

**Wilderness Workshop ♦ Rocky Mountain Wild ♦
Great Old Broads for Wilderness ♦ The Wilderness Society ♦
Rocky Mountain Recreation Initiative ♦ Rocky Smith ♦
Conservation Colorado**

March 12, 2018

Scott Fitzwilliams, Forest Supervisor
C/o Matt Klein, Realty Specialist
White River National Forest
PO Box 190
Minturn, CO 81645
Via email: matthewklein@fs.fed.us

Re: Berlaimont Estate Access Route Draft EIS

Dear Mr. Fitzwilliams:

Please accept these comments on the Berlaimont Estate Access Route Draft Environmental Impact Statement (DEIS) from Wilderness Workshop, Rocky Mountain Wild, Great Old Broads for Wilderness, The Wilderness Society, Rocky Mountain Recreation Initiative, Rocky Smith, and Conservation Colorado.

As discussed below, existing access is adequate. Applicability of the Alaska National Interest Lands Conservation Act (ANILCA) in this case is dubious. 16 U.S.C. §§ 3103-3233. Even if ANILCA applies, the Forest Service's ANILCA determination is flawed. The agency's own analysis confirms that the proposed development is not a reasonable use of the parcel, and that adequate access to this inholding already exists and/or could be achieved with much less damage to Federal and other important resources.

The Forest Service's flawed ANILCA determination taints the Draft EIS, which is unlawful. The agency has failed to take a hard look at reasonable alternatives, cumulative effects, reasonably foreseeable impacts, and appears poised to take action that fails to minimize damage to important resources that the Forest Service is obligated to protect.

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I. BACKGROUND

Berlaimont Estates is the most recent proposal to develop a 680-acre National Forest inholding located 6 miles north of the community of Edwards, Colorado. The Berlaimont parcel, which is also often referred to as the Overlook Parcel, was purchased by the current owners in 2008 after several previous owners gave up on their own development plans and sold out. Shortly after purchasing the parcel, the new owners made clear their intent to subdivide it into 35-acre lots and build an exclusive enclave with 19 new mansions. There has been consistent public opposition to this proposal.

The Forest Service DEIS is limited to the consideration of whether to grant expanded access to the project proponent for the proposed development. The purpose and need of the proposal under consideration, properly stated, is to provide a road to meet Berlaimont's desire to expand access to allow development of 19 individual residential lots. NEPA compliance is required for all foreseeable aspects of the private proposal to use and occupy federal lands, including the impacts of infrastructure needed to build and operate the

housing development. However, the DEIS is prepared with a limited scope that conceals impacts and viable alternatives from the public and the decisionmaker. In particular, there is no alternative that assesses the level of development that could occur with existing access and utility easements. The DEIS speculates, without analysis, that “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.” DEIS at 2. The No Action Alternative arbitrarily dismisses the option to build on existing access and easements, thus preventing analysis across a reasonable range of alternative courses of action. DEIS at 28. Forest Service approval of utility easements and special use permits would be required for development of three home sites on existing access, yet this action alternative was concealed from both the public and the decisionmaker.

The narrow scope of analysis and limited range alternatives support a pre-determined outcome that conceals important information and options. The approach taken in the DEIS and ANILCA determination unartfully and unlawfully dodges the duties the Forest Service must carry out as the federal land management agency. A NEPA compliant DEIS and ANILCA determination would confirm that current access is adequate, and would focus on the other aspects of the Berlaimont Estates development proposal. Berlaimont’s development proposal is “potentially subject to Federal responsibility and control” and therefore the entire Berlaimont proposal is the “major federal action” subject to NEPA analysis. 42 C.F.R. § 1508.18. Here, the ANILCA determination and DEIS are so deficient that the project must go back to scoping to set out a lawful scope of analysis and range of alternatives. These issues and more are discussed below.

Pursuant to ANILCA, NEPA, and applicable Forest Service regulations, the agency’s consideration is multi-tiered. First, the USFS must consider whether the parcel already has adequate access. If so, the analysis should stop there. If not, the agency can proceed with a more involved determination under ANILCA examining whether the proposed use is reasonable and what kind of access would be adequate to support that reasonable use. Finally, the agency must disclose and analyze the environmental impacts of the proposed access, along with reasonable alternatives. Based on that analysis the agency will decide how to proceed.

As a matter of law, a parcel that already has reasonable access has no ANILCA right to expand its access to satisfy fanciful development proposals. The broad based public opposition to this project reflects the fact that the proposal to radically expand current uses is not reasonable, and it is not in the public interest. The proposal would result in high-end exurban sprawl in the middle of the National Forest. And, while there are sprawling subdivisions in the Eagle Valley, that is no excuse for more. Especially not within the National Forest. These types of developments result in higher costs to local communities and the environment than most other land use.

The population of Eagle County is expected to nearly double in coming decades. And, with that kind of growth on the horizon, it is clear that we must be more judicious about how and where development occurs than we ever were before. Residents of Eagle County

cherish the wildlife, public lands, and open space that make the area such a wonderful place to live. This proposal threatens all of that.

Intense public opposition to this proposal also stems from the fact that it will require constructing a new paved road through cherished open space. The new road would cut through National Forest land that supports varied recreational activities and sensitive wildlife. In order to approve the proposal, Forest managers will have to amend a plan that closed the area in winter months to protect vulnerable wildlife. The existing plan has been in place for over a decade and was effective long before the current owners bought the parcel. Nonetheless, the Forest Service is contemplating eliminating the plan's protections for the benefit of a speculative real estate development.

The Forest Service's DEIS makes clear that development of the new proposed road and subdivision would destroy and degrade habitat for iconic wildlife. The area currently provides winter range, severe winter range, and winter concentration areas for deer and elk. It represents an important migration corridor for the second largest migrating deer herd in the State of Colorado—a herd that has been in steep decline since the 1980s as a result of loss of winter habitat and habitat fragmentation from development and recreational impacts. Elk populations in the area have also been in steep decline for the same reasons.¹ This project will increase the rate of decline by adding to the causes of that decline.

The project will also destroy and degrade habitat for threatened, endangered, and sensitive species. For example, there are populations of green-lineage cutthroat trout in stream reaches that would be impacted by the proposed development. The proposed project bisects occupied range for greater sage-grouse,² and new homes would be built in lynx habitat. Sensitive populations of Colorado River cutthroat trout, Brewer's sparrow, and populations of Harrington penstemon would all be directly and indirectly impacted by the development as well.

The Berlaimont proposal would also result in a loss of access to important trails and soft surface roads that provide recreational opportunities for hikers, bikers, cross-country skiers, snowshoers, dog walkers, dirt bikers, and numerous other groups. The area is utilized by residents of nearby neighborhoods and people from up and down the Eagle Valley because it generally holds less snow and loses snow faster than most other parts of the Valley. These resources are increasingly important and becoming scarcer as growth continues to eat up the area's open space.

Also striking are climate and wildland fire related effects of this project. The reality of climate change is that fires are becoming more severe and more costly to fight. This

¹ See Colorado Parks and Wildlife, Scoping Comments on Berlaimont Estates Access Route EIS (Nov. 7, 2016), attached as Exhibit 1.

² Colorado Parks and Wildlife notes satellite collar data from 2010 indicating greater sage-grouse in the project area. A U.S. Forest Service biologist also reported seeing a greater sage-grouse hen with three chicks on Forest Service land near Berry Creek in the summer of 2012. See Exhibit 1.

proposal would put a high-end residential subdivision deep within a fire-prone national forest. The development would put more people and property at risk, and increase damages when fire does rage through the area. The mitigation plan considered by the U.S. Forest Service is elaborate, but it only underscores the potential costs and dangers of this proposed development.

This background highlights why the proposed parcel is an unreasonable land use. The following sections provide more detail on why the U.S. Forest Service should deny the damaging access that project proponents have proposed.

II. THE ANILCA DETERMINATION AND DEIS ARE UNNECESSARY BECAUSE EXISTING ACCESS IS ADEQUATE.

As stated above, as a matter of law, a parcel that already has reasonable access has no ANILCA right to expand its access to satisfy fanciful development proposals. “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.” 36 C.F.R. § 251.110(g). “[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).

The Berlaimont parcel is currently accessible via existing Forest Service Roads (FSRs): 774, 783, 780, and 778. These routes provide access from the south and west, and less directly from the north and east. Existing roads are open to cars and trucks in snow-free seasons and by snow machines in the winter. Seasonal closures are in-effect to protect important Federal resources that the USFS determined needed such protections in its Forest Plan. The project proponent purchased the parcel with access via existing routes and without any guarantee of additional or improved access. It is unreasonable for the owner to claim a right to a new paved, two-lane road that is accessible year-round to facilitate development far in excess of the type on other similarly situated inholdings.

The DEIS indicates that under the “existing county code, up to three homes could be constructed on [the parcel].” DEIS at 2, 73. Development of three homes would allow for the reasonable use and enjoyment of this parcel while also going substantially further toward minimizing impacts on Federal resources than any of the action alternatives that the USFS is currently considering. The ANILCA determination was not informed by a NEPA action alternative contemplating use of existing roads. Similarly, the DEIS did not inform the ANILCA decision regarding the potential mitigation of development impacts, commercial use of federal roads, or other aspects of existing and/or potential federal control and authority over a three-home-development alternative. 42 C.F.R. § 1508.18. The ANILCA determination and DEIS both lack analysis of the reasonableness of a development based on existing access.

Further, as the USFS’s consideration of similarly situated parcels confirms, NFS inholdings are consistently accessed via dirt roads (see DEIS, App. C, Add. B (listing 10 inholdings, all

of which are accessed by dirt roads), and generally do not have year-round plowed access (see *id.* (showing that 80 percent of inholdings considered by the USFS did not have plowed access)).

In this case, adequate access exists to the parcel and the USFS does not have an obligation under ANILCA to grant the Berlaimont proponent's grandiose proposal for a hugely impactful new paved, year-round road to facilitate unreasonable development plans.

III. ANILCA DOES NOT REQUIRE THE U.S. FOREST SERVICE TO GRANT ACCESS TO THIS PRIVATE INHOLDING.

ANILCA does not require the U.S. Forest Service to grant an easement across public lands to this private inholding. Therefore, the Forest Service can and should deny the proponent's request for improved access across the National Forest.

The basis for applying ANILCA rights outside of Alaska is not found in the text of the statute. Applying the canon of construction announced by the Supreme Court, the "two stated goals" of ANILCA concern only Alaska inholdings, and therefore it is improper to extend ANILCA's terms to lands beyond Alaska. *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (rejecting ANILCA interpretation as "inconsistent with both the text and context of the statute as a whole.").

In *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), the Supreme Court rejected the Ninth Circuit's application of another provision of ANILCA, 16 U.S.C. § 3210, outside Alaska. In so doing, the Court explicitly cited ANILCA Title XIII, which contains the access provision in Section 3210(a), as among the "provisions of ANILCA [that] need not be extended beyond the State of Alaska in order to effectuate their apparent purposes." *Id.* at 550; see also *id.* at 550 n.19 (referencing ANILCA Title XIII). As the *Amoco Production* Court pointed out, "ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska." *Id.* at 549 (emphasis added).

