above, the agency is bound by its own interpretation of the statute.

law, the USDA developed and published agency guidelines, which interpret the law.<sup>100</sup> Those guidelines dictate what types of conveyances are legal and appropriate under the law. This project is illegal and inappropriate because it contravenes the agency's own interpretation of FSFREA as published in agency guidelines.

**i. This property is not an “unneeded” or “excess” administrative site.**

According to the USDA guidelines, FSFREA only grants legislative authority to sell “excess capital assets”.<sup>101</sup> Similarly, the Secretary notifies Congress of proposed FSFREA conveyances by identifying them as “unneeded administrative sites”.<sup>102</sup> These “unneeded administrative sites”, according to the agency interpretation of FSFREA, must have “limited potential for disruption of employee productivity or customer service” and must be “not needed for resource protection, recreational or future administrative purposes.”<sup>103</sup>

This project does not involve “excess” or “unneeded” land and facilities. Rather the portion of the BTNF North Cache administrative site slated for auction is the heart and soul of the BTNF. The Supervisor's Office successfully has stood at this same location in the Town of Jackson for over 40 years.<sup>104</sup> Some 60 BTNF employees work and live on this site. The public visits this site for information, permitting and all other BTNF services. Personnel from other government agencies access this facility, including officials and staff from Wyoming Game and Fish, the Nation Elk Refuge, the Bureau of Land Management and the Grand Teton National Park. Fire-fighting activities for the

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<sup>100</sup> See e.g. USDA Asset Management Plan FY 2007.

<sup>101</sup> *Id.* at p. 5-11.

<sup>102</sup> USDA Forest Service Fiscal Year 2008 Budget Justification, p. 15-12; USDA Forest Service Fiscal Year 2009 Budget Justification, p. 13-10; USDA Forest Service Fiscal Year 2010 Budget Justification, p. 12-9.

<sup>103</sup> USDA Asset Management Plan FY 2007, p. 5-11.

<sup>104</sup> EA at 2.

BTNF are properly located here rapid response and efficiency of operation.<sup>105</sup> BTNF dispatch, vehicle storage and horse facilities are conveniently centered here. And, this site is home for eight BTNF employees and their families. Therefore, sale of this land will cause “disruption of employee productivity or customer service,” and this land is needed for current and “future administrative purposes.” This project disposes of administrative land that is vital to every purpose and function of the BTNF.

Accordingly, disposal of this property is illegal and inappropriate because it ignores the agency’s own interpretation of the statute, which limits FSFREA sales to “unneeded” and “excess” land and facilities.

**ii. This project lacks support from the local community and elected officials.**

Agency guidelines limit sales to those with local community support, and this project has none. According to the USDA, FSFREA’s “conveyance authority can only be used for certain types of administrative sites.”<sup>106</sup> These types of sales only include those with “support of local community and elected officials.”<sup>107</sup> This project, however, lacks support from both the local community and elected officials, which makes it an illegal and inappropriate application of FSFREA.

The local community expressed overwhelming disapproval of this project in numerous written public comments addressed to the BTNF.<sup>108</sup> For example, Amy Unfried of Jackson said that the Forest Service “shouldn’t be selling public land for short term

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<sup>105</sup> Section 3.d.i herein below (Moving the Fire Cache to Cottonwood is absurd).

<sup>106</sup> USDA Asset Management Plan FY 2007, p. 5-11.

<sup>107</sup> Id.

<sup>108</sup> See all written scoping comments and comments to the EA received by the BTNF, which are incorporated into this document by reference.

gain.”<sup>109</sup> And Bud Chatham, another Jackson resident, said it sends a bad message “if we choose hotels and development over the one entity that truly protects our local natural resources,” the BTNF.<sup>110</sup> Moreover, citizens posted comments expressing disapproval at a website created for this purpose.<sup>111</sup>

The local community also expressed its disapproval in meetings with the BTNF. As reported in the local news,

Braving a storm that closed all major arteries into Jackson, nearly 45 people, including U.S. Sen. Mike Enzi, attended the first public meeting in Jackson on the potential sale of the 15.5 acres on N. Cache Street and possible relocation of the supervisor’s office. Fifteen people criticized the possible sale and move during public comment, including long-term Jackson residents like Frank Ewing and public officials like Wyoming Rep. Pete Jorgensen.<sup>112</sup>

Other public meetings have been equally well attended where citizens have consistently voiced objections to the project.<sup>113</sup>

Community organizations have told the BTNF this is a bad idea. Responding to this sale, the Jackson Hole Conservation Alliance, representing over 2,000 members, proclaimed “selling public lands to maintain agency operations is an *appalling management practice*.”<sup>114</sup> Writing directly to the BTNF Supervisor, the Alliance argued that the sale

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<sup>109</sup> B-T Move Criticized, by Corey Hatch, *Jackson Hole News & Guide* (Feb. 16, 2008).

<sup>110</sup> *Id.*

<sup>111</sup> www.ProtectThePuttPutt.com (click the “comment” button in the top right corner of the “home page”).

<sup>112</sup> Public Blasts HQ Move, by Katy Niner, *Jackson Hole News & Guide* (Feb. 9, 2008).

<sup>113</sup> See e.g. BTNF Employees Make Pitch to Stay in Jackson, Jake Nichols, *Planet JH Weekly* (Dec. 5, 2007); see generally BTNF Meeting Notes from scoping meetings in 2008 and 2009.

<sup>114</sup> November 2009 Alliance Action, § 3, Jackson Hole Conservation Alliance (Nov. 2009), available at <http://www.jhalliance.org/Library/AllianceAction/AA.2009/Nov09AA.htm#AA3>.

might “remedy these short-term challenges,” but “not result in the best long-term solution.”<sup>115</sup>

Citizens expressed their disapproval by writing letters to the local newspaper for publication. “The Bridger-Teton National Forest should abandon its outdated and ill-conceived plans to sell prime public land on North Cache Street . . . ,” according to one recent letter.<sup>116</sup> And the local newspaper has echoed that public opposition in staff editorials, acknowledging fringe support for the plan from “those who salivate at the possibility of owning rare and coveted North Cache Drive street-front property,” but counseling the BTNF for “a reassessment, if not abandonment, of the controversial program.”<sup>117</sup>

Calling it “a stunningly boneheaded proposal on a number of levels,” local columnist Jonathan Schechter likened the BTNF selling its land to “the functional equivalent of forcing an agrarian society to eat its seed corn.”<sup>118</sup> Writing directly to the Regional Forester in his column, Mr. Schechter said, “I strongly urge you to keep the Bridger-

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<sup>115</sup> letter to Kniffy Hamilton, Supervisor, from Franz Carmenzind, Executive Director, Jackson Hole Conservation Alliance, *et al.* (Nov. 14, 2008); *see also* letter to U.S. Senators John Barrasso and Mike Enzi, and to U.S. Representative Cynthia Lummis from Louise Lasley, Public lands Director, Jackson Hole Conservation Alliance (Nov. 2, 2009) (calling this project a “tragedy”); Jackson Hole Conservation Alliance Preliminary Comments on the Jackson Administrative Site Land Conveyance and Development Draft Environmental Assessment (Nov. 10, 2009) (“selling public land is [not] the appropriate way to fund Bridger-Teton’s budget needs,” endorsing the “no action” choice); letters from the Snake River Fund, among others, filed with the BTNF as public scoping comment and as comment to the EA, which are incorporated into this document by reference.

<sup>116</sup> Rethink Land Sale, letter to Editor from Tim Young, *Jackson Hole News & Guide* (Oct. 7, 2009); *see also* Big Bucks Blind Feds in Sale of Forest Land, Guest Shot by Charlie Payne, *Jackson Hole News & Guide* (Sept. 30, 2009).

<sup>117</sup> Abandon Forest HQ Plans, Editorial, *Jackson Hole News & Guide* (Sept. 30, 2009); According to columnist Todd Wilkinson, this sale is “wildly unpopular locally.” Forcing B-T land Sale is Pure Crass Politics, The New West, by Todd Wilkinson, *Jackson Hole News & Guide* (Nov. 25, 2009).

<sup>118</sup> Forest Service Budget Woes Continue, by Jonathan Schechter, *Jackson Hole News & Guide* (Sept. 26, 2007); *see also* Disparate Events Linked by Economics, by Jonathan Schechter, *Jackson Hole News & Guide* (Nov. 21, 2007) (“. . . the Forest Service’s regional and national offices don’t really ‘get’ why we value the Bridger-Teton. Valuing a forest for something other than its commodity potential runs counter to 100 years of Forest Service culture.”).

Teton Forest supervisor's office where it is, and *not sell any of the land* upon which the office currently sits."<sup>119</sup>

BTNF employees object too; "I am in complete disagreement with the whole idea of the Conveyance. I think it is extremely short-sighted to sell off land," according to one employee.<sup>120</sup> Other BTNF employees told BTNF decision-makers in written comments the following:

- wait until capital improvement funds are available;
- short-sighted to sell public land to finance facilities;
- selling of public land to developer will reduce open space, and compromise water quality and habitat; and
- not our mission to sell public land.<sup>121</sup>

Local elected officials never endorsed this sale. Although elected officials have expressed support for the BTNF maintaining a strong presence in the Town of Jackson, they never supported this sale. Local officials became swept up in the threat back in 2007 by the Regional Forester to move the BTNF Supervisor's Office out of Jackson. But local elected officials never weighed in on this FSFREA sale of land on North Cache.

Local elected officials refused to endorse BTNF construction plans at its Nelson Administrative Site, which is part of this EA.<sup>122</sup> Public opposition to this piece of the project included spoken opposition at meetings of the Town Council for the Town of

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<sup>119</sup> Forest Service Must Work with the Valley, by Jonathan Schechter, *Jackson Hole News & Guide* (Feb. 13, 2008) (stating his rationale over the next three pages).

<sup>120</sup> e-mail from Heidi Zarchis to Michael Schrotz, BTNF Planning-Lands Staff Officer (October 21, 2009), obtained from BTNF files in its response to our FOIA request.

<sup>121</sup> Compilation of Employee Comments (undated); *see also* all written employee comments received by the BTNF, which are incorporated into this document by reference.

<sup>122</sup> Forest to get Guidance on Nelson Drive Plan, by Cara Froedge, *Jackson Hole News & Guide* (Sept. 16, 2009) (stating, "Officials refused to back a plan to develop an area of Nelson Drive to house forest employees").

Jackson and the Board of Commissioners for Teton County, letters and e-mails to those local elected officials, a resolution from a Homeowners Association and a petition signed by nearly 70 local citizens and presented to the Town and County.<sup>123</sup>

Responding to citizens' opposition, both the Town Council and the Board of Commissioners refused to endorse BTNF plans to sprawl up to 26 more houses on virgin forest at the Nelson Administrative Site.<sup>124</sup> Rather, it directed staff to draft a resolution reflecting "community values."<sup>125</sup> So instead of support for the Nelson Site Plan, both the Council and Commissioners officially admonished the BTNF to preserve open space, "protect critical wildlife habitat" and "use the smallest footprint possible" at the Nelson construction site.<sup>126</sup>

Therefore, this project does not just "lack support" from the local community and elected officials as required by the agencies own interpretation of the statute—locals actually hate the whole idea. Accordingly, this project is an illegal and inappropriate application of FSFREA.

- d. This project is an illegal and inappropriate use of FSFREA because it contravenes public policy and erodes public trust.

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<sup>123</sup> Public record for "United States Forest Service – Nelson Property" agenda documentation, Joint Information Meeting of the Town Council for the Town of Jackson and the Board of Commissioners for Teton County (Aug. 3, 2009); No Movement yet on Nelson Drive Homes, by Kevin Huelsmann, *Jackson Hole News & Guide* (Aug. 5, 2009) ("This is basically a sprawl plan," Counselor Greg Miles said)

<sup>124</sup> No Movement yet on Nelson Drive Homes, by Kevin Huelsmann, *Jackson Hole News & Guide* (Aug. 5, 2009).

<sup>125</sup> Restraint Sought in Forest Housing Plan, by Cara Rank, *Jackson Hole News & Guide* (Oct. 7, 2009).

<sup>126</sup> Joint Resolution of the Town of Jackson Council and Teton County Board of Commissioners (Oct. 5, 2009).

FSFREA embodies commendable public policy goals, and this project does not. FSFREA's goal of increasing Forest Service efficiencies by realigning Forest boundaries and by culling excess and unneeded land and facilities is good policy.<sup>127</sup> Such policy is consistent with sound management practices and consistent with safeguarding of public assets; and thereby, such policy is consistent with sustaining public trust.

However, this project erodes public trust by perverting the public policy goals behind FSFREA. This project perverts FSFREA policy because it does not realigning Forest boundaries and does not dispose of excess and unneeded land and facilities. Rather this is a money-grab by the BTNF, motivated by greed.

**i. The BTNF became blinded by the big bucks.**

The BTNF became blinded by the big bucks it could generate by selling its high-dollar real estate in downtown Jackson, Wyoming. FSFREA was never meant for his type of project. But a unique feature of FSFREA, which allows the agency to "Keep the Cash," motivated the BTNF to ignore the statute's purpose and apply it in a way that contravenes public policy and erodes public trust.<sup>128</sup>

Congress intended FSFREA to enable the U.S. Forest Service to realign its forest boundaries by conveying excess parcels that provide no benefit to the agency and to enable it to cull its excess structures that had become worthless to the agency in order

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<sup>127</sup> We maintain that sale of public land to finance facilities maintenance needs and thereby abrogate government obligations in this regard is reprehensible as a public policy, but such was never the intent of FSFREA anyway. Section 1.b herein above (explaining FSFREA's Congressional intent)

<sup>128</sup> This unique feature of FSFREA states as follows:

[A]ll proceeds from the conveyance of an administrative site . . . shall be available to the Secretary, until expended and without further appropriation to pay necessary and incidental costs incurred by the Secretary in connection with the acquisition, improvement, maintenance, reconstruction, or construction of a facility or improvement for the National Forest System . . . .

FSFREA §505.

to improve its operational efficiency.<sup>129</sup> However, FSFREA is unique among other similar conveyance authorities.<sup>130</sup> FSFREA allows the agency to retain its proceeds from the disposition of these antiquated assets. No other conveyance authority has ever allowed the agency to “Keep the Cash”. This unique feature of the legislation is what drives the greed behind this project.

This project does not seek to dispose of excess or antiquated land or structures in order to improve operational efficiencies; it seeks to generate the most amounts of cash possible by selling off the existing BTNF Supervisor’s Office and 27 other facilities in active use by the BTNF, which occupy a prime spot on the Jackson Hole Monopoly board.<sup>131</sup> The motivation, which drives this project, is the big bucks that the BTNF gets to keep and spend on some new stuff. This type of FSFREA abuse contravenes public policy and erodes public trust.

**ii. This land sale aligns the BTNF with big business real estate developers.**

Developers have always lusted after the BTNF headquarters location. FSFREA, however, gave the BTNF the incentive to engage those buzzards and their big bucks because, under FSFREA, now the agency gets to “Keep the Cash.”

“IMAX sparked the idea of moving the BTNF office,” according to Todd Wilkinson who uncovered evidence of secret meetings back in 2007 between the BTNF and a local

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<sup>129</sup> Section 1.b herein above.

<sup>130</sup> See e.g. National Forest Management Policy Act of 1976, 16 U.S.C. 472a (1976).

<sup>131</sup> The BTNF Supervisor has identified Alternative 3 in the EA as her Preferred Alternative. Alternative 3 seeks to sell the 10 acres where all BTNF Supervisor’s Office facilities are located, as much or more than any other alternative identified in the EA. When asked her rationale for choosing this large tract of land for sale as her Preferred Alternative, Supervisor “Kniffy” Hamilton unabashedly proclaimed that her only reason is that it “generates the most revenue.” East Jackson Neighborhood meeting at Jackson Senior Center (Nov. 18, 2009); accord EA at 14 (the Preferred Alternative (Alternative 3) has the greatest potential to “return the greatest revenue” ).

developer who wanted to build an IMAX theater on the site.<sup>132</sup> “Regional Forest Service officials sought to rationalize the sale of prime real-estate in north Jackson under the guise of efficiency, employee housing and public good,” according to the *Jackson Hole News & Guide*.<sup>133</sup> “It was only after *News & Guide* columnist Todd Wilkinson obtained documents through a Freedom of Information Act (FOIA)<sup>134</sup> request that officials acknowledged a private cinema company had engaged the agency about buying its downtown property from the earliest stages.”<sup>135</sup>

Subsequently, the BTNF met with Jay Kornoff, a real estate broker at Sotheby’s, who advised “sell it all,” estimating a return of \$38 million to \$53 million, depending upon the level of up-zoning.<sup>136</sup>

In order to spark more interest, the BTNF created “Industry Day” at the Snow King Resort in March of 2009.<sup>137</sup> For this event, it developed a dedicated website, it produced a glossy, large-format brochure, it invited a select group of moguls and it simulcast the event nationwide for those that did not travel to Jackson Hole. “The Gateway to Grand Teton and Yellowstone,” it proclaimed, is available to the highest bidder.

