IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-1512

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

Plaintiffs,

v.

DAN DALLAS, in his official capacity as Forest Supervisor; TAMARA WHITTINGTON, in her official capacity as Deputy Regional Forester; BRIAN FEREBEE, in his official capacity as Regional Forester, UNITED STATES FOREST SERVICE, a Federal Agency within the U.S. Department of Agriculture; ANNE TIMBERMAN, in her official capacity as Western Colorado Supervisor, and U.S. FISH AND WILDLIFE SERVICE, a federal agency within the Department of the Interior;

Defendants.

COMPLAINT
(REVIEW AND RELIEF SOUGHT UNDER ADMINISTRATIVE PROCEDURE ACT)

INTRODUCTION

1. By this lawsuit, Rocky Mountain Wild, San Luis Valley Ecosystems Council, San Juan Citizens Alliance, and Wilderness Workshop ("Plaintiffs") seek judicial review and remedy of decisions made and actions taken by the Defendants, Dan Dallas, Forest Supervisor for the United States Forest Service; Tamara Whittington, Deputy Regional Forester, Brian Ferebee, Regional Forester, the United States Forest Service (collectively "Forest Service"), Ann Timberman, Western Colorado Supervisor, and the United States Fish and Wildlife Service ("USFWS").

2. This Complaint involves the same 2014 Environmental Impact Statement ("2014 EIS") and agency actions granting interests in public lands that the Court held arbitrary and

capricious in closely related litigation. *Rocky Mountain Wild, et al. v. Dallas ("RMW 15-1342"), et al*, 15-cv-01342-RPM. In the order denying a motion to reconsider, Judge Matsch clarified "the substance of the Court's holding":

> The Forest Service did not merely err in some technical aspect of its legal analysis, it disclaimed the power to consider key aspects of the environmental analysis it was duty-bound to undertake. Whether that is couched in terms of entirely failing to consider an important aspect of the problem, offering an explanation for its decision that runs counter to the evidence, failing to base its decision on consideration of the relevant factors, making a clear error of judgment, or acting "otherwise not in accordance with law," the conclusion is the same: the Forest Service failed to exercise the duties imposed on it by NEPA.[1]

Id., ECF No. 82 at 4-5. Judge Matsch confirmed the EIS was contrary to law because it disavowed the Forest Service had any authority under ANILCA and the land exchange regulations.

> The Court's determination is not that ANILCA does not apply, as LMJV argues, but that ANILCA does not prevent Defendants from regulating the use of the federal land being conveyed to LMJV. This analysis gives weight to the Forest Service's powers and duties under both ANILCA and Forest Service land exchange regulations. Any other interpretation would effectively render the land exchange regulations meaningless when, as here, an exchange arises as an alternative to or in connection with an ANILCA access demand.

Id. at 7-8. Despite the direct holdings, the Forest Service continues to rely on the 2014 FEIS. The Forest Service has released public records that confirm plans to begin road construction as early as June 2019 based on actions taken in reliance on the 2014 EIS. On May 24, 2017, over objections, LMJV and the government sought further action by the District Court. The opposed motion sought ratification of ineffective and incomplete efforts to comply with the Court's orders and judgement and requested dismissal. RMW 15-1342 at ECF No. 109.

[1]In light of the incomplete unwinding of the land exchange and Defendants' continued reliance on the 2014 FEIS, non-compliance with these Orders is being addressed concurrently.

3. The Forest Service has sought to take actions based on legal interpretations that were addressed by a temporary injunction entered by Judge Kane in 2007. *Colorado Wild, Inc. v. United States Forest Service,* 523 F. Supp. 2d 1213, 1227 FN15 (D. Colo. 2007). Serious and as-yet unresolved impediments to the Forest Service simply granting additional road access were identified in the 2008 Notice of Intent ("NOI") to prepare an EIS. 73 FR 54786 (September 28, 2008). The NOI responded to the 2008 settlement agreement that required the Forest Service to prepare an EIS before granting additional road access. *Colorado Wild v. Forest Service,* 06-cv-02089-JLK-DW (ECF No. 147, 150). The issues in the 2008 NOI were not addressed in the Supplemental Information Statement ("SIS") adopting the invalidated 2014 EIS as the basis for the Forest Service's 2019 Record of Decision ("2019 FROD") granting LMJV with additional road access to build a Vail-sized development.

4. The ROD and SIS disregarded and diminished judicial findings of fact and law entered in previous litigation by granting LMJV unfettered and unmitigated use of a road across National Forest System lands to construct and operate a commercial and residential development to serve the Forest Service permitted Wolf Creek Ski Area. The Forest Service continues to fragment its decisionmaking on the Ski Area development proposals by treating the joint proposal contained in the 2008 Settlement Agreement between LMJV and the Wolf Creek Ski Area Corporation ("WCSAC") as unrelated projects, even though the agreement binds LMJV and WCSAC to a common position as to the road access. This lawsuit seeks to invalidate unlawful agency decisions and actions to establish a clean slate by which the local, state, and federal agencies can take action informed by federal laws requiring informed decisionmaking. *See e.g.* ECF No. 1-1 (Record of Decision); ECF No. 1-2 (Supplemental Information Statement); ECF No. 1-3 (Plaintiff's Objections).

5. The claims are based on several federal land management laws, particularly the Forest Service's failure to fulfill the "hard look" mandate, public disclosure, and informed decisionmaking duties under the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA") when considering and approving Special Use Permits, easements, and other conveyances of federal public land ("2018 ANILCA Proposal") that grant a right-of-way for access across National Forest System ("NFS") lands connecting U.S. Highway 160 ("Hwy 160") to private land within the Rio Grande National Forest.

6. This suit seeks to invalidate and set aside Defendants' decisions that facilitate and enhance a 1,700 unit private development by providing expanded private access across National Forest System lands to a private parcel created by a controversial 1980s land exchange. The 2018 ANILCA Proposal was initiated for the specific purpose of enabling development of an 8,000-person village on Wolf Creek Pass, known locally as the Village at Wolf Creek. Plaintiffs have successfully challenged the use of this public land for this private development in the past and are engaged in an ongoing effort to educate the public and advocate for what is considered one of the most biologically important areas in the Southern Rockies - that provides habitat and migration pathways for elk, deer, black bear and the threatened Canada lynx.

7. In short, by granting LMJV's ANILCA Proposal that was submitted in late 2017 and early 2018 based on the 2019 FROD and 2014 EIS, Defendants have taken final agency action to issue private interests in federal lands and granted access necessary to build a massive resort development without considering or taking the steps necessary to reduce and eliminate impacts to the surrounding National Forest System lands.

8. The Forest Service shielded difficult questions from scrutiny by manipulating the scope and structure of the NEPA analysis. The NEPA analysis was limited by erroneous legal interpretations of the scope of federal power and authority over the development proposal.

9. Important facts and conclusions were excluded from NEPA analysis and disclosure to create the impression that the Forest Service is required to provide whatever unfettered and unrestricted access that the private developer demanded. For example, the appraisal report used to justify the court invalidated 2015 ROD and land exchange opined that "the highest and best use of the Non-Federal [LMJV] Parcel remains limited development with five rural residential homesites (35 acres each), as well as complimentary mountain recreation or ski-area related uses." The appraisal concluded that, "[the highest and best use] on the 177-acre [LMJV] property does not require year-round access or wet utilities, and probably generates the highest return to the land at the least risk." *Id*. (emphasis supplied). Defendants failed to adequately consider the findings of this report during the 2014 NEPA analysis. The NEPA analysis is based on the Forest Service's erroneous legal conclusion that reasonable use of the LMJV parcel requires expanded access and utility easements. This Forest Service legal conclusion was rejected by Honorable Judge Kane in 2007. *Colorado Wild, Inc. v. United States Forest Service*, 523 F. Supp. 2d 1213, 1227 FN15 (D. Colo. 2007). The Forest Service's arguments were also rejected by Honorable Judge Matsch in 2017. *RMW 15-2342*.

10. Defendants' public statements confirm that the Forest Service ignored federal law, judicial orders, settlement agreements, and the conclusions of numerous specialists in deciding to issue the 2019 ROD based on an arbitrary and capricious analysis in the 2014 EIS. The SIS does not contain a NEPA analysis. The SIS simply reuses a twice-rejected Forest Service interpretation of federal land management laws that leave the Forest Service no choice except to

expand access without condition and to provide unnecessary access to a parcel controlled by a politically powerful developer, LMJV.

11. Defendant Dallas and other Forest Service decisionmakers have stated publicly that the Forest Service lacks the discretion to deny LMJV's demand for expanded access to the parcel created by a 1986 land exchange. On or about April 2014, Defendant Dallas attempted to choose the no action alternative. Kenneth Capps, attorney with the United States Department of Agriculture's Office of General Counsel intervened on behalf of LMJV and informed Defendant Dallas that the interpretations agreed upon by Mr. Capps and LMJV prevented Defendant Dallas from choosing the no action alternative. Mr. Capps' legally erroneous interpretations thereby limited the choice of reasonable alternatives.

12. The 2019 FROD and 2014 NEPA analysis are based on the erroneous legal premise that the Forest Service lacked discretion to deny the request for expanded access. The NEPA analysis assumed that the Forest Service was required to provide whatever type and extent of access demanded by the private developer. The NEPA analysis assumed that the Forest Service lacked power to impose conditions and mitigation measures that protect the federal lands, whether access was provided by land exchange or various easements and Special Use Permits.

13. The normal process for granting access across National Forest System lands outside Alaska was adopted in Federal Land and Policy Management Act ("FLPMA") of 1976. 43 U.S.C. § 1740 ("Secretary of Agriculture, with respect to lands within the National Forest System, shall promulgate rules and regulations to carry out the purposes of [FLPMA]."). The Forest Service promulgated access regulations that "apply to access across all National Forest System lands." 36 C.F.R. 251.110; *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."). FLPMA, which provides the Forest Service authority in Colorado, was ignored by the Forest Service in favor of an inapplicable ANILCA provision.

14. The challenged decisions were based on 2014 FEIS and 2015 ROD. The FEIS and ROD were explicitly limited in scope by the erroneous premise that the Forest Service lacks discretion to deny or condition the LMJV request to expand access beyond what was provided in the 1986 land exchange. Legal error concerning the Defendants' power and authority to manage federal lands was among the reasons the previous NEPA analysis was enjoined and later rendered null and void. *See Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1215 (D. Colo. 2007).

15. The 2014 FEIS analyzing the decision to approve the grant of expanded access pursuant to ANILCA is unlawfully limited in scope because it failed to consider a reasonable range of alternative courses of action and mitigation measures, as required by NEPA. The only other action alternative - access via land exchange - was explicitly set aside as arbitrary and capricious, and contrary to law in RMW 15-1342. Although the issue was not reached, the 2014 FEIS' range of alternatives was also inadequate in that *inter alia* it failed to consider: (1) acquisition of the non-federal land; (2) construction and operation limited to existing access; and (3) alternatives involving mitigation measures and restrictive terms and conditions authorized and required by federal land management laws; and (4) ANILCA-based mitigation, terms, and conditions.

16. In addition to the judicial findings, the 2014 FEIS is unlawful due to: (1) the Forest Service's attempt to manipulate the land parcels and eliminate a federal nexus to limit NEPA review and further Endangered Species Act ("ESA") consultation; (2) unlawful political interference and influence pervading the Forest Service's NEPA decision making process; (3)

failure to create transparency and promote public participation; (4) failure to accurately assess the impacts of the decision based on the best available science; (5) failure to adhere to the Forest Plan; and other violations outlined in this Complaint.

17. A Biological Opinion ("BO") was required by ESA Section 7 to gain the U.S. Fish and Wildlife Service's input into an agency action that may affect a federally listed species. A BO addresses the action agency's ESA duties and informs the NEPA analysis and ROD. The 2018 Wolf Creek Access BO is arbitrary and capricious. The 2014 FEIS lacks information and analysis of matters identified in the 2018 BO

18. Plaintiffs ask that the Court declare unlawful, vacate, and set aside the Defendant's actions in approving the 2019 FROD granting ANILCA-based access across Forest Service lands related to the Village at Wolf Creek Access Project, and remand to Defendants for compliance with all substantive and procedural requirements of federal law.

19. In addition, Plaintiff seeks declaratory and injunctive relief which (1) invalidates Defendant's 2019 FROD; (2) invalidates the 2014 FEIS and prohibits use of materials prepared to support the 2014 FEIS; 3) remands to the agency for completion of a single, comprehensive environmental analysis that fully analyzes the Village Access Project, construction and development of the Village itself, and other connected actions; (4) orders that any environmental analysis begin anew and in compliance with NEPA; (5) orders that such NEPA analysis include an full range of reasonable alternatives; (6) invalidates the USFWS's Biological Opinion and orders compliance with the Endangered Species Act; and, (7) precludes Defendant from granting, authorizing, or allowing LMJV use of Forest Service lands for the construction or operation of the proposed Village, or authorizing construction, improvement or use of new or

existing access roads across Forest Service lands until Defendants have complied with Federal law.

20. Each of Plaintiffs' clams provides an independent basis for granting the relief requested.

AGENCY ACTIONS AT ISSUE

21. The 2019 FROD is a final agency action subject to APA review by the District Court. 5 U.S.C. 701 *et seq.* As part of the APA review, the 2014 FEIS, SIS, and NEPA analysis, Biological Opinion, and each agency action underlying or implementing the ROD are subject to APA-based judicial review.

22. The 2019 FROD approved a LMJV proposal for additional access and other uses of federal lands. The 2019 FROD maintains the option for the Forest Service to reissue a federal land exchange where LMJV agreed to convey approximately 177 acres of privately held land to the Rio Grande National Forest in exchange for approximately 205 acres of NFS land managed by the Rio Grande National Forest. The 2019 FROD, by its own terms, cannot be implemented until the land exchange is unwound.

23. The documents that would accomplish the proposed ANILCA transaction were excluded from NEPA analysis and have not been publicly disclosed.

24. The 2019 FROD approves the LMJV access request and authorizes use and occupancy of the National Forest System land for the purpose of constructing and operating the development known as the Village at Wolf Creek.

25. The 2019 FROD contains a list of authorizations, all of which are subject to APA review as distinct agency actions. The ROD also approved an undisclosed array of Forest Service real estate actions that relinquish the federal government's ability to review, approve, mitigate,

and control the impacts of the private development on the NFS lands and the Wolf Creek Ski Area. The ROD authorized numerous actions and approvals that were not included in the draft ROD. The ROD authorizes numerous actions that were not analyzed in the FEIS. The ROD authorizes numerous actions that were not analyzed in the Biological Opinion.

