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October 5, 2020

San Juan National Forest
Attn: Becca Smith
PO Box 310
Pagosa Springs, CO 81147

Re: Valle Seco 2019 Land Exchange Draft Environmental Assessment

Dear Ms. Smith:

These comments are offered in response to the San Juan National Forest's Valle Seco 2019 Land Exchange Draft Environmental Assessment. The comments are endorsed by San Juan Citizens Alliance, Center for Biological Diversity, Defenders of Wildlife, Conservation Colorado, Rocky Mountain Wild, Quiet Use Coalition, Great Old Broads for Wilderness, and San Luis Valley Ecosystem Council.

The proposed Valle Seco 2019 Land Exchange project is not in the public interest as proposed. The land exchange entirely abandons the agency's commitment to roadless area conservation as enumerated in the Colorado Roadless Rule. We urge the Forest Service to reject the proposed Valle Seco 2019 Land Exchange as drafted.

Of most concern, the project entails the conveyance out of public ownership of 175 acres of Colorado Roadless Area adjacent to the South San Juan Wilderness. In exchange, the Forest Service would primarily acquire one large isolated private land holding, one the exchange proponent has threatened to convert into a domestic elk farm.

Alternatively, the Forest Service should evaluate an action alternative that complies with the Colorado Roadless Rule by eliminating federal Parcel 1 from the exchange, and thereby create a lawful alternative that adheres to federal roadless area protection regulations.

The genesis of this project is that Bootjack Ranch purchased the Valle Seco inholding in 2014, and then promptly closed to public access the roadway across the property that was previously open to public use. Simultaneously, Bootjack started proposing use of the property as a domestic elk ranch. These actions, closing the road to public use and proposing domestic elk farming with potential to spread disease to native elk herds, was clearly intended to stoke public consternation and set the table for a land exchange. In essence, Bootjack is employing regrettable tactics to manipulate the public into supporting its desired outcome by effectively taking the Valle Seco

inholding and public access hostage to its demands for an exchange. Otherwise, it promises to undertake actions that degrade and destroy public wildlife and wildland values.

We do not believe it is appropriate for the Forest Service to respond to these aggressive and threatening tactics employed by the proponent, and by the proponent's hired facilitator Western Land Group, by capitulating to their demands.

1. PURPOSE AND NEED

The primary stated public purpose and need for the project is the acquisition of the 880-acre Valle Seco inholding. NEPA requires analysis of a range of reasonable alternatives to achieve the desired project outcome.

In this case, the most reasonable alternative course of action is outright purchase of the 880-acre Valle Seco property using funding via the Land and Water Conservation Fund (LWCF). Congress recently enacted legislation to automatically guarantee full funding of the LWCF in the amount of \$900 million annually. If the Valle Seco parcel is valuable as big game winter range, it will score well in LWCF funding criteria and be competitive for funding. In fact, there is a relative lack of pending acquisition projects among national forests in Colorado and LWCF funding would be readily available. Conclusion of acquisition via LWCF will happen much more promptly and without public controversy compared to alternative approaches like this proposed land exchange. If the acquisition lacks a willing seller, the Forest Service can defer until a future date when the property is owned by someone with a conservation outlook.

The benefits of acquisition to wildlife, specifically elk and mule deer, are detailed in the Draft EA. NEPA requires that alternative means of securing these benefits be analyzed, most obviously direct purchase. We note that the Ninth Circuit Court of Appeals found that the Forest Service violated NEPA in considering a land exchange precisely because the agency failed to consider the alternative of purchasing the property at issue using LWCF moneys. See *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999).

Disposal of Colorado Roadless Areas, and of recommended wild and scenic river segments, is not a viable project purpose and need that serves any public benefit. The threats posed by wildlife farming, particularly those linked to chronic wasting disease or other diseases typical of concentrated elk feed grounds like what the proponent intends, confirm that providing National Forest System land to an entity considering such activities is not in the public interest.

2. THE PROPOSED VALLE SECO LAND EXCHANGE DOES NOT ADHERE TO THE COLORADO ROADLESS RULE

Each of the three action alternatives would exchange to a private party 175 acres of publicly-owned National Forest lands protected by the Colorado Roadless Rule. As discussed below, we believe this is poor policy and poor precedent, undermines the purpose of the Colorado Rule, contradicts the Rule's plain language, and that the Forest Service has failed to explain how its proposal complies with the law.

A. The Colorado Roadless Rule.

The Forest Service, cooperating with the State of Colorado, adopted the Colorado Roadless Rule in 2012 to protect the unique values of the more than four million acres of roadless National Forest lands in the state from most road construction and logging.

In the Rule's preamble, the Forest Service recognized that:

Roadless areas are important because they are, among other things, sources of drinking water, important fish and wildlife habitat, semi-primitive or primitive recreation areas, including motorized and non-motorized recreation opportunities, and naturally appearing landscapes. A need exists to provide for the conservation and management of roadless area characteristics.

The Department [of Agriculture], the Forest Service, and the State of Colorado recognize that timber cutting, sale, or removal and road construction/reconstruction have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area characteristics.

Forest Service, Colorado Roadless Rule, 77 Fed. Reg. 39576, (July 3, 2012).

The Rule's preamble quotes Colorado's governor who petitioned for the state rule as stating: "Roadless areas belong to all Americans and are a resource to protect and pass on to future generations." *Id.*, 77 Fed. Reg. 39577. The agency responded: "The final rule will provide long-term management of CRAs to ensure roadless area values are passed on to future generations." *Id.* The Forest Service adopted a national Roadless Area Conservation Rule and the Colorado Roadless Rule in part because piecemeal decision-making on individual projects was causing the incremental loss of increasingly scarce and important roadless values.

The Colorado Roadless Rule permits the Chief of the Forest Service to modify Colorado Roadless Area (CRA) boundaries, or add new areas, "based on changed circumstances" after providing public notice and a 90-day public comment period. The rule reads:

The Chief of the Forest Service may modify the boundaries of any designated Colorado Roadless Area identified in § 294.49 or add new Colorado Roadless Areas based on changed circumstances. Modifications and additions will be reflected in the set of maps maintained at the national headquarters office of the Forest Service.... Public notice with a minimum 90-day comment period will be provided for any proposed Colorado Roadless Area boundary modifications or additions.

36 C.F.R. § 294.47(a).

B. The Action Alternatives Propose Surrendering Roadless Lands to a Private Party.

The Forest Service analyzes three action alternatives concerning the proposal to obtain Parcel A, an 880-acre inholding. The owner of Parcel A, Kelcy Warren's Bootjack Ranch, seeks to obtain in exchange for the parcel 175 acres of the South San Juan Adjacent CRA contiguous to the Ranch. Draft EA at 34. Each of the action alternatives would trade that portion of the CRA to Mr. Warren.

Alternative 2 would transfer 175 acres of the South San Juan Adjacent CRA to the Bootjack Ranch while making a boundary modification to add 529 acres from two contiguous parcels to the Winter Hills/Serviceberry Mountain CRA more than 10 miles as the crow flies and 25 miles by road from the South San Juan Adjacent parcel. Draft EA at 22, 26 (map).

Alternative 3 would be the same as Alternative 2, but would also “modify” the boundaries of the Winter Hills/Serviceberry Mountain CRA by creating a free-standing, non-contiguous roadless area of 4,675 acres separated from the existing CRA by paved Highway 84. This free-standing roadless area would consist of National Forest lands east and south of Parcel A, as well as the southeastern portion of Parcel A, following the exchange. Draft EA at 25, 28 (map).

