Colorado Wild Public Lands
PO Box 1772, Basalt, CO 81621
coloradowildpubliclands@gmail.com
coloradowildpubliclands.org

April 15, 2024

Objection Reviewing Officer
USDA Forest Service Rocky Mountain Region 2
1617 Cole Blvd
Lakewood, CO 80401

Submitted via the project website:
http://www.fs.usda.gov/project/?project=61576.

To the Objection Reviewing Officer,

Re: **Objection** to the Draft Finding of No Significant Impact and Draft Decision Notice for Pre-Decisional Administrative Review for the Willow Creek Exchange, March 2024.
Responsible Official: Monte Williams, Forest and Grassland Supervisor, Arapahoe and Roosevelt National Forests and Pawnee National Grassland.

The following are the objections of Colorado Wild Public Lands (CWPL) to the Draft Decision Notice (DDN) the Finding of No Significant Impact (FONSI) and the Final Environmental Assessment (FEA) for the Willow Creek Land Exchange (LEX) project released by the USDA Forest Service (Agency) on March 3, 2024.

Colorado Wild Public Lands is a non-profit 501(c)3 organization whose mission is to protect the integrity, size and quality of our public lands in Colorado. We work to keep our public lands open and accessible and to ensure transparency in land management decisions, especially regarding land exchanges. CWPL has reviewed and analyzed the available public documents for the Willow Creek Land Exchange since the initial land exchange scoping, and CWPL has participated in each of the public comment periods.

The proposal is the exchange of one federal parcel of approximately 5.5 acres, located near the base of Mary Jane Ski Area, for one private parcel of approximately 50.2 acres, located on Highway 125, approximately 25 miles northwest of Granby, Colorado. The proposed exchange, promoted by TMI, would involve lands in the Sulphur Ranger District of the Arapahoe and Roosevelt National Forest in Grand County, Colorado.

In this objection we incorporate by reference the scoping letter submitted by CWPL and others dated April 1, 2022 (CWPL Scoping), and the comment letter responding to the Willow Creek Land Exchange Draft Environmental Assessment submitted by CWPL and others dated December 17, 2023 (CWPL DEA Comments). These letters previously identified and highlighted the following objections in compliance with the Comment and Objection Rule at 36 CFR 218(d)(6).

On behalf of its Board, Members, the signatories to the above comment letters, and the general public, CWPL objects to the DDN, FONSI, and FEA for violations of the National Environmental Policy Act (NEPA), specifically the Agency's deficient analysis in its Environmental Assessment and unsupported FONSI, its failure to respond to Freedom of Information Act (FOIA) requests and to disclose documents that would facilitate an informed public comment period, violations of the Federal Land Management and Policy Act (FLPMA), namely errors associated with equal-value conclusions and public-interest determinations, and violations of the Federal Administrative Procedure Act (APA) requiring reasoned decisionmaking supported by a complete administrative record.

I. THE AGENCY IS CONTINUING ITS UNLAWFUL PRACTICE OF EXCLUDING VALUATION INFORMATION FROM THE PUBLIC NEPA PROCESS.

Project appraisals have not been completed, and the Agency has provided no information to substantiate a decision that the parcels have equal value. The strategy of delaying appraisals until after the public process is closed and a FONSI and DDN have been issued violates FLPMA and NEPA.

A. THE AGENCY LACKS SUFFICIENT INFORMATION TO MAKE THE DETERMINATION OF EQUAL VALUE AS REQUIRED BY FLPMA.

The fair, proper, and transparent valuation of the parcels in a proposed land exchange as required under FLPMA is fundamental to the Public Interest Determination. This analysis begins with a Valuation Consultation and culminates in a Public Interest Determination based on demonstrating equal value as supported by properly instructed and prepared appraisals. The appraisals are the heart of any land exchange analysis. They inform the Agency's decision about how the parcels that the NEPA documents analyze should be configured.

Absent an informed assessment of the parcel valuations, the prospect of changing parcel configurations to make the proposal conform to appraisals makes the NEPA documents merely speculative and meaningless. Only with an indication of value can the Agency undertake an accurate resources assessment of the actual parcels to present for public comment. The values define the resources and values to be analyzed in the NEPA documents; this analysis is then used to inform the Public Interest Determination. The two processes are interconnected; accurate, adequate, and thorough NEPA analysis cannot occur without a FLPMA-mandated equal-value

assessment and the FLPMA-mandated public interest determination cannot occur without an accurate NEPA analysis.

The NEPA process and the appraisal process are so intertwined that the Agency must substantially complete the appraisal process before the release of NEPA analysis [CWPL DEA Comments at 2]. This procedural order not only presents an accurate picture for assessment of the exchange, it also unequivocally allows the release of the appraisals with the rest of the supporting documentation, such as biological and wetlands studies that serve to inform public comment. Delaying all appraisals and property valuation analyses until after the close of NEPA processes results in property identification and assessments based on mere speculation. It is disingenuous for the Agency to issue a Public Interest Determination, FONSI, and DDN based on mere conjecture about the size and the value of the non-federal parcel's acreage, while simultaneously instructing the appraiser to disregard future zoning and future uses of the Federal Parcel, as identified by the proponent and supported by the zoning authority, because they are "speculative."

Because the Equal Value requirement is fundamental to the Public Interest Determination, the public's ability to assess and comment on this determination, and the NEPA process is hampered by the unavailability of the appraisals; by withholding them, the Agency is not being transparent. The BLM was recently chastised for this practice in another land exchange:

> There is something uncomfortable about the BLM concealing appraisals of the value of lands subject to a proposed exchange; it smacks of secrecy rather than transparency and thus gives rise to suspicions that the BLM is hiding some improper conduct. Accordingly, the Court does not condone the BLM's behavior and finds that it has contributed to the bringing of this litigation. (Civil Action No. 17-cv-01564-MSK Ruling March 25, 2021)

Why then was the public precluded from reviewing these critical documents? Why has the Agency ignored court directives and withheld the appraisals from the public at the time (i.e., during public comment periods) when they would be critical to allowing meaningful public commenting? If no valuation information has been created or provided to the Agency, how can the DDN [at 12] conclude that the exchanged lands are of comparable value or can be made to be of comparable value?

The Agency cannot lawfully trade away public lands in a land exchange without satisfying FLPMA's equal-value requirement. This FLPMA requirement requires developing appraisals for the properties involved. Because land exchanges impact the human environment and appraisals are a necessary underlying component of a land exchange approval, they are an essential document in the NEPA process and must be made available for the public to review and comment on. 40 C.F.R. § 1506.6(f) (requiring agencies to "make…underlying documents available to the public."); Ctr. for Biological Diversity v. Walsh, 2021 WL 1193190, at *4 (D. Colo. Mar. 30, 2021) ("The agency must give the public notice of the EA and FONSI (and underlying documentation) and solicit information and comment from the public on the documents and proposed action before proceeding to finalize its decision.") (emphasis added).

In general, economic documents and information are within the scope of NEPA. A NEPA evaluation looks at impacts to the "human environment," 42 U.S.C. § 4332(c), which is defined to include "economic or social effects" that are interrelated with environmental effects, 40 C.F.R. § 1508.14. The regulations also define "effects" to include "economic" effects. *Id.* § 1508.8. Further, NEPA ensures that agencies "attain the widest range of beneficial uses of the environment without …other undesirable and unintended consequences," 42 U.S.C. § 4331(b)(3), which may include economic consequences. The Supreme Court in Robertson v. Methow Valley Citizens Council reviewed a proposed ski resort in a national forest involving an EIS that reviewed the "economic market for skiing and other summer and winter recreational activities in the valley." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 339 (1989) (further noting EIS looked at "socio-economic" conditions); id. at 342 (identifying economic benefits of not permitting ski resorts). The Tenth Circuit highlighted economic data contained within an EIS from a report entitled "2008 Energy Outlook," which detailed information about coal production and economic growth. *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1235 (10th Cir. 2017). Thus, economic information related to the NEPA must be disclosed and subjected to public notice and comment.