“A match made in heaven” best describes what this project became: the BTNF with valuable real estate to sell, and commercial developers ready to cash in on a good deal.

Why let good public policy get in the way of such extraordinary opportunity?

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<sup>132</sup> The New West, by Todd Wilkinson, *Jackson Hole News & Guide* (Jan. 9, 2008); accord Forest Ups Sale Acreage, by Katy Niner, *Jackson Hole News & Guide* (Feb. 7, 2008) (reporting on “irked community members who have felt locked out of the process”).

<sup>133</sup> Abandon Forest HQ Plans, Editorial, *Jackson Hole News & Guide* (Sept. 30, 2009)

<sup>134</sup> 5 U.S.C. § 552, as amended (1996).

<sup>135</sup> *Id.*

<sup>136</sup> Notes from BTNF meeting with Jay Kornoff, obtained from BTNF files in its response to our FOIA request.

<sup>137</sup> “Specifically targeting the real estate market and potential buyers,” the EA admits that this event formed the basis for its Preferred Alternative (Alternative 3) because it has the greatest potential to “return the greatest revenue.” EA at 14.

Unfortunately, this greed, borne from a unique feature of the legislation allowing the BTNF to “Keep the Cash,” does contravene public policy and does erode public trust. Therefore, the Secretary must stop this FSFREA abuse.

**iii. This type of FSFREA abuse risks losing the authority for future legitimate uses.**

Once Congress realizes that the unique nature of this legislation, allowing the agency to “Keep the Cash”, motivates local Forests to maximize its returns and motivates them align with commercial real estate investors, ignoring the intent of FSFREA, and abusing the authority, Congress will repeal and/or fail to extend FSFREA. Accordingly, this type of FSFREA abuse risks losing the authority for its future legitimate uses.

**iv. This sale contravenes well-established public policy that pre-dates FSFREA.**

Whereas previous FSFREA conveyances have been consistent with pre-existing public policy governing appropriate management of our public assets, this project violates those principles as well. Historically, the North Cache Property was transferred to the Forest Service to protect it from private development, a fact that the BTNF now wants to ignore.

The Forest Service came into possession of the North Cache property for the purpose of keeping it in the public domain. In 1958, National Elk Refuge had been “under constant pressure to sell or permit the land to private developers.”<sup>138</sup> Lots in the neighborhood were selling for as much as seven-hundred dollars each, and the value of this land was “constantly increasing.”<sup>139</sup> Ironically, this economic pressure led the Director of the Elk

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<sup>138</sup> EA at 2.

<sup>139</sup> *Id.*

Refuge to approach the Forest Service about a possible land transfer in order to protect this land from future development. Thus in 1963, the North Cache property was transferred from the Department of Interior to the U.S. Forest Service.

Memories are short, and in less than one lifetime, the BTNF has forgotten how it became the guardian of this property. It has now succumbed to the same economic pressure that led to the transfer of this property for its safekeeping in 1963. Since then, lots in the neighborhood have gone from \$700 each to over one million dollars each—a sum sufficient to erase those memories why the BTNF came into possession of this land in the first place.

Accordingly, this project is inappropriate because it contravenes the public policy that committed this property to the Forest for protection and preservation in the first place.

**v. This sale disregards the founding purpose of the U.S. Forest Service.**

"Caring for the land and serving the people," reflects the purpose and mission of the U.S. Forest Service.<sup>140</sup> But, this project does neither. It disposes of precious *land*, putting it in the hands of real estate tycoons, and it ignores the pleas of the *people* who declare it an abuse of the public trust.

At the turn of the last century, our Nation's forests were threatened by the same greed that motivates the BTNF and its developer-conspirators for this project. At that time, President Theodore Roosevelt, advocated formation of the Forest Reserves, which became the predecessor of our modern day U.S. Forest Service. Even back then, President Roosevelt warned, "The forest reserves should be set apart forever for the use

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<sup>140</sup> "About Us – Mission," U.S. Forest Service, at <http://www.fs.fed.us/aboutus/mission.shtml>.

and benefit of our people as a whole and *not sacrificed to the shortsighted greed of a few.*"<sup>141</sup>

Current leadership in Washington still recognizes this principle. Secretary Vilsak has identified our Forests as "a national treasure-requiring all of us to protect and preserve them for future generations."<sup>142</sup> Their constituency understands this principle as well. Over the past seven years, no fewer than 18 separate opinion polls have shown strong public support for national forest conservation.<sup>143</sup> Therefore, this project should be stopped on grounds that it disregards the mission and purpose upon which the U.S. Forest Service was first founded and upon which it still exists today.

**vi. Our own Regional Forester condemns this sort of sacrificing of the land for short term economic gains.**

The most compelling statement of purpose for the Forest Service comes from the personal statement of "Guiding Ethics" from our own Regional Forester, Harv Forsgren:

"I will not sacrifice the long term health, diversity, or productivity of the land for *short term social or economic gains.*"<sup>144</sup>

Mr. Forsgren must now step up to the plate and make good on his word. He must stop this FSFREA sale because it flies in the face of the mission of the Forest Service, it ignores the admonitions of its founder, and most importantly, it contradicts his own

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<sup>141</sup> The Big Burn: Teddy Roosevelt and the Fire that Saved America, by Timothy Eagan (2009) p. 42 (quoting President Roosevelt's first annual message to Congress).

<sup>142</sup> Agriculture Sec. Thomas Vilsak, Seattle, WA (Aug. 14, 2009); *accord* "Vision of the Forest Service," by Tom Tidwell, Chief of U.S. Forest Service ("I cannot tell you how pleased I am that the Secretary not only understands our mission, but understands the importance of that mission"), available at <http://www.fs.fed.us/video/tidwell/transcript.html> .

<sup>143</sup> Heritage Forests Campaign at [http://www.ourforests.org/public\\_support/](http://www.ourforests.org/public_support/).

<sup>144</sup> "Regional Forester's Guiding Ethics," by Harv Forsgren, R-4 Regional Forester (emphasis added).

statement of “Guiding Ethics.” To do otherwise is to choose economic expediency and greed over the preserving “the land.”

In summary, public policy behind FSFREA, pre-existing FSFREA, and appurtenant to the U.S. Forest Service from its inception requires the agency to abandon its short-sighted plans to auction off this valuable and irreplaceable public asset for commercial development. Moreover, this agency, entrusted with protection of our public lands, must abandon these plans because they erode that public trust.

For all of the foregoing reasons, this project is an inappropriate and illegal application of the enabling legislation when it, *inter ali*, violates the plain meaning of FSFREA, it disregards Congressional intent, it abrogates the agency’s own interpretation of the statute, and it contravenes public policy and erodes public trust.

## 2. THE NEPA ANALYSIS FOR THIS PROJECT IS FATALLY FLAWED.

NEPA analysis requires that the agency take a “hard look” at the environmental consequences of its decision.<sup>145</sup> The agency must consider “every significant aspect of the environmental impact of a proposed action and inform the public that it has indeed considered environmental concerns in its decision-making process.”<sup>146</sup> The statute dictates procedural safeguards rather than a certain result.<sup>147</sup> Failures to follow well-established procedural safeguards infect the NEPA analysis.

This NEPA analysis is fatally flawed because, *inter alii*, (1) its statement of “Purpose and Needs,” in the EA, contains unsubstantiated assertions, which are untrue, (2) the agency committed significant time and money to the project before completing its environmental analysis, which taints its judgment, (3) pivotal participants have undisclosed conflicts of interest, which taint the process, (4) the EA does not include “meaningful public input,” (5) the EA does not properly address Civil Rights impacts, and (6) the EA does not properly address environmental impacts.

- a. The NEPA analysis is fatally flawed because its statement of “Purpose and Needs” contains unsubstantiated assertions, which are untrue.

Every EA must include a statement of “need for the proposal.”<sup>148</sup> It forms the major premise for any logical conclusion to the EA.<sup>149</sup> But in its statement of “Purpose and Need,” the EA for this project makes unsubstantiated claims, which are untrue.

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<sup>145</sup> Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

<sup>146</sup> Earth Island Inst. V. U.S. Forest Service, 442 F.3d 1147, 1153-54 (9<sup>th</sup> Cir. 2006).

<sup>147</sup> Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989).

<sup>148</sup> 36 C.F.R. §220.7(b)(1).

<sup>149</sup> The EA purports to follow a syllogism where the “Purpose and Need” forms the major premise, the “Proposed Action” forms the minor premise, and by deductive reasoning, the conclusion logically follows as the Final Decision. “Syllogism” in the *Oxford Dictionary of Philosophy*, by Simon Blackburn, Oxford University Press (1996).

The “Purpose and Need” statement in this EA lists needs, *inter ali*, for (1) employee “housing,” (2) greater “visibility” and (3) a lack of alternative funding in order to justify this project; but those needs do not exist. Therefore, because the “Purpose and Need” statement of this EA forms its major premise, and because that major premise is untrue, the analysis and its conclusions are fatally flawed.

**i. The EA’s purported need for housing is a pretext for the real purpose.**

The “Purpose and Need” statement in this EA repeatedly asserts that BTNF housing needs form the basis for this project, which is untrue. These unsubstantiated and false statements include the following:

- “The action is driven . . . by the difficulty for employees to find affordable housing in the Jackson area.”
- “The action is further driven by the fact that employee recruitment and retention is already challenging and is expected to become more challenging in the near future due to housing costs and housing availability in the Jackson and surrounding areas.”
- “Job offers are frequently not applied to or offers are turned down once the applicant inquires into housing costs and availability.”
- “New employees find it difficult if not impossible to enter the Jackson real estate market, either in rental units or home ownership.”<sup>150</sup>

The EA provides no attribution to authority for these false claims. They are not substantiated by any data, credible or otherwise, included in the EA, included by reference or otherwise available.<sup>151</sup> And the prevailing evidence is that they are untrue.

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<sup>150</sup> EA at p. 7.

Evidence that a housing shortage is just a pretext is found in public statements by the BTNF. In 2007, BTNF Supervisor told the *Jackson Hole News & Guide* that “high housing prices haven’t stopped employees of the Supervisor’s Office from living in Jackson.”<sup>152</sup> “Employees are figuring out ways to buy . . . here,” Supervisor Hamilton said.<sup>153</sup> “A lot of people stay here a long time. They love Jackson. They love the quality of life here,” she said.<sup>154</sup> According to other news reports, “The agency has sought to justify the sale and move by citing the cost of living in Jackson. But its own report on rental prices found no significant difference in rents in Jackson, the bedroom community of Alpine and the new energy center of Pinedale.”<sup>155</sup>

The real truth slipped out when the *Jackson Hole News and Guide* reported on September 5, 2007 that Erin O’Connor, spokesperson for the Forest Service Intermountain Region, admitted the proposed move is as much about cashing in on the valuable real estate as it is about saving Forest Service employees some housing costs.<sup>156</sup>

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<sup>151</sup> 40 C.F.R. §1502.9(b), §1502.22, and §1502.24 (the NEPA document should identify methods used, reference scientific sources relied upon, discuss responsible opposing views and disclose incomplete or unavailable information, scientific uncertainty and risk); Citizens for Better Forestry v. USDA, 341 F.3d 961 (9th Cir. 2003) (holding that NEPA requires documentation of “best available science” in project records).

<sup>152</sup> No Guarantee for B-T, by Corey Hatch, *Jackson Hole News & Guide* (Nov. 30, 2007).

<sup>153</sup> Id.; see also BTNF Employees Make Pitch to Stay in Jackson, Jake Nichols, *Planet JH Weekly* (Dec. 5, 2007) (“‘But people are buying here; we can show you,’ insisted BTNF Supervisor Kniffy Hamilton. ‘People have figured out how to make it here’”).

<sup>154</sup> Id.

<sup>155</sup> Forest Ups Sale Acreage, by Katy Niner, *Jackson Hole News & Guide* (Feb. 7, 2008); see also memo to Jack Troyer, former Regional Forester, from David D. Erin (setting out BTNF employee housing options), obtained from BTNF files in its response to our FOIA request.

<sup>156</sup> Talk of HQ Rankles Resort: Move of Forest Service office now tied to value of Jackson site, by Corey Hatch, *Jackson Hole News & Guide* (Sept. 5, 2007).

Secondly, data proves that housing need is just a pretext when it shows that the BTNF already has adequate housing facilities, and not all of them are occupied.<sup>157</sup> By its own inventory, 79 people are potentially housed in BTNF housing as follows: 20 people at North Cache, 36.5 at the Nelson Drive site, 14.5 at the Cottonwood site, with 2 private and 2 Forest Service pads for manufactured homes vacant for a potential of 8 more people. These include BTNF employees and their family members.<sup>158</sup>

Third, other BTNF data shows housing need is just a pretext. That data shows that those BTNF employees that do not live in employee housing already have their housing needs met too. According to the BTNF's own data, all 42 permanent Supervisor's Office employees either own their own homes or rent from the BTNF as follows: 35 of 42 employees own single family dwellings, which includes six who own manufactured homes on the North Cache campus; the remaining seven employees rent existing Forest Service housing.<sup>159</sup> Therefore, everyone in the Supervisor's Office who does not live in employee housing already owns a home.<sup>160</sup>

Local Jackson Ranger District Office employees also already have their housing needs met. Those 25 permanent employees own or rent as follows: 19 of 25 own their own home, either a single family dwelling (14), a condominium (1), a townhome (1), a manufactured home (2), or a deed-restricted attainable home (1); five of the remaining six employees rent existing Forest Service housing; and one employee rents an

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<sup>157</sup> Tim Kaczynski, former BTNF employee, says he lived in BTNF housing at the Nelson Site, and back then three units were unoccupied.

<sup>158</sup> Conveyance Project Housing Distribution Chart (Sept. 17, 2009), obtained from BTNF files in its response to our FOIA request.

<sup>159</sup> Meeting Notes: Interagency Breakfast (Oct. 23, 2007), obtained from BTNF files in its response to our FOIA request. BTNF data also proves that Supervisor's Office employees live within the following distances from work: 33 live within 10 miles; 2 live within 30 miles; 4 live within 50 miles; and 3 live greater than 50 miles from work. *Id.*

<sup>160</sup> Even seasonal employees have enough housing. According to BTNF data, the four seasonal employees at the Supervisor's Office either rent existing Forest Service housing (2) or rent in Town of Jackson Housing for Senior Citizens (2). *Id.*

apartment.<sup>161</sup> Therefore, everyone in the Ranger District Office who does not live in employee housing already owns a home except one who rents an apartment.<sup>162</sup>

Summarizing the BTNF housing data, all permanent BTNF employees who work in Jackson either rent existing BTNF employee housing or own a home, except one employee who rents a market apartment, and the BTNF has four employee housing trailer pads that are not being fully utilized.

Forth, BTNF claims of a housing shortage are just a pretext because affordable market rentals are readily available in the Town of Jackson. In fact, availability of rental units exploded since 2007 with 41 units in Teton County advertised for rent for under \$1,600.00 per month in October of 2009.<sup>163</sup> Never before has such a glut of affordable rental housing hit the local market. Even if the BTNF housing shortage argument had some modicum of validity in 2007, which it did not, that argument now has completely flipped on its head.

Likewise, claims of a housing shortage are just a pretext because affordable homes are widely available for purchase. Since it gathered its housing data in 2007, the local real estate market tanked. Even the BTNF's own estimates predict housing prices are down 20 to 30 per cent.<sup>164</sup> This is confirmed by local industry data showing sales prices for

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<sup>161</sup> *Id.*; BTNF data shows that District Office employees live within commuting distance as follows: 13 live within 10 miles; 5 live within 30 miles; 7 live within 50 miles; and no one lives greater than 50 miles from work. *Id.*

<sup>162</sup> Seasonal employees and volunteers for the Ranger District Office have housing too; they own a home (1), rent existing Forest Service housing (19), live in Grand Teton national Park housing (3), or rent a market home or trailer (4). *Id.*

<sup>163</sup> Classified ads, *Jackson Hole News and Guide* (Oct. 14, 2009). This does not count affordable rentals available within commuting distance located outside Teton County, WY.