Alternative 4 would be the same as Alternative 2, but would “modify” the boundaries of the Winter Hills/Serviceberry Mountain CRA by creating a free-standing, non-contiguous roadless area of 7,425 acres surrounding and including Parcel A, separated from the existing CRA by paved Highway 84. Alternative 4 further closes a portion of the road that accesses Parcel A. Draft EA at 25, 29 (map).

All of the action alternatives would result in the loss of 175 acres of the South San Juan Adjacent CRA as those acres would be transferred from public ownership to a private party. No additions are contemplated to the South San Juan Adjacent CRA.

C. Each Action Alternative Undermines the Colorado Roadless Rule.

We object to the fact that each action alternative would result in disposal of 175 acres of roadless lands from the South San Juan Adjacent CRA. We oppose removing qualifying lands from the roadless lands from protection of the Colorado Roadless Rule to benefit Mr. Warren’s ranch.

The Forest Service adopted the 2001 national Roadless Area Conservation Rule and the state-specific Colorado Roadless Rule in 2012 to conserve the many values that roadless areas encompass: sources of pure water, unfragmented fish and wildlife habitat, wild country, and opportunities to enjoy the forest in its natural state, and to preserve roadless areas for future generations. The South San Juan Adjacent CRA contains many of the values the Colorado Roadless Rule was adopted to protect. The 2013 San Juan Forest Plan describes this roadless area as containing suitable habitat for the imperiled lynx, which has been documented to use nearby Wolf Creek Pass. The South San Juan Adjacent CRA is part of an undeveloped corridor with forest cover on public lands across the San Juan River valley that is the only location on the San Juan National Forest where contiguous public land ownership connects the South San Juan and Weminuche wildland areas, with wilderness core buffered by adjoining roadless lands.¹ Unfragmented habitat such as roadless national forest lands provides a critical backstop against future degradation of linkage and dispersal corridors.

¹ See Forest Service, Colorado Roadless Rule Final EIS, Map of Alternative 2 (2012), attached as Ex.1, and available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5366307.pdf (last viewed Feb. 9, 2020).

The South San Juan Adjacent CRA contains the most significant low-elevation landscape corridor in the San Juans, the densely forested connection between the South San Juan and Weminuche Wilderness Areas bridging Highway 160 between Johnny Creek and Turkey Creek. The 158,790-acre South San Juan Wilderness, just a few hundred yards from the land slated to be traded, is among the wildest landscapes in all of Colorado. This reputation relates to the South San Juans' history harboring the last remnant population of grizzly bears in the Southern Rocky Mountains, and including suitable habitat for the future wolverine recovery. The Johnny Creek corridor extends down to ponderosa pine forests at its lowest elevations along the San Juan River. Ponderosa pine forests are among the most underrepresented ecosystem types within National Wilderness Preservation System in Colorado. This corridor follows an elk migration route and is a logical movement route for forest-dwelling species such as lynx, wolverine, and pine marten dispersing from the South San Juans to the Weminuche and back. This parcel provides the only opportunity to preserve unfragmented forested habitat where the Weminuche and South San Juan Wilderness Areas could abut.

These ecological, wildlife, and wetland values inspired San Juan Citizens Alliance and a dozen other conservation groups to propose to protect the South San Juan Adjacent roadless area as designated wilderness for the last two decades, a fact the Draft EA neither acknowledges or responds to, in violation of NEPA.² Further, the Forest Service adopted the Roadless Rule because incremental decision-making was causing a loss of increasingly scarce and important roadless values. Eliminating roadless protections and federal control over this parcel would undermine the very reason these lands were protected by the national and Colorado Roadless Rule.

The Draft EA asserts that the 175-acre portion of the South San Juan Adjacent CRA contains authorized and unauthorized roads, ditches, and fences. *See* Draft EA at 33. Concerning unauthorized roads, the Forest Service should not use its own failure to protect the roadless area from illegal uses as a basis for trading away these public lands. Doing so would reward unlawful activity and agency negligence, an impact the Forest Service fails to address in the Draft EA. As to the presence of authorized roads, ditches, and fences, the Forest Service clearly concluded that those impacts did not diminish the area's roadless values when it designated the area as a CRA. Note that between the publication of the national Roadless Rule and the Colorado Rule, the Forest Service revisited its roadless area inventories and added and subtracted lands to be covered by the Colorado Rule based on new information. It did not change the designation of the parcel at issue. Further, if the Forest Service identifies non-conforming uses in roadless areas, it should rectify the problems rather than using its own poor management as an excuse to jettison those areas.

² Map, Citizens Plan for the Wild San Juans (Nov. 1, 1999) (showing proposed wilderness for the South San Juan Adjacent CRA), attached as Ex.2. The Citizens Plan was submitted for San Juan Forest Plan Revision, and endorsed by San Juan Citizens Alliance, Southern Rockies Ecosystem Project, The Wilderness Society, Sierra Club-Rocky Mountain Chapter, Rocky Mountain Recreation Initiative, Center for Native Ecosystems, Sinapu, Biodiversity Conservation Alliance, Colorado Environmental Coalition, Colorado Wild, Western Resource Advocates, Upper Arkansas South Platte Project.

D. The Forest Service Fails to Support Its Allegations of “Changed Circumstances” Concerning the South San Juan Adjacent CRA Parcel.

1. Prior interpretations of the “changed circumstances.”

As noted above, the Chief of the Forest Service may “modify” the boundaries of any designated CRA “identified in § 294.49 or add new Colorado Roadless Areas based on changed circumstances.” 36 C.F.R. § 294.47(a) (emphasis added).

This provision is unique to the Colorado Roadless Rule. The 2001 national Roadless Area Conservation Rule apparently allows the agency to modify roadless area boundaries, but does not define the process for doing so. 36 C.F.R. § 294.11 (2001) (defining “inventoried roadless areas” as “[a]reas identified in a set of inventoried roadless area maps ... which are held at the National headquarters office of the Forest Service, *or any subsequent update or revision of those maps.*” (emphasis added)).

A similar provision occurs in the 2008 Idaho Roadless Rule. 36 C.F.R. § 294.27(b). While the Forest Service has three times modified Idaho roadless area boundaries, and has acknowledged that the standard for modification or addition includes “changed circumstances,” we could locate no evidence that the Forest Service has ever specifically justified its decision on the basis of “changed circumstances” or explained the meaning of that phrase.

For example, in 2014, the Forest Service adopted a final rule modifying the boundaries of five roadless areas in Idaho and “correcting” the boundaries to several others. 79 Fed. Reg. 33436 (June 11, 2014). The Forest Service identified the standard as requiring “changed circumstances,” *id.*, but did not use that specific term in justifying the boundary modifications, simply asserting that the changes “are necessary.” *Id.* at 33437.

