



United States
Department
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Forest
Service



Final

Record of Decision

Village at Wolf Creek Access Project

Final Environmental Impact Statement

USDA Forest Service
Rocky Mountain Region
Rio Grande National Forest
Divide Ranger District
Mineral County, Colorado

United States Department of Agriculture
United States Forest Service
Rio Grande National Forest
1803 West Highway 160
Monte Vista, Colorado 81144

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Table of Contents

<u>Number / Section</u>	<u>Page</u>
1.0 Introduction	1
2.0 Background and Location.....	1
3.0 Purpose and Need.....	6
4.0 Decision.....	7
4.1 The Decision.....	7
4.2 Selected Alternative.....	8
4.2.1 Best Management Practices.....	10
4.2.2 Monitoring.....	10
4.2.3 Permits, Licenses, Entitlements and/or Consultation	11
5.0 Decision Rationale	11
6.0 Public Involvement.....	21
7.0 Alternatives Considered	21
7.1 Alternatives Considered but Eliminated from Detailed Study	22
7.2 Alternative 1 - No Action	22
7.3 Alternative 2 - Land Exchange.....	22
7.4 Alternative 3 – Access Road	23
8.0 Environmentally Preferable Alternative.....	23
9.0 Findings Required by Other Laws, Regulations and Agency Policy	23
10.0 Pre-Decisional Administrative Objection Process	24
11.0 Contact Person.....	24
12.0 Signature and Date	24

1.0 Introduction

This final Record of Decision (ROD) documents my second decision and rationale for the Village at Wolf Creek Access Project. My first ROD, issued May 21, 2015, approved a land exchange to provide Leavell-McCombs Joint Venture (LMJV) access to its privately held land adjacent to the Wolf Creek Ski Area (WCSA) and within the Rio Grande National Forest (Rio Grande NF). A lawsuit challenged my first ROD and the United States District Court for the District of Colorado (the Court) set the land exchange decision aside on May 19, 2017. Leavell-McCombs Joint Venture appealed to the United States Court of Appeals for the Tenth Circuit (the Tenth Circuit). On December 11, 2018, the Tenth Circuit dismissed LMJV's appeal. The Tenth Circuit noted that the Forest Service "*must* take some action to provide LMJV with access" and noted that I had issued a draft ROD July 19, 2018 that would grant LMJV access by allowing construction of a new road across Forest Service land.

During the appeal, LMJV sent me a letter (dated January 12, 2018) seeking immediate year-round access to its private property. Leavell-McCombs Joint Venture indicated that it sought to maintain its appeal while gaining immediate access to the portion of its land that was not subject to the challenged land exchange. I determined that attempting to grant access conditioned on the litigation outcome was impracticable. However, faced with the obligation to provide LMJV with access to its lands, and constrained by the Court's decision, I decided to consider granting LMJV access through a right-of-way across Forest Service land instead of through a land exchange.

I had my staff prepare a supplemental information report (SIR) to determine if the 2014 Environmental Impact Statement (EIS), which had considered both a land exchange and a right-of-way, would need to be supplemented. The interdisciplinary team recommended that changed conditions and new information would not present a significantly different picture of the environmental effects and a supplement to the EIS was not warranted. Under our regulatory process, I issued a second draft ROD on July 19, 2018 which initiated an opportunity for administrative review. My draft decision was administratively challenged. Our Deputy Regional Forester considered all objections and issued a 48 page response on November 19, 2018 which found no violation of law, regulation or policy. I have reviewed the 48 page response, agree with its rationale, and will comply with its instructions. I have considered the 2014 EIS, the SIR and the outcomes of the consultation with the U.S. Fish and Wildlife Service (USFWS) under the Endangered Species Act (ESA) which concluded with a Biological Opinion on December 17, 2018. I now make this final decision approving access to LMJV's private inholding through a right-of-way across National Forest System (NFS) land.

2.0 Background and Location

Acquisition of, and proposed access to, private lands in the project area has been complicated by a procedural and litigation history spanning over 30 years.

In 1986, a Decision Notice was signed for the Proposed Wolf Creek Land Exchange. The 1986 Decision Notice approved conveyance of approximately 300 acres of NFS lands managed by the Rio Grande NF adjacent to the WCSA in exchange for non-Federal lands located in Saguache County, Colorado. The 1986 Decision Notice created a private inholding surrounded by the Rio Grande NF. The inholding, which is entirely within the WCSA Special Use Permit boundary, is owned by LMJV. The NFS lands surrounding the inholding are managed by the Rio Grande NF under Management Area Prescription 8.22 – Ski Based Resorts (EIS Figure 1.9-1).

The 1986 land exchange was evaluated in an Environmental Assessment which considered four alternatives: two land exchange alternatives, one alternative developing a resort on NFS lands under a special use permit, and a no action alternative. An initial Decision Notice selected the no-action alternative based on potential impacts including impacts to the adjacent ski area. That decision was reversed two weeks later and the land exchange was approved with the understanding that Mineral County would regulate the development on private land and a condition that LMJV would grant an

easement providing “a specific level of control of the type of developments” for the purpose of assuring that the development would be compatible with the adjacent ski area (March 6, 1986 Decision Notice, p. 3).

A “scenic easement” was granted in May 1987 and filed in the Mineral County property records in June 1987 and amended in 1998. This easement limits the development to “a mix of residential, commercial, and recreational uses typical to an all-season resort village” and specifically states its purpose is to assure compatibility with the adjacent ski area including the scenic and recreational values of the adjoining NFS lands (EIS, Appendix F). To ensure the private development will be compatible with the ski area, the easement allows the Forest Service to prohibit 19 specific uses of the former federal property including mobile homes, mining and feed lots (EIS, Appendix F). The easement also ensures: 1) conditions for advertising signs; 2) that the architectural style of all structures will be compatible with the location; 3) that buildings will be harmoniously colored; and 4) that building height will be no greater than 48 feet (EIS, Appendix F). Finally, the easement also makes clear that it is “not intended to conflict with or intrude upon the land use controls of the State of Colorado, Mineral County, or other unit of local government except as specified herein.” (EIS, Appendix F). Thus, the 1986 Decision Notice and the subsequent scenic easement contrasted the general land use authority which remained with Mineral County from the “specific level of control of the type of development” which was granted to the Forest Service. The size, density and specific building restrictions for the Village development were left to Mineral County, while the scenic easement granted the Forest Service narrow authority to ensure that the planned resort was compatible with the ski area.

National Forest System Road (NFSR) 391, which connects with U.S. Highway 160 (Hwy 160) and passes through a WCSA parking lot, crosses the private inholding and provides vehicular access to Alberta Park Reservoir. National Forest System Road 391 provides vehicular access to the private inholding during the summer months. During the winter months this road is under a public motorized closure order and serves as a ski trail for the WCSA.

In June 2001, LMJV applied to the Rio Grande NF for rights-of-way across NFS lands between Hwy 160 and its private inholding. Leavell-McCombs Joint Venture requested that the Forest Service provide permanent, year-round vehicular access to the property through extension of the Tranquility parking lot at WCSA. The proposal was to create the “Tranquility Road” by extending a road through, and beyond, the Tranquility parking lot by approximately 250 feet across NFS lands, thereby connecting to the private land inholding.

The Rio Grande NF completed an EIS to analyze the request for access to the private inholding under Section 1323(a) of the Alaska National Interest Lands Conservation Act (ANILCA). The EIS analyzed four alternatives in detail:

- Alternative 1: No Action
- Alternative 2: The Proposed Action (request for a single additional access to the property via an extension of Tranquility Road);
- Alternative 3: Snow Shed – East Village Access Alternative (a single access alternative using a new road, referred to as the “Snow Shed Road”); and
- Alternative 4: Dual Access Road (a dual access alternative requiring construction and use of both the Snow Shed Road and the extended Tranquility Road).

In March 2006, a ROD was signed by Rio Grande NF Supervisor Peter Clark. The decision was Alternative 4 which required the construction of the “Snow Shed Road” and the “Tranquility Road” extension. Four separate appeals of the ROD were received. In July 2006, Deputy Regional Forester Greg Griffith denied the appeals (thereby upholding the decision in the ROD).

In October 2006, a lawsuit was filed against the Forest Service in federal district court, alleging that, among other things, the Final EIS and ROD were arbitrary and capricious under the Administrative Procedure Act and in violation of the National Environmental Policy Act (NEPA). In November 2006, a temporary restraining order was granted. In October 2007, a preliminary injunction was granted. In February 2008, the lawsuit was settled in order to bring prompt closure to the litigation and allow for the initiation of a new analysis. The settlement recognized that the Forest Service did not concede the decision making process violated any laws.

Citing the Forest Service's obligation to provide adequate access to the private inholding under ANILCA, LMJV requested that the Forest Service consider two alternative means of granting access, a land exchange and an access road across NFS lands. The July 2010, land exchange proposal would exchange approximately 177 acres of LMJV's existing parcel for approximately 205 acres of federal land. The exchange would obviate the need for access via a right-of-way across Forest Service land by creating a direct connection between LMJV's land and Highway 160. An Agreement to Initiate a land exchange was signed between the Rio Grande NF and LMJV and a Notice of Intent to Prepare an EIS was published in the Federal Register on April 19, 2011.

