No. 22-35555

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF THE CRAZY MOUNTAINS, et al.,
Plaintiffs – Appellants

v.

MARY ERICKSON, et al.,
Defendants – Appellees

On Appeal from the United States District Court
for the District of Montana, No. 1:19-cv-00066
Honorable Susan P. Watters, District Judge

BRIEF OF AMICUS CURIAE THE PROPERTY AND ENVIRONMENT RESEARCH CENTER IN SUPPORT OF DEFENDANTS – APPELLEES/AFFIRMANCE

JONATHAN WOOD
Property and Environment
Research Center
2048 Analysis Drive, Suite A
Bozeman, Montana 59718-6829
Telephone: (406) 587-9591
Email: jonathan@perc.org

Attorney for Amicus Curiae
Property and Environment Research Center

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae the Property and Environment Research Center is a nonprofit corporation organized under the laws of Montana, which also has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

The Property and Environment Research Center (PERC) respectfully submits this amicus brief supporting Defendants-Appellees Mary Erickson, Leanne Marten, Vicki Christiansen, United States Forest Service, United States Department of Agriculture, M Hanging Lazy 3, LLC, Henry Guth, Inc., and affirmance of the district court's summary judgment ruling.[1]

Statement of Interest of Amici

PERC is the national leader in market solutions for conservation, with over 40 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

This case concerns the continuing challenges resulting from 19th century federal policies that created a "checkerboard" landscape of stranded public and private lands. PERC and its affiliated scholars have produced extensive scholarship

[1] Pursuant to FRAP 29(a)(2), all parties have consented to the filing of this amicus brief, with appellants asking that the brief further state that they take no position on its filing. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than PERC, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

on these challenges and how voluntary negotiations can resolve them in ways that benefit both public and private lands.[2] We have also explored how choosing conflict over collaboration breeds distrust between federal agencies, private landowners, and the public and preempts future win-win solutions.[3] PERC's unique policy perspective will be useful to the Court as it considers this case.

Summary of the Argument

By historical accident, many western landscapes are checkerboarded by alternating public and private lands. This checkerboarding produces persistent access challenges for land managers, a problem exemplified by this case. Exchanging public and private lands to consolidate ownership and negotiating

[2] *See, e.g.,* L. Claire Powers, et al., *Reconnecting stranded public lands is a win-win for conservation and people*, 270 Biological Conservation 109,557 (2022), https://www.sciencedirect.com/science/article/abs/pii/S0006320722001100; Bryan Leonard, et al., *Stranded land constrains public land management and contributes to larger fires*, 16 Environ. Res. Letters 114,014 (2021), https://iopscience.iop.org/article/10.1088/1748-9326/ac2e39/pdf; Bryan Leonard & Andrew J. Plantinga, *Stranded: The Effects of Inaccessible Public Land on Local Economies in the American West*, Working Paper (2021), bit.ly/3qv1Tuy; Tim Fitzgerald, *Federal Land Exchanges: Let's End the Barter*, PERC Policy Series (2000), https://perc.org/wp-content/uploads/2023/06/federal-land-exchange-fitzgerald.pdf.

[3] *See* Amicus Brief of Private Land Conservation Groups, *High Lonesome Ranch, LLC v. Bd. of Cnty. Commissioners for Cnty. of Garfield,* Case No. 21-1020 (10th Cir. filed June 29, 2021); PERC, *Comment Supporting Proposed East Crazy Inspiration Divide Land Exchange* (Jan. 6, 2023), https://www. perc.org/wp-content/uploads/2023/01/PERC-Comment-East-Crazy-Inspiration-Divide-Land-Exchange.docx.pdf; PERC, *Comment Supporting Proposed South Crazy Mountains Land Exchange* (Nov. 21, 2019), https://perc.org/2019/11/21/public-comment-on-the-south-crazy-mountains-land-exchange/.

voluntary access agreements, as the Forest Service and private landowners did here, are proven tools to resolve checkerboarding or mitigate its effects.

But these win-win solutions depend on federal agencies having an efficient and flexible process to finalize agreements with neighboring landowners. In this case, Friends of the Crazy Mountains, et al, ask the court to upend established practices under the National Environmental Policy Act and make it unduly difficult for federal agencies and private landowners to work together to resolve access challenges in checkerboarded landscapes. The court should reject that invitation.