<sup>164</sup> Lands Meeting Notes (Sept. 22, 2009), obtained from BTNF files in its response to our FOIA request.

entry-level homes as of July of 2009 fell 33 per cent according to David Viehman, author of *The Hole Report* and owner of Jackson Hole Real Estate Associates.<sup>165</sup>

For BTNF employees who want to live in Jackson area bedroom communities of Alpine or Victor, housing prices are down almost 50 per cent; folks there are practically giving them away. In addition to cheaper and more available housing in this community, first time home buyers now get a tax credit of up to \$8,000.00; qualified repeat home buyers get up to \$6,500.00.<sup>166</sup>

Despite the ready availability of affordable market homes, the Teton County Housing Authority<sup>167</sup> and Jackson Hole Community Housing Trust<sup>168</sup> continue to develop more deed-restricted affordable and attainable housing for sale at below-market rates to those who qualify. In fact, qualified buyers are turning down those units even when they do qualify.<sup>169</sup>

Finally, the BTNF has failed to consider housing subsidies for its employees in lieu of building more unneeded housing in this community.<sup>170</sup> Notwithstanding a lack of housing subsidies, employees still fair better in the local housing market because they have received Cost of Living raises. During a time when other local residents see their

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<sup>165</sup> <http://www.jacksonholereport.com/>; As a further example of the battering taken by the local real estate market, the oldest and largest real estate firm in Jackson Hole, Real Estate of Jackson Hole, with some 80 agents and brokers, closed its doors this year because of insolvency.

<sup>166</sup> The Worker, Homeownership, and Business Assistance Act of 2009, Pub. Law 111-92 (2009).

<sup>167</sup> [http://tetonwyo.org/AgencyHome.asp?dept\\_id=house](http://tetonwyo.org/AgencyHome.asp?dept_id=house) .

<sup>168</sup> <http://housingtrustjh.org/> .

<sup>169</sup> See e.g. Downtown Affordable Condo Called in to Question: Dozens have passed up chance to own Pearl at Jackson units, by Cara Rank, *Jackson Hole News & Guide* (Nov. 4, 2009).

<sup>170</sup> "For the cost of constructing one new unit, a housing subsidy of \$20,000 per year could be provided for 20 years (and much more if interest is considered)." Letter from Robert H. Stellwagon to Mayor and Council, Town of Jackson, and Chair and Commissioners, Teton County (Aug. 20, 2009).

incomes diminishing and even worry about losing our jobs, BTNF employees have received more than a four per cent increase in pay over the last two years.<sup>171</sup>

Accordingly, a shortage of affordable housing for BTNF employees is a pretextual “Purpose and Need,” not the true reason, for this project because (1) the vast majority of employees already own their own home, (2) the vast majority of those who do not own, already live in existing Forest Service housing, (3) Forest Service housing facilities are not fully utilized, with enough available trailer pads to accommodate 8 more people, (4) the community is replete with affordable housing for rent, for sale and by application for those who qualify.

The real reason is dollars--\$35 to \$50 million of them—which is very hard to resist. In 2007, the BTNF seized upon a “once-in-a-lifetime opportunity.” New legislation, buried in an appropriations bill, authorized local Forest Service Supervisors to auction off of our public assets to the highest bidder and “Keep the Cash.”<sup>172</sup>

Back then, real estate in Jackson Hole was hot and the BTNF Supervisor’s Office occupied a prime spot in downtown boom-town. “Why not cash in, get a new office building out of the deal, and be a part of the local development frenzy?” thought the BTNF.

But a plan without a purpose is sure to fail. Let’s include our housing needs, thought the BTNF. Why let the facts get in the way of a good plan, thought the BTNF? Employee housing is always been a sympathetic cause. So we got this EA and its contrived “Purpose and Need” for more housing.

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<sup>171</sup> General Services (GS) grade employees got an across the board 1.70% increase in January of 2007 and a 2.50% increase in February of 2008.

<sup>172</sup> Section 1.d.i–ii herein above.

But, employee housing is not a valid “need for the proposal” as required by NEPA,<sup>173</sup> which means a major premise of this EA is untrue. If the major premise is false, then the subsequent analysis and conclusions in this EA are fatally flawed.

**ii. Building more BTNF housing invalidates the project’s “purpose” of reducing facilities maintenance costs.**

The EA’s proffers another “Purpose” for the project is to reduce facilities maintenance costs.<sup>174</sup> But more than doubling the current number of employee housing units, as the BTNF plans to do, will only increase future maintenance costs.<sup>175</sup> Will this just force the BTNF to sell more land in the future?

If BTNF logic for building more employee housing seems distorted, it is because the purported “need” for more employee housing is a pretext—a ruse for the real reason for this project. This project is nothing but a short-sighted money-grab, motivated by greed, falsely justified by a non-existent yet sympathetic cause.

**iii. The EA’s claim of difficulty with employee “recruitment and retention” is false and unsubstantiated.**

The EA falsely claims as a “Purpose and Need” that “the action is further driven by *the fact* that employee recruitment and retention is already challenging and is expected to become more challenging.”<sup>176</sup> This false statement of “need” is not supported by data

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<sup>173</sup> 36 C.F.R. §220.7(b)(1).

<sup>174</sup> EA at 6.

<sup>175</sup> The rationale behind current federal policy encouraging less government-provided employee housing is to reduce future facilities maintenance costs.

<sup>176</sup> EA at 7 (emphasis added); the EA further makes an unsubstantiated claim that “[j]ob offers are frequently not applied to or offered are turned down once the applicant inquires into housing costs and availability.” *Id.* Frankly, this is the best place to live in the world; who would not *kill* to work and live here?

or by citation to authority in the EA, or by data or citations incorporated by reference into the EA.

Furthermore, this is a false assertion about difficult “employee recruitment and retention” because the BTNF has an exceptionally high quality work force. Anyone who says otherwise has not known the devoted individuals employed by the BTNF and has not seen the fine work they do. The BTNF did not come by this caliber of work force by happenstance either.

The BTNF offers its employees tangible advantages over other Forest assignments. The BTNF offers, among others, an unsurpassed natural beauty, incomparable biodiversity, unequaled geological fascinations, and a reputation for collegiality among a long-term, quality staff. Also, the community offers exceptional public education, health care, cultural activities and recreational activities, not found anywhere else in the Forest system.

Accordingly, this EA is disingenuous to suggest that the BTNF cannot attract and retain a qualified work force because it has an exceptional staff and because the offering of this Forest and its community are unrivaled anywhere. Therefore, this EA is based upon false assumptions, which invalidate any conclusions drawn from it.

**iv. The alleged “need” for greater visibility is not possible with any of the action alternatives.**

The “Purpose and Need” statement in this EA falsely contends that one purpose of this agency action is to “locate the new facilities for visibility . . . .”<sup>177</sup> It states, “Public benefits from this proposal include . . . improved visibility and access to buildings for

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<sup>177</sup> EA at p. 6.

improved customer service and visitor contact.”<sup>178</sup> But this is a false premise because none of the proposed alternatives offers greater visibility.

The BTNF Supervisors office currently is highly visible. Serving as the “visitor center” for the Forest, it is located on the main corridor in downtown Jackson, which forms the gateway to Yellowstone and Grand Teton National Parks. In fact, its location is right on the only corridor in and out of town heading to the north. It offers visitor parking, staff at the front desk to welcome visitors, and maps and information about the Forest in the lobby. It is currently one of the most “visible” public buildings in Teton County—more visible than the County Courthouse, more visible than city hall for the Town of Jackson, and more visible than the Chamber of Commerce.

None of the purposed alternatives will improve BTNF “visibility”; in fact, nothing could improve its visibility over its current location. All of the proposed alternatives for action eliminate the prime location currently occupied by the Supervisor’s office. All of the proposed alternatives for action relocate the Supervisor’s Office and all other facilities to the back of the lot. All of the proposed alternatives for action decrease “visibility.”

Accordingly, greater “visibility” cannot be a “need for the proposal”<sup>179</sup> as required by NEPA, and this EA is fatally flawed because its statement of “Purpose and Needs” contains statements that are untrue.

**v. The alleged “need” to locate fire facilities appropriately is not possible with any of the action alternatives.**

The “Purpose and Need” statement in this EA falsely contends that one purpose of this agency action is to maintain “fire facilities located for appropriate response.”<sup>180</sup> It

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<sup>178</sup> EA at p. 7.

<sup>179</sup> 36 C.F.R. §220.7(b)(1).

<sup>180</sup> EA at 7.

states, “The purpose of this proposal is to generate funds [to] maintain fire response.”<sup>181</sup> But this is a false premise because none of the proposed alternatives offers better fire response.

The BTNF Fire Cache currently is ideally located at the North Cache Site for fast and efficient response. All of the action alternatives move the Fire Cache from its current location to the Cottonwood Site. As discussed in Section 3.d.i herein below, moving the Fire Cache to Cottonwood is absurd. The Cottonwood Site is 15 to 20 miles down the canyon in the middle of nowhere. The Cottonwood Site has no mobile phone service and sketchy Forest Service radio reception. It is located too far from the local airport and from food and supplies in the Town of Jackson. Fire fighters’ safety will be sacrificed by the necessity to negotiate a curvy mountain road in order to get to their sleep quarters after a long day of fighting fires.

Accordingly, better “fire response” cannot be a “need for the proposal,” as required by NEPA,<sup>182</sup> because all of the action alternatives make it worse. Therefore, this EA is fatally flawed because its statement of “Purpose and Needs” contains statements that are untrue.

**vi. Lack of funding is a false “Purpose and Need” for this project.**

“The purpose of this proposal is to generate funds” according to the opening sentence in the EA’s statement of “Purpose and Need.”<sup>183</sup> Implicit in that statement is that funds are not otherwise available because if other funds were available, the “Purpose and

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<sup>181</sup> *Id.* at 6.

<sup>182</sup> 36 C.F.R. §220.7(b)(1).

<sup>183</sup> EA at 7.

Need” to “generate funds” does not exist.<sup>184</sup> However, the “Purpose and Need” statement avoids explicitly declaring that other funds are not available because other funds are available.<sup>185</sup>

Plenty of other funds are available. Of the \$6 billion Forest Service budget in FY 2010, \$500 million is designated for facilities maintenance and construction.<sup>186</sup> That includes a \$50 million Presidential Initiative to address “critical deferred maintenance and operational components of the Forest Service infrastructure.”<sup>187</sup> And the U.S. Forest Service already received \$650 million in additional funding for deferred maintenance from ARRA funds this year.<sup>188</sup>

Funding is certainly available for other federal projects in the Jackson area. The Grand Teton National Park, five miles up the road, got a \$13 million “presidentially directed” earmark for its housing construction in FY 2010.<sup>189</sup> This is on the tails of completion of a new Visitors’ Center at the Park. More significantly, the BTNF just let a \$1.15 million contract for construction of a new District Ranger’s office in Big Piney, which was always listed as a lower priority than this project. Therefore, other funding is available.

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<sup>184</sup> The artful dodge comes with this statement: “The Forest Service has considered other funding mechanisms, to no avail.” EA at 30. But the unanswered questions are *who* in “the Forest Service” considered *what* “other funding sources.”

<sup>185</sup> Only in its “Background” section, does the EA mention that “*appropriated* funds are lacking to accomplish” construction of “facilities that need to be replaced” by the BTNF. EA at 3 (emphasis added). According to the EA, “[i]n response to this need, Congress passed [FSFREA].” *Id.* This is a false statement of Congressional intent as FSFREA was never intended as an alternative funding source. See Section 1.b herein above. FSFREA was meant to be a mechanism to realign Forest boundaries and dispose of “unneeded” facilities. *Id.*

<sup>186</sup> US Forest Service Fiscal Year 2010 President’s Budget Overview, p. 1-4.

<sup>187</sup> USDA FY 2010 Budget Summary and Annual Performance Plan, p. 79.

<sup>188</sup> USDA FY 2010 Budget Summary and Annual Performance Plan, p. 79. Through the American Recovery and Reinvestment Act of 2009, combined with other economic recovery legislation from 2008, Congress has appropriated \$787 billion in additional funds to stimulate the U.S. economy.

<sup>189</sup> “FY 2010 Earmark List,” p. 7, House Committee on Appropriations website, available at [http://appropriations.house.gov/Subcommittees/sub\\_ienv.shtml](http://appropriations.house.gov/Subcommittees/sub_ienv.shtml).

Even though the EA does not explicitly identify its “need” for funding, a lack of funding is inferred from the EA. But this is a false premise because other funding is available.

**vii. But for this project, funding would be already assigned to the BTNF.**

The BTNF has been passed over for funding for its infrastructure needs because of this project. Two-and-one-half years ago, however inappropriately, the Forest Service identified this project as an alternative source of funds for the BTNF.<sup>190</sup> At that time, any efforts to fund BNF facilities maintenance needs through traditional channels were abandoned.<sup>191</sup>

Accordingly, BTNF intentionally has been passed over for funding because it “already” has this high-dollar real estate in downtown Jackson on the chopping block. But for its plans to sell us out, the BTNF would not have to sell us out.

**viii. All other “needs” upon which the EA is premised are unsubstantiated.**

Other unsubstantiated “needs” listed in the EA as justification for this project include need for “a higher level of security” and need to replace all “28 offices and facilities.”<sup>192</sup> These “needs,” like the other needs discussed herein, are not substantiated by any data, credible or otherwise, included in the EA, incorporated by reference or otherwise available. Therefore, the EA fails to identify a single verifiable “need.”

For all of the foregoing reasons, the “Purpose and Need” statement, which forms the major premise for this environmental analysis is unsubstantiated and untrue.

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<sup>190</sup> USDA Forest Service Fiscal Year 2008 Budget Justification,; The BTNF later amended its plans, increasing the number of acres it planned to cash in. USDA Forest Service Fiscal Year 2009 Budget Justification.

<sup>191</sup>The EA even alludes to “supplementing funds *needed* with other revenue sources” if “an adequate amount of money is not generated.” EA at 23 (emphasis added). The subtext of this statement is “let’s sell the land, see what we get, then try for some other funding.”

<sup>192</sup> EA at 7.

Therefore, any conclusions that might be drawn from this document are invalid and the NEPA process associated with it is fatally flawed.

- b. The NEPA process is fatally flawed because the Forest Service committed significant time and money to the project long before completing its environmental analysis.

Federal regulations explicitly, and repeatedly, require that environmental analysis review be timely. “Agencies shall integrate the NEPA process with other planning at the earliest possible time to ensure planning and decisions reflect environmental values, . . . and to head off potential conflicts.”<sup>193</sup> Similarly, regulations require that environmental review be commenced “as close to possible to the time the agency is developing or is presented with a proposal.”<sup>194</sup> And regulations require that the analysis “shall 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.*”<sup>195</sup>

The rationale behind this rule is that inflexibility may occur if delay in preparing the environmental analysis is allowed. “After major investment of both time and money, it is likely that more environmental harm will be tolerated.”<sup>196</sup> For this reason, the U.S.

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<sup>193</sup> 40 C.F.R. §1501.2 (2005).

<sup>194</sup> 40 C.F.R §1502.5 (2005).

<sup>195</sup> *Id.*; see also 40 C.F.R. §1502.2(g) (2005) (“Environmental impact statements shall serve as a means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made”).

<sup>196</sup> Save the Yaak Committee v. Block, 840 F.2d 714, 718 (9<sup>th</sup> Cir. 1988) (holding that “failure to comply with NEPA’s timing requirements “seriously impeded the degree to which their planning and decisions could reflect environmental values.”); see also Metcalf v. Daley, 214 F.3d 1135, 1142 (9<sup>th</sup> Cir. 2000) (holding that the agencies had made an “irreversible and irretrievable commitment of resources” prior to environmental review); West v. Sec’y of Dep’t of Transp., 206 F.3d 920, 930 n.14 (9<sup>th</sup> Cir. 2000) (the injury “consists of added risk to the environment that takes place when governmental decision-makers

Supreme Court insists that the environmental assessment that informs government actions “shall be prepared at the feasibility analysis (go—no go) stage.”<sup>197</sup>

In this case, the BTNF invested enormous amounts of time and money before it completed the EA. It passed the “go, no go” point-of-no-return long before it completed the EA. And all objectivity was lost along the way.<sup>198</sup>

The BTNF first contemplated this project in 2007. Even before the idea was mentioned publically, the BTNF had already consulted with developers and real estate brokers about selling its extraordinary piece of property in Jackson Hole.<sup>199</sup> Subsequently, the BTNF completed all the required documentation and planning for the sale.<sup>200</sup>

The BTNF courted investors at its “Real Estate Forum,” professionally produced and performed at Snow King Resort.<sup>201</sup> The BTNF conspired with Town planners and a “team” of paid professionals to develop the layout for future construction at the Nelson Site.<sup>202</sup> The time and cost of all this is not exactly known, but it was not cheap or easy.<sup>203</sup>

In September of 2009, before completion of the EA, the BTNF had already reported to its Regional Office in a private memo the following:

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make up their minds without having before them an analysis (with public comment) of the likely effects of their decisions on the environment”); accord Calvert Cliffs Coordinating Committee, Inc. v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1127 (D.C. Cir. 1971) (NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy).

