IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 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,

and

LEAVELL-McCOMBS JOINT VENTURE,

Intervenor.

ORDER SETTING ASIDE AGENCY ACTION

Plaintiffs Rocky Mountain Wild, San Luis Valley Ecosystems Council, San Juan Citizens Alliance, and Wilderness Workshop seek review of Defendants' approval of a land exchange between the United States and the Leavell-McCombs Joint Venture (LMJV). The land exchange would provide access connecting U.S. Highway 160 to private land owned by LMJV that is entirely surrounded by National Forest lands within the Rio Grande National Forest and adjacent to the Wolf Creek Ski Area. LMJV intends to develop the property into a resort.

Plaintiffs' challenge is based on the National Environmental Policy Act (NEPA), the

Alaska National Interest Lands Conservation Act (ANILCA), Forest Service Land Exchange Regulations, the Southern Rockies Lynx Amendment (SRLA) to the National Forest Management Act, the Endangered Species Act, and Forest Service regulations governing administrative review of objections. Review is sought under the Administrative Procedure Act, 5 U.S.C. § 501, *et seq*. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346, and 1361.

I. BACKGROUND FACTS

A. The 1987 Land Exchange and Creation of LMJV's Inholding

In 1987, Intervenor LMJV's predecessor[1] and the United States Forest Service exchanged eight parcels held by LMJV in Saguache County, Colorado, totaling 1,631 acres, for 420 acres of Forest Service land adjacent to the Wolf Creek Ski Area in Mineral County. The Forest Service recognized at the time that the exchange raised "concerns" about the impact of potential development.

It was expressly recognized at the time of the 1987 exchange that LMJV proposed to use the 420-acre parcel to develop a base area "to compliment [sic] the Wolf Creek Ski Area." *See* Environmental Assessment (Jan. 1986), W01156.[2] LMJV stated the development would be "built around a resort core," would "include commercial amenities and a hotel in addition to condos and other residential structures built around common areas," and would be formed to take advantage of the summer season as well as winter. Letter, October 9, 1985, W01339. In

---

[1] LMJV is a joint venture formed by Charles Leavell and Billy Joe "Red" McCombs. For simplicity, this Order refers to LMJV throughout, rather than its predecessor, even though LMJV was formed at a date later than some of the referenced events.

[2] References to the Record in this Order use the Bates numbers in the Record.

connection with the proposal, LMJV's agent provided what it called a "liberal but reasonable" development scenario of 208 units providing occupancy for 834 skiers. Memorandum, March 8, 1985, W01317 (describing the assumption as "worst case, assuming maximum additional demand and minimum additional supply over the anticipated build-out period" (emphasis in original)).

The Forest Service prepared an environmental assessment (EA) of the proposed land exchange pursuant to NEPA.[3] Initially, on February 20, 1986, the Forest Service issued a Decision Notice determining not to undertake the land exchange. Decision Notice, W01362. That decision noted that the exchange "would create an isolated, developed non-Federal parcel in a large area of solid Federal ownership," and was based on the assessment that "subsequent environmental, social, and economic impacts resulting from development are not at all clear," that "many decisions concerning the management of the National Forest System are irreversible," that "[s]uch grave irreversible actions require clear benefits." *Id.*, W01363-64.

Two weeks later, on March 6, 1986, the Forest Service reversed itself and issued a new Decision Notice approving the land exchange. Decision Notice, W01366-69. The new decision acknowledged that the February decision was based on "the fact that development of the Federal

---

[3] An agency may prepare an environmental assessment ("EA") to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). The EA, while typically more concise than an environmental impact statement (EIS), must still discuss the "need for the proposal," "alternatives as required by [NEPA] section 102(2)(E)," and "the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(b)). If the agency concludes that the action will not cause significant impacts, it may issue a Finding of No Significant Impact and need not prepare an EIS. 40 C.F.R. § 1508.13.

tract could be in derogation of the Wolf Creek Ski Area and other adjacent National Forest System lands," but concluded that LMJV's agreement in principle to certain mitigation measures would "alleviate this concern." *Id.*, W01368. It also noted that Mineral County would regulate "components of development that are subject to County ordinances and regulation," and that "other local, state and federal agencies will have review and approval authority for many components of any development plans that are proposed." *Id.*[4]

Although LMJV had estimated a "worst case" scenario of development as discussed above, neither the 1986 EA nor the Decision Notice conditioned approval on the size of the resort to be constructed. However, the Forest Service did condition its Decision Notice on LMJV's agreement to provide the Forest Service with a scenic easement that limited development:

> The land exchange proponent must donate an easement over the Federal tract to the United States <u>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</u>.

Decision Notice at W01369 (emphasis added). Given this condition and others, the March 1986

---

[4] Concerning the Forest Service's abrupt turnaround in 1986, Defendant Gustafson stated in a 2014 email "briefing paper" to Forest Service staff:

> The Levell-McCombs [sic] joint venture proposed a land exchange to the Forest Service in the early 1980s to create a private inholding within the Forest that could be developed to provide overnight accommodations and commercial services at the ski area. The 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.

Email, C0021685.

Decision Notice made a Finding of No Significant Impact and concluded that an EIS was not needed. *Id.* The Decision Notice was not subjected to legal challenge.

The Scenic Easement entered into pursuant to this decision stated that LMJV's intended use of the real property was development that "shall include a mix of residential, commercial, and recreational uses typical to an all-season resort village." Scenic Easement, W01404. The easement's stated purpose was "to provide a specific level of control of the type of development … to assure that said development is compatible with the Wolf Creek Ski Area," but was "not intended to conflict with or intrude upon the land use controls of the State of Colorado, Mineral County, or other unit of local government except as specified herein." *Id.* at 1403. It required architectural styling compatible with the ski area location, harmoniously colored building materials, and building heights not exceeding 48 feet. *Id.* at 1404-05. It also listed over twenty prohibited uses of the property and limited the number and size of advertising signs. *Id.*[5]

As originally proposed, the federal parcel to be conveyed to LMJV in the 1987 exchange overlaid U.S. Highway 160, and thus LMJV would have had highway access directly from its property. In September 1986, the Forest Service amended the Decision Notice to reduce the federal parcel conveyed to LMJV from 420 acres to 300 acres based on the results of final

---

[5] Prohibited uses included agricultural product distribution or processing facilities; feed lots, dairies, and similar activities; commercial greenhouses; cemeteries; housing for seasonal farm labor; gun clubs and shooting ranges; airports; extractive industries (except for construction purposes); drive-in theaters; hazardous products storage; agricultural implements sales and services; car washes; manufacturing facilities; lumber yards, nursery stock production and sales, yard equipment and supply dealers, and warehouses; salvage junk yards; hot mix plants, rock crushers, and similar uses; sawmills; mobile homes or mobile home parks; and mining and industrial activities. *Id.*

appraisals of the exchanged parcels. Amended Decision Notice, W01370. This adjustment of the federal exchange parcel had the apparently-unintended effect of eliminating direct access from LMJV's private property to Highway 160, creating LMJV's present inholding. *See* Final Environmental Impact Statement (FEIS), W10725. As a result of this elimination of a direct connection to Highway 160, LMJV's parcel became accessible only via Forest Service Road ("FSR") 391. Vehicular access on FSR 391 is, however, limited to the summer months. *Id.* In winter the road is closed to motorized traffic and serves as a ski trail. *Id.* The 1987 exchange was completed in May 1987.

