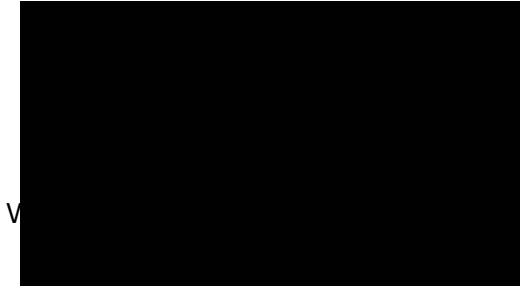


Andy Wiessner



November 9, 2020

USDA Forest Service Rocky Mountain Region
Attn: Objection Reviewing Officer
P.O. Box 18980
Golden, CO 80402

Dear Forest Service Reviewing Officer,

I am writing to object to the proposed Draft Record of Decision (DROD) on the Berlaimont Estates Access Route north of Edwards, Colorado. I previously submitted electronic and written comments on the DRAFT EIS in November of 2016.

By way of background, when the ANILCA law cited in your Draft ROD passed Congress in 1980, I was a young staffer on the U.S. House of Representatives Committee on Interior and Insular Affairs and worked directly on Section 1323 of ANILCA. In addition, I have served for 24 years on the Board of the non-profit Wilderness Land Trust, which specializes in acquiring inholdings inside Wilderness and wilderness candidate areas and then conveying those inholdings to the Forest Service and BLM. I am also a professional public lands consultant working for the Denver based Western Land Group, Inc., and we specialize in Federal land exchanges and other public land management matters. Accordingly, I am very

familiar with National Forest land use matters and the treatment of inholdings in our National Forests. These comments are my own personal comments, however, and do not necessarily reflect the views of Western Land Group or the Wilderness Land Trust.

Forest Service Access obligations under Sec. 1323 of ANILCA

From the outset, it needs to be recognized that the Forest Service is required to grant an inholder **ONLY** such access “as the **Secretary deems adequate** to secure to the owner the **reasonable** use and enjoyment” of the inholding. Also, as stated in Forest Service Manual 2734.6: “**The access to which the landowner is entitled need not be on the most direct, economical, or convenient route for the landowner.**”

When Congress drafts laws such as ANILCA it must be assumed that Congress chooses the wording of the law carefully. Accordingly, when ANILCA says the access to be granted is that which “the Secretary deems adequate”, it means just that. **ANILCA DOES NOT SAY THAT THE SECRETARY MUST GRANT ACCESS FOR ANY LEGAL USE OF THE LAND THAT THE APPLICANT PROPOSES...**and there is a 9th Circuit Appeals Court case in the Absaroka Beartooth Wilderness in Montana (2004) and a 2020 case in the Upper Kaimichi Wilderness in Oklahoma where road access to a wilderness inholding was denied by the Secretary, and the courts upheld the denial.

Therefore, as I read ANILCA, the Secretary has very broad discretion as to what type of access to grant Berlaimont. I believe that the Forest Service should carefully examine the following:

1. **Buyer beware:** It appears that the Berlaimont property was purchased by the current owner for purposes of real estate speculation. The \$9 million purchase price paid by Berlaimont was, in my opinion, foolhardy speculation, based on the existing primitive dirt road access into the property via Forest Roads 774 and 780. Certainly, a buyer who had carefully analyzed the existing access should have known that they were not necessarily entitled to paved road access across the National Forest. And,

even if they received permission for ungraded, “one point” (i.e. Alternative 2) dirt or gravel road status to reach their land, that they were not entitled to access which would disturb additional National Forest lands as the applicant has requested in Alternative 3.

As is noted on page 1 of the DROD, the Secretary would be entirely justified in determining that a reasonable use of the Berlaimont land is 3 home sites under Eagle County “driveway” standards

Or, the Secretary might determine that 19 summer homes or cabins accessed by a dirt road was a reasonable use of the land.

Or, the Secretary might determine that access by the existing dirt road (without upgrade), or by helicopter, was adequate.

None of those determinations by the Secretary would be unreasonable under ANILCA, given the concept of “buyer beware”.

In addition, the Forest Service should consider that when Berlaimont bought its land, it also knew FULL WELL that the roads in the area were closed in winter to honor the Forest Plan’s designation of the NF land as Category 5.41 deer and elk winter range. The DROD suggests that the Forest Plan will need to be amended to allow paving and year round use of the 2.4 miles of National Forest land that must be crossed to reach Berlaimont’s land.

I submit the Forest Service has ZERO obligation to change the Forest Plan to accommodate Berlaimont’s request for pavement and year round road access. Indeed, I think it would be very questionable from a legal standpoint. **Berlaimont knew the status of the NF land and roads when it bought its inholding, and it is not the Forest Service’s job, or legal obligation, to bail Berlaimont out of a bad investment...**especially when the 36 CFR Regs. require that any decision made re: Berlaimont’s access must “minimize” impacts on the surrounding NF lands.