ANILCA's statutory language fully supports the Supreme Court's conclusion in *Amoco Production*. Nothing in the language of § 3210(a) states that it varies from every other provision of ANILCA by applying nationwide. Further, § 3210(a) is in the same section with – and must be read in *pari materia* with – 16 U.S.C. § 3210(b), a virtually identical provision addressing access to private inholding properties within the general "public lands." See 2B Norman J. Singer, *Sutherland Statutory Construction*, § 51.03 (6th ed. 2000) ("[E]ach section of a law which deals with the same subject matter must be read in *pari materia* with other sections on the same subject."). The term "public lands" is elsewhere defined in ANILCA to mean "land situated in Alaska." 16 U.S.C. § 3102(3) (emphasis added). As the Fourth Circuit concluded, this statutory language "gives rise to a strong presumption" that 16 U.S.C. § 3210(a), like its companion § 3210(b), "applies only to land in Alaska." *United States v. Srnsky*, 271 F.3d 595, 602 (4th Cir. 2001).

The Forest Service should reevaluate the purpose and need for this project given that ANILCA does not require or provide the basis for the agency to grant improved access for

public lands located outside Alaska. Other discretionary legal mechanism may exist to allow private use of public lands for a private purpose, but none are examined in the NEPA analysis.

IV. THE RECORD CONTRADICTS THE USFS'S DETERMINATION THAT PAVED ACCESS TO PROMOTE SUBURBAN SPRAWL IS "REASONABLE USE AND ENJOYMENT" OF THE PARCEL

To the extent that ANILCA grants this inholder any right of access across National Forest lands, that right is not unfettered. It is limited to only such access as the Secretary of Agriculture deems adequate to secure the owner the reasonable use and enjoyment of the property. 16 U.S.C. § 3210(a), (b)(emphasis added). Such access is further subject to such terms and conditions as the Secretary of Agriculture may prescribe. 16 U.S.C. § 3210(a).

Determining what constitutes "adequate" access and "reasonable use and enjoyment," therefore, are primary inquiries. The two are linked. "Adequate" access is defined by applicable regulations to mean "a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources." 36 C.F.R. § 251.111.³ The agency must determine "reasonable use and enjoyment" based on "contemporaneous uses made of similarly situated lands in the area and any other relevant criteria" and, again, ensure that such use "minimize[s] the impacts to federal resources." 36 C.F.R. § 251.114(a).⁴

The following paragraphs highlight why this proposed use is not reasonable and why the Forest Service's reasonable use conclusion is erroneous and arbitrary. They also explain why "adequate access" would involve substantially less than the USFS has considered in its action alternatives.

A. THE FOREST SERVICE'S OWN ANALYSIS SHOWS THAT THE PROPOSED DEVELOPMENT IS NOT A "REASONABLE USE."

The Forest Service's determination regarding "reasonable use and enjoyment" requires substantially more than "rubber-stamping whatever use the landowner intends to make of its property." *Colo. Wild, Inc. v. United States Forest Serv.*, 523 F. Supp. 2d 1213, 1227 n.15

³ Note: adequate access does not include rights-of-way for power lines or other utilities, but those are connected actions that must be considered in any Forest Service analysis. Here, the Forest Service indicates that utilities would be buried in the new road corridor, but fails to provide any analysis of potential impacts. DEIS at 7; see Section VI *infra*. The DEIS also indicates that the homes at Berlaimont Estates would be on septic systems, but the document fails to discuss/disclose potential impacts of these septic systems on resources. See Section VI *infra*.

⁴ 36 C.F.R. § 251.114(f) also requires that authorizing officers ensure that: the landowner has shown no existing routes of access available by deed or under state or common law; the route "minimize[s] adverse impacts on soils, fish and wildlife, scenic, cultural, threatened and endangered species, and other values of the Federal land"; and the "location and method of access" are consistent with the management of the area and Forest Land and Resource Management Plans.

(D. Colo. 2007). In fact, the Forest Service has stated, its reasonable use determination under ANILCA may properly limit a landowner's use of non-Federal land "to the extent that the facilities and modes of access authorized on Federal land limit the use and enjoyment of non-Federal land to that which is determined to be reasonable by the authorizing officer." Final Rule, 56 Fed. Reg. 27410 at 274110-12 (June 14, 1991); see also id. Courts have upheld agency decisions denying proposed access roads deemed to have unreasonable impacts on Federal lands. See e.g., Dobbs v. United States Forest Serv., No. CIV-16-112-RAW, at 23-24 (E.D. Okla. Dec. 26, 2017); Hoffenberg v. United States, No. CV-08-08164-PCT-FJM, at 4, 17 (D. Ariz. Aug. 5, 2010).

Here, though, the USFS seems intent on rubber-stamping the proponent's desired access, regardless of indicators in its own data. The Forest Service's conclusions related to "similarly situated" parcels are not supported by its own data. Further, the "other relevant criteria" considered by the Forest Service is random, incomplete, and arbitrarily used to support the agency's rubber-stamp.

In its DEIS the Forest Service contorts itself to find that the proponent's proposed use of the Berlaimont parcel is reasonable despite substantial evidence in the record to the contrary. To arrive at that conclusion the agency ignores obvious commonalities between Berlaimont and other inholdings, relies heavily on parcels that are not similarly situated, and cherry-picks a list of "other criteria" to support its predetermined conclusion. The agency fails to fully consider any of this information in an unbiased way.

- i. USFS's analysis of "similarly situated" parcels does not support the agency's conclusion.

The Forest Service began its reasonable use determination by looking for "similarly situated" parcels. In all, the agency examined 23 properties and compared them based on a number of characteristics that the agency claims are relevant. See DEIS, App. C at 3; see also id., App. C, Add. B at 1-4. Only ten of the parcels that the USFS examined were true inholdings.

Based on its review of these parcels, the USFS concluded that it found no properties "that were true NFS inholdings (i.e. entirely surrounded by NFS land) with a subdivision design where standard parcel is at least 35 acres." DEIS, App. C at 4.⁵ If that were true, the absence of similarly situated parcels would logically support a conclusion that the proposed use is not reasonable. Put another way, the absence of inholdings that have been subdivided to build high-end estates on large lots does not reflect contemporaneous uses of other inholdings and is, therefore, not a reasonable use.

However, the USFS's conclusion ignores the Muddy Pass/Lake Agnes development listed in Addendum B to Appendix C. DEIS, App. C, Add. B at 2. That parcel is a true NFS inholding,

⁵ Several inholdings were used for residential development, but all were more primitive than what is proposed at Berlaimont Estates. Most inholdings had only seasonal access. And all of the inholdings were accessed via dirt roads.

625 acres in size, that has been divided into 18 lots. Only one lot is less than 35 acres. In overall size of the inholding and in the size of the subdivided lots, the Muddy Pass/Lake Agnes development lines up very closely with the Berlaimont parcel. It shares other similarities with the proposed Berlaimont Estates development, too. There are some expensive dwellings that have been developed on lots in the Muddy Pass/Lake Agnes inholding.⁶ Marketing highlights proximity to the resort town of Steamboat and Denver.⁷ The development incorporates shared easements to protect access and open space.⁸

The Muddy Pass/Lake Agnes inholding shares one other important characteristic with the current, undeveloped Berlaimont inholding: both are accessed by unpaved, dirt roads. But the Forest Service makes no mention of the fact that dirt provides adequate access for the Muddy Pass/Lake Agnes inholding. Nor does the agency even consider that a dirt road may be adequate for reasonable use of the Berlaimont parcel.

The USFS concludes that the Berlaimont and Muddy Pass/Lake Agnes inholdings are not similar, but the agency provides no rationale for that. The only rationale apparent in the agency's ANILCA determination is the fact that there is no paved road into the Muddy Pass/Lake Agnes parcel, and a paved road is what the USFS intends to grant in this case.⁹ Obviously, the Berlaimont proponents want a paved road. The Forest Service, however, has an obligation to make its reasonable use determination based on similarly situated parcels.

⁶ Katy Canada, Denver Post, Historic corporate retreat near Steamboat Springs redone for family life, listed for \$4.95 million (August 30, 2017) (listing for \$4.95 million home in the Muddy Pass/Lake Agnes inholding), available at <https://www.denverpost.com/2017/08/30/phillips-petroleum-corporate-retreat-for-sale/> (last accessed 3/9/18); see also Sotheby's International Realty video listing for Rabbit Ears Lodge on Lake Agnes ("Own a rare piece of private lake front property just 25 minutes from the Steamboat Springs Ski Resort. Rabbit Ears Lodge is a breathtaking estate on 37.6 acres situated on Lake Agnes, a private 110 acre, crystal clear, stocked lake!"), available at <https://www.youtube.com/watch?v=veLGvZJbUww> (last accessed 3/9/18); LakeHomesUSA.com web listing for Lakefront home on 35 wooded/ranch acres for \$1.7 million ("The property is 35-acres of tress and pasture, with custom home and garages built to accommodate the BEAUTIFUL surroundings. Enjoy the exclusiveness of owning one of only 19-private sites encompassing 640-acres that include numerous ponds, streams, valley, and mountain terrain, then it is surrounded by two National Forests, and only 30-highway miles from the world-class ski resort in Steamboat Springs.")(emphasis original), available at http://www.oceanhomesusa.com/waterfront/steamboat-springs-walden-clark-oak-creek-steamboat-lake-n-platte-river_colorado_9260.html (last accessed 3/9/18).

⁷ Lakelubbers.com webpage on "Lake Agnes, Colorado USA" (describing how the inholding has been subdivided into 35-acre parcels that protect exclusivity and celebrate the surrounding natural environment. Also discussing shared easements that protect access and open space. And highlighting the inholding's proximity to the popular resort community of Steamboat Springs and to Denver (just 97 miles away)), available at <https://www.lakelubbers.com/lake-agnes-1328/> (last accessed 3/9/18); Land and Farm real estate listing for 1999 County Road 186, Lot 9 (listing a home for sale only 25 minutes from Steamboat Springs), https://www.landandfarm.com/property/Lake_Agnes_Colorado-232808/ (last accessed 3/9/18).

⁸ See Lakelubbers.com webpage at N.7 *supra*.

⁹ There may be some important differences between the Muddy Pass/Lake Agnes inholding. For example, from what we have been able to gather, the Muddy Pass/Lake Agnes parcel is much closer to a highway than Berlaimont, and the access road does not appear to traverse sensitive winter range for deer and elk. Also, there is no indication that access to the Muddy Pass/Lake Agnes parcel required the USFS to amend the applicable Forest Plan and eliminate protections for wintering wildlife. But, again, the USFS makes no attempt to identify or articulate these differences.

The agency cannot simply ignore defining characteristics of those similarly situated parcels to rubber-stamp the proponent's plan.

