

Wilderness Workshop ♦ Rocky Mountain Wild

November 7, 2016

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White River National Forest
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Via email: matthewklein@fs.fed.us
Electronically: <https://cara.ecosystem-management.org/Public/CommentInput?Project=50041>

Re: Berlaimont Estate Access Route EIS

Dear Mr. Fitzwilliams:

Please accept these comments on the Berlaimont Estate Access Route Environmental Impact Statement (EIS) from Wilderness Workshop and Rocky Mountain Wild.

The Forest Service is putting the cart before the horse by analyzing access to the proposed Berlaimont Estate development before determining “reasonable use” of the parcel and whether “adequate” access already exists.

As discussed below, applicability of the Alaska National Interest Lands Conservation Act (ANILCA) in this case is dubious. 16 U.S.C. §§ 3103-3233. Even if ANILCA applies, the statute directs the Forest Service to determine whether the massive proposed development is a reasonable use of the parcel. We do not think it is. Next, the agency should determine whether adequate access exists to facilitate reasonable use of the parcel. We believe adequate access already exists. These determinations are primary considerations and should be undertaken before the Forest Service commits resources to a time consuming and expensive analysis of the proponent’s plan.

If the agency does proceed with analysis, an EIS is necessary due to the substantial impacts likely to result from the proposal. These comments discuss specific resources that would be impacted by the proposal, and alternatives that should be considered by the Forest Service in an EIS.

The Forest Service can and should deny any proposal that involves construction of a new, highly visible and impactful roadway through important wildlife habitat that facilitates development of 19 new mansions in the middle of the Forest. Such use is unreasonable and not in the public interest.

I. ANILCA DOES NOT REQUIRE THE U.S. FOREST SERVICE TO GRANT ACCESS TO THIS PRIVATE INHOLDING.

ANILCA does not require the U.S. Forest Service to grant an easement across public lands to this private inholding.

The basis for applying ANILCA rights outside of Alaska is not found in the text of the statute. Applying the canon of construction announced by the Supreme Court, the “two stated goals” of ANILCA concern only Alaska inholdings, and therefore it is improper to extend ANILCA’s terms to lands beyond Alaska. Sturgeon v. Frost, 136 S. Ct. 1061, 1066 (2016)(rejecting ANILCA interpretation as “inconsistent with both the text and context of the statute as a whole.” Id. at 1070).

In Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987), the Supreme Court rejected the Ninth Circuit’s application of another provision of ANILCA, 16 U.S.C. § 3120, outside Alaska. In so doing, the Court explicitly cited ANILCA Title XIII, which contains the access provision in Section 3210(a), as among the “provisions of ANILCA [that] need not be extended beyond the State of Alaska in order to effectuate their apparent purposes.” Id. at 550; *see also id.* at 550 n.19 (referencing ANILCA Title XIII). As the Amoco Production Court pointed out, “ANILCA’s primary purpose was to complete the allocation of federal lands in the State of Alaska.” Id. at 549 (emphasis added).

ANILCA’s statutory language fully supports the Supreme Court’s conclusion in Amoco Production. Nothing in the language of § 3210(a) states that it varies from every other provision of ANILCA by applying nationwide. Further, § 3210(a) is in the same section with – and must be read in pari materia with – 16 U.S.C. § 3210(b), a virtually identical provision addressing access to private inholding properties within the general “public lands.” *See* 2B Norman J. Singer, *Sutherland Statutory Construction*, § 51.03 (6th ed. 2000) (“[E]ach section of a law which deals with the same subject matter must be read in pari materia with other sections on the same subject.”). The term “public lands” is elsewhere defined in ANILCA to mean “land situated in Alaska.” 16 U.S.C. § 3102(3) (emphasis added). As the Fourth Circuit concluded, this statutory language “gives rise to a strong presumption” that 16 U.S.C. § 3210(a), like its companion § 3210(b), “applies only to land in Alaska.” United States v. Srnsky, 271 F.3d 595, 602 (4th Cir. 2001).

The Forest Service should reevaluate the purpose and need for this project given that ANILCA does not require the agency to grant improved access.