I applaud the Forest Service for recommending Alternative 2 over Alternative 3 in the DROD. **IN NO CASE, should the final decision be changed to permit Alternative 3, as that would adversely impact critically important conservation**

areas and the heart of the deer and elk winter habitat in the project area. The DROD states on page 4 that Supervisor Fitzwilliams has chosen Alternative 2 because “it is the least amount of impact and disturbance to NFS lands”, and that is to be commended. However, for reasons discuss later, I respectfully suggest that instead of 2.4 miles of pavement on the NF land, Berlaimont be limited to dirt or gravel road only. That will slow down vehicle speeds, discourage casual sightseeing and be more in character with the low key use of the land west of Berry Creek that now exists, and also more consistent with every other inholding that the USFS considered in its ANILCA determination (none of which had pavement).

2. The project Berlaimont is proposing is NOT a reasonable use of its land:

Although 35 acre lot subdivisions are permissible under Colorado law, the Forest Service should not be obligated to grant paved road access across our public land to facilitate a speculative, high altitude mega-mansion subdivision in prime deer and elk winter range. Berlaimont’s homes would sit roughly 2,000 vertical feet above the Edwards valley floor, and, by my estimation, be the highest overall subdivision in Eagle County. It would be akin to building a subdivision at mid-Vail in Vail or Spruce Saddle in Beaver Creek, and the Forest Service should not allow paving of the National Forest to facilitate that unreasonable goal. **Sedimentation in Berry Creek has been cited as a reason for pavement, but even the FEIS makes clear that pavement won’t improve the situation—even with PDCs proposed by the agency. Best case scenario, with PDCs, is that Berry Creek will be maintained in its current degraded condition. The Forest Service should consider a dirt road with PDC applied, but here the agency failed to consider that alternative.**

Further, Berlaimont’s subdivision is requesting 2.4 miles of pavement in prime deer and elk winter range on NFS land (and many more miles of pavement on Berlaimont’s land), and pavement will increase use of the road by casual sightseers in the summer months and lead to higher vehicle speeds. That will be detrimental to both wildlife and the low key recreational uses that exist in the area today. Not all areas of our National Forests need to be dedicated to

increased recreational use, and especially motorized use. The area west of Berry Creek receives relatively low impact use today, and it should stay that way. Putting in new pavement on our public land west of Berry Creek is unnecessary in this area that many people enjoy today for low key recreational use.

I also strongly object to the new snowmobile parking lot as proposed in Berry Creek and the new recreational trails to be constructed to the west of Berry Creek. Both of those proposals will bring more humans into an area that the Forest Plan emphasizes for deer and elk winter management, and that is not appropriate. **In addition, the new snowmobile parking and recreational trails were not part of the original proposal analyzed in the DEIS, and should legally, therefore, require opportunity for additional public comment and input. It isn't clear to me from the FEIS that the Forest Service has fully disclosed and considered the potential impacts of this new snowmobile trailhead. The impacts could be significant with increased use, traffic, and disturbance in this critical wildlife habitat that is additive to the increases already anticipated with the activity proposed by Berlaimont Estates, LLC.**

These new trails will not be needed if the proposed decision is amended to allow gravel road only...and no pavement...for the 2.4 miles of the access road that cross NFS land.

2. The Agnes Lake inholding cited on page 6 of the DROD is not a good comparable for justifying approval of this project as a reasonable use:

The DROD (page 6) relies heavily on the Agnes Lake road in the Routt National Forest to justify the a conclusion that Berlaimont Estates is a reasonable use, and approving a paved, year-round road across 2.4 miles of critical wildlife habitat on NFS land. The Agnes Lake parcel is not a good comparable. To confirm that, I drove up to Lake Agnes on October 19, 2020.

First, it's worth noting that Lake Agnes didn't begin as a subdivision. Lake Agnes began as a corporate retreat back in the 1950s. A road to the parcel was developed at that point.^{[\[1\]](#)} For some years the parcel was used as a summer

camp.^[2] Subdivision of the parcel occurred around 1980, nearly 40 years ago, and residential development since then has occurred based on the existing access—which as discussed above is dramatically different than access required for the Berlaimont proposal. There is no indication that use of Lake Agnes as a residential subdivision required access complications that are comparable to Berlaimont at all—in fact, a searching review shows access to Berlaimont is vastly more complicated.

In this case, the Forest Service failed to acknowledge or address key differences between the historical context of Lake Agnes and Berlaimont. This consideration is key and courts have found parcels to be not similarly situated based on intervening events and historical context. *See e.g., Dobbs v. United States Forest Serv.*, 810 F. App'x 644, 653-54 (10th Cir. 2020) (wilderness inholdings were not similarly situated for purposes of ANILCA where one predated wilderness designation and already had road access prior to designation of the surrounding area as wilderness).