I. Collaborative solutions are needed to resolve checkerboarding and mitigate its effects

A. Historical federal policies produced checkerboarded landscapes that continue to present challenges today

As the United States spread west, the federal government acquired vast landholdings. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 670 (1979). *See also* James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. Colo. L. Rev. 241, 245–52 (1994). Initially, the federal government sought to leverage these holdings to encourage western settlement and development. *See* Douglas W. Allen, *Establishing Economic Property Rights by Giving Away An Empire*, 63 J. L. & Econ. 251 (2019); Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. Colo. L. Rev. at 247–50. It made lands of various sizes

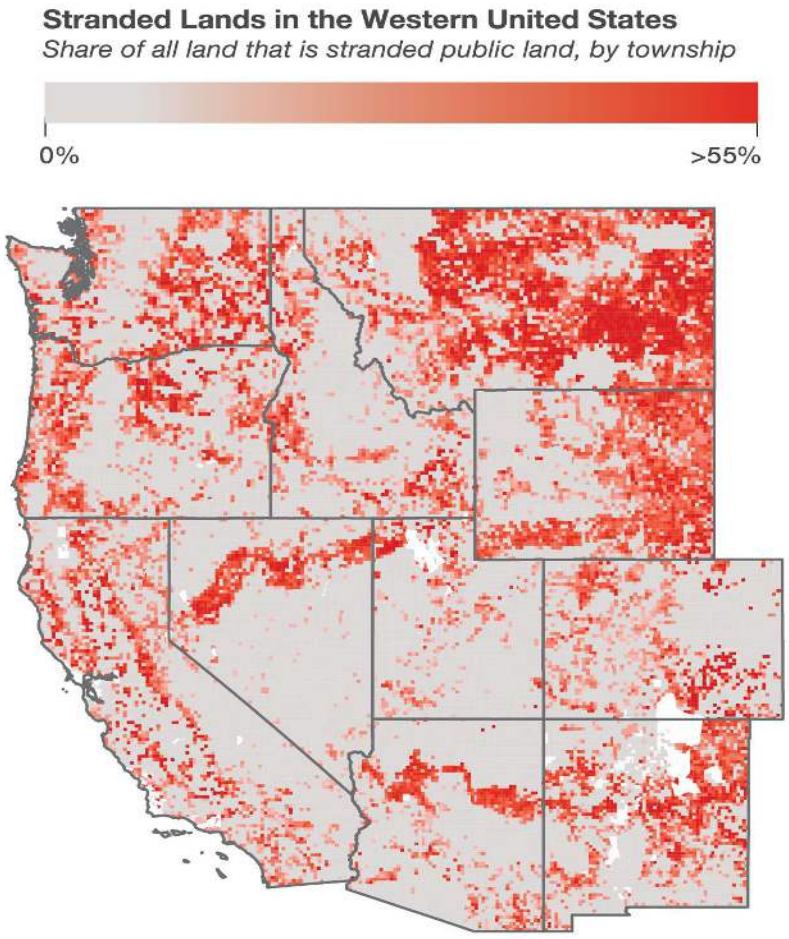
available to anyone willing to improve western land by building a farm, a ranch, mine, or railroad. *See* Shawn Regan, et al., *Opening the Range: Reforms to Allow Markets for Voluntary Conservation on Federal Grazing Lands*, 2023 Utah L. Rev. 197, 204–05 (2023); Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. Colo. L. Rev. at 247–50.

To manage this colossal land-disposal program, the government divided the west into 36-square-mile townships, consisting of 640-acre "sections" numbered 1 through 36. *See Camfield v. United States*, 167 U.S. 518, 519 (1897). *See also* Leonard & Plantinga, *Stranded*, *supra* at 7. For some of the disposal programs, only particular sections were granted to private owners. Railroads, for instance, were given every odd-numbered section up to 40 miles from a new track. *See* Allen, 63 J. L. & Econ. at 263; James L. Huffman, *American Prairie Reserve: Protecting Wildlife Habitat on a Grand Scale*, 59 Nat. Res. J. 35, 54 (2019). The value of these lands was intended to cover the cost of rail construction and induce companies to build a network connecting the east and west. *See Leo Sheep*, 440 U.S. at 672, 676–77. *See* Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. Colo. L. Rev. at 249 & n.51.