Other economic information was also included in the NEPA process for the Willow Creek Land Exchange and the idea that only natural resources are part of the human environment is belied by the Environmental Assessment [FEA at 85], which discusses issues such as realty authorizations, transportation, recreation, and social and economic resources. Accordingly, as documents underlying the Environmental Assessment, the appraisals should have been made available for public comment. The Agency should reissue the NEPA documents for public comment with the benefit of all relevant underlying documents, including appraisal documents.

Notably, the Agency's NEPA process for the Land Exchange identifies the appraisals and equal-value requirements. The FEA [at 37] and DNN both contain a heading called "Equalization of Values" in which the Agency acknowledges the lack of appraisals and avoids providing the concepts to be employed, rules to be followed, and techniques to be used. The Environmental Assessment sidesteps the need for the appraisals by citing the opinion from the Valuation Consultation that "it appears this land exchange proposal is structured with enough flexibility to accommodate compliance with the equal value Requirement of the Federal Land Policy and Management Act of 1976 (FLPMA)." (FEA at 37, CWPL DEA Comments at 4]. The DDN acknowledges the requirement for these appraisals by stating that the final Decision Notice will include the final appraised values and equalization strategy, (DDN page 12) but undermines any meaningful public or Agency review of the economic benefit of the Land Exchange by not making this information available until too late in the process, i.e.; when the Final Decision Notice is signed (DDN page 12).

The Agency perpetuates an ongoing problem for the public when it comes to land exchanges. The Forest Service continues its practice of withholding appraisals from the public and avoiding public comment on the appraisals for the Willow Creek Land Exchange by not doing them until all

comment periods have closed. NEPA, combined with FLPMA and APA, provides a public check on agencies proposing to trade away public lands valuable to all Americans. The current process for the Willow Creek Land Exchange forecloses meaningful public participation, violates NEPA, FLPMA, and the APA, and undermines the public's faith in good government [CWPL DEA Comments at 16].

B. THE APPRAISAL PROCESS IS TOO LATE TO COMPLY WITH NEPA

The Agency cannot prepare NEPA documents absent a responsible Valuation Consultation, as it determines the parcel configuration to be analyzed in an EA or EIS. No monetary information was released in the NEPA process, and the public record indicates that the Agency has no information regarding the monetary values of the parcels. The Agency has made no details of any Valuation procedures or Scope of Work for the appraiser available to the public. Moreover, despite the Implementation Schedules in the June 2021 Agreement to Initiate (ATI) showing that appraisals were to be conducted before the release of the FEA [ATI at 15], the Agency has subsequently chosen to delay the preparation or release of appraisals until after the close of the EA comment period. At a public open house held on November 29, 2023, Leslie Mc Fadden, USFS Realty Specialist, stated she had recently accompanied the appraiser to the properties, indicating that the appraiser had been hired only recently. CWPL questions the intent of this change in procedural order, particularly in light of the recent direction from the Federal District Court in the Valle Seco Land Exchange case (Colorado Wild Public Lands vs US Forest Service: Case No. 21-ev-2802 (CRC)) to disclose appraisal and valuation information to the public.

Eric Freels, Sulphur District Ranger, blamed the delay in completing the appraisals on the lack of BLM surveys which need to be completed by the BLM. However, the recent release of the ATI for the Locke Park Land Exchange suggests that this is part of an illegal pattern and practice of excluding appraisals from the public process (see section II.E. below). District Ranger Freels also claimed that the NEPA and FLPMA processes are independent and the NEPA process does not need to comply with FLPMA [pers. comm. 3/4/2024]. The FEA [at 15] states that "this land exchange is proposed under the authority of, ..., the Federal Land Policy and Management Act of October 21, 1976," then omits FLPMA from Table 5 on the following page. FLPMA is one of the "[K]ey federal laws and regulations applicable to the proposed land exchange." However, this fictional separation between NEPA and FLPMA was restated in the Agency's response to CWPL's comments. [FEA Appendix D-12, Comment Response 0055-3].

In the CWPL case cited above, the court upheld CWPL's assertion that the Forest Service was improperly withholding appraisals and engaging in a continuing pattern and practice in doing so:

> In the context of a FOIA policy-or-practice claim, the plaintiff "must [plausibly] allege . . . that the agency has adopted, endorsed, or implemented some policy or practice that constitutes an ongoing failure to abide by the terms of FOIA." Muttitt, 926 F. Supp. 2d at 293.

> COWPL did exactly that in this case. [CWPL vs. the Forest Service, Case No. 21-cv-2802 (CRC)]

Now, in the Willow Creek NEPA process, the Agency is thwarting this decision by changing its long-standing process; it is delaying the appraisals until after any opportunity to comment under NEPA has been foreclosed, seemingly to avoid another potential FOIA violation. However, in doing so, the Agency has denied itself and the public a critical element of the information necessary to undertake an informed analysis of both Equal Value as required under FLPMA and the exchange proposal presented under NEPA–something the court is also likely to look askance at for similar transparency reasons. Delaying the appraisal process allows the Agency to continue the illegal practice of not disclosing the appraisals to the public, and seeks to circumvent NEPA and FLPMA (and APA) requirements for transparency and informed public participation.

C. THE VALUATION CONSULTATION DOES NOT PROVIDE SUFFICIENT INFORMATION

As stated above and in CWPL's DEA comments [CWPL DEA comments at 2], no quantitative information regarding monetary values has been disclosed. The only indication of the relative monetary values of the parcels identified by the Agency to date appears to be the undisclosed Willow Creek Land Exchange Valuation Consultation (April 17, 2019). The FEA [at 37] indicates that the instructive information in this consultation is limited to:

> it appears this land exchange proposal is structured with enough flexibility to accommodate compliance with the equal value requirement of the Federal Land Policy and Management Act of 1976 (FLPMA).

The 2018 Willow Creek Land Exchange Proposal anticipated the potential for a donation of some of the acreage from the non-federal party [Exchange Proposal, 2018 at 17]; CWPL assumes this donation was the "flexibility" contemplated in the Valuation Consultation. However, according to the FEA [at 37], the unreleased Amended Exchange Proposal (2022) now advocates a completely new and different "flexibility" strategy to undermine the equal value criteria in FLPMA by failing to define even the size and configuration of the Non-Federal parcel. The wholesale changes to the proposed future land uses of the Federal parcel and the potential changes to the area, size, and shape of the Non-federal parcel pending the values in the Appraisals necessitate a new or revised Valuation Consultation and Appraisals. This issue is further discussed below.

D. THE FEDERAL APPRAISALS SHOULD REFLECT THE FULL DEVELOPMENT POTENTIAL OF THE FEDERAL PARCEL

Despite the Agency's failure to release the Statement of Work instructing the appraisals, the FEA offers insight as to what one might expect in the appraisals. Discussion of existing zoning in the FEA [at 37] and the Agency's responses to CWPL's DEA Comments [FEA Appendix D-13 Comment

Responses 0055-5 - 0055-8] indicate that the appraised values of the exchange properties will utilize past land use designations and zoning determinations, vastly undervaluing the Federal Land. FEA Section 2.2.4 sidesteps providing any meaningful valuation information by stating: "Considering the legal, physical and locational aspects of each of the parcels, it is possible that the appraised value of the Federal parcel will be either higher or lower than the appraised value of the non-Federal parcel."