The Forest Service also fails to acknowledge and discuss in any detail several defining commonalities shared by the parcels that actually qualify as NFS inholdings. First, every one of the ten inholdings that the USFS looked at is accessed via dirt road. Not one has a paved access. Additionally, only two of the ten inholdings have year-round, snowplowed access.¹⁰ Those important characteristics, which the inholdings have in common, are clear in the USFS's data (see DEIS, App. C, Add. B), but ignored in the agency's conclusion. The lack of paved, year-round access to other inholdings underscores the unreasonableness of the proposed paved and plowed access for the Berlaimont proposal.

While overlooking or ignoring similarities between the Berlaimont parcel and other inholdings, the USFS relies heavily on comparisons to parcels that are not inholdings at all. For example, the agency includes several subdivided edgeholdings in its determination. See e.g., DEIS, App. C at 5; see also id., App. C, Add. B (listing Mountain Star, Cordillera, Wildridge, Homestead, and Singletree). Edgeholdings do not lie in the middle of National Forest, and as such they are not similarly situated. Development and access to edgeholdings, for example, generally does not involve traversing public lands or federally managed sensitive wildlife habitat. Edgeholding development certainly does not involve a reasonable use determination under ANILCA. Nonetheless, the Forest Service ignores these important differences and chooses to rely heavily on comparisons between the Berlaimont inholding and edgeholdings to support its reasonable use conclusions.

Comparisons that the USFS draws between the proposed Berlaimont Estates subdivision and subdivided edgeholdings show that the agency ignored the substantial impacts associated with developing inholdings that generally do not apply to parcels outside the National Forest. For example, the USFS concludes that the density is lower at Berlaimont than nearby edgeholdings and that development of Berlaimont may result in comparatively fewer impacts (DEIS, App. C at 5) while completely failing to mention that edgeholdings do not have roads traversing National Forest land with important public land values. The agency neglects to acknowledge or consider the substantially greater impacts that the proposed road to Berlaimont will have on public land values, and that any benefits will accrue to only 19 homeowners. Courts have confirmed that the "Forest Service is specially charged with unique duties to consider the public interest specifically with regard to private activities affecting National Forest System lands." Order Setting Aside Agency Action at 25, Rocky Mtn. Wild v. Dallas, Civil Action No 15-cv-01342-RPM (D. Colo. 2017). Here, the USFS's failure to acknowledge or consider the very different impacts that the Berlaimont access would have compared to edgeholdings further undermines the agency's reasonable use conclusion.

¹⁰ Importantly, from information that we have been able to gather on the few NFS inholdings that actually have plowed access, access to those parcels does not traverse sensitive winter wildlife habitat and such access did not involve amendment of a Forest Plan.

The agency's consideration of similarly situated parcels is arbitrary because it ignores defining characteristics of USFS inholdings and relies so heavily on comparisons to parcels that are not inholdings and are not similarly situated.

- ii. The "Other Relevant Criteria" considered by USFS are cherry-picked to support the agency's reasonable use determination.

In addition to looking at similarly situated parcels, the USFS also has authority to look at "other relevant criteria" in making a reasonable use determination. 36 C.F.R. § 251.114(a). But that examination should be fair and searching, it cannot be arbitrarily based on limited criteria intended to support the agency's position. This approach is prohibited because it creates a pre-determined outcome. Informed decisionmaking requires the agency to look at all relevant criteria. 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."). In this case, the agency undertook a cursory examination of a select few criteria to support approval of the proposal.¹¹ As discussed below, a more searching examination of these criteria, and consideration of other obviously relevant criteria that the USFS chose to ignore, confirm that the proposed use is not reasonable.

Berlaimont's proximity to the I-70 corridor and location within the resort area of the Vail Valley

The Forest Service puts great weight on Berlaimont's proximity to the I-70 highway corridor and the resort area of the upper Vail Valley.¹² For example, the agency concludes that "[a]dding the proposed 19 homesites to the area will not create a noteworthy increase in the amount of human activity on and around these highway-adjacent public lands." DEIS, App. C at 4. This conclusion, however, is backwards. Given the amount of sprawl in the valley and the clear impacts that is having and has had on the very same resources that would be impacted by this proposal, the USFS has a special duty to protect what's left.¹³

¹¹ Specifically, the agency examined: 1) Berlaimont's close proximity to the I-70 corridor, 2) Berlaimont's location within the resort area of the upper Vail Valley, 3) the applicant's site plan/homesite locations, 4) the applicant's plan for water supply infrastructure, 5) Colorado state law regarding subdivisions, 6) Eagle County zoning, and 7) Eagle County's Variance from Improvement Standards. See DEIS, App. C at 4.

¹² It isn't clear why the Forest Service's analysis suggests that this project will be developed in the Vail Valley—other than maybe to support its conclusion that another ritzy subdivision wouldn't be a marked departure from trends. Importantly, though, the project is located in the Eagle River Valley several miles from the Vail Valley.

¹³ As discussed below, the Forest Service is charged with developing and implementing plans that manage NFS lands to provide for diversity of plant and animal communities based on the suitability and capability of the specific land area. The agency is supposed to approve or deny particular projects based on the applicable forest plan. See 16 U.S.C.S. 1600-1614; 1604(a), (g), (g)(3)(B), (i); see also Section IV.A.iii. infra. Here, though, the agency is poised to eliminate protections in its plan for wintering wildlife to facilitate sprawl, which is largely responsible for steep and consistent declines in wildlife populations in the area. See Pam Boyd, Vail Daily, Forest Service process with Berlaimont Estates launches public good versus private rights debate, March 8, 2018 (quoting a former Colorado State wildlife manager: "Heicher said development along the Interstate 70 corridor has resulted in a 60 percent to 70 percent reduction of local critical deer habitat. He said projects such as Berlaimont add to the problem because they both reduce overall habitat and fragment

In reaching its conclusion that this project will not create a noteworthy increase in human activity in the area, the USFS ignores the fact that the public lands around the Berlaimont parcel receive varying amounts of use—ranging from relatively high use in the lower elevations around Edwards to low use in the higher areas near the proposed subdivision. The main access to the area, Road 780, is closed to regular vehicles in the winter. DEIS at 223. The DEIS confirms that granting the proposed access will increase daily vehicle trips from approximately zero trips per day in the wintertime now, to 215 trips per day after the project is complete. DEIS at 168. Based on this information in the DEIS, the FS’s conclusion is unsupported and wrong on any meaningful project-level scale. In fact, paving year-round access through these public lands will substantially change the amount and type of activities occurring on these public lands.

The FS’s cursory consideration of this project’s proximity to I-70 and resort communities further ignores the agency’s obligation to protect public land values and important wildlife habitat in the area.¹⁴ Wildlife in the Eagle Valley is in crisis due to the extensive development that has consumed important habitat.¹⁵ Several of the edgeholding developments discussed in the DEIS, as well as many more subdivisions in the area that were not considered by the FS, are responsible for consuming vast swaths of important habitat and devouring open space in the area. This project would contribute to that decline. Rather than acknowledging as much in its reasonable use determination and coming to the logical conclusion that one more sprawling subdivision in important habitat is neither reasonable nor in the public interest, the FS simply ignores those realities and concludes that paving the National Forest to facilitate more sprawl is a reasonable use.

The Forest Service’s reasonable use determination cannot ignore or disregard the problems with sprawl. Between 2001 and 2011, natural areas in the West—including forests, wetlands, deserts, and grasslands—were disappearing at the rate of one football field every 2.5 minutes.¹⁶ In the same period, sprawl accounted for more than half of all open space that was lost in the American West, and the footprint of cities and towns in the

habitat that remains.”), available at <https://www.vaildaily.com/news/forest-service-process-with-berlaimont-estates-launches-public-good-versus-private-rights-debate/> (last accessed 3/9/18).

¹⁴ See Note 13 *supra*.

¹⁵ See Exhibit 1; see also Scott Miller, Vail Daily, Vail Valley wildlife facing population declines due to development, traffic, Jan. 22, 2018, available at <https://www.vaildaily.com/news/vail-valley-wildlife-facing-population-declines-due-to-development-traffic/> (last accessed 3/9/18); Vail Daily Editorial Board, Vail Daily, Do we truly value wildlife? Then it’s time to acknowledge that it’s up to everyone to help, February 27, 2018 (noting “a roughly two-thirds decline in the elk herd between Vail Pass and Wolcott south of Interstate 70 in the past 15 years.”), available at <https://www.vaildaily.com/opinion/do-we-truly-value-wildlife-then-its-time-to-acknowledge-that-its-up-to-everyone-to-help-editorial/> (last accessed 3/9/18).

¹⁶ Center for American Progress, The Disappearing West Report, available here: https://disappearingwest.org/land.html#land_big_picture (last accessed 3/9/18); see also Center for American Progress, The Disappearing West: Colorado Fact Sheet (May 2016) (confirming that hundreds of square miles of natural area have been lost to sprawl in recent years, and calling for protection of large and contiguous areas of public lands), available at <https://disappearingwest.org/factsheets/colorado.pdf> (last accessed 3/9/18).

region grew nearly 17 percent.¹⁷ Some of the fastest growth in the West occurred in Colorado, including within Eagle County.

Sprawl is directly impacting National Forest System lands and the values on those lands that the USFS is charged to protect. Sprawl has eaten up vast swaths of the important wildlife habitat in the West, making animals more dependent on National Forest Lands for survival. Here the project proponent intends to use this parcel to develop a subdivision in the middle of our National Forest. This will directly undermine the Forest Service's ability to achieve goals articulated in the existing Forest Plan. In fact, the USFS has concluded that the project cannot be approved without amending the Forest Plan to eliminate protections for wintering wildlife. DEIS at 23 ("Fulfilling the Forest Service's obligations under ANILCA would result in an inconsistency with two forest-wide standards under Alternative 2 and an additional inconsistency with MA 5.41 under Alternatives 3 and 4 due to the design and year-round operation of the road on NFS lands.").

Since the proposed development of Berlaimont Estates really is suburban sprawl in the backcountry, the USFS should consider sprawl and the impacts of sprawl along with "other relevant criteria" in its reasonable use determination. There is a growing body of evidence confirming that the cost of sprawl is very high—ecologically and economically.¹⁸ We are rapidly losing the values that the Forest Service is charged to protect due to this sprawl. The question about whether more sprawl is a reasonable use of this parcel is the primary consideration before the USFS, and while the agency considers some of the impacts of sprawl in the DEIS, the agency fails to address them in any meaningful way in its reasonable use determination.

Based on the foregoing, conclusions drawn by the USFS that this sprawling subdivision would be reasonable because there is other sprawl in the area is arbitrary. It ignores the agency's mission, the serious impacts that existing sprawl has had on resources the USFS is charged to protect, and the fact that development of Berlaimont Estates promises more of the same.

The applicant's site plan/homesite locations

¹⁷ Id.