Further, when access to Lake Agnes was built, and even when subdivision of the parcel occurred, times were very different. Decisions that may have been reasonable in the 1950s or the 1980s may no longer be reasonable today. In the intervening decades a lot has changed. New information related to the impacts of sprawl, declining wildlife populations, climate change, and the increasing risks of wildland fire show that decisions we made 40-70 years ago would be unreasonable today.

Also, the Agnes Lake road is not paved, nor has it been since it was first constructed by Phillips Petroleum in 1952 to access a corporate retreat. Following is a comparison of the Agnes Lake Road and the proposed Berlaimont road:

-the Agnes Lake Road is **not** paved, whereas the Berlaimont road would have 2.4 miles of pavement;

-the portion of the Agnes Lake Road on NFS land rises only 300 vertical feet in gentle terrain, whereas the Berlaimont road on NF land will rise 1,000 vertical feet, much of it in steep terrain, or on steep slopes;

-the Agnes Lake road crosses only about 0.75 miles of gently sloping NF land, whereas Berlaimont will cross 2.4 miles;

-the Agnes Lake Road has **zero** switchbacks, **no** cut and fill, and **no** retaining walls or other features requiring expensive construction, whereas the Berlaimont road will have many switchbacks, traverse steep terrain for 1.5 of its 2.4 miles, and have cut and fill and retaining walls up to 600 feet long and 20 feet tall DROD;

-the Agnes Lake road passes through land classified as “5.12 General Forest and Rangeland” under the Forest Plan, whereas Berlaimont passes through Forest Plan 5.41 land “Deer and Elk Winter Management”.

Lastly, once the Agnes Lake Road reaches private land, it rises only an additional 300 vertical feet over 0.7 miles in gentle terrain, whereas the Berlaimont Road will rise 1000 vertical feet for several miles on Berlaimont’s land with many switchbacks, massive retaining walls, and huge cut and fill.

Conclusion: Except that they both traverse NFS lands, the Agnes Lake and proposed Berlaimont roads are not comparable in any significant way.

Development of Lake Agnes began 70 years ago and the current subdivision was built with preexisting access, rather than demanding a damaging, highly engineered new paved, year round road to enable construction of new mansions. The Lake Agnes parcel has direct access right off Highway 40 and better access than Berlaimont has off of any County road, much less a highway. Agnes Lake is accessed on a gentle gravel road in mild terrain, whereas Berlaimont will be a very difficult and expensive road to build in steep terrain and prime wildlife habitat.

As Colorado Parks and Wildlife (CPW) noted in a November 7, 2016 letter to Forest Supervisor Scott Fitzwilliams, roads that are comparable to the proposed Berlaimont road are Fulford, Homestake Creek, Tigiwon Road, Pine Lake and Carbonate. Woods Lake is another comparable inholding situation to Berlaimont. And, ALL of those have gravel road access only.

CPW also stated that:

“Amending the Forest Plan to the detriment of Management Area 5.41 (Deer and Elk Winter Range) and several species on the Region 2 sensitive species list does not appear to be meeting 36 CFR Subpart D that requires any authorized access route to be located and constructed so as to minimize damage or disturbance to NFS lands and resources.”

Given all the above, I urge that the DROD be changed to allow gravel road access to Berlaimont’s land only. Once again, it is not the responsibility of the Forest Service to reward a bad investment decision by Berlaimont and bail them out with paved road access.

-Your final Record of Decision should examine all possible options for purchase or exchange of the Berlaimont land. I understand that the current owner may not want to sell or exchange it, but if it is made clear to the owner that you will not be granting him paved road access, he may change his mind if the reality of his foolhardy \$9 million investment sinks in. Given the overwhelming hostility to Berlaimont in Eagle County, and from our Congressional delegation and many local elected officials (including State Senator Kerry Donovan and State Rep. Dylan Roberts, I would suspect that LWCF and other funds could be raised to buy the inholding if the developer has any sense whatsoever.

In summary, the Berlaimont property is a bad place for any significant development...particularly because the most developable parts of it lie deep inside White River National Forest land approximately 1500 to 2000 above the valley floor. Under ANILCA, you are obligated to provide only “reasonable” access to the Berlaimont land. I would suggest that means “one-point” access to the SE corner of Berlaimont’s land, BUT with a gravel road surface replacing the proposed DROD pavement.

I believe the Berlaimont property was purchased for real estate speculation by the current owners at a wildly inflated price. It is not the obligation of the Forest Service to reward that speculation by granting the landowners several points of access, or by granting them approval for a paved road. Your duty is to grant only

such access under ANILCA as will enable them to reach their land in a manner enjoyed by similar inholders on the WRNF (i.e. dirt or gravel road access to the southeast portion of their land), while protecting the surrounding National Forest land and its critical wildlife habitat to “minimize adverse impacts” as required in accordance with 36 CFR 251.114 and the Forest Service Manual.

I suggest amending the Draft Record of Decision to allow gravel road access to Berlaimont’s land only.

Respectfully submitted,

Andy Wiessner