

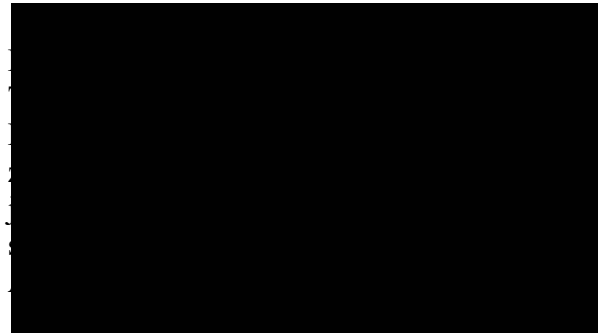
**OBJECTION TO THE REGIONAL FORESTER
ROCKY MOUNTAIN REGION
UNITED STATES FOREST SERVICE**

In the Matter of the September 24, 2020
Draft Record of Decision of Forest Supervisor
Scott G. Fitzwilliams of the White River National Forest
Regarding the Berlaimont Estates Access Route
Final Environmental Impact Statement

**OBJECTION PURSUANT TO 36 C.F.R. § 218.8 BY
BERLAIMONT ESTATES, LLC TO THE DRAFT RECORD OF DECISION IN
BERLAIMONT ESTATES ROAD IMPROVEMENT PROJECT (PROJECT # 50041)**

**MEETING WITH REVIEWING OFFICER
REQUESTED PURSUANT TO 36 C.F.R. § 218.11(a)**

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Name and Address of Objector:

Berlaimont Estates, LLC
Attn: Vaclav Vochoska

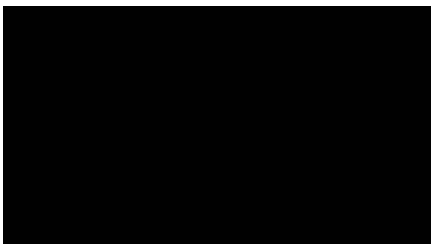


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INTRODUCTION

Berlaimont Estates, LLC (“Berlaimont”) objects to White River National Forest Supervisor Scott Fitzwilliams’ September 24, 2020 Draft Record of Decision (“ROD”). Berlaimont requests a meeting with the Reviewing Officer to discuss this objection pursuant to 36 C.F.R. § 218.11(a).

The Forest Supervisor’s selection of Alternative 2 (and rejection of Alternative 3) does not provide the “access” “adequate to secure to” Berlaimont “the reasonable use and enjoyment” of Berlaimont’s inholding (the “Property”) as mandated by the Alaska National Interest Lands Conservation Act (“ANILCA”), 16 U.S.C. § 3210(a). Berlaimont plans to construct an ultra-low-density development of 19 homes on the 680-acre Property, a use approved by state statute and Eagle County land use regulations, and that the Forest Supervisor independently and appropriately determined is reasonable under ANILCA.

Berlaimont requested Forest Service approval to construct a road over Forest Service lands to the Property along a route that would make use of an existing Forest Service road through a designated utility corridor for much of its length, and connect to the developable part of the Property by utilizing the natural topography and avoiding steep slopes and ridgelines. That route is designated as Alternative 3 in the Draft ROD. As the Forest Supervisor acknowledged in the Draft ROD, Alternative 3 satisfies the agency’s nondiscretionary, mandatory duty under ANILCA and Forest Service regulations to provide Berlaimont with “adequate” access “to secure to the owner the reasonable use and enjoyment” of the Property.

Yet the Forest Supervisor *rejected* Alternative 3 in the Draft ROD. The Forest Supervisor instead selected Alternative 2, a decision that, if the Regional Forester allows it to

stand, does not provide access “adequate to secure to the owner the reasonable use” of the Property, as required by ANILCA, Forest Service regulations, federal court precedent, and the Forest Service’s own analysis. The record, the expert analyses attached to this objection, and the observations of the Eagle River Fire Protection District attached as Exhibit 20, all demonstrate that Alternative 2:

- does not connect to the developable and useable part of the Property or secure or even facilitate connectivity to it, but connects to the Property at the base of a narrow ridgeline 1,000 feet in elevation below the developable lands;
- requires substantial blasting and earthwork on that ridgeline (including 2.5 times the amount of retaining wall, and twice as much guardrail);
- forces seven switchbacks up the narrow ridge bordered by a ravine;
- will visually scar that ridge in an unsightly manner visible forever from the valley floor and surrounding lands;
- creates permanent barriers to the movement of wildlife, including elk, across the landscape;
- will subject drivers to unnecessary hazards including steep grades and tight switchbacks that will cause more vehicles to drive off the road, particularly when icy conditions exist, resulting in a greater number of accidents; and
- results in an access route that, due to greater fuel volatility and steeper slopes, increases the risk of wildfire activity that may prevent access by responding fire resources, egress by evacuating community members, and increased travel time that impedes the timely intervention of emergency services.

The aggregate deficiencies of the access in Alternative 2 will functionally prevent Berlaimont from making *any* use of the Property.

The principal defect in the Forest Supervisor's draft decision is that he selected a route that does not connect to the useable, developable part of the Property, secure the reasonable use of it, or even facilitate connectivity to it. Berlaimont objects because the Forest Supervisor's selection of Alternative 2 rests on the erroneous belief (rejected by a federal court that addressed it) that ANILCA allows the agency to force the owner of the inholding to endure inadequate access on private lands in a take-it or leave-it manner so long as the Forest Service believes the access is adequate on Forest Service lands. That is an arbitrary interpretation of the statute's and regulations' requirement to provide access "adequate to secure to the owner the reasonable use and enjoyment" of the Property, and it is a fundamental error of the Forest Supervisor's decision. A road is a linear feature and, under ANILCA, it must be adequate "to secure to the owner the reasonable use" of the Property where it enters and crosses the private lands, as a matter of law. 16 U.S.C. § 3210(a). The Forest Service's statutory duty to provide "adequate access" does not stop at the property line of the inholding where, as here, given the topography and property lines the Forest Service's chosen access route does not connect to the location of the identified reasonable use, and results in access that is plainly inadequate to secure that reasonable use.

Given the unique topography of the Property, Alternative 3 is "adequate" to "secure to the owner the reasonable use" of the Property, and Alternative 2 is not. That observation is confirmed by independent analyses of engineering, road and traffic, fire, and wildlife experts, and the November 6, 2020 observations of the Eagle River Fire Protection District that are attached to this objection, all of which are now part of the "whole record" on which the Forest

Service’s decision must be based, and which a reviewing federal court will evaluate under 5 U.S.C. § 706.

The Regional Forester should direct the Forest Supervisor to select Alternative 3 because it provides the “adequate” access guaranteed by ANILCA. Alternative 3 is safe, results in less impacts to wildlife and elk, reduces adverse consequences to visual resources and the environment, connects to the developable part of the Property, and avoids the needless hazards associated with Alternative 2. A federal court will not uphold the agency’s selection of Alternative 2 given these facts, the Forest Supervisor’s rationale, and the unambiguous text of 16 U.S.C. § 3210(a).

STATEMENT REGARDING COMPLIANCE WITH 36 C.F.R. § 218.8 and § 218.9

This objection complies with 36 C.F.R. § 218.8(c) because Berlaimont submitted a comment letter on March 12, 2018 to the Forest Service addressing the Draft Environmental Impact Statement (“Draft EIS” or DEIS”), the selection of Alternative 3 as the Forest Service’s preferred alternative, and the deficiencies of Alternative 2 (attached as **Exhibit 3**). That letter, submitted during the open comment period, supported the Forest Service’s selection of Alternative 3 as the preferred alternative for minimizing the problems that make Alternative 2 inadequate: safety concerns, impacts to the environment and visual landscape through blasting, wildlife disruption, and a far greater and more adverse overall environmental impact. *See Ex. 3*, pp. 1–3. Berlaimont also submitted written comments on the scoping notice on November 7, 2016. *See Comments of Berlaimont Estates LLC on Public Scoping Notice (Nov. 7, 2016)* (attached as **Exhibit 4**). Berlaimont’s scoping comments identified the deficiencies associated with Alternative 2, noting that it is not adequate because it “would require numerous switchbacks, cut and fill, large retaining walls, and extensive guard rails . . . [and] would entail

blasting and similarly invasive techniques.” **Ex. 4**, p. 3. Berlaimont’s comments on the Draft EIS and scoping notice address the issues contained in this objection, which satisfies the requirements of 36 C.F.R. § 218.8(d)(6). *See Exs. 3 & 4.*

The name and address of the objector appears on the cover page of this objection, which satisfies 36 C.F.R. § 218.8(d)(1). Please direct any contact with the objector to objector’s counsel, identified on the cover page of this objection.

This objection is prepared by objector’s counsel and objector, and verification of authorship will be provided upon request within the meaning of 36 C.F.R. § 218.8(d)(2).

The name of the proposed project and the name and title of the responsible official appear on the cover page and the first page of this objection as required by 36 C.F.R. § 218.8(d)(4).

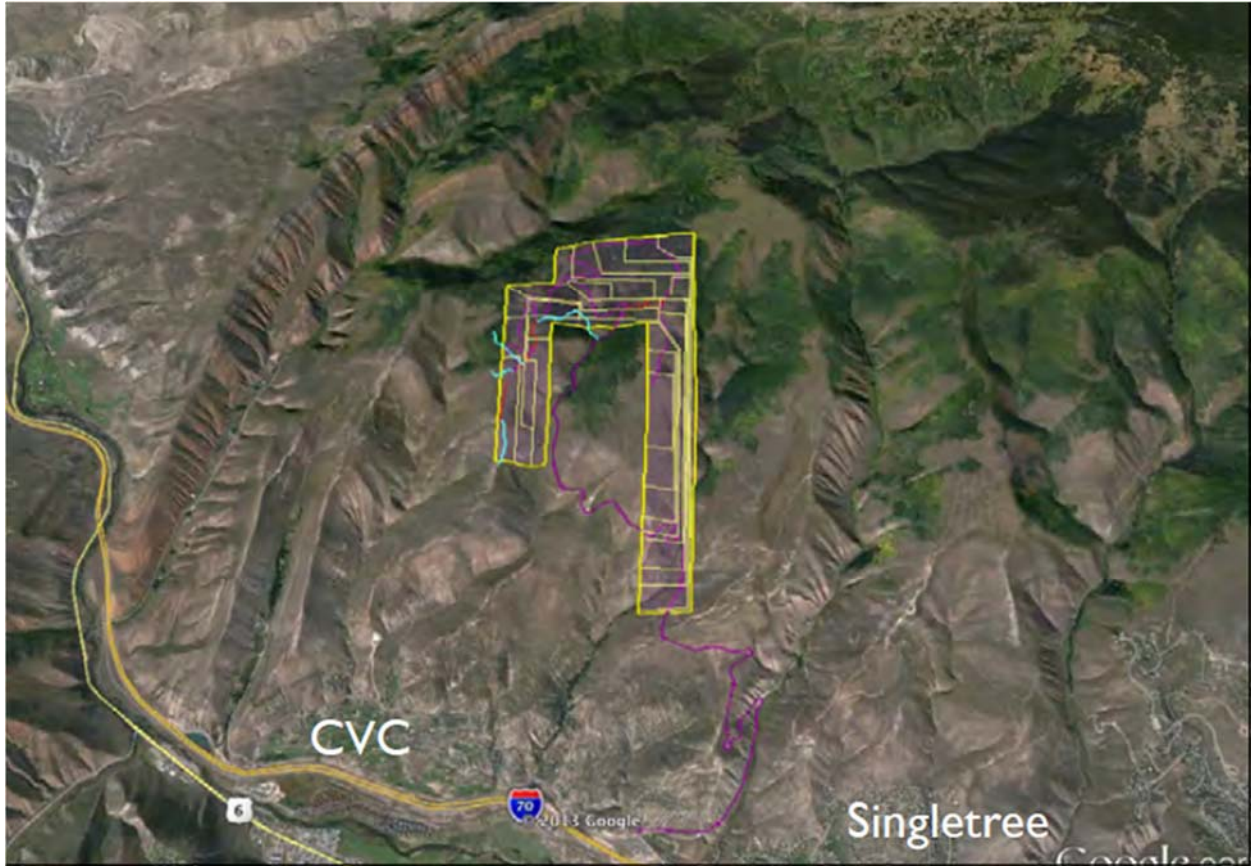
This objection requests the Regional Forester to direct the Forest Supervisor to select Alternative 3 in the final Record of Decision, and reject Alternative 2, for the reasons explained in this objection. This satisfies 36 C.F.R. § 218.8(d)(5).

This objection is filed on or before November 9, 2020 and is therefore timely within the meaning of 36 C.F.R. § 218.9.

FACTUAL BACKGROUND

Berlaimont’s Proposed Ultra-Low-Density 19-Home Development

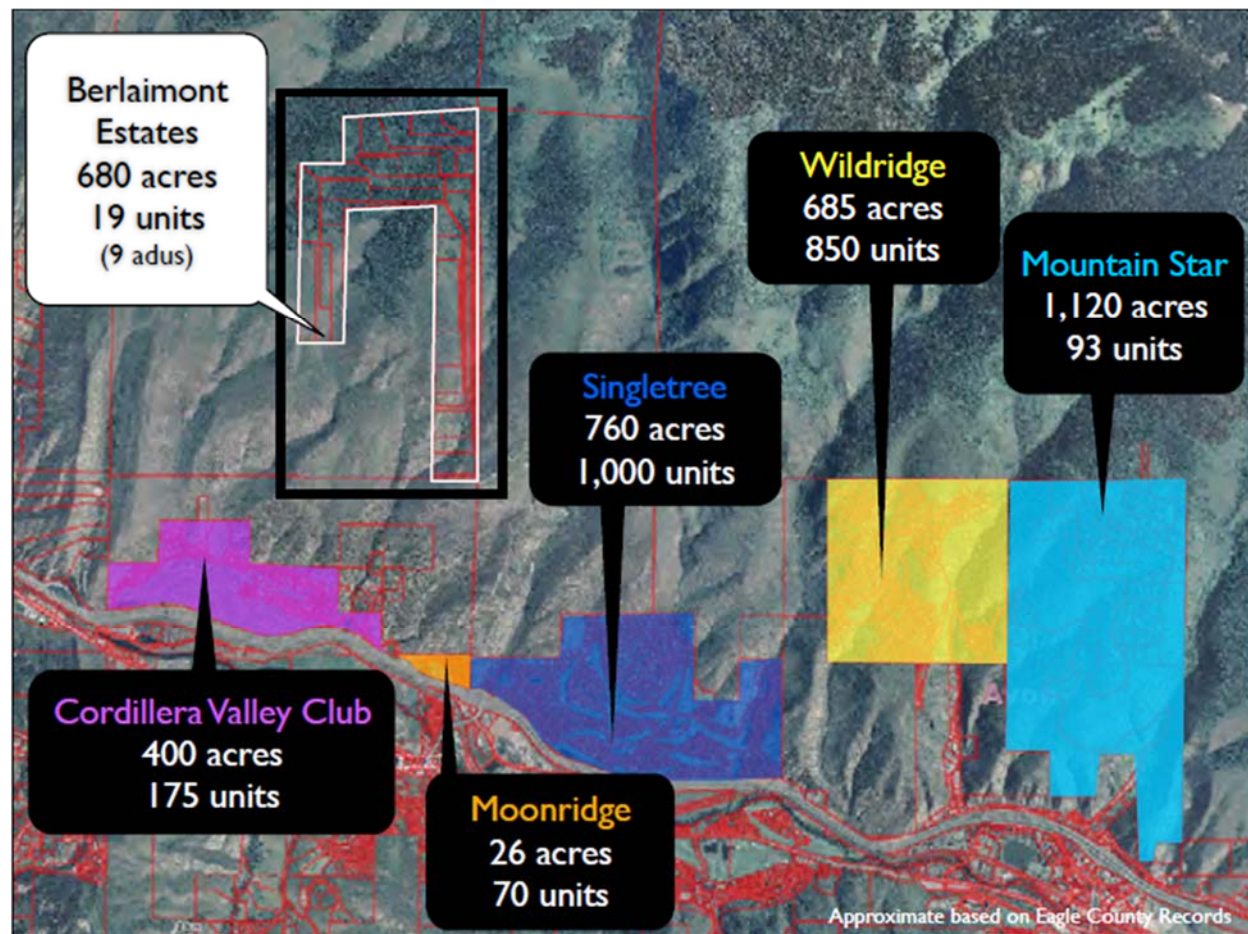
Berlaimont owns a 680-acre inholding (the Property) within the White River National Forest (“WRNF”) in Eagle County, Colorado. Forest Service lands surround the Property on all sides. The Property has a distinctive horseshoe shape with an eastern and western leg.



