IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-01342-RPM

ROCKY MOUNTAIN WILD; SAN LUIS VALLEY ECOSYSTEM COUNCIL; SAN JUAN CITIZENS ALLIANCE; WILDERNESS WORKSHOP,

Plaintiffs,

v.

DAN DALLAS, in his official capacity as Forest Supervisor; MARIBETH GUSTAFSON, in her official capacity as Deputy Regional Forester; UNITED STATES FOREST SERVICE, a Federal Agency within the U.S. Department of Agriculture; UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency within the Department of the Interior,

Defendants,

v.

LEAVELL-McCOMBS JOINT VENTURE,

Intervenor.

PLAINTIFFS' OPENING MERITS BRIEF

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I. INTRODUCTION

This litigation arises from a judicially ratified Settlement Agreement that sought to ensure Forest Service compliance with federal law before approving activities or an application for access involving a "landowner's plan to develop its 287.5 acre property as a year-round resort village, to be known as the Village at Wolf Creek." *Colorado Wild v. Forest Service*, 06-cv-02089-JLK-DW (ECF No. 147 at 2). The Forest Service agreed to "initiate a new NEPA process which will include a new scoping process and preparation of a new draft [Environmental Impact Statement ("DEIS")] and final EIS ("FEIS"), in connection with [Leavell-McCombs Joint Venture ("LMJV")]'s application" for expanded access to LJMV property. *Id*. at ¶2. The agreement established that "[t]he Forest Service shall not issue any new special use authorizations or authorize any other activities related to the proposed access, other than those required to complete the new NEPA process, unless and until a new NEPA process is completed which results in a new FEIS and [Record of Decision ("ROD")]." *Id* at ¶4.

However, in approving LMJV's access application via land exchange, easements, right of ways, and special use permits for LMJV's conceptual development plans, the Forest Service and the United States Fish and Wildlife Service ("FWS") violated the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), the National Forest Management Act ("NFMA"), Agency Regulations, and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, ("APA"). Further implementation has been stayed pending resolution of the present case on its merits. ECF No. 6.

By providing land adjacent to U.S. Highway 160 with unfettered and unrestrained access, the Forest Service paved the way for a development proposal that would detrimentally impact one of the most important wildlife corridors in the Southern Rockies. The development would

include "1,711 units, which may include two hotels with 200 units, 16 condominiums with 821 units, 46 townhomes with 522 units, 138 single family lots, and 221,000 ft² of commercial space" ("Village").[1] W10763. This massive development could accommodate approximately 8,000 guests. If the LMJV plan is successfully constructed and operated, it will change a beloved natural area, crucial habitat for the federally listed Canada lynx, the unique Wolf Creek Ski Area ("Ski Area"), and a fragile high alpine ecosystem into a population center that forever disrupts and degrades the Rio Grande and San Juan National Forests.

Without judicial relief, implementation of the ROD (and currently stayed actions that partially implemented the ROD) will proceed without the benefit of statutorily required environmental analysis commensurate with the full scope of LMJV's plans to operate a 1711-unit residential and commercial ski resort facility. Matters excluded from analysis, include, but are not limited to, access and utility corridors across National Forest lands per the land exchange and ROD, necessary and complex permitting and construction of intersections and interchanges between the two access roads and U.S. Highway 160, the construction and operation of the proposed 8,000 person Village at Wolf Creek, and the projects included in the Wolf Creek Ski Corporation's proposed Master Development Plan ("MDP").

The impact of LMJV's application(s) to access U.S. Highway 160, actual development plans, alternative access proposals, mitigation measures, and other important aspects of this decision were never subjected to the proper level of scrutiny by the public, state agencies, the Army Corps of Engineers, Federal Highway Administration, and/or the FWS in accordance with

[1] Plaintiffs' brief uses the misnomer "Village" to refer to the name given to the current development proposal. In 1986, the then 208 unit/800 bed condominium proposal reflected the plain language definition of a "village," which has less than 1000 people. https://en.wikipedia.org/wiki/Settlement_hierarchy. The current proposal envisions commercial and residential development that constitutes a private "town" of 8-10,000 residents. *Id.*

the carefully structured process the Council on Environmental Quality ("CEQ") created to ensure federal agencies implement the nation's environmental policies. The duties imposed on the Defendants were shirked in a series of decisions to simplify and expedite the NEPA process, thereby violating the well-defined and interdisciplinary NEPA process set out in the CEQ regulations.

For example, despite NEPA's requirement to disclose and analyze all reasonably foreseeable actions in a single NEPA document, the Ski Area expansion detailed in the MDP have yet to be analyzed in conjunction with the LMJV-proposed operation of the Ski Area's base area. The Ski Area and LMJV plans rely on overlapping easements and special use permits for use of federal land, federal access roads, and utility corridors that connect the Ski Area and Village to U.S. Highway 160. A confidential settlement agreement was struck in 2008 between the Ski Area and LMJV that purportedly resolved numerous conflicts over uses of public lands that forms the basis of both the Village proposal and the MDP. ECF No. 51 (Samford Declaration). The agreement has never been publicly released or subjected to or analyzed in NEPA analysis. *See* ECF No. 45 (Order resolving motion to compel disclosure).

An example of an unexamined NEPA alternative is provided by the Forest Service-abandoning its commitment to prepare an EIS that analyzes the Colorado Department of Transportation's ("CDOT") determination that LJMV's development plans, considered in light of the Ski Area traffic, necessitates construction of a "single grade-separated interchange" to service the expanding Ski Area and the Village. 73 FR 54786 (September 28, 2008). U.S. Highway 160 upgrade alternatives were not analyzed in the 1986 Environmental Assessment that analyzed the access needed to serve LMJV's original plan to construct 208 condominium units. W01168 ("Access to this parcel is along U.S. Highway 160, through the Wolf Creek Ski Area

parking lot, and along a primary USFS access road (FS 391) that terminates at Alberta Lake.). CDOT sought to participate, but was excluded from preparation of the 2014 EIS.

Impacts of the full LMJV plan and Ski Area expansion on the federally listed Canada lynx are not adequately analyzed in the NEPA or ESA consultation processes. This action will have deleterious impacts on the lynx that were glanced over by relying on uncertain and ineffective mitigation measures. Access approval needed for LMJV's 1711-unit development plan also violates the Southern Rockies Lynx Amendment ("SRLA") to the Rio Grande Forest Plan.

The Forest Service deviation from its 2008 commitments and federal laws creates a complex and overlapping set of violations. This merits brief first meets Plaintiffs' burden to establish jurisdiction over the case. Next, the brief describes the general factual background. The argument section divides the overlapping legal claims into five categories based on the primary authority relied upon: 1) NEPA, 2) Forest Plan Lynx Standard; 3) ESA; 4) Public Land Laws; and, 4) APA prohibitions on undue influence and bias in agency decisionmaking. The final section addresses the normal APA remedy, which is to find unlawful and set aside agency action, coupled with the alternative basis to issuing equitable relief.

II. JURISDICTION

A. Final Agency Actions are Ripe for Judicial Review

Pursuant to the Administrative Procedure Act ("APA"), federal district courts have jurisdiction to review any "final agency action." *See* 5 U.S.C. § 704. An agency action is considered "final" if it marks "the consummation of the agency decision-making process and legal consequences flow from it." *McKeen v. United States Forest Serv*., 615 F.3d 1244, 1253

(10th Cir. 2010) (internal citations omitted) (NEPA challenge) *accord Bennett v. Spear*, 520 U.S. 154, 177-78, (1997) (ESA challenge).

Plaintiffs challenged several types of final agency actions as violating the substantive and procedural standards set out in NEPA and ESA. 5 U.S.C. § 706; 16 U.S.C. § 1536(a)(2), (g)(a); *see also Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1243 (10th Cir. 2008) (The APA "defines agency action as: "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.") (*quoting* 5 U.S.C. § 551(13)). An agency cannot avoid judicial review with irrelevant assertions that the decision uses inexact terms or includes caveats that allow the agency to later revisit the decision. *Cure Land, LLC v. USDA*, 2016 U.S. App. LEXIS 14844, at *10-11 (10th Cir. Aug. 12, 2016) (rejecting ripeness challenge and upholding agency EA/FONSI that analyzed "entire Project").

By reading APA "agency action" in light of caselaw establishing jurisdictional criteria, the following "final agency actions"[2] give rise to this litigation:

- On an undetermined date in 2012 or 2013, the Forest Service approved the "Wolf Creek Ski Area Master Development Plan." W18247 - W18408. The Forest Service did not prepare any NEPA documentation or carry out ESA consultation before approving the MDP.

- On September 9, 2013, the Forest Service issued a "Decision Memo Wolf Creek Ski Area Summer Projects – 2013" that relied upon a categorical exclusion to implement site-specific components "of the approved Wolf Creek Ski Area Master Development Plan." W3503-W03508. The use of a categorical exclusion is a final agency action that terminated the NEPA analysis without preparation of an Environmental Assessment or Environmental Impact Statement. *Id.*

[2] An APA "agency action" is distinct from a "final agency action," both of which are distinct from NEPA's use of "major federal action" (40 C.F.R. § 1508.18), and the ESA use of "agency action" (16 U.S.C. §1536 (a)(2)) that triggers federal agencies' duties to comply with those statutes' procedural requirements and substantive restrictions. *See Colo. Envtl. Coal. v. Office of Legacy Mgmt*., 819 F. Supp. 2d 1193 (D. Colo. 2011) (applying each of the terms).

- A November 15, 2013 letter (W05493- W05532) contains the Fish and Wildlife Service's Biological Opinion[3] addressing "formal Section 7 consultation" on "the land exchange between the Rio Grande NF and the Leavell-McCombs Joint Venture" that confirmed the action would cause ESA-prohibited "take" of lynx. W05526. The Biological Opinion is the culmination of the FWS's decisiommaking process that alters the Forest Service and LMJV's legal exposure to ESA "take" liability based on an "Incidental Take Statement" with "mandatory reporting and monitoring" and "reinitiation of consultation" requirements. W05528. The Biological Opinion included no "Reasonable and Prudent Measures (RPM) necessary to further minimize the impacts of such take on the lynx." W05528.

- On November 18, 2014, Defendant Dan Dallas, on behalf of the Forest Service, issued its "Final Environmental Impact Statement for the Village at Wolf Creek Access Project." W10694 - W11502. The FEIS is the culmination of the NEPA process.[4]

- On March 13, 2015, Defendant Maribeth Gustafson, on behalf of the Forest Service and without benefit of any hearings or meetings with Objectors, sent letters denying all Objections. W12135 - W12607. On March 13, 2015, Ms. Gustafson denied Plaintiffs' Objections. W12547 - W12607.

- The May 21, 2015 ROD is the culmination of the Forest Service decisionmaking process. W12650 - W12685.

- The ROD was given immediate effect and was implemented by a number of transactions, Special Use Permits, and other federal approvals creating and extinguishing interests in federal land. The effect and implementation of the ROD is stayed by a stipulation entered with the purpose of preventing physical harm to Plaintiffs' interests and ensuring those transactions can be unwound should the Court find unlawful and set aside any or all of the challenged final agency actions. ECF No. 6-1.

When a party shows it will suffer harm from implementation of a "final agency action," the matter is generally ripe for judicial review. *Friends Of Marolt Park v. U.S. Dep't of Transp*., 382 F.3d 1088, 1093 & n.2 (10th Cir. 2004) ("[A] court determines whether an agency decision is ripe for judicial review by examining the fitness of the issues for judicial decision and the

[3] For the ESA claims, unlike other ESA citizen suits, the FWS Biological Opinion is the "final agency action" that gives rise to APA judicial review. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (distinguishing APA review of ESA Section 7 consultation claims and ESA citizen suits).
[4] It is well settled that "alleged failure to comply with NEPA constitutes 'final agency action.'" *See Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv*., 75 F.3d 1429, 1434 (10th Cir. N.M. 1996) (*citing* 5 U.S.C. 551(13)).

hardship caused to the parties if review is withheld.") (citation and internal quotation marks omitted). As applied to agency actions, ripeness is meant "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). As recognized in the Stipulation (ECF No. 6-1) filed with the Motion to Stay, the "final agency actions" listed above allow real estate transactions, construction, use of federal lands, impacts to species, and other concrete harms that impose hardships on Plaintiffs.

Each of the agency actions are "final agency actions" and, as set out more fully in the overlapping standing section and attached declarations, each "agency action" and part thereof, is ripe for adjudication. *Colo. Envtl. Coal. v. Office of Legacy Mgmt*., 819 F. Supp. 2d 1193, 1205-06 (D. Colo. 2011) (denying agency ripeness challenge).

B. Plaintiffs have Standing to Bring APA, NEPA, NFMA, and ESA Claims

The Supreme Court has long held that, "[w]hile generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic (sic) interests of the plaintiff, that will suffice." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (U.S. 2009) (*citing Sierra Club v. Morton*, 405 U.S. 727, 734-736 (1972)) (*emphasis supplied*) ("interest alleged to have been injured 'may reflect 'aesthetic, conservational, and recreational' as well as economic values.'") (*quoting Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970)).

Both the Administrative Record and Declarations submitted with this brief satisfy "the burden of establishing an actual or imminent injury that is concrete and particularized rather than conjectural or hypothetical; a causal connection that is "fairly traceable" to the conduct complained of; and a likelihood of redressability in the event of a favorable decision." *Id. see*

also, Catron County Bd. of Comm'rs v. U. S. Fish & Wildlife Serv., 75 F.3d 1429, 1433 (10th Cir. N.M. 1996); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The attached Declarations, combined with the detail provided in the Administrative Record through Plaintiffs' Comments, demonstrate the required injury. "'Under [NEPA] an injury results not from the agency's decision, but from the agency's uninformed decisionmaking.'" *Jackson Hole Conservation Alliance v. Babbitt*, 96 F. Supp.2d 1288, 1294 (D.Wyo. 2000), *quoting Rio Hondo*, 102 F.3d at 452. Similarly, wildlife interests are a proper basis on which to base standing. "[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing." *Southern Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1233-1234 (10th Cir. Utah 2010) (citations omitted), s*ee* S*an Luis Valley Ecosystem Council v. United States Fish & Wildlife Serv*., 657 F. Supp. 2d 1233, 1241-1242 (D. Colo. 2009)(granting injunctive relief after confirming standing) *quoting Save Strawberry Canyon v. Dep't of Energy*, 613 F.Supp.2d 1177, 1187 (N.D. Calif. 2009) ("There is no doubt that the failure to undertake an EIS when required to do so constitutes procedural injury to those affected by the environmental impacts of a project.") (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 & n. 7 (1992). "A litigant shows an injury to its concrete interest by demonstrating either a geographical nexus to or actual use of the site of agency action." *Sierra Club v. United States DOE*, 287 F.3d 1256, 1265 (10th Cir. Colo. 2002).

Jimbo Buickerood, a member and staff of the San Juan Citizens Alliance ("SJCA") regularly visits, skis, and enjoys the Wolf Creek Ski Area and surrounding National Forests. Pls. Ex. 1 (Buickarood Declaration). Mr. Buickerood's declaration explains how his enjoyment, and the enjoyment of other SJCA members are impaired by faulty agency decisionmaking that lead

to unnecessary environmental impacts from the LMJV proposal. In addition to SJCA's organizational comments, his declaration identifies at least 37 comments and objections directly filed SJCA members and supporters. A few specific comments of SJCA members are singled out and provide evidence from the Administrative Record in support of supports standing and the granting the requested relief.

Christine Canaly .Director and member of the San Luis Valley Luis Ecosystems Council ("SLVEC") visits the National Forest on Wolf Creek with her family "to enjoy wildlife, hike and play hide and seek with my (at the time) young son, through the vegetation and rock formations that will be affected by this potential planned development." Ex. 1 (Canaly Declaration) at ¶7. Ms. Canaly intends to continue her visits to the area with her family and confirms ongoing and future plans of SLVEC members to visit and enjoy the area. Ms. Canaly explains throughout her declaration SLVEC's deep involvement and enduring interests in water and impacts that may befall the unique San Luis Valley aquifer system due to the Village planned for the Headwaters of the South Fork of the Rio Grande on Wolf Creek Pass. Ms. Canaly testifies on the importance of NEPA and ESA compliance to inform her membership and local governments on the impacts of the Village proposal. SLVEC relies on judicial remedy of federal agency violations to avoid impacts to SLVEC members' interests in the interwoven lands and water of Wolf Creek Pass and the San Luis Valley.

Tehri Parker, Executive Director of Rocky Mountain Wild ("RMW") has spent time both professionally and personally on Wolf Creek Pass. Ex. 3 (Parker Declaration). Mrs. Parker provides insight into the harm RMW members will suffer should this decision be approved by the Court. RMW started a petition opposing this land exchange decision which received 81,511

signatures from around the country. It is clear that Tehri and RMW will be harmed by this decision and subsequent development.

Paige Singer, Staff Biologist at Rocky Mountain Wild, has dedicated much of her career to advocating for and studying the Canada lynx. Ex. 4 (Singer Declaration). Her work has focused extensively on maintaining connectivity through studying lynx movement and exploring ways to mitigate traffic impacts. She is upset that the Forest Service and FWS have failed in their legal obligations to protect the Canada lynx. She spends her professional and personal time in lynx habitat with a dream of encountering this majestic cat in the wild.[5]

The Tenth Circuit has confirmed that the types of injury involved in the present case are redressable and fairly traceable to the NEPA and ESA violations. "[T]he alleged injury is the potential environmental impact of an uninformed decision [. . .]" and the "injury is redressable by a court order requiring the [agency] to undertake a NEPA and ESA analysis in order to better inform itself of the consequences of its decision[. . .]. *Sierra Club v. US DOE*, 287 F.3d 1256, 1265-1266 (10th Cir. Colo. 2002) (setting aside actions and remanding for further proceedings). In the present case, Plaintiffs' injuries may be remedied by an order finding that compliance with federal law was not achieved before the Defendants made decisions and took action to implement those unlawful decisions; setting aside the offending agency decisions/actions; and remanding with instructions to comply with the substantive requirements of NEPA, the ESA, and other state and federal laws. Plaintiffs respectfully submit that the evidence provided in the Declarations and Administrative Record demonstrate standing to pursue judicial review and for

[5]Wilderness Workshop relies on the evidence in the Administrative Record, particularly the comments and Objections it jointly submitted with other Plaintiffs. *See Massachusetts v. Envtl. Prot. Agency,* 549 U.S. 497, 518 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review.").

this Court to grant effective judicial relief that holds unlawful and sets aside the Forest Service's and FWS's final agency actions in furtherance of the construction of the proposed Village at Wolf Creek.

Similarly, Plaintiffs have fulfilled their requirements of exhausting administrative remedies. Throughout the NEPA process, Plaintiffs and their members participated at every opportunity by submitting Scoping Comments (W02605- W02616), Comments on the DEIS (W06450- W06481), FOIA requests (February and November, 2014), and a Pre-Decisional Administrative Objection (January, 2015)(W11720-W12117).

In sum jurisdiction is established by record evidence and declarations, and all claims can be remedied by APA relief setting aside agency action. Ex. 2 (Canaly Declaration: "Whenever a project proposal involves federal control or involvement, I rely on interdisciplinary analysis in NEPA documents to inform myself, SLVEC, and local governments on the impacts. Although a federal analysis may remain subject to debate, it provides a reliable basis for an informed public to engage our local, state, and federal decisionmakers.").

III. SUMMARY OF FACTS AND PROCEDURAL HISTORY

Establishing facts for APA review is distinct from both trial practice and summary judgement standards. *Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1576 (10th Cir. 1994).* "The 'agency action must be examined by scrutinizing the administrative record at the time the agency made its decision.'" *Sierra Club v. United States DOE*, 255 F.Supp. 2d 1177, 1181 (D. Colo. 2002) (citations omitted) (emphasis supplied*).* APA review "is generally based on the full administrative record that was before all decision makers, including in this case the Deciding Officer and the Reviewing Officers, at the time of the decision.").[6] *Bar MK Ranches v.*

[6]These standards are addressed more thoroughly in the accompanying Motion to Supplement the

*Yuette*r, 994 F.2d 735, 739 (10th Cir. 1993) (addressing Forest Service decisions) (emphasis supplied).

The FWS filed a single disc containing the Administrative Record as it existed when the Biological Opinion issued in 2013. ECF No. 19 at ¶1 *citing* FWS000001 through FWS007183. Defendant Forest Service's Administrative Records for the FEIS, Objection Resolution and ROD are found on one of the three disks filed November 13, 2015. ECF No. 19 at ¶2 *citing* W00001 through W18142. The Forest Service included a screenshot of the index that confirms the documents considered as part of the Administrative Record available and considered by Defendant Dallas at the time he decided to approve and finalize the FEIS. W11513- W11518. However, there is no delineation of the Administrative Record before Defendant Gustafson when she decided to deny all Objections, nor is there any indication of the contents of Administrative Record before Defendant Dallas when he issued the ROD. Neither decisionmaker, both of whom are named Defendants, filed any proof to establish the content of the three separate Administrative Records before each decisionmaker, "at the time of the decision." *Bar MK Ranches*, 994 F.2d at 739.

In addition to the two DVDs containing Administrative Records, the Forest Service has lodged five additional DVDs for consideration by the Court. On November 13, 2015, the Forest Service lodged two additional DVDs with emails and other documents found during email searches and analyses conducted during the litigation. ECF No. 19 at ¶3 *citing* C0000001 through C0039506; *Id*. at ¶4 *citing* CP000001 through CP004867. On July 19, 2016, the Forest Service lodged an additional three DVDs of materials with the Court. ECF Nos. 46, 47.[7]

Administrative Record with Extra-Record Evidence, which is incorporated here by reference.

[7] Although these DVDs are numbered W18143 through W18657, they are proffered as supplements that should not be confused with the Administrative Record.

However, the filings did not provide a declaration by Defendant Gustafson or Defendant Dallas to establish whether any proffered documents were before the Forest Service decisionmaker when the decision was made on the FEIS, Objection denial, and ROD.

The following facts are based on the Administrative Records and *extra-record* evidence addressed in a separate Motion to Supplement the Forest Service Administrative Records.[8]

A. Wolf Creek Pass is a Magnificent Natural and Recreational Area

Wolf Creek Pass is cherished for its wilderness lands, remote location, and natural beauty. The San Juan and Rio Grande National Forests meet at the top of Wolf Creek Pass, with the Continental Divide pronouncing the landscape. These National Forests are managed to protect habitat for a variety of wildlife, plants, rare aquatic environments, fragile high alpine ecosystems, and the unique Wolf Creek Ski Area. The Ski Area is located adjacent to U.S. Highway 160 and is difficult to reach because of its remote location, far from transportation hubs, in one of the harshest winter areas in the region. This area is widely known as receiving "The Most Snow in Colorado," averaging 465 inches annually. W18258. The elevation of the proposed base area development is between 10,860 feet and 10,240 feet. W10696. If constructed, this would be the highest town in North America. C8039. Wolf Creek Pass is a wild place that has been managed for limited use to preserve it for generations to come, until the Forest Service approved LMJV's plan to create an urban center at the base of the Wolf Creek Ski Area.

The comments from the many people opposing the development of Wolf Creek Pass tells the story. "Allowing a huge commercial and residential development in this mostly road free

[8] As requested by the Court, at the completion of briefing, Plaintiffs will index and provide the Court with a printed copy of all documents cited in its Merits and Reply briefs.

area would put sprawl and industrial activity in the middle of this natural haven." W07740. "[T]he swap will allow McCombs to destroy one of the best places in the Southwest. Once that habitat has gone away, nature will take 100s of years to replace it, if ever." W07742. "Please don't overdevelop this beautiful area." W07735. "I'm just a person from Colorado who loves Wolf Creek as it is . . . Why spoil a beautiful area?" W07737. "One man's personal greed should never take precedence over the experience and livelihood of local people." W07740. "Why is it that wealth always wins over common sense and the environment?" W07742.

Existing businesses in Pagosa Springs and South Fork provide lodging and other commercial activities related to the Wolf Creek ski area. The Village, if constructed and operated, or if it goes bankrupt like other proposals, will negatively impact the socioeconomic condition of these communities, particularly Pagosa Springs and Archuleta County. C3181.

The use of these National Forests for a small Ski Area and limited development on Wolf Creek Pass has been carefully balanced with the ecological functions and surrounding communities for decades. Unconditional approval of LMJV's current plan would replace the existing setting with a town-sized development destroying the balance achieved by Forest Service specialists, the communities, and conservation groups.

B. Ownership of Land, Access Rights, and Interests in Land

The parcel in question was created in 1986 by the Forest Service approval (W01366) of LMJV's proposed land exchange to allow construction of a small 208 unit "condominium development" and base area to serve the Wolf Creek Ski Area. W01314 (private NEPA contractor analysis based on 1974 plan). The 1986 proposal estimated occupancy for an additional 834 skiers, with an unspecified number of summer guests. W01317 (Western Land Exchange Company, a LMJV's agent, estimate based on updated 1974 plan).

Originally, this 1986 land transfer was determined *not* to serve the public interest (W01362), but after encumbrances allowing Forest Service control were added, this proposal was deemed compatible with the National Forest and the character of the Wolf Creek Ski Area. W01366. Deputy Regional Forester, Maribeth Gustafson, disclosed, "[t]he Forest Service initially turned down the proposal but reversed course several weeks later, without any explanation, and approved the land exchange. It is commonly understood that Mr. McCombs brought political pressure to bear to realize his dream to develop the ski area." C0021685.

"Access to this parcel is along U.S. Highway 160, through the Wolf Creek Ski Area parking lot, and along a primary USFS access road (FS 391) that terminates at Alberta Lake." W01168. The favorable 1986 public interest determination was justified by requiring a Scenic Easement requiring LMJV to file plans "[p]rior to commencement of construction on the real property […] to the Forest Supervisor, Rio Grande National Forest, for approval." W10726. The Scenic Easement provides Forest Service with authority to impose terms and conditions "minimizing environmental effects to natural resources within the project area […and…] to administer the herein described lands to protect the scenic and recreational values of adjoining National Forest System lands; to provide a specific level of control of the type of development on said land to assure that said development is compatible with the Wolf Creek Ski Area." *Id*. Numerous federal easements and interests in land are involved with the inholding. *See e.g.* W01355- W01528.

Mr. McCombs has struggled through the years to increase access to the parcel. *Id*. When the Forest Service granted expanded access in 2006, "litigation ensued and Judge Kane issued a preliminary injunction based, in part, on the allegations of improper influence and the concern

that an adequate range of alternatives was not considered because the Forest Service deferred to the proponent's grand plans for the inholding." C0021685.

C. LJMV Plan for Development and Expanded Access

The newly configured LMJV plans no longer resemble the 1986 proposal, analysis, or original land exchange that led to the creation of the LMJV parcel. The LMVJ plan seeks to greatly expand road and utility access, and obviate future Forest Service approval of plans to construct and operate a private commercial and residential town with a "projected total of 1,711 residences, 221,100 square feet of commercial ancillary infrastructure such as roads, central water treatment and storage, wastewater treatment and disposal, a possible energy generation plant and distribution system, a phone, data and cable television center, as well as restaurants and shops." W02213-W02214.

To gain access needed to implement LMJV's expanded development plan, "LMJV would convey approximately 177 acres of non-Federal lands to the Rio Grande National Forest (Rio Grande NF) in exchange for approximately 205 acres of NFS lands managed by the Rio Grande NF." W10698. The appraisal of these parcels determined that, [a]fter considering legal permissibility, physical possibility, financial feasibility, and maximum productivity, the appraiser concluded the following Highest and Best Uses . . . Non-Federal [parcel] – "five rural residential homesites" and "Federal [parcel] – "five rural residential homesites…" W03518. The use of existing access to carry out this "Highest and Best Use" was not considered in the EIS.

This conceptual development proposals analyzed in the FEIS all involve expanded access sought for a town within the National Forests that would accommodate a year-round population of approximately 6,675 people (W11120), but could return to the 10,000 person proposal based on the Forest Service approvals that disavow all current and future federal control over the

development. W10752 ("*It is important to clarify that development on private lands is not a component of either of the Action Alternatives.* The Rio Grande NF has no jurisdiction on private lands.") (italics in original). The scope of the federal government's existing interests and potential power to manage the National Forests were not taken into account when analyzing the Forest Service assertion that the developer had an unfettered legal right of "access to non-Federal land within the boundaries of the NFS to secure to the owner the reasonable use and enjoyment thereof." W10696.

D. The Canada Lynx

In 2000, the Canada Lynx was listed as threatened under the Endangered Species Act. 65 FR 16052 (March 24, 2000). The listing decision provides extensive information on the Canada lynx and threats that could cause the species to go extinct. The FWS found that the single factor threatening lynx in the United States was "the inadequacy of existing regulatory mechanisms, specifically the lack of guidance for conservation of lynx in National Forest Land. FWS007147. The FWS' Biological Opinion provides a concise summary:

> The lynx is a medium-sized cat with long legs; large, well-furred paws; long tufts on the ears; and a short, black-tipped tail (McCord and Cardoza 1982, cited in SRLA BO). Individual lynx maintain large home ranges reported as generally ranging between 12 to 83 square miles (Koehler I 990; Aubry et al. 2000; Squires and Laurion 2000; Squires et al. 2004; Vashon et al. 2005) (cited in SRLA BO). The size of lynx home ranges varies depending on abundance of prey, the animal's gender and age, season, and the density of lynx populations (Koehler 1990; Poole 1994; Slough and Mowat 1996; Aubry et al. 2000; Mowat et al. 2000; Vashon et al. 2005, cited in SRLA BO).

FWS 007148. The following sections provide additional information on the Canada lynx, its reliance on the National Forests on both sides of Wolf Creek Pass, existing threats, and threats posed by proposed development.

1. Wolf Creek Pass Landscape Linkage

The Wolf Creek Pass Landscape Linkage ("WCPLL") "spans a forested swath over the Continental Divide between large blocks of high quality subalpine lynx habitat." FWS007156.

> The importance of landscape linkages and dispersal corridors to the landscape ecology of rare forest carnivores include (1) facilitating daily and seasonal intra- and inter-home range movements, (2) facilitating mating and genetic interchange, (3) allowing dispersal from population centers and colonization of otherwise suitable, vacant habitat, and (4) allowing populations to respond to natural and human-caused environmental changes and catastrophes.

W10874. The WCPLL is part of the Colorado Parks and Wildlife ("CPW") "Core Research Area" in the San Juan Mountains. FWS 007156. The San Juan Mountains contain the largest continuous block of high quality lynx habitat in the State and where CPW focused their 10-year lynx monitoring and research efforts. *Id.* The Wolf Creek Ski Area and the LMJV parcel fall within the heart of the WCPLL. FWS007156-57. Lynx are heavily using the WCPLL area as a dispersal corridor and the viability of this linkage is important to the recovery of lynx in Colorado. W10876. Lynx Linkages "can be maintained, degraded, or severed by management activities and human infrastructure, such as high-use highways, subdivisions or other developments." *Id.*

"[T]his section of U.S. 160 over Wolf Creek Pass is less permeable and contains a higher percentage of obstacles that may increase highway mortality probabilities of lynx that attempt crossings." FWS007158. However, "[e]vidence suggests that these natural features do not deter lynx from crossing the U.S. 160 corridor. *Shenk* (2005) provided evidence that 27 individual lynx crossed U.S. 160 between 1999 and 2005. *Id.* By the Forest Service's own account, when "compared to other Colorado highway sections where lynx have been road-killed (i.e., I-70 and 550), this section of Hwy 160 over Wolf Creek Pass is less permeable and contains a higher

percentage of obstacles that would likely increase highway mortality probabilities of lynx that attempt crossings." W10879.