Many areas of the west were too dry, mountainous, or otherwise lacking in necessary resources to support homesteaders, ranchers, or miners. *See* Regan, et

al., 2023 Utah L. Rev. at 204–07. In those areas, the even-numbered sections excluded from railroad grants were never claimed by anyone else, producing landscapes of alternating public and private sections which persist to this day. *See* Leonard & Plantinga, *Stranded*, *supra* at 8; Huffman, *American Prairie Reserve*, 59 Nat. Res. J. at 54. PERC scholars have estimated that more than 6 million acres of public land in 11 western states are stranded in these landscapes. *See* Bryan Leonard, et al., *Stranded land constrains public land management, supra* at *2–3; Leonard & Plantinga, *Stranded*, *supra* at 9–10. *See also* Theodore Roosevelt Conservation Partnership & OnX, *Off Limits, But Within Reach: Unlocking the West's Inaccessible Public Lands* (2020) (reaching similar results).[4]

[4] https:// onxmaps.com/wp-content/uploads/2020/12/onX_TRCP_West_Federal_ Landlocked_Report.pdf.



[5]

These lands present significant challenges. Checkerboarding can render public lands inaccessible to the public, since reaching them would require permission or a right to cross private lands. *See* General Accounting Office, *Reasons for and Effects of Inadequate Public Access* (1994).[6] Neighboring

[5] Bryan Leonard, *Stranded: The economics of inaccessible public lands in the West* (2020), https://www.perc.org/2020/12/16/stranded/.

[6] https://www.gao.gov/ assets/rced-92-116br.pdf.

landowners may be perceived as capturing the benefits of inaccessible public lands with significant hunting and recreation values that should be widely shared by the public. And, where landowners do not readily give permission to cross their land, these conflicts can build into direct confrontations, blocked trails, trespasses, and litigation. *Leo Sheep*, 440 U.S. at 687 ("[L]itigation over access questions generally has been rare[,]" but "the present times are litigious ones."). *See, e.g., High Lonesome Ranch, LLC v. Bd. of Cnty. Commissioners for Cnty. of Garfield*, 61 F.4th 1225, 1242–45 (10th Cir. 2023).

Stranded public and private lands are also more difficult to manage. In forest and grassland ecosystems, for instance, land managers may lack necessary access to remove excess fuels on stranded public lands. *See* Leonard, et al., *Stranded land constrains public land management*, *supra* at *2. A study by several PERC scholars has found that these lands are 21.7% less likely to receive fuel treatments than non-stranded public lands. *Id.* at *7. When fires ignite on these stranded lands, they are also significantly more likely to grow and spread to other lands. *Id.* at *6. This is due not only to the buildup of unmanaged fuels but also the difficulty of deploying fire-fighting resources to stranded lands. *See id.* at *8-9.

It is highly doubtful that Congress intended to produce these results through its 19th century disposal policies. *See* Huffman, *American Prairie Reserve*, 59 Nat.

Res. J. at 41. More likely is that it "gave the issue of access little thought" because it "obviously believed that when development came, it would occur in a parallel fashion on adjoining public and private lands." *Leo Sheep*, 440 U.S. at 681, 686. But now that these unanticipated problems have arisen, federal agencies and private landowners must figure out how to resolve them amicably and fairly.

B. Negotiation and compromise are the best means to resolve checkerboard challenges

In the Crazy Mountains, the Forest Service has spent decades working with private landowners and other stakeholders to resolve checkerboarding challenges. *See* U.S. Forest Service, *East Crazy Inspiration Divide Land Exchange Prelim. Envtl. Assessment* (2022)[7] (discussing a proposed land exchange for which negotiations began in 1970). It has been helped in this endeavor by a diverse group of landowners, sportsmen, and conservationists working together to find common ground and fair solutions.[8] These negotiations have produced exchanges that consolidated public and private lands. *See, e.g.,* U.S. Forest Service, *South Crazy*

[7] https://www.fs.usda.gov/project/?project=63115.
[8] *See* Crazy Mountain Access Project, *We are the Crazy Mountains*, https://www.crazymountain-project.com/we-are-the-crazy-mountains; John Salazar, *Crazies working group searching for solutions*, Bozeman Daily Chron. (July 24, 2019), https://www.bozemandailychronicle.com/opinions/guest_columnists/crazies-working-group-searching-for-solutions/article_74e877bd-ebff-54e5-ad51-87feed9150d0.html.