<sup>197</sup> Andrus v. Sierra Club, 442 U.S. 347, 351-52 n.3 (1979).

<sup>198</sup> Section 1.a.3 herein above (The “no action alternative was never an option as required by the statute).

<sup>199</sup> See discussion of BTNF contacts with IMAX theater developer and real estate broker at Section 1.d.ii herein above.

<sup>200</sup> See list at Section 1.a.iii herein above.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*; Section 2.c.i herein below reveals the undisclosed conflict of interest held by a key member of the “team” that taints this planning process.

<sup>203</sup> Michael Schrotz, BTNF Planning-Lands Staff Officer, estimated a cost of \$100,000 when asked at the East Jackson Neighborhood Association meeting at the Senior Center on Nov. 18, 2009.

- “Sales Implementation Strategy nearing completion, awaiting identification of preferred alternative”;
- “Nelson site surveying completed. Project has been reviewed by utility providers to prepare for planning and design. Engineering info has been compiled”; and
- “Future actions” include “Planning and construction of Nelson and Cottonwood site work (road, utilities, etc.) for trailer pads and employee housing for 2010 and 2011 . . . .”<sup>204</sup>

Moreover, before completion of the EA, the BTNF had already sent its “Sales Implementation Strategy” (SIS) for this project to the Regional Office for review.<sup>205</sup> And the BTNF already had a “Draft Decision Document” referenced in meeting notes from September 22, 2009.<sup>206</sup>

Accordingly, the BTNF invested enormous amounts of time and money in this project long before completing the EA, which tainted its objectivity and infected its decision-making. Evidence even indicates that the decision was made long before completion of the EA.<sup>207</sup> Therefore, this NEPA process is fatally flawed.

- c. The NEPA analysis is fatally flawed because pivotal participants have undisclosed conflicts of interest.

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<sup>204</sup> R-4 Briefing Memo (Sept. 25, 2009), obtained from BTNF files in its response to our FOIA request.

<sup>205</sup> e-mail from Richa Wilson, R-4 Architectural Historian, to Thomas Enroth, R-4 Hazmat Coordinator (Sept. 21, 2009), obtained from BTNF files in its response to our FOIA request; *see also* extensive discussion of the SIS in Conveyance Meeting Notes (Sept. 22, 2009), including advise to “go more generic” and include “less detail,” obtained from BTNF files in its response to our FOIA request.

<sup>206</sup> Conveyance Meeting notes (Sept. 22, 2009), obtained from BTNF files in its response to our FOIA request.

<sup>207</sup> *See also*, Section 1.a.iii herein above (The “no action alternative” was never an option as required by the statute).

NEPA requires a fair and accurate analysis of environmental impacts of any proposed government action.<sup>208</sup> Conflicts of interest among participants taint that analysis. These conflicts of interest occur when someone holds multiple interests, one of which could *possibly* corrupt the motivation for an act in the other. In this case, the NEPA analysis is fatally flawed because pivotal participants have such undisclosed conflicts of interest.

**i. The EA relies upon a private professional planner with undisclosed conflicts of interest.**

A professional planner who played a pivotal role in development of the Site Plan for the BTNF Nelson Administrative Site has undisclosed conflicts of interest, which have tainted the NEPA process.

Council on Environmental Quality (CEQ) regulations require disclosure of “financial or other interest in the outcome of the project.”<sup>209</sup> The purpose of this disclosure statement requirement is to avoid situations in which the contractor has “an interest in the outcome of the proposal.”<sup>210</sup> According to the CEQ, this serves to assure the public that the environmental statement has been “prepared free of subjective, self serving research and analysis.”<sup>211</sup>

Richard VanGytenbeek, team leader for development of development of the Nelson Drive Site Plan, had financial and personal interest in its outcome. Mr. VanGytenbeek is licensed professional landscape architect at Rendezvous Engineering. He and his firm bid on and negotiated a contract with the BTNF for his professional services in early

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<sup>208</sup> 36 C.F.R. §220.7.

<sup>209</sup> 40 C.F.R. §1506.5(c) (applying specifically to preparation of an EIS); CEQ regulations also require that the “responsible federal official must independently evaluate the statement prior to its approval and take responsibility for its scope and contents; Guidance Regarding NEPA Regulations, published at 48 Fed. Reg. 34263 (1983).

<sup>210</sup> *Id.* (“this will ensure a better and more defensible statement for federal agencies”).

<sup>211</sup> *Id.*

2009.<sup>212</sup> Over the ensuing six months, he served as “team leader” for the Rendezvous team, which included other local professionals from Carney Architects, Collins Planning Architects and Biota Research and Consulting, Inc.

As team leader, Mr. VanGytenbeek coordinated activities, reports and billing from the other members of his team. He helped direct neighborhood meetings and presented plans to the Council for the Town of Jackson Town and the Board of County Commissioners for Teton County. His work product is cited in and relied upon by the EA.<sup>213</sup>

Not mentioned in the EA and never disclosed to the public are Mr. VanGytenbeek’s competing interests. First, his personal residence is adjacent to the Nelson Drive Site. Its property line is contiguous with the Forest boundary. Second, Mr. VanGytenbeek expressed strong feelings about this project before he got the job, which helped shape the outcome of this EA.

In November of 2008, before he worked for the BTNF, Mr. VanGytenbeek wrote a two page letter to the BTNF listing his concerns with the Nelson Administrative site development. In his letter, he identified the following issues:

- Density concerns;
- Traffic concerns;
- Wildlife impacts
- Zoning issues;
- Water and sewer issues;
- Aesthetic concerns; and

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<sup>212</sup> Contract negotiations are memorialized in notes by Michael Schrotz, BTNF Planning-Lands Staff Officer, obtained from BTNF files in its response to our FOIA request.

<sup>213</sup> See *e.g.* EA at 104.

- Concerns with disruption of existing “neighborhood fabric.”<sup>214</sup>

Whether Mr. VanGytenbeek allowed his personal views expressed in this letter to influence his professional judgment and influence his contribution as “team leader,” which shaped this EA, may never be known for sure. What is known for sure is that Mr. VanGytenbeek had multiple interests, one of which “could possibly corrupt [his] motivation to act” against the other conflicting interests. Therefore, Mr. VanGytenbeek had an undeniable conflict of interest, which he never disclosed to the public.

Mr. VanGytenbeek failure to disclose his conflicts of interest violated the tenets of his profession. The Code of Professional Ethics for the American Society of Landscape Architects requires that members “should seek to make full disclosure of relevant information to clients, public, and other interested parties who rely on their advice and professional work product.”<sup>215</sup> Relevant information, which must be disclosed, would include personal views of this project as expressed in Mr. VanGytenbeek’s letter written to the BTNF before contracting for his professional services with the BTNF. Without need for further clarification, the Code nonetheless continues,

Members making public statements on landscape architectural issues shall disclose compensation other than fee and their role and any economic interest in the project.<sup>216</sup>

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<sup>214</sup> Letter from Richard VanGytenbeek to BTNF, obtained from BTNF files in its response to our FOIA request.

<sup>215</sup> Code of Professional Ethics, Cannon I, §ES1.2, American Society of Landscape Architects, *as amended* May 6, 2006); *accord* §R1.101 (“Members shall deal with other Members, clients, employers, employees, and the public with honesty, dignity, and integrity in all actions and communications of any kind”).

<sup>216</sup> *Id.* at §R1.201.

“Economic interests,” which must be disclosed, include ownership of adjacent property. Therefore, this pivotal player in the planning process was duty bound to disclose his various conflicts of interest, which he did not.

While disclosure is Mr. VanGytenbeek’s professional responsibility, the BTNF must share the blame for deficient disclosure because the BTNF certainly knew or should have known about Mr. VanGytenbeek’s adverse economic interests and about his personally held opinions of this project. The BTNF was also in the same position as Mr. VanGytenbeek to make the requisite public disclosures. Failure of the BTNF to reveal this conflict of interest can only be construed as an attempt to conceal it for nefarious reasons.

In other words, the BTNF also has an undisclosed conflict of interest: its interest in proper public disclosure conflicts, which risks impugning his credibility, conflicts with its interest in having Mr. VanGytenbeek’s as an effective member of its “team.” In any case, an undisclosed conflict of interest held by a pivotal member of the planning team taints the outcome of this EA—especially when the BTNF had constructive notice of the conflict and remained silent. For this reason, the EA is fatally flawed.

**ii. The final decision-maker also has a conflict of interest.**

The Regional Forester has delegated final decision-making authority for this EA to the BTNF Supervisor.<sup>217</sup> But the Supervisor has “competing interests, one of which could *possibly* corrupt the motivation for an act in the other.” Such conflicts of interest taint the NEPA process.

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<sup>217</sup> letter from Regional Office to BTNF Supervisor, referenced in “Conveyance Meeting Conference Call notes (undated), obtained from BTNF files in its response to our FOIA request.

Her first interest is to follow the law. As the “Responsible Official,”<sup>218</sup> the Supervisor is bound by law to “[complete] the environmental document review *before* making a decision on the proposal.”<sup>219</sup> Her second interest, however, is to follow the mandate from her Regional Forester to sell some or all the land.<sup>220</sup> These competing interests create a situation where one could *possibly* corrupt the motivation for an act in the other. Therefore, she is not the proper decision-maker for this EA, which requires a fair and balanced consideration of the environmental consequences of this decision.<sup>221</sup>

Accordingly, the NEPA process is fatally flawed because the final decision-maker and a pivotal participant have conflicts of interest that have tainted the process.

- d. The NEPA analysis is fatally flawed because it fails to incorporate meaningful public input.

NEPA requires the agency to use “all practicable means and measures” to fulfill its responsibilities under the Act.<sup>222</sup> NEPA responsibilities include identification of people or organizations who are interested in the proposed actions.<sup>223</sup> Such interested people and organizations must have the opportunity to “provide meaningful input” prior to an

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<sup>218</sup> 36 C.F.R §220.3 (defining “Responsible official” as “the Agency employee who has the authority to make and implement a decision on a proposed action”); Forest Service Manual (FSM) §195.41 (same).

<sup>219</sup> 36 C.F.R §220.4(c)(1); see also §220.4(c)(4) (requiring the Responsible Official to “[consider] the alternatives analyzed in environmental document(s) before rendering a decision on the proposal”).

<sup>220</sup> Section 1.a.iii herein above (the “no action alternative” was never an option); see also private e-mail outlining what the Regional Office told the BTNF about the NEPA process as follows:

One EA – Two Decisions (one to sell property and second to develop property, assuming we are not selling all of it. [RO will delegate to Kniffy authority to make both of these decisions.

e-mail from Mike Balboni, BTNF Deputy Supervisor, to Michael Schrotz, et al. (April 4, 2008), obtained from BTNF files in its response to our FOIA request.

<sup>221</sup> Kleppe, 427 U.S. at 410 n.21; Earth Island, 442 F.3d at 1153-54; Marsh, 490 U.S. at 371.

<sup>222</sup> 42 USC §4331(b).

<sup>223</sup> CEQ NEPA Regulations, 40 C.F.R. §1501.7.

agency decision.<sup>224</sup> Such meaningful public input plays an indispensable role in the NEPA process.

This is an indispensable part of the process because NEPA requires decision-makers to be fully informed of the environmental consequences of their decisions. And, members of the public generally 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.

The public plays an indispensable role in the NEPA process in other ways too. In addition to the role of public comments to inform agencies of environmental impacts that they may have misunderstood or failed to recognize and to 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.

Therefore, “meaningful” public participation in the NEPA process should allow citizens to communicate with and influence government actions that directly affect their health and well-being. A failure of “meaningful public input” is fatal flaw in this process.

This process is fatally flawed of lack of “meaningful public input” because (1) the BTNF stifled, misunderstood or ignored public comment, (2) the Nelson Site planning process moved too quickly past the public to allow adequate response to that portion of the project, (3) the BTNF denied and ignored our repeat requests for delay in order to complete a FOIA application and to better participate, (4) request for appointment of an

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<sup>224</sup> NFS Regulations, 36 C.F.R. §215.1, and see CEQ NEPA Regulations, 40 C.F.R. §1501.4(b), 1506.6(b).

advisory committee was denied, and (5) public input is meaningless since the BTNF already made its decision.

**i. Public input has been stifled, misunderstood and/or ignored by the BTNF.**

Forest Service policy makers affirm that individuals and communities increasingly are demanding involvement in agency decisions that affect their futures.<sup>225</sup> Both the information revolution and growing distrust of central authorities and expert knowledge have fed demands for collaborative planning and decision-making, say the authorities at the Forest Service. Thus, increasingly people expect to be heard, to have a seat at the table, and a role in decisions. The truism—you can plan *with* people, but not *for* them—is becoming harder to avoid they say. In this current climate of public attitudes, according to the agency’s own internal advisors, collaborative stewardship may be the only choice that works.<sup>226</sup>

In this case, however, citizens often felt stifled, misunderstood and ignored during the NEPA planning process. For example, at public meetings, BTNF officials evaded sincere questioning by concerned citizens.<sup>227</sup> Citizens attending the East Jackson Neighborhood Association meeting in October of 2008 felt frustrated by the BTNF vague and “unresponsive” answers to questions and concerns. Citizens were told by the BTNF *we don’t know what we will do at the Nelson Site yet*. Then at the next neighborhood meeting in July of 2009, the BTNF had it all worked out.

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<sup>225</sup> Emerging Issues, by Maitland Sharpe, Director, Policy Analysis, U.S. Forest Service (Oct. 27, 1999) (presented at the National Leadership Conference, Madison, Wisconsin).

<sup>226</sup> *Id.*

<sup>227</sup> Citizens attending the East Jackson Neighborhood Association meeting in October of 2008 felt frustrated by the BTNF vague and “unresponsive” answers to questions and concerns. Citizens were told, “We don’t know what we will do at the Nelson Site yet. Then at the next public meeting in July of 2009, citizens perceived that the BTNF had it all worked out.

The BTNF and its paid planners presented to the public over three weeks in July of 2009 its site plan for the Nelson Drive portion of this project. The preconceived plan did not accommodate public concerns about environmental impacts of development in this area.

The BTNF sponsored Nelson Site design *charrette* was a *charade*. Community participants were given a Hobson's choice.<sup>228</sup> The BTNF and its private paid planners set parameters for this public process that left participants with only one possible outcome—a sprawl of housing on the hillside at the Putt-Putt trailhead—the one outcome desired by the BTNF. Therefore, citizens who participated in good faith felt railroaded into the BTNF's preconceived plans.

BTNF planning rushed along in three weeks left citizens feeling railroaded. Although the scoping documents appeared in 2008, the full extent of the Nelson development plan was revealed only in July of 2009. The Nelson development went from vague ideas in 2008 to real architectural drawings in 2009 without intervening dialogue. At public meetings in July of 2009, when the BTNF revealed this full set of plans for the first time, citizens complained that this process moved too quickly.

Moreover, the Nelson site plan presented in those 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.

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<sup>228</sup> A Hobson's choice is a free choice in which only one option is offered. The choice is therefore between taking the option or not; "take it or leave it." The phrase is said to originate from Thomas Hobson (1544–1631), a livery stable owner at Cambridge, England. To rotate the use of his horses he offered customers the choice of either taking the horse in the stall nearest the door or taking none at all. [http://en.wikipedia.org/wiki/Hobson's\\_choice](http://en.wikipedia.org/wiki/Hobson's_choice).

Later, one BTNF official remarked that he was unaware of any negative public comments about the Nelson project, which is not correct.<sup>229</sup> Another BTNF planner 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.<sup>230</sup>

Accordingly, public input has been stifled, misunderstood and/or ignored by the BTNF. This approach to gathering public input is contrary to both the spirit and letter of the NEPA requirements. It invalidates the process.

**ii. Requests for a delay to allow meaningful public input was denied.**

Within two weeks of when the BTNF presented its surprise plans for the Nelson Site construction, in order to allow for time to correct flaws in the process, citizens requested a 180-day stay in the NEPA planning process, which the BTNF denied.<sup>231</sup>

Last-minute architectural plans emerged for the Nelson Dive site construction three months before the BTNF published this EA. The BTNF “team” led by Rendezvous Engineering presented their plan to the public on July 27, 2009.<sup>232</sup> This occurred right at the conclusion of a public meeting, and no opportunity for public input occurred until

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<sup>229</sup> See e.g. public scoping comments received by the BTNF.