See Berlaimont Presentation to Eagle County Board of County Commissioners, Dec. 10, 2013 (attached as **Exhibit 14**), at 13 (The yellow polygons in the map above depict the 19 separate parcels within the 680-acre inholding, each larger than 35 acres.). The federal government created the horseshoe shape when it patented the lands out of federal ownership and into private ownership in the 1930's. The eastern and western legs of the Property are, for the most part, undevelopable because they are narrow and follow ridgelines bordered on the east and west by steep slopes. The developable portion of the Property lies to the north in the base of the “horseshoe” that connects the eastern and western legs. The base of the horseshoe creates a plateau that is the only suitable area for development, which has the distinct advantage of lessening impacts to environmental and visual resources by creating a less visible and clustered

developed area. This is the portion of the Property that will be put to reasonable use. All of the eastern leg and the majority of the western leg will remain undeveloped in a natural state.

The Berlaimont Property is located within sight of Interstate 70 near Edwards, Colorado. The area contains multiple residential developments containing thousands of residential units. The location of the Berlaimont Property, and nearby residential developments, appear below.



See Berlaimont Presentation to Eagle County Board of County Commissioners, Oct. 1, 2013 (attached as **Exhibit 13**), at 16. From the beginning, Berlaimont proposed to construct only 19 homes on the 680-acre Property, resulting in far fewer residential units, and more undeveloped land per unit, than any of the nearby high-density developments. See **Ex. 13**, at 61–64. Berlaimont’s proposal for the Property is far less dense and impactful, with the least number

of units and the most acreage per unit. See Presentation to Colorado Parks & Wildlife (attached as **Exhibit 19**), pp. 3–5. Allegations that Berlaimont’s proposal will “urbanize” the area, or create high-density development, overlook the facts and are simply wrong. The reality is that less than 5% of the 680 acres will be physically developed with residential units or access roads. The great balance of the Property will remain undeveloped, and will continue to provide high-quality elk and wildlife habitat, as it does today.

Colorado Land Use Statutes and Regulations

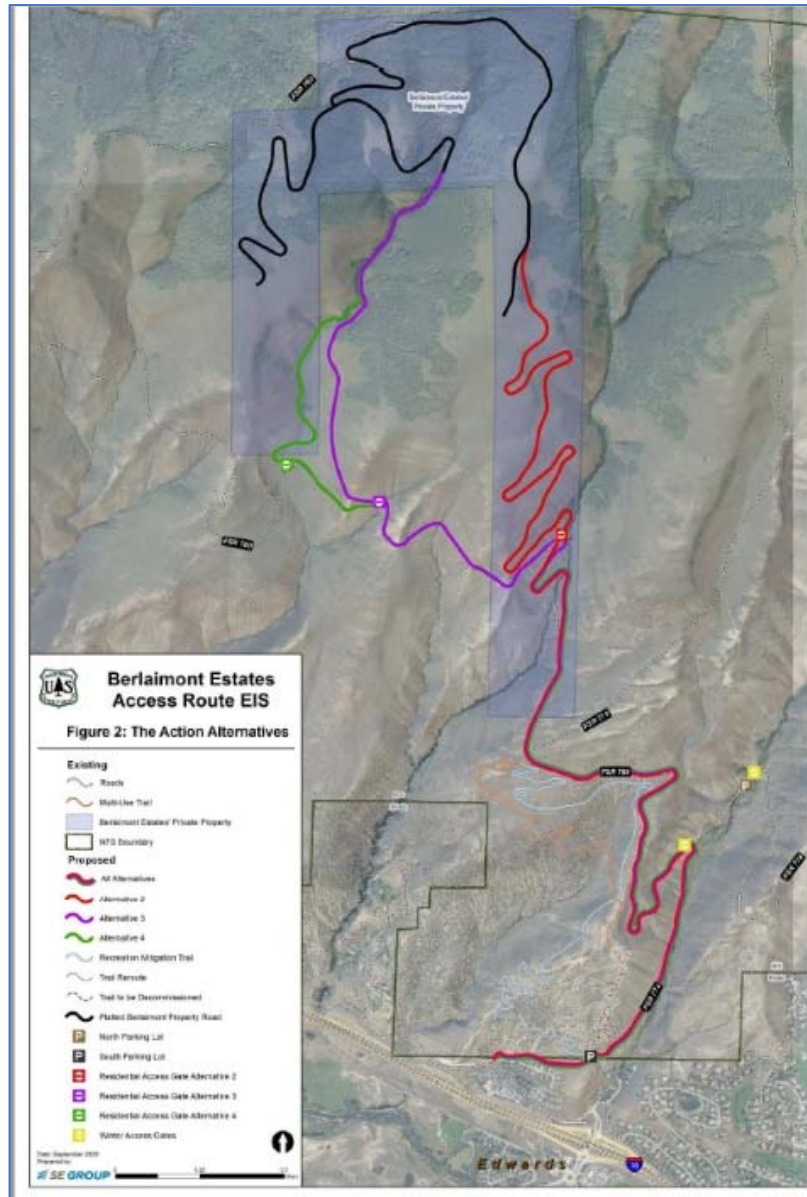
Under Colorado law, Berlaimont has a statutory right to develop the 19 residences. In 1972, the Colorado General Assembly enacted Senate Bill 35 requiring counties to pass regulations managing parcels of land 35 acres or smaller. Parcels 35 acres or larger are exempt from this requirement. Consistent with Senate Bill 35, the Property is subdivided into 19 lots of more than 35 acres. Eagle County zoned the Property as a ‘Resource,’ meaning the County pre-approved development of parcels this size. See Eagle County Comprehensive Plan, Section 3-210; see also C.R.S. § 30-28-101(10)(b) (exempting the creation of parcels 35 acres or larger from subdivision regulations). This zoning designation is rural in character, will preserve the great majority of the Property in an undeveloped state, and does not permit the intensive development that has occurred elsewhere along Interstate 70. Berlaimont never intended to increase the density of the use of the Property. Berlaimont never submitted an application for re-zoning or up-zoning, and never applied for a planned use development to increase the scope of the development.

Access to the Berlaimont Property

Like much of Eagle County, very steep terrain exists in and around the Property, complicating access. Large areas around the Property have slopes in excess of 25%, with some

areas exceeding 50%. See Final Environmental Impact Statement (“Final EIS” or “FEIS”), Fig. 13, Slope Analysis. Much of the Property’s steepest terrain exists in and along the narrow eastern leg of the Property (into which the Forest Supervisor squeezed five of the seven switchbacks of Alternative 2). Currently, Forest Service Road 774 (Berry Creek Road), intersects with Eagle County roads near the Moonridge subdivision on the North side of Interstate 70 and traverses north toward the eastern leg of the Property. The Forest Service currently allows only seasonal vehicular access past an access gate on Berry Creek Road. Another road (Forest Service Road 780) intersects with Forest Service Road 774 higher up on the hillside, closer to the Property. Forest Service Road 780 is within a designated utility corridor, Management Area 8.32, under the WRNF Forest Plan See Final EIS, Fig. 2, The Action Alternatives (reproduced below and attached as **Exhibit 1**).

Alternative 3 relies on parts of these existing Forest Service Roads, including the portion of Forest Service Road 780 that is within the designated utility corridor, in addition to proposing a section of new access road from the utility corridor to reach the developable portion of the Property. See **Ex. 1**, Figure 2 from the FEIS.



Ex. 1, Final EIS, *Figure 2: The Action Alternatives.*

Forest Supervisor Fitzwilliams Directed Berlaimont to Obtain Eagle County Approval First

In 2008, Berlaimont submitted a special use application to the Forest Service seeking to access the developable part of the Property by constructing a road in the WRNF that runs north between the eastern and western legs of the horseshoe-shaped Property that later became known as Alternative 3. The following year, Forest Supervisor Fitzwilliams instructed Berlaimont to

obtain necessary approval and variances for Berlaimont's access route from Eagle County before the Forest Service would begin NEPA review of Berlaimont's requested access. *See*

Fitzwilliams Nov. 9, 2009 Email to Michael English (attached as **Exhibit 5**). The Forest Supervisor stated:

It just doesn't make sense to me to move forward with the analysis until we know what the County will and will not allow on the property. . . . If we can narrow the scope of alternatives to what the County would actually approve, it is much more efficient.

Ex. 5.

Eagle County Reviewed and Approved Alternative 3

Berlaimont followed the Forest Supervisor's direction, as it consistently has during this 12-year process. Berlaimont commissioned technical, engineering, environmental, geologic, wildlife, and safety analyses of potential routes to the Property to present the best options to Eagle County. Those studies appeared in a comprehensive Environmental Impact Report submitted to Eagle County. On July 15, 2013, Berlaimont filed an application for variances from the Eagle County Land Use Regulations ("Land Use Regulations"). Berlaimont engaged in an extensive public process with Eagle County involving fire, safety, road standards, wildlife habitat, water resources, and other considerations. Berlaimont sought variances from the Land Use Regulations with regard to access and roadway standards, including standards requiring two means of access to the Property ("dual access"), emergency vehicle turnaround areas, and other road design standards. *See* 2013 Berlaimont Variance Application from Improvement Standards submitted to Eagle County (attached as **Exhibit 6**).

Eagle County held multiple public sessions to consider Berlaimont's application. *See Exs. 13 & 14*, Berlaimont Presentations to Eagle County Board of County Commissioners, Oct. 1, 2013 & Dec. 10, 2013. After consulting with experts, including Eagle River Fire Protection

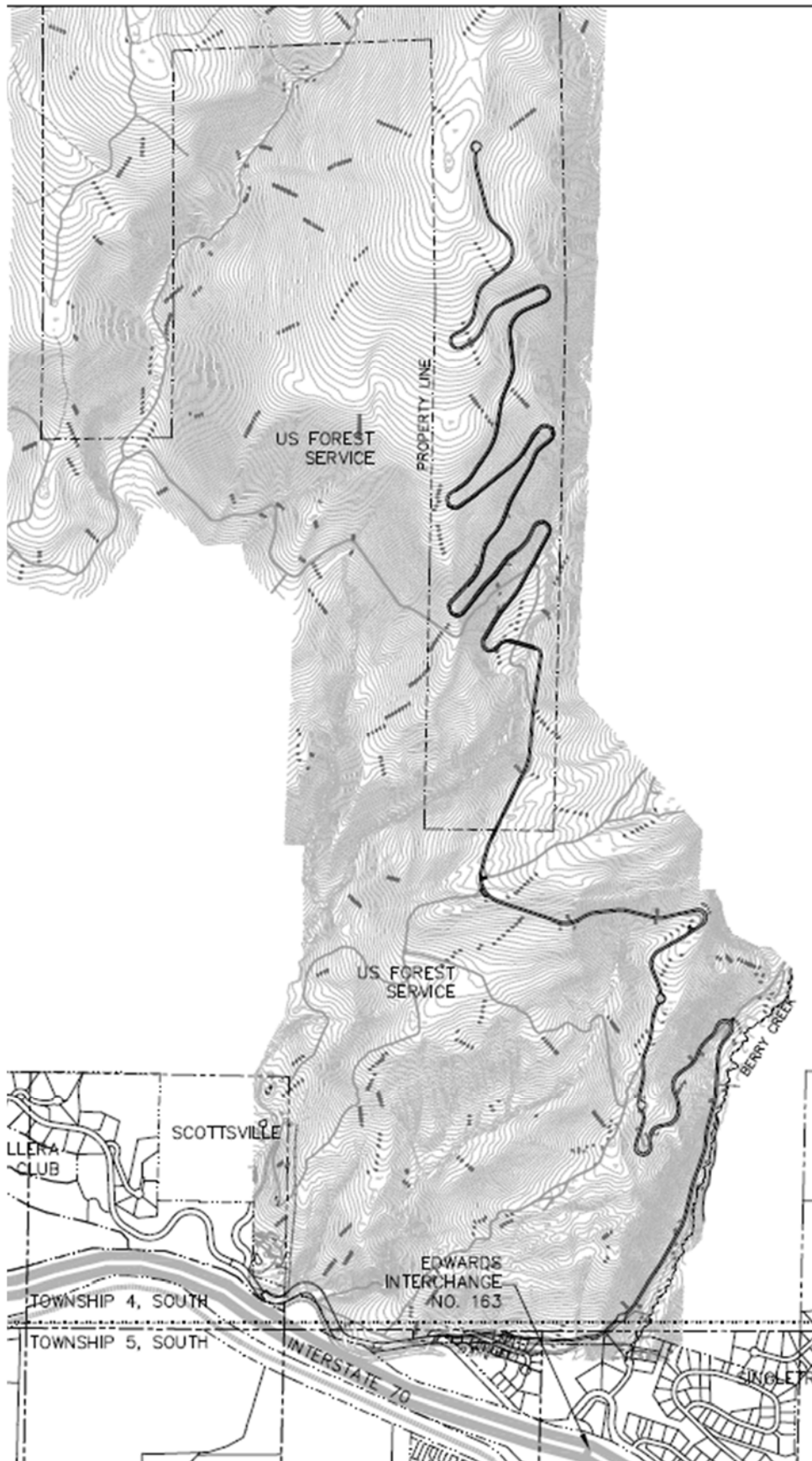
District, Berlaimont identified that the only feasible route to access the developable portion of the Property was Alternative 3 because: (A) access up the narrow east leg of the Property is steep, impracticable, requires multiple switchbacks squeezed into a narrow corridor, and does not meet County and national safety road standards; (B) access up the east leg is not safe or efficient for emergency response or fire and hazard evacuation; and (C) a road traveling up the ridge on the east leg would cause substantially more disturbance and permanent visual scarring of the landscape that would be prominent and visible from the nearby Edwards community and surrounding areas. See **Exs. 13 & 14**.

On January 7, 2014, after conducting a public process with public hearings, the Eagle County Commissioners authorized variances from certain Eagle County improvement standards including dual access, emergency turnaround areas, and road design standards. See Eagle County, Resolution No. 2014-001, File No. VIS-4398 (attached as **Exhibit 7**). The County's grant of a variance from the dual access safety requirement has the ancillary benefit of halving the amount of disturbance to Forest Service lands given that, absent the variance, a second access road would have to cross the WRNF. The County required extensive analysis to ensure the single access route to the Property is abundantly safe. In approving the access road referred to here as Alternative 3, the Eagle County Commissioners "balance[d] the hardships to the applicant of not granting the Variance against the adverse impact on the health, safety, and welfare of persons affected, and the adverse impact of the lands affected." See **Ex. 7**, p. 11.