> Lynx now cross Hwy 160 because it bisects large tracts of some of the highest quality lynx habitat in the Southern Rockies. The Village at Wolf Creek project area is located between two of the principal lynx breeding complexes in the San Juan Core Area, Platoro, to the south, and Rio Grande Reservoir, to the north. These subpopulations, with established home ranges and documented reproduction, contribute appreciably to the overall Southern Rockies population. ... With the exception of landscape connectivity across Hwy 160 through the WCPLL (even considering the Culebra Range, which extends south of the Sangre de Cristo Range into New Mexico), the habitat block south of Hwy 160 is otherwise isolated from the remainder of the Southern Rockies Geographic area by low elevation "non-habitat."

W11069. The WCPLL is one of the most important areas to conserve for the long term viability of the lynx in the Southern Rockies.

2. Beetles and Wildfire Recently Increased Threats to the Canada Lynx

The Declaration of Paige Singer provides context through a FWS map that shows the extensive impact of both the West Fork fire and the spruce bark beetle epidemic on the Wolf Creek Pass habitat. FWS007153; Ex. 4 (Singer Declaration).

Due in part to climate change enhancement of ecological processes, lynx and its prey are negatively affected by spruce bark beetles that are currently at epidemic levels on the National Forests on and around Wolf Creek Pass. FWS007151. Beetles have killed most of the mature spruce trees in the Weminuche Wilderness, and new beetle attacks were detected in high-mountain areas outside the wilderness, from the town of South Fork to Wolf Creek Pass. FWS007150.

On June 5, 2013, the West Fork fire ignited and "burned within lynx habitat within the Trout Creek, West Fork San Juan River, and East Fork San Juan River LAUs." FWS007150. *Koehler etal. (2008)* concluded that lynx avoid recent burns, openings, and open canopy, among

other things. FWS007160. The FWS concludes that "there is uncertainty about how the burned areas will influence landscape level lynx movement." *Id.*

Based on the changed conditions on Wolf Creek Pass due to fire and spruce bark beetle, the Forest Service has acknowledged that there is "uncertainty regarding lynx habitat use in the changed landscape." C18124. The Forest Service concluded, "[b]ecause of the patchy, discontinuous distribution of lynx habitat in the Southern Rockies Ecosystem, maintaining landscape-level habitat connectivity may be paramount to maintaining a viable population." W10875.

Spruce bark beetle and wildfire impacts are both natural occurrences that ultimately benefit forest health and will result in healthier wildlife habitat in the future, if natural forces continue to dominate the Wolf Creek Pass.

3. Lynx are Harmed by Existing and Increased Traffic

The FWS Biological Opinion established that traffic on Hwy 160 over Wolf Creek Pass poses a great threat to the lynx.

> Populations of wide-ranging carnivores (e.g. lynx) are particularly vulnerable to road traffic accidents due to low population densities, low reproductive rates, and large home range sizes (Forman et al. 2003; Ruediger 2000). Species with large area requirements are more affected by highways, because their biological requirements often force them to cross highways to find sufficient prey, find mates, and disperse from natal home ranges (Ruediger 2000).

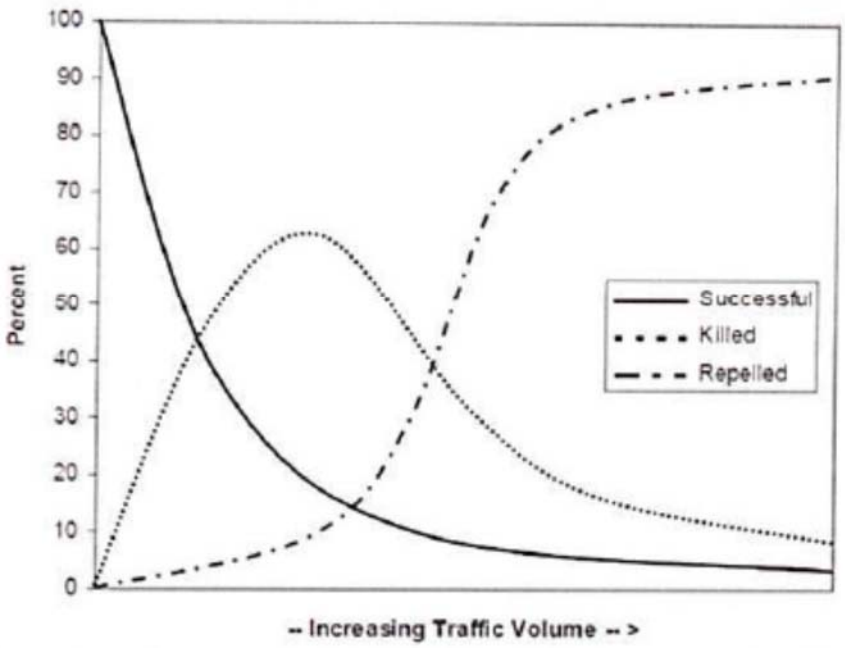
FWS007169. *Forman et al.* (2003) concluded that both vehicle speed and traffic volume influence wildlife collisions. *Id.*

The FWS confirmed that higher traffic volumes on highways likely predispose lynx to a higher risk of mortality on highways while attempting to meet their biological needs. *Id*.

> The issue with the land transfer decision and subsequent development is that, it will push overall traffic volume on U.S. 160 above levels documented to reduce habitat effectiveness and use adjacent to the highway corridor within the

> LAUs adjacent to the highway. Increased traffic volume will increase the rate of lynx hit by vehicle mortality during the first phase of development, followed by a reduction in the mortality rate as traffic volume continues to increase and lynx increase avoidance of the highway corridor.

FWS13.



FWS007170. The above graph represents the repellant impact of traffic on lynx movement and connectivity of habitat on Wolf Creek. Lynx expert William C. Ruediger has concluded that, "as traffic volume approaches or exceeds 2,000 vehicles per day, mortality of wildlife may become significant-as well as avoidance and displacement." C0007284 – C0007285.

The Forest Service confirmed that providing access for LMJV's plans would further harm lynx and its habitat in the National Forests.

> It is likely that the appreciable increase in traffic volume along Hwy 160 resulting from full development of the Village under the Moderate and Maximum Density Development Concepts would result in greater lynx avoidance of the highway corridor, impairing some local and dispersing movements that may lead to reduced landscape connectivity within the designated WCPLL.

W11069. This conclusion is based on increased traffic due to village construction, occupancy, employment, and overall visitation. Projections for traffic after village construction is an "AADT ("Annual Average Daily Traffic") for maximum buildout [of] 8,334 [vehicles per day] (71.2% [increase over baseline]). W11065, FWS007172.[9] To put this into perspective, "annual average two-way daily traffic (AADT) volumes within or above the 2,000-5,000 vehicles per day (VPD) range have been documented to impair lynx movements." W10879. The Forest Service acknowledges that "traffic levels on Hwy 160 through the WCPLL . . . would be . . . far above the range documented to impair lynx movements." W11068. The Forest Service concludes that "[t]he significance of increased highway mortality along the Hwy 160 corridor could impair the continued recovery of lynx in Colorado as a result of fewer animals contributing to the population." *Id.*

The traffic generated from this federal agency action will adversely impact the federally listed Canada lynx.

4. The Wolf Creek Ski Area Harms Lynx

Wolf Creek Ski Area's ongoing operations result in significant impacts to the lynx. The Ski Area "impairs some local lynx use during the ski season as a result of human activity . . . [resulting in] reduced foraging and possible denning (in the most remote, forested areas of the SUP area) opportunities and may deflect diurnal, ski season movements across the ski area." FWS4686.

"The ski area uses explosives and other means for avalanche control within the 1,581-acre SUP boundary." FWS4686. "The ski area assists CDOT with explosives work, as needed,

[9] The traffic report completed for the developer by Felsburg, Holt & Ullevig discloses future peak traffic levels of 10,400 vehicles per day. W02791.

above the Snow Shed over Highway 160 . . . Explosives might startle and displace lynx that are in the vicinity at the time. FWS4684-85. On Wolf Creek Pass these explosives "can be triggered remotely and routinely to release propane-fueled percussive blasts of compressed air, reducing the likelihood for large avalanches to build up before being released."[10]

> Wolf Creek presently operates five grooming vehicles nightly to prepare approximately 400 acres of terrain…Wolf Creek additionally operates two grooming vehicles which service the free Nordic skiing area. Due to the large storms which frequent the area, Wolf Creek additionally owns and maintains a large fleet of auxiliary grooming machines which are only used occasionally.

W18276. Wolf Creek's limited snowmaking facilities are augmented as necessary with manual shoveling of snow from within inter-trail tree islands. *Id.* Based on these ongoing deterrent activities "[t]here is little evidence of lynx using the base area or other highly developed portion of ski areas, especially if forested cover is not present." FWS007168 (Ruediger et al. (2000)). In sum, the minimal existing footprint already has negative impacts on lynx which will be greatly enhanced by the proposed large scale development and concurrent Ski Area expansions and upgrades.

5. LMJV's Village at Wolf Creek Plan Increases Lynx Impacts

The Village at Wolf Creek will have direct negative impacts on lynx. There will be significant impacts on

> lynx movement around the base area and the Village, the development will increase barriers and restrictions from approximately 3.04 miles to approximately 4.77 miles east of Wolf Creek Pass, increasing fragmentation by reducing penetrable portions of the highway to 2.73 miles (from 4.46 miles). Barriers may impede movements, resulting in higher mortality and lower reproduction (Foreman et al. 2003).

[10] http://www.fs.usda.gov/detail/arp/news-events/?cid=STELPRD3818099.

W12677. The increased year round population of the Village will also impact lynx.

CPW pointed out,

> dispersed winter recreation from cross-country skiing, snowshoeing and snowmobiling into lynx hunting areas and travel corridors, which could result in either direct movement out of the area by lynx, direct mortality from illegal take, or disruption of lynx hunting activities, all of which could result in lower productivity of lynx in the general area.

W07255. The BA further provides that,

> [t]he same effects of reduced habitat effectiveness and habitat functionality for lynx and their prey base that would occur within and around the Village at Wolf Creek project area could also occur in more distant areas as a result of off-site dispersed recreation [. . .]. Greater use of existing areas by residents, guests, and employees of the Village at Wolf Creek could result in greater lynx displacement and greater probabilities of mortality from illegal take.

FWS004700; FWS004699 (In addition to development-related lynx habitat losses, there would be additional reduced habitat effectiveness and habitat functionality for lynx and their prey base in surrounding areas as a result of habitat fragmentation, perforation, and risk factors and disturbances (e.g., stray pets, dispersed recreation, etc.) related to human activity and presence….).

This development would also make Wolf Creek Pass into a summer destination. A Forest Service Winter Sports Wildlife Biologist noted,

> [a]nother concern I have is ski area summer uses! The needs to be considerable conversation on lynx habitat conservation (both direct and indirect impacts) as it pertains to the development of summer uses on ski areas. The proposed summer uses will change the footprint of the ski areas, as well as, increase the amount of use year round.

C14376. The location of the proposed development adjacent to the ski area greatly increases the magnitude of impacts and required expanded and comprehensive analysis of these impacts. The increased lynx impacts caused by Village construction and recreational use would occur in combination with impacts from fire, beetles, traffic and Ski Area expansion plans.

E. Wolf Creek Ski Area MDP Expansion Would Increase Environmental Impacts.

In 1986, the Forest Service used a contractor-prepared Environmental Assessment to examine the interplay between the Ski Area's MDP and LMJV's development plans. W01314-W01318. LMJV's agent, Western Land Exchange Company, used a 1974 MDP to estimate the 1986 proposal could add 208 additional condominium units, due in part to the number of users the Forest Service permitted ski area could accommodate. W01317.

In 2012, the Ski Area updated its MDP to take into account the LMJV development and the 2008 Settlement Agreement whereby the private parties transferred property rights and otherwise allocated between them their perceived rights to use the National Forest System for their respective purposes. See ECF No. 51 (Samford Declaration); ECF Nos. 22, 36 (Pls Briefing). The FEIS described "the future implementation of planned projects identified in WCSA's MDP" as "reasonably foreseeable." W11099.

Several interactions between the Village at Wolf Creek and the Ski Area were identified. "WCSA's daily capacity of 4,500 skiers would likely be exceeded regularly – *weekends* could see approximately 105% of the daily capacity, with *peak days* at 245% – significantly altering the recreational experience at the ski area. Peak days would be expected to increase in frequency throughout the season." W11125. After village construction, "the lift and trail network would become overwhelmed on a more consistent basis, significantly altering the recreational experience at the ski area throughout the season . . . Hence, the unique qualities that have come to define "the Wolf Creek experience" would be jeopardized . . .." W11132. "Absent major upgrades to WCSA's lift/trail network and supporting facilities, the unique qualities that have come to define "the Wolf Creek experience" (including lack of lift lines, low trail densities, and

quality snow conditions) would be compromised." *Id*. The Village "would significantly and permanently alter the experience for the majority of WCSA's existing clientele." *Id.*

The Ski Area MDP seeks to increase the Special Use Permit boundary by 1000 acres (W18265), and significantly upgrade and add new chairlifts to increase the mountains daily capacity (W18266). Two of the new chairlifts will go directly into the private parcel owned by LMJV. W18318. The Ski area is already seeking approval to construct the Meadow Lift which would service the Village.[11]

The MDP adds snowmaking to lengthen the season and enhance the beginner experience. W18267. The MDP highlights new areas of ski mountain enhancement that seeks to expand the Ski Area in a manner that requires increased avalanche blasting in expert and off-piste terrain, grooming for expanded beginner and intermediate use just above the Village, dispersed recreation, forest clearing for fire mitigation, other activities that take place near 8,000 person ski areas like Vail in the Interstate 70 Corridor west of Denver. *See e.g.* W11422, W11360, W11440, W11449, (FEIS Comments).

Without benefit of NPEA analysis of environmental or lynx impacts or means to avoid them, the Forest Service acknowledged that "[i]n general, it is reasonable to assume that, in total, the lift/terrain projects contemplated in WCSA's 2013 Master Development Plan would help address, but would not offset, the potential *recreational impacts of a large residential development* proximate to the ski area." W11136 (emphasis supplied). This recreational impact includes "a commensurate increase in the ski area's daily skier capacity," which translates to impacts to traffic and other common infrastructure. W11316.

[11] http://www.fs.usda.gov/detail/riogrande/news-events/?cid=FSEPRD516693

LMJV's plan for the Village at Wolf Creek and the Ski Area MDP are an inseparably intertwined private recreational, commercial, and residential enterprise that is dependent on the National Forest System. However, the Ski Area Master Development Plan was only given passing mention, and has not been subjected to the disclosure and analysis requirements of NEPA or ESA.

F. The Federal Decisionmaking Process

As explained in more detail in the Argument sections, several statutory procedures and standards apply to a private proposal involving, among other things, federal control, construction of a federal highway access, wetlands, threatened and endangered species, and various interests in National Forest. The processes addressed by Plaintiffs' claims are divided roughly, if imperfectly, into two parts: 1) the Forest Service led NEPA process and the Forest Service planning/decisionmaking/objection processes; and 2) the FWS led ESA consultation process, which culminated in the issuance of a Biological Opinion. Because other federal agencies have jurisdictional authority and control over the LMJV proposal, these agencies are noted within the Forest Service NEPA process.

1. Forest Service NEPA Analysis and Project Decisions.

The Forest Service actions in this case have taken a circuitous route. For purposes of this litigation, the 2008 Settlement that invalidated the 2006 EIS and associated access approvals created a clean slate on which state and federal agencies would analyze and consider LMJV's development proposals. The February 29, 2008 Settlement Agreement required the Forest Service to

> initiate a new NEPA process which will include a new scoping process and preparation of a new draft EIS and final EIS, in connection with LMJV's application" [. . .] requesting special use authorizations for rights-of-way for access and utilities across National Forest System lands from U.S. Highway 160

> to LMJV's private property, located within and surrounded by Rio Grande National Forest lands.

Colorado Wild v. Forest Service, 06-cv-02089-JLK-DW (ECF No. 147). The judicially ratified (ECF No. 150) Settlement Agreement confirmed, "the purpose of LMJV's application was to facilitate the landowner's plan to develop its 287.5 acre property as a year-round resort village, to be known as the Village at Wolf Creek." *Id*. at ECF No. 147 at 2. On June 11, 2008, CDOT confirmed that LMJV-related Highway 160 access applications had been withdrawn. W01500-W01501.

a. The Forest Service Acted as Lead Agency for the NEPA Process

CDOT's June 11, 2008 letter is among the first indication in the Administrative Record that a new LMJV Special Use Permit application existed. W01501. CDOT sought to "integrate the proposed new Village access with the existing Ski Area access to a single access point [using a] single, grade-separated access point. W01501. The CDOT access configuration was not subjected to NEPA analysis. The record is ambiguous on the number of alternative proposals LMJV submitted, but the 2008 Special Use Permit application was followed by numerous alternative configurations and requests for "authorizations for rights-of-way for access and utilities across National Forest System lands from U.S. Highway 160 to LMJV's private property." *Colorado Wild*, 06-cv-02089-JLK-DW (ECF No. 147) at 2.

LMJV's 2008 access proposal, along with CDOT's recommended configuration of U.S. Highway 160 access, triggered the publication of a Forest Service Notice of Intent to Prepare an Environmental Impact Statement that anticipated the scope of NEPA analysis.

> The Forest Service will prepare a Draft Environmental Impact Statement (Draft EIS) to evaluate the environmental impacts of authorizing Leavell-McCombs Joint Venture (LMJV) to access 287.5 acres of private property surrounded by National Forest System land. The Forest Service must provide adequate access for the reasonable use and enjoyment of private land. LMJV intends to construct

> a resort and other facilities known as the Village at Wolf Creek on their property, which lies entirely within the Wolf Creek Ski Area. An alternative that evaluates combining the access for both the Village at Wolf Creek and the Wolf Creek Ski Area into a single grade-separated interchange will be analyzed.

73 FR 54786 (September 28, 2008). The Notice of Intent identified actions and alternatives.

> The Proposed Action is to authorize the construction and use of a safe and efficient road, approximately 1,650 feet in length, across NFS land to provide "year-around wheeled vehicle access" to LMJV for their reasonable use and enjoyment of the property. The proposal includes authorization of rights-of-way adjacent to the access road for the installation of utilities to service the Village property.
>
> [. . .] In addition to the Proposed Action and No Action Alternative, where the access road and Village at Wolf Creek would not be constructed, one alternative being considered would combine the LMJV Village at Wolf Creek access and Wolf Creek Ski Area access into one integrated access using a single grade-separated interchange access point from U.S. Highway 160.

Id. The FEIS confirms that, "[e]arly in the analysis, however, the project was placed on indefinite hold pending new information." W10726.

In July 2010, the NEPA analysis resumed when LMJV submitted new information and a land exchange proposal. W10726 (proposal not contained in the Administrative Record). The first proposal contained in the section of the Forest Service Administrative Record titled "Project Initiation" (W01529 - W02342) is a September 21, 2010 letter providing new information that clarified a "proposed Village at Wolf Creek Land Exchange" based on three options. W01529. One of the new access options was based on an agreement reached between LMJV and the Ski Area in a May 8, 2008 Settlement Conference held by Magistrate Judge David West "where Settlement agreement was reached." *Wolf Creek Ski Corporation v. Leavell--McCombs Joint Venture, D/B/A The Village At Wolf Creek*, 04--CV--01099--JLK--DLW (Dist. Colo) (ECF No 327); ECF No. 51.

On April 13, 2011, the Forest Service issued a NEPA scoping notice on the LMJV access proposal limited to two of the three options contained in the LMJV-proposed land exchange. W02343-W02350. The Forest Service announced that the NEPA process was going forward based on additional information and alternatives, including a land exchange proposal. W02343. The Administrative Record contains public comments and documentation from public meetings held as part of the NEPA scoping process. W2353-W02712.

On May 11, 2011, Defendants "invited numerous local, state and Federal agencies to participate as Cooperating Agencies as defined by 40 CFR 1501.6 and 1508.5." W11341 (listing thirteen agencies.) On May 26, 2011, the Forest Service held a scoping meeting for potential "cooperating agencies" that was also attended by LMJV and its agents, but no member of the public. W02518 (sign-in sheet). Several agencies submitted written scoping comments. W2521-W2539. In those comments, several agencies accepted the Forest Service invitation to participate as cooperating agencies. W02533 (FWS), W02537 (U.S. Army Corps of Engineers). However, the Forest Service decided "to simplify and expedite" the NEPA process and thereby decided not to have any Cooperating Agencies. W11342 (FEIS Appendix I, Page 71) *accord* W12558 (Response to Comments: "the Forest Service as the lead agency (40 CFR Part 1501.5) decided not to have Cooperating Agencies (40 CFR Part 1501.6)."). Based on scoping, the Forest Service resumed its NEPA analysis.

On August 17, 2012, the Forest Service announced a 45-day comment period and the release of the Draft Environmental Impact State (DEIS) for the Village at Wolf Creek Access Project. W06354-W06355. The DEIS (W05787-W06353) was the subject of numerous comments (W06361-W07753).

DEIS comments were submitted by government entities with special expertise and jurisdiction over the project. Among CDOT's comments was the failure prepare a "document to satisfy The Federal Highway Administration's (FHWA) National Environmental Policy Act requirements for the proposed action." W07241-W07246 ("Unfortunately, we feel that impacts to state highways, state highway safety, and access control issues have not been adequately disclosed as described above. Additional issues related to groundwater, water quality, MBTA, and permits have been identified."). CPW "[asked] that all wildlife issues that have been presented plus those brought up in the FWS's BO be analyzed and addressed in the EIS document." W07253. The U.S. Army Corps of Engineers comments included the request that the DEIS reflect that "the Forest Service elected not to have any cooperating agencies, and the Corps was not involved in any further coordination or review until the DEIS was published." W07257 – W07258 (confirming proposal involves "Section 404 of the Clean Water Act […] application to discharge fill materials into waters of the United States" due to construction impacts on "fen wetlands" and noting that "effects to wetlands and streams from the interruption of groundwater" had not been adequately analyzed.).

The U.S. EPA commented that the Army Corps of Engineers "may need to supplement the EIS to meet its CWA and NEPA requirements. We recommend that USFS encourage LMJV to discuss plans for the Village at Wolf Creek development with the Corps as soon as possible." W07262. U.S. EPA's comments "identified additional information, data, analyses, or discussion that we recommend for inclusion in the FEIS." W07266. FWS did not comment. Instead, the Department of Interior confirmed that "U.S. Fish and Wildlife Service advises that Endangered Species Act issues will be addressed though the Section 7 consultation process." W07240.

b. Forest Service Participation in the ESA Section 7 Consultation

After the DEIS comment period, the Forest Service moved the Section 7 process forward on May 1, 2013 by sending FWS a contractor-prepared "Final Biological Assessment For The Village At Wolf Creek Access Project, Divide Ranger District, Rio Grande National Forest, Colorado." W05139 - W05278. This "Biological Assessment" transmitted the Forest Service's final determinations on ESA-listed species for purposes of analyzing "Alternative 2 of the Draft Environmental Impact Statement. On August 19, 2013, the Forest Service supplemented the Biological Assessment (W05278-W05282) to update "that analysis as a result of the altered environmental baseline resulting from the effects of the West Fork Fire Complex and the continuing spruce beetle epidemic." W05285. The Forest Service did not supplement the DEIS to reflect this altered environmental baseline or to allow comments on information disclosed by the Biological Assessments.

On September 24, 2013, the Forest Service approved the contractor-prepared "Wildlife Biological And Specialist Report for The Village At Wolf Creek Access Project Environmental Impact Statement, Rio Grande National Forest, Mineral County, Colorado" (W05308- W05492) ("Biological Evaluation") with the stated purpose to document the "review [of] all USFS planned, funded, executed, or permitted programs and activities for possible effects on sensitive species." W05316.

A November 15, 2013 letter (W05493- W05532) contains FWS's Biological Opinion addressing "formal Section 7 consultation" on "the land exchange between the Rio Grande NF and the Leavell-McCombs Joint Venture." W05526. The letter confirmed the agency action under review would cause ESA-prohibited "take" of lynx. W05526. The BO was not subject to NEPA comment or review procedures.

c. The Forest Service Finalized the EIS on November 18, 2014 Without Supplementation

On an unspecified date before March 20, 2014, Dan Dallas determined a supplemental NEPA analysis was required to analyze an over-snow access alternative. Extra-record evidence of a Briefing Paper sent from the Regional Office to the D.C. Office and disclosed during FOIA litigation confirms the Forest Service should have, but did not include this information in the official EIS Administrative Record. 2WC_FOIA_HC_011692, *also disclosed at* C21621, C18866. This process, was not followed and a Supplemental EIS was not prepared.

Other issues arose throughout the NEPA process that the Forest Service knew or should have known required supplementation of the EIS. These included the need to amend the Rio Grande Forest Plan to account for the SRLA violations and a new report by lynx expert William Ruediger that provided information contrary to the analysis in the EIS.

On November 18, 2014, without first providing any opportunity for public or agency NEPA supplementation or comment on the issues and information compiled since the August 17, 2012 DEIS, the Forest Service announced the release of the Final EIS. W10694-W11502. The FEIS is the culmination of the NEPA process, and has not been supplemented. A draft Record of Decision was issued with the FEIS. W12608-W12641.

d. The Forest Service Denied all Objections

The Thanksgiving-eve FEIS release triggered an administrative objection period with numerous objections filed before the January 5, 2015 deadline. W11520-W12129. On December 23, 2014, Plaintiffs sought an extension of time to file objections due, in part, to ongoing violation of the Freedom of Information Act requests filed in February and November 2014. C28613, W17988. This extension request was denied on January 15, 2015; 10 days after the Objections were due. W17988. On March 13, 2015, Defendant Maribeth Gustafson, on

behalf of the Forest Service and without benefit of any hearings or meetings with Objectors, sent letters denying all objections that were approved for detailed review. W12135 - W12607. On March 13, 2015, after granting herself an extension, Ms. Gustafson denied Plaintiffs' Objections, with one minor exception. W12547 - W12607. Ms. Gustafson directed Mr. Dallas to provide additional information and clarification on lynx impacts in context of Forest Plan lynx Guidelines. W12607.

e. The Forest Service Approved the LMJV Proposal Through a Record of Decision with Immediate Effect

On May 21, 2015, the Forest Service issued a Record of Decision "ROD," that completed the Forest Service decisionmaking process. W12650 - W12685. The ROD was given immediate effect and was implemented by number of transactions, Special Use Permits, and other federal approvals creating and extinguishing interests in federal land, the effect and use of which has been stayed by a stipulation entered with the purpose of preventing physical harm to Plaintiffs' interests and ensuring those transactions can be unwound should the Court find unlawful and set aside final agency actions, or parts thereof, on which those transactions are based. ECF No. 6-1. The ROD cites to an October 2014 study for additional lynx information. W12659.

2. Lynx Protection is Addressed by Several Agency Decisions and Plans.

In addition to NEPA's general duties, several other statutory and regulatory protections are triggered by LMJV's plan which aim to conserve and recover the ESA-listed Canada lynx. For example, the FWS is required to prepare a Biological Opinion and provide mitigating terms and conditions to minimize the action agencies' impacts of a proposal that will result in take of a listed species or its critical habitat. 16 U.S.C. Sec. 1536(a)(2). The Southern Rockies Lynx Amendment ("SLRA") to the Rio Grande Forest Plan also provides protections for lynx that guide and constrain Forest Service decisionmaking.

After describing those requirements in context of the lynx living on and near Wolf Creek Pass, this section summarizes the non-binding "Conservation Measures." These measures emerged from the FWS and Forest Service determination that approving the LMJV plan will result in take of lynx and trigger SRLA standards based on traffic related mortality, habitat loss, and increased pressure due to construction and operation of the Village.

a. The ESA-Listing Triggers "Take" Prohibitions and Agency Duties to Consult with FWS

As set out in greater detail in the Argument Section, ESA listing provides substantive and procedural protections for the lynx. Federal agencies have an affirmative duty to protect and help recover listed species. 16 U.S.C. 1536(a)(1). As set out above, the Forest Service sought "Section 7" consultation (16 U.S.C. § 1536(a)(2-3)) to inform FWS about the Forest Service actions that impact lynx and to ascertain scientifically valid ways to minimize these impacts and avoid prohibited "take" of lynx. 16 U.S.C. 1568. As outlined in the Argument Section, this process and the resultant protection from incidental take was unlawfully extended to LMJV's private actions on their private parcel, which should have required compliance with the more rigorous and public Section 10 consultation process. 16 U.S. Code § 1539(b). In turn, the FWS prepared a Biological Opinion (16 U.S.C. § 1536(a)(2)) that is required to identify and set forth actions the Forest Service must take to remedy the anticipated impacts to the lynx and avoid criminal and civil "take" penalties. 16 U.S.C. §1540. The FWS issued a final Biological Opinion on November, 15, 2013, for the Village at Wolf Creek. FWS007144.

The ESA compels FWS to identify and list "critical habitat" to ensure that extinction is avoided and to ensure habitat needed for recovery is protected. 16 U.S.C.S. § 1533(a)(3)(B). However, the FWS has continuously failed to designate lynx critical habitat in Colorado. Recently, the U.S. District Court for the District of Montana, Missoula Division, remanded this

critical habitat decision back to the FWS to reconsider designation of critical habitat in Colorado. *WildEarth Guardians et al. v. U.S. Dept. of Interior et. al*., 9:14-cv-00272-DLC, ECF No. 68 (Sept. 7, 2016). The Court stated "[i]n the case of Colorado, where "most if not all" of the elements of the P[rimary] C[onstituent] E[lements] are "clearly" present, the evidence in the final rule compels the designation of critical habitat in that state." *Id.* at 17.[12] The Court further proclaimed that "[g]iven that evidence cited by the Service in the September 2014 final rule shows that a reproducing lynx population exists in Colorado, the FWS's failure, on account of marginal hare densities, to designate critical habitat to protect that population and aid in its maintenance is arbitrary, capricious, and "offends the ESA." *Id.* at 20.

b. Southern Rockies Lynx Amendment.

Protection of lynx and its habitat is mandated by the Forest Plan that NFMA requires the Forest Service to prepare and update to guide its management decisions on the National Forests. 16 U.S.C. § 1604(i)("use and occupancy of National Forest System lands shall be consistent with the land management plans.") The Southern Rockies Lynx Amendment ("SRLA") was incorporated into the Rio Grande Forest Plan through the Southern Rockies Lynx Amendment Record of Decision that was signed on October 28, 2008. The SRLA outlines the objectives, standards, and guidelines that must be met within all Forest Service decisions in the Southern Rockies. Most applicable to the Wolf Creek Access decision is SRLA Standard ALL S1 which mandates that that "New or expanded permanent developments and vegetation management

[12] Primary Constituent Elements are defined as "A physical or biological feature essential to the conservation of a species for which its designated or proposed critical habitat is based on, such as space for individual and population growth, and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and habitats that are protected from disturbance or are representative of the species= historic geographic and ecological distribution." https://www.fws.gov/nc-es/fish/glossary.pdf.

practices and activities must maintain habitat connectivity." W03826. The Wolf Creek decision violated this Forest Plan Standard.

c. Non-Binding Wolf Creek Lynx "Conservation Measures" were Adopted.

