

Wilderness Workshop • Rocky Mountain Wild •
Great Old Broads for Wilderness •
Rocky Mountain Recreation Initiative •
Rocky Smith • Conservation Colorado

Nov. 9, 2020

USDA Forest Service Rocky Mountain Region

Attn: Reviewing Officer

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Golden, CO 80402

Submitted online via: <https://cara.ecosystem-management.org/Public//CommentInput?Project=50041>

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RE: OBJECTION Berlaimont Estates Access Route FEIS and Draft ROD, White River
National Forest, from Wilderness Workshop

Wilderness Workshop submits this objection on behalf of Great Old Broads for Wilderness, Rocky Mountain Wild, Rocky Mountain Recreation Initiative, Rocky Smith and Conservation Colorado, under 36 C.F.R. § 218, to the Forest Service's Berlaimont Estates Access Route Final Environmental Impact Statement (FEIS) and Draft Record of Decision (DROD). Wilderness Workshop et al. previously submitted a written comment regarding this project during public-comment periods.¹

Wilderness Workshop is the lead objector for the purposes of this objection and contact should be with Wilderness Workshop's Staff Attorney, Peter Hart, at 303-475-4915 or via email at: peter@wildernessworkshop.org. Wilderness Workshop's physical address is PO Box 1442, Carbondale, Colorado 81623. The written comments and the comments of members of all cosigning groups on this objection are incorporated here by reference.

¹ See Wilderness Workshop et al. Comment on the Berlaimont Estate Access Route Draft EIS (Mar. 12, 2018) (attached as Exhibit 1); *see also* Wilderness Workshop et al. Scoping Comments on the Berlaimont Estates Access Route EIS (Nov. 7, 2016) (attached as Exhibit 2); Wilderness Workshop, Comment on Berlaimont Estates Road Improvement Project (August 23, 2018) (attached as Exhibit 3).

Public notice of the FEIS and DROD was published on September 25, 2020.² Therefore, under 36 C.F.R. § 218.7, this objection is timely because Wilderness Workshop submitted it electronically within 45 days of the draft's publication.

Wilderness Workshop requests an objection-resolution meeting to address the concerns raised below.

Introduction:

This entire process has been corrupted by a reasonable use determination that cannot withstand scrutiny. Additionally, officials at the U.S. Forest Service (USFS or FS) misconstrued the agency's authority under ANILCA and applicable regulations and have proposed a plan that fails to comply with federal land use laws. The existing transportation system is adequate for reasonable use and enjoyment of the parcel, therefore allowing, if not requiring, the Forest Service to deny the request for expanded use of the National Forest for a private road. The decision-making process was further corrupted by excluding the analysis of the development potential that informed the public and decisionmakers of any access alternative actions that might not allow full buildout on 19 lots and would not use the National Forest to connect to their proposed road system, thereby reducing impacts via a smaller development based on the use of the existing road or historic access routes. The Forest Service illegally abdicated the duty to protect the environment by framing the analysis as if a 19 lot development with expanded access across the National Forests was the only reasonable development alternative, thereby preventing the decisionmakers from selecting any alternative course of action that would minimize or avoid impacts to the National Forest or important public interests. Corruption of the National Forest Management Act and Federal Land and Policy Management Act by relying on an Alaska-specific law is further confirmed by the improper use of ANILCA to create private utility systems. The ANILCA provision that is being misapplied to create "access" via "ingress and egress" in Colorado³ does not authorize the Forest Service to create a "utility system" that crosses the National Forest.⁴

The project is set in the Eagle Valley, on a south facing slope that provides some of the last best winter wildlife habitat in the area.⁵ The project proponent is a private land speculator

² See Notice of Opportunity to Object – Berlaimont Estates Access Route FEIS and ROD, Glenwood Springs Post Independent, Sept. 25, 2020, available at <https://classifieds.postindependent.com/ad/Legals/Legals/ad/8-0000621720-01#.X3dG-y2z2N8> (last accessed 10/2/20).

³ 16 USCS § 3210(a)

⁴ 36 C.F.R. § 251.111 (access does not include utilities).

⁵ The FEIS confirms the heightened significance of habitat in and around the Berlaimont parcel. See *e.g.*, USDA, Forest Service, White River National Forest, Final Environmental Impact Statement Berlaimont Estates Access Route (FEIS) (Sept. 2020) at 232-3 ("The importance of elk winter range north of I-70 in the Eagle Valley has increased in recent years as a result of habitat loss and fragmentation from human development activities. South-facing slopes are particularly valuable habitat because of enhanced snow-shedding characteristics. The relatively mesic conditions on side slopes of most ridges in the analysis area support more vigorous mountain shrub communities with a greater abundance of serviceberry and mountain mahogany, two important winter browse species. Habitat effectiveness of this winter range is relatively high because of motorized road

who knowingly purchased a limited-access parcel more than a decade ago. The property was purchased with seasonal access on dirt roads—which is the same level of access that characterizes every other similarly situated parcel that the USFS considered in Eagle County, all of which enjoy reasonable use of their parcels. Eagle County “driveway” standards would allow construction of up to three homesites on the parcel.⁶ Now, though, the developer has asked the USFS for year-round paved access to support a scheme to build 19 mansions (with 9 accessory units) on the property. In order to approve this project, the USFS must accede to an ill-defined utility corridor, paving public lands that provide critical wildlife habitat and amending the Forest Plan, which was in effect when the developer purchased this property, to eliminate seasonal wildlife closures in place to protect this outstanding, remaining winter habitat. Critically, this is not an inholding that requires additional access. This parcel has existing access, historic access⁷, and potential access options via private routes⁸ that prevent application of ANILCA, even if the Alaska-specific statute applies in Colorado.

Winter wildlife habitat is a limiting resource for deer and elk populations. This is the habitat that deer and elk need to survive Colorado’s coldest and snowiest months. During wintertime, deer and elk persist on starvation rations. They rely on areas where snow accumulations are relatively low, where there may still be some forage and browse, and where they can shelter without disturbance. Every calorie counts for these animals during the winter. Reduced forage or unnecessary disturbances that require movement can be the difference between life and death.

Wildlife populations in the Eagle Valley are in crisis of decline. Populations of deer and elk have dropped by 50%, and maybe more, in recent decades.⁹ Experts agree that increased

closures, including the closure of FSR 780 to all motorized use, including snowmobiles, from November 24 to May 21. This closure was implemented specifically to protect this large, isolated block of elk and deer winter range within MA 5.41 from human disturbance.”).

⁶ See FEIS at 29.

⁷ The Draft EIS, FEIS and reasonable use determination failed to reveal and analyze historic access, whether through Red Canyon Creek Road or otherwise. “Per 36 CFR 251.112(b), Berlaimont Estates’ SF-299 application [which was filed in 2014] should have disclosed the historic access to their private inholding. [Matthew Klein’s] review of the application materials indicates that this information was not included.” See email from Mathew Klein, Realty Specialist, Eagle/Holy Cross Ranger District, White River National Forest, to Andy Hensler, Berlaimont Lobbyist, Huperetes Advisors (July 31, 2019 1:15PM) (on file with the U.S. Forest Service). As of July 2019, the information had not been provided, confirming the outcome of the analysis was predetermined.

⁸ A draft Response to Comments, released pursuant to FOIA, confirmed that, “Access through both Cordillera Valley Club and from Red Canyon Creek Road were specifically researched as options by the Forest Service, including parcel research and direct conversations and contacts with landowners or their representatives. Access through Cordillera Valley Club was dismissed because private property owners there would not grant public access. Red Canyon Road was dismissed due to steep terrain, and private property owners that would not grant public access. The complete rationale for dismissal of these and other possible routes is included in FEIS, Chapter 2, Section E.

⁹ Scott Condon, Elk herd population plummets in Aspen, Vail areas as human use grows, Aspen Times, Feb. 1, 2020 (“beleaguered herds that roam the Roaring Fork and Eagle valleys reached a tipping point and have experienced a 50% reduction in their population since around the year 2000.”), available at <https://www.aspentimes.com/news/lost-in-the-crowd/> (attached as Exhibit 4). The study by Paul Milhouser

pressure from year-round recreation and development are the primary causes for this decline.¹⁰ The DROD acknowledges these problems:

- “A reality of development of any kind on or near the National Forest in Eagle County is the impact to wildlife. These impacts are a function of myriad actions for which everyone bears some responsibility (e.g., population growth, land development, utilities and infrastructure, recreation, etc.). I understand the gradual degradation of natural resources is frustrating to some members of the public.”¹¹
- “In Eagle County, the challenges are amplified by the abutting residential and commercial growth that is beyond my control.”¹²

And the DROD indicates Forest Service officials are looking for innovative and collaborative ways to address “challenges to wildlife habitat that exist within Eagle County, including extensive dispersed and developed recreation, residential and commercial growth, a large roadway network, and others....”¹³

Despite acknowledging the broad challenges facing wildlife, the impacts of development on wildlife, and the degradation of natural resources in the area more generally, the USFS here is proposing to approve a project that will exacerbate existing problems and add to damage already done. The agency’s proposed decision fails to take meaningful action to change course and fails to take necessary action to protect the natural resources that the agency is charged to protect.

Instead the USFS undertook a reasonable use determination which completely ignored the weight of evidence demonstrating that Berlaimont Estates is not a reasonable use of this private inholding. Adding insult to this error, the USFS misconstrued its own authority. Claiming

referenced in this article represents new information that the Forest Service did not consider in its ANILCA determination or the FEIS, but that the agency must consider now before issuing a final decision. The study is discussed in greater detail below. The study should be in the project record, as Mr. Milhouser personally met with Forest Service officials to discuss the implications of this study and the Berlaimont project while the EIS was being prepared. However, there is no indication in the FEIS or the DROD that this information was considered by the agency. *See* Millhouser, Paul. Evaluating Landscape Connectivity and Habitat Fragmentation Effects on Elk in the Roaring Fork and Eagle Valleys. Rocky Mountain Wild, 2019 (attached as Exhibit 5).

¹⁰ *See e.g.*, FEIS at 234 *citing* Mao et al., 2009 and CPW, 2016 (“The Berlaimont Project Area is located within CPW DAU D8. DAU D8 contains GMUs 35, 36 (GMU 36 specifically overlaps the Berlaimont Project Area), 45, and 361. The population objective for DAU D8 has been reduced several times since 1980. In 1988, it was reduced from 26,000 to 21,000 and it was reduced from 21,000 to a range of 13,500-16,500 in 2009. The need to reduce the population objective was due to several factors with the main three factors being the same as that of elk; loss of winter habitats (largely due to development), habitat fragmentation, and recreational impacts. As with elk, mule deer use the large block of largely undeveloped habitat containing the Berlaimont Project Area at a slightly greater extent than other areas in the GMU, suggesting its relative importance.”).

¹¹ USDA, Forest Service, Draft Record of Decision for the Berlaimont Estates Access Route (DROD) (Sept. 2020) at 7.

¹² *Id.*

¹³ *Id.*

that it had no authority to choose the only alternative which would adequately protect public lands and critical wildlife habitat misinformed the public and the decisionmaker and withheld important information on reasonable use alternatives based on historic, current, and potential access alternatives. Indeed, the no action alternative flatly refused to disclose or analyze the possible range of uses of the parcel based on existing road access and utility easements. The no action alternative merely established an environmental baseline; it did not inform the public and the decisionmaker as to the impacts that would be expected from development alternatives that did not involve the proponent's desired use of the National Forest for utility and road access to a residential development.

Here the USFS failed to exercise its authority to ensure protection of public lands and wildlife which would necessitate maintaining, rather than eliminating, existing seasonal closures. The agency ignored critical factors in its reasonable use determination and relied on others that do not support its conclusions. The agency's DROD is arbitrary and capricious, and an abuse of discretion. Implementing the proposed action based on the existing record would violate the law and the agency's mission.

The DROD claims that Alternative 2 "has the least amount of impact and disturbance to NFS lands, and to the extent possible, minimizes impacts to wildlife while still meeting the adequate access requirements required by ANILCA."¹⁴ The impacts of providing a utility easement were essentially ignored, even though the FEIS recognizes that "access" does not include "rights-of-way for power lines or other utilities."¹⁵ Here the Forest Service limited the No Action Alternative to include no development at all, even though development using historic, current, and other private access routes is a foreseeable consequence of denying the permit application. Indeed, Berlaimont's Form 299 application failed to even disclose historic access, even though required by 36 CFR 251.112(b).¹⁶ Refusal to analyze the foreseeable development ignores evidence in the FEIS and the project record showing that even absent approval of any alternative considered, there is development potential on the parcel that would be construed as reasonable use at something less than 19 parcels. The development potential for less than 19 parcels was recognized internally and should have been considered in the No Action Alternative or in an Application Denial Alternative that compared with the baseline established in a No Action and the other action alternatives, but it was not. The inadequate and incomplete analysis underscores the agency's complete dismissal of the No Action Alternative which, according to the USFS "would not meet the ANILCA determination and would not address the purpose and need."¹⁷ Federal judges have twice rejected and recognized this scheme, promoted by some of

¹⁴ DROD at 8.

¹⁵ FEIS at C-16.

¹⁶ See Berlaimont Estates, LLC, Standard Form 299: Application for Transportation and Utility Systems and Facilities on Federal Lands (Submitted to the White River National Forest May 8, 2014) (including no mention of historic access) (in the project file). See also N.7 *supra*.

¹⁷ DROD at 31.

the same agency officials, as a deliberate abdication of the Forest Service duties to protect the National Forest.¹⁸

The agency's overly narrow interpretation of its duties to protect the National Forest subverts the entire decision-making process and undermines the outcome. These strained legal interpretations and evasive environmental analysis confirm agency bias toward a predetermined outcome that meets private developers' interests in federal lands in Colorado that Congress never envisioned when passing ANILCA to address unique issues in Alaska. Granting this objection, along with the slew of additional objections the USFS will receive from the impacted public, and invalidating the FEIS and DROD would task the Forest Service with starting anew, based on the foundational notion that the Forest Service has a duty to protect the National Forests. Denying the objection would allow the Forest Service to dole out access and utility rights in Colorado to developers, without regard to the NFMA and FLPMA provisions Congress adopted, and with grave indifference to the public interest.

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¹⁸ *Rocky Mt. Wild v. Dallas*, 2017 U.S. Dist. LEXIS 231942, at *4 (D. Colo. Sep. 14, 2017) (describing scheme as an "artful dodge"); *Colorado Wild, Inc. v. United States Forest Service*, 523 F. Supp. 2d 1213, 1227 FN15 (D. Colo. 2007) (criticizing Forest Service acceptance of unreasonable legal analysis promoted by developers).

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I. The Forest Service erred by applying section 3210(a) of ANILCA in determining that Berlaimont was entitled to “adequate access” for “reasonable use and enjoyment.”

The Forest Service determined that the Alaska National Interest Lands Conservation Act (or “ANILCA”) governed the grant of an access right-of-way across national forest land to provide access to the Berlaimont property. This determination was made in error. ANILCA should not be applied in assessing Berlaimont’s easement request for three primary reasons: (A) ANILCA should not be applied outside of Alaska, (B) ANILCA does not apply to utilities, and (C) FLPMA (the “Federal Land Policy and Management Act”) governs questions regarding rights-of-way across national-forest lands.

In its March 18, 2018 comment, Wilderness Workshop argued that ANILCA was inapplicable on pages 2-7.

A. ANILCA is not applicable outside of Alaska.

The Service was not obligated to grant the developer increased access to the Berlaimont inholding because—contrary to Forest Service regulations and the Ninth Circuit’s decision in *Montana Wilderness Association v. U.S. Forest Service*—ANILCA’s section 3210(a) should only be applied to national forests within Alaska.¹⁹

In its final EIS for the Berlaimont access proposal, the USFS determined that ANILCA, *Montana Wilderness*, and Forest Service regulations legally require the agency to provide adequate access to the Berlaimont inholding for its reasonable use and enjoyment.²⁰ In its

¹⁹ 655 F.2d 951 (9th Cir. 1981); 36 C.F.R. Subpart D.

²⁰ FEIS at 4-5; *Id.* Appendix C-2 – C-3.

comment on the draft EIS for this proposal, Wilderness Workshop argued that section 3210(a) of ANILCA should not be applied outside of Alaska, and therefore that the Service was wrong to conclude that this section governed Berlaimont's request for improved access.²¹

Section 3210(a) of ANILCA should apply only to Alaska because such an interpretation is supported by ANILCA's purpose; it would avoid amendment and repeal by implication; and the Supreme Court has seriously questioned the interpretive value of post-enactment legislative history—the basis of the Ninth Circuit's decision in *Montana Wilderness Association*.

1. ANILCA's text suggests that section 3210(a) should only apply to Alaskan national forests.

Reading section 3210(a) with its counterpart—3210(b)—strongly suggests that 3210(a) was meant to apply only to national forests in Alaska. “A primary rule of statutory construction is that when a court interprets multiple statutes dealing with a related subject or object, the statutes are *in pari materia* and must be considered together.”²² Section 3210(b) is *identical* to section 3210(a), except that it refers to “public lands” instead of the “National Forest System,” and to the Secretary of the Interior instead of the Secretary of Agriculture. Thus, as *Montana Wilderness* recognized, “[t]he natural interpretation is that [3210(a) and (b)] were meant to have the same effect, one on [Alaskan] lands controlled by the Secretary of Agriculture, and the other on [Alaskan] lands controlled by the Secretary of the Interior. Since we assume that [section 3210(b)] ... applies only to Alaskan land, we face a presumption that [3210(a)] was meant to apply [only] to Alaska as well.”²³ Notably, the Fourth Circuit has agreed with this analysis.²⁴

Other language in ANILCA bolsters this conclusion. Title V of ANILCA is titled “National Forest System” and speaks of expanding the “the units of the National Forest System” by adding lands to existing national forests in Alaska.²⁵ This suggests that the existing national forests in Alaska comprise the “National Forest System” that the act references.

According to the court in *Montana Wilderness*, Congress may have supplied a “definition” of “National Forest System” in an earlier statute, 16 U.S.C. § 1609(a), which states “[t]he ‘National Forest System’ shall include all national forest lands reserved or withdrawn from the public domain of the United States[.]”²⁶ Notably, however, this “definition” is absent from ANILCA's definition section. Definitions in one statute should not govern interpretation of another. The Supreme Court—both before and after *Montana Wilderness* was decided—has stated that “most words have different shades of meaning and consequently may be variously construed, *not only when they occur in different statutes*, but when used more than once in the

²¹ Exhibit 1, Comment at 6-7.

²² *Linquist v. Bowen*, 813 F.2d 884, 888 (8th Cir. 1987).

²³ *Montana Wilderness Ass'n*, 655 F.2d at 954.

²⁴ See *United States v. Srnsky*, 271 F.3d 595, 602-03 (4th Cir. 2001) (noting that there is a “strong presumption” that 3210(a) applies only to national forests in Alaska because it must be read *in pari materia* with 3210(b)).

²⁵ P.L. 96-487 § 505(a).

²⁶ 16 U.S.C. § 1609(a).

same statute or even in the same section.”²⁷ Just because Congress defined a term in one act does not mean that the definition is automatically imported into future acts. Here, Congress does not reference this earlier statute anywhere in section 3210(a) or the rest of ANILCA.

A harmonious reading of ANILCA’s text demands an Alaska-only interpretation of the law.

2. Section 3210(a) was intended as an Alaska-only fix to Alaskan land-management challenges.

The Alaska-only interpretation of section 3210(a) is also better supported by the overall purpose of ANILCA and the particular exigencies in Alaska that the inholding-access provision was meant to address. *Montana Wilderness* did not consider purpose-based arguments in its interpretation of section 3210(a), but since the case was decided the Supreme Court has entertained strong purpose-based arguments when interpreting other provisions of ANILCA.

First, Congress’s overarching purpose in enacting ANILCA was to address Alaska-specific concerns. The Act’s purpose section refers exclusively to Alaska. Additionally, the Supreme Court has recognized ANILCA’s aim of establishing Alaska-only standards. In *Sturgeon v. Frost*, the Court noted that federal land management in Alaska posed unique challenges demanding ANILCA’s Alaska-specific solutions.²⁸ That case examined whether an Alaska-owned river flowing through a national park in the state was subject to ANILCA and park regulations. The Supreme Court stated:

ANILCA repeatedly recognizes that Alaska is different.... ANILCA itself accordingly carves out numerous Alaska-specific exceptions to the Park Service’s general authority over federally managed preservation areas. For example, ANILCA *requires* the Secretary of the Interior to permit ‘the exercise of valid commercial fishing or privileges’ within the National Wildlife Refuge System in Alaska, [which the Secretary is not required to do for lower-48 Wildlife Refuges].²⁹

Similarly, ANILCA *requires* the Forest Service to provide adequate access to inholdings, which Congress had not done for any lower-48 national forest. This suggests that Congress intended section 3210(a) to be an Alaska-specific grant of strong inholding-access rights. The Supreme Court would seemingly agree—elsewhere in *Sturgeon*, it stated that “ANILCA’s primary purpose was to complete the land allocation of federal lands in the State of Alaska.”³⁰

Further, it would be strange for Congress to enact a sweeping national policy in a statute otherwise devoted only to Alaskan federal lands. No other provision of the act applies

²⁷ *Env’tl. Def. Fund v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1933)) (emphasis added).

²⁸ 136 S. Ct. at 1070.

²⁹ *Id.* (emphasis added).

³⁰ *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 549 (1987).

nationwide. As the Supreme Court has stated, Congress does not “hide elephants in mouseholes.”³¹ Likewise, Congress would not bury a nationally significant provision in one part of an act that otherwise applies only to Alaska, especially considering that there was no suggestion during the floor debate that section 3210(a) was intended to have a nationwide impact.³²

Second, an Alaska-only interpretation is supported by an analysis of the exigencies that sections 3210(a) and (b) were meant to address. ANILCA’s creation of federal conservation units in Alaska left over 800,000 acres of private land surrounded by federal land. In light of this, section 3210 could be read as a compromise: in exchange for surrounding owners’ property with federally protected land, Congress gave owners strong inholding-access rights. This understanding is consistent with ANILCA’s dual purposes: to protect federal lands while also providing “adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its peoples.”³³ For these reasons, section 3210 is best read as being an Alaska-only solution to an Alaska-only problem. Congress likely intended to create strong inholding-access rights for the hundreds of thousands of acres of private inholdings that were created by ANILCA. There was no need to do so nationally.

In interpreting section 3210(a), *Montana Wilderness* considered neither ANILCA’s overall purpose nor section 3210(a)’s apparent purpose.³⁴ No appellate court has done so.³⁵ In contrast, the Supreme Court focused on ANILCA’s purpose when it interpreted the statute in *Sturgeon v. Frost*. In light of Congress’s purpose in enacting the provision, section 3210(a) should be read as an Alaska-only mandate.

3. An Alaska-only interpretation is necessary to avoid the amendment and repeal of other laws by implication.

Section 3210(a) never purported to repeal or amend any other law, but a nationwide interpretation of its access provision would negate portions of both the Wilderness Act and the Federal Land Policy and Management Act. The Supreme Court has counseled against statutory interpretations that would impliedly negate other laws, noting that “[i]t is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.”³⁶ Similarly, “amendments by implication[] are not favored.”³⁷ In order to effectuate a repeal, “the intention of the legislature to repeal must be clear and manifest.”³⁸

³¹ *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468 (2001).

³² *See Montana Wilderness Ass’n*, 655 F.2d at 955-56 & n.7.

³³ 16 U.S.C. § 3101.

³⁴ *See Montana Wilderness Ass’n*, 655 F.2d at 953-57.

³⁵ *See, e.g., United States v. Jenks*, 22 F.3d 1513 (1994); *Srnsky*, 271 F.3d at 602-03.

³⁶ *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976).

³⁷ *United States v. Welden*, 377 U.S. 95, 103 n.12 (1964) (“Amendments by implication, like repeals by implication, are not favored.”).

³⁸ *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936).

A nationwide interpretation of section 3210(a) would effectively repeal section 5(a) of the Wilderness Act. This provision gives the Secretary a choice between granting access to inholders within wilderness areas and exchanging an inholder's land with more easily accessed federal land of similar value.³⁹ Applying ANILCA section 3210(a) nationwide would eliminate the Secretary's discretion and thereby repeal this section of the Wilderness Act. Yet there is no evidence that Congress intended such a repeal. In fact, in its first opinion in *Montana Wilderness Association*, the Ninth Circuit held as much, declaring that section 3210(a) "as interpreted by the appellees would repeal by implication a portion[] of the Wilderness Act, 16 U.S.C. § 1134(a)."⁴⁰ While the court omitted this holding from its opinion upon rehearing of the case, it remains correct.⁴¹

A nationwide interpretation of section 3210(a) would also amend FLPMA by implication to require access instead of the discretionary grant contemplated by FLPMA.⁴² FLPMA Title V gives the Secretary discretion in deciding whether to grant rights-of-way over Forest Service land,⁴³ but ANILCA diminishes that discretion by providing that the Secretary "shall" allow access to inholdings.⁴⁴ This interpretation, therefore, would be an impermissible amendment of FLPMA by implication. Importing ANILCA into Colorado reduces (but does not eliminate) federal control and authority over the proposal. Using ANILCA standards instead of FLPMA results in an FEIS and DROD that abdicate the NEPA duty to inform the public and the decisionmaker as to the consequences of an unreasonable 19 parcel residential development proposal that can only go forward based on National Forest access and utilities.

4. ANILCA's legislative history is consistent with an interpretation that limits the statute to lands within Alaska.

ANILCA's legislative history is consistent with this conclusion.