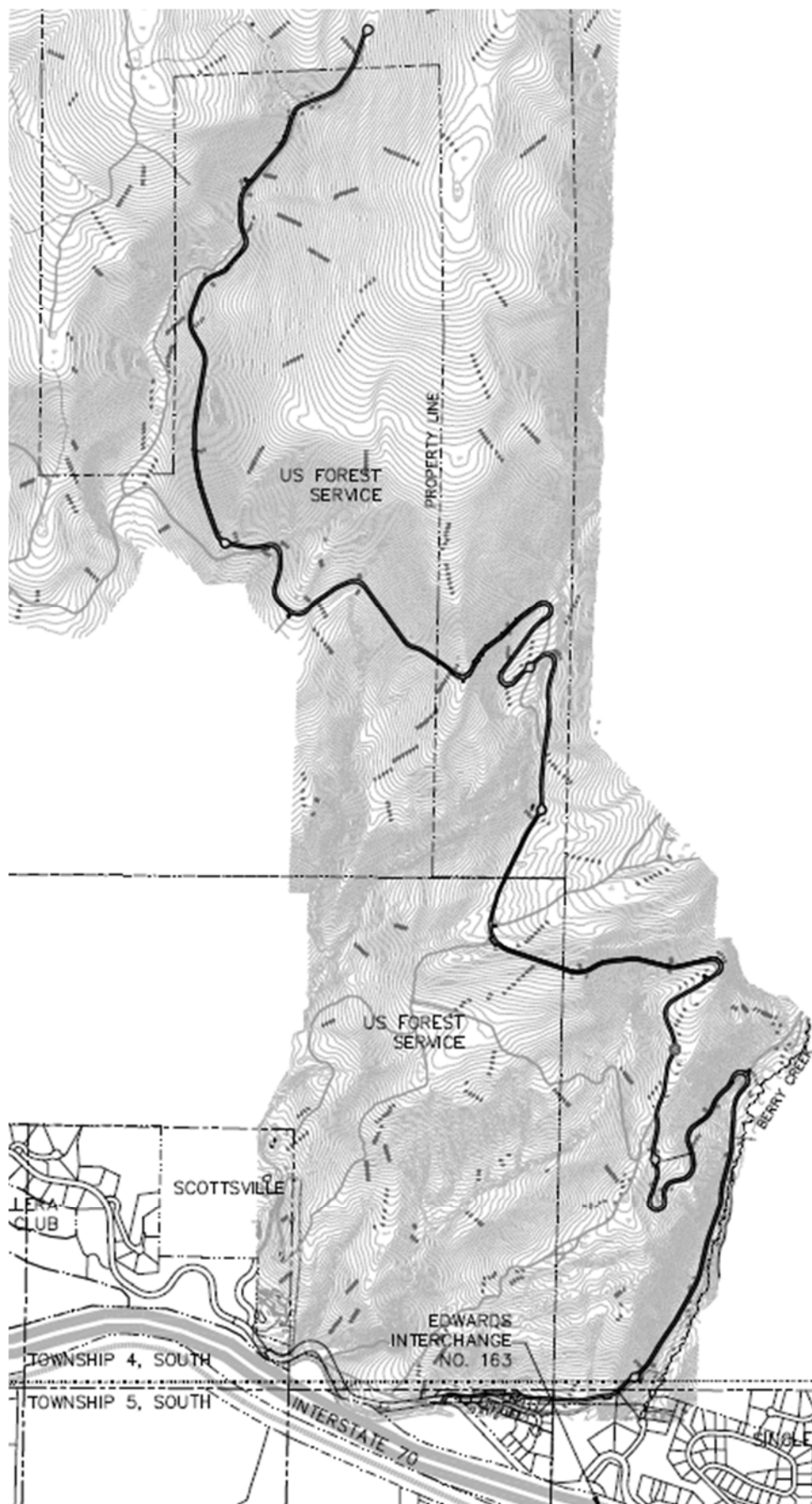
Principal Differences Between Alternative 2 and Alternative 3

There are two possible access routes, identified in the Draft ROD and Final EIS as Alternative 2 and Alternative 3. Maps of each, prepared by Alpine Engineering, Inc., appear on the following pages. See Alternative 2 & 3 Topographic Maps (attached as **Exhibits 16 & 17**).

Alternative 2 crosses Forest Service lands to the eastern leg of the Property, but does not connect to the developable part of the Property—it requires construction of a new road up a steep ridgeline where no road exists today. Alternative 2 requires seven switchbacks to be constructed to ascend the steep ridgeline within the narrow eastern leg of the Property, and an elevation gain of about 1,000 feet. The route is on exceedingly steep terrain, demonstrated by the frequency, density, and tight radii of the seven switchbacks squeezed into the corridor of the Property’s eastern leg. The route required by Alternative 2 is bordered on the east by a steep ravine of slopes in excess of 45 degrees, and constrained on either side by the property lines. *See* Final EIS, Fig. 13, Slope Analysis. Construction of Alternative 2 would require 116,000 square feet of retaining walls up to nearly 60 feet in height, and 10,000 linear feet of guardrail to prevent vehicles from falling down the steep hillside. The map on the next page demonstrates that construction of Alternative 2 would yield a visual and physical zigzag barrier on the currently undeveloped ridgeline, and create a major impediment to wildlife moving east to west across the landscape.



Alternative 2.
See Ex. 16.



Alternative 3.
See Ex. 17.

Alternative 3 differs from Alternative 2 in that it connects to the developable part of the Property, the location of the reasonable use identified by the Forest Supervisor. Alternative 3 follows an existing Forest Service road from the eastern leg of the Property toward the western leg of the Property. Over 4,000 linear feet of Alternative 3 lie within that existing road corridor. After Alternative 3 exits the east leg of the Property and reenters the WRNF, about half of the Alternative 3 route is within Management Area 8.32, a designated utility corridor under the WRNF Forest Plan. See Figure 1, Final EIS. Alternative 3 follows the landscape in a linear manner toward the Property, connecting directly to the developable part of it.

Of the two possible access routes, Alternative 3 is greatly preferable to Alternative 2 because it is safer, avoids road design hazards, relies on over 4,000 feet of existing roads, connects directly to the developable part of the Property, avoids steep slopes, is more resilient to fire, has better emergency access and egress, and minimizes wildlife impacts.

Engineering: Alpine Engineering, Inc. (“AEI”) concludes that based on “AEI’s years of experience in designing roadways in mountainous terrain in Eagle County, Alternative 3 as originally designed, permitted and approved by Eagle County, is the preferred alternative to provide access to the Berlaimont Estates homesites.” See Alpine Engineering Inc., Observations and Comparison of Access Alternatives Memorandum (attached as **Exhibit 8**), p. 3. Alpine Engineering identified significant differences between Alternatives 2 and 3:

Roadway Design Feature	Alternative 2	Alternative 3
Retaining Wall (sq. ft.)	116,777	48,120
Total Length of Retaining Walls (linear ft.)	5,303	4,794
Maximum Retaining Wall Height (ft.)	59	27.5
Earthwork Volume (cubic yds.)	248,910 ±	175,396 ±
Total Roadway in >40% Slope (linear ft.)	9,000 ±	6,400 ±
Length of Roadway within Existing USFS Dirt Road Corridor (linear ft.)	0	4,240

Ex. 8, Table 1, p. 2.

Road Design: The engineering and road planning firm Kimley-Horn evaluated multiple parameters of the road design, safety, traffic capacity, and driver use of Alternatives 2 and 3. Kimley-Horn concluded that “Alternative 3 provides a safer roadway.” See Kimley-Horn, Feasibility of Berlaimont Estates Access Roads Alternatives 2 and 3 Memorandum (attached as **Exhibit 9**), p. 5.

As to Alternative 2, Kimley-Horn observed significantly greater hazards:

- Alternative 2 has a “35%–50% longer travel time for emergency response and evacuation”;
- Alternative 2 includes a profile with 40% more roadway at the maximum grade of 10%;
- Alternative 2 includes 250% more square footage of retaining walls and, as a result of shading caused by high walls, increased icing potential in critical locations;
- Alternative 2 presents an increased chance of vehicle collisions due to driver error than Alternative 3;
- “Alternative 2 has seven (7) conflict points” with resulting “increased potential for collisions”;
- Alternative 2 has a “heightened risk for an injury or fatality resulting from a runoff the road crash”; and
- Alternative 2 has limited opportunity to provide pullouts, and will require pullouts to be located at non-standard spacing.

Kimley-Horn noted the following about Alternative 3:

- Alternative 3 has fewer roadside hazards and will require installation of 50% less guardrail;
- Alternative 3 provides an alignment with five fewer minimum-radius curves creating potential conflict points;
- Alternative 3 will require less rock excavation and blasting; and
- Alternative 3 mitigates human factors by providing a simpler alignment with fewer opportunities for human error.

See **Ex. 9**, pp. 1–5.

Fire and Safety: The wildland fire risk assessment experts at Anchor Point conclude that “[s]imple observation of the two alternatives shows that Alternative 3 [is] a much shorter

and less complex road system than Alternative 2 and hence preferable from a fire response and citizen evacuation perspective.” See Anchor Point, Berlaimont Estates Access Review (attached as **Exhibit 10**), p. 8. The Anchor Point analysis notes that:

- Alternative 2 ***puts the road almost entirely within the more extreme fuel profile*** and resultant fire behavior zones;
- Alternative 2 ***does not take advantage of the area of decreased fire behavior*** as seen along the northern portion of Alternative 3; and
- Alternative 2’s additional drive time of approximately 8 minutes to the furthest developed lot and 6 minutes to the emergency staging area is “significant” from a fire manager’s perspective, and critical to medical and EMS emergencies.

Ex. 10, pp. 6–8.

Minimizing Impacts to Wildlife: The 2.5 times more retaining walls, 5,000 additional linear feet of guardrail, nearly 60-foot-tall retaining walls, and seven switchbacks required for Alternative 2, all constructed in the narrow corridor of the eastern leg of the Property, yield far greater wildlife impacts than does Alternative 3. See SWCA Environmental Consultants, Evaluation of Berlaimont Estates Access Route Memorandum (attached as **Exhibit 11**). The wildlife ecologists at SWCA Environmental Consultants note that the “conclusion and the Decision Rationale in the ROD are not supported by the analysis in the FEIS or the [Environmental Impact Report (“EIR”)] and is not scientifically defensible given the information that was provided by the USFS” because the “combination of the larger direct impacts from Alternative 2 to elk winter range and severe winter range with the indirect and barrier effects of Alternative 2 ***does not support the conclusion that Alternative 2 is the least impactful to elk.***”

Ex. 11, p. 8 (emphasis added).

Forest Service Special Use Application

Following Eagle County’s approval of variances necessary to construct Alternative 3, and in accord with Forest Supervisor Fitzwilliams’ 2009 instructions, Berlaimont resubmitted its

special use application to the Forest Service in 2014. See USFS Standard Form 299: Application for Transportation and Utility Systems and Facilities on Federal Lands (attached as **Exhibit 15**). Berlaimont’s application to the Forest Service provided the route information generated in the Eagle County process, including the facts that demonstrated that Alternative 3 was greatly preferable based on safety, access, fire resilience, road hazards, and wildlife effects. See **Ex. 15**. In connection with the application, Berlaimont offered to assist in improving sensitive species habitat enhancement, wildfire mitigation, public recreation, and other mitigation efforts. In February 2016, the Forest Service accepted Berlaimont’s special use application for access to the inholding and, in August and September 2016, published notices of intent to prepare an EIS. See 81 Fed. Reg. 55,173 (Aug. 18, 2016); 81 Fed. Reg. 65,624 (Sept. 23, 2016).

The Forest Service published a Draft Environmental Impact Statement on January 26, 2018 in which the Forest Supervisor designated Alternative 3—the route Berlaimont had obtained permission and variances from the County to construct at the direction of the Forest Supervisor, and that the County had deemed adequately safe to allow single access—as the preferred alternative. The Forest Supervisor determined that Alternative 3 would have the least impact to the WRNF and surrounding resources. The Draft EIS concludes that “[b]ased on the analysis and environmental consequences of each alternative, Alternative 3 has been identified as the agency preferred alternative. This alternative meets the Purpose and Need for the project and is consistent with the ANILCA determination for the project.”

Draft Record of Decision and Final EIS

On September 24, 2020, the Forest Supervisor issued a Final EIS and Draft ROD. As required by Forest Service regulations, in the Draft ROD the Forest Supervisor considered whether Berlaimont’s planned 19-unit development was a “reasonable use” of the Property by

considering “contemporaneous uses made of similarly situated lands in the area and any other relevant criteria.” 36 C.F.R. § 251.114(a). The Forest Supervisor based his reasonable use determination on the Final EIS, in which the agency exhaustively considered 23 potentially similarly situated existing properties and the characteristics of those properties. See **Ex. 2**, ANICLA Determination. The Forest Service noted that its consideration of other “relevant criteria” required it to consider the character of the local area and concluded that “Berlaimont does not mark a dramatic departure from other nearby existing upscale residential developments such as Mountain Star (Avon), Cordillera (Edwards), Creamery Ranch (Edwards), and Red Sky Ranch (Wolcott), among others.” See **Ex. 2**, p. C-8.

That statement fails to recognize that Berlaimont proposes dramatically less development than existing residential developments in the area. Berlaimont’s 19-home plans for 680 acres of land will be far less dense and impactful than existing developments nearby, with the least number of units and correspondingly the most acreage per unit.

Subdivision	Acreage	No. of Units	Acres per Unit
Moonridge	26	70	0.37 Acres/Unit
Singletree	760	1,000	0.76 Acres/Unit
Wildridge	685	850	0.81 Acres/Unit
Cordillera Valley Club	400	175	2.29 Acres/Unit
Mountain Star	1,120	93	12.04 Acres/Unit
Berlaimont Estates	680	19	35.79 Acres/Unit

Using seven criteria, the Forest Service identified one similarly situated property—the Lichen Ranch subdivision (also called “Muddy Pass”), a 635-acre inholding with 18 residential homes within the Medicine Bow-Routt National Forest in Grand County, Colorado. **Ex. 2**, p. C-6. Based on that similarly situated property analysis, and applying other relevant criteria, the Forest Supervisor determined that Berlaimont’s planned 19-home development is a “reasonable use” of the Property.

Consistent with ANILCA, the Final EIS states: “Once a proposed land use is determined to be reasonable, the Forest Service must then determine what level of access will be adequate for securing that reasonable use.” Final EIS, p. 6. Following that direction, the Forest Supervisor considered the method of access “adequate to secure the owner reasonable use and enjoyment” of the Property as required by 16 U.S.C. § 3210(a). The Forest Supervisor acknowledged that Alternative 3, the preferred alternative in the Draft EIS, is “adequate access” for the reasonable use of the Property under ANILCA. Draft ROD, p. 3.

Yet the Forest Supervisor *rejected* Alternative 3 and selected Alternative 2, determining that it too satisfies ANILCA. Draft ROD, p. 3. The Forest Supervisor identified impacts to elk and resources on National Forest lands as the basis for his decision to select Alternative 2 over Alternative 3:

My goal in choosing this alternative is to create fewer impacts to NFS lands, resources, and wildlife. In comparison to the other action alternatives, this route does that. . . . The overwhelming concerns about further degradation of elk populations in the area have prompted me to choose the alternative that minimizes impacts to elk as best possible. . . . Ultimately, I decided to choose Alternative 2 because it has the least impacts on NFS lands, and the road alignment avoids crucial winter concentration areas for elk.

Draft ROD, p. 5. It is notable that the Forest Service grounded his decision on “fewer impacts to NFS lands,” although the landscape includes NFS lands, the Property, and other private lands. The Forest Supervisor did not consider the consequences of his decision on non-Forest Service lands and resources, including to the Property itself or to wildlife moving across property lines through the landscape. See Draft ROD, p. 3 (“Alternative 2 will have the least impact to NFS lands Therefore, I will grant a special use authorization for Alternative 2.”). Nor did the Forest Supervisor acknowledge that Alternative 2 and Alternative 3 are materially different

because, given the rugged topography, they require Berlaimont to construct very different access routes over the Property to reach the Property's developable portion to the north.