Mountain Land Exchange Completed (2022).[9] They've also produced access agreements that expanded public access and addressed management challenges for private landowners. *See, e.g.,* Brett French, *New easement to northeast side of Crazy Mountains should open this fall*, Billings Gazette (Sept. 27, 2020).[10] This case concerns just such a collaborative solution to long-simmering conflict, a landowner's donation of a formal public-access easement in exchange for the Forest Service forgoing speculative prescriptive-easement claims. *See Friends of the Crazy Mountains v. Erickson*, 2022 WL 951755, 2–3 (D. Mont. 2022).

Forest Service policy expressly encourages disputes with neighboring landowners to be resolved in these ways. The agency's manual states that, when access across private land is desired, officials must "make every reasonable effort to negotiate a satisfactory easement on equitable terms." Forest Service Manual § 5463. The agency will consider more provocative approaches, like litigation or the use of eminent domain, only if "there is no reasonable way to avoid non-Federal land and the right-of-way cannot be satisfactorily acquired through negotiation[s], or clear title cannot be conveyed due to title defects." *See id.* That policy is well

[9] https://www.fs.usda.gov/detail/custergallatin/news-events/?cid=FSEPRD988313.

[10] https://billingsgazette.com/lifestyles/recreation/new-easement-to-northeast-side-of-crazy-mountains-should-open-this-fall/article_cd818b61-c0a3-5002-b532-bfa4eb9b67d1.html.

founded. Voluntary exchanges of land and access agreements can amicably resolve checkerboarding conflicts, while confrontation risks making problems worse.

One of the chief tools for resolving checkerboarding is to exchange public and private lands to produce larger, consolidated blocks of each. *See* Huffman, *American Prairie Reserve*, 59 Nat. Res. J. at 54. *See also* John W. Sheridan, Note, *The Legal Landscape of America's Landlocked Property*, 37 UCLA J. Envtl. L. & Pol'y 229, 249-51 (2019). Federal law allows federal agencies to exchange lands with private landowners if it is in the public interest. *See, e.g.,* 43 U.S.C. § 1716(a). Although the number and extent of exchanges varies from year to year, federal agencies frequently rely on this tool. *See* Cong. Res. Service, *Land Exchanges: Bureau of Land Management (BLM) Process and Issues* 2–3 (2016)[11] (noting that, between 2006 and 2015, the Bureau of Land Management exchanged 159,130 acres of federal land for 193,663 acres of private land). Consolidating checkerboarded lands through exchanges not only solves many management challenges but can also produce better environmental outcomes by, for instance, securing large blocks of contiguous wildlife habitat, dispersal of outdoor

[11] https://sgp.fas.org/crs/misc/R41509.pdf.

recreation, and protection of headwater streams. *See, e.g.,* Powers, et al., *supra*.; Huffman, *American Prairie Reserve*, 59 Nat. Res. J. at 54.

While land exchanges can solve checkerboarding, negotiation of access agreements can mitigate its effects even where it persists. *See, e.g.,* Travis Brammer, *Using Land and Water Conservation Fund Money to Protect Western Migration Corridors*, 22 Wyo. L. Rev. 61, 74–77 (2022). These flexible agreements can take many forms, including a landowner selling an easement to a federal agency, a federal agency and private landowner exchanging easements allowing the other to cross their land, or, as happened here, a landowner donating an easement. These agreements can be easier to negotiate than exchanges because they do not require either side to give up title to their land.

Both voluntary options are superior to conflict. Litigation, for instance, is costly, time-consuming, and uncertain. Even if an agency were willing to sink years and significant funds into a lawsuit to establish a prescriptive easement, there's no guarantee that it would prevail.[12] But it would almost certainly erode

[12] To acquire a prescriptive easement in Montana, for instance, the Forest Service would have had to prove six factors by clear and convincing evidence. *Wareing v. Schreckendgust*, 280 Mont. 196, 206 (1996). It would also have to overcome landowner defenses by clear and convincing evidence, including that the landowner extinguished the easement by prescription by erecting signs or blocking access for 5 years as the landowners have done here. *Dome Mountain Ranch v. Park Cty.*, 307 Mont. 420, 426 (2001).

trust and goodwill with landowners, both of which are essential to voluntary and collaborative solutions. Thus, litigation may not only be a setback to the agency's short-term access goals but could have long term consequences for the agency's ability to work with its neighbors when future challenges arise.