In 2012, the Rio Grande NF issued a Draft Environmental Impact Statement (DEIS) that evaluated, in detail, the no-action alternative (Alternative 1) and two action alternatives. Alternative 2 was a land exchange and Alternative 3 was authorization of access over NFS lands to the private inholding. For both action alternatives the Forest Service also evaluated three levels of potential development on the private land.

Congress has not granted the Forest Service regulatory authority over private land. Accordingly, the DEIS addressed the only authority the Forest Service has over the private land development -- the scenic easement. The DEIS meant to summarize the limited authority granted to the Forest Service by the scenic easement when it disclaimed authority to regulate the "degree or density" of development on the private parcel and deferred to Mineral County's general regulation of private development. The "degree or density" reference was a way to avoid restating the detailed terms of the scenic easement which prohibited 19 uses that did not bear repeating because those uses were not being proposed. *See*, definition of "scenic easement" in the 2012 DEIS. The 48 foot building height limitation and other specific limitations on the potential development stated in the scenic easement were discussed throughout the DEIS and the 2014 EIS where applicable. The full scenic easement was provided to the public as an appendix to the Draft EIS (DEIS, Appendix D).

In my 2015 decision, I did not disclaim either my ability to enforce the terms of the scenic easement or my ability to seek easement restrictions for the land exchange alternative under 36 C.F.R. 254.3(h) ("needed to protect the public interest" or "appropriate"). Leavell-McCombs Joint Venture indicated that it was agreeable to negotiate deed restrictions as a part of the land exchange and agreed that the Forest Service would consider applying a scenic easement to the proposed federal exchange parcel. However, I ultimately decided not to analyze applying the 1986 scenic easement or other easement restrictions in the land exchange and advised the public of this determination in the DEIS. This led to a distinction in the analysis between the land exchange alternative (which would retain easement restrictions only on 120 acres of private land not being exchanged) and the ANILCA right-of-way alternative (where the entire private parcel would remain subject to the scenic easement). For the ANILCA right-of-way alternative, the Forest Service *would not* have the authority to impose additional deed restrictions but the USFWS had regulatory authority under the ESA and could negotiate conservation measures that would apply to development of private property under either alternative. Such conservation measures had not been negotiated when the DEIS was released to the public in 2012.

Due to the anticipated indirect effects resulting from development on the private land, the Forest Service, USFWS and LMJV developed conservation measures to minimize adverse effects to a threatened species, the Canada lynx. These conservation measures were developed during the section 7 consultation process on effects of the project to species and habitats listed under the ESA as

specified in the November 15, 2013 Biological Opinion. Based on the May 19, 2017 Court ruling and the 2018 consultation with the USFWS, the conservation measures have been improved. The improved conservation measures can be found in the 2018 Biological Opinion, which includes a lynx conservation fund agreement between LMJV and the National Forest Foundation (NFF) as an appendix. A brief synopsis of the conservation measures follows:

Leavell-McCombs Joint Venture will provide funding to implement conservation measures to reduce impacts of any proposed development to the Canada lynx. Funds provided by LMJV will be administered by the National Forest Foundation and used to implement projects recommended by an Advisory Panel consisting of representatives with expertise in lynx biology, traffic, and other relevant disciplines from the Colorado Department of Transportation (CDOT), Colorado Parks & Wildlife, and the Forest Service – one representative from the Rio Grande NF and one from the Rocky Mountain Research Station (National Forest Foundation agreement attached to the Biological Opinion).

Initial funds will be used to pay for a corridor assessment and a trapping/collaring program to determine lynx movement across Hwy 160 between South Fork and Pagosa Springs, Colorado. These studies will result in a prioritization of crossing points by lynx on Hwy 160. Next, the Advisory Panel members will identify options for a program to further protect lynx from traffic and to facilitate lynx movement across Hwy 160. The National Forest Foundation agreement clarifies that the Advisory Panel has authority to spend the funds at its discretion and does not need LMJV's approval. The agreement and funds remain in effect and available even if the lynx is removed from the federal list of threatened and endangered species. The parties may agree to modify conservation measures based on the delisting after the conclusion of any litigation challenging the delisting.

Leavell-McCombs Joint Venture must also undertake the following actions intended to reduce potential impacts to Canada lynx:

- Worker Orientation. Leavell-McCombs Joint Venture will conduct worker orientation concerning Canada lynx conservation.
- Worker Shuttle. Leavell-McCombs Joint Venture will bus workers to and from the project site to minimize potential construction-traffic-related impacts to lynx during the infrastructure development period.
- On-Site Employee Housing. In Phase 1 and subsequent phases of any future Village development, LMJV will provide some employee housing at the Village to minimize those employees' traffic impacts and will offer bus service to its other employees to reduce the amount of traffic they would otherwise add to Hwy 160.
- On-Site Convenience to Reduce Highway Traffic. As to its future owners and guests, LMJV anticipates that they will have fewer trips along Hwy 160 during their stay than other similar developments in that LMJV plans to provide the necessary essentials (i.e., grocery store, restaurants, etc.) at the Village to minimize their need to travel outside the Village for such items.
- Property Owners and Guests Lynx Awareness Program. Leavell-McCombs Joint Venture will provide an orientation program to its owners and guests that will advise them of lynx movements in the area and the importance of motorists being aware of potential lynx crossings on Hwy 160 within the Landscape Linkage.

The implementation of these conservation measures will help minimize adverse effects to Canada lynx associated with the selected alternative. The Advisory Panel may also identify new or modified conservation measures in the future based on best available information at the time and the panel's collective judgment about the most beneficial use of the funds on behalf of the Canada lynx.

On May 21, 2015, I issued a ROD selecting the land exchange alternative because it presented an opportunity to recognize LMJV's right to its congressionally-mandated access to the inholding pursuant to ANILCA (Figure 1). The land exchange would minimize impacts of LMJV's development of the Village by changing the footprint of the development to a less sensitive location further from the ski area base and connecting the property directly to Hwy 160.

In June 2015, a lawsuit was filed challenging my 2015 ROD. The land exchange went forward subject to a stipulation that would allow voiding the exchange in the event of an adverse ruling. On May 19, 2017, the Court held that the Forest Service improperly failed to consider imposing deed restrictions on the federal land to be exchanged, that the power to impose deed restrictions demonstrated "actual power to control" the private development, and the failure to consider deed restrictions led the Forest Service to unlawfully limit its NEPA analysis. The Court emphasized the fact that the private land came into being through a land exchange in 1986, and the 1986 land exchange was constrained by the scenic easement. The Court held that the Forest Service was required by 36 C.F.R. 254.3(h) to consider imposing deed restrictions in the 2015 evaluation of the proposed land exchange. The Court appeared to overlook that the Deputy Regional Forester had considered, and rejected, imposing deed restrictions in her response to objections on the 2015 land exchange.

The Court also found the analysis insufficient because the Court concluded that the conservation measures were inadequate to meet ESA requirements. The Court assumed that the conservation measures were necessary to avoid jeopardy to the Canada lynx and held that the conservation measures were insufficient for that purpose.