First, as *Montana Wilderness* recognized, the pre-enactment legislative history of section 3210(a) gives no indication that it was intended to apply outside of Alaska. Indeed, "[t]here are numerous occasions [during the floor debates] when one would expect a change in current laws of access of the magnitude of the [nationwide interpretation] to be discussed, mentioned, or at least alluded to."⁴⁵ In the Energy Committee's report on the bill, the committee noted that a Utah district-court case raised concerns about inholding access, then stated that "[t]he Committee amendment [regarding section 3210] is designed to resolve any lingering legal questions by making it clear that non-Federal landowners have a right of access (across) National

³⁹ 16 U.S.C. § 1134(a).

⁴⁰ *Montana Wilderness Ass'n v. U.S. Forest Serv.*, No. 80-3374, *slip op.* (9th Cir. May 14, 1981), *vacated after reh'g*, 655 F.2d at 954, *as reprinted in* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1988).

⁴¹ *See Montana Wilderness Ass'n*, 655 F.2d at 957 n.12.

⁴² 43 U.S.C. § 1761(a).

⁴³ 43 U.S.C. § 1761 (providing the Secretary with discretion to approve or deny rights-of-way over, upon, under, or through National Forest lands).

⁴⁴ 16 U.S.C. § 3210(a).

⁴⁵ *Montana Wilderness Ass'n*, 655 F.2d at 955-56 & n.7.

Forests and public land.”⁴⁶ The Committee recognized that inholding access presented a problem that was national in scope, but the remedy it proposed was ultimately Alaska-specific. It would have been strange for the Committee to grant access rights across national forests nationwide, while at the same time limiting its grant of access across other kinds of federal lands to those that are situated Alaska.⁴⁷

The post-enactment legislative history cited by the *Montana Wilderness* court is unpersuasive. The Ninth Circuit pointed to statements in a conference report suggesting that Congress deleted an inholding-access provision in a Colorado wilderness bill because it thought that issue had been clarified by ANILCA.⁴⁸ But a conference report is not legislation—members of Congress do not vote on the report, only the subsequent bill. Further, the fact that the House included an inholding-access provision in a Colorado-focused statute shows that the House, at least, did not believe that ANILCA had already addressed this issue.

Lastly, *Montana Wilderness* relied on two contemporaneous Supreme Court cases that approved of, albeit with reservation, the use of post-enactment legislative history as a tool of statutory interpretation.⁴⁹ Since *Montana Wilderness* was decided, however, the Supreme Court has criticized the use of post-enactment legislative history. In *Bruesewitz*, for example, the Court stated that “[p]ost-enactment legislative history ... is not a legitimate tool of statutory interpretation.”⁵⁰ As the Court explained, post-enactment remarks and reports could not have informed the understanding of those who voted to enact statutory language.⁵¹ Legislative actions taken after the enactment of ANILCA are accordingly irrelevant when interpreting section 3210(a).⁵²

B. ANILCA access excludes utility easements.

The FEIS and DROD both use ANILCA to limit the NEPA analysis of the utility impacts and as a legal mandate for the Forest Service decision to grant a vaguely described utility easement.⁵³

⁴⁶ S. Rep. No. 96-413, 96th Cong. 1st Sess. at 310 (1979), *reprinted in* (Feb. 1981) U.S.C. Cong. & Admin. News 9130.

⁴⁷ From remarks by other members of Congress, it seems that some were unaware that “public lands” was a term of art in the statute. After the bill was passed, for instance, a member of Congress stated that one flaw in the final bill is that granted inholding access rights “across national forest and public lands *nationwide*.” 126 Cong. Rec. H10529–30 (daily ed. Nov. 12, 1980) (emphasis added)). Because of ANILCA’s Alaska-only definition of “public lands,” there are *no* nationwide “public lands.”

⁴⁸ House-Senate Conference Rep. on the Colo. Wilderness Act, H.R. Rep. No.1521, 96th Cong. 2d Sess. (1980).

⁴⁹ *Montana Wilderness Ass’n*, 655 F.2d at 957 (citing *Consumer Product Safety Comm’n*, 447 U.S. 102, 118 n.13, 120 (1980) and *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980)).

⁵⁰ *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 241-42 (2011).

⁵¹ *Id.*

⁵² See N.29 *supra*.

⁵³ FEIS at E-36, E 37; DROD at 10, 21 (unenforceable utility BMPs).

Even if the ANILCA provision were properly applied to a National Forest in Colorado, ANILCA speaks only to “access” for “ingress and egress” and does not allow the Forest Service to essentially give away a valuable utility easement to a persistent developer.⁵⁴ Other portions of ANILCA use a very specific and defined term - “transportation or utility system” – to address utilities within conservation units.⁵⁵ Importantly, the plain language of ANILCA’s “National Forest” provision that is being misapplied to Colorado makes no mention of utilities, only “access” for “ingress and egress.”⁵⁶

The exclusion of utilities from the cherry-picked ANILCA provision is consistent with the Forest Service regulations that use a plain language interpretation of “access” via “ingress and egress” to exclude utilities.⁵⁷ FLPMA regulations confirm that even if ANILCA is applied in Colorado, ANILCA’s “access” provision does not authorize the Forest Service to create a “utility system” that crosses the National Forest.

The quiet inclusion of an undefined and unrestricted private utility easement into the ANILCA access application and DROD confirms the development bias within the underlying NEPA process. If the developer still seeks to use the National Forest to enable development of the property after conclusion of the objection process, the Forest Service must demand a new application and produce a new draft and final EIS that frames any “access” application within the Congressional intent of public land laws. The current FEIS does not provide responsible Forest Service officials with the opportunity to choose amongst all reasonable alternatives, free from the corrupting influences that predetermine an outcome that provides the developer with the desired road and utilities, regardless of the federal laws that impose limits and requirements on public land decision-making.

II. FLPMA governs questions of rights-of-way across national-forest land.

Congress enacted the Federal Land Policy and Management Act of 1976 (or “FLPMA”) in part to “provide[] uniform and comprehensive authority to the Secretary to grant rights-of-way on the national resource lands for such purposes as roads, trails, canals, and powerlines.”⁵⁸ FLPMA Title V gives the Secretary of Agriculture the discretionary authority to grant rights-of-way over national-forest lands.⁵⁹ By FLPMA’s own terms, this authority is exclusive: under Section 510, “no right-of-way ... shall be granted, issued, or renewed over, upon, under, or through such lands *except under and subject to [FLPMA’s] provisions, limitations, and conditions.*”⁶⁰ This provision applies to utilities.

⁵⁴ 16 USCS § 3210(a).

⁵⁵ 16 U.S.C. § 3162(4).

⁵⁶ 16 U.S.C. § 3210(a).

⁵⁷ 36 C.F.R. § 251.111; FEIS at C-16 (“access” does not include utilities).

⁵⁸ 122 Cong. Rec. 4046 (1976) (statement of Sen. Haskell).

⁵⁹ 43 U.S.C. § 1761.

⁶⁰ *Id.* § 1770 (emphasis added).

Congress intended for FLPMA to become the “single statute” governing rights-of-way over national-forest lands.⁶¹ The legislature made clear that FLPMA was the singular authority regarding rights-of-way by explicitly repealing thirty other statutes—all laws that included their own limited right-of-way provisions—in FLPMA Section 706.⁶²

When it enacted ANILCA, Congress gave no indication that it meant to amend or repeal FLPMA’s regime for determining access and utility rights-of-way. Congress knows how to repeal statutes; it did so in FLPMA Section 706 by expressly providing a list of the statutes that were “repealed insofar as they apply to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System.”⁶³ Congress did not include any similar language in ANILCA.

Nevertheless, the Forest Service has determined to apply ANILCA in Colorado, in large part to tie their own hands via an ANILCA *requirement* for the Forest Service to provide access across NFS lands to private inholdings.⁶⁴ No such requirement exists for Colorado. FLPMA Title V, which governs all private access across national-forest lands outside Alaska, vests *discretionary* authority in the Secretary to grant – or deny or grant with conditions – requests for rights-of-way.

To determine that ANILCA *requires* the Forest Service to grant inholding access and utility corridor(s) would be to find that ANILCA amended the discretionary access and utility regime established in FLPMA.⁶⁵ Since ANILCA did not claim to amend or repeal any part of FLPMA, however, the Forest Service’s determination must be based on the notion that ANILCA *implicitly amended* FLPMA. In the words of the Supreme Court, such “amendments by implication[] are not favored.”⁶⁶ To effectively amend existing laws, Congress must manifest an intent for the new legislation to amend the previous law. Here, that did not happen.

The Forest Service therefore erred when it applied ANILCA because FLPMA Title V governs such questions. A wider range of alternatives would emerge from FLPMA analysis, and

⁶¹ Gail L. Achterman, *Rights-of-Way Under Title V of FLPMA*, 14A RMMLF-INST 7 (1984).

⁶² 43 U.S.C. § 1701 note (“Repeal of Laws Relating to Right of Way”) (noting that “the following statutes or parts of statutes are repealed insofar as they apply to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System” and including a subsequent list of statutes).

⁶³ *Id.*

⁶⁴ FEIS, Appendix C at C-2 (“The applicant asserts, and the WRNF agrees, that the agency is legally obligated to provide access to the Berlaimont property across NFS lands. More precisely, Section 1323(a) of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) requires the Forest Service to provide access to private inholdings...”).

⁶⁵ 1A Sutherland Statutory Construction § 22:1 (7th ed.) (“[A]ny change of the scope or effect of an existing statute, by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form, is treated as amendatory.”).

⁶⁶ *United States v. Welden*, 377 U.S. 95, 103 n.12 (1964) (“Amendments by implication, like repeals by implication, are not favored.”); see also 1A Sutherland Statutory Construction § 22:13 n.3 (7th ed.) (listing cases).

confirm that the National Forest need not be impacted based on alternative routes through private land that are known to the Forest Service, but were not considered in the FEIS.

III. Even if ANILCA applied, the Forest Service’s reasonable-use and adequate-access determinations were still flawed with respect to the Berlaimont parcel.

As explained above, the Forest Service should not have relied on ANILCA in approving Berlaimont’s requested easement in the White River National Forest.⁶⁷ Even if ANILCA’s standards governed inholding access within Colorado, however, the agency was wrong in concluding that those standards were satisfied by Berlaimont’s proposed development.

Under ANILCA, “[t]he Secretary [of Agriculture] 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.”⁶⁸ Forest Service regulations define 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.”⁶⁹ Access refers only to “the ability of landowners to have ingress and egress to their lands” and does not include rights-of-way for utilities.⁷⁰ While ANILCA does not define “reasonable use and enjoyment”, the Forest Service’s implementing regulations direct the authorizing officer to “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.”⁷¹ The Forest Service has discretion to grant expanded access, and the inholder’s right under ANILCA “is clearly subject to reasonable regulation.”⁷² Similarly, even if utilities were to be approved pursuant to FLPMA, these private rights in the National Forest cannot be established through a vague reference to a utility corridor, with the uses and limitations to be determined after the utility corridor is approved.⁷³

The FEIS and DROD cannot be salvaged. The proper remedy is to start with a clean slate, free from the bias and predetermined outcome. A new Interdisciplinary Team, from a different Region and free from bias, should be chosen to begin the NEPA process anew. That said, it is reasonable to assume that the developer would not file a new application if the Forest Service confirmed the existing law would be applied faithfully, and with the purpose of protecting the National Forest. In that case, it seems unlikely the developer would get the damaging year-

⁶⁷ Importantly, as discussed in greater detail below, the one property that the U.S. Forest Service found to be similarly situated to Berlaimont’s proposal did not have ANILCA access. Access to that parcel was authorized through FLPMA.

⁶⁸ 16 U.S.C. § 3210.

⁶⁹ 36 C.F.R. § 251.111.

⁷⁰ *Id.*

⁷¹ 36 C.F.R. § 251.114.

⁷² *High Country Citizens’ Alliance v. U.S. Forest Serv.*, No. 97-1373, 2000 WL 147381, 3 (10th Cir. 2000) (internal citations omitted) (granting inholders a limited permit to account for snowplowing concerns in Gunnison County).

⁷³ FEIS at 11 (“Design plans and specifications for these utilities have not been submitted yet.”).

round, paved road sought here. Of course, the impacts of denying the request to use National Forest lands for development access are not available, as any potential development of less than 19 parcels that may be supported by existing access and utility corridors was illegally excluded from the NEPA analysis.⁷⁴ Indeed, the predetermined conclusions in the FEIS are confirmed by a May 19, 2019 email produced in FOIA that reveals the Forest Service “eliminated routes on the West, South and East based on resource impacts (as well as contacting and not getting permission from private land owners).”⁷⁵

The Forest Service erred in its determination because there is no similarly situated inholding or any other “relevant criteria” that supports the Berlaimont parcel’s proposed use as “reasonable,” and no criteria suggest that the road to the parcel is not already “adequate.”⁷⁶

A. The proposed development does not constitute “reasonable use and enjoyment” of the Berlaimont parcel.

Here, the Forest Service predetermined the conclusion that the proposed Berlaimont Estates is a reasonable use, and geared all analysis toward mandatory approval of an upgraded road and providing a utility corridor for this developer. In the DEIS, the Forest Service analyzed 23 private parcels and determined that none were “similarly situated.”⁷⁷ The agency concluded that none of these parcels had “the same characteristics as Berlaimont that they should be deemed similarly situated.”⁷⁸ In so finding, the agency emphasized the “uniqueness of Berlaimont, as viewed from a National Forest perspective.”⁷⁹ Nonetheless, by eliminating any comparable parcels from the “similarly situated” analysis, the predetermined outcome was justified based on several “other relevant criteria” used to conclude that the proposed development is a reasonable use.⁸⁰ The agency received substantial pushback on the transparent and arbitrary use of “other relevant criteria” to predetermine and limit the DEIS analysis, as well as its conclusion that those criteria support a reasonable use despite the inability to identify any comparable uses of similarly situated parcels.⁸¹

The agency subsequently changed course to justify the same conclusion. Now, in the FEIS, the Forest Service is still looking at the same 23 parcels that it previously examined, but the

⁷⁴ FEIS at 29 (“should [the developer] decide to develop their property using the existing FSRs [Forest Service Roads], the project could be proposed to Eagle County, the road standard could be evaluated, and the environmental impacts would be analyzed . . .”).

⁷⁵ See e.g., email from Kenneth Capps, Senior Counsel, Office of General Counsel, USDA, RE: Berlaimont Meeting w/ Tammy @3:30 Thursday (Wednesday, May 15, 2019 6:26 PM) (attached as Exhibit 6).

⁷⁶ Exhibit 1, Comment at 7-21.

⁷⁷ See DEIS, Appendix C at 3.

⁷⁸ DEIS at 4.

⁷⁹ *Id.*

⁸⁰ *Id.* at 7.

⁸¹ See e.g., Exhibit 1, Comments; see also FEIS, Appendix D (including comments submitted by the Eagle County Board of County Commissioners (March 12, 2018); Senator Michael Bennet, Congressman Joe Neguse, and Colorado Governor Jared Polis (June 3, 2019); and State Senator Kerry Donovan and State Representative Dylan Roberts).

agency has concluded that one parcel—the Lake Agnes parcel—is actually “similarly situated to the Berlaimont property.”⁸² The record shows that the proponent pushed the agency hard to reconsider its prior conclusion regarding Lake Agnes.⁸³ Nonetheless, the Forest Service’s new conclusion about the Lake Agnes parcel is fatally flawed because it arbitrarily ignores critical differences between the Lake Agnes and Berlaimont parcels. Those differences undermine any conclusion that the two parcels are similarly situated in the context of this ANILCA determination. Proper consideration of relevant factors would confirm what the Forest Service concluded in the DEIS: that there are no similarly situated parcels to Berlaimont Estates being used for comparable purposes, essentially because the proposed development is so unreasonable that a similarly situated parcel purportedly does not exist elsewhere.⁸⁴ Further, as discussed below, a proper “searching” consideration of “other relevant criteria” shows clearly how unreasonable this proposed use is.

The Forest Service also erred in its conclusion that Berlaimont Estates is a reasonable use because it ignored the fact that the Berlaimont parcel is surrounded by habitat for threatened and endangered species and because, even in the FEIS, it continues to focus on irrelevant and misleading data as “other relevant criteria” to support its decision. Required information, such as historic, existing, and potential access routes that would undermine the predetermined decision to grant access were knowingly excluded. Proper and thorough consideration of these factors would compel a different conclusion: that the proposed use of the Berlaimont parcel does not constitute “reasonable use and enjoyment” of the land necessitating impacts to the National Forest to provide a dramatic upgrade in existing access.

1. The Forest Service consideration of similarly situated parcels was arbitrary and capricious.

The Forest Service’s evaluation of other inholdings was arbitrary and capricious. The agency followed the weight of evidence to an illogical conclusion and ignored consideration of

⁸² FEIS, Appendix C at C-6.

⁸³ See e.g., email from project lobbyist Andy Hensler, Huperetes Advisors (on behalf of Berlaimont) to Aaron Mayville, District Ranger, Scott Fitzwilliams, Forest Supervisor and Deciding Officer, and Mathew Klein, Project Lead for the Berlaimont Access Route project re: “Berlaimont Estates” (May 30, 2018 9:26:48AM)(making the case that the Muddy Pass parcel is similar to Berlaimont and attaching a letter from law firm Wilmer Hale entitled “Letter to USFS re Wilderness Workshop Comment (167316229)” (these documents are on file with the Forest Service and attached as Exhibit 8). Note FOIA documents related to the Berlaimont proposal and released to Wilderness Workshop also show numerous phone calls and in-person meetings between representatives of Berlaimont Estates and the U.S. Forest Service in the period between the public comment period on the DEIS and release of the Final EIS. All released documents have been made public and the Forest Service has also made them available to the project proponents. See Letter from Ezekiel Williams, Counsel for Berlaimont Estates, LLC, Lewis Bess Williams & Weese P.C., to Scott Fitzwilliams, Forest Supervisor, White River National Forest, Re: Freedom of Information Act Request (May 11, 2019) (requesting all documents released to Wilderness Workshop) (on file with the Forest Service and attached as Exhibit 7). All of these documents should be in the project record.

⁸⁴ Of course, the narrow criteria used to eliminate all *similarly* situated parcels that could inform a reasoned analysis predetermines the decision to approve the application, and confirms the similarly situated analysis is an arbitrary and capricious effort to abdicate duties to protect the National Forest.

critical factors that undermine its ultimate conclusion. The agency undertook a “comprehensive search”—including properties presented by the applicant—to identify “properties that might be similarly situated to Berlaimont.”⁸⁵ This exhaustive search resulted in a list of 23 properties. In the DEIS, the Forest Service concluded none were similarly situated.⁸⁶ The list focused on roads and access, and completely ignored the utilities.

Then the agency changed course in the FEIS to conclude that one of the parcels previously considered actually was similarly situated. The agency failed to explain this change in position, and failed to provide additional information to support its new conclusion. Nonetheless, even the Forest Service’s new conclusion found that 22 parcels, or more than 95% of the parcels considered after a comprehensive search for comparable properties, still were not similarly situated.⁸⁷ None of the 23 comparables, even the one the Forest Service now considers to be similarly situated, had paved access. This body of evidence, if analyzed in good faith, likely confirms that historic, existing, and potential access is similar across the parcels, and Berlaimont’s proposal constitutes a significant departure from the norm that confirms the proposed use is not reasonable.

Instead, the FEIS arbitrarily focused only on the similarities between Berlaimont and the Lake Agnes parcel to justify its conclusion that the Berlaimont proposal is reasonable after all.⁸⁸ For reasons discussed below, the Forest Service’s conclusion that Lake Agnes is similarly situated to Berlaimont and that it somehow justifies this speculative real estate development as a “reasonable use” is flawed. The agency ignored critical differences with the Lake Agnes parcel that render its conclusion arbitrary and capricious. Proper consideration of the factors discussed below would show that Berlaimont and Lake Agnes have important dissimilarities that reveal the unreasonable nature of the Berlaimont proposal.

First, Lake Agnes is an easily accessible area and close to a public highway.⁸⁹ The access road to Lake Agnes is only 1.5 miles in length and is not paved.⁹⁰ The road climbs only 600 feet in elevation, and it does not have switchbacks or large berms and retaining walls.⁹¹ In contrast, Berlaimont is “difficult to access,” and would require close to 6 miles of road construction and reconstruction with multiple engineered switchbacks, climbing *thousands* of feet in elevation, for

⁸⁵ FEIS, Appendix C at C-4.

⁸⁶ DEIS, Appendix C at 4 (“...none of the properties possess enough of the same characteristics as Berlaimont that they can be reasonably described as “similar”).

⁸⁷ FEIS, Appendix C at C-6.

⁸⁸ FEIS, Appendix C at C-11 (“The analysis detailed in Section III.A shows that one existing property/development is ‘similarly situated’ (the Lichen Ranch subdivision in Grand County) with a current land use that is almost identical to what is proposed by Berlaimont. Thus, that property confirms that Berlaimont’s proposed land use is not unprecedented.”)

⁸⁹ FEIS, Appendix C, Addendum B at 2.

⁹⁰ FEIS, Appendix C, Addendum B at 2; *see also* U.S. Dept. of Ag., Forest Service, Forest Road Easement for Lake Agnes Property Owners Association (Nov. 19, 1997) (hereafter “Lake Agnes Easement”) (Exhibit A shows easement length: Approximately 5,280 feet) (attached as Exhibit 9).

⁹¹ There is no information in the record about utilities at the Lake Agnes parcel.

potential residents to get to their homes.⁹² The road to Berlaimont would require more than twice as much road mileage across public lands as the road to Lake Agnes, and it would be paved—which the road to Lake Agnes is not.

Second, and relatedly, Berlaimont is significantly more isolated than Lake Agnes. The Forest Service claims that both parcels are within 3-miles of a paved state and county road. That claim is deceptive, though. It reflects mileage to Berlaimont “as the crow flies” rather than as the road goes. If the Forest Service was considering granting aerial access, it may be appropriate to measure distance as the crow flies. But here the proposed use will be accessed on a road with buried utilities and the agency ignored the actual length of road that would need to be upgraded or constructed to provide access to the proposed use. No mention is made of the soils and geology, and the ability, if any, to actually bury utilities.

Whereas, at Lake Agnes developed lots are accessible within 1.5 miles and a few minutes’ drive of a state highway, developed lots at Berlaimont would require around 5 miles of switchbacking and several thousand feet of climbing for access.⁹³ The drive time to Berlaimont residences from a paved state or county road could easily be three or four times as long as it takes to get from highway 40 to homes on the Lake Agnes parcel. The challenge of accessing Berlaimont is underscored by the proposal to construct a helipad on site for emergency access.⁹⁴ The Forest Service framed its analysis to ignore or obscure these important dissimilarities. If you consider the actual distance to be traveled between a paved road and these respective developments, Berlaimont is significantly more isolated. This, of course, has important bearing on numerous other relevant issues that the Forest Service failed to consider or discuss (e.g., how long it would take first responders to get from a paved state or county road to the proposed homes in an emergency).

Third, the need for pavement to access Berlaimont underscores important differences between Berlaimont and Lake Agnes that the USFS ignored. Lake Agnes is accessed via dirt road, as is the case with every other inholding that the Forest Service looked at.⁹⁵ In the case of Berlaimont, though, the agency decided pavement was necessary to curb sedimentation, reduce maintenance, and to lessen impacts to the Berry Creek watershed and aquatic species that

⁹² FEIS, Appendix C, Addendum B at 2; *Edwards Area Community Plan* 50 (2017), [hereinafter *Community Plan*] (available in the project record. See FEIS at 296 (citing the Community Plan as “Eagle County, 2017c”).

⁹³ Compare Exhibit 9, Lake Agnes Easement, Exhibit A (depicting the 1.5 mile, relatively flat and considerably less turny route to Lake Agnes) and DROD at 35 (depicting the 5.7 mile, steep and switchbacking route access route to the proposed Berlaimont Estates).

⁹⁴ See FEIS at 102 (“A helipad may also be installed on Berlaimont Estates’ private property; if it is installed it would be made available for emergency use.”). Note: the helipad begs questions about the “need” for a year-round, paved road.

⁹⁵ See FEIS, Appendix C, Addendum B (note two parcels have a mix of dirt and pavement, but none have full pavement. Further, both of the parcels with dirt/pavement access are only accessible only by snowmachine in the winter. In the case of Berlaimont, as discussed below, the Forest Service dismissed a partial pavement alternative.).

occupy the area.⁹⁶ Basically, Berlaimont is such an intensive proposed use in such a sensitive area that common knowledge suggests that dirt road access, which characterizes every other inholding the USFS considered, would be unacceptable due to sedimentation.⁹⁷

Importantly, though, the record raises questions about whether the impacts of this damaging road could be adequately reduced with pavement. The 2017 opinion⁹⁸ of a Forest Service fisheries biologist that was disregarded—and even contradicted in the FEIS⁹⁹—was included in a 2020 Biological Evaluation.¹⁰⁰ Documents confirming the Forest Service eliminated further analysis of the biologist’s opinion from the FEIS also confirm that the interdisciplinary NEPA analysis must, but did not, address the counterintuitive but science-based conclusion that paving this particular access might actually result in more sedimentation and impact trout and protected fish due to sanding required to provide winter traction.¹⁰¹

Again, the myriad of considerations posed by installing and maintaining buried utilities is not even considered in any analysis.

The perceived and predetermined need to allow paved access underscores the sensitivity of natural resources in the area, the intensity of the proposed development, and just how damaging Berlaimont could be in comparison to other inholdings. Nonetheless, the USFS failed to give any meaningful consideration to this critical difference.