II. Throwing sand into the procedural gears will only prolong the problems of checkerboarding

Collaborative solutions to access conflicts depend on federal agencies having a predictable and efficient process for considering and finalizing agreements with neighboring landowners. In this case, Friends of the Crazy Mountains challenge the Forest Service's acceptance of a donated trail easement and construction of a trail through that easement under the National Environmental Policy Act. If accepted, their arguments would upend established agency practice and discourage collaborative solutions to checkerboarding.

A. NEPA analysis must be based in reality, not conjecture

The foundation for much of Friends of the Crazy Mountains' NEPA claim is their mischaracterization of the easement donation agreement as "giving up historic access rights." *See* Opening Br. at 1, 17, 27, 29, 35, 65. This assumes that the Forest Service previously had a bona fide easement providing public access across private land. But, as the district court held, the Forest Service had "no legally valid interest in the portion of the trails that traverse private property."

Friends of the Crazy Mountains, 2022 WL 951755 at 4. And Friends of the Crazy Mountains have explicitly chosen not to appeal that holding. *See* Opening Br. at 19 n. 3.

Moreover, agency decisions must be grounded in reality, not conjecture. *See Safari Club Int'l v. Haaland*, 31 F.4th 1157, 1176 (9th Cir. 2022); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1171 (9th Cir. 2010). It would have been improper for the Forest Service to base its NEPA analysis on speculative assumptions about the outcome of a hypothetical lawsuit seeking to establish a prescriptive easement. Instead, the proper comparison was the situation as it existed: there were no legally established access rights and access had long been blocked by private landowners. *See Friends of the Crazy Mountains*, 2022 WL 951755 at 2.

Friends of the Crazy Mountains' speculative approach to NEPA would also be impractical. It would raise myriad subsidiary questions, like how to account for the environmental tradeoffs of spending agency resources on protracted litigation rather than forest management and restoration. It would also invite landowners to demand that agencies base their NEPA analysis on their preferred speculations about the legal consequences of the Service asserting an easement interest.

Friends of the Crazy Mountains' approach would also penalize landowners who enter voluntary, collaborative agreements. Indeed, the reason that the landowners are defendants in this case is because they entered into such an agreement. *See* Order, *Friends of the Crazy Mountains v. Erickson*, 19-cv-66, ECF. No. 46, 5, 9–12 (Nov. 18, 2020). If a landowner refused to negotiate, their property rights would remain secure and, if the public or a federal agency sought to establish a prescriptive easement, they would enjoy all the law's protections against such claims. *See supra* n. 31 (discussing the high bar for establishing a prescriptive easement). But for landowners willing to work with a federal agency to provide access, the agency would have to assume away their property rights when analyzing any agreement, putting an unjustified thumb on the scale against compromise. This would only serve to discourage negotiation and collaboration between federal land-management agencies and neighboring private landowners.

B. NEPA does not forbid iterative analysis as proposed agreements gain specificity

Here, the Forest Service, as agencies frequently do, followed an iterative process to analyze the easement donation under NEPA. In 2006, it acknowledged the need to secure formal rights of way in this area and considered the environmental impacts of various trail uses as part of its Travel Plan. *See Friends of the Crazy Mountains*, 2022 WL 951755, at 2. In 2009, as negotiations

progressed, it analyzed the environmental impacts of rerouting the trail within a specific envelope and for a variety of uses, while acknowledging that the precise details would need to "correspond[] with final rights-of-way." *See id.* After reaching a tentative agreement with the landowner that identified a particular route and uses of the trail, the Service sought public input on whether there was any new information or changed circumstances that would warrant additional NEPA analysis. *See id.* at 3. None were identified and the Service concluded that final acceptance of the easement donation and construction of a trail in the new right-of-way was categorically excluded from further review under NEPA. *See id.*

Friends of the Crazy Mountains faults the Forest Service for following this iterative process. It acknowledges that the 2009 environmental analysis contemplated a future compromise with the landowners, provided some details about the potential trail reroute, and analyzed the environmental impacts at that generalized level. *See* Opening Br. at 30. But it objects to the Service's reliance on this analysis because, in 2009, "the specific location and design of a new, relocated trail was not known" and was contingent on continued negotiation with the landowner. *See id.* at 31.