¹⁸ See e.g., Nick M. Haddad, et al., Habitat fragmentation and its lasting impact on Earth's ecosystems, *Science Advances*, Vol 1, No. 2 (March 20, 2015) (A synthesis of fragmentation experiments spanning multiple biomes and scales, five continents, and 35 years demonstrates that habitat fragmentation reduces biodiversity by 13 to 75% and impairs key ecosystem functions by decreasing biomass and altering nutrient cycles. Effects are greatest in the smallest and most isolated fragments, and they magnify with the passage of time. These findings indicate an urgent need for conservation and restoration measures to improve landscape connectivity, which will reduce extinction rates and help maintain ecosystem services.), available at <http://advances.sciencemag.org/content/1/2/e1500052>; see also National Science Foundation webpage on the study "Shrinking habitats have adverse effects on world ecosystems—and ultimately people" (March 23, 2015), available at https://nsf.gov/discoveries/disc_summ.jsp?cntn_id=134468&org=NSF (last accessed 3/9/18).

The Forest Service also considers the applicant's site plan/homesite locations to support its reasonable use conclusion.¹⁹ Here again the agency offers conclusory statements suggesting that the lower density of this development may result in fewer comparative impacts to adjacent NFS lands than other "existing developments nearby which border the National Forest." DEIS, App. C at 5. But, as mentioned above, those existing developments are not inholdings and did not require damaging roads to be built across the National Forest lands or a reasonable use determination by a federal agency. In contrast to the USFS's conclusion, the proposed improved access to this inholding will result in more direct impact to public land values than edgeholding development that does not involve crossing public land.

Also, in considering this criterion, the USFS again completely ignored the fact that Berlaimont's site plan and homesite locations represent a new sprawling residential subdivision in undisturbed open space. The agency has chosen not to consider whether or not the use of the parcel to create additional sprawl in the area is reasonable. Moreover, the DEIS fails to analyze and compare the impacts of increasing the existing development potential from three homesites to nineteen residential units, which is a direct impact of the proposal under consideration. Failure to consider whether more sprawl in the backcountry is a reasonable use will render the agency's determination arbitrary and capricious.

The extent of sprawl nearby supports a conclusion that more sprawl in the area—which will destroy and degrade important wildlife habitat, impact water resources, increase air pollution, reduce open space, etc.—is not a reasonable use of this National Forest inholding. Instead the agency attempted to use the existence of that sprawl to support a conclusion that new sprawl within the Forest is reasonable. The agency must do better. It must consider more searchingly the criteria that it says relate to this decision.

The applicant's plan for water supply infrastructure

The USFS notes that no new water-related infrastructure would be necessary to support the proposed development on U.S. Forest Service lands (DEIS, App. C at 5), but that is untrue. Agency officials confirmed the proponent's intent to lay a water line in the road that would cross USFS managed lands.

Further, the FS suggests that the developers have requisite approvals to develop the water systems they will need. In fact, the agency completely fails to acknowledge that the project proponent does not have approval to develop any water supply system or any sewage system. See e.g., Eagle County Land Use Regulations, Ch. VI – Areas and Activities of State Interest (requiring approval of a 1041 permit for water and sewer systems servicing more than 9 homes).²⁰

¹⁹ Note, the USFS considers homesite locations to support its reasonable use determination, but fails to consider visual impacts of homesite locations in its DEIS. See Section VI *infra*.

²⁰ As discussed in Section VI below, the USFS's DEIS arbitrarily fails to disclose and analyze the impacts of providing infrastructure for the proposed nineteen sites. The infrastructure required for the three homesites accessed by existing roads is also ignored based on the arbitrary, capricious, and false premise (DEIS at 28-29) that three homesites could be developed without further Federal control and responsibility. 42 C.F.R. §

The County's Land Use Code requires a lengthy permitting and approval process for new water and sewer service to any subdivision servicing 10 or more dwellings in unincorporated portions of the County. The County implemented these regulations under 1041 powers to promote the health, safety, and general welfare of the citizens and to protect the environment of Eagle County; to protect the beauty of the landscape and natural scenic characteristics, to preserve and protect important archeological and historic sites, to protect and enhance wildlife habitat, air and water quality, and to conserve natural resources; to ensure that new development will pay for itself to the maximum extent practicable, and to ensure that present residents of Eagle County will not have to subsidize new development through increased cost of public services and/or degradation of the quality of life; to plan for and regulate the site selection, construction, expansion, and operation of matters of state interest to facilitate the planned and orderly use of land as recommended by the Eagle County Master Plan; and to regulate the use of land on the basis of the financial and environmental impact thereof on the community or surrounding areas within the development area and source development area.²¹

Acquiring a permit under these regulations is not a foregone conclusion. These types of permits have been controversial in the past and the County has denied requests before. There is no evidence in the record that Berlaimont has acquired the requisite approvals from the County for water and sewage services for dwellings and accessory units proposed on the 19 separate lots.

Based on the criteria considered by the County, it seems unlikely that Berlaimont would be granted approval. Nonetheless, the Forest Service ignored this unresolved regulatory hurdle to reach its reasonable use determination. Failure to even consider onerous and unfulfilled permitting requirements undermines any USFS conclusion that the proposal is a reasonable use because of the applicant's plan for water supply infrastructure.

In fact, there are significant questions about what kind of facilities and infrastructure would be needed to provide water and sewer to an expensive subdivision that is so far from centralized infrastructure. The DEIS completely fails to answer those questions. As discussed later in the letter, the USFS never considers these facilities or their potential impacts. See Section VI *infra*.

Nonetheless, the USFS relies on this as another "relevant criteria" supporting its reasonable use determination. The agency mischaracterized the status of approval for the Berlaimont water and sewer system and its failure to discuss potential impacts of any such system are just another example of the agency failing to take a searching look at criteria that it

1508.18. The DEIS deficiency is compounded by arbitrary reliance on County processes as a substitute for NEPA duties. The DEIS must, but does not, analyze and compare a no action alternative that denies both road and infrastructure access and the action alternatives involving the federal approval required for three or nineteen homesite proposals.

²¹ Eagle County Guidelines and Regulations for Matters of State Interest, available at http://www.eaglecounty.us/Planning/Documents/Chapter_VI_-_Areas_and_Activities_of_State_Interest_052012/ (last accessed 3/9/18).

determined to be relevant to the decision and failing to disclose important facts that do not support its reasonable use conclusion.

Colorado state law regarding subdivisions

The USFS looks at State and local regulations as “other relevant criteria.” The agency suggests that the State’s exemption of 35-acre parcels from subdivision regulations supports the conclusion that Berlaimont’s proposal is a reasonable use. DEIS, App. C. at 6. Simply acknowledging that there is an exemption from subdivision regulations for 35-acre parcels does not satisfy the agency’s obligations. Nor does it support the agency’s conclusion. Here the agency has an independent obligation to determine whether the proposed use is reasonable.

It is commonly accepted that the exemption of 35-acre parcels is contributing to the proliferation of exurban sprawl in Colorado.²² This large lot development results in the loss of rural landscapes, open space, and wildlife habitat.²³ It also leads directly to a decline in air and water quality. For example, new septic systems (like the ones that would be used at Berlaimont (see e.g., DEIS at 7; see also Section VI *infra*) increase waste nutrient counts in surface and groundwater. And disturbance from roads and driveways inhibit natural infiltration of pollutants through topsoil as rainwater runs directly off paved surfaces into drains. Air quality suffers too as drivers spend more and more time driving between exurban developments and communities where they work and/or where they get services. Some of these potential impacts are mentioned in the DEIS, but the agency fails to consider any of them in the reasonable use determination.

The Forest Service must do more than simply mention the existence of a state law. The agency has a duty to consider whether the suburban sprawl proposed by Berlaimont proponents is a reasonable use under the circumstances.

Eagle County zoning classification

The USFS comes to the same conclusion with regard to County regulations, saying low-density residential development on 35-acre parcels is allowed without need for further review and approval by the Planning Commission or Board of Commissioners. DEIS, App. C at 6, 7 (the proposed use is “consistent with... Eagle County zoning regulations.”). Again, a more searching look does not support the agency’s conclusion.

²² See e.g., Environment Colorado Research and Policy Center, *Losing Ground: Colorado’s vanishing agricultural landscape* (March 2006) (“...subdivisions 35 acres and greater are proliferating in Colorado’s open spaces. Between 1972 and 2000, 2 million acres of agricultural land was lost in tracts sized just big enough to avoid regulation.” (internal cites omitted)), available at https://environmentcolorado.org/sites/environment/files/reports/Losing_Ground.pdf (last accessed 3/9/18).

²³ *Id.*; also note Federal agencies have consistently determined that this 35-acre exemption may negatively impact wildlife resources. See e.g., 73 FR 6660, 6672 (concluding that exemption from county subdivision regulations may negatively impact some prairie dogs); 78 FR 2486, 2523 (same conclusion with regard to Gunnison Sage Grouse).

This particular parcel is zoned Resource in the Eagle County Land Use Plan. As the Forest Service notes in the DEIS, that zone is intended to “maintain the open rural character of Eagle County” and to “protect and enhance the appropriate use of natural resources and agricultural uses in the County including water, minerals, fiber, and open land....” Eagle County Land Use Regulations, Article 3 – Zoning Districts; see also DEIS at 2.

In fact, this proposal would do nothing to maintain the open rural character of the County, nor would it protect or enhance the appropriate use of natural resources and agricultural uses. This proposal would put a suburban subdivision in the middle of undeveloped National Forest land, and it would require a highly visible and impactful road through sensitive wildlife habitat and cherished community open space to get there.

Similar to federal land management laws, Eagle County land use regulations do not condone backcountry sprawl. For example, the County’s land use code and Master Plan aim to “reduc[e] the waste of excessive amounts of roads; promote energy conservation; secur[e] safety from fire; ...”, while “Protecting both urban and non-urban development; conserving value of property and encouraging the most appropriate use of land.” See Eagle County Land Use Regulations at Section 1.02 Purposes. The rules intend to regulate activities that would result in significant changes in population density, on the basis of impacts to local communities and surrounding areas, and generally aim to provide for the “orderly use of land and protection of the environment in a manner consistent with constitutional rights.” *Id.* The County’s regulations also strive to protect lands from activities that would cause immediate or foreseeable danger to significant wildlife habitat and would endanger wildlife species. *Id.* Generally, sprawling residential development in the backcountry (like the Berlaimont Estates proposal) is not a reasonable use under Eagle County’s Land Use Code or the Master Plan.

Additionally, the Forest Service’s discussion of County regulations fails to acknowledge that further review and approval from the County will likely be necessary for this project under the 1041 regulations mentioned above. See Section on *The applicant’s plan for water supply infrastructure supra*.

Failure to even consider onerous and unfulfilled permitting requirements undermines any USFS conclusion that the proposal is consistent with or reasonable under County regulations. Here again it is apparent that the USFS undertook only a superficial examination of other relevant criteria.

Eagle County Variance from Improvement Standards

The USFS puts substantial stock in Eagle County’s issuance of a road variance for this project. DEIS, App. C at 6 (“Implicit in granting of this variance is an acknowledgement by the County that the applicant’s proposed development of their property is lawful.”). The agency suggests that approval of this variance supports its reasonable use conclusion. That simply is not true.