Second, in 2015, the Forest Service modified a roadless area boundary to permit the construction of a short road segment and restroom facility within the West Mink IRA relating to the Gibson Jack trailhead. Neither the Federal Register notice announcing, nor that adopting, the boundary modification identified any “changed circumstance” using that term. 80 Fed. Reg. 39051 (July 8, 2015) (notice of proposed boundary modification); 80 Fed. Reg. 59727 (Oct. 2015) (Oct. 2, 2015) (notice of final boundary modification).³

Third, in 2020, the Caribou-Targhee National Forest approved a mine expansion project which included a land exchange that traded 160 acre of roadless area to the mine while the mine provided 600+ acres of lands to be included in the IRA in return. Neither the Final EIS nor the

³ The Forest Service defined the purpose and need for this project to include the “need to provide permanent restroom facilities to address the change in use patterns along with population growth within the Pocatello area has contributed to frequent crowded conditions at Gibson Jack Trailhead.” Gibson Jack Trailhead Relocation, Environmental Assessment (June 2015) at 9, available at https://www.fs.usda.gov/nfs/11558/www/nepa/98802_FSPLT3_2517747.pdf (last viewed Sep. 21, 2020). To the extent that the Forest Service asserts this is the “changed circumstance,” we note that it relates to a change within the roadless area where the boundary was modified. The Forest Service here identifies no changed circumstance within the South San Juan Adjacent CRA.

project's Record of Decision specifically identify a "changed circumstance" justifying the exchange, although the EIS acknowledges that either a "changed circumstance" or "public need" is required. See Forest Service and BLM, Final EIS for the Proposed Dairy Syncline Mine and Reclamation Plan Nov. 2019), available at https://www.fs.usda.gov/nfs/11558/www/nepa/56566_FSPLT3_4905599.pdf (last viewed Sep. 21, 2020); Caribou-Targhee National Forest, Final Record of Decision, Dairy Syncline Mine Project (April 2020), available at https://www.fs.usda.gov/nfs/11558/www/nepa/56566_FSPLT3_5257771.pdf (last viewed Sep. 21, 2020).

Similarly, the Forest Service has approved two land exchanges in Colorado involving CRAs, but in neither case did the agency's public documents specifically identify a "changed circumstance" justifying the "modifications" to CRA boundaries.

The Arapaho-Roosevelt National Forest approved the Husted-Maitland Land exchange in February 2019, which resulted in a net gain of 125 acres to roadless areas. The Forest Service acquired 324 acres in the Comanche Peak and Crosier Mountain CRAs in exchange for 199 acres of roadless lands in the Crosier Mountain CRA. The acquired lands were inholdings within the CRAs. The Forest Service found that the land exchange was in the public interest in part because it "[c]reate[d] a net increase of approximately 125 acres of land managed under the Colorado Roadless Rule," and because it acquired the only private inholding within the Crosier Mountain CRA and two inholdings within the Comanche Peak CRA.⁴ Neither the EA nor the Decision Notice mention the words "changed circumstances."

The Rio Grande National Forest approved the Summitville Interchange project involving parcels near the Summitville mine in 2019.⁵ This project removed 16 acres of the Wightman Fork-Lookout CRA "within and adjacent to the Summitville Superfund site," the vast majority actually within the site, and added 10 acres of acquired inholdings to that roadless area.⁶ Although this resulted in a net decrease of 6 acres of roadless land, the acquired acres involved an inholding completely surrounded by the CRA.⁷ The exchange thus blocked up more remote habitat and improved roadless area management. As a Decision Memo signed by the Forest

⁴ Forest Service, Husted-Maitland Land Exchange, Decision Notice and FONSI (Feb. 28, 2019) at 7, attached as Ex.3, and available at https://www.fs.usda.gov/nfs/11558/www/nepa/103116_FSPLT3_4625994.pdf (last viewed Feb. 9, 2020).

⁵ Forest Service, Decision Memorandum for the Chief, Modification to Colorado Roadless Area Boundary, Final Action (Mar. 19, 2019), attached as Ex.4.

⁶ Forest Service, News Release, "Rio Grande National Forest seeking input on two proposals in Summitville area," (Jan. 12, 2018), attached as Ex.5, and available at https://www.fs.usda.gov/nfs/11558/www/nepa/107984_FSPLT3_4173910.pdf (last viewed Feb. 9, 2019).

⁷ See Forest Service, Map, Wightman Fork to Lookout Colorado Roadless Area (CRA) Proposed Boundary Modification (Oct. 26, 2017), attached as Ex.6, and available at https://www.fs.usda.gov/nfs/11558/www/nepa/107984_FSPLT3_4106092.pdf (last viewed Feb. 9, 2019).

Service Chief explained, the exchange “[a]llows the Forest Service to dispose of un-manageable mineral survey fractions [of CRA lands] within the superfund site in exchange for adjacent properties that allow for boundary consolidation [within a CRA] by eliminating three private inholdings.”⁸ While that Decision Memo mentions the phrase “changed circumstance” in two places, the document never explicitly defines what those circumstances are.

In short, the Forest Service has never defined what meets the test for “changed circumstance.” But in every prior case, the Forest Service has ensured that the roadless area that loses some acreage pursuant to a boundary modification gains at least some land back, or benefits in some other way, from the modification.

We further urge that a “changed circumstance” must include a change within or pertaining to the parcel for which the modification is proposed, which appears to be how the Forest Service has interpreted the provision in every prior application. Further, any “change” should constitute something more than a desire to terminate protection for the area at issue.

2. The Draft EA fails to demonstrate “changed circumstances.”

The Draft EA appears to be the first time the Forest Service has interpreted the meaning of the phrase “changed circumstances,” and has specifically asserted that a CRA boundary modification meets that test. The Draft EA at 33 states:

For this project, three changed circumstances have been identified:

- 1) the opportunity to conduct a land exchange to acquire critical winter range and a crucial migration corridor for elk and mule deer in the Valle Seco area;
- 2) the opportunity to acquire jurisdictional control over National Forest System Road 653 in the Valle Seco area; and
- 3) the closure of all or portions of three system roads (NFSR 653.C, NFSR 653.D and NFSR 619) in the Valle Seco area that have been decommissioned since the Colorado Roadless Rule has been in effect.

The EA does not identify any changed circumstance associated with Parcel 1 since the San Juan NF confirmed its boundary in the 2012 Colorado Roadless Rule. None of the three items noted above has anything to do with changes to, or circumstances within, Parcel 1 which the Forest Service intends to exchange to Mr. Kelcy Warren. Changed circumstances routinely refer to emerging data that has bearing on boundaries and management intent where data on the ground contradicts the findings that went into the original boundary. These might include inaccurate road locations, streambeds, seasonal impoundments, easements, un-inventoried or adjacent roadless acres, etc., any of which might require a change in the boundary. In the Colorado Roadless Rule FEIS response to comments⁹, the Forest Service described the circumstances that would permit a boundary modification associated with changed circumstances:

⁸ Forest Service, Decision Memorandum for the Chief (Ex.4).

⁹ See Rulemaking for Colorado Roadless Areas, Final Environmental Impact Statement, May 2012 at H-17.

Because of the continual improvement in mapping technology, Alternative 2 in the FEIS includes a provision to administratively correct CRA boundaries. Also included is a provision to modify boundaries, which can be done during forest plan revision or any other time there is a substantial update to a boundary or the identification of new roadless areas. *The modification language in preferred alternative uses “changed circumstance” because any number of circumstances will present themselves in the future, including a reduction in road miles that could cause a roadless boundary to be adjusted.* (emphasis added) (Roadless Rule FEIS at H-17)

In lieu of finding any relevant, site-specific changed circumstance for the South San Juan Adjacent CRA that would conform to the circumstances anticipated during the crafting of the Colorado Roadless Rule, the Draft EA instead describes a variety of unrelated activities occurring elsewhere across the San Juan NF.

Item 1, the opportunity to conduct a land exchange in an area located 25 miles distant by road from the South San Juan Adjacent CRA has no bearing to the CRA’s on-the-ground circumstances.

Item 2, acquiring jurisdiction over a Forest system road 25 miles distant from the South San Juan Adjacent CRA similarly has no bearing to the CRA’s on-the-ground circumstance.