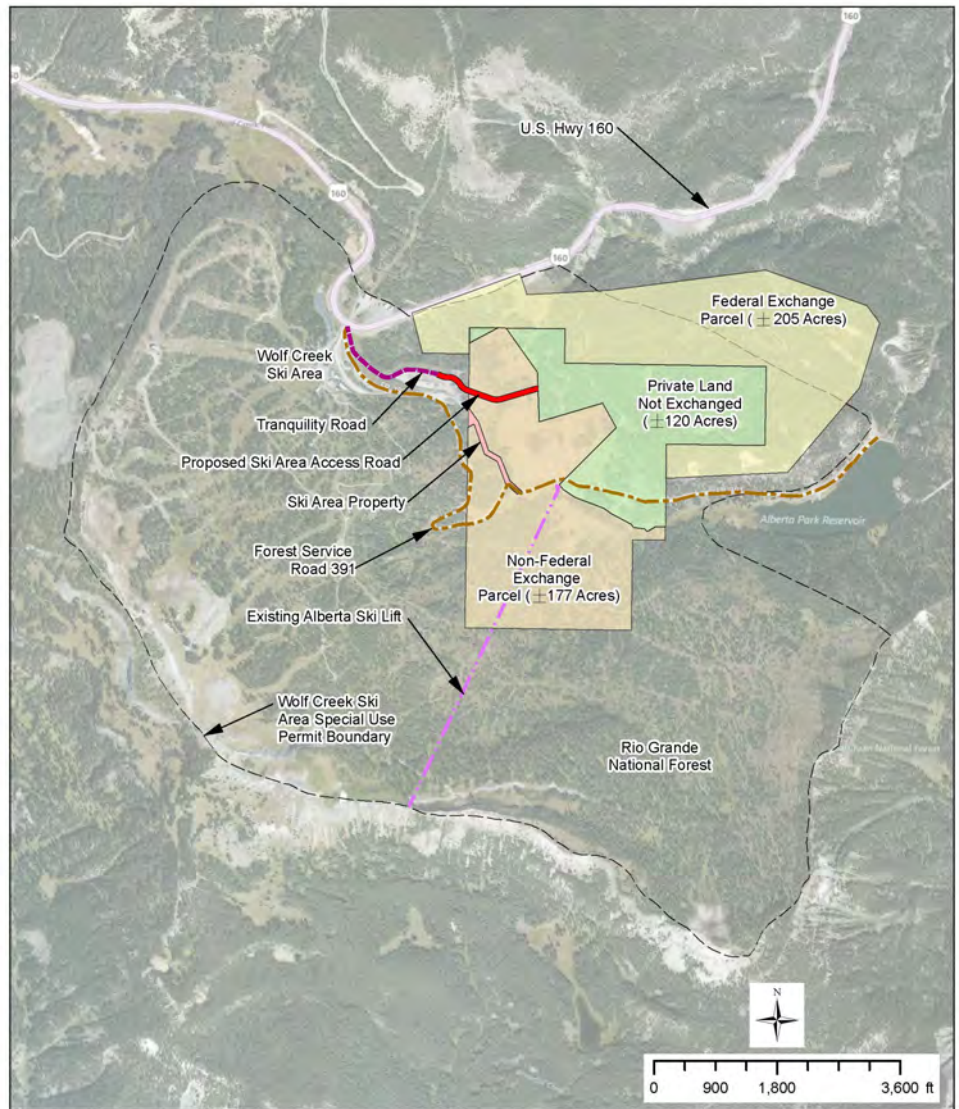
The Court found three specific deficiencies in the conservation measures. First, the measures were found not to be reasonably specific, certain to occur, and subject to deadlines or otherwise enforceable obligations, because the funding commitment was not sufficient and there was no provision for resolution of any disagreement between LMJV and USFWS regarding specific measures. Second, the Court concluded that the conservation measures imposed no binding obligation on the Forest Service to insure the private development would not likely jeopardize the lynx. Third, to the extent that the USFWS had an enforcement role regarding the conservation measures, the Court found that the USFWS was limited to the point of essentially leaving LMJV to self-report.

Based on these findings, the Court set aside the 2015 ROD. On September 14, 2017, the Court denied LMJV's motion to reconsider. Subsequently, LMJV, Rocky Mountain Wild¹ and the United States all appealed the Court's ruling to the Tenth Circuit and participated in that court's mediation program. However, the case was not settled and the United States decided to pursue a new decision and dismissed its appeal.

On January 12, 2018, LMJV requested immediate access to the "core" 120 acres of its inholding, describing those "core" acres as the portion of the original inholding that would have remained in LMJV ownership under the 2015 land exchange. Leavell-McCombs Joint Venture expressed the view that it is entitled to an access road under ANILCA *pending* the Tenth Circuit's ruling on its appeal. On December 11, 2018, the Tenth Circuit dismissed the case.

¹ Rocky Mountain Wild and others were plaintiffs in the lawsuit. I will refer to this plaintiff group in my decision as Rocky Mountain Wild.

Figure 1: Land Exchange



Legend

- | | |
|--|---|
|  Non-Federal Exchange Parcel |  Tranquility Road |
|  Federal Exchange Parcel |  Proposed Ski Area Access Road |
|  Private Parcel Not Exchanged |  Forest Service Road 391 |
|  Ski Area Property (Not Included in the Exchange) |  Ski Area Special Use Permit Boundary |
| |  Existing Alberta Ski Lift |



3.0 Purpose and Need

The Purpose and Need for Action is to allow LMJV to access its property to secure reasonable use and enjoyment thereof as provided in ANILCA and Forest Service regulations, while minimizing environmental effects to natural resources within the project area. The legal entitlement is defined by ANILCA (and Forest Service regulations) as a right of access to non-Federal land within the boundaries of the NFS, in this case the Rio Grande NF. Leavell-McCombs Joint Venture proposed a land exchange to satisfy its access needs and, in the alternative, applied for road access. The Forest

Service has evaluated both the land exchange and the application for road access as alternative means of providing LMJV with the access to which it is statutorily entitled.

4.0 Decision

4.1 The Decision

Under ANILCA, LMJV is entitled to adequate access for the reasonable use and enjoyment of its private inholding. I have determined pursuant to ANILCA and our regulations that the reasonable use and enjoyment of LMJV's private inholding is as an all-season resort with residential and commercial development to support the adjacent ski area. I must therefore grant LMJV adequate access to fulfill that use. In its dismissal order, the Tenth Circuit emphasized that the Forest Service "is not free to 'do nothing at all'; it *must* take some action to provide LMJV with access." LMJV's willingness to consider accessing its inholding through a land exchange gave me a chance to determine whether the significant environmental effects of the private development could be lessened by allowing it to be built on a different footprint. The EIS clearly shows that the land exchange would result in protecting more sensitive environments such as fen wetlands and riparian areas from the proposed development. Therefore, in my draft 2015 decision, I found the land exchange to be in the public interest based on the footprint alone and without deed restrictions. Rocky Mountain Wild and others filed objections in which they argued additional deed restrictions were required.

Rocky Mountain Wild also challenged the EIS as inadequate because it failed to evaluate alternatives which would impose additional development restrictions on the private land. The Court agreed that the ROD was insufficient to select the unconstrained land exchange alternative because: 1) the 1986 land exchange decision required a scenic easement; and 2) Forest Service regulations allow me to decline a land exchange unless the proponent accepts deed restrictions on the federal exchange parcel if restrictions are needed to protect the public interest or if I find restrictions to be appropriate (36 C.F.R. 254.3(h)).

Rocky Mountain Wild, and others that advocate a land exchange with deed restrictions, seem to assume that I can impose deed restrictions which LMJV does not agree with. However, the regulations are clear that LMJV need not accept any deed restrictions that I propose (36 C.F.R. 254.3(a)). Leavell-McCombs Joint Venture can reject any deed restrictions and insist on the access which Congress, through ANILCA, has guaranteed LMJV over NFS lands. Forest Service policy also makes clear that I should only seek deed restrictions when they are needed to insure a land exchange is in the public interest. Deed restrictions are not needed in the public interest in this situation for several reasons stated in the 2015 response to objection. Moreover, the development LMJV proposes is consistent with Forest Service management of the surrounding NFS lands as a ski area. Deed restrictions are generally discouraged in Forest Service policy because they create perpetual administrative burdens on the agency and reduce the value of the exchange parcel (FSH 5409.13, Ch. 33.41c.33, Land Acquisition Handbook). Thus, Forest Service policy is to avoid deed restrictions unless they are required by law, regulation or Executive Order, or when the use of the conveyed federal land would substantially conflict with management objectives on adjacent federal land (FSH 5409.13, Ch. 33.41c.33, Land Acquisition Handbook).

In my 2015 final decision I found the land exchange to be in the public interest based on the footprint alone and without deed restrictions. Leavell-McCombs Joint Venture has a legal right of access which would allow it to build a resort on its private land and the environmental effects on the private land are greater than they would be with a land exchange- even a land exchange without further deed restrictions. Rocky Mountain Wild and others have asserted that I should have, as part of the land exchange, sought to extend the 1986 scenic easement to the exchange parcel. I opted not to select the land exchange alternative and impose the scenic easement, however, because the land exchange was in the public interest without any deed restrictions and the scenic easement already applies to Alternative 3. The EIS showed that there were only minor differences between development

constrained by the scenic easement and development constrained by local land use controls. The primary difference was the possibility that Mineral County would allow buildings that would exceed the 48 foot height restriction. However, the changed footprint of the development under the land exchange alternative located any such tall buildings further from the ski area. Consistent with the scenic easement, which deferred general land use control to Mineral County, I believe it is appropriate to defer to local land use regulation absent a compelling reason for Forest Service regulation.

I also did not consider seeking to impose restrictions on LMJV's use of its private land as a condition of granting road access because that would exceed my authority as noted below in Section 5.0 (3) Forest Service Regulatory Authority.

On January 12, 2018, LMJV sought access under ANILCA. Leveall-McCombs Joint Venture's proposal was to keep the then-current litigation alive with the possibility that the 2015 land exchange, without deed restrictions, could be saved but allow LMJV immediate access so it could build roads and begin to develop the "core" of its planned Village. Since the Tenth Circuit dismissed the case on December 11, 2018, it is no longer possible to grant "interim" road access while waiting to see if the Tenth Circuit reverses the district court and upholds the 2015 land exchange. I rejected LMJV's January 12, 2018 proposal in my draft ROD and noted that I remain open to a future land exchange. However, as the Tenth Circuit noted, I ". . . *must* take some action to provide LMJV with access."

The EIS also took a hard look at the significant environmental effects of selecting the ANILCA right-of-way alternative, which would allow LMJV to develop the existing parcel constrained by the scenic easement. Therefore, I am selecting Alternative 3 to allow ANILCA access to the LMJV inholding. The implementation of my decision is contingent on the 2015 exchange of deeds (which transferred the federal exchange parcel to LMJV) being voided either by agreement with LMJV or by court order. The process of voiding the prior land exchange is likely to take several months.