Federal land exchange appraisal rules include a requirement to:

"[E]stimate the value of the (federal) lands ... as if in private ownership" [43 CFR 2201.3(a)(2)], creating a hypothetical condition of private, not federal ownership. Because of this hypothetical condition, the appraisals should employ the appraisal standards used in private transactions, The Uniform Standards of Professional Appraisal Practices (USPAP)[1]; these standards require analysis of the parcels both before and after the proposed transaction.

Under the USPAP standards, the "highest and best use" and the corresponding appraised value of the Federal parcel should reflect the anticipated uses. Per the FEA, upon closing of the exchange transaction, the Federal parcel will be assembled with the proponent's adjacent property to facilitate condominium development using both properties [FEA at 33]. The FEA only identifies TMII's ownership of the 0.43-acre outlot (Outlot F of Bridger's Cache subdivision) that abuts the Federal Parcel. The adjacent 3.82 acre Outlot E, also owned by TMII [per Grand County Assessor], also abuts the Federal Parcel but was not included in the FEA review. The omission of the proponent's adjacent property in this discussion appears arbitrary. At a minimum, the appraised value of the Federal parcel should be based upon the values and benefits from assemblage with all of the proponents' adjacent lands, resulting in approximately 9.79 acres for high-density development in this valuable and lucrative location.

The Conceptual Site Plan provided in the FEA clearly shows that the proponents and USFS have identified the "highest and best use" of the Federal parcel as a condominium development. Therefore, the market transactions used to appraise the value of the Federal land must involve parcels with the potential for similar condominium development, or they do not represent comparable properties. Disregarding the "Before and After" rule of USPAP will devalue the Federal Parcel by ignoring the "highest and best use" criteria for appraisals.

Because it contains Mary Jane Creek and parking lot embankments, Outlot F was likely viewed as unbuildable in the subdivision process and has been valued by the County Appraiser as unbuildable since the subdivision occurred ($11,320 in 2023). The Agency's response to

[1]The Uniform Standards of Professional Appraisal Practices (USPAP) prescribes the appraisal standards used in transactions among private parties. There is another set of standards used by the Federal Government in its transactions with outside parties, the Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA, or "yellow book"). Both sets of standards may apply to Land Exchanges, and the Statement of Work instructs these applications.

comments 0055-6 [FEA at D-13] indicates that the Federal parcel should be valued as similarly unbuildable, simply because the Town of Winter Park historically placed all Federal lands into a single zone district. However, when these three parcels are aggregated at the closing of the exchange, they become a multimillion-dollar parcel adjacent to skier parking, within a stone's throw of the Super Gauge Express, Pony Express, and Iron Horse ski lifts at the base of the internationally acclaimed Winter Park Resort. Acquisition of the Federal Parcel vastly enhances the value of the previously undevelopable adjacent lands and provides access for transportation and utilities, condominium development opportunities, and other undisclosed development potential.

The unique benefits of acquiring the Federal parcel to the proponent [FEA at 32] must also be included in the appraised valuation. Winter Park Resort and the adjacent neighbors have indicated support for this exchange based upon receiving easements and covenants for future land use restrictions on the Federal parcel. The existing access roads and parking lot are also components of the Federal parcel that will be conveyed to the proponent in the exchange that represent substantial value to the proponent and others, and thus should further increase the value of the Federal parcel.

Future multi-family residential use of the Federal parcel is not speculative, as the FEA [at 32] identifies this as the "Anticipated Future Use of the Federal Parcel," and provides conceptual plans for an 85-unit condominium [FEA at Appendix C]. The anticipated post-assemblage land use is provided in the Conceptual Site Plan. The existing zoning should not constrain the value of the Federal parcel when the Town of Winter Park (the land use authority) has provided support in writing for rezoning the parcel [See TII Development LLC. Letter to Forest Supervisor, Monte Williams, 2023]. Based on the information in the FEA and other public documents, it would be outrageous to conclude that the existing conditions, zoning, and past entitlements represent the market value or "highest and best use" value of the Federal parcel.

E. THE STATEMENT OF WORK FOR THE APPRAISALS MUST BE CONSISTENT IN ADDRESSING SPECULATIVE CONDITIONS.

The appraisal instructions, called the Statement of Work, have not been released to the public, violating NEPA, FLPMA, and the APA. We request that these instructions and the appraisal provide consistency in the Agency's approach to each of the parcels. The instructions for the valuation of the Federal Parcel should not be limited to considering only existing zoning, because the zoning authority has already provided written support for changing the existing zoning to allow for condominium development [See Winter Park 2015 letter, Attachment C to EA]. If the Non-Federal parcel is being acquired, in part because there is speculation about future uses for residential development, then reasonably foreseeable condominium development should also be assumed for the Federal Parcel. The parcel's appraised value should reflect its full development value to the proponent. The appraisal instructions should also consider development limitations created by wetlands, streams, road embankments, easements, and right-of-ways that discount the market value of the Non-Federal Parcel.

F. TO REACH AND AFFIRM THE EQUAL VALUE REQUIREMENT OF FLPMA, THE AGENCY MUST ACCURATELY DESCRIBE THE MARKET VALUES AND THE "HIGHEST AND BEST USE" OF THE PARCELS.

The properties' relative appraised value depends on each property's "highest and best use"—the FLPMA legal standard, 43 C.F.R. § 2200.0-5(k), that is defined as "the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future." The Agency has articulated condominium development as this future use for the Federal Parcel throughout the decision-making process and in its administrative record.

CWPL has persistently argued that appraisals are the heart of every land exchange and they should treat all lands in any given exchange equally, applying appraisal instructions evenly to the Federal and non-Federal parcels. An unbiased appraisal would value the parcel for condominium development at the base of an internationally acclaimed ski area to be several times more valuable than the rural parcel located near the top of a pass in Grand County. Unfortunately, appraisals for land exchanges often use methods imparted through appraisal instructions that distort and bias the valuations.

No information is provided in the FEA or Decision Document regarding why the Federal Parcel was configured as it is. Was it to create a property where the proponent is the only "logical buyer?" Why has this proposed development restricted the discussion of other potential buyers? District Ranger Eric Freeles indicated that the value of the Federal Parcel would likely be discounted because the only access available is through the proponent's property [pers. comm. 3/4/2024]. This ignores the existence of the plowed and maintained Mary Jane Road adjacent to these Federal lands. It also flaunts the fact that the Federal Parcel was configured specifically to circumvent the myriad of potential alternative access points from adjacent Federal lands or existing roads. The Agency's failure to explain and support the configuration of the proposed Federal Parcel, and the resulting minimization of the market value of the Federal Parcel, appears arbitrary and capricious.

Throughout the FEA, the Agency seems to maintain that post-exchange uses of the parcels will not deviate from a version described in the Conceptual Plan. However, three separate conceptual plans were released per CWPL's FOIA request, each with increasing impact on the Federal Parcel. Also, according to the Grand County Assessor, the proponent owns a 3.86-acre parcel located directly adjacent to the Federal Parcel (Outlot E, Bridgers Cache Sub.) –a fact that was not disclosed in the FEA– in addition to the 0.432-acre parcel that was disclosed (Outlot F, Bridgers Cache Sub.). The FEA completely ignores the likely consolidation of all three of these parcels for development purposes, and the proponent has not disclosed any of their future plans for the larger property once they have assembled them. The value of both of these adjacent private parcels would be greatly enhanced by this exchange. The FEA failed to disclose TMII's ownership of the larger adjacent parcel or the effect this assemblage will have on the value of all three parcels.