Item 3, travel management decisions on several Forest system routes 25 miles distant from the South San Juan Adjacent CRA also has no bearing to the CRA’s on-the-ground circumstance. In fact, the land exchange does not alter the Forest Service’s ability to close and decommission roads under its jurisdiction. The agency can implement travel management decisions for areas around Valle Seco that are entirely unrelated to the South San Juan Adjacent CRA.

The private parcel that the Forest Service seeks to acquire has been in private hands for decades, and the agency does not assert that the roadless area to be surrendered to private ownership has changed since the Colorado Roadless Rule was adopted. Without an identified changed circumstance, any change to the roadless area boundaries is unlawful.

In contrast to the lack of any site specific on-the-ground information provided to account for changed circumstances associated with the South San Juan Adjacent CRA, the Draft EA does provide detail about a relevant changed circumstance that justifies a boundary modification for the Winter Hills/Serviceberry Mountain CRA: “there is an abandoned, nonsystem road that went to an abandoned communication site on the top of Serviceberry Mountain within the 529 acres proposed for addition to the CRA under Alternative 2.” Draft EA at 37. This confirms a changed circumstance directly related to the boundary of the CRA, i.e., a road apparently abandoned since the CRA boundary inventory was previously completed. This is the type of common sense application of the changed circumstance criteria that is completely lacking for the South San Juan Adjacent CRA boundary modification.

E. The Forest Service Fails to Provide Needed Information Concerning Boundary Modifications to the Winter Hills/Serviceberry Mountain CRA in Alternatives 2 and Newly Identified Roadless Areas in Alternatives 3 and 4

The Colorado Roadless Rule distinguishes between “modifications” and “additions” when

addressing changes to the extent of the Rule's protections. "Modifications and additions will be reflected in the set of maps maintained at the national headquarters office of the Forest Service.... Public notice with a minimum 90-day comment period will be provided for any proposed Colorado Roadless Area boundary modifications or additions." 36 C.F.R. § 294.47(a).

The various proposed boundary modifications and additions outlined in Alternatives 2, 3 and 4 do not have a direct nexus to the land exchange. If the Forest Service through additional field investigation and documentation of changed circumstances has identified appropriate boundary modifications or new CRA designations, it can move forward on those actions independent of the pending land exchange.

It seems clear that the proposal to modify the outdated boundary and add 529 acres from two contiguous parcels to the Winter Hills/Serviceberry Mountain CRA proposed in all of the action alternatives is a result of a boundary "modification." It is unclear, however, why the Forest Service characterizes the designation of roadless lands adjacent to Parcel A as a "modification" of the Winter Hills/Serviceberry Mountain CRA, when the lands around Parcel A are separated from the CRA by a mile, a state highway and in some places additional Forest Service roads. See Draft EA at 26 (Figure 6). The roadless lands around Parcel A thus appear to meet the definition of an addition to the Colorado Roadless Rule and not a boundary modification of an existing CRA.

We request that, in any subsequently prepared NEPA document, the Forest Service explain why the agency proposes to declare the new area a "modification" to an existing CRA rather than an "addition."¹⁰

Any proposed boundary modification or addition requires review and approval by the Chief following a 90-day comment period. 36 C.F.R. § 294.47(a). No notification has been provided to address any of the proposed "modifications" and/or "additions" to the Winter Hills/Serviceberry Mountain CRA as contemplated under Alternatives 2, 3 or 4. The Forest Service must inform the public in any subsequently-prepared NEPA document how and when the Forest Service intends to discharge that duty and how it relates to the timeline for approving the land exchange.

We are also puzzled by other aspects of the proposed additions or modifications to roadless areas anticipated in the action alternatives. While we would of course welcome the making a boundary modification to add 529 acres from two contiguous parcels to the Winter Hills/Serviceberry Mountain CRA, as envisioned in all action alternatives, we do not understand how that modification is connected to the proposed land exchange, as the Draft EA alleges. Draft EA at 2 ("The proposed CRA boundary modifications are considered connected actions to the land exchange."). The Forest Service does not explain how the two actions – the land exchange and the 529-acre expansion of the roadless area – are connected. CEQ regulations define "connected actions" that must be considered in the same NEPA document as actions that

¹⁰ If the answer is that designating a new area may require additional procedure, such as a rulemaking, such an explanation would be unpersuasive. If the proposed course of action would require additional process under law to make an "addition," the Forest Service should simply undertake the actions the law requires.

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a). It is unclear how any of these apply. Neither of the two actions – the land exchange and the 529-acre addition to the roadless area – appear to “automatically trigger” each other or any other action. The Forest Service does not explain why the two actions could not proceed independently. If the lands directly adjacent to the Winter Hills/Serviceberry Mountain CRA meet the standard for roadless protection, there is no reason they could not be added to the CRA through the boundary modification procedure described by the Colorado Roadless Rule even if the land exchange is rejected or cancelled. Nor is it clear why the two actions must be considered “interdependent parts” of the land exchange or any other action. The Forest Service must better explain why these two actions relate to each other.

Similarly, the Forest Service lands surrounding Parcel A and identified in Alternatives 3 and 4 could also be added to the list of Colorado roadless areas, regardless of the land exchange (although additional acres within Parcel A could be added under both alternatives). Again, the Forest Service must better explain how the land exchange and the proposed boundary “modification” are “connected actions.”

3. THE FOREST SERVICE MUST PREPARE AN ENVIRONMENTAL IMPACT STATEMENT

The proposed Valle Seco 2019 Land Exchange project is contrary to numerous elements of the 2013 San Juan Forest Plan, and entails the elimination from public ownership of roadless areas, citizen-proposed wilderness areas, identified suitable wild and scenic river corridors, riparian corridors, potential habitat for the federally listed Canada lynx, and many other highly valued public resources. Forest Plan amendments, and changes to federal statutes and regulations, would certainly be required to carry out the proposal.

A. An Agency Must Prepare an EIS If There Are Questions as to Whether Impacts May Be Significant.

NEPA requires federal agencies to prepare a full environmental impact statement (EIS) before undertaking “major Federal actions significantly affecting the quality of the human environment.”¹¹ The Ninth Circuit states:

We have held that an EIS *must* be prepared if ‘substantial questions are raised as to whether a project ... *may* cause significant degradation to some human environmental factor.’ To trigger this requirement a ‘plaintiff need not show that

¹¹ 42 U.S.C. § 4332(C).

significant effects *will in fact occur*,’ [but instead] raising ‘substantial questions whether a project may have a significant effect’ is sufficient.¹²

The Tenth Circuit concurs. “If the agency determines that its proposed action *may* ‘significantly affect’ the environment, the agency must prepare a detailed statement on the environmental impact of the proposed action in the form of an EIS.”¹³

If an agency “decides not to prepare an EIS, ‘it must put forth a convincing statement of reasons’ that explains why the project will impact the environment no more than insignificantly. This account proves crucial to evaluating whether the [agency] took the requisite ‘hard look.’”¹⁴

“Significance” under NEPA requires consideration of the action’s context and intensity.¹⁵ An agency must analyze the significance of the action in several contexts, including short- and long-term effects within the setting of the proposed action (including site-specific, local impacts).¹⁶ Intensity refers to the severity of the impact and requires consideration of ten identified factors that may generally lead to a significance determination, including:

- (1) unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas;
- (2) 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; and
- (3) whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.¹⁷

B. Because The Land Exchange Is Likely To Have Significant Impacts, The Forest Service Should Prepare An EIS.

The Valle Seco Land Exchange meets at least three standards for “significance.”