<sup>230</sup> *Id.*; BTNF oral presentation to Joint Information Meeting of the town Council for the Town of Jackson and the Board of commissioners for Teton County, Wyoming (Aug. 3, 2009); No Movement yet on Nelson Drive Homes, by Kevin Huelsmann, *Jackson Hole News & Guide* (Aug. 5, 2009) (“We believe this proposal reflects public input and the natural features of the area,” said Bill Collins, a planning consultant who helped design the site plan”).

<sup>231</sup> letter from Protect the Putt-Putt to Carole “Kniffy” Hamilton, BTNF Supervisor (August 10, 2009) (Re: Demand for immediate stay in NEPA process for Jackson Admin. Site Conveyance).

<sup>232</sup> Initially, the plan was not published anywhere, so other interests citizens, those that did not attend meetings, did not see this plan.

now. One week later, the BTNF presented its plan for Nelson Drive construction to a joint meeting of the Town council and County commissioners for final approval there.<sup>233</sup>

This “new” plan is a radical departure from the vague ideas discussed by BTNF officials up until July. Consequently, we requested time to effectively participate:

Now that a specific architectural plan is proposed, NEPA requires that you allow adequate time for comment. Less than two weeks has passed since a few of us saw this plan for the first time. Without more time for public dissemination and input, you have 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.<sup>234</sup>

Declaring that (1) the public has a strong interest in the aesthetic, cultural, economic, social, and health effects of this “new” plan, (2) that NEPA requires the BTNF consider these effects,<sup>235</sup> and (3) that these effects are only discernable now that a specific plan is available, the BTNF should allow citizens more time.<sup>236</sup>

Another reason for the delay was to allow the BTNF time to respond to a pending FOIA request, which was meant to contribute to a better public understanding of this project. In order to effectively participate in the NEPA process, citizens must be well informed.<sup>237</sup>

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<sup>233</sup> The Town Council and Board of Commissioners ‘smelled a rat’ and wisely demurred. No Movement yet on Nelson Drive Homes, by Kevin Huelsmann, *Jackson Hole News & Guide* (Aug. 5, 2009) (“Town and county officials delayed endorsing a plan by the U.S. Forest Service to build additional employee housing on land near Nelson Drive”).

<sup>234</sup> letter from Protect the Putt-Putt to Carole “Kniffy” Hamilton, BTNF Supervisor (August 10, 2009).

<sup>235</sup> 40 C.F.R. §1508.8, *id.* at §1508.14.

<sup>236</sup> letter from Protect the Putt-Putt to “Kniffy” Hamilton, BTNF Supervisor (August 10, 2009).

<sup>237</sup> letter from Protect the Putt-Putt to John Kuzloski, BTNF FOIA Coordinator via FedEx (August 8, 2009) (Re: FOIA request / fee waiver requested); The BTNF delayed its response to our FOIA request beyond the 20-day statutory limit. Letter from “Kniffy” Hamilton, BTNF Supervisor to Charles L. Payne via USPS

They must understand agency actions, and the rationale behind them. The stay request would have allowed citizens to be better informed through their FOIA request and allow them to better provide “meaningful input” and potentially correct the flaws in the NEPA process.

The stay request was intended to prevent appeals and litigation arising from the NEPA process. Citizens denied “meaningful input” in processes that are flawed inevitably create fodder for costly appeals and length litigation.<sup>238</sup> A better approach is to get it right the first time.

This stay request would have produced no negative impacts on the project, which should be delayed for other reasons. Conveyance of our public land at this time would be a waste of valuable resources because the local economy at this time is not conducive to real estate sales of this magnitude. Local developers told the BTNF this is the wrong time to precede with this conveyance. Accordingly, the delay would have

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(Sept. 9, 2009) (postmark same); When the BTNF responded to our FOIA request some 30 days after the request, it stated as follows:

In your request, you listed factors that we use to evaluate a fee waiver request, but you did not address these factors in sufficient detail for me to make a determination on your fee waiver request. Your response to these factors should explain specifically how the information will be used to benefit the public.

The BTNF request for more information continued:

In addition to supplying information to address these six fee waiver factors, it would be helpful for you to submit copies of articles of incorporation of your organization, the constitution and bylaws of your organization, and publications of your organization including, but not limited to, newsletters, membership brochures, and fund-raising solicitations.

*Id.* (offering the alternative of paying an estimated \$1,750.00 fee). We provided all the requested additional information within 5 days. Letter from Protect the Putt-Putt to “Kniffy” Hamilton, BTNF Supervisor via FedEx (Sept. 15, 2009). After considering additional information provided, the BTNF began to process our request in early October of 2009, less than one month before publishing this EA.

<sup>238</sup> In support for our stay request, we also cited the need to protect public interests and to preserve our issues for appeal. In cases where the agency fails to correct fatal flaws in its process, citizens are entitled to administrative and judicial review. Accordingly, the stay request would have allowed citizens the opportunity adequately identify all relevant issues and preserve them for appeal. 36 CFR 215.11(a)(2)

been appropriate for sound economic reasons, in addition to allowing more “meaningful” public input.

Nonetheless, the stay request was denied<sup>239</sup> and our request to reconsider ignored.<sup>240</sup> Whereas the BTNF took two-and-one-half years of closed-door planning for this project, in the eleventh hour it sprung on the community a very controversial part of the project, the Nelson Site construction plans. Whereas this portion of the project ignores previous public comment, the BTNF denied repeated requests for more time, even while processing a relevant FOIA request. Instead the BTNF quickly published its overly complex EA for this project.<sup>241</sup> Therefore, the BTNF stifled, ignored and/or misunderstood early public comment on the Nelson Drive construction plans and it denied adequate opportunity for public participation after it presented its plans, which further thwarted “meaningful” public input.

### **iii. Request for an advisory committee was denied.**

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<sup>239</sup> Letter from Carole “Kniffy” Hamilton, BTNF Supervisor, to Charles L. Payne, Jr., Protect the Putt-Putt (Sept. 3, 2009) (“We think there may be some confusion as to the relationship between conceptual planning done for the Nelson administrative site and the NEPA process”).

<sup>240</sup> Letter from Protect the Putt-Putt to Carole “Kniffy” Hamilton, BTNF Supervisor (Sept. 9, 2009) (Re: Request to reconsider delay of NEPA process and delay of Town Council and County Commission consideration of BTNF Nelson Site housing development). In our letter we cited concern over the delay in processing our FOIA request as follows:

In your letter, you also state that our Freedom of Information Act request “will be processed separately” even though the 20 day statutory period for you to respond lapsed last week without any response from you. That request for information is integral to our understanding of your process and integral to our meaningful participation.

*Id.* The BTNF never responded to our request for reconsideration and published this EA anyway.

<sup>241</sup> The EA is 105 pages and the public has 30 days to comment. As set out in Section 2.f.i herein below, a lengthy and complex EA like this one violates CEQ recommendations and further stifles “meaningful” public input.

Citizens requested formation of an advisory committee.<sup>242</sup> Reciting one of the primary goals of NEPA, “to encourage meaningful public input in the process of evaluating the environmental impacts of a proposed federal action such as this,”<sup>243</sup> we advocated for improved input on this project under the Federal Advisory Committee Act (FACA).<sup>244</sup>

Collaboration with the public on decisions like this one is exactly what Congress had in mind when it enacted FACA. Moreover, Congress has more recently made FACA directly applicable to U.S. Forest Service decision-makers in the National Forest Management Act of 1976 (NFMA).<sup>245</sup> The NFMA requires “public participation and use of advisory boards” composed of “a cross section of groups interested in the planning for and management of the National Forest System and the various types of uses and enjoyment of the lands thereof.”<sup>246</sup> As the outcome of this issue will have serious, long-range consequences for this community, and as the outcome is potentially a very divisive for this community and the BTNF, a collaborative effort using a FACA committee was in everyone’s best interest.

FACA is particularly applicable in this instance because it provides for bringing together agency representatives, public officials, public interest groups, interested parties, and those with expertise in relevant fields such as real estate development. It requires formal proceedings that are structured, transparent, and inclusive of the general public.

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<sup>242</sup> letter from Protect the Putt-Putt to “Kniffy” Hamilton, BTNF Supervisor (Oct. 29, 2009) (filed as an initial comment to the EA).

<sup>243</sup> “NEPA Task Force Report—Modernizing NEPA Implementation”, Council on Environmental Quality (CEQ) (Sept. 2003) (“Such collaboration with interested individuals and organizations will improve the quality of decision-making and increase public trust and confidence in agency decisions”).

<sup>244</sup> 5 USC App.2

<sup>245</sup> National Forest Management Act of 1976, 16 U.S.C. 1600, as amended (1990) (Congress specifically directed the U.S. Forest Service decision-makers on public participation and use of advisory boards as follows: “the Secretary, pursuant to the Federal Advisory Committee Act and other applicable law, shall establish and consult such advisory boards as he deems necessary to secure full information and advice on the execution of his responsibilities”).

<sup>246</sup> *Id.* at §1612

The advice provided by FACA committees is generally highly credible in situations like this.<sup>247</sup>

This community is replete with highly qualified and motivated individuals to serve in this capacity, community leaders and individuals who have already engaged the BTNF on this issue.<sup>248</sup> These individuals could bring invaluable perspective and expertise to a forum designed to spawn a consensus view. While a consensus is not required, the process would help not only inform BTNF decision-making, but would help ameliorate the divisive nature of this decision in the community and help avoid the need for administrative appeals and judicial review.

Despite its immense potential benefit, agencies are often reluctant to form an advisory committee under FACA for a variety of unfounded reasons. For example, the BTNF may have the perception that establishing a FACA committee is a time-consuming process. But the steps are quite simple:

- Develop a charter and publish notice of establishment of the committee. This can be a two or three page document that sets out the mission and general operational characteristics of the committee;
- Appoint a Designated Federal Officer to manage the committee;
- Appoint members of the committee, choosing membership so that all points of view are fairly represented and balanced;
- Announce the meeting in the Federal Register and ensure meetings are open to the public; and

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<sup>247</sup> CEQ, "Collaboration in NEPA, A Handbook for NRPA Practitioners", Oct, 2007, p. 90.

<sup>248</sup> letter from Protect the Putt-Putt to Carole "Kniffy" Hamilton, BTNF Supervisor (Oct. 29, 2009) (suggesting, for example, (1) Mark Obringer, member of the Town Council and former member of the Town Planning Commission, (2) Town of Jackson Mayor Mark Barron, (3) Teton County Board of Commissioners Chairman Hank Phibbs, (4) Louise Lasley, Public Lands Director for the Conservation Alliance, (5) Armond Aciri of Save Historic Jackson Hole, (6) Patty Ewing from the East Jackson Neighborhood Association, and (7) Bob Graham, realtor in this valley for 30 years).

- Keep minutes and make committee documents available to the public.

Agencies also may be reluctant to form an advisory committee under FACA because Congress and the Office of Management and Budget have directed agencies to limit the number of FACA committees they establish. However, best practices of public involvement under NEPA have the same requirements contained in FACA. Moreover, the life-time and mission of this committee would be limited in scope and duration. Lastly, the potential benefit to the BTNF decision-maker and to the community would be immense.

Thus, with nothing to lose and everything to gain, we advocated formation of an advisory committee pursuant to FACA in order to help ensure more “meaningful” public input in the process of evaluating the environmental impacts of this proposed project. Our request was denied.<sup>249</sup>

The Regional Forester denied our request without stating a reason. “We believe this is not an appropriate use of the advisory committee process,” he said.<sup>250</sup> This off-handed dismissal of a sincere request to be heard reinforces the perception that public input is being stifled, ignored and/or misunderstood.

Accordingly, the NEPA process is fatally flawed for lack of “meaningful” public input because the BTNF stifled, ignored and/or misunderstood early comments, rushed the Nelson Site construction plans past the public and their elected officials just before publishing its overly complex 105-page EA, denied a stay request while our FOIA request was pending, and refused to consider an advisory committee.

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<sup>249</sup> letter from Harv Frosgren, R-4 Regional Forester, to Charles I. Payne, Jr., Protect the Putt-Putt (Nov. 16, 2009) (“We do not intend to select individual community members into an advisory committee”).

<sup>250</sup> *Id.* (“For consideration of the alternatives, the NEPA process is the appropriate venue to fairly and equitably gather and incorporate all public comment for this project”).

**iv. Public input is irrelevant since the decision was already made.**

The likely reason for agency disinterest in public input is because its decision is already made. As set out in Section 1.a.3 herein above, the “no action alternative” has never been an option. Section 2.b herein above explains how the BTNF became locked out of the “no action alternative” after expending considerable amounts of time and mounds of money, which must be repaid from the proceeds of this project. Not only was it locked out of “no action,” it became obligated to “generate the most amount of revenue.”<sup>251</sup> Therefore, no measure of public input would affect the outcome of this NEPA process.

For the foregoing reasons, this NEPA process is fatally flawed from lack of “meaningful” public input because (1) the BTNF stifled, ignored and/or misunderstood public input, (2) then after two-and-one-half years of closed-door planning, it rushed the Nelson Site construction plan through, (3) while denying two requests for a stay with a highly relevant FOIA request was pending, (4) publishing its lengthy and complicated EA one month later, when (4) the Regional Forester dismissively rebuffed a sincere suggestion for an advisory committee, and because (5) the BTNF already made its decision.

- e. The NEPA process is fatally flawed because it does not properly consider the significant impacts upon the civil rights of its employees.

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<sup>251</sup> Section 1.d.i. (The BTNF became blinded by the Big Bucks). Alternative 3 in the EA is the Preferred Alternative, which seeks to sell as much or more than any other alternative identified in the EA. When asked her rationale for choosing this particular tract of land for sale as her Preferred Alternative, BTNF Supervisor “Kniffy” Hamilton responded that it “generates the most revenue.” East Jackson Neighborhood meeting at Jackson Senior Center (Nov. 18, 2009); *accord* EA at 14 (the Preferred Alternative (Alternative 3) has the greatest potential to “return the greatest revenue” ).

The BTNF has failed to complete a Civil Rights Impact Analysis (CRIA) as part of this NEPA analysis.<sup>252</sup> USDA rules require agencies to analyze the civil rights impact(s) of their “policies, actions, or decisions that will affect the USDA work force.”<sup>253</sup> A CRIA is the proscribed mechanism to identify agency actions that adversely or disproportionately impact employees based upon their membership in a protected group.<sup>254</sup>

A CRIA is required whenever a policy, program, or activity has “potentially adverse civil rights impacts.”<sup>255</sup> The BTNF decided not to complete a full CRIA, “or even a simplified one,” because this project only uproots eight families and they still will reside within the 49-mile radius, which defines the BTNF commuting area.<sup>256</sup> This was in May of 2009, before the BTNF learned that those eight families are required to foot the bill for their force move off the North Cache site when it is sold.

On October 16, 2009, the BTNF announced, “The Forest Service has no authority to pay for moving those privately owned residences” on the North Cache site set to be conveyed away.<sup>257</sup> “All along we’ve know that we would have to relocate the homes, but we were optimistic, since it is at the behest of the government, that we would absorb those costs,” said Mary Cernicek, BTNF spokesperson.<sup>258</sup> BTNF employees were told to “expect to move their [homes] under any action alternative.”<sup>259</sup>

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<sup>252</sup> The EA briefly addresses “Civil Rights” under “Other Required Disclosures” section using canned language and no analysis. EA at pp. 98-99.

<sup>253</sup> “Civil Rights Impact Analysis,” USDA Office of Civil Rights, DR 4300-4, §2 (May 30, 2003).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at §9(a)(6), *see also id.* at §9(a)(4) (requiring CRIA for proposed agency reorganizations that require approval pursuant to DR 1010-1, section 6).

<sup>256</sup> e-mail from Russell Bennion to Mike Balboni, former Deputy Forest Supervisor (May 5, 2009) obtained from BTNF files in its response to our FOIA request.

<sup>257</sup> No Funds to Move Homes, by Corey Hatch, *Jackson Hole Daily* (Oct. 17, 2009).