Friends of the Crazy Mountains cites no precedent for the principle that an agency cannot analyze a project's environmental impacts in stages as it becomes

more detailed. Agencies frequently "tier" their NEPA analysis in this way, initially analyzing general sketches of future projects and later analyzing more precise details as they become available. *See, e.g.,* Council on Envtl. Qual., *Final Guidance for Effective Use of Programmatic NEPA Reviews*, 79 Fed. Reg. 76,986 (Dec. 23, 2014). Doing so saves agencies substantial time by narrowing the range of issues they must consider in later rounds of analysis when such analysis would hold up implementation of a project. *See id.* at 76,987–88.

This iterative approach is especially helpful where an agency is negotiating with a private landowner to resolve access conflicts. Without it, the agency and the landowner would have to fully work out the details of a compromise for the agency to only then being working through the often-slow NEPA process. *Cf.* Eric Edwards & Sara Sutherland, *Does Environmental Review Worsen the Wildfire Crisis?*, PERC Policy Br. (2022) (discussing how NEPA affects the Forest Service's ability to implement forest restoration projects).[13] If that analysis revealed environmental impacts too great for the Service to accept any compromise that the landowner was open to, all of the time negotiating would have been wasted. Likewise, the public might object to being given an opportunity to weigh

[13] https://www.perc.org/wp-content/uploads/2022/06/PERC-PolicyBrief-NEPA-Web.pdf.

in on the proposal only at the 11th hour, once the agreement was fully baked.[14] The only way for agencies to provide early opportunities for public engagement and increasing assurances to landowners as negotiations progress is to analyze a prospective compromise in stages as details come into focus, precisely as the Forest Service did here.

C. For negotiated solutions, agencies need not consider alternatives that would alienate cooperating landowners

Finally, Friends of the Crazy Mountains objects to the Service analyzing the proposed easement donation as an up-or-down choice. Opening Br. at 59–66. They vaguely allude to alternatives that the agency should have considered. But it cites no precedent for the principle that, where a project is conditioned on the voluntary agreement of a private landowner, an agency must consider alternatives that the landowner would not accept.

This Court has previously upheld agency decisions to limit analysis to the proposed action and no-action alternative where the action "is a negotiated agreement." *California ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S.*

[14] Ironically, Friends of the Crazy Mountains itself raises this objection despite also faulting the Service for relying on its early disclosure and analysis of a general framework for a potential agreement before every precise detail had been worked out. *Compare* Opening Br. at 30–31 to *id.* at 61–62.

Dep't of the Interior, 767 F.3d 781, 797 (9th Cir. 2014). As this Court explained then, "[d]iscussing a hypothetical alternative that no one had agreed to (or would likely agree to) would have been unhelpful . . ." *Id. See Muckleshoot Indian Tribe v. U.S. Fores Service*, 177 F.3d 800, 814 (9th Cir. 1999) (requiring consideration of additional alternatives where a landowner affirmatively stated they would have considered additional concessions).

Were the Court to hold otherwise, it would risk discouraging private landowners from working with federal agencies to resolve access disputes, by creating the perception that their tentative agreement opens the door for outside agitators to demand, and the agency to consider, alternatives that the landowners would never agree to. Here, for instance, Friends of the Crazy Mountains' vague description of additional alternatives appears to include that the Forest Service should have adopted their (rejected by the district court) legal arguments concerning easements and perhaps pursued litigation against the landowners to establish those hypothetical easements. *See* Opening Br. at 63. What landowner would work with the agency if doing so opened the door to litigation seeking to attack her property rights?

Conclusion

In this case, the Forest Service and private landowners found a voluntary and collaborative solution to a long-simmering access dispute. With millions of acres of public and private lands rendered inaccessible by checkerboarding, those are precisely the types of solutions that are needed to expand access to public lands and improve land management. Through unsupported NEPA arguments, Friends of the Crazy Mountains seeks to erect new procedural obstacles to such agreements, which will only extend the problems associated with checkerboarding and discourage private landowners from coming to the negotiating table. This Court should affirm the district court's decision upholding the easement donation and rejecting Friends of the Crazy Mountains' NEPA challenge.

Respectfully submitted June 12, 2023.

/s/ Jonathan Wood
Jonathan Wood
Counsel for Property and Environment Research Center

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