I am turning down the land exchange proposal *without deed restrictions* and choosing, instead, the ANILCA right-of-way alternative under which the scenic easement applies to the entire private parcel. This decision addresses the Court's concern that the land exchange alternative gives up existing regulatory authority, while recognizing that I cannot compel LMJV to accept *any* deed restrictions. A land exchange is a consensual real estate transaction for the proponent as well as for the Forest Service. The Forest Service participated in the appellate court's mediation process but that process was unsuccessful. Therefore, it is time to grant LMJV the access it has sought since 2001 and which Congress has mandated through ANILCA. Once LMJV is enjoying its Congressionally-mandated access, it may still want to pursue a land exchange which LMJV, WCSA and many members of the public advocated. I remain open to that possibility.

4.2 Selected Alternative

I am selecting Alternative 3 from the 2014 EIS, which was designed to fulfill the Forest Service's obligation under ANILCA to provide adequate access to non-Federally owned land to secure to the owner the reasonable use and enjoyment thereof. Under Alternative 3, in contrast to the land exchange alternative, the configuration of NFS and private lands in the project area would remain unchanged. The area of the private land inholding included in this alternative is, plus or minus, 288 acres. This alternative includes an access road across NFS lands between Hwy 160 on the north and the private land inholding on the south (Figure 2). The road would be about 1,610 feet in length and be within a 100-foot corridor with a total area of only about 3.7 acres.

Figure 2: ANILCA Road Access



As was the case with the land exchange alternative, the existing Tranquility Road would be extended (approximately 530 feet east across NFS lands) to provide access between the inholding and WCSA, and would provide limited, restricted and seasonal access between Hwy 160 and the private land inholding. This road would have a 60 foot corridor and impact 0.73 acres. Tranquility Road would also provide a route for emergency access/egress.

With regard to the choice of where to locate the access roads, the topography, the location of the existing ski area development, the location of the highway, and the location of the inholding greatly

constrain my options. The 2006 EIS and the current (2014) EIS considered and eliminated granting access via NFSR 391, or through a single access point via the proposed Tranquility Road. Moreover, internal scoping and public comment did not identify any significant difference in environmental impacts based on the location of the access route. I therefore choose not to modify the planned routes and confirm that the access roads are on the best available locations.

This selected alternative may not be implemented until both

- The land exchange documents have been voided and returned to pre-exchange status;
- The Wolf Creek Ski Area closes for the 2018/2019 ski season (as any ground disturbing activities resulting from the decision would necessarily need access either from FSR 391 or the Tranquility parking lots).

4.2.1 Best Management Practices

Best management practices (BMPs) exist for the Rio Grande National Forest that apply to all access and utility rights-of-way. The purpose of the BMPs is to minimize potential impacts to resources during construction, operation and maintenance of the rights-of-way.

Storm water runoff controls from construction sites are mandated by the Federal Water Pollution Control Act (Clean Water Act). In Colorado, the U.S. Environmental Protection Agency (EPA) has delegated authority to the Colorado Department of Public Health and Environment (CDPHE). Construction sites which disturb greater than one acre are required to acquire a storm water discharge permit. This decision requires LMJV to obtain all required permits.

A critical requirement of the Construction Storm Water Discharge permit is the Storm Water Management Plan (SWMP). At a minimum, a SWMP should communicate and satisfy the following:

- Identify all potential sources of pollution which may affect the quality of storm water discharges associated with construction activity;
- Describe BMPs to be used to reduce the pollutants in storm water discharges associated with construction activity including the installation, implementation and maintenance requirements; and
- Utilize good engineering practices and be updated as needed throughout construction and stabilization of the site.

The implementation of these best management practices should reduce the potential impacts associated with Alternative 3.

4.2.2 Monitoring

The Forest Service will be responsible for monitoring the construction and maintenance of both roads on NFS lands; and monitoring the private land development for compliance with the scenic easement.

As part of the Biological Opinion, Reasonable and Prudent Measure #6 requires that the Forest Service and the Applicant (LMJV) shall monitor and report the progress of implementation of the proposed action, and the traffic impacts to Canada lynx associated with the access. The report shall include the progress of the Village development, and the implementation of the conservation measures. Further, Term and Condition 6 (including 6.1-6.5) details the timeline for annual submission (March 1) along with specific additional requirements of the report.

4.2.3 Permits, Licenses, Entitlements and/or Consultation

While the pre-existing scenic easement applies to the private inholding, this decision applies only to NFS lands analyzed within the 2014 EIS. However, because of the unique public/private land interface involved in this project, other Federal, State, and local entities have jurisdiction on private land. The Forest Service assumes no responsibility for enforcing laws, regulations or policies under the jurisdiction of other governmental agencies. The following permits, licenses, entitlements and/or consultations may be necessary:

- CDOT Highway Access Permit
- U.S. Army Corps of Engineers – permit for impacts to Waters of the U.S., including wetlands
- Colorado Department of Public Health and Environment (CDPHE) Grading Permit and Stormwater Discharge Permit
- Mineral County Planned Unit Development (PUD)
- Mineral County Building Construction Permits

5.0 Decision Rationale

The rationale for my decision is based on a thorough review of six factors that I identified as being key to my decision after considering the Court’s two written opinions. Each of the following six factors, including why they are key to my decision, are explored in detail, below.

- 1) Reasonable Use and Enjoyment, Adequate Access & Similarly Situated Properties;
- 2) Range of Alternatives;
- 3) Forest Service Regulatory Authority;
- 4) NEPA Hard Look Review;
- 5) Endangered Species Act and Canada Lynx Conservation Measures; and
- 6) Forest Plan Direction.

1) Reasonable Use and Enjoyment, Adequate Access & Similarly Situated Properties

The regulations interpreting and implementing Section 3210 of ANILCA are set out in the Code of Federal Regulations at 36 CFR §251.110 – 114, Subpart D – Access to Non-Federal Lands. The concepts of “reasonable use and enjoyment,” “adequate access,” and “similarly situated properties” are central to ANILCA, and, therefore, to this decision.

Section 3210(a) of the Alaska National Interest Lands Conservation Act of 1980 reads as follows:

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, that such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.²

In reviewing the public comments regarding ANILCA, I have noticed what I believe to be a fundamental misperception regarding this statute. Congress enacted ANILCA for a variety of reasons including to ensure access to private land within the boundaries of the National Forest System. Congress did not suggest that it was providing for federal regulation of private property within those boundaries. Private land use regulation remains the province of local government. Mineral County, not the Forest Service, will determine what LMJV will be allowed to construct on its property. However, Mineral County cannot approve a subdivision plat under state law for a parcel that lacks

² 16 U.S.C. § 1323(a)

legal access to a public road. In 2005, Mineral County approved LMJV's Planned Unit Development for the private property. In state court litigation the judge found that existing, seasonal access on NFSR 391 was inadequate for a year-round development of even the first phase of LMJV's then-proposed development (on 70 acres) and the judge vacated the County approval. Therefore, the Forest Service must consider the reasonable use of the inholding and grant appropriate access without benefit of a final determination by the County as to what development it will allow.

ANILCA does not require the Forest Service to decide which use, within a range of reasonable uses, will be "allowed." The Forest Service's task is more limited. The Forest Service must simply ensure that it provides access over National Forest System lands that will allow use of the private property within the reasonable range. If I determine that the reasonable use of the property is commercial and residential use to serve a ski area, my analysis is not done. I must then determine the minimum access necessary to that use. If year-round automobile access is needed for commercial and residential use of a +/- 288 acre property at a ski area, it is not relevant under ANILCA whether that access will be used for a small development or a very large development. If year-round automobile access is needed for operation of even a small development, I must grant that level of access. It is then Mineral County's responsibility to determine the size and configuration of the development that will be allowed using that access.

Three terms were fundamental to my evaluation of the access ANILCA requires me to grant to the LMJV inholding: 1) "adequate access"; 2) "reasonable use and enjoyment"; and 3) "similarly situated" lands. Forest Service 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.³

The regulation goes on to provide that:

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. 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.⁴

After an extensive analysis documented in the EIS and the administrative record, I did not find a property "similarly situated" to the LMJV inholding in size and location other than those already on a public road. Thus, I considered "other relevant criteria" as required by the regulation. The history of the LMJV parcel shows how unique the property is. The original purpose of the Forest Service in authorizing the land exchange that created this inholding was to facilitate commercial and residential development associated with the WCSA. Indeed, the 1986 Environmental Assessment assumed development of an all-season resort with 208 residential units, two restaurants, two day lodges and six retail shops. While access was not expressly addressed at the time of the exchange, ANILCA was in effect and it would be disingenuous to suggest that anyone assumed that the intended commercial and residential development was to be operated without automobile access on a snowplowed road.

I find that the reasonable use and enjoyment of the 288-acre LMJV parcel (located near the ski area base which is on a snowplowed highway) is the use intended by the Forest Service when the parcel was created – use as an all-season resort including commercial and residential properties. Nevertheless, ANILCA does not guarantee unlimited access. The analysis shows that such an all-season resort can be operated using an at-grade access and I find that LMJV is not entitled to a grade-separated intersection with Hwy 160 under ANILCA. At this time LMJV is not seeking a grade-

³ 36 CFR § 251.111

⁴ 36 CFR § 251.114(a)

separated intersection. If one becomes necessary in the future, that would be a discretionary decision not mandated by ANILCA.