Fourth, the Forest Service ignored differences between Berlaimont and Lake Agnes related to wildlife and existing management plans.¹⁰² Berlaimont is in the middle of critical elk

⁹⁶ DROD at 6. Note that pavement will necessitate deicing in winter which will also cause sedimentation and impacts to watersheds and aquatic species in the area. *See* DROD at 13 (“All roads would be treated with a sand/salt mix (95 percent sand, 5 percent salt) for de-icing”).

⁹⁷ FEIS at E-10 (responding to comments questioning need for paved access).

⁹⁸ *See* email from Matt Grove, Fisheries Biologist, WRNF, to Kelly Owns, SE Group, RE: Berlaimont Trout Questions (Weds, Sept. 27, 2017 1:28 PM) (“We really need to address the new sediment impacts associated with the paved road. I am talking about winter maintenance and traction sand. There needs to be some kind of design criteria/mitigation that includes sediment basins or some kind of sediment control along the lower stretch of the road. The existing road definitely kicks in some sediment and is affecting the existing condition, but it does have some permeability to it. I am under the opinion that traction sand and winter maintenance with no control measures would contribute more sediment than the existing road currently does.”) (attached as Exhibit 10).

⁹⁹ FEIS at 43-44 (eliminating NEPA analysis of unpaved access because “the literature has found that paved roads produce less sediment than unpaved roads.”).

¹⁰⁰ *See* Exhibit 11, FINAL_BE_Wildlife_Berlaimont_WoodyEdits_25FEB20 at 10, 21-22, 17-20, 39 (adding concerns raised in 2017 to Biological Evaluation).

¹⁰¹ *See* Exhibit 12, March 2020 Biological Evaluation.

¹⁰² Note, the USFS did discuss proximity to Deer and Elk Severe Winter Ranges and Winter Concentration Areas under “Other Relevant Criteria” in the ANILCA determination. However, that does not obviate the need to discuss the relevance of this criterion to parcels the agency claims are similarly situated. Further, as discussed below, the agency’s consideration of this criterion under other relevant criteria is flawed.

and mule-deer winter range.¹⁰³ This habitat is protected by seasonal closures under the Forest Service’s existing Forest Plan.¹⁰⁴ The same plan provides for seasonal closures to protect sage grouse (which is a candidate for protection under the ESA, due largely to dramatic losses in habitat) and brewer’s sparrow (which is a USFS sensitive species) breeding activities in the area.¹⁰⁵ It also includes standards to protect conservation priority populations of cutthroat trout in the Berry Creek drainage, where Berlaimont’s paved road would begin and where sediment from maintenance of the proposed road threatens these fish species and this important habitat.¹⁰⁶ These protections and restrictions were in place when Berlaimont developers bought the parcel, but would need to be eliminated for the proposed use to proceed.¹⁰⁷ Potential impacts to wildlife and the need to amend the Forest Plan to eliminate protections for wildlife have been primary concerns raised interested parties and the public.¹⁰⁸ Nonetheless, the Forest Service failed to even discuss or consider whether these were issues at Lake Agnes.

The Routt National Forest Plan shows that Lake Agnes is surrounded by “General Forest and Rangeland,” rather than deer and elk winter range, and shows no evidence of seasonal

¹⁰³ See *e.g.*, N.5 *supra*, N.381-394 *infra*; see also COLO. PARKS AND WILDLIFE, COLORADO ACTION PLAN FOR IMPLEMENTATION OF DEPARTMENT OFF THE INTERIOR SECRETARIAL ORDER 3362 35-36 (2019).

¹⁰⁴ FEIS at 2; FEIS, Appendix C, Addendum B at 2.

¹⁰⁵ FEIS at 8.

¹⁰⁶ Note, as discussed in more detail below in this objection. We found no discussion or analysis of standards in the White River Plan (2002) requiring that “management activities that have the potential to impact occupied cutthroat trout habitat, tributaries of occupied cutthroat trout habitat, or identified reintroduction areas, maintain or enhance existing cutthroat trout habitat.” WRNF, LRMP (2002) at 2-25. Relevant guidelines in the plan that are intended to protect cutthroat also appear to have been ignored in the FEIS. *Id.* Our review suggests that the project may also require amendment to eliminate these requirements of the plan.

¹⁰⁷ See *e.g.*, FEIS, Appendix B. Forest Plan Amendment at B-2 (“All three access routes under consideration would be inconsistent with White River Forest Plan (2002) Standards.”).

¹⁰⁸ See *e.g.*, Eagle County Board of County Commissioners, Comments on Berlaimont Estates’ Access Route DEIS (March 12, 2018), at 2, 3 (identifying concerns related to wildlife impacts and amendment of the Forest Plan to eliminate seasonal closures at a time when “[d]eer and elk populations in the County are in decline and elimination of winter closures could be detrimental.” Also noting “Eagle County’s commitment to protecting important habitat.”); Edwards Metropolitan District, Comments on Berlaimont DEIS (March 12, 2018) (urging denial of Berlaimont’s application for a paved road based on these factors: “Critical wildlife winter range will be compromised,” “Elk calving areas will be compromised,” and “Interference with wildlife migration patterns”); Letter from Michael Bennet, U.S. Senator; Joe Neguse, U.S. Rep.; and Jared Polis, Governor of Colorado, re. Berlaimont Estates (June 3, 2019) (noting significant concern from the community and local elected officials, including Eagle County Commissioners about “effects that this proposal would have on wildlife habitat and the need to “amend the existing Forest Plan, and abandon seasonal wildlife closures intended to protect critical winter range.”); Letter from Kerry Donovan, State Senator, and Dylan Roberts, State Rep., re. Berlaimont Estates (noting declining wildlife populations, the importance of existing winter closures, widespread community concern, and stating “In our assessment, the Berlaimont Estates access road proposal is unreasonable on many levels” and “[t]he desires of a single developer should not outweigh the voice of the community and the long term stewardship responsibility of the USFS for our shared public lands.”). These letters are available in Appendix D of the FEIS.

closures.¹⁰⁹ Further, there is no indication that approval of the Lake Agnes development required the Forest Service to formally amend its Forest Plan to provide residents special access through an area that is closed to the public during winter months. The Forest Service’s own analysis shows that, in addition to amending a Forest Plan to eliminate broadly supported seasonal closures that are needed for declining wildlife more now than ever before, the proposed action will increase vehicle trips through the area by orders of magnitude.¹¹⁰ Once again, the agency’s decision to ignore or willfully subvert these critical differences undermines its conclusion.¹¹¹

Fifth, the Forest Service failed to acknowledge or address the fact that access to Lake Agnes did not involve ANILCA or grant of an easement under that law. The Forest Service does note that access to Lake Agnes “is via a single National Forest System Road (NFSR 254) authorized via a FLPMA easement granted to the Lake Agnes Property Owners Association.”¹¹² It is reasonable to conclude that ANILCA was rejected because the Lake Agnes proposal included utilities, which ANILCA does not contemplate. Instead of informing the public and the decisionmaker as to the distinctions, the FEIS says nothing more and ignores the host of relevant questions that must be answered to support the agency’s “similarly situated” conclusion. For example, if FLPMA was the proper tool to authorize access to Lake Agnes, why isn’t it the proper tool to authorize access to Berlaimont?¹¹³

Sixth, the Forest Service failed to acknowledge or address key differences between the historical context of Lake Agnes and Berlaimont. This consideration is key and courts have found parcels to be not similarly situated based on intervening events. *See e.g., Dobbs v. United States Forest Serv.*, 810 F. App’x 644, 653-54 (10th Cir. 2020) (wilderness inholdings are not similarly situated for the purposes of ANILCA where one predated wilderness designation and already had road access prior to designation of the surrounding area as wilderness). Lake Agnes began as a corporate retreat back in the 1950s. A road to the parcel was developed at that point.¹¹⁴ For some years the parcel was used as a summer camp.¹¹⁵ Subdivision of the parcel occurred around

¹⁰⁹ See Routt National Forest Land and Resource Management Plan (1998), Chapter 2 Management Area Prescriptions at 34, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5166023.pdf (last accessed 10/21/20).

¹¹⁰ FEIS, Table 3B-2. Trip Generation for Berlaimont Estates, at 100 (indicating that traffic associated with the proposed development alone, absent the additional recreational traffic resulting from the proposed action, could be as high as 164 trips per day, year-round); *see also* FEIS at 100 (noting that approval of the proposed action, including all of the recreational improvements proposed, will produce even more average daily trips—bumping the estimated total to 214 trips per day).

¹¹¹ *See infra* discussion of how the USFS failed to even acknowledge habitat of threatened and endangered species surrounding the Berlaimont parcel in its ANILCA determination. According to Addendum B in the FEIS, Lake Agnes is not surrounded by National Forest Lands that provide habitat for federally listed species. *See* FEIS, Appendix C, Addendum B, at 2.

¹¹² FEIS, Appendix C, at C-6.

¹¹³ *See supra* discussion of FLPMA as an alternative option to authorize access that was not considered here.

¹¹⁴ Note: a corporate retreat may be a reasonable use for the Berlaimont parcel, but U.S. Forest Service did not consider that because the proponent has not suggested this use.

¹¹⁵ Note: a summer camp may be a reasonable use for the Berlaimont parcel, but the U.S. Forest Service did not consider that.

1980, nearly 40 years ago, and residential development since then has occurred based on the existing access—which as discussed above is dramatically different than access required for the Berlaimont proposal. There is no indication that use of Lake Agnes as a residential subdivision required access complications that are comparable to Berlaimont at all—in fact, a searching review shows access to Berlaimont is stratospherically more complicated. Further, when access to Lake Agnes was built, and even when subdivision of the parcel occurred, times were very different. Decisions that may have been reasonable in the 1950s or the 1980s may no longer be reasonable today. In the intervening decades a lot has changed. New information related to the impacts of sprawl, declining wildlife populations, climate change, and the increasing risks of wildland fire show that decisions we made 40-70 years ago would be unreasonable today.

Public comments on the DEIS made this point well, and the public dialogue and new information since release of the DEIS underscore the point.¹¹⁶ Nonetheless, the Forest Service has chosen to ignore this information and the strong evidence that Berlaimont’s proposal is unreasonable. In so doing, the agency is simply perpetuating the same mistakes we have made for decades—for example by putting more people and expensive homes in fire prone landscapes far from first responders, increasing the need and foreseeable costs of fighting fires while ignoring the reality that we cannot afford it, and proceeding to pave more critical winter wildlife habitat to facilitate increases in sprawl and recreation—which are the primary drivers of declining wildlife populations. Simply put, the Forest Service is ignoring the fact that history does not support granting approval for this development. Rather it underscores the reasonableness of not approving it.

Finally, even ignoring the differences discussed above and putting aside problems with the Forest Service’s conclusions with regard to Lake Agnes, the existence of something similar still does not justify the agency’s reasonableness conclusion in this case. Here the agency says that Berlaimont’s proposed use “is not unprecedented.”¹¹⁷ Even if one accepts that conclusion, it is only the first step in the Forest Service’s reasonableness determination and, as discussed in more detail throughout this objection, the distinctions between Lake Agnes and the Berlaimont proposal confirm that Berlaimont is unreasonable—whether it is preceded or not.¹¹⁸

Here the Forest Service failed to conduct the analysis that would have confirmed that the proposed use of the land and the subsequent requirements for paved, year-round access with a

¹¹⁶ See e.g., Exhibit 1, Comments at 4-5, 7, 11-14, 15-21, 23-30 (discussing wildfire risk, sprawl, wildlife impacts, and climate change); see also Exhibit 5, Evaluating Landscape Connectivity and Habitat Fragmentation Effects on Elk (identifying an alarming decline in elk populations in the Eagle and Roaring Fork valleys and presenting evidence that populations may not recover due to human influence on the landscape, including fragmentation from development and recreation); Peter Hart, Wilderness Workshop: Wildfire risk, cost make Berlaimont unreasonable, Vail Daily, August 13, 2019 (attached as Exhibit 13); Exhibit 19; Section VII *infra*.

¹¹⁷ See e.g. FEIS at 5.

¹¹⁸ Discussion of precedent highlights another issue the Forest Service’s failed to consider in its reasonable use determination: is Berlaimont a reasonable use given the precedent it will create? The answer should be “no.” Approving Berlaimont with ANILCA has the potential to create a precedent that real estate speculators would love to exploit all over the country. Every inholder could claim a right to a paved, year-round road to their property so they could maximize development potential.

utility corridor were not reasonable. The Forest Service's regulations mandate that reasonable-use determinations be based on contemporaneous uses made of similarly situated lands in the area, historic access, and any other relevant criteria."¹¹⁹ Here, there are no contemporary uses of similarly situated lands that indicate the proposed Berlaimont use is reasonable. Therefore, the Forest Service must find the proposed use to be unreasonable.¹²⁰ The Forest Service's contrary conclusion is based on flawed analysis that omitted and ignored relevant and critical criteria.

2. The Forest Service arbitrarily ignored the fact that the Berlaimont parcel is surrounded by habitat for threatened and endangered species.

The Forest Service's ANILCA determination erroneously indicates that the Berlaimont parcel is not surrounded by National Forest System lands which are identified as habitat for Federally-listed species.¹²¹ The agency included this criterion in the ANILCA determination because:

Section 7 of the Endangered Species Act mandates consultation by the Forest Service with the U.S. Fish & Wildlife Service, which may require additional planning and result in greater limitations on land uses and modes of access simply due to a property's location within habitat for a threatened or endangered species. In other words, a land use which may be reasonable on an inholding property surrounded by general NFS lands may be determined to be unreasonable on an inholding surrounded by TES habitat specifically because of its location within that TES habitat.¹²²

Nonetheless, the determination failed to even acknowledge the presence of habitat for federally listed Canada lynx and greenback cutthroat trout, as well as habitat for greater sage grouse which is a candidate for protection under the Act, on National Forest lands surrounding the parcel, let alone provide an effects and take analysis informed by ESA consultation. The record includes evidence of such habitat that the Forest Service ignored.¹²³ The Forest Service's failure

¹¹⁹ 36 C.F.R. § 251.114.

¹²⁰ Exhibit 1, Comment at 8-11.

¹²¹ FEIS, Appendix C, Addendum B at 1 (table indicating that Berlaimont is not "surrounded by NFS lands which are identified as habitat for Federal-listed TES species").

¹²² FEIS, Appendix C at C-5.

¹²³ See e.g., Colorado Parks and Wildlife, Scoping Comments on Berlaimont (Nov. 7, 2016), at 3 (indicating "[t]he proposed project bisects GrSG occupied range for the North Eagle and South Routt (NESR) population;" "GrSG are considered landscape scale species that need large, intact undisturbed sagebrush habitats to maintain populations;" "in 2009 CPW recorded several GPS locations of a collared GrSG in the location of the proposed project (12/29/2009 to 2/11/2010). In addition, a USFS Wildlife Biologist reported a GrSG hen with 3 chicks on Forest Service property near Berry Creek on July 3, 2012. These observations identify the areas as being important for GrSG winter range and brood rearing habitats." See also Exhibit 2, WW et al., scoping comments at 30-31 (discussing evidence of lynx habitat and habitat for Greenback cutthroat surrounding the Berlaimont parcel); Richard W. Thompson, Wildlife Biologist, Western Ecosystems Inc., Biological Assessment for the Berlaimont Access Road Project, Eagle County, Colorado at 13 (stating that "Lynx habitat surrounds the upper portion of the private parcel"); Exhibit 10 (confirming the presence of green lineage cutthroat in Berry

to acknowledge this habitat in its ANILCA determination undermines the agency's conclusion about the reasonableness of Berlaimont's proposed use.

3. *The Forest Service erred in its examination of "other relevant criteria" when making its reasonable-use determination.*

The Forest Service failed to properly examine "other relevant criteria" by focusing on irrelevant or misleading data while neglecting to consider other highly relevant information.

a. *The Forest Service analyzed criteria that were not relevant to a reasonable-use determination.*

While the Forest Service has discretion to consider "other relevant criteria" in making a reasonable use determination, examination of that criteria should be fair and searching, it cannot be arbitrarily based on limited criteria intended to support the position of the agency or the proponent. The Forest Service used a prohibited approach that creates a pre-determined outcome. Informed decisionmaking requires the agency to look at all relevant criteria.¹²⁴ In this case, criteria that the agency considered were cherry-picked to support its predetermined outcome – expanded, year-round and paved road access and an undefined utility corridor. In fact, several of these criteria can be traced directly back to Berlaimont's Standard Form 299 Application—suggesting, once again, that the Forest Service is really representing the proponent's interests in this process and not the interests of the public.¹²⁵ Further, the agency's representation, consideration and conclusions regarding these criteria do not withstand scrutiny.

The agency considers "Characteristics of the Local Area," including "Human presence on public lands located within the Interstate 70 highway viewshed."¹²⁶ The agency was arbitrary and capricious in concluding that the Berlaimont proposal does not constitute a departure from existing and historic uses on public lands within the I-70 viewshed in Eagle County. To support their claim the agency stated: "homesteading, ranching, and logging" "have been the norm for many decades." But the developer's proposed use is not any of those things. This proposal is about building a new upscale subdivision on an inholding and paving public lands to access it and burying utilities on the National Forest to service the subdivision. In fact, after an exhaustive search of Eagle County inholdings, the USFS found that none looked anything like what has been proposed here. Eagle County officials also disagreed with the Forest Service's conclusion on this

Creek and indicating that "we have been directed to treat green lineage fish as federally threatened 'Greenback' until we receive further direction.").

¹²⁴ See *San Luis Valley Ecosystem Council v. U.S Fish and Wildlife Service*, 657 F.Supp.2d 1233, 1247 (D. Colo. 2009) (NEPA is violated when agency's framing of issues predetermines the outcome.).

¹²⁵ Berlaimont Estates, LLC, Standard Form 299: Application for Transportation and Utility Systems and Facilities on Federal Lands (Submitted to the White River National Forest May 8, 2014) at 8-9 (on file with the Forest Service).

¹²⁶ FEIS, Appendix C at C-7

point and encouraged the agency to “reconsider[] this conclusion.”¹²⁷ The County noted that Berlaimont’s proposed development:

is different from the development of other inholdings in the County, particularly because the Berlaimont property sits outside the discrete location of the I-70 corridor, thousands of feet and miles away from the highway and other development. For example, pumping domestic water for a distance of almost 6 miles through an elevation gain of 1800+ vertical feet appears to be unusual to achieve development in this area, where currently no further extensive water supply infrastructure exists to support residential development. This departure from the I-70 corridor area does distinguish the subject area from existing development supported by such infrastructure/delivery system.¹²⁸

The Forest Service’s conclusions fly in the face of these facts.

The agency also considered the “Character of existing residential developments within the Edwards-Avon-Vail metro area.”¹²⁹ It is true that there are upscale residential developments in the Eagle Valley. However, *none of those are on inholdings—which is the defining characteristic of Berlaimont*, and distinguishes the proposed Estates from all of these existing residential developments. The Forest Service confirmed this by finding that none of those other subdivisions were similarly situated. Nonetheless, the agency shoehorned this criterion into its analysis under “other relevant” to justify a predetermined conclusion. The agency’s framing and consideration is biased rather than searching. The agency chose to rely on similarities and not to give equal weight to critical differences because those differences undermine the comparison.

The Forest Service also considered whether Berlaimont’s close proximity to Deer and Elk Severe Winter Range and Winter Concentration Areas constitutes a departure from other existing residential development.¹³⁰ This frame predetermines the answer, but avoids the real question: is more of the same reasonable? In this case, development of critical and severe winter range is one of the factors driving declining populations. Here, though, the USFS’s reasonable use determination doesn’t even consider whether it is reasonable to develop, degrade, and destroy more of it.

The Forest Service also considered “State and Local Government Laws and Decision.”¹³¹ As a primary matter, no statutes or case law require or allow the Forest Service to determine that a generically “lawful” activity is a “reasonable use” on a particular parcel. The legal abstraction predetermines the outcome of a site-specific analysis that is heavily fact dependent. The Forest Service should not have relied on county land use planning standards to make a reasonableness determination regarding the National Forest.¹³² Nonetheless, the USFS once

¹²⁷ See Eagle County Board of County Commissioners’ comments to the USFS re. Berlaimont Estates’ Access Route Draft Environmental Impact Statement (March 12, 2018) at 2, available in Appendix D of the FEIS.

¹²⁸ *Id.*

¹²⁹ FEIS, Appendix C at C-7 – C-8.

¹³⁰ *Id.*, at C-8.

¹³¹ *Id.*, at C-9 – C-10.

¹³² Exhibit 1, Comment at 17-18.

again cherry-picked criterion favorable to the developer and drew conclusions and presented law/facts in a way favorable to its predetermined decision. In so doing, the agency omitted critical facts that favor a different conclusion than the one it drew.

USFS claims that the proposed use is not inconsistent with zoning regulations. Importantly, the U.S. Forest Service does not administer the Eagle County Code. That is the responsibility of the County. Just as the County cannot decide how federal agencies will administer their regulations, so it is inappropriate for the Forest Service to conclude how the County land use regulations are administered. The Forest Service admits this, but proceeds to rely on its own interpretation of County regulations anyway.

More importantly, though, land use development is more complicated than a zoning classification. Special use permits and other devices are often used to deviate from a particular zoning classification. There are many zone-wide, local-compatibility, and site-specific considerations that go into approval of any proposed land use, and it is arbitrary for the Forest Service to rely on some while not considering the rest.

In this case, as the Forest Service points out in the FEIS (but, notably, not in the reasonable use determination), a developer must still comply with County regulations regarding site development.¹³³ There are additional requirements related to access, wildfire, water and utilities, visual impacts, code compliance, and other offsite impacts related to protecting the environment and the health, safety and welfare of Eagle County residents that may also require County review and approval. By focusing on the County process, the Forest Service abdicates its own duty to manage the National Forests.¹³⁴

In comments on the Draft EIS, the County also pointed out that there may be a need for Berlaimont's developers to apply for and obtain a 1041 permit for a new domestic water and wastewater system to support the proposed 19 dwellings and 9 accessory units, as well as a variety of additional permits.¹³⁵ The proposal will also likely trigger special review by the County of the water facilities, including the reservoirs and large water tanks, necessary to provide water for wildfire protection at the Estates. These permits and this "special review" are not discussed in the reasonable use determination, though. It is not appropriate for the Forest Service to pick and choose regulations that the project may comply with to support its reasonable use determination while ignoring regulations that the proposal may or may not comply with.

The Forest Service also relied on the Eagle County Board of Commissioners' approval of road variances to justify its "reasonable use" determination.¹³⁶ The County pushed back against the USFS's characterization of this issue in comments on the DEIS. Specifically, County officials

¹³³ FEIS at 140-1.

¹³⁴ *Rocky Mt. Wild v. Dallas*, 2017 U.S. Dist. LEXIS 231942, at *4 (D. Colo. Sep. 14, 2017); *Colorado Wild, Inc. v. United States Forest Service*, 523 F. Supp. 2d 1213, 1227 FN15 (D. Colo. 2007).

¹³⁵ See Eagle County Board of County Commissioners' comments to the USFS re. Berlaimont Estates' Access Route Draft Environmental Impact Statement (March 12, 2018) at 2, available in Appendix D of the FEIS.

¹³⁶ FEIS, Appendix C at C-10.

made clear that Eagle County was not required to make a “reasonable use” determination, and that “[t]he road variance approved by Eagle County should not be interpreted as approval for this type of land use.”¹³⁷ In the DEIS the Forest Service claimed that “implicit in the granting of [the] variance [was] an acknowledgement by the County that the applicant’s proposed development of their property [was] lawful.”¹³⁸ The agency reworded its conclusion in the FEIS, saying: “Although the granting of such a variance is not a direct approval by the County of the proposed land use itself, it demonstrates that County officials found Berlaimont’s requested variance to have technical and legal merit.”¹³⁹

The Forest Service’s logic is flawed here on several levels. First, the agency does not even acknowledge that the need for variances is a clear indication that the developer’s request does not comply with applicable regulations on its face. Second, grant of these variances was about technical access and not about reasonable land use—which County officials made clear to the USFS in comments, and the agency basically ignored and tried to paper over. Third as discussed above, this is just one of many County regulations that will apply to the project. It appears that the USFS picked this one (likely at the request of the project proponent) because it could be spun to support approval of the project. But the agency ignored numerous other County regulations that likely don’t support the Forest Service’s conclusions, and the USFS also ignored meaningful consideration of County planning documents that clearly do not support its conclusion.

For example, Eagle County published an “Edwards Area Community Plan” in 2017 that provides a better understanding of the county’s views regarding the Berlaimont development.¹⁴⁰ The plan points out that “the entirety of [the Berlaimont parcel] supports critical habitat for mule deer, and the access road would cross long established deer migration routes.”¹⁴¹ The plan also criticized the proposed project, stating that “development on remote, difficult to access

¹³⁷ See Eagle County Board of County Commissioners’ comments to the USFS re. Berlaimont Estates’ Access Route Draft Environmental Impact Statement (March 12, 2018) at 2, available in Appendix D of the FEIS; see also Pam Boyd, *Berlaimont Team Defends Controversial Development Proposal*, VAIL DAILY (July 13, 2019), available at <https://www.vaildaily.com/news/berlaimont-team-defends-controversial-development-proposal/> (last accessed 10/23/20).

¹³⁸ DEIS, Appendix C at 6.

¹³⁹ FEIS, Appendix C at C-10. Importantly, the Eagle County variance would not apply to the Alternative 2 (the Proposed Action) in the FEIS.

¹⁴⁰ USFS cites the Edwards Area Community Plan in its cumulative impact analysis, but fails to consider it in the reasonable use determination. Compare FEIS, Appendix C. ANILCA Determination (with no mention of the Edwards Community Plan) and FEIS at 119 (noting that the Edwards Area Community Plan “is a visioning document developed by the Eagle County Planning Commission with considerable public input” and that the Plan “includes and acknowledges Berlaimont Estates’ private property (Character Area 2: Northwest Edwards). Future land use recommendation for property is ‘Constrained,’ indicating limited opportunities for development.”). USFS cites the Edwards Area Community Plan in its list of sources in the FEIS at 296.