In a novel process that attempts to comply with both the ESA and the SRLA, the FWS accepted LMJV-proposed "Conservation Measures" that purport to minimize lynx "take" by maintaining lynx habitat connectivity. These measures were drafted by the developer without benefit of the best available science and amount to an inadequate funding commitment for measures that have not yet been determined. Potential measures that may be implemented have been shown to be ineffective.

An October 12, 2012 letter from the FWS to the LMJV highlighted that "[t]he development concepts of your proposal are inconsistent with the [SRLA] direction and likely to result in significant adverse effects to Canada lynx and result in take of lynx." FWS004151. This letter further noted that "[c]ompleting the conservation measures concurrent with construction will provide a measure of safety on the highway since fewer animals are likely to be on the road surface, reducing the potential for vehicle collisions." FWS004150 – 51. The FWS concluded that the LMJV proposed Conservation Measures were ineffective, and identified other options.

> Considering the effects associated with the development (i.e. habitat loss within the WCPLL, and increased traffic volume on US Highway 160), *few options exist* to avoid, minimize, or mitigate the anticipated effects, and are likely to benefit lynx within the action area. Some available options are as follows:
>
> • Sell existing property to US Forest Service (assumes willing purchase).
> • Exchange private parcel for Forest Service lands elsewhere that will not result in similar impacts.
> • Place property under conservation easement to minimize or eliminate future development.

> • Mitigate (40 CFR 1508.20) for the loss of up to approximately 314 acres of lynx landscape linkage habitat (does not necessarily equate to habitat for foraging or denning) resulting from development of the property.
> • Construct, through cooperation with CDOT and FHWA, crossing structures commensurate with the effects of the VWC development, including habitat loss and impacts of increased traffic volume.
> • Monetary compensation for the loss of habitat within the WCPLL equal to the acreage lost from direct and indirect effects of the VWC development.
> • Monetary compensation, commensurate with VWC development effects, for increase traffic volume resulting in adverse effects, including take of lynx.

FWS3976 (emphasis added). This October 12 letter prompted a FWS "conversation with the applicant [LMJV]." FWS004025. Meeting notes from that "conversation" are not contained in the Administrative Record.

A FWS response letter was drafted and reviewed by Solicitors Office attorneys Dana Jacobson and Kate Williams-Shuck; FWS Western Colorado Supervisor, Patty Gelatt; - FWS Section 7 Coordinator, Doug Laye; and other FWS staff. FWS004021, *et seq.* On December 5, 2012, the FWS identified a weaker set of conservation measures that again confirmed lynx "take."

> Considering the effects associated with the development (i.e. habitat loss within the WCPLL, and increased traffic volume on US Highway 160), *few options exist* to avoid, minimize, or mitigate the anticipated effects. The Service has identified a few of the options below:
>
> > • Minimize take resulting from the loss of up to approximately 314 acres of lynx landscape linkage habitat resulting from development of the property. Mitigation should be accomplished through replacement of in kind habitat equal to the anticipated habitat lost within the WCPLL.
> > • Construct, through cooperation with COOT and FHWA, crossing structures commensurate with the effects of the VWC development, including habitat loss and impacts of increased traffic volume.
> > • Monetary compensation for the loss of habitat within the WCPLL equal to the acreage lost from direct and indirect effects of the VWC development. Funds would be placed into a conservation fund and made available to conduct lynx conservation activities within the action area.

> • Monetary compensation, commensurate with VWC development effects, for increase traffic volume resulting in adverse effects, including take of lynx. Funds would be placed into a conservation fund and used to address highway related impacts within the WCPLL.

C12613 (emphasis added). Again the developer expressed extreme displeasure in these conservation measures.[13] This set of original FWS proposed conservation measures acknowledged the detrimental impacts of both habitat loss due to constructing the Village, impacts of operating the Village, and increased traffic. The original FWS proposed options highlight that drastic measures and financial commitments are needed to "minimize, or mitigate the anticipated effects" that "take" lynx.

Final Conservation Measures were created after the DEIS comment period and were disclosed without analysis in an appendix to the FEIS. W11286. As stated by Forest Service Biologist, Randy Ghormley, this was a "unique section 7 agreement process" which did not adhere to established FWS protocols that implement the ESA. C0012331.

i. The Conservation Agreement Creates a Plan to Create non-Binding Conservation Measures

The Conservation Measures (W11286) agreed to by LMJV rely on a "panel" to identify, analyze, and recommend appropriate conservation measures sometime in the future.[14] "The

[13] LMJV's agent, Dust Hicks, emailed, "[s]ame old Kurt B.S. We need to strongly rebuke this response and the three months wasted time it took for them to respond. They have no justification for us mitigating all 314 acres of private land, constructing any crossing structures, and monetarily compensating for loss of all habitat. Kurt has apparently convinced Patty, Susan, and solicitors to "Reach for the Moon" to get Red to PAY for this Section 7 B.O. We will need to visit as a team, (maybe Friday after we meet with FS in Denver), and then set a face to face in Denver asap including entire F&W team and USFS representation." C0012620.

[14] The Proponent will appoint 2 members of this 6 person panel, with two other spots going to the Forest Service and the FWS, the agencies that rubber stamped this "Conservation Agreement." It is a clear conflict to have FWS, the agency tasked with enforcing and objectively analyzing the effectiveness of these measures, also part of the process of negotiating these measures while under the influence of LMJV agents.

individual panel members will make recommendations for actions that need to be taken to provide safe passage across the Highway 160 in general, as well as the actions that will appropriately minimize take from the Village." FWS007165. The Conservation Agreement lists potential mitigation measures that may or may not be implemented. W11288 ([Mitigation] could be in the form of crossing structures or traffic speed controls, depending on the technology available at that time, the feasibility of implementing the recommended measures, and the availability of funds within the reserve fund). No mitigation measures are mentioned that "minimize take from the Village." *Id.* "Once individual panel members provide their recommendations to the Applicant, *the Service and the Applicant shall meet to determine how the adverse effects to lynx shall be minimized*."[15] W11287 (emphasis added).

"[T]here is some uncertainty regarding what specific measures will be implemented, and when implementation will occur." FWS007173. The BO acknowledges that:

> [d]ue to the uncertainty regarding the timing of implementation of specific conservation measures, we anticipate an increase in the mortality rate of lynx on U.S. 160 in the short term until implementation of the conservation measures begins to reduce the mortality rate. *Any reduction in the mortality rate will depend on the specific measure implemented and when implementation of the measures occurs. It is not possible to quantify reduction in the mortality rate at this time.*

Id. (emphasis added); FWS007162 (Depending on *when*, and *which*, conservation measures the Applicant implements, the rate of mortality *may* be reduced.) (emphasis added).

FWS statements reflect unresolved concerns about the conservation measures:

[15] The issue with this is highlighted by FWS Biologist Kurt Broderdorp's comment to BA: "The funding commitment, in and of itself, is not assumed to be adequate to maintain habitat connectivity. Without the Applicants *commitment to implement the measures recommended by the panel*, the funding does nothing. The commitment to implement measures forwarded by the panel provides reasonable certainty that the conservation measure will be implemented." FWS005558 (*emphasis added).* The Applicant has not made such a commitment.

> [w]here do the min and max numbers come from? It seems arbitrary. In general I think there is too much focus on the min and max cap amounts dictating what will be done for lynx instead of in reverse where what is needed to minimize the impacts of incidental take are determined first then the funding is worked out.

FWS004154. Another issue was highlighted by another FWS employee:

> [w]e need to consider that even if a crossing site is found (if that is the outcome of the studies), and money is available to construct it – final placement may be outside the control of the applicant, FS, or the Service. So you could end up being unable (due to state highway control) to implement the best solution for the impacts. The Service may want to anticipate this and construct a fall back option for helping lynx population outside the action area? Since this plan will not be a reasonable prudent measure or a term and condition, I think the Service has broader latitude to "see" the conservation plan at a broader lynx population scale. Again, this seems like the money is dictating the conservation measures instead of determining what is necessary to minimize incidental take first.

FWS04156 It is clear this "conservation" strategy is no more than an agreement to try to do something beneficial in the future in order to comply with current legal mandates.

ii. The Panel Will be Constrained by Insufficient Funding and the Proposed Conservation Measures are Known to be Inadequate

The funding commitment made by the developer will not be sufficient to fund the panel and to implement meaningful mitigation measures. W11286. The budget is based on a sliding scale linked to a phased development of up to 3422 units. C0013788.[16] Wildlife crossing "structures . . .can cost $3,000,000 per structure, or more." C33263, *see also* C13209 (wildlife crossing structure examples with costs); C13211 (estimate for underpass structures for Wolf Creek Pass), Exh. 3 (Parker Declaration: $5,000,000); Exh 4 (Singer Declaration :same).

The Conservation Agreement confirms the lack of funding by claiming mitigation *could* be supported by "third-party contributions, such as grants or contributions from other developers

[16] Contrary to the 1711-unit plan analyzed in the EIS, the projected budget is based on plan to construct a 3422-unit development over the next twenty years. The budget also highlights that over 1,500 units will be completed before the panel considers any connectivity structures.

or non-profit organizations." FWS007166. The Conservation Agreement has a projected budget attached which highlights the fact that much damage to the lynx will be done before these measures may be implemented (years 2023, 2032, 2036). C0013788.

Compounding the financial limitations, the actual measures themselves have proven to be ineffective. The conservation measures assume that installing crossing structures on U.S. Highway 160 will avoid "take" and minimize the adverse impacts on the lynx. The Conservation Measures are contradicted by a study, contained in the Administrative Record, confirming that when faced with habitat disturbance a lynx had, "left and now occupies an area hundreds of miles from its original home range." FWS5914. Driving lynx from its existing habitat is a form of unmitigated take (50 CFR 222.102 (definition of harm)) and is not addressed in the "conservation measures."

The ineffectiveness of highway crossing structures is confirmed by a study where, "during monitoring of the use of highway wildlife crossings in Banff National Park in Canada, researchers found that highways act as lynx territory boundaries and are not incorporated into a home range, even though crossing structures exist (B. Leeson, pers. comm. 2001)." FWS001589 (Wolf Creek Pass East BO – 2003).[17] The Biological Opinion confirms that the crossing structure already constructed near Wolf Creek Pass has not proven effective to avoid "take" or promote lynx recovery. FWS007159.

Similarly, measures aimed to "reduce vehicle speeds along highways and enhance driver awareness" have proven ineffective. *Id.* The "one known study that directly looked at warning

[17] The Ruediger Report further supports the conclusion that crossing structures will not be effective on Wolf Creek Pass. *See S*ections V.B.4.; V.C.2.b.iii-iv; (lynx mitigation).

sign impact on wildlife-vehicle collisions, [found] enhanced warning signs are not effective in reducing wildlife-vehicle collisions (Huijser et al. 2008). *Id.*

Although the exact conservation measures the panel may recommend remain unknown, the potential measures identified in the Conservation Agreement are demonstrably ineffective mitigation measures to avoid "take" and recover lynx.

iii. Mitigation Plans Involving Changes to LMJV Proposal were not Adopted

The Conservation Agreement fails to include any measures aimed at reducing the impacts of Village construction, habitat loss, increased recreational pressure, summer use, nighttime presence, noise and light pollution, and other effects of operating a large scale development on this high alpine pass.

d. The 2014 Ruediger Report Confirms that Lynx Impacts are Not Mitigated by Proposed Crossing Structures

While LMJV was pressuring the Forest Service to finalize the EIS,[18] an October, 2014 report by *Ruediger et al.* titled "*Wildlife Habitat Connectivity and Associated Wildlife Crossings for US Highway 160, Phases II and III"* provided new and highly relevant information about lynx crossing structures on Wolf Creek Pass, before the FEIS was released on November 18, 2014, and months before the Final ROD was issued on May 21, 2015. The Forest Service accepted that the *Ruediger* report fulfilled the proponents agreed upon "conservation measure #4 that directed development of the corridor assessment . . ." W12658. This report involved a "wildlife habitat linkage assessment process and associated new ways that the information can be

[18]*See* Section E.1, E.3 *discusssing e.g.* C23790 (he has been hearing from the proponent and his sense is that if the decision is not made by October 1st, the political bells will start ringing loudly); C24605 (If the FEIS and Draft ROD are not released before the election date the proponents have commented that they will engage the department).

used to expedite highway projects, improve mitigation measures, facilitate interagency dialogue and implement wildlife habitat connectivity on the landscape." FWS004152, C25412.

The conservation measures contained in the November 15, 2013 Biological Opinion provide that this report be completed to "assess the US Highway 160 corridor within the WCPLL to determine the location and appropriate number of structures to address mitigation of VWC development effects." FWS004152. This "corridor assessment" was meant to "result in a prioritization of crossing points by lynx on Hwy 160." W12656.

Ruediger specifically found "it appears unlikely that modeling will be able to substantially help identify specific locations for future lynx crossings . . ." W18499. *Ruediger* lists numerous reasons for why lynx crossing structures will not be effective. These include, a "total lack of documented lynx use of the existing crossings, the high snow depths limiting the use of underpass wildlife crossings for four to five months of the year, the paucity of data as to where lynx are crossing US 160, and the fact that only one lynx is known to have been hit by vehicles in the Wolf Creek Pass vicinity." *Id.* *Ruediger* concluded "this report will make no recommendations for wildlife crossings to specifically benefit lynx." *Id.*

On April 3, 2015, before the ROD was issued, Threatened, Endangered, and Sensitive Species Program Leader, Peter McDonald, indicated that he wanted to speak with Forest Service Biologist Randy Ghormley about the "Ruediger paper on effectiveness of a lynx crossing along the highway." C37657. Mr. Ghormley responded about the conclusion on Wolf Creek pass stating, "it's pretty clear when you read it." C37661. Mr. Ghormley highlights that the report is "specific to implementing one of our key Conservation Measures" and "[i]t will be interesting to see what the "panel" comes up with, and what options truly exist to maintain permeability of the highway." C37880.

This report was never considered in the Forest Service's DEIS, FEIS or Biological Assessment, or FWS's Biological Opinion. Instead, Defendant Dan Dallas glossed over the *Ruediger Report* with a dismissive paragraph in the ROD asserting:

> [b]ased on my consideration of the report's findings and further discussion with the U.S. Fish and Wildlife Service (pers. comm. with Kurt Broderdorp, FWS, April 6, 2015), I conclude the report does not substantially alter the previous analyses and conclusions about effects to the Canada lynx on which my decision here relies.

W12659.

The legal basis for Plaintiffs' request for judicial relief in the form of invalidation of agency action and remand for NEPA, ESA, Forest Plan, and Forest Service regulation compliance is addressed in context of these facts, as established by the Administrative Record.

IV. STANDARD OF REVIEW

Where a statute, such as NEPA or NFMA does not provide for a private right of action, the APA, 5 U.S.C. § 701 *et seq.*, provides for judicial review of final agency actions.

> Judicial review of both formal and informal agency action is governed by § 706 of the APA, which provides that a "reviewing court shall . . .hold unlawful and set aside agency action, findings, and conclusions found" not to meet six separate standards. [*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 n. 30 (1971)] (*citing* 5 U.S.C. § 706(2)). Informal agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 413-14, 91 S. Ct. at 822 (construing § 706(2)(A)-(D), the "generally applicable" standards). […] These standards require the reviewing court to engage in a "substantial inquiry." *Overton Park*, 401 U.S. at 415, 91 S. Ct. at 823. An agency's decision is entitled to a presumption of regularity, "but that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review."

Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1573-74 (10th Cir. 1994) (footnotes omitted). Because the arbitrary and capricious standard "focuses on the rationality of the

agency's decisionmaking process rather than on the rationality of the actual decision . . . the agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id*. at 1574, *see also Motor Vehicle Mfrs., 463 US at 43; Dine Citizens Against Ruining our Env't v. Klein, 747 F. Supp. 2d 1234, 1257 (D. Colo. 2010).* Reviewing courts are not allowed to "supply a reasoned basis for the agency's action that the agency itself has not given" nor may the agency's briefing provide a *post hoc* rationalization that provides a reasoned basis not contained in the administrative record. *Motor Vehicle Mfrs. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983), quoting SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *San Luis Valley Ecosystem Council v. United States Forest Serv.*, 2007 WL 1463855, *2 (D. Colo. 2007). This presumption does not allow courts to "rubber stamp" administrative decisions "they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (internal quotation marks omitted).

Usually, "[a] presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action." *Colo. Health Care Ass'n v. Colo. Dep't of Soc. Serv.*, 842 F.2d 1158, 1164 (10th Cir. 1988). However, procedural deference is not strongly supported where NEPA regulates all federal agencies under a uniform set of procedures and terminology set out by the CEQ. *See e.g.* 40 C.F.R. § 1508.1. NEPA does not implicate any special expertise of the regulated agency; NEPA imposes a statutory duty (42 U.S.C. § 4332(2)(C)) to use NEPA's procedural requirements to "prevent or eliminate damage" to the environment. *Ross v. FHA*, 162 F.3d 1046, 1051 (10th Cir. 1998). Judicial deference should be applied sparingly here to determine whether an agency followed its duties to follow NEPA procedures and apply the "hard look" standard when analyzing a private proposal. *Citizens*

against Burlington, Inc. v. Busey, 938 F.2d 190, 209 (D.C. Cir. 1991) (agencies have "duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project."). Yet, the APA standard establishes checks and balances by requiring judicial review to be "searching and careful," "thorough, probing, and in-depth." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415 (1971).

When laws, statutes, or regulations that grant privileges or relinquish rights to federally-owned lands are at issue, these authorities "granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that such grants must be construed favorably to the Government and that nothing passes but what is conveyed in clear and explicit language -- inferences being resolved not against but for the Government." *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919) (citations omitted) a*ccord United States v. Union Pacific R. Co*., 353 U.S. 112, 116; *Andrus v. Charlestone Stone Products*, 436 U.S. 604, 617, (1978); *Walton v. United States*, 415 F.2d 121, 123 (10th Cir. 1969). Should a district court find that an agency failed to apply this rule of interpretation to favor the Government's rights and interests in the National Forest System, the reasoning and conclusions are arbitrary, capricious, and contrary to law and the agency actions must be set aside, just as a Court of Appeals would set aside a district court order based on an erroneous legal standard. *Olenhouse*, 42 F.3d at 1580 (10th Cir. 1994)(analogizing APA judicial review to an appellate court).

Thus, the APA directs Courts to set aside an agency action when:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs., 463 U.S. at 43.

V. ARGUMENT

Although the APA standard of review applies differently to NEPA claims and ESA claims in some circumstances, in the present case, Plaintiffs' rely on the Administrative Record, omissions thereto, and extra-record evidence to support its argument on the merits under both statutes. *Sierra Club v. United States DOE*, 287 F.3d 1256, 1265-1266 (10th Cir. 2002) (reversing and remanding for further proceedings) *accord Sierra Club v. United States DOE*, 255 F. Supp. 2d 1177, 1189-1190 (D. Colo. 2002) (conducting administrative record review, making findings, and setting aside agency action taken without NEPA and ESA compliance).

Underlying each claim is the Forest Service misapplication and misinterpretation of statutes and regulations in a manner that favored the private developer and diminished the federal statutes and regulations that impose duties on the Forest Service's exercise of authority over the National Forest System and the ESA-protected Canada lynx. *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919). This case involves "several interrelated agency decisions" with multiple legal violations, and is more "like a Gordian knot that needs cutting than a simple tangle that the government can untie with a little extra time." *High Country Conservation Advocates v. U.S. Forest Serv.,* 67 F. Supp. 3d 1262, 1265 (D. Colo. 2014).

The argument addresses the Gordian knot of agency actions and violations by first addressing clams primarily invoking NEPA. The next two sections address lynx and other species in contest of Forest Plan Standards and then the ESA. The fourth section of the argument addresses public land statues and the last section addresses undue influence exerted on the agency decisionmakers, scientists, and resource specialists.

A. Forest Service Did not Comply with the NEPA Procedures

The Tenth Circuit has summarized the relevant requirements of NEPA and its implementing regulations.

> Under NEPA, an agency is required to prepare and circulate for review and comment an environmental impact statement before undertaking "legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The agency must prepare a detailed environmental assessment to determine whether the project requires an environmental impact statement. 40 C.F.R. § 1508.9. If an environmental impact statement is prepared, it must detail the environmental impact of the proposed action, any unavoidable adverse environmental effects if the proposal is implemented, alternatives to the proposed action, the relationship between local shortterm uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources involved in the proposed action if it is implemented. 42 U.S.C. § 4332(C).
>
> NEPA has twin aims. First, it "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process. Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it required only that the agency take a 'hard look' at the environmental consequences before taking a major action.

Sierra Club v. United States DOE, 287 F.3d 1256, 1261-1262 (10th Cir. Colo. 2002) *quoting Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983) (internal citations omitted) *and citing Sierra Club v. Hodel*, 848 F.2d 1068, 1088 (10th Cir. 1988). NEPA's carefully designed procedures are intended to provide substantive protections.

> The centerpiece of environmental regulation in the United States, NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives. *See* 42 U.S.C. § 4331(b) (congressional declaration of national environmental policy).

N.M. ex rel. Richardson v. BLM, 565 F.3d 683, 703 (10th Cir. 2009).

A "federal action" such as the LMJV request involving federal land to expand access to its private parcel triggers the agency's statutory duty (42 U.S.C. § 4332(2)(C)) to use NEPA's procedural requirements to "prevent or eliminate damage" to the environment. The Federal agency must use the NEPA process to "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). Promises of post-approval analysis of reasonably foreseeable actions has been rejected in recognition that although "assurances of future NEPA review possess a certain pragmatic appeal, such assurances cannot obviate the need for compliance with NEPA regulations." *Sierra Club v. United States DOE*, 255 F. Supp. 2d 1177, 1186 (D. Colo. 2002) (holding issuance of easements for mine access arbitrary and capricious when it preceded NEPA compliance).

At the earliest stages of the NEPA review, EPA provided scoping comments that alerted the Forest Service to fatal flaws that were not corrected.

> Along with identifying impacts of the land exchange, the EIS should assess any direct, indirect and cumulative impacts associated with the connected development. We recommend that the EIS disclose the impacts of all reasonably foreseeable actions on environmental resources in a way for the decision-maker to be able to effectively plan to reduce impacts on such resources to the fullest extent possible.

W02524 (EPA Scoping Comments). The Forest Service elected instead to categorize the development as having only indirect effects, and avoided the disclosure of foreseeable actions, thus thwarting the NEPA procedures that allow the public and the decision-maker to reduce impacts and otherwise comply with NEPA "to the fullest extent possible." 42 U.S.C. § 4332(2)(C). Despite the legal requirements and EPA's cautionary comments, the EIS only considered indirect impacts of a conceptual outline of the LMJV development, and made no

effort to analyze easements, mitigation measures, and other available means to minimize the direct impact of the development on the National Forest, the ski area, or the environment that the NEPA process was adopted to protect. Instead of rigorous analysis, the FEIS that presented the Forest Service decisionmaker with a predetermined and legally erroneous choice between two means of providing unfettered and unrestrained access and a no action alternative that the FEIS wrongly concluded could not be selected. W12658 (ROD: "The proponent has a right under ANILCA to access the property. Thus, whether under Alternative B or Alternative C, there is likely to be an increase in traffic on Highway 160 due to the development.").

Each NEPA claim is addressed in the order set out in the complaint, with Claims 8-10 combined in Section V.A.6 under NEPA's "hard look" standard.

1. The FEIS and NEPA process are based on an unlawfully narrow designation of Federal Action and an unreasonably narrow purpose and need statement in violation of NEPA.

NEPA is triggered by "Federal control and responsibility, which are the defining features of a "major federal action." 40 C.F.R. § 1508.18. When impacts of the "federal action" are significant and require and 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). It is difficult to imagine two proposals more closely related than LMJV's Highway 160 access proposal and LMJV's plan to construct the Village at Wolf Creek on federal lands adjacent to Highway 160 to service the federally permitted Wolf Creek Ski Area, which operates on federal lands.

Other federal agencies with expertise or jurisdiction over LMJV's proposals have confirmed the integrated nature of LMJV's access expansion and subsequent development

constitute an "integrated proposal." W02537 (U.S. Army Corps of Engineers Scoping Comments); W02533 (FWS Scoping Comments: "The Scoping Letter included two alternatives, which will result in the development of private lands owned by the applicant."); W7262 (EPA DEIS Comments: "recommend the FEIS present an expanded analysis of cumulative effects…"; W7241 (CDOT DEIS Comments: "An incomplete analysis of the maximum development scenario results in a segmentation of the NEPA analysis). Instead of heeding the advice of these state and federal agencies, the Forest Service segregated the access proposal from the development proposal, and thereby defined an unlawful "federal action" that excluded the direct impacts of the development proposal and irreparably poisoned the subsequent NEPA analysis. *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).

> The Forest Service stated its position in rejecting Plaintiffs' Objections:
>
> [T]he future development of the Village at Wolf Creek is not a part of the Purpose and Need or the federal proposed action, because it is not a federal action; it is a private action.

W12549 (Response to Plaintiffs' Objections). The Forest Service position is wrong, as a matter of law. The Forest Service position contradicts the integrated proposal recognized in the judicially ratified 2008 Settlement Agreement that set aside the 2006 EIS and established the Forest Service would initiate a new NEPA process to analyze the "landowner's plan to develop its 287.5 acre property as a year-round resort village, to be known as the Village at Wolf Creek" and any "application" for expanded access to LJMV property. *Colorado Wild v. Forest Service*, 06-cv-02089-JLK-DW (ECF No. 147 at 2, *Id*. at ¶2). In other words, the inclusion of a Village access proposal and a Village development proposal within a single "federal action" is settled.

The designation of the "federal action" (42 U.S.C. § 4332(2)(C)) and "purpose and need" are critical steps that trigger NEPA's procedural requirements. By narrowly defining the federal action and the purpose and need, the FEIS fails to satisfy NEPA's requirements of public participation and informed decisionmaking. *Sierra Club v. United States DOE*, 287 F.3d 1256, 1261-1262 (10th Cir. Colo. 2002). The Forest Service is the only state or federal agency who believes the Village access and Village development are segregable proposals. But, as lead agency, the Forest Service formulated unique interpretations that ignore well-established interpretations of the duty of all federal agencies (42 U.S.C. § 4332(2)(C)) to use NEPA's procedural requirements to "prevent or eliminate damage" to the environment. *Ross v. FHA*, 162 F.3d 1046, 1051 (10th Cir. 1998) ("major federal action" means that the federal government has "actual power" to control the project).

The narrowed scope of analysis tainted other areas of required NEPA analysis as well. Specifically, this narrowly defined "federal action" precluded detailed analysis of at least three reasonable alternatives identified by the public, LMJV, the Ski Area, and CDOT. *See* Section III.2. By narrowing the federal action to the access proposal, the Forest Service "define[d the] project so narrowly that it foreclose[d] a reasonable consideration of alternatives." *Colo. Wild, Inc. v. United States Forest Serv*., 523 F. Supp. 2d 1213, 1226 (D. Colo. 2007) *quoting Fuel Safe*, 389 F.3d at 1324 (*quoting Davis,* 302 F.3d at 1119); *citing Citizens' Comm*., 297 F.3d at 1030.

Similarly, NEPA caselaw precludes the definition of "the project's purpose in terms so unreasonably narrow as to make the [NEPA analysis] 'a foreordained formality.'" *City of Bridgeton v. FAA*, 212 F.3d 448, 458 (8th Cir. 2000) (*quoting Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), *cert. denied* 502 U.S. 994 (1991) *citing Simmons v.*

U.S. Army Corps of Eng'rs, 120 F.3d 664, 666 (7th Cir. 1997)). The FEIS states that the "Forest Service is evaluating the land exchange as a means of providing legal access" to a private inholding. W10728. The "purpose and need' statement avoids the stated purpose of the expanded access request, which is a grant of an interest in federal land to allow the LMJV's private development proposal to provide residential and commercial service to the Ski Area, which operates on the National Forest pursuant to Special Use Permit. Viewed objectively, the only possible purpose of the access requests is construction of a town-sized base area to provide housing and commercial services to people who ski and recreate in the National Forest. The only private purpose is profiting off the natural beauty, recreational opportunities and other amenities provided by the National Forests on Wolf Creek Pass.

As explained more in subsequent sections of this brief, the fatal flaw of an unlawfully narrow designation of the federal action and an unreasonably narrow purpose and need statement manifests and metastasizes into other claims. This Claim forms a stand-alone and straightforward legal basis to vacate the FEIS and ROD that the Forest Service built on legal error and interpretations that created a virtual Gordian knot of ESA, NEPA, and NFMA violations.

2. The EIS examined an unlawfully narrow Range of Reasonable Access Alternatives

Contrary to the CEQ regulations, the Forest Service did not carry out a NEPA alternatives analysis that defined the issues sharply to provide a "clear basis for choice among options by the decision maker and the public." 40 C.F.R. § 1502.14.

> The requirement that agencies consider alternatives to the action under review is "the heart of the environmental impact statement." […] As a consequence, NEPA's implementing regulations require agencies to "[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."

Colo. Wild, Inc. v. United States Forest Serv., 523 F. Supp. 2d 1213, 1226 (D. Colo. 2007) *citing Fuel Safe Washington v. Fed. Energy Regulatory Comm'n*, 389 F.3d 1313, 1323 (10th Cir. 2004) (*quoting* 40 C.F.R. § 1502.14(a)). To comply with this requirement, an agency must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b). The alternatives analysis necessarily includes "[o]ther reasonable courses of actions" as well as mitigation measures not in the proposed action. 40 C.F.R. § 1508.25(a); 40 C.F.R. § 1508.25(b)(2)-(3). The agency's treatment of alternatives must be "substantial" and present impacts of alternatives in comparative form "sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and public." 40 C.F.R. § 1502.14. For the reasons set out across all NEPA sections of this brief, the Forest Service did not comply with the NEPA's core requirement to consider and compare alternatives.

The EIS compared three "alternatives;" "Alternative 1 – No Action; Alternative 2 – Land Exchange; and Alternative 3 – ANILCA Road Access." W10756. The FEIS did not offer the public or the decisionmaker a detailed examination of any development alternative that did not involve the same result: expanded access of LMJV's choosing for purposes of building and operating a year-round town below the Ski Area. As set out more completely in other sections of this brief, the FEIS alternatives analysis did not offer the decisionmaker the opportunity to impose ANILCA terms and conditions, land exchange encumbrances, or mitigation measures to protect Federal Lands and Lynx from the impacts of the LMJV development.

Three reasonable recognized access configurations were not analyzed: (1) using existing or slightly enhanced access for reasonable use and enjoyment private parcel; (2) a grade-separated interchange based on designs, traffic studies, and impacts CDOT and the Forest Service confirmed are necessary for U.S. Highway 160 access; or (3) addressing the Settlement Agreement alternative presented by LMJV and the Ski Area. The omission of these alternatives precluded NEPA analysis of alternative means of providing reasonable access to the National Forest, the LMJV property, and the federally permitted Ski Area that LMJV's residential and commercial development proposal would service. In each instance, the agency considered the excluded alternative internally, confirming, "that such analysis was possible" but not included in a NEPA document. *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009).

a. Over-the-Snow Winter Access Alternative Was Determined Reasonable Yet not Considered in the EIS.