In our experience, the appraisal Statement of Work often contains unusual Assignment Instructions (See Objection to the DDN and FONSI for the Valle Seco 2019 Land Exchange Project November 2, 2021, at 19 and 20), many of which create a set of conditions that lend themselves to artifice; these manufactured conditions lead to concerns about the credibility of the appraisals, none of which can be assuaged by the Agency's continued withholding of them.

The market value of the Non-Federal parcel must also reflect the reality that the current economic value of this parcel is vastly reduced by the inhospitable and charred appearance of the parcel and the entire valley surrounding it.

The Comparable Sales analysis should characterize the proponent, TMII, as a "motivated buyer"; the letter from TMII to the Agency indicates that the parcel was purchased as "trade bait, " for the sole purpose of luring the Forest Service into a land exchange. "TMII Development LLC acquired the 50-acre Willow Creek property with the intent of including it in a land exchange with the U.S. Forest Service" [TMII Development LLC. Letter to Forest Supervisor, Monte Williams, 2023]. The appraisals should reflect the parcel's remote location nearly surrounded by National Forest lands, for which the management priority is wildlife habitat, because that priority would affect the Forest Service's willingness to permit road improvements and extension of utilities over the Forest. The stream, wetlands, and road constraints on the parcel, as well as the recent wildfire devastation, would also likely temper expectations for substantial development plans.

The Agency has stated that it will release the appraisals with the signed decision. But that timing, coupled with the Agency's premature Objection process rather than a post-decision appeal process, denies the public any opportunity to evaluate whether the appraisals reflect current land values and how well, if at all, they support the Agency's public interest determination - in violation of NEPA, FLPMA, and the APA. Either the appraisals should have been released in time to be considered during the NEPA public comment period, or the Agency should have delayed the release of the FONSI/DDN and subsequent objection period.

G. THE STRATEGY OF DIVIDING THE NON-FEDERAL PARCEL SUBVERTS THE EQUAL VALUE REQUIREMENT OF FLPMA

The method of equalizing property values outlined in the FEA [at 37] would completely alter the economic and resource values associated with the Non-Federal parcel for both the proponent and the Agency. As discussed in Section III.C. below, this potential subdivision process renders substantive assessment of the parcel's resource or monetary value by the Agency or the public baseless or merely speculative.

We request that the Agency withdraw the FEA and the DDN and release the Appraisals. Release of the appraisals must be accompanied by a 45-day period for the public to review and comment on them.

II. THE AGENCY IS RUSHING THE NEPA PROCESS AND OMITTING CRITICAL INFORMATION

A. THE AGENCY IS VIOLATING NEPA, FLPMA, AND THE APA BY NOT RELEASING CRITICAL INFORMATION, THEREBY LIMITING THE PUBLIC'S ABILITY TO COMMENT

On March 2, 2022, during the Scoping period, CWPL requested documents associated with this exchange. This request was never completely fulfilled and documents were redacted to the point of uselessness. During the public comment period for the DEA, CWPL submitted another formal FOIA request, dated Dec. 5, 2023, for documents supporting the Willow Creek NEPA.

CWPL's formal request asked for an expedited response due to the upcoming deadline to submit comments, and noted that the information contained in the requested documents was necessary for a substantive review of the proposed project and NEPA analysis. The Agency did not release any of the requested documents until February 6, 2024. When it did, it released very few of the documents and indicated that other items were under review. Due to a lack of response on the Agency's part, CWPL submitted a third FOIA request on April 8, 2024. To date, CWPL has received neither additional releases nor a formal denial of that December request, thereby denying this organization and the greater public any opportunity to add subsequent comments to the NEPA record. This failure to comply with FOIA and to disclose important information underlies our strong objection to this premature release of the FONSI and the DDN.

The FEA [at 2] cites the 2022 Amended Exchange Proposal and indicates that numerous changes have been proposed to the exchange since scoping; this Amended Exchange Proposal is one of the documents CWPL requested in December 2023 that has not yet been released. A transparent public process necessitates that any such documents (such as site plans, quality maps, elevation drawings, etc.) outlining substantive changes proposed to the project since the scoping period accompany the release of the FEA. The public should not be required to conjecture what has been proposed, based solely on the FEA's synopsis of public documents. Discussed below are several categories of impacts resulting from the proposed exchange that the Agency has not sufficiently reviewed as required by NEPA, FLPMA, and the APA.

B. THIRD-PARTY AGREEMENTS SUPPORTING THE FONSI ARE NOT YET DRAFTED AND DO NOT SUBSTITUTE FOR FEDERAL PROTECTIONS

The FEA [at 32] states that TMII, Winter Park Resort, and the Arlberg Club are formulating a "final definitive agreement" containing a restrictive covenant that would restrict development on the northern half of the Federal Parcel and identifies this non-existent or inchoate agreement as a condition of the Land Exchange. The FONSI [at 2] relies on a statement that implementation of this "definitive agreement" will provide long-term protection of vegetation and open space on approximately 4 acres of the (Federal) parcel. The DDN [at 11] contradicts both of these assertions by stating that this document will outline clear responsibilities for road maintenance, and "other

topics covered by the agreement would be up to the (non-Federal) signatories." In any case, the Agency will not be a party to or enforce these agreements. And, as the agreements do not yet exist, the Agency has not reviewed them and cannot review them for sufficient mitigation elements. Thus, these "agreements" cannot support the FONSI. The courts have held that the Administrative Procedures Act (APA) provides the appropriate standard of review of the Agency's conclusions in its FONSI; under these standards, the Agency cannot rely on unsigned agreements between non-Federal parties to support a FONSI and it is incumbent upon the Agency to identify and evaluate the proposed mitigation measures to ensure they would meet that standard, not simply observe that such measures are possible and prospective.[2] Hence, premising a FONSI on these hypothetical "agreements" is arbitrary and capricious.

Resources on the Federal Parcel should be protected with Conservation Easements or deed restrictions, rather than with uncertain future third-party agreements.

36 CFR 254.3 (h) gives the Agency the authority to impose appropriate restrictions on lands conveyed out of its jurisdiction:

> ***Reservations or restrictions in the public interest.*** In any exchange, the authorized officer shall reserve such rights or retain such interests as are needed to protect the public interest or shall otherwise restrict the use of Federal lands to be exchanged, as appropriate. The use or development of lands conveyed out of Federal ownership are subject to any restrictions imposed by the conveyance documents and all laws, regulations, and zoning authorities of State and local governing bodies. (Underline added)

CWPL's comments on the Draft EA stated that the parcel should be conveyed only subject to permanent restrictions to protect natural resources such as habitat for sensitive species, existing recreational uses, and scenic qualities. Given the inevitable uncertainty about future changes in use on privately owned land, these restrictions must be drafted specifically to protect the target resources, and be managed by the Agency or a grantee qualified to oversee the management of those target resources.