I find that year-round snowplowed access is the access adequate to the reasonable use and enjoyment of the LMJV property. I further find that the existing seasonal access on NFSR 391 is not adequate access because it would not allow operation of an all-season resort similar to that assumed in the 1986 Environmental Analysis. I further find that snowplowed access on NFSR 391 is not adequate, because it would not minimize disturbance to the skiing resource. I further find that over-the-snow access is not adequate because I found no property similar in size and location currently operating a resort associated with a ski area by over-the-snow means.

I conclude that selection of either action alternative would meet the obligation under ANILCA to provide access adequate to secure the reasonable use and enjoyment of the LMJV inholding.

2) Range of Alternatives

Under the Council on Environmental Quality (CEQ) regulations, the Forest Service is required to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.⁵ The Forest Service Handbook (FSH) provides direction on developing alternatives:⁶

- No specific number of alternatives is required or prescribed.
- Develop other reasonable alternatives fully and impartially.
- Ensure that the range of alternatives does not prematurely foreclose options that might protect, restore, and enhance the environment.
- Reasonable alternatives to the proposed action should fulfill the purpose and need and address unresolved conflicts related to the proposed action.

As established in case law interpreting NEPA, the phrase "all reasonable alternatives" has not been interpreted to require an unreasonable number of alternatives. It does require a range of reasonable alternatives, whether or not they are within agency jurisdiction to implement.⁷

Comments received during the public scoping process provided the basis for determining the range of alternatives. Seven total alternatives were considered, of which four were eliminated from detailed study. As identified in Chapter 2 of the EIS, alternatives considered but eliminated from detailed analysis include:

- Exchange Non-Federal Inholding for a Federal Parcel Elsewhere
- Forest Service Purchase of the Private Land Inholding
- Access Non-Federal Parcel from Tranquility Road
- Access the Non-Federal Parcel Via an Upgraded NFSR 391

The EIS page 2-5 explains why we did not carry these alternatives forward for detailed analysis.

Three alternatives were analyzed in detail in the EIS. These alternatives included:

1. No Action (representing a continuation of existing Federal and non-Federal land ownership patterns and management practices)
2. Land Exchange of Federal and Non-Federal Lands Within the Same Area

⁵ 40 CFR. § 1501.2(c)

⁶ FSH 1909.15, Chapter 10 – Environmental Analysis

⁷ 40 CFR § 1502.14(c)

3. Access Road

To further define the range of alternatives analyzed and adequately disclose the indirect effects associated with private land development under Alternatives 2 and 3, the EIS analyzed a range of development concepts – including Low, Moderate and Maximum Density – for each action alternative. I acknowledge that whatever development plan is ultimately approved by Mineral County in the future would likely vary from what is analyzed in the EIS. However, each of these development concepts provides a reasonable basis from which to analyze and disclose the indirect effects of development that could potentially occur as a result of Forest Service approval to access the private inholding. In essence, the EIS evaluated in detail seven alternative development scenarios (3 development scenarios for each action alternative and the no action development scenario).

Rocky Mountain Wild also alleged that the Forest Service failed to analyze three other reasonable alternatives: 1) granting only over-the-snow access; 2) requiring a grade-separated exchange with Hwy 160; and 3) development on the private land consistent with “Option 2” of LMJV’s original proposal. The over-the-snow access alternative did not need to be considered because it would not meet the purpose and need of providing access sufficient to the reasonable use and enjoyment of the LMJV parcel. Consideration of a grade-separated exchange is not necessary because an at-grade intersection is sufficient for the reasonable use and enjoyment of the property. ANILCA does not require a grade-separated interchange, it only requires access commensurate with reasonable use and enjoyment. The EIS analyzed an at-grade intersection as satisfying access for the reasonable use and enjoyment of the private property. The at-grade intersection approved with Alternative 3 may be a limiting factor for development at some point in the future of the maximum⁸ density concept. If a grade-separated interchange becomes necessary, it will be in the distant future and require a new analysis at that time. Finally, Rocky Mountain Wild misunderstood LMJV’s reference to “Option 2,” which was never a stand-alone alternative. It was merely one of the scenarios under which the existing parcel might be developed if there were no land exchange. Absent a land exchange, the Forest Service has no authority to impose development restrictions on the private inholding. Thus the Forest Service could not “choose” Option 2 under Alternative 3 and reasonably decided to deal with the uncertainty regarding the ultimate configuration of the development on the private land by analyzing three different development scenarios for each action alternative.

Based on FSH and CEQ direction on development of alternatives, I have determined that the range of alternatives, including alternatives considered but eliminated from detailed analysis, is sufficient to satisfy the requirements of NEPA and make an informed decision. The Deputy Regional Forester rejected the many additional alternatives suggested by those that objected to my draft ROD. I agree that none of those alternatives are necessary to inform my decision or engage the public and I have considered and rejected each of them.

3) Forest Service Regulatory Authority

It is important to note that future development on the private inholding is not a component of the federal action. During the public comment process and the litigation, it became clear to me that there are differing perceptions or understandings of the extent and source of Forest Service regulatory authority over LMJV’s use of its private inholding. Because it is critical to a proper

⁸ I have made the language in this Final ROD consistent with the FEIS. Responses to comment on the DEIS and our response to the objection ambiguously stated that the at-grade intersection could be a limiting factor *beyond the moderate density development concept*. The traffic study clearly showed that the point at which CDOT might require a grade-separated exchange was not expected to occur even at the maximum density level of development. Neither the EIS nor the traffic study provided any support for the idea that the maximum density concept would not be possible using an at-grade intersection. But, CDOT would make a final determination based on actual traffic counts and could require a grade-separated exchange before the maximum development projected in the maximum density concept is achieved.

understanding of my decision, my authority over the private LMJV inholding is addressed in detail below.

Congress has decided through ANILCA that the Forest Service must grant access adequate for the reasonable use and enjoyment of the private inholding. The Forest Service articulated its interpretation of ANILCA's access provision in 1991 regulations as follows: "these rules do not purport to give the Forest Service the right to tell a landowner what use may be made of non-Federal land." (56 Fed. Reg. 27410 (June 14, 1991)). Thus, I cannot mandate development restrictions under my ANILCA authority as a condition of the land exchange or as a condition of granting access over NFS lands. Congress has already granted a right of access and LMJV can insist on that access rather than accept a land exchange burdened by deed restrictions. Therefore, the Forest Service does not have "actual control" of the private development under ANILCA necessary to "federalize" the private development for NEPA purposes.

The second potential regulatory authority at play in this decision is the existing scenic easement on LMJV's private inholding. As noted above, the scenic easement limits the development to "a mix of residential, commercial, and recreational uses typical to an all-season resort village" and provides the Forest Service the ability to "veto" certain non-conforming uses of the property. But the scenic easement does not purport to give general regulatory authority to the Forest Service that would allow the Forest Service to control the degree or density of the private development. As long as the development is typical of an all-season resort village, the scenic easement does not constrain the size of the development in any manner. In fact, the EIS recognizes that Alternative 3, where the entire private inholding is constrained by the scenic easement, could still result in a residential and commercial development with 403 hotel units; 998 condominium units; 504 townhomes; 76 single family residences and 221,000 square feet of commercial space. The scenic easement also specifically recognizes that Mineral County retains general regulatory authority and expresses the intent not to "conflict with or intrude upon" that development authority. Thus nothing in the scenic easement gives the Forest Service "actual control" of the development on the private land.

The final source of regulatory authority at issue is the Forest Service's authority to seek deed restrictions which would constrain development on the federal exchange parcel after it passes into private ownership. This authority was the subject of particular confusion during the litigation, and I note the Court's concern that my 2015 ROD did not specifically address the ability of the Forest Service in a land exchange scenario to seek additional deed restrictions pursuant to 36 CFR 254.3(h) if "appropriate" or if needed in the public interest.

The land exchange regulations do allow the Forest Service to turn down a land exchange proposal where the proponent is unwilling to accept deed restrictions if those restrictions are needed in the public interest or the Forest Service finds the restrictions to be appropriate. Similarly, the proponent cannot be compelled to accept any deed restrictions and the regulations provide no independent authority to regulate the land after it passes into private ownership. Any deed restrictions proposed by the Forest Service must be accepted by the land exchange proponent (36 CFR 254.3(a)). Thus, none of the three potential sources of regulatory authority over the LMJV inholding provides "actual control" of the private development.

4) NEPA "Hard Look" Review

The environmental effects associated with any of the alternatives are a key component of my decision. The EIS includes analysis of the potential impacts to the physical, biological and human environment. This includes direct, indirect and cumulative effects analyses associated with Alternatives 1, 2 and 3, based on multiple development concepts for the Village at Wolf Creek. My staff and I have conducted a thorough review of the environmental analyses associated with each of the alternatives analyzed in the EIS and engaged the public in the review. There has been vocal opposition to the development based on the likely effects disclosed in the EIS. I carefully considered these environmental effects and the public comment (both pro and con) when making my decision. I carefully weighed all environmental effects with the Forest Service's legal obligations under ANILCA.