B. LMJV's Development of the Village at Wolf Creek

In 1987, LMJV and the Wolf Creek Ski Area (WCSA) jointly obtained water rights for a development of 2,444 units, and the Forest Service accepted WCSA's Master Development Plan,[6] which included LMJV's discussion of planned development of the Village at Wolf Creek (Village), a resort with more than 2,100 units. Final Record of Decision (ROD), W12662.

In 2000, the Mineral County Board of Commissioners approved LMJV's preliminary plans for year-round resort development at Wolf Creek and established a procedure for subsequent County reviews and approvals. *See generally* Findings of Fact and Conclusions of Law, District Court, Mineral County, Colorado, ¶ 6, W01454. In October 2004, after hearings and public input, the Board of Commissioners approved LMJV's Final Development Plan, which provided for 2,200 residential units, over 500,000 square feet of commercial space, and up to

[6] The Wolf Creek Ski area operates on National Forest Land under a Special Use Permit with the Forest Service. One condition of the permit is that WCSA develop a Master Development Plan.

10,000 inhabitants. *See id.*, W01458-59.

Mineral County's approval was challenged in state court. The Mineral County District Court determined that the County violated Colorado law by approving the development plan before LMJV established that its proposed development had adequate access to the public highway system. *Id.*, W01482. The Colorado Court of Appeals affirmed the district court, holding that under Colorado law a local authority cannot approve a subdivision unless the applicant has "at least year-around wheeled vehicular access" to the property. *Wolf Creek Ski Corp. v. Bd. of Cty Comm'rs of Mineral Cty.*, 170 P.3d 821, 829-30 (Colo. App. 2007).

C. The Unsuccessful 2001-2007 Access Proposal

In 2001, in addition to seeking County approval for its development plan, LMJV applied to the Forest Service for a right-of-way across National Forest land between Highway 160 and LMJV's inholding. ROD, W12663. In 2006, after evaluation and preparation of an EIS, the Forest Service granted LMJV two rights-of-way: a 750-foot corridor known as Snowshed Road, which would directly connect LMJV's land to Highway 160 and serve as primary access to its development; and a 250-foot extension of the existing Tranquility Road—which accesses an existing ski area parking lot—to be used as emergency access or for shuttle bus transit between the development and the ski area parking lot. *See* FEIS, W10725-26.

Some of the Plaintiffs in this case brought suit challenging the 2006 decision. *See Colo. Wild v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213 (D. Colo. 2007). The Court granted Plaintiffs' request for preliminary injunctive relief, after which the parties ultimately settled the case. As

part of the settlement, the Forest Service agreed to initiate a new NEPA process and prepare a new EIS for any subsequent application by LMJV for access to its property across National Forest lands. *See* Stipulated Settlement Agreement, *Colorado Wild v. Forest Service*, 06-cv-02089- JLK-DW, Doc. 147.

D. The Present Access/Land Exchange Proposal

In 2010, LMJV proposed the present land exchange as a means of gaining access to its property for the purpose of development. *See* Land Exchange Proposal, W01547; *see also* FEIS, W10726. Under the proposal, approximately 177 acres of LMJV's existing parcel would be exchanged for approximately 205 acres of federal land. *See* Land Exchange Proposal, W01548. The exchange would obviate the need for access via an easement across Forest Service land by creating a direct connection between LMJV's land and Highway 160. *See id.*

LMJV's land exchange proposal included a conceptual development plan. This plan, described as "Option 1," projected a total of 1,711 residential units at full build-out. It also stated that the development would be built in phases to match existing skier capacity at Wolf Creek. Phase 1 would include approximately 497 residential units. *Id.*, W01551. LMJV proposed that "the land exchange and its companion revised development plan … be analyzed by the Forest Service in accordance with [NEPA] as LMJV's 'proposed action'…." *Id.*, W01549.

As a proposed alternative to the land exchange proposal, LMJV simultaneously submitted an application for an easement across National Forest land that would serve as the primary access road from U.S. Highway 160 to LMJV's existing property. *See id.*, W01549, W01572, *et seq.*

LMJV requested the Forest Service to address this application under Alaska National Interest Lands Conservation Act (ANILCA). *See id.*, W01549, W01578. With the application, LMJV provided two potential road configurations and development plans, Options 2 and 3. *Id.*, W01550. Option 2 contemplated 1,850 residential units and Option 3 contemplated 1,981 units. *Id.*, W01551.

Pursuant to its land exchange regulations, the Forest Service conducted a Feasibility Analysis of the proposed land exchange to make an initial determination about the resources, public interest and valuation of the parcels. Feasibility Analysis, W02211; *see* 36 C.F.R. § 254.4(b). The Forest Service concluded that the exchange was technically feasible and sufficiently in the public interest to warrant additional evaluation. Feasibility Analysis*,* W02224. In particular, the Forest Service found the exchange was consistent with the Forest Plan; would move most development farther from the ski slopes, potentially reducing user conflicts and visual impacts and increasing the amount of skiable alpine terrain; and would result in a net gain to the Forest Service of wetlands and perennial streams. *Id*. Based on the Feasibility Analysis, in January 2011 the Forest Service and LMJV entered a nonbinding "Agreement to Initiate" the land exchange. W02200.

II. FOREST SERVICE ANALYSIS OF THE LAND EXCHANGE PROPOSAL

A. NEPA Analysis

After entering the Agreement to Initiate, the Forest Service began analysis of the proposed exchange under NEPA with "scoping," a public process designed to determine the

scope of the analysis. *See* Scoping Notice, W02343, *et seq.* The scoping process included public meetings, submission of public comments, and a public site-visit to the land exchange area. *See generally* W02351-2658; EIS, W10700.

In August 2012, the Forest Service issued a Draft EIS for public comment and held public meetings. Notice, W06354-55. By the time the public comment period closed on October 16, 2012, the Forest Service had received over 900 public comments. *See* Comments, W06361-7753; EIS, W10701. In November 2014 the Forest Service issued its Final EIS (FEIS). W10694, *et seq.*

The FEIS stated that the Purpose and Need for Action is to "allow the non-Federal party to access its property to secure reasonable use and enjoyment thereof as provided in ANILCA and the Forest Service regulations, while minimizing environmental effects to natural resources within the project area." FEIS, W10725. This statement of purpose and need, as its language indicates, was based on the Forest Service's interpretation of ANILCA, which requires the Forest Service to provide the owner of a private inholding within the boundaries of Forest Service land with access adequate to secure the owner reasonable use and enjoyment of its land. *See id.*, W10726-28, 10740-41. After review of the uses of similarly situated inholdings (and finding that there were no similarly-situated properties), and consideration of the original purpose of the 1986 land exchange, the Forest Service determined that reasonable use of the LMJV parcel was as a winter resort including commercial and residential properties. *See* Record of Decision (ROD), W12675. The Forest Service concluded that "adequate access" for that reasonable use was year-round snowplowed access and that the current seasonal access via FSR 391 was not

adequate. *Id.*, W12675.