¹⁴¹ See Community Plan at 50.

properties that support critical wildlife habitat is generally not supported by this plan.”¹⁴² The Plan goes on with more detailed recommendations:

The construction of homes on the Berlaimont Estates Property would require a new road that could negatively impact wildlife habitat and the nature and quality of recreational trails and experiences that presently exist on Forest Service lands in the area. A land swap or purchase converting this property to public ownership is strongly recommended as an alternative to development. Agricultural use would also be consistent with the purposes and intents of this Plan.¹⁴³

Although the Forest Service cited the community plan in the FEIS, it did not acknowledge that the plan does not consider the Berlaimont proposal to be reasonable.

In a similar vein, the Forest Service concluded that “the State of Colorado considers the subdivision of rural property into 35-acre residential parcels, as proposed and platted by Berlaimont, to be an acceptable and lawful pattern of land use.”¹⁴⁴ This assertion was based on a state statute exempting “any division of land which creates parcels of land each of which comprises thirty-five or more acres of land and none of which is intended for use by multiple owners” from regulations that govern “subdivisions.”¹⁴⁵ This statute, however, only exempts owners from statewide subdivision regulations, not any other regulations—including those of the local county.¹⁴⁶ The statute does not suggest that the use of such land is reasonable.¹⁴⁷ Notably, the exemption applies to any 35-acre land parcel, including parcels that are not completely surrounded by national-forest land. The Forest Service should not have relied on this information to make a reasonableness determination.¹⁴⁸

b. The Forest Service failed to consider “other relevant criteria” that were highly relevant to a reasonable-use determination.

The Forest Service also failed to consider the state and federal governments’ interest in minimizing Berlaimont’s impact on wildlife corridors. On August 21, 2019, Governor Polis directed Colorado’s Department of Natural Resources to study migration patterns and habitats for animals such as elk and deer; to identify threats to the animals’ seasonal migration corridors; and to compile a list of “policy, regulatory, and legislative opportunities to ensure the ongoing conservation of seasonal big-game habitat and migration corridors.”¹⁴⁹ Colorado Parks and Wildlife recently released the 2020 Status Report: Big Game Winter Range and Migration

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ DEIS, Appendix C at 6; *see also* FEIS Appendix C at C-9.

¹⁴⁵ Colo. Rev. Stat. § 30-28-101 (West 1996).

¹⁴⁶ *Boone v. Board of County Comm’rs*, 107 P.3d at 1114, 1117 (Colo. App. 2004) (“[I]nterpreting the 35-acre subdivision exemption as an implied limitation on this power [of the county’s zoning regulations] would defeat the express intent of the General Assembly.”).

¹⁴⁷ Colo. Rev. Stat. § 30-28-101 (West 1996).

¹⁴⁸ Exhibit 1, Comment at 16.

¹⁴⁹ Colo. Exec. Order (E.O.) No. D 2019-011, 3 (Aug 21, 2019). This E.O. is attached to Exhibit 14.

Corridors.¹⁵⁰ The report underscores the State’s goal of protecting seasonal habitats and migration corridors, as well as highlighting that residential and recreational development, like that proposed in this Berlaimont proposal, continue to cause wildlife population declines and to permanently destroy and degrade winter range and migration corridors.¹⁵¹ Although this study and Governor Polis’s order issued after the comment period for the DEIS ended, the order was highlighted in a letter that the Executive Director of Colorado’s Department of Natural Resources sent directly to the Forest Service regarding the Berlaimont project.¹⁵²

Polis’s order relates to another order signed by the Secretary of the Interior in February 2018. The federal order directs federal agencies to work with states such as Colorado to improve the winter range and migration corridors relied on by “big game” animals.¹⁵³ In particular, the Secretary directed federal agencies to work with state agencies and to “[a]ssess State wildlife agency data regarding wildlife migrations early in the planning process for land use plans and significant project-level actions that bureaus develop,” and to “minimize[e] development that would fragment winter range and primary migration corridors.”¹⁵⁴ The action-forcing purposes of NEPA prevent the Forest Service from ignoring the ongoing efforts of the other agencies, particularly where the Forest Service is considering an approval that would frustrate cooperation between Colorado and other Federal agencies by destroying valuable habitat and migration corridors relied upon migrating big game species that are managed by the State of Colorado and migrate between lands managed by the Bureau of Land Management’s Colorado River Valley Field Office and the National Forest lands under threat by this proposal.

The Forest Service did not consider the cooperative efforts of Colorado and Interior when it made its reasonable-use determination.¹⁵⁵ The FEIS acknowledges that private, residential land development on the Berlaimont parcel will impact winter-range and severe-winter-range habitats for species such as elk, and will likely contribute to the decline of local wildlife

¹⁵⁰ Cooley, C. P., A. Holland, M. Cowardin, M. Flenner, T. Balzer, J. Stiver, E. Slezak, B. Marette, D. Neumann, T. Elm and J. Holst. 2020. Status Report: Big Game Winter Range and Migration Corridors. Colorado Parks and Wildlife (attached as Exhibit 18), available at <https://cpw.state.co.us/Documents/Hunting/BigGame/2020BigGameWinterRangeandMigrationCorridorsReport.pdf>. This report is discussed in more detail in sections below.

¹⁵¹ *Id.*

¹⁵² See Letter from Dan Gibbs, Executive Director, Colorado Parks and Wildlife to Scott Fitzwilliams, Forest Supervisor, White River National Forest (Oct. 3, 2019) (Highlighting new information, including: “Executive Order (EO) D 2019-011, which underscores the importance of conserving big-game wildlife corridors and winter range habitat in Colorado. We ask that you strongly take the EO into account as you consider the removal of the seasonal closure of the current road that protects important winter wildlife habitat, and also evaluate to what degree this action may set an undesirable precedent for future development proposals in the state.”) (attached as Exhibit 14).

¹⁵³ DEP’T OF INTERIOR, ORDER NO. 3362, SUBJECT: IMPROVING HABITAT QUALITY IN WESTERN BIG-GAME WINTER RANGE AND MIGRATION CORRIDORS (2018), available at <https://www.fws.gov/hsscc/pdfs/Signed%20SO%203362.pdf> (attached as Exhibit 15).

¹⁵⁴ *Id.* at 4.

¹⁵⁵ FEIS, Appendix C at C-7.

populations.¹⁵⁶ Although the FEIS proposes to install speed bumps before wildlife crossing areas and minimize guardrails as mitigation measures based on discussions with CPW, it did not acknowledge that the proposed development would go against the federal and state interests in protecting and restoring wildlife corridors.¹⁵⁷ The Forest Service failed to consider growing federal and state support for the protection of migration corridors when determining whether private development in the middle of crucial habitat is a “reasonable use” of public land.

The Forest Service also did not consider the current White River National Forest management plan when assessing whether Berlaimont’s proposed plan was a “reasonable use.” According to the Forest Service’s own regulations, a landowner’s “reasonable use” of private property must be consistent with other laws and regulations, including the applicable forest-management plan.¹⁵⁸ If a proposed use is not consistent with the current plan, the proposed use must be made consistent.¹⁵⁹ While that could involve amending the Forest Plan, the Forest Service also has discretion to consider whether such an amendment would be reasonable under “other relevant criteria.” Here the Forest Service failed to disclose and analyze the benefit of denying any Forest Plan amendment that diminishes wildlife protections, despite an extraordinary amount of evidence in the project record supporting the importance of maintaining seasonal closures to protect declining wildlife populations.¹⁶⁰

All of the action alternatives under consideration would be inconsistent with the current White River National Forest Plan.¹⁶¹ No effort was made to determine whether utility

¹⁵⁶ FEIS at 85, 231-35, 243-46. *See also* Community Plan at 50; COLO. PARKS AND WILDLIFE, *Colo. West Slope Mule Deer Strategy* (Nov. 2014) <https://cpw.state.co.us/Documents/MuleDeer/MuleDeerStrategy.pdf> (attached as Exhibit 16); Letter from Colorado Parks and Wildlife to Eagle County Community Development, RE: VIS-4398 Berlaimont Estates Variance from Improvement Standards (Sept. 11, 2013), *available at* https://www.eaglecounty.us/Planning/Documents/Referrals/VIS-4398_Responses_09272013/ (attached as Exhibit 17).

¹⁵⁷ DROD at 24 (detailing project design criteria intended to reduce impacts on wildlife).

¹⁵⁸ 36 C.F.R. § 251.54(e)(1)(i-ii).

¹⁵⁹ *Breaker v. United States*, 977 F. Supp. 2d 921, 938 (D. Minn. 2013); 36 C.F.R. § 251.54(e)(1)(i-ii).

¹⁶⁰ *See e.g.*, N.5 *supra* (discussing the importance of winter range and the need for closures), N.152-154 *supra* (highlighting protection of winter range as a priority of the State); *see also* hundreds of comments in the project record underscoring the importance of maintaining seasonal closures and questioning the reasonableness of removing those protections. Note that the Forest Service did respond to comments raising this issue in the FEIS. However, the agency’s response does not withstand scrutiny. The agency said that any potential inconsistency with the Forest Plan relates to the access route..., not the reasonableness of the proposed use...” FEIS at E-32. This contradicts the fact that the agency considered consistency between the proposed use of this inholding and adjacent federal land use designations/protections in its reasonable use determination. *See e.g.*, FEIS, Appendix C, at C-4 – C-5 (showing that proximity to wilderness, roadless, and TES habitat were primary considerations in the Forest Service’s reasonable use determination). Here, once again, the agency cherry-picked the land-use designations/protections to consider in its ANILCA determination and it arbitrarily ignored considered others, like consistency with the Forest Plan—though that is clearly a relevant consideration in a reasonable use determination. All of this just shows, once again, the agency chose to focus on criteria that would support a predetermined conclusion to this process: providing the developer with year-round, paved access to this proposed new subdivision.

¹⁶¹ FEIS, Appendix B at B-2.

installation, use, and maintenance would be consistent. The only alternative proposed in the FEIS that would be consistent is the no-action alternative that sets out a baseline by arbitrarily suggesting that no development would take place if the application is denied. The Forest Service merely references ANILCA when it explains why it must disregard the no-action alternative (and the denial alternative), and how the agency disregarded the development potential based on existing access.¹⁶² It acknowledges that any improvement to the road would increase traffic and fragment seasonal habitat for elk and deer in the region. The FEIS does not have any reason for disregarding the no-action alternative other than its arbitrary determination that the road (and existing utilities) are not “adequate” to meet the developer’s desires, as contrasted with a “reasonable use.”¹⁶³

Even absent consideration of the need to amend the Forest Plan in its ANILCA determination, the USFS should have considered the declining wildlife populations in the area and the fact that those declines have been fueled by sprawling development like the one proposed at Berlaimont Estates. The agency must ask if the proposed land use is reasonable given that it will perpetuate and contribute to the ongoing decline of the area’s important and sensitive wildlife populations.¹⁶⁴ Instead, as described above, the agency chose to rely on the fact that there is a lot of existing development in sensitive winter wildlife habitat to justify a decision to allow even more of it. The agency should have used its broad discretion to consider whether it is reasonable to continue making the same decisions that are driving wildlife population declines.

The Forest Service also failed to consider the overwhelming opposition to this project in its reasonable use determination, though this is clearly relevant criteria.¹⁶⁵ The Draft ROD makes clear the amount of public opposition to this project: “There is no doubt that this project is highly controversial; approximately 1,000 comment letters have been received thus far. All but a few of the comments received are in strong opposition to the project.”¹⁶⁶ The project record shows evidence of the same. Emails in the record confirm that the overwhelming majority of public comments opposed granting an easement to access the proposed Berlaimont subdivision.¹⁶⁷ The Forest Service also received a petition with more than 4,000 signatures from

¹⁶² FEIS at 29 (arbitrarily asserting that maintaining willful ignorance as to the developer’s alternative plans constituted “total uncertainty” as to development potential on existing access).

¹⁶³ Exhibit 1, Comment at 19.

¹⁶⁴ The FEIS clearly spells out the myriad of serious harms this proposal would cause to deer and elk, but the agency refused to consider that in the reasonable use determination. See FEIS at 243-246.

¹⁶⁵ We provided a reasonably thorough compilation of letters, opinion pieces, and news articles related to this proposal that present a compelling portrayal of the depth and extent of public opposition to this proposal. See Exhibit 19.

¹⁶⁶ See DROD at 5.

¹⁶⁷ See *e.g.*, email from Mathew Klein, Realty Specialist, USFS, to Aaron Mayville, District Ranger, USFS, “2009 public comments for Edwards Overlook (aka Berlaimont)” (Friday, February 26, 2016 12:30:10 PM) (“The public comments were overwhelmingly opposed to the granting of an easement for a paved access road.” (emphasis original)) (available in the project record). See also DROD at 5: “All but a few of the [approximately 1000] comments received are in strong opposition to the project.”

locals opposed to this damaging proposal.¹⁶⁸ The project is so widely disdained that there was a “standing-room-only” opposition rally in Edwards after the DEIS comment period closed.¹⁶⁹ Nonetheless, the Forest Service ignored consideration of public sentiment in its reasonable use determination. The USFS’s failure to acknowledge or address the overwhelming public opposition to this project is just one more indication that agency consideration of “Other Relevant Criteria” was undertaken selectively to support its conclusion. It was not a searching review of relevant considerations.

The USFS also did not consider the wildfire related costs and risks of this proposal with “other relevant criteria.” The Forest Service acknowledges that Berlaimont Estates would be built in the Wildland Urban Interface (WUI) within an area with moderate and high wildfire hazard.¹⁷⁰ Wildland fires are increasing in regularity and severity with climate change. The FEIS considers extensive mitigation measures to protect against the potential dangers associated with putting more people, infrastructure, and expensive houses in the WUI. But nowhere did the USFS consider these issues in its reasonable use determination. It seems clear that, based on what we know about the costs and likelihood of fire in the WUI, it may not be reasonable to develop a new expensive subdivision in this area.¹⁷¹ This proposal will simply put more people and more property in harm’s way. The potential costs of that decision cannot be ignored by the agency in determining if this is a reasonable use.

The Forest Service has also not considered utilities that would be required to be installed along the proposed roads.¹⁷² The FEIS states that “Berlaimont Estates plans to have the power, communication, and utilities buried within the road corridor for the entire length of the

¹⁶⁸ Bill Andree & Howard Leavitt, Letter: Forest Service needs to draw the line on Berlaimont, Vail Daily, May 11, 2020 (discussing presentation of a petition presented to Forest Supervisor, Scott Fitzwilliams, with more than 4,200 “signatures from local residents who are vehemently opposed to the access road as proposed, due to its known wildlife and environmental impacts.”) (see Exhibit 19); see also Pam Boyd, More than 2,400 petition signatures oppose Berlaimont plan north of Edwards, Vail Daily, December 15, 2018 (see Exhibit 19).

¹⁶⁹ Pam Boyd, Buck Berlaimont march, rally attracts large crowd Saturday in Edwards: Standing-room-only rally cites wildlife habitat destruction, unreasonable road plan, Vail Daily, March 17, 2019 (“‘What if Berlaimont paved a road through your living room?’ read one of the signs at Saturday’s Buck Berlaimont march in Edwards. Other sign messages were more concise. One read ‘No Road’ while another simply declared ‘Enough!’ And the fiery sign carriers and participants at the Saturday protest committed themselves to a central strategy to battle the proposed development — keep the pressure on the US Forest Service to rethink its determination that the Berlaimont plan represents a ‘reasonable’ use of the property.”) (see Exhibit 19).

¹⁷⁰ FEIS at 206.

¹⁷¹ See e.g., Adam McCurdy, ACES Forest & Climate Program Director, *Flames in Our Forests: Colorado’s Unprecedented Wildfire Season* (Nov. 2, 2020) (discussing 2020, Colorado’s most devastating wildfire season ever, and the fact that climate change and people in the WUI are causing more fires and more severe fires than ever before: “The number of people using and living near fire-prone western forests has increased drastically over the past two decades. Between 1992 and 2015 the number of homes near wildlands increased by 42%. More people means ... more sparks. Between 1992 and 2012 humans started 84% of wildfires in the US and on average tripled the length of the ‘lightning fire season’. More recently, both the Cameron Peak fire and the East Troublesome Creek fire are suspected to be human-caused.”) (attached as Exhibit 20); see also Exhibit 13.

¹⁷² See *Colorado Wild v. U.S. Forest Serv.*, 523 F. Supp. 2d at 1213 (D. Colo. 2007).

upgraded/new road. Design plans and specifications for these utilities have not been submitted yet.”¹⁷³ Under ANILCA, the Forest Service is not authorized to approve utility systems such as power or communications. The installation of such utilities will be disruptive and must be considered along with other relevant criteria in applying FLPMA standards. As Berlaimont has not yet submitted plans for utilities, the Forest Service has no way to tell how disruptive or environmentally destructive the utilities will be.¹⁷⁴

In sum, here the Forest Service’s consideration of “other relevant criteria” is superficial rather than searching. The conclusions drawn by the agency from the criteria examined do not withstand scrutiny. And the agency has failed to look at other relevant criteria that weigh against a determination that this sprawling subdivision is a reasonable use of a NFS inholding. The criteria that the USFS chose to consider were arbitrary and the agency’s conclusions are as well.

B. The Forest Service erred by failing to properly analyze similarly situated parcels in making its adequate-access determination.

The Forest Service’s assessment of similarly situated parcels was also arbitrary. Forest Service regulations direct the Secretary to allow access “that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land.”¹⁷⁵ The repetition of the “similarly situated” standard suggests that the Forest Service has to compare the access similar inholdings have in order to determine what is “adequate.”¹⁷⁶ Courts have found that failure to consider such “additional statutory criteria in determining adequate access” is arbitrary and capricious.¹⁷⁷

The Forest Service did not analyze what constituted “adequate access.” Once it determined that Berlaimont’s proposal for year-round residential homes was a “reasonable use,” the Forest Service assumed that year-round snowplow access and paved roads were “necessary for the reasonable use and enjoyment of the property.”¹⁷⁸ The Forest Service failed to actually compare Berlaimont’s proposed road to any other access roads to the inholdings the agency had identified.¹⁷⁹ It also declined to consider the negative impacts of an improved road in the area at the time of its adequate-access determination, instead choosing to address these impacts after adequate access was already determined.¹⁸⁰

An access road without seasonal snowplowing would constitute adequate access. While snowplowing was a feature documented in the inholding comparison, the Forest Service did not

¹⁷³ FEIS at 8.

¹⁷⁴ Exhibit 1, Comment at 14-15.

¹⁷⁵ 36 C.F.R. § 251.111.

¹⁷⁶ See *High Country Citizens’ Alliance*, No. 97-1373, 2000 WL 147381, at 5-6. The court notes that Forest Service regulations require “similarly situated” comparisons at both the “reasonable use” and “adequate access” stages.

¹⁷⁷ *Breaker*, 977 F. Supp. 2d at 940-41 (citing 36 C.F.R. § 251.114(a)).

¹⁷⁸ FEIS, Appendix C at C-13 – C-14.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

use this data to determine if snowplowing was necessary for other similarly situated parcels. In fact, the only arguably comparable inholding in the FEIS, Lake Agnes, had no data on snowplowing.¹⁸¹ Even if snowplowing does occur at Lake Agnes, the access road to Berlaimont is at least 3.5 times as long and climbs several thousand feet higher. Addendum B in the Forest Service's ANILCA determination makes clear that none of the inholdings with roads that are as long as that proposed for Berlaimont, those most similarly situated within the National Forest, have snowplowed access.¹⁸² Several of the inholdings with longer access roads, like Piney River Ranch and Fulford, are accessible only via oversnow vehicle in the winter months. Nonetheless, the USFS ignored this fact. Eliminating snowplowing would allow the Forest Service to adhere to its own management plan and prevent the further fragmentation of crucial wildlife habitat. Given these factors, snowplowing is not necessary for adequate access.¹⁸³

Similarly, the Forest Service did not compare similarly situated parcels to determine if *paved access* to the Berlaimont parcel was necessary. Under all three action alternatives that the Forest Service considered, the proposed road would be paved. However, the ANILCA determination does not address whether paved access is reasonable or not. Paved access is also a feature discussed in the inholding comparison, but the Forest Service does not even make a determination as to whether a paved road is necessary under ANILCA. None of the other inholdings considered by the USFS have paved access, which would strongly suggest that adequate access to the Berlaimont property does not need to be paved. Nonetheless, the Forest Service failed to consider whether an unpaved road constituted adequate access to the Berlaimont parcel.

Finally, the Forest Service failed to analyze whether roads to similarly situated parcels were similar in length *and* environmental impact. All alternatives considered by the Forest Service for Berlaimont access include “[n]umerous retaining walls, some up to 600 feet long and approximately 20 feet tall[.]”¹⁸⁴ Although the FEIS compared the length of access roads in similarly situated inholdings, it failed to consider how disruptive the road and associated utilities would be on the surrounding landscape due to the challenging geology and topography. It should be noted that Berlaimont’s proposed access road was significantly longer than many other inholding roads at 5.7 miles (for Alternative 2), and the road would climb more than many—which will require multiple switchbacks and huge amounts of cut and fill.¹⁸⁵ The proposed road is far more elaborate and disruptive than any comparable access road examined by the agency, showing it is far beyond the access the Forest Service is actually required to provide. Previous case law has shown that adequate access can include road closures and it may

¹⁸¹ The Forest Service states that it is “not sure” whether year-round snowplowing access is provided to Lichen Ranch/Lake Agnes. FEIS, Appendix C, Addendum B at 2.

¹⁸² See FEIS, Appendix C, Addendum B (showing that no inholdings considered by the USFS with access roads in excess of 10,000 feet in length have snowplowed access. The proposed access to Berlaimont would be closer to 30,000 feet in length).

¹⁸³ Exhibit 1, Comment at 22-23.

¹⁸⁴ See *e.g.*, FEIS at 30, 34, 37.

¹⁸⁵ See *Community Plan* at 49-50; FEIS at 129; *Id.*, Appendix C, Addendum B at 2.

not even require traditional roads.¹⁸⁶ Berlaimont's current access to the parcel via an unpaved, unplowed Service road is accordingly adequate.¹⁸⁷

C. Because year-round use of the Berlaimont inholding is not reasonable, the Service must deny Berlaimont year-round access in order to minimize impacts on national-forest resources.

As explained above, the developer's proposed year-round use of the Berlaimont inholding is not a "reasonable use" under ANILCA. Consequently, the Service cannot nonetheless choose to grant Berlaimont year-round motorized access, for doing so would violate Service regulations requiring it to minimize impacts on the deer and elk populations which depend on the area for severe winter range—as well as other sensitive resources in the area. In other words, the Service's regulations preclude it from granting Berlaimont year-round access if year-round use of the parcel is not reasonable.

Under the Service's regulations, "landowners shall be authorized such access as the authorized officer deems to be adequate to secure them the reasonable use and enjoyment of their land."¹⁸⁸ "Adequate access" is defined as "a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources."¹⁸⁹ Further, the Service must also ensure that the route authorized is (1) "so located and constructed as to minimize adverse impacts on soils, fish and wildlife, scenic, cultural, threatened and endangered species, and other values of the Federal land[,] "¹⁹⁰ and (2) "as consistent as reasonably possible with the management of any congressionally designated area and is consistent with Forest Land and Resource Management Plans or the plans are amended to accommodate the access grant."¹⁹¹ In other words, because "adequate access" is defined in terms of the minimization of impacts on national-forest resources, the Service is obligated to grant *no more impactful* access than what is needed to service the "reasonable use" of the Berlaimont inholding.

The Service recognized that year-round motorized access would have significant impacts on deer and elk populations that depend on the area. Under the current White River National Forest Plan,¹⁹² the national-forest roads which could provide year-round access are closed from

¹⁸⁶ See *Dobbs v. U.S. Forest Serv.*, No. CIV-16-112-RAW, 2017, at 2 (E.D. Okla. Dec. 26, 2017); *Johnson v U.S.*, No. CV 00-217-BLG-RWA, at 20 (D. Mt. Apr. 2, 2002); *Mountain States Legal Found. v. Espy*, 833 F. Supp. 808, 817 (D. Idaho 1993).

¹⁸⁷ Exhibit 1, Comment at 23-24.

¹⁸⁸ 36 C.F.R. § 251.110(c).

¹⁸⁹ *Id.* § 251.111.

¹⁹⁰ *Id.* § 251.114(f)(2).

¹⁹¹ *Id.* § 251.114(f)(3).

¹⁹² The relevant standard under this forest plan is MA 5.41, "Deer and Elk Winter Range." U.S. Forest Serv., 2002a 3-57.

November to May as they bisect deer and elk severe winter range.¹⁹³ The Service recognized that the habitat effectiveness of this area is “relatively high” because of the seasonal closure, a measure “implemented specifically to protect this large, isolated block” of deer and elk winter habitat.¹⁹⁴ Yet, the Service noted that year-round motorized access in the area surrounding Berlaimont would negatively impact deer and elk populations by forcing them to winter on other already-occupied habitat or lower quality habitat¹⁹⁵ and by continuing the trend of habitat loss and fragmentation in the area north of I-70.¹⁹⁶

The Service’s special-use-authorization regulations require it to grant Berlaimont no more impactful access than that which is adequate to secure reasonable use of the inholding. As explained above, the Service was incorrect to conclude that the developer’s plan to build a year-round residential community in the middle of elk severe winter range is a reasonable use of the Berlaimont parcel. Thus, the Service is only required under ANILCA to grant access to secure lesser uses of the parcel, e.g. a summer-only residential community. Because of the adverse impacts that granting year-round access would entail, the Service cannot grant the developer greater access than what is adequate to secure reasonable use of the inholding. Therefore, since year-round use of the Berlaimont parcel is unreasonable, and because the Service is obligated to minimize the impacts of its access grant, the Service must deny year-round access to the developer.