The documents in the agency's "record reveals [the Forest Service] conducted an internal analysis" but excluded over snow access from consideration in the FEIS. *Id*. On March 20, 2014, the Denver Regional Office advised the Washington D.C. Office.

> The Rio Grande National Forest determined that since over-snow access was not analyzed within any of the alternatives one or more new alternatives needed to be developed and analyzed. The new alternatives will be analyzed in a supplementary EIS and open to public comment before a final EIS is completed and a decision is made.

WO_00002824. Over the snow access was debated and analyzed internally by the Forest Service, and identified as a reasonable alternative.

> **Q. What are some examples of similarly situated properties where over-snow access is required?**
>
> A. One of the best examples is by Alta Ski Area. There are several residences adjoining Alta Ski Area that are private inholdings within the Uinta-Wasatch Cache National Forest in Utah. Residents must access their property using over-snow means during the winter. Another good example can be found closer to

> home at Telluride where a restaurant and overnight facility near the ski area are accessed through over-snow means. We plan to expand our research further while working on the supplementary EIS.

WO_00002826.

> **Q. Why wouldn't an over-snow access be analyzed in the No-Action Alternative?**
>
> A. Over-snow access to the proponents land is currently not allowed due to the motorized over-snow closure order covering the Wolf Creek Ski Area permitted area of operation. Since our current regulations restrict motorized over-snow travel within the permitted area NEPA is required to authorize motorized over-snow access.

WO_00002828. These two answers to questions were developed after analyzing the question internally, and demonstrate that an over the snow access alternative similar to Alta and Telluride inholdings are reasonable alternative yet they were inexplicably and arbitrarily excluded from NEPA analysis.

This alternative was requested in Plaintiffs' comments. W06459 (There are private inholdings on Beaver Creek, Alamosa River Headwaters, Red Mountain Creek, Lime Creek, and others. These properties enjoy access mostly via dirt or gravel roads which are not plowed in winter, necessitating snowmobile access). The alternative is not analyzed in the NEPA document. In short, the Forest Service identified over snow access as a specific reasonable alternative and went as far as creating a Briefing Paper and Media documents, but did not analyze it in the FEIS. *N.M. ex rel.* Richardson v. BLM, 565 F.3d 683, 708 (10th Cir. 2009)(holding a NEPA analysis unlawful where "analysis was possible" but not included in a NEPA document).

b. A Grade-Separated Highway 160 Interchange was not Analyzed But Was a Reasonable Alternative

Similarly, the Notice of Intent, and the Feasibility Analysis on which the Land Exchange were premised both confirmed that a reasonable alternative involves the need to locate, design, and build a grade-separated interchange.

> A grade separated interchange off Highway 160 capable of handling full buildout traffic estimates would be required to be built at the initial stage of development.

73 FR 54786 (September 28, 2008). Even though concerns with omitting this aspect of the alternative means of satisfying the LMJV access proposal, were repeatedly raised by agency comments, public comments and Plaintiffs' objections, Ms. Gustafson's dismissed it in the objection resolution without explanation or record support.

> If a grade-separated interchange were to be necessary to accommodate residential development, it is likely that it would be in the distant future. Whether or not a grade-separated interchange is economically or technically feasible, or necessary, is beyond the scope of this analysis. This is not segmentation of the NEPA process/analysis.

W12552 (Response to Objections). Ms. Gustafson's conclusion is contrary to, and unsupported by the Administrative Record, particularly the Forest Service Notice of Intent and CDOT's diligent efforts to ensure the NEPA process would consider the impacts of this reasonable alternative. W01501; W07241-W07246 (CDOT requests to examine a single, grade separated interchange to meet combined demands of Ski Area and LMJV discussed more fully at Section IV(B)(6)(a)).

Similar to Dan Dallas's 2014 determination that an SEIS was needed to analyze the over the snow access, the 2008 Forest Service determination in the Notice of Intent that a single grade separated interchange cannot be found in the EIS.

c. LMJV Proposed an Alternative Configuration based on the 2008 Settlement Agreement between LMJV and the Ski Area that was not Analyzed in the EIS

The Forest Service internally, but not in the FEIS, compared LMJV's proposed action based on "[t]he settlement agreement [with the Ski Area which] contemplated a smaller non-Federal parcel to be part of the land exchange than that currently proposed." C0034145.

> Option 3 is the original plan that has preliminary approval in Mineral County and follows the Village's 2008 settlement agreement with the Ski Area." [. . .] Option 2 is a new land plan on the land owned by The Village that the Ski Area has consented to, which could leave in effect some of the easements agreed to in the settlement agreement.

W10534. There is no explanation in the EIS for exclusion of the Option 3 from "detailed study." *Colo. Wild, Inc. v. United States Forest Serv*., 523 F. Supp. 2d 1213, 1226 (D. Colo. 2007). Indeed, there is little evidence in the record to confirm the terms of the "Settlement Agreement" alternative.

The secrecy around the Settlement Agreement and the Court Order denying access (ECF No. 45) preclude Plaintiffs from fully developing this argument. For purposes of NEPA, it is enough that evidence in the Administrative Record establish that three action alternative proposals were presented by LMJV, but the Forest Service only analyzed two alternatives in the EIS. C0034145.

3. Denial of LMJV's expanded access request was inappropriately excluded from the no action alternative.

The NEPA analysis was based on the legally erroneous premise that the decisionmaker could not lawfully choose a true "no action" alternative that would deny the land exchange proposal and allow construction to go forward, if at all, on the rights and access created in 1986. C34338 (reasoning for not selecting the No Action Alternative, i.e., that it would not meet the Purpose and Need of the project). In a May 2013 email, Defendant Dallas confirmed he was

considering selection of the no action alternative, but was dissuaded by agency attorney Ken Capps. C14658 (I quietly briefed you all on what I as line officer would like to do. Since then Mr. Capps has weighed in thinking we likely would not be successful in that strategy under appeal by the proponent. I'm still treading water.").

Had Defendant Dallas been allowed to choose the no action alternative and deny the LMJV access proposal, the Forest Service would maintain its existing rights of review and approval in the Scenic Easement and existing federal encumbrances on the existing parcel. *See* W01403 *et seq*. The other legal authorities discussed throughout this brief that allow the Forest Service to manage and protect the National Forests in light of any development proposals LMJV might forward based on existing access.

NEPA violations are established "when the way the agency framed the choices meant that the result was practically predetermined." *San Luis Valley Ecosystem Council v. U.S Fish and Wildlife Service,* 657 F.Supp.2d 1233, 1247 (D.Colo. 2009) (NEPA violation where denial "was not addressed in any meaningful way because the government took the position that it could not do this."). Here, an FEIS framed on a foundation of legal error wrongly limited the decisionmaker's choice of alternatives by excluding the possibility of choosing a "No Action" alternative that denies LMJV's access expansion proposal. W12658 ("proponent has a right under ANILCA").

The Administrative Record confirms this NEPA violation arises from framing the action around an erroneous legal ANILCA determination, where the appraiser recognized that development under existing access rights and limitations that include the Scenic Easement, would constitute not only a reasonable use, but the "highest and best use" of the existing parcel. W03518. The FEIS does not reveal the conclusion of the professional appraiser that Highest and

Best Use "on the 177-acre subject property does not require expanded year-round access or wet utilities, and probably generates the highest return to the land at the least risk." W03518. Mr. Capps' dissuasion with Defendant Dallas, which presumably reflects the legal error that framed the FEIS, effectively eliminated the "no action" alternative by erroneously concluding that LMJV was entitled to some mandatory grant of additional access. W10752 ("*It is important to clarify that development on private lands is not a component of either of the Action Alternatives.* The Rio Grande NF has no jurisdiction on private lands.") (italics in original).

Instead, the FEIS was prepared in such a way that the "no action" alternative does not present the public and decisionmaker with the choice of denying LMJV's request for expanded access. Moreover, the analysis in the "no action" alternative does not provide a basis to compare the impacts and effects of construction and operations that could take place if Defendants denied LMJV's request for expanded access with LMJV's full build-out proposal. Where reasonable use and access is exceeded by the "highest and best use" based on existing seasonal access, the no action alternative unlawfully framed the choices and prevented the CEQ-defined NEPA alternatives analysis from affording the substantive protections that Congress intended when passing NEPA.

NEPA's "no action" provision is a key feature, but here it was excluded by legal error that is reflected in the ROD as a predetermined approval of some kind of access expansion. W12658. The legal error that frames the FEIS to "practically predetermine" the "no action" would not be chosen leaves the public and Defendant Dallas "treading water" and requires the FEIS be set aside as unlawful. *San Luis Valley Ecosystem Council*, 657 F.Supp.2d at 1247.

4. The Forest Service failed to involve cooperating agencies

CEQ's cooperating agency regulations prevent lead agencies from excluding federal agencies from the NEPA process. "Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency." 40 C.F.R. § 1501.6 (emphasis supplied). Whether the lead agency fails to invite agencies or the "other Federal agency" is not included as a cooperating agency, the absence of cooperating agencies violates the "single EIS" requirement that prevents segmentation of the NEPA analysis of the "major federal action." 40 CFR §§ 1501.6, 1508.5. The Forest Service is the lead agency, but lacks discretion and authority to exclude other federal agencies. Once a "Federal agency which has jurisdiction by law" is invited, the "cooperating agency" is created as a matter of law. 40 C.F.R. § 1501.6.

Here, the Forest Service identified, invited, and then excluded from the NEPA process, at least two cooperating agencies with jurisdiction by law that sought cooperating agency status.

> The U.S. Fish & Wildlife Service and the U.S. Army Corps of Engineers both accepted the Forest Service's invitation to become a Cooperating Agency. However, the Forest Service, in order to simplify and expedite the NEPA process, decided not to have any Cooperating Agencies.

W11342. *accord* W12558 (Response to Comments: "the Forest Service as the lead agency (40 CFR Part 1501.5) decided not to have Cooperating Agencies (40 CFR Part 1501.6).").[19] There is no valid basis for the Forest Service to elevate simplicity and speed over the CEQ mandate that other agencies with "jurisdiction by law shall be a cooperating agency." 40 C.F.R. § 1501.6.

The Forest Service exclusion of mandatory "cooperating agencies" in the NEPA process violates NEPA, and results in an EIS that was prepared contrary to law. *Colo. Envtl. Coalition v.*

[19] CDOT had also agreed to "cooperating agency" status due to its authority over U.S. Highway 160 access. The Court need not reach the issue of CDOT's request to be included as a cooperating agency. However, on the facts of the case, Plaintiffs submit that it would be an abuse of discretion to exclude the state agency primarily responsible for decisions involving U.S. Highway 160. This issue is best addressed on remand, in conjunction with the interwoven question of the allocation of jurisdiction between the Federal Highway Commission and CDOT over this federal highway that LMJV, the Ski Area, and the Forest Service seek to access.

Office of Legacy Mgmt., 819 F. Supp. 2d 1193, 1215-16 (D. Colo. 2011) (setting aside NEPA analysis where sending "cooperating agency" a draft for comment fails to satisfy lead agency duties).

The Forest Service objection review makes no excuse or explanation beyond simplicity, speed, and the substitution of comment opportunities for mandatory cooperating agency procedures. W12408 (Obj. Review). Perhaps recognizing the clear violation in the NEPA process she oversaw, Ms. Gustafson's Objection Resolution avoids the issue by relying on the erroneous legal conclusion that the decision to exclude federal agencies is not reviewable by the courts, thus allowing violation with impunity. W12558 (Obj. Resolution) *citing Wyoming v. U.S. Dep't of Agric*., 661 F.3d 1209 (10th Cir. 2011).

The decision and laws allowing exclusion of Wyoming are inapposite here. The "cooperating agency" provisions applied in *Wyoming* uses "may request" and "may by agreement" to set out the lead agency's discretion to *exclude states*. *Id*. at 1242, *quoting* 40 C.F.R. §§ 1501.6, § 1508.5. The *Wyoming* distinction between state agencies and federal agencies with jurisdiction or special expertise was explained in Plaintiffs' comments, which set forth in detail that the Forest Service does not enjoy any discretion to exclude federal "cooperating agencies." W11746- W11748. Federal agencies with jurisdiction by law are mandatory "cooperating agencies." 40 C.F.R 1501.6 ("Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency."). The Forest Service acted outside its authority based on the erroneous legal determination that it had unfettered discretion to excluded two "federal agencies with jurisdiction by law." *Id*.

The Administrative Record confirms that the Forest Service unlawfully excluded the Army Corps of Engineers and the Fish and Wildlife Service, each of which undisputedly have current jurisdiction by law over the National Forest and the private development due to impacts on wetlands (W11046), migratory birds (W10908), and threatened and endangered species. FWS007144.

The Corps of Engineers has jurisdiction due to the impacts on wetlands. W11046. In carrying out its duties, including the analysis of the LMJV's impacts on wetlands, the COE has specific criteria it must review that would have materially altered the NEPA analysis. When COE and wetlands are involved, there is a presumption that practicable alternatives are available that do not involve wetlands unless clearly demonstrated otherwise. 40 C.F.R. § 230.10(a)(3). "In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." *Id*. Here, fen wetlands constitute a special aquatic site, but there was no attempt to define practical alternatives that involve wetland mitigation. See e.g. W11390 ("It is reasonable to assume […] the Corps could condition any Wetland Permit for the project by creating a Special Condition to protect the fen wetland. The Special Condition could potentially require a buffer from development, exclude stormwater from developed areas from entering the wetland, or impose other protective measures."). By excluding the COE, the federal agency with expertise in protecting wetlands was not able to analyze and scrutinize the reasonably foreseeable effects the Village would have on the wetlands, or the available mitigation.

When carrying out its wetlands duties, COE conducts a "public interest review." 33 C.F.R. § 320.4(a). This public interest review requires COE to evaluate "the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest," and to balance "the benefits which reasonably may be expected to accrue from the proposal . . . against its reasonably foreseeable detriments." 33 C.F.R. § 320.4(a)(1). Had COE been involved, the FEIS would have contained a "least environmentally damaging practicable alternative" focused on impacts on the aquatic ecosystem, accompanied by a COE public interest review that involves broader considerations. *Id*. "The decision whether to authorize a proposal [involving wetlands], and if so, the conditions under which it will be allowed to occur, are . . . determined by the outcome of this general balancing process." Prohibiting COE from acting as a

cooperating agency renders that FEIS and ROD unlawful. This is especially true here, where one of the factors used to justify this land exchange requires analysis of impacts to wetlands and watersheds. 36 CFR 254.3(b)(1).

As argued more fully below, the FWS has jurisdiction by law over the land exchange proposal and the Village due to present and future impacts on threatened and endangered species and migratory birds. Section V. C. The FWS conducted analysis regarding the Canada lynx in the context of ESA, but did not carry out any NEPA analysis, which is a separate violation set out below. Section V.B.5. By excluding FWS from the NEPA process, Plaintiffs, the public, and local, state, and federal decisionmakers are denied the benefit of NEPA participation and analysis by the federal agency with expertise and jurisdiction by law over species afforded the special protections contained in the ESA.

By unlawfully excluding all cooperating agencies, the Forest Service carried out an insular analysis that failed to provide the legally required transparent NEPA process, to the fullest extent possible. The Forest Service has pointed to comment opportunities and other non-NEPA staff interactions. W12558. These informal interactions do not substitute for mandatory cooperating agency status and procedures. *Colo. Envtl. Coalition v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1215 (D. Col. 2011) (rejecting EPA NEPA comments as proposed substitute for cooperating agency status and duties in setting aside NEPA analysis and remanding) *cited at* W11748.

The Forest Service exceeded its authority and committed legal error where the CEQ regulations command that an invited, "Federal agency which has jurisdiction by law shall be a cooperating agency." 40 C.F.R. § 1501.6. The NEPA process, EIS, and ROD are therefore contrary to law and agency procedure.

5. Defendants Failed to Use NEPA to Identify and Analyze the Effectiveness of Available Mitigation Measures

The Forest Service failed to adequately analyze mitigation measures aimed at minimizing the adverse impacts of the land exchange and the Village development. NEPA defines "mitigation" as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 C.F.R. § 1508.20 (a)-(e). As explained above, the narrow definition of the "federal action" that eliminated reasonable alternatives from the NEPA inquiry is a contributing factor to the inadequacy of the mitigation analysis.

NEPA documents must: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," and (2) "include discussion of . . . [m]eans to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 C.F.R. § 1502.14(f); 40 C.F.R. § 1502.16(h). NEPA documents must analyze the effectiveness of mitigation measures in context of the proposed action and proposed alternatives. 40 C.F.R. § 1502.14(f). When a proposed action will result in impacts to resources that cannot be avoided, NEPA obligates the Agency to go further in describing what mitigating efforts it could pursue to off-set the unavoidable impacts of a federal action. *See* 40 C.F.C. § 1502.16(h) (stating that an EIS "shall include discussions of [and] . . . [m]eans to mitigate adverse environmental impacts").

Agencies cannot rely on untested mitigation measures:

> [T]he Court holds that the Corps' reliance on mitigation measures that were unsupported by any evidence in the record cannot be given deference under NEPA. The Court remands to the Corps for further findings on cumulative impacts, impacts to ranchlands, and the efficacy of mitigation measures.

Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1238 (D. Wyo. 2005). "[T]he Court [cannot] defer to the [agency's] bald assertions that mitigation will be successful." *Id*. at 1252. Mitigation must be "supported by …substantial evidence in the

record." *Id*. "A conclusory statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind not only fails to crystallize the issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives." *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992), *aff'd* 998 F.2d (9th Cir. 1993). Without that support, the agency "was arbitrary and capricious in relying on mitigation to conclude that there would be no significant impact to [environmental resources]." *Id.* The Ninth Circuit agreed that fair evaluation requires agencies to "analyze[] the mitigation measures in detail [and] explain how effective the measures would be." *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985). "It is not enough to merely list possible mitigation measures." *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir.1999).

"[T]he line between an EIS that contains an adequate discussion of mitigation measures and one that contains a 'mere listing' is not well defined." *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1054 (10th Cir. 2011) *citing Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 476 (9th Cir.2000). The essential test is reasonableness in light of NEPA standards. *See Robertson*, 490 U.S. at 352 (discussion need be only "reasonably complete"). "Detailed quantitative assessments of possible mitigation measures are generally necessary when a federal agency prepares an EIS to assess the impacts of a relatively contained, site-specific proposal." *Id.* Like any other aspect of NEPA, the key feature is that "NEPA procedures must ensure that environmental information is available to public officials and citizens **before** decisions are made and **before** actions are taken." 40 C.F.R. § 1500.1(b) (emphasis supplied).

Here the EIS confirms the LMJV access proposal involves a site-specific federal action with impacts that emanate through the San Juan and Rio Grande National Forests. Federal land

and environmental resources will be irreversibly committed by Forest Service decisions and actions to create a new private parcels surrounded by the National Forest. *Id*. Mitigation analysis contained in the EIS that relies on future consideration and identification of mitigation measures based on a Biological Opinion prepared without benefit of a NEPA process are not reasonable. However, determining Forest Plan consistency based on uncertain and ineffective measures is arbitrary and capricious.

a. The Forest Service NEPA Analysis was Not Informed by Public Comment on Lynx Mitigation Measures

NEPA requires that mitigation measures be discussed[20] with "sufficient detail to ensure that environmental consequences have been fairly evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Id*. at 353. The EIS discussion of lynx mitigation measures is not comprehensive, is not supported by substantial evidence, and is contrary to evidence in the Administrative Record, and therefore did not provide an opportunity for meaningful public comment. *Id*.

Despite DEIS comments seeking effective lynx mitigation and analysis, the Forest Service declined. W11405 (FEIS Response to Comments: "Should an Action Alternative be

[20]Because NEPA contains a broader definition and procedural requirements for "mitigation" analysis than the ESA, the Fish and Wildlife Service's non-NEPA mitigation analysis during species-specific Section 7 consultation cannot substitute for NEPA analysis contained in the FEIS. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 653 (9th Cir. 2014) (holding that Biological Opinion is a FWS action that must be subjected to NEPA scrutiny). This has particular resonance here where the Forest Service rejected FWS participation as a "cooperating agency" in the NEPA analysis. *See* Section V.A.4.

selected by the Decision Maker, a comprehensive mitigation package will be developed, required, and enforced by the resource agencies as permitted under their respective jurisdictions."). As described in the above Summary of Facts, lynx mitigation revolves around unspecified measures that a panel will someday propose and LMJV can chose to accept and possibly seek additional funds to build at some undisclosed locations along U.S. Highway 160. *See e.g.* W11066 - W11067 ("the lynx 'tell' us where to place the crossings."). Each of the following set of facts below confirm a violation of NEPA's action-forcing mandate as applied to lynx mitigation measures.

i. The FEIS Does not Reveal that FWS Believed Stronger Lynx Conservation Measures Were Needed

A set of alternative lynx mitigation measures the FWS presented to LMJV and the Forest Service in letters dated October 12 and December 5, 2012 were never discussed in the NEPA analysis. FWS3976, C12613. Moreover, the final conservation measures used to justify compliance with SRLA Standard All S1 included none of the measures FWS identified as potentially effective as binding mitigation measures. W11286. Without NEPA disclosure, analysis, or comparison to FWS's scientifically based measures; the Forest Service adopted final measures that are almost identical to the conceptual mitigation measures proposed by the proponent. FWS004017 (September 10, 2012 Letter from LMVJ attorney). NEPA's requirements, were circumvented by the private negotiations amongst Defendants and Intervenors, thus escaping the interdisciplinary mandates, comparisons of alternatives, and other means by which the CEQ NEPA regulations implement the federal environmental policies.

Much has changed since the federally-encumbered private parcel was created in 1986 and it is clear that "few options exist" (FWS3976, C12613) to adequately protect the National Forest,

maintain habitat connectivity, and help conserve the Canada lynx based on the current development plans.[21] The Forest Service's failure to consider or analyze the strong recommendations made by the USFWS in accordance with NEPA's public participation and informed decisionmaking purposes is arbitrary and capricious.

ii. FEIS Unlawfully Limited Lynx Mitigation Analysis to Traffic Impacts

The Forest Service failed to provide NEPA-compliant analysis of any mitigation measures aimed at minimizing the impacts of lynx habitat loss, construction activities, and Village operations. The ROD claims "[t]he primary negative impact associated with the land exchange occurs as a result of the loss of lynx habitat." W12661. However, "no conservation measures have been agreed upon to offset the direct habitat losses of lynx habitat resulting from the exchange or the adverse effects that would result from indirect habitat losses and reduced habitat effectiveness resulting from development and occupancy of the Village at Wolf Creek parcel." W11072. Going from identifying a "primary negative impact" to a lack of "offset[ting]" measures, without analysis of this omission is unlawful.

Beyond traffic impacts, the Forest Service knew the importance of mitigating the direct loss of 147 acres of lynx habitat in the land exchange. The Forest Service sent a Biological Assessment to the FWS that identified the need for "purchase of in-kind habitat." C11160. The Forest Service further explained that,

> a conservation measure could be developed that would result in a compensatory net gain of ± 147 acres of equal value lynx habitat on NFS lands within the THLAU or a contiguous LAU, which would also more than cover the 26.6-acre net loss of "general" public lands.

[21] The ESA listed Canada lynx was not even a consideration in 1986 when this parcel was privatized.

FWS004717. Richard W. Thompson, Wildlife Biologist and one of the contractors who prepared the NEPA analysis and ESA compliance documents noted the need to mitigate the direct loss of lynx habitat caused by the land exchange and planned Village.

> I disagree that the total effects of the action have been offset by the agreed upon CMs. Those measures only focus on maintaining habitat connectivity across the highway. They *do not address the direct habitat losses or the indirect losses and reduced habitat effectiveness* from developing the resulting private parcel. The FS would have discretion over requiring offsetting CMs, but those effects are significant and have not been offset or addressed by any CMs. It is our responsibility to point that out.

W15651 (emphasis added). Even with the abundance of evidence of a gap in lynx protections, this mitigation was excluded from NEPA analysis and the final conservation measures. The exclusion was partly based on LMJV's lobbying[22] and partly based on the sole focus of attempting to justify complied with SRLA Standard ALL S1.[23]

Without any citation to the EIS or substantial evidence to support any decision on lynx mitigation, Defendant Dallas asserts in the Record of Decision that, "the lynx conservation measures…are adequate to address not only the loss of 147 acres of primary lynx habitat but also address indirect impacts associated with the development of the private lands." W12661, W12678 *see also* W10803 (The Applicant would provide funding to implement conservation measures to reduce impacts of any proposed development to the Canada lynx).

Defendant Dallas' statements in the ROD are unfounded and any action taken without NEPA analysis and substantial evidence about lynx mitigation is arbitrary and capricious, and without adherence to NEPA procedures, and must be set aside.

[22] See Section V.E.4 (Undue influence to avoid Forest Plan Amendment)
[23] See Section V.B. (Forest Plan)

b. The Forest Service Relied upon Lynx Mitigation Measures the FWS Prepared without Conducting NEPA Analysis

The FWS requested, but was denied a role as "cooperating agency," and the FWS did not subject the Biological Opinion to its own NEPA analysis. Yet, the Forest Service Final EIS defers to the FWS Biological Opinion, issued after the DEIS comments closed, as the source of the NEPA analysis of lynx related issues and the adequacy of conservation measures.[24] W11074 (The section 7 process involving the USFWS, Proponent, and Forest Service will consider all significant Village-related effects to lynx and lynx habitat); W11074 (Conservation measures developed as part of [section 7] process will minimize adverse project effects and inconsistency with the SRLA). The Forest Service impermissibly attempts to substitute ESA compliance for NEPA's public participation requirements that are not required during section 7 consultation.

The FWS's failure to conduct NEPA on the Biological Opinion ripened into a NEPA violation when the Forest Service issued the ROD. This shortcutting of the NEPA procedural requirements by relying on an alleged compliance with another federal law is prohibited. *Lemon v. McHugh*, 668 F. Supp. 2d 133, 144 (D.D.C. 2009) ("compliance with the [National Historic Preservation Act] 'does not relieve a federal agency of the duty of complying with the impact statement requirement 'to the fullest extent possible.'"") *quoting Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. Idaho 1982) *quoting* 42 U.S.C. § 4332.

The Ninth Circuit has looked at this issue in detail and concluded that the ESA Consultation process does not provide compliance with the duty of all federal agencies to comply with NEPA's public participation and informed decisionmaking procedures "to the fullest extent

[24] Although the Forest Service heavily relies on the FWS consultation process and the final Biological Opinion, this document was never provided to the public throughout the NEPA process for review and comment.

possible" before taking federal action. 42 U.S.C. § 4332.[25] In reaching this conclusion, the Ninth Circuit reasoned that the ESA's definition of cumulative impacts is more restrictive than that required in NEPA analysis. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 653 (9th Cir. 2014) *citing Methow Valley Citizens Council, 490 U.S. at 349* (we cannot reach an informed decision about the extent to which implementation of the BiOp is an environmental preservation action…because we do not know how the action will impact the broader natural environment. We find no basis for exempting Reclamation from the EIS requirement. *See Methow Valley Citizens Council*, 490 U.S. at 349 (HN97 "NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.")).

Even if a non-NEPA Biological Opinion were properly relied upon to issue the ROD, the Biological Opinion in this case fails to adequately consider ski area operations, Village operations, CDOT operations, or the ski area MDP in the environmental baseline or as cumulative impacts on the lynx, all of which the FEIS clearly identify as such.[26] W11316. Deferring NEPA analysis to the ESA process resulted in an unlawful gap in the NEPA analysis and shielded this analysis from NEPA's public participation requirements.

c. The FEIS Misrepresents the Status and Terms of the Proposed Lynx Mitigation Measures

As set out above, the Forest Service based its decision and determinations of administrative compliance on uncertain and undisclosed mitigation measures. Reliance on conceptual lynx conservation measures violates the requirement that "NEPA procedures must

[25] *See* ESA Section V.C.2.b.i-iii

[26] The BO mentions some of these impacts contributing to the environmental baseline, but fails to provide any analysis of how these actions individually and cumulatively impact lynx within the action area. FWS007156.

ensure that environmental information is available to public officials and citizens **before** decisions are made and **before** actions are taken." 40 C.F.R. § 1500.1(b)(emphasis added); *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429, 1437 (10th Cir. 1996). The statutory prohibition against taking agency action before NEPA compliance applies to all agency decisionmaking. 42 U.S.C. § 4332(2)(C) *cited by New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012). Otherwise, NEPA's mandate that agencies "shall […] utilize a systematic, interdisciplinary approach" is reduced to an after-the-fact formality. 42 U.S.C. § 4332(2)(A).

The Forest Service concludes repeatedly in the FEIS that "the Proponent's commitment to implement the conservation measures…recommended by the Technical Panel…should be adequate to maintain habitat connectivity…and…meet the intent of the "…*maintain habitat connectivity…*" clause that is at the core of Southern Rockies Lynx Management Direction Standard ALL S1 (USFS, 2009b)." W11066, W11069, W11070, W11074.[27] This FEIS statement is contrary to facts and misleads the reader. The Technical Panel has made no recommendation. The Technical Panel has not been convened. The lack of a binding commitment to implement unknown conservation measures of a future panel is a fantastical paper tiger that does not protect lynx. This unfounded and repeated conclusion does not satisfy NEPA mitigation mandates.

Where the availability and effectiveness of lynx mitigation measures has sweeping implications for the federal agencies with jurisdiction over the LMJV plan, an EIS that fails to

[27] FWS Biologist Kurt Broderdorp highlighted this issue in a comment to the BA stating, "Need more detail. How do the conservation measures reduce effects." FWS005631.

honestly and adequately analyze mitigation measures confirms that the EIS and agency actions are unlawful and must be set aside.

i. FEIS Fails to Disclose Inadequacy of Mitigation Measures for Low Density Development that "Takes" Lynx

Any mitigation the Technical Panel considers will be carried out after-the-fact and commensurate with the number of units constructed. The Forest Service's Biological Assessment highlights that low density development will appreciably increases lynx impacts.

> Low density, Village at Wolf Creek contributions to Highway 160 traffic through the WCPLL would be additive to traffic volumes already within the range of those documented to impair lynx movements. These relatively small incremental increases by themselves would present an appreciable risk factor to lynx (K. Broderdorp, USFWS, pers. comm., Apr. 12, 2012) and adversely affect habitat connectivity and vehicle-related lynx mortality along Highway 160. The Applicant's commitment to implement the measures recommended by the Technical Panel and the Strategy's funding commitment provides reasonable certainty that the conservation measure will be implemented. However, while it is unlikely that the project would only be developed to the low density concept level, it is uncertain if all conservation measures that might be recommended by the Technical Panel under the low density development concept could be implemented to minimize Village traffic contribution effects because of the limited funding ($4,500.00-$9,000.00) that would be generated under that development concept.

FWS004641. The LMJV-promoted approach was accepted despite efforts of FWS staff. C14607 (I have not yet heard back from the USFWS yet on the uncertainty of adequate funding to implement conservation measures under the low density development concept that we discussed on our conference call yesterday).