Chapter 4 of the EIS includes detailed analysis of potential direct, indirect and cumulative effects associated with each alternative. A summary of these effects is provided in Chapter 2 of the EIS (Tables 2.6-1 and 2.6-2, and Tables 2.6-3.1 through 2.6-3.14 of Section 2.6.2). The EIS displays the impacts of the various development levels under each alternative across a wide variety of resources, including: surface water; groundwater; geology and soils; water rights and use; climate and air quality; vegetation; wetlands; macroinvertebrates and fish; wildlife; special status plant and animal species (ESA listed and Regional Forester sensitive); scenic resources; recreation resources; transportation; social and economic resources; and cultural resources.

One issue of confusion and dispute regarding the EIS was whether the effects of LMJV's proposed private development should be considered part of the federal action and thus a "direct" effect of the federal access decision or whether those impacts should be considered an indirect effect of the federal access decision.

Future development of an all-season resort on private land that is accessible year-round would not be possible without Forest Service approval for either a land exchange (Alternative 2), or a road access corridor across NFS lands (Alternative 3). Therefore, future development on the private lands owned by LMJV was analyzed as an indirect effect of approval of either Alternative 2 or 3. As noted above, because the ultimate size of LMJV's development will not be known until Mineral County issues its approvals, and the County cannot issue its approvals until LMJV has access, the Forest Service used a range of development scenarios (Low, Medium, and High) to capture the impacts of granting LMJV's access to its inholding whether through a right-of-way or a land exchange.

While I believe we correctly categorized the impacts of LMJV's Village as indirect effects of the federal access decision, I also firmly believe that our analysis would not have been different if the EIS treated the Village impacts as direct effects rather than indirect effects. We would still have used the same reasonable range of development scenarios to capture the impacts of the Village. Describing the environmental effects as "direct" effects does not give the Forest Service any additional control over the private land and the private development is not part of the federal action whether the effects of the private development are categorized as direct or indirect effects. The bottom line here is that no one was misled. Anybody that reviewed the EIS knows that the Forest Service decision will lead to a large development on private lands that will have significant environmental effects across a wide range of resources. The EIS did not attempt to downplay the significant effects of the private development by characterizing those effects as "indirect" effects.

Although the EIS took a broad approach and analyzed future development on the private lands, it should be noted that the Rio Grande NF has no jurisdiction⁹ on private lands and that the NFMA and the Forest Plan do not apply to private lands. Additionally, it is important to reinforce that future development on the private inholding is not a component of either of the action alternatives analyzed in the EIS.

The EIS acknowledges that the WCSA 2013 Master Development Plan (MDP) identified reasonably-foreseeable future actions such as the Meadow Lift which were analyzed for cumulative effects but not as connected actions. WCSA's 2013 MDP is not itself an action at all nor does the MDP account for a future Village (of any size/configuration) on private lands near the base area. Both the Rio Grande and San Juan National Forests accepted the MDP in November of 2015.

Based on the review of surrounding lands and activities associated with those lands, it was determined that there are no additional connected actions.

This analysis constituted a "hard look" at the potential environmental effects of the alternatives and more than met the twin aims of NEPA: informed decision making and public participation. Any defects in the EIS that do not defeat the informational goals of NEPA do not require a new analysis.

⁹ The Forest Service does have authority to enforce the scenic easement but LMJV has not proposed a development that is inconsistent with that easement.

Whether the Forest Service properly classified the private land development impacts as direct or indirect impacts is not controlling and I am convinced that the EIS is adequate.

5) Endangered Species Act & Canada Lynx Conservation Measures

In listing the Canada lynx (*Lynx canadensis*) as a threatened species under the ESA, the USFWS determined that “the single factor” threatening the species was the inadequacy of regulatory mechanisms¹⁰ to conserve the Canada lynx distinct population segment (DPS) in the lower 48 states. From the Lynx Conservation Assessment and Strategy which preceded this listing, through the Southern Rockies Lynx Amendments (SRLA) and down to project-level consultation under the ESA, a fundamental concern was and still is connectivity of habitats. That concern was expressed in creating Lynx Analysis Units (LAUs) and Linkage Areas.

The Forest Service addressed the “single factor” of forest plans without lynx conservation guidance by amending twenty-five forest plans across the Northern (2007) and Southern (2008) Rocky Mountains. The amendments to 7 forest plans in the southern Rockies were referred to as the Southern Rockies Lynx Amendment (SRLA) and the amendments to eighteen forest plans in the Northern Rockies were known as the Northern Rockies Lynx Management Direction (NRLMD). These amendments established management direction on approximately 25 million acres of Canada lynx habitat on NFS lands. In its Biological Opinion, the USFWS found “the programmatic and project-level objectives, standards, and guidelines in the [SRLA] provide comprehensive conservation direction adequate to reduce most adverse effects to lynx from Forest management and to preclude jeopardy to the lynx.” The SRLA (like its companion NRLMD in the Northern Rockies) followed a programmatic/project consultation format:

“Further section 7(a)(2) consultation will occur on future site-specific projects and activities if they may affect lynx. Future consultations will reference back to the Biological Opinion issued on this decision to ensure the effects of the specific projects are within the effects anticipated in the Biological Opinion issued on this decision (USDI FWS 2008).”

“The Service concludes that continued implementation of the Plans incorporating the amendments for lynx conservation may result in some level of adverse effects to lynx. However, the level of adverse effects to lynx are not reasonably expected to, directly or indirectly, reduce appreciably the likelihood of both the survival and recovery of the lynx DPS in the wild by reducing the reproduction, numbers, or distribution of lynx.”

The consultation is structured by recognizing the programmatic Biological Opinion for the SRLA as the first tier of a consultation framework, with the review of subsequent projects that may affect lynx as being the second tier of consultation. For projects expected to adversely affect the Canada lynx which are consistent with, and fully analyzed under, the first tier Biological Opinion, the USFWS provides a letter that confirms that the project is in compliance with the programmatic Biological Opinion on the SRLA. For projects that will adversely affect the Canada lynx but were not fully analyzed in the first tier Biological Opinion, a second tier Biological Opinion is prepared. For projects that will result in insignificant and discountable effects to the Canada lynx, the USFWS provides a letter of concurrence.

The structure of the Canada lynx listing (and the programmatic and site-specific Tier 2 Biological Opinions for the SRLA) reinforce the unlikelihood of an individual project on private land resulting in jeopardy to the Canada lynx. The Response-to-Comment section of the EIS rejected any concern that the private development could jeopardize the lynx stating: “there is no project or action that could be implemented, if its effects were confined to the Southern Rockies that would result in a jeopardy determination.” Project-level Biological Opinions rely on programmatic Biological

¹⁰ The listing decision specified the lack of guidance in National Forest land and resource management plans and Bureau of Land Management land use plans.

Opinions to address jeopardy and focus on a smaller scale where the concerns are incidental take, adverse effects and conservation rather than jeopardy. As long as the basic programmatic/site-specific framework remains the same, there is no need to further address jeopardy at the project-level because jeopardy has already been considered and resolved at the programmatic level by the SRLA plan amendments' Biological Opinion.

The Forest Service lacked jurisdiction to directly regulate private land or to regulate the highways themselves. Accordingly, the SRLA focused on Forest Service management of NFS lands. SRLA Standard ALL S1 provided that "permanent developments" and vegetation management projects must maintain habitat connectivity in an LAU and/or Linkage Area. If the Forest Service were proposing to construct an all-season resort on NFS lands under a special use authorization, Standard ALL S1 would apply. But, Standard ALL S1 was not developed to prevent the Forest Service from authorizing access to developments on private land, even where those developments have adverse impacts on connectivity. Rather, Standard ALL S1 applies only to developments on NFS land where the Forest Service has jurisdiction. Thus, ALL S1 *was not applicable* to the Village at Wolf Creek development on private land.

The April 2013 Biological Assessment, August 2013 Supplemental Biological Assessment, and the 2014 EIS erroneously assumed that ALL S1 applied to the private land development. As a practical matter, the error is of no significance because the connectivity issue addressed in the ALL S1 standard is very much at the center of our analysis of the impact the private development will have on Canada lynx. The 2013 and 2018 Biological Opinions do not repeat the Forest Service error of tying the connectivity issue to Standard ALL S1. The project-level consultation seeks to deal with the biggest impact of the private development on connectivity through LMJV's conservation measures that address the adverse effects of increased highway use on connectivity (deleterious effects of more avoidance of Hwy 160, or death of individual lynx on the highway). So, the conservation measures take the place of Standard ALL S1 in a private-land scenario, where maintaining landscape and habitat connectivity for the lynx in the Wolf Creek Pass linkage area¹¹ continues to be of interest to the parties and the ALL S1 standard is not applicable.