The Forest Service considered two "action" alternatives to meet this purpose and need. Alternative 2 was the proposed land exchange. FEIS, W10698. Alternative 3, the "ANILCA Road Access" alternative, considered granting a right-of-way for a new snow-plowed road from Highway 160 to LMJV's current inholding. *Id.*, W10699; *see also* Map, W10759. Both action alternatives also considered granting a right-of-way extending Tranquility Road from the existing ski area parking lot to LMJV's inholding to provide off-season use and emergency access. *Id.*, W10698-99. The Forest Service also included Alternative 1, a "no-action" alternative under which land ownership would not change and LMJV would not be granted additional access. *See id.*, W10698.[7]

The FEIS's stated Scope of Analysis of the development concepts of the action alternatives emphasized the Forest Service's expressly-limited role in analyzing only the effects of the land exchange, and the Forest Service's explicit disclaimer of any power to control or regulate the potential development of the federal property once it was transferred to LMJV: "*It is important to clarify that development on private lands is not a component of either of the Action Alternatives.*" *Id.*, W10752 (emphasis in original). Future development was therefore considered as a "connected action" for NEPA purposes, but analyzed only as an "indirect effect" of either the proposed exchange or the alternative proposed ANILCA access.

[7] The FEIS also considered, but did not analyze in detail, four other alternatives: (1) exchanging LMJV's inholding for a federal parcel elsewhere; (2) purchasing LMJV's inholding; (3) upgrading FSR 391 for all-year access; and (4) extending Tranquility Road as the sole access to the inholding. *Id.*, W10760-61.

This limited scope of analysis was based on the premise that the "Forest Service has no authority to regulate the degree or density of development on private land" FEIS, W10761; *see also id.*, 10752 ("The Rio Grande NF has no jurisdiction on private lands."). The Forest Service further reasoned that "Mineral County has the authority to regulate the use and development of the LMJV's private land in the future"; while the Forest Service stated that its own "legal obligation is to accommodate the private landowner with access considered to be adequate with respect to reasonable use and enjoyment of the property." *Id.*, W10761.

Accordingly, the Forest Service analyzed potential future development "concepts" as an "indirect effect" of the proposed land exchange, while disclaiming again that *"the Forest Service will not, and cannot, approve a specific level of development on private lands, the range of development concepts is simply included to provide estimates of potential indirect effects*." *Id.* (emphasis in original). Because there was "not presently a PUD approved by Mineral County for any level of development of the private lands, and the level of any future development that may be approved by Mineral County is unknown," the Forest Service examined a range of "potential" development "concepts"—involving low, medium, and maximum density—in the FEIS. *Id.*[8] The FEIS recognized that "[w]hatever development concept plan which [*sic*] may ultimately be approved by Mineral County in the future would likely vary from what is analyzed here," but stated that this analysis of the alternative development concepts provided "a reasonable basis

[8] Low density was defined as nine 35-acre lots; moderate density as 71 hotel rooms, 251 condo units, 120 townhouse units, 55 single-family lots and 49,500 sq. ft. of commercial space; and maximum density as 1,711 units, 138 single-family lots and 221,000 sq. ft. of commercial space. W10762-63.

from which to analyze and disclose the indirect effects of development that could potentially occur if the land exchange or road access alternative were implemented." *Id.*, W10761. The FEIS then discussed the perceived impacts of each alternative, under each development concept. W10761, *et seq.* The FEIS advised, without discussion, that although the Scenic Easement encumbering LMJV's property from the 1987 land exchange would continue to apply to the approximately 120 acres not included in the present exchange, it would not apply to the 205-acre parcel being conveyed by the Forest Service to LMJV. *Id.*, W10762-63.

B. The Record of Decision

On May 21, 2015, the Forest Service issued its final Record of Decision (ROD). W12650 *et seq.* In the ROD, Defendant Forest Supervisor Dan Dallas selected the land exchange proposal (Alternative 2), stating that the decision would serve to meet LMJV's right to access its property by creating a private land parcel that extends to Highway 160, so that year-round vehicular access could be established by a new private road. W12653-54. The ROD also authorized a short extension of the existing Tranquility Road across Forest Service land to provide off-season and emergency access to the private parcel. W12654.

The ROD, like the FEIS, was based on a limited statement of Purpose and Need—"to allow the LMJV to access its property to secure reasonable use and enjoyment thereof as provided in ANILCA and Forest Service regulations, while minimizing environmental effects to natural resources within the project area." ROD, W12653. The ROD stated that Forest Service monitoring of activities on the federal parcel to be conveyed to LMJV would be limited to

monitoring certain identified "best management practices" developed for construction and operation of a ski area access road, and storm water runoff controls from construction sites. *Id.* at W12655-56. The federal parcel conveyed to LMJV would also be subject to limited encumbrances, including utility special use authorizations. *Id.* The ROD emphasized that Forest Service monitoring of development activity would include only these limited best management practices and encumbrances, again disclaiming broader power:

> The Forest Service has no authority to regulate the degree or density of development on private land; therefore, the required monitoring associated with my decision will be restricted to monitoring the best management practices and encumbrances described above. The Forest Service will be responsible for monitoring to ensure that each of the required actions stated in this decision occur.

Id., W12656. Similarly, with respect to future development, the ROD emphasized again that the scope of the FEIS's analysis, and of the decision, was limited:

> Although the FEIS analyzed future development on the private lands, it should be noted that the Rio Grande NF has no jurisdiction on private lands. Additionally, it is important to reinforce that future residential development is not a component of either of the Action Alternatives analyzed in the FEIS.

Id., 12676.

Like the FEIS, the ROD noted that the Scenic Easement imposed by the Forest Service in connection with the 1987 land exchange "would apply only to the ±120 acres of private land not included in the land exchange and would not apply to the ±205-acre Federal exchange parcel being acquired by the LMJV." *Id.*, 12661. The ROD concluded, however, that Mineral County zoning regulations, together with the remaining 120 acres of scenic easement, "would sufficiently protect the public interest in aesthetics." *Id.* It did not say whether extension of the Scenic

Easement or similar restrictions to the federal exchange parcel had even been discussed with LMJV.

C. Endangered Species Act Consultation

In addition to its analysis under NEPA, the Forest Service consulted with the FWS pursuant to Section 7 of the Endangered Species Act concerning whether the land exchange would jeopardize the continued existence of the Canada lynx or the Southwestern willow flycatcher, the two species in the project area listed as threatened or endangered under the Endangered Species Act. *See* Forest Service Biological Assessment, FWS004612; Forest Service Supplemental Biological Assessment, FWS006151; FWS Biological Opinion, FWS007144.