<sup>258</sup> *Id.*

<sup>259</sup> E-mail from Sara E. Baldwin, acting Deputy Supervisor, to Michael Schrotz, BTNF Planning-Lands Staff Officer, *et. al.* Reporting on a meeting with employees who own homes on the North Cache site and pre-judging the NEPA process, Ms. Baldwin wrote:

“We are kind of stuck,” said one homeowner who owns a manufactured home and leases land from the BTNF at its North Cache site.<sup>260</sup> “When you are some of the lowest employees on the totem pole as far as pay goes, when you’re living in these trailers, that’s the only thing you can afford,” said another.<sup>261</sup> “If we had to pay \$20,000 [to move], that’s two-thirds of my annual salary,” he/she said. “We just don’t have the money, period.”<sup>262</sup>

The BTNF must analyze the impacts of its decision to move these families because they are members of a protected class. Protected employees include those distinguished by their race, color, national origin, age, disability, sex, marital status, parental status, religion, sexual orientation, genetics, political beliefs, or low income status.<sup>263</sup> “There are people who just got married,” according to one homeowner. “They’re sitting here, newlyweds, and they are going to have to go into debt and possibly bankruptcy.”<sup>264</sup>

Protected groups also include persons “protected under Federal Law . . . from discrimination on any prohibited basis.”<sup>265</sup> Such other “Federal Law” includes Title VIII of the Civil Rights Act of 1968, known as the Fair Housing Act (FHA).<sup>266</sup> The FHA

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I shared with them the news that the Federal Government was unable to pay for moving their trailers, that they should expect to move their trailers under any action alternative, and that the No Action alternative was highly unlikely to be the decision.

*Id.*

<sup>260</sup> Forced Move Upsets Forest Workers, by Corey Hatch, *Jackson Hole News & Guide* (Oct. 21, 2009).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> “Civil Rights Impact Analysis,” USDA Office of Civil Rights, DR 4300-4, §3(k); *see also* Executive Order 12898 (1998) (requiring agencies to identify and address disproportionately high and adverse human health and environmental effects, including the interrelated social and economic effects of their programs, policies and activities on minority and low-income populations).

<sup>264</sup> Forced Move Upsets Forest Workers, by Corey Hatch, *Jackson Hole News & Guide* (Oct. 21, 2009).

<sup>265</sup> *Id.* at §3(q).

<sup>266</sup> 42 U.S.C. §3601, *et seq.* (1968), as amended (March 12, 1989), *see also* Executive Order 11063 (Non-Discrimination and Equal Opportunity in Housing directs all agencies to take appropriate action to promote the abandonment of discriminatory practices with respect to property or facilities owned or operated by the Federal Government or provided with Federal financial assistance in the sale, leasing, rental, or other disposition of such property or facilities), Executive Order 12892, *as amended* (providing

prohibits discrimination “in the terms, conditions or privilege of the sale or rental of a dwelling, or in the provision of services or facilities in connection therewith”<sup>267</sup> and prohibits “interfering with a person's enjoyment or exercise of housing rights.”<sup>268</sup>

The BTNF must analyze more than whether this project intentionally injures its protected employees. It must look for any unforeseen disparate impacts of agency actions or their consequences.<sup>269</sup> Disparate impacts describe a facially neutral action that has an unjustified adverse impact on members of a protected class. Such a facially neutral agency decision is one that does not appear to be discriminatory on its face; rather it is one that is discriminatory in its application or effect. Statistical comparisons are often required to elucidate these disparate impacts.

The BTNF is on notice of the civil impacts of this project because homeowners filed a complaint with their union, which the EA ignores. “The unfair labor practice regarding the Supervisor’s Conveyance Plans,” forms the basis for their petition to the BTNF from the National Federation of Federal Employees on their behalf.<sup>270</sup> The relief requested is “only what was promised for years: payment of relocation expenses, trailer pads with like amenities, a location within the city limits and trailer pads for the duration of employment.”

In this case, the BTNF decided to pursue a policy or action without regard to its effects, intentional or unintentional, on protected groups of employees. It failed to do the

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that programs and activities relating to housing shall be administered in a manner affirmatively to further the purposes of the Act and shall cooperate with the Secretary of Housing and Urban Development, who shall be responsible for exercising leadership in furthering the design and delivery of Federal programs and activities), *accord*, 1866 Civil Rights Act, 14 Stat. 27-30 (April 9, 1866), U.S. Const., 14<sup>th</sup> Amend. (1868).

<sup>267</sup> 42 U.S.C. §3604(b).

<sup>268</sup> *Id.* at §3631.

<sup>269</sup> *Id.* at §3(r).

<sup>270</sup> “Pre-grievance,” National Federal of Federal Employees (Oct. 7, 2009), obtained from BTNF files in its response to our FOIA request.

requisite CRIA to identify how this policy or action may adversely or disproportionately impact those employees. Accordingly, this action or policy violates USDA rules, and therefore, its NEPA process for this project is fatally flawed.

- f. The NEPA analysis is fatally flawed because it fails to recognize the "significant impact" on the environment from this project.

Failure to recognize and analyze the significant impacts of this project creates a critical flaw in its NEPA process. This occurred when the BTNF created a lengthy and overly complicated EA without dedicating adequate resources to study the impacts.

- i. A lengthy EA does not substitute for proper consideration of significant impacts.**

In the past, The Forest Service has produced lengthy EAs, which should have been Environmental Impact Statements (EIS). Accordingly the CEQ has advised agencies to limit the length of EAs to 10 to 15 pages.<sup>271</sup> Whereas the BTNF produced this cumbersome 105-page EA, ten-fold longer than the appropriate length for an EA, it does not substitute for a full EIS. It still does not properly analyze the significant impacts of this project all over town.

A full EIS may be required to properly analyze this project because its requirements are different and its analysis more inclusive. One important difference is that in an EIS the agency must respond to each substantive public comment.<sup>272</sup> Such responsiveness in the EIS process, which does not exist for an EA, often effects changes in final EIS.

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<sup>271</sup> Fed. Reg., Vol. 73, No. 143, p. 43091, July 24, 2008; *accord*, 40 C.F.R. §1501.7(b)(1); *but see*, 36 C.F.R. §220.7(a).

<sup>272</sup> 40 C.F.R. §1503.4.

Changes in the final EIS may include factual changes, modifications to the analysis or alternatives considered, or explanations why a comment does not require agency consideration.<sup>273</sup> This project has intense public interest and will generate many substantive comments. Under this EA analysis, the agency can ignore such comments.

**ii. An EIS is required because of potentially significant impacts of this project.**

This project requires a full EIS because environmental impacts that may be “significant.” The BTNF must prepare a full Environmental Impact Statement (EIS) when it is proposing a major federal action with potential to *significantly affect* the quality of the human environment.<sup>274</sup>

The rule in NEPA is that when the proposed action *potentially* could “significantly impact” the environment, the agency must prepare a full Environmental Impact Statement.<sup>275</sup> “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

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<sup>273</sup> Id. at §1503.4(a).

<sup>274</sup> 40 C.F.R. §1501.7; “A Citizen’s Guide to NEPA”, CEQ pub., p.18 (Dec. 2007).

<sup>275</sup> 40 USC 4332(2)(c).

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<sup>276</sup>; and (9) whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.<sup>277</sup>

This project has “significant” environmental impacts, both contextually and in intensity, which require a detailed environmental analysis.<sup>278</sup> The BTNF’s failure to recognize the need for a full EIS is a fatal flaw and requires correction.

**iii. In the alternative, separate EAs for each portion of this project are required to properly analyze its impacts.**

This EA attempts to analyze at least four distinct agency actions in one document. It covers three options for selling land and 28 existing structures on North Cache in downtown Jackson, ignoring the “no action alternative.” It considers redevelopment of the North Cache site in three very different configurations, ignoring the possibility of rebuilding the Supervisor’s Office building on its current site and leaving employee

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<sup>276</sup> 16 U.S.C. § 1531, *et seq.*

<sup>277</sup> 40 C.F.R. §1508.27.

<sup>278</sup> For examples of “significant” impact, see Section 3 herein below.

owned homes and other structures undisturbed. It proffers plans to sprawl up to 26 additional residences on virgin forest at the Putt-Putt trail head at the Nelson Site on the east end of town. And it discusses relocation of critical facilities 15 to 20 miles south of town at the Cottonwood site, including fire fighting faculties and employee owned homes.

This is too much for one EA. Its complexity stifles public participation by introducing numerous issues in a confusing array of configurations. It confounds a fair and informed NEPA analysis by the decision-maker because of its convoluted internal logic. And it is too complex for effective agency oversight and appeal. That is to say, it is too much unless the BTNF decision is already made and the EA is only designed to justify that decision.<sup>279</sup>

**iv. The BTNF failed to devote adequate resources to identify the “significant” impacts of this project.**

Whereas the BTNF devoted enormous time over two-and-one-half years and mounds of money towards planning this project, it gave short shrift to identification and analysis of its impacts. The BTNF out-sourced planning for the Nelson Drive site construction that occurred in the eleventh hour, well after project planning was almost complete.<sup>280</sup>

Once the BTNF did get around to impact identification and analysis at the Nelson Site, its paid professional planners lacked adequate time or funds to address environmental impacts of construction on the Nelson site. In contract negotiations with its planners

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<sup>279</sup>“You have the need and authority to do this project, now you need to present it better.” BT Conveyance EA Concerns, by Gail Baer, obtained in response to FOIA request; “We are in charge of analysis. We can craft the criteria.” handwritten notes by Mike Balboni, BTNF Deputy Supervisor, from conference call with Keith, Mary, Mike, and Erin (2007) obtained from BTNF files in its response to our FOIA request.

<sup>280</sup> The BTNF did not have a staff biologist during some or all of the two-and-one-half-year planning for this project.

over fees, Richard VanGytenbeek, landscape architect at Rendezvous Engineering and “team” leader, noted that his “team” was “underfunded.”<sup>281</sup> Therefore, according to Mr. VanGytenbeek, they would have to “assume a good amount of information.”<sup>282</sup>

The Rendezvous “team” traffic engineer for the Nelson Drive construction presented his report in July of 2009--his conclusions based 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 preexisting data and made general assumptions about common traffic volumes and patterns. He did not address any potential on-street parking problems. He used vague generalities to refute public concerns about traffic issues raised by neighbors at the one recent meeting where he spoke.<sup>283</sup> Neighbors knew more about what to expect from the traffic and parking created by this addition of 26 new homes to the area.

The “team” biologist had one month to do a walk-around of the Nelson site in June.<sup>284</sup> He recognized the inadequacy of his brief efforts to gather information and admitted that his conclusions are largely based upon assumptions, not actual observations.<sup>285</sup> He acknowledged the seasonal variations in wildlife use of the area, which are not predictable from a single walk-around at the site. His lack of actual data pales in comparison to the enormous year-round experience of long-term neighbors and trail users in the area.

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<sup>281</sup> The proposed sum of \$19.9 thousand allotted for the team’s services was limited by the necessity to keep the BTNF contribution to less than half of what the Town of Jackson and Teton County contributed in order to circumvent federal rules for hiring contractors. Whereas the Town and County contribution totaled \$10,000, the total package was limited to less than \$20,000. Invoices may indicate that the “team” might actually have earned more than \$20,000, but this is unsubstantiated at the present time. See BTNF files obtained in its response to our FOIA request.

<sup>282</sup> Notes in files obtained from BTNF files in its response to our FOIA request.

<sup>283</sup> Public Meeting at Senior Center (July 14, 2009).

<sup>284</sup> At the public meeting where he presented his findings, he admitted that his “study” was limited to walking the site in June of 2009. *Id.*

<sup>285</sup> *Id.*

Therefore, The BTNF has failed to devote adequate resources to identify the “significant” impacts of this project. And, the NEPA process is fatally flawed because the EA is too long yet not thorough enough to substitute for an EIS, because it fails to consider potentially “significant” impacts as would a full EIS, and because this EA and its numerous choices is too complex for one EA.

In summary, the BTNF has failed to follow NEPA’s “procedural safeguards.”<sup>286</sup> Among other things, (1) its statement of “Purpose and Needs,” in the EA, contains unsubstantiated assertions, which are untrue, (2) the agency committed significant time and money to the project before completing its environmental analysis, which taints its judgment, (3) pivotal participants have undisclosed conflicts of interest, which taint the process, (4) the EA does not include “meaningful public input,” (5) the EA does not properly address Civil Rights impacts, and (6) the EA does not properly address environmental impacts. Therefore, his NEPA analysis is fatally flawed.

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<sup>286</sup> Marsh, 490 U.S. at 371.

### 3. NEPA REQUIRES THE “NO ACTION ALTERNATIVE.”

Although the Forest Service has never seriously considered the “no action alternative” as an option and it is only given courtesy mention in the EA,<sup>287</sup> it is the only logical choice because (1) no one wants any of the action alternatives, (2) the land will never achieve “highest and best use” after the conveyance, (3) environmental impacts of all the action alternatives are significant, and (4) all action alternatives increase operational inefficiencies.

- a. NEPA requires the “No Action Alternative” because no one has said this is a good idea.

No one endorses the action alternatives including citizens and elected officials in the community, community public interest groups, and even BTNF employees object. For this reason, the agency should choose “no action.”

#### **i. Citizens in the community abhor this project.**

People detest it and likely will not stand for it.<sup>288</sup> Citizens view the redevelopment of North Cache by commercial entrepreneurs as an inequitable tax on this community.<sup>289</sup>

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<sup>287</sup> Sections 1.a.iii and 2.b herein above.

<sup>288</sup> “Jackson resident Joe Albright said people will oppose the Forest if it goes forward with Forest Supervisor Kniffy Hamilton’s proposal.” Last call for Opinions on Forest Land Sale, by Corey Hatch, *Jackson Hole News & Guide* (Nov. 25, 2009). Overwhelming disapproval is evidenced in numerous written public comments addressed to the BTNF. See all written scoping comments and comments to the EA received by the BTNF, which are incorporated into this document by reference; *see also* Section 1.c.ii herein above; *and see* comments at [www.ProtectThePuttPutt.com](http://www.ProtectThePuttPutt.com).

<sup>289</sup> One local citizen complained to the BTNF as follows:

I have . . . expressed my continued astonishment that any responsible agency would suggest it proper to sell valuable land to build structures that should have been—and could have been, had timely and proper applications been filed—funded in the usual

Citizens appreciate that the supervisor's office is old, but "it ought to be the responsibility of the federal government to provide funds for it" they say.<sup>290</sup> "That's what we pay taxes for, right."<sup>291</sup>

Whereas the BTNF serves the entire nation with almost one million tourists passing through Jackson Hole each year, the population of the Town of Jackson is only 8,452, and the population of the remaining Teton County is 10,345.<sup>292</sup> Those local citizens must bear the burden of this BTNF fund raising scheme to meet its "facilities maintenance needs." The local citizens must endure the burden of another colossal commercial venture causing increased traffic, pollution, noise and congestion along the North Cache corridor day in and day out. The local citizens also must bear the indirect effects from this development such as increased demands on public services.

Accordingly, local citizens hate this project because funding BTNF needs is not just their burden, yet this project disproportionately levies that burden on them.

**ii. Community leaders did not support this project.**

Town of Jackson and Teton County elected officials never endorsed this project.<sup>293</sup> In fact, "officials refused to back a plan to develop an area of Nelson Drive to house forest

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and customary way—thru capital funds appropriations . . . . Future generations will wonder what we were thinking!

See e.g. letter from Elise M. Prayzich, Jackson, Wyoming, to "Kniffy" Hamilton, BTNF Supervisor (Nov. 18, 2009).

<sup>290</sup> B-T Move Criticized, by Corey Hatch, *Jackson Hole News & Guide* (Feb. 16, 2008).

<sup>291</sup> Last Call for Opinions on Forest Land Sale, by Corey Hatch, *Jackson Hole News & Guide* (Nov. 25, 2009).

<sup>292</sup> Town of Jackson website at

<http://www.townofjackson.com/content/index.cfm?fuseaction=showContent&contentID=12&navID=1>.

<sup>293</sup> Section 1.a.iii herein above.

employees.”<sup>294</sup> “This is basically a sprawl plan,” Councilor Greg Miles said. “I don’t think it includes enough planning for future development.”<sup>295</sup> Rather than sanction this ill-conceived plan, the Town and County passed a resolution reflecting “community values” of preserving open spaces, protection wildlife habitat.<sup>296</sup>

### **iii. Public interest groups oppose this project.**

Community organizations have told the BTNF this is a bad idea.<sup>297</sup> The Jackson Hole Conservation Alliance, a strong community voice in Jackson Hole, identifies this project as a “tragedy.”<sup>298</sup> And, it opposes “selling public land . . . to fund the Bridger-Teton’s budget needs. This allows the government to ignore their responsibility to provide the needed money to operate,” says the Alliance<sup>299</sup>

### **iv. Even BTNF employees overwhelmingly oppose this project.**

No one likes this project, including BTNF employees.<sup>300</sup> For example, “I am in complete disagreement with the whole idea of the Conveyance,” said one employee.<sup>301</sup> Others called this project “short-sighted” and “not our mission to sell public land.”<sup>302</sup> In fact,

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<sup>294</sup> Forest to get Guidance on Nelson Drive Plan, by Cara Froedge, *Jackson Hole News & Guide* (Sept. 16, 2009) (reporting the Town of Jackson Town Council and Teton County Commissioners refusal to endorse BTNF construction plans at its Nelson Site).