The County issued a variance based on consideration of technical criteria related to engineering standards.²⁴ The County did not review the land use plan or the environmental and social impacts of this development, nor did the County condone this as a reasonable land use.²⁵

The variance dictates the standards that a road would need to meet if the proponents of Berlaimont were allowed to develop the parcel as proposed. And, in fact, the extensive requirements of that variance underscore the impact that the proposed development would have on other important values. Given how massive and impactful the road would need to be, the variance could be used to strongly support a conclusion that the proposed land use is not reasonable. But the USFS failed to even consider that.

Other relevant criteria the agency failed to consider

As discussed above, the Forest Service should have considered the impacts of more sprawl in the backcountry along with “other relevant criteria.” Such consideration should include discussion of the impacts that sprawl is having on local communities and public land values (including wildlife). It is hard to see how, if the agency actually frames this proposal for what it is, the agency could conclude that it is a reasonable use of the parcel.

Among other relevant criteria, 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

²⁴ See Letter from the Eagle County Board of County Commissioners to Scott Fitzwilliams, Forest Supervisor, Re: Berlaimont Estates’ Access Route Draft Environmental Impact Statement, March 12, 2018, (“In 2014, the County conditionally approved a request from Berlaimont for a variance from the improvement standards contained in the Eagle County Land Use Regulations pertaining to dual access, emergency vehicle turnaround areas and certain road improvement standards, including those for turn radii. The standards for approval of this variance are technical in nature; consequently, the County did not have the opportunity to consider the social and environmental impacts of a permanent access road to the Berlaimont property. The County’s role was limited to deciding whether to grant a variance to roadway standards. Therefore, the road variance approved by Eagle County should not be interpreted as approval for this type of land use as suggested in the DEIS. The variance simply dictates the standards that a road would need to meet if the proponents of Berlaimont were to develop the parcels as proposed.”), attached as Exhibit 2.

²⁵ Id. (“... we want to make clear that the road variance approved by Eagle County was not an approval for this development or for this type of land use. We hope that any approved action will adequately balance a need for adequate access to private property with the critical need in Eagle County to preserve the quality of public lands and natural resources, including wildlife habitats.”); see also Pam Boyd, Vail Daily, Eagle County approves road variance for Edwards development, Dec. 12, 2013 (“BETH AYRES OLIVER, EAGLE COUNTY ASSISTANT ATTORNEY, CAUTIONED THE COMMISSIONERS THAT THEY NEEDED TO FOCUS THEIR REVIEW AND COMMENTS SOLELY ON THE ROAD VARIANCE ISSUE, NOT THE LARGER ISSUE OF THE DEVELOPMENT PLAN ITSELF. THE LARGER DEVELOPMENT ISSUES WILL BE VETTED DURING THE FOREST SERVICE PROCESS.”) (caps original), available at <https://www.vaildaily.com/news/eagle-county-approves-road-variance-for-edwards-development/> (last accessed 3/10/18); Pam Boyd, Vail Daily, Eagle County examines road concerns related to Berlaimont Estates proposal, Oct. 3, 2013 (“...Eagle County will not be reviewing the land use plan. There will be a U.S. Forest Service review process to address various development issues...”), available at <https://www.vaildaily.com/news/eagle-county-examines-road-concerns-related-to-berlaimont-estates-proposal/> (last accessed 3/10/18).

proposed land use is reasonable given the fact that it will perpetuate and contribute to the ongoing decline of the area's important and sensitive wildlife populations.

The Forest Service also ignored the overwhelming opposition to this project that members of the public articulated during the scoping period. While the DEIS fails to include any discussion of public comments, there are emails in the record confirming the fact that the overwhelming majority of public comments opposed granting an easement to access the proposed Berlaimont subdivision.²⁶ 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.

Finally, the USFS should 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. DEIS at 197. Wildland fires are increasing in regularity and severity with climate change. The DEIS 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. This proposal will simply put more people and more property in harms way. The potential costs of that decision cannot be ignored by the agency in determining if this is a reasonable use.

In sum, here the Forest Service's consideration of "other relevant criteria" is superficial rather than seeking. 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.

- iii. The proposed Forest Plan amendment underscores that this proposed use is not reasonable.

The National Forest Management Act of 1976, 16 U.S.C.S. § 1600 et seq., requires the USFS to develop a land and resource management plan, commonly known as a forest plan, for each unit of the National Forest System. Each forest plan envisions the forest will be used for multiple purposes, including outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness. 16 U.S.C.S. § 1604(e)(1). At the same time, the forest plan provides for diversity of plant and animal communities based on the suitability and capability of the

²⁶ 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).

specific land area. 16 U.S.C.S. § 1604(g)(3)(B). These plans are developed with extensive analysis and numerous opportunities for public comment that often span years. In turn, the Forest Service implements each forest plan by approving or disapproving particular projects, each of which must comply with the applicable forest plan.

Now, though, the USFS is proposing to change the Forest Plan to eliminate important wildlife protections, so that the agency can approve this damaging proposal. See e.g., DEIS, App. B at B-2 (“All three access roads under consideration would be inconsistent with White River Forest Plan (2002) Standards.”). Here, inconsistency with the Forest Plan is strong evidence that the proposed use is not reasonable.

The specific standards from which the proposed project would have to be exempted include seasonal restrictions to reduce disturbance in key wildlife habitat (Wildlife (General) Standard #1), and seasonal restrictions intended to protect breeding Brewer’s Sparrow (Wildlife (sage grouse and Brewer’s sparrow) Standard #4). *Id.* at B-2 – B-3. An exemption would also be necessary for Alternatives 3 and 4 from a requirement to avoid building new infrastructure through important forage, cover, and birthing areas (Infrastructure Standard #2). *Id.* at B-3.²⁷

The standards are in place to protect wildlife that, as discussed throughout this letter and in numerous other comment letters in the project record, is in dramatic decline.²⁸ Professionals at the Colorado Department of Parks and Wildlife spelled out the situation in scoping comments, and it is dire. See Exhibit 1. Deer and elk rely heavily on the project area for winter habitat and as a migration corridor. The proposed project will directly destroy and diminish the effectiveness of this habitat. It will contribute directly to the mortality of these animals and drive them into other areas. But, due to extensive sprawling development elsewhere in the Eagle Valley, these animals increasingly have nowhere to go.

Similar impacts would accrue to other sensitive species, including the Brewer’s sparrow and greater sage-grouse, that rely on the area. These species would suffer habitat loss and reduced effectiveness of habitat as well. Both species are in steep decline because development and fragmentation of habitat. This project promises more of the same.

The need to amend the plan is relevant to the reasonable use determination, but the agency fails to adequately address it. See e.g., 36 C.F.R. § 251.114(f)(3). In fact, the Forest Plan amendment is mentioned only one time in the ANILCA determination—in a regulatory reference. Otherwise, the agency completely ignored this issue.

²⁷ Note: The DEIS suggests that MA 5.41 Infrastructure Standard #2 would not be required under Alternative 2 because it would follow existing road alignments, the agency fails to acknowledge that there will likely be destruction of important forage, cover, and/or birthing areas with construction of a new, paved, year-round, road that is twice the width of the existing road.

²⁸ Scott Miller, Vail Daily, Vail Valley wildlife facing population declines due to development, traffic, Jan. 22, 2018, available at <https://www.vaildaily.com/news/vail-valley-wildlife-facing-population-declines-due-to-development-traffic/> (last accessed 3/9/18).

The need for a Forest Plan amendment would logically be discussed and considered in the Forest Service's analysis of similarly situated parcels, and along with "other relevant criteria." For example, were forest plan amendments necessary for access to any of the other inholdings considered by the agency? A negative answer would raise questions about the reasonableness of this proposal, and may support a conclusion that the proposed use is not reasonable.

Similarly, the need to completely revise the area's management should be considered along with "other relevant criteria." After all, the Forest Service implemented a management regime for the area based on years of study and consideration of various alternatives in the 2002 White River Land and Resources Management Plan. That plan was subject of multiple rounds of public comment and appeal. Further, the project proponent purchased the parcel with existing management in place. Nonetheless, the Forest Service undertakes no substantive discussion of the need for an amendment in its reasonable use determination.

Prior to concluding that any development at the Berlaimont Estates that involves National Forests or other interests in federal land is a reasonable use, the USFS must revisit the rationale for its previous determinations in the Forest Plan and consider whether the new proposal warrants reversal of the plan on its merits. It is not enough that someone demands access, the reasonableness of the request must be examined in context of NFMA's planning regimen.

National Forests exist, not to encourage, or even accommodate, private development, but rather to protect public resources, such as wildlife and fish, and watersheds. Approving access for a real estate development and eliminating the protections in the Forest Plan to accommodate that development directly contradict this purpose.

In this case, the developer bought a parcel surrounded by National Forest lands that provide important wildlife habitat. Existing routes to access the inholding were subject of seasonal closures to protect wildlife. The developer purchased the parcel with knowledge of these circumstances. The limitations were likely reflected in the price he paid. It is not reasonable now for the developer to claim, and it would be unreasonable for the Forest Service to find, that his use and enjoyment of the parcel requires amending the Forest Plan to construct a new, much more impactful access that completely undermines existing protections for wildlife and other values on the surrounding public lands. The fact that the developer's plan would require such drastic changes in management and access suggests strongly that his proposal is not a reasonable use. The Forest Service, however, failed to even consider or discuss this issue in its reasonable use determination.

B. THE FOREST SERVICE'S OWN ANALYSIS CONFIRMS THAT "ADEQUATE" ACCESS TO THE PARCEL EXISTS AND/OR NECESSITATES SUBSTANTIALLY LESS THAN PROPOSED IN ACTION ALTERNATIVES.

As discussed above, adequate access to this parcel already exists. See Section II supra. That is where the USFS's analysis should stop. Applicable USFS regulations say, where there is adequate access or access that can be made adequate, there is no obligation to grant

additional access. 36 CFR § 251.110(g). The law does not require maximum or even desired access, adequate access is all that is required.

Even if the USFS disagrees that adequate access exists and proceeds with its ANILCA determination, it is clear that access could be made adequate with substantially less impactful improvements than those proposed in the action alternatives.

Under ANILCA and applicable regulations the law requires that, after concluding whether the proposed use is reasonable, the USFS must determine what type of access is adequate. Again, ANILCA § 1323(a) only requires the Forest Service to provide access "that the Secretary deems adequate for the reasonable use and enjoyment" of the property, "subject to such terms and conditions as the Secretary of Agriculture may prescribe." 16 U.S.C. § 3210(a). Adequate access should be "consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources." 36 C.F.R. § 251.111; *see also* *id.* at §§ 251.114(a), 251.110(c). In many cases that adequate access is far less than project proponents would like.²⁹

In reviewing permit applications for access across National Forest lands, federal case law makes clear that the Forest Service is not required to grant any particular type of access and the agency has broad authority to condition any access that it may approve. For instance, Courts have found adequate access to inholdings "via remnants of an old foot trail or cross country." Dobbs v. United States Forest Serv., No. CIV-16-112-RAW, at *2, 23-24 (E.D. Okla. Dec. 26, 2017). A Montana federal court denied road access when it upheld a Forest Service decision to require access to an inholding via foot, horse, or helicopter. Johnson v. U.S., No. CV 00-217-BLG-RWA (D. MT, April 2, 2002) at 20, *aff'd*, 93 Fed. Appx. 133 (9th Cir. Mar. 12, 2004) ("ANILCA...does not guarantee the cheapest access, only adequate access."). Another federal court in Idaho upheld periodic road closures, restrictions on snowplowing, and other conditions placed on access by the Forest Service to protect resources. Mountain States Legal Foundation v. Espy, 833 F. Supp. 808, 817 (D. Idaho 1993). Courts have also held that use of forest roads beyond what is allowed for the general public is subject to reasonable regulation for the protection of public lands and forest resources. Adams v. United States, 255 F.3d 787, 795 (9th Cir. Nev. 2001).