LEGAL BACKGROUND

I. The Alaska National Interest Lands Conservation Act of 1980

ANILCA requires the Forest Service to provide adequate access to private property that is completely surrounded by National Forest System lands. Congress enacted ANILCA in 1980 to ensure that owners of federal inholdings in National Forest System lands throughout the United States have a right to access their property and to resolve “any lingering legal questions” about an inholder's right to access the private property. See H. Rep. No. 95-1045, pt. 1, at 213 (1978). The relevant section of ANILCA states:

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, ***the Secretary shall provide*** such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems ***adequate to secure to the owner the reasonable use and enjoyment thereof***: Provided, [t]hat such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

16 U.S.C. § 3210(a) (emphases added). ANILCA thus grants inholders “a threshold ‘right of access to their lands.’” *United States v. Jenks*, 22 F.3d 1513, 1516 (10th Cir. 1994) (quoting *Adams v. United States*, 3 F.3d 1254, 1258–59 (9th Cir. 1993)). ANILCA “commands the Secretary of Agriculture to provide access to secure the owner's reasonable use and enjoyment of the property.” *Adams*, 3 F.3d at 1258–59. The threshold right of access is subject to reasonable regulation by the Forest Service, but “adequate access” “cannot be arbitrarily and capriciously denied.” See 56 Fed. Reg. 27,410 (June 14, 1991) (final rule for ANILCA implementing Forest Service regulations). The provisions of § 3210(a) apply to inholdings within all National Forest System lands, not just National Forest System lands in Alaska. *E.g.*, *Mont. Wilderness Ass'n*,

Nine Quarters Circle Ranch v. United States, 655 F.2d 951 (9th Cir. 1981); Forest Service Manual § 2701.1 – Current Statutory Authorities.

In reviewing whether the Forest Service has complied with ANILCA’s “adequate access” mandate, courts consider first, “what uses of the property are reasonable” and second, “what access is adequate to allow for those reasonable uses.” *High Country Citizens’ All. v. U.S. Forest Serv.*, 203 F.3d 835 (10th Cir. 2000); *Nelson v. United States*, 64 F. Supp. 2d 1318, 1324 (N.D. Ga. 1999) (same principle). What is “adequate access” thus depends on the inholder’s proposed use of its property. See H. Rep. No. 96-97, pt. 1, at 240 (1979). “[T]he form of access which is adequate to provide access to a recreational cabin is far different from the access needed to move equipment into or bring ore out of a valid mining claim.” See H. Rep. No. 96-97, at 240; see also *Adams*, 3 F.3d at 1259–60 (“Reasonable access for the general public to hunt, fish, or camp may be unreasonable when applied to the [landowners] who need year-round access sufficient to operate a ranch.”). Congress directed the Forest Service to consider safety in its analysis. See H. Rep. No. 96-97, at 240 (“The Committee recognizes that such rights may include the right to traverse the Federal land with aircraft, motor boats, or land vehicles, and to use such parts of the Federal lands as are necessary to construct **safe routes** for such vehicles.”) (emphasis added).

Under federal judicial decisions reviewing Forest Service ANILCA decisions, it is not enough for the Forest Service to provide an inholder with access that is “adequate” across the National Forest that terminates at a location at the private property that is not adequate to secure the reasonable use of the property. To allow “reasonable use” of the inholding as required by section 3210(a), the route *on the inholding* must also be “adequate” where the location of that linear route is determined by the route chosen by the Forest Service. See *Nelson v. United States*,

64 F. Supp. 2d 1318, 1324–25 (N.D. Ga. 1999) (holding that Forest Service acted unlawfully by providing access that was not “adequate” because the agency-approved route did not connect to the developable part of the inholding but at a location that would require construction of a “zigzag” road up a steep hillside to access the developable interior of the inholding). In *Nelson*, the court observed in setting aside the Forest Service’s adequate access determination, that the agency violated Forest Service regulations by equating “adequate access” with “any access.” 64 F. Supp. 2d at 1325. The court further stated that the Forest Service unlawfully ignored the fact that the access route it authorized over Forest Service lands terminated at a location that required the owner of the inholding to construct inadequate access on the private lands. The court ruled that the Forest Service’s chosen route “was arbitrary and capricious because the Forest Service failed to consider whether [the route] constituted adequate access, ***particularly where it crosses private property.***” *Id.* at 1324 (emphasis added).

Another federal court ruled the Forest Service violated its statutory duties under ANILCA when it refused to grant motorized access to an inholding within the Boundary Waters Canoe Area Wilderness. There, the Forest Service informed the owner of the inholding that he could access the inholding by canoe, and by portaging the canoe over a mile along an overgrown, closed road. *Breaker v. United States*, 977 F. Supp. 2d 921, 930 (D. Minn. 2013). The *Breaker* court cited *Nelson* and ruled that that the agency violated ANILCA: “[t]he Forest Service acted arbitrarily and capriciously by conflating the ‘any access’ standard with that of ‘adequate access,’ and by failing to consider facts that may support a determination of inadequate access.” *Breaker*, 977 F. Supp. 2d at 940.

The rulings in *Nelson* and *Breaker* apply the obvious and rational interpretation of the adequate access requirement of ANILCA. The ANILCA Determination appended to the Final EIS references the *Nelson* and *Breaker* rulings and states the following adequate access test:

Access that facilitates connectivity to the usable part of the Berlaimont property is necessary. ... Consequently, any access route that does not facilitate connectivity to the useable part of the property would be nonfunctional and insufficient, and, therefore inadequate. This approach – carefully distinguishing between ‘adequate access’ versus ‘any access’ – is supported by previous case law.

Ex. 2, ANILCA Determination, pp. C-13 (citations omitted). The adequate access test the Forest Service stated in the ANILCA Determination substitutes “facilitate connectivity to the useable part of the property” for the statutory phrase “secure to the owner the reasonable use and enjoyment” in 16 U.S.C. § 3210(a). Nonetheless, that is the test the Forest Service identified in the Final EIS.

An access route – such as a road – is linear, and the Forest Service must consider all of it – on Forest Service lands and on the inholding – in determining whether it is adequate or inadequate “to secure to the owner the reasonable use and enjoyment” of the inholding under the plain text of 16 U.S.C. § 3210(a). The Forest Service determination of “adequacy” cannot ignore the fact that the access selected across Forest Service lands necessarily dictates the route within the inholding, particularly where topography and property lines constrain that access, and the chosen route does not connect to the developable part of the inholding. See *Nelson*, 64 F. Supp. 2d at 1324; *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985 (ruling that federal agency could not overlook the consequences of its decision because it would “wear blinders that Congress has not chosen to impose”).

II. Forest Service Regulations

The Forest Service adopted regulations to implement ANILCA's mandate that the agency provide "adequate" access to inholdings within National Forest System lands. *See generally* 36 C.F.R. § 251, Subpart D. The regulations provide that "landowners shall be authorized such access as the authorized officer deems to be adequate to secure them the reasonable use and enjoyment of their land." 36 C.F.R. § 251.110(c). The authorized officer "shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria." 36 C.F.R. § 251.114(a). "Access" means "the ability of landowners to have ingress and egress to their lands." 36 C.F.R. § 251.111. "Adequate access" is "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 that minimizes damages or disturbances to National Forest System lands and resources." 36 C.F.R. § 251.111.

ARGUMENT

The Regional Forester should set aside the Forest Supervisor's selection of Alternative 2 because it denies Berlaimont the statutorily required "adequate access" for the reasonable use of the Property. Having appropriately and rationally determined that Berlaimont's planned 19-home development is a "reasonable use" of the Property, *see Ex. 2*, ANILCA requires the Forest Supervisor to provide "adequate access" on Forest Service lands *and* on the Property to "secure" that "reasonable use" because the route chosen by the Forest Service in this mountainous location determines the route on the Property. Alternative 2 would functionally prevent *any* use of the Property because it does not connect to the developable part of the Property, does not secure to Berlaimont the reasonable use and enjoyment of the Property, and does not even

facilitate connectivity to the developable part of the Property. Alternative 2 is inadequate because it requires construction of a hazardous zigzag road up a steep ridge that is not feasible, is unnecessarily impactful, and exceedingly dangerous.

The Forest Supervisor's determination to select Alternative 2 is arbitrary and capricious because the Draft ROD incorrectly concluded that Alternative 2 would cause less impact than Alternative 3 (when the opposite is true) and because it failed to consider the barriers to construction and the substantial safety risks and hazards of Alternative 2. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (an agency decision is unlawful if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

The Regional Forester should direct the Forest Supervisor to select Alternative 3 because that alternative connects to the developable part of the Property and provides "adequate" access for the reasonable use of the Property, as the Forest Supervisor acknowledged. Draft ROD, p. 3. Alternative 2 does not. Alternative 3 is safer, less impactful to the WRNF and the surrounding environment, avoids the unnecessary hazards of Alternative 2, and complies with ANILCA, Forest Service regulations, and the Forest Service's own analysis in the FEIS.

I. The Forest Service's determination that Berlaimont's proposed use is a "reasonable use" is well-reasoned and supported by the record.

A. The reasonable use determination will withstand legal challenge.

The Forest Service correctly concluded that Berlaimont's proposed development is a "reasonable use" of the Property. *See Ex. 2*, ANILCA Determination, pp. C-11 to -12. In determining that Berlaimont's proposed development is a "reasonable use," the Forest Service

properly identified the provisions of the federal statute and the regulations it is required to consider. **Ex. 2**, pp. C-2 to -4. The Forest Service thoroughly and extensively analyzed 23 potentially similarly situated properties to conclude that Berlaimont’s proposed use is a “reasonable use” of the land. *See* 36 C.F.R. § 251.114(a) (“The authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria.”).

In making this determination, the Forest Supervisor considered a comprehensive set of factors such as property and parcel size, whether the properties were true inholdings, proximity to paved roads, proximity to deer and elk ranges, and the nature of the surrounding federal lands. *See Ex. 2*, pp. C-5 to -6. The Forest Service also considered other relevant criteria such as the character of the Edwards-Avon-Vail metro area, and state and local government laws and decisions. After consideration of these factors, the Forest Service determined that Berlaimont’s planned development is a “reasonable use” of the Property pursuant to 36 C.F.R. § 251.114(a).¹ **Ex. 2**, pp. C-11 to -12. The Forest Service’s determination that Berlaimont’s proposed development is a reasonable use of the inholding for purposes of ANILCA is thorough, well-reasoned, and amply supported by the record. *See Ex. 2*, pp. C-1 to -22 and accompanying maps.

Appendix C of the Final EIS documents the agency’s exhaustive analysis that underlies the Forest Supervisor’s conclusion in the Draft ROD that Berlaimont’s proposed 19 ultra-low-density year-round homes is a reasonable use of the Property for purposes of ANILCA. **Ex. 2**,

¹ After considering criteria such as property size, distance to paved roads, whether the property is a true inholding, and others, the Forest Service determined that the Lichen Ranch subdivision located in Grand County, Colorado is “similarly situated” to the Property. *See Ex. 2*, pp. C-4 to -6. The Forest Service did not, however, analyze the terrain either on or surrounding the Lichen Ranch inholding. The access provided to Lichen Ranch is essentially flat.

pp. C-4 to -8. In reaching that conclusion, the Forest Supervisor considered ANILCA, Forest Service regulations, and federal judicial decisions applying ANILCA. **Ex. 2**, pp. C-1 to -22. The Forest Supervisor came to the well-reasoned and supported decision that:

The “other relevant criteria” examined in Section III.B further show that the proposed use (a) is consistent with human activities on and around NFS lands within the I-70 viewshed, (b) is consistent with the character of other upscale residential developments in the Edwards-Avon-Vail area, (c) is consistent with regards to proximity to Severe Winter Range and Winter Concentration Areas for mule deer and elk, (d) offers a lower proposed density of development than other nearby developments currently sharing a property boundary with NFS lands, (e) anticipates a water supply infrastructure wherein no facilities will be constructed on NFS lands, and (f) is consistent with Colorado statutory law and Eagle County zoning regulations.

Thus, based on findings in Sections III.A and III.B that demonstrate both precedent and consistency, ***the applicant’s proposed development is a reasonable use of their private property.***

Ex. 2, p. C-11 (emphasis added).

The logic of that determination is further confirmed by the multiple high-density residential developments in the near vicinity of the Property. See **Ex. 13**, Presentation to Board of County Commissioners, at 80–128.

The Forest Service made an independent determination regarding the reasonable use of the Property, as required by judicial decisions applying ANILCA. See *Colo. Wild, Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1227 & n.15 (D. Colo. 2007) (finding that the Forest Service must undertake its own “reasonable use and enjoyment” determination and may not “rubber stamp[] whatever use the landowner” or county determines is reasonable). The Forest Service’s decision that Berlaimont’s planned use is “reasonable” is thoroughly analyzed and well-supported. See 16 U.S.C. § 3210(a); *High Country Citizens’ All.*, 203 F.3d 835 (holding that the “Forest Service must determine: (1) what uses of the property are reasonable; and (2) what

access is adequate to allow for those reasonable uses”). For those reasons, the Forest Service’s reasonable use determination will withstand judicial scrutiny.

B. The Forest Service cannot select the “No Action” alternative without also violating ANILCA.

Given the Forest Supervisor’s thorough and rational reasonable use determination, ANILCA imposes a mandatory, non-discretionary duty on the agency to provide Berlaimont access that “secures” to Berlaimont that same reasonable use. 16 U.S.C. § 3210(a). Here, despite what special interest opposition groups may argue, under existing conditions the Property and proposed homesites are not accessible year-round. The existing Forest Service dirt roads are closed half the year to vehicles and do not provide access to passenger vehicles in their current state. The Forest Supervisor correctly concluded that Berlaimont must have access that: (1) facilitates connectivity to the usable portion of the Property; (2) is accessible year-round for highway-legal, wheeled vehicles because the homes will be year-round residences; and (3) is snowplowed in the winter months. **Ex. 2**, pp. C-13 to C-14. The Forest Supervisor concluded that it “would be unreasonable to limit access to such development to only over-the-snow (OSVs) or non-motorized means for several months each year” because Berlaimont has the “potential to *serve as residents’ year-round primary residences.*” **Ex. 2**, p. C-13 (emphasis added). The Forest Supervisor appropriately and rationally determined that year-round access for highway-legal vehicles must be paved. **Ex. 2**, p. C-13. “[T]he types of motor vehicles that are reasonably expected to access such residences are different than the types of vehicles considered reasonable for accessing a recreational cabin, hunt camp, or other type of primitive-type dwelling unit.” **Ex. 2**, p. C-13.

The Forest Supervisor’s independent reasonable use determination is amply supported by ANILCA, Forest Service regulations, relevant case law, and the analysis in the Final EIS. *E.g.*,

16 U.S.C. § 3210(a); 36 C.F.R. §§ 251.111, 251.114(a). Despite what third parties may allege, Berlaimont residents cannot be required to snowshoe, cross-country ski, or walk the more than three miles and over 1,000 feet of elevation gain it would take to access the Property in the winter months. *See Breaker v. United States*, 977 F. Supp. 2d 921, 940 (D. Minn. 2013) (ruling that the Forest Service violated ANILCA “by conflating the ‘any access’ standard with that of ‘adequate access,’ and by failing to consider facts that may support a determination of inadequate access”). Such difficult access is not “adequate access” for 19 homes, and a selection of the No Action alternative or an unpaved access route would certainly be overturned upon judicial review. *Breaker*, 977 F. Supp. 2d at 940 (finding that access by a “narrow and faint trail, overgrown with trees and brush” is not adequate access even though it is “possible” to access the property by that means). The Regional Forester should uphold the Forest Supervisor’s determination of reasonable use, and uphold the determination that the access must be a paved and snowplowed road that connects to the usable portion of the Property. The Regional Forester should reject any attempt to assert that Berlaimont already possesses adequate access to the Property.

II. The Forest Service violated ANILCA and its own regulations by providing inadequate access for the reasonable use of the Property.

A. ANILCA does not permit the Forest Service to provide inadequate access for the reasonable use of the Property.

Having made the independent and well-reasoned determination that Berlaimont’s proposed building of 19 homesites is a reasonable use of the Property, the Forest Service is required by the statute to provide access that “secures to” Berlaimont the reasonable use of the Property. 16 U.S.C. § 3210(a). This statutory mandate is unambiguous and means that the Forest Service must do more than simply provide access to *any* portion of the Property. *See* 16

U.S.C. § 3210(a); *see also United Keetoowah Band of Cherokee Indians of Okla. v. U.S. Dep't of Hous. & Urban Dev.*, 567 F.3d 1235, 1240 (10th Cir. 2009) (“If Congress has spoken directly to the issue, that is the end of the matter; the court, as well as the agency, must give effect to Congress’s unambiguously expressed intent.”). If the route selected by the Forest Service provides access to a portion of the Property that is not useable and cannot support access to the 19 homesites, that access is not adequate and violates the plain language of the statute because it does not “secure to the owner the reasonable use and enjoyment” of the Property within the meaning of 16 U.S.C. § 3210(a). *See Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) (noting that if the agency’s interpretation “violate[s] Congress’s precise instructions or exceed[s] the statute’s clear boundaries,” then “the agency’s interpretation is unlawful”).