26. The Biological Opinion ("2018 BO") addressed LMJV's updated ANILCA proposal and was completed on December 18, 2018, approximately six months after the 2018 Draft Record of Decision was published and after the 45 day objection period ended. The focus of the 2018 BO was on impacts to the Canada lynx. Again the 2018 BO fails to adhere to the ESA's legal requirements and is not based on the best available science. Shockingly, the amount of incidental take in the 2018 BO was reduced to one lynx over the life of the project, as opposed to the finding in the previous 2013 BO of three lynx over a six year period. This significant reduction was not supported by the record, and combined with other deficiencies taints the 2018 BO's conclusions rendering it arbitrary and capricious.

27. The Forest Service's actions were based on the SIS and 2014 FEIS issued on November 18, 2014. A Draft EIS was issued on August 17, 2012. Scoping took place from April 13, 2011 to June 4, 2011.

28. On January 29, 2014, an Administrative Draft FEIS was circulated for comment. Defendant Dallas stated publicly that he expected the Administrative Draft FEIS would be released as a Final EIS in February or March of 2014. During 2014, Defendants substantially rewrote Chapter 1 of the Administrative Draft EIS. On information and belief, Defendants provided detailed information to LMJV regarding the internal rewrite of Chapter 1 of the Administrative Draft FEIS. The U.S.D.A. Office of General Counsel provided LMJV with access to detailed information throughout the NEPA process. On information and belief, the

2014 rewrite of Chapter 1 accommodated LMJV's legal interpretations regarding the scope of Defendants' authority. Defendants have not acted in a manner that allows privilege with regard to the 2014 rewrite of the Administrative Draft FEIS or the 2019 FROD.

WOLF CREEK PASS AND RIO GRANDE NATIONAL FOREST

29. This lawsuit involves a unique area of the Rio Grande National Forest that is well known to people who have driven U.S. Highway 160 over Wolf Creek Pass between South Fork and Pagosa Springs Colorado.

30. Wolf Creek Pass regularly receives some of the greatest accumulation of snow in Colorado's Rocky Mountains, receiving over 400 inches of snow on average each year. Wolf Creek Pass is located in between two designated Wilderness areas. The Weminuche Wilderness lies to the North of the pass and the South San Juan Wilderness lies to the South. There are no other highways accessing the area near the proposed Village.

31. The public land in question is at the base of Wolf Creek Ski Area which has six lifts and 1,600 acres of skiable terrain, just east of the Continental Divide in the San Juan Mountains of Southern Colorado. The Wolf Creek Ski Area is operated on National Forest System land, based on a Special Use Permit and 2015 Master Development Plan that was approved by the Forest Service.

32. The Canada Lynx is listed as threatened under the Endangered Species Act. The Wolf Creek Pass Lynx Linkage is very important for the recovery of lynx population in the Southern Rockies. It connects two key breeding areas: Platoro to the south, and Rio Grande Reservoir to the north.

33. The Forest Service identified, and then excluded from the NEPA process, at least two cooperating agencies with jurisdiction and expertise over wetlands and the unique ecological functions in and around Wolf Creek Pass.

> 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.

2014 FEIS Appendix I, Page 71.

34. This picture depicts the Basin Fen Pond Wetland. The Basin Fen Pond Wetland would be severely impacted by the construction and operation of the Village at Wolf Creek. The proposal seeks to use water drawn from the aquifers that feed wetlands on the National Forests.

These eight photos accurately depict vegetation and wetlands found on the federal parcel:






35. The towns of Pagosa Springs and South Fork rely on commercial activities related to the Wolf Creek ski area. The Village will negatively impact the socioeconomic condition of these communities.

36. The public is not in favor of the land exchange decision. The Forest Service received extensive comments and objections filed by local, regional and national individuals and organizations opposing this decision. On September 20, 2018, Ogla Troxel, Administrative Review Coordinator for R2 Regional Office confirmed 904 total objections had been received. Of the 904 objections received, the Forest Service determined that 68 had established standing. The 2019 FROD does not identify the number of objections that were considered in detail. In November 2018, in an undated and unsigned document titled "Village at Wolf Creek Access Project Objection Issues and Responses" the Forest Service denied all objections via a generic response. The Forest Service only responded to a few of the 68 persons that were determined to have standing to file administrative objections.

JURISDICTION AND VENUE

37. This Court has jurisdiction to review agency actions and provide remedy pursuant to 28 U.S.C. §§ 1331 (federal question); 1346 (U.S. as defendant); 1361 (Mandamus); 2201

(declaratory relief); 2202 (injunctive relief); and Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* A present and actual controversy exists between the parties that can be remedied by setting aside the 2014 FEIS, SIS, 2019 FROD, and any other action taken to provide LMJV with any right in federal lands. Under the APA, courts "shall" "hold unlawful and set aside agency action" that is found to be arbitrary, capricious, contrary to law, or to violate other APA standards of review set out in the statute. 5 U.S.C. § 706(2)(A)). APA-based vacatur of agency action is a common and appropriate form of injunctive relief granted by district courts.

38. An actual, justiciable controversy exists between Plaintiffs and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201-02 and 5 U.S.C. §§ 705 & 706. Each challenged agency action is final and subject to judicial review under 5 U.S.C. §§ 702, 704, and 706. Endangered Species Act claims are brought pursuant to the APA and do not require sixty-day notice of intent to sue.

39. Venue is properly vested in this Court pursuant to 28 U.S.C. §§ 1391(b)(2) and 1391(e)(1)(B). The project area at issue in this lawsuit is located in the Wolf Creek area of the San Juan Mountains, in Mineral County, Southwestern Colorado, on Forest Service land within the boundaries of the Rio Grande National Forest. The agency actions challenged in this suit occurred in Colorado. Some agency actions challenged in this suit were approved in Washington D.C. Plaintiffs' organizations are incorporated and headquartered in Colorado, and many of Plaintiff's members reside within Colorado.

40. On June 23, 2006 Senior U.S. District Court Judge John L. Kane issued *Order* (ECF No. 49) in *Colorado Wild v. U.S. Forest Service*, No. 05-cv-1175 (challenging the Forest Service's issuance of ANILCA access and special use authorizations to LMJV in violation of NEPA). This order advised counsel of record and the Clerk of the Court "that any additional

related cases shall be assigned directly to me without processing through the AP docket procedure." By abandoning the scope of analysis set out in the 2008 Notice of Intent, the Forest Service and LMJV violated the settlement agreement entered in *Colorado Wild v. U.S. Forest Service*, No. 05-cv-1175. The Forest Service also violated the settlement agreement by relying on pre-2005 analysis in its 2018 BO, SIS, and 2019 FROD.

PARTIES

41. Plaintiff ROCKY MOUNTAIN WILD is a Colorado non-profit organization with its mailing address at 1536 Wynkoop St., Suite #900, Denver, CO 80202. Rocky Mountain Wild was created by the merger of two of Colorado's most trusted and effective conservation organizations, Center for Native Ecosystems and Colorado Wild. Recognizing the need to stem dramatic losses of native species and habitat, these organizations joined forces to protect, connect and restore wildlife and wild lands throughout the Southern Rocky Mountain region of Colorado, southern Wyoming, eastern Utah, and northern New Mexico. Rocky Mountain Wild, and its predecessor organizations, regularly reviews projects proposed on or affecting National Forest lands that might adversely affect wildlife, water quality, air quality, and other resources; comments extensively on proposed public land management decisions; and when necessary files administrative appeals and lawsuits. Rocky Mountain Wild and its members have attended numerous public meetings regarding the proposed Village at Wolf Creek and associated actions.

42. Plaintiff SAN LUIS VALLEY ECOSYSTEM COUNCIL ("SLVEC") is a Colorado based environmental advocacy organization that protects and restores—through research, education, and advocacy—the biological diversity, ecosystems, and natural resources of the Upper Rio Grande bioregion, balancing ecological values and human needs. SLVEC has approximately 170 members and has organized over 120 volunteers involved in different

working groups throughout the San Luis Valley. SLVEC is a known and active participant in public land management in Colorado, with a demonstrated interest in protecting the integrity of public lands on Wolf Creek. SLVEC participated fully in the NEPA process by submitting comments during the public comment period. SLVEC exhausted its administrative remedies by filing a timely objection. SLVEC members are concerned with protecting water quality and quantity, air quality, wildlife, scenery, environmental justice, sense of place, quality of life and other values. SLVEC members live in the San Luis Valley and use and enjoy the roads, public lands, and streams impacted by the proposed project and depend upon clean, consistently flowing, water from the Rio Grande. SLVEC members intend to continue their use and enjoyment of the land, air, and water, which are directly, indirectly, and cumulatively impacted by the Forest Service decision to promote the construction and operation of the Village at Wolf Creek by providing public land and special use authorizations. The impacts to SLVEC and its members interests described herein are compounded by the failure of the federal government to provide viable information and alternative courses of action to the public and the decisionmakers through the required NEPA process before taking action that will have permanent consequences for the people, water, land, and wildlife of this region. SLVEC brings this action on behalf of itself and its adversely affected members and staff.

43. Plaintiff SAN JUAN CITIZENS ALLIANCE ("SJCA") is a non-profit organization with over 1,000 members in the Four Corners region. SJCA is actively involved in monitoring and scrutinizing National Forest management, overseeing government decision-making and compliance with environmental laws, advocating for cleaner air quality and better stewardship of natural systems, promoting reduced energy consumption, energy efficiency and renewable energy, and working for improvements to community health. SJCA members in the Four Corners

region use and plan to use the federal lands in and around the Wolf Creek Ski Area. SJCA members are adversely affected by the proposed land exchange and extension of Tranquility Road as well as impacts from pollution, resource consumption, and wetlands alterations. SJCA brings this action on its own behalf and on behalf of its adversely affected members.

44. Plaintiff WILDERNESS WORKSHOP ("WW") was founded in 1967 and its mission is to protect and conserve the wilderness and natural resources of the Roaring Fork Watershed, the White River National Forest, and adjacent public lands. WW is a non-profit organization that engages in research, education, legal advocacy and grassroots organizing to protect the ecological integrity of local landscapes and public lands. Wilderness Workshop not only defends pristine public lands from new threats, but also helps restore the functional wildness of a landscape fragmented by human activity. WW protects and preserves existing wilderness areas, advocates for expanding wilderness, defends roadless areas from development that would destroy their wilderness character, and safeguards the ecological integrity of all federal public lands in its area of interest. Wilderness Workshop has a long history of participation in forest planning and advocating for the protection of imperiled wildlife, including the Canada lynx.

45. Plaintiffs have participated throughout the NEPA process underlying the 2019 FROD.

46. Plaintiffs participated in the informal activities carried out pursuant to the 2008 Notice of Intent.

47. Plaintiffs timely submitted scoping comments in 2011.

48. Plaintiffs timely submitted detailed comments on the *Village at Wolf Creek Access Project Draft Environmental Impact Statement* issued in August 2012. ("2012 DEIS).

49. Plaintiffs timely submitted an *Administrative Objection* of the *Village at Wolf Creek Access Project Final Environmental Impact Statement* on January 5, 2015.

50. In 2017, the District Court held that the FEIS was arbitrary capricious and contrary to law, and remanded to the agency. The District Court subsequently rejected LMJV's request to reconsider, and confirmed the FEIS is contrary to law. All parties filed notices of appeal with the Tenth Circuit Court of Appeals. On December 11, 2018, the Tenth Circuit Court of Appeals ruled that it lacked jurisdiction over the matter because the district court had entered its findings and final order, remanded to the agency, and dismissed all appeals of the district court's decision. The judgment became final when no party sought Supreme Court review.

51. Plaintiffs, and their members, were not provided an opportunity to comment on any NEPA documents issued after 2013. The SIS is not a NEPA document. Appeals and objections are not NEPA comment opportunities.

52. Plaintiffs filed detailed objections on the Draft ROD and SIS. The Forest Service denied each objection, and issued the 2019 FROD on February 27, 2019.

53. The Forest Service only allowed individuals or organizations that commented on the 2012 DEIS to file objections. The administrative record contains written objections filed by Plaintiffs' members. The Forest Service, without notifying Plaintiffs' members, posted a letter that generically denied their objections as lacking standing. The Forest Service arbitrarily denied members' objections whose 2012 comments are contained in the RMW 15-1342 administrative record. The Forest Service unlawfully denied members' objections on the basis that the 2012 opportunity to provide NEPA comments presents a condition precedent to filing objections on the 2018 DROD and SIS. Plaintiffs have standing to address the Forest Service failure to adhere to procedures required by law and to seek remedy for the harms done to its members.

54. Each Plaintiff and their members use, enjoy, and plan to continue to use and enjoy on a regular basis, the public lands and natural resources adjacent to the proposed Village at Wolf Creek, including the use of easements for public access to forest land over private land where the Village is proposed, and adjacent lands. This use and enjoyment involves many health, recreational, moral, scientific, spiritual, professional, educational, aesthetic and other purposes that would be degraded by the development that the Defendant's project approval makes possible. Plaintiffs' members enjoy hiking in the Wolf Creek area, camping at Alberta Lake, cross country skiing on public and private lands in the surrounding area, downhill skiing at the Wolf Creek Ski Area, viewing wildlife on private and public lands in the surrounding area, and driving on National Forest System Road 391 ("FSR 391") to, across, and beyond the LMJV property when the road is dry and is clear of snow and snowmelt runoff. Plaintiffs and their members benefit from the intact ecosystem of the area as it exists today. Plaintiffs and their members will be adversely affected by Defendant's approval of the land exchange and extended road access across Forest Service land. This project will harm the biological integrity of the area which they strive to protect and the aesthetics of the area.

55. The decisions and actions contained in the SIS, 2018 BO, and 2019 FROD are causing, and continue to cause direct, immediate, and irreparable informational and procedural injury to Plaintiffs' interests by denying them and their members the right to informed decision making and full disclosure required by NEPA.

56. Unless the relief prayed for herein is granted, Plaintiffs and their members will continue to suffer ongoing and irreparable harm and injury to their interests, including their future use and enjoyment of the Wolf Creek area.

57. Defendant DAN DALLAS is the Forest Supervisor of the Rio Grande National Forest who approved the NEPA analysis and challenged decisions herein, and, in that official capacity, is responsible for implementing and complying with federal law, including the federal laws implicated by this action.