II. THE FOREST SERVICE MUST DETERMINE “REASONABLE USE” AND “ADEQUATE” ACCESS PRIOR TO UNDERTAKING AN EIS.

To the extent that ANILCA grants this inholder any right of access across National Forest lands, that right is not unfettered. It is limited to only such access as the

Secretary of Agriculture deems adequate to secure the owner the reasonable use and enjoyment of the property. 16 U.S.C. § 3210(a), (b)(emphasis added).

Determining what constitutes “adequate” access and “reasonable use and enjoyment,” therefore, are primary inquiries. The two are linked. “Adequate” access is defined by applicable regulations to mean “a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources.” 36 C.F.R. § 251.111(a), (b).¹ The agency must determine “reasonable use and enjoyment” based on “contemporaneous uses made of similarly situated lands in the area and any other relevant criteria” and, again, ensure that such use “minimize[s] the impacts to federal resources.” 36 C.F.R. § 251.114(a).²

In this case, the Forest Service has not determined the level use of the property that would constitute “reasonable use and enjoyment.” Nor has the agency determined the type of access that would be “adequate” for such reasonable use. Our research suggests that the proposed development of Berlaimont Estates is not reasonable and that adequate access already exists.

The inholding at issue is accessible via existing Forest Service Roads (FSRs): 774, 783, 780, and 778. The existing roads provide access from the south and west, and less directly from the north and east. The project proponent purchased the parcel with access via existing routes and without any guarantee of additional or improved access. It is unreasonable for the owner to claim a right to a new paved, two-lane road that is accessible year round to facilitate development far in excess of the type on other similarly situated inholdings in the area.

We scanned the White River National Forest for inholdings and found no examples of other large inholdings that have been subdivided into high-end housing developments with 19 new large homes on 35-acre parcels, and that require paved, year-round access. Most, if not all, of the other inholdings on the forest are accessed via dirt roads. Most are accessible by full-sized vehicle only during the summer months. Very few have been subdivided, and none of the subdivisions are comparable in size, scale, or impact to the proposed Berlaimont Estates. Similarly situated inholdings are generally used as small ranches or for primitive cabins and individual homes.

¹ Note: adequate access does not include rights-of-way for power lines or other utilities, but those are connected actions that must be considered in any Forest Service analysis.

² 36 C.F.R. § 251.114(f) also requires that authorizing officers ensure that: the landowner has shown no existing routes of access available by deed or under state or common law; the route “minimize[s] adverse impacts on soils, fish and wildlife, scenic, cultural, threatened and endangered species, and other values of the Federal land”; and the “location and method of access” are consistent with the management of the area and Forest Land and Resource management Plans.

Additionally, we found no other example of an inholding where access required amendment of the Forest Plan, as would be necessary to facilitate the developer's plan in this case. The necessity of a Forest Plan amendment for this proposed new access is just one more reason that the proposed use is unreasonable.³

This strongly suggests that the proponent's proposal and the proposed action described by the Forest Service in the scoping notice exceed "adequate" access for "reasonable use and enjoyment." In fact, it suggests that access the Forest Service is preparing to analyze may be unreasonably grandiose and may fail to minimize damage and disturbance as required by agency regulations.

Nonetheless, the agency is preparing to undertake a full EIS analyzing a new paved road to facilitate development of the parcel. We agree that a paved access road into the proposed development could have significant impacts on the environment and necessitates preparation of an EIS under NEPA. See e.g., Alpine Lakes Prot. Soc'y v. U.S. Forest Serv., 838 F. Supp. 478, 484-85 (W.D. Wash. 1993); see also Hale v. Norton, 476 F.3d 694, 700-701 (9th Cir. 2007). However, we do not agree with the unsupported conclusion that building 19 new up-scale homes on the inholding is reasonable use or that authorizing a new paved road is necessary for adequate access.

Analyzing alternatives that grant access far in excess of what is adequate for reasonable use would be a waste of money, time, and energy. Before undertaking an EIS, the U.S. Forest Service should make determinations about reasonable use and adequate access. We further recommend that the agency allow for full public participation in those determinations by providing notice and meaningful opportunities for public comment.