In this case, the Forest Service's conclusion that the proposed development constitutes "reasonable use" is flawed as discussed above. *See* Section IV.A. *supra*. The Forest Service looked at 10 Forest Service inholdings every one of which was accessed via dirt road, and only two of which have plowed winter access. The few inholdings that have plowed winter

²⁹ Importantly, the DEIS conflates the easement and special use permit, yet acknowledges the project proponent will need a special use permit from the Forest Service. *See also* Section VII *infra*. Applicable regulations make it clear that the agency can deny special use permits based on environmental or other considerations. 36 C.F.R. § 251.54(g)(4) ("Based on evaluation of the information provided by the applicant and other relevant information such as environmental findings, the authorized officer shall decide whether to approve the proposed use, approve the proposed use with modifications, or deny the proposed use." (emphasis added)). Conflating the authorities and discretion involved in granting an easement or issuing a special use permit to respond to a development proposal involving ANILCA access conceals available alternative courses of action, and unlawfully limits the scope of the DEIS.

access are not located in areas with important winter wildlife habitat and did not involve amending the applicable Forest Plan.³⁰ Those facts strongly suggest that adequate access to this inholding would be something less impactful and intensive than the 26-foot wide, paved, year-round access proposed by the proponent.

The Berlaimont parcel is accessible via existing roads that are open to cars and trucks in snow-free seasons and by snow machines in the winter. Seasonal closures are in-effect to protect important Federal resources. The project proponent purchased the parcel with access via existing routes and without any guarantee of additional or improved access. It is unreasonable for the owner to claim a right to a new paved, two-lane road that is accessible year-round to facilitate development far in excess of the type on other similarly situated inholdings.

The Forest Service is not required to grant additional or upgraded access:

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); see also § 251.114(f)(1). In fact, the authorized officer shall approve only those access facilities or modes of access necessary for reasonable use and enjoyment of the land and that minimize the impacts on the Federal resources. Id. at § 251.114(a)(emphasis added). Clearly then, the Forest Service is under no obligation to grant the most convenient access for maximum use or maximum revenue-producing use, but the agency does have an affirmative obligation to minimize impacts.

Agency regulations indicate that, in some circumstances it would be inappropriate for the Forest Service to authorize special access at all. For example, prior to authorizing special use, the Forest Service must determine that there are no other existing rights or access routes available by deed or under State or common law. 36 C.F.R. § 251.114(f)(1). Routes shall not be authorized if they fail to minimize adverse impacts on soils, fish and wildlife, scenic, cultural, threatened and endangered species, and other values of the Federal land. Id. at § 251.114(f)(2). And regulations indicate that consistency with the Forest Plan is an important and primary consideration. Id. at § 251.114(f)(3).

The proposed year-round paved access to Berlaimont that the USFS considered in all action alternatives would fail to minimize adverse impacts. For example, each alternative would involve eliminating important protections for wintering wildlife in the Forest Plan. See e.g., DEIS at 23-24. Each action alternative would in result in alteration, fragmentation, or removal of wildlife habitat for threatened and endangered species, as well as for sensitive

³⁰ Based on our review, none of the parcels listed in Addendum B that have snowplowed access have the same wildlife issues as Berlaimont. For example, neither the Montezuma Heights inholding or the Taylor Gulch inholding are in important deer and elk winter range that has been closed to protect sensitive wildlife. See DEIS, App. C, Add. B. A Forest Plan amendment does not appear to have been necessary for access to either of those parcels.

species. See e.g., DEIS, Table 2-7 at 78. Harrington penstemon, for example, would suffer a loss of between 24 and 26 percent of occupied habitat within the analysis area as a result of the project, and the viability of populations in the area may be affected by development of this project along with other habitat loss from development in the area. DEIS at 204, 207. The DEIS confirms that all action alternatives are “likely to adversely affect” endangered fish. Id. at 79; 227. All action alternatives would result in “direct mortality of eggs and/or nestlings of all migratory bird species known or suspected of occurring in the project area...” Id. at 24, 32, 79, 82, B-5.

The area’s declining deer and elk populations that are increasingly dependent on this swath of land for winter habitat and migration will experience “reduced habitat effectiveness and habitat losses” Id. at 80, 232, 233, B-5. This would displace deer and elk to “other already occupied winter range and unoccupied lower quality habitat.” Id. at 80. New disturbances and increased barriers would force deer and elk to “move more frequently and move longer distances” in seasons when these animals are surviving on starvation rations and every calorie counts. Id. This would result in “additional winter kill losses” of both deer and elk. Id. These impacts would result from “road construction effects, habitat impacts, restricted movements, reduced habitat effectiveness, road and highway mortality, road use and private residential effects, and displacement from recreational trail corridors...” Id. at 79.

In sum, the action alternatives considered all involve paved, year-round access through important winter habitat. Such access is substantially more impactful than access to any of the other inholdings that the USFS examined as similarly situated parcels. The impacts anticipated to result from approval and construction of any of the action alternatives are clear evidence that all of them fail to minimize potential impacts.

Simply, the Forest Service’s ANILCA determination and its DEIS fail to support a conclusion that building 19 new up-scale homes on the inholding is reasonable use or that authorizing a new paved, year-round road through this sensitive wildlife habitat is necessary for adequate access. See e.g., *Alpine Lakes Prot. Soc’y v. U.S. Forest Serv.*, 838 F. Supp. 478, 484-85 (W.D. Wash. 1993); see also *Hale v. Norton*, 476 F.3d 694, 700-701 (9th Cir. 2007).

V. THE FOREST SERVICE FAILED TO CONSIDER REASONABLE ALTERNATIVES.

In preparing an EIS, the Forest Service is required to consider a reasonable range of alternatives. The alternatives analysis forms the “heart of the environmental impact statement.” 40 C.F.R. § 1502.14. 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. Id. 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.” Id.

This section of an EIS should “[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.” Id. at § 1502.14(a) (emphasis added). The existence of reasonable but unexamined alternatives will render an EIS inadequate. See Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1065 (9th Cir. 1998). Agencies must “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.” 40 C.F.R. § 1502.14(b). The EIS must consider “reasonable alternatives not within the jurisdiction of the lead agency,” as well as a no action alternative. Id. at § 1502.14(c), (d). In addition, agencies must consider and discuss “appropriate mitigation measures....” Id. at § 1502.14(f).

A. THE FOREST SERVICE MUST CONSIDER ALTERNATIVES THAT MINIMIZE AND MITIGATE IMPACTS, INCLUDING LESS IMPACTFUL ACCESS AND MAINTAINING SEASONAL CLOSURES.

Impacts flowing from a grant of ANILCA access must be mitigated by “such terms and conditions as the Secretary of Agriculture may prescribe.” 16 U.S.C. § 3210(a), (b). 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. As discussed above, the Forest Service has a duty to minimize potential impacts. 36 C.F.R. § 251.111; id. at § 251.114(a), (f)(2).

Again, the flawed ANILCA determination undermines the USFS’s decision to eliminate or not consider several alternatives that would minimize and mitigate impacts. For example, based on a conclusion that year-round access by normal cars and trucks is appropriate, the USFS fails to consider any alternative that would keep seasonal closures in place and avoid the need for a Forest Plan amendment.

The current owner purchased the property with notice of seasonal road closures affecting access to the parcel. And the Forest Service has an obligation to minimize impacts on resources. Good winter wildlife habitat for big game is an important and dwindling resource that deserves protection, and it has been a management priority of the Forest Service for years. Therefore it would be reasonable for the Forest Service to consider alternatives that maintained seasonal closures or avoided adverse impacts to winter range.

Failure to consider maintaining closures and complying with the existing Forest Plan in any action alternative in this DEIS violates the agency’s obligation to consider all reasonable alternatives and the agency’s obligations to minimize damages and to protect forest resources. As discussed above, 80 percent of the National Forest inholdings examined by the USFS do not have snowplowed access in the winter. DEIS, App. C, Add. B at 1-4. 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.

The Forest Service also refused to consider an alternative granting access on a dirt road, even though every one of the 10 inholdings the agency considered in its reasonable use determination is accessed via dirt road. DEIS, App C., Add. B at 1-4. The Forest Service dismissed this alternative based on potential impacts to water quality. DEIS at 42. In dismissing this potential alternative, however, the Forest Service ignored an alternative that is very clearly reasonable based on the fact that every other inholding is accessed via dirt road, and the agency failed to undertake its obligation to consider and comparatively examine the potential impacts of that alternative.

If the Forest Service actually considered a dirt road alternative, the agency may find that minor improvements to the existing access roads are appropriate to facilitate adequate access, that mitigation measures could minimize potential impacts of such an alternative on water quality, and that the other potential impacts (e.g., impacts to wintering wildlife, scenery, etc) are substantially less with a dirt road than the paved road action alternatives that were considered. The Forest Service should consider reasonable alternatives that involve minor improvements to existing dirt roads and do not include new pavement.

In addition, since the water quality impacts are the only justification that the Forest Service gives for its failure to consider a dirt road alternative, it may also be reasonable for the agency to consider a partial pavement alternative. Such an alternative may involve paving those portions of the access road in important water influence zones and leaving the rest of the road soft surface. Such an alternative may provide adequate access to the parcel while minimizing damage to water quality and the numerous other values that will be impacted by this project.

Another reasonable alternative that was proposed in scoping comments, is the use of tunnels and bridges to reduce long-term land disturbance and fragmentation. The DEIS mentions the use of bridges over Beard Creek in its discussion of BMPs, but only over Beard Creek. DEIS at 51. That token consideration fails to satisfy the agency's obligation to look at reasonable alternatives. Further, there is no indication that those BMPs would be mandatory. Recent press statements by USFS officials suggest they aren't committed to any particular BMPs yet.³¹

The Forest Service must look at alternatives that consider bridges and tunnels more broadly. For example, it would be reasonable, given the wildlife resources at issue, to consider tunnels and bridges for each proposed access route. It is unclear why the USFS failed to consider additional bridges, as well as tunnels in other portions of the analysis area to reduce impacts. Such engineering tools have been incorporated into high-end developments elsewhere in the Eagle Valley for the benefit of various resources.

³¹ See e.g., Pam Boyd, Vail Daily, Forest Service process with Berlaimont Estates launches public good versus private rights debate, March 8, 2018 ("I don't yet have a good answer of what those mitigations will look like," Mayville said. He noted they could include lower speed limits on the road, speed bumps, flashing signs, wildlife crossing bridges and road barriers. Regardless of what is required, Mayville noted that the developer will be responsible for financing the road construction."), available at <https://www.vaildaily.com/news/forest-service-process-with-berlaimont-estates-launches-public-good-versus-private-rights-debate/> (last accessed 3/9/18).