As discussed in more detail below, a consultation under Section 7 of the Endangered Species Act typically occurs when a federal agency contemplates taking action that may impact an endangered species, in which case consultation between the "action agency" and the "consulting agency"—here, the Forest Service and FWS, respectively—is required. When there is no "federal nexus" to a proposed action and strictly private action is contemplated, such as development on private land, the typical procedure is an application by the private party under Endangered Species Act Section 10. Section 10 requires the applicant to follow specific procedures including preparation of a habitat conservation plan and separate NEPA analysis of the development.

In this case, Endangered Species Act analysis and compliance efforts were undertaken pursuant to Section 7 consultation between the Forest Service and the FWS. Consistently with its

position in the NEPA analysis, the Forest Service considered the proposed federal action for Endangered Species Act purposes to be the land exchange, alone. As a result, the Forest Service determined that upon completion of the exchange it would have no involvement in or control over LMJV's intended development. This raised a question whether Section 7 procedures could apply to any consideration of LMJV's development activities.

LMJV requested and was granted status as an "applicant" in connection with the Section 7 consultation. Letter, March 1, 2012, W04006.[9] However, finding no sufficient "federal nexus" to LMJV's development, the Forest Service initially notified LMJV that although it would be allowed to participate in the Section 7 consultation between the Forest Service and the FWS, it would also be required to comply with Section 10: "You are hereby advised that [authorization for] any incidental take that may be associated with the private land development which occurs after the land exchange will need to be obtained from the U.S. Fish and Wildlife Service through the ESA Section 10 (Habitat Conservation Plan) process." *Id.*

LMJV resisted being required to comply with Section 10, apparently taking its case to upper levels of Forest Service management.[10] Ultimately, the initial determination was reversed

---

[9] *See* 50 C.F.R. § 402.02 (defining "applicant" as "any person … who requires formal approval from a Federal agency as a prerequisite for conducting [an] action." "Action" is defined as "all activities or program of any kind authorized or carried out, in whole or in part, by Federal agencies…."

[10] *See, e.g.*, Forest Service Email, C0008039 ("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 [habitat conservation plan] with FWS and Section 10 consultation... A meeting with both agencies and the proponents, and each parties [*sic*] attorneys, is planned in early July, with the Proponent planning to discuss with Undersecretary Sherman prior to that meeting.").

later in 2012 to permit LMJV to avoid the more rigorous Section 10 consultation, despite the Forest Service's insistence that there would be no federal involvement in LMJV's private development.

Pursuant to the Section 7 consultation, FWS issued its Biological Opinion. *See* W05493, *et seq.* The FWS did not anticipate that the land exchange itself would result in any direct effects to the Canada lynx, but found that construction of the Village would have adverse effects on lynx that were "reasonably certain to occur." *Id.*, W05511.[11] In particular, the FWS found that the Village would lead to greater traffic on Highway 160, potentially leading to an increase in lynx mortality in highway crossings, and fragmenting lynx habitat by impeding movement between habitat on the north and south sides of Highway 160. *Id.*, W05518-19.[12]

Due to these anticipated adverse effects of LMJV's development, the FWS obtained LMJV's agreement to certain conservation measures intended to minimize adverse effects on the lynx with a "reasonable certainty of effectiveness," which measures would be binding on future owners of the property as well. *Id.*, W05513. LMJV committed to provide funding on a "per unit" basis, with specified minimum and maximum per unit caps ($500 and $1000, respectively), proportionate to the number of units occupied in the Village. *Id.* The committed funds would be paid into an account to be administered by a "technical panel" consisting of "representatives with expertise in lynx biology, traffic, and other relevant disciplines from CDOT, the [FWS] (as a

---

[11] The Biological Opinion also concurred in the Forest Service's finding that the Project was not likely to adversely affect the Southwestern willow flycatcher. *Id.*, W05493.

[12] The FWS stated that since lynx reintroduction began in 1999, the FWS is aware of eleven lynx hit and killed by vehicles in Colorado, one on Highway 160. *Id.*, W05508.

technical advisor), [Colorado Parks & Wildlife], the Forest Service, and two representatives of the [LMJV's] choosing representing relevant traffic and biology expertise." *Id.*, W05513.

The conservation measures to be funded by LMJV included proposed highway corridor assessment and lynx trapping/collaring programs, intended to provide a scientific method of prioritizing lynx crossing on Highway 160 and to assist the technical panel in determining the future use of available funds for practical conservation methods. *Id.*, W05515. The strategy also discussed a projected budget; provisions for determining whether the need for increased funding might require LMJV's payment of more than the minimum per unit amount of $500, and up to the maximum of $1,000 per unit; and additional measures committing LMJV to undertake worker orientation, provide a worker shuttle to minimize construction-related traffic, provide on-site worker housing and conveniences for future residents to reduce highway traffic, and provide an orientation program to future owners and guests. *Id.*, W05515-16.

The FWS's Biological Opinion acknowledged, however, that although the conservation strategy "establishes a framework for implementation of measures to minimize adverse effects" caused by LMJV's project, "there is some uncertainty regarding what specific measures will be implemented, and when implementation will occur." *Id.*, W05522. It stated that the planned studies would help prioritize specific measures, but "a decision on what measures will be implemented, and when implementation of any specific measures will occur is yet to be determined." *Id.* As a result, the FWS anticipated an increase in lynx mortality until implementation of conservation measure began to reduce the mortality rate, and acknowledged

that it was not possible to quantify reduction in the mortality rate at this time. *Id.*

The FWS concluded that, with the conservation measures, the land exchange and subsequent construction of the Village were not likely to jeopardize the "continued existence of the lynx within the contiguous United States population segment," and that since no critical habitat has been designated for this species in Colorado, none would be affected. *Id.*, W05524.

Accordingly, the FWS issued an Incidental Take Statement (ITS) pursuant to Sections 7 and 9 of the Endangered Species Act. The ITS afforded LMJV protection from Section 9 liability, and allowed for the "take" of one lynx in addition to the baseline level of two lynx presumed to be killed per six-year period, provided LMJV implements the agreed conservation measures and complies with specified reporting obligations. *Id.*, W05525-27. The FWS also imposed certain monitoring and reporting requirements on LMJV concerning lynx impact and details of the development and implementation of the required conservation measures. *Id.*

The ROD concluded that the conservation measures committed to by LMJV and the FWS during the Endangered Species Act consultation process would minimize adverse effects on the Canada lynx, and were consistent with requirements imposed by the Endangered Species Act as well as ANILCA and the National Forest Management Act (Southern Rockies Lynx Amendment to the Forest Plan for the Rio Grande National Forest). ROD, W12657-59.

III. STANDARD OF REVIEW

Plaintiffs seek review and relief under the APA, 5 U.S.C. §§ 701-706. "When courts consider such challenges, an agency's decision is entitled to a presumption of regularity, and the

challenger bears the burden of persuasion." *Coalition of Concerned Citizens to Make Art Smart v. Fed. Transit Admin. Of U.S. Dept. of Transp.*, 843 F.3d 886, 901 (10th Cir. 2016) (quoting *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1045 (10th Cir. 2011)). A court can set aside an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 902 (quoting 5 U.S.C. § 706(2)(A)). An agency's decision will be deemed arbitrary and capricious "if the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision 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, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment." *Id.* (citations omitted).