III. THE FOREST SERVICE IS NOT REQUIRED TO AUTHORIZE AN EXTRAVAGANT AND DAMAGING NEW ROAD TO THIS PRIVATE PARCEL.

Even if one argues that ANILCA requires agencies to provide access to private lands within national forests outside Alaska, it clearly does not require the extravagant improvements requested here. As described above, in areas where it applies, ANILCA requires only adequate access. Adequate access is: "a route and method of access" providing for "reasonable use and enjoyment of the non-Federal land" that is "consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources." 36 C.F.R. § 251.111; see

³ We note that, when the current owner purchased this parcel, the existing Forest Plan had been in effect for years. The owner knew or should have known about seasonal closures and route restrictions in the Forest Plan that were intended to protect important resources in the area.

also id. at §§ 251.114(a), 251.110(c). In many cases that adequate access is far less than project proponents would like.⁴

In reviewing permit applications for access across National Forest lands, federal case law makes clear that the Forest Service is not required to grant any particular type of access and the agency has broad authority to condition any access that it may approve. For instance, a Montana federal court denied road access when it upheld a Forest Service decision to require access via foot, horse, or helicopter. Johnson v. U.S., No. CV 00-217-BLG-RWA (D. MT, April 2, 2002) at 20, *aff'd*, 93 Fed. Appx. 133 (9th Cir. Mar. 12, 2004) (“ANILCA...does not guarantee the cheapest access, only adequate access.”). Another federal court in Idaho upheld periodic road closures, restrictions on snowplowing, and other conditions placed on access by the Forest Service to protect resources. Mountain States Legal Foundation v. Espy, 833 F. Supp. 808, 817 (D. Idaho 1993). Courts have also held that use of forest roads beyond what is allowed for the general public is subject to reasonable regulation for the protection of public lands and forest resources. Adams v. United States, 255 F.3d 787, 795 (9th Cir. Nev. 2001).

Clearly, the Forest Service has ample discretion to find that a road, let alone a paved, year-round road through sensitive wildlife habitat, is not required for the reasonable use and enjoyment of a private inholding. As noted above, roads already access the property in question. Existing roads are open to motor vehicles in snow-free seasons and by snow machines in the winter. Seasonal closures are in-effect to protect important resources in the area, and were known to the developer when the property was purchased. Adequate access for reasonable use exists now.

The Forest Service is not required to grant additional or upgraded access:

Where there is existing access or a right of access to a property over non-National Forest land or over public roads that is adequate or that can be made adequate, there is no obligation to grant additional access through National Forest System lands.

36 C.F.R. § 251.110(g); *see also* § 251.114(f)(1). In fact, the authorized officer shall approve only those access facilities or modes of access necessary for reasonable use and enjoyment of the land and that minimize the impacts on the Federal resources. *Id.*, at § 251.114(a)(emphasis added). Clearly then, the Forest Service is under no obligation to grant the most convenient access for maximum use or maximum

⁴ Importantly, as discussed in the last section of this letter, Forest Service regulations make it clear that the agency can deny special use permits based on environmental or other considerations. 36 C.F.R. § 251.54(g)(4) (“Based on evaluation of the information provided by the applicant and other relevant information such as environmental findings, the authorized officer shall decide whether to approve the proposed use, approve the proposed use with modifications, or deny the proposed use.” (emphasis added)).

revenue-producing use, but the agency does have an affirmative obligation to minimize impacts.

Agency regulations indicate that, in some circumstances it would be inappropriate for the Forest Service to authorize special access at all. For example, prior to authorizing special use, the Forest Service must determine that there are no other existing rights or access routes available by deed or under State or common law. 36 C.F.R. § 251.114(f)(1). Routes shall not be authorized if they fail to minimize adverse impacts on soils, fish and wildlife, scenic, cultural, threatened and endangered species, and other values of the Federal land. Id., at § 251.114(f)(2). And regulations indicate that consistency with the Forest Plan is an important and primary consideration. Id., at § 251.114(f)(3).

In this case, it isn't clear whether other existing rights or routes are available, but it is clear that the proposed route would have adverse impacts on important federal land values, and that it is not consistent with the existing Forest Plan. Further, as discussed above, the proposed access appears to exceed adequate access for reasonably use and enjoyment.

We know of no other areas where the Forest Service has allowed paved road access across its land to private inholdings to facilitate this type of subdivision development. Allowing such access, which is much more than required by law and regulation, would encourage real estate speculators to buy inholdings and attempt to put major developments on them. Thus approving the request here could set a far-reaching and dangerous precedent.

The Forest Service has authority and good reason to reject this extravagant proposal, and that's what the agency should do. To the extent any access is required by law, it should be significantly less than what the developer has proposed in this case.