1. Alternative 2 violates ANILCA because it does not provide “adequate access.”

The Forest Supervisor’s selection of Alternative 2 in the draft ROD does not “secure to” Berlaimont the reasonable use of the Property to develop 19 homes. The Forest Supervisor cannot read the “secure to” language out of the statute. Alternative 2 connects to the Property at its unusable, undevelopable eastern leg. To connect to the site of the identified reasonable use, Berlaimont must:

- blast a road up a narrow segment of the Property along a steep ridgeline;
- construct seven small-radius switchbacks “where there is a heightened risk for an injury or fatality resulting from a runoff the road crash,” **Ex. 9**, p. 5;
- build “roadway at maximum allowable grade” leading to “more vehicles leaving the roadway, particularly when icy conditions exist, resulting in a greater number of rescues,” **Ex. 20**, p. 2;

- build over 117,000 square feet of retaining walls up to nearly 60 feet tall and 10,000 feet of guardrail to prevent drivers from plunging off the road, **Ex. 8**, p. 2, **Ex. 9**, p. 3; and
- create an access route that is not adequate for “responding fire resources, and egress by evacuating community members,” **Ex. 20**, p. 2.

All of these factors are wholly unnecessary and avoidable, and do not exist with Alternative 3.

The Forest Supervisor is not permitted to ignore the “secure to” language of ANILCA in providing access over the Forest Service lands that does not connect to the developable part of the Property and, because of the topography, dictates inadequate access on the private lands. The statute requires the Forest Service to provide access over Forest Service lands to a location on the private lands that secures to Berlaimont the reasonable use of the Property. *Nelson v. United States*, 64 F. Supp. 2d 1318, 1324 (N.D. Ga. 1999) (ruling that “the Forest Service’s denial of plaintiff’s Special Use Application was arbitrary and capricious because the Forest Service failed to consider whether [the route] constituted adequate access, ***particularly where it crosses private property.***”) (emphasis added)).

The Forest Supervisor’s selection of Alternative 2 provides inadequate access because the statute does not authorize the agency to select access that may appear “adequate” on Forest Service lands but that does not connect to the developable part of the Property, does not secure to Berlaimont the reasonable use and enjoyment of the developable part of the Property, and that is “inadequate” on the inholding for the reasonable use of the Property.

Alternative 2 is also inadequate under the adequacy test stated in the ANILCA Determination attached to the Final EIS. The ANILCA Determination states: “any access route that does not facilitate connectivity to the useable part of the property would be nonfunctional

and insufficient, and, therefore, inadequate.” **Ex. 2**, ANILCA Determination, pp. C-13.

Alternative 2 does not facilitate connectivity to the useable part of the Property, nor connect directly to it. Alternative 2 connects to the Property at a location that requires construction of a dangerous, arbitrary, unsafe, and hazardous road within the inholding wholly inadequate for the planned 19 homes (and which the County may withhold approval of for the same reasons).

Alternative 2 is “nonfunctional and insufficient, and, therefore, inadequate” under the adequacy test stated in the ANILCA Determination. **Ex. 2**, ANILCA Determination, pp. C-13.

2. *Nelson v. United States confirms that the access must be adequate within the inholding.*

The agency’s decision in *Nelson* (which the court vacated as unlawful) is strikingly similar to the Forest Supervisor’s selection of Alternative 2 in the draft ROD here, and the Forest Service will likely receive the same result if it does not select Alternative 3. *See* 64 F. Supp. 2d 1318. In *Nelson*, an individual owned a 69-acre inholding in mountainous terrain surrounded by Forest Service lands. The owner proposed to construct three cabins in a developable area of the inholding, nearly 1,000 feet higher in elevation than the lowest part of the inholding. There were two alternate routes: “the Brasstown Wagon Road and the Yewell Cove Road.” *Id.* at 1320. The owner requested access to the developable part of the inholding by way of the existing but closed Brasstown Wagon Road over Forest Service lands. *Id.* Brasstown Wagon Road provided direct access to the planned cabin locations in the developable part of the private inholding. The Yewell Cove Road provided an alternate access point to the private inholding, but only to 2 to 4 acres of private land at a location 1,000 feet lower in elevation from the location of the cabins, and separated from the developable location by steep slopes, rock formations, and cliffs. Substantial blasting and earthwork would be necessary on the inholding to extend Yewell Cove Road within the inholding to the developable portion of the inholding. *Id.* at 1320–21.

The Forest Service determined that the owner's proposed three cabins was a reasonable use of the inholding under agency regulations. 64 F. Supp. 2d at 1324. But the Forest Service rejected the Brasstown Wagon Road route that connected directly with the location for the cabins. Instead, the Forest Service selected the Yewell Cove Road, which connected to the inholding at a location 1,000 feet lower in elevation than the planned cabins, and which required switchbacks, blasting, and earthworks to construct road up to the planned cabins. *Id.*

The district court ruled that the Forest Service violated the agency's own ANILCA access regulations and vacated the decision. The court held that Yewell Cove Road did not provide "adequate access" to the inholding because that road terminated within the inholding at the base of a rock cliff rather than at the developable part of the private property. The court noted that, in order to make "reasonable use" of the property using Yewell Cove Road, the inholder would need to conduct substantial blasting and drilling through rock to construct a "zigzag" road up steep slopes on the inholding to reach the developable portion of the property. *Id.* at 1325.

The court ruled that the Forest Service violated its mandatory nondiscretionary duties under the statute and agency regulations by equating "any access" to the property with "adequate access" "to secure" "reasonable use" of the inholding. *Id.* ("This standard is higher than the 'any access' test that the Forest Service is relying upon.").

The *Nelson* court observed that the Forest Service's duty to provide adequate access does not stop at the border of the inholding. The court ruled that the agency unlawfully failed to provide adequate access along its entire route, including within the inholding: "the court rules that the Forest Service's denial of the plaintiffs' Special Use Application was arbitrary and capricious because the Forest Service failed to consider whether Yewell Cove Road constituted adequate access, **particularly where it crosses private property.**" *Id.* at 1324 (emphasis added).

3. *The Forest Supervisor made the same error as in Nelson v. United States.*

The Forest Supervisor here committed the **identical error** in the Draft ROD that the Forest Service committed in *Nelson*. The same problems that made Yewell Cove Road inadequate in *Nelson* make Alternative 2 inadequate in this matter. The Forest Supervisor granted “any access” to the closest point of Berlaimont’s Property, not “adequate access” mandated by ANILCA:

- As in *Nelson*, the WRNF granted access not to the developable part of the Property but to only a small portion of the Property which was separated from the developable portion by a steep ridge;
- As in *Nelson*, to secure the approved “reasonable use” of the Property, Berlaimont would need to construct a road within the inholding by blasting and drilling to access the usable portion of the Property;
- As in *Nelson*, Berlaimont would need to construct a new “zigzag” road up a steep ridge line within the inholding, requiring a large disturbance of earth, rocks, and trees;
- As in *Nelson*, the developable part of the inholding is 1,000 feet higher in elevation than the point where the access road first touches the inholding;
- As in *Nelson*, the “Forest Service did not consider whether [the road] provided adequate access outside of Forest Service property,” *id.* at 1324 (emphasis added); and
- As in *Nelson*, the Forest Supervisor failed to recognize that the access is inadequate “**particularly where it crosses private property**,” *id.* (emphasis added).

If the Forest Service’s final ROD selects Alternative 2, a district court will vacate that decision (as in *Nelson*) because Alternative 2 is “any access” rather than “adequate access.” *See also Breaker v. United States*, 977 F. Supp. 2d 921, 940 (D. Minn. 2013) (relying on *Nelson* and ruling that the Forest Service violated ANILCA “by conflating the ‘any access’ standard with that of ‘adequate access,’ and by failing to consider facts that may support a determination of inadequate access.”).

4. *Alternative 2 would functionally prevent Berlaimont from using the Property.*

The Forest Service’s ANILCA Determination stated that the Forest Service must provide adequate access to the Property, which means “[a]ccess that ***facilitates connectivity to the usable part of the Berlaimont property*** is necessary” and that an “access route that does not facilitate connectivity to the useable part of the property would be ***nonfunctional and insufficient, and, therefore, inadequate.***” **Ex. 2**, ANILCA Determination, pp. C-13 (emphases added).² As part of the ANILCA Determination, the Forest Service correctly determined that “adequate access” means paved year-round access for highway-wheeled vehicles because the homes will be year-round homes and the “types of motor vehicles that are reasonably expected to access such residences are different than the type of vehicles considered reasonable for accessing a recreational cabin, hunt camp, or other primitive-type dwelling unit[s].” **Ex. 2**, pp. C-13 to -14.

Despite that, the Forest Supervisor violated 16 U.S.C. § 3210(a) because he chose, without a reasoned explanation, an alternative that does not connect at all to the developable part of the Property, does not secure to Berlaimont the reasonable use of the Property, and that will *inhibit and obstruct* access to it. Alternative 2 is unsafe and creates multiple unnecessary hazards. The record evidence and opinions of experts identify that compared to Alternative 3, Alternative 2 is unsafe, impracticable, and provides inadequate access to the Property because:

- “Alternative 2 locates the community’s roadway within an area comprised of more volatile fuel and severe slopes. The combination of greater fuel volatility in alignment with steeper slopes creates the potential for fire activity that prevents access by responding fire resources, and egress by evacuating community members.” **Ex. 20**, Eagle River Fire Protection District Analysis, p. 2.

² The Forest Service’s ANILCA Determination states that Eagle County’s approval of and granting of variances to Berlaimont for Alternative 3 does not require the Forest Supervisor to approve Alternative 3. See **Ex. 2**, p. C-10. But the ANILCA Determination does not address the fact that it is entirely speculative, and doubtful, that Eagle County will grant the necessary variances for the construction of Alternative 2 based on the public safety concerns of the road design identified in pages 16-18, *supra*.

- Alternative 3 provides a safer access route from a fire and emergency vehicle response and citizen evacuation perspective because “[n]arrow roads, steep grades, soft shoulders, and hairpin turns which are more prevalent in Alternative 2 than Alternative 3 can all contribute to reduced response times and the potential increase to fire apparatus accidents.” See **Ex. 11**, Anchor Point Fire Safety Analysis, p. 1.
- Alternative 3 provides a safer roadway due to (1) reduced travel time for emergency vehicles, (2) alignment with fewer minimum-radius curves and conflict points, (3) less roadway distance at a sustained maximum grade, (4) less guardrail, (5) less rock excavation and blasting, (6) less road icing caused by high retaining walls in critical locations; (7) more emergency pullouts; (8) reduced long-term slope stability concerns, and (9) a simpler road alignment with fewer opportunities for driver error. See **Ex. 9**, Kimley-Horn Traffic Safety Analysis, pp. 3–5.
- Alternative 3 will (1) substantially reduce the amount of disturbance to the overall landscape, (2) reduce the length of guardrails to 5,000 linear feet from 10,000 linear feet for Alternative 2, (3) require 2.5 times less retaining walls, (3) cut in half the total length of road that traverses terrain greater than 40% in slope, and (4) utilizes existing road corridors to reduce construction of new roads. See **Ex. 8**, Alpine Engineering Analysis, pp. 2–4.

Alternative 3 was identified through a public process conducted with Eagle County at the specific direction of the Forest Supervisor. It emerged after comprehensive study in that public process as the only route approved by Eagle County and represents the only access adequate to secure the “reasonable use” of the Property. In the preamble to the ANILCA implementing regulations, the Forest Service “agree[d] that [ANILCA] prevents the use of the current regulations to totally deny access.” See 56 Fed. Reg. at 27, 412. Here, no other adequate access exists because Eagle County approved only one route and, due to the factors discussed above, likely would not approve variances necessary to construct Alternative 2. See **Ex. 6**, Berlaimont Variance from Improvement Standards submitted to Eagle County, July 2013. Forest Supervisor Fitzwilliams instructed Berlaimont to go to the County to see “what the county will allow” before the Forest Service would initiate its NEPA review process. See **Ex. 5**, Nov. 9, 2009 Email to Michael English. After completing that extensive multi-year public County process, Forest

Supervisor Fitzwilliams denied the only access deemed “adequate” by the Eagle County Board of County Commissioners. See **Ex. 7**, Eagle County Resolution, pp. 1–2. The Forest Supervisor’s action is perplexing and arbitrary, particularly given the substantive evaluation that Berlaimont and others devoted to studying wildlife, fire safety, engineering, geology, soils, road design, and emergency egress and ingress, which led Eagle County to approve Alternative 3 and the Forest Service itself to choose Alternative 3 as the “preferred alternative” in the Draft EIS.

B. The Forest Service violated its own ANILCA regulations.

The Forest Service’s ANILCA regulations require the agency to provide “adequate access” to the Property, defined as “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. It is axiomatic that the Forest Service, like any federal administrative agency, “is not free to ignore or violate its regulations.” *Nat’l Env’t Dev. Ass’n’s Clean Air Project v. Env’t Prot. Agency*, 752 F.3d 999, 1011 (D.C. Cir. 2014) (quotation omitted). The Forest Supervisor here violated the regulations in three related but distinct ways.

1. *The Forest Supervisor violated the regulations by selecting an alternative that does not provide adequate access for the reasonable use of the Property.*

The Forest Service’s ANILCA regulations—like the statute they implement—require the agency to provide access “for reasonable use and enjoyment of the non-Federal land.” 36 C.F.R. § 251.111. The regulations provide that “landowners shall be authorized such access as the authorized officer deems to be adequate to secure them the reasonable use and enjoyment of their land.” 36 C.F.R. § 251.110(c). The regulations mandate that “access” must be adequate not only to the inholding, but within it for the identified reasonable use, because they define “access” as the “ability of landowners to have ingress and egress to their lands.” 36 C.F.R. § 251.111. That

regulation requires the Forest Supervisor to ensure that the access route within the Property is adequate for the landowner's "ingress and egress." *Id.*

The Forest Supervisor here failed to provide the "adequate access" for the landowners' "ingress and egress to their lands" for the "reasonable use and enjoyment" of the Property mandated by 36 C.F.R. §§ 251.110(c) and 251.111. The difficulty and hazards of the ingress and egress via a zigzag road selected by the Forest Supervisor violates the agency's non-discretionary duty in 36 C.F.R. §§ 251.110(c) and 251.111 to provide adequate access that secures to Berlaimont the reasonable use and enjoyment of the Property. By selecting Alternative 2, rather than Alternative 3, the Forest Supervisor violated the "adequate access" requirements of the regulations for all the same reasons that he violated the "adequate access" requirements of the statute, 16 U.S.C. § 3210(a), explained above in Part II.A.

2. *The Forest Supervisor violated the regulations by elevating the regulatory objective to minimize disturbance to National Forest System lands to supersede the requirement to provide adequate access for the reasonable use of the Property.*

The Forest Supervisor's primary rationale for selecting Alternative 2 rather than Alternative 3 was to comply with the regulatory requirement to minimize impacts to National Forest System lands, resources, and wildlife. See Draft ROD, p. 5 ("My goal in choosing this alternative is to create fewer impacts to NFS lands, resources, and wildlife."). That rationale violates the regulations because it disregards the regulatory (and statutory) duty to provide adequate access for the reasonable use of the inholding. The regulations do not direct the agency to achieve only one of the objectives of the regulation—the alternative that creates "fewer impacts to NFS lands, resources, and wildlife." The regulations require the Forest Service to select an access route that accomplishes all three objectives: (i) adequate access, (ii) for the reasonable use and enjoyment of the inholding, **and** (iii) that minimizes damage or disturbance to

NFS lands and resources. 36 C.F.R. §§ 251.111, 251.114(a). The Forest Supervisor violated the regulations by selecting an alternative he perceived to achieve the regulatory goal of minimizing damage or disturbance to NFS lands and resources without also achieving the additional non-discretionary regulatory goals of providing “adequate access” for the “reasonable use and enjoyment” of the Property.