IV. Ripeness and Standing

The parties do not dispute, and the Court agrees, that the Forest Service's Record of Decision authorizing the land exchange and the FWS's Biological Opinion under the Endangered Species Act are final agency decisions that are ripe for review. Given the Court's disposition of this matter based on those two decisions, it is not necessary to address Plaintiffs' assertion that additional agency decisions are also subject to review.

Plaintiffs' standing to assert their claims in this action is not contested. The Declarations submitted by Plaintiffs meet Plaintiffs' 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. *See Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

V. ANALYSIS

The following aspects of the Record of Decision and the Biological Opinion that forms part of the basis for the ROD require relief under the APA. Defendants failed to consider important aspects of the issues before them, offered an explanation for their decision that runs counter to the evidence, failed to base their decision on consideration of the relevant factors, and based their decision on an analysis that is contrary to law.

A. NEPA

Compliance with NEPA is required if the federal government's involvement in a project constitutes "major federal action." 42 U.S.C. § 4332(2)(C). "Major federal action" is defined as "actions by the federal government … and nonfederal actions 'with effects that may be major and which are potentially subject to Federal control and responsibility." *Ross v. Federal Hwy. Admin.*, 162 F.3d 1046, 1051 (10th Cir. 1998), quoting *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1482 (10th Cir. 1990). In effect, "major federal action" means that the federal government has the "actual power" to control the project. *Id.*

Once it is determined that major federal action is contemplated and that an EIS is necessary, the involved federal agency must consider the scope of the EIS. 40 C.F.R. § 1508.25. To determine the proper scope, the agency "shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts." *Id.* One category of actions is "connected actions," which "means that they are closely related and therefore should be discussed in the same impact

statement." *Id.*, § 1508.25(a)(1). Alternatives that must be discussed include a "no action alternative," "[o]ther reasonable courses of action," and mitigation measures. *Id.*, § 1508.25(b). Impacts that must be discussed are direct, indirect, and cumulative impacts. *Id.*, § 1508.25(c).

The purpose of this review is twofold: it "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action"; and it "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Sierra Club v. U.S. Dept. of Energy*, 287 F.3d 1256, 1262 (10th Cir. 2002), quoting *Baltimore Gas & Elec. Co. v. NRDC,* 462 U.S. 87, 97 (1983).

In this case, the Forest Service determined that the purpose and need of the proposed action "is to allow the LMJV to access its property to secure reasonable use and enjoyment thereof as provided in ANILCA and Forest Service regulations, while minimizing environmental effects to natural resources within the project area." ROD, W12653. The Forest Service recognized that future development on LMJV's private lands was a "connected action" because future residential development on land that is accessible year-around would not be possible without Forest Service approval of either the land exchange or the alternative of road access across National Forest System lands. ROD, W12675-76; *see* 40 C.F.R. § 1508.25(a)(ii) (defining connected actions as those that "[c]annot or will not proceed unless other actions are taken previously or simultaneously").

The Forest Service limited its environmental analysis of LMJV's proposed development, however, to its indirect impact as a result of the land exchange. *Id.* It justified this limited review

based on the determination that "the Rio Grande NF has no jurisdiction on private lands" and that "future residential development is not a component of either of the Action Alternatives analyzed in the FEIS." *Id.*; *see also* FEIS, W10752 ("*It is important to clarify that development on private lands is not a component of either of the Action Alternatives.*" *Id.*, W10752 (emphasis in original). The Forest Service also explained its reasoning in responding to objections to the Draft ROD by stating:

> The intent of the applicant is to develop the Village at Wolf Creek. However, the future development of the Village at Wolf Creek is not a part of the Purpose and Need or the federal proposed action, <u>because it is not a federal action</u>; it is a private action. 40 CFR 1508.23 defines a proposal subject to NEPA as when an agency has a goal and is actively preparing to make a decision to accomplish that goal. The Village at Wolf Creek is not an agency goal nor will the agency actively prepare a decision to accomplish the proposed development. Further, as indicated in Section 2.4 of the FEIS (p. 2-6), the Forest Service does not have the authority to approve or deny a specific level of development on private lands.

Objection Response, W12549 (emphasis added).

The Forest Service's reasoning and the resulting limitation on the scope of the environmental analysis reflected in the FEIS and ROD were contrary to law and directly contradicted by the Forest Service's own prior actions in the history of LMJV's acquisition and ownership of its private inholding.

The 1987 land exchange was consummated with the express knowledge of LMJV's intent to develop a year-round resort village to serve the Wolf Creek Ski Area. *See, e.g.*, FEIS W10725 (stating that "as a result of the land exchange, the Rio Grande NF anticipated that the private land would be developed for residential/commercial use to complement WCSA"). Indeed, LMJV

asserts that the 1987 land exchange was instigated by the Forest Service, not LMJV, to further the agency's own goals in establishing a base camp development to complement the Wolf Creek Ski Area. Intervenor's Response (Doc. 57) at 2-4. In any event, given its knowledge of LMJV's development intentions, the Forest Service conditioned the 1987 exchange on the Scenic Easement, which remains in place and substantially limits the uses and development of the federal property conveyed to LMJV in 1987.

In light of this prior history on the very same property, there is no legal or logical basis for Defendants' position in the FEIS and ROD that the Forest Service had no power or jurisdiction to limit or regulate development on the federal lands being conveyed to LMJV in the present exchange.

It was also legally erroneous and an abuse of discretion for the Forest Service to reject objections to the Draft ROD on the ground that the proposed development was necessarily "not a federal action" because LMJV is not an agency and the proposed Village at Wolf Creek is not an agency goal. A major federal action requiring NEPA analysis is one which is potentially subject to federal control or responsibility, or one over which a federal agency has actual power or control. *Ross*, 162 F.3d at 1051. The 1987 Scenic Easement demonstrates the Forest Service's actual power to control development.

In addition, Defendants' own argument on a separate issue in this litigation contradicts their position in the FEIS and ROD that they had no power to impose development controls. *See* Federal Defendants' Response Brief (Doc. 55) at 56 (acknowledging that Forest Service land

exchange regulations grant discretion to the Forest Service to place restrictions on land conveyed out of federal ownership). Indeed, those regulations require the agency to "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." 36 C.F.R. § 254.3(h). Defendants abdicated this duty by disclaiming that they had the power. For example, neither the FEIS nor the ROD provide the reasoning or public interest analysis for failing to consider conditioning the land exchange on extension of the Scenic Easement to the federal lands being conveyed, or taking other restrictive steps.

The Forest Service's explanation that development would be subject to regulation by Mineral County and other state and local authorities is also inadequate to justify a refusal even to consider possible federal restrictions. The Forest Service is specially charged with unique duties to consider the public interest specifically with regard to private activities affecting National Forest System lands. Mineral County has its own interests with regard to permitting or regulating development. It cannot be assumed that those interests coincide.