IV. AMENDING THE FOREST PLAN TO ACCOMMODATE SPECULATIVE REAL ESTATE DEVELOPMENT IS UNREASONABLE AND THE NEED TO AMEND THE FOREST PLAN STRONGLY SUGGESTS THAT THE PROPOSED USE IS UNREASONABLE.

With the exception of a utility corridor running northwest to southeast across the very southern edge of the private property the project area falls within Management Area 5.41. Under this prescription:

Deer and elk winter ranges are managed to provide adequate amounts of quality forage, cover and solitude for deer, elk and other species.

Forest Plan at 3-57.

A standard for this management area prescription requires that

Over-the-snow vehicle use is restricted to designated routes and play areas unless authorized by special use permit or for emergency use.

Forest Plan at 3-58.

Guidelines require restricting any recreational activities that would disturb deer and elk in winter and spring, and “minimize[ing] human activity during periods when elk and deer are concentrated in the area.” Id. at 3-58, 3-59.

Winter range is critically important to deer and elk, and it is becoming scarce in the Eagle Valley as development increases. The area surrounding the private parcel, being mostly south and southwest facing, is important and high quality winter range for big game animals.

With a private residential development built and occupied on the property, habitat effectiveness would diminish. Increased human and vehicle traffic, as well as domestic dogs, would disturb wildlife. Use of snowmobiles, snow bikes and other forms of winter recreation may increase significantly with new development and improved year-round access to the area. Increased disturbance to wintering wildlife could impact both the private and public lands. Degradation of this important habitat, coupled with development that is occurring in important habitat elsewhere, could be quite harmful to deer and elk throughout the Eagle Valley.

Yet the Forest Service, while acknowledging the incompatibility of the proposed development with Forest Plan management prescription 5.41, nevertheless proposes to amend the plan to accommodate the proposed development. We are opposed to sacrificing winter range or any other important resources in order to accommodate speculative real estate development in the middle of the national forest. That runs counter to the purpose for which the national forest system was formed and for which it exists today. National Forests exist, not to encourage, or even accommodate, private development, but rather to protect public resources, such as wildlife and fish, and watersheds. Approving access for a real estate development and reducing the protections in the Forest Plan to accommodate that development directly contradict this purpose.

In this case, the developer bought a piece of land surrounded by prime wildlife habitat. Existing routes to access the parcel were subject of seasonal closures to protect wildlife. The developer purchased the parcel with knowledge of these circumstances. The limitations were likely reflected in the price he paid. It is unreasonable now for the developer to claim, and it would be unreasonable for the Forest Service to find, that his use and enjoyment of the parcel requires amending the Forest Plan to construct a new, much more impactful access that completely undermines existing protections for wildlife. The fact that the developer’s plan would require such drastic changes in management and access suggests strongly that his proposal is not a reasonable use.

V. THE FOREST SERVICE IS REQUIRED TO MINIMIZE IMPACTS ON IMPORTANT VALUES.

ANILCA does not allow the Forest Service to rubber stamp expanded access to inholdings. As discussed throughout this letter, the agency has authority to reject proposals that are unreasonable and too impactful. Forest Service regulations also impose a duty to limit the access and impose terms and conditions “that minimize the impacts on the Federal resources.” 36 C.F.R. § 251.111; *id.*, at § 251.114(a), (f)(2). As a result, the Forest Service cannot choose to authorize an activity that fails to minimize impacts, damage and disturbance to public lands and resources.

Some important resources that will be impacted by this project include: cutthroat trout habitat, bald eagle habitat, harrington beardtongue populations, elk winter range, greater sage grouse habitat, lynx habitat and a lynx analysis unit, mule deer winter range and migration corridors, potential conservation areas designated by the Colorado Natural Heritage Program, public water supplies and supply systems, riparian habitat, black bear habitat and human conflict areas, great blue heron nesting areas, moose habitat, and mountain lion habitat and human conflict areas. *See* 16-132 BerlaimontEstatesAccessRouteScreen (attached as Exhibit 1).

The Forest Service cannot approve any special access that fails to minimize impacts on these important resources.