The USFWS did not specifically address the question in its 2013 Biological Opinion whether conservation measures were necessary to insure that the private development is not likely to jeopardize the species. Thus, the Forest Service reinitiated consultation with a BA on my choice of Alternative 3. The BA took the position that the private land development would not jeopardize the Canada lynx *even if there were no conservation measures*. The purpose of the conservation measures is not to avoid jeopardy but to implement proactive conservation measures for Canada lynx in the Wolf Creek Pass linkage area which reduce adverse effects to the local population, minimize incidental take, and maintain connectivity values for lynx in a key landscape movement linkage for lynx in southern Colorado.

In response to the Court's finding that the conservation measures were inadequate, LMJV has clarified in the contractual agreement with NFF that the funding commitment is firm and the Advisory Panel has authority to expend funds as it sees fit. The NFF agreement replaces the MOU that was anticipated in the 2013 Biological Opinion and increases the certainty that the conservation measures will be implemented because the National Forest Foundation holds the funds and administers the program together with the Advisory Panel.

I find that the modified conservation measures are reasonably specific, certain to occur and impose enforceable obligations. Based on the National Forest Foundation agreement, it is now certain that

¹¹ Linkage areas are areas of movement opportunities between habitat blocks that may be separated by intervening areas of "non-habitat" such as basins, valleys, agricultural lands, or where lynx habitat naturally narrows between blocks. They exist on the landscape and can be maintained, degraded, or severed by management activities and human infrastructure, such as high-use highways, subdivisions or other developments.

an Advisory Panel will be assembled to consider and implement conservation measures to maintain Canada lynx habitat connectivity. Such conservation measures include: a corridor assessment and trapping/collaring program; funding the Advisory Panel in proportion to the amount of development that is authorized on the LMJV parcel up to a maximum of \$1,981,000; that the Advisory Panel will be independent of LMJV; and conservation actions that benefit Canada lynx will take place. Moreover, the 2018 Biological Opinion ensures that LMJV will take the following actions that will benefit Canada lynx: Worker Orientation, Worker Shuttle, On-Site Employee Housing, On-Site Convenience to Reduce Highway Traffic, Property Owners and Guests Lynx Awareness Program, and annual reporting (together with the Forest Service) regarding the build-out of the development, the traffic generated on Highway 160 and traffic impacts to Canada lynx. These conservation measures will help us understand how Hwy 160 affects the local lynx population and address the increasing highway traffic which has the most potential to impact connectivity – a key factor for conserving the local population.

With my decision to grant a perpetual right-of-way over NFS lands, rather than a land exchange, the Forest Service will have a continuing federal action and will have the responsibility to reinitiate consultation if necessary.

While these concrete actions will occur, the USFWS noted in its 2018 Biological Opinion that it is not certain exactly what other conservation actions will take place or when and where conservation measures will occur. Based on the imprecise content, timing and location of some conservation measures, the USFWS could not predict the impact of those measures in the 2018 Biological Opinion. But, that imprecision does not detract from the certainty that conservation measures will take place and will benefit Canada lynx.

I further find that the Forest Service’s amendment of 25 forest plans covering over 25 million acres of lynx habitat on NFS lands across the Rocky Mountains (and the continued tiered consultation process with the USFWS) amply meets the Section 7(a)(2) obligation to “insure” that this project is “not likely to jeopardize” the continued existence of the Canada lynx. The conservation measures were never intended to carry that burden and are not necessary to the no-jeopardy determination. The USFWS also concludes that the conservation measures are not necessary to its no-jeopardy finding. (Biological Opinion (12-18-2018) p. 24).

The November 13, 2017, USFWS status review for Canada lynx indicates that the lynx has recovered and that a proposed rule delisting the species will be pursued. The current schedule for a proposed delisting rule is approximately October 2019, with a final rule within one year later if the USFWS proceeds to finalize the delisting after taking public comment and reviewing submitted information and data. The determination that the lynx has recovered also supports my finding that this project is not likely to jeopardize the lynx.

6) Forest Plan Direction

Congress, through NFMA, directed the Forest Service to ensure that “instruments for the use and occupancy of National Forest System lands” should be consistent with the forest plan. 16 U.S.C. §1604(i). Grant of an access route over NFS lands is subject to NFMA’s consistency provision but development of private land is not.

The access routes evaluated in the EIS are within Management Area Prescription 8.22 - Ski-based Resorts: Existing/Potential (Forest Plan, IV-35 to 36), which emphasizes management for their existing or potential use as ski-based resort sites. This management area encompasses the WCSA SUP boundary (EIS Figure 1.9-1). Granting access to private property for development complimentary to the ski area is consistent with this management area prescription.

The SRLA distinguished forest roads from high-speed highways as follows:

Unlike high-speed highways, the types of roads managed by the Forest Service do not have the high speeds and high use levels that would create barriers to lynx movements or result in significant mortality risk. Roads may reduce lynx habitat by removing forest cover, but this constitutes a minor amount of habitat. Along less-traveled roads where roadside vegetation provides good hare habitat, sometimes lynx use the roadbeds for travel and foraging (Koehler and Brittell 1990). Research on the Okanogan NF in Washington showed that lynx neither preferred nor avoided forest roads, and the existing road density did not appear to affect lynx habitat selection (McKelvey et al. 2000). Available information suggests lynx do not avoid roads (Ruggiero et al. 2000) except at high traffic volumes (Apps 2000).

Standard ALL S1, Objective ALL O1 and the HU guidelines are applicable to these access routes. However, the access routes themselves have minor impacts on connectivity. The BA (2018) concluded that there would be relatively minor effects to Canada lynx habitat effectiveness, the Canada lynx prey base and foraging functionality, diurnal security habitat and thermal cover, habitat connectivity, and home range efficacy in habitats surrounding the access road corridor as a result of its development and use. While ALL S1 requires these routes to “maintain” connectivity, the SRLA defines “maintain” as follows: “Maintain – In the context of this decision, maintain means to provide enough lynx habitat to conserve lynx. It does not mean to keep the status quo.” Thus, the minor impact of these access routes on connectivity remains consistent with the ALL S1 and does not require a forest plan amendment.

Similarly, any minor tension between authorizing these access routes and the SRLA guidelines and objectives does not require an amendment. The SRLA describes objectives, standards and guidelines as follows: “objectives are descriptions of desired resource conditions; standards are management requirements designed to meet the objectives; and guidelines are recommended management actions that will normally be taken to meet the objectives, but are not required.” Amendments are only required if standards cannot be met.

While the SRLA does apply to the access routes, the SRLA does not purport to grant authority to control private land within the boundary of a National Forest. In fact, the SRLA Biological Opinion that relied on the SRLA management direction and analyses assumed that private land will be developed in a manner that could be detrimental to lynx.

The Biological Opinion for the SRLA made the following observations:

“The Forest Service has varying levels of authority and jurisdiction” For instance, the Forest Service typically has little influence on . . . private land development but has substantial influence on lynx through vegetation management actions on National Forests.”

“Many actions that affect connectivity are . . . under the authority of other agencies . . . or private land owners.

“The Forest Service considers the conditions of lynx habitat on private lands within LAUs to the extent possible, in its assessment of baseline conditions during development of projects for Forest lands, and adjusts its action to reduce negative effects in the LAU.”

“Even with implementation of the amendment, the role of the Forest Service in ameliorating the impacts of highway or private land development is limited. The amendment would however . . . require the Forest Service to consider land exchanges or acquisition, and coordinate with other agencies to lessen the impacts of development.”

The Biological Opinion for the SRLA goes on to recognize that adverse private land effects will occur but recognizes that the size of private land parcels is small relative to total lynx habitat as well as individual lynx home ranges. The Biological Opinion concludes that the negative effects of private

land development interspersed with NFS land would be moderated by management of surrounding NFS lands under the amendment. Finally, the Biological Opinion notes that the objectives are to “actively maintain or restore” lynx habitat connectivity “either through Federal land management or conservation easements, land exchanges, or other cooperative efforts with private land owners.” Clearly, the Biological Opinion recognized the Forest Service did not have the authority to impose its plan standards on private lands. Thus, the amendment sought to incentivize private landowners to cooperate in conserving Canada lynx. Here, LMJV is cooperating to conserve lynx through committing to substantial funding and developing conservation measures.

The 2013 Biological Assessment for the proposed land exchange also recognized: “[t]he future development of private lands and the density of development that might occur on the Village parcel would be outside of the [U.S. Forest Service’s] jurisdiction and not subject to SRLA direction (i.e., because the parcel would be private land).”

The characterization in the 2014 EIS that Alternative 3 is not consistent with Standard ALL S1 or Objective ALL O1 and would require a site-specific forest plan amendment was incorrect. However, the objection reviewing officer provided an instruction to address the SRLA in the plan consistency analysis. This ROD demonstrates that SRLA Standard ALL S1 and Objective ALL O1 do not apply to private land development.

For the foregoing reasons, the decision does not require a forest plan amendment because the access roads are not inconsistent with an applicable standard and the forest plan direction does not apply to private land development.