IV. The Forest Service’s purpose and need statement is impermissibly narrow.¹⁹⁷

Properly defining the purpose and need of a project is critical to ensuring a sufficient and proper analysis of alternatives and impacts. An EIS’s “Purpose and Need” is supposed to briefly define the underlying request or goal motivating agency action.¹⁹⁸ The stated goal of a project necessarily dictates the range of reasonable alternatives. However, an agency cannot define its purpose and need in unreasonably narrow terms so that only its favored alternative could meet the purpose and need.¹⁹⁹ Rather, a purpose and need statement must define a project broadly enough to allow consideration of a reasonable range of alternatives. An almost identically

¹⁹³ FEIS at 233.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 244.

¹⁹⁶ *Id.*

¹⁹⁷ Wilderness Workshop et al., raised concern about the narrow purpose and need of this project in comments on the DEIS. See Exhibit 1, Comments at 6-7. Note: NEPA’s implementing regulations have changed since this project began, but there is no indication in the DROD or the FEIS that the U.S. Forest Service has made a decision to apply newer regulations to this project. See 40 C.F.R. § 1506.13 (listing the effective date of new regulations and indicating that agencies have discretion to apply new regulations to ongoing activities and environmental documents initiated before September 14, 2020). This objection cites the regulations that were in effect throughout the multi-year Berlaimont review process rather than the regulations that were implemented only days before release of the Draft ROD.

¹⁹⁸ 40 C.F.R. § 1502.13.

¹⁹⁹ An agency may not “define a project so narrowly that it forecloses a reasonable consideration of alternatives.”) *Fuel Safe Washington v. Fed. Energy Regulatory Comm’n*, 389 F.3d 1313, 1323 (10th Cir. 2004) quoting *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002).

unlawful definition of the purpose and need that narrowed alternatives analysis has been considered, and rejected, by the federal courts.²⁰⁰

This is critical to the adequacy of the NEPA process and the agency's analysis, but also to the public. NEPA requires that agencies "present complete and accurate information to decision makers and to the public to allow an informed comparison of the alternatives considered in the EIS."²⁰¹ "Where the information contained in the initial EIS was so incomplete or misleading that the decision maker and the public could not make an informed comparison of the alternatives, revision of the EIS may be necessary to provide a reasonable, good faith, and objective presentation of the subjects required by NEPA."²⁰²

In this case, the Forest Service's purpose and need was construed narrowly "to provide an improved road to Berlaimont Estates LLC's (the Applicant) private property."²⁰³ The agency then cites ANILCA which it claims directs the agency "to provide adequate access to private property fully contained within the National Forest System."²⁰⁴ And the FEIS notes the proponents' own purpose and need, which is to develop nineteen single-family residences and associated dwelling units on its inholding.²⁰⁵ The FEIS also says the current maintenance level and condition of existing roads are not at a level desired by the Applicant.²⁰⁶

This framing reflects that the agency determined improved access was required merely because the applicant wanted expanded road and utility access and ANILCA was the only appropriate tool to achieve that purpose and need. Narrowing the alternatives to serve the contrived purpose and need of complying with a mandatory ANILCA request completely ignores any other authorities that the U.S. Forest Service may have at its disposal to respond to the proponents' request for an improved road and utilities. As discussed above, in other circumstances, including in granting access to other inholdings in Colorado, the U.S. Forest Service has used FLPMA. In this case, though, the Forest Service's narrow framing of the alternatives analysis through the applicant-focused purpose and need impermissibly eliminated consideration of any other applicable authority and focused the entire analysis on ANILCA.

²⁰⁰ *Colo. Wild, Inc. v. United States Forest Serv.*, 523 F. Supp. 2d 1213, 1228 (D. Colo. 2007) (enjoining unlawful action because "Forest Service's adoption of LMJV's County-approved development plan as the reasonable use and enjoyment of the property essentially transformed the FEIS's purpose and need for action to the provision of access adequate to serve LMJV's full-scale development plans. It also drove the agency's identification and analysis of "reasonable alternatives" to LMJV's access proposal, and prevented it from considering any alternatives that involved "reasonable use and enjoyment" of the property other than full build-out of the Village as proposed.") *Rocky Mt. Wild v. Dallas*, 2017 U.S. Dist. LEXIS 231942, at *4 (D. Colo. Sep. 14, 2017).

²⁰¹ *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d at 813.

²⁰² *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988), amended by 867 F.2d 1244 (9th Cir. 1989) (internal citation and quotations omitted).

²⁰³ FEIS at S-1.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at S-2.

²⁰⁶ *Id.*

Even putting aside the fact that the Forest Service's frame for this analysis allowed it to avoid looking at any authority other than ANILCA to respond to proponents' access request, the purpose and need also demonstrate that the Forest Service unlawfully predetermined that it was required to provide an improved road and utilities. Even under ANILCA that frame is impermissibly narrow. It ignores the fact that ANILCA only requires adequate access for reasonable use. If the proponent already has adequate access for reasonable use, nothing more is required under ANILCA.²⁰⁷

The Forest Service's impermissibly narrow frame for the purpose and need of this project enabled the agency to ignore any other authorities it might use to respond to the proponents' proposal. It also allowed the agency to predetermine that an improved road was necessary for adequate access and, as discussed in more detail below, improperly omit and dismiss several reasonable alternatives that should have been considered. Additionally, this frame misled the public and undermined any notion that the FEIS represents an accurate, clear, or appropriately comparative representation of options available to the agency.

V. The Forest Service failed to consider reasonable alternatives as required under NEPA.

As a result of its unlawful decision to apply ANILCA's mandatory access provision, the agency unlawfully narrowed the purpose and need and thereby failed to consider reasonable alternatives. "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate."²⁰⁸

In explaining why all of the considered alternatives were inconsistent with the governing forest plan, the agency stated that it was "legally required under [ANILCA] to provide adequate access to inholdings[.]"²⁰⁹ As set forth above, and confirmed by the courts, this determination is factually and legally erroneous. Regardless of whether ANILCA applies to the Berlaimont proposal, however, the Forest Service must still consider a full range of reasonable alternatives in between a no-action alternative that assumes no development and creates a baseline for comparison, a no-action alternative that examines development potential and access options that do not require Forest Service approval, and the Forest Service approval of expanded road and utility access that includes rights to a fully paved road providing year-round access to a 19 parcel residential development.

²⁰⁷ "Where there is existing access or a right of access to a property over non-National Forest land or over public roads that is adequate or that can be made adequate, there is no obligation to grant additional access through National Forest System lands." 36 C.F.R. § 251.110(g). Further, disclosure and analysis of historic access is required, but was not conducted or included in Berlaimont's 299 application. *Id.* at § 251.112(b); *see also* N.7, N.16, N.125 *supra*. The analysis did not consider whether existing or historic access through the Red Canyon route would be better for wildlife than any other could therefore justify requiring Berlaimont to attempt to get access on that route, as it appears to have been an historic access to the property. *See* Exhibit 6.

²⁰⁸ *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008).

²⁰⁹ FEIS, Appendix B at B-2.

Defining the “federal action” and “purpose and need” are critical to establish the scope of the NEPA review. However, the FEIS “purpose and need” is based on erroneous legal interpretations of ANILCA that avoid the question of what, if any, terms and conditions should be placed on that access to meet ANILCA and other statutory and regulatory obligations and goals. Although NEPA does not prescribe a specific outcome, it does require the Forest Service to disclose and analyze its power and control to limit the scope of ANILCA access within the context of the “purpose and need” for a private project that ‘but for’ the Forest Service’s provision of access and utilities, could not be developed in any configuration set out in the FEIS.

The FEIS approach illegally segments the “federal action” into the access decision and the access required for the development, and ignores the real test involving federal power to control a private project that satisfies NEPA’s “major federal action” trigger.²¹⁰ Setting aside the FEIS and beginning anew would allow the scoping process to build the NEPA process on a lawful “purpose and need” that supports analysis of reasonable range of alternatives and mitigation measures.²¹¹

In preparing an EIS, the Forest Service is required to consider a range of reasonable alternatives. The alternatives analysis forms the “heart of the environmental impact statement.”²¹² The agency is required to use information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16) to present the environmental impacts of the proposal and the alternatives.²¹³ The impacts should be presented in “comparative form, [] sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.”²¹⁴

This section of an EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.”²¹⁵ The existence of reasonable but unexamined alternatives will render an EIS inadequate.²¹⁶ Agencies must “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.”²¹⁷ The EIS must consider “reasonable alternatives not within the jurisdiction of the lead agency,” as well as a no action alternative.²¹⁸ In addition, agencies must consider and discuss “appropriate mitigation measures....”²¹⁹

²¹⁰ *Ross v. FHA*, 162 F.3d 1046, 1051 (10th Cir. 1998) (“major federal action” means that the federal government has “actual power” to control the project). *Sierra Club v. United States DOE*, 255 F. Supp. 2d 1177, 1189-1190 (D. Colo. 2002) (holding mine access and accessed mine must receive NEPA and ESA analysis before agency can grant access approval).

²¹¹ See *San Luis Valley Ecosystem v. United States Forest Serv.*, 2007 U.S. Dist. LEXIS 36242 (D. Colo. 2007).

²¹² 40 C.F.R. § 1502.14.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at § 1502.14(a) (emphasis added).

²¹⁶ See *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998).

²¹⁷ 40 C.F.R. § 1502.14(b).

²¹⁸ *Id.* at § 1502.14(c), (d).

²¹⁹ *Id.* at § 1502.14(f).

Here, as discussed below, there are a number of reasonable alternatives that the Forest Service failed to consider. Furthermore, the reasonable alternatives must be tailored to fit the Forest Service's purpose and need "against the background of a private need, in a manner broad enough to allow consideration of a reasonable range of alternatives."²²⁰ The agency is not required to fit the alternatives within the private landowner's proposal, but rather to consider its own interests in addition to the landowner's. The agency does have to consider legal rights that override its own—for example, if a private owner holds subsurface mineral rights in a national forest, the Forest Service must allow access to that land.²²¹ However, the Forest Service has adequate room to propose additional alternatives if those alternatives are feasible.²²²

Further, impacts flowing from a grant of ANILCA access must be mitigated by "such terms and conditions as the Secretary of Agriculture may prescribe."²²³ Consideration of ANILCA access necessarily involves NEPA disclosure and analysis of available mitigation that may be imposed via terms and conditions on the proposed access and alternatives to meet other statutory and regulatory obligations and goals. ANILCA does not write the agency a blank check to regulate private land use, but "when USFS grants an inholder access to their private parcel under the ANILCA, that action can have some impact on the use of the land."²²⁴ As discussed above, the Forest Service has a duty to inform that discretion by following the procedural mandates of NEPA, which were adopted by Congress to avoid and minimize potential impacts of agency decisions.²²⁵

By only considering three similar alternatives, each of which is limited to the consideration of road and utility access to "19 homes and associated development" but no other potentially reasonable uses based on existing, historic, or potential access routes, the Forest Service relied on an FEIS that unlawfully excluded a reasonable range of alternatives as required under NEPA.²²⁶

²²⁰ *Nat'l Parks Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1071 (9th Cir. 2010); 40 C.F.R. § 1502.13.

²²¹ See *Nat'l Parks Conservation Ass'n v. U.S. Forest Serv.*, 177 F. Supp. 3d 1, 17 (D.D.C. 2016).

²²² *Id.* at 18.

²²³ 16 U.S.C. § 3210(a), (b).

²²⁴ *Rocky Mt. Wild v. Dallas*, Civil Action No. 19-cv-01512-CMA, 2020 U.S. Dist. LEXIS 173197, at *9 (D. Colo. Sep. 22, 2020).

²²⁵ 36 C.F.R. § 251.111; *Id.* at § 251.114(a), (f)(2), *Oglala Sioux Tribe v. United States NRC*, 896 F.3d 520, 529 (2018) (We know that the environmental values protected by NEPA are of a high order -- because Congress has told us so.) *quoting* 42 U.S.C. § 4331 (recognizing "the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," and declaring the federal government's responsibility to "preserve important historic, cultural, and natural aspects of our national heritage").

²²⁶ FEIS at 41.

A. The Forest Service failed to compare alternative reasonable uses that remain should the 19-parcel access application be denied.

Due to the agency's flawed ANILCA determination and impermissibly narrow purpose and need that creates an arbitrary mandate for the Forest Service to provide access for 19 homes by assuming historic, current, or private access options that allow fewer parcels are unreasonable, the Forest Service subverts an important aspect of the No Action Alternative, which typically addresses denial of the private application. The Draft ROD confirms a concerted effort to create an arbitrary standard that provides whatever a developer demands, while abdicating agency duties to protect the National Forest.²²⁷ The Draft ROD says this:

Most commenters requested the No Action Alternative be chosen as the Selected Alternative. Selection of the No Action Alternative is precluded as a viable option for this project since it would not satisfy ANILCA's mandate to provide access adequate to secure reasonable use of the private property in question. ... For this project, the No Action Alternative solely provides a baseline for comparing the effects of the action alternatives. I am responsible for making a decision that meets the Forest Service's obligations under ANILCA to provide adequate access for the reasonable use of the private property, and to do so while considering damage or disturbance to NFS lands and resources.²²⁸

In fact, as discussed throughout these comments, there are alternate authorities the Forest Service did not seriously consider that may well *require* the Forest Service to deny Berlaimont's access request, based on available information regarding other reasonable uses and access routes that were deliberately ignored.²²⁹ Further, as discussed above, the Forest Service's ANILCA determination was flawed. For these reasons the agency's wholesale dismissal of the purposes of the No Action Alternative to inform the public and the decisionmaker as to baseline conditions *and the potential consequences of denial* is arbitrary and capricious.

Further, the No Action alternative, as presented in the FEIS, distracts from reasonable alternatives that could foreseeably flow from denial of the current application. Certainly, the No Action Alternative set a baseline by assuming no development would take place if the application were denied. However, it is also reasonable to foresee some development would take place based on the existing road and utility access.²³⁰

²²⁷ *Rocky Mt. Wild v. Dallas*, 2017 U.S. Dist. LEXIS 231942, at *4 (D. Colo. Sep. 14, 2017).

²²⁸ DROD at 5.

²²⁹ FEIS at 29.

²³⁰ The Forest Service confirms this in the FEIS, saying "the existing roads may meet Eagle County 'driveway' standards, in which case the owner may be able to use them in order to build and access up to three home sites." FEIS at 2. And, while three homesites with seasonal road access and over snow access looks a lot like several of the inholdings the USFS looked at in its ANILCA determination, the agency says it has no obligation to consider such development: "At this time, it is assumed that no development of the Berlaimont Estates' private property would occur solely by use of existing FSRs. The existing road has not been evaluated for consistency with Eagle County road standards. Although some speculation exists that FSR 774 and FSR 780 may meet Eagle County "driveway" standards which would allow the development of up to three homes on

The simplistic approach to the No Action Alternative taken in the FEIS fails inform the public and the decisionmaker about the development potential on whatever historic and existing access and utility easement may exist, or potential access through private lands. It also predetermines the erroneous conclusion in the DROD that among foreseeable development scenarios, Alternative 2 “has the least amount of impact and disturbance to NFS lands, and to the extent possible, minimizes impacts to wildlife while still meeting the adequate access requirements required by ANILCA.”²³¹ The impacts of denying a utility easement was ignored, even though the FEIS recognizes that ANILCA “access” does not include rights-of-way for power lines or other utilities.²³² Instead of an informed decision as to a range of alternative road and utility options that could ensure both reasonable use and protect the National Forest, the FEIS presents access to a 19 parcel development *fait accompli*.

The unexamined notion that Alternative 2 would have less impact than development of three homesites based on existing access and utility limitations conflicts with other statements in the FEIS. For example, the USFS confirmed that the No Action Alternative, without the benefit of any analysis of impacts from reasonably foreseeable development based on existing road access and utility easements, is the environmentally preferable alternative. The corrupted analysis underscores the agency’s manipulation of the No Action Alternative into a paperwork exercise that did not inform the decisionmaker or the public. The predetermined outcome of a 19-parcel development across all action alternatives and bias built into the No Action Alternative is confirmed by the conclusion that denying the application “would not meet the ANILCA determination and would not address the purpose and need.”²³³ However, the ANILCA determination also did not consider whether reasonable use may be achieved with access that serves less than a 19 parcel development. The record confirms that abdicating the duty to protect the National Forest and enrich the development by only considering a 19-parcel option was knowing and deliberate.²³⁴

The response to comments confirms the false choice used in the FEIS to predetermine the outcome where the USFS excluded any analysis of existing access based on the notion that “[s]election of the No Action Alternative would not satisfy ANILCA’s mandate to provide access adequate to secure reasonable use of the private property in question.”²³⁵ Indeed, “[t]he No Action Alternative provides a baseline for comparing the effects of the action alternatives....”, all of which assume development would be pursued.²³⁶ However, nowhere in the EIS are the impacts of development based on existing access and utilities analyzed, and therefore there is no

the Berlaimont Estates’ private property, at no time has Berlaimont Estates ever proposed this development to the WRNF, or otherwise indicated to the WRNF a willingness or desire to develop their private property by using the existing access route in its current condition.” FEIS at 29. This ignores the fact Berlaimont already has adequate access for a reasonable use.

²³¹ DROD at 8.

²³² FEIS at C-16.

²³³ DROD at 31.

²³⁴ See Exhibit 6.

²³⁵ FEIS at E-8.

²³⁶ FEIS at E-8.

comparison of denial against other alternatives to inform the decision to deny the application or to approve with conditions.

As presented, the No Action Alternative in the FEIS does not disclose or analyze development potential that corresponds to existing scope of access and utilities, as they currently exist. The development potential based on the existing access and utilities is not clear in the FEIS, but could be determined by simply asking the developer, and requiring a definitive, written answer that can be relied upon in the NEPA and ANILCA analysis. It is unclear why the Forest Service is providing a windfall to Berlaimont Estates, LLC, at the expense of the White River National Forest and the public, by failing to assess what would be built, and what impact the federal laws could have on a development using the existing Forest Service Road System or private options.²³⁷ NEPA requires analysis and informed decision-making to protect the environment and the National Forests, not assumptions and deference to a private developer.

By creating a mandated approval, and failing to consider alternative development configurations based on existing access and utilities, the FEIS fails to inform public and the decisionmaker of the potential consequences of foreseeable development of denying the application. The late Judge Matsch described these tactics as an “artful dodge” that abdicates the Forest Service duty to protect the Forest that demonstrates a “patent effort to circumvent its obligation to protect the natural environment of the [National] Forest.”²³⁸

The FEIS fails to analyze and compare a no action alternative that presents impacts of denying the application that sets out: 1) a baseline based on no development if the application is denied; and, 2) the impacts of foreseeable development if the Forest Service denies both road and infrastructure access application and the developer proceeds with three homesites based on existing rights and infrastructure. The FEIS’s failure to inform the public and the decisionmaker of the environmental consequences of denying the application is compounded by an unreasonably narrow range of FEIS alternatives that similarly limit the analysis and the range of decisions that allow the Forest Service to protect the National Forest.

B. The Forest Service arbitrarily failed to consider unpaved access to Berlaimont.

The Forest Service did not take a hard look at an alternative with unpaved access in its FEIS. All three action alternatives proposed paved access to the Berlaimont property that would bisect and affect important habitat. The FEIS addressed the possibility of an unpaved road, but dismissed the consideration, without analysis or comparison to other alternatives, due to soil-

²³⁷ A little context underscores this point: this developer failed to provide any details on historic access to the parcel in its 299 application (see N.7, N.16, N.125 *supra*). Now the developer is proposing a damaging road across national forest that may cost tens of millions of dollars, but nowhere was it considered how far those millions of dollars could go toward securing and improving access along the historic access route through Red Canyon (see N.207 *supra*).

²³⁸ *Rocky Mt. Wild v. Dallas*, 2017 U.S. Dist. LEXIS 231942, at *4 (D. Colo. Sep. 14, 2017). *Colorado Wild, Inc. v. United States Forest Service*, 523 F. Supp. 2d 1213, 1227 FN15 (D. Colo. 2007) (criticizing Forest Service acceptance of unreasonable legal analysis promoted by developers).

erosion and runoff concerns.²³⁹ This decision was arbitrary because it failed to consider the possibility that an upgraded or maintained unpaved road could reduce potential impacts on sensitive resources.²⁴⁰

The FEIS makes clear that paving the road will not eliminate potential environmental impacts. For example, the FEIS indicates that, even with extensive PDC and BMPs applied to the project, habitat for sensitive cutthroat trout “would be maintained in its current diminished condition.”²⁴¹ In other words, paving the road will not necessarily eliminate or even improve existing problems for wildlife.

The FEIS lists numerous adverse environmental impacts of paved roads. This includes acknowledgement that “runoff is greater on paved roads”;²⁴² that paving the road would take more than one season;²⁴³ that applying chemical snowmelt on a paved road would be necessary;²⁴⁴ that paving the road “may result in additional illegal use, which could potentially increase over time, as well as increased vehicle traffic”;²⁴⁵ and that pavement could increase pedestrian use by dog walkers/hikers during winter months and invite more winter use of roads and trails throughout the project area compared to the current winter use.²⁴⁶

The FEIS makes a very minimal effort to suggest pavement would have fewer and less intense impacts, but the record confirms that the FEIS ignored conclusions and internal analysis conducted by resource specialists.²⁴⁷ The scant analysis is biased toward the predetermined assumption that any pavement is preferable to any unpaved road. For example, the Forest Service cites studies comparing sedimentation from “below paved roads” versus “near poorly maintained unpaved roads.”²⁴⁸ Conclusions from this study are obviously not applicable to well-maintained unpaved roads. The Forest Service also cites the need to use magnesium chloride for dust suppression on a dirt road as a reason not to consider an unpaved alternative, while also suggesting elsewhere in the FEIS the necessity of using “chemical snowmelt on the paved roadway.”²⁴⁹ And while the agency focuses largely on potential impacts to the hydrology and

²³⁹ FEIS at 43-44.

²⁴⁰ The Forest Service refusal to consider an alternative granting access on a dirt road is also arbitrary because every one of the ten inholdings the agency considered in its reasonable use determination is accessed via dirt road. *See e.g.* Exhibit 1, Comments at 26.

²⁴¹ FEIS at 238.

²⁴² FEIS at 189.

²⁴³ FEIS 114.

²⁴⁴ *Id.* at 73, 176.

²⁴⁵ FEIS at 95, 99.

²⁴⁶ FEIS at 101, 117.

²⁴⁷ Exhibit 10 (with email from USFS biologist saying: “I am under the opinion that traction sand and winter maintenance with no control measures would contribute more sediment than the existing road currently does.”); *see also* N.98 *supra*.

²⁴⁸ FEIS at 43.

²⁴⁹ Compare FEIS at 44 (“...because of likely impacts to water quality from use of magnesium chloride (for dust control and sedimentation), ... the ID Team determined that this option could have adverse impacts to hydrology and stream habitat, particularly in Berry Creek.”) with FEIS at 176 (discussing how climate change

stream habitat of Berry Creek in dismissing any alternative without full pavement, as discussed above, the paved road along with PDC and BMPs proposed by the Forest Service will only “maintain” diminished conditions in Berry Creek rather than improving those conditions. There is very little discussion about how pavement and dirt comparatively impact other resources, including other wildlife resources.

Instead of assumption, the Forest Service must conduct an informed NEPA analysis to disclose how paved versus unpaved access to Berlaimont would affect local wildlife. Given that paving the road does not result in a marked improvement for cutthroat trout over the current, unmaintained dirt road, the failure to consider and disclose the comparative impacts of an unpaved road with thoughtful design features to reduce impacts is arbitrary and capricious. This omission is likely even more glaring for the mule deer and elk that migrate through the area and rely upon the area for winter range. There is no question that vehicle speeds on a paved road will be higher in the winter, increasing risks associated with wildlife/vehicle collisions and mortality. Also, the impacts cited above make it clear that the paved road would reduce the effectiveness of winter wildlife habitat in the area by inviting more recreational use. Nonetheless the Forest Service refusal to consider an unpaved road alternative undermines the intent of NEPA and reveals the inadequacy of the agency’s analysis. Without interdisciplinary analysis informed by agency resources specialists to allow comparison of the relative impacts of paved and unpaved roads, particularly from various levels of winter use, and potential for roadkill, the FEIS lacks the analysis that NEPA’s alternative mandate requires.

Furthermore, the Forest Service’s ANILCA determination does not “require” paved access.²⁵⁰ The Forest Service must analyze a range of reasonable uses based on an unpaved or partially paved alternative that allow comparison across those alternatives, thereby allowing an informed decision that preserves the natural integrity of the area and prevents further fragmentation of national-forest lands.²⁵¹

C. The Forest Service failed to consider partial pavement.

The Forest Service’s refusal to consider an alternative granting partial pavement is potentially even more problematic than the failure to consider an entirely unpaved alternative. As many commenters pointed out, if pavement really is better for some values, partial pavement could enable the Forest Service to address any concerns related to soil erosion and runoff in the most sensitive watersheds (e.g., Berry Creek, where existing watershed conditions are “diminished”), while also avoiding the myriad of impacts associated with paving the rest of the route.²⁵² Also, considering an action alternative short of full pavement would much more closely resemble access to other inholdings.

will impact the timing, amount, and necessity of “chemical snowmelt on the paved roadway.”). *See also* DROD at 13 (“All roads would be treated with a sand/salt mix (95 percent sand, 5 percent salt) for de-icing.”).