VI. IF THE FOREST SERVICE PROCEEDS WITH ANALYSIS, THE AGENCY MUST CONSIDER A REASONABLE RANGE OF ALTERNATIVES.

As discussed above, if the Forest Service proceeds with analysis of this project, an EIS is the appropriate tool. The project will involve significant impacts to wildlife, recreation, hydrology, scenery, and other resources. Additionally, authorization of access proposed by the developer would require amendment of the Forest Plan that, in this case, would have long-term and significant impacts on wildlife habitat and wildlife management in the area.

In preparing an EIS, the Forest Service is required to consider a reasonable range of alternatives. The alternatives analysis forms the “heart of the environmental impact statement.” 40 C.F.R. § 1502.14. The agency is required to use information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16) to present the environmental impacts of the proposal and the alternatives. *Id.* The impacts should be presented in “comparative form, [] sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” *Id.*

This section of an EIS should “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” *Id.*, at §

1502.14(a). The existence of reasonable but unexamined alternatives will render an EIS inadequate. See Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1065 (9th Cir. 1998). Agencies must “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.” 40 C.F.R. § 1502.14(b). The EIS must consider “reasonable alternatives not within the jurisdiction of the lead agency,” as well as a no action alternative. *Id.*, at § 1502.14(c), (d). In addition, agencies must consider and discuss “appropriate mitigation measures....” *Id.*, at § 1502.14(f).

A. THE FOREST SERVICE MUST CONSIDER A NO ACTION ALTERNATIVE.

Agency regulations require that the Forest Service consider a no action alternative. *Id.*, at § 1502.14(d). In this case, a no action alternative would involve not authorizing any special access to the private inholding. As discussed above, the Forest Service has authority not to grant special access in this case. Adequate access already exists for reasonable use and enjoyment of the parcel. The agency would be justified in adopting a no action alternative. Regardless of whether the agency adopts a no action alternative, its inclusion in the analysis is necessary to inform the process.

B. THE FOREST SERVICE MUST CONSIDER ALTERNATIVES THAT MINIMIZE AND MITIGATE IMPACTS, INCLUDING LESS IMPACTFUL ACCESS AND MAINTAINING SEASONAL CLOSURES.

Impacts flowing from a grant of ANILCA access must be mitigated by “such terms and conditions as the Secretary of Agriculture may prescribe.” 16 U.S.C. § 3210(a), (b). Consideration of ANILCA access necessarily involves NEPA disclosure and analysis of available mitigation that may be imposed via terms and conditions on the proposed access and alternatives to meet other statutory and regulatory obligations and goals. As discussed above, the Forest Service has a duty to minimize potential impacts. 36 C.F.R. § 251.111; *id.*, at § 251.114(a), (f)(2).

One example of an alternative that would minimize potential impacts is authorization of access on a dirt road. The Forest Service may find that minor improvements to the existing access roads are appropriate to facilitate adequate access. The Forest Service should consider reasonable alternatives that involve minor improvements to existing dirt roads and do not include paved roads.

Another reasonable alternative that would minimize potential impacts could include use of tunnels and bridges as part of any new or improved access road to reduce long-term land disturbance and fragmentation. Such engineering tools have been incorporated into high-end developments elsewhere in the Eagle Valley for the benefit of various resources.

One example of mitigation measures that should be part of alternatives considered is seasonal access. Routes in the area are currently closed seasonally to protect

wildlife. As discussed above, the current owner purchased the property with notice of seasonal road closures affecting access to the parcel. And the Forest Service has an obligation to minimize impacts on resources. Good winter wildlife habitat for big game is an important and dwindling resource that deserves protection, and it has been a management priority of the Forest Service for years. Therefore it would be reasonable for the Forest Service to consider alternatives that maintained seasonal closures. Failure to consider maintaining those closures in any alternatives that the Forest Service may consider would violate the agency's obligation to take a hard look, as well as obligations to minimize damages and to protect forest resources.

C. THE FOREST SERVICE MUST CONSIDER ACQUIRING THE PROPERTY
VIA PURCHASE OR EXCHANGE.

The private land parcel for which access is sought is completely surrounded by national forest land. Much of the private land and access to it are on steep slopes and overlap with important wildlife habitat. The area is also a popular recreation spot, an important hunting ground, part of a public water supply, and a very visible piece of wildland from almost anywhere in the Edwards area. Thus, any substantial development and upgraded access for this parcel would adversely impact a variety of resources.