¹² *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (citations omitted) (emphasis original). See also *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864-65 (9th Cir. 2005) (“To trigger this [EIS] requirement a plaintiff need not show that significant effects will in fact occur, but raising substantial questions whether a project may have a significant effect is sufficient.” (internal quotations, citations, and alterations omitted)).

¹³ *Airport Neighbors Alliance v. U.S.*, 90 F.3d 426, 429 (10th Cir. 1996) (citation omitted) (emphasis added).

¹⁴ *Ocean Advoc.*, 402 F.3d at 864.

¹⁵ 40 C.F.R. § 1508.27.

¹⁶ *Id.* § 1508.27(a).

¹⁷ *Id.* § 1508.27(b)(3), (6), (10).

First, Parcel 1 is in proximity to wetlands, lands eligible for protection as wild and scenic rivers, and ecologically critical areas including the South San Juan Wilderness. These values would be unprotected or less protected if the action alternatives are adopted. The Forest Service notes that Colorado Roadless Areas, including the 175-acre parcel to be traded away, “are considered protected areas” that are “especially dedicated to the protection and maintenance of biological diversity.” Draft EA at 31.

Second, this proposal will set precedent concerning the interpretation of a key provision of the Colorado Roadless Rule: what is sufficient to demonstrate “changed circumstances” such that it justifies divesting the public of roadless National Forest lands where nothing has changed within or relating to that roadless area.

Third, as discussed above, this proposal threatens to violate the Colorado Roadless Rule by divesting the public of roadless National Forest lands without meeting the provisions of the Roadless Rule. The Colorado Roadless Rule requires preparation of an Environmental Impact Statement when proposed actions would significantly alter the undeveloped character of a roadless area. In this instance, the proposed land exchange would divest the public of ownership of 175 acres of the South San Juan Adjacent CRA. The agency would no longer have management jurisdiction over these lands, and contrary to the Colorado Roadless Rule the lands would subsequently be open to tree removal and road construction. The Rule requires analysis of such an outcome via an Environmental Impact Statement.

Environmental documentation will be prepared pursuant to Section 102 of the National Environmental Policy Act, 40 CFR part 1500, and 36 CFR part 220 for any proposed action within a Colorado Roadless Area. Proposed actions that would significantly alter the undeveloped character of a Colorado Roadless Area require an Environmental Impact Statement (EIS). 36 C.F.R. § 294.45(a).

Additionally, the Forest Service Handbook provides explicit direction for preparation of an Environmental Impact Statement (EIS) in this circumstance. (FSH 1909.15) Forest Service NEPA procedures require preparation of an EIS for “Proposals that would substantially alter the undeveloped character of an inventoried roadless area or potential wilderness area.” FSH 1909.15, Ch. 21.2. *See also* 36 C.F.R. § 220.5(a)(2) (Forest Service NEPA regs stating same). The elimination of a roadless area from public ownership clearly meets the threshold of substantially altering the undeveloped character of such roadless area as it would no longer have any protection under the Colorado Roadless Rule or the Forest Plan. An EIS is required, per Forest Service NEPA requirements.

C. Where, as Here, an Agency Prepares a Long EA, It Should Prepare an EIS.

The CEQ has stated: “While the regulations do not contain page limits for EA’s [sic], the Council has generally advised agencies to keep the length of EAs to not more than approximately 10-15 pages *In most cases ... a lengthy EA indicates that an EIS is needed.*”¹⁸

¹⁸ Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,037 (1981) (emphasis added).

Courts have concluded that even EAs of less than 100 pages in length provide evidence of the need to complete an EIS.¹⁹ More than three decades ago, First Circuit Court Judge Stephen Breyer, now a Justice of the U.S. Supreme Court, set aside a lengthy EA and required preparation of an EIS, explaining:

To announce that these documents – despite their length and complexity – demonstrate no need for an EIS is rather like the mathematics teacher who, after filling three blackboards with equations, announces to the class “you see, it is obvious.”²⁰

Here, the length and complexity of the Draft EA require the Forest Service to prepare an EIS. The Draft EA itself is over 120 pages long, and that’s without counting the additional dozens of pages of supporting documents. The fact that it takes the Forest Service well over 100 pages to reach the conclusion that the proposal can’t possibly have significant impacts indicates that the opposite conclusion is more likely. The Forest Service must prepare an EIS.

The Forest Service cannot argue that the EA it prepared is the functional equivalent of an EIS and therefore no violation has occurred. Among other things, agencies must allow 45 days for public comment on an EIS, 40 C.F.R. § 1506.10(d) (which the Forest Service did not provide here), and Clean Air Act Section 309 requires EPA to review each EIS for comment, a mandate that does not apply to EAs. Further, as now-Justice Breyer noted in *Sierra Club v. Marsh*:

[U]nder NEPA and its implementing regulations, we cannot accept the EA[s] as a substitute for an EIS -- despite the time, effort, and analysis that went into their production -- because an EA and an EIS serve very different purposes. An EA aims simply to identify (and assess the ‘significance’ of) potential impacts on the environment; it does not balance different kinds of positive and negative environmental effects, one against the other; nor does it weigh negative environmental impacts against a project’s other objectives, such as, for example, economic development.... The purpose of an EA is simply to help the agencies decide if an EIS is needed.

To treat an EA as if it were an EIS would confuse these different roles, to the point where neither the agency nor those outside it could be certain that the

¹⁹ See *National Audubon Society v. Hoffman*, 917 F. Supp. 280, 287 (D. Vt. 1995), *aff’d* 132 F.3d 7 (2nd Cir 1997) (65-page EA); *Curry v. U.S. Forest Service*, 988 F. Supp. 541, 552 (W.D. Pa. 1997) (49-page EA).

²⁰ *Sierra Club v. Marsh*, 769 F.2d 868, 874 (1st Cir. 1985). See also *Evans v. Anderson*, 314 F.3d 1006, 1023 (9th Cir. 2002) (“No matter how thorough, an EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment.”) (requiring agency prepare EIS rather than EA); *Puerto Rico Conservation Foundation v Larson*, 797 F. Supp. 1066, 1069 n.3 (D. Puerto Rico 1992) (enjoining road construction in national forest because agency relied on EA rather than preparing EIS).

government fully recognized and took proper account of environmental effects in making a decision with a likely significant impact on the environment.²¹

4. REASONABLE AND LEGAL ALTERNATIVES

The Draft EA incorporates several alternatives that appear intended to camouflage the disposal of the South San Juan Adjacent CRA.

Alternatives 3 and 4 create the impression that Winter Hills/Serviceberry Mountain CRA could be significantly enlarged. The Draft EA's characterization of Alternatives 3 and 4 as making "additions" to the Winter Hills/Serviceberry Mountain CRA is nonsensical. An addition would be a unit of contiguous or adjacent lands. Alternatives 3 and 4 discuss lands separated from Winter Hills/Serviceberry Mountain CRA by paved Highway 84 and National Forest System Roads 653 and 656, and situated at their closest point by one to two miles of intervening roaded federal and private land.

NEPA requires analysis of feasible and reasonable alternatives. It is not reasonable to describe lands up to two miles distant, across three intervening roads, as an "addition" to an existing roadless area.

By the Forest Service rationale, all roadless areas on the San Juan National Forest could be considered one extended roadless area with intervening paved highways and forest development roads. Consider the similar circumstance on the Dolores District to the described Alternatives 3 and 4. In Dolores, Highway 145 separates the Ryman CRA east of the highway from the Storm Peak CRA west of the highway. By the logic of the Valle Seco Land Exchange project EA, those two areas should be considered one roadless area separated by a highway.