The Forest Service's express refusal—based on a perceived lack of jurisdiction—even to consider any limitations, restrictions, controls, or other measures designed to ensure compatibility of development with surrounding National Forest System lands was arbitrary and capricious, an abuse of discretion, and contrary to law. The Forest Service entirely failed to consider an important aspect of the problem, offered explanations for its decision that run counter to the evidence before the agency, failed to base its decision on consideration of all

relevant factors, and was wrong as a matter of law.

B. ANILCA

Defendants also misconstrued their legal authority under ANILCA, adding to their erroneous restriction of the scope of their analysis. The express purpose and need for the land exchange (or the alternative proposal for an ANILCA access route across National Forest land) was to "allow the LMJV to access its property to secure reasonable use and enjoyment thereof as provided in ANILCA and Forest Service regulations…." ROD, 12653. Even assuming the Forest Service correctly determined that LMJV's reasonable use and enjoyment of its property was as a year-round resort village, for which all-season access is required, the Forest Service erred as a matter of law in determining that ANILCA limited its power to restrict or regulate the nature, scope, or density of LMJV's development of federal property being conveyed to it.

First, as discussed above, Forest Service land exchange regulations expressly require the Forest Service to consider reserving or retaining such interests in federal lands being exchanged as may be required to protect the public interest. 36 C.F.R. § 254.3(h). These regulations establish the power the Forest Service disclaimed, and the Forest Service's previous use of it in the required 1987 Scenic Easement demonstrated its exercise of that power.

Second, ANILCA does not revoke or limit that power in connection with the land exchange. LMJV invoked ANILCA to seek access to its existing property by way of an easement across federal land. The ANILCA proposal was an alternative to the land exchange. As LMJV itself points out, ANILCA regulations "encourage the Forest Service to exchange land with an

ANILCA applicant if possible to eliminate the need to use NFS lands for access purposes." Intervenor's Response (Doc. 57) at 24-25, citing 36 C.F.R. § 251.114(g)(3). When a land exchange is selected instead of a proposal under ANILCA, any limitation on Forest Service power to regulate private property to which access is granted under ANILCA is inapplicable.[13]

Defendants fail to apprehend this distinction when they argue that the Forest Service's determination of reasonable use of an applicant's property, for purposes of determining whether ANILCA access should be granted, is pertinent only to deciding what restrictions or regulation should be placed on the access across federal property, and that ANILCA does not provide broader regulatory authority over the use of the private inholding to which access is granted. In ANILCA access cases, the property to which access is being granted is already privately owned. When a land exchange is used as an alternative to ANILCA access across federal land, the agency is conveying title to federal property, not access across federal property. In such situations the federal power to place restrictions on use of the property being conveyed is clear and explicit. Therefore Defendants' categorical refusal to consider restrictions on the federal exchange parcel based on ANILCA was arbitrary, capricious, and contrary to law.

C. Forest Service Land Exchange Regulations.

As discussed above, land exchange regulations require the Forest Service to consider whether to reserve rights or interests or impose development restrictions on federal lands to be exchanged, in order to protect the public interest. 36 C.F.R. § 254.3(h). Failure to consider such

---

[13] ANILCA's limitation on Forest Service power to restrict the use of property to which ANILCA access is granted is also not as absolute as Defendants suggest. *See Colorado Wild, Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d at 1227-28 and n.15.

options, based on a legally-erroneous determination that the Forest Service had no power or jurisdiction to do so, was a separate abuse of discretion that violated these regulations as well as undermining the agency's ability to do the thorough analysis of all possible impacts required by NEPA.

D. Endangered Species Act

Section 9 of the Endangered Species Act makes it unlawful to "take" members of an endangered species. 16 U.S.C. § 1538(a)(1)(B).[14] The Endangered Species Act provides two procedures, however, by which "take" of an endangered or threatened species may be authorized, and liability under Section 9 may be avoided.

Section 7 requires inter-agency consultation in connection with any action "authorized, funded, or carried out" by a federal agency that may jeopardize endangered or threatened species or their habitat. 16 U.S.C. § 1536(a)(2).[15] Section 7 and its implementing regulations "apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03; *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1104 (10th Cir. 2010). "Action" is defined as "all activities or programs of any kind authorized or carried out, in whole or in part, by Federal agencies…." 50 C.F.R. § 402.02. In a Section 7 consultation, if the FWS as

[14] "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 16 U.S.C. § 1532(19). The FWS has defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife." 50 C.F.R. § 17.3. 16 U.S.C. § 1540 provides civil and criminal penalties for violations of Section 9.

[15] The FWS administers the Endangered Species Act with respect to species under the jurisdiction of the Secretary of the Interior, while the National Marine Fisheries Service administers the Endangered Species Act with respect to species under the jurisdiction of the Secretary of Commerce. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 651 (2007).

consulting agency makes a "no jeopardy" determination, it must include an incidental take statement in its Biological Opinion that, among other things, "[s]pecifies the impact, *i.e.*, the amount or extent, of such incidental take on the species." 50 C.F.R. § 402.14(i)(1)(i); 16 U.S.C. § 1536(b)(4). If the amount of take specified in the ITS is exceeded, the action agency must reinitiate Section 7 consultation. 50 C.F.R. § 402.16(a).

Section 10 applies where there is no "federal nexus." In such cases, the FWS may issue an incidental take permit (ITP) allowing a private person to "take" a species listed under Section 9, but avoid liability, "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B); 50 C.F.R. § 17.32(b). However, rigorous procedures must be met for a Section 10 permit, which may not be issued unless the applicant submits a habitat conservation plan specifying the likely impacts resulting from the activity, the steps the applicant will take to minimize and mitigate such impacts, the funding that will be available to implement such steps, alternatives considered and why they are not being used, and such other measures as the agency may require. 16 U.S.C. § 1539(a)(2)(A). Opportunity for public comment is also required, as well as specific findings supporting permit issuance. 16 U.S.C. § 1539(a)(2)(B).

In this case, as discussed above, the Forest Service consulted with the FWS under Section 7 in connection with the Forest Service's role as action agency in the proposed land exchange. LMJV was permitted to participate in this consultation process as "applicant," and ultimately was a beneficiary of the ITS issued by the FWS, authorizing specified incidental take subject to

LMJV's complying with specified obligations, including funding, monitoring, and certain conservation measures. By this procedure, LMJV was spared from complying with Section 10 and obtaining an ITP for its private activities.

There is, at the very least, a serious issue whether this procedure complied with the Endangered Species Act. The Forest Service's position in connection with its NEPA and ANILCA analyses of the land exchange was that the agency would have no involvement or control in development of LMJV's private land after the exchange, and therefore there was no federal action requiring full NEPA analysis of the development. That position, however, raised a dilemma because it logically suggested that LMJV's development lacked the necessary federal nexus for purposes of Section 7 of the Endangered Species Act. The Forest Service and FWS determined that Section 7 consultation would still suffice, even though the only continuing federal agency involvement was not by the "action agency"—the Forest Service—but rather was the FWS's limited role in overseeing LMJV's compliance with the conservation measures imposed in connection with the ITS.