3. *The Forest Supervisor violated the regulations by selecting the alternative with greater impacts to elk.*

The regulations require the agency to “minimize the impacts on the Federal resources” and “minimize[] damage or disturbance to National Forest System lands and resources” in providing the “adequate access” for the “reasonable use and enjoyment” of the inholding guaranteed by the regulations (and by the statute). 36 C.F.R. §§ 251.111, 251.114(a). The Forest Supervisor identified wildlife, particularly elk, as the principal Federal resource that he acted to protect in selecting Alternative 2 rather than Alternative 3. See Draft ROD, pp. 4–5. Wildlife, including elk, are not stationary; they move within and across the landscape. By selecting Alternative 2, the Forest Supervisor violated the regulatory command he sought to achieve—minimize the impacts on the Federal resources—by issuing a decision that will result in the construction of a seven-switchback access road with over 116,000 square feet of retaining walls up to 60 feet in height, and 10,000 linear feet of guardrail, up a narrow ridgeline between two identified areas of elk winter range.

For these reasons, Alternative 2 “would have the greatest direct impact to elk winter range and severe winter range habitats when compared to Alternative 3.” See **Ex. 11**, SWCA Wildlife Impact Analysis, pp. 3, 10 (map of Property and elk winter range). Alternative 2 will create a significant barrier to those elk, the very Federal resource the Forest Supervisor sought to protect, because the “road sections on the steeper slopes would prevent movement of animals

across the landscape, limit access to winter forage, and could create ‘a ***complete barrier to local animal movements.***’” See **Ex. 11**, p. 5 (quoting the Biological Assessment, pp. 32–33). The SWCA Wildlife Impact Analysis notes that the Environmental Impact Report submitted to Eagle County, which the Forest Service had before it when it prepared the Final EIS, “goes on to identify that these barriers would be exacerbated by guard rails, deep snow on cut and fill slopes, and areas with extensive retaining walls,” resulting in “increased energetic costs and reduced availability of winter elk range if elk are unable to move from one habitat patch to another.” **Ex. 11**, p. 5. The SWCA analysis finds that the “FEIS failed to recognize and acknowledge these likely impacts and resulted in a finding that is not supported by the data or analysis” and that the Forest Service’s own FEIS analysis “acknowledged that ***Alternative 2 would result in fragmentation of an area in winter range and severe winter range, between concentration areas, that could otherwise be left intact.***” **Ex. 11**, p. 6.

The Forest Supervisor violated the regulatory requirement in 36 C.F.R. § 251.114(a) to “minimize the impacts on the Federal resources” by selecting the Alternative with greater impacts to elk and wildlife.

C. A federal court will not defer to the Forest Supervisor’s interpretation that the ANILCA adequate access obligation applies solely on Forest Service lands.

A court will not defer to the Forest Supervisor’s interpretation that the agency may select a route that dictates inadequate access on the inholding if the agency believes it minimizes impacts to Forest resources. Under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), a court may defer to an agency’s reasonable interpretation of a statute that the agency administers if the statute is silent or ambiguous. But a court will not defer where, as here, “the statute’s meaning is unambiguous.” *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 28 (D.C. Cir. 2019).

1. *The statute is not ambiguous.*

ANILCA could hardly be clearer: Congress directed the Forest Service to provide an inholder “access adequate to secure to the owner the reasonable use and enjoyment” of the inholding. 16 U.S.C. § 3210(a). Forest Service regulations implementing ANILCA’s mandate do little more than repeat ANILCA’s terms. See 36 C.F.R. § 251.111 (“Adequate access means 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.”).

Under the statute, the Forest Service has no discretion to select an access route that is inadequate based on a belief that the route reduces effects on resources (especially when that concern is unsupported by the thorough analysis in the Final EIS). A reviewing court will not accept the Forest Supervisor’s construction of the statute because it attempts to shoehorn into the plain text an option to select inadequate access if the agency believes it minimizes effects on wildlife.

Nor will a court defer to the Forest Supervisor’s belief that ANILCA’s “adequate” access mandate applies only on Forest Service lands, and is not relevant or applicable to the access on the private inholding. The statute requires that the access be “adequate to secure to the owner the reasonable use and enjoyment” of the inholding. 16 U.S.C. § 3210(a). Plainly, as the District of Colorado ruled, the “reasonable use and enjoyment” element requires the Forest Service to make an independent determination of the reasonable use of the private lands. *Colo. Wild, Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1227 & n.15 (D. Colo. 2007). Having determined that Berlaimont’s planned development is a “reasonable use” of the Property, the statute does not permit the Forest Service to select an alternative that, while arguably “adequate” on Forest

Service lands, is inadequate on the private lands, because that route does not “secure the reasonable use” of the inholding as required by ANILCA. *Nelson*, 64 F. Supp. 2d at 1324 (ruling that the Forest Service failed to consider whether [the route] constituted adequate access, ***particularly where it crosses private property***” (emphasis added)). The Forest Supervisor’s apparent belief that ANILCA requires him only to select a route that is adequate on Forest Service lands, and that does not connect to the developable part of the Property, defies and ignores the unambiguous text of the statute (access adequate “to secure” reasonable use), and a court will reject it. *Chevron*, 467 U.S. at 842–43 (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

2. *A federal court will not accept the Forest Supervisor’s interpretation of ANILCA.*

Even if a court determines that ANILCA is silent or ambiguous (it is not) about whether the access need be “adequate” on the inholding “to secure to the owner the reasonable use and enjoyment” of the Property, a court will not defer to the Forest Supervisor’s position under the second step of the *Chevron* analysis because that position is “arbitrary, capricious, [and] manifestly contrary to the statute.” *New Mexico v. Dep’t of the Interior*, 854 F.3d 1207, 1221 (10th Cir. 2017) (quotation omitted).

Simply put, an access road is a linear feature and the statute commands that it be “adequate” “to secure” to the owner the “reasonable use and enjoyment” of the identified development. 16 U.S.C. § 3210(a). That requires the access on Forest Service lands to connect to the useable portion of the inholding, taking into account topography and the constraints of property lines, on both Forest Service and private lands. It is plainly unreasonable (and

unlawful) for the Forest Supervisor, having appropriately determined the reasonable use of the inholding at a location within rugged topography, to put blinders on when it comes to the “adequate access” requirement of the statute, and ignore the obvious inadequacies of the access route as a whole. *See Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 924 (D.C. Cir. 2017) (reversing a Forest Service decision and noting that “[b]linders may work for horses, but they are no good for administrative agencies”). A federal court will not defer to the Forest Supervisor’s apparent belief that the adequate access obligation applies solely on Forest Service lands because it reads out of the statute the obligation that the access must be “adequate to secure to the owner the reasonable use and enjoyment thereof.” 16 U.S.C. § 3210(a); *see also Kennecott Utah Copper Corp. v. U.S. Dep’t of Interior*, 88 F.3d 1191, 1212 (D.C. Cir. 1996) (reversing an agency’s interpretation of a statute under the second step of *Chevron* because the interpretation “lies beyond the bounds of permissible” and “is simply not a reasonable attribution of intent to Congress”).

D. A federal court will not defer to the Forest Supervisor’s interpretation of agency regulations.

Nor will a federal court defer to the Forest Supervisor’s interpretation in the draft ROD of the Forest Service regulations implementing ANILCA’s “adequate access” requirement. The U.S. Supreme Court dramatically restricted judicial deference to agency interpretations of regulations last year in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). The Court instructed federal courts to defer to an agency’s interpretation of its own regulation only if, after “exhaust[ing] all the traditional tools of construction,” the court determines the regulation is “genuinely ambiguous.” *Id.* at 2415 (quotation omitted). If not “genuinely ambiguous,” federal courts will enforce regulations as written without deferring to administrative interpretations such as that offered by the Forest Supervisor in the draft ROD. *Id.*

The pertinent regulation defines “adequate access” as “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. Another regulation provides: “In issuing a special-use authorization for access to non-Federal lands, the authorized officer shall authorize only those access facilities or modes of access that are needed for the reasonable use and enjoyment of the land and that minimize the impacts on the Federal resources.” 36 C.F.R. § 251.114(a).

These regulations are consistent and unambiguous: the Forest Service must provide “adequate access” “needed for” or “that provides for” “reasonable use and enjoyment” of the inholding **and** “that minimize[s] the impacts” or “minimizes damage or disturbance” to Forest Service lands and resources. 36 C.F.R. §§ 251.111, 251.114(a). The regulations direct the agency to select a route that accomplishes all of those objectives (although only “adequate access” and “reasonable use” appear in the statute). The plain text of the regulations do not direct the agency to select an inadequate access route if it minimizes impacts to Forest Service lands and resources. Nor do the regulations permit the Forest Service to select an access route that is inadequate on the inholding for the reasonable use and enjoyment of those lands, as the Forest Supervisor did here in the Draft ROD, if the agency decisionmaker thinks it would minimize damage or disturbance on Forest Service lands.

The regulations are not “genuinely ambiguous” within the meaning of *Kisor v. Wilkie*, 139 S. Ct. at 2414–15, and a reviewing court will enforce them as written and will not defer to the Forest Supervisor’s erroneous interpretation of them. See *Okla. Dep’t Env’t Quality v. Env’t Prot. Agency*, 740 F.3d 185, 194 (D.C. Cir. 2014) (“Although the EPA’s interpretation of

its own regulation is ordinarily entitled to controlling weight, we cannot defer where, as here, the interpretation violates the very statute the agency administers”).

- E. The regulations require the Forest Service to provide an access route that is consistent with the access provided to similarly situated non-Federal land.

Section 251.111 of the regulations instruct the Forest Service to provide “a route and method of access to non-Federal lands . . . consistent with similarly situated non-Federal land.” 36 C.F.R. § 251.111 (emphasis added). In determining what is adequate access to the Property, the Forest Service determined that another inholding within Forest Service land (called Lichen Ranch or Muddy Pass) was a similarly situated non-Federal property. Lichen Ranch is accessed by a road over Forest Service land that has a direct access route with only one switchback and that does not present the safety and engineering challenges present in Alternative 2. See Final EIS Map of Access to Muddy Pass Inholding (attached as **Exhibit 12**). The simplicity of the access to Lichen Ranch, a “similarly situated” property, further confirms that the Forest Supervisor’s selection of Alternative 2 does not satisfy ANILCA. Not one of the 23 separate potentially similarly situated non-Federal lands considered by the Forest Service in its ANILCA Determination involve access with multiple switchbacks squeezed up a narrow ridge with driving hazards, retaining walls, and conflict points as does Alternative 2. See **Ex. 2**, Appendix C ANILCA Determination, (Addendum Map Series – Analysis of Similarly Situated Lands). The Forest Service’s own similarly situated lands analysis underscores the inadequacy of the access chosen here by the Forest Supervisor.

III. The Forest Supervisor’s draft decision choosing Alternative 2 is irrational, contrary to the record, and failed to consider numerous safety and other important issues.

If finalized, the draft ROD’s selection of Alternative 2 would be a textbook example of arbitrary and capricious agency action because it fails to articulate a rational connection between

the selection of Alternative 2 and the extensive evidence that Alternative 2 is infeasible, unduly dangerous, and has substantially more impacts on the WRNF and its resources compared to Alternative 3. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (“[T]he arbitrary and capricious standard focuses on the rationality of an agency’s decisionmaking process.”); *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a **rational** connection between the facts found and the choice made.” (emphasis added)); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (“[A]n ‘[u]nexplained inconsistency’ in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”).

- A. The Forest Service’s primary rationale for selecting Alternative 2—adverse impacts on deer and elk and minimizing disturbance to the White River National Forest—is contradicted by the evidence.

The record leads to the conclusion that, relative to Alternative 3, Alternative 2 will: (1) cause more impacts to wildlife; (2) pose greater danger and unnecessary hazards to residents, guests, and emergency service personnel; and (3) have greater adverse effects to WRNF resources.

1. *Alternative 2 is the most disruptive to deer, elk, and other sensitive species.*

The Forest Supervisor summarized his decision to choose Alternative 2: “Ultimately, I decided to choose Alternative 2 because it has the least impacts on NFS lands, and the road alignment avoids crucial winter concentration for elk.” Draft ROD, p. 5. The Forest Supervisor stated:

Alternative 2 roads avoid elk winter concentration areas and skirt the western edge of elk severe winter range. The Alternative 2 road alignment would fragment less winter range and leave a larger block of winter range intact and effective. Impacts of Alternatives 3 and 4 to habitat are similar, both bisecting an elk winter

concentration area, and essentially creating an island effect to elk with private development to the north, west, and east; however, Alternative 4 would extend the farthest to the west and fragment the largest area of habitat. Both Alternatives 3 and 4 would cause declines to the wintering elk herd. As a result, among the action alternatives, Alternative 2 is the least impactful to wintering elk.

Final EIS, p. 245. This analysis is contradictory to the Final EIS's analysis, the data and analysis provided in the EIR, and the independent expert opinions attached to this objection. *See Exs. 8–11; Ex. 18*, July 2013 EIR.

Contrary to the Forest Supervisor's conclusions, virtually every aspect of the road design for Alternative 2 will make it *more* disruptive and damaging to wildlife habitat, winter foraging, and migration than Alternative 3. Alternative 2 does not, as the Forest Supervisor claimed, "avoid elk winter concentration areas and skirt the western edge of elk severe winter range." Alternative 2 requires construction of switchbacks and retaining walls within elk severe winter range and within elk winter concentration areas mapped by Colorado Parks and Wildlife as shown in the Environmental Impact Report (provided to the Forest Service with Berlaimont's application), and as shown in the attached SWCA Report. *See Ex. 11*, p. 10; *Ex. 18*, Biotic Assessment, p. 30. Much of Alternative 3, on the other hand, would be constructed on existing Forest Service roads contained within a designated utility corridor before following natural topography to reach the Property. *See Ex. 1* – Final EIS Figure 2; *Ex. 16*, Alternative 3 Topographic Map. Much of Alternative 2, in contrast, does not follow an existing roadbed and therefore would require entirely new construction, substantially more excavation, blasting, drilling, cut-and-fill work, and construction of retaining walls nearly 60 feet tall up a ridgeline. *See Ex. 1*, Final EIS Figure 2; *Ex. 17*, Alternative 3 Topographic Map; *see also Ex. 8*, Alpine Engineering Memorandum, Table 1. The Draft ROD incorrectly analyzed the direct impacts to elk and did not evaluate indirect impacts to all types of elk winter range. The Draft ROD cannot

withstand scrutiny on this point because the Forest Supervisor did not evaluate Alternative 2's barrier effects, impacts to wildlife movement corridors, and indirect impact to elk and the functionality of their habitat. *See Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1147 (D.C. Cir. 2005) (setting aside agency action as arbitrary and capricious because "the record in this case shows that the agency entirely failed to consider important aspects of the [] problems before it" and "ignored" evidence contrary to its decision); *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985) (ruling that federal agency could not overlook the indirect environmental effects of its decision because it would "wear blinders that Congress has not chosen to impose").