The Forest Service's non-NEPA, Biological Assessment simply concluded that "it is assumed that adequate funding will be available to implement the conservation measures recommended by the technical panel, consistent with the conservation measures described in the proposed action." FWS004641. By this assumption, the Forest Service dismissed a serious issue with the conservation agreement and the NEPA-mandated disclosure and analysis. NEPA

prohibits the Forest Service assumption that adequate funding would be found to implement mitigation not yet defined. NEPA requires the agencies to cooperate to conduct a NEPA analysis based on evidence, not assumptions pressed by LMJV's agents and rejected by agency scientists.

ii. The Mitigation Analysis Violates NEPA's Best Available Scientific Information Requirement

The Forest Service's conclusions are not based on NEPAs' interdisciplinary analysis mandate. NEPA's implementing regulations require agencies to:

> [I]nsure the professional integrity, including scientific integrity of the discussions and analysis in environmental impact statements. [Agencies] shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.

40 C.F.R. § 1502.24 (Methodology and Scientific Accuracy). Further, where data is not presented in the NEPA document, the agency must justify not requiring that data to be obtained. 40 C.F.R. § 1502.22. Closely related to NEPA's mandate that agencies take a "hard look" at environmental impacts, NEPA prohibits reliance upon conclusions or assumptions that are not supported by scientific or objective data. *Citizens Against Toxic Sprays, Inc. v. Bergeland*, 428 F.Supp. 908 (1977). "Unsubstantiated determinations or claims lacking in specificity can be fatal for an [environmental study] …. Such documents must not only reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project, but also provide the reviewing court with the necessary factual specificity to conduct its review." *Committee to Preserve Boomer Lake Park v. Dept. of Transportation*, 4 F.3d 1543, 1553 (10th Cir. 1993) *see also* Natural Resources Defense Council v. Hodel, 865 F.2d 288, 298 (D.C.Cir.1988) (under NEPA, finding insufficient "conclusory remarks [and] statements that do not equip a decisionmaker to make an informed decision about alternative courses of action, or a court to review the Secretary's reasoning").

This argument overlaps with the section on the FWS's failure to use the best available science in the Biological Opinion and these violations necessarily feed each other.[28] The BO states that "[t]he effectiveness of properly sited and designed structures at excluding animals (including lynx) from highways and facilitating movements below or above the highway is generally high." FWS007173, W11066. The FEIS states that "[t]he effectiveness of any crossing structures installed on Highway 160 may be greater than average because there are a limited number of suitable locations and structures would be sited based on results of a Corridor Assessment and Trapping/Collaring Program." W11067. The Forest Service knew this information was inaccurate but chose to leave it in the analysis instead of supplementing the analysis with contradictory information that constitutes the best available science.

The FEIS fails to acknowledge the 2014 *Ruediger Report*, which confirmed that there is no data to support any location that would be conducive to constructing a crossing structure.[29] This scientific report disrupts much of the Forest Service's conclusions about the effectiveness of future mitigation measures to maintain connectivity. Dismissing this reports conclusions in the ROD entirely failed to explain or justify why information contrary to a prime foundation of the analysis is not important and does not warrant further analysis. The *Ruediger* report represents the best scientific information about connectivity and wildlife crossings on US Highway 160. The Forest Service's decision to take the easy way out instead of adhering to NEPA's public disclosure and hard look requirements, renders the decision arbitrary and capricious.

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[28] See. Section V.C.2.b.i (ESA requires best available science in the Biological Opinion).

[29] A late addition to the ROD notes this report's existence, but does nothing to address the failure to address this October 2014 report in the November 20, 2014 FEIS. It is clear the Forest Service was aware of this report based on Forest Service Biologist, Randy Ghormley's participation on the "US 160 Wildlife Connectivity Team" that is listed in the beginning of the report. W18420. The timing is conspicuously concurrent with LMJV ramping up political pressure beginning in August, 2014 to release the FEIS. *See* Undue Influence Section V.E.1,3

d. Forest Service FEIS Failed to Analyze Binding Mitigation Measures to Condition Future Use of Parcel and Expanded Access

The narrow scope of NEPA analysis resulted in the Forest Service also failing to analyze other authority the agency possesses for implementing binding mitigation measures for impacts to water, air, fens, wetlands, lynx, and other resources. This deficiency resulted in the failure to analyze numerous possible alternatives proposed by the comments (easements, increased mitigation measures, alternate access options). Because this authority is addressed in more detail elsewhere, a summary is provided here.

i. Land Exchange Regulations

Forest Service land exchanges are "discretionary, voluntary real estate transactions." 36 CFR § 254.3. Mandatory mitigation duties limit the agency discretion to carry out land exchanges. *See* 36 CFR § 254.3(h)("In any exchange, the authorized officer shall reserve such rights or retain such interests as are needed to protect the public interest or shall otherwise restrict the use of Federal lands to be exchanged, as appropriate."). The FEIS did not disclose or analyze the reservation or retention of rights and interests as a means to mitigate the impacts of constructing and operating the Village at Wolf Creek. The Forest Service violated its own regulations and NEPA by failing to disclose and analyze the reservation and retention of rights and interests that protect the public interest and the NFS lands.

ii. Scenic Easement

The Forest Service holds easements burdening the current LMJV parcel that provide federal authority to impose conditions on the Village at Wolf Creek construction and operation. For example, the Scenic Easement requires LMJV to file plans "[p]rior to commencement of construction on the real property […] to the Forest Supervisor, Rio Grande National Forest, for approval." W10726. The Scenic Easement provides Forest Service with authority to impose

terms and conditions "minimizing environmental effects to natural resources within the project area." W10726. The purpose of the Scenic Easement is "to administer the herein described lands to protect the scenic and recreational values of adjoining National Forest System lands; to provide a specific level of control of the type of development on said land to assure that said development is compatible with the Wolf Creek Ski Area." This scenic easement was attached to the parcel during the first land exchange that created the private parcel.

Because of legal error, the EIS does not disclose or discuss similar mitigation measures that could be imposed by asserting direct federal control and authority over the development proposal through a Scenic Easement. A Scenic Easement placed on the new parcel to protect the National Forests is not only reasonable and legally viable, LMJV's Dusty Hicks expected one would be required, with some adjustments to address the new Village plans. C0000804 ("Dusty: we expect a scenic easement will be attached to the parcel we acquire…Tom M[alecek]: expect request from proponent to revise scenic easement esp in regard to height.").

The EIS contains no analysis of the protections a similar scenic easement applied to the newly created inholding could provide the National Forest.

iii. ANILCA Terms and Conditions

ANILCA does not allow Defendants to rubber stamp the expanded access and ignore uses and development plans announced by LMJV. ANILCA contemplates the Forest Service will only provide access "that the Secretary deems adequate for the reasonable use and enjoyment" of the property. 16 U.S.C. § 1323(a). 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). 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. *Id.* Regulations clarify Defendants' duty to limit the access and impose terms and conditions "that minimize the impacts on the Federal resources." 36 C.F.R. § 251.114(a).

The FEIS does not disclose or analyze any potential binding terms and conditions on the proposed ANILCA access expansion. The Forest Service based its FEIS and decisions on the erroneous legal conclusion that it lacks power to mitigate the impacts of operating the Village at Wolf Creek by imposing terms and conditions on the future use of expanded ANILCA access. Failure to account for this discretion throughout the NEPA process was arbitrary and capricious and contrary to law

e. Arbitrary and Capricious Legal Determinations Require the EIS be Set Aside

Defendants did not use NEPA to disclose or inform their broad discretion over whether to approve the land exchange based on the federal power to impose binding mitigation measures that protect the National Forest from the LMJV plan. These federal considerations must disclosed and be made **before** any land exchange or expanded access decision, either of which would limit the Forest Service authority to require the implementation of measures to minimize or mitigate the subsequent indirect effects of the private Village at Wolf Creek development. W11286.

Without the benefit of a lawful NEPA mitigation analysis and based on legal error in interpreting ANILCA and land exchange regulations, the FEIS asserts "[t]he Forest Service will not condition the land exchange based upon the implementation of BMPs and design criteria." W11404. This abuse of discretion resulted in the proponent's ability to draft its own "conservation measures" and a failure to analyze other alternatives in the NEPA process. The EIS and ROD must therefore be set aside and the matter remanded to provide federal agencies a

"clean slate" on which to consider LMJV's plans. *High Country Conservation Advocates*, 67 F. Supp. 3d at 1263.

6. The FEIS Failed to Provide the Public and the Decisionmaker a "Hard Look" at Direct, Indirect, and Cumulative Impacts of Connected and Cumulative Actions

This section addresses the common legal and factual basis of the overlapping NEPA Claims 8, 9, and 10. In addressing similar legal violations, Judge Kane addressed legal the ambiguities that can arise when determining whether the Forest Service "arbitrarily and unlawfully limited the scope of their analysis in the FEIS and ROD by failing to analyze the impacts of at least two 'connected actions' to LMJV's access request: (1) the design, construction and CDOT permitting of the interchange(s) to connect the approved access road(s) to U.S. Highway 160; and (2) LMJV's development of the Village." *Colo. Wild, Inc. v. United States Forest Serv.*, 523 F. Supp. 2d 1213, 1224 (D. Colo. 2007). Yet, the same actions were arbitrarily excluded from "federal action" and "purposes and need" that determine the scope of the "hard look" across a robust analysis of alternatives. As set out above, at least three additional federal approvals are involved in LMJV's access and development proposals: (3) FWS permitting of lynx "take,"(4) Corps of Engineers wetland permitting; and, (5) Forest Service approval of the Ski Area Master Development Plan, and implementation.

The definitional overlaps between 'cumulative' and 'connected' are harmonized and effectively applied to the facts of the present case based on the Tenth Circuit's reconfirmation of NEPA's "single-EIS" mandate. *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.")

This requirement to carry out the impacts analysis in a "single-EIS" untangles the definitional ambiguities. *Id*.

> To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts [including] Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. [… and],Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

C.F.R. § 1508.25. Tenth Circuit precedent also confirms the single-EIS must "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*, 256 F.3d 1024 at 1035 *quoting Co. Envtl. Coal*, 185 F.3d at 1176. Promises of future NEPA cannot avoid this action-forcing NEPA provision requiring analysis at the earliest possible time.[30] *Sierra Club v. United States DOE*, 255 F. Supp. 2d at. Without these mandates agencies can manipulate their analysis such that, "cumulative effects analysis, including site-specific impacts, might never occur." *Colo. Envtl. Coalition v. Office of Legacy Mgmt.,* 819 F. Supp. 2d 1193, 1209 FN 23 (D. Colo. 2011).

Although a single EIS is mandated, NEPA does allow agencies *to approve a project* in several decisions, "so long as their NEPA documents adequately analyze and disclose the impacts of the entire Project . . . ." *Cure Land, LLC v. USDA*, 2016 U.S. App. LEXIS 14844, at *23-24 n.11 (10th Cir. Aug. 12, 2016) *quoting Defs. of Wildlife v. U.S. Dep't of Navy*, 733 F.3d

[30] In circumstances not present in the LMJV proposal, an agency may use "tiering" to meet its duties in multiple NEPA documents. *See Pennaco Energy, Inc. v. United States DOI*, 377 F.3d 1147, 1151 (10th Cir. 2004) ("DOI manages the use of federal oil and gas resources through a three-phase decision-making process"). The FEIS and ROD do not mention "tiering."

1106, 1116 (11th Cir. 2013) ("To be sure, Defendants' Record of Decision does commit resources to the Project, and we perceive no reason why Defendants cannot analyze the entire Project "in a single impact statement.") (citations omitted).

In short, the Forest Service did not follow the single-EIS mandate to ensure a "hard look" at all NEPA-defined impacts "'regardless of what agency (Federal or non-Federal) or person undertakes such other actions.'" *Custer County Action Ass'n*, 256 F.3d 1024 at 1035. Plaintiffs respectfully submit that the Forest Service created a tangled knot of legal errors that resulted in "an exercise in form over substance […that serves as …] a subterfuge designed to rationalize a decision already made." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1263-64 (10th Cir. 2011) (*citations omitted*).

a. FHA/CDOT Right of Way and Interchange Approvals Were Excluded from Impacts Analysis

The Notice of Intent identified the interchange configuration and determination of an access point as a key action that would be considered in the EIS.

> The Proposed Action is to authorize the construction and use of a safe and efficient road, approximately 1,650 feet in length, across NFS land to provide "year-around wheeled vehicle access" to LMJV for their reasonable use and enjoyment of the property. The proposal includes authorization of rights-of-way adjacent to the access road for the installation of utilities to service the Village property.
>
> […] In addition to the Proposed Action and No Action Alternative, where the access road and Village at Wolf Creek would not be constructed, one alternative being considered would combine the LMJV Village at Wolf Creek access and Wolf Creek Ski Area access into one integrated access using a single grade-separated interchange access point from U.S. Highway 160.

73 FR 54786 (September 28, 2008). The issue remained live throughout the NEPA process. CDOT commented on the DEIS's failure "to satisfy The Federal Highway Administration's (FHWA) National Environmental Policy Act requirements for the proposed action." W07241,

W07246 ("Unfortunately, we feel that impacts to state highways, state highway safety, and access control issues have not been adequately disclosed as described above. Additional issues related to groundwater, water quality, MBTA, and permits have been identified."); W02213 (Feasibility Analysis), W01551(LMJV application exhibits: "The Non-Federal Party proposes to work with the Colorado Department of Transportation to build a grade-separated interchange at an appropriate location on the highway.").

The Forest Service was obligated to fully comply with NEPA analysis of a U.S. Highway 160 upgrade and access point relocation that will become necessary based on the increased traffic to Ski Area and Village, in combination with existing local, regional, and national use of this U.S. Highway. Impacts will also flow from circumstances that have changed since LMJV consummated the 1986 land deal with access to build a 208 unit condominium development. W01168 ("Access to this parcel is along U.S. Highway 160, through the Wolf Creek Ski Area parking lot, and along a primary USFS access road (FS 391) that terminates at Alberta Lake.).

The failure to analyze the impacts of locating and building a "grade-separated" U.S. Highway 160 interchange to service the Village/Ski Area Complex violates NEPA. 40 C.F.R. § 1502.9(b)." *High Country Conservation Advocates v. United States Forest Serv.,* 52 F. Supp. 3d 1174, 1198 (D. Colo. 2014).

b. Implementation and Approval of the Ski Area's 2012 Master Development Plan Poses Foreseen and Foreseeable Impacts of Traffic, Habitat Loss, and other Ski Area Activates on Lynx That were not Disclosed and Analyzed.

Shortly after the 2012 release of the Draft EIS, the Ski Area submitted a proposed Master Development Plan to the Forest Service to expand the Ski Area and take other actions that would increase impacts on the National Forest System. W10923. Although the date and means of approval are murky, the 2014 EIS is based on the erroneous claim that that "[t]he 2013 MDP has

been accepted by the Rio Grande NF and is still pending a decision by the San Juan NF at this time." W11135. The Forest Service approved the MDP was approved on an undetermined date in 2012 or 2013. On September 9, 2013, the Forest Service issued a "Decision Memo Wolf Creek Ski Area Summer Projects – 2013" that relied upon a categorical exclusion to implement site-specific components "of the approved Wolf Creek Ski Area Master Development Plan." W0003503-W0003508. Even though it was approved and being implemented by a series of Categorical Exclusions, the cumulative impacts of the MDP were not analyzed in the EIS or any other NEPA document. The Forest Service has structured its NEPA analysis so the direct, indirect, and cumulative impacts of the Village and Ski Area may never be analyzed in a single-EIS. *Colo. Envtl. Coalition v. Office of Legacy Mgmt.,* 819 F. Supp. 2d at 1209 FN 23.

The MDP is a private proposal to use and occupy the National Forest that falls squarely within the definition of an action that must be analyzed in the FEIS triggered by LMJV's proposals, "'regardless of what agency (Federal or non-Federal) or person undertakes such other actions.'" *Custer County Action Ass'n*, 256 F.3d 1024 at 1035. A passing mention in the FEIS confirms the omission of this MDP proposal, despite its direct, indirect, and cumulative impacts on the National Forest, lynx, and the human environment generally.

> Because site-specific NEPA analyses are required to implement the individual projects, the potential effects to wetlands are not known. There would be cumulative (although unquantifiable) effects to wetlands in the Analysis Area based on past and future activities at WCSA, as well as potential development on private lands evaluated in Alternatives 2 and 3. The Rio Grande NF is currently analyzing a set of projects from the MDP that includes: rebuilding the Charisma Run Race Hutch; installation of a 500,000 gallon water tank near the Powder Puff ski trail; installation of the new Elma Chairlift (bottom terminal located near the bottom terminal of the Alberta Chairlift); and replacement of the Upper Lodge deck and stairs.

W11048. The U.S. Army Corps of Engineers comments included the request that the DEIS reflect that "the Forest Service elected not to have any cooperating agencies, and the Corps was

not involved in any further coordination or review until the DEIS was published." W07257 (confirming foreseeability of a "Section 404 of the Clean Water Act for an application to discharge fill materials into waters of the United States" do to construction impacts on fen wetlands and noting that "effects to wetlands and streams from the interruption of groundwater" had not been adequately analyzed.).

The upshot is that both the FEIS and MDP arbitrarily denied any interrelationship between the proposed base area and the expanding ski area the Village would service. Despite the obvious purpose of providing expanded access to the parcel to service the skiers using the Ski Area, the analysis in the FEIS, and therefore the scope of the NEPA analysis, was unlawfully limited to the LMJV's desire for expanded access to build an unrestrained development.

Jason Marks, a NEPA consultant, aptly highlighted this issue. "Wolf Creek Ski Area's 2011 Master Development Plan is conspicuously absent of any discussion about the future construction of the Village. Therefore, it does not plan for accommodating another potential 7,000 (give or take) guests who, it is logical to assume, will want to ski." FOIA1_1779. Jason Marks also inquired of proponent's agent Dusty Hicks, "which is trigger for future phases?" FOIA1_8204. To which LMJV's Hicks responded, "no set mechanism, but some based on ski area development, don't want to overwhelm the mountain." *Id*. Mr. Marks then highlights the pains taken to avoid inclusion in the EIA by stating they "need to figure out how to frame that discussion, but not a connected action with ski area."

Quite recently, the Forest Service invited NEPA comment on WCSA proposal to further implement the MDP by constructing the "Meadow Lift," which connects the Village at Wolf Creek to an expanded area of beginner terrain. Ex. 13 (Meadow Lift Scoping Notice).

The failure to analyze the Wolf Creek Ski Area's MDP impacts as a "reasonably foreseeable future action" in the same EIS that analyzes impacts of granting expanded access for LMJV to construct and operate the commercial and residential development to service the Wolf Creek Ski Area is contrary to law, and precludes the "hard look" that NEPA and its implementing regulations require.

7. NEPA Public Participation to the Fullest Extent Possible was Precluded by Freedom of Information Act Violations

NEPA requires that agencies "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. §1506.6(a). NEPA ensures that all agencies shall make available through Freedom of Information Act the "environmental impact statements, the comments received, and any underlying documents available to the public pursuant to [FOIA], without regard to the exclusion for interagency memoranda where such memoranda transmit comments of the Federal agencies on the environmental impact of the proposed action." *Id.* §1506.6(f). Instead, the Forest Service diligently sought to avoid transparency and excluded Plaintiffs and the public from fully informed participation.

Instead of heeding NEPA's "to the fullest extent possible" mandate (42 U.S.C. § 4332(2)(C)), the Forest Service has acted in numerous ways that have interfered with and diminished the public's ability to understand and participate in the NEPA process. C9695 (Dan Dallas instructing to "delete[]" letter "in case we get a foia…"); W11906 ("I had Rick send that to me hardcopy so it would not be subject to FOIA… or "cc [attorney]" so we can "keep the conversation in-house"). Arbitrary and capricious actions during the NEPA process include but are not limited to: 1) FOIA violations that prevent Plaintiffs from accessing and using agency records during the NEPA process; and, (2) the Forest Service's failure to respond to Plaintiff's Request for Extension for the Objection Period based on FOIA violations. The violations of

FOIA were confirmed in summary judgment orders requiring new searches. *Rocky Mountain Wild v. Forest Service ("RMW I"* 14-cv-02496-WYD-KMT, ECF No. 31 (Summary Judgement Order); *RMW I* at ECF No. 39 at 2 (FOIA search excluded Washington D.C. Offices of the Forest Service Chief and Undersecretary). *Rocky Mountain Wild v. Forest Service ("RMW II")*, 15-cv-00127-WJM, ECF No. 56 (Summary Judgement Order); Neither FOIA request has been fully, and remaining issues will be address after Judge Martinez resolves the pending Motion. *RMW II* at ECF No. 61, 62 (pending motion of law)

Additionally, the Forest Service concealed the heavy involvement by the Regional Office and the Washington Office in the NEPA process. This concealment involves declarations submitted by Defendant Dallas, and a Forest Service paralegal, who testified that the Regional Office and Washington Offices were not involved. *RMW I*, ECF No. 28-1 at ¶4 *accord Id*. ECF NO. 28-2 (declaration addressing Regional Office).Yet, after being ordered to search these Offices, on October 27, 2015, months after the ROD issued, the Forest Service had not yet completed its search, assembly and release of records withheld by the Regional and Washington D.C. Offices. RMW II, ECF No. 32. As set out below, some of these documents confirmed the suspicion set out in Plaintiffs' Objection that the same people involved in preparing the EIS were deciding the Objections. Ms. Gustafson's involvement in briefing the Washington Office on Mr. Dallas's determination that supplemental NEPA analysis was required to examine an over snow access alternative was not revealed until 2016 disclosures.

The unresolved RMW I FOIA litigation may still disgorge contractor communications with the Washington Office documents that explain the sudden and unexplained reversal of Mr. Dallas' determination that the EIS was deficient. *RMW II,* ECF No. 61.

The CEQ regulations recognize that NEPA public participation depends on full and prompt FOIA access to agency records. The related FOIA litigation and the record in this case demonstrate that the Forest Service violated NEPA by breaching its FOIA duties and obstructing public access to agency records.

B. The Forest Service Violated the Southern Rockies Lynx Amendments to its Forest Plan

The Forest Service's decision violates the National Forest Management Act ("NFMA") based 2008 Southern Rockies Lynx Amendment ("SRLA") (W00422) that "promotes the recovery of lynx, and reduces or eliminates potential adverse effects from land management activities and practices" (W00426) in the Rio Grande National Forest Revised Land and Resource Management Plan ("Forest Plan").[31] W00001-W00212.

1. NFMA Mandates Compliance with Forest Plan Standards

NFMA uses a land use planning approach that requires the Forest Service to ensure that all activities on national forest lands "shall be consistent with the land management plans. 16 U.S.C.§ 1604(i). Forest plans must "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area . . . ." 16 U.S.C. § 1604(g)(3)(B); *see also Utah Envtl. Cong. v. Russell,* 518 F.3d 817, 821 (10th Cir. 2008). Implementing regulations provide standards and guidelines to create a forest plan and approve any accompanying site-specific projects. *See* 16 U.S.C. § 1604(g); *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 737 (10th Cir. 2006).

When a Court reviews a challenge to a forest plan or a site-specific project, it first must determine whether the plan or the project meets NFMA and NFMA's implementing regulations.

[31] The SRLA is also known as the Southern Rockies Lynx Management Directives.

See Utah Envtl. Cong. v. Troyer, 479 F.3d 1269, 1272 (10th Cir. 2007), *Biodiversity Conservation Alliance v. Jiron,* 762 F.3d 1036 (10th Cir. 2014). The 9th Circuit has considered a similar violation of the National Park Service planning statute and determined that a court must be able to review, in advance, how specific measures will bring projects into compliance with environmental standards. *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733 ("The Parks Service proposes to increase the risk of harm to the environment and then perform its studies.... This approach has the process exactly backwards."). Monitoring may serve to confirm the appropriateness of a mitigation measure, but that does not make it an adequate mitigation measure in itself. *Alaska Wilderness League v. Kempthorne***,** 548 F.3d 815, 827-828 (9th Cir. 2008)(emphasis added).

2. Lynx Protections are Required by SLRA Standard ALL S1

The SRLA establishes the objectives, standards, and guidelines for all Forest Service decisions in the Southern Rockies as they concern lynx. "A forest plan standard is a course of action or level of attainment required to achieve the Desired Conditions." W1107. While guidelines and objectives are discretionary, "[s]tandards are *mandatory; deviation from Standards is not permissible without an amendment to the Forest Plan*." Id. (emphasis added).

The SRLA identified maintenance of suitable habitat and habitat connectivity as a critical standard that is necessary for the lynx's continued survival. Defendant's decision violates the Southern Rockies Lynx Management Amendment Standard ALL S1 as it fails to maintain connectivity. Standard ALL S1 mandates that, "New or expanded permanent developments and vegetation management practices and activities must maintain habitat connectivity." W00460. The SRLA defines maintain as "to provide enough lynx habitat to conserve lynx. It does not mean to keep the status quo." W11066.

The SLRA confirm that the ALL S1 is significant because,

> [m]aintaining habitat connectivity is particularly important in the Southern Rockies Amendment area, which is separated from lynx habitat to the north in Wyoming and distant from populations of lynx in the Northern Rockies and Canada. Objective ALL O1 and standard ALL S1 assure that all management projects in lynx habitat will consider the need to maintain habitat connectivity within and between LAUs and in linkage areas.

W438.[32] The lynx habitat connectivity standard therefore is the mandatory component of the Forest Plan that the Forest Service may not violate when approving LMJV's plan by providing expanded U.S. Highway 160 access through a land exchange.

3. The ROD and EIS are inconsistent with Standard ALL S1

The Forest Service's decisions set out in the ROD will result in traffic increases and proposed year round recreational use that would not maintain connectivity of lynx habitat. Rather, it would degrade existing connectivity, both across Highway 160 and within the Trout-Handkerchief Lynx Analysis Unit, in violation of Forest Plan Standard All S1.

The EIS highlights that "As habitat connectivity for lynx has already been impacted, habitat connectivity is a necessity to provide for viability of the species in the Southern Rockies." W971. The Forest Service further discloses that the "likely increase in mortality would constitute "take" under the ESA." FWS004707. The Forest Service concludes that "traffic contributions to Hwy 160 under the Moderate and Maximum Density Development Concepts would increase appreciably above the environmental baseline traffic levels that impair lynx movements and pose more serious threats to mortality and habitat fragmentation [and] they would by themselves present a moderate risk factor to lynx." W11066. However, the agency fails to provide evidence

[32] This action also implicates and violates Objective ALL O1 which directs the Forest Service to "Maintain or restore lynx habitat connectivity in and between LAUs, and in linkage areas." W00460.

to support the conclusion that the "generally high" effectiveness of crossing structures to mitigate connectivity degradations caused by the Village would still "maintain habitat connectivity." *Id.* The contrary scientific evidence on the ineffectiveness of such measures is set out in Section III.F.2.c.

The Forest Service also notes an information gap that undercuts any assumptions or conclusions regarding SRLA compliance.

> During a recent field visit, 3 key information needs in the post-fire, post-beetle landscape were identified by RGNF staff, Rocky Mountain Research Station (RMRS) scientists, and us: (1) urgent need for a broad-scale assessment of current vegetation conditions following recent landscape disturbances, (2) clarification of spruce-fir disturbance dynamics in the eastern San Juan Mountains, and (3) uncertainty regarding lynx habitat use in the changed landscape, and implications for the Southern Rockies Lynx Amendment (SRLA). These information gaps *limit the Forest's ability to make defensible decisions to meet requirements of the SRLA* and other management objectives.

C0018124 (emphasis added). The Forest Service failed to fill in these gaps and adequately assess the environmental baseline. Consequently, the agency cannot know how the land exchange induced increase in traffic would impact the lynx connectivity required by Plan Standard ALL S1. The Forest Service decided to rely on unsupported assumptions and future mitigation studies. "This approach has the process exactly backwards." *See* Nat'l Parks & Conservation Ass'n, 241 F.3d at 733 (rejecting agency proposal to "increase the risk of harm to the environment and then perform its studies.").

This substantive NFMA violation is established in the Administrative Record by agency scientists. The Forest Service's Wildlife Biologist reviewing the Biological Assessment for the Wolf Creek Access Project concluded "It seems clear that this project does <u>not</u> meet ALL S1, and I don't think adjusting the alternative would change that." C12277 (emphasis in original). In agreement, Wildlife Biologist Rick Thompson, a member of the Consultant Team felt "either Alternative would be inconsistent with Standard ALL S1, requiring a Forest Plan amendment for

either Alternative." W11904. Mr. Thompson then conveyed to the prime consultant and the Forest Service that "in order to comply with NEPA and avoid a *fatal flaw*, the Forest Service believes that this current conclusion must be disclosed to the public and the public must be provided the opportunity to comment on the decision to amend the Forest Plan." C12273 (emphasis added). The EIS was finalized and ROD was issued without heeding the advice of the agency scientists or the consultants to remedy the "fatal flaw" - a violation of a mandatory Plan Standard - ALL S1. *Id*.

The U.S. Fish and Wildlife Service's Biological Opinion also confirms the violation of Standard ALL S1. "Increased traffic volume will increase the rate of lynx hit by vehicle mortality during the first phase of development, followed by a reduction in the mortality rate as traffic volume continues to increase and lynx increase avoidance of the highway corridor." FWS007162. The Biological Opinion contained the scientific finding that lynx "avoidance results in reduced use of habitat along and near the highway, negatively influencing the ability of lynx to forage, den, travel, and maintain adjacent home ranges." FWS007156. To complicate matters, "animals may, continue to appear on the road surface exposing them to traffic and, possibly be killed, unless the entire length of highway is fenced. However, fencing the entire corridor reduces habitat connectivity." FWS007173. Further, "by year 2043 (full build out of the [1,711-unit] Village), mortality risk to lynx on U.S. 160 may be lower as the barrier effect increases and lynx movements are disrupted because they are less likely to attempt a crossing of U.S. 160." FWS007172. The Biological Opinion concluded that "[t]raffic volume resulting from the development will push overall traffic volume on U.S. 160 above levels documented to reduce habitat effectiveness and use adjacent to the highway corridor within the LAUs adjacent to the highway." FWS007162.

The Administrative Record is devoid of an evidence-based explanation of how the land exchange and LMVJ plan can "maintain habitat connectivity" when lynx are "repelled" from the highway due to the Village related increase in traffic. Even if crossing structures are constructed, lynx will not go close enough to the highway to use them. These impacts are not compatible with ALL S1's mandate that "New or expanded permanent developments and vegetation management practices and activities must maintain habitat connectivity." W00460.

4. Mitigation Measures used to Justify SRLA Compliance are Speculative and Will Not Maintain Connectivity

As addressed more fully above in the Lynx Fact Section and in addressing the NEPA mitigation mandate (Section V.A.5.a-c), proposed lynx Conservation Measures rely on a study which will "monitor" where/if lynx are still crossing Hwy 160. This prohibited, "backward" approach will "increase the risk of harm to the environment and then perform its studies." *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 733. The reasoning behind this finding makes sense and is common to NFMA, NEPA, and the ESA. Once the damage is done, it may be too late to figure out ways to remedy the harm.

Speculative, future mitigation measures to "maintain connectivity" cannot achieve compliance with SRLA ALL S1. The Forest Service repeatedly asserts SRLA Standard All S1 compliance based on conservation measures that will be decided upon in the future by a panel not yet assembled. W11066, W11069, W11070, W11074. Even if the backward approach was allowable, the Forest Service recognized that "it is currently unlikely that the extent of agreed upon conservation measures will result in the consistency of either alternative with Standard ALL S1." W11904.