58. Defendant TAMMY WHITTINGTON is the Deputy Regional Forester who served as the responsible official that oversaw and directed DAN DALLAS and the Forest Service employees who carried out day-to-day implementation of the challenged agency actions. Deputy Regional Forester Whittington did not act as an administrative law judge. Deputy Regional Forester Whittington took direction from, and had her discretion limited by advice provided by, the Office of General Counsel staff, including Kenneth Capps. Mr. Capps helped prepare the 2012 DEIS, 2014 FEIS, 2015 ROD, 2018 DROD, SIS, objection determinations, 2019 FROD, and represented the Forest Service in RMW 15-1342. Mr. Capps regularly interacted with LMJV and helped brief the Washington D.C. Offices during preparation of the 2012 DEIS and Draft ROD and prevented Defendant Dallas from pursuing supplementation of the 2012 DEIS in 2014 to address similarly situated properties that use over snow access. Deputy Regional Forester Whittington served as the reviewing officer of Plaintiffs' objections concerning the SIS and Draft ROD. Due to real bias and perceived bias arising from Mr. Capp's legal advice and her conflicting official capacities, Deputy Regional Forester Whittington failed to satisfy the Forest Service's responsibilities and the duty of a responsible official to follow basic principles of fairness and due process in resolving the objections.

59. Defendant UNITED STATES FOREST SERVICE is a federal agency operating as part of the U.S. Department of Agriculture. The Forest Service is responsible for activities on National Forest System lands, including the Rio Grande National Forest. The Forest Service is

responsible for overseeing and administering National Forest lands, and use and access by the public. The Forest Service holds several easements that encumber the private parcel where the proposed Village would be constructed including, but not limited to, a scenic easement and an easement on FSR 391 for public access across the LMJV property to Alberta Lake. The Forest Service also owns all lands under Highway 160 and holds a Highway Easement Deed for a right-of-way for the operation and maintenance of Highway 160. The Forest Service manages Tranquility Road as part of the National Forest Transportation System. The Forest Service's national headquarters is located at 201 14th Street, SW, Washington, D.C. 20090.

60. Defendant UNITED STATES FISH & WILDLIFE SERVICE is an agency within the U.S. Department of the Interior. USFWS is responsible for conservation, protection, and enhancement of fish, wildlife, plants and their habitats for the continuing benefit of the American people.

61. The proponent and beneficiary of the unlawful federal action under review is Red McCombs, an individual doing business as Leavell-McCombs Joint Venture (collectively "LMJV") and neither is a required party to this lawsuit. All other members of the Joint Venture, including the namesake Leavells are no longer participants in the LMJV. LMJV exists in name only. LMJV is an alter ego of Red McCombs, and is the sole owner of the private parcel. The present suit does not impede LMJV's ability to protect its financial interests or to make highest and best use based on existing access. The District Court does not have jurisdiction to address LMJV's potential contract claims against Defendants which may be brought, if at all, in the Court of Claims.

62. LMJV's development proposal, and the configuration of the proposed access, is based on the Forest Service acceptance of an agreement entered between Red McCombs and the

Wolf Creek Ski Area Corporation ("WCSAC"), the owner and operator of the Wolf Creek Ski Area, which operates on National Forest Lands based on a Special Use Permit. By terms of a Confidential Settlement Agreement in *Wolf Creek Ski Corporation v. Leavell--Mccombs Joint Venture, D/B/A The Village At Wolf Creek*, 04--CV--01099--JLK--DLW (Dist. Colo), private land within the Special Use Permit must be conveyed in the land exchange, and if not, other terms control the proposals WCSAC and LMJV may pursue. Although the Confidential Settlement Agreement is a component of the federal action under analysis here, the Agreement was not included in the Administrative Record. The terms of the Confidential Settlement Agreement were provided to Mr. Capps and other federal officials for their review and consideration. Defendants arbitrarily limited the scope of options based on the Confidential Settlement Agreement. By making the Confidential Settlement Agreement part of the federal land deal and providing its terms to federal officials, the Confidential Settlement Agreement is no longer confidential. The present suit does not impede WCSC's ability to protect its financial interests or to make highest and best use of its federally issued permit based on existing access. The District Court does not have jurisdiction to address WCSC's potential contract claims against Defendants which may be brought, if at all, in the Court of Claims.

STATUTORY AND REGULATORY BACKGROUND

National Environmental Policy Act ("NEPA")

63. Congress enacted NEPA to "promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4331. To fulfill this stated goal, NEPA requires federal agencies to analyze the environmental impacts of a particular action before proceeding with that action. *Id.* § 4332(2)(c). In addition, federal agencies must notify the public of

proposed projects and allow the public to comment on the fully-disclosed environmental impacts of a proposed action.

64. A proposal exists at the stage in the development of an action when an agency has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the effects can be meaningfully evaluated. 40 C.F.R. § 1508.23.

65. NEPA contains "'action-forcing' provisions to make sure that federal agencies act according to the letter and spirit of the Act." 40 C.F.R. § 1500.1(a). The NEPA process is based on an interdisciplinary analysis of the purpose and need of the agency action, alternative courses of action, direct, indirect and cumulative impacts of the action and connected actions, and mitigation measures. Only after adequately completing the NEPA process may an agency take action. *See* 42 U.S.C. § 4332.

66. The first goal of NEPA is to ensure informed decisionmaking. NEPA sets forth specific procedural requirements federal agencies must follow as they carefully gather and evaluate relevant information about the potential impact of a range of alternative courses of proposed agency action on the environment. 42 U.S.C. § 4332. NEPA's second goal is to ensure "that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process" and revealed available alternatives, thereby guaranteeing that the public is involved in and aware of agency processes. 40 C.F.R. §§1500.1(b); 1500.2(d); 1506.6.

67. The cornerstone of NEPA is the environmental impact statement ("EIS") that federal agencies must prepare and circulate for public review and comment. An EIS is required for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1501.4.

68. Federal agencies must prepare an EIS prior to initiating any major federal action significantly effecting the human environment to ensure the environmental impacts are considered and disclosed to the public during the decision-making process. 40 C.F.R. §§ 1501.2, 1502.5. In this document, the federal agency must identify direct, indirect, and cumulative impacts of the proposed action, consider alternative actions (including a "no action" alternative) and their impacts, and identify all irreversible and irretrievable commitments of resources associated with the action. 42 U.S.C. § 4332(2). This requirement is commonly referred to as the agency's duty to take a "hard look" at the environmental impacts of its proposed action.

69. Federal agencies are also required to consider three types of impacts, or effects:

> **Direct effects**, which are caused by the action and occur at the same time and place. 40 C.F.R. 1508.8(a) (emphasis added). Direct effects of privatizing public lands via a land exchange include the proposed development.
>
> **Indirect effects**, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. 40 C.F.R. § 1508.8(b) (emphasis added).
>
> **Cumulative impacts**, which are the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7 (emphasis added).

70. NEPA requires federal agencies to consider three types of actions in an EIS; connected, cumulative, and similar. 40 C.F.R. § 1508.25. Connected actions are closely related actions that the Forest Service must discuss in the same impact statement. 40 C.F.R. § 1508.25(a)(l). Connected actions are those that: (i) Automatically trigger other actions which

may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification. *Id.* at § 1508.25(a)(1)(i-iii).

71. Cumulative actions are those which "when viewed with other reasonably foreseeable or proposed actions have cumulatively significant impacts" should also be considered in the same impact statement. *Id.* at § 1508.25(a)(2).

72. The federal agency must also identify and evaluate the effectiveness and feasibility of any mitigation measures adopted to alleviate identified impacts from the proposed action. 40 C.F.R. §§ 1502.14(t); 1502.16(h).

73. NEPA requires disclosure and analysis of reasonable terms and conditions of granting expanded access to a private landowner. NEPA requires disclosure and analysis of reasonable reservations of rights and interests that may be imposed upon a parcel of land which is exchanged out of the National Forest System.

National Forest Management Act (NFMA)

74. In enacting NFMA, Congress stated that "the new knowledge derived from coordinated public and private research programs will promote a sound technical and ecological base for effective management, use, and protection of the Nation's renewable resources." 16 U.S.C. § 1600(4).

75. Further, Congress stated that the "Forest Service . . . has both a responsibility and an opportunity to be a leader in assuring that the Nation maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity." 16 U.S.C. § 1600(6).

76. Through NFMA, Congress established a two-step process for managing the

National Forests. The first step is for the Forest Service to prepare and implement comprehensive "land and resource management plans," i.e., "Forest Plans" for each National Forest. 16 U.S.C. § 1604(a). The second step is for the Forest Service to ensure that site-specific management projects within a National Forest are consistent with the Forest Plan. *See* 16 U.S.C. § 1604(i).

The Federal Land Policy and Management Act ("FLPMA") of 1976
Regulations Applicable to National Forest System Lands (36 C.F.R. 251.110)

77. FLPMA passed two years after NFMA, confirmed that the "Secretary of Agriculture, with respect to lands within the National Forest System, shall promulgate rules and regulations to carry out the purposes of this Act." 43 U.S.C. § 1740.

78. The Forest Service promulgated access regulations "apply to access across all National Forest System lands." 36 C.F.R. 251.110; *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."). Interpretations of the Forest Service access regulations to apply ANILCA standards outside of Alaska are precluded by the plain language and purposes of FLPMA and ANILCA.

79. The regulations applicable to public lands outside Alaska confirm that granting additional access to parcels with adequate access is not mandatory. 36 CFR 251.110(g) ("Where there is existing access or a right of access to a property over non-National Forest land or over public roads that is adequate or that can be made adequate, there is no obligation to grant additional access through National Forest System lands."). "[I]t is undisputed that LMJV currently has direct, seasonal, vehicular access to its property via FSR 391." *Colorado Wild,* 523 F. Supp. at 1222.

80. The regulations define "access" and "adequate access."

> Access means the ability of landowners to have ingress and egress to their lands. It does not include rights-of-way for power lines or other utilities.
>
> Adequate access means 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.

81. The regulations set out a number of criteria, terms and conditions the Forest Service must address in granting an access application. 36 C.F.R. § 251.114. The regulations provide considerable power and control to ensure protection of the National Forest System lands.

Alaska National Interest Lands Conservation Act ("ANILCA") of 1980
16 U.S.C. § 3210

82. ANILCA was passed for the purpose of addressing unique issues created by Alaskan Statehood, indigenous claims, and federal public lands in Alaska. ANILCA grants landowners in Alaska, including those within the National Forest System in Alaska, a statutory right to secure access to a private inholding via a right-of-way over National Forest lands. The plain language and purposes of ANILCA are specific to and limited to the "public lands in Alaska." 16 U.S.C. § 3101 (d).

> [ANILCA] provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

Id. There is no legislative history pre-dating the adoption of ANILCA to suggest any Congressional intent to apply ANILCA to National Forest System or other federal interest in land outside of Alaska.

83. Under ANILCA's provisions, which only apply to Alaska, 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 (*emphasis added*). Nothing in the language or structure of ANILCA suggests an intent to apply this language of this provision outside of Alaska.

84. In granting access in the lower 48 or considering ANICLA access for Alaskan applicants, Judge Kane has confirmed that the agency "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." *Colorado Wild,* 523 F. Supp. at 1222, FN15 *citing* 16 U.S.C. § 3210(a). NEPA compliance is mandatory for all aspects of an ANILCA-based agency action.

85. ANILCA-based access decisions require NEPA analysis of a range of reasonable of alternative reservations of land and interests that restrict the use of easements, special use permits or other devices that provide for private use of National Forest Land.

86. Regulations applicable to private access, even if they were to apply to LMJV's application request, do not preclude NEPA analysis of the terms and conditions which may be imposed upon access or the uses to be made of the land being accessed.

National Forest System Land Exchanges
36 C.F.R. § 254.3

87. Land exchanges are discretionary agency actions. 36 C.F.R. § 254.3(a).

88. Land exchanges may take place "only after a determination is made that the public interest will be well served." 36 C.F.R. § 254.3(b).

89. "The authorized officer shall consider only those exchange proposals that are consistent with land and resource management plans (36 CFR part 219)." 36 C.F.R. § 254.3(f).

90. NEPA compliance is mandatory for all aspects of the land exchange process. 36 C.F.R. 254.3(g). Appraisals are included in the scope of NEPA analysis.

91. "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 C.F.R. § 254.3(h).

92. Land exchanges require NEPA analysis of a range of reasonable alternative reservations of land and interest that restrict the use of land conveyed out of federal ownership**.**

93. Regulations applicable to Forest Service Land exchanges do not preclude NEPA analysis of the terms and conditions which may be imposed upon the parcel which is exchanged out of the National Forest System.

Endangered Species Act

94. The ESA was enacted to "provide a program for the conservation of . . . endangered species and threatened species" and to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). To

receive the full protections of the ESA, a species must first be listed by the Secretary as "endangered" or "threatened" pursuant to ESA section 4. 16 U.S.C. § 1533.

95. Under the ESA, Federal agencies have an affirmative duty to protect and help recover listed species. 16 U.S.C. § 1536(a)(1).

96. Once a species is listed as "endangered" or "threatened" under the ESA, it is protected under the Act's substantive and procedural provisions. The ESA prohibits any federal agency from taking any action found "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat]." 16 U.S.C. § 1536(a)(2). The ESA also makes it unlawful for any person to "take" (i.e., injure, kill, or destroy habitat) of an endangered species. 16 U.S.C. § 1538(a)(1)(B); § 1532(19).

97. Under the ESA, a species is threatened when it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

98. The ESA prohibits any person from "taking" a threatened or endangered species. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. §§ 17.21, 17.31. To "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. 16 U.S.C. § 1532(19).

99. The ESA requires that all federal agencies "carry out programs for the conservation" of threatened and endangered species and consult with the Secretary in order to ensure that their actions are "not likely to jeopardize the continued existence" of such species. 16 U.S.C. § 1536(a)(1), (2).

100. When considering the impacts proposed actions may have on wildlife, USFWS undertakes a biological opinion that must identify the action area, environmental baseline, and

the effects of the action. The "action area" includes "all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. The "environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area." Id. The effects of the action include the direct, indirect, and cumulative effects to a species from a proposed agency action, as well as "interrelated and interdependent actions." Id. §§ 402.02 (defining "effects of action"), 402.14(c)(4) & (8).

101. If, after the Federal agency has consulted with the Secretary, the Secretary concludes that the agency's actions are not likely to jeopardize the continued existence of the listed species in question, the Secretary shall provide the agency with an Incidental Take Statement ("ITS"). 16 U.S.C. § 1536(b)(4)(A).

102. The Secretary may also provide the agency with an ITS if the agency has offered reasonable and prudent measures which the Secretary believes are not likely to jeopardize the continued existence of the listed species in question. *Id.*

103. The ITS shall "(i) specif[y] the impact of such incidental taking on the species, (ii) specif[y] those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, . . . and (iv) set[] for the terms and conditions . . . that must be complied with by the Federal agency . . . to implement the measures specified under clause[] (ii)." 16 U.S.C. § 1536(b)(4)(C).