The upshot of this determination was that, on one hand, LMJV avoided more scrupulous federal review of its development plans under NEPA by virtue of the Forest Service's narrow definition of the scope of federal action as <u>not</u> including the development; while, on the other hand, LMJV also avoided the onus of Endangered Species Act Section 10 compliance by virtue of the determination that there <u>was</u> a sufficient federal nexus to the development for that purpose.

Defendants and Intervenor have not cited, nor has the Court located, any precedent for

this use of Section 7 to, in effect, circumvent Section 10 compliance with Section 7 by a non-federal party. **Endangered Species Act legislative history strongly suggests that Section 10 compliance should have been required. Section 10 was enacted specifically to provide a means by which private parties could obtain approval of incidental take resulting from non-federal development activities not covered by Section 7. A recent article reviewed the legislative history of the Endangered Species Act and the 1982 amendment that added Section 10, and concluded:**

> **Accordingly, as made plain by Congress in amending the ESA, an ITP [under Section 10] was created because it is the *only* mechanism for authorizing take where the underlying *purpose* of the project at issue is private development. As such, what defines ITP eligibility is the *purpose* of the activity at issue. Thus, in Congress' eyes, the *only* means by which a private development project lacking a federal nexus—or by the same token, a State or local development project or management scheme lacking a federal nexus—may proceed, despite the fact that the project will incidentally take listed species, is by first obtaining an ITP.**

Wm. S. Eubanks II, *Subverting Congress' Intent: The Recent Misapplication of Section 10 of the Endangered Species Act and Its Consequential Impacts on Sensitive Wildlife and Habitat,* 42 B. C. Envtl. Aff. L. Rev. 259, 280 (2015), (emphasis in original; footnotes omitted). The FWS's own Handbook regarding Section 10 compliance **similarly** suggests that Section 7, which was enacted as part of the original Endangered Species Act in 1973, has never been intended or understood to provide incidental take protection for non-federal parties engaged in private development activities:

> Before 1982, the ESA did not have mechanisms for exempting take prohibitions from Federal or non-Federal activities, except for permits to authorize take from scientific research or certain other conservation actions. Congress recognized the need for a process to reduce conflicts between listed species and economic development, <u>so it amended the</u>

> ESA in 1982 to add an exemption for incidental take of listed species that would result from non-Federal activities (section 10(a)(1)(B)). Incidental take is that which is incidental to, and not the purpose of, carrying out an otherwise lawful activity.

Habitat Conservation Planning and Incidental Take Permit Processing Handbook (Dec. 21, 2016), p. 1-2 (emphasis added).[16] The record in this case also contains a number of communications indicating doubt and skepticism among Forest Service and FWS employees concerning the legitimacy of using only Section 7 in the circumstances presented here, where there is no ongoing federal involvement in LMJV's development activities other than FWS's limited role as monitor of LMJV's compliance with the ITS issued to the Forest Service.[17]

It is not necessary to decide whether the "take" authorization is legal because the conservation measures agreed upon by the FWS and LMJV were inadequate to meet Endangered Species Act requirements.

Section 7(a)(2) of the Endangered Species Act requires that:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical….

[16] Available at https://www.fws.gov/endangered/esa-library/pdf/HCP_Handbook.pdf.

[17] *See, e.g.,* FWS3831-32 (FWS email seeking a "citation, presumabl[y] from some precedent, for our extending section 7 over the private land actions that result in take of listed species" and "that would explain the pathway for the applicant to receive the Section 7 exemption through our [Biological Opinion] for effects occurring on private lands"); C11441 (Forest Service email: "The twist the counsels decided to do on section 7/10 are sure to be of interest."); C12331-32 (Forest Service to FWS email: referring to the determination that FWS would "by virtue of some currently unidentified existing precedent, maintain discretionary authority over the private village development," and stating that "some verbage [sic] better explaining our unique section 7 agreement process for this project will be needed at some point").

16 U.S.C. § 1536(a)(2) (emphasis added). The Supreme Court has stated that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer," and that the structure of the Endangered Species Act "indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173-74 (1978).[18] Notably, this provision imposes the duty on the action agency—here, the Forest Service—to "insure" that its proposed action is not likely to jeopardize a listed species.

Section 7(b)(4) then provides that if the FWS concludes that the taking of a listed species incidental to an agency action will not violate Section 7(a)(2), the FWS "shall provide the Federal agency and the applicant concerned, if any, with a written statement that

> (i) specifies the impact of such incidental taking on the species,
>
> (ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,
>
> (iii) [inapplicable], 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 applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

16 U.S.C. § 1536(b)(4). Incidental take that occurs in compliance with the terms and conditions of an ITS issued under § 7(b)(4) is not considered to be a prohibited taking of the concerned species. 16 U.S.C. § 1536(o)(2).

---

[18] 1979 amendments to Section 7 changed the original requirement that the agency "insure" that listed species would not be jeopardized to a requirement that it "insure" that jeopardy "is not likely." Nevertheless, agencies continue to be under a substantive mandate to use "all methods and procedures which are necessary" to "prevent the loss of any endangered species, regardless of the cost." *Roosevelt Campobello Intern. Park v. U.S. E.P.A.*, 684 F.2d 1041, 1048-49 (1st Cir. 1982), quoting *TVA v. Hill*, 437 U.S. at 185, 188 n.34.

Conservation or mitigation measures supporting findings of no jeopardy and issuance of an ITS must be "reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." *Center for Biological Diversity v. Salazar,* 804 F. Supp. 2d 987, 1001 (D. Ariz. 2011), quoting *Center for Biological Diversity v. Rumsfeld,* 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002). Reliance on the proposed actions of other agencies does not satisfy the action agency's burden of insuring that its actions are not likely to jeopardize a listed species. *Sierra Club v. Marsh,* 816 F.2d 1376, 1386 (9th Cir. 1987); *National Wildlife Federation v. Coleman*, 529 F.2d 359, 374 (5th Cir. 1976).

The conservation measures discussed in the FWS's Biological Opinion in this case do not meet these requirements.

First, the measures are not reasonably specific, certain to occur, and subject to deadlines or otherwise enforceable obligations. Funding is set at a minimum of $500 and a maximum of $1,000 per unit, pursuant to a schedule tied to plat approval and other benchmarks with regard to each phase of construction. But determination of how that funding will be set and applied falls far short of reasonably specific and certain to occur.