The attached wildlife expert analysis demonstrates that the Forest Supervisor's analysis is incorrect. *See Ex. 11*, SWCA Wildlife Impact Analysis, pp. 1–8. The analysis concludes that: "The FEIS analysis does not support the decision made in the draft ROD or the summary of impacts [on the elk population] presented in the FEIS." *Ex. 11*, p. 4. The SWCA analysis shows that the Forest Service's determination that Alternative 2 is the least impactful to wintering elk is contradicted by analyses presented in the Final EIS and the July 2013 Berlaimont Environmental Impact Report (EIR), and is not supported by the record, the EIR, or the science. *Ex. 11*, pp. 2–5; *see also Ex. 6. Ex. 11*, pp. 3–5. Significant findings of the wildlife analysis report include:

- "[T]he analyses in the FEIS and EIR suggest that Alternative 2 would result in the largest impacts in both winter range and severe winter range when compared to Alternative 3." *Ex. 11*, p. 6.
- "While Alternative 2 avoids direct impacts to winter concentration areas, the USFS analysis presented on page 244 of the FEIS clearly demonstrates that Alternative 2 would have the greatest impact to elk severe winter range." *Ex. 11*, p. 5.
- "[T]he USFS finding that [Alternative 2] avoids impacts to winter concentration areas only considers the direct impacts to winter concentration areas. Alternative 2 skirts the edge of two winter concentration areas, impacts 11 wildlife movement corridors likely used by elk to move between the winter

- concentration areas, and fragments an area between the two winter concentration areas that the USFS acknowledges ‘could be left intact.’” **Ex. 11**, p. 5.
- “Alternative 2 would bisect 11 known or potential wildlife movement corridors and Alternative 3 would bisect six.” **Ex. 11**, p. 4.
 - “[T]he impacts of the large cut and fill slopes and the heights of the retaining walls [of Alternative 2] would **form an effective barrier preventing movement of elk** between the two winter concentration areas and creating impacts that could exceed those of Alternative 3. **The EIR supports the barrier effect and should been considered in the FEIS analysis.** Pages 32 and 33 of the Biotic Assessment attached to the EIR identifies that road sections on steeper slopes would prevent movement of animals across the landscape, limit access to winter forage, and could create a “**complete barrier to local animal movements.**” **Ex. 11**, pp. 3–4 (emphases added); *see also* **Ex. 11**, p. 7, Figure 2 – Elk Winter Range (from Appendix B to the EIR).
 - “While all alternatives will likely attract elk and other wildlife to the road surface in winter, the USFS analysis did not recognize that increased retaining wall extents and heights, guard rail requirements, and snow removal challenges could create different impacts to animals on the road. Elk and other wildlife that use the Alternative 2 road surface would have limited ability to evade traffic or escape the surface of the road due to the extensive retaining walls and high slopes.” **Ex. 11**, p. 4.
 - “As described in the EIR, because of the size and extent of the cut and fill slopes, retaining walls, and guard rails, Alternative 2 could create a ‘complete barrier to local animal movements’ and result in increased energetic costs and reduced availability of winter range if elk are unable to move from one habitat patch to another. This **fragmentation would exceed the impacts of Alternative 3 and may result in both elk concentration areas becoming islands separated by Alternative 2.**” **Ex. 11**, p. 7 (emphases added).
 - “While the Alternative 3 alignment does travel through the edge of a winter concentration area, it is sited along an existing energy corridor containing two above-ground high-voltage transmission lines.” **Ex. 11**, p. 3.

The expert analysis concluded that the “**combination of the larger direct impacts from Alternative 2 to winter range and severe winter range with the indirect and barrier effects described above does not support that Alternative 2 is the least impactful.**” **Ex. 11**, p. 8. The Forest Supervisor’s decision to select Alternative 2 because he perceived it to result in less impacts to elk and wildlife is contradicted by the record. *See Dist. Hosp. Partners, L.P. v.*

Burwell, 786 F.3d 46, 59 (D.C. Cir. 2015) (ruling that agency acted arbitrarily and capriciously because its decision was “counter to the evidence” and the agency “never discussed” evidence contradicting its determination).

2. *Alternative 3 will have less adverse impact on deer, elk, and other species.*

As the SWCA Wildlife Impact Analysis explains, Alternative 3 will have far *less* impacts to wildlife than Alternative 2 because Alternative 3 would utilize existing Forest Service roads and the natural topography of the area, rather than blasting, cutting, filling, and constructing 200% more guardrails and building 250% more retaining walls to facilitate Alternative 2’s road design. See Final EIS, p. 244 (acknowledging that Alternative 2 would require substantially more cut and fill than Alternative 3, would have greater impacts from retaining walls, and “would develop the hillside, fragmenting an area that could be left intact”); see also **Ex. 8**, Alpine Engineering Memorandum, at Table 1. Alternative 2’s high road density (defined as a measure of the length of a road in a given area of land, and generally used as a proxy for how disruptive a road will be to migrating animals) and resulting “barrier effect” will be more disruptive to wildlife than Alternative 3. See **Ex. 11**, pp. 3–5. Because Alternative 3 utilizes existing Forest Service Roads (which the elk and other wildlife have grown accustomed to) and the natural topography, disturbance to elk concentration range is vastly outweighed by the potential negative impacts of the barrier effect and isolating effects of selecting Alternative 2 as described in the Wildlife Analysis. See generally **Ex. 11**, pp. 1–5.

B. Alternative 2 will cause more adverse impacts to the environment than Alternative 3.

The draft ROD and the FEIS ignore significant differences in the environmental impacts of Alternatives 2 and 3. Alternative 2 will have far greater impact than Alternative 3 on the surrounding environment and resources. Alpine Engineering estimates that constructing

Alternative 2 would require excavating 248,910 cubic yards of material and installing 116,777 square feet of retaining walls compared to the much less significant 175,396 cubic yards of material and 48,120 square feet of retaining walls for Alternative 3. See **Ex. 8**, Table 1. More landscape disturbance will mean more fugitive dust, which may affect nearby Berry Creek. The additional fill volume in Alternative 2 relative to Alternative 3 results in significantly more impacts because the fill but must come by truck from offsite locations. Hence, the much greater fill with Alternative 2 will require many more delivery trips, which will cause additional fugitive dust, GHG emissions, and other impacts to wildlife and nearby residents. See Final EIS, pp. 100–02; see also **Ex. 8**, Table 1. Similarly, the increased travel time for cars and other vehicles under Alternative 2 will cause additional adverse impacts. **Ex. 9**, Kimley-Horn Traffic Safety Analysis, p. 2. Over time, the relative increase in average trip time of 50% to 90% will cause substantial and unnecessary impacts to wildlife and nearby residents. See **Ex. 9**, p. 2.

C. Alternative 2 poses unreasonable hazards to human health and safety.

The County, the Forest Service, and Berlaimont all agree that access to the Property will be single-access (meaning a single route) rather than the standard double-access generally required by Eagle County standards. The fact that there will be only one point of access to the Property, rather than the usual two, highlights the need for that single access road to be as safe and dependable as possible, especially during Eagle County’s winter conditions.³ Alternative 3 is the access road that follows the most passable topography, and contours the existing landscape by following the existing road network to the extent possible. Yet the Forest Service failed to

³ Berlaimont requested and received the variance from Eagle County’s dual access requirement, which cuts in half impacts to National Forest System lands because there is only one access road to the Property instead of two.

consider safety and driving hazards at all and instead chose the *most dangerous* alternative (Alternative 2).

1. *Alternative 2 is unreasonably hazardous.*

Alternative 2 poses unreasonable safety risks to residents and guests because of the steep slopes leading into switchbacks, the amount of guardrail and sign-posted sections of road, and the hazardous winter driving conditions that exist for as much as half of the year. The agency failed to consider safety at all in selecting Alternative 2 in the draft ROD. *See Am. Coll. of Emergency Physicians v. Price*, 264 F. Supp. 3d 89, 94 (D.D.C. 2017) (remanding agency decision because the agency “acted arbitrarily and capriciously by failing to seriously respond to” “problems with the [] regulation” raised by the plaintiff).

First, the attached independent traffic safety analysis performed by Kimley-Horn notes the inherent dangers in the design of Alternative 2 and the potential for greater environmental impacts from such large disturbances. *See Ex. 9*, pp. 1–4. This analysis is supported by the fact that numerous elements of the road design fail to meet American Association of State Highway and Transportation Officials (“AASHTO”) safety standards. *See Ex. 9*, pp. 1, 3. Road designs that violate AASHTO standards are considered by professionals to have “roadside hazards.” *See Ex. 9*, p. 3. Because of Alternative 2’s exceedance of AASHTO standards, the traffic safety analysis concludes it is questionable whether Eagle County will approve the necessary variances needed to build and construct Alternative 2.

Second, the traffic safety report recognizes that a sustained 10% road grade makes it difficult to maintain speed while driving uphill, often causing drivers to attempt to pass slower drivers, increasing the likelihood of head-on collisions. *Ex. 9*, p. 3. Alternative 2 has ten segments with 10% grades, compared to one segment for Alternative 3. The unsafe elements of

Alternative 2's road design—including long stretches of road above the maximum 10% grade, narrow-radius switchbacks, multiple “conflict points” (in which tight turns inhibit a large vehicle's ability to pass an oncoming vehicle), and “unrecoverable” zones⁴—pose an unreasonable risk to the daily users of the road including residents and their guests, delivery drivers and contractors, and emergency service providers. See **Ex. 9**, pp. 2–3. Alternative 2's tight switchbacks, sustained steep grades, and guardrails will require substantially more signage, which in turn distracts drivers by forcing them to absorb and respond to more information, further increasing the risk of accidents. **Ex. 9**, pp. 5. Severe winter driving conditions that exist at this high-elevation location for more than half the year will exacerbate these risks. In contrast, the terrain that Alternative 3 utilizes for the access route is far less severe and has less road above a 10% grade, fewer narrow-radius switchbacks, and fewer “unrecoverable” zones. See **Ex. 9**, pp. 1–4.

Third, according to the independent engineering report performed by Alpine Engineering, given the steep slope of Alternative 2, the narrow width of the east leg of the Property, and the amount of cut-and-fill wall construction, a possible slide or subsidence or earth movement will require the road location to be closed or re-constructed. See **Ex. 8**, Alpine Engineering Memorandum, p. 3; see also **Ex. 9**, p. 4. If the Alternative 2 road is rendered temporarily unusable—by a rockslide, washout, fire or otherwise—*there is no alternative route* to the Property, and residents and guests on the Property will be left with *no egress route at all* and emergency vehicles with no ingress. Squeezing Alternative 2 into the east leg of the Property up

⁴ An “unrecoverable zone” is an area where, if a vehicle travels off the roadway onto the slope, will slide down the slope rather than “recover” back to the roadway. **Ex. 9**, Kimley-Horn Traffic Safety Analysis, p. 3

the steep ridgeline leaves no room for re-construction or re-routing if there is subsidence, mud slide, or debris flow. See **Ex. 9**, p. 4.

Berlaimont has sought and received a variance from Eagle County's land use requirement of dual-access under Alternative 3 (which is far less prone to rockslides or subsidence), but it is far from clear whether Eagle County will grant a variance from the dual-access requirement for Alternative 2, for the simple reason that the County may be reticent to allow single-access where it is foreseeable that the only access road will be affected by a rockslide or subsidence. The risks of slides, subsidence, and shifting earth on the Alternative 3 route are substantially lower. See **Ex. 9**, p. 4.

The Forest Supervisor failed to consider these significant public health and safety concerns. If the draft ROD is finalized, this failure will compel a court to set aside the decision as required by the Administrative Procedure Act. See 5 U.S.C. § 706(2)(A) (the reviewing court shall hold unlawful and set aside agency action that is "arbitrary, capricious . . . or otherwise not in accordance with law"); *Dist. Hosp. Partners*, 786 F.3d at 59 (ruling that agency acted arbitrarily and capriciously because the agency "never discussed" evidence contradicting its decision).

2. *The Forest Supervisor's selection of Alternative 2 is arbitrary and capricious because the record shows that access is infeasible, unreasonably dangerous, and irrational.*

Civil engineers, traffic-safety experts, and emergency response personnel agree that Alternative 2 exposes road users to undue hazards and is the most dangerous of the action alternatives considered in the Draft ROD. When considered in light of the infeasibility of constructing the route, the inadequacy of the access route is obvious.

Safety impacts. The Forest Service made no effort to analyze or address the new hazards and risks it created by selecting Alternative 2, despite the known risks of a road design that switchbacks up a very narrow and severe slope. See Decision and Rationale for the Decision, Draft ROD, pp. 3–8. By failing to address the increased risk of dangerous driving conditions, particularly in the severe winter conditions that exist for over half of the year at high elevations in Eagle County, the Forest Supervisor failed to recognize the inadequacy of Alternative 2. See 16 U.S.C. § 3210(a).

The dangerous design of the switchbacking road wedged into the narrow eastern leg of the Property makes it inadequate access, and the Forest Supervisor’s failure to take into account the safety considerations for the residents and guests at the Property, including emergency responders, illuminates the arbitrary and capricious decision of selecting Alternative 2. **Indeed, the words “safe” or “safety” do not appear once in the Draft ROD.** See generally Draft ROD, pp. 1–33.

Inherent Dangers. As the attached traffic safety and engineering analyses detail, Alternative 2 would squeeze a new road in the constricted corridor of the eastern leg of Property and requires the road to climb a significant amount of elevation through a rocky and steep ridge requiring seven switchbacks to gain access to the developable portion of the Property. As the Kimley-Horn and Alpine Engineering analyses explain in detail, a few of the numerous safety problems with Alternative 2 are as follows:

- Alternative 2 has 10 segments of road with 10% grades for a total length of 3,500 feet. **Ex. 9**, p. 2. The American Association of State Highway and Transportation Officials (“AASHTO”) discourages maximum grades of 10% for extended lengths. **Ex. 9**, p. 2.
- Those steep sections with 10% grade transition immediately into small-radius switchbacks, requiring vehicles to quickly reduce speeds to negotiate the tight turns. **Ex. 9**, pp. 1–2.

- The small-radius switchbacks and narrow lanes create “conflict points” where, due to the narrow road and tight turn radius, larger vehicles such as firetrucks or delivery trucks will encroach into the opposing lane and potentially impact an oncoming vehicle. **Ex. 9**, p. 3. Alternative 2 has seven “conflict points” while Alternative 3 has only two. **Ex. 9**, p. 3.
- Per AASHTO guidance, slopes steeper than a 4:1 run-to-rise ratio are “non-recoverable” (*i.e.*, a vehicle leaving the roadway will not be able to re-correct and enter back onto the roadway and will instead plunge down the hill) require the installation of guardrails. **Ex. 9**, p. 3.
 - Alternative 2 has approximately 9,000 feet of roadway on “non-recoverable” slopes while Alternative 3 has only 6,400 feet. **Ex. 8**, Table 1.
- Alternative 2 has roadside hazards requiring installation of approximately 10,000 linear feet of guardrails. Alternative 3 requires half that, or 5,000 linear feet. **Ex. 9**, p. 4–5.
 - Experience shows that drivers maintain at least 4 feet of distance from guardrails, effectively reducing the width of the road to 18 feet rather than the County-mandated 20 feet. **Ex. 9**, p. 4–5.
 - Guardrails present visual impacts that obstruct drivers’ view and restrict wildlife movement. **Ex. 9**, p. 4–5.
 - Guardrails restrict the operation of snowplows and limit available space for snow storage. **Ex. 9**, p. 4.
- Alternative 2 will require more than 2.4 times the amount of retaining walls as measured by square footage (116,777 sq. ft. for Alternative 2 versus 48,120 sq. ft. for Alternative 3), and the tallest retaining wall will be over twice as high as Alternative 3 (59 feet tall versus 27.5 feet tall). **Ex. 8**, Table 1.
- The number and size of retaining walls necessary under Alternative 2 increases icing potential in critical locations. **Ex. 9**, pp. 1, 4–5.
- The risk of snowslides, rockslides, and washout of the Alternative 2 road is greatly increased due to the increased number and size of the retaining walls required. **Ex. 9**, p. 4.
- Severe winter conditions that routinely exist in Eagle County above 8,000 feet elevation will exacerbate the risks caused by the above conditions.

AASHTO—the nation’s leading organization in providing road safety standards—considers many of these issues to be “roadside hazards” which pose a significant risk of danger

to users of the road. **Ex. 9**, pp. 2–4 Given the scope and number of roadside hazards, it is far from clear whether the County would grant Berlaimont the variances needed to construct Alternative 2. And the County has already agreed with the analyses of Kimley-Horn and Alpine in agreeing that Alternative 3—which mostly follows existing roads and the natural topography—is the safest route to the Property. See **Ex. 7**, Eagle County Variance Resolution; **Ex. 8**, p. 1; **Ex. 9**, p. 1

3. *Alternative 2 is a dangerous means of egress and ingress during emergencies.*

In addition to road design safety concerns inherent to Alternative 2, that alternative presents even graver safety concerns during emergency situations. According to the attached analysis, Alternative 2 is far more dangerous than Alternative 3 during a fire emergency. See **Ex. 10**, Anchor Point Fire Safety Analysis; **Ex. 20**, ERFDP Analysis. The Eagle River Fire Protection District, the public agency responsible for fire response and emergency medical services for the surrounding area, notes: “Of principal concern to the Fire District, Alternative 2 adds 35%-50% more travel time for emergency response and evacuation. Extending travel time delays the arrival of fire suppression resources, allowing for fire growth to continue unabated, potentially complicating initial attack. Also, increased travel time impedes the timely intervention of emergency medical services.” **Ex. 20**, p. 1.