104. Under USFWS's regulations implementing the ITS process, the impacts of the take authorized by the ITS must be monitored and reported to USFWS. 50 C.F.R. § 402.14(I)(3)

105. The USFWS ITS implementing regulations also require that if the amount of the take authorized by the ITS "is exceeded, the Federal agency must reinitiate consultation immediately." 50 C.F.R. § 402.14(i)(4).

106. The other purpose of an ITS is to provide a trigger for reinitiating consultation

when the authorized take limit is exceeded.

107. In 2017, the U.S. District Court for the District of Colorado found that Service's 2013 Biological Opinion for the land exchange was arbitrary and capricious. On December 18, 2018, while the Tenth Circuit Court of Appeals was still considering whether to dismiss LMJV's appeal for lack of appellate jurisdiction, USFWS issued a new Biological Opinion with conservation measures that are not reasonably certain to occur.

108. The 2018 BO confirmed the proposed action would take lynx, based on vehicle collisions, significant habitat modification or degradation, leading to significant impairment of feeding, breeding, and sheltering.

109. The 2018 BO contained five Reasonable and Prudent Measures LMJV pledged to follow to mitigate the impacts on lynx. The Reasonable and Prudent Measures include: 1) worker orientations; 2) worker shuttles; 3) employee housing; 4) provision of grocery stores, restaurants, etc. designed to reduce highway traffic; and 5) awareness program for owners and guests. Reporting requirements were also included. The Reasonable and Prudent Measures in the 2018 BO were examined in the 2014 FEIS analysis of potential mitigation measures.

110. The 2018 BO encourages, but does not require, the Forest Service and LMJV to notify USFWS "within ten (10) days of learning or discovering a dead lynx."

111. The 2018 BO does not contain a Habitat Conservation Plan.

112. The 2018 BO fails to adhere to the best scientific information standard.

113. The 2018 BO contains the same procedural and substantive deficiencies that rendered the 2013 Biological Opinion arbitrary and capricious.

Southern Rockies Lynx Amendments

114. Lynx protection has been regulated on Forest Service land by the provisions in the Southern Rockies Lynx Management Direction ("SRLMD"). SRLMD at 1.

115. The SRLMD outlines the objectives, standards, and guidelines that must be met within all Forest Plans in the Southern Rockies. In the SRLMD, USFWS identified maintenance of suitable habitat and habitat connectivity as critical measures necessary for the lynx's continued survival.

116. Standard ALL S1 mandates that "New or expanded permanent developments and vegetation management practices and activities must maintain habitat connectivity."

FACTUAL AND PROCEDURAL BACKGROUND

117. The facts in this case will be established and the case resolved based on APA review of the whole Administrative Record considered by the agency decisionmaker(s), as supplemented pursuant to relevant case law.

118. Plaintiffs' Statement of Facts depends heavily on documents which should be contained in the Administrative Record in this case.

119. The Forest Service has not reviewed or sought to obtain the full Administrative Record created or obtained by third party contractors and subcontractors on the agency's behalf. The contractor records were considered, directly and indirectly, by Defendants. The Forest Service must obtain the contractors' records for inclusion in the Administrative Record.

120. The Administrative Record considered by Defendant Dan Dallas when signing the 2019 FROD does not include thousands of pages of emails and documents released (and withheld) by the Forest Service in ongoing FOIA litigation. The Administrative Record considered by Defendant Dan Dallas when signing the 2019 FROD does not include thousands of pages of emails and documents created and obtained by the Forest Service contractors.

121. The Administrative Record considered by Defendant Whittington while serving as objection "reviewing officer" does not include thousands of pages of emails and documents

released (and withheld) by the Forest Service in ongoing FOIA litigation. The Administrative Record considered by Defendant Whittington in resolving the objections does not include thousands of pages of emails and documents created and obtained by the Forest Service contractors.

122. Defendants have already completed significant work toward compiling and reviewing documents which should be included in the Administrative Record as defined by the APA and relevant case law. Defendants can easily assemble and certify the Administrative Record on the same date as it files its Answer.

123. The Administrative Record relied upon by Defendants' decisionmakers does not include emails and communications showing the full extent to which the project proponent unduly influenced the NEPA analysis. Many tens of thousands of agency records were assembled, released, and withheld by the Forest Service after the 2014 EIS was finalized. More than 10,000 documents were assembled, released, or withheld by the Forest Service after the 2019 FROD was finalized.

124. Defendants' personnel have an established pattern and practice of exchanging documents and information in unofficial ways for the explicit purpose of avoiding public and judicial scrutiny.

125. The USDA Office of General Counsel possesses agency records that must be included in the Administrative Record and supplements thereto. As a member of the NEPA team, Kenneth Capps (USDA Office of General Counsel attorney) carried out duties unrelated to providing legal advice to the decisionmakers. Defendants knowingly and willfully used Mr. Capps' involvement to unlawfully shield agency records from public and judicial review.

126. On information and belief, USFWS did not prepare and archive its Administrative Record when releasing the 2018 BO.

127. Defendants did not maintain and prepare a contemporaneous Administrative Record required by basic principles of fairness and due process, and their decisions cannot survive judicial review.

Physical and Geographic Characteristics

128. On May 14, 1987, the United States conveyed to Leavell Properties, Inc., precursor to Leavell-McCombs Joint Venture, through a patent and land exchange, approximately 300 acres of National Forest Service land. The land is at the base of Wolf Creek Ski Area, which has six chair lifts, two surface lifts, and 1,600 acres of skiable terrain, just east of the continental divide in the pristine San Juan Mountains of Southern Colorado.

129. Under the current conditions, without the approved land exchange, LMJV has vehicular access to the private parcel via Forest Service Road 391 during periods when the road is snow-free. LMJV has over-the-snow access to its parcel during periods when the roads are covered in snow. Reasonable use and enjoyment of the parcel is available based on current access. LMJV provided the Forest Service with a list of inholdings with a combination of road and over-the-snow access. LMJV has "represented to the Forest Service and others that it could and would build and operate the Village as planned using FSR 391 if needed, without the additional access and utility corridors it requested." *Colorado Wild,* 523 F.Supp.2d at 1216. The highest and best use of the LMJV parcel does not require expanded access.

130. Based on the public comments submitted in 2012, the Forest Service conducted an extensive review of "similarly situated" properties and found numerous instances where commercial and/or residential use is being made of private property within or adjacent to a ski

area boundary with only over-the-snow winter access. In 2014, Defendant Dallas concluded that "reasonable use and enjoyment" of the property may be had with only over-the-snow access.

131. Over-the-snow access was not an alternative considered in the DEIS or the FEIS. The Forest Service finalized the 2014 EIS and issued the 2019 FROD without using NEPA to evaluate Defendant Dallas's conclusions or the information regarding inholdings known to the Forest Service that operate with only over-the-snow access. The Forest Service prohibited Defendant Dallas from asking LMJV to submit a proposal for winter over-the-snow operations and summer road access. Defendant Dallas was prohibited from requesting the proposal to form the basis for a new alternative or alternatives to be included in a Supplemental Draft EIS which would have been released to the public for comment in the summer of 2014. Even without an LMJV proposal, Defendant Dallas was preparing to propose an alternative or alternatives with over-the-snow access in addition to the existing action alternatives which consider only year around automobile access.

132. Defendants knowingly and willfully directed Defendant Dallas to forego analysis he had proposed. Defendant Dallas followed orders from unknown persons in the Forest Service by knowingly and willfully misleading the public by changing his conclusion as to examples known to the Forest Service in 2014 that involved inholdings that used over-the-snow access. This table is an accurate listing of sixteen examples known to the Forest Service in early 2014 that Defendant Dallas determined to be similarly situated with the LMJV property.

Ski Area	Forest	Private In-Holdings	Ownership	Development	Access Provisions
Alta (UT)	Uinta-Wasatch Cache	Yes	Non-Ski Area	Private Residences	Over Snow with Restrictions
Brighton (UT)	Uinta-Wasatch Cache	Yes	Non-Ski Area	Private Residences	Over Snow
Arapahoe Basin	White River	Yes	Non-Ski Area	None	No Proposals
Keystone	White River	Yes	Non-Ski Area	None	No Formal Proposals
Breckenridge	White River	Yes	Non-Ski Area	None	No Formal

					Proposals
Winter Park	Arapaho Roosevelt	Yes, Immediately Adjacent	Non-Ski Area	Private Club, Overnight Accommodation	Over Snow
Telluride	Grand Mesa Uncompahgre and Gunnison	Yes	Ski Area and Non-Ski Area	Restaurant and Overnight Facility (Ski Area Facilities)	Over Snow
Beaver Creek	White River	Yes	Ski Area	Restaurant-Ski Area Dining	Over Snow
Crested Butte	Grand Mesa Uncompahgre and Gunnison	Yes	Ski Area	Resort Facilities (Lift Terminal, Skier Services)	Over Snow within Operational Boundary
Copper	White River	Yes	Ski Area	Resort Facilities (Lift Terminal, Wind Turbines)	Over Snow (Resort Operation)
Vail	White River	Yes	Ski Area	Private Club, Restaurant (Ski Area Facility)	Over Snow
Loveland	Arapaho Roosevelt	No	N/A	N/A	N/A
Monarch	Pike San Isabel	No	N/A	N/A	N/A
Meadowlark	Bighorn	No	N/A	N/A	N/A
Sleeping Giant	Shoshone	No	N/A	N/A	N/A
Red Lodge Race Camp	Shoshone	No	N/A	N/A	N/A

Based on the broad scale review of "similarly situated" properties it was found in several instances that commercial and/or residential use is being made of private property within ski area boundaries and adjacent to ski area boundaries with only over-the-snow *winter* access. This raises the possibility that "reasonable use and enjoyment" of the property may be had with summer vehicular access and winter over-the-snow access.

The Forest Service excluded all of these properties from consideration in the 2014 FEIS on the basis that they were not "similarly situated." The Forest Service did not include an over-the-snow alternative in the 2014 FEIS. Over-the-snow access is a reasonable alternative to the access approved by the 2019 FROD.

133. LMJV's private property lies to the south side of Hwy 160 approximately one (1) mile from Wolf Creek Pass. Hwy 160 passes over Wolf Creek Pass at an elevation of 10,850

feet. LMJV's private property and proposed development site is located between 10,300 feet and 11,900 feet.

Proposed Village at Wolf Creek

134. LMJV's land is located in rural Mineral County, Colorado, currently home to approximately 700 residents.

135. The proposed Village involves alternative proposals involving approximately 1,711 and 1,850 units for residential and commercial development, housing approximately 8,000 people and 221,000 square feet of commercial space. LMJV promotes its development plans at various forums including its website - thevillageatwolfcreek.com. The LMJV proposal also includes a natural gas distribution facility, a water storage and treatment facility, and a waste water treatment plant resulting in discharge into the headwaters of the Rio Grande River.

136. LMJV's plans include distinct development alternatives that depend on the scope and location of the access that may be approved by the Forest Service. LMJV intervened to ensure that the Forest Service did not request development plans that included existing, over-the-snow access. The Forest Service has actual power and control over LMJV's development proposals through, among other things, the Scenic Easement that was issued as a condition precedent to the 1986 land exchange.

137. LMJV's development plans have not been submitted for Forest Service review and approval pursuant to the terms of the Scenic Easement. The proposed Village will dramatically increase the flow of traffic on U.S. Highway 160 over Wolf Creek Pass, resulting in increased wildlife habitat fragmentation and disruption of a crucial habitat linkage between the South San Juan and Weminuche Wilderness areas for species including elk, deer, and the Endangered Species Act protected Canada lynx.

138. On or about April 18, 2008, Defendant Dallas sent a letter to Dana Mees requesting the Federal Highway Administration to provide a qualified engineer who would work an estimated 100 to 120 days to inform the consideration of LMJV's access application. On or about August 13-15, 2008, Becky Bryan, NEPA coordinator, conducted a site visit involving LMJV, third party contractors, and various state and federal officials. The site visit was based on LMJV's placement of flagging to indicate potential road configurations. Efforts to gain the assistance and approvals from Colorado Department of Transportation and the Federal Highway Administration were terminated before 2011, on the basis that the land exchange became the preferred alternative.

Mineral County Land Use Planning

139. In 2003, Mineral County Board of County Commissioners approved LMJV's application for Village development as a Planned Use Development ("PUD"). The PUD approval no longer reflects current conditions in Mineral County. LMJV must submit a new application and obtain approval by the Mineral County Board of County Commissioners for any PUD development proposal based on current conditions, including new traffic estimates.

140. Judge Kuenhold of the District Court for Mineral County struck down Mineral County's approval of the Village PUD because the County had not established reasonable U.S. Highway 160 access to the development. *Wolf Creek Ski Corp. v. Bd. Of County Comm'rs of Mineral County*, No. 2004-CV-12 (Oct. 13, 2005) (Findings of Fact and Conclusions of Law Remanding the Matter to the Board of County Commissioners). In doing so, the Court specifically found that existing access via FSR 391 was not sufficient to handle the expansive development LMJV proposed: "Construction of a development of this size without a good all weather road is problematic at best. The PUD is a small city designed to serve year-round

recreational uses and skiing in particular… it is not possible to utilize the single-lane, gravel, seasonally-closed road for the kind of services that are required in a development of this size and scope. *Id.* at 33-35. The PUD approval was rendered null and void. The Court was not presented with, and rendered no opinion upon, the access requirements for a non-PUD development proposal.

141. The Colorado Court of Appeals upheld the invalidation of the PUD without reaching and resolving all the problems with the County PUD approval. *Wolf Creek Ski Corp. v. Bd. of County Comm'rs*, 170 P.3d 821, 824 (Colo. Ct. App. 2007) ("Our determination that the board abused its discretion renders plaintiffs' other contentions moot. Therefore, we affirm the order and remand to the trial court with directions to remand to the board for further proceedings, which are not limited by statements in the trial court's order concerning what the developer must do.").

142. In the 2006 FEIS and ROD, and the 2014 FEIS and 2019 FROD, the Forest Service relied on Mineral County's approval of the Village PUD to justify the agency's determination that the proposed Village constitutes "reasonable use and enjoyment," and therefore warrants approval of the requested access roads and utility corridors. Based on this overly deferential treatment of Mineral County's overturned approval, the Forest Service reached the unsubstantiated conclusions that (1) it had no choice but to grant access; and (2) that full build out of the Village as proposed in the PUD would occur under any possible scenario, even under a no-action alternative.