Similarly, there are no conservation measures aimed at ameliorating the impacts of increased recreational use due to the year round Village population. These impacts will further hinder connectivity and result in lynx avoiding this corridor.

Jason Marks, Senior Project Manager for one of the NEPA contractors acknowledged, "[i]t's come to our attention that there is a Forest Plan consistency issue with the proposed land exchange related to lynx management." C6802. He then noted that,

> [r]egarding the proposed land exchange (Alternative 2) for the Village at Wolf Creek EIS, four options exist:
> 1) Modify the land exchange to make it consistent with the SRLA
> 2) Mitigate for the loss of 147 acres of by finding 147 acres of primary lynx habitat on private land that is within a lynx linkage area and in the same (or an adjacent) Lynx Analysis Unit (LAU)
> 3) Amend the Forest Plan (which was superseded by the SRLA) so that the Standards, Guidelines and Objectives are not applicable to the land exhange
> 4) Move forward with a known Forest Plan inconsistency which would preclude the land exchange from being the Selected Alternative in the ROD

C6803. The Forest Service choose none of these options.

By failing to either comply with the Forest Plan or provide "the public […] the opportunity to comment on [a proposed] decision to amend the Forest Plan," the Forest Service decisionmaking process contains a "fatal flaw" that renders the ROD and EIS contrary to mandatory Plan Standard ALL S1. C12273. This "fatal flaw" cannot be remedied during judicial review, and requires the ROD and EIS be set aside, and the matter remanded.

C. The Fish and Wildlife Service Consultation Process violates the ESA

1. LMJV Lobbied and Obtained a "Unique" Consultation Process

LMJV got a "unique section 7 agreement." C12331. The Wolf Creek Village ESA consultation process was a "new twist on how things are usually done." C9985. Given this, the agencies struggled to find "a citation (i.e. BO) that would explain the pathway for the applicant to receive the Section 7 exemption through our BO for effects occurring on private lands..." FWS3831. Forest Service Biologist, Randy Ghormley noted, "The twist the counsels decided to do on section 7/10 are sure to be of interest." C11441.

It became clear that "[t]he FWS d[id] not want to go through an HCP [Habitat Conservation Plan] process under section 10 as that EIS becomes their responsibility and could take many years working directly with the proponent." W13268.[33] The unique process that allowed the USFWS to avoid the HCP process resulted from "the FWS['s]… willing[ness] to make the interconnected call required for section 7, and with that…replace the FS as the agency monitoring the Village development." C9310.

> The section 10 direction, identified on March 1, 2012, was reversed at a meeting on August 29, 2012 when the USFWS notified the Applicant that the USFWS would undertake enforcement of a conservation strategy (to be developed and mutually agreed to by the USFWS and Applicant) to minimize private land development-related effects on lynx once the land exchange occurs.

W14426.

The stated rationale underlying this unique process was that the lynx "[c]onservation measures will be part of the proposed action." and "FWS will undertake discretionary authority and enforcement." C9976. The problem the agency specialists identified with this rationale is that the "discretionary authority and enforcement" that USFWS claims will create a federal nexus for Section 7 purposes is the exact "discretionary authority and enforcement" the USFWS

[33] An approved permit and "Habitat Conservation Plan" is required for a private party to avoid criminal and civil liability for "take" of a listed species. 16 U.S.C.S. § 1539 (b)(2)(A) (2) (no "take" can be approved "unless the applicant therefor submits to the Secretary a conservation plan").

wields pursuant to Section 10 of the ESA. This "unique process" placed the FWS on both sides of the consultation, whereby the FWS became both the action agency and the consultee. This relationship goes against the rationale of the Section 7 federal agency consultation process, and the liability protections afforded by the Section 10 Habitat Conservation Plan where FWS advises and approves means to avoid "take" and "adverse effects" of a private action. *See* C0005680 (The Forest Service, in cooperation with the applicant, must monitor and report the progress of the action and its impact on the species to the USFWS); C0005677 (the applicant is entitled to review draft biological opinions obtained through the action agency, and to provide comments through the action agency); FWS007180 (Since the Forest Service does not retain jurisdiction over the development (as stated above), we recommend that if any of the circumstance described above occur, the Applicant should contact the Western Colorado Office of the Service as soon as possible to initiate discussions and determine a course of action).

Essentially, the unique process narrowly defined the "action agency" to avoid the Section 10 process. This "new twist" would give LMJV "take" protection without submitting the "conservation plan" required by the Section 10 process. By succumbing to this unlawful and truly unique approach to consultation, the FWS bypassed a statutorily mandated public NEPA process, ignored HCP application and approval procedures, and violated the ESA's agency consultation procedures. 16 U.S.C. § § 1536, 1539.

a. The U.S. Fish and Wildlife Service Violated the ESA by Providing LMJV with Incidental Take Protection Through Section 7, Instead of Section 10

The Law is clear that when private land development with no federal nexus will result in take of a listed species, Section 10 of the ESA is the legal means of gaining incidental take protection. 16 U.S. Code § 1539(2). The Service typically provides any appropriate incidental take exemption through the section 7(a)(2) consultation process when the project is authorized, funded, or carried out by an agency of the Federal government and the take of listed wildlife would be caused by the action subject to consultation. FWS007176. Section 7 applies to

"holders of, or applicants for, *contracts, permits, licenses*, etc. that authorize the use or occupancy of National Forest System lands (e.g., timber harvesting, grazing, mining, or other special uses)." C0005677 (emphasis added). Such entities can apply for applicant status if they require formal approval or authorization from a federal agency as a prerequisite to conducting the action." 50 CFR §402.02. Although contrary to law, the EIS confirms the agencies defined away the federal nexus. W11074 ("the future development of private lands and the density of development that might occur on private lands would be outside of the Forest Service's jurisdiction.")

If an action does not fall within the Section 7 federal nexus definition, than an entity must comply with the formal Section 10 process. "The components of a completed [Section 10] permit application are a standard application form, an H[habitat] C[onservation] P[lan], an Implementation Agreement (if applicable), the application fee, and a draft National Environmental Policy Act (NEPA) analysis." C6015.[34] These components are also set out in the statute. 16 U.S.C.S. § 1539 (2)(A)("No permit […] unless the applicant therefor submits to the Secretary a conservation plan that specifies [. . .]). Without the sufficient federal nexus that invokes Section 7, Congress provided for a more rigorous and public process to be followed for private development to be exempted from take; presumably because private entities are not mandated with the same conservation goals as federal agencies. For Section 10, the USFWS oversees the process and gains enforcement responsibilities.

> The permit shall contain such *terms and conditions* as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with…(C) The Secretary *shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions* of the permit.

[34] Information obtained through hyperlinks used in AR document: *http://www.fws.gov/endangered/esa-library/index.html#hcp_policy -> https://www.fws.gov/endangered/esa-library/pdf/hcp.pdf*

16 U.S. Code § 1539(2)(B)(v),(C) (emphasis added). Clint Jones, LMJV Project Manager summarized the effect of the federal jurisdiction theory, "After land exchange then ESA §10." C159. The Forest Service, acting as the action agency, agreed with Mr. Jones' assessment. However, Section 10 procedures were not followed.

b. Forest Service Abandoned its Correct Determination that Section 10 Coverage was Necessary

By refusing to exercise NFMA, ANILCA and land exchange authority and duties to protect the National Forests, the Forest Service arbitrarily established a set of legal circumstance it believed would render LMJV ineligible for incidental take protection through the Section 7 process.

> [B]ased on our discussions and Dan's decision to not "condition" the ROW permit for the secondary access road, this letter also conveys that the applicant will need to obtain an incidental take permit for effects associated with the private land development through the section 10 (HCP) process with the FWS.

C5928; C6076 (need for a section 10 HCP); C6145 (proponents will therefore need to work with the USFWS to prepare an HCP under Section 10 of the ESA). The Forest Service's contrived conclusion is based on the premise that the development "does not have a legitimate federal nexus for section 7. For example, Alternative 2 (Land Exchange) minimum build-out scenario in the DEIS does not even involve a secondary access road." C8444.

Once the land exchange became the preferred alternative, section 7 coverage was no longer a viable LMJV option. Even Al Pfister of the FWS acknowledged, "If the Land Exchange happens and the development is on private land, it could become a Section 10 Consultation." C173. Kurt Broderdorp, USFWS Biologist, conveyed the opinion of Sarena Selbo (USFWS Regional Section 7 Coordinator) that "there does not appear to be an appropriate section 7 connection besides ANILCA MOU scenario." C740.

However, LMJV was not happy with this turn of events, and threatened the Colorado agency personnel with pressure at the Washington D.C. level.

> We are right now at a critical juncture with the Proponent and FWS over Consultation, with the Proponent insisting Section 7 all the way and the FS telling them they need to do a HCP with FWS and Section 10 consultation... A meeting with both agencies and the proponents, and each parties attorneys, is planned in early July, with the Proponent planning to discuss with Undersecretary Sherman prior to that meeting.

C8039. It became abundantly clear that "[t]he proponent would like to avoid the Section 10 process if at all possible while also retaining the proposed action as a land exchange." CP374. Red McCombs wanted it both ways – no federal jurisdiction and "take" protections via Section 7 agency action consultation procedures. This desire resulted in "differences of opinion between FS and the proponents over appropriate ESA compliance and responsibilities." C8690; C4987 ("For a fact the proponent is most concerned, as that is what precipitated our December meeting").

Attorneys for the proponent even attempted to create a federal nexus through secondary access approvals. C2971 (we believe this secondary access easement is a preferable mechanism for including the development of the village on non-federal lands within the scope of the Section 7 consultation on the land exchange and access easement). When it became clear that avenue was not going to work "proponent [offered] an interesting and bizarre twist to the proposed action in order to establish a federal nexus. I don't see how it is possible…" C1118. Randy Ghormley, Forest Service Biologist, and Kurt Broderdorp, USFWS Biologist, communicated that "it looks like the Section 7 vs. 10 pot is stirred up again" and "Dan and Susan are perhaps working on a new deal to avoid a section 10." C5988. OGC Attorney Kenneth Capps sought feedback on possible ways to avoid the Section 10 process and was met with "mild horror that the FS would consider doing this." C1155. Mr. Capps further acknowledged that "the joint venture would like us to solve all their potential problems in the future." Id. When Federal Agencies have to exercise administrative gymnastics to reach a pre-determined outcome, the result is often arbitrary and capricious.[35]

[35] See Undue Influence Section V.E.

In the end, political pressure won out over "mild horror" and the FWS and Forest Service used Section 7 instead of Section 10, and thereby created a uniquely unlawful process to grant LMJV protection from ESA liability.

2. The Section 7 Consultation Violated the Endangered Species Act

The Endangered Species Act ("ESA") "provide[s] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The ESA constitutes "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species ... [and] reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

Section 7 of the ESA requires federal agencies to "consult" with USFWS for actions that "may affect" a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Federal agency actions include those projects "authorized, funded, or carried out by such agency." Id. One of the purposes of the consultation process is to acknowledge and account for "take" of listed species. "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 CFR 222.102. "Harm," within the definition of take is "significant habitat modification or degradation…by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 CFR 222.102.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant. 50 CFR 402.02. When a federal agency determines an action may affect listed species or critical habitat it must

submit a biological assessment to the USFWS. The contents of a biological assessment may include:

> (1) The results of an on-site inspection of the area affected by the action to determine if listed or proposed species are present or occur seasonally.
> (2) The views of recognized experts on the species at issue.
> (3) A review of the literature and other information.
> (4) An analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies.
> (5) An analysis of alternate actions considered by the Federal agency for the proposed action.

50 CFR 402.12(f). The USFWS must then draft a comprehensive biological opinion using the best information available. 16 U.S.C. Sec. 1536(a)(2). The biological opinion *shall* include:

> **(1)** A summary of the information on which the opinion is based;
> **(2)** A detailed discussion of the effects of the action on listed species or critical habitat; and
> **(3)** The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat
> 50 CFR 402.14(h). If incidental take will occur, the FWS must then issue and Incidental take statement which
> **(i**) Specifies the impact, ***i.e.,*** the amount or extent, of such incidental taking on the species;…
> **(ii)** Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;… [and]
> **(iv)** Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified.

50 CFR 402.14(i)(1). "Effects of the action" means,

> direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification.

> Interdependent actions are those that have no independent utility apart from the action under consideration.

10 C.F.R. § 402.02. The consultation process must also consider the action's "cumulative effects," which "are those effects of future State or private activities ... that are reasonably certain to occur within the action area." *Id*. An "action area" is defined as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." Id

The Court in *Sierra Club v. United States DOE, 255 F.Supp.2d 1177 (D. Colo. 2002)* found that Section 7 requires agencies to consider all related impacts. *Id*. at 1188 *citing Conner v. Burford*, 848 F.2d 1441, 1453-54 (9th Cir.1988) (requiring ESA consultation to address not only oil and gas leases, but also future exploration and development); *Defenders of Wildlife v. Babbitt, 130 F.Supp.*2d 121, 128-130 (D.D.C.2001) (requiring ESA § 7 consultation analysis to include impacts of all activities within the action area "added to" the environmental baseline--in other words, an analysis of the *total impact* on the species); *Greenpeace v. National Marine Fisheries Serv.*, 80 F.Supp.2d 1137, 1149 (W.D.Wash.2000) (finding management plans unlawful for failing to consider cumulative impacts on the species). Congress made clear that federal agencies must "give the benefit of the doubt to the species." H.R.Conf.Rep. No. 96-697, 96th Cong., 1st Sess. 12, reprinted in 1979 U.S.Code Cong. & Admin.News 2572, 2576.

a. The Narrowly Drawn Forest Service Biological Assessment violated the ESA Section 7 Requirements

The Section 7 consultation began with a Biological Assessment, prepared by the Forest Service to inform the USFS of the scope of the lynx impacts involved with federal approval of LMJV's request for a land exchange or expanded ANILCA access to support the Village proposal. FWS004612. The Forest Service focused the Biological Assessment almost exclusively on minimizing the impacts of lynx habitat connectivity issues. This flaw stemmed from the apparent need to justify compliance with SRLA Standard ALL S1 and define the

project to avoid NEPA analysis. A "project description [is] arbitrary and capricious [if] it ignored "an important aspect of the problem"… [t]his results in a faulty Biological Opinion, which in turn result[s] in an invalid approval of the project under the Endangered Species Act." *Pacificans for a Scenic Coast v. California Department of Transportation,* 2016 WL 4585768, 2016 U.S. Dist. LEXIS 119479 (N.D. Cal. Sep. 2, 2016). The impacts of a year round, large scale development on the lynx was not adequately disclosed, assessed or minimized in the Biological Assessment, which poisoned the subsequent Section 7 consultation.

The Biological Assessment relies on the conservation measures which were agreed to between the proponent and the FWS, without benefit of NEPA analysis.[36] The Biological Assessment concludes,

> In summary, the lynx conservation measures (Section 3.2.4), negotiated between the USFWS and Applicant, have been agreed to as a satisfactory outcome to compensate for the impaired habitat connectivity effects across Highway 160 and increased highway mortality probabilities related to the proposed Village at Wolf Creek development so that take is minimized and the management direction for linkage zones is being met. The additional potential conservation measures above (1-5) will be considered as part of the section 7 process, but may not be considered critical or necessary to *meeting the overall intent of the management direction*.

FWS004724. The conservation measures focused on maintaining connectivity, which was used to justify compliance with SRLA Standard ALL S1. These narrowly focused conservation measures fail to analyze or minimize take from the loss of habitat and the constructing and operating this large scale development.

USFWS Biologist Kurt Broderdorp highlighted this issue in a comment to the draft Biological Assessment noting, "I do not agree with this statement. The agreed upon conservation measures do not offset the loss of habitat." FWS5342. Kurt further noted, "[t]he most significant issue is that the effects analysis does not include a sufficient analysis of effects of the action that

[36]The Biological Opinion did not benefit from NEPA process. This claim is addressed in Section V.A.5.b. and incorporated by reference here.

includes the conservation measures. The document should include discussion about how the measures minimize the adverse effect and potential take." FWS5216. The Biological Assessment could not include such an analysis because the conservation measures are unknown and the proposed measures have been shown to be ineffective.[37]

Essentially, the Forest Service's need to assert compliance with the Forest Plan SRLA and narrow the scope of NEPA analysis trumped the FWS' requirement to assess and minimize take from all "effects of the action." The BA's focus on connectivity and reliance on the "conservation measures" to minimize only this form of take is unlawful and was carried into the FWS's unlawful Biological Opinion.

b. The Biological Opinion is Arbitrary, Capricious, and Contrary to Law

The Biological Opinion prepared for the unique LMJV Section 7 consultation does not adequately examine the full scope of the agency action, the total impacts on the lynx, or comply with the legal requirements of the ESA. 16 U.S.C. § 1536(a)(2). As a result of this unlawful process the Incidental Take Statement ("ITS") fails to minimize all the impacts that will result in "take" of the lynx.

i. The BO Failed to Analyze the Effects of the Ski Area or CDOT Operations in the Environmental Baseline or as Cumulative Impacts

A Biological Opinion must consider ongoing or future actions in either the environmental baseline or as cumulative effects. 50 C.F.R. § 402.14(g)(3). The BO was doomed to fail, because the Forest Service Biological Assessment wrongly asserts that **"**[t]he existing environmental baseline was considered in the SRLA Record of Decision (USFS 2008a,b, 2009, Tab 2, #11). FWS004694. However, the SRLA Record of Decision does not provide analysis that would adequately substitute as analysis of the environmental baseline of impacts on lynx within this

[37] *See* Lynx Fact Section III.D.

action area. W00416. Specifically, the analysis is absent any meaningful discussion of the major impacts of the Wolf Creek Ski Area and continuing CDOT control work on the Pass.[38]

The FEIS discloses "[p]rojects that have been occurring in the past, in the present and are likely to continue into the foreseeable future that are not under Forest Service jurisdiction include:…Use and maintenance of Hwy 160, including snow removal and avalanche control." W11022; C0013189 (The facility, sometimes referred to as the 'Top Shop', becomes a staging area for snow removal operations, avalanche mitigation, first response to emergencies (automobile accidents in particular), and other winter specific events).

The FEIS also discloses "[o]ngoing Operations at WCSA [and] Operations and maintenance across the 1,581 acre SUP" as "Other Factors Affecting Lynx in the Analysis Area." W10880. The FEIS further acknowledges that "Wolf Creek Ski Area Operations" are "Village at Wolf Creek Access Project Cumulative Effects Projects."

However, the Wolf Creek Biological Opinion's Cumulative Effects Section discloses "[t]he BA [Biological Assessment] documented that there are no State, private or Tribal actions within the action area that are reasonably certain to occur." FWS007175. If WCSA and CDOT operations were not adequately considered in the environmental baseline, they should have been analyzed as cumulative impacts. These are State and Private future actions that are reasonably certain to occur in the action area. There is no analysis of how the ongoing ski area operation, CDOT operations, other known impacts and the large scale village development cumulatively impacts the lynx.

The BO fails to analyze the ongoing operational impacts of the ski area. Although acknowledging that Ski Area operations impact the lynx, the BO fails to adequately account for the extent of this impact and how it impacts the environmental baseline, or is factored in as a cumulative impact. For example, the BO fails to account for the frequency that explosives are detonated within the action area. Presumably, each time this area gets new snow, such munitions

[38] See Lynx Fact Section III.D.

are deployed. These echoing explosions used to ensure safe conditions at one of the snowiest locations in Colorado has deterrent impacts on the lynx and should have been thoroughly analyzed in either the baseline analysis or as a cumulative impact. The same goes for the nightly use of snow-cats for grooming, dispersed recreational impacts, and other known ongoing and future impacts. Failure to analyze these "effects of the action" renders the analysis arbitrary and capricious.

ii. The WCSA MDP Should Have Been Considered in the Biological Opinion as an Interrelated Action with Cumulative Impacts

Although the entities and agencies attempt to keep the WCSA Master Development Plan ("MDP") and the Village at Wolf Creek separate and distinct, it is clear that they are interrelated actions with cumulative impacts. Evidence in the record confirms the interrelatedness of these actions.[39] Without drastic upgrades and increased capacity at the Wolf Creek Ski Area it will not be able to accommodate the Village at Wolf Creek. Conversely, visitors will not want to go through the time, effort, and expense of lodging at the Village at Wolf Creek just to stand in long lift lines and be cramped on a mountain not suited for that amount of skiers. The financial feasibility of both endeavors are completely dependent on one another. This satisfies ESA's definition of an interrelated action. 10 C.F.R. § 402.02.

Despite the interrelationship between the Ski Area MDP and the LMVJ plan to build a Village to serve the Ski Area, the FEIS arbitrarily asserts "[i]t is important to note that WCSA's 2013 Master Development Plan *does not* account for a future Village (of any size/configuration) on private lands near the base area. All conceptual Master Development Plan projects were conceived of by the Pitcher family to further their mission of creating a unique skiing experience." W11135. And the MDP echoes this arbitrary sentiment, "Wolf Creek's MDP was developed independently from the proposed development plans and current proposed USFS land exchange proposal put forth by the adjacent private landowners, the Village at Wolf Creek… However, proximity to the proposed development inevitably raises questions, as reflected during

[39] See Facts Section III.D.5, III.E.

Wolf Creek's public scoping and input process." W18327. However, these self-serving and factually infirm statements alleging segregation of the Village from the Ski Area it would service does not make the failure to analyze the impacts of the projects contained in the MDP on lynx any less arbitrary and capricious.

Although the Ski Area MDP may independently trigger ESA consultation requirements, the Ski Area MDP cannot be ignored during the Village consultation where this Court has found that an "incremental-step consultation violates the ESA." *Sierra Club v. United States DOE, 255 F.Supp.2d 1177, 1188 (D. Colo. 2002), citing Conner v. Burford, 848 F.2d 1441, 1453-54 (9th Cir.1988).* This Court must "interpret the term "agency action" broadly" to include the Ski Area the Village would serve. *TVA v. Hill*, 437 U.S. 153, 173 & n. 18, 98 S.Ct. 2279, 2291 & n. 18, 57 L.Ed.2d 117 (1978). Further the District of Columbia Circuit has noted, "[c]aution can only be exercised if the agency takes a look at all the possible ramifications of the agency action." *North Slope*, 642 F.2d at 608 (quoting North Slope, 486 F.Supp. at 351). The Court in *Conner v. Burford,* noted that "species like the grizzly and the gray wolf require large home ranges making it critical that ESA review occur early in the process to avoid piecemeal chipping away of habitat." *Conner,* 848 F.2d at 1454. The lynx is similar to the grizzly and the gray wolf in that it needs a large connected range.[40]

The BO also fails to analyze the cumulative impacts of other ongoing activities within the action area. These activities are also not accounted for in the BO's environmental baseline. The FEIS discloses the "Table Salvage Timber Sale, About 195 acres of spruce beetle kill salvage that is currently ongoing" and the "Big Meadows Reservoir Timber Salvage - 32.4 acre overstory removal cut within Big Meadows Campground" W11317. These timber projects will continue to negatively impact the lynx which must be accounted for somewhere in the BO analysis.

The MDP discloses that "[w]ith backcountry use on the rise in the Wolf Creek Pass area, Wolf Creek's ski patrol have been called upon to partake in dog-assisted avalanche victim

[40] See Lynx Fact Section III.D.

locates. Time is of the essence in these cases, and helicopter transport of teams would be extremely beneficial. W18300-01. The BO fails to analyze the impacts of increasing backcountry use and helicopter transport cumulatively with the construction of this large scale development.[41]

iii. The BO Relied on Mitigation Measures That are Conceptual and Infeasible

A Biological Opinion may not rely on proposed mitigation measures "absent specific and binding plans" for those mitigation measures. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008). This requires "a clear, definite commitment of resources" toward those mitigation measures. *Id.* Mitigation measures that "are conceptual in nature only" do not qualify. *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1002 (D. Ariz. 2011).[42] The FWS discloses that "it is uncertain exactly what the recommendations of the Technical Panel will be to minimize the various sources of take." FWS4641.

The Biological Opinion fails to analyze the feasibility of the conservation measures. In a letter dated December 5, 2012, USFWS stated that "few options exist to avoid, minimize, or mitigate the anticipated effects" on lynx. C12613.[43] This letter relays strong mitigation measures not contained in the final Biological Opinion. The FWS fails to explain why the weakened and uncertain conservation measures will be effective. The FWS also fails to qualify the conclusion that "the Applicant has incorporated all practical measures possible into the proposed action to minimize the impacts of take on lynx." FWS007178. The conservation measures fail to address the loss of habitat.[44] The proposed action does not include any binding measures, only a funding

[41] The MDP also discloses that "Helicopter-assisted avalanche control work would benefit not only Wolf Creek's operations but also the Colorado Department of Transportation's (CDOT) avalanche control work along the highway." W18300, see also C0023989 (In 2011, WCSA was issued a temporary use permit which allowed a helicopter to land in the backcountry on the Conejos Peak Ranger District as part of a process to determine the feasibility of starting a heli-skiing service).

[42] See Lynx Fact Section III.D

[43] See Lynx Fact Section III.D.

[44] In general, our policy is that replacement habitat must be done at a high ratio (e.g 8:1). Habitat enhancement or restoration can be done at a lower ratio (say 3:1 to 5:1). FWS3982

commitment. FWS acknowledged this deficiency, but failed to correct it. FWS4087 (I also want to make sure there is a concrete minimization proposal that can be relied on in the section 7, as there is significant case law on relying on conservation measures that are not yet defined in a BiOp).

iv. The Biological Opinion is Not Based on the Best Available Science.

The ESA requires a Biological Opinion to contain and to provide the best scientific and commercial data available to describe the proposed action and anticipated impacts to listed and proposed species and critical habitats. 16 U.S.C. §1536(a)(2). Where significant information gaps exist, there are two options:

1) Extend the due date of a BO to allow more time for data collection and analysis, or

2) The FWS proceeds with developing the BO using available information and *erring on behalf of the species* when evaluating the extent of effects.

C0005679 (emphasis added). The FWS failed to "err[] on behalf of the species." For example, the BO discounts the impacts of impaired lynx habitat connectivity by claiming

> "[w]hile these effects are significant, we have little evidence that they will lead to a specific injury to individual lynx. While the existing literature (e.g. Theobald and Shenk, 2011) supports our conclusion of reduced habitat use within the LAUs adjacent to U.S. 160, we have no means to effectively measure the functional habitat loss within the action area."

FWS007174. Difficulty in measuring take does not justify permitting harmful actions.

The FWS arbitrarily and capriciously sweeps connectivity issues under the rug by echoing that "we anticipate that implementation of the conservation measures will, in the long term, reduce the likelihood of take of lynx hit by vehicles, and minimize the reduction of habitat connectivity along the U.S. 160 corridor within the Landscape Linkage." FWS007175.[45]

Instead of scientific data to analyze the impact of spruce bark beetle on lynx feeding, the BO relies on the Forest Service's "[a]necdotal evidence [that] indicates that hares, squirrels, and

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[45] See Lynx Fact Section III.F.2.c ("conservation measures."

lynx continue to be present and use infected stands (R. Ghormley, Forest Service, pers. com, Aug. 30, 2012, cited in BA)." FWS007151. The FWS points out, but does not correct its conclusion, that "the Rio Grande has not collected empirical evidence to support the assertion..." This statement contradicts with "research that has been conducted, [and] concluded that red squirrel populations declined significantly in areas with >40 percent mortality of spruce trees due to beetle infestations in Alaska (Matsouka et al. 2001, and Colorado Yeager and Riordan, 1953; cited in Koprowski et al. 2005)." Id; FWS001757 (Numbers of squirrels have dropped precipitously in the highest elevation forests damaged by insects). "When snowshoe hare densities decline, lynx rely heavily on red squirrels for survival…" *Id*.

Reliance on unsupported anecdotal evidence over scientific research renders the Biological Opinion arbitrary, capricious, and contrary to law.

v. Conservation Measures are not Based on the Best Available Science

The Biological Opinion relies on the LMJV-proposed lynx Conservation Measures in making its ESA mandated determinations. These conservation measures are not scientifically based, but instead are financially constrained and uncertain to occur or minimize take. The FWS biologists originally proposed strong conservation measures to the applicant, but the FWS failed to support its biologists' determinations.[46] The FWS biologist provided ample justification for the FWS's proposed mitigation and making those measures into binding terms and conditions that would aim to minimize the impacts of the action on lynx. The FWS sought a process where "what is needed to minimize the impacts of incidental take are determined first then the funding is worked out." FWS4154. But faced with intense pressure, the agency failed to support its scientists, and caved to pressure.[47] The FWS ultimately agreed to conservation measures that are uncertain, not based on the best available science, and will not minimize take of the lynx.

[46] *See*, Lynx Fact Section III.F.2.c-d.
[47] *See*, Undue Influence Section V.F

The FWS claims that, "implementation of the conservation measures in the long term reduces the adverse effects to lynx. Therefore, we conclude that implementation the conservation measures over the life of the project will serve to reduce the anticipated take caused by traffic generated by the Village." FWS007175. This statement is not based on the best scientific information and is only limited to traffic related take. However, the FWS relies on the possibility of these measures minimizing take and "maintaining connectivity." In turn, the Forest Service premised its BA and FEIS on the presumed effectiveness of these measures, which is contrary to the best available science.[48]

Despite clear warnings by FWS scientists, the FWS issued a Biological Opinion that did not include a credible project description and failed to heed its own scientists' analysis of mitigation measures, which undercuts the ESA consultation requirements. "As a general matter, it seems likely that Fish and Wildlife Service should be able to rely on the action agency's description of its proposed project, including any proposed mitigation measures, at least so long as the Service is not on clear notice that the information is wrong." *Pacificans for a Scenic Coast v. California Department of Transportation United States District Court, N.D. California. 2016 WL 4585768, 2016 U.S. Dist. LEXIS 119479 (N.D. Cal. Sep. 2, 2016,) citing Defs. of Wildlife v. U.S. Fish & Wildlife Serv.*, No. 16-cv-01993-LHK, 2016 WL 4382604, at *18 (N.D. Cal. Aug. 17, 2016). The Administrative Record confirms that both the Forest Service and the FWS knew these conservation measures had been shown to be ineffective, yet still rely on these measures to justify compliance with the ESA, NEPA, and the SRLA. This failure renders the Biological Opinion, the EIS, and ROD unlawful, arbitrary and capricious.

b. The Incidental Take Statement is Arbitrary and Capricious

The Incidental Take Statement does not match the scope of the "take" identified in the Administrative Record, and only considers take in "the form of lynx-vehicle collisions caused by

[48] *See* Lynx Facts Section III.F.2.c-d

increased traffic volume stemming from the Village development." FWS007178. This narrow view of the impacts of this action is pervasive throughout the BO. The FWS fails to account for other causes of take related to the 1,711 unit, 8,000 person development with its extensive infrastructure and supporting amenities. The footprint of this development within the WCPLL will result in take to lynx. The increased year round pressure on this fragile and sensitive environment will result in "significant habitat modification or degradation…by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 CFR 222.102.