Several years ago, an adjacent parcel owned by the State of Colorado was exchanged to consolidate ownership, ease management, preserve open space, and to protect resources in the area. The Forest Service should consider acquiring this parcel as well. By virtue of its location and the various resources it provides, this parcel really belongs in public ownership. The Forest Service should attempt to acquire this land before approving any access that would lead to development. Any EIS should consider alternatives that include federal acquisition of the inholding.

D. THE FOREST SERVICE MUST CONSIDER OTHER ACCESS ROUTES.

The Forest Service must consider all possible methods of reducing impacts from the project:

[An EIS] shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.

40 C.F.R. § 1502.1.

As discussed above, the Forest Service must first consider what type of access is adequate. Given that roads already access the property, it must consider whether any additional or improved access is needed. And because the agency has a responsibility to minimize impacts (*see* 36 C.F.R. § 251.111 and 114(a)), it must carefully examine whether paved access is needed.

The agency must examine other possible routes. One possible route would be access from the west via roads 780 and 783. Roads 783 and 783.1 already cross part of the inholding to which access is sought. This access is partially across private land and would require a shorter distance of national forest road to be upgraded than would either of the alternative routes described in the scoping notice.

There appears to be another road in the northwest portion of the property. *See* White River National Forest visitors map. *See also* Eagle County's GIS website at: <http://gisweb.eaglecounty.us/website/ecgis/viewer.htm>. Zoom in on the parcel in question, and you will see all the roads accessing the property

For access to be granted across Forest Service land, the following conditions must be met:

[T]he authorizing officer, prior to issuing any access authorization, must also ensure that:

- (1) The landowner has demonstrated a lack of any existing rights or routes of access available by deed or under State or common law;
- (2) The route is so located and constructed as to minimize adverse impacts on soils, fish and wildlife, scenic, cultural, threatened and endangered species, and other values of the Federal land; ...
- (4) When access routes exist across the adjacent non-Federal lands or the best route as determined by the authorizing officer is across non-Federal lands, the applicant landowner has demonstrated that all legal recourse to obtain reasonable access across adjacent non-Federal lands has been exhausted or has little chance of success.

36 C.F.R. § 251.114(f).

The Forest Service must thoroughly examine all possible routes to the inholding, and the impacts from granting access over each one. The selected route must minimize impacts to resources, which means it might not be the route most desired by the applicant.

VII. THE FOREST SERVICE MUST CONSIDER AND DISCLOSE ALL IMPACTS ASSOCIATED WITH ALTERNATIVES AND CONNECTED, CUMULATIVE AND SIMILAR ACTIONS.

To determine the appropriate scope of EISs, agencies shall consider direct, indirect, and cumulative impacts of all reasonable alternatives and connected, cumulative and similar actions. 40 C.F.R. § 1508.25. "Connected actions" are those which "[a]utomatically trigger other actions which may require environmental impact statements," or which "[c]annot or will not proceed unless other actions are taken previously or simultaneously, or that "[a]re interdependent parts of a larger action

and depend on the larger action for their justification.” Id. “Cumulative actions” are those “which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” Id. “Similar actions” are defined as those which, when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. Id.

Here, special access authorization would not be necessary but for the developer’s plan to subdivide the subject parcel and build homes there. Without authorization of this new, year-round access road, the developer will not be able to develop a high-end, year-round, residential community on the parcel. The two actions are therefore connected. And the Forest Service has an obligation to consider impacts of both the road and foreseeable development of the inholding, as well as impacts of all the other connected, cumulative and similar actions, in the same EIS.

The developer’s plan—made possible only by authorization of special access—will convert prime, undeveloped wildlife habitat into a residential enclave of large homes. It will transform an area primarily utilized by wildlife, hunters, recreationists, and as a source of public water, into an access corridor for a developed subdivision. Importantly, too, the proposed residential development will be high-end and service intensive. All of the actions and impacts associated with creating this new residential community where none currently exists must be considered in an EIS.