143. Judge Kane found that the PUD was relied upon to limit alternatives analyzed in the NEPA process:

> The Forest Service's adoption of LMJV's County-approved development plan as the reasonable use and enjoyment of the property essentially transformed the FEIS's purpose and need for action to the provision of access adequate to serve LMJV's full-scale development plans…prevented it from considering any alternatives that involved "reasonable use and enjoyment" of the property other than full build-out of the Village as proposed.

Colorado Wild, 523 F.Supp.2d at 1228.

144. The SIS and 2014 FEIS rely on anticipated further Mineral County PUD review and approval as the basis to avoid NEPA analysis of reasonable alternatives. Reasonable use and enjoyment of the LMJV parcel may not necessarily require PUD review and approval.

145. Judge Matsch concluded that the Forest Service reliance on county government's pronouncements in lieu of NEPA analysis were arbitrary and capricious.

146. LMJV has not sought Mineral County land use approval for a new PUD-sized project. Merely gaining access is not a sufficient basis for Mineral County to grant land use approval. The conceptual development identified in the 2014 FEIS differs significantly from the PUD invalidated by Colorado Courts. The conceptual development in the 2014 FEIS differs from LMJV's current development plans. LMJV has shared its current development plans with WCVSC and other persons.

2006 FEIS and ROD and Subsequent Litigation

147. In June 2001, LMJV applied to the Rio Grande National Forest for rights-of-way ("ROW") across NFS lands between Hwy 160 and the private parcel. LMJV requested that the Forest Service provide permanent, year-round vehicular access to the property through extension of the Tranquility parking lot at Wolf Creek Ski Area.

148. In March 2006, a ROD was signed by Rio Grande National Forest Supervisor Peter Clark authorizing the construction of two access roads across Forest Service lands to the private parcel.

149. Four separate appeals of the 2006 ROD were submitted. Deputy Regional Forester Greg Griffith denied the appeals, thereby upholding the decision in the ROD.

150. In October 2006, a suit was filed against the Forest Service, alleging that, among other things, the 2006 EIS and ROD were arbitrary and capricious under the APA and in violation of NEPA. In November 2006, a temporary restraining order was granted which prohibited the Forest Service from: (1) authorizing any ground disturbing construction activity; (2) submitting applications or entering into agreements with the Colorado Department of Transportation ("CDOT"); or (3) taking any other action implementing the FEIS and ROD.

151. In October 2007, Senior Judge John L. Kane granted the plaintiffs' request for continued preliminary injunctive relief.

152. In February 2008, the U.S. Forest Service negotiated a settlement with the Plaintiffs, concluding that case. The settlement contemplated that any access decisions would include the NEPA process that is the focus of this current litigation. The settlement disavowed all approvals, including the extension and use of Tranquility Road. The settlement prohibited use of the 2006 FEIS for future approvals.

153. The 2008 Settlement Agreement requires 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, 06-cv-02089-JLK-DW (ECF No. 147). The 2009 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 2.

154. The Forest Service failed to complete a new NEPA process based on a reasonable range of alternative means to avoid, eliminate, or reduce the impacts of LMJV's plan to develop the Village at Wolf Creek. The Forest Service had submitted a Notice of Intent in 2008 that contained various alternatives for NEPA consideration. 93 FR 54786 (September 28, 2008). The Notice of Intent confirmed the scope of analysis and alternatives that would be considered:

> 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 combined access alternative was never considered in a NEPA document. The reason that combined access was not considered is an ongoing feud between LMJV and WCSCA. The feud was partially resolved by a confidential settlement agreement resolving litigation LMJV brought that accused WCSCA of gaining expanded ski area access through covert means in the late 1990s, to the exclusion of LMJV's desires for expanded access for its Village proposal.

155. If the NEPA process had been implemented as published in the Federal Register, the Forest Service likely would have complied with the 2008 Settlement Agreement and NEPA. Instead, The 2019 FROD, 2018 SIS, and 2014 EIS ignored the alternatives set out in the 2008 Notice of Intent, violated the 2008 Settlement Agreement, and contain the same deficiencies that warrant a preliminary injunction for the same reasons Judge Kane enjoined the project in 2007.

156. Forest Supervisor Dan Dallas has stated publicly that the 2006 FEIS was not flawed. Defendant Dallas has stated publicly that he did not agree with the decision to settle the previous lawsuit. Forest Supervisor Dan Dallas carried forward legal errors advocated by LMJV that unlawfully limited the scope of the current NEPA analysis. Defendant Dallas, in 2014, attempted to comply with federal law, but was pressured by agency counsel and his supervisors to provide LMJV with unfettered access on the theory that Defendant Dallas lacked any authority to do otherwise. Ultimately, Defendant Dallas premised the FEIS and 2019 FROD on the false assertion that reasonable use and enjoyment of the property for ANILCA purposes requires access allowing for unrestrained construction and operation of the Village at Wolf Creek.

157. The 2008 Settlement Agreement invalidated all Forest Service actions related to the 2001 Access Application. Judge Matsch invalidated all Forest Service actions, thereby creating a status quo ante for ownership and road access at an undetermined date before the 2001 Access Application.

Current Federal Action Under Review - LMJV's 2017 Request for Easements, Special Use Permits, and other Interest in National Forest Lands that Expands Access Sufficient to Construct a 1700 - 1850 Unit Development

158. The construction and operation of the Village at Wolf Creek on federal lands and/or lands encumbered by federal interests on LMJV's parcel is the federal action that requires NEPA review.

159. On or about October 2017, LMJV's Harry Adams sent a demand for Forest Service approval of access for the purpose of constructing the Village at Wolf Creek. LMJV submitted subsequent requests and applications. None of LMJV's demands, requests, or applications provided any detail on the current LMJV development proposal. LMJV's development proposal has changed since 2014.

160. By narrowly defining the federal action to eliminate the true purpose of the expanded access proposal – construction and operation of the Village at Wolf Creek – the FEIS omitted the hard look at the direct effects and impacts of the LMJV development. The FEIS confirms that "the range of development concepts is simply included to provide an estimate of potential indirect effects." 2014 FEIS at 1-4.

161. Judge Matsch rejected the Forest Service decision to limit the NEPA analysis of the development and operation of the Village of Wolf Creek based, in part, on the unlawful designation of the development and operation impacts as indirect impacts of the access approval. The Order stated, "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. […] 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."

162. In July 2010, LMJV submitted a land exchange proposal to the Rio Grande National Forest for consideration as a NEPA alternative to the 2008 application in which LMJV requested an access road across Forest Service lands based on ANILCA. The 2010 proposal was

a subterfuge to avoid full NEPA analysis of the issues identified by the public and other agencies that would preclude LMJV's plan to develop the Village at Wolf Creek.

163. Notice of Intent to Prepare an EIS was published in the Federal Register on April 19, 2011. The 2011 Notice of Intent supplemented the reasoning contained in the 2008 Notice of Intent.

164. The NEPA process that culminated with the 2014 FEIS was arbitrarily limited in scope to the direct impacts of granting access. The FEIS did not include detailed analysis of the direct effects of the Village at Wolf Creek proposal pursuant to NEPA's requirements.

165. The design and approval of the necessary intersection/interchange with U.S. Hwy 160 is not independent of the Forest Service's approval of the land exchange and access road for the purpose of constructing and operating the Village. In 2008, state and federal personnel began carrying out engineering and other work required to analyze the ANILCA-based access alternative. Those efforts were not carried out, but were deemed unnecessary based on the 2011 Notice of Intent and LMJV's objections. The 2011 Notice of Intent was a subterfuge designed to avoid the consideration of a shared access alternative set out in the 2008 Notice of Intent.

166. LMJV's construction, use, and maintenance of access roads for the construction and operation of the proposed Village will directly impact U. S. Hwy 160. Construction, use, and maintenance of expanded access across Forest Service lands and roads is inter-related with, and would not occur, but for the Forest Service's 2019 FROD approving LMJV's 2008 access proposal.

167. The Forest Service has received estimates of traffic generated by construction and operation of the Village confirming the need for grade-separated interchanges on Hwy 160. A grade-separated interchange would be achieved by building bridges over or tunnels under Hwy

160 to allow Village traffic to access the proposed Village without interrupting the flow of traffic on Hwy 160.

168. The 2019 FROD and SIS attempts to circumvent the federal control the Forest Service would otherwise have over LMJV's reasonably foreseeable development. The 2019 FROD was constructed so as to avoid the status quo, which requires the federal government to be applicants or co-applicants in any permit application to CDOT for the construction of improvements to Hwy 160 such as intersections and interchanges.

169. The 2014 FEIS fails to analyze the feasibility of, and the possible impacts from a grade separated interchange at the Village Access Road with Hwy 160. The 2008 Notice of Intent confirms that a grade separated interchange to service LMJV and the Ski Area is a foreseeable component of the larger ski area expansion proposal that was excluded from detailed NEPA analysis. CDOT described the decision to forego analysis of the grade separated interchange as unlawful segmentation of the NEPA process. The Forest Service did not invite CDOT's participation as a cooperating agency in the NEPA analysis.

Alternatives

170. The 2014 FEIS is based on action alternatives limited to the land exchange and road access associated with the proposed Village at Wolf Creek. The land exchange alternative was found to be arbitrary and capricious, thereby precluding the comparison of alternatives that forms the heart of the NEPA process.

171. The Forest Service examined three alternatives to the defined federal action; a No Action alternative, and two Action Alternatives. All three alternatives assumed that LMJV would construct the Village regardless of whether and how the Forest Service granted additional access. The Agency chose Alternative 2 (Land Exchange) as its Proposed Action in 2015, granting

LMJV land adjacent to Hwy 160, and extending Tranquility Road across NFS lands. That choice, and the underlying FEIS, were declared arbitrary, capricious, and contrary to law.

172. There is no basis for the Forest Service to rely on the 2014 FEIS. Reliance on the 2014 FEIS unreasonably interprets the orders issued by Judge Matsch and constitutes knowing and willful violation that may be addressed as contempt of court.

173. Reasonable alternatives were excluded from detailed analysis, including acquisition of the private parcel, increased conservation measures, limited development, and others.

174. The appraisals used to support the land exchange confirm that one homesite per each 35 acre parcel based on current access is the Highest and Best Use of the LMVJ parcel. The Highest and Best Use was not analyzed as a viable alternative course of action. The public and decisionmakers were not informed of the relative merits of denying the request for expanded access. The FEIS does not reveal the professional appraiser's determination that the Highest and Best Use "on the 177-acre subject property does not require year-round access or wet utilities, and probably generates the highest return to the land at the least risk." The appraisal conducted in 2014 did not analyze the entire LMJV parcel. Had the same inquiry been made for the entire LMJV parcel, the same determination would have been reached.

175. The 2014 FEIS failed to disclose and analyze a genuine No Action Alternative. The Forest Service describes the No Action alternative as being included in the analysis only to meet its requirements under NEPA and to "provide a baseline for comparing the effects of the Action Alternatives." FEIS at pg. 2-1. Where Defendants have no obligation, under ANILCA, land exchange regulations, or otherwise, to provide enhanced access to the private parcel, a no action alternative that involves no construction is a real and viable alternative in this case.

176. Where the LMJV's purpose is to build the Village at Wolf Creek, not providing the expanded access requested to build a Vail-sized development is the correct no action alternative to analyze. The public and the decisionmakers were presented with a legally erroneous argument that the no action alternative could not be chosen.

177. Granting LMJV's request for expanded access was not compared to an alternative of denying the request and mitigating the private development with the current Highest and Best Use based on existing access, federal easements, and encumbrances on the LMJV parcel. Judge Kane was correct to conclude that "adoption of LMJV's…development plan as the reasonable use and enjoyment of the property essentially transformed the FEIS's purpose and need for action to the provision of access adequate to serve LMJV's full-scale development plans [and] …prevented it from considering any alternatives that involved "reasonable use and enjoyment" of the property other than full build-out of the Village as proposed." *Colorado Wild,* 523 F. Supp. at 1228. Judge Matsch confirmed the same analytical error was committed in the 2014 NEPA analysis.

178. The FEIS does not consider alternatives that would mitigate the LMJV use of the National Forest System land to access its development proposal. Various forms of federally enforceable mitigation alternatives were precluded by legal theories promoted by LMJV through allies in the USDA Office of General Council, Forest Service Regional Office, and Forest Service Washington Office. For example the FEIS wrongly concludes that "the type and scope of wildfire mitigation for any development resulting from Forest Service approval of either of the Action Alternatives would be determined by Mineral County during the PUD process. The Forest Service does not regulate development on private land." *FEIS at 116.* Despite Judge Matsch's ruling, the Forest Service does not correct any legal or factual deficiencies in the FEIS.

179. Defendants did not use the FEIS to provide detailed evaluation or consideration of alternatives involving mitigation measures and ANILCA terms and conditions. Comments submitted by Plaintiffs and others identified a wide range of potential mitigation, terms, and conditions that did not receive detailed analysis or inclusion in the FEIS alternatives.

Scenic Easement

180. In approving the 1987 land exchange, Defendant and LMJV executed a scenic easement on or about May 14, 1987. This scenic easement was amended on or about December 11, 1998.

181. A scenic easement is a contract between a private party and the government where the private party agrees to restrictions on the use of his/her property. The private parcel would not have been created without an easement that retained federal power, control and approval over the LMJV parcel.

182. The land exchange alternative diminishes existing federal property rights and seeks to eliminate power and control over LMJV's property and development. Defendants designed the agency action as a means to eliminate federal power to review, approve, deny, and otherwise control development of the Village at Wolf Creek.

183. The 2019 FROD is not based on a NEPA analysis that discloses the full scope of federal rights and interests in the LMJV parcels. The establishment of new easements to ensure reasonable use of the access was not analyzed in the FEIS. The approval of access to an LMJV development proposal that has not undergone scrutiny required by the Scenic Easement is arbitrary, capricious, and contrary to law.

184. Independent and additive to the federal control and power over LMJV's expanded access proposal, Defendants' power to approve of LMJV's development plans and architectural

plans for the proposed Village property pursuant to the Scenic Easement confirms a major federal action requiring NEPA compliance.

Improper Influence Over the Forest Service's NEPA Process

185. The 2014 FEIS is based on similar bias and undue influence that corrupted and eventually invalidated the previous NEPA analysis regarding the Village at Wolf Creek in 2006.

186. The Forest Service allowed contractor bias and undue influence by the LMJV to undermine the public interest in an objective and fair NEPA process.

187. The Forest Service failed to limit the Proponent's participation and interference with the NEPA process.

188. The Forest Service failed to request and review portions of the administrative record that was maintained by third-party contractors.