The Forest Service also failed to consider issuing a special use permit and an easement as two separate alternatives. Special use permits and easements are different legal tools that convey different rights and responsibilities, and will result in different impacts to the human environment. The USFS must consider the various legal tools that might be used to grant access in separate and distinct alternatives.

As discussed throughout this letter, the DEIS also fails to analyze and compare a no action alternative that denies both road and infrastructure access and action alternatives involving the federal approval required for three or nineteen homesite proposals. As it is, the range of alternatives considered in the DEIS is unreasonably narrow.

The Forest Service's failure to consider these reasonable alternatives renders the EIS inadequate.

B. THE FOREST SERVICE FAILED TO CONSIDER ACQUIRING THE PROPERTY VIA PURCHASE OR EXCHANGE.

The private land parcel for which access is sought is completely surrounded by national forest land.³² Much of the private land and access to it are on steep slopes and overlap with important wildlife habitat. The area is also a popular recreation spot, an important hunting ground, part of a public water supply, and a very visible piece of wildland from almost anywhere in the Edwards area. Thus, any substantial development and upgraded access for this parcel would adversely impact a variety of resources.

Several years ago, an adjacent parcel owned by the State of Colorado was exchanged to consolidate ownership, ease management, preserve open space, and to protect resources in the area. The Forest Service should consider acquiring this parcel as well. By virtue of its location and the various resources it provides, this parcel really belongs in public ownership. The Forest Service should attempt to acquire this land before approving any access that would lead to development.

This reasonable alternative was raised by several commenters during scoping. Nonetheless, the Forest Service failed to consider it or even address it in the Draft EIS.

VI. THE FOREST SERVICE FAILED TO TAKE A HARD LOOK AT IMPACTS ASSOCIATED WITH ALTERNATIVES AND CONNECTED, CUMULATIVE AND SIMILAR ACTIONS.

NEPA is triggered by "Federal control and responsibility, which are the defining features

³² Forest Service regulations require consideration of a voluntary land exchange in situations involving the grant of ANILCA access to wilderness inholdings. 36 C.F.R. § 251.114(g)(3). It would be reasonable for the agency to consider such an alternative in this situation too, where access will be damaging to important resources and involve amendment of the Forest Plan.

of a “major federal action.” 40 C.F.R. § 1508.18. When impacts of the “major federal action” are significant and require an EIS, “[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” 40 C.F.R. § 1502.4(a). The “federal action” is the private proposal that the Forest Service grant road and utility access necessary to “to develop single-family residences” due, in part, to “current maintenance level and condition of the existing FSRs [that] are not at the level desired by Berlaimont Estates to meet their objectives.” DEIS at 3. However, the DEIS sets out an unlawful “federal action” that excluded the “direct impacts” impacts of the private development proposal that depends on expanded use of federal lands, creating an arbitrarily narrow NEPA analysis.

The action agency, with assistance of cooperating agencies, must also “analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts of ‘past, present, and reasonable foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.’” Custer County Action Ass’n v. Garvey, 256 F.3d 1024, 1035 (10th Cir. 2001) (“federal action” triggers the agency’s NEPA duty (42 U.S.C. § 4332(2)(C)) to use NEPA’s procedural requirements). To determine the appropriate scope of EISs, agencies shall consider direct, indirect, and cumulative impacts of all reasonable alternatives and connected, cumulative and similar actions. 40 C.F.R. § 1508.25. “Connected actions” are those which “[a]utomatically trigger other actions which may require environmental impact statements,” or which “[c]annot or will not proceed unless other actions are taken previously or simultaneously, or that “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” *Id.* “Cumulative actions” are those “which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” *Id.* “Similar actions” are defined as those which, when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. *Id.*

Here, neither an expanded easement nor special access authorization would be necessary but for the developer’s plan to subdivide the subject parcel and build homes there. Without federal authorizations necessary for the proposed new, year-round access road, the developer will not be able to develop the high-end, year-round, residential community that has been proposed on the parcel. The two actions are therefore connected.³³ And the Forest Service has an obligation to consider impacts of both the road and foreseeable development of the inholding, as well as impacts of all the other connected, cumulative and similar actions, in the same EIS.

³³ Courts have granted injunctions based on the USFS’s failure to consider residential developments along with the road infrastructure necessary to support them cumulatively and as connected actions. Colo. Wild, Inc. v. United States Forest Serv., 523 F. Supp. 2d 1213, 1224-1226 (D. Colo. 2007). The definitional overlaps between ‘cumulative’ and ‘connected’ are harmonized and effectively applied to the facts based on the Tenth Circuit’s reconfirmation of NEPA’s “single-EIS” mandate. See Cure Land, LLC v. USDA, 2016 U.S. App. LEXIS 14844, at *23-24 n.11 (10th Cir. Aug. 12, 2016). 40 C.F.R. § 1502.4(a) (“Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.”).

The developer's plan—made possible only by authorization of special access permit or an easement—will convert prime, undeveloped wildlife habitat into a residential enclave of large homes. It will transform an area primarily utilized by wildlife, hunters, recreationists, and as a source of public water, into an access corridor for a developed subdivision. Importantly, too, the proposed residential development will be high-end and service-intensive. All of the actions and impacts associated with creating this new residential community where none currently exists must be considered in an EIS.

Nonetheless, the USFS failed to take a hard look at potential impacts of several connected actions. For example, the DEIS confirms that the proponents plan to utilize septic systems for each of the 19 homes and all accessory units. *See e.g.*, DEIS at 7 (“Homesites would be on individual sewage disposal systems (septic systems)”). The agency fails to consider any potential impacts associated with these septic systems.

Similarly, the DEIS confirms that water supply infrastructure will be located on private lands (DEIS, App. C at 5), but the agency fails to disclose and analyze what that water infrastructure might look like or the impacts of how it may operate. The agency must consider what kind of facilities will be necessary to support this type of development, how big they will be, and the impacts of building and operating those facilities.

The DEIS arbitrarily fails to disclose and analyze the impacts of providing water and sewer-related infrastructure for the proposed nineteen sites. The infrastructure required for the three homesites accessed by existing roads is also ignored based on the arbitrary, capricious, and false premise (DEIS at 28-29) that three homesites could be developed without further Federal control and responsibility. 42 C.F.R. § 1508.18. These DEIS deficiencies are compounded by arbitrary reliance on County processes as a substitute for NEPA duties. *See* Section IV.A.ii *supra*.

The DEIS also failed to take a hard look at how the habitat destroying sprawl that will result from this project contributes to habitat destroying sprawl that has already eliminated or diminished the quality of most of the other winter wildlife habitat in the area. There are scientific methods available to quantify the extent and effect of existing and foreseeable sprawl.³⁴ And it is important for the USFS to put this project in context of other similar actions that have had quantifiable and significant cumulative impacts on the same resources that will be impacted. For example, the Forest Service should put the habitat alteration, modification, and destruction that will result from this project into context with the dramatic declines that other development has had on wildlife in the area. Wildlife managers have stated that “development along the Interstate 70 corridor has resulted in a 60 percent to 70 percent reduction of local critical deer habitat. [And that] projects such as Berlaimont add to the problem because they both reduce overall habitat and fragment

³⁴ *See e.g.*, 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> (last accessed 3/9/18).

habitat that remains.”³⁵ The Forest Service must actually quantify and disclose the extent to which this development will contribute to the past, present, and reasonably foreseeable declines that other sprawling development is having on impacted resources like wildlife.

The Forest failed to look at other foreseeable development, like the proposed development of 564 new units at Edwards River Park.³⁶ Development of the Edwards River Park is significant in that it will result in increases in traffic, population, recreational pressure, demands on emergency services, water, and other services, etc. in the area that are cumulative and similar to impacts from the proposed development of Berlaimont Estates. The Forest Service failed to look at this project specifically, which suggests the agency did not look too hard for foreseeable projects in the area that will have important impacts. The agency needs to undertake a more searching examination of foreseeable development, and take a hard look at the impacts of that development in its DEIS.

The DEIS confirms that Section 7 Consultation may be required under the Endangered Species Act for the Federally listed and Proposed Species potentially affected by this proposal (e.g., the four Colorado River fish, Greenback cutthroat trout, and Canada lynx), but there is no indication when that will occur or that it has occurred. DEIS at 25.

Appendix C indicates that the Berlaimont parcel is not surrounded by NFS lands which are identified as habitat for Federally-listed TES species. DEIS, App. C, Add. B at 4. This does not square with other information in the DEIS or comments in the record. For example, the DEIS notes that there are greenback cutthroat in Berry Creek. DEIS, Table 2-7 at 78. As discussed below, the Berlaimont parcel also appears to have and to be surrounded by lynx habitat, despite the USFS’s characterization in the DEIS. The Forest Service’s failure accurately note these factors in the ANILCA determination and in its DEIS undermine the agency’s analysis and strongly suggest that the agency failed to take a hard look at potential impacts to TES species.

There is other evidence in the DEIS to suggest that USFS failed to take a hard look at potential impacts to lynx. For example, DEIS Figure 17 shows lynx habitat adjacent to and near the northern portion of the Berlaimont property. There is some primary habitat as well as secondary habitat adjacent to and near the northwest side of the property. See DEIS at Figure 17. The text states 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...” DEIS at 216. Homes would likely be built in the northern part of the property if access is approved. In fact, structures would be constructed in lynx secondary habitat, with a few close to primary habitat. See DEIS Figures 4, 5, and 6

³⁵ See e.g., Pam Boyd, Vail Daily, Forest Service process with Berlaimont Estates launches public good versus private rights debate, March 8, 2018 (quoting former Colorado State wildlife manager, Bill Heicher, who is also a lifelong resident of the area), available at <https://www.vaildaily.com/news/forest-service-process-with-berlaimont-estates-launches-public-good-versus-private-rights-debate/> (last accessed 3/9/18).

³⁶ Pam Boyd, Vail Daily, Edwards River Park, a 564-unit housing project, gets initial approval from Eagle County (Dec. 20, 2017), available at <https://www.vaildaily.com/news/edwards-river-park-a-564-unit-project-gets-initial-approval-from-eagle-county/> (last accessed 3/8/18).

and compare with Figure 17. But the DEIS concludes that because the habitat on private land is not considered part of the baseline lynx habitat, it is considered non-habitat:

...since these aspen stands not part of the baseline habitat types, the impacts would not affect the baseline lynx habitat. Accordingly, all aspen stands and meadows on the private parcel warrant classification as lynx non-habitat.

Id. at 227.

That is a very inappropriate conclusion. The northern portion of the Berliamont property likely has lynx habitat, especially since it is adjacent to lynx primary and secondary habitat on national forest land, as shown in Figure 17. Habitat does not become non-habitat by virtue of being located on private land. The Forest Service must not use habitat location on private land as an excuse for not analyzing impacts from connected actions, i.e., housing development on lynx habitat. Instead, the EIS must disclose impacts to lynx habitat and connectivity on the Berliamont property from constructing residences and appurtenant facilities if access is approved.