The beneficiaries of the exchange should not object to receiving these lands with a deed restriction to protect the portions of the Federal Parcel that they have stated they do not intend to develop; objection to this requirement suggests that the recipients of these lands may have other plans for

[2] Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994) ("[T]he arbitrary and capricious standard requires an agency action to be supported by the facts in the record."); New Mexico, 565 F.3d at 704 (judiciary must ask whether the agency "did a careful job at fact gathering and otherwise supporting its position"). In the NEPA context, when agencies rely on measures to reduce environmental impacts to insignificance, the agency is obligated to analyze such measures and explain the basis for finding they will be effective. Sutey Order at 12-13. 1 1 See also Davis v. Mineta, 302 F.3d 1104, 1125 (10th Cir. 2002) ("Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal."); Dine Citizens Against Ruining our Env't v. Klein, 747 F.Supp.2d 1234, 1259 (D. Colo. 2010) ("The lack of details as to the nature of the mitigation measures in reaching the finding of no significant impacts precludes any meaningful review."). Case 1:17-cv-01564-MSK Document 46 Filed 04/22/21 USDC Colorado Page 4 of 16 5.

them. Moreover, it is inevitable, not speculative, that at some point, the Federal Parcel would be developed if traded to private ownership. At a minimum, the conservation easement or deed restriction should specify best practices for when that occurs.

CWPL has commented extensively on why the agencies should include conservation easements or deed restrictions on parcels conveyed out of public ownership. This practice should be implemented, where needed to protect important resources, as a matter of policy on all land exchanges.

The FEA references a restrictive covenant among third parties, (TMII (the Non-Federal Party), Winter Park Resort, and the Arlberg Club); CWPL supports such restrictions. However, this agreement is purely speculative and lacks details about the mechanisms of its future enforcement. Although the Feasibility Analysis [at 23] states that a covenant between IWPOC, WPRA, and the Arlburg Club will prohibit any future development on the northern half of the Federal parcel,, the FEA tells us no such agreement has been finalized and the details have not been made public.

The FEA [at 77] states that TMII (the Non-Federal Party), Winter Park Resort, and the Arlberg Club are renegotiating a "final definitive agreement" containing a restrictive covenant on the Federal parcel for the benefit of Winter Park Resort and the Arlberg Club that would restrict development on the northern half of the Federal parcel, with the exception of trails and sidewalks. The details of these agreements should be made available to the public as required by NEPA, FLPMA, and the APA. In any case, this potential restrictive covenant agreement will not be enforced by the Federal Government and does not adequately substitute for deed restrictions on the Federal parcel as part of the exchange to ensure the public benefits identified in the FEA remain intact. To support the public interest, the Agency should impose deed restrictions on the Federal parcel precluding further "bait-and-switch" tactics that would expand development to the north on the Federal parcel in the future.

C. THE FEA DOES NOT ADEQUATELY ASSESS THE IMPACTS OF THE FUTURE DEVELOPMENT OF THE FEDERAL PARCEL

The land exchange and the applicant's buildout proposal are connected actions under NEPA, and must be scoped, analyzed, and appraised as a "whole" proposal, not piecemeal. (See 40 CFR 1509.1(e) (1).) Representatives of Western Land Group and USFS at the public open house said that future development would likely be limited to the area presented in the Conceptual Plan. The FEA mentions the potential for third-party agreements that would restrict development on the northern portion of the Federal Parcel and ties the environmental review under NEPA to that outcome. Because the USFS is relying on third-party agreements to restrict future development of the northern portion of the Federal Parcel (See Section below) that are purely hypothetical, the FEA should anticipate future development on the Federal parcel beyond the narrow focus area identified in the Conceptual Plan and include all properties likely to be assembled.

Documents released for Scoping, including the Feasibility Analysis [at 22], and the letter from Winter Park (dated June 15, 2015), described a development scenario of 75 condominium units located entirely on non-Federal land, and limited to 1.35 acres of parking on the Federal parcel [FA at 22].

The FEA, DDN, and FONSI refer to an Amended Exchange Proposal (TMII 2022) and Amendment 2 of the Agreement to Initiate (Forest Service 2023); neither of these documents have been released, despite CWPL's December 2023 FOIA request for them. The FEA [at 2 and Appendix C] now indicates the following changes have occurred between successive conceptual plans:

(1) no buildings were initially proposed for construction on the Federal Parcel, but now approximately one-third of the buildings would be constructed on the Federal parcel, along with access roads and circulation;
(2) the proposed density has been raised from 75 to 85 condominium units; and
(3) some below-grade parking and the majority of the surface parking will now be located on the Federal parcel.

There is no additional information on building height, grading changes, or additional impacts.

CWPL is also concerned that the size of the Federal Parcel will result in future development and environmental impacts. The FEA does not state why the exchange will convey over 5 acres of Federal land when the current development proposal identifies uses on only about 1.5 acres. The northern end of the Federal Parcel should be deed-restricted by the Federal government. This restriction would limit the future development area and the associated environmental impacts.

CWPL is also concerned that the size and scale of development will not fit within the identified development area on the Federal parcel. The conceptual site plan shows the building and parking area extending almost to the east and west edges of the sloped parcel and the stream. This development plan will result in extensive impervious surfaces and retaining walls. It also leaves little to no room for construction requirements such as excavation, stockpiling, and staging that would potentially impact additional land. Little to no room is also left for future screening planting. As such, the actual development will almost certainly spread to the north on the Federal parcel after the exchange. Each of these issues must be analyzed by the agency within the context of its NEPA and FLPMA analyses.

D. THE FEA DID NOT ADEQUATELY DISCLOSE THE EFFECTS OF THE PROPOSED ACTION ON THREATENED OR ENDANGERED SPECIES

The FEA includes confusing and contradicting information regarding the presence of, and impacts to Threatened and Endangered Species and does not disclose sufficient analysis to support the FONSI. The FEA [at 46] identifies the Federal parcel as suitable habitat for the Canada

Lynx, Gray Wolf, and Wolverine and indicates that the Lynx is known or suspected to be present in the parcel. "Detailed discussions for each species carried forward for analysis are provided in the Willow Creek Land Exchange Biological Assessment (ERO 2023a) [FEA at 46]. However, the Biological Assessment (BA) has not been released to the public, because, according to the DDN [at 18], the BA is still in draft form: " Draft Biological Assessments (BA) are not provided to the public. The Final Biological Assessment and USFWS response will be posted to the project website once consultation with USFWS has been completed." As of the release of the FEA and accompanying documents, USFWS–the agency responsible for ensuring compliance with the ESA– had not yet weighed in on impacts yet the Forest Service has released a draft Decision that is based on a FONSI not supported by USFWS input.

1. THE BIOLOGICAL EVALUATION (BE) DOES NOT INCLUDE DISCUSSION OR ANALYSIS OF IMPACTS FROM THE PROPOSAL ON THREATENED SPECIES.

Despite specific direction to "Prepare biological evaluations for each authorized, funded, or conducted project, or activity on National Forest System lands to determine the possible effects of the proposed activity on TES species" [Forest Plan Operational Goal #46, BE at 3], the BE lacks any analysis of the effects of the proposal on the Canada Lynx and the Biological Assessment (ERO 2023) is not yet complete [See Above].

The BE cites several Forest Planning directives regarding the management and disposition of habitats for TES and Sensitive Species. However, the proposed Land Exchange is contrary to that direction for the identified mammals. The BE [at 29] states "Suitable habitat for marten would be lost to [the Forest] from the Proposed Action," and describes how future development of the Federal Parcel will likely impact "individual martens ... from construction activities such as noise or light" and how the post-exchange development will compromise habitat connectivity and foraging habitat.