In effect, Alternatives 3 and 4 describe a new expanded Winter Hills/Serviceberry Mountain CRA that has a paved highway through the middle of it, which is plainly absurd. There is no existing Colorado Roadless Area anywhere in the state with such a geographic circumstance. In every situation in Colorado where a road separates undeveloped portions of roadless national forest lands, these are designated as individual, stand-alone roadless areas in the Colorado Roadless Rule.

The Forest Service must explain the criteria by which it identified lands in Alternatives 3 and 4 as additions to the existing Winter Hills/Serviceberry Mountain CRA. The San Juan Forest LRMP described "a new and more accurate inventory" that described lands meeting roadless area criteria as obviously not containing classified roads, utility corridors, and the like.²² Current forest planning rules have similar direction for assessment of roadless areas (FSH 1909.12). None of these criteria appear to contemplate a single contiguous roadless area split by a highway, as described by Alternatives 3 and 4. Please provide the reference for the roadless inventory criteria utilized in the Draft EA.

²¹ *Sierra Club v. Marsh*, 769 F.2d at 875.

²² See Appendix C – Roadless Area Inventory and Wilderness Evaluation, San Juan LRMP at C-2.

In fact, Alternatives 3 and 4 actually describe the inventory and establishment of a new, stand-alone roadless area. This requires modification of the List of Designated Colorado Roadless Areas. 36 C.F.R. § 294.45. The NEPA analysis needs to accurately describe the regulatory mechanisms by which the new CRA configured in Alternatives 3 and 4 would be established. It is misleading and inaccurate to portray these lands as somehow an addition to an existing area from which they are separated by a highway.

5. THE PROPOSED LAND EXCHANGE IS NOT IN THE PUBLIC INTEREST AND VIOLATES FOREST SERVICE LAND EXCHANGE REGULATIONS

Land exchanges are discretionary and thus there is no requirement for the Forest Service to undertake this project. “The Secretary is not required to exchange any Federal lands. Land exchanges are discretionary, voluntary real estate transactions between the Federal and non-Federal parties.” (36 CFR 254.3(a))

The Forest Service is required to make a decision that serves the public interest (36 C.F.R. 254(b)). In this case, the proposed land exchange is not in the public interest. The loss of roadless areas lands with protected designations, suitable wild and scenic river corridors, and fragmentation of existing intact habitats are just a few of the reasons why this exchange is not in the public interest and should be rejected out of hand.

Furthermore, the Forest Service can only consider land exchanges consistent with its land and resource management plans. This exchange is contrary to multiple aspects of the San Juan Land and Resource Management Plan (Forest Plan) because it proposes to dispose of roadless areas, wild and scenic river corridors, and riparian corridors specifically called out for retention and protection in the Forest Plan.

“The authorized officer shall consider only those exchange proposals that are consistent with land and resource management plans” (36 CFR part 219)”(36 C.F.R. 254(f)).

The regulations do not give the Forest Service discretion to ignore its Forest Plan and pursue projects contrary to the plain direction of the Plan.

“A land exchange may be completed only after it has been determined that the overall public interest would be well served.” 36 CFR 254.3(b). Simply put, it’s not in the public interest to essentially give in to a hostage taker here, rewarding Mr. Warren for his anti-wildlife, anti-public behavior by closing the road and threatening to build structures on Parcel A when he clearly purchased the area as trade bait so he can expand his ranch. See Draft EA at 4 (noting that Mr. Warren, upon purchasing the Parcel A, “locked the gate across the road at the northern property boundary and has denied public access through the property to the NFS land south of the property”); *id.* at 22 (describing intent of Mr. Warren to “construct[] a hunting lodge and rais[e] elk on the property”); *id.* at 46 (“On non-Federal Parcel A, the likely future uses include construction of a lodge, raising domestic elk on the property, construction of fences and powerlines, well drilling, maintenance of stock ponds, and road use. If these activities take place, there could be impacts to vegetation and noxious weeds, but the level of these impacts will depend on the extent of development, grazing, and associated activities that occur.”); *id.* at 86 (“in 2015 the current landowner locked the gate across the road at the northern property

boundary. It has been closed and locked and the public has been denied access through the property to the NFS land south of the property since that time.”).

It is also grossly unseemly given that Mr. Warren recently gave \$10 million to the President’s re-election campaign while this proposal is pending.²³ The Forest Service cannot avoid the impression that the agency has been bought and sold to Mr. Warren.

6. THE LAND EXCHANGE IS CONTRARY TO FOREST PLAN DIRECTION AND GUIDANCE.

A. The South San Juan Adjacent Roadless Area is managed under the Colorado Roadless Rule to protect its roadless characteristics.

The Colorado Roadless Rule preamble describes the purposes of roadless areas.

Roadless areas are, among other things, sources of drinking water, important fish and wildlife habitat, semi-primitive or primitive recreation areas, including motorized and nonmotorized recreation opportunities, and natural-appearing landscapes. There is a need to provide for the conservation and management of roadless area characteristics.” 77 Fed. Reg. 39576, 39577 (July 3, 2012).

The Colorado Roadless Rule was adopted to provide a “high level of conservation of roadless area characteristics.” *Id.* It was adopted after receiving 312,000 public comments. 77 Fed. Reg. at 39581. It was spurred by a request in 2007 from Gov. Bill Ritter to Undersecretary of Agriculture Mark Rey, with the observation that “Roadless areas belong to all Americans and are a resource to protect and pass on to future generations.” 77 Fed. Reg. at 39577. However, now apparently the San Juan NF does not concur that roadless areas in fact “belong to all Americans” but instead wants to give ownership of a considerable chunk of roadless forest to just one single person. That is an extraordinary contradiction, and a significant disappointment in the agency’s commitment to roadless area stewardship.

The Forest Plan declined to recommend the South San Juan Adjacent Colorado Roadless Area (CRA) for wilderness designation, and instead alleged that “Management under the Colorado Roadless Rule would protect roadless characteristics.” Forest Plan at C-51. Now though, the San Juan NF is proposing to dispose of roadless lands and hence neither the Forest Plan nor the Colorado Roadless Rule would offer any protection.

The South San Juan Adjacent CRA is managed under Management Area 1, Natural Processes Dominate. The Forest Plan clearly documents that this CRA is one of the premier locations of pristine lands on the San Juan National Forest, and it is lumped together with designated wilderness areas as a place to emphasize protection of its undeveloped character. The Draft EA does not demonstrate how the public is guaranteed that the undeveloped character of the South San Juan Adjacent CRA will be protected if the public no longer has jurisdiction over the land.

²³ See M. Soraghan, Dakota Access CEO gives \$10M to boost Trump, E&E News (Sep. 23, 2020), attached as Ex. 7.

From the Forest Plan:

“These relatively pristine lands are places where natural ecological processes operate free from human influences. Succession, fire, insects, disease, floods, and other natural processes and disturbance events shape the composition, structure, and landscape patterns of the vegetation. These areas contribute significantly to ecosystem and species diversity and sustainability, serve as habitat for fauna and flora, and offer wildlife corridors, reference areas, primitive recreation opportunities, and places for people seeking natural scenery and solitude. Roads and human structures are absent and management activities are limited on MA 1 lands. Motorized travel, and in most cases, motorized equipment are prohibited. MA 1 areas include designated wilderness areas, the Piedra Area, WSAs, and other lands where a primary desired condition is to maintain the undeveloped natural character of the landscape.” (Forest Plan at 185)

Disposal of the South San Juan Adjacent CRA is not in the public interest, and does not conform to the Forest Plan. Disposal would not maintain the CRA’s undeveloped natural character, as spelled out by the Forest Plan. Any attempt to exchange these lands out of the National Forest System would therefore violate the Forest Plan, in violation of the National Forest Management Act. While the Forest Service could attempt to amend the Forest Plan to permit the exchange, that amendment would demonstrate that an EIS is necessary.