²⁵⁰ FEIS, Appendix C at C-13.

²⁵¹ Exhibit 1, Comment at 26.

²⁵² *See e.g.*, Exhibit 1, Comments at 26.

D. The Forest Service failed to consider an alternative that maintains seasonal closures.

The Forest Service may impose “reasonable terms and conditions of access” on the ingress and egress of private inholdings.²⁵³ The Berlaimont property is located in the middle of winter-range habitat for species such as elk and mule deer.²⁵⁴ These species rely on this land during the winter and, as a result, the access roads near Berlaimont close during the winter months.

The Forest Service acknowledged that year-round access would reduce habitat effectiveness in the area and “would be the largest impact associated with the overall project.”²⁵⁵ The road alternatives proposed by the Forest Service, even with slow speeds and flashing signs, would fragment this habitat, “likely resulting in additional winter kill losses” to specific herds.²⁵⁶ Because this would be the most destructive impact of the Berlaimont project, the Forest Service should have considered an alternative that would maintain seasonal closures.

The current forest plan mandates seasonal closures in the winter.²⁵⁷ The plan has been in place since 2002, and the closure was based on sound reasoning, data, and public process that was not questioned by the current FEIS. Berlaimont purchased the inholding in 2008 and brought its proposal to the Forest Service in 2015.²⁵⁸ The landowners were aware that access to the property was restricted due to its remote location, and that only seasonal access was available, when it proposed a 19-home development.

Further, 80 percent of the National Forest inholdings examined by the USFS do not have snowplowed access in the winter.²⁵⁹ The ones that are accessible in the winter do not appear to be located in areas where sensitive winter wildlife habitat is as serious an issue. The Forest Service’s decision not to even consider any action alternative that would maintain seasonal closures and eliminate the need for a Forest Plan Amendment renders this EIS inadequate.

²⁵³ *Mountain States*, 833 F. Supp. at 817.

²⁵⁴ FEIS at 222-3: For this analysis, it is assumed that the term “key wildlife habitat” applies to deer and elk winter concentration areas and severe winter range as currently mapped by CPW, and deer and elk winter range. All potential access route segments as included in each of the action alternatives would bisect deer and elk winter ranges, deer and elk winter concentration areas on NFS lands (with the exception of elk winter concentration areas under Alternative 2), and deer and elk severe winter ranges. *See also* COLO. PARKS AND WILDLIFE, COLORADO ACTION PLAN FOR IMPLEMENTATION OF DEPARTMENT OFF THE INTERIOR SECRETARIAL ORDER 3362 35-36 (2019) (this plan has also been updated and the newest revision is attached as Exhibit 23).

²⁵⁵ FEIS at 244, 246.

²⁵⁶ *Id.* at 244, 246. Elk herd DAU-12 will particularly be affected by the Berlaimont Proposal.

²⁵⁷ U.S. FOREST SERV., WHITE RIVER NATIONAL FOREST MANAGEMENT PLAN – 2002 REVISION 3-13 (2002); *see also* FEIS at 222-3 (“Because the selected access route would be open to motorized vehicle use by future Berlaimont residents, disturbance of adjacent key wildlife habitat would be increased rather than reduced. There is no mitigation that could be implemented to make the action alternatives consistent with this standard; therefore, Alternatives 2, 3, and 4 would be inconsistent with this standard and a Forest Plan Amendment describing why this standard would be set aside for this project would be required for the Selected Alternative.”).

²⁵⁸ *See Access, BERLAIMONT ESTATES*, <http://berlaimontestates.com/#access> (last visited 10/28/20); FEIS at 3.

²⁵⁹ FEIS, App. C, Add. B at 1-4.

Under a seasonal-closure alternative, landowners would still have access to their private property and an ability to develop residential homes on it. At least six other residential inholdings analyzed in the FEIS do not have year-round snowplowed access.²⁶⁰ As discussed above, seasonal closures would be consistent with ANILCA and its regulations.²⁶¹

E. The Forest Service failed to consider alternatives utilizing different legal tools to grant access.

As is evidenced by the Lake Agnes parcel, ANILCA easements are not the only tool available to the Forest Service to provide access to inholdings. FLPMA provides another potential tool. FLPMA was used to grant access to Lake Agnes, for example.²⁶² Commenters asked the Forest Service to consider alternatives to an ANILCA easement, including an alternative granting a special use permit.²⁶³

The response to comments rejects considerations of any other options not explicitly proposed by the developer and ignores potential configurations by vaguely asserting that a nonexclusive easement with undefined terms and “special use authorization” would be used, “if appropriate.”²⁶⁴ Instead of providing analysis in the FEIS to address and inform the type of approval that might be provided, the response points to a “template for the legal instrument” as constraining the choice of available legal devices to create a private interest in the National Forest.²⁶⁵ The proposal to issue a vague approval - to be fleshed out later - violates NEPA by concealing the actual decision under consideration.

The evasive response to comments inadvertently confirms there are options that would convey rights/permissions and serve the various purposes, needs, and legal obligations of the private landowner and the Forest Service. Yet, the options, purposes, and impacts of a specific conveyance or permit are nowhere disclosed or considered in the NEPA document, thereby concealing an important aspect of the problem from analysis to the public and the decisionmaker. Instead, the FEIS writes the Forest Service a blank check to privatize the National Forest by issuing whatever devices, with whatever terms, that the Forest Supervisor deems “appropriate” after NEPA is complete.²⁶⁶

To satisfy its obligations under NEPA, the USFS must take a hard look at alternatives utilizing different legal tools to respond to the proponent’s access request.

²⁶⁰ *Id.*

²⁶¹ Exhibit 1, Comment at 25-26.

²⁶² FEIS, Appendix C at C-6 (“Access to Lichen Ranch is via a single National Forest System Road (NFSR 254) authorized via a FLPMA easement granted to the Lake Agnes Property Owners Association.”).

²⁶³ Exhibit 1, Comments at 27.

²⁶⁴ FEIS at E-10 - E-11.

²⁶⁵ *Id.*

²⁶⁶ FEIS at E 11

F. The Forest Service failed to consider purchasing or exchanging the Berlaimont parcel in order to maintain the integrity of the White River National Forest.

A land exchange is another reasonable alternative that the Forest Service failed to consider. The White River National Forest Management Plan requires the Forest Service to “take advantage of opportunities in approved land ownership adjustment plans to convey, purchase, or exchange lands where needed.”²⁶⁷ Despite actual inquiries into acquisition of the Berlaimont property to protect the National Forest and wildlife interests, the viability and public benefit of a purchase alternative was not considered.²⁶⁸ The Forest Service resource specialist reviewed the acquisition inquiry and confirmed that, “It is worth a try.”²⁶⁹

Other Forest Service actions have considered the exchange or purchase of land as a reasonable alternative. In *Sierra Club v. Dombeck*, the Forest Service considered a proposed action of exchanging private inholdings in order to consolidate lands on the Kaibab National Forest.²⁷⁰ The court concluded that the Forest Service failed to “rigorously explore and objectively evaluate all reasonable alternatives” because it did not examine alternatives such as purchasing the inholdings outright.²⁷¹ Similar cases have concluded that considering the purchase of land is a reasonable alternative to proposed actions such as exchanges of land.²⁷² While these cases have not analyzed whether the consideration of land exchange and purchases are required in any proposed action involving Forest Service inholdings, the Ninth Circuit has held that consideration of a land purchase may be proper even where a proposed action does not involve a land purchase.²⁷³ Additionally, the Forest Service cannot argue that a land purchase is unreasonable based on lack of funding.²⁷⁴

The purpose of the proposed action, according to the FEIS, is to “provide an improved road to the Berlaimont Estates’ private property.”²⁷⁵ The need is so that Berlaimont can “develop single-family residences on their property.”²⁷⁶ The Forest Service also has to consider its own need in relation to the proposed action, which includes “a determination of [the applicant’s]

²⁶⁷ WHITE RIVER FOREST MANAGEMENT PLAN (2002), at 1-14.

²⁶⁸ Email from Tami Sabol, Acting FS/RMEF National Liaison, to Aaron Mayville, District Ranger, FW: A conversation about your property near Berlaimont (Wednesday, May 15, 2019 10:53 AM) (forwarding outreach from the Rocky Mountain Elk Foundation to Berlaimont representatives with this quote: “More specifically, I am hoping to talk with you about the potential of either purchasing your property, or discussing the possibility of a conservation easement, both of which could have financial benefits to you as the landowner.”) (attached as Exhibit 21).

²⁶⁹ *Id.*

²⁷⁰ *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1059-60 (D. Ariz. 2001).

²⁷¹ *Id.* at 1068.

²⁷² See *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999).

²⁷³ *Id.*

²⁷⁴ *Id.* The Forest Service has the ability to request federal funding to purchase private inholdings, which the court in *Muckleshoot* determined was enough to require that the option be considered in an EIS.

²⁷⁵ FEIS at 3.

²⁷⁶ *Id.* at 4.

patent or common law rights” of access across private parcels to inform “the permit issuance process.”²⁷⁷

In addition, according to its own management plan, the Forest Service must also decide if “the proposal is or could be made consistent with forest wide and management area standards.”²⁷⁸ Further, the agency must decide “whether the project is in the public's interest in terms of forest wide goals and objectives.”²⁷⁹ The FEIS made no effort to inform the public or decisionmaker of any acquisition potential or the actual means to achieve acquisition, despite the clear benefit of acquisition options to protect the objectives and standards set out in the Forest Plan and recognition of acquisition as a viable option.²⁸⁰

In this case, there is no question that the Berlaimont proposal does not comply with the Forest Plan, and that the project is not in the public interest. All of the 19-parcel action alternatives currently included in the FEIS subvert the Forest Service’s needs and the needs of the public to the desires of a speculative real estate developer. While the Draft ROD indicates some vague effort was made to contact the owners about an exchange or sale and they were uninterested and therefore the option was excluded from NEPA analysis.²⁸¹ However, NEPA’s action-forcing mandate compels the reasonable step of appraising the fair market value and describing a bona fide offer to serve as an alternative to the actions proposed in the FEIS.

Since the Forest Service has completely written off the No Action Alternative, a buyout alternative may be the only reasonable alternative that does not involve destroying critical winter wildlife habitat, bucking the clear interest of the public, and changing the Forest Plan. Such an alternative may be appealing to the developer if it was not clear that they were going to get a year-round, paved road.²⁸² Such an alternative would also satisfy local land-use goals. In its 2017 community plan, Eagle County “strongly” suggested “a land swap or purchase converting this property to public ownership” in order to avoid negatively impacting wildlife in the northwest Edwards area.²⁸³ Importantly, too, now that the Land and Water Conservation Fund is fully funded, the costs associated with a buyout may be readily available.²⁸⁴

Nonetheless, rather than considering an alternative that offered the developer fair market value for this inholding and obviated the “need” to pave critical habitat and change the existing Forest Plan, the Forest Service instead undertook consideration of a no action alternative that was nothing more than pretext (since the agency said it couldn’t adopt it), and

²⁷⁷ *United States v. Jenks*, 22 F.3d 1513, 1518-19 (10th Cir. 1994).

²⁷⁸ WHITE RIVER FOREST MANAGEMENT PLAN at P-4.

²⁷⁹ *Id.*

²⁸⁰ See Exhibit 21.

²⁸¹ DROD at 5.

²⁸² As it is, the Forest Service is only considering action alternatives that give Berlaimont what it wants: a year-round, paved road.

²⁸³ Community Plan at 50; Exhibit 1, Comment at 27.

²⁸⁴ The WRNF is currently applying for LWCF monies to purchase land from the State of Colorado just across the Valley from Berlaimont, near Arrowhead.

three 19-parcel action alternatives that would give the developer a paved, year-round road at the expense of the Forest and the public.

VI. The Service violated NEPA by failing to take a “hard look” at some of the environmental consequences and mitigation strategies involved in granting Berlaimont year-round access to develop a residential community.

NEPA requires the Service to take a hard look at “every significant aspect” of the environmental impacts of its proposed action.²⁸⁵ This requires that the Service (1) adequately identify, evaluate, and discuss with sufficient specificity (2) every significant and reasonably foreseeable (3) direct, indirect, and cumulative impact (4) of the proposed action and any connected, similar, and cumulative actions.²⁸⁶ “NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process.”²⁸⁷

In its FEIS, the Service noted that the development of the Berlaimont inholding into a “low-density, year-round residential community” is a connected action under NEPA.²⁸⁸ This triggers the Service’s obligation to take a hard look at “every significant aspect” of the reasonably foreseeable direct, indirect, cumulative environmental impacts arising from this development.²⁸⁹

The Service failed to take a hard look at many aspects of the impacts of granting the developer increased access to the Berlaimont inholding as well as the connected action of the resulting development of the inholding. In particular, the Service failed to take a hard look at (A) current, foreseeable, and reasonable development potential; (B) some direct, indirect, and

²⁸⁵ *Baltimore Gas and Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). See *Hillsdale Env’tl. Loss Prevention, Inc. v. U.S. Army Corps. of Engrs.*, 702 F.3d 1156, 1175-76 (10th Cir. 2012).

²⁸⁶ See *Baltimore Gas*, 462 U.S. at 97-98; *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Biodiversity Conservation All. v. U.S. Forest Serv.*, 765 F.3d 1264, 1267 (10th Cir. 2014); *Colo. Env’tl. Coal. v. Dombeck*, 185 F.3d 1162, 1176 (10th Cir. 1999) (quoting 40 C.F.R. § 1508.7); *Env’tl. Def. Fund, Inc. v. Andrus*, 619 F.2d 1368, 1378 (10th Cir.1980) (“An EIS is not supposed to resolve all contentions but rather to identify them in a full disclosure sense in order to enable the decision makers to undertake informed choices.”); *Hillsdale*, 702 F.3d at 1175-76; *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1228-31 (10th Cir. 2008) (holding that NEPA did not require the agency to analyze the impacts of future actions that were “speculative” or not “imminent” connected actions); *Wyoming v. U.S. Dep’t of Agric.*, 661 F.3d 1209, 1253 (10th Cir. 2011) (“In general, we have not required agencies to consider ‘speculative’ impacts or actions in an EIS, whether it be in the context of the reasonable-alternatives analysis or the reasonably foreseeable impacts of the proposed project or other projects.”); 40 C.F.R. §§ 1500.1, 1508.25(a), 1508.25(c).

²⁸⁷ *Baltimore Gas*, 462 U.S. at 97 (internal quotations and citations omitted); see also 40 C.F.R. § 1500.1.

²⁸⁸ FEIS at 11, 39-40.

²⁸⁹ 40 C.F.R. § 1508.25(a). See FEIS at 39 (citing 40 C.F.R. § 1500.1) (“[R]esidential development [of the inholding] would be a connected action per § 1508.25(a)(ii) and (iii). Although the Forest Service decision does not extend to development on private land, the decision maker (the Forest Supervisor) should understand the full extent of the environmental consequences of the action.”).

cumulative impacts to wildlife; (C) impacts associated with construction of water infrastructure; (D) wildfire related costs and impacts; and (E) the mitigation strategies it incorporated into its action alternatives without discussing their effectiveness at mitigating impacts.²⁹⁰

A. The Forest Service failed to take a hard look at current, foreseeable, and reasonable development potential, thereby preventing comparison across a range of no action and action alternatives.

As discussed above, the Forest Service framed the No Action Alternative to avoid consideration of the existing development potential on the parcel. That development potential must be considered somewhere in the NEPA analysis, whether it be in the No Action or in an action alternative between the No Action and the 19-parcel action alternatives that were considered in the FEIS. As it is, there is foreseeable development that could proceed even with a denial of the proposed action by the U.S. Forest Service that was not adequately considered by the agency. The legal machinations that unlawfully limited the range of options also precluded NEPA-mandated disclosure and hard-look analysis of those impacts that foreseeably flow from denying the application. There is absolutely no factual basis to conclude that no development would take place if the application for access and utilities to serve 19-parcel development was denied.²⁹¹ This fatal flaw was recognized during the internal reviews.²⁹²

B. The Forest Service failed to take a hard look at environmental consequences for wildlife.

The Service failed to take a hard look at (1) impacts from past and future development sprawl—impacts that are cumulative with the development of the Berlaimont inholding—on elk and deer;²⁹³ (2) impacts from Berlaimont’s development on lynx habitat;²⁹⁴ (3) impacts entailed by a residential community—noise, pets, lights, and increased recreation—on surrounding wildlife;²⁹⁵ (4) impacts to the greater sage-grouse;²⁹⁶ and (5) impacts to cutthroat trout.²⁹⁷

1. Cumulative impacts to deer and elk populations

The Forest Service failed to take a hard look at the cumulative impacts to deer and elk populations from the continuing trend of development sprawl north of the I-70 corridor. In its March 18, 2018 comment, Wilderness Workshop argued that the Service “must actually quantify

²⁹⁰ In its comment on the draft EIS, Wilderness Workshop argued that the Service failed to take a hard look at these impacts on pages 27-33. Exhibit 1, Comment 27–33.

²⁹¹ See e.g., FEIS at 127 (“Under the No Action Alternative, no residential community construction within the analysis area would occur.”).

²⁹² See e.g., Exhibit 6.

²⁹³ Exhibit 1 at. 29-30.

²⁹⁴ *Id.* at 30-31.

²⁹⁵ *Id.* at 31.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 30.

and disclose the extent to which [Berlaimont's] development will contribute to the past, present, and reasonably foreseeable declines that other sprawling development is having" on elk and deer populations.²⁹⁸ It would not be difficult for the Forest Service to quantify these cumulative impacts to elk, as scientific methods exist for doing so.²⁹⁹

In the FEIS, the Forest Service noted that the access grant and subsequent development of the Berlaimont inholding would both "continue the trend of winter range loss and fragmentation north of I-70 associated with subdivisions extending from the valley bottom to the upper elevations of winter range[.]" and would have a cumulative impact with at least one other building project in the area.³⁰⁰ The Service noted a trend—that "private land development ... has pushed wild ungulates onto public lands"—which, in part, seems to have led the Forest Service to conclude that "[w]inter deer and elk use of th[e] habitat block [in and around the Berlaimont parcel] has probably increased in recent years with the loss of adjacent winter range on private lands."³⁰¹ The Forest Service then concluded that:

[r]educed habitat effectiveness and habitat losses [as a result of the Berlaimont access road and development] would displace wintering elk to other already occupied winter range and to unoccupied lower quality habitat. Overuse of winter range already at carrying capacity could have adverse, long-term impacts, further impairing the habitat's ability to support the existing (or even a reduced) number of animals.³⁰²

While the Forest Service acknowledged the habitat loss that elk and deer would suffer as a result of just the Berlaimont proposal, it failed to contextualize and quantify habitat loss from the Berlaimont proposal with respect to both past developments and this and other possible future developments. Further, the Forest Service failed to consider a number of foreseeable developments that will impact deer and elk habitat and populations, like the Edwards River Park³⁰³ and McCoy Park Terrain Development Project³⁰⁴. Edwards River Park was recently given approval by the Eagle County Planning Commission and is now under consideration by the Eagle County Commissioners. The McCoy Park Terrain Development Project was approved by the

²⁹⁸ *Id.* at 30.

²⁹⁹ *Id.* at 29 (citing Conservation Science Partners, Description of the Approach, Data, and Analytical Methods Used to Estimate Natural Land Loss in the Western U.S. (May 13, 2016), *available at* <https://disappearingwest.org/methodology.pdf>).

³⁰⁰ FEIS at 244, 247-89

³⁰¹ *Id.* at 231-2.

³⁰² *Id.* at 244; *see also Id.* at 83, 85.

³⁰³ *See* Real Vail Staff, Eagle County Planning Commission to review Edwards RiverPark, RealVail.com (July 13, 2020) (disclosing details about this 594 unit planned development in historic winter range near Edwards) (attached as Exhibit 22).

³⁰⁴ *See* White River National Forest's Beaver Creek Resort – McCoy Park Terrain Development webpage here: <https://www.fs.usda.gov/project/?project=52650> (last accessed 11/3/20). The project was approved by the Forest Service in November of 2018 and it directly impacted dozens of acres of important elk habitat, but it is not mentioned in the Berlaimont FEIS.

Forest Service in 2018, but was not considered here. These are just two examples of projects and developments overlooked by the agency, but there are likely more.

The Service must adequately identify and evaluate adverse environmental impacts from the cumulative degradation of wildlife habitat. Cumulative impacts to elk from past and expected future development in the Edwards area fits this test, but the agency must search more broadly as well. Merely identifying an adverse, cumulative impact to elk habitat indicates that the Forest Service may have failed to make “a reasonable, good faith, objective presentation of those impacts sufficient to foster public participation and informed decision making.”³⁰⁵ The agency’s failure to consider foreseeable development in the area that will have cumulative effects on elk and elk habitat also demonstrates that the agency failed to take a hard look at potential impacts.

2. Impacts to Canada lynx habitat

In its March 18, 2018 comment, Wilderness Workshop argued that the Service failed to take a hard look at impacts to lynx habitat from the development of the Berlaimont inholding.³⁰⁶ The Service correctly noted that Canada lynx are a threatened species under the Endangered Species Act.³⁰⁷ And the Service recognized that lynx habitat exists adjacent to the northern portion of the Berlaimont inholding—the same portion where the developer plans to build houses.³⁰⁸ It even noted that “aspen stands on the Berlaimont Estates’ private parcel are within 300 meters of ‘primary vegetation’ areas, and would likely be considered ‘secondary vegetation’ if on NFS lands.”³⁰⁹ But the Service concluded that because “[l]ynx habitat types are not mapped on non-NFS lands on the WRNF ... all aspen stands and meadows on the private parcel warrant classification as lynx non-habitat.”³¹⁰ For this reason, and because the Service concluded that highway lynx-mortality rates from the proposed access routes would be low, the Service concluded that its proposed and connected actions are “not likely to adversely affect” lynx.³¹¹

The Forest Service cited no authority for its conclusion that private land bearing the characteristics of lynx habitat is categorically considered non-habitat by virtue of being located on private land.³¹² But the Forest Service knew that the developer plans to build houses—a plan which, as the Service recognized, is a connected action under NEPA—in the very same area that would “likely be considered ‘secondary vegetation’ [for lynx habitat] if on NFS lands.”³¹³ As Wilderness Workshop argued in its comment, “[h]abitat does not become non-habitat by virtue

³⁰⁵ *Colo. Envtl. Coal.*, 185 F.3d at 177.

³⁰⁶ Exhibit 1, Comment at 30–31.

³⁰⁷ FEIS Table 3L-1 at 224.

³⁰⁸ *Id.* Figure 17.

³⁰⁹ *Id.* at 238.

³¹⁰ *Id.* at 226.

³¹¹ *Id.* at 239.

³¹² *Id.* at 238-9.

³¹³ See *Id.* Figures 4, 5, 6, 8, 13, 16, and 19. Note also that primary habitat lies not far from the private land boundary. See Richard W. Thompson, Certified Wildlife Biologist, Western Ecosystems, Inc., Biological Assessment (BA) for the Berlaimont Access Road Project, Eagle County, Colorado (undated) Figure 3-1 at p. 14 (available in the project record).

of being located on private land. The Forest Service must not use habitat location on private land as an excuse for not analyzing the impacts from connected actions, i.e. housing development on lynx habitat.”³¹⁴ The Service’s non-habitat classification is simply not scientifically justifiable—habitat identification and classifications place no weight on public-private distinctions.

Further, the Forest Service conclusion directly contradicts information in the Biological Assessment (BA), which says: ““Secondary vegetation on private land would consist of approximately 315 acres on the northern portion of the private parcel.”³¹⁵ Figure 3-1 in the BA also shows one narrow stretch of primary habitat hitting the private property, in addition to the northern property boundary being surrounded by secondary habitat.³¹⁶ This, again, undermines the agency’s conclusions and demonstrates a failure to take a hard look at potential impacts to lynx.

In addition to lacking scientific merit, the Forest Service’s non-habitat decision is at odds with its own past positions. On the Forest Service’s website, the agency recognized the importance of private land for providing wildlife habitat, stating that “[p]rivate forest lands ... [s]upply ... fish and wildlife habitat.... These forests face many threats, including ... the permanent loss of working forest land to non-forest uses.”³¹⁷ The Forest Service further recognized the threat from private development to lynx in its 2008 Southern Rockies Lynx Amendment to the forest plan for White River National Forest.³¹⁸ Finally, even the Forest Service Manual instructs officials to “[p]lace top priority on conservation and recovery of endangered, threatened, and proposed species and their habitats through relevant National Forest System, State *and Private Forestry*, and Research and Development activities and programs.”³¹⁹ Together, this shows the Service’s own past stances recognize that private land can be classified as wildlife habitat.

It is simply unjustifiable—both scientifically and given the Forest Service’s stance elsewhere—for the Service to preclude analysis of impacts to lynx habitat by arbitrarily concluding that private land cannot serve as lynx habitat. The FEIS itself recognized that “the decision maker (the Forest Supervisor) should understand the full extent of the environmental consequences of [private land development].”³²⁰ The artificial distinction runs afoul, and invites ESA violations, which are enforceable by various means, including citizen suit.³²¹ The

³¹⁴ Exhibit 1, Comment at 31.

³¹⁵ See BA at 16.

³¹⁶ See N.313 (BA, Figure 3-1) *supra*.

³¹⁷ U.S. Forest Serv., *Managing the Land – Private Land*, available at <https://www.fs.fed.us/managing-land/private-land>.

³¹⁸ U.S. Forest Serv., S. Rockies Lynx Amendment: Record of Decision, at 4 (2008), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5357379.pdf (identifying private land development as one risk factor affecting lynx movement).