Relevant actions and impacts include those associated with building and maintaining all of the houses the proponent would like to build on the parcel. Also, the agency must consider new disturbance and fragmentation associated with all of the other foreseeable development (e.g., miles of new road, driveways, cul-de-sacs, cut and fill associated with berms and retaining walls, emergency vehicle pullouts, transmission and distribution lines (including water, sewer, and telecom), blasting to build an improved road, etc). All of the foreseeable traffic and use changes associated with new residential development, year-round access and improved road conditions (e.g., wildlife impacts, increased traffic, changes in access and use of the area, increased and ongoing maintenance needs, trail and parking impacts on recreation and hunting) must be considered. The agency must analyze alterations in hydrology, wildlife habitat effectiveness and use patterns, potential spread of weeds, sensitive plant habitat, impacts associated with new services and utilities, and impacts to quality of life for residents nearby (including changes in traffic, noise, air quality, scenery, and the loss of open space). The agency should also consider potential costs to surrounding communities (e.g., for emergency services, snowplowing), etc. And all of the other various impacts that this new development will have on wildlife, fisheries, recreation, scenery, soils, hydrology, public water supplies, sensitive plants, emergency services, vegetation management, current area users and residents, and the numerous other existing values in the area. The list goes on.

VIII. THE FOREST SERVICE MUST APPROVE A SPECIAL-USE AUTHORIZATION FOR UPGRADE AND USE OF ACCESS ROADS.

According to 36 C.F.R. § 251.112(a), applicants for easements to reach private property must apply for a special use permit under 36 C.F.R. § 251.54. A special use permit is also appropriate when, as in this case, the roads sought for access to the private inholding are currently closed to public motor vehicle use:⁵

In those cases where a landowner's ingress or egress across National Forest System lands would require surface disturbance or would require the use of Government-owned roads, trails, or transportation facilities not authorized for general public use, the landowner must apply for and receive a special-use or road-use authorization documenting the occupancy and use authorized on National Forest System lands or facilities and identifying the landowner's rights, privileges, responsibilities, and obligations.

Id., at § 251.110(d).⁶ A special-use authorization is also required when construction is needed or desired:

Instrument of authorization.

To grant authority to construct and/or use facilities and structures on National Forest System lands for access to non-Federal lands, the authorized officer shall issue a special-use authorization in conformance with the provisions of subpart B of this part or a road-use permit. In cases where Road Rights-of-way Construction and Use Agreements are in effect, the authorized officer may grant an easement in accordance with the provisions of part 212 of this chapter.

Id., at § 251.113.

For special use permits, applicants must demonstrate financial capability:

Technical and financial capability.

The proponent is required to provide sufficient evidence to satisfy the authorized officer that the proponent has, or prior to commencement of construction will have, the technical and financial capability to construct, operate, maintain, and terminate the project for which an authorization is requested, and the proponent is otherwise acceptable.

⁵ The Scoping Letter states that the property is "currently accessible in the summer months" via Forest Service Roads 774 and 780.

⁶ For access which would use only facilities open to the public, there appears to be no requirement to obtain a special use permit, according to 36 C.F.R. § 251.110(e), but section 251.112(a) still requires applicants to apply for a special use permit.

Id., at § 251.54(d)(3).

Construction and maintenance of the requested access is likely to be expensive, as much work would be needed to widen and pave the roads, and to construct retaining walls to stabilize steep slopes. Maintaining the road and safe access to the proposed development will require substantial ongoing investment. Therefore, the Forest Service must carefully assess the ability of the applicant to pay for and perform the needed work and maintenance prior to granting any special-use authorization.

CONCLUSION

It is not clear that ANILCA applies to this project. If it does apply, the Forest Service must determine what constitutes “reasonable use and enjoyment” of the inholding, and what type of access would be “adequate” for that use. An examination of other similarly situated inholdings suggests that the proposed development is not a reasonable use and that adequate access already exists.

If the Forest Service proceeds with analysis of this project, an EIS is the right tool. The EIS must consider alternatives that are far less impactful than the alternatives discussed in the scoping notice and shown in Figures 1 and 2 of that notice.

Ultimately the Forest Service has broad discretion to deny or condition any special use authorization. The agency also has an obligation to protect important resources in the area and to minimize any impacts to federal land resources.

Given the agency’s authority and relevant obligations, it is hard to see how the Forest Service could approve anything approaching what the proponent has requested. The access necessary to support development of the proposed Berlaimont Estates would have significant impacts on important public resources and would not serve the public interest. Every effort should be made by the Forest Service to acquire the parcel and to continue managing the area to protect important values there. If acquisition is impossible and the agency chooses to authorize access, that access should be strictly limited, involve few improvements, and maintain existing seasonal closures.

Thank you,

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Attached: 1 Exhibit (wildlife screen)