B. The Forest Plan recommended the East Fork of the San Juan as suitable for designation under the Wild and Scenic Rivers Act.

The plan’s management direction specifies that:

“In order to manage the rivers for their potential inclusion into the National Wild and Scenic River System, existing authorities will be used to protect the identified river’s free-flowing character, water quality, ORVs, and recommended classification (details of the interim protective management are listed in FSM 1990.12_80 and BLM Manual 6400).” (Forest Plan at 197)

The Forest Service cannot dispose of a recommended suitable WSR segment corridor and comply with plan direction. The Forest Service must use “existing authorities” to protect the river’s ORVs and recommended classification, and disposing of river corridor lands from public ownership is a violation of those authorities. The Forest Service Manual specifies management for agency identified suitable river segments:

“Forest Service-identified eligible and suitable rivers must be protected sufficiently to maintain free flow and outstandingly remarkable values unless a determination of ineligibility or non-suitability is made.” (FSM 1990.12_84.3)

The San Juan NF cannot dispose of a suitable wild and scenic river corridor segment and suggest that this action offers “sufficient protection” to maintain the outstandingly remarkable values for which the corridor was identified. The Draft EA purports that an unspecified conservation easement will be applied subsequently to lands in the WSR corridor, but the content of the easement is not provided for public review or comment. Draft EA at 24. It is not possible to ascertain how the proposed exchange of lands in the suitable WSR corridor complies with

direction to protect outstandingly remarkable values as this information about the content of the potential easement is not disclosed for review or analysis.

C. The proposed exchange does not conform to the Forest Plan direction for Land Ownership.

The Forest Plan emphasizes that river corridors, riparian areas, and contiguous natural ecosystems (such as roadless areas adjacent to designated wilderness) will be retained in public ownership. Lands will only be disposed of where they do not meet these needs or are interspersed with expanding communities. The federal parcels within the contemplated Valle Seco land exchange have significant river corridor, riparian, and contiguous natural ecosystem values and the Forest cannot dispose of these without ignoring its Forest Plan direction.

“Public lands are generally retained in federal ownership in order to provide long-term values. The vision for the planning area is to retain in public ownership all lands that meet the long-term needs of maintaining the integrity of contiguous natural ecosystems, river frontage, riparian areas and wetland ecosystems, recreation and open space, scenery, and clean air and water. Under the direction of the LRMP, on a case-by-case basis and through the methods available to each agency, the SJNF and TRFO would acquire lands and/or mineral estates that enhance this vision. The agencies would dispose of lands that do not meet these needs or are interspersed with expanding communities where the agency mission can no longer be met. In all such cases, the primary guiding principle would be the greater public benefit.” (Forest Plan at 137)

The EA fails to address these standards, and does not show that the portion of the South San Juan Adjacent CRA “does not meet” the needs of “maintaining the integrity of contiguous natural ecosystems,” nor can it allege that that parcel is “interspersed with expanding communities where the agency mission can no longer be met.” The parcel simply has the misfortune to be coveted by a billionaire. A desired condition of the Forest Plan is to retain or acquire river frontage and riparian areas. The proposed land exchange disposes of stream frontage and riparian areas, such as those that exist within Parcel 1. The Valle Seco land exchange is contrary to Forest Plan direction for land tenure.

“Desired Condition 2.18.3. The SJNF and TRFO retains and/or acquires river frontage, riparian areas and wetland ecosystems, and other lands that would enhance or protect recreation, open space, scenery, clean air and water, and key habitat for species.” (Forest Plan at 141)

Because the proposal violates the Forest Plan, it would also violate the National Forest Management Act unless the Forest Service amended the plan to accommodate this exchange. *See* 16 U.S.C. § 1604(i) (“Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.”). Again, amending the plan would only underscore the significance of this proposal, and require the preparation of an EIS.

7. END USE OF ACQUIRED FEDERAL PARCELS

The NEPA analysis must evaluate the end use of federal parcels that are transferred into private ownership, as this is a directly related connected impact of the land exchange decision. Given the project proponent's expressed desire to operate a domestic elk farm with 10-foot or higher fences on the Valle Seco parcel, that is a reasonably foreseeable intended use for the transferred federal parcels as well. For example, the NEPA document should analyze the consequences of fenced, domestic elk farms on Parcels 1, 2 and 3 given the stated land use preference of the proponent. Additionally, large trophy homes abound on various properties of the project participants. Trophy home construction and associated impacts should be evaluated as a foreseeable outcome of the exchange. The Draft EA does not describe future development potential of the parcels once they become privately owned. Draft EA at 24.

The Draft EA admits that "land management strategies on private parcels, such as development, can be incompatible with the Forest Service's land management objectives for adjacent public lands and can result in impacts to resource values on both the public lands and the private inholding." Draft EA at 12. But the EA says almost nothing about the impacts of Mr. Warren's plans concerning the 175 acres traded away to him.

The NEPA analysis should also evaluate deed restrictions that the Forest Service can impose on any parcels that might be conveyed out of federal ownership that protect national forest resources. The Forest Service must analyze the reservation or retention of rights and interests as a means to mitigate the impacts of conveying any parcels out of public ownership. Without knowing the details of any proposed conservation easements, it is not possible to ascertain how the public interest is or is not being protected.

The Forest Service cannot dispose of lands where future private uses will conflict with national forest management objectives. In this case, tree removal and road construction on Parcel 1, converting prior roadless lands, are in stark conflict with the management objectives spelled out by the Colorado Roadless Rule. Agency land exchange regulations require that future uses not be in conflict with established forest management objectives:

The intended use of the conveyed Federal land will not substantially conflict with established management objectives on adjacent Federal lands, including Indian Trust lands. 36 CFR § 254.3(b)

8. CULTURAL RESOURCES

The National Historic Preservation Act mandates that federal agencies initiate and conduct tribal consultation, and other duties, as early as possible in consideration of an "undertaking." 36 CFR § 800. The land exchange proposal is an undertaking.

The Draft EA describes the presence of an historic habitation site eligible for listing on the National Register of Historic Places on Parcel 1. It further describes mitigation via a conservation easement:

To mitigate the conveyance of one historic habitation site in Parcel 1, the Forest and the SHPO will develop property protection language within a conservation easement. The conservation easement would direct the landowners and conservators in how to avoid and monitor the site. Long-term property protection and site avoidance per the conservation easement would sufficiently safeguard the site, resulting in no adverse effects to the resources. Draft EA at 81

The Draft EA is unclear whether this conservation easement is the same as the easement described for protecting Wild and Scenic River corridor values, or if this is a different additional conservation easement applying to lands other than those in the WSR corridor. The Draft EA does not provide details of the conservation easement or its terms, thus the public is unable to comment or ascertain whether proposed language is adequate or not. Additional details should be provided to substantiate the generic claims outlined in the Draft EA.

9. MINERAL DEVELOPMENT

The Draft EA fails to adequately address the impacts of potential mineral development on Parcel A, given that Mr. Warren has failed to secure all the mineral rights to the area. *See* Draft EA at 1. (“The non-Federal Party is *pursuing* acquisition of the mineral estate under non-Federal Parcel A.” (emphasis added)); *id.* at 85 (“Parcel A consists of three tracts totaling 880 acres of which approximately 69.18% of the mineral estate is currently owned by the non-Federal Party and would be acquired.”).