In the same vane the USFS has an obligation to consider the impacts that development of this parcel would have on all of the wildlife that rely on surrounding forestlands. Such impacts can include increased dispersed recreation by homeowners (the DEIS notes that there will be horse corrals on the property, at 39), pets, lights, noise, etc. Here there are only vague references to these potential impacts that fail to satisfy the agency's hard look mandate. Part of the agency's hard look involves consideration of conditions that would reduce potential impacts. ANILCA permits the agency to impose conditions on development, and agency regulations require the USFS to minimize adverse impacts.

The Forest Service also failed to take a hard look at greater sage-grouse impacts and to take affirmative steps to minimize potential impacts. Sage-grouse presence in the project area was documented in comments submitted by the wildlife professionals at the State of Colorado. See Exhibit 1 at 3-5. The comments highlight the importance of this particular population of sage-grouse, and outline numerous best management practices that could reduce potential impacts. Id. The comments also point out several reasons that the existing Forest Plan—the same plan that the USFS intends to amend to allow this development to proceed—for the area was inadequate. The DEIS fails to discuss or consider these issues in any detail. For example, the BMPs include no mitigation measures to protect sage-grouse. See DEIS, Table 2-6 at 54.

The USFS has failed to take a hard look at the effects of the proposed BMPs. For example, the agency lists a possible bridge over Beard Creek among BMPs, but fails to provide any discussion about the effectiveness of bridges at reducing wildlife impacts in the EIS. There are similar bridges in the area that were constructed to benefit wildlife (e.g., along the access road to Mountain Star), so there should be a body of evidence that the USFS could draw from to consider and disclose the potential benefits that such a BMP may have on the wildlife it is intended to protect. There's plenty of skepticism, even from wildlife

professionals, about the efficacy of these BMPs.³⁷ And it is disingenuous for the USFS to claim that these BMPs will reduce impacts without actually offering any quantifiable information to support that claim in the DEIS. The agency's mandate to take a "hard look" requires more. The agency must actually analyze and disclose how BMPs will reduce impacts. Further, if the agency is relying on BMPs to reduce impacts, the agency must make those mandatory.

The Forest Service has failed to analyze visual impacts of the homes proposed to be developed on the inholding. The issue is not novel. It has been discussed every time development of this parcel has been proposed.³⁸ The maps provided in the DEIS indicate where housing envelopes would be located. The Forest Service should be able to provide some schematics showing what development of new houses within those envelopes would look like.

The Forest Service also failed to take a hard look at the potential impacts of amending the Forest Plan to allow for development of the proposed road and the Berlaimont subdivision. The DEIS confirms that the road would essentially cut in half the migration corridor relied upon by the second largest deer herd in the State of Colorado. DEIS, Table 2-7 at 80; Id. at 225. The DEIS also acknowledges that the proposed amendment "would have direct adverse effects on deer, elk, sage grouse and brewer's sparrow habitat." DEIS, App. B at B-5. However, the agency concludes that "due to the limited scope and scale of the amendment it is not considered a substantial lessening of protections on specific resources or uses." Id. This conclusion blatantly ignores the dramatic declines in wildlife populations in the area, and the important role that the project area will play in the ongoing viability of these animals in the area. It further ignores the habitat degradation that these animals are enduring throughout the analysis area.³⁹

Further, the FS's reliance on BMPs to reduce the impacts is unsupported. The FS suggests that "although the project would affect function and connectivity in this area, project specific design criteria are in place to reduce resource impacts." Id. These conclusions are unsupported by the DEIS because, as described above, the FS failed to adequately consider impacts that this project will have on declining wildlife populations in the context of population declines from similar and foreseeable development. Further, the agency claims

³⁷ Matt Kroschel, CBS4, Wildlife at center of debate over paved road for new subdivision, March 8, 2018 (note televised interview with Bill Heicher, former area wildlife manager, at 1minute and 40 seconds: "...everybody says: 'mitigate, mitigate. Everybody agrees, 'ah, we'll mitigate.' I've never seen a mitigation project, yet, for deer or elk that was actually successful. Deer and elk have always suffered."), available at <http://cbsloc.al/2FtryY2> (last accessed 3/9/18).

³⁸ See e.g., Cliff Thompson, Vail Daily, New 'Edwards Overlook' in the works, March 21, 2005 ("While Ryan said his plan is still "very preliminary," he's hoping to avoid the controversy that dogged a previous development proposal on the land by avoiding ridgeline buildings that would be highly visible..."), available at <https://www.vaildaily.com/news/new-edwards-overlook-in-the-works/> (last accessed 3/12/18).

³⁹ The Forest Service appears to be trying to diminish potential impacts to deer and elk by examining impacts across a large area. But the agency has failed to examine other existing and foreseeable threats to deer and elk habitat across the same area. For example, the list of reasonably foreseeable land use projects that the USFS examines is limited to projects in the immediate Edwards area. NEPA requires more.

that BMPs will reduce the impacts while failing to analyze or disclose how effective those will actually be.

VII. THE FOREST SERVICE MUST APPROVE A SPECIAL-USE AUTHORIZATION FOR UPGRADE AND USE OF ACCESS ROADS.

Each of the action alternatives in the DEIS conflates the issuance of an easement, which conveys an irrevocable interest in federal land to a private person, and a special use permit, which conveys a discretionary license to use federal land to a private person. This conflation is fatal to the DEIS.

According to 36 C.F.R. § 251.112(a), applicants for easements to reach private property must apply for a special use permit under 36 C.F.R. § 251.54. A special use permit is also appropriate when, as in this case, the roads sought for access to the private inholding are currently closed to public motor vehicle use:⁴⁰

In those cases where a landowner's ingress or egress across National Forest System lands would require surface disturbance or would require the use of Government-owned roads, trails, or transportation facilities not authorized for general public use, the landowner must apply for and receive a special-use or road-use authorization documenting the occupancy and use authorized on National Forest System lands or facilities and identifying the landowner's rights, privileges, responsibilities, and obligations.

Id. at § 251.110(d).⁴¹ A special-use authorization is also required when construction is needed or desired:

Instrument of authorization.

To grant authority to construct and/or use facilities and structures on National Forest System lands for access to non-Federal lands, the authorized officer shall issue a special-use authorization in conformance with the provisions of subpart B of this part or a road-use permit. In cases where Road Rights-of-way Construction and Use Agreements are in effect, the authorized officer may grant an easement in accordance with the provisions of part 212 of this chapter.

Id. at § 251.113.

For special use permits, applicants must demonstrate financial capability:

Technical and financial capability.

⁴⁰ The Scoping Letter states that the property is "currently accessible in the summer months" via Forest Service Roads 774 and 780.

⁴¹ For access which would use only facilities open to the public, there appears to be no requirement to obtain a special use permit, according to 36 C.F.R. § 251.110(e), but section 251.112(a) still requires applicants to apply for a special use permit.

The proponent is required to provide sufficient evidence to satisfy the authorized officer that the proponent has, or prior to commencement of construction will have, the technical and financial capability to construct, operate, maintain, and terminate the project for which an authorization is requested, and the proponent is otherwise acceptable.

Id. at § 251.54(d)(3).

Although only mentioned in passing, Forest Service regulations at Part 212 apply to easements. 36 C.F.R. Part 212. However, the DEIS provides no analysis of the requirements, including conditions and payments, that the Forest Service may and sometimes must impose as part of any “Issuance of Reciprocal Easements” acknowledged by DEIS. FEIS Table 2-5. The potential terms of the reciprocal easements for the proposed roads are not identified or analyzed in the DEIS. 36 C.F.R. § 212.8 – 212.9. The omission of such an important component is fatal to the DEIS, and requires the Forest Service to start anew, with a clean slate.

Construction and maintenance of the requested access is likely to be expensive, as much work would be needed to widen and pave the roads, and to construct retaining walls to stabilize steep slopes. Some estimates have put the cost of the road above \$10 million. Maintaining the road and safe access to the proposed development will require substantial ongoing investment. Therefore, the Forest Service must carefully assess the ability of the applicant to pay for and perform the needed work and maintenance prior to granting any special-use authorization. The DEIS did not include any discussion of this issue.

VIII. CONCLUSION

Based on the foregoing, existing access to this inholding is adequate and the USFS’s consideration of this damaging proposal should stop there.

Applicability of the Alaska National Interest Lands Conservation Act (ANILCA) in this case is dubious. 16 U.S.C. §§ 3103-3233. But even if ANILCA was found to apply, the Forest Service’s ANILCA determination here is flawed. The agency’s own analysis confirms that the proposed development is not a reasonable use of the parcel, and that adequate access to this inholding already exists and/or could be achieved with much less damage to Federal and other important resources.

The Forest Service’s flawed ANILCA determination renders the Draft EIS unlawful. The agency has failed to take a hard look at reasonable alternatives and appears poised to take action that does not limit damage to important resources that the Forest Service is obligated to protect.

Thank you,

Peter Hart, Staff Attorney
Wilderness Workshop
PO Box 1442
Carbondale, CO 81623
www.wildernessworkshop.org
[970.963.3977](tel:970.963.3977) (office)
peter@wildernessworkshop.org

Matthew Sandler, Staff Attorney
Rocky Mountain Wild
1536 Wynkoop St., Suite 900
Denver, CO 80202
Phone: 303-579-5162
matt@rockymountainwild.org
rockymountainwild.org

Scott Miller, Senior Regional Director
The Wilderness Society
Denver, Colorado
p. 303.468.1961
scott_miller@twc.org
www.wilderness.org

Luke Schafer, West Slope Director
Conservation Colorado
529 Yampa Ave.
Craig, CO 81625
O: 303.405.6761 and 970.824.5241
luke@conservationco.org

Rocky Smith, Independent Forest
Management Analyst
1030 Pearl St. #9
Denver, CO 80203
2rockwsmith@gmail.com
303 839-5900

Rosalind McClellan, Coordinator
Rocky Mountain Recreation Initiative
1567 Twin Sisters Rd.
Nederland, CO 80466
720 635-7799
rosalind.mcclellan@colorado.edu

Karen Ryman, Co-Leader
Roaring Fork Broadband
Great Old Broads for Wilderness
343 Grove Ct.
Aspen, CO 81611
KRYMAN@msn.com

Christine Shaver, Leader
Mile High Broadband
Great Old Broads for Wilderness
Denver, CO 80127
milehighbroads@gmail.com

Cristina Harmon
Great Old Broads for Wilderness, NWCO
Chapter
PO Box 771850
Steamboat Springs, CO 80477
steambabe@gmail.com
970-846-0247

Attached:

- Exhibit 1* - Colorado Parks and Wildlife, Scoping Comments on Berlaimont Estates Access Route EIS (Nov. 7, 2016)
- Exhibit 2* - Letter from the Eagle County Board of County Commissioners to Scott Fitzwilliams, Forest Supervisor, Re: Berlaimont Estates' Access Route Draft Environmental Impact Statement (March 12, 2018)