While the FEA [at 58] describes the potential impact of the proposal on Marten and Lynx populations as "minor" [FEA at 49 and 59], one cannot deny that the proposal absolutely will not:

- "Establish an upward trend for threatened, endangered or sensitive plant and animal species (TES), and maintain sensitive species through management activities that recognize TES habitat needs across all levels or scales" [Forest Wide direction Goal #4, BE at 3],
- Protect, restore or enhance "Habitats for federally listed threatened, endangered, and proposed species and regionally listed sensitive species" or "assure that those species, whose viability is a concern, survive throughout their range, that populations increase or stabilize, or that threats to populations are eliminated" [Forest Plan Operational Goal # 45 BE at 3], or
- Manage activities to avoid disturbance to sensitive species which would result in a trend toward Federal listing or loss of population viability..." [Forest Plan Guideline Standard #50 BE at 5].

The FEA [at 46] notes that Threatened Canada Lynx are known or suspected to be present in the Federal Parcel. It also states that suitable habitat for the Canada Lynx, the Endangered Gray Wolf, and the "proposed threatened" Wolverine is present in the Federal Parcel. The FEA [at 46] states that there will be a net loss of 3.81 acres of Wolverine habitat. The Wolverine was listed as threatened in November 2023 (USFWS Press Release, November 29, 2023), but the FEA and FONSI fail to mention this change in status. These three mammals are identified as "carried forward" for further analysis because the Federal Parcel contains their habitat. The Biological Evaluation (ERO 2023) is conspicuously silent on any Federally Threatened and Endangered Species, and because the BA is not available to the public, we cannot know what it will say about the proposed privatization and development of habitat for these species with no mitigation.

The FEA [at 49] states: "Under the Proposed Action, the National Forest System will lose approximately 5.48 acres of lynx primary habitat" yet it goes on to offer contradictory assessments of the proposal's potential impact on Lynx. This assessment ranges from stating there is no habitat on the federal parcel to describing actions that may affect the Lynx. Regardless, since the BE does not address Lynx, there is no publicly available rationale for these conflicting analyses. No discussion of impacts is provided in the FEA for the other two ESA-listed mammals which were supposed to be "Carried Forward" for further analysis, the Wolverine and the Grey Wolf.

The Agency's response to concerns about the viability of these resources once they are transferred into private ownership in the FONSI and DDN is to dismiss the resource values as being insignificant and to postulate that conceptual plans provided by the proponent can be used to evaluate the environmental impacts of the exchange, despite the fact that at least three separate conceptual plans have been provided to the Agency to date, each with increasing impact on the Federal Parcel. None of the NEPA documents disclose that the exchange proponent also owns a 3.86-acre parcel [Grand County Assessor Data], located directly adjacent to the Federal Parcel (Outlot E, Bridgers Cache Sub.), in addition to the 0.432-acre parcel that was disclosed (Outlot F, Bridgers Cache Sub.). The FEA completely ignores the likely combination of all three of these parcels for development and the associated impacts. It appears that the proponent has not disclosed any of their future plans for the full combined property once they own the Federal Parcel.

2. THE BE AND FEA ALSO LACK ANY DISCUSSION OF MITIGATION MEASURES FOR TES SPECIES.

Because it is not public, we cannot know whether the BA will recommend mitigation for the loss of this TES habitat. As stated above, it is CWPL's belief that an unbiased appraisal valuation would demonstrate that the Federal parcel is worth far more than the non-Federal parcel. One method to equalize the values of the lands being exchanged would be for the proponent to incorporate additional land with suitable Wolverine and Lynx habitat to mitigate impacts.

E. CREATION OF A NEW PARCEL THROUGH SUBDIVISION AND THE POSTULATED ACREAGE REDUCTION IN THE NON-FEDERAL LAND SHOULD BE EVALUATED AS A SEPARATE ALTERNATIVE IN THE EA.

The broad strategy to equalize property values as outlined in Section 2.2.4 Equalization of Value in the FEA threatens the primary purposes for acquiring the non-Federal Parcel, attempts to trivialize the importance of scrutinizing the appraisals, and subverts the purpose and intent of the equal value requirement of FLPMA. To equalize the property values, the FEA outlines a strategy to subdivide the non-Federal parcel and leave a new parcel of undisclosed size in the ownership of the proponent, potentially submarining the stated purposes for the Agency acquiring the Non-Federal parcel as follows:

- Dividing the non-Federal parcel would create "a new inholding" held by the proponent, despite the statement in the FEA to the contrary [FEA at 37];
- Dividing the non-Federal parcel and omitting a portion from the exchange could negate 5 of the 6 Public Objectives for acquiring the Non-Federal parcel [FEA at 10];
- Dividing the non-Federal parcel and omitting a portion from the exchange could negate 5 of the 7 Public Benefits for acquiring the Non-Federal parcel [FEA at 20];
- Carving out a portion of the Non-Federal Land negates the "Purpose and Need for the Proposed Project" in that it "reduces the administrative costs and improves management efficiency through reduction of an inholding." [FEA at 10].
- This subdivision would enhance the value of the new inholding parcel to the proponent after the Non-Federal parcel is appraised.
- The creation of new right-of-way easements "to ensure legal access, and all rights to the parcels" would further increase the value to the proponent post-appraisals.
- Dividing the non-Federal parcel would create the "need" for an additional phase or phases of this exchange in the future to meet the objectives and public benefits identified for the current exchange.
- If there remains any intent to "donate" this new inholding parcel, it should be identified as valuable consideration in this exchange and reflected in the analysis of the exchange, rather than being used to circumvent FLPMA.

The alternative of dividing the non-Federal parcel affects all resource and economic values associated with that parcel. The FEA should include, as required by NEPA, FLPMA, and the APA, clear analyses of the diminished public benefits of receiving a smaller Willow Creek Parcel in the exchange. Any benefits of this planned division of the parcel would accrue totally to the proponent, while diminishing or even negating the goals of the USFS and the anticipated public benefits that support this exchange.

F. THE FEA OVERSTATES THE PUBLIC BENEFIT OF ACQUIRING THE NON-FEDERAL PARCEL

The FEA indicates that this is a uniquely valuable private parcel and fails to identify the fact that the neighboring private property inholding downstream also contains the contiguous wetland and wildlife habitat which represent the primary benefits of this exchange. The potential for connected future actions, future land exchanges, and cumulative effects from actions on the adjacent private land merits acknowledgment and discussion in the FEA.

The FEA also fails to note the potential future costs from the Troublesome fire and its impacts on the economic and resource values of the Non-Federal Parcel. A section of the Stillwater Road is being washed out and will likely continue to require Federal funds to repair, due to the fire [CWPL Site Visit November 11/29/2023]. Although the wetland appears to be recovering, the economic value of this parcel is also vastly reduced by the inhospitable and charred appearance of the parcel and the entire valley surrounding it.

G. THE FEA SHOULD EVALUATE OTHER METHODS TO ACQUIRE THE NON-FEDERAL PARCEL

This proposal continues a practice of providing exclusive benefits to individuals at the public expense, without exploring alternative acquisition methods. The FEA provides only a cursory statement to justify removing alternative acquisition efforts from consideration and does not document attempts by the Federal Government to look into the purchase or condemnation of the property. The proponents purchased the property specifically to bait the USFS into an exchange to acquire the property at the base of Winter Park Ski Area: "TMII has made the non-Federal parcel available to the Forest Service on the basis of exchange only and has no interest in conveying this parcel to the Forest Service through a direct sale "(TMII 2023) [FEA at 38]. Instead of cash, the proponent wants the advantages of ownership of this public parcel through a trade, without having to openly compete against other potentially interested buyers. The Agency's continued willingness to take this bait perpetuates a specialized, exclusive real estate and consulting market focused on Federal land exchanges.