The Forest Service must assume potential for mineral development unless and until Mr. Warren acquires all of the mineral rights. The Draft EA judges that non-federal Parcel A has “moderate potential for foreseeable development of oil and gas resources due to the presence of moderately favorable host rocks.” Draft EA at 84. The BLM and the Forest Service have offered and sold parcels for oil and gas lease relatively nearby in the Chromo area as recently as 2017. Given that the Forest Service would not control future oil and gas exploration on Parcel A if acquired without ownership of full mineral interest, the analysis must disclose how the exploitation of these mineral resources will impact elk and other values across all alternatives. In particular, it should assess how potential mineral development of non-acquired private minerals could affect the value of obtaining the property for wildlife habitat, because as described in the Draft EA, “private oil and gas development has the potential to create management conflicts with the protected resources on the adjacent federal land, especially wildlife habitat, due to different regulatory requirements for federal and non-federal mineral management.” Draft EA at 85.

Part of the stated “purpose and need” for the project is to “Secure important elk and mule deer winter range, winter concentration areas, severe winter range, and migratory corridors” and to “Acquire non-Federal inholdings within the SJNF to prevent their potential development and impact on NFS lands in the future.” Draft EA at 12. Can the Forest Service meet these goals without acquiring the mineral rights to Parcel A?

10. HABITAT CONNECTIVITY

Parcel 3 comprises the only contiguous public ownership across the San Juan River, bridging the South San Juan wilderness and roadless complex with the Weminuche wilderness and roadless complex. This uniquely situated parcel is a critical component of the larger landscape of

connected, protected landscapes in the Southern Rocky Mountains. A proposal to dispose of this parcel, and sever the only connected corridor in contiguous public ownership is monumental, and should receive an extreme level of scrutiny.

The Draft EA dismisses concerns about habitat connectivity by asserting that existing private ownership on Bootjack Ranch does not deter movement of elk and other species at this time. Draft EA at 55. This presumes no change in use or condition of the private lands controlled by Bootjack. However, by comparison the public can be reasonably assured that Parcel 1 and 3 will remain in an undeveloped condition if retained in public ownership. The NEPA analysis needs to assess what is a foreseeable impact to habitat connectivity in the event of private land development, and in the event that federal parcels 1 and 3 are logged, roaded, and otherwise developed in the future. A change in character of the federal parcels, and the associated adjacent private lands, could obviously impact the function of large undeveloped landscapes as connections are severed to adjacent areas. The statement that elk currently enjoy the presently undeveloped character of these lands says nothing about future uses, particularly once the public has no control over future activities on the federal parcels. The landowner's stated desire to construct high fences and farm domestic elk on the Valle Seco parcel provides evidence of the landowner's priorities, and thus the NEPA analysis needs to assess similar uses for the federal parcels 1 and 3 if conveyed to private ownership.

The Weminuche and South San Juan are the largest, and arguably most significant, undeveloped and protected landscapes in the southern Rocky Mountains. The only location where these two large blocks of intact and unfragmented habitat intersect on public lands is in Parcel 3. It would be an extraordinary step backwards in conserving connected, undeveloped landscapes if the Forest Service disposed of this crucial connecting parcel.

This is particularly concerning in conjunction with whittling away at the South San Juans landscape by disposing from public ownership 175 acre of the adjacent roadless area. This project takes the Forest Service, and the public owners of the national forest, in the direction precisely opposite to protecting connected landscapes. This is a particularly crucial factor in a rapidly changing landscape.

11. IMPACTS TO ELK MIGRATION

Disposal of public parcels may interrupt existing elk and ungulate movement patterns, as private landowners fence and otherwise make modifications that alter current movement opportunities.

For example, disposal of Parcel 1 will further squeeze elk migration and movement in and out of the East Fork valley. There are many fences, public and private roads, the ranch houses, the East Fork of the river and such just north of Parcel 1. There is steeper, higher elevation terrain to the south of Parcel 1, containing north and northwest facing slopes that hold snow longer in the spring. This limits animal movement, and unknown development of Parcel 1 could further restrict movement. Given the adjacent Bootjack private land is already fenced (owing to history of cattle grazing), private owners are likely to extend the fence if Parcel 1 is acquired (further limiting movement).

12. ENVIRONMENTAL JUSTICE AND PUBLIC PARTICIPATION ARE IMPORTANT COMPONENTS OF THIS EIS.

The Forest Service must provide a safe and comprehensive public participation opportunity for all publics in this NEPA process. The proponent of the land exchange, Mr. Kelcy Warren, owns Energy Transfer Partners and the extraordinarily controversial Dakota Access Pipeline. In the course of the months-long public protests against that project led by the Standing Rock Sioux Tribe and other indigenous tribes and organizations, Mr. Warren repeatedly displayed his disdain for Native Americans and for conservation organizations and values. He hired a private security firm comprised of ex-military mercenaries, TigerSwan, to harass and intimidate the public in North Dakota, specifically targeting indigenous people. Mr. Warren's behavior and opinions are well documented in numerous media accounts.²⁴

The Forest Service must guarantee this process will be safe for all members of the public to participate, if and when Mr. Warren employs his mercenaries again to harass and intimidate the public. At the end of the day, it is not in the public's interest to engage in management projects with proponents with a history of disdain for public participation.

13. INAPPROPRIATE PRE-DECISIONAL LOBBYING BY FOREST SUPERVISOR

At the conclusion of the public scoping period early in 2020, the San Juan Forest Supervisor authored an opinion editorial in a bald attempt to diminish public concern about disposal of inventoried Colorado roadless areas in the pending land exchange proposal.²⁵ This op ed constitutes inappropriate pre-decisional lobbying in support of a pre-ordained outcome before the Forest Service had barely even received public scoping input, and well before required NEPA analysis had been completed.

The op ed erroneously described the South San Juan Wilderness Adjacent roadless area as in fact "not immediately adjacent to any designated wilderness area," and furthermore asserted that the existence of illegal unauthorized roads "detract from their roadless character, making them appropriate for conveyance out of federal ownership." This opinion was published by the Forest Supervisor, defended the agency's inability or unwillingness to prevent illegal trespass and destruction of a designated Colorado roadless area, and was offered as justification for disposing of that roadless area well before any NEPA review or public scoping analysis occurred.

As the Forest Supervisor is the designated reviewing officer during a potential objection process upon completion of the NEPA analysis process, this blatant attempt to skew public opinion casts into serious doubt the ability of agency staff to conduct an unbiased review of the Valle Seco 2019 Land Exchange proposal. The NEPA process has been irrevocably contaminated and the Forest Service should start anew with appropriately unbiased agency officials in charge of the process.

²⁴ See Warren articles, attached as Ex. 8.

²⁵ Kara Chadwick, Land exchange would acquire critical elk and deer habitat, Durango Herald (Feb. 8, 2020), attached as Ex. 9.

CONCLUSION

The contemplated Valle Seco land exchange is not in the public interest and the project should be abandoned. It violates numerous federal regulatory and statutory standards. It flies in the face of the San Juan Forest Plan. It requires rewriting the Colorado Roadless Rule. It violates the Wild and Scenic Rivers Act. It will necessitate an enormous commitment of time and resources by the San Juan National Forest to prepare an Environmental Impact Statement to comply with the National Environmental Policy Act. And it has engendered a robust amount of public controversy.

Common sense suggests that the Forest Service simply abandon this ill-conceived land grab, and instead just buy the Valle Seco parcel if so desired.

Sincerely yours,



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