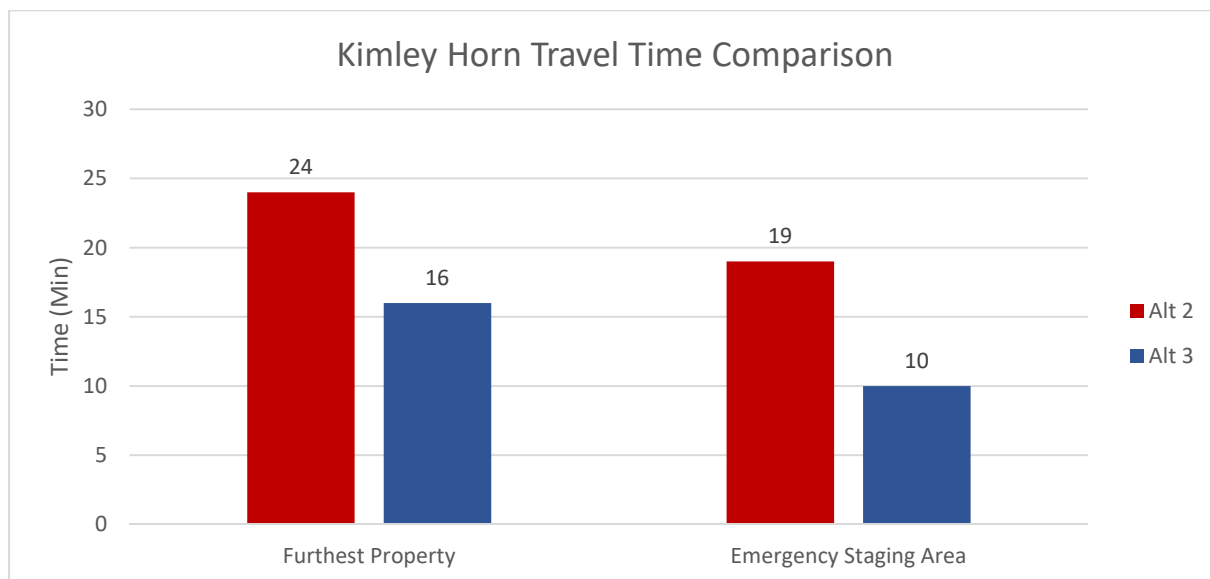
The Anchor Point Fire Safety Analysis supports that conclusion, observing that:

The road system is a fundamental life safety element and must be given the ***highest priority*** in the development review process. From a fire response and citizen evacuation perspective, shorter, faster, and least complex is always preferable. Simple observation of the two alternatives shows ***Alternative 3 [is] a much shorter and less complex road system than Alternative 2 and hence preferable from a fire response and citizen evacuation perspective.***

. . . . From a fire department access/egress perspective, Alternative 3 is the preferred route due to the extensive system of switchbacks, slower speeds and safety concerns of Alternative 2.

Ex. 10, p. 3 (emphasis added). Ingress to and egress from the Property are paramount fire safety concerns in developing any property, and even more so for a property that will have only one means of access. **Ex. 10**, pp. 2–6.

The safety concerns of the road design of Alternative 2 (such as the seven tight switchbacks and steep grades) lead to approximately 35-50% longer drive times for normal passenger cars. **Ex. 9**, pp. 1–2. But this increased drive time impacts emergency service vehicles even more acutely. Traffic safety experts Kimley-Horn estimate that Alternative 2 will add substantial driving time to access the Property based on route characteristics such as the steepness and the number of switchbacks and “conflict points.” See **Ex. 9**, p. 3. That analysis found that from the point Alternatives 2 and 3 diverge near the Beard Creek crossing:



Ex. 9, p. 2. Those differences equate to a 48% increase in time to access the furthest developed lot and 88% increased time to access the emergency staging area located in the center of the developable portion of the Property. **Ex. 9**, p. 2.

Other significant disadvantages of Alternative 2 are:

- Heavy vehicles (such as ambulances and fire trucks carrying large amounts of water) and long-axle vehicles will require even more time to navigate Alternative 2. *See Ex. 10*, p. 3 (explaining that a standard fire truck, some carrying over 50,000 pounds of water, will require “quality access” that avoids steep roads containing numerous narrow-radius switchbacks).
- “From a fire department access/egress perspective, Alternative 3 is the preferred route due to the extensive system of switchbacks, slower speeds and safety concerns of Alternative 2.” *Ex. 10*, p. 3.
 - When a resident has a heart attack, a house catches fire, or a wildfire threatens residences, the significantly extended drive time of Alternative 2 presents substantial risk to human health and safety by delaying the ingress of emergency service personnel and the egress of the residents. *Ex. 10*, p. 8.
- “Alternative 2 adds approximately 8 additional minutes’ drive time to or from the furthest developed lot and approximately 6 minutes to the emergency staging area. Fire managers would consider the additional travel time of Alternative 2 to be a significant addition to either egress or access drive times. More critical, perhaps is evaluating this increase in time, in reference to Medical / EMS emergencies.” *Ex. 10*, p. 8.
- While fuel surrounding the two alternatives creates a risk from wildfires, Alternative 3 presents two substantial advantages that Alternative 2 lacks.
 - First, the upper one-third of the Alternative 3 route is protected by a stand of Aspen trees which would slow the spread of fire. *See Ex. 10*, p. 3.
 - Second, the extended drive time of Alternative 2 “gains no benefit from the Aspen stands at the top of the Alternative 3 route. This in combination with the increased drive time . . . increased the overall exposure of vehicles along this route.” *Ex. 10*, p. 3.
- “Narrow roads, steep grades, soft shoulders, and hairpin turns which are more prevalent in Alternative 2 than Alternative 3 can all contribute to reduced response times and the potential increase to fire apparatus accidents.” *Ex. 10*, p. 1.

The Forest Supervisor is required to consider “public health and safety impacts” and hazards in selecting the alternative, but here failed to consider those potential risks in the Draft ROD. *See* 16 U.S.C. § 3210(a) (requiring access that secures “reasonable use and enjoyment”); 42 U.S.C. § 4331; *see also* 40 C.F.R. § 1508.27 (in conducting a NEPA analysis, the agency should consider “[t]he degree to which the proposed action affects public health and safety”).

4. *The Forest Service's failure to consider the significant safety risks and increased disturbance of Alternative 2 to the landscape will cause a federal court to set aside the Draft ROD.*

The Forest Service did not consider the substantial safety risks, driving hazards, and greater adverse impacts in the Draft ROD or the FEIS, and that failure makes the decision to select Alternative 2 arbitrary and capricious. See 5 U.S.C. § 706(2)(A) (the reviewing court shall hold unlawful and set aside agency action that is “arbitrary, capricious . . . or otherwise not in accordance with law”). The United States Supreme Court has made plain that an agency decision is “arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). The Forest Service’s complete failure to even consider the safety of Alternative 2, and the multiple unnecessary hazards for access it creates, in its Draft ROD is a “failure to consider an important aspect of the problem.” *Id.* The failure to acknowledge that the record demonstrates that Alternative 2 has a much more substantial impact on Forest Service lands and surrounding resources is a “decision that runs counter to the evidence before the agency.” *Id.*; see also *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (stating “an agency’s refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of § 706”).

5. *The Forest Supervisor's rejection of Alternative 3 overlooks the White River National Forest Plan.*

The Forest Supervisor failed to recognize that 40% of Alternative 3 is within Management Area 8.32, a designated utility corridor. See FEIS, at Figure 1. Designated utility corridors are expressly managed for “major routes and highways,” and the Forest Service expects

that physical disturbances to existing conditions are generally “high.” See White River Nat’l Forest 2002 Land and Resources Management Plan, p. 3-85, *available at* https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_000999.pdf (last visited November 9, 2020). Because a substantial portion of Alternative 3 is contained in a Forest Plan land management area designated for “major routes and highways,” the Forest Supervisor failed to consider the diminished impact Alternative 3 will have on the non-utility designated Forest System lands.

This oversight demonstrates the lack of rational connection to the analysis in the record for the Forest Supervisor’s decision to select Alternative 2 because he perceived it to yield fewer impacts to Forest resources than Alternative 3. See *Butte Cnty.*, 613 F.3d at 194 (rejecting agency finding under APA substantial evidence standard where agency failed to “articulate a satisfactory explanation” and “ignore[d] evidence contradicting its position” (internal quotation marks and citations omitted)). Alternative 3 would utilize an existing road in the utility corridor. By building a new road rather than utilizing an existing one for a substantial portion of the access route, the Forest Supervisor’s selection of Alternative 2 multiplies, rather than reduces impacts.

IV. The draft ROD provides no reasoned explanation for the Forest Supervisor’s departure from the Preferred Alternative in the Draft EIS.

For *twelve years*, Berlaimont has worked with the Forest Service, County officials, and an array of experts and stakeholders to design an access route that satisfies ANILCA and limits environmental impacts to the greatest possible extent. From the beginning, Berlaimont’s objective was and is to construct 19 homes on private land, a plan that will leave the great majority of the 680-inholding undeveloped, and that will result in far *less* development than the high-density developments in the vicinity.

In 2009, Forest Supervisor Fitzwilliams instructed Berlaimont to obtain approval of the access from Eagle County first, to conserve Forest Service resources in analyzing the access route under NEPA. *See Ex. 4.* Berlaimont did so, and devoted considerable time and effort to identifying the best access route, which Eagle County evaluated in a public process and approved. Once Berlaimont had done so, the Forest Service identified the carefully planned Alternative 3 as the “preferred alternative” that would be carried forward. *See Draft EIS, p. 40.* For years Berlaimont and the County have been laboring under the Draft EIS’s identification of Alternative 3 as the preferred alternative.

The Forest Service’s ANILCA Determination in the Draft EIS, and in the Final EIS, stated that the agency would apply an adequate access test that complies with 16 U.S.C. § 3210(a), Forest Service regulations, and federal caselaw. The test identified by the Forest Service states, “any access route that does not facilitate connectivity to the useable part of the property would be nonfunctional and insufficient, and, therefore, inadequate.” *Ex. 2, pp. C-13.* The “facilitates connectivity” test identified by the Forest Service does not apply the “secures to” test of the statute, 16 U.S.C. § 3210(a).

Yet the Forest Supervisor made no effort to offer any reasoned explanation how Alternative 2 satisfies even the adequate access test stated in the ANILCA Determination in the Final EIS. Alternative 2 does not facilitate connectivity to the useable part of the Property and is inadequate under the access test stated in the Final EIS. Nor does Alternative 2 secure to Berlaimont the reasonable use and enjoyment of the Property guaranteed by 16 U.S.C. § 3210(a). Nor, other than referencing wildlife, did the Forest Supervisor explain his decision to reject Alternative 3 given his prior direction to Berlaimont that it obtain Eagle County approval before the Forest Service would commence the NEPA process.

A fundamental principle of administrative law is that the “agency must examine the relevant data and articulate a satisfactory explanation for its action including a *rational connection between the facts found and the choice made.*” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 48 (1983) (emphasis added and quotation omitted); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (“The agency must make plain its course of inquiry, its analysis and its reasoning.”). Absent that clear explanation, a reviewing entity—whether a higher agency official or a court—cannot perform its function. *Atchinson, T. & S.F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 806 (1973). When an agency changes its position, “an unexplained inconsistency” in the agency’s decisionmaking will cause a court to hold the decision to be an “arbitrary and capricious change from agency practice.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (internal quotation omitted).

The draft ROD offers no reasoned explanation for the reversal from the route for which the Forest Service required Berlaimont to obtain variances from the County, particularly given the deficiencies, inadequacies, and hazards associated with Alternative 2, and the fact that it is plainly inadequate under 16 U.S.C. § 3210(a) and under the “adequate access” test stated in the agency’s ANILCA Determination. See *Fed. Comm’n Comm’n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“[A]n agency changing its course must supply a reasoned analysis,” including by “show[ing] that there are good reasons for the new policy.”); *Lone Mountain Processing, Inc. v. Sec’y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. Failing to supply such analysis renders the agency’s action arbitrary and capricious.” (internal quotation and citation omitted)). The Forest

Supervisor's selection of Alternative 2 is arbitrary and capricious because the wildlife-based explanation he offered is: contradicted by the FEIS analysis; contradicted by the record evidence demonstrating that Alternative 3 results in fewer adverse effects for wildlife, emergency services, traffic construction and safety; and results in inadequate access under the agency's own adequate access test stated in the record. *See generally Exs. 2*, pp. C-13, 8–11, 20.

CONCLUSION

Berlaimont Estates, LLC respectfully requests the Regional Forester to set aside the draft decision selecting Alternative 2 and direct the Forest Supervisor to select Alternative 3. Please contact undersigned counsel to schedule the meeting requested pursuant to 36 C.F.R.

§ 218.11(a).

Respectfully submitted,

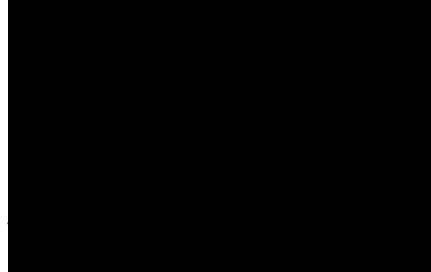
s/ Ezekiel J. Williams

Ezekiel J. Williams

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Spencer R. Allen

WILLIAMS WEESE PEPPE & FERGUSON PC



Attorneys for Berlaimont Estates, LLC

Dated this 9th day of November 2020.

LIST OF EXHIBITS

1. Figure 2: The Action Alternatives Berlaimont Estates Access Route EIS, Sept. 25, 2020
2. Final EIS, Appendix C. ANILCA Determination, pp. C-1 to -18
3. Berlaimont Estates, LLC Comment Letter on Draft EIS, Mar. 12, 2018
4. Berlaimont Estates, LLC Comments on Public Scoping Notice, Nov. 7, 2016
5. Forest Supervisor Fitzwilliams Email to Michael English of Berlaimont Estates, Nov. 9, 2009
6. Berlaimont Variance Application from Improvement Standards, submitted to Eagle County, July 2013
7. Eagle County, Resolution No. 2014-001, File No. VIS-4398
8. Alpine Engineering Inc., Observations and Comparison of Access Alternatives Memorandum
9. Kimley-Horn, Feasibility of Access Roads Alternatives 2 and 3 Memorandum
10. Anchor Point Group, Berlaimont Estates Access Review
11. SWCA Environmental Consultants, Evaluation of Berlaimont Estates Access Route Memorandum
12. FEIS Map of Access to Muddy Pass Inholding
13. Berlaimont Presentation to Eagle County Board of County Commissioners, Oct. 1, 2013
14. Berlaimont Presentation to Eagle County Board of County Commissioners, Dec. 10, 2013
15. Standard Form 299: Application for Transportation and Utility Systems and Facilities on Federal Lands, Submitted to the WRNF, May 8, 2014
16. Alternative 2 Topographic Map, Prepared by Alpine Engineering
17. Alternative 3 Topographic Map, Prepared by Alpine Engineering
18. Environmental Impact Report, Appendix E to Berlaimont Variance from Improvement Standards, submitted to Eagle County, July 2013
19. Berlaimont Estates Presentation to Colorado Parks & Wildlife, Sept. 1, 2016

20. Eagle River Fire Protection District, Berlaimont Estates Road Alternatives 2 and 3
Memorandum, Nov. 6, 2020