189. LMJV agents influenced the Forest Service and the NEPA contractor throughout the process. When alternatives were being chosen, Forest Service personnel were conveying the proponent's threats via forwarded emails. For example, Defendants exchanged emails saying that "Poe tells me that Red McCombs will pull the proposal and set the access application back in front of you." Analysis of utility issues were influenced by emails 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," despite prohibitions on proponent involvement in the FEIS analysis.

190. When LMJV ran into resistance from local Forest Service personnel, intervention by the Washington D.C. Office was sought. In one instance, LMJV announced "plans to discuss the issue with [USDA] Undersecretary [for Natural Resources and Environment Harris] Sherman

prior to that meeting." The Forest Service has not released relevant Washington Office documents requested by the pending 2018 FOIA request.

191. Basic NEPA decisions such as invitation of cooperative agencies were presented to LMJV's agent Adam Poe for review and approval. LMJV's agent Adam Poe exerted his influence to convince the Forest Service to unlawfully abandon the involvement of Environmental Protection Agency in the NEPA process, thus reducing the cooperating agency to the role of mere commenter. On information and belief, the role of other state and federal agencies were diminished or eliminated at the request/direction of LMJV. LMJV's successful lobbying of the Forest Service to exclude cooperating agencies swept difficult issues under the rug and avoided NEPA disclosure and analysis.

192. Undue influence and bias were asserted on the appraisal process where the Forest Service and LMJV refused to pay the appraiser the added costs associated with choosing anything but the Comparison Sales approach. The appraisal instructions unduly limited and predetermined the outcome of the appraisal. The appraisal instructions created a foregone conclusion where the appraiser dutifully applied the inapplicable comparable sales methodology to parcels with different highest and best uses.

193. Documents released pursuant to two FOIA requests submitted in 2014 confirm LMJV was allowed to participate in Defendant's NEPA decisionmaking process.

194. In 2014, the Administrative Draft FEIS and draft ROD prepared by Defendant Dallas were substantially rewritten. The FEIS and draft ROD were rewritten to eliminate Forest Service interpretations, in favor of LMJV's legally erroneous interpretation of ANILCA. *See Colorado Wild, Inc.* 523 F. Supp. 2d 1213, 1227 FN15 (D. Colo. 2007). On information and belief, the 2014 rewrite was led by Forest Service officials and attorneys in Denver. Review of

Defendants' otherwise privileged emails support the allegation that "improper influence by LMJV and resulting contractor bias 'compromised the objectivity and integrity of the NEPA process.'" *Colorado Wild Inc*, 523 F.Supp.2d 1213.

195. A FOIA request was submitted to the Forest Service on July 20, 2018 based on the opportunity to file objections on the SIS and 2018 DROD. The Forest Service has engaged in numerous dilatory tactics to withhold responsive agency records that are not subject to a FOIA Exemption. The FOIA matter is being litigated in a case filed on November 29, 2018. *RMW v. USFS*, 28-cv-03065. The Forest Service failed to provide any agency records until compelled by court order. *Id*. at ECF No. 20. Agency records were provided in an unsearchable format, but ongoing manual review confirms that LMJV began demanding ANILCA access as early as October 24, 2017, while the LMJV appeal to the Tenth Circuit was pending (*RMW v. USFS*, 17-1366) and before the United States filed its appeal on November 9, 2017. *RMW v. USFS*, 17-1408. Circuit Mediation took place in December and January 2018. The fifth FOIA disclosure, provided on May 2, 2019, revealed for the first time that Red McCombs had begun pressuring

Regional Forester Ferebee to provide expanded access in the 2019 FROD in October 2017.

> We are legally entitled to adequate access to our property. We are making one last request to the two of you, to meet with us and discuss our request to revise the Record of Decision to address the Court's concerns and finally bring this project to a conclusion that is consistent with the Forest service's legal obligations, the needs of the forest, and our interests as a private land owner. We believe that we are entitled to petition the Forest Service for action directly affecting our interests and we do not believe that the Forest Service can or should refuse to meet with us or provide an explanation as to why no action has occurred to implement the exchange.
>
> Please advise us not later than Friday October 27th, as to whether and when we can meet. If you decline, we will proceed accordingly and exhaust all measures to obtain the legal access to which we are entitled.
>
> Rltw,
>
> Harry Ben Adams IV
>
> Executive Vice President
>
> McCombs Enterprises

196. Emails released in the FOIA matter confirm that Regional Forester Ferebee initially sought to reinitiate the NEPA process to inform a new ROD.

From: "Ferebee, Brian -FS" <bferebee@fs.fed.us>
Date: October 24, 2017 at 7:49:14 PM MDT
To: "Casamassa, Glenn -FS" <gcasamassa@fs.fed.us>
Subject: Re: Wolf Creek LEX Considerations

Glenn, thanks for the note. I'm not in a place of being supportive of an appeal. Our track record with this project has been poor at best and we keep going in front of the court only to continue to receive unfavorable rulings and, in some cases, some very unhelpful decisions for the agency. When I reflect on the couple of decades of work we have put into this specific project and where we are now, I think it is time for us to get very focused on exactly what our obligation is, which is access. With that said, putting a lot of energy and oversight into an appeal just to improve the record when there are several issues we will not win on doesn't resonate with me. I would rather place folks' time on reinitiating NEPA to focus on access. Thanks for asking. BF

Sent from my iPhone

197. Regional Forester Ferebee met with the Forest Service Chief in late October or early November 2017 to discuss the LMJV proposal. After meeting with the Forest Service Chief, the plan to reinitiate NEPA analysis was abandoned. The SIS was issued instead to support the 2019 FROD.

198. Defendants' employees and agents used various means, including paper copies and FOIA violations, to conceal their communications in order to avoid FOIA scrutiny and to exclude materials from the administrative record for APA review. Defendants deliberately destroyed agency records that should be contained in the Administrative Record. Defendants did not follow a document retention policy during the NEPA process.

Biological Opinion

199. At the conclusion of the Endangered Species Act Section 7 Consultation the USFWS issued a Biological Opinion. The 2014 FEIS relied on a Biological Opinion issued on

November 15, 2013. The 2019 FROD, however, relied on a new 2018 BO issued on December 18, 2018. The 2014 EIS and the June 2018 SIS/DROD were issued without benefit of the 2018 BO.

200. Both the 2013 and 2018 BOs found that the land exchange "[m]ay affect, is likely to adversely affect" the Canada lynx.

201. Both BOs state that "the Wolf Creek Pass area appears to have functioned as the principal linkage for lynx moving between the South San Juan Wilderness and the main body of the San Juan Core area to the northwest." 2013 and 2018 *BOs at 14.*

202. The 2018 BO changed the conclusion from the 2013 BO that "topographical features and anthropogenic highway infrastructure created physical barriers or restriction to lynx attempting to cross U.S. 60 (*sic).*" *2018 BO* at 14. This new conclusion is not based on the best available science specific to Wolf Creek Pass.

203. The 2013 BO states that "traffic volumes [above] 4000 VPD (vehicles per day)…are more serious threats to mortality and habitat fragmentation." *Id. at 15.* Even the low development scenario will push traffic volumes above 4000 VPD in the future. *Id. at 28.*

204. The 2018 BO claims that "Lynx hit-by-vehicle mortality within Colorado totals 15 individuals since reintroduction began in 1999." *Id. at 16.* This claim is undercut by the acknowledgement in the 2013 and 2018 BOs that "Discovery or detection of lynx injury or mortality attributed to a lynx-vehicle collision is very unlikely if the animal wanders away from the highway before it dies." *Id. at 27.*

205. The 2018 BO states that "enhanced warning signs are not effective in reducing wildlife-vehicle collisions. *Id. at 16.*

206. The 2018 BO states that "traffic generated by the development will elevate overall traffic volume on U.S. 160 above levels documented to reduce habitat effectiveness and lynx use adjacent to the highway corridor within the LAUs adjacent to the highway." *Id. at 17.*

207. The 2018 BO concludes that "[a]t some point …mortality risk will begin to decline as the barrier effect increases and begins to disrupt lynx movements and avoidance effects increase. " *Id. at 22.* The BO unlawfully quantifies take through mortality and not overall harm to the lynx.

208. The 2018 BO was accompanied by an ITS that authorized the Forest Service "take" of one lynx as a result of the development. *Id. at 27.* The ITS relies on a surrogate measure to monitor the take limit. *Id*. The selected surrogate measure is the level of traffic. *Id.* This surrogate fails to account for the multiple ways lynx will be impacted by the construction and residential and commercial use of this massive development.

209. The BO includes Reasonable and Prudent Measures written by LMJV. *Id. at* 27-28. The Service then concludes "we are not aware of additional minimization measures that could be implemented to minimize the take of lynx." *Id. at 28.*

210. The 2018 BO is based on the false notion that the "[t]he RGNF…does not have jurisdiction over the Applicant's private land development." *Id*. at 26. The BO does not consider the authority provided by FLPMA, ANILCA (if found applicable), Forest Service exchange regulations, the scenic easement, or NFMA.

211. The 2013 and 2018 BOs were limited in scope in the same manner as the NEPA analysis is limited. On information and belief, LMJV pressured USFWS to unlawfully limit the scope of the BOs.

212. The 2013 BO and ITS did not survive judicial scrutiny, and were abandoned by the Forest Service and USFWS. However, it is still used to support the 2014 FEIS.

213. The 2018 BO and ITS do not provide LMJV with protection against its actions that "take" Lynx or other ESA-listed species.

CLAIMS FOR RELIEF

CLAIM ONE

National Environmental Policy Act

The EIS and NEPA process are based on an unlawfully narrow designation of Federal Action and an unreasonably narrow purpose and need statement

214. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

215. A "major federal action significantly affecting the human environment" triggers the agency duty to prepare an EIS. The "NEPA process" used to prepare the EIS is defined to "mean[] all measures necessary for compliance with the requirements of section 2 and Title I of NEPA." 40 C.F.R. § 1508.21.

216. Once a "major federal action" triggers the NEPA process, an agency cannot, define the project's purpose and need in terms so narrow as to make the NEPA analysis a mere formality. The NEPA process requires a purpose and need statement that "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1.

217. Here, the "major federal action significantly affecting the human environment" is the request for access for the purpose of constructing the Village at Wolf Creek. Defendants have 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." *Colorado Wild*, 06-cv-02089-JLK-DW (Doc. 147) at 2.

218. The 2014 FEIS is the NEPA document being relied upon for the 2019 FROD. The process and scope of analysis used in the 2014 FEIS has been held arbitrary, capricious, and contrary to law. Reliance on the 2014 FEIS violates NEPA and Court Orders.

219. The 2014 FEIS is based on the legally erroneous determination that the "Purpose and Need for Action is to allow the non-Federal party to access its property as legally entitled. The Proposed Action is a land exchange, not a village." FEIS Appendix I at 142. There is no NEPA analysis of the easements, special use permits, and other devices to provide ANILCA-based access to this parcel, which is located outside of Alaska.

220. The scope of the 2014 FEIS relies on the legally erroneous determination that federal law requires expanded access. Defendants ignored the plain language and judicial interpretations of federal statutes and regulations when determining the adequacy of existing access. Defendants unlawfully adopted LMJV's argument that existing access is inadequate.

221. By adopting a scope of review based on the erroneous conclusion that LMJV is entitled to expanded access, Defendants excluded "reasonable alternatives that would avoid or minimize adverse impacts or enhance" the environment from disclosure and analysis in the NEPA process. 40 C.F.R. § 1502.1.

222. By limiting the disclosure and interdisciplinary analysis of alternatives, direct impacts, and mitigation measures of the "federal action" to the effects of the land exchange and ANILCA access, the FEIS violated NEPA. By narrowly defining the "federal action" and "purpose and need" to eliminate the true purpose of the land exchange – construction and operation of the Village at Wolf Creek – the USFS unlawfully avoids taking a hard look at the direct impacts of the proposed LMJV development, reasonable alternatives, and mitigation measures, as required by NEPA. 42 U.S.C. § 4332(2).

223. The Forest Service violated NEPA in the same way that the agency has been held to violate the law previously, by approving the access across NFS lands in a 2014 FEIS, SIS, and 2019 FROD which were based on an improperly narrowed "federal action" and "purpose and need statement."

224. The 2014 FEIS, NEPA process, and agency actions based on the 2014 FEIS and NEPA process were arbitrary and capricious, not in accordance with law, and without observance of procedure required by law under the APA and other Federal Statutes. 5 U.S.C. §§ 701-706.

CLAIM TWO

National Environmental Policy Act

Range of Alternatives considered is unlawfully narrow

225. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

226. A federal agency must "rigorously explore and objectively evaluate all reasonable alternatives," before deciding on a course of action. *40 C.F.R. § 1502.14(a); see 42 U.S.C. § 4332 (2)(C)(iii), (E).* The alternatives analysis is designed to define the issues sharply and to provide a "clear basis for choice among options by the decision maker and the public." *40 C.F.R. § 1502.14.* "[T]he alternatives developed to meet the Purpose and Need for Federal Action […] include: Alternative 1 – No Action; Alternative 2 – Land Exchange; and Alternative 3 – ANILCA Road Access." *FEIS at 2-1*. The FEIS did not include a detailed examination of any other alternative course of action.

227. The Land Exchange Alternative, which the Forest Service deemed reasonable in the 2014 FEIS, was ruled arbitrary and capricious due to its limited scope. Therefore, the FEIS did

not compare the ANILCA Road Access alternative with any other reasonable alternative. The 2019 FROD did not "eliminate[e] the possibility of a future land exchange" for increased access. *ROD at* 8.

228. The FEIS failed to consider any other reasonable alternatives in detail. Reasonable alternatives not considered in detail include: (1) returning the LMJV parcel to the NFS lands by acquisition of the non-federal land; (2) constructing and operating a resort development limited by LMJV's representations in 1986 that the land exchange was made for the purpose of a 208 unit base area and shops; (3) expanding existing access, construction, and operation based on shared Ski Area and Village use of existing roads and a grade separated interchange; and (4) conditioning expanded access for Village construction and operation based on enhanced mitigation measures, reservations of rights, restrictions on exchanged lands, and ANILCA terms and conditions.

229. The Forest Service has violated NEPA by failing to consider a reasonable range of alternatives in the challenged 2014 FEIS and 2019 ROD. 40 C.F.R. § 1502.14(a); *see* 42 U.S.C. § 4332 (2)(C)(iii), (E).

230. The resulting FEIS and decisions were therefore arbitrary and capricious, not in accordance with law, and without observance of procedure required by law under the APA and other Federal Statutes. 5 U.S.C. §§ 701-706.