³¹⁹ U.S. Forest Serv., Forest Serv. Manual 2670 at 4 (amended 2005), available at https://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsm?2600 (emphasis added).

³²⁰ FEIS at 39.

³²¹ *Bennett v. Spear*, 520 U.S. 154, 170 (1997) (“any person” who knowingly “takes” an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.) *quoting* See §§ 1540(a) and (b) (authorizing civil fines of up to \$ 25,000 per violation and criminal penalties of up to \$

development of homes so close to, and possibly within, primary and secondary habitat warrants discussion under NEPA of the impacts that the housing development could have on lynx habitat on national-forest lands. As a result of housing development, the “primary vegetation” habitat within 300 meters of the Berlaimont inholding may become degraded due to noise, light pollution, domestic dogs, and increased dispersed recreation. The Service failed to even consider the fact that lynx may not use some or any of the public-land habitat if houses are built on the private Berlaimont inholding.

Because the Service failed to both identify and evaluate the impacts to lynx habitat on the Berlaimont inholding and identify and evaluate the impacts from Berlaimont’s development to national-forest lynx habitat, the Service violated NEPA by failing to take a hard look at impacts to this threatened species.

3. Impacts to wildlife from a year-round residential community

Development of the Berlaimont inholding would also foreseeably impact other wildlife in the surrounding area. Wilderness Workshop argued that the Forest Service failed to take a hard look at impacts to wildlife that would result from the existence of an isolated, year-round residential community.³²² For example, the Service noted that the planned Berlaimont residential community would have day-to-day noise levels typical of a “quiet rural area.”³²³ Yet the Service undertook no further analysis of what impacts this noise would have on surrounding wildlife.³²⁴ Some species may not tolerate even this level of noise, resulting in their departure from the area.

Moreover, noise is not the only consequence of the development of a residential community. As Wilderness Workshop pointed out, residential communities will also likely cause impacts by having pets in the area, by increasing light-pollution from houses and vehicles, and by increasing dispersed recreation throughout the surrounding national forest. The Forest Service included project design criteria (PDC) intended to minimize impacts. For example, the FEIS includes PDC prohibiting human entry onto National Forest lands surrounding the Berlaimont parcel during critical winter months, but there is no analysis, discussion, or disclosure about whether such PDC would actually be effective. It would be very difficult to enforce. The Service failed to adequately consider these impacts or the effectiveness of proposed mitigation even though they are a reasonably foreseeable consequence of developing a residential community in this sensitive habitat.³²⁵

The Service also mentioned that a helipad might be installed on the Berlaimont inholding.³²⁶ Even infrequent helicopter landings on the inholding would have significant noise-

50,000 and imprisonment for one year); *citing Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687 (upholding interpretation of the term “take” to include significant habitat degradation).

³²² Exhibit 1, Comment at 31.

³²³ FEIS at 162.

³²⁴ *See Id.* at 161-4.

³²⁵ *See* N.375, N.376 *infra*.

³²⁶ FEIS at 102.

related impacts to surrounding wildlife. More frequent landings could have a very detrimental effect.

A year-round residential community could have significant impacts on surrounding wildlife. As a result, the Forest Service violated NEPA by failing to take a hard look at these impacts.

4. Impacts to the greater sage-grouse

The Forest Service also failed to take a hard look at impacts to greater sage-grouse and potential mitigation measures that could minimize these impacts.³²⁷ Wilderness Workshop argued as much in its comment.³²⁸ The Forest Service concluded that the Berlaimont access road and development may impact sage-grouse but is not likely to result in a loss of viability in the planning area nor cause a trend toward federal listing.³²⁹ The Forest Service recognized that sage-grouse habitat is present in the planning area and provided a cursory summary of expected impacts to this species.³³⁰ But the Forest Service left a more detailed analysis of the impacts to sensitive species such as the sage-grouse to “the Fish and Wildlife BA/BE, Migratory Bird, and SOLC report, which is contained in the project file.”³³¹

This document, however, was neither appended to the draft EIS or placed in the Forest Service’s project file until long after the public comment had closed, meaning that the public was not given the opportunity to scrutinize the full impact analysis.³³² The fact that this report was not publicly available when the Forest Service published its draft EIS indicates that the Service defied one of NEPA’s primary aims—to inform and involve the public in its analysis of the environmental consequences of proposed actions.³³³ The Forest Service’s “hard look” is supposed to be carried out under public scrutiny. The agency cannot leave its analysis of environmental consequences to documents that are not publicly available. The Forest Service thus failed to take a hard look at impacts to greater sage-grouse by not conducting its impact analysis under public scrutiny.

Additionally, even outside the context of a “hard look” challenge, courts have found that agencies violate NEPA when they fail to make key documents publicly available for comment in

³²⁷ We note that unanalyzed mitigation measures could also benefit sensitive brewer’s sparrow, which the Biological Evaluation concluded would suffer “a direct loss... by removing sagebrush habitat where breeding and nesting activity is highly probable.” BE at 33. As it is, the Forest Service is planning to amend away protections for brewer’s sparrow contained in the existing Forest Plan.

³²⁸ Exhibit 1, Comment at 31.

³²⁹ FEIS at 83.

³³⁰ *Id.* at 241-2.

³³¹ *Id.* at 239 n.206.

³³² See U.S. Forest Serv., Berlaimont Estates Road Improvement Project, Project Documents, *available at* <https://www.fs.usda.gov/project/?project=50041>.

³³³ See *Baltimore Gas*, 462 U.S. at 97; 40 C.F.R. § 1500.1(b).

their draft analyses.³³⁴ Likewise here, the Forest Service violated NEPA by failing to make the Fish and Wildlife BA/BE, Migratory Bird, and SOLC report publicly available.³³⁵

Setting aside the agency's failure to make these documents available to the public, the analysis does not comply with NEPA's hard look mandate. The BE, for example, arbitrarily ignores information about the presence and use of the Berlaimont project area that was presented in the project record. For example, the BE cites comments provided by Colorado Parks and Wildlife (CPW), but fails to acknowledge all of the documented sightings of sage-grouse in the area.³³⁶ Minimizing the known presence of sage-grouse in the area goes hand in hand with the agency's effort to minimize potential impacts of the proposed action.

The BE also directly contradicts conclusions and recommendations provided by Colorado Parks and Wildlife. For example, CPW comments provide that "it is important to protect [this habitat] so not to reduce the overall extent of the range," and "observations identify the area as being important for GrSG winter range and brood rearing habitats."³³⁷ The CPW letter goes on to say:

In recent decades, exurban growth expressed as rural small-parcel development, has increased the fragmentation of sagebrush habitat in former rangelands. The subsequent expansion of road networks, even low-volume secondary roads, negatively affects GrSG. Recent studies have indicated that minimal road traffic (1-12 vehicles per day) reduces female grouse nest initiation and the number of breeding males displaying at leks.³³⁸

CPW also highlights that there are only three populations of greater sage grouse on the White River National Forest, that those three populations are the smallest in the State, and that they are the "most threatened by anthropogenic activities;" and that the "WRNF Land and Resource Management Plan guidelines are inadequate to protect GrSG and its habitat" because "the guidelines do not address disturbances such as road construction or recreational activities."³³⁹ CPW recommends that the Forest Service follow guidelines established by BLM in its Greater Sage-Grouse Approved Resource Management Plan Amendment which specifically listed infrastructure and urbanization as threats to the sage grouse in the Berlaimont area, and

³³⁴ *League of Wilderness Defenders v. Connaughton*, 2014 WL 6977611 at *14–20 (D. Or. Dec. 9, 2014).

³³⁵ This point is relevant to all species and resources analyzed in the Biological Assessment and Biological Evaluation, both of which were not timely made available to the public.

³³⁶ See BE at 23 (citing CPW comments and detailing some sage-grouse sightings, but omitting some too); compare Letter from Perry Will, Area 8 Wildlife Manager, Colorado Parks and Wildlife, to Scott Fitzwilliams, Forest Supervisor, White River National Forest (Nov. 7, 2016) (noting "a USFS Wildlife Biologist reported a GrSG hen with 3 chicks on Forest Service property near Berry Creek on July 3, 2012," which is ignored in the BE.), available in the project file.

³³⁷ Letter from Perry Will, Area 8 Wildlife Manager, Colorado Parks and Wildlife, to Scott Fitzwilliams, Forest Supervisor, White River National Forest (Nov. 7, 2016) (noting "a USFS Wildlife Biologist reported a GrSG hen with 3 chicks on Forest Service property near Berry Creek on July 3, 2012." The BE ignores this.), available in the project file.

³³⁸ *Id.* (internal cites omitted).

³³⁹ *Id.*

recommends “avoiding any major or minor new infrastructure disturbance in [general habitat management areas]” like the Berlaimont project area.³⁴⁰ The Forest Service ignored this recommendation and made no effort to consider guidelines established in new plans or the new science that informs those plans.

The BE does cite the CPW comments, but it cherry-picks information presented in the letter that does not wholly undermine the proposed action. The BE ignores CPW’s recommendations and minimizes potential impacts with this callous conclusion: “Such development would displace few, if any, birds present from more active road and trail corridors, and fragment habitat potentially occupied by a low density of birds, particularly on private land under Alternative 2.”³⁴¹ The BE then indicates that existing standards and guidelines “would [] benefit any sage-grouse that may be in the vicinity...” but concludes that amending the plan to remove those standards will only harm a few individuals and will not be a big deal to the greater sage-grouse more broadly.³⁴²

The BE’s conclusion is jarringly different from CPW’s comments. For example, CPW comments suggest that, given the small existing populations of sage grouse on the White River National Forest, impacts to individuals may be proportionately more significant on this Forest. Forest Service regulations require that the agency consider just that in amending its forest plan, as the agency must “maintain[] the diversity of plant and animal communities and the persistence of native species in the plan area.”³⁴³ Somehow, though, the Forest Service arrived at a completely different conclusion. CPW also said that guidelines in the WRNF Plan are inadequate to protect sage-grouse, meanwhile the BE and the FEIS suggest that even without those guidelines impacts to sage grouse from this project would be minimal.

These Forest Service conclusions are even more troubling because, unlike virtually every other land management plan governing public lands where sage grouse habitat exists in the western United States, the White River Forest Plan has not been recently amended or updated to reflect the most recent science on sage grouse. This means that the White River National Forest has never considered the wealth of new information related to sage grouse management and conservation. The BE does not resolve that problem. In fact, the BE fails to consider any scientific study related to sage grouse published after 2016.³⁴⁴ Of course, there has been a great deal of new information generated about this species in recent years, and much of that information supports a conclusion that we are not doing enough to protect sage grouse and sage grouse habitat, and that our existing plans and regulations are not strong enough to prevent the

³⁴⁰ *Id.*

³⁴¹ BE at 24.

³⁴² *Id.*

³⁴³ 36 C.F.R. 219.9.

³⁴⁴ BE at 22.

continued decline of this species.³⁴⁵ Nonetheless, the Forest Service failed to consider any of this information related to sage grouse in its BE or FEIS.

The age of the WRNF Plan and its adequacy with regard to sage grouse is important for another reason too. When the U.S. Fish and Wildlife Service (FWS) decided in 2015 not to list the Greater Sage-Grouse under the Endangered Species Act (ESA), it was not because the species was secure. The FWS in 2010 had determined that sage grouse were in serious enough trouble to invoke the ESA and put them in the queue for a possible listing. With half its historic habitat lost across the West—due largely to development—the grouse’s numbers had fallen from several million to perhaps 500,000.

The agency’s decision not to list sage-grouse was a vote of confidence in a set of management plans from 2015 that steered development away from the bird’s most important habitat. Creating these guidelines involved updating and consolidating 98 separate land use plans—a massive, years-long undertaking that brought ranchers, drillers, environmental groups, and other interests to the table. The conservation commitments in the resulting compromise, the FWS wrote, “ensure that high-quality sage-grouse lands with substantial populations are minimally disturbed and sage-grouse within this habitat remain protected.”³⁴⁶ But the WRNF Plan was not updated with all of these other plans. The WRNF was not part of the compromise. As a result, the White River Forest Plan remains a relic of the previous era, when inadequate existing regulatory mechanisms existed to ensure the continued viability of this species.

Here the FEIS fails to provide the public and the Forest Service with a hard look at the potential impacts to sage grouse by relying on an outdated and inadequate plan, and environmental analysis that fails to consider the most recent science.

5. Impacts to Cutthroat Trout

Here the Forest Service appears to have ignored standards and guidelines related to cutthroat trout in its Forest Plan that are not compatible with the proposed project. Specifically, the Forest Plan requires that:

For management activities that have the potential to impact occupied cutthroat trout habitat, tributaries of occupied cutthroat trout habitat, or identified reintroduction areas, maintain or enhance existing cutthroat trout habitat. At minimum and where necessary:

- Reduce sediment from existing roads and trails.
- Maintain pool depths.

³⁴⁵ Carter, S.K., Arkle, R.S., Bencin, H.L., Harms, B.R., Manier, D.J., Johnston, A.N., Phillips, S.L., Hanser, S.E., and Bowen, Z.H., 2020, Annotated bibliography of scientific research on greater sage-grouse published from 2015 to 2019: U.S. Geological Survey Open-File Report 2020–1103, 264 p., available at <https://doi.org/10.3133/ofr20201103> (attached as Exhibit 24).

³⁴⁶ Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Greater Sage-Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59857, 59882 (Oct. 2, 2015).

- Maintain riparian vegetation.
- Retain large woody debris in streams.³⁴⁷

Relevant guidelines emphasize restricting “construction of new roads within 350 feet of occupied cutthroat streams or within 150 feet from the edge of the current or historic floodplain ... to maintain hydrologic function and limit road-related stream sediment;” rerouting roads in cutthroat habitat when possible “to improve hydrologic function.”³⁴⁸

As discussed throughout these comments, Berry Creek contains populations of cutthroat trout of conservation concern, including green-lineage cutthroats that should be managed as listed species. The proposed use, including the Berlaimont road and the road to the new proposed snowmobile trailhead (as well as all the associated connected actions), will result in road construction and reconstruction very near to Berry Creek. This new paving and winter maintenance will not reduce sedimentation, and it is likely to decrease pool depths and impact riparian vegetation. These potentially significant impacts were not adequately considered in the FEIS.

C. The Forest Service failed to take a hard look at impacts associated with the development of water infrastructure for the Berlaimont inholding.

Wilderness Workshop argued that the Forest Service failed to take a hard look at impacts associated with developing water infrastructure for the Berlaimont inholding.³⁴⁹ The Forest Service noted that the houses constructed on the Berlaimont inholding would be supplied with water from underground pipes leading to water reservoirs and storage tanks filled by stream and spring diversions from Beard Creek,³⁵⁰ but the FEIS did not evaluate or even identify all of the impacts that would result from constructing and operating foreseeable water infrastructure.

Even where the agency discusses potential impacts internally, unless that discussion is included in the FEIS as interdisciplinary NEPA analysis, the internal discussion fails to comply with NEPA’s hard look requirement.³⁵¹ For example, the FEIS indicates that there would be surface disturbance in wetlands from a diversion structure,³⁵² but provides no analysis of the pipelines, pumps, ditches, reservoirs and tanks needed to support this development—those items are only briefly mentioned in the FEIS at all.³⁵³

Further, while the FEIS provides some estimate of disturbance due to connected actions on private lands, these estimates do not appear to include water storage reservoirs or large

³⁴⁷ White River National Forest, LRMP (2002) at 2-25.

³⁴⁸ *Id.*

³⁴⁹ Exhibit 1, Comment at 29.

³⁵⁰ FEIS at E-37, 39.

³⁵¹ *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009) (NEPA violation occurs when agency “conducted an internal analysis” but did not include the analysis in the NEPA document).

³⁵² FEIS at 278.

³⁵³ FEIS at 39.

water tanks. The FEIS indicates that such developments “are conceptual at this time,”³⁵⁴ even though they were a mandatory condition of approval for an Eagle County variance back in 2014. Specifically, the County required installation of a 270,000-gallon water tank that is fitted for fire suppression use as well as two ponds with dry-hydrants and “depths great enough to sustain helicopter dips during a fire.”³⁵⁵ Considering the potential impacts of this water infrastructure is very important because the storage reservoirs and tanks needed to supply these 19 mansions with water, and to provide fire protection so far from a fire station, are so large.

The Forest Service only mentions in passing that “two ponds and a primary water tank ... would be accessible for use in fire suppression within the Berlaimont Estates’ private property.”³⁵⁶ The Service suggested that these ponds would be constructed by the developer, stating “[u]nder Alternatives 2, 3, and 4, two ponds and 19 single family homes and associated accessory dwelling units could be constructed.”³⁵⁷ The Forest Service acknowledges the impact that water diversions from Beard Creek to supply these ponds would have on fish living in that creek.³⁵⁸ However, the agency fails to discuss other environmental impacts of these ponds or the large water tank.³⁵⁹

Potential effects that should be considered include, for example, the impacts to soil and geology from digging these ponds, impacts to wildlife who may be drawn to the ponds, or, as discussed above, the impacts resulting from constructing water diversions on Beard Creek along with all of the associated pumps, pipelines, canals, etc. There are also safety concerns associated with putting large water impoundments high on a hill above a populated area.

³⁵⁴ FEIS at 40.

³⁵⁵ See Letter from Eric Lovgren, Wildfire Mitigation Manager, Eagle County, to Ben Gerdes, P.E. – Senior Staff Engineer, Eagle County, RE: VIS-4398 – Variance from Dual Access, Emergency Turnaround and Road Design Standards; Berlaimont Estates – Berlaimont Road, Sept. 9, 2013 (attached with Exhibit 25); see also Resolution of the Board of County Commissioners of the County of Eagle, State of Colorado, Resolution No. 2014-001 (Jan. 7, 2014) (Incorporating conditions of approval: “2. The Applicant shall incorporate the road improvement and construction recommendations provided by the Eagle County Wildfire Mitigation referral response dated September 9, 2013.”) (attached as Exhibit 26). All of this correspondence is in the Forest Service project file. See email from Mathew Klein, Realty Specialist, Eagle/Holy Cross Ranger District, White River National Forest, to Ross Wilmore, Forest Service, Re: Berlaimont – docs for County variance (August 22, 2016 12:56PM) (disclosing where on the agency’s share drive “all of the documents from 2013 variance from Eagle County” are located, and urging “particular attention to the pdf titled ‘variance – Responses’, where you will find e-mails/letters from Eric Lovgren...”) (also in the project file).

³⁵⁶ FEIS at 102, 206.

³⁵⁷ *Id.* at 201; see also *Id.* at 237 (calling two ponds “Berlaimont Estates Ponds 1 and 2” and suggesting that water would be diverted from Beard Creek to replenish water loss from evaporation).

³⁵⁸ *Id.* at 201.

³⁵⁹ The Service does, mention that a “stock pond” currently exists on the Berlaimont inholding and discusses impacts to that pond from its proposed action. See e.g., FEIS at 205 (discussing invasive weeds at the pond), 275 (“There is also one small man-made stock pond, without wetland vegetation located on the private parcel.”). However, there is no indication that this stock pond as one of two wildfire-mitigation ponds required for the project.

Notably, the Forest Service failed to consider impacts to one Region 2 sensitive species, the Boreal western toad, because it determined that “no suitable breeding habitat exists” even though it lists ponds as potential breeding habitat.³⁶⁰ It is “reasonably foreseeable” that toads could move in to these newly constructed ponds, especially considering that they would be hydrologically connected to Beard Creek via the water diversion.

Obviously, the impacts associated with developing water-supply and fire mitigation infrastructure are certainly a “significant” indirect consequence of the connected action of developing the Berlaimont inholding. Beyond the impacts that would result from *constructing* this infrastructure—such as impacts to creek fish and water quality—the Forest Service itself has elsewhere recognized that *the mere operation* of stream diversions can “block sediment movement, accumulate debris, block fish passage in the main channel, entrain fish in the diversion ditch, or dewater the stream entirely.”³⁶¹ The Service has even published a guide that discusses the impacts and mitigation measures that are possible for constructing stream diversions.³⁶²

Here the Forest Service failed to take a hard look at impacts associated with construction and operation of foreseeable water infrastructure as required by NEPA.

D. The Forest failed to take a hard look at potential wildfire costs and impacts.

Some of the scariest aspects of the Berlaimont proposal relate to wildfire. However, the FEIS fails to alert the public and decisionmakers to the fact that Berlaimont Estates will put people and expensive infrastructure in a fire prone landscape that is far from first responders, providing a range of threats to the surrounding National Forest. As is, there is no property or infrastructure to protect in the area. Land managers can let it burn when fire comes. But with the addition of 19 new estates, there will be a need to put firefighters and first responders on that hill when fire comes.³⁶³ The proposal creates unreasonable risks to health and safety, unreasonable economic costs, and threatens the National Forest. The Forest Service failed to take a hard look at this information in the FEIS.

Wildfires are becoming more intense and unpredictable as a result of climate change. Fire seasons are now 78 days longer than in 1970. Twice as many acres burn every year compared to three decades ago, and scientists believe that acreage may double again by mid-century.³⁶⁴ Fires put huge strain on local and federal governments, and result in serious long-

³⁶⁰ *Id.* at 227.

³⁶¹ U.S. Forest Serv., Planning and Layout of Small-Stream Diversions, at 2 (2013), *available at* <https://www.fs.fed.us/t-d/pubs/pdfpubs/pdf13251801/pdf13251801dpi100.pdf>.

³⁶² *Id.*

³⁶³ “One of the primary unit objectives is to protect human life, power and gas lines, developed recreation facilities, and private property from wildfire.” FEIS at 208.

³⁶⁴ See USDA, U.S. Forest Service, The Rising Cost of Wildfire Operations: Effects on the Forest Service’s Non-Fire Work (Aug. 4, 2015), at 2 (“Increasing development in fire-prone areas also puts more stress on the Forest Service’s suppression efforts.”), *available at* <https://www.fs.fed.us/sites/default/files/2015-Fire-Budget-Report.pdf> (attached as Exhibit 30).

term economic impacts. In 2017, the U.S. Forest Service spent over \$3.175 billion on wildland fire suppression.³⁶⁵ By 2021 fire suppression costs will consume more than 2/3rds of the agency's budget.³⁶⁶ That requires land managers to poach funds from other programs, like recreation and wildlife management, and leaves public lands undermanaged in a period of unprecedented demand.

Impacts on local communities are similarly devastating. Locals suffer long-term damages and costs from wildfire that can be nine times the cost of fire suppression, including lost business and tax revenue, property and infrastructure damage, physical and mental health effects, and landscape rehabilitation.³⁶⁷ Nearly half of those costs are borne at the community level by local governments, businesses, and citizens.³⁶⁸ The most difficult, dangerous, and expensive place to fight fire is in the Wildland Urban Interface (WUI), where as much as 95% of suppression costs accrue —places like Berlaimont.³⁶⁹ The WUI is being developed faster than any other land-use type in the U.S.³⁷⁰

To deal with wildfire risk, proponents of Berlaimont have a mitigation plan proposing that houses be built to standards that allow residents to shelter in place when wildfire comes. That is necessary because fire is likely to burn up the hill from below, cutting off the one access road and first responders. There isn't any water to fight fire on the parcel, so developers proposed constructing a pond big enough for helicopter bucket drops. Houses would have water tanks and sprinklers. Questions remain about where the water would come from. Taxpayers would probably have to pay costs of helicopter use during a wildfire.

The plan boils down to this: hope the new estates are resilient enough that fire could burn over them, hope residents can safely shelter in place, and try to get some water on the hill so fire fighters have a chance when fire comes. The costs of constructing fire resilient structures

³⁶⁵ Katie Hoover, Congressional Research Service, Wildfire Management Funding: Background Issues, and FY2018 Appropriations (Oct. 31, 2017), available at <https://fas.org/sgp/crs/misc/R45005.pdf> (attached as Exhibit 27).

³⁶⁶ U.S. Forest Service "Cost of Fire Operations" website at <https://www.fs.fed.us/about-agency/budget-performance/cost-fire-operations>.

³⁶⁷ Headwaters Economics. 2018. The Full Community Costs of Wildfire, available at <https://headwaterseconomics.org/wildfire/homes-risk/full-community-costs-of-wildfire/> (attached as Exhibit 28).

³⁶⁸ *Id.*

³⁶⁹ Quadrennial Fire Review. 2015. 2014 Quadrennial Fire Review: Final Report. U.S. Department of Agriculture Forest Service Fire and Aviation Management and Department of the Interior Office of Wildland Fire, Washington, D.C., available at <https://www.forestsandrangelands.gov/documents/qfr/2014QFRFinalReport.pdf>.

³⁷⁰ Radeloff, V.C., D. P. Helmers, H. A. Kramer, M. H. Mockrin, P.M. Alexandre, A. Bar-Massada, V. Butsic, T.J. Hawbaker, S. Martinuzzi, A. D. Syphard, and S. I. Stewart. 2018. Rapid growth of the US wildland-urban interface raises wildfire risk. *Proceedings of the National Academy of Sciences*, available at <http://www.pnas.org/content/early/2018/03/06/1718850115.short> (attached as Exhibit 29); *see also* Exhibit 30, at 2. ("Increasing development in fire-prone areas also puts more stress on the Forest Service's suppression efforts").

would be borne by folks who want live at Berlaimont Estates—those willing to roll the dice when fire comes.

But those costs are just the beginning. Most costs associated with wildfire accrue later: when first responders put their lives at risk to protect people and property, and when public land managers engage in a wildland fire that would not be necessary but for a road paved to new estates in the middle of the forest.