6.0 Public Involvement

Public involvement with the Village of Wolf Creek Access Project began on April 13, 2011. Details of the public involvement efforts are described in the EIS, Section 1.5. The following is a summary of those efforts:

- On April 13, 2011 a scoping package soliciting comments was mailed to 84 individuals, agencies, tribes and other organizations. In addition, the scoping package was posted on the Rio Grande NF website. The scoping period ended on June 4, 2011.
- On April 19, 2011 a Notice of Intent to prepare an EIS was published in the Federal Register.
- On April 25, 26 and 27, 2011 public open houses were held in Creede, Pagosa Springs, and Del Norte, Colorado respectively.
- A field trip to the project area was held September 20, 2011.
- On August 17, 2012 a Notice of Availability of the DEIS was published in the Federal Register, which initiated a 45-day comment period. The comment period was subsequently extended by 15 days to October 16, 2012.

These public involvement efforts resulted in the Forest Service receiving 111 comment letters during the scoping period (April 13-June 4, 2011) and 893 comment letters during the DEIS comment period (August 17-October 16, 2012).

7.0 Alternatives Considered

As per CEQ Regulation 40 CFR 1502.14, alternatives to the No Action were developed and analyzed to address environmental issues. They include four Alternatives considered but eliminated from detailed study, Alternative 2 – Land Exchange, and Alternative 3 – Access Road.

7.1 Alternatives Considered but Eliminated from Detailed Study

Exchange Non-Federal Inholding for a Federal Parcel Elsewhere.

This alternative assumes that the Forest Service and LMJV would agree to exchange the private inholding for a Federal parcel of equal value on the Rio Grande NF or elsewhere on federally owned property. This alternative was eliminated from analysis because LMJV expressed no interest in such an exchange.

Forest Service Purchase of the Private Land Inholding.

This alternative assumes the United States (Forest Service) would purchase the non-Federal inholding from LMJV. Historically, the Forest Service has acquired critical non-Federal parcels through a congressional appropriation from the Land and Water Conservation Fund (LWCF). While the non-Federal parcel would be a desirable acquisition for the Forest Service, such an acquisition would require that LMJV be willing to sell the private land inholding and that funds be available from the LWCF for the purchase. This alternative was rejected because it does not meet the Purpose and Need, LMJV is not willing to sell and there would not likely be funding available for the purchase of the inholding.

Access the Non-Federal Parcel Via an Upgraded NFSR 391.

This alternative provides for upgrades that would allow winter use of NFSR 391. However, this access is encumbered by seasonal use, as well as design and recreational land use issues. This alternative was eliminated from detailed study because it conflicts with established Forest Service winter recreational uses, would materially interfere and be inconsistent with the ongoing operations of WCSA, and would impact traffic at WCSA's intersection with Hwy 160.

Access Non Federal Parcel from Tranquility Road.

This alternative assumes that the private land inholding would be accessed by extending Tranquility Road, the access road to WCSA's parking lots, east to the inholding to provide primary vehicular access. This alternative would create ski area access and parking lot traffic issues, and depending on the level of development that may ultimately be approved by Mineral County, could result in the CDOT requirement for a grade-separated interchange with Hwy 160 due to issues of safety and congestion. Therefore, this alternative was eliminated from detailed study because of the potential impacts to WCSA operations and due to potential traffic impacts at WCSA's access road intersection with Hwy 160. It should be noted that the Tranquility Road extension is included in the Action Alternative as a means of providing ski area access from the LMJV parcel and to serve as an emergency access/egress road.

7.2 Alternative 1 - No Action

Per the requirement of 40 CFR part 1502.14, a No Action Alternative has been included in the analysis to provide a baseline for comparing the effects of the Action Alternatives. By definition, the No Action Alternative represents a continuation of existing Federal and non-Federal land ownership patterns and existing management practices on these lands. Under the No Action Alternative, as illustrated by Figure 2.2-1, LMJV has vehicular access to the private parcel via NFSR 391 during those periods when this road is snow-free, generally mid-June through September. Under this alternative there would be no additional road access provided to the ±288-acre private land inholding.

7.3 Alternative 2 - Land Exchange

Alternative 2 as illustrated by Figure 2.2-2 within the EIS, is a land exchange between the United States and LMJV designed to fulfill the Forest Service's obligations under ANILCA to provide adequate access to non-Federally owned land to secure to the owner the reasonable use and enjoyment thereof. This alternative proposes that LMJV would convey approximately 177 acres of non-Federal

lands to the Rio Grande NF in exchange for approximately 205 acres of NFS lands managed by the Rio Grande NF. The estimated 177-acre non-Federal exchange parcel to be conveyed to the United States encompasses the southern and western portions of the private land inholding, and the ±205-acre Federal exchange parcel is located to the north, east and south of the private land inholding. This exchange would create a private land parcel of approximately 325 acres extending to Hwy 160, and would accommodate year-round vehicular access. Under Alternative 2, the existing Tranquility Road which extends from Hwy 160 to a WCSA parking lot, would be extended east plus or minus 1,593 linear feet across NFS lands within the WCSA SUP boundary to provide access between the private land parcel and WCSA. This road would provide limited, restricted and seasonal access between Hwy 160 and the private land parcel, and would also provide a route for emergency access/egress.

7.4 Alternative 3 – Access Road

Alternative 3 was designed to fulfill the Forest Service’s obligations under ANILCA to provide adequate access to non-Federally owned land to secure to the owner the reasonable use and enjoyment thereof. Under Alternative 3, the configuration of NFS and private lands in the project area would remain unchanged. The area of the private land inholding included in this alternative is about 288 acres. This alternative includes an access road across NFS lands between Hwy 160 on the north and the private land inholding on the south (EIS Figure 2.2-4). The road would be about 1,610 feet in length and be within a 100-foot corridor with a total area of about 3.7 acres.

The existing Tranquility Road would be extended east about 530 linear feet across NFS lands to provide access between the inholding and WCSA, and would provide limited, restricted and seasonal access between Hwy 160 and the private land inholding. Tranquility Road would also provide a route for emergency access/egress.

8.0 Environmentally Preferable Alternative

In accordance with CEQ Regulations, I am required to identify the alternative or alternatives that could be considered environmentally preferable [40 C.F.R. 1505.2(b)]. The Forest Service Handbook 1909.15 Section 05 describes *environmentally preferable* as: “The alternative that will best promote the National Environmental Policy Act as expressed in NEPA’s Section 101 (42 USC 4321). Ordinarily, the environmentally preferable alternative is that which causes the least harm to the biological and physical environment; it is the alternative which best protects and preserves historic, cultural and natural resources” (36 CFR 220.3). Based on the review of the alternatives, Alternative 1, the No Action, is the environmentally preferable alternative.

9.0 Findings Required by Other Laws, Regulations and Agency Policy

I have reviewed the EIS and concluded that implementation of Alternative 3 is consistent with all relevant laws, regulations and requirements. This includes, but is not limited to, the following:

- Alaska National Interest Land Conservation Act of 1980
- Clean Water Act of 1977, as amended
- Endangered Species Act of 1973, as amended, including consultation resulting in the Biological Opinion as signed on December 17, 2018
- Floodplain Management – Executive Order 11988 of 1973
- National Environmental Policy Act of 1968, as amended
- National Forest Management Act of 1976
- National Historic Preservation Act of 1966, as amended
- Protection of Wetlands – Executive Order 11990 of 1977

10.0 Pre-Decisional Administrative Objection Process

The Village at Wolf Creek Access Project, Alternative 3 ANILCA the draft ROD was subject to the pre-decisional review process pursuant to 36 C.F.R. 218, Subparts A and B.

The objection period began on July 22, 2018 and ended on September 4, 2018. Only individuals or organizations who submitted specific written comments during the two opportunities to comment as described in the public involvement section (6.0) were eligible to file an objection (36 CFR 218.2, 218.5(a)). Not all who submitted comments were eligible to object. All objections were addressed by the Reviewing Officer and answered by letter either electronically or by Postal Service on or near November 19, 2018.

An objection resolution meeting was held on October 24, 2018. No resolution was reached. Public record documents on this project including objection and comment records can be found on the Rio Grande National Forest webpage at: <https://www.fs.usda.gov/project/?project-35945>.

11.0 Contact Person

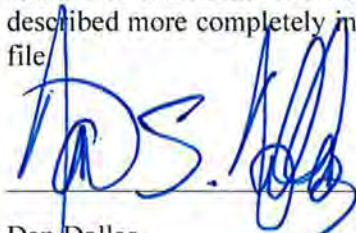
For additional information concerning the Record of Decision, the EIS, or the Forest Service objection process, please contact:

Tom Malecek, Deputy Forest Supervisor
Rio Grande National Forest
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Monte Vista, CO 81144
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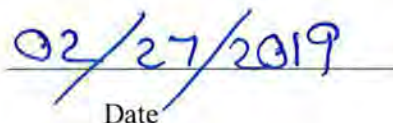
The Record of Decision, and supporting documents, are available for inspection during regular business hours, Monday through Friday 8:00 AM until 4:30 PM, except federal holidays at the above address.

12.0 Signature and Date

I have been delegated the authority and am the Responsible Official for the decision outlined in the Record of Decision. Note that in many cases this Record of Decision summarizes information described more completely in the EIS. For detailed information, please refer to the EIS and project file.



Dan Dallas
Forest Supervisor
Rio Grande National Forest



Date