The Incidental Take Statement fails to adopt any Reasonable and Prudent Measures or mandatory implementing Terms and Conditions that would minimize take. The "Service concludes that the Applicant has incorporated all practical measures possible into the proposed action to minimize the impacts of take on lynx." FWS007178. Based on this conclusion, the FWS's ITS did "not identif[y] any Reasonable and Prudent Measures (RPM) necessary to further minimize the impacts of such take on the lynx." FWS007179. Instead of using the discretion granted to the FWS to mandate strong, effective, and binding RPMs, the agency abused its discretion by allowing the proponent to draft its own RPMs which are speculative, constrained by financial limitations, and uncertain to be effective. The inadequacy of this ITS was known to the agency as expressed by Kurt Broderdorp who refers to the ITS as a "straw dog,"[49] and USFWS Section 7 Coordinator, Doug Laye's acknowledgement that this is an "odd circumstance." FWS5858.

c. FWS Used an Arbitrary Surrogate to Express the Amount and Extent of Take

The FWS uses "traffic volume generated by the Village as a detectible and measurable surrogate" to assess the effect of take. FWS007178; 50 CFR 402.14 (i)(1)(i). However, the FWS

[49] "Straw dog" appears to be used as in *Rosemont Enters., Inc. v. Urban Sys., Inc*., N.Y.S.2d 144, 147 (Sup. Ct. 1973)("It appears an afterthought, a straw dog, asserted more for delay than for legitimate legal purpose.").

acknowledges that it does not know the full extent of take resulting from traffic because, "systematic record keeping of wildlife road mortality of U.S. roads is non-existent" and "[l]ynx struck by vehicles may wander away from the highway right-of-way, and subsequently die, and likely go unreported and undocumented." FWS007177. Even with this uncertainty the FWS makes the unsupported conclusion that "[t]he baseline mortality rate of two lynx per six years has not been exceeded within the action area during the 14 years since reintroductions began." FWS007176. This statement is not true - as far as the USFWS knows, 5 lynx per year may be getting killed on Wolf Creek pass, or 20. There is no data to support this conclusion.

A surrogate is meant to "set[] a clear standard for determining when the level of anticipated take has been exceeded." 50 CFR 402.14 (i)(1)(i). Using a surrogate with an admitted unmeasurable impact on the species is arbitrary and capricious. This surrogate also fails to account for the greatly increased pressure put on this important habitat by the thousands of year round visitors that will be disrupting and displacing lynx. Using traffic as a surrogate does not account for the increased developed footprint, greater magnitude of recreational users, associated infrastructure (sound and light pollution), or maintenance and safety operations (avalanche blasting, helicopter use). The FWS fails to explain or analyze other surrogates that could more accurately trigger reinitiation. Further, as acknowledged in the BO, when traffic increases to a certain point, lynx will generally avoid this corridor; creating a barrier to movement, isolating segments of the population, and generally harming the species.

The Service also fails to identify a level of traffic that will trigger reinitiation. Without a specific level of traffic that will indicate the level of take has been exceeded, the FWS has failed to adequately account for the "effect of take." The FWS again points to the "conservation measures" instead of complying with the ESA and determining the true measures of take which would have resulted in more comprehensive and stringent RPMs and Terms and Conditions.

d. Forest Service and FWS Must Reinitiate Consultation based on the Ruediger Report and the Recent Court Ruling

The ESA requires that action agencies must reinitiate Section 7 consultation "[i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." *50 CFR* § 402.16(b), *see also* C0005679 (The Forest Service will be advised that any new information that becomes available later could trigger the need to reinitiate consultation). "When a party...suffers a procedural injury, it 'may complain of that failure at the time the failure takes place, for the claim can never get riper.' " *Id.* (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998)). "Reinitiation of formal consultation...shall be requested by the Federal agency or by the Service." 50 C.F.R. § 402.16.

The Ruediger Report on Highway 160 provides "new information" that must trigger reinitiation.[50] Both the Forest Service and the FWS knew about this study and its findings that were contrary to much of the analysis in the BA and BO. W12659 (referencing Dan Dallas' personal communication with USFWS Biologist Kurt Broderdorp about Ruediger report). The BA (FWS004705) and BO (FWS007173) state that the effectiveness of highway crossing structures is generally high. Since, "conservation measures are part of the proposed action,"[51] this "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." *50 CFR* § 402.16(b).

Reinitiation is also required by the FWS decision to exclude Colorado from lynx critical habitat was recently overturned by a U.S. Federal Court. *WildEarth Guardians et al. v. U.S. Dept. of Interior et. al., 9:14-cv-00272-DLC, ECF No. 68 (Sept. 7, 2016).* Given the Courts strong insinuation that Colorado contains lynx critical habitat, it is reasonable to believe that this

[50] *See* Section III.F.2.d Lynx Fact Section on Ruediger Report.
[51] https://www.fws.gov/endangered/esa-library/pdf/CH4.PDF at 4-19

"new information reveals effects of the action that *may affect* listed species or *critical habitat* in a manner or to an extent not previously considered." *50 CFR* § 402.16(b) (emphasis added).

Should the Court set aside the Biological Opinion, reinitiation is not required. However, if the Biological Opinion is upheld, reinitiation of consultation is warranted by the Ruediger Report and the recent ruling reversing the FWS decision to exclude lynx habitat in Colorado from critical habitat designation.

3. The Biological Opinion Fails to Adequately Consider the Impact of the Action on Other Listed Species.

a. Endangered Fish are Effected by "Transmountain Water" Use

The greatly increased water usage resulting from the Village "may effect" the endangered pikeminnow and razorback sucker, which requires Section 7 consultation. W10871. The need to prepare a Biological Opinion on these fish is supported by Forest Services Fisheries Biologist, Dave Gerhardt's statement that,

> re: endangered fish - I can't agree with their ""no effect"" conclusion as it's presented. They correctly state that ""Those principles state that ESA consultation may still be required for historic depletions occurring prior to October 25, 1991, if those depletions have a federal nexus (San Juan River Basin Recovery Implementation Program 2002)."" This action constitutes a federal nexus that does not exist without the proposed action and, in my opinion, can't be dismissed in the manner they are attempting.

C4692.

LMJV's agent, Dusty Hicks, confirmed in a meeting with the Forest Service that "[LMJV's] augmentation plan comes from transmountain water, so can't impact downstream [Rio Grande] water rights." C0000802. The EIS confirms that LMJV reliance on San Luis Valley Water Conservancy water depletions and augmentation plans is relies on the "transbasin diversion that delivers water from the San Juan River Basin into the Rio Grande Basin." W11057.

Colorado's concerns about the sensitive Rio Grande Cutthroat trout were similarly dismissed in the EIS response to comments based on LMJV's intent to rely on groundwater, augmented from the San Juan River. W11400.

b. Yellow Billed Cuckoo

On October 3, 2014, the FWS announced that the yellow billed cuckoo was listed as a federally threatened species and shortly afterwards critical habitat was designated. 79 FR 5991 (October 3, 2014). The Forest Service Biological Evaluation it concluded that the project would have "no impact" on the species or its habitat, "as the appropriate habitat does not exist within the project area…" C0034932. However, the Forest Service documents, like the November 18, 2014 FEIS, do not even recognize the listed status of the yellow billed cuckoo. W10870.

This issue was raised in Plaintiffs' Objections. W12473. The Objection Review confirmed that none of the Forest Service NEPA or ESA analysis could have considered that "currently designated critical habitat for the yellow-billed cuckoo begins approximately four and a half river miles east and downstream of the town of South Fork" on the Rio Grande. W12474. There is no scientific analysis in the record to support any determination of whether water depletion in the Rio Grande "may impact" the species and its habitat. Instead of conducting the proper analysis of the impacts in a supplemental Biological Assessment and EIS in light of the determinations made by FWS in its listing decisions, the FS decided to place a Section 218 report in the project file. C31131, W12474.

The Section 218 report fails to analyze how the Yellow Billed Cuckoo would be impacted in times of drought. "The augmentation water released from Rio Grande Reservoir would affect the Rio Grande River both upstream and downstream of its confluence with the South Fork of the Rio Grande in the Town of South Fork." C0034932-33. Without a thorough

analysis of the proponent's decreed plan for augmentation, the scientific finding that lead to listing and designation of critical Yellow Billed Cuckoo on the Rio Grande, the agencies do not know the priority of the water right and if the Section 218 report's conclusion is accurate.

The Forest Service then issued the ROD on May 21, 2015 without any consultation with FWS on the Forest Service "may effect" determination. W12650.

D. The Forest Service took Action Based on Legal and Factual Conclusions that are Contrary to Substantive Provisions of Applicable Land Management Statues

Three issues arising under substantive provisions of federal public lands law are addressed here. Each overlaps with the procedural requirements of NEPA and ESA, and are addressed here for clarity to inform both sections. A forth NFMA issue – SRLA compliance – is so intertwined with the Lynx questions, that it is addressed above in a separate section, to minimize repetition in this section.

1. The Forest Service conclusion that ANILCA requires enhanced road access is contrary to law

The Forest Service based the land exchange on the legal conclusion that ANILCA does not provide the Forest Service discretion to protect the National Forest by mandating that the federal government provide whatever access LMJV demands, with no future control. This legally erroneous ANILCA interpretation is reflected throughout the FEIS premised on the assertion that "[t]he Forest Service has no authority to regulate the degree or density of development on private land." W10761. This legal error was repeated in refusing to consider alternative mitigation measures applicable to Lynx:

> While the Forest Service has discretion over whether to approve the land exchange, once that decision is made they would have no authority to require the implementation of measures to minimize or mitigate the subsequent indirect effects of private Village at Wolf Creek development.

W11286. Both statements are contrary to law.

Both statements misconstrue the basic duties and expansive powers that Congress provided the Forest Service to protect the National Forest System, including the limitations on alienating federal lands contained in ANILCA. *See Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (The Supreme Court has repeatedly observed that "[the] power over the public land thus entrusted to Congress is without limitations." (citations omitted). Congress adopted ANILCA to balance "the Forest Service's obligation to protect national forest interests [with] the interests of inholders seeking access to property surrounded by Forest Service land." *U.S. v. Jenks*, 22 F.3d 1513 (10th Cir. 1994).[52] In short, there is no legal or factual basis for the Forest Service to again accept LMJV's self-serving legal theory creating a private entitlement under ANILCA to unrestrained use and impact of federal lands to expand the limited access to U.S. Highway 160 provided in the controversial 1986 land exchange. *Colorado Wild, Inc. v. United States Forest Service*, 523 F. Supp. 2d 1213, 1227 FN15 (D. Colo. 2007).

a. Adequate Access Was Provided in 1986

The first step in the ANILCA analysis is whether existing access is adequate, or can be made adequate to provide reasonable private use of a non-Federal property within a National Forest System. "Where there is existing access or a right of access to a property over non-

[52] Although the Court has ruled against Plaintiffs' argument that ANILCA is wholly inapplicable to the present case, the basis for applying ANILCA rights outside of Alaska is not found in the text of the statute. *Nat'l Parks Conservation Ass'n v. United States Forest Serv*., 2016 U.S. Dist. LEXIS 43075 (D.D.C. Mar. 31, 2016)("Although ANICLA, in general, applies to national forests in Alaska, *courts have determined* that its 'reasonable use' provision has a 'nation-wide effect,' and is thus applicable to national forests throughout the United States.")(*emphasis supplied*). Plaintiffs preserves the argument that applying the canon of construction announced by the Supreme Court, the "two stated goals" of ANILCA concern only Alaska inholdings, and therefore the lower courts may not continue to extend ANILCA's terms to lands beyond Alaska. *Sturgeon v. Frost*, 136 S. Ct. 1061, 1066 (2016)(rejecting ANILCA interpretation as "inconsistent with both the text and context of the statute as a whole." *Id*. at 1070).

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). As explained above, the FEIS does not contain an alternative that discloses a reasonable development proposal that could occur on existing access in harmony with the National Forest, thereby failing to provide information on which to base the ANILCA determination. The Forest Service explanation of its obligation to grant unfettered access based LMJV's ANILCA "right" to expanded access is contrary to law and fact.

The resolution of Plaintiffs' Objections wrongly states that "access was not granted" in 1986. W12559. This error was confirmed in notes of a meeting between the Forest Service (Rick) and the developer's agent (Dusty): "Rick: under Alt 1 (no action) the Village as currently depicted could not develop, so how to analyze? How to do effects analysis? Any development? Dusty: still development potential." C0000804. Despite LMJV's continued insistence that the 1986 access provides "development potential," the FEIS's fails to analyze the level of development that could take place with the existing access, or existing access made adequate by allowing over snow winter access to the 200 unit development proposal contemplated in 1986. W10751. The Environmental Assessment[53] underlying the original exchange contemplated limited access for a limited development.

[53] The use of the Environmental Assessment instead of an EIS was based on the Forest Service deferral of many aspects for future analysis, something NEPA caselaw now modern caselaw prohibits. *See San Luis Valley Ecosystem Council v. United States Forest Serv.,* 2007 WL 1463855, *2 (D. Colo. 2007).

> Access to *this* parcel is along U.S. Highway 160, through the Wolf Creek Ski Area parking lot, and along a primary USFS access road (FS 391) that terminates at Alberta Lake.

W01168 (1986 EA)

> Access to the selected land from the highway will be at the existing ski area access point. No impact to the access is expected to result from the proposed development of the selected land. New access construction is scheduled by the Department of Highways for 1986 and it has been designed to accommodate all potential expansion at the Wolf Creek Aki Area. Since residents of the proposed development would primarily be users of the ski area during winter (the maximum use period for the access point) and because the availability of lodging at the ski area would reduce the maximum number of vehicles entering and leaving through the access point daily, no additional impact due to private land development at Wolf Creek Pass is foreseen.

W01182- W01183 (1986 EA). As explained above at Section V.A.5.d.iii. and below at Section V.A.3.a., Defendant Gustafson resolved the ANILCA objections knowing that an EIS has never been prepared to examine development opportunities on the "existing access" for 208 units, in context of the world as it exists thirty years later in 2016. Yet, in 2014, Defendants Gustafson and Dallas determined a Supplemental NEPA analysis was necessary to analyze adding over snow access as a means to make the existing access adequate in context of the original 1986 exchange, and current conditions on Wolf Creek Pass. C0021619.

"Adequate access" is defined by the ANILCA 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. The FEIS used a crabbed interpretation to dismiss a narrow set of "similarly situated" parcels that allowed for over snow access. The Forest Service made no attempt to look beyond Colorado or Utah to identify non-federal land that uses over snow access to service a small 10 to 200 unit

development. Instead, the FEIS used crabbed interpretations to explain away each of the parcels that use over snow access. W10744-W10745.

Although Plaintiffs maintain that "similarly situated" parcels were identified, accepting the premise that no "similarly situated non-Federal parcel" exists would squarely establish that the Wolf Creek parcel is unique, thereby requiring site-specific analysis. However, the FEIS makes no effort to examine the development possibilities for this unique parcel based on existing access, which Defendants Gustafson and Dallas determined was necessary in March 2014 to meet their NEPA duties. C0021619. In other words, the Forest Service used "uniqueness" inherent in every property to avoid the ANILCA question, and then violated NEPA by sweeping this important component under the rug, opting instead for the predetermined conclusion that access was inadequate because it would not allow LMJV to pursue the grandiose commercial and residential development involving "1,711 units, which may include two hotels with 200 units, 16 condominiums with 821 units, 46 townhomes with 522 units, 138 single family lots, and 221,000 ft² of commercial space." W10763.

The FEIS recognizes that "[t]he 1986 Environmental Assessment assumed development of a winter resort with 208 residential units, two restaurants, two day lodges and six retail shops." W10751. However, the FEIS, without citation, construes the access conveyed as an "inadvertent failure to assure access to the public highway." *Id*. The Forest Service manufactured this "inadvertent failure" in direct contravention of the long-standing precedent that protects the public lands from such misadventures by ensuring that "nothing passes but what is conveyed in clear and explicit language -- inferences being resolved not against but for the Government." *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919) (citations omitted). The "inadvertent failure" inference in the FEIS is contrary to law.

The presumption that LMJV possesses inadequate access is contrary to law and is refuted by evidence in the administrative record. The obligation to provide additional ANILCA access is based on an inferred and fabricated inadvertence that is disallowed by long-standing Supreme Court precedent. Thus, the inadequate access theory is part of the misadventure whereby the deal struck in 1986 was sweetened by Defendants seeking to provide the developer with unfettered access for the purposes of constructing a commercial and residential development of unlimited size. The Forest Service regulations confirm that access that already provides for development, is adequate.

b. ANILCA Requires Terms and Conditions that Minimize Damage and Disturbance to the National Forest

In the second ANILCA step, assuming *arguendo* that the 1986 access to a 200 unit development is now inadequate because LMJV now wants to build 1,711 residential units and 221,000 ft² of commercial space, "terms and conditions should be placed on that access to meet other statutory and regulatory obligations and goals." *Colorado Wild, Inc. v. United States Forest Service*, 523 F. Supp. 2d 1213, 1227 FN15 (D. Colo. 2007) *citing High Country Citizens' Alliance v. United States Forest Service*, 203 F.3d 835 (10th Cir. 2000).

This ANILCA component was applied after the land exchange was initially determined as not in the public interest. W01365. Subsequent political intervention and negotiations established that ongoing federal control of the development through a Scenic Easement (C2852) was a key components that purportedly changed the "public interest determination" from the first Record of Decision that denied the 1986 exchange. The subsequent Record of Decision that approved the exchange and created the private parcel contemplated ongoing federal involvement, which creates a strong inference that access was knowingly left unresolved.

> The land exchange proponent must donate an easement over the Federal tract to the United States which provides a specific level of control of the type of developments on the Federal land conveyed. The purpose of the easement will be to assure that development of the Federal land conveyed is compatible with the Wolf Creek Ski Area.

W01369 (Decision Notice). Using terms and conditions to maintain and exercise ongoing federal control over the development has always been a key component of the Village at Wolf Creek, and is a key component of any ANILCA analysis. However, legal error is committed where these terms and conditions are ignored in the FEIS based on assertions that "[t]he Forest Service has no authority to regulate the degree or density of development on private land." W10761 *accord* W11286.

Judge Kane rejected the "no authority to regulate" position taken by the Forest Service and Intervenor LMJV in the previous litigation:

> The Forest Service's determinations regarding "reasonable use and enjoyment" and access adequate for such use under ANILCA § 1323(a) are not, as LMJV asserts, a matter of the Forest Service rubber-stamping whatever use the landowner announces it intends to make of its property and then providing access adequate to meet this purpose. 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). By the statute's terms, therefore, the Secretary must determine what constitutes reasonable use and enjoyment of the lands, what access is adequate to allow for those reasonable uses and what, if any, terms and conditions should be placed on that access to meet other statutory and regulatory obligations and goals. *See id.; High Country Citizens' Alliance v. United States Forest Service*, 203 F.3d 835 (10th Cir. 2000) (unpublished). Forest Service regulations governing ANILCA access requests reiterate these statutory requirements. *See* 36 C.F.R. § 251.114(a) (requiring agency to determine what constitutes reasonable use and enjoyment of non-Federal lands and to authorize only the access needed for such use and enjoyment and "that minimize[s] the impacts on the Federal resources"); *see also* Final 11 Rule, 56 Fed. Reg. 27410, 27410 (June 14, 1991) (ANILCA access determination "is a discretionary decision of the authorized officer based upon given circumstances"). The Forest Service has also acknowledged that ANILCA, while not authorizing direct control or use of non-Federal land, does "provide[] a basis for determining the appropriate private access use of Federally owned land," 56 Fed. Reg. at 27411, and "does not require the authorized officer

> to allow the construction of [an access] facility on Federal land that would be required for a use on the non-Federal land that the authorized officer considers to be an unreasonable use of the non-Federal land," *id*. at 27410. Thus, 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." *Id*. at 27412.

Colorado Wild, Inc. v. United States Forest Service, 523 F. Supp. 2d 1213, 1227 FN15 (D. Colo. 2007) (emphasis supplied). Although ANILCA vests the Forest Service with abundant discretion and power in these situations, the agency explicitly disavowed this authority when developing alternatives, mitigation measures, and other provisions required by NEPA. Even assuming there is a requirement to provide additional access, the Forest Service is duty-bound to use NEPA to disclose and analyze which ANILCA "terms and conditions should be placed on that access to meet other statutory and regulatory obligations and goals." *Id. citing High Country Citizens' Alliance v. United States Forest Service,* 203 F.3d 835 (10th Cir. 2000).

Under ANILCA, the Secretary of Agriculture "shall provide such access to non-federally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure the owner the reasonable use and enjoyment thereof." 16 U.S.C. § 3210; *see also* 36 C.F.R. § 251.114(a)("[T]he authorized officer shall authorize only those access facilities or modes of access that are needed for the reasonable use and enjoyment of the land."). According to the regulations interpreting and implementing ANILCA, any access authorization must be "consistent with [the access provided for] similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources." 36 C.F.R. §251.110-114.

Even by limiting its search to Utah and Colorado, the FEIS identified dozens of other similarly situated inholdings that allow resort development based on dirt or gravel roads and over-snow access during winter. Although not identical, and without conceding they are not

"similarly situated," these parcels are similar enough generate information on which to develop reasonable access alternative that balance reasonable development opportunities with the protection of the National Forest System and other important values. Moreover, the Forest Service did not search the nearby Four Corners states of Arizona and New Mexico or elsewhere for "similarly situated" properties. W11346 ("search for similarly situated lands on the Divide Ranger District and at ski resorts in Colorado and Utah").

In sum, the Forest Service conclusion that ANILCA mandates LMJV's expanded access to Highway 160 to support a 1,711-plus unit residential and commercial enterprise on a parcel obtained based on an EA and negotiated ROD that provided access to a 208 unit development is contrary to law and facts established in the administrative record. Where this did not take place, it is proper to invalidate the agency action as contrary to law, and remand to begin the process anew in accordance with the Court's rulings.

2. The Forest Service Violated its Land Exchange Regulations

The Forest Service violated its Land Exchange Regulations by misleading the public and failing to make mandatory determinations. The FEIS relies on the "Public Interest Determination" contained in the 2010 Feasibility Analysis to justify this land exchange. W11353. The Feasibility Analysis deferred some major issues for subsequent analysis. W02219 (Threatened, endangered, and sensitive plant and animal species and their habitat will be addressed in a Biological Assessment and Evaluation. Recent resource inventories in the area indicate that further analysis would be needed in evaluating the affect on Canada lynx). Further, the Feasibility Analysis "weighed [the land exchange] against the proponent's existing ANILCA access right." W02224. The Feasibility Analysis determination was made without benefit of a NEPA process.

As set out in the previous section, the Feasibility Analysis was flawed in assuming the LMJV absolutely "has a right of access under ANILCA and that LMJV has every intention of securing access to the property either through land exchange or direct easement grant." Id. The Feasibility Analysis failed to acknowledge that 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). In short, the erroneous ANILCA determination and limiting the scope of the Feasibility Analysis predetermined the Forest Service must take some kind of action to provide expanded access, an outcome that is contrary to law. As set out below, modern land laws disfavor land exchanges by limiting their use to situations where the "public interest will be well served." 36 CFR 254.3(b).

"The Secretary is not required to exchange any Federal lands. Land exchanges are discretionary, voluntary real estate transactions between the Federal and non-Federal parties." 36 CFR 254.3(a). "An exchange may only be completed after a determination is made that the public interest will be well served." 36 CFR 254.3(b). The Forest Service's incorrect ANILCA determination resulted in a failure to acknowledge the discretion the agency had in approving this land exchange. Instead, incorrect ANILCA interpretations and analysis resulted in error of law that created a "hands tied" approach to analyzing the merits of this land exchange. The ANILCA violations contribute to the land exchange regulations violations.

a. The Required Factors Were Not Considered

Similarly, the Forest Service limited its analysis of the impacts of the operation of the private development, thereby it failed to adequately consider the factors relevant to the public interest determination.

> ***Factors to consider.*** When considering the public interest, the authorized officer shall give full consideration to the opportunity to *achieve better*

> *management of Federal lands and resources*, to meet the needs of *State and local residents and their economies*, and to secure important objectives, including but not limited to: *protection of fish and wildlife habitats*, cultural resources, *watersheds, and wilderness and aesthetic values*; *enhancement of recreation opportunities and public access*; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of existing or planned land use authorizations (§ 254.4(c)(4); *promotion of multiple-use values*; *implementation of applicable Forest Land and Resource Management Plans*; and *fulfillment of public needs.*

36 CFR 254.3(b)(1) (*emphasis added*). Several land exchange provisions involving hazardous substances are triggered by the presence of a benzene plume upgradient from the exchange parcels. 43 C.F.R. § 254.3(i); W11231 (2013 map of benzene plume). Despite the definitive appearance conveyed by the map, the FEIS later confirms that "the contaminant plume has not been fully defined in its down-gradient extent." W11374. Without any basis in the FEIS, the Forest Service agreed to a "hold harmless" agreement instead of delineating the plume and taking the necessary action to ensure clean-up before the exchanging land that may be contaminated by an undefined but known contamination plume. 59 FR 10854 at 10858.

This land exchange would not result in better management of federal lands and resources, or protection of fish and wildlife habitats. It will negatively impact the federally listed Canada lynx and crucial lynx habitat.[54] It will violate the SRLA Standard ALL S1.[55] When this balancing includes a federally listed species; statutorily, that factor must weigh heavier than others. This decision will not benefit many local residents and their economies. C3181 (Archuleta County will bear a relative "lion's share" of impacts, but the entire project and land exchange will occur within neighboring Mineral County, from which Archuleta County will

[54] See Section III.D Lynx Facts.
[55] See Section V.B. Forest Plan and Lynx

receive no tax revenue to offset those impacts). This decision will drain water from local watersheds and take away from the surrounding wilderness and aesthetic values.

A key public interest identified in the public comments confirmed that the remote Wolf Creek Pass is a place people go to escape the grind of daily life which generally involves developed landscapes, populous environments, and traffic. The land exchange and subsequent large scale development is going to bring all of this hustle and bustle to Wolf Creek Pass. The solitude and rather pristine setting will be no more. This decision will not enhance the recreation opportunities or public access. Some places are not supposed to be developed. While this development may provide easier public access for some, it will destroy an important natural area for generations to come.

Overall, the public does not need an 8,000 person development in this high alpine setting. With over 21 developed resort style ski areas in Colorado, maintaining Wolf Creek Ski Area as a unique ski only experience is in the public interest.[56] When honestly considered, these factors do not support the land exchange decision.

b. Land Exchange Findings Violate the Regulations

The Forest Service violated its land exchange regulations through the improper public interest findings.

> **(2)** ***Findings.*** To determine that an exchange well serves the public interest, the authorized officer must find that -
> **(i)** The resource values and the public objectives served by the non-Federal lands or interests to be acquired must equal or exceed the resource values and the public objectives served by the Federal lands to be conveyed, and
> **(ii)** The intended use of the conveyed Federal land will not substantially conflict with established management objectives on adjacent Federal lands, including Indian Trust lands.

[56] http://coloradoski.com/resorts

36 CFR 254.3(b)(2).

i. Resource Value Findings were Skewed

While alleging to weigh the resource values gained and lost due to the land exchange, the FS failed to analyze and disclose the actual impacts to these resources due to the large scale development. For example this development,

> impacts wetlands classified as fens in six locations. The impacts are due to surface roads and excavating for the construction of tunnels for roads. Forest Service Manual Wildlife, Fish & Sensitive Plant Habitat Management, Section 2631.3 Fens states that "These ecosystems are difficult to reclaim and are essentially irreplaceable," and recommends that the Forest Service "provide direction in Forest Plans to protect the functions and services of fens. Give emphasis to large-size fens."

C2800. Acquiring a fen that will be irreplaceably impacted by construction activities is not additive to resource values. Analyzing the numbers without contemplating the impacts results in a highly skewed public interest determination. This same flaw is inherent in the calculations of lynx habitat gained and lost. The reality is that all lynx habitat on both parcels will be lost due to year round high impact development of these parcels.

ii. Adjacent Federal Lands Were Excluded

The Forest Service took a narrow view of adjacent lands as those designated as MA 8.22 – Ski Based Resorts, and MA 5.13 – Forest Products. As Figure 3.11-1 (FEIS 8-30) highlights these two management designations are the tip of the iceberg. This exchange parcel is surrounded by the San Juan National Forest, Rio Grande National Forest, Weminuche Wilderness, La Garita Wilderness, and the South San Juan Wilderness. Designation MA 8.22 is a tiny part of this map and the areas of MA 5.13 pale in comparison to the vast amount of Wilderness designated and multi-use lands surrounding this parcel that will be negatively impacted by this land transfer.

c. Land and Resource Management Plan Standards Preclude Exchange

"The authorized officer *shall consider only* those exchange proposals that are consistent with land and resource management plans (36 CFR part 219)." 36 CFR 254.3(f). For all the reasons outlined in the sections on Lynx Facts and the Southern Rockies Lynx Amendment violations (Sections III.B, V.B.), this exchange is also in violation of the Land Exchange Regulations. The "conservation measures" will not maintain habitat connectivity and this land exchange decision is arbitrary and capricious.

d. The EIS Failed to Consider Reservations or Restrictions in the Public Interest

The Forest Service never considered any "reservations or restrictions" to attach to the land exchange that would benefit the public interest.

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

36 CFR 254.3(h). The Forest Service should have considered and mandated conservation measures, restrictions on the uses of the transferred land, scenic easements, and other protective measures. The failure to analyze or implement these measures violates the land exchange regulations.

e. A Land Exchange is Precluded by Reasonable Interpretations of Federal Law

The Forest Service land exchange analysis is doomed by the false assumption that LMJV's desire for expanded access requires that the "merits of completing an exchange must be evaluated in contrast to the grant of an easement for access to the property." W02224. Alleging

that the agencies hands were bound by unfettered ANILCA access rights resulted in a watered down public interest determination. An honest assessment and legally sound application of the factors to be considered preclude the decision to approve this land transfer. The mandatory findings preclude such a transfer as violating the Forest Plan by failing to maintain lynx connectivity on adjacent lands. The Forest Service violated its Land Exchange Regulations rendering this decision arbitrary, capricious, and unlawful.

3. Forest Service Violated its Regulations by Failing to Provide an Objective and Unbiased Objection Review

Defendants committed an abuse of discretion by assigning Maribeth Gustafson to review pre-decisional administrative objections for the Wolf Creek Access Project. The Forest Service abused its discretion when Maribeth Gustafson failed to recuse herself from reviewing objections to agency decisions she directly coordinated and oversaw. *36 C.F.R. § 218* was promulgated by the Forest Service to provide a pre-decisional administrative review process, more commonly known as an objection process, for projects and activities documented with a Decision Notice or Record of Decision. 36 C.F.R. § 218.1. The reviewing officer is the Forest Service line officer at the next higher administrative level above the responsible official, or the respective Associate Deputy Chief, Deputy Regional Forester, or Deputy Forest Supervisor with the delegation of authority to review an objection. 36 C.F.R. § 218.3(a).

> If a designated reviewing officer finds a need to recuse himself or herself from an objection review because previous engagement with the project in question might result in a perceived bias, a provision added to the final rule at § 218.3(a) directs that the Forest Service line officer at the next higher administrative level above that reviewing officer shall assume the reviewing officer responsibilities.

78 FR 18481, 18489.

Real and perceived bias exists where Maribeth Gustafson participated and guided this NEPA process. The Administrative Record posted to the agency website during the Objection period did not reveal the full extent of Maribeth Gustafson's involvement. Records obtained through FOIA and in the Administrative Record the Forest Service lodged with the Court reveal Ms. Gustafson's direct and substantial role in preparing the decision she later reviewed.