CLAIM THREE

National Environmental Policy Act

Denial of LMJV's expanded access request was inappropriately excluded from the alternatives

231. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

232. NEPA alternatives analysis is the heart of the NEPA process and is designed to define 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.*

233. The 2014 FEIS provided a muddled and legally erroneous set of choices.

234. The "no action" alternative does not present the public and decisionmaker with the choice of denying LMJV's request for expanded access for purposes of constructing and operating a 1,700-plus unit version of the Village at Wolf Creek.

235. The action alternatives do not present the public and decisionmaker with the choice of denying LMJV's request for expanded access for purposes of constructing and operating the Village at Wolf Creek.

236. The "no action" alternative assumes no construction or operation of a Village could occur if LMJV's access applications were denied.

237. The "no action" alternative does not inform the public and decisionmaker of the impacts and effects of construction and operations that could take place if Defendants denied LMJV's request for expanded access.

238. The FEIS does not reveal the conclusion of the professional appraiser that the Highest and Best Use "on the 177-acre subject property does not require year-round access or wet utilities, and probably generates the highest return to the land at the least risk."

239. Defendants acted on the erroneous premise that additional access was required for construction, and therefore the "no action" alternative concealed denial as a viable choice among alternatives.

240. The narrowed range of choices among alternatives presented to the public and decisionmakers was based on an inaccurate interpretation of ANILCA and federal law promoted by LMJV and its allies within the USFS.

241. Based on the above facts and legal obligations, the Forest Service violated NEPA by failing to inform the public and decisionmaker that it could choose a "no action" alternative denying expanded access and resulting in development limited by existing access. 40 C.F.R. § 1502.14(d).

242. The FEIS and resulting decision was therefore arbitrary and capricious, not in accordance with law, and without observance of procedures required by law under the APA and other Federal Statutes. 5 U.S.C. §§ 701-706.

CLAIM FOUR

National Environmental Policy Act

Forest Service failed to involve cooperating agencies

243. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

244. Consistent with NEPA's "one EIS" requirement, agencies of the federal government are required to cooperate in the analysis of a federal action to ensure a comprehensive and efficient analysis of the impacts on the environment from the perspective of present and future generations. 42 USC §§ 4331(a), 4332(2).

245. NEPA regulations implement the mandate that Federal agencies prepare NEPA analyses and documentation "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. 40 CFR §§ 1501.6, 1508.5.

246. Failure to invite and include cooperating agencies in the NEPA process violates NEPA.

247. "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. 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 "one EIS" requirement and serves to segment the NEPA analysis of the "major federal action*." 40 CFR §§ 1501.6, 1508.5.*

248. The Forest Service identified, and then excluded from the NEPA process, at least two cooperating agencies with jurisdiction 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.

FEIS Appendix I, Page 71.

249. The Forest Service identified other federal, state, and local cooperating agencies, but excluded them from cooperating agency status. The Forest Service violated the NEPA by unlawfully excluding all cooperating agencies from NEPA process.

250. The resulting 2014 FEIS and decisions were therefore arbitrary and capricious, not in accordance with law, and without observance of procedure required by law under the APA and other Federal Statutes. 5 U.S.C. §§ 701-706.

CLAIM FIVE

National Environmental Policy Act

FEIS fails to identify and analyze the effectiveness of available mitigation measures

251. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

252. 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).

253. 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). 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).

254. The 2014 FEIS unlawfully narrowed the proposed action and available alternatives to providing unconditioned, expanded access to the existing LMJV parcel. Narrowing the scope of the proposed action excluded NEPA disclosure and analysis of mitigation measures available to address impacts of the construction and operation of the Village at Wolf Creek.

255. The 2014 FEIS does not inform the decisionmaker and the public that Defendants have a wide range of powers, duties, and discretionary authority to impose mitigation measures on the future use of the ANILCA access and any parcel privatized by land exchange.

256. The 2014 FEIS erroneously avoids analysis of mitigation by stating that Mineral County's land use planning process would address mitigation of development resulting from Forest Service approval of either of the Action Alternatives. The Forest Service ignores federal authority by asserting that the Forest Service does not regulate development on private land

created by land exchange. The 2014 FEIS asserts that mitigation of the post-exchange impacts is the responsibility of other federal, state, and local agencies.

257. Forest Service land exchanges are discretionary agency actions with that discretion limited by regulation and subject to NEPA compliance. 36 C.F.R. § 254.3. Mandatory mitigation duties limit the agency discretion to carry out land exchanges and provide alternative means that must be analyzed in a NEPA document. *See* 36 C.F.R. § 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 Forest Service has not used a NEPA analysis to disclose or analyze a land exchange alternative with mitigation measures that reserve rights or retain interests to protect the public interest or the National Forest System.

258. The subsequent use or development of private lands based on the decision to grant additional access is subject to restrictions imposed by the conveyance documents. The 2014 FEIS did not disclose or analyze the use of reservation or retention of rights and interests in the access instruments as a means to mitigate the impacts of constructing and operating the Village at Wolf Creek. The Forest Service violated its own regulations by failing to disclose and analyze the reservation and retention of rights and interests that protect the public interest and the NFS lands.

259. 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." The Scenic Easement provides Forest Service with authority to

impose terms and conditions "minimizing environmental effects to natural resources within the project area." 2014 FEIS at 1-3. 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."

260. The FEIS does not disclose or discuss mitigation measures that may be imposed by asserting direct federal control and authority over the development proposal, as contemplated by the Scenic Easement. The Forest Service abused its discretion and violated NEPA by failing to consider and analyze the federal powers the Scenic Easement retained and reserved in the unique private parcel created by the LMJV in the 1987 land exchange.

261. ANILCA does not apply outside Alaska. ANILCA does not apply to a parcel created by a Forest Service land exchange in Colorado. Further, the LMJV parcel was obtained with an access road. The LMJV parcel is not an inholding.

262. 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.*

263. Forest Service access 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). "Before issuing any access authorization, an officer must ensure that the route is so located and constructed as to minimize adverse impacts on soils, fish and wildlife, scenic, cultural, threatened and endangered species, and other values of the federal land." 36 C.F.R. § 251.114(f)(2).

264. The 2014 FEIS does not disclose or analyze any binding terms and conditions on the proposed ANILCA-based access expansion. The Forest Service based its 2014 FEIS, SIS, and decisions on the erroneous conclusion that it lacks power to mitigate the impacts of operation of the Village at Wolf Creek by imposing terms and conditions on expanded ANILCA access.

265. Instead of analyzing mitigation measures available for adoption by the decisionmaker, the 2014 FEIS lists non-binding best management practices to guide construction and operation of the Village at Wolf Creek. Terms and conditions necessary to protect Canada Lynx were not analyzed in detail because the mitigation would require a site-specific Forest Plan Amendment. The 2014 FEIS lists mitigation measures that might be imposed by other government entities, without analysis. Further, the 2014 FEIS relies on mitigation measures contained within the 2013 BO, but the SIS fails to address this document, offer public comment opportunity, or discuss the efficacy of those measures.

266. The 2014 FEIS does not analyze the effectiveness of mitigation measures or best management practices the Forest Service has power and duty to impose.

267. The 2014 FEIS is based on clear error of law:

> As indicated in Section 2.4 of the FEIS, the Forest Service has no authority to regulate the degree or density of development on private land and defers to Mineral County to regulate use and development of LMJV's private lands in the future

2014 FEIS Appendix I. at 78, *see e.*g. *Id*. at 70, 91, 122, 175 (same). The Forest Service limited its examination of lynx mitigation measures to the land exchange and did not examine lynx mitigation measures available under the ANILCA alternative. 2014 FEIS Appendix B at 13

268. Without benefit of NEPA mitigation analysis and in open defiance of ANILCA, FLPMA, and Forest Service access and land exchange regulations, the 2019 FROD is based on legal error flowing from the 2014 FEIS assertion that "[t]he Forest Service will not condition the land exchange based upon the implementation of BMPs and design criteria." 2014 FEIS Appendix I at 133.

269. The 2014 FEIS failed to compare mitigation measures across a reasonable range of action alternatives. A valid NEPA analysis does not exist that discloses and considers mitigation measures that could apply to LMJV's request for expanded access.

270. The 2014 FEIS, NEPA process, SIS, 2019 FROD, and agency actions based on the NEPA process were arbitrary and capricious, not in accordance with law, and without observance of procedure required by law under the APA and other Federal Statutes. 5 U.S.C. §§ 701-706.

CLAIM SIX

Alaska National Interest Lands Conservation Act

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

271. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

272. Under ANILCA, the Secretary of Agriculture "shall provide such access to non-federally owned land within the boundaries of the National Forest System *in Alaska* as the Secretary deems adequate to secure the owner the reasonable use and enjoyment thereof." 16 U.S.C. § 3210 (*emphasis added*); *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."). ANILCA was adopted to address peculiar questions involving Alaskan lands, including Alaskan inholdings created at statehood.

273. Application of ANILCA to National Forest System lands in Colorado is precluded by the plain language of the statute. All judicial interpretations applying ANILCA outside of Alaska are based on post-enactment legislative history. The Tenth Circuit has not addressed the plain language and purpose of ANILCA, and has not directly ruled on the application of ANILCA in Colorado. The Tenth Circuit, in dicta not applicable to the present case, has accepted Ninth Circuit interpretations that ANILCA applies outside of Alaska. Recently, U.S. Supreme Court opinions have reversed Ninth Circuit interpretations of ANILCA and confirmed that Congress adopted ANILCA to address the unique situations presented by Alaskan statehood. Applying ANILCA to the LMJV access request is contrary to law.

274. Even where ANILCA is applicable, the agency has the power to deny or condition approval of a private access request. ANILCA provides "Where there is existing access or a right of access to a property over non-National Forest land or over public roads that is adequate or that can be made adequate, there is no obligation to grant additional access." 36 C.F.R. § 251.110(g).

275. According to the Forest Service regulations, 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.

276. There are dozens of other similarly situated inholdings on the Rio Grande National Forest for which access is provided via dirt or gravel roads and snowmobile access during winter. Properties with similarly limited access enjoy "reasonable use and enjoyment," via summer roads and winter over-snow-access. The Forest Service gives no justification in the 2014 FEIS for why the LMJV property deserves enhanced road access other than the owner's apparent interest in developing a large-scale residential and commercial enterprise to benefit the Forest Service permitted ski area.

277. The Forest Service failed to conduct its own review of similarly situated properties. In 2014, ANILCA sections of the near-final 2014 FEIS were rewritten at the direction of Maribeth Gustafson and Defendants' attorney Kenneth Capps. The 2014 rewrite was based on LMJV's legal arguments and LMJV's identification of a limited set of "similarly situated" properties. Throughout 2014, Defendants provided LMJV with information and access regarding internal Forest Service deliberations on the ANILCA issues.

278. As a matter of law and fact, there is no basis for the conclusion that LMJV has any ANILCA entitlement to expand the limited access it obtained in the controversial 1987 land exchange. Defendants' ANILCA conclusions are not subject to deference. Defendants' deliberations regarding ANILCA were not maintained in a manner that supports any assertion of privilege. ANILCA does not apply in Colorado or to a parcel that has existing access.

279. The 2014 FEIS, SIS, 2019 FROD, and resulting decisions are therefore arbitrary and capricious, not in accordance with law, and without observance of procedure required by law under the APA and other Federal Statutes. 5 U.S.C. §§ 701-706.

CLAIM SEVEN

Forest Service Land Exchange Regulations

The land exchange alternative did not comply with agency land exchange requirements

280. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

281. The Administrative Record does not identify agency compliance with the regulations applicable to Forest Service land exchanges. 36 C.F.R. § 254.1 et seq. The resulting NEPA alternative was therefore set aside as arbitrary, capricious, and contrary to law.

282. Key factors in assessing a land exchange that benefits the National Forest System and the public and environmental interests were explicitly excluded from NEPA analysis and NEPA comment.

283. Predetermined outcomes are prohibited by NEPA and the land exchange regulations mandating NEPA analysis of all reasonable alternatives.

284. Judge Matsch confirmed that the 2014 FEIS violated the National Environmental Policy Act and Forest Service land exchange regulations limiting the scope of the analysis of potential land exchanges that could benefit the environmental and public interests.

285. 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 (D.Colo. 2009).

286. The legal error in creating a now-invalidated Land Exchange alternative that excluded Forest Service power and duties as set out in the land exchange regulations framed a limited set of choices and a predetermined outcome in the 2014 FEIS, which poisoned the 2019 FROD that grew out of the 2014 FEIS.

287. The resulting exchange determinations, 2014 FEIS, and 2019 ROD are therefore arbitrary and capricious, not in accordance with law, and without observance of procedures required by law under the APA. 5 U.S.C. §§ 701-706.

CLAIM EIGHT

National Environmental Policy Act

Consideration of connected actions is inadequate

288. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

289. In addition to the major federal action, NEPA requires federal agencies to consider three types of actions in an EIS; connected, cumulative, and similar. 40 C.F.R. § 1508.25. Connected actions are closely related actions that the Forest Service must discuss in the same impact statement. 40 C.F.R. § 1508.25(a)(l). Connected actions are those that: (i) Automatically trigger other actions which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a)(1)(i-iii).

290. Construction and operation of the Village at Wolf Creek is part of the major federal action subject to full NEPA analysis.

291. In the alternative, the Village at Wolf Creek is a connected action to the grant of expanded access that (1) requires the preparation of detailed NEPA analysis of the actual proposal; (2) cannot proceed unless and until either the land exchange is granted or another form of enhanced road access is provided to the currently held LMJV property; and (3) is the necessary next step in the larger action, of which granting enhance HWY 160 access is a necessary initial step.

292. The Forest Service has violated the National Environmental Policy Act by approving the proposed land exchange and right-of-way access across NFS lands in a Final Environmental Impact Statement and Record of Decision which fail to properly identify and analyze the impacts of connected actions. 40 C.F.R. § 1508.25(a)(1).

293. The FEIS and ROD failed to provide detailed interdisciplinary analysis of the direct and indirect impacts of the following connected actions: (1) Electric power supply needs/ upgraded or expanded utility corridors; (2) Offsite air-quality impacts from expanded electricity generation, as well as from wood burning stoves and fireplaces; (3) Diesel emissions from construction; (4) Mosquito spraying; (5) Natural gas transport; (6) Communications infrastructure; (7) Greenhouse gas emissions, and (8) other reasonably foreseeable impacts.