<sup>295</sup> No Movement yet on Nelson Drive Homes, by Kevin Huelsmann, *Jackson Hole News & Guide* (Aug. 5, 2009).

<sup>296</sup> Joint Resolution of the Town of Jackson Council and Teton County Board of Commissioners (Oct. 5, 2009); Restraint Sought in Forest Housing Plan, by Cara Rank, *Jackson Hole News & Guide* (Oct. 7, 2009).

<sup>297</sup> Sections 1.a.iii herein above.

<sup>298</sup> letter to U.S. Senators John Barrasso and Mike Enzi, and to U.S. Representative Cynthia Lummis from Louise Lasley, Public Lands Director, Jackson Hole Conservation Alliance (Nov. 2, 2009).

<sup>299</sup> Jackson Hole Conservation Alliance Preliminary Comments on the Jackson Administrative Site Land Conveyance and Development Draft Environmental Assessment (Nov. 10, 2009); see also letters from the Snake River Fund, among others, filed with the BTNF as public scoping comment and as comment to the EA, which are incorporated into this document by reference.

<sup>300</sup> Section 1.a.iii herein above.

<sup>301</sup> e-mail from Heidi Zarchis to Michael Schrotz, BTNF Planning-Lands Staff Officer (October 21, 2009), obtained from BTNF files in its response to our FOIA request.

<sup>302</sup> Employee Scoping Comment Compilation, provided by BTNF.

the comments submitted by BTNF employees equally echo the sentiments expressed in the comments it received from the local community.<sup>303</sup>

Accordingly, because no one wants any action alternatives, not citizens in the community, not elected officials, not community public interest groups, not even BTNF employees, the agency should choose “no action.”

- b. NEPA requires the “No Action Alternative” because the sale property will never achieve its “highest and best use.”

The sale property for this project has already attained its “highest and best use.” In real estate vernacular, the value of a property is directly related to the *use* of that property; the “highest and best use” is the reasonably probable *use* that produces the highest property value.<sup>304</sup>

Certain conditions will limit a property’s “highest and best use,” for example:

- Only those uses that are, or may be, legally allowed are potential highest and best uses; this may exclude uses that are not, and unlikely to become, allowed by zoning, uses forbidden by government regulations, and uses prohibited by deed restrictions or covenants;
- Any potential use must be physically possible given the size, shape, topography, and other characteristics of the site; and

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<sup>303</sup> Letters, e-mails and spoken comments to the BTNF from its employees, submitted the BTNF as internal communications, public scoping comments and as comment to the EA, which are incorporated into this document by reference.

<sup>304</sup> See *generally* The Appraisal of Real Estate, by the Appraisal Institute (12th Edition).

- The highest and best use of a property must be financially feasible, which means that the proposed use of a property must generate adequate revenue to justify the costs of construction plus a profit for the developer.<sup>305</sup>

The sale property in this project, in any configuration, will never achieve a “higher property value” than it has with its present *use* because of (1) current conditions in the market, (2) its future legally allowable uses will be defined by “rural” zoning, (3) risk and uncertainty, if not impossibility, currently associated with up-zoning, and (4) future revised planning regulations could prohibit up-zoning.

**i. The real estate market is at its nadir.**

This land cannot achieve a higher or better use because the local real estate market is in the tank. Commercial sales virtually halted. Construction projects remain uncompleted all over downtown. Office space and retail space sits empty. Under these market conditions, no one will buy this property, or if they do, the price will be less than its value in its current *use* as our BTNF Supervisor’s Office. Therefore, the sale property for this project has already attained its “highest and best use.”

**ii. This land is useless to anyone but the BTNF because once conveyed, it is zoned “rural”.**

This land cannot achieve a higher or better use it is limited to “those uses that are, or may be, legally allowed” after its sale.<sup>306</sup> Currently the sale parcel, which is occupied by

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<sup>305</sup> *Id.*

<sup>306</sup> This may exclude uses that are not, and unlikely to become, allowed by zoning, uses forbidden by government regulations, and uses prohibited by deed restrictions or covenants.

the BTNF Supervisor’s office and other BTNF structures, is zoned by definition as Public/Semi-Public (P/SP) under Town of Jackson Land Use Regulations (LDRs).<sup>307</sup>

If the sale property did find a buyer, which it may not, once conveyed the property automatically becomes zoned as “rural” pursuant to the LDRs.<sup>308</sup> Land use under rural zoning creates a “property value” less than its current use because, in a rural zone the property can only be used for agriculture, ranching or limited residential with one house per 35 acres.<sup>309</sup> Therefore, the sale property for this project has already attained its “highest and best use.”

**iii. Attempts to up-zone the conveyed property will fail.**

After a sale, without up-zoning, this property would remain lower and worse than it is now, and up-zoning by the new owner would fail. Up-zoning would require local officials’ approval. Specifically the Town of Jackson Planning Commission would study any application for a zoning change and make recommendations to the Town Council. The Council would consider those recommendations, take public input, and vote any change.

This process likely would fail to achieve the desired zoning change. First, the Town officials never endorsed this project.<sup>310</sup> Second, citizens abhor this project.<sup>311</sup> Third, similar projects were defeated by referendum in this Town. Attempts to annex the Gill/Porter Ranch at the southern end of town for a “higher and better use” through up-

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<sup>307</sup> Town of Jackson, Wyoming, Land Development Regulations (LDRs), Art. II, §2050(F).

<sup>308</sup> Town of Jackson LDRs state as follows:

When land changed jurisdiction by transfer, trade or sale from State or Federal agencies to a private land owner, the land shall be assigned the Rural zoning district designation by the Town Council pursuant to Section 5150.

LDRs, Art. II, §2040.

<sup>309</sup> *Id.* at §2130.

<sup>310</sup> Sections 1.a.iii and 3.a.ii herein above.

<sup>311</sup> Sections 1.a.iii, 3.a.i, and 3.a.iii herein above.

zoning failed in 2002.<sup>312</sup> Citizens back then defeated the change by referendum, and citizens are more concerned by this project than they were back then. Therefore, the sale property would likewise fail to achieve a higher and better use through up-zoning.

**iv. As the Comprehensive Plan revisions proceed, this land may never achieve its potential.**

Legally permissible land uses for BTNF land, if it reached private ownership, is influenced by the local Comprehensive Plan for Development (Comp. Plan).<sup>313</sup> The Comp Plan serves as a long-range planning tool and helps predetermine land use in the community. One purpose of the Comp. Plan is to provide predictability to land developers and adjacent landowners about future permissible land uses.

In this case, the LDRs actually reference the Comp. Plan specifically. “At the time [BTNF land] is transferred, or purposed to be transferred, into private ownership, the property shall be reclassified to an appropriate zoning district to allow private ownership pursuant to the Jackson-Teton County Comprehensive Plan.”<sup>314</sup> So the Comp. Plan could influence future “highest and best use” of BTNF land in downtown Jackson.

The Comp. Plan, however, is currently undergoing a complete rewrite. While the outcome is still uncertain, it is guaranteed to become more restrictive very soon.<sup>315</sup> On the contrary the EA assumes, without justification, the following:

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<sup>312</sup> Porter Ranch Split Nears, by Cara Rank, *Jackson Hole News & Guide* (Nov. 25, 2009).

<sup>313</sup> Teton County and Town of Jackson Comprehensive Plan for Development, available at <http://www.ci.jackson.wy.us/content/index.cfm?contentID=30&fuseaction=showContent&navID=30>.

<sup>314</sup> LDRs at §2150(G).

<sup>315</sup> See e.g. Boards Back Wildlife, by Cara Rank, *Jackson Hole Daily* (Nov. 23, 2009) (“Wildlife protection should *the primary consideration in all land-use decisions*, planners decided in a vote last week.”) (emphasis added).

It is anticipated that the current zoning of “Public-Semi-Public” would be changed to “Auto-Commercial with a Lodging Overlay” thus allowing mixed uses.<sup>316</sup>

This assumption is unsupported by attribution or available evidence and is likely untrue, especially after the current Comp. Plan rewrite is completed. Therefore, “highest and best use” of the BTNF parcel will likely always be its current use.

**v. The Town’s Planned Sub-Center Development tool offers no advantage to potential buyers.**

The BTNF touts the Town’s Planned Sub-Center Development (PSCD) tool as the trick to achieving a “highest and best use” greater than its current use.<sup>317</sup> It refers to “the special ten-acre ordinance” that “allows the purchaser with an opportunity to establish zoning most effective for their proposed development.”<sup>318</sup> But, the PSCD District in town of Jackson LDRs offers no advantage to potential buyers.<sup>319</sup>

The BTNF assertion that the PSCD offers some advantage in this regard ignores its own market analysis by TCBA, its Washington based full service market consultant.<sup>320</sup> TCBA told the BTNF that the PSCD was a complicated process with no greater guarantee of a more desirable outcome than the conventional up-zoning process.<sup>321</sup> So by predictions from the BTNF’s own consultants, the sale property is unlikely to achieve any “higher or

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<sup>316</sup> EA at ii; The EA also deceptively states that “the highest and best use of the North Cache property is a balanced mixture of commercial, retail, and residential uses that reinforce goals and objectives of the Town of Jackson Comprehensive Plan.” EA at 9. The EA never considers impending radical revisions to the Comp. Plan.

<sup>317</sup> EA at iii.

<sup>318</sup> *Id.*

<sup>319</sup> LDRs at §2600, *et seq.*

<sup>320</sup> Section 1.a.iii.

<sup>321</sup> TCBA Market Analysis, obtained from BTNF files in its response to our FOIA request.

better” use through the Town’s PSCD tool. Therefore, its current use will always be its “highest and best use.”

Accordingly, the sale property for this project has already attained its “highest and best use” because it will not achieve any higher or better use (1) when the local real estate market for this sort of property is non-existent, (2) after the sale, the land is automatically down-zoned from P/PS to “rural,” (3) attempts at up-zoning by any new owner will fail in the face of public opposition, (4) the impending Comp. Plan revisions may seal its fate, and (5) contrary to the EA’s assertion, the PSCD tool offers no advantage for up-zoning. Therefore, the BTNF sale property’s current use will always be its “highest and best use.”

c. NEPA requires the “No Action Alternative” because impacts are significant.

The BTNF must choose the “No Action Alternative” because environmental impacts from all actions alternative are too significant. All of the action alternatives create sprawl on virgin Forest, destroy portions of a popular summer recreation area, construct housing in a critical winter wildlife area, desecrate the neighborhood night sky, affect neighbors’ quiet enjoyment of their homes, build next to wetlands and next to the National Elk Refuge, and create unidentified commercial real estate development along North Cache. Only the “No Action Alternative” protects the wildlife and the community from these effects.

**i. All action alternatives create sprawl onto virgin forest.**

The Putt-Putt trailhead is slated for destruction. All action alternatives cut a new road and build up to 26 new residences there. Rather than increase density within it existing

developments at North Cache, Nelson and/or Cottinwood, the EA chooses to sprawl these houses up the hill on virgin forest land.

“Loss of open space is increasingly important,” according to U.S. Forest Service policy makers.<sup>322</sup> “Citizens are concerned about the accelerating pace of land-use changes surrounding their communities and want to preserve landscapes while creating livable areas.”<sup>323</sup> Heightened public concern is driven by the accelerated rate of “urban sprawl.” Conversion of forest and rangeland is increasing faster than population growth. Between 1945 and 1997, about one-half acre was converted to urban uses for each new person in a community. From 1992 to 1997, the conversion rate more than doubled, with 1.2 acres of undeveloped land converted for each new person.<sup>324</sup>

“Urban sprawl” is particularly sensitive to this community because of its recent unbridled growth. Consistent with national concerns, preservation of open spaces is consistently ranked, along with protection of wildlife habitat, as this community’s number one priority.

The Nelson Drive site has never had development extending beyond the existing approximately four acres. The first houses were constructed there in 1950. The Bureau of Reclamation added four houses in 1985. And in 2001, the BTNF added two bunkhouses for a total of nine residential structures, all of which have remained within the same four-acre boundary of development.<sup>325</sup>

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<sup>322</sup> Loss and Fragmentation of Open Space, U.S. Forest Service Position Paper, available at <http://www.fs.fed.us/publications/policy-analysis/loss-of-open-space-position-paper.pdf> .

<sup>323</sup> *Id.*

<sup>324</sup> Summary of the Forest Fragmentation, by L. DeCoster (2000) (unpublished manuscript cited in Loss and Fragmentation of Open Space cited in note 322 herein above).

<sup>325</sup> EA at p. 3

Now the BTNF plans to sprawl houses on over eight acres, doubling the existing footprint and tripling the number of houses to 36. But why choose sprawl?—because the BTNF says it’s cheaper. And the BTNF is unwilling to limit growth there in the future.

Moreover, the BTNF will not consider any less intrusive alternatives. These were eliminated from the EA and are no longer identified as an option. A less intrusive option was to sell four acres of land on North Cache, which would allow room for more construction on the remaining land there. This would permit the same amount of construction, but alleviate the need to expand onto virgin Forest at Nelson Drive. The BTNF refuses to consider this, or any other, less intrusive alternative.<sup>326</sup>

NEPA regulations require that the agency “objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their being eliminated.”<sup>327</sup> This EA fails to do that. It fails to consider selling less land at North Cache in order to accommodate additional housing needs there.

Accordingly, the “No Action Alternative” is the only alternative available to the BTNF that does not destroy virgin Forest and create “urban sprawl.”

**ii. All action alternatives destroy portions of a popular summer recreation area.**

This project will forever alter a portion of the most popular trail in the BTNF. The project calls for destruction and relocation of portions of the Putt-Putt trail, which is

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<sup>326</sup> “This housing construction by the Forest Service is bad for the Town and County. It more than doubles the existing development footprint, ignores significant environmental impacts, lacks any objective data as justification, and creates unnecessary sprawl. It flies in the face of well-established community values for preservation of open spaces and respect for wildlife habitat. Ironically, the Forest Service has other viable alternatives to meet its housing needs with virtually no environmental and community impacts.” Comment by Bette Payne posted at [www.ProtectThePuttPutt.com](http://www.ProtectThePuttPutt.com) (Sept. 9, 2009).

<sup>327</sup> 40 C.F.R. §1502.13

unsurpassed for biking and hiking in the summer months. It is considered the “local’s” trail because of its convenient location at the edge of town. And its popularity is driven by its unrivaled splendor.<sup>328</sup>

Destruction of this trail contravenes the policy and purposes behind the National Trail Systems Act.<sup>329</sup> Established in 1968, its “statement of policy and declaration of purpose” declares that the establishment and maintenance of trails provides “for the ever-increasing outdoor recreation needs of an expanding population” and promotes “the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air and historic resources of the Nation.”<sup>330</sup> The Act calls for trails “primarily, near the urban areas” and “secondarily within scenic areas.”<sup>331</sup>

The Putt-Putt trail qualifies as both a beautifully scenic trail and a conveniently located trail originating at the eastern edge of the Town of Jackson. For both these reasons, the Putt-Putt trail is extremely popular in the summer months satisfying the community’s ever-increasing need for outdoor recreation with a population that doubled over the last ten years.

Accordingly, the BTNF must choose “no action” because this project contravenes public policy established by the National Trail Systems Act and destroys portions of this community’s most prized summer recreation area.

### **iii. All action alternatives impact critical winter wildlife habitat.**

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<sup>328</sup> See e.g. Comment by Dona Guenther posted at [www.ProtectThePuttPutt.com](http://www.ProtectThePuttPutt.com) (Sept. 3, 2009) (“The Putt-Putt and Cache Creek Trails are extremely popular for the residents of downtown Jackson. It is so convenient for so many to access this area and enjoy exercise and the outdoors without driving or starting an automobile. The small cabin adds charm to this area and is in keeping with the OLD JACKSON Beauty which makes this town and county so very popular with residents and tourist alike.”).

<sup>329</sup> 16 U.S.C. 1241 *et seq.*

<sup>330</sup> *Id.* at § 2(a).

<sup>331</sup> *Id.* at § 2(a)(i) and (ii).

No action alternative is only choice that protects important winter wildlife habitat; others all involve build-out at sensitive areas.

The Nelson Site area, which is slated for a sprawl of new BTNF houses, is an important winter wildlife habitat as evidenced by special protections it receives from the BTNF in the winter. The BTNF enforces special winter use rules in this area.<sup>332</sup> It requires trail users to not leave the trail and have dogs leashed at all times. Violations are punished with a fine. Thus, the BTNF recognizes this area's importance to winter wildlife because it enforces special protections there in the winter.