Participating in the underlying decision, NEPA analysis, communication plan, and briefings creates an actual and perceived bias that should have led to appointment of an independent deciding official, and therefore allowing Maribeth Gustafson to serve as reviewing officer violates Forest Service regulations, the APA, and Plaintiffs' Due Process rights.

a. Maribeth Gustafson Involvement

During the decisionmaking process Maribeth Gustafson described project proponent, Red McCombs as "very charming." C25902. She announced that "Dan Dallas briefed me a few weeks ago on his intended decision with Wolf Creek. Today he sent in a briefing paper and aggressive time line for briefings, etc. While I supported his decision as presented verbally, I have not seen a draft decision document." C21805. She inquired, "I'd like an update on Wolf Creek. Please provide a brief status report. What are you noticing? What is your timeline? Also, I'd like to read the ROD myself but wondering if you are finding significant need for editing. Please make me a copy to read..." C22624. She provided updates to senior officials. C25420 ([p]art of the private land we would acquire is currently being used by the ski area for skiing. It is not lift served. The ski area would like to continue that use once we acquire); C21676, C24650. She provided back up when communicating with the proponent. C26061 (Should I plan to join the call on Friday to back you up in sharing this news?); C25377 (The status of the minerals certification will be brought up on Wednesday in the call between Red McCombs and Maribeth).

She provided guidance. CP2064. She was very interested in this decision. C18807, C23140. She was a contact on project briefing papers. C24651.

Maribeth Gustafson's "previous engagement with the project" does "result in a perceived bias." Her comments make clear that she has an actual bias towards the decision and she helped support the decision – instead of providing an objective and honest review. "On behalf of Mr. McCombs, please pass along his message of gratitude and thanks to Maribeth and staff." C25904.

b. Forest Service Staff Responsible for NEPA Process also Drafted Objection Responses

The same team that drafted the NEPA analysis was responsible for responding to Objections critical of their own work. This clear conflict of interest resulted in another layer of partiality and bias in the Objection review process. Dan Dallas, the ultimate decision maker was a part of the process. C29862 ([Maribeth Gustafson wrote] Dan, I know you want to talk about Wolf Creek….lets get together next week while you are here for RLT). Ken Capps, Senior Counsel at the Office of the General Counsel, and David Loomis, Forest Service Regional Environmental Planner, played integral roles in responding to Objections. C29497 (It would be great if Ken Capps and David Loomis could also attend the meeting or at least the initial part. As you know both Ken and David had significant roles in the preparation of the FEIS); C35691 (Ken Capps did a critical review of the [Objection] response and had major edits); C35920 (I have made the edits from Capps with the exception you were going to work on), W17761. Randy Ghormley, the lead Forest Service Biologist responsible for much of the wildlife analysis also got to critique his own work through aiding with objection responses. C31026 (Having spent a good 2 years investing in the wildlife portion of this analysis, I appreciate the opportunity to

review this), C0031015. Adam Mendonca, Wolf Creek project manager, and Tate Curtis, Forest Service Appraiser who worked on Wolf Creek issues, also participated in the Objection review process. C30429 (Adam is handling all things related to ANILCA, which is Pearson's issue 7. Tate is covering the Appraisal, which is Issue 8. I finished Issue 10 which was easy (ski area support), CP4697."

b. NEPA Contractors Prepared Objection Responses

The same contractors who prepared the NEPA analysis also evaluated their own work through drafting Objection responses. C29871 (Specifically, we have the various resource specialists of the Consultant Team working on the Colorado Wild objection issues); C30955 (Responsible Party for Issues). If "perceived bias" is to be avoided, having contractors being paid by LMJV respond to Objections is improper. C30993 (FS 2015 funding proposal).[57]

c. Procedural Violations Prejudice Plaintiffs

The pre-decisional review process was plaintiffs' opportunity to plead its case to the agency. The Forest Service Reviewing Officer should use a critical eye during the review and not give deference to the agency. Courts give deference to the agency partly based on the understanding that through by following administrative procedures, the agency has been put on notice and has already internally scrutinized the process and decision. *See e.g. Olenhouse,* 42 F.3d at 1573-74. The administrative variety of due process ensures that Plaintiffs get a fair shake and assures the Court that the Agency was playing by the rules, being objective, and making

[57] The funding proposal does not indicate any Forest Service funds were going towards the contractors work on Objection responses. Plaintiffs were denied access to contractor billing records which would help confirm this point.

good decisions. This regulatory violation prejudiced plaintiffs by again rubber stamping this decision.

The Forest Service did not adequately analyze and critically review the NEPA process, persistent flaws in the underlying analysis, and ultimately an illegal agency decision. The Forest Service's pre-decisional objection review process is fairly new and it is clear the agency was still figuring out how it should unfold. C18731 (we need [] a clear understanding of the new objection process. The third party contractor and western lands did not agree on the process so Dan and I agreed that we would get clear direction on the process.). The process was not implemented to merely provide the Forest Service staff and contractors an opportunity to evaluate their own work. Maribeth Gustafson had a personal and professional interest in the outcome of this process and having her at the helm of the Objection review process was arbitrary and capricious.

Without an unbiased, critical, non-deferential pre-decisional review, the Court is forced to conduct *de novo* review, with no basis to defer or allow a presumptions of validity to determinations made without compliance with administrative procedures. As set for the in Section VI, APA remedies contemplate that once the court determines action was taken without compliance with agency procedures, the action can be set aside and the case remanded.

E. The Project Proponent Exerted Undue Influence Throughout this Process

Leavell McCombs Joint Venture's impatience, insistence, and scare tactics forced the Defendant's processes in directions which lead the agencies to go against its own best judgements and instead act arbitrarily and capriciously. This happened at numerous times in the process and resulted in both NEPA and ESA violations. On a similar record, Judge Kane concluded that, "[t]he ultimate question to be decided is whether any improper influence by

LMJV and resulting contractor bias 'compromised the objectivity and integrity of the NEPA process.'" *Colo. Wild, Inc.* 523 F. Supp. 2d at 1230 (D. Colo. 2007)(granting preliminary injunction) *quoting Ass'ns Working for Aurora's Residential Envt. v. Colorado Dep't of Transp*., 153 F.3d 1122, 1129 (10th Cir. 1998).

Despite an MOU limiting the Proponent's participation (W11874), basic NEPA decisions such as invitation of cooperative agencies were presented to Adam Poe for review and approval. W12116 (submit scope of work…to Western Lands Group before we can officially proceed with work). Although communications between the proponent and the contractor were to be limited to milestone updates, a contract was executed by which the proponent could track and oversee the contractor's activities.

> WER will provide WLG consolidated monthly invoices for such work no later than the last day of the month. WLG will immediately review such invoices and provide copies to the Proponent.

W11899. Although the Administrative Record lacks the full range of communications, documents released in the previous NEPA revealed that billing was a favored method for the proponent to monitor and influence the NEPA analysis. The proponent also maintained open and inappropriate lines of communication with the Forest Service. This is highlighted and outlined below through the extensive communications between Steve Rinella and Adam Poe. W11915.

The changing positions and contradictory interpretations of the FS and LMJV regarding the FS's decision contravene the reasoned decisionmaking requirements of the APA and NEPA which is properly remedied by remand to the agency so that the EIS process may begin "anew" and free of bias and undue influence. *See San Luis Valley Ecosystem v. United States Forest Serv*., 2007 U.S. Dist. LEXIS 36242 (D. Colo. 2007) (finding that error at [a NEPA procedural crossroad] will require the process to begin anew). Further, the proponent's improper

participation and influence resulted in an analysis that failed to analyze reasonable alternatives, honestly assess impacts, or involve the complete consideration mandated by law.

> Properly understood, NEPA requires an environmental analysis of the full consequences of a large federal project—with the inevitable, and necessary, possibility that those consequences will result in a no-project determination. Not having received any semblance of a full EIS on [the project], the Court has no opinion on the validity of future analyses or whether, with full analyses, [the project] should or should not proceed. The Court's duty, however, is to ensure that a no-go option receives the complete consideration it requires without undue influence from North Dakota's impatience.

Government of the Province of Manitoba v. Salazar, 926 F.Supp.2d 189, 192 (D.C. 2013). As outlined below, had the proponent allowed the agencies to follow its administrative instincts and take the time necessary, the final decision would have been more defensible.

1. Political Pressure Created a Chilling Effect

Instead of adhering to the MOU and allowing the Forest Service and the consultant team to conduct the necessary analysis and comply with NEPA requirements, the Proponent, Red McCombs used pressure and scare tactics to get what he wanted. This was not the first time he used this approach. Maribeth Gustafson refers to the original land transfer that got Mr. McCombs this parcel and acknowledges that, "It is commonly understood that Mr. McCombs brought political pressure to bear to realize his dream to develop the ski area. C21685. This round was no different. OGC attorney Ken Capps noticed the odd relationship between the parties and noted "I'm confused. Who is going to be in our conference room? The RO and the proponent? That seems weird to have the proponent who requested the meeting here with the RO that just gives you guys advice and you are on the other line?" C1112. Strange bedfellows and blurred boundaries allowed the proponent an ear into the process and a lifeline when that process threatened to move in directions that could be against their interests or cause the process to be delayed. In these instances, Mr. McCombs was loud and clear.

As a well-connected billionaire businessman Red McCombs had the ability to pressure and scare the government employees working on this project. C25101 (Red McCombs is getting "frustrated" and may "begin making calls to his friends in Washington); CP3015 ("Red will do what Red will do" in terms of political contacts); CP2962 (The intent of the call is for Red McCombs to "talk to somebody in charge" and be assured that the process is moving forward. My sword is now dull at keeping this issue at the Forest level); CP2930 (McCombs is rattling cages); C22628 (his client wants to start pressuring law makers for ""help"") (been receiving some push back by the proponent); C23790 (he has been hearing from the proponent and his sense is that if the decision is not made by October 1st, the political bells will start ringing loudly); C24605 (If the FEIS and Draft ROD are not released before the election date the proponents have commented that they will engage the department). Mr. McCombs also made sure the decisionmaker and those above him heard his voice. C16512 (personal meeting b/t Dan Dallas and Red McCombs); CP3061 (He expressed extreme displeasure that Dan Jiron would not be available and asked me to communicate that. I explained Maribeth's role and responsibilities, but he was undeterred in his assertion that the lead responsible official be available); C8086 (Capps is open all week, and would have Dan up there as they want a face to face with the decision maker). The Forest Service got calls from lobbying firms and D.C. attorney being ordered to "ensure [the Decision] stays on track" (C22628) and that "Dan promised Red a decision…"C22609. It was noted that the proponent was "kind of pushy." CP3040. The proponent was so enmeshed in the process that a Wolf Creek project manager conveyed, "I consider most of my internal correspondence with the proponent to be internal workings, just as

if someone asked for our work on the DEIS before it was complete, and thus not subject to FOIA." WC_FOIA_ACP_1071.[58]

2. Pressure Influenced Range of Alternatives:

When alternatives were being chosen, Forest Service personnel were conveying the proponent's threats via forwarded emails saying, for example, that "Poe tells me that Red McCombs will pull the proposal and set the access application back in front of you. W12850. Influence on choice of alternatives was forbidden by the MOU. W11874. Further evidence of improper participation by the project proponent can be found in emails about utility issues from David Johnson of Western Ecological Resources to Forest Service employee Adam Mendonca conveying that "[t]his information should be provided to Western Land Group for review by the Proponent." W12115.

This improper involvement started at scoping. W13449 (date for next meeting on scoping results, etc…); W13462 (apps and drinks at the Tap Room… we would try and make it a point not to talk about work. yeaa right.....).

Through analyzing similarly situated properties it became apparent to the Forest Service that it needed to analyze an over-snow access option. This decision was memorialized in a Briefing Paper that announced:

> The RGNF plans to begin scoping for a supplementary EIS for the Village at Wolf Creek Land Exchange Project. After reviewing similarly situated properties, as required by NEPA, and further consultation with OGC [redacted]… The proponent is expected to seek Departmental and/or Congressional assistance to pressure the RGNF to make a decision rather than developing a supplemental EIS.

[58] Mr. Malecek was informed that such communications would be reviewed "in order to determine whether the information is protected…under b5 (FS pre-decisional & Privileged)

CP2068. First, the Proponent searched for ways to keep the Forest Service quite on this issue. C21639 (see if we have specific language to use to keep Dan from sending letter prior to our having full and complete internal meetings and discussions). Then, the Proponent's agent Adam Poe sent Forest Service employee Steve Rinella "Some guidance in our MOU that encourages discussions rather than letters as a first line if communications." C21638. Adam Poe then sent Dan Dallas another set of "similarly situated properties" that would allegedly allow the agency to bypass any further analysis. C21982. Once again, the Forest Service was improperly influenced by the proponent into failing to follow through with necessary analysis that would have taken a hard look at all the alternatives. The pressure and scare tactics of a well-connected business man won out over the better judgment of the Forest Service.

3. Pressure to Avoid Supplemental DEIS for Forest Plan Amendment

When it became clear that the Forest Service would have to amend its Forest Plan to honestly account for the violation of SRLA Standard ALL S1, the proponent spoke loud and clear and improperly influenced this decision. Ironically, had the proponent allowed the Forest Service to proceed with the plan amendment, the final decision would have been more defensible. Instead on November 1, 2012, word spread through the Forest Service that "[t]he proponent contests the need for a plan amendment and would like to further discuss this." C12295. Then on December 26, 2012, Forest Service project lead Thomas Malecek was informed that "Randy [Ghormley] was going to make a first crack at language to include that responds to our not needing a FS plan amendment." C12980. The problem with drafting this language was that the conservation measures were not finalized until February 21, 2013. Based on pressure exerted by the Proponent the Forest Service pre-decided how they would avoid SRLA compliance by relying on undetermined and uncommitted to conservation measures.

4. Pressure Created Unique ESA Consolation

The Forest Service originally conveyed that it "will not move the land exchange through Section 7 and is directing the proponent to meet with FWS and begin the HCP process/Section 10." C8453. However, the Proponent "did not want to pursue the section 10 process for their private land development." C12297; C4987 (For a fact the proponent is most concerned, as that is what precipitated our December meeting). Once again the pressure and scare tactics began. "[T]he Proponent has requested a meeting with the FS and FWS…as they would like to discuss the decision. The proponent has indicated they will have an attorney at the meeting; also that they may consult with Undersecretary Sherman prior to the meeting." C8453. The proponent felt so strongly about this issue that it ordered the contractors to "stop work on the project." C5662. FS Biologist Randy Ghormley inquired, "Must be the Sec. 7 Sec. 10 thing? Or can you talk now?" Id. Contractor Jerry Powell replied, "I don't know, but I suspect you are correct. I probably should not talk now. Just to be safe." Id. Predictably, the Forest Service and the USFWS caved on their initial determination and granted the proponent Incidental take protection through the Section 7 process.[59]

5. Steve Rinella and Adam Poe Circumvented Communications Protocol

The records obtained from the Regional Office based on Judge Martinez and Judge Daniel's Summary Judgment Orders confirmed that Steve Rinella (Forest Service) and Adam Poe (Proponent's Agent) had an open line of communication. *RMW I*, ECF No. 31 (Summary Judgement Order); *RMW II,* ECF No. 56 (Summary Judgement Order); Neither FOIA request has been fully, and remaining issues will be address after Judge Martinez resolves the pending Motion. RMW II at ECF No. 61, 62 (pending motion of law)

[59] See Section V.C (ESA Claims)

Closely coordinating with Regional and Washington Office bureaucrats that can overrule the local specialists may not be uncommon when a party has an interest in ensuring the agency is working diligently toward the final decision. However, when this coordination turns into pressure that influences the analysis and the compromises the integrity of the NEPA process, it is improper . *Colo. Wild, Inc.* 523 F. Supp. 2d at 1230 (D. Colo. 2007)

At a critical juncture in the process Steve Rinella disclosed "Poe tells me that Red McCombs will pull the proposal and set the access application back in front of you." W12850. This threat was heard loud and clear. The range of alternatives and scope was duly limited and the integrity of the NEPA process was compromised. *Id*.. *See* Sections V.A.1-2.

Rinella and Poe kept secrets that prevented public transparency and shielded decisionmakers from full knowledge of their own agency's activities. WC_FOIA1_HC_02085 (If anybody asks, you found this blowing down the sidewalk last time you were in Creede); C6411 (take a look at this and give me a call. Don't share yet). Rinella kept Poe apprised of deliberative process privileged information that was withheld from the public. C37552 (rumors about needed fixes); C18560 (Is the Forest Service working on it?); C18938 (Have you seen anything regarding a release date for the FEIS and draft ROD.? Radio silence from RGNF despite promises to keep us posted). Rinella helped the proponent gain strategic advantages. FOIA1_5007 (You underestimate me. with one stroke of a pen I 1) minimize cash equalization 2) present a more logical boundary and 3) give the tiniest bit of credibility to your clients when they say, 'we're not only taking the most developable land). When issues arose, they met privately to discuss. C2096 (I detect an attitude in there. Aren't we about due to have lunch?). And when the process goes against the LMJV's interests, Steve Rinella commiserates, "Screwed again." C0032032.

6. Proponent Contact with Contractors:

Plaintiffs have alleged, but have not been provided access to records to confirm whether LMJV also violated the MOU by having inappropriate contact with the NEPA consultants. FOIA1_1651 (Poe guiding analysis); FOIA1_12367 (WER providing Poe update on sections of EIS); CP3160 (I do note that this came from Adam Poe so it appears that somehow the basic analysis that Don Dressler did for Jim Bedwell got sent out to the contractors to fill-in the details); C3127 (Series of email between Poe and Prime Consultant). The extent of the unlawful communications between the NEPA contractors and the proponent cannot be known without review of the NEPA contractors' records, which Plaintiffs maintain are federal agency records.

This is a fully briefed issue in the RMW FOIA litigation, and Plaintiffs respectfully maintain its objections made in the present litigation. ECF No. 45 (Order denying ECF No. 22 regarding contractor records).

VI. Remedy

APA provisions relevant to actions taken without due process protections afforded by an administrative hearing establish that a "reviewing court shall […] (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," […], (C) […] short of statutory right; (D) without observance of procedure required by law; [or] (E) unsupported by substantial evidence. 5 U.S.C. § 706. The APA's "hold unlawful and set aside" remedy provides complete relief here, and prevents the Court from getting entangled in the agency's decisionmaking process. *See e.g. Sierra Club v. United States DOE*, 255 F. Supp. 2d 1177, 1190 (D. Colo. 2002) (finding ESA and NEPA violations, setting aside actions, and remanding); *but see Colo. Envtl. Coalition*, 875

F. Supp. 2d at 1259 (setting aside NEPA analysis, finding ESA violation, and remanding without vacating agency actions).[60]

Although Defendants may ask the Court to rely on equitable powers to reform agency actions, keep the land exchange in place, or otherwise rehabilitate the agency actions that Plaintiffs seek to set aside, Courts regularly reject this approach where judicial review and relief is meant to stop the "bureaucratic steam roller" created when a federal agency fails to fully comply with the NEPA's procedural duties before taking action. *Colo. Wild, Inc. v. U.S. Forest Service*, 523 F. Supp. 2d 1213, 1221 (D. Colo. 2007) *citing Davis*, 302 F.3d at1115 & n.7. *High Country Conservation Advocates v. U.S. Forest Serv*., 67 F. Supp. 3d 1262, 1263 (D. Colo. 2014)(distinguishing cases that use equitable relief to deviate from APA vacatur).

The normal APA remedy and alternatively, the Court's equity powers to ensure a fair and just APA remedy, are addressed in turn.

A. Hold Unlawful, Set Aside Agency Action, and Remand

The APA provides that where an agency action is found to be arbitrary and capricious or contrary to law, the Courts "hold [it] unlawful and set [it] aside." *Colo. Envtl. Coalition v. Salazar*, 875 F. Supp. 2d 1233, 1259 (D. Colo. 2012) *quoting* 5 U.S.C. § 706(2). Where the nation's environmental policies are given meaning through a set of procedural requirements, the District Court's role is to ensure the agency complies with those procedures before action is taken. *N.M. ex rel. Richardson,* 565 F.3d at 703 ("NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives.").

[60] The remand has not yet been resolved. *See e.g. Colo. Envtl. Coal. v. Office of Legacy Mgmt*., 08-cv-01624-WJM-MJW (ECF No. 132) (D. Colo. January 13, 2016)(Order Denying Without Prejudice Defendants' Motion To Dissolve The Injunction).

"Vacatur is the normal remedy for an agency action that fails to comply with NEPA." *High Country Conservation Advocates*, 67 F. Supp. 3d at 1263. Deciding issues presented coupled with finding unlawful and vacating the "final agency actions" listed above (Section II. Jurisdiction, A. Final Agency Action) would provide full relief requested, without resort to the deployment of the Court's equitable powers. Vacatur and remand would resolve the NEPA claims and clean the slate for consideration on remand, without substituting the Court's judgment for that of the Forest Service, FWS, COE, CDOT, FHA and other state, local, and federal agencies with jurisdiction, expertise, and statutory duties. *Id*. at 1265 ("[W]hile it is not the Court's responsibility to mandate a particular outcome, NEPA's goals of deliberative, non-arbitrary decision-making would seem best served by the agencies approaching these actions with a clean slate."); *accord Sierra Club v. Hodel*, 848 F.2d 1068, 1094 (10th Cir. 1988) *citing* 40 C.F.R. §§ 1503.1(a)(4), 1506.6 ("The preparation of an EIS […] entails […] public and interagency participation. […]. This cross-pollinization of views could not occur within the enclosed environs of a courtroom.").

Similar to an appellate court that finds legal error below, judicial economy is served where a District Court avoids entanglement with administrative procedures beyond the findings of fact and determinations of law needed to effectively set aside the offending actions and guide the agency remand. The APA requires that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1176 (D.N.M. 2000)(entering findings and setting aside substantive ESA violations). The APA duty is mandatory. *Id. quoting Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997)("'When a statute uses the word 'shall,' Congress has imposed

a mandatory duty upon the subject of the command; and judicial review may not extend agency discretion or authority beyond what a statute provides.").

In short, for each agency action taken without compliance with procedures set out in NEPA or ESA or held unlawful based on a substantive provision of NEPA, ESA or NFMA, the proper remedy is based on findings of fact and law, creating a clean slate by setting aside the agency action, and remanding to the agency for decisionmaking consistent with the Court's findings. *Sierra Club v. United States DOE*, 255 F. Supp. 2d 1177, 1190 (D. Colo. 2002)(remedying ESA and NEPA violations by declaring violations, voiding offending action, and remanding).

B. Alternatively, Equitable Power May be Used to Ensure Effective Relief

Alternatively, the equities and the public interest may support enhancement of the "hold unlawful and set aside" remedy with injunctive relief to tailor the APA relief to the court's findings of fact and law. *Colo. Envtl. Coalition*, 875 F. Supp. 2d at 1259 (setting aside NEPA analysis, finding ESA violation, and remanding without vacating agency actions). Plaintiffs reserve additional argument to respond to any exercise of equitable discretion Defendant and Intervenor may suggest in Response Briefing.

1. Plaintiffs Will Suffer Irreparable Injury

Where a NEPA violation has been found, harm to the environment and the Plaintiffs is usually found, and it is the rare case where plaintiff has been found correct on the merits of a substantial NEPA claim but has been refused an injunction because of lack of harm or a balancing of the equities. As the Tenth Circuit has stated: "[W]e hold that harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure." *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002) *see also Catron County v.*

U.S. Fish and Wildlife Service, 75 F.3d 1429, 1440(10th Cir. 1996) ("An environmental injury usually is of an enduring or permanent nature, seldom remedied by money damages and generally considered irreparable."). Further, the statute creates a procedural right, the violation of which creates the risk of "real environmental harm [as a result of] inadequate foresight and deliberation." *Catron County*, 75 F.3d at 1433. Additionally,

> the risk of irreparable harm is impossible to assess because the studies that would assess that harm are incomplete. Legal remedies are inadequate, however, because permitting construction to proceed before the NEPA studies have been completed would defeat the purpose of undertaking the studies, whose purpose is to make the agency aware of relevant environmental considerations before acting.

Sierra Club v. Hodel, 848 F.2d at 1097.

Regardless of the underlying statute, the party seeking equitable relief must show "a specific showing that the environmental harm results in irreparable injury to their specific interests." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *Davis v. Mineta*, 302 F.3d at 1115). The attached declarations demonstrate, Plaintiffs will suffer irreparable injury in the form of exclusion from National Forest parcels conveyed to LMJV in the land exchange, environmentally destructive road construction activities, subsequent construction activities at the proposed Village site once access is opened, and impacts flowing from operation of the expanded Village/Ski Area Complex. Likewise, Plaintiffs will suffer irreparable informational injury, which translates into "real environmental harm" under ESA, NFMA and NEPA, as a consequence of "inadequate foresight and deliberation," (*Catron County*, 75 F.3d at 1433), if CDOT-proposed access to Highway 160 and other access options with reasonable terms and conditions are not considered before the Forest Service effectively precludes them by providing access through the approvals set out in the ROD.

As the Declarations explain, the exclusion of "cooperating agencies" and an EIS without a robust interdisciplinary analysis of reasonable alternatives to LMJV's proposal inflicts substantial and irreparable informational harm upon Plaintiffs and the general public that relies on NEPA interdisciplinary analysis. The substantial harm to Plaintiffs and the public "is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decision-makers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment." *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989).

Plaintiffs' declarations provide the Court with the evidence required to provide equitable relief.

2. Environmental Harm Arising From Defendants' Unlawful Actions Outweigh Any Potential Competing Harm

Plaintiffs cannot conceive of what harm will befall the Defendants or LMJV by equitable relief tailored to ensure compliance with ESA, NFMA, and NEPA before any action is taken on LMJV's access applications. The Forest Service and LMJV will suffer no harm if required to consider the full effects of LMJV's plan on remand before granting any expanded access, as was agreed to in the judicially ratified 2008 Settlement Agreement. *Colorado Wild v. Forest Service*, 06-cv-02089-JLK-DW (ECF No. 147, 150. Both confirmed that "the purpose of LMJV's application was to facilitate the landowner's plan to develop its 287.5 acre property as a year-round resort village, to be known as the Village at Wolf Creek." *Id*. at ECF No. 147 at 2. As noted above, proceeding with actions absent compliance with NEPA constitutes "real environmental harm [as a result of] inadequate foresight and deliberation." *Catron County*, 75 F.3d at 1433.

3. Irreparable Environmental Harm and Harm Arising From Forest Service's Uninformed Decision-Making Outweigh Any Potential Competing Harm to Third Parties

Regarding potential economic losses to LMJV from construction delays, Courts have repeatedly held that economic interests are not irreparable and, therefore, as a matter of law, they do not outweigh threatened irreparable environmental harm.

As the Tenth Circuit has stated: "[a]ny increased costs from delay [] while an EIS is being prepared [] is not sufficient to establish prejudice, because NEPA contemplates just such a delay." *Park County Resource Council, Inc. v. U.S. Dept. of Agriculture*, 817 F.2d 609, 618 (10th Cir. 1987), (citations omitted), *overruled on other grounds*, *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). In *Park County*, the economic harm fell on third party oil and gas companies. *Id.* Where, as here, the irreparable environmental harm arises from the government's failure to comply with NEPA, "economic loss cannot be considered compelling if it is to be gained in contravention of federal law." *Wilderness Society v. Tyrrel*, 701 F. Supp. 1473, 1491 (E.D. Cal. 1988), citing *Northern Cheyenne Tribe v. Hodel,* 851 F.2d 1152, 1157 (9th Cir. 1988). Depending on the legal basis for finding a particular action unlawful, it is plausible that LMJV may be able to recoup any financial loss by bringing an action against LMJV's agents, the Forest Service, or agency contractors.

Where there is a threat of irreparable environmental harm, "more than pecuniary harm must be demonstrated" in order to avoid a preliminary injunction. *Northern Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986). Economic harm does not outweigh the public interest in ensuring that agencies comply with NEPA. *National Parks Conservation Assn. v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) (enjoining National Park Service action pending EIS despite economic harm to third parties, holding that a "loss of anticipated revenues []does not outweigh

the potential irreparable damage to the environment.") *See also, Alaska Wilderness Recreation and Tourism Ass'n. v. Morrison,* 67 F.3d 723, 732 (9th Cir. 1995) (enjoining timber sales awarded to third parties pending the Forest Service's compliance with NEPA); *Idaho Sporting Congress v. Alexander,* 222 F.3d 562, 569 (9th Cir. 2000) (finding that potential financial harm to Forest Service, intervening timber companies and surrounding communities, was outweighed by irreparable environmental harm.).

In *National Wildlife Federation v. National Marine Fisheries Service,* 235 F. Supp. 2d 1143, 1162 (W.D. Wash. 2002), the U.S. Army Corps of Engineers sought to avoid a preliminary injunction by arguing that delaying dredging would cost the government $10,000 per day and demobilizing the contractor could cost up to $800,000. The court found that these harms were "economic, and therefore, not irreparable," and it concluded that these concerns did not outweigh the threat of irreparable environmental injury resulting from the proposed dredging activities. *Id.* Therefore, even if an injunction would cause LMJV substantial financial hardship, economic harm is not irreparable and, as a matter of law, it does not override a threat of irreparable environmental harm.

4. The Public Interest Supports Injunctive Relief

The public interest favors injunctive relief. "[T]here is an overriding public interest in preservation of the undeveloped character of the area recognized by [NEPA]. This public interest in preserving the character of the environment is one that the plaintiffs may seek to protect by obtaining equitable relief." *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 at 1250 (10th Cir. 1973) (citations omitted*). See also Sierra Club v. Lujan,* 716 F. Supp. 1289, 1293. (D. Ariz., 1989) (Where environmental laws have been violated and harm to the

environment is imminent, "[t]he public interest is obvious," and an injunction should issue.). The exchange parcels still retain an undeveloped character.

Moreover, as evidenced by the considerable public outcry against the development – the overwhelming majority of the thousands of comments on the DEIS opposed the development – this clearly is not merely a theoretical public interest, but rather, a substantial, vocal and united public interest in outspoken opposition to the Forest Service's unlawful piecemeal approach to addressing the impacts of the proposed Village at Wolf Creek and associated federal actions.

Further, as set out above, several other agencies and entities, as well as Defendants' employees, commented that the NEPA and ESA processes were flawed for numerous reasons. The public interests supports the exercise of equitable powers to ensure the APA remedy is effective.

VII. CONCLUSION

For reasons set forth herein, Plaintiffs respectfully request the Court grant Plaintiffs' request to set aside unlawful agency actions, and to provide whatever relief may be appropriate under the circumstances.

Respectfully Submitted this 29th Day of September 2016

s/Travis E. Stills
Travis E. Stills
Energy & Conservation Law
1911 Main Ave., Suite 238
Durango, Colorado 81301
(970) 375-9231
stills@frontier.net

Matthew Sandler
Rocky Mountain Wild
1536 Wynkoop St. Suite 900
Denver, CO 80202
303-579-5162
Matt@rockymountainwild.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2016 I served a copy of this filing on all parties by using the CM/ECF system, except where noted below.

s/ Travis E. Stills
Travis E. Stills