H. FUTURE COSTS ASSOCIATED WITH FEDERAL MANAGEMENT OF THE NON-FEDERAL PARCEL ARE NOT DISCLOSED

Neither the Wetlands Specialist Report nor the FEA provided any analysis of the impacts on the wetlands from the Troublesome Fire. What remedial actions have been taken and what actions will the Forest Service need to take to protect the wetlands from sedimentation and other impacts? What noxious weed issues are present, and what are the present and future costs of addressing them? These items would inform the Agency whether remedial actions should be taken on the Non-Federal parcel to restore or enhance wetland functioning. This affects the value of the parcel from an environmental and monetary standpoint. This key piece of the environmental analysis would inform the pre-exchange agreements, but is not included in the FEA, violating NEPA, FLPMA, and the APA.

I. SCENIC IMPACTS OF DEVELOPMENT ON THE FEDERAL PARCEL ARE NOT DISCLOSED OR ADDRESSED

The majority of the public comments provided during scoping for this project listed concerns about the proposed development on the Federal parcel and the associated impacts on scenic quality, existing recreational uses, and socio-economic concerns. The Management Direction for the area is to "protect or preserve scenic values and recreational uses of designated scenic byways and other heavily used scenic travel corridors." [BE at 5]. Highway 40 over Berthoud Pass is a Designated National Scenic Byway, and it is certain that vastly more people have the opportunity to enjoy the seemingly undeveloped scenery of the National Forest at the base of Winter Park Resort than will ever visit the remote Willow Creek parcel.

Despite these concerns, the FEA provides insufficient information to evaluate the scenic impacts of the proposed project. The FEA [at 3] highlights a development plan that is purely conceptual with no administrative or legal constraints to additional, future development on the Federal Parcel. There is no location map that clearly shows the surrounding development and property boundaries or helps to visualize the surrounding development; the context provided by good maps and figures is necessary for an informed decision regarding scenic impacts. Clear identification of the elements in the conceptual development proposal should also be provided to the public and decision maker (i.e. building elevations, parking, legible topography (existing and proposed), and limits of disturbance. At a minimum, the FEA must include the anticipated height of the building/s (a TMII PowerPoint presented during scoping [Kevin Magenis presentation attached] showed an approximately six story building built on substantial embankments towering over Mary Jane Road), in reference to the low-lying buildings in the vicinity and the heights allowed by Winter Park [Winter Park letter, EA Attachment C].

Per the FEA [at 76], significant scenic impacts to identified high-quality scenic lands will result from this exchange, including the impacts from construction and replacing trees with buildings. The scenic and natural character of this area would be further degraded if this exchange sets a precedent for future land use decisions to expand building density via land exchanges and rezoning. Each of these impacts mst be assessed as required by NEPA, FLPMA, and the APA.

J. RECREATION AND ACCESS CONCERNS ARE NOT DISCLOSED OR ADDRESSED

Discrepancies between the DEA and the FEA appear to change the fate of the existing trails on the property, without evaluating the impacts on the community. The DEA indicates that continued enjoyment of the trail will exist post-exchange: it describes the trails as cherished community amenities that "would continue to be available for use..."[DEA at 42 and 43]. Yet the FEA [at 79] indicates that the future of these public amenities is unclear when it states "the use of social trails and forest areas on the Federal parcel may continue for private use."

In contrast to the DEA, the FEA includes no language indicating the future disposition of these trails. The FEA should evaluate existing uses and the potential to make some portion of these access trails sustainable. At a minimum, requirements must be included in the LEX Decision to ensure continuing public pedestrian and vehicular access, including trails, sidewalks and roads through the development area. Easements or agreements providing continued public access through the property are critical components of the Public Benefit Determination that should be included in this exchange.

CWPL acknowledges that the Non-Federal Parcel offers recreational opportunities and supports Federal efforts to protect and enhance them. However, these uses are geographically distant from the Federal Parcel and are likely to serve recreational uses for completely different users.

K. TRANSPORTATION AND PARKING CONCERNS ARE NOT DISCLOSED OR ADDRESSED

There are strong community concerns regarding traffic flow and safety at the interchange with Mary Jane Road and Highway 40. Construction and additional residential uses will also impact the surrounding public and Forest Service roads. This development will lead to additional traffic due to this land exchange. Per the FEA [at 81], Highway 40 is already congested with existing traffic. The FEA lacks sufficient information to disclose the public impact of the proposal on roads, ski area parking, and transportation infrastructure.

L. WORKFORCE HOUSING AND OTHER SOCIAL IMPACTS ARE NOT DISCLOSED OR ADDRESSED

The FEA describes a need for workforce housing in Winter Park, yet the proposal is likely to exacerbate the lack of housing by serving only the second-home population. It will increase the need for workers, without providing offsetting workforce accommodations, The proposal does not identify any provisions for public use of the condominium complex or grounds.

A housing needs assessment was conducted in 2022 for the newly created Fraser River Valley Housing Partnership (Williford, LLC et al. 2022). The assessment pointed to a number of factors exacerbating the current housing shortage for seasonal workers [FEA at 88]. If development is going to occur, it should include a mix of housing types and not add to the need for workforce housing. At a minimum, the FEA should include some analysis of the increased pressure on workforce housing that an additional 85-second homes will create.

M. MULTIPLE CUMULATIVE IMPACTS HAVE NOT BEEN SUFFICIENTLY IDENTIFIED

The FEA has included no new information to address CWPL's DEA comments that the document lacked sufficient analysis of the Cumulative Impacts associated with this exchange. Cumulative Impacts analysis should document the net gain or loss of environmental resources and the effects on the human environment in connection with other Agency actions; it should document these impacts in conjunction with those from other past and ongoing national forest actions. The CEQ

guidance directs the agencies to take more expansive views of the context surrounding Cumulative Impacts:

> Cumulative impact is the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. [40 CFR ~ 1508.7].

For the most part, the Willow Creek FEA limited Cumulative Impacts analysis to uses on the individual parcels in this exchange, without considering these impacts in the context of other past or ongoing management actions or projects that generate similar losses within the Forest. For example, the FEA does not disclose the probability that this exchange will increase the demand for future land exchanges [See Section Below]. Additional development pressure is inevitable, not just reasonably foreseeable.

The Cumulative Effects analysis should consider past and present land exchanges and acknowledge the impacts and demand exemplified by exchange proposals in the vicinity of other ski areas, such as Wolf Creek and the Yellowstone Club. Many of these analyses lend themselves to quantitative data, making wider analysis manageable.

The FEA acknowledges that there will be impacts from the land exchange, but it also avoids the incremental nature of the impacts through phrases such as "may affect, but not likely to adversely affect." These impacts must be considered in the larger context of similar impacts from other projects because they all begin to add up to larger impacts. Evaluating the impacts of the exchange only within the context of itself is inadequate; the only way to understand the cumulative impacts of any given action is to evaluate it in conjunction with other actions.

Because CWPL reviews land exchanges around Colorado, we see bigger-picture impacts from these land exchanges. Each individual national forest or BLM field office focuses on the project that it is analyzing under a given NEPA process. Phrases like "only a small percentage of" and "no significant impacts" are repeated in every NEPA document by every field office, begging the question: what are the cumulative effects of all these smaller actions?

Specifically, the public is concerned about repeated conveyances of publicly accessible recreation and water resources, habitats for sensitive species, wetlands, and cultural resources. These resources have been conveyed out of Federal control without protections such as conservation easements. Our experience is limited mostly to land exchanges; we have no idea what is being compromised through oil and gas leasing, Special Use Permits, timber sales, protected area boundary modifications, and other land management agencies. Common sense indicates that the impacts from all of these actions taken together have long-term impacts on the viability of species and other natural resources. An impact unique to this proposal is the pressure new development places on an already constrained housing stock, for which the FEA includes no analysis.