The technical panel is to be "created by" LMJV and to consist of representatives from certain agencies and LMJV, as discussed above. But the panel itself has no actual authority to implement any specific conservation measures. The conservation strategy calls for individual

members of the panel to make "recommendations" to LMJV for actions to be taken to provide safe lynx passage across Highway 160 as well as actions that will "appropriately minimize" take from the Village. Biological Opinion, W05514, § 2. LMJV and the FWS are then "to meet to determine how the adverse effects to lynx shall be minimized for Phase 1 of the project but also in consideration of full build-out of the project," and to agree upon measures "to the maximum extent practicable" prior to issuance of the first certificate of occupancy. *Id.*

There is no provision for resolution of any disagreement between LMJV and the FWS concerning specific measures to be implemented. In contrast, the Biological Assessment that first described LMJV's proposed conservation measures provided that in the event of disagreement between LMJV and the FWS, the issue would be "elevated to the Regional Director for Region 6 of the [FWS]." Biological Assessment, W05171. As a result of the unexplained elimination of this provision in the final version of the conservation strategy, the actual measures to be implemented are effectively relegated to recommendations of panel members that are subject to an agreement to agree, with no provision to resolve an impasse. That cannot be characterized as an enforceable agreement to implement specific conservation measures. *See generally, e.g., New York Life Ins. Co. v. K N Energy, Inc.*, 80 F.3d 405, 409 (10th Cir. 1996) ("To have an enforceable contract it must appear that further negotiations are not required to work out important and essential terms."). Two other sections of the conservation measures suffer from the same flaw. Biological Opinion, W05515 § 5 (providing that LMJV "agrees to carryout [*sic*] or contract for the implementation of any action, agreed to by [LMJV] and [the FWS], including

environmental clearances, engineering, obtaining permits, construction, etc.," and providing for decisions regarding implementation to be made in accordance with the process described in § 2, above, which has no process to resolve disagreements); *id.* § 7 (allowing for potential increases in the per unit funding cap, "provided [LMJV] agrees that there is adequate documentation to support an increase and the increase is reasonable and necessary to implement measures in accordance with the conservation measures"). Indeed, the Biological Opinion acknowledges this lack of specific measures and the resulting inability to determine impact on lynx mortality. Biological Opinion, W05522.

Second, the conservation measures impose no ongoing obligation on the Forest Service, even though its proposed federal action was the sole basis for initiating Section 7 consultation. The Biological Opinion instead reinforces the Forest Service's position that "future development of the subsequent private land is outside of their jurisdiction…." Biological Opinion, W05526. Consequently, the only continuing federal agency implementation and enforcement duties are left to the FWS. Section 7 imposes the responsibility on the Forest Service, as action agency, to insure that its action is not likely to jeopardize a listed species, yet the procedure proposed by the LMJV and the Forest Service, and accepted by the FWS, relieves the Forest Service of any involvement in monitoring, enforcing, or otherwise having anything to do with potential incidental take from LMJV's development. This reliance on another agency, which itself has no involvement in either the land exchange or the subsequent development, fails to meet the Forest Service's statutory duty to "insure" no listed species is likely to be jeopardized by its action.

Third, to the extent the FWS retains any ongoing federal monitoring and enforcement role, in lieu of any involvement by the Forest Service, it is limited to the point of essentially leaving LMJV to self-report. The Biological Opinion provides that the conservation measures are "non-discretionary" *id.*, W05526, but concerning enforcement it merely states:

> [I]n the event that the Applicant fails to: (1) implement the conservation measures in their entirety; or (2) Applicant modifies the development in a manner that results in greater traffic volume than anticipated by the BA; or (3) Applicant fails to provide the required annual report, the incidental take exemption specified above may lapse. 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.

Id., W05529 (emphasis added). **In contrast, in Section 7 consultations involving the typical ongoing participation by the federal action agency, that federal agency is mandated to reinitiate consultation with the FWS "immediately" if the amount of incidental take exceeds what is permitted by an ITS. 50 C.F.R. § 402.14(i)(4).** Reliance solely on the FWS for enforcement, weakened further by the FWS's tepid recommendation that the incidental take exemption "may" lapse and LMJV "should" contact the FWS if LMJV finds that it has failed to meet its obligations, again falls short of measures reasonably expected to insure against the likelihood of jeopardy to a listed species.

In short, the conservation strategy provided by the Biological Opinion and incorporated into the FEIS and ROD expressly recognizes that development resulting from the Forest Service's approval of the land exchange will adversely impact an endangered species, yet fails to comply with the statutory requirements for the protection of that species. That is an abuse of

discretion and contrary to law.

VI. OVERVIEW

For reasons not knowable from this record the Forest Service in 1986 decided to accept a land exchange to provide a developer with 420 acres adjacent to the Wolf Creek Ski Area and overlapping Highway 160 at Wolf Creek Pass for the purpose of building a ski resort to include a hotel, condominium residences and commercial amenities for year around use. The extent of the development was expected to be determined by Mineral County. The actual exchange of lands was reduced from 420 acres to 300 acres. The excluded parcel included the area adjacent to Highway 160, creating a private inholding of land within the Rio Grande National Forest.

Mineral County approved a development plan for 2,200 residential units, more than 500,000 square feet of commercial space, and up to 10,000 inhabitants. The Colorado courts rejected that plan because it violated Colorado's statutory law requiring year-around vehicular access to the property.

The exchange decision was made on a Finding of No Significant Impact on the natural environment so no Environmental Impact Statement was prepared and no public participation was required. Perhaps anticipating the outcome of the litigation LMJV sought access by applying for a right-of-way access across public land from the highway to its private acreage in 2001. That proposal was the subject of environmental studies resulting in an Environmental Impact Statement and an approval in 2006. The proposed access grants were challenged in this Court. After the issuance of a preliminary injunction a settlement agreement ended that civil matter.

This new land exchange was initiated by LMJV in 2010. Pursuant to a Memorandum of Understanding LMJV retained and paid the contractors who did the studies required by the NEPA process. In reviewing and relying on that work there appears to be a predictive bias in the Forest Service to make the outcome consistent with the 1987 decision that a ski resort complementing the Wolf Creek Ski Area would be in the public interest, **even though that decision was made without benefit of an environmental impact statement or public participation.** Public awareness of the fragility of the natural environment has greatly increased in the intervening thirty years and the need for a scientifically based analysis of the impact of the Forest Service decisions in managing National Forest System lands to support a decision is imperative in explaining the decision to the public. The 900 public comments in the record show this heightened public awareness of the effects of human disruption of the native environment. The Rio Grande National Forest has two designated wilderness areas near the area involved in this action. It has unique features. Notably, responses to the public comments were prepared by the contractors who did the work. They would not be expected to find that work to be flawed.

What NEPA requires is that before taking any major action a federal agency must stop and take a careful look to determine the environmental impact of that decision, and listen to the public before taking action. The Forest Service failed to do that in the Record of Decision. The duty of this Court is to set it aside.

VII. ORDER

Where an agency action is found to be arbitrary and capricious, an abuse of discretion, or

otherwise not in accordance with law, the Court must "hold [it] unlawful and set [it] aside." 5 U.S.C. § 706(2). The Court finds and concludes that Defendants' actions violated the APA in the respects specified in this decision. Accordingly, it is

ORDERED that the Record of Decision dated May 21, 2015, is SET ASIDE.

DATED: May 19, 2017

BY THE COURT:

s/Richard P. Matsch

____
Richard P. Matsch, Senior Judge