Rather than taking a hard look at these potential wildfire-related costs, which will almost certainly be borne disproportionately by a Forest Service led federal response team, the Forest Service simply recites claims made in Berlaimont's mitigation plan and defers to the County. For example, the without disclosing the potential costs of protecting residents of Berlaimont Estates when the fire comes, the documents says that the Forest Service will:

[c]ontinue to collaborate with the Eagle County Wildfire Mitigation Manager and Eagle River Fire Protection District, and independent fire mitigation experts to ensure that the Action Alternative, if chosen, continues to meet the needs of not only the proposed development, but the community as a whole. Revise the Anchor Point Group Wildland Fire Mitigation Plan to ensure the plan is specific to the chosen Alternative.³⁷¹

The FEIS says: "Additional discussion of wildfire emergency and recovery services are beyond the scope of this analysis because Eagle County oversees wildfire planning and emergency management on private land."³⁷²

Inadequate does not even begin to describe this discussion of the potential costs and impacts of wildfire running through this new subdivision, or conversely, running from the subdivision into the National Forest. The Forest Service is responsible for fighting wildfire on millions of acres of public lands across the country, spends billions of taxpayer dollars annually on wildland fire suppression activities, and therefore cannot simply defer its discussion of the wildfire-related effects of this decision to the proponent's consultants and local government. Local governments will be calling the U.S. Forest Service the second a fire starts on that hillside, whether within the National Forest or on a residential parcel.

NEPA requires more. The agency must take a hard look at the potential wildfire-related consequences of the federal action. This proposal involves serious wildfire risks and potential costs that affect the reasonableness of the development. Impacts may affect National Forest resources, as well as local citizens and agencies, taxpayers more broadly, just to name a few. In this case, the agency's decision would allow expansion of the WUI, which promises impacts on nearly every resource from local wildlife to budget crunchers in Washington.

³⁷¹ FEIS at 56.

³⁷² FEIS at E-14.

E. The Service failed to take a hard look at mitigation measures by deciding to incorporate mitigation strategies into its action alternatives without examining their effectiveness at mitigating adverse impacts.

In its March 18, 2018 comment, Wilderness Workshop argued that the Forest Service failed to take a hard look at the effects of implementing the Forest Service’s proposed mitigation measures by failing to analyze and disclose how effectively these mitigation measures would reduce impacts.³⁷³ Instead of analyzing the impacts from the proposed action, then examining to what extent those impacts could be mitigated, the Service analyzed the impacts from its action alternatives with the mitigation measures listed in Table 2-6 already applied.³⁷⁴

In *Robertson v. Methow Valley Citizens Council*, the Supreme Court recognized that NEPA requires agencies to include in an EIS a “reasonably complete discussion of possible mitigation measures” but held that agencies need not include a complete mitigation plan of “specific measures which *will* be employed to mitigate the adverse impacts of a proposed action.”³⁷⁵ This caveat does not apply here, however, as the Service neglected to discuss the effects of implementing mitigation measures but chose instead to include a complete mitigation plan of measures that it *will* implement. The Supreme Court explained that NEPA’s mitigation-measures requirement also serves a public-disclosure function, stating:

More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the “action-forcing” function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects. An adverse effect that can be fully remedied by, for example, an inconsequential public expenditure is certainly not as serious as a similar effect that can only be modestly ameliorated through the commitment of vast public and private resources.³⁷⁶

Essentially, the Court recognized that a discussion of the extent to which mitigation measures can ameliorate environmental impacts can shed light on just how serious those impacts are to begin with—the less that mitigation measures can ameliorate an impact, the more serious that impact is.

Similarly, here, the Forest Service’s failure to discuss the effectiveness of its planned mitigation measures independently of the magnitude of unmitigated impacts deprived the public of an opportunity to scrutinize just how impactful the Berlaimont access proposal would be

³⁷³ Exhibit 1, Comment at 31-33.

³⁷⁴ FEIS at 44 (“The potential effects of implementing the action alternatives were analyzed with these [mitigation measures] applied.”).

³⁷⁵ 490 U.S. at 351-53 (emphasis in original) (internal quotations omitted).

³⁷⁶ *Id.* at 352.

without mitigation strategies. As we explained in our DEIS comments, the effectiveness of some of these mitigation measures—such as wildlife bridges—is questionable, at best.³⁷⁷ Instead, NEPA requires the Forest Service to analyze and evaluate the unmitigated impacts of the Berlaimont access and development proposal before discussing the extent to which those impacts can be impacted. Such an approach would better serve the goals of NEPA by allowing the public both to better understand the magnitude of unmitigated impacts and to scrutinize whether the Service’s chosen mitigation strategies are, in fact, effective.

While the Forest Service is required to consider mitigation, the agency’s decision to analyze project impacts only with mitigation measures already applied violates its NEPA obligation to include “a reasonably complete discussion of possible mitigation measures” in its EIS. By neglecting to analyze mitigation measures independent of the proposed action, the Service offered *no* discussion of the effectiveness and costs of its list of mitigation measures. Moreover, the Service failed to disclose the full, unmitigated impact of its proposed action the connected development of the Berlaimont inholding. For these reasons, the Service violated NEPA by failing to take a hard look at its proffered mitigation measures.

VII. The Forest Service failed to take a hard look at new information.

There is new information and changed circumstances relevant to the Berlaimont proposal and the wildlife and habitat values that will be affected by this proposal that the Forest Service has never considered. This information is “relevant to environmental concerns and bearing on the proposed action [and] its impacts,”³⁷⁸ and it must be considered in a supplemental analysis prior to Forest Service approval of any new road to Berlaimont Estates.

Several recent studies (e.g., those related to wildfire) are cited above in this objection and must be considered by the Forest Service as part of its reasonable use determination and in a revised analysis prior to approval of this project.

The Forest Service should also update the FEIS with the most recent wildlife counts from CPW. It is our understanding that those counts show that the decline of deer and elk populations continue—which, as discussed throughout this letter, is relevant to the environmental concerns associated with Berlaimont’s proposal. New wildlife counts should be considered along with new information released by the State Department of Natural Resources, CPW, and the Governor’s Office indicating how important it is for us to protect winter wildlife habitat and migration corridors, like those that would be degraded and destroyed by this proposal. Some of these policies are discussed below and elsewhere in this objection.

Another important piece of new information is a recent study confirming that increased development in the Eagle Valley is a major cause of declining elk populations.³⁷⁹ This study found

³⁷⁷ Exhibit 1, Comment at 31-32.

³⁷⁸ 40 C.F.R. 1502.9.

³⁷⁹ Exhibit 5, Evaluating Landscape Connectivity and Habitat Fragmentation Effects on Elk.

that human influence, as reflected by habitat fragmentation and reduction of landscape connectivity, is the driving force in the declining elk populations in the area. The study concluded that, absent changes in management practice, the best case scenario for elk populations would be for them to remain near current relatively low levels, but that they may well decline further.³⁸⁰ This information is critically important for the USFS to consider as the agency contemplates approval of a project that will further fragment critical elk winter range with a year-round road, suburban sprawl, and the addition of more recreational infrastructure and use. Consideration of this new science would weigh heavily against approval of the Berlaimont proposal because it is, quite simply, additive to existing problems and completely unreasonable. As the study suggests, approving this project is completely counterproductive to maintaining healthy elk populations in the area.

The Forest Service also failed to consider a recently released report from Colorado Parks and Wildlife related to Big Game Winter Range and Migration Corridors.³⁸¹ The report was published in response to a 2019 Executive Order signed by Colorado Governor Jared Polis and ordering state agencies to “conserve Colorado’s big game winter range and wildlife migration corridors.”³⁸² As mentioned above, DNR specifically wrote to the Forest Service and asked that this report be considered in the FEIS, though it is not cited at all by the USFS.

CPW’s report notes that “Colorado’s wildlife resources require careful and increasingly intensive management to accommodate the many and varied public demands and growing impacts from people. CPW is actively working to balance the ever-increasing human presence on the landscape with conservation of our state’s world-class natural resources.”³⁸³ The Status Report states that “winter range quality and quantity is one of the primary limiting factors for big game population performance.”³⁸⁴ “Human recreation and development; which are occurring at unprecedented levels in Colorado, increasingly overlap with, fragment, and impact big game winter range habitats.”³⁸⁵ The Report highlights important recent findings, including research indicating that “increasing human development within mule deer habitats was correlated with declining recruitment rates, particularly development within seasonal winter ranges. Residential development had twice the magnitude of effect of any other factor investigated.”³⁸⁶ In the same study “researchers concluded that further increases in human development on deer ranges may not be compatible with the goal of maintaining highly productive deer populations.”³⁸⁷ “These results underscore the negative impact of residential development could have on mule deer populations.”³⁸⁸ The status report also discusses primary threats to winter wildlife habitat and

³⁸⁰ *Id.*

³⁸¹ Exhibit 18, CPW 2020 Status Report: Big Game Winter Range and Migration Corridors.

³⁸² Executive Order D 2019 011: Conserving Colorado’s Big Game Winter Range and Migration Corridors. See Exhibit 14.

³⁸³ Exhibit 18 at 5.

³⁸⁴ *Id.* at 18

³⁸⁵ *Id.* at 18.

³⁸⁶ *Id.* at 18.

³⁸⁷ *Id.* at 19.

³⁸⁸ *Id.* at 19.

migration corridors including increasing residential development and recreation, including along the I-70 corridor in western Colorado; recreation; roads; and development, including housing and ex-urban development.³⁸⁹ This report provides more scientific information that confirms how unreasonable it is for the Forest Service to pave over a critical mule deer migration corridor and deer and elk winter range to facilitate new sprawling residential development and more recreation.

CPW also recently released the Colorado Action Plan for Implementation of Department of the Interior Secretarial Order 3362: “Improving Habitat Quality in Western Big-Game Winter Range and Migration Corridors”.³⁹⁰ This plan highlights the need for protection of deer and elk in the Berlaimont project area with this description of it as a “landscape priority area”:

Big game habitat for the 14,000 deer and 3,700 elk within the Piney River/State Bridge area has declined in quantity and quality due to land development, fragmentation by roads and trails, increased human activity on public lands, and suppression of large-scale wildfires. Conservation easements are also needed to protect migration corridors and winter ranges, as well as limit recreational activity on winter range.³⁹¹

The report makes clear that “habitat carrying capacity has declined over recent decades, as both the quantity and quality of habitat have diminished due to land development, fragmentation by roads and trails, increased human activity on public lands, and suppression of large-scale wildfires.”³⁹² It is critically important for the Forest Service to consider this information prior to approval of the Berlaimont project. Berlaimont will contribute to declining habitat carrying capacity with development, fragmentation, increased human activity and a new need for fire suppression. The report goes into great detail about how important habitat in the Berlaimont area is to deer and elk.³⁹³ The report speaks directly to the risks posed by activities associated with the Berlaimont proposal on this important habitat.³⁹⁴ Close consideration of this new information underscores how unreasonable the Berlaimont proposal truly is, how damaging it will be on public land resources, and how counterproductive it is to the goals of wildlife managers and the Governor of the State of Colorado (as well as the public).

As discussed above there is also a wealth of science related to sage grouse and management of sage grouse habitat that the Forest Service has never considered, but that must be considered before any approval of this damaging proposal.³⁹⁵

³⁸⁹ *Id.* at 23-33.

³⁹⁰ Colorado Parks and Wildlife, Colorado Action Plan for Implementation of the Interior Secretarial Order 3362: “Improving Habitat Quality in Western Big-Game Winter Range and Migration Corridors 2020-2021” (Sept. 10, 2020), available at <https://www.nfwf.org/sites/default/files/2020-09/Colorado2020SAP.pdf> (attached as Exhibit 23).

³⁹¹ *Id.*

³⁹² *Id.* at 28.

³⁹³ *Id.* at 29-30.

³⁹⁴ *Id.*, at 34-36.

³⁹⁵ See Exhibit 24.

There are also new projects affecting deer and elk habitat that will have cumulative impacts on those resources and that were not considered by the U.S. Forest Service.³⁹⁶ The agency must consider foreseeable projects listed in this objection, and the agency must undertake a searching review of all other projects that may have additive impacts on resources at issue here.

The Forest Service must consider new information related to climate change, including the Fourth National Climate Assessment³⁹⁷, which was issued in late 2018, as well as other studies discussing the aridification of the western North America³⁹⁸. This science shows that degradation of values the Forest Service is charged to protect, including clean air, water, and wildlife habitat, will continue as a result of climate change. Decreasing precipitation and increasing wildfire frequency, as well as other climate change related stressors are expected to decrease the ability of forests in the western U.S. to support wildlife, water production, and other economic uses. Climate change has already had observable impacts on biodiversity, ecosystems, and the benefits they provide to the public. These impacts include habitat degradation and the spread of invasive species. Such changes are projected to continue, and without substantial and sustained changes in the way we live our lives and the trajectory that our past decisions (including land use decisions like those at issue here) have set us on, extinctions and transformative impacts on some ecosystems will not be avoidable in the long-term. Land managers should be thinking of adaptation strategies, including protecting safe havens for important species, to address emerging impacts of climate change. The Forest Service needs to consider this information as it contemplates approving a proposal that will destroy and degrade critical and scarce habitat for declining wildlife populations; and as it considers the reasonableness of a decision that will put more people and expensive homes into a landscape that is likely to experience extreme fire in coming years and decades.

Consideration of the most recent climate science is critically important on the White River National Forest, where the agency has never undertaken any programmatic analysis of its management activities in the context of climate change. Basically, that means that the Forest Service has never considered how best to manage forest resources in light of the changing climate. Absent that broader analysis and some meaningful programmatic guidance, the Forest Service has a heavy burden to analyze and disclose the impacts climate will have on its projects and the impacts its projects will have on climate. Here, the Forest Service must consider the potential impacts this project will have on scarce resources, like winter range, in the context of climate change. The agency should be considering how important it is to protect habitat not just because of its importance locally, but also because climate change is impacting this habitat all across the forest, and all across the nation. All of that may provide additional reason not to pave

³⁹⁶ See e.g., N.303, N.304 *supra*. This is not a searching list, but rather an indication that the USFS has failed to undertake a thorough search or consideration of foreseeable development with potential cumulative impacts. The agency must undertake that search before approving this project.

³⁹⁷ Available at <https://nca2018.globalchange.gov/> (last accessed 11/8/20).

³⁹⁸ Climate change and the aridification of North America, Jonathan T. Overpeck, Bradley Udall, Proceedings of the National Academy of Sciences Jun 2020, 117 (22) 11856-11858; DOI: 10.1073/pnas.2006323117.

a road through this critical habitat. But in order for the agency to adequately analyze potential impacts and a thoughtful path forward, the agency must be considering the most recent science in this dynamic field.

VIII. The Forest Service failed to provide meaningful opportunity for public comment

The Forest Service has moved the parking lot for a proposed snowmobile trailhead multiple times over the course of this project without providing a meaningful opportunity for comment, and it is unclear that the potential impacts of the most recently proposed trailhead were adequately considered in the FEIS.

Supplemental comments filed by Wilderness Workshop describe the process undertaken by the Forest Service to propose a new location for a snowmobile trailhead between the public comment period on the Draft EIS and release of the Final.³⁹⁹ Timing of the agency's public meeting stymied effective public participation. The Forest Service offered a comment period on the proposal, but failed to provide any analysis of the proposed change. Now the agency has changed the trailhead location again, this time with no opportunity for public comment at all. These decisions undermine the public's ability to participate in the process and violate the intent of NEPA.

Also troubling is the fact that the Forest Service has provided no actual analysis related to the potential impacts of this change. That appears to be a major oversight, as the new proposed location for this trailhead will move it higher and deeper into the Berry Creek drainage. The new location holds snow longer than the originally proposed location and it will necessitate more maintenance, including snowplowing, during winter months. Winter road maintenance in this area could affect watershed values and wildlife, including cutthroat trout.

The new location will also likely result in increased usage—which the Forest Service failed to consider. Increased usage will result from improved infrastructure (e.g., a more functional trailhead) as well as the fact that the new location holds snow longer for snowmobile use. Increased usage of the snowmobile trailhead will have direct, indirect, and cumulative effects on wintering wildlife in the area that do not appear to have been considered either. The concern is that, not only will you have Berlaimont residents making approximately 160 daily vehicle trips up and down a road that bisects critical winter range all season long, you'll also have an increase in the number of trucks, snowplows, and loud snowmobiles traveling up a separate road that bisects this habitat.

This new location was not considered in the Draft EIS, and the public has never had a meaningful opportunity to comment on it, nor has the Forest Service ever analyzed or disclosed to the public the potential impacts it will have related to noise, wildlife, watershed and other values. The Forest Service has an obligation to consider and disclose the potential impacts of this new project component, especially in light of other reasonable alternatives. And NEPA requires

³⁹⁹ Exhibit 3.

that the public be given a meaningful opportunity to comment. Additionally, it is imperative that the Forest Service give experts from other agencies, like Colorado Parks and Wildlife, time to comment on these important new plan components before the project is approved.

For these reasons, we urge the agency to supplement the EIS with meaningful analysis of this new component and release that revised analysis, as a new Draft EIS, for public comment rather than proceeding to release a final decision.

IX. The Forest Service Draft Decision fails to properly minimize impacts and fails to consider the requirements of 36 CFR 251.54.

In issuing a special use authorization for access over National Forest land, the Forest Service "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."⁴⁰⁰ Here, it is clear for all of the reasons discussed above that the Forest Service decision fails to minimize the impacts on Federal Resources as required by applicable regulation and precedent.⁴⁰¹ This project will have significant and unacceptable impacts on public land values and Federal resources, including wildlife habitat, wildlife populations, native ecosystems and plant communities, important watersheds and water resources, air quality, wildland fire potential and risk, climate change, and others. The Forest Service process subverted these potential impacts to the proponent's purpose and need and failed to comply with applicable law and regulation.

Also, the agency failed to properly consider the public interest as required by 36 C.F.R. § 251.54. That regulation states that an authorized officer "shall reject any proposal" if the officer determines that "the proposed use would not be in the public interest," or if the proposal would fail to comply with any of the other criteria in that section.⁴⁰² In addition to the impacts to public lands and values discussed throughout this objection and in all of the public comments in the record, the Forest Service has simply ignored the very clear interest of the public. The public discourse about this proposal dating back to scoping in 2016 has made one thing perfectly clear: the public hates this proposal. That sentiment has been evident in public comments, in petitions, in newspaper articles and reports, opinion pieces, and many letters to the editor. People abhor this project because it fails to protect the public interest. Yet the Forest Service failed to consider that and to reject the proposal as required by its own regulations.

Relatedly, the agency has provided no evidence of the proponent's technical and financial capability to construct, operate, maintain, and terminate the project as required by § 251.54. Prior to approving this proposal, the USFS must show that the use would be in the public

⁴⁰⁰ 36 C.F.R. § 251.114(a); *see also* 42 U.S.C. § 4332; 36 C.F.R. §§ 251.54, 251.110 to 251.114.

⁴⁰¹ "[D]etermining what constitutes adequate access [...] include[s] a balancing of 'the reasonable use and enjoyment of the land' and that which 'minimize[s] the impacts on the Federal resources.'" *Breaker v. United States*, 977 F. Supp. 2d 921, 940 (D. Minn. 2013) *quoting* 36 C.F.R. § 251.114(a).

⁴⁰² 36 C.F.R. § 251.54.

interest and that the applicant has the technical and financial capability to undertake construction and maintenance of this costly and damaging project.

X. Berlaimont Estates and its counsel have unduly influenced Forest Service decision-makers via improper *ex parte* contacts.

Berlaimont Estates, acting through counsel, has exerted undue influence on Forest Service decision-makers via at least two improper *ex parte* memoranda. Wilderness Workshop learned of these communications from documents disclosed as part of a Freedom of Information Act request response received after public comment periods. Since this claim “concerns an issue that arose after the designated opportunity for comment,” it can be included in an objection.⁴⁰³

The first *ex parte* communication was provided to the USFS by a Berlaimont representative, Michael English, in the summer of 2009. The communication includes a legal memo drafted by attorneys at Hogan & Hartson on June 2, 2009. The second relevant communication was submitted to Matt Klein and Kenneth Capps by Andrew Spielman at WilmerHale on May 30, 2018—after the comment period for the DEIS had closed. These memoranda lay out legal arguments and a strategy to circumvent and avoid County and USFS authority that is favorable to Berlaimont Estates.⁴⁰⁴

The Administrative Procedure Act prohibits *ex parte* contacts in formal rulemakings and adjudications. Even where not expressly proscribed by statute, courts nonetheless frown upon such *ex parte* communications because “[e]ven the possibility that there is ... one administrative record for the public and this court and another for the [agency] is intolerable.”⁴⁰⁵ The risk is particularly intolerable when an agency is determining private rights: “[w]here agency action resembles judicial action, where it involves formal rulemaking, adjudication, or *quasi-adjudication* among ‘conflicting private claims to a valuable privilege,’ the insulation of the decisionmaker from *ex parte* contacts is justified by basic notions of due process to the parties involved.”⁴⁰⁶

Here, *ex parte* contacts were inappropriate because the Forest Service’s action is quasi-adjudicative in nature. Berlaimont Estates has “request[ed] an easement for improved access” across national forest land, and the Forest Service is determining Berlaimont’s access rights in this proceeding. Such a determination of private rights imbues this administrative process with an adjudicative character that makes *ex parte* contacts inappropriate.

The Forest Service must undertake a review for such contacts, undue influence, and contractor bias that includes all records of the contractor and records of communications and contacts between the developer and the contractor. Because of the difference between FOIA

⁴⁰³ 36 C.F.R. § 218.8(d)(6).

⁴⁰⁴ See also N.83 *supra*.

⁴⁰⁵ *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 54 (D.C. Cir. 1977).

⁴⁰⁶ *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (emphasis added).

standards and litigation standards, these records are within a “blind spot.”⁴⁰⁷ The Forest Service must obtain all such records to inform the investigation into contractor and agency bias. Because it is apparent that the FEIS and DROD went forward based on the “blind spot,” the proper response is for the objections team to set both aside with directions to reconsider the analysis on the full record, not just the level of contact, influence and bias that is identifiable on the limited set of records publicly available through FOIA.

Conclusion and Proposed Remedies:

The Forest Service should set aside the DROD and FEIS, and require a new application that identifies all necessary information, including development potential based on current access, historic access, and potential access routes that do not involve the National Forest. In a new process the agency should consider alternative authorities to respond to any access request by Berlaimont, and undertake a fair and searching examination of relevant criteria if the agency decides to process the request under ANILCA. In addition to the proposed road, private land development and all associated impacts, the agency must consider and disclose impacts and authorities relevant to utilities. Any new NEPA analysis must be guided by a purpose and need statement that is not overly narrow and adequately considers the needs and purposes of the Forest Service and the public interest in addition to the goals of the project proponent. Any new NEPA analysis must consider reasonable alternatives, such as those discussed above, that the agency failed to analyze in the EIS here and take a hard look at all of the potential consequences as required by law. Any new examination should consider changed circumstances and new information the agency omitted from the current analysis. Unlike the DROD and FEIS, a new process should provide meaningful opportunities for public comment on all project components; consider the public interest; and minimize impacts on federal resources. Finally, the agency must ensure that a new process is not unduly influenced by the project proponent.

Sincerely,



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⁴⁰⁷*Rocky Mt. Wild, Inc. v. United States Forest Serv.*, 878 F.3d 1258, 1262 (10th Cir. 2018).

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- Ex. 1 - FINAL 2018 3 12 Berlaimont DEIS Cmts WW et al..pdf
- Ex. 2 - 2016 11 7 Scoping Cmts FINAL.pdf
- Ex. 3 - Final supplemental cmt 8.23.18.pdf
- Ex. 4 - Elk herd population plummets in Aspen, Vail areas as human use grows _
AspenTimes.com.pdf
- Ex. 5 - Evaluating Landscape Connectivity and Habitat Fragmentation Effects on Elk.pdf

Ex. 6 - Emails RE Berliamont Meeting w Tammy 330 Thursday.pdf
Ex. 7 - Berlaimont FOIA records request letter (00453971).pdf
Ex. 8 - Hensler Ltr RE Berlaimont Estates.pdf
Ex. 9 - lake agnes easement.pdf
Ex. 10 - Grove email RE Berlaimont trout questions.pdf
Ex. 11 - FINAL_BE_Wildlife_Berlaimont_WoodyEdits_25FEB20.pdf
Ex. 12 - Berlaimont Estates EIS_Biological Evaluation_FisheriesWildlife_March2020.pdf
Ex. 13 - Wilderness Workshop/ Wildfire risk, cost make Berlaimont unreasonable |
VailDaily.com.pdf
Ex. 14 - DNR Berlaimont Letter - 100319.pdf
Ex. 15 - Signed SO 3362.pdf
Ex. 16 - MuleDeerStrategy.pdf
Ex. 17 - CPW to E.C. RE. VIS-4398 Responses 09272013.pdf
Ex. 18 - 2020BigGameWinterRangeandMigrationCorridorsReport.pdf
Ex. 19 - Press clips related to Berlaimont.docx
Ex. 20 - FLAMES IN OUR FORESTS.docx
Ex. 21 - FW_A conversation about your property.pdf
Ex. 22 - Eagle County Planning Commission to review Edwards RiverPark - Real Vail.pdf
Ex. 23 - CPW Colorado2020SAP.pdf
Ex. 24 - Annotated Science on SG from 2015-2019.pdf
Ex. 25 - E.C. variance - Responses.pdf
Ex. 26 - variance - County resolution R14-001 Berlaimont Variance - highlight.pdf
Ex. 27 - Wildfire Management Funding_ Background, Issues, and FY2018 Appropriations.pdf
Ex. 28 - Full Community Costs of Wildfire - Headwaters Economics.pdf
Ex. 29 - Rapid growth of the US wildland-urban interface raises wildfire risk.pdf
Ex. 30 - The Rising Cost of Fire Operations_ Effects on the Forest Service's Non-Fire Work.pdf