Clearly, CWPL views this attrition as a loss to the public. However, recent news suggests that it may be more significant. In 2023, the US Fish and Wildlife Service declared 21 Species to be extinct–not endangered, but extinct; Wildlife officials fear that millions of species may be lost in our lifetimes.[3] Through its restoration of protections under the Migratory Bird Treaty Act, the Biden Administration has signaled that it has concerns about species viability; and the Administration is proposing to restore a broader scope of NEPA analysis including guidance to consider direct, indirect, and cumulative effects of agency actions on air quality and the earth's climate.

N. THIS EXCHANGE PROCESS SETS A POOR PRECEDENT FOR FUTURE LAND EXCHANGES

The Valuation Equalization strategy outlined in the FEA sets a poor precedent for future land exchanges by delaying quantitative valuation of the parcels until after the public process is closed, adding uncertainty to the public benefits to be derived.

On April 4, 2024, in response to a request from CWPL, the Pike-San Isabel National Forest released the *Locke Park Land Exchange, Agreement To Initiate, August 2022* (LP ATI) on their project website for the Locke Park Exchange. This document provides proof that USFS Region 2 intends to use the process and precedent set in the Willow Creek Land Exchange to continue the illegal practice of withholding quantitative land values from the public during the NEPA process. This Locke Park ATI utilizes the same strategy of potentially dividing the non-federal parcel and leaving a portion of it in the ownership of the non-Federal party to achieve "Equalization of Value."[LP ATI at 19]. It also outlines a potential "voluntary donation" to circumvent the equal value requirement of FLPMA [LP ATI at 20]. The timeline in the ATI further indicates that the Agency proposes to further thwart informed public comment on the Locke Park exchange by completing the appraisals three months after the close of the NEPA public process [LP ATI at 13].

The Willow Creek land exchange also creates a poor precedent by severing lands from the contiguous Federal Estate. As was stated in CWPL's scoping comments, the Federal parcel is part of a larger contiguous Forest Service parcel of land. Federal parcels that are usually identified for exchange are already logically segregated from Federal lands or partially surrounded by non-federal lands, so that proposed exchanges improve land ownership patterns. Conversely, this proposal severs the Federal Parcel land from larger contiguous public land in direct conflict with the Forest Service's goal of simplifying federal boundaries.

In addition, the proposed exchange sets a precedent that will encourage proposals for high-density developments near ski areas through land exchanges. Neither the public, nor the Forest Service, will benefit from an "open season" for land exchange proposals from landowners adjacent to the National Forests in Colorado. The FEA should identify the potential for increased future land

[3] Einhorn, Catrin. "Protected Too Late: Federal Officials Report More Than 20 Extinctions," *New York Times, Sept. 28, 2021.*

exchanges in this region based upon this precedent, and their cumulative effect on the community and the environment.

III. SUGGESTED REMEDIES

To address the objections in this document, the Agency should:

- Complete *bona fide* appraisals of the Federal and Non-Federal Parcels as outlined herein:
    - Utilize those appraisals to inform the configuration of the parcels in the exchange;
    - Give the public the opportunity to review and comment on the values of the parcels before finalizing the FONSI and Decision Notice.
- Release the public documents and the communications between Agency staff, the proponents, and others associated with the exchange, as requested under FOIA:
    - Give the public the opportunity to review and comment on these public documents before finalizing the FONSI and Decision Notice.
- Address the omissions we identified in the NEPA analysis, including assessing, disclosing, and identifying measures to mitigate the impacts of the exchange on:
    - Threatened and endangered species and other USFS-identified species-of-concern;
    - The scenic integrity of the Mary Jane area;
    - Recreation and access on the Federal Parcel;
    - Transportation and parking;
    - Workforce housing and other social impacts;
    - Cumulative impacts when combined with other Federal actions; and
    - Address concerns about the potential precedents this exchange would set;
- Include deed restrictions, conservation easements, or other permanent measures to ensure future actions remain consistent with the impacts evaluated and disclosed in the NEPA.
    - Give the public the opportunity to review and comment on these elements of the NEPA analysis and associated mitigation before finalizing the FONSI and Decision Notice.

IV. CONCLUSION

THE LACK OF APPRAISALS AND THE AGENCY'S FAILURE TO DISCLOSE IMPORTANT INFORMATION IN THE NEPA PROCESS MEAN THE NEPA PROCESS IS INCOMPLETE AND INADEQUATE, AND THAT ITS CONCLUSION IN THE FEA AND DDN IS PREMATURE.

Federal Land exchanges are discretionary, voluntary real estate transactions that may be completed only after a determination is made that the public interest will be well-served. This letter outlines numerous issues and concerns with the FEA and this land exchange process

that make public engagement and understanding of this exchange difficult, and raise significant questions about the exchange's public benefits.

The exchange and planned development of the Federal Parcel enriches private interests at the expense of public lands. The lack of future restrictions on the Federal parcel further reduces the public benefit. Environmental impacts are insufficiently disclosed, and uncertainty abounds regarding the size, configuration, and values of the parcel that the public will receive in the exchange. The combination of lack of information, numerous "bait and switch" revisions to the proposal since scoping, and the omission of an analysis of alternatives to the proposed action further clouds any indication that the proposal provides a net benefit to the public.

The Willow Creek Land Exchange documents provide no indication that the Amended Land Exchange Proposal meets the "Equal Value Determination" required by FLPMA. Information regarding the relative monetary value of the parcels as well as future costs must be released during the public process to inform the public and the Agency. The Draft Finding of No Significant Impact and Draft Decision Notice for Pre-Decisional Administrative Review for the Willow Creek Exchange, March 2024, do not address these concerns, and the Agency timelines serve to exacerbate these concerns.

Overall, CWPL maintains that the Willow Creek Land Exchange Draft FONSI is premature and not supported by the information provided in the NEPA process. Furthermore, the NEPA process is too flawed to support the Draft Decision Notice that the land exchange is in the public interest as defined in FLPMA. Appraisals are requisite components of approving a land exchange and no meaningful evaluation of the relative land values or appraisal information was included in the NEPA process. Therefore, the Agency violated NEPA and must undertake a notice and comment process for the appraisals, if not withdraw its FONSI and DDN and redo the NEPA process.

Approval of the Willow Creek Land Exchange in its current form will set bad precedents for future exchanges, and the lack of transparency in this NEPA process undermines any public benefit associated with this exchange. A decision to approve this land exchange proposal would devalue the public estate and further erode public confidence in the Federal land exchange process. Based upon our review of the FEA and associated documents, the amended Willow Creek Land Exchange Proposal does not meet Federal laws or policies, does not provide sufficient net public benefit, and should not be approved at this time.

We request that the Agency withdraw the FEA and the DDN, release the Appraisals, and address other comments identified herein. Release of the appraisals should be accompanied by a 45-day period for the public to review and comment on them. We also request that further modifications and protective measures are implemented as recommended in CWPL's letters, as the Agency continues to evaluate this exchange.

We respectfully request to meet with the reviewing officer to discuss concerns and suggested resolutions outlined in our objections. Should you have any questions, please do not hesitate to contact us.

Yours sincerely,

Brian Lorch

Brian Lorch, Executive Director
On behalf of the Board of Directors, Colorado Wild Public Lands

Colorado Wild Public Lands
PO Box 1772, Basalt, CO 81621
coloradowildpubliclands@gmail.com