The Nelson Site area, which is slated for destruction, is an important winter wildlife habitat because it is adjacent to a winter closure area. A few hundred yards away all human activity is prohibited in the winter. This restriction protects the fragile wildlife that inhabits this area in the winter. Thus, the BTNF recognizes this area's importance to winter wildlife because it completely eliminates human use in adjacent areas in the winter. Ironically, the BTNF recently abandoned plans for construction at its Lower Valley Energy Site because of its proximity to a similar winter closure area here in Jackson Hole.

The Nelson Site area, which is slated for destruction, is an important winter wildlife habitat because neighbors report numerous wildlife sightings in the winter. Mike Whitcomb of the East Jackson Neighborhood Association, pointed out to planners, "This

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<sup>332</sup> A BTNF employee comment cautions the BTNF of this issue:

Forest Service patrols this area in late fall & spring, warning people both to respect that area as critical winter range themselves and to keep their dogs on leashes for the same reason. . . . it seems ironic and disingenuous that the Forest Service is, on the one hand, telling the public to be respectful of wildlife in the area, but then wants to develop a fairly extensive housing project in the very same area.

e-mail from Dave Simpson to [comments] (Nov. 14, 2008), obtained from BTNF files in its response to our FOIA request.

is really great wildlife habitat.”<sup>333</sup> Tom Campbell, biologist with Biota Research and Consulting and member of the Rendezvous “team,” responded, “We’re not going to say that wildlife aren’t using the entire site. We know, in fact, they are.”<sup>334</sup> Thus, the BTNF’s own consultant recognizes this area’s potential importance to winter wildlife.

Other neighbors reported to the BTNF their observations of winter wildlife in this area as well.<sup>335</sup> One letter 2008 enumerated wildlife habitat concerns for this area as follows:

- The proposed real estate development is within NFS boundaries;
- The proposed real estate development encroaches upon a critical winter closure area, which, by definition, is habitat for wildlife threatened by any human encroachment during the critical winter season;
- The proposed real estate development likely is within wildlife migration corridors;
- Recent development of private land at the base of Snow King Mountain, on the boarder of the National Forest, likely has stressed wildlife in this area to a critical level already, increasing moose mortality last winter, as affirmed by residents who live in the area and who spoke at the NFS scoping meeting at the Senior Center on October 30, 2008;
- Many species of wildlife seasonally occupy the area proposed for development including deer and elk that bed there, a fox breeding pair that den there, moose that forage and traverse that area in the winter, a possible lion that hunted in that area in the past, and numerous coyotes that scavenge the kill in that area, as evidenced by comments at the NFS scoping meeting at the Senior Center on

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<sup>333</sup> Forest: Housing Would Go on Nelson Drive Site, by Cory Hatch, *Jackson Hole Daily* (July 16, 2009).

<sup>334</sup> *Id.*

<sup>335</sup> *see e.g.* letter from Curtis and Kelly Kayem to BTNF during EA scoping period (A beautiful red fox lives in the winter and naps under the same tree in the middle of the area adjacent to your proposed expansion for buildings next to Henley Road in Jackson. We have photos and love to watch him from our living room windows.”).

October 30, 2008 and by written comments submitted to the NFS in response to this proposal;

- This area borders a stand of old growth forest, otherwise nonexistent on the north side of the Cache Creek drainage this close to town, which is the habitat of the afore mentioned wildlife;
- Multiple bird species nest in the forested area adjacent to this proposed real estate development, and likely will suffer an adverse impact from this development; and among other things,
- Grouse nest in sage in the exact area of proposed real estate development and will definitely suffer an adverse impact.<sup>336</sup>

After closure of the trail on the butte north of the development area, big horn sheep have returned to the area after an eight year absence.

The Nelson Site area, which is slated for destruction, is an important winter wildlife habitat because The Jackson Hole Conservation Alliance identified it that way. The Alliance cites “the *potential impacts on wildlife* at the Nelson Drive and Cottonwood sites,” advocating for “the least amount of land to be sold on North Cache, with administrative offices and employee housing to be located on the remaining acreage, rather than at the east edge of Jackson and in the Snake River Canyon in *prime wildlife habitat*.”<sup>337</sup>

The Nelson Site area, which is slated for destruction, is an important winter wildlife habitat because the Wyoming Game and Fish Department cautioned the BTNF about wildlife in this area as follows:

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<sup>336</sup> Letter to Supervisor of the BTNF from Charles L. Payne (Nov. 8, 2008).

<sup>337</sup> Alliance Action, The Jackson Hole Conservation Alliance newsletter (Nov. 2009) available at <http://www.jhalliance.org/Library/AllianceAction/AA.2009/Nov09AA.htm>.

The Nelson Administrative Site is adjacent to crucial year-long range for deer and *crucial winter range for elk*. Teton County's NRO adjoins the current Forest Service residential area. This proposal included adding additional residential units on 6.67 acres of land that is within the NRO. The proposed development and realignment of the access trail *may have adverse effects on wintering big game in the area.*<sup>338</sup>

Whereas, all action alternatives involve build-out in this sensitive area for winter wildlife, the "No Action Alternative" is only choice that protects this critical winter wildlife habitat. Therefore, the BTNF must choose "no action."

**iv. All action alternatives degrade the neighborhood night sky.**

Night sky effects of the Nelson Site development are not addressed in the EA. However, night sky concerns are paramount in this mountain community. The Town of Jackson enforces a strict "light ordinance"<sup>339</sup> in order to protect the night sky. In East Jackson at the Nelson Site neighborhood, the night sky environment is well preserved. But with BTNF intentions to add of up to new 26 residences on the hillside there at the end of Town, the action alternatives all create unacceptable impact on the night sky. Therefore, the BTNF must choose "no action" because all action alternatives have unacceptable impacts on the cherished night sky environment at the edge of this community.

**v. All action alternatives interfere with neighbors' quiet enjoyment of their homes.**

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<sup>338</sup> Memo from Tim Fuchs, Regional Wildlife Supervisor, WY Game & Fish Dept., to Vern Sleter (Nov. 10, 2008)(emphasis added), obtained from BTNF files in its response to our FOIA request.

<sup>339</sup> Town of Jackson Municipal Ordinance §49360(A).

Construction of more houses and potentially a horse facility at the Nelson Site under any of the action alternatives will impair residents' quiet enjoyment of their homes.<sup>340</sup> East Jackson is an attractive, peaceful and enjoyable place to live. All action alternatives increase traffic, on-street parking, noise, overcrowding and degradation of aesthetics in an unacceptable way.<sup>341</sup> One neighbor put it this way: "The addition of dozens of homes will lead to parking problems, traffic congestion, and overcrowding on the roads and on Putt-Putt and other trails."<sup>342</sup> Additionally, a horse facility at the Nelson Site will contaminate runoff and ground water, which is not addressed in the EA.

Accordingly, the BTNF must choose "no action" because it is the only alternative that does not increase traffic, on-street parking, noise, overcrowding and degradation of aesthetics, and it is the only alternative that preserves neighbors' quiet enjoyment of their homes.

**vi. All action alternatives impact wetlands at the North Cache site.**

Wetlands located at the east end of BTNF land at North Cache are impacted by all action alternatives. New construction adjacent to these wetlands occurs in all action alternatives. The BTNF proposes to mitigate impacts by limiting construction to outside of a 20-foot perimeter.<sup>343</sup> Nonetheless, impacts to these wetlands require the BTNF to choose the "No Action Alternative."

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<sup>340</sup> See discussion of Nuisance actions at Restatement (Second) of Torts § 821A cmt. b (1979). Originally developed as a private tort tied to the land, a nuisance action was generally brought when a person interfered with another's "use or enjoyment of land."

<sup>341</sup> Jackson Hole Conservation Alliance Preliminary Comments on the Jackson Administrative Site Land Conveyance and Development Draft Environmental Assessment (Nov. 10, 2009) ("The increased traffic, pets, and site footprint at Nelson have been a factor in strong objections to this proposal in the East Jackson area.").

<sup>342</sup> Comment by Tim Walker posted at [www.ProtectThePuttPutt.com](http://www.ProtectThePuttPutt.com) (Aug. 30, 2009) ("when and where will this ceaseless push for more housing developments end?").

<sup>343</sup> EA at 38 (mitigation common to all alternatives).

**vii. All action alternatives cause new construction adjacent to the National Elk Refuge.**

The EA fails to consider the impacts of construction adjacent to the National Elk Refuge. This national treasure was established in 1912 to provide winter habitat and preserve the Jackson Hole elk herd.<sup>344</sup> The Refuge is an integral component of the Greater Yellowstone Ecosystem; it is bounded by Grand Teton National Park, a wilderness area, and the Bridger-Teton National Forest. The Refuge receives nearly 1 million visits annually.

All action alternatives impact the National Elk Refuge with adjacent new construction. This impact is potentially harmful to wildlife that depends upon this sanctuary for winter survival. Moreover, this construction adjacent to this renowned preserve impacts human enjoyment of its beauty. Accordingly, the BTNF must choose “no action” in order to preserve the pristine character of this national treasure and avoid detrimental impacts.

**viii. All action alternatives create unidentified commercial real estate development along North Cache.**

No one has any idea what type of development could end up here on North Cache in the short-term or in the more distant future. One thing is for sure; no developer will buy this BTNF land and risk all its uncertainties,<sup>345</sup> without big plans. Consider the prospect of an IMAX theater, which may still be a real possibility.<sup>346</sup>

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<sup>344</sup> U.S. Fish and Wildlife website at <http://www.fws.gov/refuges/profiles/index.cfm?id=61550>.

<sup>345</sup> Uncertainties associated with development of this parcel include title issues with a conveyance of government property, water rights and mineral issues, floodplain issues, soil stability issues, uncertainties of up-zoning, and the uncertainty of the current market, to name a few. See Section 3.b.i-iv herein above.

<sup>346</sup> Section 2.d.ii herein above.

Those “big plans” will no doubt include increased traffic, noise, and congestion along the thoroughfare. This “big plans” kind of development creates other types of impacts for the community, too.<sup>347</sup> Such impacts can neither be predicted nor mitigated. Therefore, this project exposes this community to unidentified and unpredictable danger of future significant impacts. The only alternative that protects Jackson Hole from unforeseen impacts of commercial development at the North Cache site is the “No Action Alternative.”

Accordingly the BTNF must choose the “No Action Alternative” because it is the only choice that protects wildlife and the community from sprawl on virgin Forest, destruction of portions of a popular summer recreation area, construction of housing in a critical winter wildlife area, desecration the neighborhood night sky, intrusion on neighbors’ quiet enjoyment of their homes, building next to wetlands and next to the National Elk Refuge, and creation of unknown commercial real estate development along North Cache.

- d. NEPA requires the “No Action Alternative” because other alternatives all increase operational inefficiencies.

The EA’s “purpose and need” is, among other things, to “generate funds” to improve “operational efficiencies.”<sup>348</sup> Likewise, FSFREA’s intent is to enable Forests to cull excess and unneeded land and facilities in order to increase operational efficiencies.<sup>349</sup> But the BTNF already operates very efficiently. This project only increases operational *inefficiencies* because it moves the fire cache to Cottonwood 15 to 20 miles away, and

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<sup>347</sup> Section 3.a.i herein above.

<sup>348</sup> EA at 6.

<sup>349</sup> Sections 1.b, 1.c.i and 1.d.i herein above.

because it uproots from their homes 8 families that live on the North Cache site. Only the “No Action Alternative” maintains the BTNF’s current high level of operational efficiency.

**i. Moving the Fire Cache to Cottonwood is absurd.**

The only alternative that maintains the Forest fire fighting facilities in town at their current location is the “No Action Alternative;” all other alternatives require building new fire cache facilities at the Cottonwood Work Center site.<sup>350</sup> The Cottonwood site is 15 to 20 miles down the Snake River Canyon south of town. This location has already proven to be an inefficient site for forest operations.<sup>351</sup>

In September of 2008, two large wildfires and three prescribed burns consumed BTNF resources. These concurrent operations would have been “much more logistically challenging” to do from Cottonwood for the following reasons:

- Time would be wasted by crews driving back and forth the farther distances from the fire locations;
- Basic supplies must be purchased in town, which would be 15 to 20 miles farther away;
- Other supplies and personnel fly on commercial airlines into the Jackson airport 12 to 15 miles north of town in the opposite direction;
- Meals for fire crews are furnished from town;
- Fire crews “typically work 12 to 16 hour days”, then would drive the “busy, curvy, dangerous road” to Cottonwood, which is unsafe;

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<sup>350</sup> EA at pp. ii-iv.

<sup>351</sup> e-mail from Heidi Zarchus to Michael Schrotz, BTNF Planning-Lands Staff Officer (Oct. 21, 2009), obtained from BTNF files in its response to our FOIA request.

- This is an “interagency fire cache” that is used to store equipment for other federal agencies located north of town;
- No mobile phone service is available at Cottonwood;
- Forest Service radio reception is “not dependable” down there in the Canyon.<sup>352</sup>

Accordingly, moving the fire cache to Cottonwood increases operational inefficiencies. “Money obtained from selling off land will be a one-time deal and won’t cover the ongoing increased operating costs that the conveyance brings about,” according to one BTNF employee.<sup>353</sup> The BTNF agrees, “If this is the only tool we have to get new facilities, then the trade-off is that we are less efficient or it costs more to operate.”<sup>354</sup> Hence, one bad choice begets another.<sup>355</sup>

The “No Action Alternative” is imperative because all the other alternatives increase operational *inefficiencies* and threaten worker safety by moving the fire cache to Cottonwood.

**ii. Moving BTNF employees from their homes at North Cache is untenable.**

The “No Action Alternative” is the only alternative that maintains current employee housing at the North Cache site. “It is hypocritical to say that [this project] is a solution to Forest employee housing, when at least 8 employees will be displaced as a result of the conveyance!”<sup>356</sup> According to this BTNF employee, “If an employee housing solution

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<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> Land Sale seen as Bad for Forest Fighting, by Cory hatch, *Jackson Hole News & Guide* (Nov. 11, 2009) (quoting Michael Schrotz, BTNF Planning-Lands Staff Officer)

<sup>355</sup> *Id.* (ignoring operational efficiencies, Schrotz explained, “When we picked Cottonwood, what Kniffy was saying was, ‘That’s my greatest return dollar-wise. I can get as many facilities replaced as possible.’”).

<sup>356</sup> e-mail from Heidi Zarchus to Michael Schrotz, BTNF Planning-Lands Staff Officer (Oct. 21, 2009), obtained from BTNF files in its response to our FOIA request.

is really the goal, it's foolish to sell off land that we already own where more housing could be built."<sup>357</sup>

Not only will 8 families be forced to move by every action alternative, they will suffer devastating financial losses. "[M]oving costs could force them into debt and force them to leave the Forest."<sup>358</sup> The impact of uprooting these folks and destroying them financially is not just an operational inefficiency as the EA considers it.<sup>359</sup> It is a moral injustice that can only be avoided by the "No Action Alternative."

In summary, although the Forest Service has never considered the "no action alternative" as an option and it is only given courtesy mention in the EA, it is the only logical choice because (1) no one wants any of the action alternatives, (2) the land will never achieve "highest and best use" after the conveyance, (3) environmental impacts of the action alternatives are significant, and (4) all action alternatives increase operational inefficiencies.

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<sup>357</sup> *Id.*

<sup>358</sup> EA at 17.

<sup>359</sup> *Id.*

## CONCLUSION

Bridger-Teton National Forest (BTNF) plans to auction to a commercial developer ten acres of its high-dollar real estate in a prime location in Jackson Hole, Wyoming, is a greedy money-grab and an illegal misapplication of the enabling legislation. BTNF attempts to justify this expropriation of our precious public land and justify expenditure of proceeds to rebuild every Forest facility in the whole area, plus up to 18 more new houses, perverts National Environmental Policy Act (NEPA) purpose and procedures. Under a fair and balanced NEPA analysis, however, the “No Action” result is imperative, but this never has been an option even considered by the BTNF.

Respectfully submitted,

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Charles L. Payne, Chairman  
Protect the Putt-Putt, a community action organization  
970 W. Broadway #378  
Jackson, Wyoming 83001

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Charles L. Payne, Jr., individually  
PO Box 7421  
Jackson, Wyoming 83002  
307-734-6956

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been delivered this the 30th day of November, 2009, by hand delivery, to the following:

Carol "Kniffy" Hamilton, Forest Supervisor  
BRIDGER-TETON NATIONAL FOREST  
340 N Cache  
Jackson, WY 83001

and via e-mail to the following: [comments-intermtn-bridger-teton@fs.fed.us](mailto:comments-intermtn-bridger-teton@fs.fed.us)

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Charles L. Payne, Jr.