294. The failure to identify and analyze these "connected" actions as such, or as opposed to addressing them in the "cumulative impacts" portion of the Forest Service's NEPA analysis, improperly narrowed the scope of the FEIS, and pre-empted the development of appropriate mitigation measures proportionate to the environmental impacts caused by the proposed and connected actions together as required by NEPA. 40 C.F.R. § 1508.25(a)(1).

295. The resulting decision was therefore arbitrary and capricious, not in accordance with law, and without observance of procedure required by law under the APA. 5 U.S.C. §§ 701-706.

CLAIM NINE

National Environmental Policy Act

The FEIS failed to provide the public and decisionmaker with a Hard Look at direct, indirect, and cumulative impacts of the agency action

1. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint. Before taking action, agencies must comply with NPEA's "hard look" requirement by providing an interdisciplinary analysis of "direct effects" (40 C.F.R. § 1508.8(a), "indirect effects," (40 C.F.R. § 1508.8(b)), and "cumulative impacts." 40 C.F.R. § 1508.7.

296. The resolution of the above claims will resolve the categorization of impacts and effects into direct, indirect and cumulative categories.

297. Regardless of categorization, the 2014 FEIS failed to provide the mandated "hard look" for issues raised by Plaintiff's comments and objections. The deficiencies include, but are not limited to, the following:

- Effects on wetlands and groundwater. The 20014 FEIS quantitatively estimates the wetland acreage that will be lost from direct flow disruptions and construction, but does not quantify the effects of the much larger threat of changes to groundwater hydrology from the Village development. The result is a gross misrepresentation of the wetland and fen acreage that will be lost to this project.

- How pollutants, other than chlorine and coliform, and not related to wastewater treatment, would result from the proposed action. Other pollutants not analyzed but found in various samplings include: lead, arsenic, iron, and cadmium.
- Impacts to various wildlife species including the Canada lynx, pine marten, boreal owl, brown creeper, Wilson's warbler, hermit thrush, Lincoln's sparrow, and olive-sided flycatcher, each of which is globally rare and/or sensitive species observed in or near the project area and could be negatively affected by the construction and operation of the Village at Wolf Creek. Construction and operation would also directly impact the Rio Grande cutthroat trout, through dewatering/alteration of local hydrology and by contamination of the headwaters of the Rio Grande River.
- The direct, indirect, and cumulative impacts related to climate change effects in the National Forest in light of the project, and the impacts of the construction and operation of a high elevation recreational development on climate change.
- Whether the actual wet water supply for any Action Alternative is sufficient or reliable, instead relying on paper water rights, and how or where additional water supply would be stored on the project site. The existing water supply to the Wolf Creek Pass area is almost certainly inadequate to meet the needs of full build-out for the Village at Wolf Creek, and in dryer years, it would struggle to meet moderate density development.
- The feasibility and impacts of Grade Separated Interchange on U.S. Highway 160. The FEIS confirms that it is foreseeable, and actually foreseen, that expanded access will allow and facilitate development and operation that

requires a grade-separated interchange to handle the greatly increased traffic and to ensure highway safety. A grade-separated interchange involves bridges, on ramps, off ramps, and other features that may not be suitable to the site-specific conditions found on Wolf Creek Pass.

- The impacts of relinquishing Federal Control via the Scenic Easement and other federal encumbrances that provide federal control over the existing LMJV parcel.
- Significant new information that became available between the draft and Final EIS relating to protected species, water supply, Canada lynx, boreal owl, Continental Divide National Scenic Trail Unit Plan, and other new and relevant information set out in the comments and objections filed by Plaintiffs, their members, government agencies, and other members of the public.
- Significant new information became available between the 2014 FEIS and the 2019 FROD that was not disclosed and analyzed in a NEPA document based on a comparison of alternatives. The SIS is not a NEPA document, and contained no comparison of alternatives.
- The best available science regarding Canada lynx response to fires that have altered the ecological setting is considered in the 2012 DEIS, which was the last opportunity for public and other agencies to provide NEPA comments on the LMJV access proposal.

298. The NEPA analysis, and resulting decision was therefore arbitrary and capricious, not in accordance with law, and without observance of procedure required by law under the APA. 5 U.S.C. §§ 701-706.

CLAIM TEN

Administrative Procedure Act, National Environmental Policy Act, Federal Records Act, Freedom of Information Act

Agency Action was taken without compliance with the overlapping NEPA public involvement purpose, Federal Records Act, and Freedom of Information Act mandates

299. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

300. Under the APA, courts 'shall' 'hold unlawful and set aside agency action" found to be arbitrary or capricious." U.S.C. § 706(2)(A)). Vacatur of agency action is a common form of relief granted by district courts presented with violations of APA, NEPA and similar laws designed to ensure federal agencies engage in open and informed decisionmaking.

301. NEPA requires "that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process" thereby guaranteeing that the public is involved in and aware of agency processes. 40 C.F.R. §§1500.1(b); 1500.2(d); 1506.6.

302. 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).

303. 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.* at 1506.6(f).

304. The Forest Service has acted in numerous ways that have interfered with the Plaintiffs' and the public's ability to understand and participate in the NEPA process, including

but not limited to: (1) FOIA violations such as failing to timely respond to Plaintiff's requests and illegally withholding documents; (2) the Forest Service's failure to respond to Plaintiff's Request for Extension for the Objection Period; (3) the Forest Service refusal to consider objections based on the often erroneous assertion that Plaintiffs' members and members of the public failed to submit comments in 2012.

305. The Federal Record Act imposes a duty to "make and preserve records" to document agency decision making. 44 U.S.C. § 3101 ("The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the [. . .] decisions [. . .] of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.").

306. The Federal Records Act's purpose ensures that agencies make adequate administrative records documenting its land management decisions and mandates that the agencies retain those records.

307. For agency decisions subject to the APA, agencies are required to make and maintain an administrative record that consists of all documents and materials directly or indirectly considered by the relevant agency decisionmakers.

308. Defendants recognized the federal recordkeeping mandate early in the current NEPA process where the employment contract between the project proponent's agent and the Third-Party NEPA Contractor required ongoing maintenance of a master index of all documents that would constitute the Administrative Record. A master index of the Administrative Record was not created. A master index of the Administrative Record that identified records created and prepared by third party contractors was not included in the Administrative Record the agencies filed in RMW 15-01342.

309. The Forest Service has repeatedly and knowingly failed to implement internal controls and procedures to make and maintain a viable administrative record that conforms to basic notions of fairness and due process. *Rocky Mountain Wild v. United States Forest Service*, 14-CV-02496-WYD-KMT; Dkt. 28, Exh. 3, ¶10 (documents were "not retained"); *see also Colorado Wild Inc*., 523 F.Supp.2d 1213, 1230 (D.Colo. 2007) (Forest Service "failed to collect and to investigate these communications and include them in the administrative record so it and the public could assess whether the LMJV-Tetra Tech relationship had violated the integrity of the NEPA and decision-making process.").

310. Where federal law and internal procedures were ignored in making the Administrative Record and the Forest Service has not released an index or otherwise made a full Administrative Record available to objectors or the public, the FEIS and agency actions taken by the Forest Service should be invalidated.

CLAIM ELEVEN

Undue influence and proponent control of NEPA process

311. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

312. In 2008, the Forest Service recognized that preparation of an unbiased FEIS must involve strictly enforced procedures and agreements that limit the Proponent's participation. However, LMJV was an active participant in the drafting and editing NEPA documents that resulted in the 2014 FEIS. Basic NEPA decisions such as invitation of cooperative agencies were presented to LMJV for review and approval. The Forest Service did not enforce or follow the agreements designed to limit LMJV participation.

313. LMJV's litigation filings confirm that it intervened and sought to influence the NEPA process. The records obtained through FOIA confirm that LMJV's efforts to pressure Regional Forester Ferebee and others constitute undue influence that biased and predetermined the outcome of the NEPA process and 2019 FROD.

314. The 2014 FEIS, SIS, 2019 FROD, and resulting decisions were therefore arbitrary and capricious, not in accordance with law, and without observance of procedure required by law under the APA. 5 U.S.C. §§ 701-706.

CLAIM TWELVE

Failure to conduct unbiased review of Objections

315. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

316. The Forest Service objection regulations were 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.

317. 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).

318. **"**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 Fed.Reg. 18481, 18489.

319. Under the APA, "[t]he functions of presiding employees and of employees participating in decisions… shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself." 5 U.S.C. § 556.

320. Due Process and fairness requires an impartial decisionmaker in administrative proceedings. The Regional Forester and Deputy Regional Forester were engaged with the SIS and LMJV's demand to issue a revised ROD without further NEPA analysis.

321. Plaintiffs' objections alerted Defendants to the problem of a biased reviewer. Plaintiff's objection stated that "[a]n independent reviewing officer must be carefully chosen to handle this matter, as LMJV and its agents have conducted extensive lobbying efforts over the past thirty years at all levels of the Forest Service and within the USDA, particularly previous leadership and staff within the office of the Under Secretary for Natural Resources and the Environment and current staff within the USDA Office of General Counsel."

322. Real and perceived bias exists where the Regional Forester and the Deputy Regional Forester participated and guided the decision to forego further NEPA analysis, despite the Regional Forester's recognition in October 2017 that additional NEPA analysis was required. On information and belief, additional agency records obtained through FOIA and the production of the Administrative Record will reveal the Deputy Director had a direct and substantial role in the decisions she later reviewed.

323. 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 Deputy Regional forester Whittington to

serve as reviewing officer violates Forest Service regulations, the APA, and Plaintiffs' right to due process and fairness in agency decisionmaking.

CLAIM THIRTEEN

National Forest Management Act

Agency action violates Southern Rockies Lynx Amendment Standard ALL S1

324. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

325. The Southern Rockies Lynx Management Directives were incorporated into the Rio Grande Forest Plan through the Southern Rockies Lynx Amendment Record of Decision that was signed on October 28, 2008.

326. Defendant's decision violates the Southern Rockies Lynx Management Directive standard ALL S1 as it fails to maintain connectivity.

327. Failure to meet the standards contained in its Forest Plan is arbitrary and capricious, and constitutes a violation of NFMA.

CLAIM FOURTEEN

Endangered Species Act, Administrative Procedure Act

The Biological Opinion is arbitrary, capricious, and not in accordance with law.

328. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

329. Defendant USFWS relied entirely on the Forest Service Biological Assessment and other documents provided by the Forest Service, LMJV, and third party contractors, including previous Biological Opinions, file information, and reference materials located at the Service's Colorado Ecological Services Field Office at the Grand Junction, Colorado office.

330. USFWS violated the Endangered Species Act by issuing a BO in 2018 that is arbitrary, capricious, and not in accordance with requirements of the Endangered Species Act.

331. The 2018 BO does not examine the full scope of the "agency action" presented by the Village at Wolf Creek proposal. 16 U.S.C. § 1536(a)(2). Inadequacies of the 2018 BO were related to and a result of inadequacies of the FEIS previously confirmed in Federal court order.

332. The 2018 BO confirms "take" of listed species by the Forest Service and LMJV. The 2018 BO confirms "take" of Lynx during construction and operation of the Village at Wolf Creek.

333. The limited scope of the 2018 BO fails to include "reasonable and prudent alternatives which [the Secretary] believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C.§ 1536 (b)(3)(A).

334. The 2018 BO fails to incorporate reasonable and prudent measures to minimize take. 50 C.F.R. §402.02.

335. The 2018 BO improperly relies on uncertain and ineffective conservation measures.

336. The 2018 BO fails to analyze the feasibility of the conservation measures. In a letter dated December 5, 2012, Fish and Wildlife Service stated that "few options exist to avoid, minimize, or mitigate the anticipated effects" on lynx. The letter relays strong mitigation measures not contained in the 2018 BO. The 2018 BO relies on self-serving assertions made by the Forest Service and LMJV that purport to reduce the level of take anticipated in the 2013 BO. USFWS fails to explain or analyze the changes from the 2013 BO to the 2018 BO, or apply best available science to explain how the weakened and uncertain conservation measures will be effective.

337. The 2018 BO fails to provide a trigger for reinitiation of consultation.

338. The 2018 BO improperly relies on false assertions contained in the Forest Service's Biological Assessment. The 2018 BO relies on erroneous determinations of the Forest Service authority and control over LMJV plans to develop the Village at Wolf Creek. The Forest Service violated the 2008 Settlement Agreement by allowing or causing USFWS to rely on unreliable materials created during the 2005 NEPA analysis to carry out Endangered Species Act duties.

339. The 2018 BO is not based on the best available science.

340. The 2018 BO is therefore arbitrary and capricious, not in accordance with law, and without observance of procedure required by law under the APA. 5 U.S.C. §§ 701-706.

REQUEST FOR RELIEF

FOR THESE REASONS, Plaintiffs respectfully requests that this Court enter judgment providing the following relief:

A. Determine and declare that the Defendants have violated the National Environmental Policy Act, and its statute's implementing regulations, by relying on the invalid 2014 *Village at Wolf Creek Access Project Final Environmental Impact Statement*, and that Defendant's actions are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law, under the Administrative Procedure Act.

B. Determine and declare that Defendants relied on erroneous interpretations of federal law when issuing the 2019 FROD approving LMJV's expanded access application and related agency actions involving LMJV's plan to construct and operate the Village at Wolf Creek.

C. Determine and declare that the USFWS acted in an arbitrary and capricious manner and did not comply with the Endangered Species Act consultation requirements in reviewing

the agency action and potential alternatives to the Forest Service proposal to provide expanded access based on an erroneously narrow interpretation of the federal control and authority over LMJV's plan to construct and operate the Village at Wolf Creek.

D. Vacate and set aside the 2014 FEIS, SIS, 2019 FROD, and all underling analysis and remand to the Defendant agency to begin anew the processes required to comply fully with NEPA, that statute's implementing regulations, and this Court's findings and orders;

E. Vacate and set aside the 2018 BO, Conservation Agreement, Biological Assessment, and other actions taken and information relied upon in preparing the 2018 BO, and remand to the USFWS for compliance with the Endangered Species Act, as applied by this Court's findings and orders;

F. Enter such orders that confirm Defendants are precluded from granting, authorizing, or allowing LMJV use of Forest Service lands for the construction or operation of the proposed Village, or authorizing construction, improvement or use of new or existing access roads across Forest Service lands until Defendants have complied with NEPA, ESA, and all other provisions of federal law.

G. Award Plaintiff its costs of litigation (including reasonable attorney, witness, and consultant fees) under the Equal Access to Justice Act, 28 U.S.C. § 2412 and Fed. R. Civ. P. 54(d), and/or under any other authority of the Court; and

H. Award such other relief as this Court deems appropriate, just, and proper.

RESPECTFULLY SUBMITTED May 28, 2019:

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